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CASES

DETERMINED IN THE

Supreme Court of British Guiana.

CRUICKSHANK v. GREEN

(In the Supreme Court, on appeal from the Rent Assessor (Boland J.) December 17, 31, 1951; January 12, 1952).

Rent Restriction—assessment—personal knowledge of Assessor—procedure.

At the hearing of an application by the tenant to have the premises assessed the Rent Assessor allowed the permitted increase for improvements. He based the cost of the improvements on his own experience of the cost of labour and material. He did not inspect the premises.

The landlord appealed.

Held: When the assessor takes into consideration any relevant fact within his personal knowledge he must follow the procedure set out in the Ordinance and cause the parties to be brought before him and inform them of the substance of such fact. If the necessary evidence is not then given, the assessor should himself summon an expert witness.

Assessment remitted to Rent Assessor.

L. A. Low for appellant.

Sugrim Singh for respondent.

Boland J.: The Court accepts the finding of the Rent Assessor as to the standard rent $12 as set out in (I) and the assessments in para. III, IV and V of the Certificate. But as regards para (II) which is 8% of $200 found by the Assessor to be a reasonable allowance for cost of the improvements by the landlord in erecting the bicycle room and changing windows, I am clearly of opinion that the Rent Assessor had no power to assess this amount based upon his own experience of the cost of labour and material since the war and without even inspecting the premises.

When a landlord does not *submit evidence* of the cost of improvements, it is the duty of the Assessor to inform him that the Court requires this evidence. On the landlord's failure to furnish the necessary evidence, or if the evidence submitted does not satisfy the Assessor, the Assessor "may take into consideration any relevant fact within his personal knowledge, provided before such facts are taken into consideration, the parties present before the Rent Assessor shall be informed of the substance of such facts," (Vide subsection 20 of section 4B of No. 23 of 1941 as amended by Section 5 (1) of No. 13 of 1947).

As regards an inspection of the premises, the Rent Assessor may base his assessment of a reasonable standard rent on what

he has observed on inspection in cases where there is no evidence of what the standard rent is in accordance with the provisions of the Ordinance. He has power to do this under section 4B, subsection 14. He may also under that subsection fix the reasonable maximum rent, but I fail to see that the Assessor is intended by the Ordinance to function as an expert builder and arbitrarily to fix a reasonable maximum rent based upon 8% of the costs of improvements. The subsection, in my view, gives him power himself to summon an expert to give the necessary evidence as regards cost of improvements. It is true that in the determination of civil issues a judge is not given the power to call evidence, but orders of assessments are really judgments in rem—not affecting only the parties before the Court, but subsequent landlords and tenants as well.

Accordingly the view I take of this matter is that the Assessor should, on failure of the landlord to furnish the necessary evidence of the cost of the improvements, after his being informed of his duty in this regard, have himself summoned an expert witness, the cost of whose evidence would be borne by the landlord.

In the result this matter will be remitted to the Rent Assessor so that he might inform the landlord of the evidence required and giving him the opportunity to furnish that evidence, and the tenant the opportunity to cross-examine any witness or himself furnish evidence in contradiction. If that evidence is not submitted or is unsatisfactory to the Rent Assessor, then the Rent Assessor will call an expert witness to testify before him. Complying with these directions, the Rent Assessor will issue a new certificate in accordance with the new evidence he receives.

Each party will bear the costs of the hearing of this appeal. Assessment remitted to Rent Assessor.

(In the Full Court, on appeal from the Magistrate's Court of the Georgetown Judicial District (Boland then C.J. acting; Stoby J), November 23, 1951; January 19, 1952).

Rent Restriction—standard rent reduced—repayment of excess rent—effective date of certificate.

The standard rent of a cottage let by the appellant to the respondent was $20 per month. On the 25th February, 1950, the Rent Assessor reduced the standard and certified the maximum rent of $15.93. The effective date in his certificate was the 25th February, 1950.

The tenant claimed recovery of rent overpaid from December 1943 to the 28th February, 1950, being the period he was in possession. The Magistrate gave judgment in his favour. The landlord appealed.

Held: The standard rent was $20 until it was reduced by the Assessor and as the effective date in the certificate was the 25th February, rent was not overpaid until after that date.

Judgment varied from $61.05 to 60 cents being 3 days excess rent.

H. A. Fraser for appellant

J. O. F. Haynes for respondent.

Judgment of the Court: In this matter the respondent recovered judgment before the Magistrate for the sum of $61.05, having claimed this sum as the amount of excess of rent paid by him to the appellant his landlord for the period of 15 months from 1st December, 1948, to the 28th February, 1950, in respect of premises situate at lot 8, Camp Street, Werk-en-Rust, Georgetown. These premises as admitted are controlled premises under Rent Restriction legislation. Respondent had paid rent at the rate of $20.00 per month. His case before the Magistrate was that the landlord was in law permitted to receive a maximum rent of only $15.93 per month, as certified in the certificate of the Rent Assessor dated the 25th February, 1950; in his *Grounds of Appeal* appellant impeaches the judgment of the learned Magistrate on two grounds:

(a) The Rent Assessor did not specify in his certificate the effective date from which the respondent could recover any excess paid by him; and

(b) That the proceedings taken for the recovery of excess of rents, if any, were irregular and not permissible by the relevant Ordinance.

The assessment certificate which was issued in the proceedings instituted before the Rent Assessor on the application of respondent as tenant against his landlord the appellant herein, on its face purports to have been made under section "4 (a) 1A of Ordinance No. 30 of 1948." This should really have read "section 4B (1A) of Ordinance No. 23 of 1941, as amended by section 4 (a) of No. 30 of 1948". Though not adduced in evidence at the trial of the action, the judgment in which is under appeal, a copy of the Assessor's reasons for decision was by consent tendered and admitted by us as additional evidence at the hearing of this appeal.

It discloses that those premises were a cottage built in 1947 on the demolition of an old building on the site. This cottage was being rented at $20.00 per month, which being the first rental

was the "standard rent". The Rent Assessor in exercise of his powers reduced the standard rent to $10.50 per month, which, with the permitted increases added, made the maximum rent $15.93 as certified by him.

It is urged by the appellant's counsel that the standard rent having been reduced, the tenant's rights to recover rent overpaid by him are limited by the terms of the proviso to the said section 4B (1A). This proviso reads:

> "Provided that where the standard rent is so reduced, no proceedings shall "be instituted for the recovery of any rent overpaid by a tenant in relation "to the period before the date of the commencement of this subsection."

Now that subsection commenced to be operative on the 20th November, 1948, the date on which Ordinance No. 30 of 1948 came into force. Accordingly, as counsel for the appellant correctly contends, all rent overpaid in respect of any period antecedent to the 20th November, 1948, would be irrecoverable in legal proceedings instituted by the tenant against the landlord.

At first glance this limitation of the rights of the tenant to recover overpaid rents might appear to be in conflict with the provisions of a later section of Ordinance No. 23 of 1941, viz: Section 5 (2) which enacts that:

> "Where, in respect of any period subsequent to the *material date,* any ten- "ant 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 the amount permitted under this "Ordinance, the amount of such excess shall, notwithstanding any agree- "ment 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."

According to subsection 3, the "*material date*" for premises such as these in the instant case is the 1st January, 1946, the premises having been built and rented for the first time since 8th March, 1941.

It should be obvious, however, that the above subsection refers to the "standard rent" as defined by the Ordinance. A right to recover rent paid for the period specified in each class of controlled premises which was in excess of that "standard rent" is given to the tenant. When, however, the legislature subsequently in Ordinance 3 of 1948 gave power to the Rent Assessor on application by the tenant to reduce the "standard rent" and thus to fix a lower standard rent for the premises, it must have seemed unfair and inequitable that the landlord who acting within his rights under the then existing Ordinance had been receiving rent not in excess of what was allowed should, because of a reduced assessment of the "standard rent" under a new Ordinance, find himself compelled to refund to his tenant what was since deemed to be an excess of rent. Accordingly the proviso to 4B (1A) was inserted

to protect the landlord in cases of reduced standard rents from being forced to refund excess of rent which had been paid for any period antecedent to the coming into operation of the new Ordinance.

The certificate of the Rent Assessor being dated 25th February, 1950, the reduced standard rent of $10.50 per month with the maximum rent of $15.93 based thereon takes effect as from that date. It was within the power of the Assessor to make the certificate retro-active, subject to the limitation of the tenant's right to bring proceedings for the recovery of overpaid rent in respect of a period before the coming into force of the Ordinance No. 30 of 1948—that is before the 30th November, 1948. But as the Rent Assessor did not exercise that power, the certificate of assessment takes effect from the 25th February as it is dated. Therefore the landlord in receiving $20.00 per month for rent was not being overpaid until the 25th February, 1950. Accordingly the learned Magistrate should have given judgment in favour of plaintiff for overpayment in respect of four days only, that is from 25th February, 1950, to 28th February, 1950, which on calculation is 60 cents.

As to the ground of appeal which challenges the tenant's right to proceed by action for the recovery of overpaid rent, we are satisfied that a tenant may under the Ordinance proceed by action.

In the result, we allow the appeal, varying, however, the judgment by substituting the sum of 60 cents with costs for the sum of $61.05 with costs, ordered by the Magistrate; the costs to plaintiff for the hearing before the Magistrate shall, of course, be in accordance with the prescribed scale in regard to the amount recovered under the varied judgment. The respondent must pay appellant's costs of appeal.

Judgment varied.

G. HICKEN LTD. v. BOOKERS SUGAR ESTATES, LTD.

In re the Deeds Registry Ordinance Chapter 177,
and
In the matter of the long lease passed by Gladys Hicken Limited in favour of Bookers Sugar Estates Limited on the 31st December, 1951.

(In the Supreme Court, Civil jurisdiction (Boland J.) May 30; July 18, 1952).

Lease—stamp duty—Tax ordinance—Right of Registrar to demand information from lessee—Deeds Registry ordinance, Chapter 177.

Gladys Hicken Ltd. a company owning land in the county of Berbice leased some of it to Messrs. Bookers Sugar Estates Ltd. The consideration for the leases as declared in the deed of lease included payment of an annual sum as rental in the contingency of there being on the demised lands in any particular year cultivations of either cane or rice or of there being the user of any portion for grazing cattle or other livestock or for agistment or otherwise.

On presentation of the deed for registration the lessees affixed $5.00 in stamps as stamp duty. The Registrar requested that he be furnished with a schedule showing the acreage under cultivation in order that the rent be ascertained and the correct assessment of duty payable be determined. The lessees refused to furnish the information and appealed to a judge in Chambers.

Held: Since it was possible to declare definitely that some rent was payable under the lease, the $5.00 stamp duty was insufficient and the Registrar was entitled to demand the required information by virtue of section 10 of the Deeds Registry Ordinance.

J. E. de Freitas for appellants.

Registrar in person.

Boland J.: The question to be determined in this matter is what is the amount of stamp duty payable on a certain deed of lease dated 31st December, 1951, and made by Gladys Hicken Ltd., in favour of Bookers Sugar Estates Ltd., in respect of lands described therein as comprising nine parcels or lots in the County of Berbice. The consideration for the lease as declared in the instrument itself includes the payment of an annual sum as rental in the contingency of there being on the demised lands in any particular year cultivations of either cane or rice or of there being the user of any portion for grazing cattle or other livestock and for agistment or otherwise. As to cane cultivation, the deed provides that the lessee shall pay as rental the sum of $5.00 per annum per acre while as to rice a rental of $3.50 per annum per acre no matter in which of the nine parcels the said cultivations may happen to be. But as to the use for grazing cattle and other livestock and for agistment the sum of $1.50 per annum per acre shall be paid where such use for grazing, etc., is on any of the parcels as are described in the deed under the headings, firstly, secondly, thirdly, fourthly, fifthly, sixthly and seventhly; and $1.75 per annum per acre where such user is in any of the parcels as described under the headings eighthly and ninthly.

On presentation of the deed for registration the lessees affixed thereon stamps to the value of $5.00 in payment of the

stamp duty, submitting that this lease did not come within the class of lease specified in (a) of section 8 (23) of the Tax Ordinance, 1939 (No. 43 of 1939) and that therefore it falls within (b) of section 8 (23) which provides for a stamp duty of $5.00 for leases "of any other kind whatsoever not hereinbefore described". The Registrar rejected this submission. He pointed out that the consideration to be paid by the lessees is by way of an annual rent for each acre of land under cane cultivation etc., and that accordingly, the duty on the deed would fall to be taxed in accordance with the second paragraph of (a) of section 8 (23) which fixes the duty on the basis of the rent received in accordance with the scale prescribed at the foot of the paragraph. In the absence of a schedule attached to the deed showing the acreage of each parcel under cultivation, the Registrar requested that he be furnished with such a schedule in order that the rent be ascertained and the correct assessment of duty payable be determined. Against the above ruling by the Registrar, the lessees have brought this appeal which now comes before me for decision.

It is agreed that as the consideration does not consist of "any money, stock or security not being, by way of rent", the lease is not to be classified as belonging to leases denoted in the first part of paragraph (a) of section 8 (23) of the Tax Ordinance, but Mr. de Freitas for the lessees submits that the lease does not provide for the payment of rent as part of the consideration except in the contingencies specified therein and therefore also it is not to be included in the second part of that paragraph. I am in agreement with Mr. de Freitas' submission that if it is impossible now to ascertain definitely whether rent will ever become payable, the lease is not to be classified for duty purposes as a lease whose consideration is the payment of rent although rent in certain contingencies may be payable during the currency of the term.

But is this a case where it is not possible to declare definitely that some rent will be payable? By Clause 2 of the lease, rent is certainly payable if at least an acre of the land is, during the currency of the term, under cane or rice cultivation. Clause 3 provides that "an acre shall be deemed to be under cane cultivation as soon as it is planted with canes and to *continue under such cultivation until the same be actually abandoned.*" And the same Clause 3 clearly indicates that there are at present *cane* cultivations on the lands, for it must be in respect of existing cane cultivations when that clause makes reference to "a plan of parts of lot Nos. 36, 38 and 40 in the rear of the Grand Canal on the Corentyne Coast, parts of the premises hereby leased" (that is the parcels fifthly, sixthly and seventhly described) "showing the cultivated portions thereof, to be found on the *original* lease No. 80 of 1935 between Edgar Evans Hicken and the lessees, executed on the 15th. February, 1935, before the Registrar of Deeds, now on record in the Deeds Registry, Schedule B. 1934 No. 17835." Before me it was admitted that by deed of surrender of lease bearing even date with the instant lease—that is on the 31st, December, 1951—in pursuance of an agreement between the lessees and the

lessors (the successor in title of Edgar Evans Hicken) whereby the lessees were to be granted a new long lease of the premises, the lessees duly surrender to the lessors the lease of the 15th, February, 1935, which itself contained provisions relating to payment of rent based, amongst other things, upon a calculation of the acreage under cane cultivation. I am satisfied that the only reason for the reference in the instant lease to the above plan is to have settled beyond dispute that the area delineated on the plan is to be deemed as being under cultivation at the commencement of the term of this lease—either because it is still being so cultivated or at any rate had been at one time planted in canes and the cultivation has not been actually abandoned. Therefore it is possible to calculate the rent that will be payable at least during the first year of the term of the lease so far as cane cultivation is concerned, and accordingly for stamp duty purposes the lease falls within the category of those where at least part of the consideration is the payment of rent.

In order to ascertain the acreage thus admitted to be under cane cultivation, I have had produced from the Registry the record of the deed of the 15th, February, 1935, and have examined the plan referred to, but I found it difficult at first to make the required calculation of the acreage. It was, however, made to understand that the acreage referred to in the accompanying certificate on the record is in terms of Dutch measurement. The Superintendent of Surveys at my request has very kindly furnished me with his calculation as embodied in his certificate which I am attaching to the record of this appeal. It shows the total area to be 418 acres Dutch measurement, which I hold is the standard of measurement that should be applied for determining the acreage in this case, although it happens to be less than the equivalent English acreage. Accordingly, the Registrar is directed to deem this acreage to be under cane cultivation in respect of which the lessee will be under obligation to pay rent at least for this year at the rate of $5.00 per acre.

With regard to the rent payable in respect of rice cultivations and for grazing and agistment of livestock, there is nothing in the deed of lease which like cane cultivation establishes that there was on the 31st, December, 1951, any user of the land for such purposes. As indicated, no duty can be assessed on the hypothesis that there will be such user or, even in the case of cane, that there will be the possibility of an increase of the acreage admitted in the deed to be under cane cultivation. But the Registrar is empowered to demand information from the lessee as to what acreage, if any, is now planted in padi so as to be deemed rice cultivation within the definition provided in Clause 3 in order that he may be enabled to assess the least rent payable this year for rice cultivations. Similarly, the Registrar is entitled to be informed about the acreage being used on 31st, December, 1951, for grazing purposes, etc.

In the correspondence between the Registrar and Mr. de Freitas, the latter would seem to challenge the Registrar's right

to demand this information. The Registrar clearly has such a power by virtue of section 10 of the Deeds Registry Ordinance, Chapter 177 and he can demand that the required information shall be verified by affidavit, which in my opinion should be the form in which generally such required information should be supplied. I should like to stress the great importance of the power given to the Registrar to request that he be supplied with information so as to enable him to ascertain the true, consideration of any instrument upon which it is his duty to base his assessment of the stamp duty payable. Our Ordinance has no provision such as that which in England is enacted by Section 5 of the Stamp Act of 1891 (54 and 55 Victoria C. 39) viz:

> "All the facts and circumstances affecting the liability of any instrument "to duty, or the amount of duty with which an instrument is chargeable "are to be fully set forth in the instrument and where with intent to de- "fraud Her Majesty, the true consideration is not set out in the instru- "ment the persons concerned incur a fine of £10."

The Registrar's duty is to see that there is no loss of revenue in such cases whether as the result of fraud or otherwise.

Accordingly I shall direct the lessees to supply to the Registrar information (such information to be on oath if so required) as to acreage under rice cultivation at 31st December, 1951, and also as to the acreage used for grazing purposes, etc. as at that date. The acreage under cane cultivation, as I have stated, has been ascertained from the admission made on the deed.

The Registrar on his being satisfied with the information supplied will assess the stamp duty payable according to the scale of rentals prescribed by Section 8 (23).

GRENARDO v. MARIAN, IMAN BAKSH and TSOI-A-HO

(In the Supreme Court, Civil jurisdiction, (Camacho J.) June 17, 18; July 19, 1952).

Joinder of defendant—on application of other defendants—no cause of action—costs of added defendants.

The plaintiff on an order made by a judge in Chambers issued a writ against the third defendant. The order was made on the application of the first and second defendants. The plaintiff had no cause of action against the third defendant.

Judgment was entered for the plaintiff against the first and second defendants with costs. The third defendant asked for his costs against them.

Held: He was joined on their application and was entitled to costs against them.

J. Carter for plaintiff.

C. V. Wight for first defendant.

J. N. Singh for second defendant.

S. L. Van B. Stafford Q.C. for third defendant.

Camacho J.: In this case, the Plaintiff Rosaline Grenardo, brought an action against Defendants Marian and Imam Baksh (hereinafter referred to as defendants 1 and 2) in which she claimed possession of a wooden chattel house which she had purchased from one Tsoi-a-Ho and mesne profits from the date of purchase.

The house originally belonged to defendants 1 and 2 but they had executed a Bill of Sale upon it in favour of Tsoi-a-Ho as security for a loan to them by him of $1,000, with interest at the rate of 3 per cent per month.

Eventually Tsoi-a-Ho persuaded defendants 1 and 2 to pass the property to him in full settlement of the principal sum and interest then due thereon, amounting in all to $1,450. An agreement of sale to this effect was duly drawn up and executed by defendants 1 and 2.

Thereupon Tsoi-a-Ho sold the property to plaintiff for $1,300 but defendants 1 and 2 who had all along remained in possession refused to give up possession to the plaintiff. They claimed that Tsoi-a-Ho was not entitled to sell the property and even suggested that there had been merely a pretended sale between the plaintiff and himself.

Some time before the action was set down for hearing, defendants 1 and 2 obtained from a Judge in Chambers, what I shall describe as a somewhat unusual order. In effect, the learned Judge at the request of defendants 1 and 2 ordered the plaintiff to join Tsoi-a-Ho, against whom she obviously had no cause of Action, as a defendant. I have been informed from the Bar Table that this was done in order to facilitate defendants 1 and 2 in their defence. Certain evidence, which they considered necessary, could not be given unless Tsoi-a-Ho was a defendant. As Mr. Stafford Q.C., Counsel for Tsoi-a-Ho points out, such an order would appear to be entirely contrary to the decision in *Hood-Bars v. Frampton* & *Co. Ltd.* (1924) W.N. 287.

In compliance with this Order of the Court, plaintiff issued a writ against Tsoi-a-Ho who promptly entered an appearance.

With the correctness or otherwise of the Order, this Court is not directly concerned nor does it venture an opinion. Where such Order does, however, indirectly concern this Court is on the question of costs to Tsoi-a-Ho (hereinafter referred to as No. 3 defendant).

At the close of the case Mr. Wight, counsel for defendants 1 and 2 quite frankly and properly admitted that his clients had failed to establish any defence to plaintiff's claim. Judgment was accordingly entered for the plaintiff against defendants 1 and 2 who were ordered to give up possession on or before the 31st August, 1952, and to pay to plaintiff by way of mesne profits the sum of $370 agreed upon by counsel. They were also ordered to pay the entire costs of the action.

Mr. Stafford then asked that judgment should be entered in favour of No. 3 defendant and that the costs of the action to be

paid by defendants 1 and 2 should include the costs of No. 3 defendant.

Mr. Wight strongly resisted this claim. The point is not entirely free from doubt and although it appears to me, in the present case, to be purely academic, I have consented to give a written judgment.

At first the argument proceeded upon the assumption that No. 3 defendant having been wrongly joined was not properly before the Court. Judgment could not in any event have been given against him in favour of the plaintiff since she admittedly had no claim whatever against him. Nor could judgment be given against him in favour of defendants 1 and 2, since they had no claim against him but were merely defendants in the action. Nor could judgment be entered in his favour if indeed he was no party to the action. Mr. Wight contended that since the Court could not enter judgment for or against No. 3 defendant, neither could it in all fairness award him costs.

Mr. Stafford then drew attention to the wording of the Order in Chambers joining No. 3 defendant. It was the plaintiff and not defendants 1 and 2 who had been ordered to join No. 3 defendant. He was therefore properly before the Court unless and until the order joining him was set aside.

I am satisfied that whatever view may be taken of the Order, the plaintiff in obedience to that order had issued a writ against No. 3 defendant. Even allowing for the fact that plaintiff in issuing the writ had merely acted upon an Order of the Court which she herself had never sought, yet it seems to me that in effect and for all practical purposes of this action, the parties to the action were placed in the same position as if the plaintiff had obtained an order to join No. 3 defendant.

I am satisfied therefore that No, 3 defendant is to all intents and purposes in the same position as a defendant who has been joined as a defendant under an order of the Court made at the request of plaintiff. He is therefore properly before the Court and the Court can give judgment in his favour and at its discretion make such order as to costs as it considers equitable.

It is clear that the plaintiff ought not to be mulct in costs for obeying an Order of the Court which she never sought.

It is also clear that No. 3 defendant against whom there was no claim whatever should not be called upon to pay the costs of his defence.

Everything in fact points to defendants 1 and 2, who were entirely responsible for bringing No. 3 defendant into the action, as the proper persons to pay his costs.

Mr. Wight, however, raises a further point. Conceding that No. 3 defendant was improperly joined as a defendant at the request of defendants 1 and 2 yet he could and should have taken steps to have his name struck out. He cannot be permitted to

sit upon his rights, take part in the action and then ask for his costs.

I confess that at first I was greatly impressed by this argument.

Under normal circumstances, there is no doubt whatever but that a defendant improperly joined should move without delay to be struck out and if he fails to do so and takes an active part in the litigation, he may be deprived of his costs. The authority for this is to be found in the case of *Mackinley v. Bathurst* 36 Times Reports 33.

Upon further consideration, however, I am not satisfied that No. 3 defendant, under the special circumstances of this case can be said to have been improperly joined as a defendant by the plaintiff so as to bring him under the provisions of 0. 16 r. 11.

0. 16 r. 11 was obviously intended to deal with cases in which the plaintiff without any Order of the Court has on his own initiative improperly joined a person as defendant. In such a case a Judge in Chambers may at the request of the person so improperly joined, order that his name be struck out. Here, however, a Judge in Chambers has ordered the plaintiff to join a person as defendant. Such person cannot in my opinion be said to have been improperly joined by the plaintiff as a defendant. Under the circumstances I do not see how No. 3 defendant could successfully have applied to a Judge in Chambers to have his name struck out. I am not here dealing with such steps as the plaintiff might have taken to set the order aside. I am dealing with the conduct of No. 3 defendant in the matter.

I am satisfied that No. 3 defendant cannot be said to have slept upon his rights in such a way as to deprive him of his costs. I am satisfied that under the special circumstances of this case the only course open to him was to enter appearance and take part in the litigation.

I shall therefore enter judgment in favour of No. 3 defendant against the plaintiff and order that the costs of No. 3 defendant be paid by defendants 1 and 2.

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

S. M. A. Nasir for first and second named defendants.

H. C. B. Humphrys for third named defendant.

(In the Supreme Court, Civil Jurisdiction (Boland J.) March 24, 31; June 4; August 16, 1952).

Money lent—Limitation Ordinance—oral acknowledgment—Common Law of England —statutory change—Common Law of this colony—effective date.

The plaintiff lent the defendants a sum of money which was statute barred at the time of the issue of his writ. He relied on an oral acknowledgment by the defendant to a third party who was not an agent of the plaintiff of the debt, within three years of the institution of the action, to take the case out of the statute.

Held: The validity of an acknowledgment of a debt which was statute barred or a promise to pay same if made orally subsequently within the statutory period, was not on the 1st January, 1917 being recognised in England. As the Common Law of this Colony is the English Common Law on the 1st January, 1917 the Limitation Ordinance is an absolute bar to an action for debt and no part payment, acknowledgment or promise to pay can make the action maintainable. James Fung v. Felicia Fung (1951 L.R.B.G.) not followed.

Obiter: In any event an acknowledgment or promise to pay even if in writing must be made to the creditor or his agent to take the case out of the statute.

Action dismissed.

F. R. Jacob for the plaintiff.

P. A. Cummings for the defendant.

Boland J.: In this case which is one where plaintiff had proceeded for judgment under Order XII on a specially endorsed writ for monies lent, the defendants who are husband and wife obtained leave to defend because, in addition to denying the alleged loan, they declared in a joint affidavit that the plaintiff's action is barred by virtue of Section 6 (1) of the Limitation Ordinance, Chapter 184. By this section it is enacted that every action for money lent shall be brought within three years next after the cause of action or suit has arisen.

Plaintiff's claim on his writ is for an aggregate sum of $720.00 and in particulars showing how this total is arrived at, he sets out various loans to the defendants on different dates commencing on January 13, 1946, and ending on 22nd September, 1946.

In the order for leave to defend, it was directed that the parties shall proceed to trial without further pleadings. However, at a subsequent date, although no statement of defence was filed, plaintiff filed a reply with leave of a judge and therein alleged that "the defendants on divers occasions admitted and acknowledged that they were indebted to the plaintiff for the amounts set out in the Statement of Claim herein, and that such admissions and acknowledgments were made by the defendants within the period of three years before the action herein was brought."

On the evidence adduced before me, I find as a fact that the plaintiff did lend to the defendants on the dates mentioned in the writ the various sums aggregating the total amount of $720.00, and that neither that sum nor any portion thereof has

been repaid. I am satisfied too, that on a day in January, 1950, each defendant in turn had a conversation relating to this indebtedness with Mr. Ludovicus Forbes, District Commissioner Essequebo Islands, who was investigating a complaint made to him by the plaintiff. Mr. Forbes met and spoke to the wife, the defendant Rajpattie first, telling her that plaintiff had complained about herself and husband owing him this sum of $720.00. Rajpattie replied that they owed the money and that they were going to pay. The husband, the defendant Harrychand, then came up as his wife was moving away, and Mr. Forbes repeated to him what he had said to his wife and Harrychand said that he would pay the amount.

It is for the Court to determine whether on the above findings of fact that there was this oral acknowledgment of the debt accompanied by a promise to pay made to Mr. Forbes by both defendants less than three years before the institution of the proceedings, the action is nevertheless maintainable despite the fact that the cause of action for the debt had arisen more than three years before. In other words, is an oral acknowledgment or promise to pay made within the period of limitation sufficient to exclude the operation of our statute of limitation which would, but for such an acknowledgment, bar the bringing of an action? There is the further question in this particular case. Assuming that an oral acknowledgment of indebtedness within the period avoids the statutory bar to the action, is an oral acknowledgment valid for such purpose although made not to the creditor himself or his agent, but to some third person?

For the purpose of a decision on the point, it will be necessary to trace the history of the law relating to the limitation of the time within which an action can be brought to enforce payment of a debt. In England under the common law there was no time limit for the bringing of such an action. But in the reign of James I, a statute known as the Limitation Act 1623 (21 Jac. 1 C. 16) was passed prescribing a period of limitation for certain specified actions which were subsequently judicially construed to include all actions for simple contract and most actions for tort at common law. The period for a simple contract debt was fixed at six years. But in the course of time, after the passing of this statute, there was a series of judicial decisions which allowed a creditor to recover a money debt which had accrued due at some date more than six years before, if, either orally or in writing, the debtor had given an unconditional promise to pay, or had made an unconditional acknowledgment of the debt from which a promise to pay could be implied; or if he had given a promise to pay on the fulfilment of a condition, then the action could be brought against him on the fulfilment of the condition.

As to the principle on which the courts were induced to make such acknowledgment or promise enforceable by action so as to revive a debt which the statute had expressly declared as being irrecoverable by action, it has always puzzled jurists to furnish a satisfactory explanation. It is unnecessary for the purpose of

the instant case to determine whether those decisions were based on a theory that the acknowledgment or fresh promise created a new cause of action and that the consideration for the promise or for the promise implied by the acknowledgment was the old indebtedness. Nor is it necessary to speculate as to whether, as has been in some quarters advanced, the decisions can be supported by the explanation that the statute of James I was intended to establish merely a presumption of payment by the debtor who would not unreasonably after a great lapse of time be unable in proof of payment to produce the necessary vouchers; yet that such presumption would be rebutted if the debtor himself acknowledged the indebtedness or promised to pay. Indeed, Lord Sumner who in his speech before the House of Lords in Spencer v. Hemmerde (1922) 2 A.C. 507 at p. 519, gives a historical review of those earlier decisions, made the comment that the decisions "have been directed to what is after all the task of decorously disregarding an Act of Parliament."

Be that as it may, what is enunciated in those decisions which may be designated "judge-made law" became as such part of the Common Law of England, and was operative as Common Law until abrogated by statute. But in England in the year 1828, there was enacted the Statute of Frauds Amendment Act (9 Geo. IV C. 14) which is commonly known as Lord Tenterden's Act. This abrogated the common law as embodied in those earlier decisions so far as a mere oral acknowledgment or promise to pay the debt is concerned, for it provided that the acknowledgment or promise by the debtor to be effective so as to revive a debt barred by the statute must be in writing. Lord Tenterden's Act is still in force in England and therefore the rule of the common law relating to the revival of a debt in the manner indicated no longer exists.

Turning now to the history in this colony of the corresponding law relating to the limitation of actions for debt, it would appear that though before the year 1856 there may have been some legislation providing for the limitation of actions, in that year an Ordinance, No. 1 of 1856, was passed purporting to settle the law in British Guiana relating to the limitation of actions. The Ordinance declared certain specified periods within which particular actions must be brought. The period for simple contract debts was three years. Except for the omission of section 8, that Ordinance is reproduced in Chapter 184 in the present revised edition of the statue law of the Colony and is still in force. Section 8 of the Ordinance of 1856, like Lord Tenterden's Act, had enacted that in this Colony an acknowledgment of a debt or promise to pay the same must be made in writing and signed by the defendant within three years before action brought so as to avoid the bar to action provided by the Ordinance. In the year 1918 by an Ordinance N. 27 of 1918, the provision of section 8 of the Ordinance of 1856 was expressly repealed; hence its non reproduction in the revised edition of our statutes published in 1930.

It is of interest to note the reason given for the enactment of the above Ordinance, No. 27 of 1918, which repealed section 8 of the Ordinance of 1856. This may be gathered from the "objects and reasons" or "explanatory memorandum" accompanying the Bill as presented for consideration by the Legislative Council. It was, as therein stated, to *make it clear that part payment or payment of interest on part 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.* Accordingly, it is obvious that in enacting Ordinance No. 27 of 1918, our legislature intended by the repeal of section 8 of the Ordinance of 1856 to provide for this colony the common law of England as laid down by judicial decisions in England prior to the passing of Lord Tentenden's Act, which was the English equivalent of Section 8 of Ordinance No. 1 of 1856. The repeal of this section, which had been passed like Lord Tenterden's Act for the express purpose of avoiding the operation of the Common Law, would have the effect, it was conceived, to bring into force in this colony the relevant Common Law of England which had since been abolished by the English statute, and which therefore was no longer being administered in England. In determining the effect of Ordinance No. 27 of 1918 whether thereby there came into force the common Law of England giving, an acknowledgment or promise to pay, though not in writing, the effect of a waiver of the defence of the statute of limitation relating to simple contract debts, the intention of the legislature must of course be disregarded. The effect in law of an Ordinance has to be ascertained on the true construction of the language itself used therein according to the canons of construction prescribed by rules of law. Even when words of a statute may be construed in more than one sense, regard may not be had to the Bill by which it was introduced nor to what has been said in Parliament, *Smith Eastern Railway v. Railway Commissioners and Hastings Corporation* (1881) 50 L.J. (Q.B.) 201 C.A. vide remarks of Selborne L.C. at page 203.

Besides, I am doubtful if the repeal of one section of an Ordinance operates automatically to revive the rules of the Common Law relating to the subject which the enacted section had purported to replace. Perhaps if a whole statute were repealed, the antecedent Common Law would be resuscitated. But when only part of a statute is deleted by a subsequent repealing statue, the effect of this may well be that the original statute is to be construed as shorn completely of the provisions enacted by the repealed section without a revival of the rules of common law which the repealed section had been designed to modify or replace. For example, I am not sure that a repeal in England now of Lord Tenterden's Act would have the result of rendering effective any acknowledgment of a debt or a promise to pay the same made within the period of limitation, whether made orally or in writing, so as to be deemed an exemption to the bar provided by the Act of James I. It is definite that a repealed Statute can only be revived by express enactment and

not by implication because of the subsequent repeal of the repealing enactment, vide Section 27 of the Interpretation Ordinance, Chapter 5, which reads:—

> "Where an Ordinance passed after the eighth day of March, eighteen "hundred and fifty-six, whether before or after the commencement of "this Ordinance, repeals a repealing enactment, it shall not be construed "as reviving any enactment previously repealed, unless words are added "reviving that enactment."

It is possible that on the same principle of construction, once the common law is abrogated by a section in a statute, the repeal of that section shall not be deemed automatically to revive the common law relating to the subject of the repealed section.

In the absence of express directions as to its interpretation given in the statute itself, a statute is to be construed in accordance with the rules of construction indicated by the Common Law. In that sense, the general principle underlying judicial decisions on the construction of a statute becomes part of the Common Law. But the fact that a statute on amendment has had added to it certain provisions which subsequently are repealed would not necessarily import that the statute must thereafter be given the same construction as was given to it before those added provisions, since repealed, had not been enacted. It must be admitted, however, that the decisions in the English Courts before Lord Tenterden's Act was passed, did not purport to construe the Act of James I. Most of those decisions purported to be based on the theory of a new cause of action created by the acknowledgement of the debt or the promise to pay the same which became enforceable on the principles of the common law relating to a binding contract between parties. If that is the correct explanation for those decisions, though it is difficult to see the consideration valid in law to support such a promise, the Common Law that would be invoked in England, should Lord Tenterden's Act be ever repealed, would not be that of judicial decisions on the construction of a statute but that relating to the rights and liabilities flowing from contract under the Common Law. Accordingly in England the rules of the Common Law affecting the binding validity of an oral promise might be applicable again on the repeal of Lord Tenterden's Act which merely prescribes that to be enforceable by action such promise shall be in writing.

But is the Common Law of England now applicable here in British Guiana on the repeal of section 8, which as I have stated is the equivalent of Lord Tenterden's Act? The common' law of England was introduced here as the Common Law of the colony as from the 1st January, 1917, by the Civil Law of British Guiana Ordinance, Chapter 7. Section 38 of that Ordinance enacts:—

> "The Common Law of the colony shall be the Common Law of England "as at *the date aforesaid* (*i.e.* the first day of January, 1917) including "therewith the doctrines of equity as *then administered or hereafter ad-*"*ministered* by courts of justice in England, and the Supreme Court shall "administer

"the doctrines of equity in the same manner as the Supreme Court of Judi-
"cature in England administers them at the date aforesaid or *at any time* "*thereafter*."

On the 1st January, 1917, the validity of an acknowledgment of a debt which was statute barred or a promise to pay same if made orally subsequently within the statutory period, was not then being recognised in England. That Common Law rule engendered by judicial decision on the subject had been abrogated since Lord Tenterden's Act was passed arid it has not been revived since. It is clear from its language that the Civil Law of British Guiana Ordinance, Chapter 7 never could have intended that the common law of England to be thereafter operative in this Colony was to be any other than that then being recognised and then being administered by English Courts on the 1st January, 1917. That Ordinance cannot be construed as purporting to give the force of law to old judicial decisions which at that date Were no longer applicable in England because of subsequent statutory enactment.

For the above reasons, I hold that those decisions given in England before Lord Tenterden's Act are not applicable in this colony, and on a construction of the Limitation Ordinance, Chapter 184, there is an absolute bar to an action for debt which was due and payable for more than three years, and that no part payment, acknowledgment or promise to pay made less than three years before the brining, of the action can operate to make the action maintainable.

Counsel for the plaintiff cited the decision of Ward, J. in James Fung v. Felicia Fung delivered on May 12, 1951, in Proceedings No. 186/1950 (Demerara) and published in the Official Gazette of 8th December, 1951, at page 1236. Ward, J. would appear to have fully appreciated the difficulty of resolving the question as to whether by the passing of Ordinance No. 27 of 1918 repealing the local equivalent of Lord Tenterden's Act, there was thereby resuscitated the old common law of England. But the learned judge would seem to have based his decision that the Common Law of England was resuscitated because of the intention of the legislature as disclosed by the explanatory memorandum attached to the Bill. I have already indicated that the intention of the legislature is not to be invoked in aid of the construction of the language of an enactment. With respect, I regret I am unable to agree with Ward, J.

Having regard to the view I have taken that an acknowledgment or promise to pay whether made orally or in writing does not avoid the operation of our Statute of Limitation, it is unnecessary to refer to the question whether an acknowledgment or promise is good for the purpose if not made to the creditor himself or his agent, but it may be said that, as is more generally accepted, if the principle underlying those early judicial decisions is that of a new promise or a continuing promise to pay the existing debt, it is difficult to see that that promise can be enforced unless it was made to the creditor himself or his agent;

Moore *v.* Bannister (1859) 4 Drew 432 at first would seem to decide differently but that case was one where the debt was a specialty debt having arisen out of the liability under a bond, and the Court had to construe the effect of another statute, the Act of William IV, relating to the limitations of actions for such debts.

For the reasons I have indicated above, I give judgment for the defendants with costs.

Solicitors: *N. C. Janki* for plaintiff.
T. A. Morris for defendant.

SATTAUR v. RUPUNUNI DEVELOPMENT COMPANY LTD.

(In the Supreme Court, Civil Jurisdiction (Bell C. J.) February 26, 17; March 3, 4, 5; September 5, 1952).

Animals—driven by servant of independent contractor—injury to pedestrian —highway—negligence—New Amsterdam Town Council Ordinance.

The defendant company received at New Amsterdam a shipment of fourteen cows from their Rupununi ranch. An independent contractor, in conformity with their usual practice, took delivery of the animals and a servant of his was driving them along the highway when a steer attacked and injured the plaintiff.

The plaintiff claimed damages for personal injuries on the ground of negligence and alternatively statutory negligence, to wit, a breach of the New Amsterdam Town Council Ordinance.

The principal defence was that the animals were in charge of an independent contractor.

Held: The defendant's animals were in charge of an independent contractor but as the work contracted to be done was necessarily dangerous and from its nature likely to cause danger to others the defendant company should have ensured that precautions were taken by the independent contractor to prevent such danger. As the defendant company had failed to do this it was liable.

Observations on the proof required to found a cause of action on statutory negligence.

Judgment for Plaintiff.

L. M. F. Cabral for plaintiff.

S. L. Van B. Stafford Q.C. for defendant.

Bell C. J.: This is a suit by the Plaintiff for damages for personal injuries which he claims were inflicted upon him at New Amsterdam, British Guiana through the negligence of one whom he alleges was the servant of the defendant, by a steer from a flock of cattle the property of the defendant whilst the flock was being driven along a public street in New Amsterdam under the control of the said alleged servant. The Plaintiff claims $5,000: as damages of which sum he claims $1,188.91 as special damages (loss of earnings, doctor's bills, cost of medicines, hospital ex-

penses etc,) The Plaintiff relies upon two causes of action, (1) Negligence at Common Law and

(11) Statutory negligence—(The New Amsterdam Town Council Ordinance Chapter 87—Section 119).

In his statement of Defence the Defendant denies, *inter alia* that the Plaintiff received the alleged injuries but at the trial little or no attempt was made to challenge him on that point, the Defence confining itself to trying to establish the several defences upon which it relied viz:—

(a) That the Defendant was not himself guilty of any negligence either at Common Law or by Statute;

(b) That at the time of the accident the cattle were not in charge or under the control of any servant of the Defendant but were then in charge and under the control of one King an independent contractor and his servants, and that this is not one of the exceptional cases in which an employer is liable for the negligence of an independent contractor or of the independent contractor's servant;

(c) That there was contributory negligence on the part of the Plaintiff or alternatively that the Plaintiff wilfully and willingly elected to encounter the danger;

(d) That the accident was caused by inevitable accident without any negligence or default on the part of the Defendant;

(e) That the true and legally blameworthy causers of the accident were third parties (the driver of a motor-car and the rider of a motor cycle) or in other words that this is a case of "*Novus actus interveniens.*"

After careful consideration of the evidence tendered by each party and the manner in which each witness gave his evidence, I am satisfied that the story told by the Plaintiff and his witnesses Hansraj, Ivan Fraser and Abdul Hack as to the circumstances in which the Plaintiff was injured on the Stelling Road on the morning of the 9th September 1948 is to be preferred to the story told by the Defence witnesses, and is a substantially true version of what took place. I accept the evidence of Dr. De Souza as to the injuries he found on the Plaintiff and I believe that those injuries were received from the steer of the defendant when it attacked the Plaintiff on the Stelling Road, New Amsterdam, on the 9th September, 1948, in the circumstances deposed to by the Plaintiff and his witnesses.

Putting aside for the moment the defences of contributory negligence, etc., inevitable accident, and *novus actus interveniens* and assuming (contrary to my finding as will be seen hereafter) that the men in charge of the cattle when the steer rushed against and injured the Plaintiff, were the servants of the Defendant, I would have no difficulty upon the evidence as a whole in coming to the conclusion that the Plaintiff had received his injuries through the negligence of the Defendant's servants a negligence which would then be imputable to the Defendant under the ordinary rule of the liability of a master for a tort committed by a servant in the course of his employment (Deen v. Davies T.L.R. Vol. 153 (1935) p. 90; Pinn v. Rew (1916) 32 T.L.R. 451; Turner

v. Coates, (1917) 115 L.T. 766; Haynes v. Harwood (1935) 152 L.T. 123.) In coming to that finding I would, in addition to the facts which flow from my acceptance of the evidence of the Plaintiff, Hansraj, Ivan Fraser and Abdul Hack as to what took place on the Stelling Road at the material time including their evidence as to the whereabouts on the Stelling Road, that is, between the cattle pen and the Strand or Water Street the Plaintiff received his injuries, have found the following facts—viz:—that the Stelling Road is in fact used by the general public as a thoroughfare connecting the Strand or Water Street and the Stelling itself, and is used as a road by persons resorting to the premises which open on the Stelling Road; that the general public have used it as such thoroughfare for about 30 years; that it is usually a busy street full of human activity especially on the day when the steamer arrives at New Amsterdam, and when the steamer departs from New Amsterdam; that it is particularly busy on Thursday mornings which is one of the days for the arrival and departure of the steamer; that motor vehicles use the Stelling Road; that the Plaintiff was injured by a steer the property of the Defendant; that the steer was one of a herd of 14 cattle which had been landed from the river steamer at New Amsterdam on the morning of the 9th September, 1948, not long before the infliction of the injuries on the Plaintiff; that that steer and the rest of the herd had been reared in remote parts of British Guiana; that the herd and the steer were unaccustomed to human beings in crowds, to the streets of a town, to the noise and bustle of human activity, to the noise made by the engines of motor-cars and/or motor cycles and the noise of their horns; that the herd and steer had but recently been released from the confinement of the river steamer; that none of the cattle in the herd was being led through the Stelling Road by a head rope or other lead and that none of them was yoked to any other of them or to any "tame" animals not of the herd; that they were not under effective control in view of the conditions prevailing or which might reasonably be expected to prevail in the Stelling Road at the hour when they were driven through, etc.; that in the light of all the foregoing which was known or should have been known to the Defendant, to King and to the men in charge of the cattle on the Stelling road at the material time, the Defendant, King and the men in charge of the cattle knew or should have known that in driving the cattle down the Stelling Road at the time and in the circumstances in which they were so driven, the cattle were very likely to stampede or run wildly about to the danger of persons lawfully using the Stelling Road as a thoroughfare or otherwise, and that the operation was in short one attended with more than usual risks (Pinn v. Rew (1916) 32 T.L.R. 451.) I would here observe that whilst the driving of cattle through the streets of market towns in England is a common occurrence and one not regarded in the ordinary way as a dangerous operation, (Brackenborough (Pauper) v. Spalding Urban District Council 166 L.T. (1942) p. 109), yet the cattle so driven may reasonably be presumed I think to be accustomed to human activity and to the noise of motor vehicles whereas cattle reared in the remote districts of British Guiana are not so accustomed.

Before I turn to deal with the defence of independent contractor which in my view is the most substantial point of defence in this suit. I will deal briefly with the defences of contributory negligence etc. inevitable accident, "and *novus actus interveniens*"

CONTRIBUTORY NEGLIGENCE

I can find no evidence in support of this defence. On the facts as I have found them the Plaintiff was suddenly confronted, through no fault of his own, with a perilous situation. It is conceivable that if he were a trained bull fighter or a highly trained athlete he might have been able to escape from the onrush of the stampeding steer, but he is neither a trained bull fighter nor a highly trained athlete, and in the light of the facts as I have found them, I do not consider it can reasonably be said that he failed to take proper steps to save himself from injury, or that he wilfully and willingly elected to encounter the danger, or that he contributed in any way by his negligence or otherwise to the injuries which he received. I hold this defence to have failed.

INEVITABLE ACCIDENT:

Sir Frederick Pollock in his text book on Torts defined inevitable accident as an accident "not avoidable by any such precaution as a reasonable man, doing such an act then and there could be expected to take", and Salmond (10th Ed. p. 24) says that that plea is "that the consequences complained of as a wrong were not intended by the defendant and could not have been foreseen and avoided by the exercise of reasonable care." (see also The Marpesia (1872) L.R. 4 P.C. 212, 220). I can find no room for the plea of inevitable accident to operate on the facts as I have found them and I hold that defence to have failed.

"NOVUS ACTUS INTERVENIENS."

It was said in Haynes v. G. Harwood and Son L.T. R. (1935) Vol. 152 p. 122 by Greer L.J. (a case of horses left unattended in the street taking alarm at being struck by a boy), that it is not true that in English Law where a Plaintiff has suffered damage occasioned by a combination between the wrongful act of a defendant and some further conscious act of an intervening person, that necessarily of itself prevents the Court from coming to a conclusion in his favour if the accident was the natural and probable consequence of the wrongful act. Lord Justice Greer stated the law as follows: "If what is relied on as "Novus actus interveniens" is the very kind of thing which is likely to happen if the want of care which is alleged in the case takes place, then it is no defence to say that there has been a novus actus interveniens. The whole question is whether or not, to use the word of the leading case, Hadley v. Baxendale (9 Ex. 341.) the accident can be said to be the natural and probable result of the breach. If it is the very thing which ought to be anticipated by a man who was leaving his horses or one of the things likely to arise as a consequence of his wrongful act, then it is no defence at all. In my judgment there can be really no doubt that in the present case the damage was the result of the wrongful act in the sense of being one of the natural and probable results of the wrongful act." It seems to me that the principle enunciated above applies to the

facts of this case as the stampeding of these particular cattle was the very thing which ought to have been anticipated by the person in charge of them on the Stelling Road on the morning of the 9th September, 1948, as likely to arise as the result of driving those particular cattle in the manner in which they were then driven on the Stelling Road. I hold this defence of "novus actus interveniens" to have failed.

I come now to the question as to whether or not the men in charge of the cattle on the Stelling Road were the servants of the Defendant or whether one of them (King) was an independent contractor and the other his servant or whether (if King was absent) the two men were servants of an independent contractor namely King. In the light of the authorities including Honeywell and Stein v. Larkin Bros. 1934 1 K.B. 198; Performing Right Society Ltd. v. Mitchell and Booker Ltd. (1822) 1 K.B.; Quarman v. Burnett (1840) 6 M. and W. 509, and of the evidence, I have come to the conclusion that when the cattle were being driven down the Stelling Road on the 9th September, 1948, when the Plaintiff received his injuries they were being so driven in pursuance of a long standing contract between the Defendant and the witness King to the terms of which King and Oswald Hamilton Fisher, the Secretary of the Defendant Company have deposed, and that by virtue of that contract King was an Independent Contractor under contract with the Defendant Company to take the cattle off the river steamer and drive them to the Abattoir. I believe that King himself took part together with the man Mona his servant, in the driving of the cattle on the morning of the 9th September, 1948, when the Plaintiff was injured by the steer. If King was then absent however, then the man who assisted Mona was, I hold, the servant of King and not of the Defendant.

I have not overlooked in coming to the above conclusion the possible inference to be drawn from the letter of Cameron and Shepherd dated the 17th November, 1948, (Exhibit K) that the Defendant admitted that the cattle had been in the charge of their *servant* as distinct from an independent contractor as they later pleaded; and I have also kept in mind the fact that the book of the Company described the remuneration paid to King as "wages" a term commonly used in payments made to a servant, but after considering all the evidence on the point, I believe that the relationship between King and the Defendant Company at the material time was as I have said before that of independent Contractor and Principal, and not that of master and servant. To the general rule that an employer is not liable for the negligence of an independent Contractor or his servants, there are several exceptions (see Clerk and Lindsell on Torts 10th Ed. 1947 p. 141; Halsbury (Hailsham Edition) Volume 23, paragraph 1005 p. 713) but only one of these can have any application in the present case namely where the work contracted to be done is necessarily dangerous, (Holliday v. Nations Telephone Co. (1899) 2 Q.B. 392), or from its nature likely to cause danger to others unless precautions, are taken to prevent such danger (the Snark (1900) p. 105 C.A. and other cases cited in 23 Halsbury p. 713 note (k) including Pinn v. Rew (1916) 32 T.L.R. 451 (a case of a driver who was

possibly an independent contractor, employed to drive a cow and a calf on the highway, there being evidence that a cow with a calf might become dangerous if it met a dog which in fact occurred). It seems to me that the work of driving these particular cattle through the stelling Road on the morning of 9th September, 1948, in the circumstances in which they were so driven was in the light of the *facts as I have* found them necessarily dangerous or was from its nature likely to cause danger to others unless precautions were taken to prevent such danger, and I cannot see that the Defendant can escape liability by arguing that the independent contractor and his servants should have adopted a less dangerous way of carrying out such work. On the contrary it seems to me that notwithstanding the existence of his standing contract with the independent contractor the Defendant should have taken steps to see that due precautions were taken by the independent contractor to prevent the dangers which were attendant upon the driving of those particular cattle through the Stelling Road on that particular day. In other words, it is not enough for the defendant to say that he has a standing contract with an independent contractor for this class of work and that he has no further responsibility in the matter even though the driving of a particular herd of cattle through a place frequented by the public may from the nature of the cattle, the nature of the place and all other circumstances be attendant by exceptional risk of danger to life and limb. I consider that the Defendant exhibited in the present case negligence of the same nature as that exhibited in the case of Pinn v. Rew; that the men who were driving the cattle were negligent and that the plea of act of independent contractor does not avail in the present case just as it did not avail in the case of Pinn v. Rew.

I accordingly find that the Plaintiff is entitled to damages against the Defendant for the tort of negligence at common law which damage I assess at $1,396.75 arrived at as follows:—

Special damage

To repairing Plaintiff's bicycle	..	$12.00
To expenses Public Hospital New Amsterdam	..	3.50
To expenses Public Hospital, Georgetown	..	21.25
To Dr. C. De Souza's fee	..	90.00
To Dr. Lachhmansingh's fee	..	30.00
To Liniment, bandages and medicine	..	20.00
To loss of earnings for three months @ $150: a month	..	450.00
To loss of earnings for three months @ $90: a month	..	270.00
		896.75

It will be seen that I have disallowed the item of $52.16 claimed for "hire of cars to conveying the Plaintiff to and from doctors and hospitals in New Amsterdam and Georgetown", as no evidence was heard in support of that item. I have reduced by one quarter the rate of loss of monthly earnings claimed by the Plaintiff. He produced no accounts in respect of his earnings and I consider the alleged rate of earning to be exaggerated.

General Damages.

I award the Plaintiff the sum of $500.00 (five hundred dollars) general damages for the pain, suffering and inconvenience he has suffered.

STATUTORY NEGLIGENCE:

There has been considerable argument in the case as to whether Section 119 of the New Amsterdam Town Council Ordinance Chapter 87 gave the Plaintiff an alternative ground for action, the ground of Statutory Negligence, and as to whether, if such an action lies, the mere failure to comply with the requirements of the section is proof of negligence entitling the Plaintiff to damages. I think I should deal with the matter briefly. Mr. Cabral has contended in the affirmative as regards both these points and in addition to the several authorities he cited in support of the first of them, relied upon the case of Lochgelly Iron & Coal Co. v. M'Mullan (1934) 1 A.C. 22 in support of the second point. I have come to the conclusion that Section 119 of Chapter 87 whilst not taking away from the Plaintiff his right of action for negligence at Common Law, does not confer any right of action upon him for Statutory Negligence. Before any such arguments can have any force, it is necessary to decide whether Section 119 has any application at all in view of Mr. Stafford's contention that the Stelling Road was not land to which the section had any application, as it was, he contends, Colony land and not subject to the operation of Section 119. I have come to the conclusion that though Colony land, the Stelling Road on the 9th September, 1948, was a place within the town of New Amsterdam to which the public resorted as of right and that Section 119 did apply to it. I come to the view that no action lies for Statutory Negligence for the reason that the general sense of the authorities is that such a right of action is only conferred in cases in which the statute imposes some positive duty upon the defendant, e.g., to maintain adequate pressure in water mains (Atkinson v. Newcastle Waterworks Co. (1877) 2 Ex. D. 441 C.P.); whereas I can find no such duty cast upon anyone by Section 119 of Chapter 87, it is in essence a prohibitory section. There is a note in 23 Halsbury, page 650, note (0), which states, that the offence of reckless, dangerous or careless driving of a motor-vehicle—the Road Traffic Act 1930 Sections 11, 12—may also give rise to a civil action at the suit of the injured party, but it gives no authority for that proposition.

I hold therefore that there is no right of action in this suit for Statutory Negligence. I would add that I have drawn no inference adverse to the Defendant by reason of the change of defence as shown by a comparison of his Original Defence and his Amended Defence of the 2nd November 1950.

There will be judgment accordingly for the Plaintiff for $1,396.75 (one thousand three hundred and ninety-six dollars and seventy five cents) and costs.

Solicitors: A. R. Sawh for plaintiff.
H.C. B. Humphrys for defendant.

(In the Supreme Court, civil jurisdiction (Stoby J.) September 2, 4, 8, 1952).

Rent Restriction—standard rent—assessment—effective date of certificate—re-payment of rent in excess of standard rent.

During the month of April 1950 the defendant let premises to the plaintiff at a monthly rental of $70.00. In June 1951 the rent assessor ascertained that the standard rent was $25.00 and assessed the maximum rent at $33.25. The effective date of the certificate was the 1st June, 1951.

In a claim by the plaintiff to recover excess rent from April 1950 it was submitted for the defendant that excess rent was not recoverable before the effective date of the certificate, that is, the 1st June 1951.

Held: Excess rent was recoverable from April, 1950.

Griffith v. Moseley explained.

Judgment for plaintiff

J. Edward de Freitas for plaintiff.

Sugrim Singh for defendant.

Stoby J.: The plaintiff's claim is against the defendant for the sum of $427.50 being an amount alleged to be overpaid by the plaintiff to the defendant in respect of rental for premises situate at lot 44, Brickdam, Georgetown, Demerara.

During the month of April, 1950, the plaintiff rented from the defendant the middle and upper flats of a building at lot 44, Brickdam, at a monthly rental of $70.00. In March, 1951, she received certain information and applied to the Rent Assessor to have the standard rent ascertained and the maximum rent assessed. But before her application could be heard the premises were sold to one Cheong-Leen, and consequently she withdrew her application against the defendant and lodged a fresh one against Cheong-Leen. The Rent Assessor ascertained the standard rent as $25 and after allowing the permitted increases assessed the maximum rent at $33.25. The Rent Assessor in accordance with subsection (23) of section 4B of the Rent Restriction Ordinance, 1941, as amended by the Rent Restriction (Amendment) Ordinance, 1947 stated that the certificate should take effect from the 1st of June, 1951.

The defendant's case is that his sister-in-law, Mrs. Matilda Sabga was at all material times the owner of the premises and that she had let the premises to the plaintiff and that the only reason why the receipts were in his name was because he was acting as her agent. I indicated at the trial that on this question of fact I accepted the plaintiff's evidence supported as it was by the receipts. I am convinced that the contract was made with the defendant, that the first rental was paid to him and a receipt given on his behalf by one of his employees, and that he was the landlord of the premises.

Counsel for the defendant urged that on any view of the facts the plaintiff was not entitled to recover any amount paid in excess of the standard rent in view of the fact that the effective date of the certificate was the 1st of June, 1951. In support

of this contention the cases of Cyril Alexander v. Parbattie Persaud (No. 616 of 1950), Victor Sampson v. Maud Roberts (No. 33 of 1951) and Edna Griffith v. Walter Moseley (No. 368 of 1950) decided by the Full Court on the 19th January, 1952, were cited. An examination of the last mentioned case shows that Counsel has entirely misconstrued the decision. In that case the respondent Walter Moseley had recovered judgment before the Magistrate for the sum of $61.05 as excess rent paid by him to the appellant Edna Griffith for a period of 15 months from the 1st December, 1948 to 28th February, 1950, in respect of premises situate at lot 8 Camp Street, Georgetown. On the 25th February, 1950, the Rent Assessor ascertained the standard rent and assessed the maximum rent and dated the certificate 25th February, 1950. The Magistrate awarded judgment for the full sum claimed despite the fact that the certificate was dated 25th February, 1950, and this decision was varied on appeal and excess rent awarded from the 25th February. But the ratio decedendi was not merely because the effective date of the certificate was the 25th February, but also because the Rent Assessor in conformity with his powers under the 1947 Amending Ordinance had reduced the standard rent from $20.00 to $10.50. The rent of $20.00 being the standard rent was a legitimate charge until reduced and it would have been manifestly unfair to permit the tenant to recover an amount which was never overpaid. As pointed out in the decision it was within the power of the Assessor to make the certificate retroactive, in which case the reduced standard rent would be payable from the date stated in the certificate, but as he did not do so, the new standard rent only took effect from the date of the certificate and excess rent only recoverable from that date. Subsection (23) section 4B must be read in conjunction with section 5 subsections (1), (2) and (3) of the Ordinance. Subsection (2) states—"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, 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." None of the decisions to which my attention has been drawn deprives a tenant from proceeding under this subsection for recovery of rent overpaid by him. The tests are, what is the standard rent and has the tenant paid rent in excess of the standard rent. When premises are assessed and the standard rent ascertained and the maximum rent fixed and a certificate issued with an effective date, the legal position is as follows:—

> (a) If the Rent Assessor acting under section 4B subsection (1A) of the Ordinance has reduced the standard

rent, then excess rent is recoverable from the effective date of the certificate.

(b) If the Rent Assessor has not reduced the standard rent then excess rent is recoverable from the material date as defined in the Ordinance even though there is an effective date in the certificate.

(c) If the Rent Assessor has not reduced the standard rent but has allowed permitted increases under section 6 subsections (1) (a), (1) (b) and (1) (c) of the Ordinance then such increases are payable to the landlord from the effective date in the certificate.

This case falls under proposition (b) above and consequently the plaintiff is entitled to recover the excess rent paid. Judgment for plaintiff for $427.50 with taxed costs.

GROSVENOR v. PERSAUD

(In the Supreme Court, on appeal from the Rent Assessor (Stoby J.) August 11; September 15, 1952).

Rent Restriction Ordinance—Standard rent—onus of proof.

The respondent was tenant of the appellant's premises in Georgetown. In previous proceedings the Rent Assessor reduced the standard rent because he held that such rent was exorbitant having regard to rentals of similar houses in the area. There was no evidence of rentals of other houses. A judge, on appeal, referred the matter back to the Rent Assessor for evidence of rentals of other houses in the locality. The Rent Assessor held that the onus was on the landlord. The landlord appealed.

Held: A landlord discharges the onus placed on him by the Ordinance by leading evidence of the standard rent. He is not required to justify the standard rent.

Assessment raised.

J. E. de Freitas for appellant.

D. P. Debidin for respondent.

Stoby J.: This appeal from the decision of the Rent Assessor certifying the standard rent and maximum rent in respect of premises situate at 317 East Street, Georgetown is another step in the protracted proceedings resulting from the tenant's application to have the standard rent of these premises ascertained.

On the 14th November, 1949 in proceedings between the appellant and the respondent the Rent Assessor assessed the maximum rent of the premises at $30.00 per month.

Subsequently on the 30th June, 1950 the landlord applied for a variation of the maximum rent and in the investigation which followed it was discovered that she had submitted her return to the Mayor and Town Council for the purpose of taxation showing that the annual rental value of the premises was $120, The Mayor and Town Council assessed the annual rental value at $86 and levied rates and taxes on that basis. In 1948 the landlord submitted

a return showing that the annual rental value was $360 and as a result the Mayor and Town Council increased the rental value from $86 to $300 and levied rates and taxes accordingly. On those facts the Rent Assessor increased the maximum rent to $34.03 per month.

On the 11th of August, 1950, the tenant made an application to have the standard rent ascertained and the Rent Assessor being satisfied that his previous assessment were based on wrong facts, and taking into account the rentals of similar premises in the area reduced the standard rent from $30 to $9 per month and assessed the maximum rent at $18.08 per month. The landlord appealed and Ward J. held that the Rent Assessor had no evidence of rentals of similar premises in the area and set aside the certificate and returned the matter to the Rent Assessor for further evidence to be taken on that point and a fresh assessment to be made.

At the rehearing Mr. De Freitas for the landlord submitted that as the matter was referred back for evidence to be taken of standard and maximum rents chargeable of similar premises in the area, the onus was on the tenant who should begin. The Rent Assessor ruled that the onus was on the landlord to prove the standard rent and that she should begin. The landlord and a witness gave evidence establishing the purchase price of the premises and the amount spent in improvements and repairs but led no evidence of rentals of similar premises in the area nor were they asked any such questions in cross-examination.

The tenant declined to lead any evidence at all. It will be seen from the above that the sole purpose for which the proceedings were returned to the Rent Assessor was carefully avoided, but nevertheless he decided to arrive at a fresh assessment with the limited material offered.

The following passage occurs in the Rent Assessor's decision—

> "In my judgment in as much as section 4B (7) of the Principal Ordinance as enacted by section 5 (1) of Ordinance 13 of 1947 places the onus of proving the Standard Rent on the landlord, this onus rests on her at all times, and she can only discharge it by facts to the contrary, or by justifying the rental fixed by her as reasonable."

With the utmost respect to an experienced Rent Assessor he has, I think, confused two separate and distinct ideas. Quite understandably section 4B subsection (7) of the Principal Ordinance as enacted by section 5 subsection (1) of Ordinance 13 of 1947 states that on the hearing of an application by a tenant or landlord to have the standard rent of premises ascertained and certified, the onus shall lie on the landlord to prove the standard rent and the maximum rent chargeable in respect of the premises. I say quite understandably, because of the definition of standard rent in the Ordinance. Standard rent means the rent at which a dwelling house, public or commercial building or building land was let on the third day of September, 1939, or when . . . . was not then let, the rent at which it was let before that date, or in the case of a dwelling house etc., first let after that date etc. the rent at which it was first let.

The Legislature must have concluded in view of that, that the information required could more easily be obtained by a landlord than a tenant but as the former might not willingly disclose such vital information the onus was placed on him in order to compel him to divulge it. A landlord discharges his onus by disclosing the rental at which his premises were let on the 3rd day of September, 1939 or if that is not applicable, by giving the information required by the Ordinance according to the circumstances of the case. The Ordinance does not require him to justify it. The rent at which premises were first let is proof of standard rent but there may be no justification whatsoever for charging that rent. Once a landlord proves the standard rent, the onus shifts to the tenant to establish circumstances which might induce the Rent Assessor to reduce the standard rent.

In the second proceedings the Rent Assessor had reduced the standard rent because he took into account evidence of rental of similar premises in the area. On the rehearing there was no such evidence and the Rent Assessor specifically stated that his decision was not based on any such finding but he nevertheless reduced the standard rent because on the evidence as a whole he considered the rental exorbitant.

Although in my view the Rent Assessor's decision that the onus was on the landlord to justify the standard rent is erroneous, it is open to me to examine the record in order to determine whether the tenant has not established facts which support the Rent Assessor's decision. When the onus is cast on a party in any civil proceedings it may be discharged by leading independent evidence or by admissions elicited in cross-examination of the other party. There is no obligation on a defendant to give evidence if the plaintiff's case has been successfully shattered by cross-examination.

The landlord admitted in evidence that she had purchased the property for $400 and spent $1,400 in improvements.

In reducing the standard rent from $30 to $12 the Rent Assessor held that he was satisfied that a considerable portion of the $1,400 was spent in repairs and replacements which were necessary to put the premises in tenantable condition prior to the first letting to the applicant. It is trite law that a landlord is not entitled to the permitted increase of eight per centum of any amount spent in decoration or repairs but this does not mean that an amount spent in improving premises before a first letting ought not to be taken into account as part of the capital expenditure. This Court has frequently said that the purchase price of premises is one of the circumstances to be taken into account in deciding whether the standard rent is reasonable but by no means the only circumstance. A person who pays an excessive price for a house to which a standard rent is attached does so at his peril, but a person who purchases a house which has never been let and spends money in improvements and lets

that house for the first time, is entitled to have his expenditure taken into account when the first rental is being challenged.

When that factor is given full consideration, it remains apparent that the Rent Assessor was justified in the facts before him elicited in cross-examination in coming to the conclusion that even in these days of fantastic rentals a standard rent of $30 for those premises was exorbitant, but as he ought, as I have shown, to have taken into account the full amount of $1,400 as part of the capital expenditure on the premises, and as he did not do so, his assessment is varied from $12 to $15. The certificate will be varied by substituting $15 for $12 as the standard rent, the permitted increase under section 6 (1) (c) of the Ordinance will be $1.80 instead of $1.44 and the maximum rent per month $24.80. Each party will bear his or her own costs.

KAILAN v. G. REID and another.
ex parte C. L. REID claimant.

(In the Supreme Court, Civil jurisdiction (Stoby J.) June 23, 26, 27; September 15, 1952).

Interpleader—Business names (*Registration*) *Ordinance—Ownership—Inconclusive.*

In this interpleader action the claimant, in order to prove that the goods taken into execution were his, relied inter alia, on the fact that the business from which the goods were taken was registered in his name under the Business Names (Registration) Ordinance Chapter 58.

Held: Registration is not conclusive evidence that the business is owned by the person in whose name it is registered.

Daniel v. Rogers, Fantini claimant, 1918, 2 K.B. 228 referred to.

Judgment for the execution creditor.

A. T. Singh for plaintiff.

L. F. S. Burnham for defendant.

Stoby J.: On the 6th March, 1952 the execution creditor W. H. Kailan levied on a number of articles in a shop at 133 Regent Street, Lacytown in order to satisfy a judgment obtained by him against one E. M. Reid and his wife Gertrude Reid.

Cuthbert Louis Reid is the brother of E. M. Reid and claims that the articles so levied on are his property and were used in the jewellery business carried on by him at 133 Regent Street, Lacytown.

It was proved by the execution creditor or admitted by the claimant that Gertrude Reid, the wife of E. M. Reid and one of the judgment debtors is the tenant of the building at 133 Regent Street. There is a board exhibited outside of the business which bears the following inscription—

"Modern Jewellery Works—E. M. Reid and Sons Goldsmiths".

Receipts for work done as a goldsmith by E. M. Reid are issued in the name of E. M. Reid and Sons. Apart from the money alleged to be used in the opening of the business the claimant

has not contributed a penny in financing the business. The claimant earns $8 per week as a baker's assistant but the debtor's daughter is paid a salary of $9 per week in the business.

The claimant's case is that he came to this colony from Dutch Guiana where he had worked as a jeweller's assistant. As he was in a better financial position than his brother, he opened a jewellery business in Lombard Street under the trade name of the Globe. As he was not a goldsmith his brother was employed to manage the business and permitted to undertake on his own behalf such work as is usually performed by a goldsmith.

After some years it was considered that the rental of the Globe's premises was too high and so a part of the stock was sold and what remained of the business was transferred to 133 Regent Street, Lacytown under the same management as before and it was so being carried on when the levy was made.

As some evidence in support of the genuineness of his claim the claimant tendered the certificate of Registration issued under the Business Names (Registration) Ordinance, Chapter 58, hereinafter referred to as the Ordinance.

Although the Ordinance requires every individual having a place of business in the colony and carrying on business under a business name which does not consist of his true surname to register the business name and furnish particulars of the general nature of the business, the principal place of the business, the christian name or surname, nationality and usual residence of the individual, such registration is not conclusive evidence that the business is owned by the person in whose name it is registered. The whole scheme of the Ordinance is indicative of the fact that registration is not conclusive of ownership because, for example, it makes provision authorising the Registrar to request further particulars from any individual whose name is not registered and upon failure to furnish the required particulars, for proceedings to be instituted against the individual. Section 10 of the Ordinance, too, imposes a disability on a person who ought to be registered but has not done so by providing that any rights under or arising out of any contract made by such a defaulter in relation to the unregistered business shall not be enforceable by action or other legal proceedings.

The inconclusiveness of registration was well illustrated in the case of Daniel v. Rogers, Fantini, Claimant 1918 2 K.B. 228 where the claimant who carried on business in a name other than her true name but was not registered under the Registration of Business Names Act, 1916, purchased the goodwill of the business and stock in trade of R and entered into occupation of the premises where R had carried on business and where until a few months before the trial of the action his name continued to appear over the premises although in fact his connection with the business ceased six months before. About five months after the stock in trade was purchased a judgment creditor of R levied on them as the property of R. At the trial of the interpleader issue the county court judge gave judgment for the claimant and his judgment was upheld by the Divisional Court.

Affirming the decision of the Divisional Court on appeal Banks L.J. said —"in this case Miss Fantini (the claimant) was not claiming a right under or arising out of any contract but was claiming a right which had been created by a past contract and that at the material time her claim rested on her common law right of property". The result of the decision referred to means that if the present claimant had indeed owned the business and had sold the stock in trade to X, a judgment creditor of the claimant's could not take the goods in execution because they would be X's property despite the falsity of the particulars of registration at the time of the levy. Conversely, if I find that the claimant's registration of the business in his name is merely a cloak to protect a brother who is financially embarrassed and that the true owner is the debtor E. M. Reid then the goods must be held to be properly taken in execution.

The facts recited earlier in this judgment, as well as other facts referred to in the evidence and which need not be repeated, leave me in no doubt whatsoever that the goods taken in execution are the debtor's property and the claimant's claim to them must fail.

Judgment for the execution creditor W. H. Kailan with costs.

Solicitors: H. B. Fraser for plaintiff.

S. M. A. Nasir for claimant.

WILLS v. SUGRIM SINGH

(In the Supreme Court, on appeal from the Rent Assessor (Hughes J) August 25, September 19, 1952).

Rent Restriction—Standard rent—Reduced—Insufficient ground.

In 1949 the appellant let premises to the respondent at $35 per month. In July, 1951 the respondent applied to the Rent Assessor to have the standard rent ascertained and the maximum fixed. The appellant proved that the standard rent was $35. He was not cross-examined. The respondent gave evidence and affirmed that he was paying $35 per month. The assessor examined the return submitted by the appellant to the Mayor and Town Council in 1948 and took into account the rental value assessed by the Mayor and Town Council. He inspected the premises and considered the standard rent top high and reduced it. The landlord appealed.

Held: There was insufficient ground for reducing the standard rent.

Appeal allowed. Standard rent restored.

S. L. Van B. Stafford Q.C., for appellant.

Respondent in person.

Hughes, J.: This is an appeal by the landlord from the decision of the Rent Assessor in which, on the application of the tenant, the standard rent was reduced from thirty-five to twenty-five dollars a month. The premises involved in this appeal are one-half of the lower portion of Lot 6 Croal Street, Georgetown, occupied by the tenant, a legal practitioner, as his Chambers.

The evidence of the applicant before the Rent Assessor is so fragmentary that it may conveniently be quoted in full:—

> "I have been the tenant of half of the lower flat at Lot 6 Croal Street, Georgetown, from 1949 at $35: per month. I use the premises as my Chambers. I pay one shilling per week for cleaning the lavatory".

That evidence, which was the only evidence adduced by the applicant, could be of no real assistance to the Rent Assessor in determining the application.

The landlord in his evidence discharged the burden placed upon him, by section 4B (7) of the Rent Restriction Ordinance, 1941 (No. 23 of 1941) as amended by the Rent Restriction (Amendment Ordinance, 1947 (No. 13 of 1947) by proving the standard rent, which is, $35: a month. The landlord was not cross-examined and there was nothing in his evidence which would call for a downward revision of the standard rent.

From the above it will be seen that the Rent Assessor had before him no oral evidence which would justify a finding in favour of the applicant.

From the Reasons given by the Rent Assessor it is clear that his decision was arrived at as a result of his inspection of the premises which he found to be "in good condition".

The Rent Assessor has considered the Return submitted by the landlord to the Mayor and Town Council for the Second Quinquennial Valuation in 1943, that is, the year before the tenant occupied the premises and before the renovations to the premises were carried out. The Rent Assessor has considered, too, the rental value assessed by the Mayor and Town Council on the whole of the flat on the ground floor, including a garage. These two considerations, though not immaterial, would not by themselves and in the light of what I regard as the principle to be followed in an application coming within section 4B (1A), be sufficient to bring about a reduction in the rent.

The principle to be followed in this case is, in my view, set out under the heading "Revision of Standard Rent by Tribunals" at page 258 of "The Rent Act" (sixth Edition) by R. E. Megarry, M.A., LL.B., as follows:—

> "(VII) If agreed rent was negotiated between educated people, professionally advised, the tribunal should bear this prominently in mind; such a rent will normally be the fair------rent, and in such a case a tribunal should be slow to make a small reduction (e.g., from £160 a year to £140 a year), for there is no scientific yardstick by which a just rent cap be ascertained with precision".

The rent agreed upon between the landlord and the tenant in this case must be regarded, *prima facie,* as the fair rent and, in the absence of evidence as to the existence of abnormal circumstances, should not be reduced. There is nothing to show that the tenant, at the time of the letting, regarded the rent as excessive; on the contrary, it may reasonably be inferred that

the tenant did not regard the rent as other than fair for having rented the premises in 1949 it is not until July, 1951, that he made application to the Rent Assessor. During the period between the letting and the application there is no evidence of any change in the circumstances which would call for a downward revision of the standard rent.

The fact that the Rent Assessor on an inspection of the premises considers that the rent should be less than that freely agreed upon between the tenant and the landlord and in fact paid for a not inconsiderable period (during which there was no material change in the circumstances existing at the time of the letting) is, in my opinion, a quite insufficient ground for the exercise of the discretion given by section 4B (1A) of the Ordinance. That discretion is, I consider, to be exercised only where there is substantial evidence to support the view that the standard rent is excessive or that it has been arrived at by fraud; it cannot be said that the Rent Assessor had before him any such evidence in this case and this appeal is accordingly allowed, and the decision of the Rent Assessor set aside. Appellant does not ask for costs.

ROBERTS v. RHEBURG and D'ALMADA in re estate Roberts (deceased).

(In the Supreme Court, civil jurisdiction (Hughes J.) September 6, 20, 1952).

Originating summons—Will—Interpretation.

This was an originating summons taken out for the purpose of determining certain questions arising in the administration of an estate.

The questions to be determined and the decisions thereon are set out in the judgment.

B. O. Adams for the plaintiff.

P. A. Cummings for the first defendant.

W. J. Gilchrist for the second defendant.

Hughes. J.: The originating summons in this matter, taken out under Order XL (C) rule 3 of the Rules of Court, 1932, calls for the determination of certain questions arising in the administration of the estate of Cyril Copeland Roberts, deceased hereinafter referred to as "the testator") whose Will is dated the 4th January, 1944, and who died on the 19th of February of the same year.

The Will, which was clearly drafted and written by the testator himself, consists in its relevant part, of six clauses designated in the Will "first to sixly" (sic.). Of those clauses the third, fourth and fifth are the ones which I am called upon to construe.

One of the questions to be determined is whether the testator died intestate as to any part of his estate; as to this it may he said at once that it is abundantly clear that it was the intention of the testator to dispose fully and effectively of all that he owned at the time of his death for in the fifth clause he states "—and any other property I may die possessed of not herein stated or named whether in this Colony or any other Country I leave and bequeath to my son Gerald Stanley Roberts". In this connection it has been submitted by Counsel for the second named Defendant that the word "property" in the passage quoted should be interpreted to mean immovable property only and in support of that submission reference was made to the context in which that word is used in other parts of the Will. I find myself unable to accept that submission for in the passage, in the fifth clause, "After my death I request my executor to sell my Motor-Car and Property 262 New Garden Street, and the proceeds from the property buy a small cottage-------" the word "property" is used when referring to both movable and immovable property. Even if there were doubt in my mind as to the meaning of the word as used by the testator it would be necessary for me to apply the presumption that the testator did not intend to die either wholly or partially intestate.

It is common ground that the only land and buildings owned by the testator at the time he made his Will was at 262 New Garden Street, Georgetown, and therefore there is no difficulty in deciding that the words "a property in Georgetown constituting of land and buildings and erections" in the third clause refer to the New Garden Street property.

The third clause is, to my mind, quite unambiguous and can be interpreted only as meaning that the testator

(a) gives to his wife for her natural life the land and buildings at 262 New Garden Street;

(b) makes provision for the payment of rates and taxes; and

(c) provides for the payment to his wife for her life of the sum of forty dollars a month from the interest derived from the investments named.

The fourth clause is certain only as to the objects, and, except as regards the bequest of one hundred dollars to Florence D'Almada, contains no reference whatever to the subject. It is necessary therefore to ascertain, from a consideration of the whole Will, the intention of the testator and, having done so, determine whether it is possible to identify the subject of that clause.

When a person sets about making his Will the two matters foremost in his mind would obviously be "what have I got to dispose of and to whom am I going to give it?" There is no reason to believe that this was not so in the case of the testator. As to the first of these matters: the testator had (a) money invested in Barbados; (b) the property in New Garden Street and (c) investments in local undertakings and, it would appear, money in the Bank. After making the usual provision for the payment of debts and funeral expenses, in the first clause, the

testator then proceeded, in the second clause of his Will, to dispose of what he owned outside this Colony: that clause presents no difficulty. He then directed his mind to the New Garden Street property where, as appears from the Will, he was residing at the time he made his Will. That property he leaves, in the third clause, to his wife "for the term of her natural life" and continues, in the same clause, to make provision for the payment of rates and taxes and for the maintenance of his wife. It seems to me entirely reasonable to conclude that the testator, having called to mind and disposed of his property outside the Colony and his immovable property in the Colony, would then proceed finally to deal with the remainder of his property (excluding that part to which he had already referred in making provision, in the third clause, for the maintenance of his wife); that remainder would be his other investments in local undertakings and the cash in the Bank. To say either that it was not the intention of the testator to dispose of that remainder or that it was his intention that it should be included in the expression "any other property" in the fifth clause, would, in my opinion, be to do violence both the presumption against intestacy and to the general scheme of the Will.

The above construction of the fourth clause involves supplying therein after the words "I give and bequeath" and before the word "as" the words "the remainder of my property".

The expression "any other property I may die possessed of not herein stated or named whether in this Colony or any other Country" in the fifth clause was, in my view, not intended by the testator to refer to any property in particular but was inserted as is usually done, to guard against dying intestate as to any property owned by him of which he may not have been aware at the time of making the Will or of which he may not have effectively disposed.

It is the case that the testator has disposed of the New Garden Street property only to the extent of giving it to his wife "for the term of her natural life" the result being that the property was not wholly disposed of in the Will and accordingly, on the death of the testator it would pass, subject to the wife's life interest, to the residuary devisee who, under the fifth clause, is the Plaintiff. Similarly with the investments named in the third clause. As I interpret the Will the testator did not have in mind those investments when writing the fourth clause: in other words, when writing the fourth clause he incorrectly regarded as having been fully disposed of the property and investments to which he had specifically referred in the preceding clause. Those investments accordingly pass to the Plaintiff as residuary legatee under the fifth clause.

The effect of the construction herein placed in the third, fourth and fifth clauses of the Will is as follows:—

(1) the land and buildings at 262 New Garden Street, Georgetown, pass to the Plaintiff;

(2) the investments in the Royal Bank of Canada, in Humphrey & Co. Ltd., and in the Hand-in-Hand Fire Insurance Co. pass to the Plaintiff;

(3) one-half of the other investments, the cash and any other assets not included in (1) and (2) above passes to the Plaintiff and of the other half one hundred dollars goes to Florence D'Almada (born Roberts) and the remainder to Francis Albert D'Almada.

Costs of all parties to be paid by the estate.

Solicitors: J. A. Jorge for the plaintiff.

I. G. Zitman for first defendant.

Carlos Gomes for the second defendant.

HOYTE v. DATHORNE

(In the Full Court of the Supreme Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Bell C.J. and Hughes J) January 18, 25, 1952).

False imprisonment—Magistrate's finding on question of fact—unwarranted.

In an action by the appellant against the respondent for damages for false imprisonment the Magistrate found that the respondent had made a report to the police that the appellant had stolen her fowl and that the report was false.

He dismissed the claim, as in his opinion, the police constable in arresting the appellant acted on his own initiative. On appeal.

Held: The finding of fact by the Magistrate could not be reconciled with his other findings in the case.

Appeal allowed and case remitted to Magistrate to assess damages.

H. A. Fraser for appellant.

J. Carter for respondent.

Judgment of the Court: This is an appeal from the decision of a Magistrate of the Georgetown Judicial District in which he gave judgment for the defendant (respondent) in a claim by the plaintiff (appellant) for damages for false imprisonment.

The false charge on which it is alleged that the appellant was given into the custody of a Police Constable, and afterwards brought before the Magistrate, is that of fowl stealing.

The Magistrate found as a fact that the report made to the Police by the respondent was "false and malicious"; he held, however, that the appellant was not given into the custody of the Police Constable by the respondent but that the Constable acted on his own initiative: it is on that point that the decision in this appeal turns.

The Court finds itself unable to reconcile the finding of the Magistrate, that the Police Constable acted on his own initiative in arresting the appellant, with the evidence when it is examined in the light of the other findings of fact of the Magistrate as set out in his "Memorandum of Reasons for Decision".

The Magistrate quotes important contradictions in the evidence of the three police witnesses and states that he could not believe their evidence. On discarding the evidence of these three witnesses there remains the evidence of—

(1) The appellant who stated that "defendant told the Police Constable to arrest myself and son";

(2) Reginald Hoyte who stated "defendant said he was going to have a warrant taken out and have my mother arrested"; also ". . . the defendant told McLean to arrest my mother";

It is of importance to note that the Magistrate accepted the evidence of this witness whom he states gave his evidence in a straightforward manner and convinced him that he was a witness of truth;

(3) David Robinson whose evidence does not relate to the aspect of the matter under consideration; and

(4) The respondent who says "I did not direct P.C. McLean to arrest the Hoytes".

The position therefore is that the only evidence that the Police Constable acted on his own initiative is that of the respondent but we find ourselves unable to take the view that the Magistrate acted on that evidence for it is clear that he did not believe that portion of the respondent's evidence for he found that the Police Constable had not so acted in the case of the other person arrested at the same time and on the same information as the appellant.

It may be the case that the Magistrate came to the conclusion that enquiries made by the police, other than the false information furnished by the respondent, caused the Police Constable to arrest the appellant: there is, however, no evidence of such enquiries. Police Constable McLean's evidence (which, be it remembered the Magistrate did not accept) is that "after making enquiries from Mrs. Clarke we charged both plaintiffs. Mrs. Clarke did come to the Police Station but she did not identify the fowl as the meat was cut up". It seems clear from this that enquiries from Mrs. Clarke followed, and did not precede, the arrest.

Even if it were correct that P.C. McLean, as he and Sergeant Barrington allege, arrested the appellant on the instructions of Sergeant Barrington, there is no evidence that Sergeant Barrington, had any information other than the false report of the respondent made to him at the Station, and what was told to him by P.C. McLean.

This Court finds that the Magistrate viewing the circumstances reasonably could not have found, as he did, that the respondent did not give the appellant into the custody of the police. This matter is accordingly referred back to the Magistrate to record, a finding that the respondent did unlawfully and wrongfully give the appellant into the custody of the police; to assess the damages payable to the appellant by the respondent and to review and, if necessary, vary any order as to costs of the hearing before him.

The costs of this appeal are to be paid by the respondent.

Matter referred back to the Magistrate.

BACCHUS v. SOBERS personally and in her capacity as the administratrix of the estate of Lena Drucilla Bacchus.

(In the Supreme Court, civil jurisdiction (Stoby J.) September 24, 26, 27, 1951; February 1, 16; September 22, 1952).

Immovable property—Title in name of another—Gift—When presumption arises—Resulting trust—Writing.

The plaintiff purchased immovable property in the name of a lady with whom he was living. After her death the administrator of her estate claimed the property as part of the estate. The plaintiff brought an action claiming that the property was held in trust for him.

Held: The purchase of property by a man in the name of a woman who is not his wife does not create a presumption that a gift was intended.

Although the proviso to the Statute of Frauds making writing unnecessary for the creation of a resulting trust is not part of the law of this Colony, since the trust is created by implication or construction of law, parol evidence is admissible to prove it.

The remaining portion of the judgment dealing with questions of fact is not reported.

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

P. A. Cummings for the defendant

Stoby J.: The plaintiff claims that the defendant in her capacity as administratrix of the estate of Lena Drucilla Bacchus is the trustee of certain immovable property situate on the East Coast Demerara, transport for which is in the name of Lena Drucilla Bacchus and certain movable property in the defendant's possession.

The plaintiff who is a cousin of Lena Drucilla Bacchus was married in 1909 and separated from his wife in 1919. After serving as a police constable for some years he resigned and after serving for short periods in various capacities in the Civil Service engaged in private enterprise as a general contractor.

Shortly after the separation with his wife the plaintiff formed an illicit relationship with the deceased. In 1921 when that relationship was in its infancy he was given certain information by Mr. H. A Howard, who was then an assistant commissary residing at Golden Grove, East Coast. As a result of the information so given, the plaintiff contacted a Mr. Pereira who owned the S½

of lot 5 Nabaclis with the buildings and erections thereon and purchased the property for $575. Since transport for this property was passed in the name of the deceased it becomes necessary to decide whether the property was purchased with the deceased's own money and if not, whether it was a gift to her or whether she held the property in trust for the plaintiff.

In order to determine whose money bought the property some assistance may be gained from an examination of the events which preceded the purchase.

The deceased's father died on the 19th April, 1916; he was survived by his wife and eleven children. This, estate was valued at $933.50 and included 5 properties which were bequeathed to his widow and children. After his death his widow, deceased and another daughter lived in one of the properties at Paradise. In 1919 the plaintiff went to live in the house occupied by the deceased and her mother. He was then 36 years of age and she an adult and unmarried. Although she was an industrious woman she had at all times lived with her father and mother and it would be reasonable to assume that during her father's lifetime she had not acquired any money of her own. All her work and labour in the farm or in the coconut business would have been for the benefit of the family as a whole and not for herself. It is therefore doubtful whether by 1922 when the Nabaclis property was purchased she had acquired a sufficiently independent outlook to conserve her resources for her old age.

On the other hand the plaintiff from an early stage of his career had shown traits of restlessness and ambition which are exemplified by his short sojourn within the circumscribed area of the Civil Service and his eventual occupation as a contractor for the supply of shell to the Public Works Department. As a road overseer and contractor it is not unlikely that he would have met Mr. Howard then Commissary in the district, and I am satisfied that when the S½ of lot 5 Nabaclis was purchased it was with the plaintiff's money.

It now becomes necessary to consider the legal consequences which flow from the above recited facts.

Counsel for the plaintiff has submitted that—

(a) in view of the relationship between the plaintiff and deceased it cannot be inferred that placing the transport for the property in her name implies that a gift was intended and,

(b) the Court should find that the evidence establishes an express trust in favour of the plaintiff.

The latter submission is founded on the evidence of the plaintiff that when he purchased the property he put it in the deceased's name in order to protect it from his wife and the deceased agreed to hold it for him, and on the evidence regarding the alleged making of a will by the deceased whereby everything that she possessed was bequeathed to the plaintiff.

I do not accept that portion of the plaintiff's evidence in which he said "Lena (the deceased) agreed to hold it (the property) for me". Admittedly the incident took place nearly thirty years ago but the plaintiff's evidence on such an important issue

is unconvincing; it lacks detail and struck me at the time as being designed to bolster his case.

The evidence regarding the alleged making of the deceased's will and its disappearance is even more unsatisfactory. If a will were made and deposited in the writing desk at the Nabaclis house it is unexplainable why the plaintiff who visited the house in September, 1948, for the purpose of taking an inventory did not remove the will. He says that he forgot the key and was unable to open the desk but there was nothing to prevent him returning the following day or week. The will was an important document, as the transports for all the properties were in the deceased's name, and yet, he adopted an attitude of carelessness and indifference which is only consistent with the fact that no such document existed. I have not overlooked the evidence that his dispute with the defendant originated since October 1948 but it must be borne in mind that Lena Bacchus died on the 31st August, 1948 which gave him a month to obtain the will before he was excluded from the house.

In any event the execution of a will by Lena Bachus in 1936 under which all her property, movable and immovable, was bequeathed to the plaintiff would not be confirmatory of an express trust in 1922. For the will to be regarded as positive proof that a trust was created years before, there should be some declaration in the will itself or some statement or circumstance which can only be referable to the creation of a trust. Such is not the case. The will is consistent with the absence of a trust. It is a declaration that the property is owned by the testator and rather than supporting a trust it negatives the creation of one.

I return to the first submission which is one of pure law.

Where a husband purchases property in his wife's name a gift to her is presumed in the absence of evidence of an intention to the contrary, but there is no presumption of a gift where property is purchased by a man in the name of a woman with whom he lives as his wife but to whom he is not legally married; in such a case it must be affirmatively proved that a gift was intended. Sear v. Foster (1858) 4 K & J 152.

No attempt was made by the defendant to prove that a gift of S½ lot 5 Nabaclis was intended and any defence founded on a gift must fail.

Counsel for defendant in an attractive argument submitted that under section 3D (d) Cap. 7 of the Civil Law of British Guiana Ordinance there can be no creation of a trust without writing. That the position in this Colony differs from England where trusts by operation of law are expressly reserved by the Statute of Frauds. That since no such writing exists, even if I found that the property was purchased with the plaintiff's money he would be disentitled to relief.

For many years it has been regarded as settled law in this Colony that the full and absolute title conferred by section 21 (2) of the Deeds Registry Ordinance, Cap. 177, does not extinguish trusts which exist in respect to the immovable property the subject matter of the title, but the full and absolute title enures for the benefit of the cestui que trust.

Sooknandan v. Sanicharry, executor of the estate of Dookny (1942) L.R.B.G. 260; (1943) L.R.B.G. 125.

The point taken by Counsel for the defendant does not appear to have been brought to the notice either of Duke J. who heard the case in the first instance or of Verity C.J. and Fretz J. who constituted the Full Court for the purpose of the appeal.

Because of that and in deference to the very thorough argument presented I have felt free to examine the authorities afresh and arrive at my own conclusion.

Counsel is correct when he asserts that section 8 of the Statute of Frauds is not part of the law of this Colony. That section is as follows:

> "Provided always that where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law or be transferred or extinguished by an act or operation of law then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made, anything hereinbefore *contained to the* contrary notwithstanding."

Nowhere in section 3D (d) of the Civil Law of British Guiana Ordinance, Cap. 7 is the above proviso to be found and an examination of the previous edition of the Laws of British Guiana confirms that it was never part of the law of this Colony. Dalton in his Civil Law of British Guiana at pages 22—24 assumes that the proviso was incorporated in the Civil Law Ordinance, but in that assumption he is undoubtedly wrong. The question arises whether the absence from our law of the proviso referred to above has the effect of preventing a plaintiff from establishing by parol evidence circumstances from which a resulting trust can be implied. I think not. When the Statute of Frauds was introduced into English legislation the doctrine of resulting trusts was part and parcel of the law of England; Dyer v. Dyer 1788 2 Cox 93, but it must still have been considered prudent to enact the proviso so as to avoid all possible misconceptions. In this Colony the draughtsman of the Civil Law Ordinance must have regarded it as redundant to state that writing was not necessary in the case of resulting trusts when by the very nature of the trust itself a written instrument is inconsistent with its creation. Proviso (d) to section 3 of the Civil Law Ordinance states that "no action shall be brought to charge anyone upon any declaration, creation . . . . . of any trust relating to immovable property unless the agreement or some memorandum thereof is in writing and signed by the party to be charged or some other person thereunto by him lawfully authorised". Since a resulting trust arises by implication the above section has no application to this branch of the law and the omission to incorporate section 8 of the Statute of Frauds into the law of the Colony does not mean that a written instrument is now required.

9V follows from my conclusions of fact and law, that the plaintiff is entitled to the declaration claimed in respect of S½ lot 5 Section C Nabaclis.

Solicitors: D. P. Debidin for plaintiff.
Carlos Gomes for defendant.

TRILOKIE NAUTH v. G. C. FUNG-ON

(In the Full Court, on appeal from the Magistrates' Court for the Courantyne Judicial District (Bell C.J. and Boland J.) October 9, 1952).

District Commissioner—Authority to perform functions in one district—Transfer to another district—Another authority required.

The respondent, an officer attached to the District Administration East Demerara was authorised by the Colonial Secretary to perform the functions and duties of a District Commissioner. He was transferred to Berbice where he performed similar functions without a fresh authority.

On a charge brought in Berbice by the respondent against the appellant for that he being the occupier of business premises situate at Rose Hall Village, Courantyne, Berbice in the Berbice Administrative District, in the Courantyne Judicial District, did have on the said business premises on the 1st day of March, 1952, certain spirituous liquor to wit eighteen (18) fluid ounces or thereabouts of rum, contrary to Section 80 (1) of the intoxicating Liquor Licensing Ordinance. Chapter 107, the Magistrate convicted the appellant who appealed on the ground that the respondent had no authority to act as a District Commissioner.

....*Held:* The respondent's letter of authorisation to perform the functions of a District Commissioner in the East Demerara District gave him no power except in that district.

Appeal allowed.

S. D. S. Hardyal for the appellant.

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

Judgment of the Court: The point has been raised in this appeal that Mr. G. C. Fung-On was not authorised to bring this prosecution as he was not a duly authorised District Commissioner within the meaning of the District Administration (Transfer of Duties) Ordinance, 1937.

Mr. Fung-On's letter of authorisation to perform the functions and duties of a District Commissioner is dated the 31st July, 1944 and was exhibited as Exhibit "A". It is admitted that on that date he was an officer of the District Administration East Demerara. It will be observed that the letter does not limit his appointment to any particular administrative District of the Colony. In this case he purported to exercise the functions and duties of District Commissioner for the Berbice District where he was then on duty.

Counsel for the appellant contends that such exercise of power is invalid because the letter of authorisation gave him and could give him no power except in the East Demerara District and this only whilst he was on the staff of the Administration of the East Demerara District, and in this connection he referred to the language of Section 2 of Ordinance No. 31 of 1937. The Solicitor-General contends on the other hand that that Ordinance enabled the Colonial Secretary to authorise Mr. Fung-On to exercise the functions and duties of a District Commissioner in whatever District he may happen to be stationed on duty as an Administrative Officer.

The construction which we place upon Section 2 of that Ordinance is that the appointment under it of any officer as a

District Commissioner must be limited to a particular District in which the officer is serving at the time of his appointment. It follows that if he is assigned to any other District he cannot, in our view, perform the functions and duties of a District Commissioner in that latter District. That in our opinion is the reasonable construction to be placed upon the section and we feel that if it were intended by the legislature that the officer should be able to exercise the functions and duties of a District Commissioner in any other District to which he may be transferred, express language should have been used to say so.

The point taken by Counsel for the appellant is fatal to this conviction. The appeal is accordingly allowed and the conviction and sentence are quashed. Costs are awarded in favour of the appellant.

HARRY PERSAUD v. THE QUEEN

(In the Court of Criminal Appeal, on appeal from the Supreme Court (Bell C.J., Boland and Hughes J.J.) September 23, 24; October 17, 1952).

Criminal Law—Threat to murder—Letter—Handwriting—Expert evidence—Uttering the letter—Burden of proof—Circumstantial or Presumptive evidence—Duplicity—Criminal Law (*Procedure*) *Ordinance—Deposition of witness absent from the Colony—Evidence Ordinance—No uttering to person against whom threat made—Offence constituted without.*

The appellant was convicted for threatening to murder contrary to section 43 of the Criminal Law (Offences) Ordinance, Chapter 17.

It was proved at the trial that a letter was received by the Governor's private secretary containing a threat to shoot one P. The letter was never shown to P. A handwriting expert gave evidence that after examining the admitted handwriting of the appellant and the letter subject of the charge it was his opinion that the letter was written by the appellant.

There was evidence that the appellant was at the Post Office on the day that the letter must have been posted but no evidence that he posted it or had it in his possession other than the evidence of the handwriting expert. There was also evidence that the appellant had a grievance against the person threatened.

The trial judge held that there was a *prima facie* case and left the case to the jury. After conviction he issued a certificate under section 5 (c) of the Criminal Appeal Ordinance that the case was fit for appeal on the question of mixed law and fact regarding the evidence of the handwriting expert.

Under section 23 of the Ordinance he reserved five questions of law for the consideration of the Court.

The questions of law reserved are fully set out in the judgment but may be summarised as follows:—

1. Whether the letter contained any threat to murder at all.
2. Whether there was any legal proof that the appellant uttered the letter.
3. Whether the indictment was not bad for duplicity.

4. Whether the deposition of P. who was out of the Colony was properly admitted in that he left from the airport at Atkinson Field by aeroplane and no witness could say that the aeroplane had not returned.
5. Whether the letter was a threatening letter within the meaning of section 43 Chapter 17 in as much as it was not alleged that it was uttered to the person against whom the threat was alleged to be made.

The relevant portion of the letter to the Governor was as follows:—

Cane Grove,
East Coast, Dem.,
8th March, 1951.

Dear Sir,

P said that he don't afraid of no one that the Governor agree with him to do anything he like. Sir as a father we like you to go into this story and get P out of here or we will shoot his ass to death. P. is against the wish of over 1,500 people and he is ruin the scheme money also the success of the people. One who is a Superintendent and J.P. is that the example Govt., employ him to show the people.

We beg: you as the Governor to act now and get P out, or we will write the Secretary of States for the Colony and the Prime Minister and tell him that you agree with all these story, we can bear no more.

Your humble.
R.C. Sgt. and people "

The evidence adduced by the Crown to show that P. was not in the Colony was the evidence of a policeman who said that he had accompanied him to the airport and seen him depart by plane. The day before the trial he had made inquiries at his home and work place and he was not there.

Held: As to the evidence of the handwriting expert an adequate warning was given in the summing-up as to the degree of caution to be exercised before acting on that evidence.

Cummings v Jackman O.G. 29.9.51 page 577 considered.

As to questions of law reserved:

(1) the letter contained a threat to murder a human being;

(2) The burden of proof may be discharged not only by positive evidence but by circumstantial evidence. In this case the circumstantial evidence established a prima facie case which was not rebutted. R. v. Burdett 4B and Ald 120 cited;

(3) the indictment was not bad for duplicity in view of Rule 5 of the Rules in the Fifth Schedule to the Criminal Law (Procedure) Ordinance, Chapter 16;

(4) while subsection (4) of section 89 of the Evidence Ordinance, Chapter 25, states what shall be deemed sufficient evidence of absence from the Colony when a deponent has left the Colony by ship it does not preclude other modes of proving absence and in this case the evidence was enough to justify the ruling that P. was absent from the Colony.

Section 43 of Chapter 17 does not require that the threatening letter must be uttered to the person against whom the threat is made.

Appeal dismissed.

L. F. S. Burnham for appellant.

A. C. Brazao Q.C. Solicitor-General for respondent.

HARRY PERSAUD v. THE QUEEN

The following is the case stated by Stoby J. the trial judge: The prisoner Harry Persaud was indicted at the July Criminal Session, 1952 for the County of Demerara for threatening to murder contrary to section 43 of the Criminal Law (Offences) Ordinance, Chapter 17. The particulars of offence were that during the months of March and April 1951, without lawful excuse, uttered a letter or writing knowing the contents thereof, threatening to kill or murder D. P.

The trial took place before me on the 21st, 22nd and 23rd days of July, 1952. The jury after two hours deliberation returned a unanimous verdict of guilty with a recommendation for mercy and the accused was sentenced to 12 months imprisonment with hard labour.

The case for the prosecution as established at the trial was that on Friday the 9th March, 1951 Miss Gertrude Smartt Dalgleish, Secretary to the Governor and whose duty it is to open all letters addressed to the Governor or to Sir Charles Campbell Woolley, received at Government House, through the post, a letter which she opened and sent to the Colonial Secretary who sent it to the Local Government Department who delivered it to the police. The letter which was tendered as Ex J and is the subject matter of the indictment is as follows:

Editor's Note: The relevant portion of the letter is reproduced in the headnote.

Corporal Heyliger of the Cove and John Police Station was at Cane Grove on the 23rd April, 1951 pursuing certain investigations which caused him to execute a search warrant at the prisoner's house. The investigations did not then concern the letter containing the alleged threat but were directed to some other matter which was not disclosed. During the enquiries of the 23rd April and as a result of the execution of the search warrant two exercise books tendered as Ex. B1 and F respectively, were found both containing copies of a number of letters admittedly written by the prisoner. A specimen of the prisoner's handwriting was taken with his consent and tendered as Ex. H.

On the 25th April, 1951 Corporal Heyliger received the letter Ex. J the subject of the indictment and questioned the prisoner about it and he denied being the author. D. P. on the same day handed to Heyliger a letter received by him two years previously and which was tendered as Ex. K.

The postal employees at the Cane Grove Post Office by a process of deduction were able to swear positively that the prisoner was at the Post Office on the 9th March, 1951 and that he posted letters on that day but not of course that he posted the letter Ex. J. Their deductions were made in this way. When a member of the public registers a letter an acceptance receipt is made out and the original dated and handed to the person registering the letter. When Corporal Heyliger searched the prisoner's house four such acceptance receipts dated 9.3.51, Ex. B2 to B5, were found. The postal employees on seeing the original registration or acceptance receipts were able to recall that the prisoner had

posted letters on the 9th March, 1951. Their evidence was supported by another incident. On the 9th March a postal apprentice named Gravesande cleared the post box and found an envelope addressed to Mrs. D. A. P. As the envelope was not properly sealed it was drawn to the Postmaster's attention who indorsed at the back "posted in this condition 10.3.51." The date was obviously a mistake. This incident caused Gravesande to recall that he had seen the prisoner at the Post Office on 9.3.51 buying stamps and posting letters.

Ex. J the letter containing the alleged threat, Ex. H the specimen handwriting of the accused and Ex. K the two year old letter handed by P. to Heyliger and about 15 other letters were handed to Lance Corporal Hinds and he examined them and stated that in his opinion Ex. J., H and K were written by one and the same person.

I was satisfied that Lance Corporal Hinds was sufficiently qualified to give expert evidence on the subject of handwriting and admitted his evidence in conformity with the Evidence Ordinance Chapter 25 section 17 (1).

If the jury accepted the evidence for the prosecution, then at the close of the case for the prosecution there was evidence that—

(a) A letter Ex. J in the handwriting of the prisoner was received at Government House through the post on the 9th March, 1951 addressed either to the Governor or to Sir Charles Campbell Woolley.

(b) This letter was opened by the Governor's Secretary Miss Smartt Dalgleish.

(c) The accused was seen at Cane Grove Post Office on the 9th March, 1951 buying stamps and posting letters.

(d) The accused was in possession of acceptance receipts bearing date 9th March, 1951.

(e) The accused admitted that he had written a letter to Sir Charles Campbell Woolley and registered it on the 9th March, 1951 and kept a copy of it. See Ex. G27. This letter was not the subject of the charge.

The defence was a complete denial that the prisoner had written the letter Ex. J and several legal submissions were made on his behalf.

At the close of evidence for the prosecution counsel for the Crown applied to amend the indictment by adding after "uttered" the words "to His Excellency, the Governor and/or Sir Charles Campbell Woolley and/or Gertrude Smartt Dalgleish". This amendment was granted. It was submitted:

(a) that assuming the letter Ex. J was uttered by the accused it did not contain a threat to kill or murder D. P.

(b) That in any event there was no proof that the accused uttered the letter Ex. J.

(c) That the indictment as amended was bad for duplicity.

With regard to the first submission I ruled that it was for the jury to decide as a question of fact whether the letter contained a threat to kill or murder D. P., or was a threat to murder P's donkey. My ruling is included in the record of evidence.

The second and third submissions were dealt with by me at the trial in a ruling which was taken down by the shorthand reporter and is included in the record of evidence. Since ruling on the point I have had an opportunity of considering the point further and adhere to the view I then held.

In support of the submission that there was no evidence of an uttering Mr. Burnham cited three cases, namely—Rex v. Hammond 2 East Pleas 1119; Rex v. Wagstaff 168 E.R. 865 or R. & R. 398 and Rex v. Heming 2 East P.C. 1116.

Great reliance was placed on the case of Rex. v. Hammond and Hammond. In that case a husband and wife were charged with feloniously sending a threatening letter to D.D. It was proved that the wife had written the letter and the husband had delivered it to D.D. and said he found it in D.D.'s garden. It was held that there was no evidence of a sending by the husband but it was a question of fact for the jury to decide whether the wife had written the letter and sent it by him in which case she alone would be guilty.

Counsel argued that the principle to be deduced from this case is that mere proof of the receipt of a letter in a person's handwriting is no proof of a sending.

In my view the case does not so decide. The argument addressed to the Court was confined to the distinction between a sending and a carrying. With the state of the law as it was in those days if the husband were acquitted the wife was almost sure to be acquitted because the Crown would have to prove that she acted without his knowledge, as if she wrote it with his knowledge or in his presence the presumption of coercion would arise. The Court decided that when the husband delivered the letter he had not sent it. The following passage is instructive: "At the time those statutes passed, it seemed that the Legislature never had it in contemplation that any person would be the carrier of a threatening letter which he himself had written or contrived. They undoubtedly conceived that such a letter would be sent by the post or by some secret conveyance so as to prevent the discovery of the person by whom it was sent".

The learned authors of Archbolds Criminal Law 1949 ed. p. 667 in dealing with the evidence necessary to prove an uttering state—"(Prove) that the letter is in the handwriting of the prisoner, and that it came to the prosecutor by post". The cases cited in support of this statement of the law are R. v. Heming, 2 East P.C. 1116 and R. v. Jepson 2 East P.C. 1115. While it must be conceded that both these cases are distinguishable from the present one, yet, coupled with the passage referred to above in Hammond's case the accuracy of the statement is unquestionable. Moreover, a similar statement of the law occurs in the 1835 edition of Archbolds and although mistakes in the text have

occurred from time to time (Woolmingtons case) it is inconceivable that having regard to the fact that uttering letters demanding money must be fairly frequent in England the statement would be allowed to go unchallenged for over 100 years unless it were correct.

Although the point was never discussed and the prisoner was charged with a different offence the case of Rex v. Treloar 9 C.A.R. p. 1 is not unhelpful. The principal evidence against Reginald Treloar who was convicted was proof of his handwriting and although the Court of Criminal Appeal held that in the circumstances of that case it would have been unsafe to convict him on the handwriting evidence alone, there is no suggestion in the judgment that on satisfactory proof of handwriting, a prima facie case is not thereby established.

Finally it may be noted that the evidence in this case was not confined to proof of handwriting and the receipt through the post but was supplemented by the other facts already mentioned.

As stated in my judgment at the trial I held that the indictment was not bad for duplicity in that several offences were not charged.

Rule 5 of the Indictment Rules Chapter 18 Vol. 1 Laws of B.G. p. 557 permits a count to be laid in the alternative if the enactment constituting an offence states the offence to be the doing of any one of any different acts in the alternative.

Section 43 of Chapter 17 creates an offence if anyone sends a letter or document containing a threat to murder or kill.

The law is succinctly stated in Halsbury Laws 2nd ed. Vol. 9 p. 136 as follows: “The material allegations in an indictment must be positive and direct and free from duplicity and repugnancy”. “But a defendant may be charged with committing several offences, e.g., with uttering a number of forged instruments if they were all uttered at the same time and it was but one transaction”.

Originally the Crown did not state in the indictment to whom the letter was alleged to be uttered but an amendment was applied for and granted. There was never any suggestion that more than one letter was uttered or that more than one continuous transaction took place. The letter was received at Government House and opened by Miss Dalgleish but since she would only open it if it was addressed to the Governor or to Sir Charles Woolley the amendment was granted in the alternative so that the whole transaction could be before the jury.

During the trial the question of the admissibility of P’s deposition arose. My ruling was taken by the shorthand writer and is included in the record of evidence and I do not propose to add anything to what is therein stated. Its admissibility had no real effect on this case but the point frequently arises at Criminal trials and an authoritative decision will save time in the future.

After I had decided to reserve the above points counsel for the accused saw me in chambers and requested me to reserve

cue other point which was mentioned at the trial but not argued. It relates to whether the letter EX J if uttered was a threatening letter within the meaning of section 43 of chapter 17, as it was never uttered to D. P. Lloyd's case 2 East P.C. 1122 seems to be authority for the proposition that it was, but in any event the language of section 43 chapter 17 is clear and unambiguous that the uttering may be to a person other than the person threatened.

QUESTIONS OF LAW

The questions reserved for the consideration of the Court of Criminal Appeal are:

1. Whether Ex. J the subject of the charge in the absence of further evidence contained any threat to murder or kill any person within the meaning of section 43 of chapter 17.
2. Whether I was right in holding that there was sufficient legal proof that the accused uttered the letter Ex. J the subject of the charge within the meaning of section 43 chapter 17.
3. Whether the indictment was not bad for duplicity alleging as it did
   (a) that the accused uttered a letter *or* writing;
   (b) that there was a threat to murder *or* kill;
   (c) that the letter or writing the subject of the charge was uttered to His Excellency the Governor *or* Sir Charles Campbell Woolley *or* Miss Smartt Dalgleish.
4. Whether the depositions of D. P. were in the circumstances of this case admissible and properly admitted.
5. Whether Ex. J the subject of the charge was a threatening letter within the meaning of section 43 of chapter 17 inasmuch as it was not alleged that it was uttered to the person against whom the threat was alleged to be made.

Judgment of the Court: Following on the conviction of the appellant for the offence of threatening to murder, contrary to section 43 of the Criminal Law (Offences) Ordinance, Chapter 17, the trial Judge —

(1) issued a certificate under section 5 (c) of the Criminal Appeal Ordinance (No. 29/1950), that this is a fit case for appeal on the following ground—

"The proof of the case against the accused depended almost entirely on the evidence of the handwriting expert Hinds who admitted that the identification of hand writing is not an exact science and capable of mistakes. As the identification by Hinds of the handwriting on Ex. J the subject of this charge as being that of the accused is the principal evidence in the case the question arises whether the verdict of the jury was justified in the circumstances".

(2) under section 23 of the Ordinance mentioned above, reserved five questions of law for the consideration of this Court.

On the point arising on the certificate issued by the trial Judge, that is the evidence of the handwriting, our attention has

been directed to the fact that the expert looked only for similarities in the comparison of handwritings submitted to him and to the fact that among the documents given to the expert was one bearing the name of the accused. In connection with these, two matters were cited respectively, the case of R. v. Treloar 9 Cr. App. R. 1 and Cummings v. Jackman published in the Official Gazette of the 29th September, 1951 p. 677. The submissions of defence counsel regarding evidence of the handwriting expert, Including the fact that the identification of handwriting is not an exact science, were based on his cross-examination of the expert and were adequately dealt with in the summing up. It is the case therefore that the jury must have been fully aware of the degree of caution to be exercised in acting upon that evidence. In the case of R. v. Rickard 13 Cr. App. R. 140, the Court of Criminal Appeal quashed the conviction on the ground, first that the evidence of handwriting, on which the conviction mainly rested, was not satisfactorily discussed before the jury, (which is certainly not the case in the present appeal), and secondly, that the Court, on inspecting the documents, found that though there were *some similarities there were some striking* dissimilarities in the documents: in the case before us the reverse is true.

We have no difficulty in coming to the conclusion that the jury had before them sufficient evidence on which to find that the accused wrote the letter which forms the subject of the charge laid against him and accordingly we see no reason to disturb the conviction on that ground.

We turn now to the several questions of law reserved by the trial Judge. The first of these is whether Ex. J. the subject of the charge, in the absence of further evidence, contained any threat to murder or kill any person within the meaning of section 43 of chapter 17.

The submission in this connection turns on the interpretation to be given to the words in the letter which has given rise to the charge and referred to as Exhibit J. namely ". . . . . get P. out of here or we will shoot his ass to death".

The jury after hearing a lengthy argument on the matter and an adequate warning from the Judge found that the letter, Exhibit J, contained a threat to murder a human being. It is safe to assume that in coming to that finding they bore in mind the whole tenor of that letter and the context in which the word "ass" occurred and decided that the writer had used the word "ass" not in its dictionary meaning but as the vulgar, well known and frequently used colloquialism. We see no ground whatever for disagreeing with the ruling of the trial judge on this point or for holding that the jury could not find as they did.

The next question of law is whether the Judge was correct in holding that there was sufficient legal proof that the accused uttered the letter Ex. J the subject of the charge within the meaning of section 43 of chapter 17. The point at issue here is—assuming that the letter was written by the appellant and that it was received by post, can it be said that there was sufficient

evidence that it was *uttered* by the appellant, within the meaning of the section under which the charge was laid? The argument put forward by defence counsel was that the appellant should not have been convicted in the absence of evidence that he had taken same positive step towards bringing about delivery or receipt of the letter, that is to say, that he either posted it or caused it to be posted. It must be conceded that in each of the cases cited by defence counsel, there is evidence that the person charged, apart from writing the letter, took some such positive step even though an indirect step towards bringing about its delivery or receipt; nor have we been able to find any case in which there was not evidence of some such step.

At page 667 of the thirty-second edition of Archbold's Criminal Pleading Evidence and Practice there is a statement to the effect that proof that a letter is in the handwriting of the prisoner and that it came to the prosecutor by post would clearly warrant a conviction for uttering under section 29 (1) (i) of the Larceny Act 1916 which makes it an offence to utter, knowing the contents thereof, a letter or writing demanding money etc. with menaces and without any reasonable or probable cause, A reference, however, to the case of R. v. Heming 2 East P.C. 1116 which is cited in Archbold in support of the above stated proposition shows that the "letter was proved to be in the handwriting of the prisoner who sent it to the post office from whence it was sent in the usual manner to the prosecutor". It does not appear from the report of Heming's case how, whether by direct or circumstantial evidence, it was proved that he had sent the letter to the post or that any consideration was given to the question of the essentials of proof of uttering by the medium of the post. Moreover the substantial point in that case was not one in relation to the *sending* of the letter but whether the letter was one "without a name" or "with a fictitious name" within the meaning of the Statute under which the prosecution was brought. R. v. Heming cannot therefore be regarded as satisfactory authority either for or against the proposition mentioned at page 667 of of Archbold. In the absence of authority the point must be decided by the principles of the law of evidence. The following principles are in point viz:—

The burden of proof is always upon the party who asserts the existence of any fact which infers legal accountability and it follows that the affirmant party is not absolved from his obligation because of the difficulty which may attend its application. It is not necessary that the corpus *delicti* should be proved by direct and positive evidence but all or some of its elements may properly be proved by circumstantial or presumptive evidence. If authority were needed for so well known a proposition it will be found in R. v. Burdett 4 B and Ald 120 where Best J said:

> "I am of the opinion that there was evidence in this case, on the part of the prosecution, which raised a strong presumption that the libel was published in Leicestershire; and no attempt having been made to rebut such presumption, it became, in my mind, conclusive of the fact. It

> has been said that there is no presumption in criminal cases. Nothing is so dangerous as stating general abstract principles. We are not to presume without proof. We are not to imagine guilt where there is no evidence to raise the presumption. But when one or more things are proved from which our experience enables us to ascertain that another, not proved, must have happened, we presume that it did happen as well in criminal as in civil cases. Nor is it necessary that the fact not proved should be established by irrefragable evidence. It is enough if its existence be highly probable particularly if the opposite party has it in his power to rebut it by evidence and yet offers none: for then we have something like an admission that the presumption is just. It has been solemnly decided that there is no difference between the rules of evidence in civil and criminal cases. . . . . There is scarcely a criminal case from the highest down to the lowest, in which Courts of Justice do not act upon this principle".

Also in R. v. Lord Coohrane cited in Wills on Circumstantial Evidence 7th Ed. p. 314 it is stated —

> "No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him but if he refuses to do so where a strong *prima facie* case has been made out by direct or presumptive or circumstantial evidence and when it is in his power to offer evidence if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

The above principles must of course be applied cautiously and only in cases where it is manifest that proofs not accessible to the prosecution are in the power of the accused (Wills Circumstantial Evidence p. 317). Nevertheless it must not be lost sight of that when all the evidence in the case has been heard the prosecution must fail if it has not established the guilt of the accused beyond a reasonable doubt.

Bearing in mind the above principles it seems to us that by establishing the following facts —

(a) that the letter Exhibit J was written by the appellant on the 8th March,

(b) that it was delivered by post the very next day at Government House from which it follows that it was in the possession of the appellant very shortly before it was posted, and person threatened to be killed because of a grievance

(c) that the contents of the letter itself show it to be a complaint to the Governor—a complaint against the

on a subject in which the appellant was interested as is proved by other evidence, the prosecution has made out a strong prima facie case.

It was open to the accused to rebut that prima facie case by some such evidence as that he was a mere amanuensis or that after writing the letter he had changed his mind and decide not to despatch it and that some one else had despatched it without his consent. Such evidence though it may not have established conclusively that he was not the person who uttered the letter, may well have raised a reasonable doubt in the mind of the jury and would have entitled him to an acquittal. Moreover if the letter had been delivered on a date long after that on which the appellant wrote it that fact might well have prevented a prima facie case from being established against him. But the appellant adduced no evidence to rebut the strong prima facie case made out against him beyond maintaining in his unsworn statement from the dock that he never wrote the letter Ex. J.

In the light of the foregoing we see no ground for disagreeing with the ruling of the trial Judge that prima facie there was sufficient legal proof that the appellant uttered the letter Exhibit J within the meaning of section 43 of Chapter 17.

The next matter for consideration is whether the indictment was bad for duplicity alleging as it did—

(a) that the accused uttered a letter *or* writing;
(b) that there was a threat to murder *or* kill;
(c) that the letter or writing the subject of the charge was uttered to His Excellency the Governor *or* Sir Charles Campbell Woolley or Miss Smartt Dalgleish.

We can find no substance whatever in either (a) or (b) above and in any event hold them to be covered by Rule 5 of the Rules in the Fifth Schedule to the Criminal Law (Procedure) Ordinance, Cap. 18. With regard to (c) it was obvious that the prosecution referred to only one uttering of the letter—and it was understood that Miss Smartt Dalgleish received it only by virtue of her duties as the Private Secretary of the Governor. She received it for and on behalf of the Governor and her receipt of it was that of the Governor. In our view there was no necessity to constitute this offence that Sir Charles Woolley, the Governor to whom the letter by its terms was obviously addressed should personally receive the letter or be informed of its contents.

We do not see in what way the accused could have claimed that he was embarrassed by the particulars set out in the indictment as to what was the precise charge he had to meet.

We next consider whether the depositions of D. P. were properly admissible in the circumstances of this case.

Our opinion on this point can be briefly stated. Subsection (4) of section 89 of the Evidence Ordinance Cap. 25 states what shall be deemed sufficient evidence of absence from the Colony when a deponent has left the Colony by ship but it does not preclude other modes of proving that fact, That subsection was

enacted when aircraft were unknown and cannot be held to apply to travel by aircraft. In our opinion where a question arises under section 89 of Chapter 25 as to whether a witness who is said to have left the Colony by aircraft is in fact absent from the Colony, all that is required is that the trial judge should be *reasonably* satisfied by the oath of a credible witness of such absence bearing in mind that the allowing in evidence of the deposition is a departure from the ordinary rules of evidence.

It is impossible for us to say in advance what kind or quantum of evidence should be demanded in any particular case but we can envisage cases in which evidence from the Immigration and/ or Emigration Authorities would probably be deemed desirable as well as evidence to show that the witness was no longer to be found at his home, place of business and the other places to which he usually resorts. We suggest for the consideration of the Executive whether it would not be better to repeal subsection (4) of section 89 and make it clear in the Evidence Ordinance that proof of the absence of any witness from the Colony shall be proof of such absence to the *reasonable satisfaction of the trial judge.* We are satisfied that the evidence of the witness Lance Corporal Heyliger which was not cross-examined to, was such as to justify the trial judge in holding that D. P. was absent from the Colony and to justify the reading of P's depositions.

We turn now to the last of the questions reserved by the trial judge namely whether Ex. J was a threatening letter within the meaning of section 43 of Chapter 17 inasmuch as it was not alleged that it was uttered to the person against whom the threat was alleged to be made. In our view there is nothing in section 43 of Chapter 17 which requires that the threatening letter must be uttered to the person against whom the threat is alleged to be made, a view which finds support in the case of Rex v. John Syme 6 Criminal Appeal Reports 257. That was a prosecution under section 16 of the Offences against the Person Act 1861, which corresponds for all practical purposes with section 43 of Chapter 17. John Syme was charged with sending a letter to Mr. Ramsay Macdonald M.P. the head of the Labour party threatening to kill one Alfred Reed, an inspector of police. It does not appear that the letter was ever seen by Alfred Reed. It is significant that the point now under consideration was not taken at the hearing of the appeal. We are of the opinion that Exhibit J was a threatening letter within the meaning of section 43 of Chapter 17.

For the above reasons we dismiss this appeal and confirm the judgment given on the indictment and the sentence awarded.

ROSE v. HANOMAN

(In the West Indian Court of Appeal, on appeal from the Supreme Court of British Guiana (Mathieu Perez, Jackson, Bell C.J.J.) November 7, 11, 14, 1952.

Immovable property—Servitude—Proprietor—Legal owner—Proper party not before court—Agreement of counsel—Duty of appellate court.

This was an appeal from the decision of Boland J. who dismissed the appellant's claim for a declaration that he was entitled to depasture cattle on respondent's land but granted the respondent an injunction restraining the appellant from continuing or repeating the acts complained of.

The respondent was not the owner by transport of the land in dispute although he had purchased it from B and was in possession. The action proceeded by the consent of counsel on the basis that transport had been passed and as if the respondent (defendant) was in fact and in law the proprietor. It was agreed at the trial that no objection would be taken on that ground.

On appeal.

Held: The action was accordingly based upon a complete misconception of the legal position of the respondent (defendant). It was the duty of an appellate court to take notice of the fact that the proper party was not before the court. The respondent was not the proper party as he was not the owner, as owner in this Colony connotes legal owner and does not include beneficial owner.

Action in Court below adjudged dismissed.

Judgment on counterclaim set aside.

B. O. Adams and *J. O. F. Haynes* for appellant.

H. C Humphrys Q.C., S. L. Van B. Stafford Q.C. with *L. M. F. Cabral* for respondent.

Judgment of the Court: On the 19th of December, 1947, the Plaintiff filed a writ against the Defendant in the Supreme Court of British Guiana claiming (a) an injunction to restrain the Defendant from impounding any cattle or other animal the property of the Plaintiff while grazing on any part or portion of land at Plantation Susannah; and (b) for damages for having at Susannah aforesaid wrongfully and unlawfully seized or taken possession of cattle the property of the Plaintiff and thereafter caused them to be impounded.

Appearance was entered to this Writ on the 29th of December, 1947, and on the 4th of February, 1948, the Plaintiff delivered his Statement of Claim wherein he alleged that he became the owner by transport of the western half of the western half of Plantation Susannah and also the owner by transport of a portion of land forming part of the east half of the west half of Susannah with the right of free pasturage as therein described and that the Defendant is and was at all material times the beneficial owner and occupier and in possession as such owner and occupier of the eastern half of the said plantation having bought the said premises from the former proprietors who were under obligation by transport compelled to afford the right to graze their cattle to each of the proprietors of the east and west halves of the said plantation as therein set out.

On the 17th of February, 1948, the Plaintiff delivered an amended Statement of Claim and on the 15th of July, 1948, the Defendant delivered his Statement of Defence wherein he admitted that he was in possession and had purchased the property from Bookers Demerara Sugar Estates Ltd. but denied that the said Company was under the obligation herein-above referred to; he counter-claimed asking for (a) a declaration that the Plaintiff's transports did not and do not in law or otherwise confer on the plaintiff or other the proprietor or proprietors for the time being of the western half of Plantation Susannah or any part thereof any right of grazing cattle over the eastern half of Plantation Susannah, or part thereof nor impose on the proprietor or proprietors of the said eastern half any legal or other obligation to allow the plaintiff or other the proprietor or proprietors as aforesaid to graze cattle thereon or in the alternative a like declaration in relation to the portion of the said eastern half lying to the south of the Public Road; and in the further alternative, that any such right of grazing is restricted as set out in the Statement of Defence; (b) damages for the said trespass and (c) an injunction restraining the Plaintiff from continuing or repeating any of the acts complained of.

On the 27th of April, 1951, a Reply and Defence to the Counterclaim was delivered and on the 11th of May, 1951, a further amended Statement of Claim was delivered, that is more than three years after the delivery of the first Statement of Claim, and in this new amended Claim the Plaintiff asks in addition for a declaration that he had acquired a prescriptive right, as distinct from a right by transport, to depasture his cattle on the eastern part or any portion of land at the Susannah Plantation.

In each of the Statements of Claim the Defendant is described as the beneficial owner and occupier and in possession as such owner and occupier and it is nowhere alleged that he was the proprietor or legal owner of the land in question.

The trial, which lasted several days, was conducted as if the question of servitude or no servitude was the only point for decision and in fact, from the pleadings and the arguments of Counsel on both sides, it is clear that the question of servitude was the main if not the only point to which attention was paid. It is difficult to see where the Judge's mind was otherwise directed; indeed the addresses of Counsel seem to us, from the record, to have been confined to the question of servitude. At no time was the question of trespass simpliciter as divorced from servitude, discussed. It is, therefore, not difficult to understand how the Judge was misled and how in his judgment the main consideration was given to that ever recurring question, servitude. To borrow a phrase from the world of music the leitmotiv of the trial was servitude or, to use another illustration, the question of servitude ran like a golden thread throughout the arguments of Counsel to the exclusion of the lesser one of trespass.

We are fortified in the above by the fact that when in his judgment the learned trial Judge to use his words "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 . . . . . As against this, the defendant's case is that the plaintiff possesses no servitude as claimed . . . . ." and which summary will be found between pages 245—249 of the record he nowhere mentions the question of trespass.

On the 15th of September, 1951, the learned trial judge delivered judgment, the concluding paragraph of which is as follows:—

> "For the reasons I have stated in this judgment, plaintiff has no right of servitude for grazing cattle on 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; 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 Counter-claim."

It is clear, and is in fact conceded that what the plaintiff was claiming is a real or praedial servitude, which presupposes the existence of both a dominant and a servient tenement. It is settled law that a praedial servitude is something which derogates from the full rights of ownership of a tenement in favour of another tenement and is in law immovable property.

At the time of the filing of the Writ, at the time of the delivery of the Statement of Claim and the various amendments thereto, at the time of Trial and at the date of judgment the defendant was not and is not now in possession of a transport in regard to the land in question, the transport being held by Bookers Demerara Sugar Estates Ltd. This fact was known to counsel in the case before trial and during the course of the trial when counsel for the appellant attempted to base an argument on that point he was stopped by counsel for the respondent who intimated that it had previously been agreed by and between the parties that no point should be made of that fact and the trial proceeded along those lines.

According to the law of this Colony, the term proprietor connotes legal owner and does not include beneficial owner. A transport of immovable property vests in the transferee full and absolute title therein and it is not lawful for any person in whom

title of such property vests to transfer it except by passing and executing a transport. See PARIKAN RAI AND LA PENITENCE ESTATES Co. Ltd. vs. DOUGLAS, 1926 L.R.B.G. 142, where reference is made to the earlier case of GANGADIA vs. BARRACOT, 1919 L.R.B.G. 216, where it was held that it is still necessary to complete a sale by transport.

The action in this case proceeded by the consent of counsel on both sides on the basis that the transfer from Bookers Demerara Sugar Estates Ltd. to the defendant had been implemented by transport and as if the defendant was, in fact and in law, the proprietor. The action was based upon a complete misconception of the legal position of the defendant. The proceedings were started and were continued upon that basis from which the trial judge was led by both parties to arrive at an erroneous conclusion as to their position.

It is manifest therefore that if judgment had been given on the Claim for the plaintiff it would have been of no value as the owner, i.e. the proprietor of the alleged servient tenement was not before the Court and the judgment given in favour of the defendant on the counter-claim in so far as it relates to the declaration and injunction is of no value as the defendant was not at the time and is not now the owner of the servient tenement.

This Court is bound to take notice of the fact that the proper party was not before the Court. As was stated in FAUSETT vs. MARK, 1943 L.R.B.G. at p. 360 “Although the principal ground upon which we are of the opinion that this appeal must be decided was not raised either in the Court below or in the notice of appeal motion, it is a case in which it would not be proper for the Appeal Court to base its decision upon mistaken conceptions of law held by the parties in relation to facts either admitted or proved beyond controversy. The facts upon which this particular question of law arises are those which are admitted, and as was said by Lord Watson in the CONNECTICUT FIRE INS. CO. vs. KAVANAGH (1892) A.C. p. 480 ‘it is not only competent but expedient in the interests of justice’ that the Court of Appeal should give effect to the law, whether the point has been raised at the time or not.”

SUTCH vs. BURNS, 60 T.L.R. 316 was an action on an Insurance Policy and the defendant there agreed for the purposes of the action that the Policy should be treated as if it gave the full cover required by the Road Traffic Acts although, in fact, it did not. The learned trial judge heard the action and gave judgment for the plaintiff, but on appeal it was held on the authority of the SUN LIFE ASS. CO. OF CANADA vs. JERVIS, 60 T.L.R. 315. and the GLASGOW NAVIGATION Co. vs. IRON ORE Co. (1910) A.C. 293 that there was no other course open to the Court but to dismiss the appeal and adjudge that the action be dismissed on the ground that the case before the House was a hypothetical case. In the instant case let it be borne in mind that the parties agreed that the point that the defendant was not the owner would not be taken and the action proceeded on that agreement.

We are not unmindful of the fact that the original cause of the action was the alleged trespass of the plaintiff's cattle on the tenement of the defendant; that question was never pursued at the trial. Whether the entry of the cattle was or was not a trespass is so inextricably interwoven in the case as presented with the existence or non-existence of the servitude claimed that we are of the opinion that until the question of servitude be considered with the proper parties before the Court the judge should have declined to decide the question of trespass or no trespass.

The proper parties were not before the Court, and, therefore, there is nothing for us to do but to follow the cases already mentioned and to dismiss the appeal and adjudge the action in the Court below to be dismissed and that the judgment on the counterclaim be set aside and that no costs be allowed to either side here or in the Court below.

Taking the view that we have done, we think it unnecessary and in fact inexpedient to deal with the other points raised in the case and we refrain from expressing any opinion thereon.

Solicitors: W. D. Dinally for appellant.

J. E. de Freitas for respondent.

In the Supreme Court, on appeal from the Rent Assessor, (Stoby J.) November 19, 1951; January 26, 1952).

Rent Restriction—assessment—personal knowledge of assessor—procedure.

Where a rent assessor uses his personal knowledge he should inform the parties of the substance of the facts relied on, make a note of them and give them an opportunity of adducing evidence if they so desire.

Assessment returned to rent assessor.

T. A. Morris for appellant.

C. M. L. John for respondent.

Stoby J. (Acting): This is an appeal by a landlord against an assessment made by the Rent Assessor in pursuance of his power under section 4A (1A) of the Rent Restriction (Amendment) Ordinance, 1943, as amended by the Rent Restriction (Amendment) Ordinance, 1950.

The evidence before the Assessor was that the premises were erected at an estimated cost of $7,760 and were first let at $24 per month. In support of the estimated cost of $7,760, the appellant called a carpenter contractor of 15 years experience whose opinion was that labour alone must have cost $1,700.

The Rent Assessor inspected the premises and said:

> "As a result of my inspection, I find that the estimated cost of the "building as stated by Clinton Barrow is excessive."

He then proceeds to exercise his powers under section 4A (1A) of Ordinance 30 of 1948 as amended by section 3 of Ordinance 24 of 1950 and certifies the standard rent at $15 per month.

It is apparent that in deciding to reduce the standard rent, the Rent Assessor did not accept the landlord's evidence as to the estimated cost of the premises but acted on his own observations.

Sub-section 20 of section 4B empowers the Rent Assessor to take into consideration any relevant facts which are within his personal knowledge. The proviso to the sub-section makes it obligatory on the Rent Assessor whenever he uses his personal knowledge to inform the parties of the substance of such facts, to make a note of them and to give them an opportunity of adducing evidence if they so desire.

In this assessment the tenant adduced no evidence regarding the cost of the premises and while such cost is not the only factor to be taken into account in arriving at a standard rent, it is one of the factors to be considered. The Rent Assessor realised the importance of cost as a factor because he was at pains to state that he regarded the landlord's estimate as excessive. There was, however, no evidence upon which he could properly arrive at such a conclusion. On the one hand there was sworn testimony about cost, on the other hand there was a complete lack of any testimony.

The Rent Assessor could not reject that sworn testimony unchallenged by cross-examination unless the cost of the build-

ing was within his personal knowledge or relevant facts affecting the cost were within his personal knowledge. If this were the fact then he should have recorded on his notes the facts which induced him to say that from personal knowledge the landlord's sworn testimony was untrue and he should have informed the landlord of those facts. In my opinion, the Rent Assessor exceeded his jurisdiction when he ignored a vital part of the evidence and purported to act on his own knowledge without disclosing, how that knowledge was acquired and consequently the assessment cannot be upheld.

It appears, however, that the tenant was not given an opportunity of adducing expert evidence regarding the cost of the premises and opportunity should now be afforded him to do so if he wishes.

This assessment is returned to the Rent Assessor with the following directions:—

(a) The certificate dated 18th April, 1951, is cancelled.

(b) The tenant is to be afforded the opportunity of adducing expert evidence regarding the cost of the premises if he so desires.

(c) If the tenant adduces such evidence then a fresh assessment is to be made having regard to the whole of the evidence.

(d) If the tenant elects to lead no further evidence then a fresh assessment should be made having regard to the fact that the estimated cost of the premises is $7,760.

Assessment returned to Rent Assessor.

BANKERS AND TRADERS INSURANCE CO., LTD
v. CROMWELL

(In the West, Indian Court of Appeal, on appeal from the Supreme Court of the Windward Islands and Leeward Islands (Perez, Collymore, Jackson C.J.J.) 25 November, 1952).

Insurance—Loss or damage by fire—Exceptions in policy—Civil commotion —Burden of proof.

The respondent insured his house and furniture with the appellants against loss or damage by fire. The respondent's house was destroyed by fire. In a claim for payment of insurance the trial judge found that there was civil commotion in Grenada but that it had died down in respondent's village two weeks before the respondent's house was destroyed. The village where the respondent's house was situate is four miles from the capital in which the civil commotion existed at the material date.

Held: If the loss was occasioned in consequence of civil commotion the respondent was not entitled to payment and the facts proved did not permit the trial judge drawing the inference, as he did, that the fire to respondent's house was not due to civil commotion.

Appeal allowed.

Judgment of the Court: In the case out of which this appeal arises, the Respondent (Plaintiff) insured his house and furniture at Woburn in the Parish of St. George with the Appellant (Defendant) Company under a Policy of Insurance dated 23rd February, 1951, against loss or damage by fire. The first and only premium was paid on the 5th March, 1951 and on the 6th March,

1951, the said house and furniture were destroyed by fire. The Respondent claimed for the damage and loss he had sustained, which the Appellant had refused to pay.

The Appellant denied liability. The condition in the policy pertinent to the issues thus raised is No. 6 which in part reads:—

> "This Insurance does not cover any loss or damage which either in origin or extent is directly or indirectly, proximately or remotely, occasioned by or contributed to by any of the following occurrences, or which, either in origin or extent directly or indirectly, proximately or remotely, arises out of or in connection with any of such occurrences, namely:—
>
> (1) . . . . . .
>
> (2) War, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not) mutiny riot, civil commotion, insurrection, rebellion, revolution, conspiracy, military, naval or usurped power, martial law or state of siege, or any of the events or causes which determine the proclamation or maintenance of martial law or state of siege.
>
> Any loss or damage happening during the existence of abnormal conditions (whether physical or otherwise) directly or indirectly, proximately or remotely, occasioned by or contributed to by or arising out of or in connection with any of the said occurrences, shall be deemed to be loss or damage which is not covered by this Insurance, except to the extent by this Insured shall prove that such loss or damage happened independently of the existence of such abnormal conditions.
>
> In any action, suit or other proceeding where the Company alleges that by reason of the provisions of this condition any loss or damage is not covered by this Insurance, the burden of proving that such loss or damage is covered shall be upon the Insured.

This as later will be seen it is incumbent upon the Respondent before he can succeed, to prove that the loss or damage which he suffered is covered by the Policy.

The action was heard by Manning, J., who on the 25th January, 1952, delivered judgment stating that the Respondent was entitled to a declaration that his loss was covered by the Policy and the amount due would be referred to Arbitration. From the judgment the Company has appealed. The learned Judge in his judgment said:—

> "In Grenada there was a strike of agricultural labourers for higher wages. A large proportion of them did not remain quietly at home to await the result of the strike. They assembled in crowds; they intimidated people willing to work; they took the opportunity of stealing and destroying growing crops; they set fire to buildings; they defied

police who were sent to restrain and disperse them; in two cases they were so violent that they had to be fired on. This is a precis of the main trend of events between February 19th and March 15th, the date of the disturbance at La Tante; but in addition the strike atmosphere generated criminal tendencies in persons who might otherwise have remained queicent with the result that fires were secretly set to buildings in several places; crops were stolen; there were isolated acts of violence; attempts were made to prevent the repair of telephone communications and to hinder the supply of food to St. George's; and a road block was set up in one place. All this constituted an insurrection, i.e. a rising up of a section of the people for mischievous and criminal purposes."

It is to be observed that many of the incidents and happenings recorded above occurred in the neighbourhood of Woburn. The learned Judge found that on the relevant date civil commotion did exist in Grenada and in our view no other Sliding was open to him on the evidence. Furthermore, the Judge continued: —

"It does not therefore help the Plaintiff's to show the fire which destroyed his house was not accompanied by any disturbance or disorder. The civil commotion created excitement outside the areas in which it was actually prevalent; this excitement led to isolated acts of crime and of violence. The Plaintiff has to satisfy me that the loss was. not due to one of these isolated incidents. The evidence as to the date disclosed an inference in his favour. The fire at Woburn and the four other fires mentioned above occurred on February 22nd; the riot at Spring and the attack on ladies in a motor-car on February 23rd; the injury to Colonel Stewart on February 24th. There were no further incidents in Woburn or its vicinity until the fire at the Plaintiff's house on March 6th and none after that date."

Despite the above and despite the finding that civil commotion existed in Grenada at the relevant date the Judge concluded that he was:—

"willing to draw an inference from this that all surversive tendencies due to the existence of civil commotion died down in this part of the island after February 24th and I find that the fire to the Plaintiff's house was not connected in any way with the civil commotion and that it was independent of any abnormal conditions arising from the civil commotion".

Before this Court the appellant contends *inter alia* that:—

(*a*) The Respondent did not discharge the onus cast upon him by condition 6 of the Policy of Insurance of proving that civil commotion did not exist on 6th March, 1951, or that if such did exist, the loss or damage was not occasioned by it or by any abnormal conditions; and

(b) The existence of civil commotion in Grenada having been established by the evidence there was no justification for the exclusion of Woburn.

On the other hand it is urged on behalf of the Respondent that, admitting civil commotion did exist in Grenada at the time of the fire, to come within the ambit of Clause 6 of the Policy, it is necessary that such commotion should have existed at the time and in the area or neighbourhood of the place where the loss occurred.

Now Woburn is a small village within 4 miles of St. George's the capital of Grenada, and is in fact policed from St. George's and Grenada itself is an Island of 120 square miles. We find it impossible to isolate Woburn as a place of tranquillity and order amidst the turbulence that existed in various not distant places in the Island.

We cannot agree with the argument of Counsel for the Respondent. In this connection we refer to the judgment of Cave. L. C. in the case of Cooper V. *General Accident Fire and Life Assurance Corporation,* 128 L. *T.* 481, where in dealing with a similar exemption in an Insurance Policy he says.

> "I do not think that is the meaning of the clause. If the loss is occasioned through—that is if it took place in consequence of—a civil commotion, then it appears to me that the case falls within the exception, and there is no need to prove a commotion at the actual time and place where the loss happened".

The learned trial Judge remarked that there is a presumption that the loss here was due to civil commotion and he finds that civil commotion did exist, yet he is willing to and has drawn the inference set out above. On this inference, which we are of opinion cannot be justified in view of his other findings, he proceeds to base his conclusion that the fire at the Plaintiff's house was not connected in any way with the civil commotion and that it was independent of any abnormal condition arising from such civil commotion.

We are of opinion that the facts as proved do not permit of the inference drawn, the more so having regard to the fact that the onus is on the Respondent to prove that the loss happened independently of such abnormal conditions.

While under the terms of a Policy it may not be essential for an Insured to prove the cause of a fire if he can prove the negative proposition that a fire was not due to abnormal conditions, yet it well may be that in certain instances an Insured by proving the actual cause of the fire can discharge the burden imposed on him.

In view of the finding of the learned trial Judge that civil commotion did exist at the time with which finding we are in entire agreement, we are of opinion that the Respondent failed to discharge the onus cast on him and therefore cannot succeed.

It is unfortunate that the trial Judge did not have the advantage enjoyed by this Court of having access to the relevant authorities.

In the result the judgment is set aside and the appeal allowed with costs here and in the Court below.

COLONIAL MINERALS LIMITED v. JOSEPH DEW & SON LIMITED.

(In the West Indian Court of Appeal, on appeal from the Supreme Court of the Windward Islands and Leeward Islands (Mathieu Perez, Collymore, Jackson C.J.J.) December 2, 5, 1952.)

Landlord and tenant—Lease—Breach of covenant—Re-entry—Condition precedent.

A lease contained a proviso for re entry on breach of one of its covenants. The original lessee assigned the lease to the appellants and it was admitted that the appellants did not comply with a covenant which entitled the respondents (lessors) to re-enter. The respondents gave notice of the breach and re-entered on the same day. They failed to give notice as required by the law of Property Amendment Act Cap. 93.

Held: A notice must precede re-entry and it must state with sufficient particularity the nature of the breach of which complaint is made.

Appeal allowed.

G. O. M. O'Reilly Q.C. and J. K. Henry for appellant.

E. E. Harvey for respondent.

Judgment of the Court: The appellant in this case by assignment acquired the rights to mine for barytes at plantation Belmont and Drews Hill, Antigua, under a lease by the respondent in favour of one James Alfred Goodwin for a period of 10 years from the 1st July, 1941 with a right of renewal for 15 years. Clause viii (3) provides *inter alia* that:

> "If the tenant shall at any time during the term hereby granted cease to work the demised mine for a period of twelve (12) successive calender months (such cessation not being due to accidents, labour disputes or any unavoidable occurrence) . . . . . .it shall be lawful for the landlord at any time thereafter upon the demised premises and mine or any part of them in the name of the whole to re-enter and thereupon this demise shall absolutely determine but without prejudice to the right of action of the landlord in respect of any breach of the tenant's covenants herein contained."

On the 9th September, 1949, the respondent re-entered and took possession of the said mine for a breach of the covenant

hereinbefore set forth and served on the appellant a notice of re-entry in the following terms: —

> "Take Notice that in pursuance of the power given to us by a Lease dated the 19th day of June, 1941, and made between ourselves the undersigned of the one part and James Alfred Goodwin of the other part with respect of a certain mine seam or bed of Barytes in or under ALL those plantations or Estates lands and hereditaments situate in the Parish of Saint John in the Island of Antigua called and known as "Belmont" and "Drews Hill" which said Lease was on the 28th day of March, 1942, assigned by the said James Alfred Goodwin to yourselves WE HEREBY REVOKE and DETERMINE each and every licence liberty and authority given for the purpose of working the said mine on account of your having ceased to work the demised mine for a period of twelve (12) successive calendar months.
>
> AND WE FURTHER GIVE YOU NOTICE that acting under the authority given us by the terms of the said Lease we have this day re-entered into possession of the said mines. Dated this 9th day of September, 1949.
>
> JOSEPH DEW & SON LTD.
> (Sgd.) R. CADMAN—*Director*.
> (Sgd.) H. L. NORRIS WHITE—*Secretary*."

The appellant thereafter brought an action against the respondent claiming:

(i) a declaration that the respondent was not entitled to re-enter on the demised premises inasmuch as

(*a*) the reversion of the demised premises had become vested in and subject to the control of the Crown under and by virtue of the provisions of the Minerals (vesting) Ordinance 1948 (No. 1 of 1949)

(*b*) alternatively, the provisions of section 9 of the Law of Property Amendment Act Cap. 93 were not complied with by the respondent.

(ii) A declaration that, the appellant was entitled to possession of the demised premises

(iii) Possession

(iv) Damages for wrongful re-entry.

The action was tried by Manning J. who gave judgment for the respondent and from that judgment the appellant has appealed.

It was submitted for the appellant that even if in the circumstances the right of re-entry had accrued to the respondent failure on his part to give notice in compliance with the statute requiring such notice would preclude him from enforcing that right. The Law of Property Amendment Act Cap. 93 enacts at section 9 (1).

> "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or other-

wise, unless and until the lessor serves on the lessee a notice, specifying the particular breach complained of, and if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor for the breach."

Now this section is exactly the same as section 14 (1) of the Conveyancing Act 1881, section 146 of the Law of Property Act 1925 and a provision in the Trinidad Conveyancing and Law of Property Ordinance (Cap. 27, No. 12). In the case of *Rajwantia v. Ruth Boodoosingh* where in 1943 the Trinidad section came under review by this Court it was held that the notice was a condition precedent to the exercise of the right of re-entry. In *Fox v. Jolly 1916 A.C.* at p. 8 Lord Buckmaster L.C. in his speech with reference to section 14 (1) of the Conveyancing Act 1881 said:

"The effect of this sub-section is plain. The right of reentry which the lessor enjoys on the breach of a covenant is not capable of being exercised against the lessee until the conditions in that sub-section have been satisfied. If such condition were not satisfied and entry were attempted at common law, such entry would be a trespass; if proceedings were instituted to obtain possession they would be instantly demurrable. That is the meaning of the phrase, "shall not be enforceable by action or otherwise." Now the conditions precedent which the lessor must perform are these. He must serve a notice, and that notice must specify the breach of covenant which is the subject of complaint. That is, he must point out the covenant which he says is broken, and he must specify the breach of which he complains." Thus it is settled law, as the authorities throughout the years have indicated, that a notice must precede re-entry and it must state with sufficient particularity the nature of the breach of which complaint is made. The course the trial took is manifest from a perusal of the pleadings and a study of the notes of evidence along with the notes of the addresses of counsel at the trial; the alleged notice of the 9th September 1949 was that on which the respondent relied as a sufficient discharge of its obligations under the relevant statute; and indeed it is pleaded in paragraphs 3 and 4 of the defence as follows:—

3. "The Plaintiff for a period of over twelve (12) successive calendar months prior to the 9th day of September, 1949 ceased to work the demised mine.

4. On the said 9th day of September, 1949, by notice in writing bearing said date the defendant revoked and determined its licence liberty and authority previously given to

the Plaintiff or its assignor to work said mine because of the Plaintiff's failure to work the demised mine for a period of twelve (12) successive calendar months prior to said date and thereupon the defendant re-entered into possession of the said mine."

Moreover the learned Judge found "The defendants gave notice to the plaintiffs on 9th September, 1949, and re-entered the same day." Before us counsel for the respondent conceded that the notice of the 9th September, standing alone, did not comply with the prerequisites to the enforcement of the right of re-entry as provided by The Law of Property Amendment Act Cap. 93; and that this notice was only an intimation that the respondent had already re-entered. In Counsel's view his cause was not lost for he pressed upon us a submission that the respondent in a letter under date 26th April, 1948 had given notice of intention to reenter on the 31st July 1948 if certain conditions were not fulfilled. In this letter it is stated:—

"The demised mine has not been worked for upwards of 12 successive calendar months and we would have re-entered the demised premises for breach of these covenants but for the fact that we were made to understand that you were importing up-to-date machinery to work the mine in the manner required by the lease.

As no machinery has as yet been imported by you, we give you notice that it is our intention to re-enter the demised premises on the 31st July, 1948, if the machinery does not arrive and work in keeping with the covenants is not commenced before that date."

The respondent did not re-enter but in spite of the basis on which the trial of the action was conducted, now seeks refuge in this expressed intention to re-enter if certain conditions were not fulfilled. In support of his argument Counsel cited the case of the *New River Company v. Crumpton* 1917 1 K.B. 762: There the defendant a tenant to plaintiff under a lease containing a covenant to repair was on the 11th December 1914 served with a notice under the conveyancing Act 1881 specifying the breach of the covenant to repair and the repairs required to be done. On the 22nd March 1916 the notice to repair was substantially uncomplied with and the plaintiff on that date brought an action for 1 possession. It was held that as the only object of the notice under the Act was to inform the tenant what she was required to do, no new notice was necessary to support the action even though so long an interval as twelve months had elapsed between the expiry of the notice and the commencement of the action. In that case the breach was a continuing one, was clearly specified and was not subject to change, whereas in the present case the period of the breach envisaged by the covenant is peculiarly related to the date of the notice; the breach must in our view on the date of notice have existed for 12 months last past; that is for the 12 months immediately preceding the notice. The breach alleged in the letter of the 26th April 1948 is not the same as that

alleged in the notice of the 9th September, 1949 and is not the as that pleaded. The respondent's submission must therefore fail. To sustain the view submitted on behalf of the respondent would be to permit after a lapse of years the revival of a conditional notice to re-enter for a limited and specified breach of a non-continuing nature. This would be concordant neither with the spirit nor language of the statute, and more would be a violation of its plain meaning.

Both Counsel addressed arguments on the first ground of appeal as to whether or not the conjoint effect of The Vesting (Minerals) Ordinance 1948 (No. 1 of 1949) and section 6 of the Law of Property Amendment Act Cap. 93 was to vest the reversionary estate of the demised premises in the Crown. Holding the view that the giving of a proper notice is an essential prerequisite of the enforceability of the right of re-entry and that as here there was no such notice we think it unnecessary and inexpedient to express any definite opinion on that aspect of the matter.

It follows from the above that the respondent was not entitled to re-enter in and upon the demised premises on the 9th September 1949 and that the appellant is entitled to the possession of the demised premises. No argument was addressed to us on the question of damages nor was any evidence led in respect of it at the trial; we therefore award nominal damages in the sum of five dollars ($5.00).

The appeal is allowed with costs here and in the Court below.

HOPE v. ROSS

In the Supreme Court, Civil Jurisdiction (Stoby J.) October 30; November 7, 1951; January 26, 1952).

Road traffic—motor car—overload induced by plaintiff—accident—not caused by overload—driver's negligence—liability of defendant.

The plaintiff engaged a car owned by the defendant and driven by his agent to convey him on a journey. The car was registered to carry four persons but the plaintiff induced the chauffeur to carry seven.

An accident occurred owing to the chauffeur's negligent driving and the plaintiff suffered injuries. The accident was unconnected with the overload.

The defence was that the defendant could not be liable because plaintiff and the chauffeur were committing a criminal offence.

Held: The accident was caused by the excessive speed at which the car was being driven. In relation to the accident the plaintiff was committing no criminal offence and was entitled to damages.

Judgment for plaintiff.

E. W. Adams for plaintiff.
S. L. VanB. Stafford, K.C. for defendant.

Stoby J.: On the 25th December, 1948, the defendant who was the owner of a Motor Car 7555 hired it to the plaintiff to

convey him from No. 53 to No. 64 and back home, which places are villages on the Corentyne Coast, Berbice. The defendant kept his motor car for hire and was paid the sum of $1.25 for the return journey. He supplied a chauffeur. After the plaintiff hired the car he invited some of his relatives and friends to accompany him on the journey.

The drive to No. 64 was uneventful but on the return journey as the chauffeur attempted to negotiate a turn at the junction of the 64-63 Public Road, the car skidded and left the public road, struck a mile stone erected on the grass verge and toppled over into an adjoining trench.

The plaintiff who suffered injuries claims damages from the defendant. The defendant in his defence pleaded inevitable accident but at the trial of this action this defence was abandoned at the close of the defendant's case and an amended defence filed with leave of the Court.

The amended defence now relied on is as follows:—

(a) The plaintiff induced and ordered the defendant's agent and chauffeur without the knowledge, consent or authority of the defendant to carry more than four persons, to wit, the chauffeur and six passengers including the plaintiff in the said car;

(b) that it was while the said overload was being carried and the said offence, in which the plaintiff was participating, was being committed that the accident complained of took place and the plaintiff suffered the injury alleged;

(c) that the said overload caused the car to be top heavy and unmanageable on corners and while negotiating a corner to leave the road and collide with a milestone and to overturn in a trench, in which accident the plaintiff suffered the alleged injury.

It is sought to found this defence upon certain facts which emerged at the trial. Immediately after the accident P.C. King assisted seven persons inclusive of the chauffeur out of the car. The chauffeur was subsequently charged and convicted for carrying more passengers than the permitted number contrary to Regulation 35 (a) of the Motor Vehicles Road Traffic (Provisional) Regulations 1940. It was conceded by the plaintiff that all the persons in the car were there at his invitation but he did not admit that the car was overloaded.

I have no hesitation in finding that the car was overloaded and the question which remains to be resolved as a result of this finding is whether the amended defence is thereby sustained.

Regulation 35 (a) of the Motor Vehicles Road Traffic (Provisional) Regulations 1940 enacts that there shall not be carried in or on any motor bus or hired car more persons than the 'permitted number'; Regulation 32 makes it obligatory on the licensing officer to fix the greatest number of persons which may be carried in a hired car and which when fixed is known as the 'per-

mitted number'. The permitted number of persons in respect of the defendant's car was five. Since there were seven persons in his car, the defendant's chauffeur had undoubtedly committed an offence and was liable in accordance with Regulation 37 to a fine not exceeding one hundred dollars.

Counsel for the defendant submitted that as the number of persons in the car in excess of five were there at the invitation of the plaintiff, then it followed that the plaintiff was liable to be convicted under the aforementioned regulation.

Section 23 of Chapter 13 enacts that every person who aids, abets, counsels, causes or procures the commission of any summary conviction offence shall be liable to be proceeded against and convicted for that offence. The suggestion is that the plaintiff caused the defendant's chauffeur to commit a summary conviction offence and was therefore liable to be convicted as a principal offender.

For the purposes of the argument it has to be assumed that the plaintiff had rendered himself liable to conviction. But it is important to note that the overloading was not the cause of the accident. The accident was caused by the excessive speed at which the car was being driven, so that in relation to the accident the plaintiff was committing no criminal offence. That is the fact which distinguishes this case from those which were cited.

In Colburn v. Putmore 149 E.R. 999, Lord Lyndhurst said at page 1,003:

> "I know of no case in which a person who has committed an act de-
> "clared by the law to be criminal has been permitted to recover compen-
> "sation against a person who has acted jointly with him in the commis-
> "sion of the crime. I entertain little doubt that a person who is declared
> "by the law to be guilty of a crime cannot be allowed to recover dam-
> "ages against another who has participated in its commission."

In the same case Baron Alderson said:

> "He (the plaintiff) should have proceeded to shew that the injury sus-
> "tained by him was a consequence of the breach of duty alleged. This
> "he has not done; for the injury sustained appears to have been the
> "consequence of his own wilful act"

In an action grounded on negligence, where the foundation of the plaintiff's claim is that the defendant's agent failed to exercise due care and skill in the performance of his duty, the primary consideration is to decide whether the defendant owed a duty to the plaintiff and if so whether he was negligent in the performance of that duty. If although both of those tests are satisfied but it transpires that the negligence arose while the plaintiff and defendant were participating in a criminal act, then the plaintiff cannot recover. But where there is no nexus between the criminal act and the negligent act, the plaintiff is entitled to recover.

Although the car was overloaded at the request of the plaintiff, the driver of it owed a duty to drive carefully. There was no agreement or direction or inducement to drive recklessly. If the reckless driving was at the plaintiff's request or if the overload caused the car to be unmanageable and resulted in its toppling over, then those acts being directly attributable to the plaintiff would come within the principle of Colburn v. Putmore. On the evidence it is clear that no criminal or negligent act of the plaintiff in any way contributed to the accident and he is entitled to damages which I assess at $222.25 special damages and $200 general damages with costs. Fit for counsel. Stay of execution granted for 6 (six) weeks.

Judgment for the plaintiff.

Solicitors: *N. O. Poonai* for plaintiff.

H. C. B. Humphrys for defendant.

KALOO v. SOMARIA executrix of SUKAI, deceased.

(In the Supreme Court, Civil Jurisdiction (Bell C.J.) January 16, 17, 22, 23, 30, 1952).

Promisory note—claim against estate—defence of forgery—burden of proof not same as in a criminal case.

The plaintiff's claim was for the sum of $560 on a promissory note alleged to be made by one Sukai since deceased. The defence was that the note was forged.

Counsel for the plaintiff submitted that where in a civil case an allegation is made of the commission of a criminal offence such allegation must be proved with the strictness demanded in a criminal case, that is to say, the allegation must be proved beyond a reasonable doubt.

Held: It was not incumbent upon the defendant to prove his allegation of forgery beyond a reasonable doubt.

The case is reported only on this aspect.

Action dismissed.

Sugrim Singh for plaintiff.

Akbar Khan for defendant.

Bell C. J.: The plaintiff's claim is one against the defendant in her capacity as the Executrix of the Estate of Sukai, a male East Indian, deceased, for the sum of $560 (five hundred and sixty dollars) being the amount alleged to be due and owing as principal and interest by the defendant as executrix of the Estate of Sukai, deceased, to the plaintiff on an overdue promissory note (Exhibited in this case as *Exhibit "A"*) dated the 5th January, 1950, made by the said Sukai, deceased, at Campbellville, East Coast Demerara, in favour of the plaintiff. The Defence to the claim, shortly stated, is that the deceased Sukai did not sign the promissory note; that the Estate of Sukai is not indebted to the plaintiff in the sum of $560 (five hundred and sixty dollars) or at all and that the signature of the late Sukai to the promissory note is a forgery.

2. The issue then for determination by this Court is clear and simple. What, however, is by no means clear and simple is where the truth of this matter lies.

3. With considerable circumstantial detail and, so far as I could see, an *air* of truthfulness the plaintiff and his two witnesses, Goolcharran alias Madei and Thomas Poonai, have described how the late Sukai signed the promissory note at the plaintiff's home at Campbellville, East Coast, Demerara, about 4.00 p.m. to 4.30 p.m. on the 5th of January, 1950, receiving in return the sum of $500 (five hundred dollars). Goolcharran and Thomas Poonai are near relatives of the late Sukai, a fact much relied upon by plaintiff's counsel. Moreover, the plaintiff contends through his counsel that the evidence shows that the state of Sukai's affairs at the time the alleged loan was made was such as to make it probable, despite the fact that at the date of the alleged loan he had a credit balance of $509.53 in the Post Office Savings Bank, that he would have needed the loan of $500. Counsel also contends that it is not an infrequent occurrence for persons with money in a bank nevertheless to borrow money. On the other hand, the defendant has adduced evidence to show that the late Sukai was not in Campbellville at the material time but was then very many miles away at Macouba, Mahaicony Creek; that his financial position on the 5th January, 1950, was such as to make it unnecessary for him to have borrowed any money from the plaintiff; that he never signed the promissory note and that his alleged signature on it is a forgery. The Defence have relied upon comparison of handwritings. They have placed great reliance on what they allege is a highly significant fact, namely, that if the signature "Sukai" on the promissory note (Exhibit "A") is placed directly over the signature "Sukai" on the Birth Certificate (Exhibit "F"), which certificate has been in the possession of the witness Madei since soon after the death of Sukai in October, 1950, 'till the hearing of this case began, it will be seen, the Defence contend, that the signature "Sukai" on the alleged promissory note (Exhibit "A") is an exact tracing of the signature "Sukai" on the Birth Certificate (Exhibit "F"). They contend that all the characteristics are reproduced and that even the dot over the "i" in the word "Sukai" is reproduced in the exact position that letter occupies in Exhibit "F". They further point to what they contend are a number of pieces of circumstantial evidence which supports their case.

4. It will be clear from what I have just stated that there has been wilful and deliberate false-swearing on one side or the other; no other explanation is possible.

5. In his final address to the Court, Mr. Sugrim Singh submitted that where in a civil case an allegation is made of the commission of a *criminal* offence, such as the allegation made by the Defence in this case that the promissory note has been forged, then the allegation must be proved with the strictness demanded in a criminal case, that is to say, the allegation must be proved *beyond a reasonable doubt.* He cited in support of his submission, the case of *Williams v. the East Indian Company* 3 East. 192. There are other cases which he might have cited in sup-

port of his contention. Thus in an action on a fire policy, it has been held that proof of a plea of wilful burning must suffice to convict of arson (Thurtell v. Beaumont, 1 Bing 339); so in actions for libel with pleas in justification imputing forgery (Chalmers *v. Shackell*, 6.C. & P. 475) or bigamy (*Willmett v. Sharmer* 8 C. & P. 695) or petitions for divorce alleging sodomy (*Statham v. Statham* (1929) P. 131 C.A.). The learned editor of Phipson on Evidence 8th Ed. 1942 at page 7 expresses the opinion that the weight of opinion is contra and that the reason for the criminal rule is inapplicable to civil cases. He cites the following cases in support of his statement. *Cooper v. Slade* 6 H.L.C. 746, 772; *Magee v. Marks* 11 Ir. C.L.R. 449 per Pigot C.B. diss Fitzgerald B; (action for penalties under the Corrupt Practices Act 1854 where it was held that a charge of bribery might be proved by a mere preponderance of probability); *Doe v. Wilson* 10 Moo. P.C. 502, 531 (forgery of a deed in an ejectment action); *Hurst v. Evans* (1917) 1 K.B. 352 (action on burglary policy); *Vaughton v. L. & N.W. R.Y.* 9 Ex. 93; *Boyce v. Chapman* 2 Bing N.C. 222; *Blankensee v. Midland R.Y.* 28 L.J. 325 (action against carriers—the felony of the defendant's servants need not be strictly established) . The editor goes on to say that the weight of opinion in America is also to the effect that so high a standard of proof is not required in civil cases. I adopt the opinion of the learned editor of Phipson and accordingly hold that in this case it is not incumbent upon the defendant to prove beyond a reasonable doubt his allegation of forgery.

His Lordship analysed the evidence and came to the conclusion that the note was forged. Judgment was entered for the defendant with costs.

SANDERS v. COOPER AND OTHERS

(In the Supreme Court, Civil Jurisdiction (Bell C.J. In Chambers) January 14, 21; February 25, 1952).

Writ of summons—negligence—defendants sued in representative capacity—Order XIV r. 8*—non compliance—application to set aside writ.*

The plaintiff without obtaining an order that the defendants be directed to defend the action in a representative capacity, issued a writ against them as representative of an athletic association, claiming damages for negligence.

The defendants applied to set aside the writ.

Held: (a) The liability of individual members of a club in tort depends upon the fact that they have acted personally or have procured the doing of a tortious act by a servant or agent.

(b) The plaintiff had not complied with Order XIV r. 8 authorising the suing of the defendants in a representative capacity.

Writ of summons struck out.

J. E. de Freitas for applicants (defendants).

I. G. Zitman for respondent (plaintiff).

Bell C. J. : The plaintiff, William Thomas Sanders, (the respondent in the application now before me), issued a Writ of Summons against G.W.E. Cooper, H. B. Massey and F. M. Cummerbatch suing them "On behalf of themselves and all members

of the B.G. Amateur Cycle and Athletic Association and Cycle Union". The indorsement to the Writ reads as follows:

(a) The Plaintiff claims against the defendants who were at all material times officers and/or members of the B.G. Amateur Cycle and Athletic Association and Cycle Union is for the sum of $2,500 (two thousand five hundred dollars) as damages and pecuniary compensation for that on the 16th day of April, 1949, they by the said Association negligently permitted a bridge over which the plaintiff (who purchased a ticket of admission to an Athletic meet to be held on the G.C.C. ground, Georgetown) had to pass in such a state or condition as to cause plaintiff to fall and thereby suffer injury and financial loss.

(b) Costs.

To that Writ of Summons the applicants (two of the defendants to the action) entered a conditional appearance with the leave of Mr. Justice Boland and then made their present application by summons in which they asked:

(1) That the Writ of Summons or the service thereof be struck out or set aside;

(2) Alternatively, that the words in brackets on the Writ of Summons viz. "(On behalf of themselves and all members of the B.G. Amateur Cycle and Athletic Association and Cycle Union)" be struck out; and

(3) That the plaintiff pay to the defendants their costs of the application to be taxed.

The grounds given by the applicants for asking that the Writ of Summons or the service thereof be struck out or set aside are these:

(a) The writ and/or service were or was irregular;

(b) The plaintiff is not entitled to sue the said defendants and the defendant, P. M. Cummerbatch in the manner and form in which they have been sued;

(c) No order has been obtained from the Court authorising the defendants to be so sued and in this action which is an action of tort, no such order can be made;

(d) Alternatively, that the proceedings are vexatious and an abuse of the process of the Court.

It is the fact that the respondent (plaintiff has failed to apply under Order XIV Rule 8 (which is identical with Order 16 Rule 9 of the Rules of the Supreme Court Annual Practice 1950 Vol. 1 p. 245) for an order that the abovenamed defendants be directed to defend the action in the representative capacity mentioned in the Writ of Summons. He has given certain reasons why he did not take that step. Those reasons do not seem sound reasons to me. It is notorious that considerable difficulties attend the successful bringing of suits against the members of a club and similar associations of persons which are not legal entities but a corporation.

"Ordinary clubs" said Lord Lindley in a passage judicially approved by Lord Parker in London Association for Pro-

lection of Trade v. Greenlands Ltd. (1916) 2 A.C. p. 39, "are founded upon the tacit understanding judicially recognised that members as such do not become liable to pay any money beyond the subscriptions required by their rules and if liabilities are to be fastened on any of their members, it must be by reason of the acts of those members themselves or by reason of the acts of their agents and that the agency must be made out by the person who relies on it for none is implied from the mere fact of association".

With regard to liability in tort in particular it seems to be settled law that the liability of individual members of a club depends upon the fact that they have acted personally, or have procured the doing of a tortuous act by a servant or agent and are not apparently liable merely because they are all members of the club. It has, however, been suggested (Encyclopaedia of Court Forms and Precedents in Civil Proceedings by Atkin 1943, Vol. VI p. 8) that where all members are joint owners and occupiers of the club property there might be a possibility of liability on that ground. In regard to third parties, members of the Club committee of an ordinary club are only liable for such contracts and in respect of such acts as they have themselves individually authorised or adopted. In tort, the liability of the members of the Committee, as in the case of individual members, depends on their having acted personally. The foregoing must be borne in mind in considering what scope exists for bringing representative actions against ordinary clubs or similar associations of persons which are not legal entities. It seems to be settled, however, that representative actions in regard to Clubs are proper when what is sought is a declaratory judgment declaring the rights of the members as a class or a declaration respecting the validity of some resolution of the Committee or a declaration and injunction to restrain expulsion or actions for money for which a person is liable to account to the Club and apparently for the recovery of club money generally.

It is settled law that an action cannot be maintained against certain members of an unincorporated association on behalf of others to enforce a strictly personal liability against members of the association whether in contract (Walker v. Sur (1914) 2 K.B. 930) or tort (Mercantile Marine Service Association v. Toms and others (1916) 2 K.B. 243) and that where separate defences may be open to some members, there can be no common interest within the meaning of Order XIV Rule 8 (London Association v. Greenlands Ltd. (1916) 2 A.C. 16; Barker v. Allanson (1937) 1 K.B. 463 C.A.). I have been unable to find any case in which Order XIV Rule 8 has been applied in an action of tort though there are *dicta* in Taff Vale RY Co. v. Amalgamated Society of Railway Servants (1901) 436 which suggest that there may be cases in which an Order under Order XIV Rule 8 might properly be made in an action of tort.

In the light of the authorities cited above as applied to the facts of the case under consideration, for I consider those cases to be directly in point, I am satisfied had I been asked to do so, that I could not properly have made an order under Order XIV Rule

8 directing the three defendants, G. W. E. Cooper, H. B. Massey and F. M. Cummerbatch to defend the action on behalf of all or any of the members of the B.C. Amateur Cycle and Athletic Association and Cycle Union. They clearly cannot be sued without that leave.

It would seem from what Mr. Zitman has said at the hearing of this Summons that the Plaintiff is not really sure whom he should sue in this matter and that he is fishing for information in the way he has drawn his Writ of Summons. Whatever his difficulties may be in that regard, I cannot allow the provisions of Order XIV Rule 8 to be invoked in cases which do not clearly fall within the principle of that Rule and Order.

I accordingly direct that the Writ of Summons in this Action be struck out on the grounds that it may prejudice and embarrass the fair trial of the action as:

(a) the writ is irregular in form;

(b) the plaintiff is not entitled to sue the defendants or any of them on behalf of all or any of the members of the B.G. Amateur Cycle and Athletic Association and Cycle Union or to sue any of the defendants in a representative capacity so far as the present action is concerned; and

(c) no order as required by Order XIV Rule 8 of the Rules of Court 1900, as amended from time to time, has been obtained authorizing the suing of the defendants or any of them in a representative capacity.

The respondent (plaintiff) must pay the applicants, Cooper and Massey (Defendants Nos. 1 and 2) the cost of this their application. Costs to be taxed.

Writ of summons struck out.

SUREYNAUTH v. THE KING

(In the West Indian Court of Appeal. On appeal by way of case stated by a Judge of the Supreme Court of British Guiana (Collymore, Jackson and Bell C.JJ.) February 18, 19; March 5, 1952).

Criminal Law—murder—evidence—separate incidents—res gestae.

The appellant was convicted before a jury of the murder of one S. At his trial the Judge admitted evidence that the appellant shot R and discharged a revolver at P members of the family of S. The incident in relation to R and P took place in the absence of S and about 29 minutes before S was killed. It was a separate incident but the Judge held that the attack on S was unintelligible unless evidence of the previous incident was given and that it was part of the res gestae.

Held: The nature of the attack on S and the kind of weapon used might well have been sufficiently indicative of the appellant's state of mind as to enable the jury to determine whether there was provocation or any question of self defence, and accordingly the attack on S was intelligible without evidence of the attacks on R and P. The evidence was not part of the res gestae.

Appeal allowed.

Conviction quashed.

E. V. Luckhoo and C. L. Luckhoo for appellant.

G. M. Farnum for the Crown.

Judgment of the Court: This is an appeal by way of case stated under Section 174 of the Criminal Law (Procedure) Ordinance of British Guiana, from conviction and sentence of Sureynauth for the murder of one Ramrattan Singh. Four other persons namely, Nackyah, Keshram, Balram and Omadat Persaud were charged together with Sureynauth for the murder of the said Ramrattan Singh, but these were all acquitted. Nackyah is the wife and Keshram, Balram and Omadat Persaud are sons of the accused Sureynauth.

The jurisdiction to state a case was questioned in the Court below, but before us this was not persisted in and we are satisfied that the Judge had ample authority to act as he did.

The learned trial Judge reserved two questions of law for our consideration, namely: —

(a) Did he err in law in ruling that the evidence given by the witnesses for the Crown in relation to the accused Sureynauth shooting Rampersaud Singh and discharging a revolver at Paragdat also known as Ninesingh, was admissible in evidence against the accused Sureynauth on his trial for the murder of Ramrattan Singh who was not present at the time of the alleged assault upon Rampersaud and Paragdat?

(b) Did he err in law in directing the jury that they must consider that evidence as part of the res gestae and as showing the state of mind of the accused Sureynauth on the morning of April 1, 1951, (the date of the alleged murder of Ramrattan Singh) towards the said Ramrattan Singh and his family?

We agree with the observation of the trial Judge that if the evidence objected to was not admissible it is obvious that the direction to the jury that they must take the evidence relating to the attack on Rampersaud and Paragdat into consideration and as to the conclusions which they might draw from this evidence would be a misdirection.

It is clear that the learned trial Judge regarded evidence as to the shooting of Rampersaud Singh and the discharging of the revolver at Paragdat alias Ninesingh to be admissible for the following reasons:—

(1) As part of the res gestae, that is to say, as being acts or incidents which constituted or accompanied and explained the fact in issue, namely, was Sureynauth guilty of the offence charged?

(2) As affording evidence of the intent to kill or to do such grievous bodily harm as was likely to result in death.

The res gestae rule is easily stated but is one which often presents great difficulty in its application. Phipson (the law of Evidence, 8th Edition, 1942) at p. 51 *has this to say of* the rule:

"The rule is derived from the obvious consideration that no disputed event "or transaction ever occurs isolated from all other events or transactions. It "must, however, be detached from such other events or transactions. "Where the line is to be drawn is always a matter of difficulty. There may "be differences of opinion as to what constitutes the event or transaction in "question and decisions upon such matters may be cited. It is also a rule "that a fact in issue should be proved in its proper setting, but that ac-"companying circumstances can only be admitted so far as is necessary for "that purpose and therefore there are also decisions on such points. There "is obvious scope for considerable difference of opinion as to what facts "constitute the event or transaction in dispute, and also as to what facts ac-"companying it are necessary to be proved in order that it should be "brought before the Court in its true light. If the evidential fact in question "is in the particular circumstances either an integral part of the event or "transaction itself or so connected with it as to be of real value in deter-"mining its existence or its true nature, then such fact is admissible as part "of the res gestae: otherwise not".

The learned trial Judge, in explaining why he regarded the evidence of the attack on Rampersaud Singh as admissible under the res gestae rule, has stated that he did not consider that the attack on Ramrattan Singh would be intelligible unless the jury were apprised of all the circumstances leading up to the latter attack. Further, he regarded the three assaults, that on Rampersaud, followed by the attack on Paragdat and the attack on Ramrattan Singh as "so intermixed with each other as to form an indivisible occurrence". While appreciating the great responsibility which lay upon the trial judge in deciding whether the evidence as to the earlier incidents was or was not admissible, the prejudicial nature of which cannot be denied, we consider

that the nature of the attack by the appellant on the deceased and the kind of weapon used might well have been sufficiently indicative of the appellant's state of mind as to enable the jury to determine whether there was provocation or any question of self defence. Accordingly, we do not agree that the attack upon Ramrattan Singh would not have been intelligible to the jury unless they were apprised of the attacks upon Rampersaud and Paragdat.

For our purposes certain relevant facts may thus briefly be stated. The accused and deceased were neighbours and on the morning of the 1st April, 1951, a quarrel arose between the family of the deceased Ramrattan Singh and that of the accused Sureynauth. This quarrel culminated in violent assaults by the accused on Rampersaud and Paragdat, the son-in-law and son, respectively, of the deceased Ramrattan Singh.

The accused appears to have discarded his firearm and those incidents then ended. At no time during those incidents was the deceased man present nor was there any indication that he was then aware of what had taken place. After a lapse of time which may have been as long as 29 minutes, the deceased Ramrattan Singh appeared on the scene, and a fight ensued between him and the accused, during the course of which the deceased was killed by the accused.

The period of time which elapsed between the assault on Rampersaud and Paragdat on the one hand, and the fatal assault on Ramrattan Singh on the other hand—an interval which we have pointed out may have been as long as 29 minutes—is one of the factors to which due regard must be had by us, taken in conjunction with the fact that the deceased was not present at the earlier assaults, in deciding whether the evidence of the earlier assaults was admissible either as part of the res gestae or as negativing the defence of self defence or raising the question of provocation.

Holding as we do that the earlier assaults on Rampersaud and Paragdat were not one indivisible occurrence but were clearly separable occurences, we have come to the conclusion that the evidence of the earlier assaults was not legally admissible.

It follows, therefore, that the learned trial Judge's direction to the jury on that evidence was erroneous.

Sitting as we do as a Court for Crown Cases Reserved whose powers are limited by the provisions of Section 174 to 177 of the Criminal Law (Procedure) Ordinance, we have no option but to quash the conviction and. sentence. If the issue of self defence had not been raised in this case, it is probable that due consideration would have been given to the substitution for the conviction for murder of a conviction for manslaughter. Doubtless due consideration will be given by the competent authorities to the earlier incidents disclosed by the evidence which we have held to be inadmissible in this case.

The conviction and sentence are accordingly quashed.

Appeal allowed. Conviction quashed.

GONSALVES v. MOOK SANG

(In the Supreme Court, on appeal from the Rent Assessor (Stoby J) November 19, 1951; March 7, 1952).

Rent Restriction—standard rent—increase of—no jurisdiction.

On an application by the respondent, landlord, for the assessment of rent, it was admitted that the standard rent was $45 per month. The assessor was of opinion that the maximum rent which he could fix was too low and as he wished to fix a maximum greater than the rent then being paid by the tenant—$52.48—he referred his notes to the advisory committee who recommended a maximum rental of $80 per month.

The assessor assessed the rental at that figure. The tenant appealed.

Held: Section 4BB (1) of the Ordinance does not enable the Rent Assessor to fix a maximum rent which is higher than the standard rent plus all the increases allowed by section 6 (1) of the Ordinance.

Appeal allowed. Remitted to Rent Assessor.

S. L. Van B. Stafford K.C. for appellant.

Theo Lee for respondent.

Stoby J.: The sole but important point in this appeal revolves around the interpretation to be given to section 4 BB (1) of the Rent Restriction Ordinance 1941 as enacted by Section 5 of the Rent Restriction Ordinance, 1948 (No. 30).

During 1939 and 1940 a building was erected on the W½ of lot 126, Barrack Street, Kingston, Georgetown. The owner sold it in 1942 and the present owner, the respondent, purchased it in 1949.

In 1940 the building was let at a rental of $45 per month but after the respondent acquired the premises, the appellant who was not the original tenant, agreed to pay a rental of $50 per month which was subsequently increased to $52.48.

In June 1950 the respondent applied to the Rent Assessor for the rental to be assessed as the rental value of the building had been assessed for taxation by the Mayor & Town Council at $60.57.

On the facts above recited, the Rent Assessor being of opinion that the maximum rent should be fixed at an amount exceeding the rent then being paid by the tenant, that is to say $52.48, referred the matter to the Advisory Committee who, having regard to the floor area of the house, recommended a rental of $80 per month. The Rent Assessor accepted this recommendation and purporting to act under Section 4 BB (1) of the Ordinance certified the maximum rent at $80 per month. From this assessment the tenant appeals.

Mr. Stafford for the tenant appellant, contended that Section 4 BB (1) of the Ordinance does not enable the Rent Assessor to fix a maximum rent which is higher than the standard rent plus all the increases allowed by section 6 (1) of the Ordinance.

Mr. Lee for the landlord respondent argued that section 4 BB (1) was purposely designed to cover those special cases where the standard rent was too low and to permit the Rent Assessor with the advice of his Advisory Committee to increase it.

Prior to the coming into force of Ordinance 30 of 1948, the Rent Assessor had no power either to increase or reduce the

standard rent except that he could fix a maximum rent higher than the standard rent in accordance with section 6 (1) of the Ordinance. The Legislature no doubt was loathe to interfere with the free bargaining powers of individuals. It realised that prior to 1939 when conditions were normal and the housing situation not acute, that the rent agreed on between landlord and tenant represented an amount which would produce a satisfactory investment to the landlord and a payment within the income of the tenant. But as the prices of materials and labour rose and as houses began to be erected under abnormal conditions, the legislature was forced to concede that the first rental was no longer a figure upon which complete reliance could be placed. And so in 1948 an Ordinance was introduced to rectify a state of affairs which had become intolerable to tenants. Section 4 of that Ordinance, subsequently amended by Ordinance 24 of 1950 enacted section 4 B (1 A) by which the Rent Assessor was authorised to reduce, but not to increase, the standard rent of buildings first let after the 8th March, 1941, on an application made by either landlord or tenant. It was recognised therefore that tenants may have been compelled when renting a house erected after 1941 to pay a rental not because he regarded the rental as a reasonable one but because he wished a house in which to dwell. But it is apparent that it was also appreciated as being most unlikely that the landlord would err on the side of moderation, hence the Rent Assessor was not authorised in this section to increase the standard rent.

By the same Ordinance, however, section 4 BB (1) enacted that:

> "Where on the hearing of any application of a landlord under Subsection (1) of section four B of this Ordinance, it appears to the Rent Assessor that having regard to all the circumstances of the case the maximum rent should be fixed at an amount exceeding the rent then being paid by a tenant in respect of the premises, or, if the premises are not then being rented, the rent at which it was last let, or in any other case where he thinks it necessary so to do, he shall, after the completion of the evidence, but before arriving at any decision in respect of the standard or maximum rent of the premises, submit the notes of evidence taken by him to the Advisory Committee of that area in which the premises are situate for their consideration".

Since this section does not specifically state that the Rent Assessor may increase the standard rent, it is necessary to determine whether it does so by implication.

Section 4 B (1) of the Rent Restriction Ordinance 1941 as enacted by Section 5 (1) of Ordinance 13 of 1947 provides for a tenant or landlord applying to the Rent Assessor to have the standard rent ascertained and certified and the maximum rent assessed, fixed and certified. No question of maximum rent arises until he has ascertained and certified the standard rent. Once the standard rent has been ascertained, the Rent Assessor may then proceed in accordance with Section 6 (1) of the Ordinance to arrive at a maximum rent.

When a landlord makes an application under section 4 B (1) the tenant may be paying more than what in the opinion of the Rent Assessor ought to be the maximum rent or he may be paying less.

If the Rent Assessor concludes that he is paying less then the provisions of Section 4 BB (1) become applicable, but those provisions can never be invoked until he has decided what the standard rent is. When the section states that before arriving at any decision in respect of the standard or maximum rent of the premises he must submit his notes to the Advisory Committee, it means that if the Rent Assessor is of opinion that the Standard Rent is too high and he wishes to reduce it under section 4 B (1) (a) and to allow the permitted increases under section 6 (1) but the reduced standard rent and permitted increases result in a maximum rent higher than that being paid by the tenant, then he must first refer his notes to the Advisory Committee.

This interpretation of the section is the only logical one for it must be noted that section 4 B (1) (A) only permits the Rent Assessor to reduce the standard rent of a house let subsequent to 8th March, 1941. Under Section 4 BB (1), however, the Rent Assessor's jurisdiction includes houses let prior to the 8th March, 1941, and if Mr. Lee's submission were correct, the Rent Assessor could increase the standard rental of a house let prior to 8th March, 1941 and thereby render nugatory the whole scheme of the Ordinance. If the intention were to empower the Rent Assessor to increase the standard rent of a house whenever let upon the application of a landlord it would have been simple for the draftsman to say so in plain language. Just as section 4 B (1A) specifically states that the Rent Assessor may reduce but not increase, section 4 BB (1) could have stated that the Rent Assessor may increase but not reduce.

It has been repeatedly stated that the main object of this Ordinance is to give tenants fair rents and to prevent landlords increasing rents by more than a permitted amount above a basic figure known as the standard rent. If this basic figure were liable to be increased the Ordinance would lack that stability so essential for carrying into effect its primary object of protecting tenants. Nor can landlords suffer any hardship if the Rent Assessor is held not to have the power to increase standard rents. The average individual who desires to purchase a property as an investment and not to live in ought to take the elementary precaution of ascertaining what the standard rent is or should even insist that an assessment be made prior to concluding the contract of sale. Once purchasers are precluded from increasing the standard rent, a period would be put to speculative buying with the resulting inflationary tendencies of the property market. The Ordinance contains ample safeguards for landlords by authorising permitted increases to recompense them for the greater capital expenditure occasioned by prevailing conditions.

For the above reasons I hold that the Rent Assessor had no jurisdiction to ignore the standard rent and fix an arbitrary maximum rent. The certificate is cancelled and returned to him to

assess the maximum rent on the following basis:

(a) Standard rent $45.00;

(b) Permitted increases under Section 6 (1) (a), (b) or (c) of the Ordinance as may be decided on in accordance with the evidence or any further evidence which may be adduced;

(c) If the permitted increases will result in a maximum rent of over $52.38, then the notes of evidence must be referred to the Advisory Committee before final decision.

Appellant's costs fixed at $15.00.

Appeal allowed. Remitted to Rent Assessor.

Solicitor—*A. G. King* for appellant.

BASIT v. ANNAMANTHADOO

(In the Full Court, on Appeal from the Magistrate's Court for the Berbice Judicial District (Boland C.J. (Acting) Stoby J.) December 14, 1951; January 19, 1952).

House agent—commission—introduction of purchaser ready and willing to buy—refusal by vendor to enter into contract—commission payable.

The appellant and respondent entered into an agreement whereby the appellant agreed to pay a commission of 3 per cent of the purchase price of $2,100 if the respondent introduced a purchaser ready and willing to purchase at that figure. The respondent introduced such a purchaser but the appellant refused to enter into an enforceable contract.

In a claim by the respondent for his commission the Magistrate gave judgment for the amount claimed. On appeal.

Held: Although no enforceable contract was entered into it was the appellant who refused to enter into one while the respondent had introduced a person who was always able and willing to do so up to the time of such refusal by the appellant.

Dennis Read Ltd. v. Goody and anor.

(A.C.) Solicitors' Journal 29.4.50 applied.

Appeal dismissed.

J. T. Clarke for appellant.

Mungal Singh for respondent.

Judgment of the Court: This is an appeal against a decision of the learned Magistrate of the Berbice Judicial District who at the New Amsterdam Court gave judgment in favour of the respondent for the sum of $63.00 claimed to be commission earned under an agreement entered between them. At the close of the case for plaintiff (the respondent in this appeal) counsel for the defendant (the appellant herein) submitted that there was no case made out by the plaintiff and relying upon this submission called no evidence for the defence, whereupon the learned Magistrate gave judgment for the plaintiff as stated.

According to the evidence adduced by plaintiff, the plaintiff and defendant had entered into an oral agreement in June 1950 whereby the defendant promised to pay to the plaintiff 3 per cent of the purchase price of $2,100 for his home at New Amsterdam if plaintiff introduced to him a person ready and willing to purchase at that figure. Plaintiff had introduced to the defendant such an intending purchaser by the name of James Gobin, who made more than one appointment with the defendant for the drawing up of a formal contract of sale, but defendant failed to keep the appointment and told plaintiff finally that he was getting more money for the place. Mr. Clarke submitting that there was no case to answer relied on Luxor (Eastbourne) Ltd. v. Cooper (1941) A.C. 108 and Dennis Read Ltd. v. Goody and anor (A.C.) Solicitors' Journal April 29th, 1950, (1950) 2 K.B.: 277 (C.A.). In Luxor (Eastbourne) Ltd. v. Cooper, the contract which was an oral agreement contained, as found by the Court, a term that the commission would be paid *on the completion of the sale.* A sale to the person introduced by the Commission Agents was not proceeded with. Indeed no draft contract of sale was ever submitted.

There was a sale to another party. The substantive question in issue was whether there was to be implied in the contract for the payment of commission a term that the owner of the property would do nothing to prevent the satisfactory completion of the transaction so as to deprive the plaintiff of the agreed commission. "There was no necessity", said Lord Russell of Killowen in his speech before the House of Lords, "for the implication of any such term." It is to be noted that the contract between the parties as found by the Court was that the agent was to get the commission "*on the completion of the sale.*" "The agreement", said Lord Wright, "contained not merely the stipulation of a point of time at which, but the expression of a condition on which, the payment was to become due. The respondent had in pursuance of this undertaking introduced the prospective or potential purchaser. Substantially the consideration emanating from him had been executed. But the reciprocal consideration on the part of the appellant companies was in the future; their promise was only to pay *on completion of the sale* and thus the promise only took effect on the happening of that event." And Lord Russell towards the end of his speech said: "It is possible for an owner to bind himself to pay a commission *for the mere introduction of a person* who offers to purchase at the specified or minimum price; but such a construction of the contract would in my opinion require clear and unequivocal language." Adopting the above hint given them by Lord Russell, commission agents were afterwards careful in their agreements to make their commission payable in consideration of the *introduction of a purchaser ready and willing* to pay the price demanded by the owner; which was the term in the oral agreement between the parties in the instant case. No testimony in contradiction of this was adduced by the defence and the learned Magistrate, as he declared in his Reasons for Decision, found that the agreement was "that the plaintiff should find a person ready and willing to purchase the property for the sum of $2,100 and that he was to receive a commission of 3 per cent on his finding such a person."

The decision in Dennis Reed Ltd. v. Goody and anor cited by Counsel at the hearing before the Magistrate and in this Court is of interest as it lays down the conditions under, and the time at, which the agent is entitled to payment of his commission when in the agreement he is promised the commission upon his introducing to the owner a person ready and willing to purchase at the price demanded. There was such a term in the agreement in that case. The plaintiff commission agent had introduced a person ready, able and willing to purchase who signed an agreement prepared by the plaintiff to buy the house for a sum acceptable to the defendants, but subject to the vendors' agreeing to indemnify him against future road charges. But although during negotiations for the sale they had declared that there were no such charges, the defendants took time to consult their solicitor before themselves signing the agreement. During the delay which resulted, the person introduced withdrew his offer to purchase. It was held by the Court of Appeal (comprising Bucknell and Denning L.J.J. and Hodson J.) that as the person introduced had with-

drawn from the negotiations before any binding contract had been made, *and the defendants had never been in default,* the plaintiffs had not introduced a person *ready, able and willing to purchase.*

. . . .Bucknell L.J. said: "In my opinion if the vendor had subsequently refused to sell, while the purchaser remained willing and able to purchase, the commission would have been payable. The fatal defect in the plaintiff's claim in this case, in my opinion, is that it was the purchaser and not the vendor who withdrew from the negotiations."

In the instant case, James Gobin giving evidence that he had offered $2,100 for the property since 1949, but that was refused further testified: "In June this year (that is 1950) the Defendant told me he would give me the property for my figure. I said I would consider it. A few days later I went to Defendant's home at Sheet Anchor and we agreed for $2,100—and he would pay all expenses. He said he would see the agent to take off some of the commission as he had to stand the whole transport expenses. We arranged to meet the following morning at the Chambers of Mr. Mungal Singh. I went but he was not there. I went to look for him but I saw him in the Strand. He asked me to wait for him for us to go to the lawyer's office to fix up matters. I waited for an hour. He did not return and I went away. I met him another day and he said someone was offering more money. I told him to sell", and in re-examination he said: "I came twice to New Amsterdam to sign the agreement and to pay."

The Magistrate in his Reasons for Decision states: "I held that the agreement being to find a person ready, able and willing to purchase and not to find a purchaser, the Plaintiff earned his commission when he found and introduced James Gobin who possessed the required and necessary qualifications and I entered judgment accordingly."

While we agree with the judgment given in favour of the plaintiff, we should, however, remark that in our view, the learned Magistrate was wrong when he declared that the plaintiff had earned his commission when he found and introduced James Gobin who possessed the required and necessary qualification. As Bucknell L. J. said in Dennis Reed Ltd. v. Goody and anor: "The plaintiff's claim to commission is not established merely by showing that the person whom they introduced was able and willing to purchase the property at any one particular moment of time; they must prove that he was ready and willing to purchase up to the time when either an enforceable contract for the purchase of the house is made between the parties or alternatively, up to the time when the vendor refuses to enter such a contract on terms on which the purchaser is willing to purchase and the vendor was at one time willing to sell."

It is clear that although in this case no enforceable contract for the purchase was signed by Gobin and defendant, the alternative condition necessary for the payment of the commission as laid down by Bucknell L. J. was fulfilled: It was the defendant who,

though he was willing at one time to enter into the contract with Gobin, ultimately refused to do so while Gobin was always and, at the time of defendant's refusal, was still willing and able.

For the above reasons we hold that the plaintiff was entitled to judgment, and we accordingly dismiss the appeal with costs to the respondent.

Appeal dismissed with costs.

In the Supreme Court, on appeal from the Rent Assessor (Boland J.) March 17, 1952).

Rent Restriction—new premises—no evidence of first rental—evidence of cost of construction of premises available but not taken—reference back to assessor.

The short point in this appeal is that, where the landlord is unable to prove the first rental but can prove other facts which will assist in determining the standard rent, the assessor should give him the opportunity of leading the evidence, even if he has not indicated that he wishes to lead such evidence.

H. A. Fraser for appellant.

Respondent in person.

Boland, J.: In this case, the Assessor purported to find the maximum rent under powers given him by virtue of Section 4B 14 (c) of the Principal Ordinance as amended by Section 5 (1) of Ordinance 13 of 1947—that is to say, he fixed the standard rent with the maximum rent based thereon, which in his opinion was reasonable having regard to all the circumstances, because the landlord was "unable to prove facts required to be proved" for the purpose of enabling him to ascertain the standard rent and find the maximum rent. These premises admittedly were "new" premises as they were constructed subsequent to 8th March, 1941. Neither the landlord nor the appellant led any evidence as to the first rental—nor did the landlord give any evidence as to the cost of the construction of the new premises. The fact that he did not tender evidence of the cost of construction does not necessarily imply that he was unable to do so. It is admitted that the amount expended on the construction was a factor to be taken into consideration by the Assessor in fixing the standard rent. The landlord had mentioned that the construction of the premises entailing the setting up of the lower flat, part of which was held by the applicant tenant, had been carried out in 1946. There is no express statement in appellant's evidence and nothing from which it can be inferred that he

could not furnish evidence of the cost of construction. The landlord at the time might have been summoned by him to testify. The appellant should have been told by the Assessor that he was required to submit that evidence, and if he failed to do so, he would be deemed unable to lead the necessary evidence.

Mr. Fraser, counsel for appellant, said at the hearing of this appeal that the landlord can submit evidence of the costs of the construction of the premises. Accordingly, the case is remitted to the Magistrate for him to hear this evidence and then make the necessary assessment, having regard to such evidence.

No costs to appellant.

Case remitted to the Magistrate.

ALSTROM v. YHAP.

(In the Supreme Court, Civil jurisdiction, (Boland J) March 11, 19, 1952).

District Lands Partition and Re-allotment Ordinance Chapter 169*—Partition Officer—publication of awards—no appeal—transport advertised—opposition—grounds—application for amendment—Rules of Supreme Court* (*Deeds Registry*) 1921*—refused—objection to Court's jurisdiction—not ousted—easement—Roman Dutch Law.*

The defendant was appointed Partition Officer to re-allot and partition a certain portion of Plantation Christianburg and Wismar. The plaintiff who was the holder by transport of a certain lot at Christianburg was awarded his lot but with certain portions excluded in favour of the county authority of Christianburg and Wismar. The portions excluded were reserved for streets and drains.

The plaintiff did not appeal.

When the defendant advertised transport in favour of the country authority the plaintiff opposed on the ground that the defendant had no power to transport his property to the authority.

At the trial an amendment of the statement of claim was applied for so as to include allegations of non compliance with the District Lands Partition and Re-allotment Ordinance. It was not allowed.

Objection in limine was taken to the plaintiff's claim on the ground that the plaintiff not having appealed from the award of the Partition Officer the Court's jurisdiction was ousted. The objection was overruled.

The action proceeded.

Held: (a) The application for amendment was refused as being not permissible under rule 9 of the Rules of the Supreme Court (Deeds Registry) 1921.

(b) The Court's jurisdiction was not ousted.

(c) The Partition Officer is authorised by the Ordinance to make reservation out of lands for such purpose as would by statute place the reserved portions under the control of the county authority.

Under Roman Dutch Law easements are immovable property and the passing of transport is required for their validity.

Action dismissed.

Jai Narine Singh for plaintiff.

G. M. Farnum Solicitor General (acting) for defendant.

Boland J.: The defendant was specially appointed under the provision of the Land Partition Ordinance 1942 (No. 22 of 1942) to re-allot and partition a certain portion of Plantation Christianburg and Wismar situate on the left bank of the Demerara River. For the purpose of discharging the duties of his appointment, the defendant thereupon became, in accordance with the terms of the above Ordinance, an officer within the meaning of the District Lands Partition and Re-Allotment Ordinance, Chapter 169; and also the provisions of this latter enactment became applicable to the re-allotments and partitioning of these Christianburg and Wismar lands just as if a valid petition for their re-allotment or partitioning had been presented to the Governor-in-Council who had by order authorized the defendant to proceed to re-allot and partition the lands in accordance with the procedure prescribed in the latter Ordinance.

In the Statement of Claim the plaintiff claims to be at the date of defendant's appointment the holder by transport of lot 33, Section B, Christianburg, Demerara River, which was within the area to be re-allotted and partitioned by the defendant in pursuance of his appointment.

After having determined what re-allotments and partitioning were to be made, the defendant duly transmitted his report with an accompanying plan to the Local Government Board and upon getting the Board's approval he caused a list to be published setting out the numbers of the lots and the owners thereof in the new allotments in accordance with his decision as approved by the Board.

In the list, the plaintiff is given lot 33, but with certain portions thereof excluded. These excluded portions are shown on the plan as reserved for streets and drains and also one strip reserved otherwise. Under the names of owners in the published list the name "Country Authority of Christianburg and Wismar Country District" appears as the owners of the "reserved" portions. No legal proceedings by way of appeal or otherwise were brought in objection to the allotments as published.

In 1949, with the object of implementing the re-allotment and partitioning, the defendant, as partition officer, proceeded to take steps to pass to the Country Authority formal transport of the "reserved" portions. He inserted the necessary advertisements in the Official Gazette. Against the passing of this transport, the plaintiff entered opposition advancing the ground that the defendant had no right or claim to pass to the Country Authority, transport of any portion of the lands owned by him. It is to enforce his opposition that the plaintiff obtained the issue of the writ in this action.

It is to be noted that the plaintiff in his grounds of opposition as filed restricted himself to the ground that the defendant had no power to pass to the Country Authority transport of any portion of his lands, and in the Statement of Claim as delivered, there was nothing further alleged in support of the plaintiff's case. But before opening his case, plaintiff's counsel made an application to amend the Statement of Claim so as to include allegations of

non-compliance with certain requirements of the Ordinance on the part of the defendant. This application for amendment was refused by the Court as being not permissible under rule 9 of the Rules of the Supreme Court (Deeds Registry) 1921 which prescribes that any application to amend a Statement of Claim in an opposition action so as to include allegations not appearing in the grounds of opposition as filed must be made by summons and before delivery of the Statement of Claim.

In limine, the Acting Solicitor General took an objection against the jurisdiction of the Court of which the Statement of Defence had given notice. He cited section 16 of Chapter 169 which makes provision for appeal to the Local Government Board and for the resort to the Magistrate's Court or the Supreme Court within two months after the decision of the Partition Officer or within two months after the determination of an appeal by the Board after which the decision of the Officer or of the Board, as the case may be, shall be final.

I ruled against this submission, holding that the plaintiff on the face of the Statement of Claim did not necessarily appear to be challenging the decision of the Partition Officer who admittedly under section 7 (g) had power to make such reservations within the lands as he considers necessary for the purpose of laying out roads, paths, or for the better drainage or for any purpose connected with the improvement thereof. What the Writ and Statement of Claim intended to challenge as explained by Counsel in his opening was the passing of transport by the Partition Officer to a party who was not one of the co-owners, nor a person claiming any interest in the lands. Clearly that was not a matter which the Magistrate would have jurisdiction to determine on appeal, and as no transport had been advertised within two months of the decision of the Partition Officer, there could be no opposition to transport within the two months.

In my view plaintiff cannot be deprived of the remedy of opposition to this transport on advertisement by the Partition Officer because he did not within two months of the Report apply for an injunction. He was not bound to rush to Court for an injunction on an implied threat to pass this transport nor even if the intention to pass transport had actually been expressed. I am satisfied that the jurisdiction of this Court to determine whether or not plaintiff's opposition to this transport is legal, just and well founded, is not ousted.

The proposed transport is intended to create easements or rights of servitude over the lands for the use and benefit of all owners and the community generally. That an easement is deemed immovable property in this Colony has been long established by judicial decision. Easements were Regarded as immovable property under Roman-Dutch Law (*vide Steele v. Thompson* (1860) 8 *W.R.* 374 *P.C.*) and they still continue to be so even since the introduction here in 1917 of the Common Law of England by the Civil Law of British Guiana Ordinance, Chapter 7, as that enactment having expressly excluded the English Common Law of Real Property left the Roman-Dutch Law still applicable to immovables. In Roman-Dutch Law,

the transfer of immovable property required for its validity the passing of transport (*Steele v. Thompson* (*supra*). The Board or the Partition Officer is empowered to give title so as to give effect to re-allotments or partitions approved by the Board (Section 17 (1) of Chapter 169) and the passing of transport would seem to be the only way of assuring a proper legal title to a person to whom it is intended to give a right of easement over lands.

By Section 89 of the Local Government Board Ordinance 1945 (No. 14 of 1945), all the roads, streets and bridges of every village or country district, not being roads, streets and bridges under the Road Ordinance, shall be under the control and management of the local authority thereof. By Section 86, all property, whether movable or immovable, belonging to a village or country district shall be vested in the local authority thereof.

Accordingly, as the Partition Officer is authorized by the Ordinance to make reservations out of the lands for such purpose as would by statute place the reserved portions under the control of the Country Authority, the way to give proper title to this easement over the lands belonging to the several part owners, including the plaintiff, is to pass transport to the Country Authority in which would be embodied the terms of the easement and the purpose for which it is vested in the Country Authority. It will be the duty of the Registrar of Deeds in approving of the transport to satisfy himself that the transport to the Country Authority gives nothing more than the easements reserved by the Partition Officer. This was the nature of the transport which was advertised following upon which the plaintiff filed his opposition.

The action is therefore dismissed, the Court holding that plaintiff's opposition is neither good, legal nor well founded. There will be costs to defendant.

Judgment for the defendant with costs.

Solicitor—*V. C. Dias,* Crown Solicitor for the defendant.

DE FREITAS v. DE FREITAS AND SANTOS

(In the Supreme Court, Divorce and Matrimonial Jurisdiction (Boland J.) December 17, 18, 19, 1951; January 3, 4; March 31, 1952).

Divorce—adultery—respondent alleging desertion—reasonable suspicion of adultery—just cause.

The petitioner sought a dissolution of his marriage with his wife on the ground of her adultery with Santos. The wife in her answer pleaded desertion by the petitioner and denied the adultery. The trial judge found that she had committed adultery.

The case is reported in respect of the wife's claim to a decree on the ground of desertion having regard to the finding of adultery against her.

Held: Inter alia that the adultery of the wife would disqualify her from obtaining a decree on the ground of desertion. Her own adultery would justify her husband not to take her back.

Glenister v. Glenister (1945) 1 A.E.R. and

Everitt v. Everitt (1949) 1 A.E.R. considered.

Sugrim Singh for petitioner

John Carter for the respondent.

Co-respondent in person.

Boland J.: As to respondent's claim that she is deserted by the petitioner because he refused to receive her in his home and still retains the same attitude towards her, there can be no doubt that her own adultery would disqualified her from obtaining a decree on the ground of desertion. In other words, her adultery would justify the husband not to take her back. Even a reasonable suspicion of adultery falling short of positive proof of actual adultery would it seems be sufficient to justify one spouse to reject the offer to resume cohabitation made by the spouse reasonably suspected of the misconduct of adultery. It was in keeping with this principle that it was held in *Everitt v. Everitt* (1949) 1 *All E.R.* 908, that

> "Where a wife who had been deserted refused to resume cohabitation in "the amply justified belief that her husband had committed adultery, and "later petitioned for divorce on the ground of the husband's desertion, "the fact that the judge hearing the petition was not satisfied that the "adultery was proved did not bring the period of desertion pleaded in the "petition retro-actively to an end."

And in his judgment in *Glenister v. Glenister* (1945) 1 *All E.R.* 513, Lord Merriman giving as an instance a hypothetical case said at p. 518:

> "If the wife has so conducted herself as to lead any reasonable person to "believe, until she gives some explanation, that she has committed adul- "tery, the husband aware of the facts and honestly drawing that infer- "ence and leaving his wife ought not to be held to have left her without "reasonable cause."

I am satisfied that petitioner was in the circumstances amply justified in refusing to receive his wife back into his home.

Accordingly, the decree nisi on the ground of respondent's

adultery is made in petitioner's favour and the prayer of respondent for a decree on the ground of desertion is rejected.

I now proceed to assess the damages payable by the co-respondent. It is clear that the damages to be awarded is compensatory, not punitive. *Butterworth v. Butterworth and Englefield* (1920) P. 126. The compensation to be awarded to the husband is for the loss of consortium and the pecuniary loss entailed by not having a wife to look after his menage. Earlier I have described the disharmony between the spouses resulting from their difference of view with regard to money expenditure. This would never at any time have been a happy home, and it is doubtful whether with this fundamental difference of outlook the union would have endured for many years. Still it was this adultery that snapped the matrimonial tie completely and irrevocably. In all the circumstances I assess as reasonable compensation to petitioner the sum of $600. I make the order nisi in favour of petitioner on the ground of adultery and I award him $600 damages as against the co-respondent. Co-respondent will also pay petitioner's costs.

Decree nisi in favour of petitioner.

Solicitors: *A. Vanier* for petitioner
H. A. Bruton for respondent.

MEREDITH AND LAWRENCE v. THE QUEEN

(In the Court of Criminal Appeal, on appeal from the Supreme Court (Bell C.J., Hughes and Stoby JJ.) March 26; April 22, 1952).

Criminal Law—receiving—possession—circumstances of suspicion.

The appellant Meredith was found guilty of receiving stolen property and sentenced to 18 months imprisonment with hard labour.

Stolen goods were found in the appellant's shop on the customers' side of the counter to which the public had access. On the search warrant the appellant told the police that he did not have possession of any of the articles mentioned in the warrant which included a description of the stolen articles. He subsequently told the police that a man had left them there, but he did not know his name. A moment later he pointed out a man outside of the shop as being one of two men who had brought the articles to him. After his arrest he stated that this man was well known to him.

At the close of the case for the prosecution counsel for the appellant submitted that there was no case to go to the jury as there was no evidence that appellant was in possession of the stolen property, but the submission was overruled. In his summing up the trial judge told the jury that he would not have left the case to them had there not been evidence —

(a) that the appellant told the police that he did not have possession of any of the articles mentioned in the search warrant although shortly before the arrival of the police two men had offered to sell him similar goods; and

(b) that the appellant told the police he did not know the names of the persons who offered to sell him the goods when in fact he knew one of them for a number of years.

Held: These were no more than suspicious circumstances and as there was no other evidence there was no case fit to be left to the jury and the judge should have so ruled.

Conviction quashed.

Appeal allowed.

W. R. Adams for appellant

G. M. Farnum, Solicitor General (acting) for respondent.

Judgment of the Court: The appellant Frederick Meredith and two others were indicted for feloniously receiving certain articles and were all found guilty and each one sentenced to 18 months imprisonment with hard labour.

The facts can be shortly stated. On the night of the 21st November, 1951, the shop of one James King was broken into and a quantity of articles stolen. The next day a detective saw two men leaving the appellant's shop and called to them to stop. One of the men stopped but the other hurried away. The detective obtained a search warrant and in company with another policeman went to the appellant's shop. The search warrant authorised the police to search for the type of articles stolen from King's shop and referred to hams and chocolates among other things. The police read the warrant to the appellant and asked him whether he had any of the articles mentioned in the warrant. The appellant said he did not have any such articles. Thereupon his shop was searched and on the customers' side, in a corner, on a bench, a carton containing chocolate slabs, raisins and biscuits was found. Under the same bench a box containing a ham was discovered. On being shown the contents of the carton and box and informed that articles similar to those were reported as stolen from a shop the previous night the appellant said that a man had left them there but he did not know his name. This statement was untrue because a moment later he went to the entrance and pointed to a man standing outside and said that he and another man had brought the articles to his shop and, after his arrest, the appellant intimated that the man was well know to him. The articles found in the shop were subsequently identified by King as some of the stolen property.

At the close of the case for the prosecution counsel for the appellant submitted that there was no case to go to the jury and asked that his client be discharged at that stage. The submission was overruled.

The general rule of law is that where the judge of the court of trial rules against a submission at the close of the case for the prosecution that there is no case to go to the jury, the court of Criminal Appeal will not quash the conviction if the evidence for the defence supplies that which was lacking—Halsbury's Laws 22nd Ed. Vol. 9 p. 276.

When, however, the judge of the court of trial left this case to the jury the appellant called no witnesses on his behalf and, in an unsworn statement from the dock, said that he relied on the statement which he had made to the police after his arrest and which had already been tendered in evidence as part of the case

for the prosecution. Since no evidence was offered by the defence which supplemented the evidence for the prosecution, this Court must determine whether the learned judge's ruling was correct.

When stolen property is found on anyone's premises it is a question of fact, depending on the circumstances of each case, whether the stolen property was there with his knowledge and consent. In this case however the goods were found not in a dwelling house but in a shop to which the public had access and on the customers' side of the counter. In addition the prosecution adduced evidence to show that two men, who were charged along with the accused, brought the goods to the shop, offered to sell them to the appellant but he refused to purchase them. The learned Judge in his summing up said that he would not have left the case to the jury had there not been evidence—

(a) that the appellant told the police that he did not have possession of any of the articles mentioned in the search warrant although shortly before the arrival of the police two men had offered to sell him similar goods; and

(b) that the appellant told the police he did not know the names of the persons who offered to sell him the goods when in fact he knew one of them for a number of years.

We agree with the learned judge that in the circumstances of this case and having regard to the evidence of the appellant's son the mere finding of the goods in the shop was not enough to import possession in the appellant. The question arises whether the suspicious circumstances referred to above was evidence from which possession may reasonably be inferred.

In Rex. v. Freedman and Freedman 22 Cr. App. R. p. 133 stolen property was found in the back room of a house. Two men were seen to go to that house. On arrival of the police they ran from the vicinity of the door of this back room and concealed themselves downstairs. When challenged they gave no explanation of their presence in the house. Their convictions were quashed on the ground that it had not been established that they had assumed control or taken possession of the stolen property although it may have been their intention to do so.

In Howes v. Edwards 1949 113 J.P. p. 303

"Police officers, who were watching appellant's house, saw a railway van "drive up to it and railway servants take a parcel, which contained stolen "goods, inside. The police entered immediately and found the parcel open. "One of the police officers said to appellant: "Have you signed for this "parcel?" and appellant replied: "No, I am examining the contents before I "sign for it". Justices convicted appellant of receiving the goods knowing "them to have been stolen:-*Held:* the case was not one of joint possession "by the thieves "and appellant, but one where the thieves were in posses- "sion of the goods and were offering to transfer it to appellant, who had "not made up his mind, at the time when the police spoke to him whether "to take possession or not; the mere fact that appellant must have put his "hand on the parcel did not bring the parcel into his possession; and, there- "fore, there being no evidence of control by appellant, the conviction must "be quashed."

The appellant might indeed have intended to purchase the goods but as the cases cited above show mere intention to purchase is insufficient to fix the appellant with actual or constructive possession. His professing ignorance of the name of one of the proposed sellers may have been prompted by the fact that, according to his own statement to the Police, he had had "too much worries with the Police Department" and desired to avoid further contact with the officers of the law. It was suspicious conduct but little else. As Avory J. said at p. 137 in Rex v. Smith 1931. 23 Cr. App. Rep. p. 135 in quashing a conviction for shopbreaking—

> "In this case we have come to the conclusion that although there were "grounds for suspicion that he was party to receiving the stolen property "knowing it to be stolen there is no sufficient evidence to support the "verdict."

There remains for consideration the appellant's statement to the police that he did not have in the shop any of the goods named in the warrant. That statement although untrue in the sense that he knew that the goods were on the premises might have been influenced by the fact that he had decided not to purchase the goods as sworn to by his son, and was not prepared to make any statement which could be interpreted as showing that he had assumed control of the goods. A helpful citizen might have volunteered some information useful to the police: While this lack of co-operation may excite suspicion it cannot amount to evidence in proof of possession.

While we are of opinion that the learned judge's summing up to the jury was a comprehensive and careful direction on the law appertaining to possession we cannot agree that the failure of the appellant to disclose the name of one of the persons who had brought the goods to his shop and his denial that the goods were in the shop (which we regard as no more than suspicious circumstances) were in themselves sufficient ground for allowing the case to go to the jury and accordingly the conviction is quashed and the sentence set aside.

Appeal allowed.

MANGROO v. REX

(In the Court of Criminal Appeal, on appeal from the Supreme Court (Bell C.J., Hughes and Stoby JJ.) March 26; April 22, 1952).

Criminal Law—murder—self defence—summing up—consideration of section 7 (2) *and the proviso to section* 6 (1) *of the Criminal Appeal Ordinance* 1950.

The appellant was on the 5th February, 1952, convicted of the murder of his wife and sentenced to death.

The defence mainly relied on at the trial was one of self defence. The facts on which this defence was founded were contained in a statement made by the accused to the police and in an unsworn statement from the dock. The statement is as follows:—

Lilawatie and I went to cut wood—went to cut small pieces of wood with the cutlass. I was to cut big pieces of wood with the axe—we were cutting the wood—me and she get quarrel. She said that me had no right to inform the police about her brother. She tell me that a "antyman"—informer—is no good. Me tell she to shut she mouth—she tell me what the hell you tell me to shut me mouth, because I got another man. I can't stand this hard work any more. I turned to she and say "You are a worthless woman." She pelt the cutlass as me but it not get me. That time I continue cutting the wood. She took up the cutlass again—rush at me with the cutlass, she said that she was she own big woman and me can do what the hell me like—"today me kill you or you kill me." I was standing across a log cutting wood. Then she rushed on to me. I do my hand like this (accused demonstrates) and she got cut on the neck—she fall down—tumbling and dead. I was sorry—got frightened. I pull the body to the Creek. I tried to get the body to sink—the body would not sink. I put a couple of cuts on the body to let it sink. I try to get the body to sink—her clothes come off—I sorry—I loved my wife. I did not intend to kill her. I am innocent. I am finished.

The trial judge in summing up to the jury told them in effect that unless it was established that the appellant had retreated before inflicting the fatal injury he could not avail himself of the defence of self defence.

Held If a person is assaulted in such a manner as to put him in immediate and obvious danger of instant death or grievous bodily harm, he may defend himself on the spot and may kill or wound the person by whom he is assaulted. Also there was no justification for the application of section 7 (2) and the proviso to section 6 (1) of the Criminal Appeal Ordinance 1950.

Conviction quashed.

L. F. S. Burnham for appellant.

G. M. Farnum acting Solicitor General for respondent.

Judgment of the Court: The appellant was on the 5th of February, 1952, convicted of the murder of his wife and sentence was duly passed upon him.

The facts which gave rise to this charge are that at about 7 o'clock on the morning of the 21st September, 1951, the appellant, aged 19 years, and his wife, aged 16 years, to whom he had been married for three weeks, were seen by the appellant's cousin going up Hauraruni Creek in a boat: the appellant then said they were going to cut wood; in the boat were an axe and a cutlass. About three hours later the appellant came to his cousin's house and told her that he had killed his wife and on her saying

that she could not believe it the appellant offered to take her to the spot and, accompanied by a neighbour, they went about one and a half miles up the Creek where the decapitated body of the appellant's wife was found partly under water. After tying the body at the spot at which it had been found (so as to prevent it floating down the Creek) these three persons went to the stelling or dock at Atkinson Field taking with them an axe and a cutlass which the appellant had brought from his home when a stop was made there for the appellant to change his clothes.

Corporal of Police Duncan, who was at Atkinson Field when the appellant and his two companions got there, said that on arrival the appellant approached him saying "Sah, this morning me and my wife Lilawatie have quarrel when we been aback to cut wood. She threatened to cut me with the cutlass and me chop she head with my axe and throw she in the Creek." The appellant was then taken to the Police Station where he made a statement, the time being then 1.30 p.m.

The injuries to the deceased, as described by the Doctor, consisted of three wounds. Two of these, in the shape of the letter 'V' were at the root of the neck: those wounds, in the words of the Doctor, "took the head off in one piece, together with a certain amount of the thorax" and could have been inflicted with the axe, exhibited in Court, used with the degree of force employed in chopping a log. The other wound was a deep circular incised one starting over the left kidney and going around the body leaving the backbone intact: it entered the peritoneal cavity and exposed the bowels.

What has been so far stated herein represents the main features of the evidence for the Crown and it may fairly be said that at the trial there was no real dispute regarding that evidence.

As regards the defence it is necessary, for the purposes of this appeal, to consider only the unsworn statement from the dock made by the appellant for the remainder of the evidence for the defence, which did not relate to the facts attending the homicide, must be regarded, at best, as a most unconvincing attempt to show insanity on the part of the appellant.

The two questions of law on which this appeal is brought are:

"1. Whether the learned trial judge did not err in his direction on the law applicable to the defence of self-defence when he directed that to establish the said defence in the circumstances of the instant case it was necessary for the accused to prove that he had retreated.

2. Whether the learned trial judge did not err in his direction on the law applicable to the defence of provocation in the circumstances of the instant case."

It is necessary in the first place, to examine the summing-up of the learned trial judge in order to determine whether there has been, as alleged by the appellant, a misdirection regarding the law relating to self-defence.

Is it the case that the jury were in fact directed that unless it was established that the appellant had retreated before inflicting the fatal injury he could not avail himself of the defence of self

defence In this connection attention was directed to the following passages in the summing up—

> " . . . . . you must take your directions on the law from me—what are the limits the law recognises as self-defence. A person could use a lethal weapon of a character that is likely to bring about death only as a last resort. He ought to be able to do nothing else. He ought to retreat first. You have no mention of that. He has emerged from this encounter with the woman, alleged by him, without one single mark on his body. Nobody has given evidence at all that he received any wounds or any injury whatsoever. Yet, a person is not bound, in acting in self-defence, to await bodily injury on himself. Before bodily injury is inflicted on him, he ought to get away first and the burden is upon him".
>
> "The swinging of an instrument like an axe on the head of the woman would not be justified in law. He ought not to. He should get away. He does not go away. He does not say he could do nothing else. I don't see how, in law, what he has put forward could amount to justification of self-defence."

It will be seen that in the above passages there occur the expressions "He ought to retreat first:"; " . . . . . he ought to get away first and the burden is upon his"; "He should get away. He does not go away." It does not follow that the use of expressions such as these necessarily amount to a misdirection for, when considered in their context and in the light of the rest of the summing-up on this aspect of the law, it may be that they lose that positive character which they undoubtedly have when regarded by themselves. Counsel for the Crown has submitted that the summing-up, when viewed as a whole, is not defective and has referred to the sentences (which occur in one of the passages quoted above) "A person could use a lethal weapon of a character that is likely to bring about death only as a last resort. He ought to be able to do nothing else."

The law is, clearly, that if a person is assaulted in such a manner as to put him in immediate and obvious danger of instant death or grievous bodily harm, he may defend himself *on the spot*, and may kill or wound the person by whom he is assaulted; or, put differently, the law does not require a person to retreat where the fierceness of the attack does not permit him to do so.

The question we must now ask ourselves is whether the learned trial judge in his summing-up correctly directed the jury as to the law relating to self-defence. There is, we consider, little room for doubt that the jury was directed, in effect, that the defence of self-defence is not made out unless it has been established that the appellant retreated before delivering the fatal blow. This constitutes a misdirection and it is therefore now necessary to consider—

(a) whether, under section 7 (2) of the Criminal Appeal Ordinance, 1950, this Court may, instead of allowing or dismissing this appeal substitute for the verdict found by the jury a verdict of guilty of manslaughter; or

(b) whether to apply the proviso to section 6 (1) of the same Ordinance.

As regards (a) the first matter for consideration is whether it appears to this Court that the jury must have been satisfied of facts which proved the appellant guilty of manslaughter. The fact that the appellant was found guilty of the offence of murder does not of necessity mean that the jury rejected the account of the occurrence given by him in his statements to the Police and to the Court: in arriving at that finding the jury may have reasoned thus: "We believe what the appellant says that he was attacked with a cutlass by the deceased and thereupon he killed her with his axe but as he did not retreat, which he must do, according to the law as given to us by the trial judge, we find that self-defence has not been made out and therefore we convict him of murder." In these circumstances this Court cannot consider the matter of the substitution of a verdict of guilty of manslaughter on the basis that the facts found by the jury did not include those stated by the appellant. An examination of the evidence for the Crown and of the statements of the appellant does not lead us to the conclusion that the jury must have found that the appellant, when attacked with a cutlass by the deceased (for, as has been stated, the jury may have believed that he was so attacked) could have retreated but did not do so. The appellant has stated that the deceased said "Today me kill you or you kill me"; that she rushed at him with a cutlass and that he then inflicted the wounds on her. In our view it cannot fairly be said that, on the appellant's account of what took place, it is manifest that the jury must have found that he could have retreated and accordingly we find ourselves unable to invoke the provisions of section 7 (2) of the Ordinance.

As regards applying the proviso to section 6 (1) of the Ordinance this Court must consider whether it is satisfied that a reasonable jury, properly directed, would without doubt have returned a verdict of guilty of murder: We refer to R. v. Haddy, 1944, L.J. Rep. Vol. 113, p. 137 and to Stirland v. Director of Public Prosecutions, L.R. App. Cases, 1944, p. 315. Bearing in mind that it cannot be said with certainty that the jury rejected the statements of the appellant, it appears to us, for the reasons given when dealing with the question of the substitution of a verdict of guilty of manslaughter, that a reasonable jury, properly directed, might have returned a verdict other than one of guilty of murder and therefore this is not a case in which the relevant proviso applies.

The fact that neither section 7 (2) nor the proviso to section 6 (1) of the Ordinance applies renders it unnecessary to consider the ground of appeal in regard to the law applicable to the defence of provocation.

This appeal is allowed: the conviction is quashed and the sentence set aside.

BOBB-SEMPLE v. LANFERMAN AND ANOR.

In re petition by Bobb-Semple for a declaration of title by virtue of the provisions of the Civil Law Ordinance Chapter 7.

BOBB-SEMPLE v. LANFERMAN

and another.

(In the Supreme Court, civil jurisdiction (Boland then C.J. (ag.)) September 25, 26; December 4, 6, 12, 13, 1951; April 26, 1952).

Declaration of title—persons entitled to oppose.

The petitioner applied for a declaration by the Court that he was entitled by prescription to the ownership of certain land. His petition was opposed by persons who were not claiming the land but claimed to have a protective title as they were in possession for more than twelve years.

The case is reported for the observations of the trial judge with respect to persons entitled to oppose. There had been no previous judicial pronouncement on this point and although an appeal was allowed on another ground this part of the judgment has not been dissented from.

Petition granted.

J. Carter for petitioner.

R. H. Luckhoo for opposers

Boland then C.J. (Ag.): This is a petition presented to the Court by virtue of Section 4 (1) of the Civil Law of British Guiana Ordinance, Chapter 7, wherein petitioner applies for a declaration by the Court that he is entitled by prescription to the ownership of the north half of Plantation St. Lawrence, which is situate on the right bank of the Essequebo River. In the petition it is alleged that petitioner has been in the sole open and continuous possession of the land *nec vi, nec clam, nec precario* since the year 1901—a period which is longer than the term of 30 years required for a possessory title by Section 4 (1) of the Ordinance. Supporting petitioner's claim that he has been in possession and has openly exercised rights of ownership over the land continuously for the period alleged, six affidavits sworn to by persons are filed in these proceedings. Of these, two were filed with leave after the hearing had begun. In each affidavit it is deposed that petitioner or his agent was seen by the deponent to be in possession of this piece of land at one time or another during the prescriptive period. In compliance with the requirements of the Rules of the Supreme Court (Declaration of Title) 1923, the petitioner after due publication of notice of the petition served a copy of the petition and of affidavits then filed in support thereof on each owner and occupier of the adjacent lands. Amongst those so served were John Lanferman and the two opposers herein Samuel Lanferman arid Henry Lanferman who were served as the three persons' jointly in occupation of the adjacent south half of Plantation St. Lawrence.

Not infrequently a person petitions the Court for a declaration of a possessory title because he finds it easier or less expensive to established a possessory title by prescription than to prove his legal title to the land. In this petition petitioner though alleging

his own possession for the prescriptive period endeavours to give some particulars of his legal title. But it should be obvious that the validity of his legal title is of no importance in this petition save perhaps that it might furnish support to the evidence submitted that petitioner was in possession as of right seeing that he was under the bona fide belief that he was in possession under a good and valid legal title.

On the other hand I take the view that to entitle a person to appear and oppose the petition that person must be qualified to oppose by reason of his claim either to a legal title, or to a possessory title in the whole or a portion of the land. If the opposer is seeking to set up his own possession for the full prescriptive period adverse to that of the petitioner, he should file a cross petition for a declaration of a possessory title in his own favour. To allow any person who has no claim of title, legal or possessory, to appear with the right to cross-examine the petitioner and other deponents on their affidavits would be extending the right of opposition not only to those who on their own admission never had any interest whatsoever in the land but also to those whose only connection with the land might be that of the criminal trespasser. The adjacent occupiers are by the notice served on them under the rules impliedly invited to appear more particularly for the purpose of protecting their adjoining lands from a declaration of title in favour of the petitioner which might include encroachments on their own lands. But I feel sure that an adjacent occupier cannot avail himself of the invitation to appear so as to be enabled to set up in opposition to the petitioner's claim of continuous possession that without any shadow of right he himself was during the period a trespasser on the land but had not remained in possession continuously for the prescriptive period so as to found a claim for a prescriptive title in himself. At the least an opposer should show that he is in possession and has been for the period of twelve years which would suffice to protect him from being dispossessed by action by virtue of the Limitation Ordinance, Chapter 184.

It is the claim of the opposers that they possess a protective title to the land based on this last mentioned ground which alone gives them the necessary qualification to intervene as opposers. That is to say that they admit that they themselves have no legal claim whatsoever to the land. They make reference to an old dispute concerning the ownership of the northern half of St. Lawrence which at one time subsisted between petitioner and their father William Lanferman, deceased. It is unnecessary for the Court in this petition to determine whether or not there was a settlement of that dispute in proceedings before this Court or otherwise whereby petitioner as he contends was recognised as the lawful owner of the northern half of St. Lawrence; because these two opposers admitting that they are both illegitimate can advance no claim as heirs at law of their father, who it may be stated died intestate. It should be mentioned that the correctness of the delimitation of St. Lawrence into a northern half and southern half as shown on the plan annexed to the petition is not

in dispute. Still though without the right to oppose except for the purpose of protecting encroachments on the southern half in their occupation, the evidence of interruptions of petitioner's occupation by these opposers although not shown to be continuous for twelve years cannot be absolutely ignored by the Court, whose duty it is to be satisfied that petitioner has in fact been in uninterrupted possession for the prescriptive period, before it can decree a declaration of a possessory title in petitioner's favour seeing that such a declaration if made by the Court would be a judgment *in rem* available against the whole world. It is in keeping with this principle that rule 6 (4) of the Rules of the Supreme Court (Declaration of Title) 1923 gives the Court hearing the petition power to order, on its own motion, the attendance at the hearing for cross-examination of any deponent upon whose affidavit an opposer or the petitioner relies. The word "cross-examination" in this connection must be understood to include examination by the Court itself. It would seem that although publication of notice of the petition in the Official Gazette and in the local press is sufficient to cause the judgment declaring a possessory title to be binding on all, whether appearing at the hearing or not, the Court still owes a duty to be satisfied that the conditions for a possessory title have been fulfilled.

His Lordship then proceeded to review the evidence, and concluded by finding that the petitioner was in continuous possession of the funds for the prescriptive period and made a declaration in his favour.

Petition granted.

Solicitors— *J. Gonsalves* for petitioner.
S. M. A. Nasir for opposers

COOMBS v. STAFFORD.

(In the Supreme Court, Civil Jurisdiction (Bell C.J.) April 1, 3, 4, 7, 9, 16, 17, 22, 23, 24, 25; May 12, 1952).

Fraud—Undue influence—Confidential relationship—presumption—burden of proof—Independent advice—pleading—particulars.

The plaintiff, a person of advanced age, and the aunt of the defendant, owned immovable and movable property valued at about $80,000:—In the year 1943 the defendant went to live with her aunt and assisted in the management of a guest house which was carried on by the plaintiff. In 1949 the plaintiff without consideration transported all her immovable property to the defendant and gave her a quantity of valuable securities, Shortly after a row ensued between the parties and the aunt drove her niece from the house. The aunt, some months after, instituted this action against the defendant claiming a declaration that the gifts were null and void as being obtained by actual fraud or alternatively undue influence.

The defendant denied every averment in the statement of claim and objected at the trial that the allegation of actual fraud should be struck out as sufficiently detailed and precise information as to what act or acts of the defendant was or were relied upon by the plaintiff as constituting actual fraud was not pleaded.

Held: There were not sufficient facts alleged to constitute actual fraud and that part of the claim must be struck out.

The action proceeded on the footing of undue influence.

It was submitted for the plaintiff that a confidential relationship existed between the plaintiff and defendant and the onus of proof was on the defendant to rebut the presumption of undue influence.

Held: On the facts accepted by the court no confidential relationship existed but assuming that one did, then the defendant had, discharged the onus and established that the gifts were not tainted with constructive fraud.

Elements necessary to be proved to establish undue influence explained.

Judgment for the defendant.

L. E. Wharton Q.C. (of the Trinidad Bar) A. M. Edun with him for the plaintiff.

H. C. Humphrys Q.C. for the defendant.

Bell C. J.: This is a claim by Miss Sarah Matilda Coombs, aged about 90 years, against her niece, Sarah Frances van Battenburg Stafford, aged 45 years. Mrs. Stafford is a married woman being the wife of Sydney Lyons van Battenburg Stafford one of Her Majesty's Counsel in the Colony of British Guiana, and practising his profession herein.

The plaintiff, invoking the Equity jurisdiction of the Supreme Court by alleging undue influence and in the alternative fraud by the defendant, claims, to cite the Statement of Claim,

"1. An Order that purported gifts of the below described properties and of transport No. 5 dated the 18th day of August, 1949, passed by the plaintiff in favour of the defendant on the 8th August, 1949, for the following properties, namely:

> "*Firstly*: Lot number 73 (seventy-three) situate in Cummingsburg, City of Georgetown, in the County of Demerara, in the Colony of British Guiana with all the buildings and erections thereon", and
>
> "*Secondly:* Lots numbers 127 (one hundred and twenty-seven) and 128 (one hundred and twenty-eight) in that part of Georgetown called Bourda as laid down and defined on the plan of the Vlissengen Districts, situate on the lands of the Vlissengen Estates made by the Sworn Land Surveyor Luke M. Hill, dated the 17th June, 1879, and deposited in the Registrar's Office of the Counties of Demerara and Essequebo on the 1st of November, 1879, and deposited in the Registrar's Office aforesaid in pursuance of the provisions of Section 64 of Ordinance No. 2 of the year 1876, and all the buildings and erections thereon" . . . . . .

be declared null and void and|or an Order setting aside the said gifts and the said conveyance by way of transport.

"2. An Order compelling the defendant to transport to the plaintiff forthwith, the said properties and that on failure of the defendant to do so within four weeks of such order, the Registrar of Deeds be empowered and ordered to pass the said transport to the plaintiff.

"3. An Order that the transfer by the plaintiff to the defendant of the following shares and securities:

I. Hand-in-Hand Preferrent Script No. 13 for $2,300.00.

II. British Guiana Government Bonds $3,000.00 at 3½ per cent.

III. Road Reconstruction Loan $2,000.00 at 5 per cent.

IV. British War Loan £500 at 3½ per cent, be set aside with all proper consequential relief.

"4. An Order compelling the defendant to deliver and transfer back to the plaintiff the said shares and securities.

"5. An Order that the promissory note for the sum of $5,000.00 dated 1st October, 1947, signed by the plaintiff in favour of the defendant be set aside with all proper consequential relief.

"6. An Injunction restraining the defendant from dealing with the aforesaid properties or from exercising any acts of ownership over the same.

"7. Such further or other relief as may be just".

It is clear from the evidence and|or admissions that Lot No. 73 Cummingsburg, Georgetown, is the property referred to during this case as "Trent House" and that Lots Nos. 127 and 128, Bourda, Georgetown, is the property referred to as "Avoca House".

The Plaintiff asserted in the Statement of Claim that the total value of the property obtained by the alleged fraud or undue influence of the defendant is $71,700.00, but evidence was given which increased somewhat the present value of the two immovable properties.

I mention in passing that it would seem that the number of the Transport referred to in paragraph 1 above (the Transport has been exhibited as Exhibit "H") should read "No. 1147" instead of "No. 5" and that the date "18th day of August, 1949" following immediately after the number of the Transport should read "8th day of August, 1949".

The defence is so framed as to deny or not to admit all averments from which undue influence could be inferred.

Before Mr. Wharton made his opening address for the plaintiff, Mr. Humphrys, in pursuance of the intimation given in paragraph 13 of the defence, moved the Court to amend paragraph 12 of the Statement of Claim, to strike out the alternative allegation of actual fraud contained therein and for the case to proceed on the footing of undue influence on the grounds that the Statement of Claim did not contain sufficiently detailed and precise information as to what act or acts of the defendant was or were relied upon by the plaintiff as constituting that actual fraud, and that if that allegation were allowed to remain the issue would only be confused. The Courts have never ventured to lay down as a general proposition what constitutes fraud but *actual* fraud, it has been said, arise from acts and circumstances of imposition (Chesterfield (Earl) v. Janssen (1751) 2 Vesey Senior 125, 155) and that it usually takes the form of a statement of what is false or a suppression of what is true (Halsbury Hailsham Edition Vol. 13 p. 16 paragraph 12). After hearing Mr. Wharton in reply, I

ruled that there had not been any sufficient statement anywhere in the Statement of Claim of the facts alleged to constitute actual fraud; that for that reason the allegation of actual fraud was bad, and that paragraph 12 of the Statement of Claim must be amended by the deletion of the words "or in the alternative by the fraud of". I amended the Statement of Claim accordingly.

I mention in passing that it would seem that it was by the testimony of the witness Commander Plumpton, that the plaintiff had hoped to establish her allegation of actual fraud. Commander Plumpton at the time of giving evidence, was clearly a very sick man and at times found it very difficult to speak at all and his having to give evidence was an obvious embarrassment to him. His wife gave it in evidence that he is suffering from a cerebral thrombosis and has had several strokes. After Commander Plumpton had given evidence, Mr. Wharton informed the Court that he, Mr. Wharton, in view of Commander Plumpton's evidence, abandoned any point which he may have sought to make concerning the mode of execution of the special Power of Attorney. I would here place it upon record that I am satisfied that no evidence has been adduced before me in this case to establish any actual fraud by the defendant, Mrs. Stafford, upon the plaintiff, Miss Coombs.

As the result of the amendment made to paragraph 12 of the Statement of Claim, this case has then been tried upon the footing of "undue influence", or what is sometimes called constructive or equitable fraud. No. issue was before me of the sanity of Miss Coombs.

Before I go any further, I propose to state what I consider to be the law applicable to this case and I begin with an attempt to state what it is that constitutes "undue influence". The Courts themselves have never attempted to define precisely fraud, or undue influence, which is one of its many varieties. The truth of the matter is, of course, that it is rarely possible to resolve questions of undue influence into hard and fast formulae and, indeed, there is *no class* of case *in which one ought more carefully to bear in mind the facts of the particular case.* In *White and Tudors* Leading Cases in Equity 9th Ed. Vol. 1 p. 225, it is stated:

> "It (undue influence) will be a question for a judge to decide upon the "circumstances of each particular case, and such circumstances as the "non-intervention of a disinterested person, or professional adviser on "behalf of the donor, especially if the donor is, from age or weakness of "disposition, likely to be imposed upon; the statement of a consideration "where there was actually none; the absence of a power of revocation; "the improvidence of the transaction, furnish a probable though not al-"ways a certain test of undue influence or fraud".

Sir F. Pollock in his work on the Law of Contract 12th Ed. p. 475 has this to say:

> "Any influence brought to bear upon a person entering into an agree-"ment or consenting to a disposal of property, which, having regard to "the age and capacity of the party, the

"nature of the transaction, and all the circumstances of the case, appear to "have been such as to preclude the exercise of free and deliberate judg- "ment is considered by Courts of Equity to be undue influence, and is a "ground for setting aside the act procured by its employment. The differ- "ence between a gift and a manifestly disadvantageous contract is for this "purpose only a matter of degree. The principle applies to any case where "influence is acquired and abused, where confidence is reposed and be- "trayed."

Again, to cite from Pollock, p. 475,476:

"Given a position of general and habitual influence, its (undue influence) "exercise in the particular case is presumed. But . . . this habitual influence "may itself be presumed to exist as a natural consequence of the condition "of the parties though it be not actually proved that the one habitually "acted as if under the dominion of the other."

Halsbury Hailsham Edition Volume 13, page 21, paragraph 17, puts the matter thus:

"A party to a transaction, though consenting to it may not give a free con- "sent, because he is exposed to such influence from the other party as to "deprive him of the free use of his judgment; and in such a case equity "will set the transaction aside, and if property has passed will order restitu- "tion, and if necessary follow it into the hands of innocent third parties. "The evidence may show that there was actual undue influence in the par- "ticular case; but in certain relations the evidence of undue influence is "presumed and then the party seeking to uphold the transaction must give "evidence rebutting the presumption."

Although as I have said the Courts have never attempted to define precisely fraud or undue influence, yet the case of *Inche Noriah v. Shaih Allie Bin Omar* (1929) A.C. 127, 132 (a case from Singapore involving undue influence) is instructive for the following statement:

"The principles upon which this case falls to be decided have been the "subject of a series of decisions in the English Courts of Chancery . . . "The question to be decided is stated in the judgment of Cotton L.J. in "the well known case of *Allcard v. Skinner* (36 Ch.D. 145,171) as fol- "lows: 'The question is: 'Does the case fall within the principles laid "down by the decisions of the Court of Chancery in setting aside volun- "tary gifts executed by parties who at the time were under such influence "as, in the opinion of the Court, enabled the donor afterwards to set the "gift aside?' These decisions may be divided into two classes: first, "where the Court has been satisfied that the gift was the result of influn- "ence expressly used by the donee for the purpose; secondly, where the "relations between the donor and donee have at or shortly before the exe- "cution of the gift been such as to raise a presumption that the donee had "influence over the donor. In such a case the Court sets aside the volun- "tary gift, unless it is proved that in fact *the gift was the spontaneous act* "*of the donor acting under circumstances* which enabled him *to exercise* "*an independent will and*

"*which justify the Court in holding that the gift was the result of a free* "*exercise* of the donor's will. The first class of cases may be considered "as depending on the principle that no one shall be allowed to retain any "benefit arising from his own fraud or wrongful act. In the second class "of cases the Court interferes, not on the ground that any wrongful act "has in fact been committed by the donee, but on the ground of public "policy, and to prevent the relations which existed between the parties "and the influence arising therefrom being abused."

In transactions *inter vivas* two classes of cases have to be considered, viz:

(a) those in which the parties stand in a special confidential relationship to one another; and

(b) those in which there is no such special relationship.

The most common examples of such confidential relationship are those of solicitor and client, trustee and cestui que trust, guardian and ward, physician and patient, principal and agent, confessor and penitent, but that list is not exhaustive, as the principle of presumed undue influence *is applied in all cases where a confidential relationship of any kind is shown to exist.* As said by Sir Samuel Romilly in argument in *Huguenin v. Baseley* (1807) 14 Ves. 273, 9 R.R. 276 and quoted with approval by Lord Cottenham in *Dent v. Bennett* (1839) 4 My and Cr. 269 at p. 277: 48 R.R. 94, 102:

"The relief stands upon a general principle applying to all the variety of "relations in which dominion may be exercised by one person over an- "other."

The existence of any such relationship between the parties raises a presumption that the gift was the effect of influence induced by those relations and *the burden lies on the donee* to show that the donor had independent advice, or adopted the transaction after the influence was removed or some equivalent circumstance. In these cases the age or capacity of the donor or the nature of the benefit are of little importance. As has been said with regard to cases falling within class (a) above, "the equitable title of the donee is incomplete", (Per Lindley L.J. in (1887) 36 Ch. D. 145,184) unless he can rebut the presumption that he unduly influenced the donor.

Again, as has been said:

"Persons may therefore, not only be proved by direct evidence of conduct "but presumed by reason of standing in any of those suspected relations as "they may be called, to be in a position of commanding influence over "those from whom they take a benefit. In either case they are called upon "to rebut the presumption that the particular benefit was procured by the "exertion of that influence and was not given with due freedom and delib- "eration."

(Pollock. Op. Cit. 476).

On the other hand, the mere existence of a fiduciary relation of *some* kind is *not* enough to raise a presumption of undue influence. As to this, the words of Lord Justice Fletcher Moulton in Re *Coomber* (1911) 1 Ch. 723 are very relevant:

> "Fiduciary relations are of many different types; they extend from the re-
> "lation of myself to an errand boy who is bound to bring me back my
> "change up to the most intimate and confidential relations which can
> "possibly exist between one party and another when the one is wholly in
> "the hands of the other because of his infinite trust in him. All these are
> "cases of fiduciary relations, and the Courts have again and again, in
> "cases where there has been a fiduciary relation, interfered and set aside
> "acts which between persons in a wholly independent position would
> "have been perfectly valid. Therefore in some minds there arises the idea
> "that if there is any fiduciary relation whatever any of these types of in-
> "terference is warranted by it. They conclude that every kind of fiduciary
> "relation justifies any kind of interference. Of course that is absurd. The
> "nature of the fiduciary relation must be such that it justifies the interfer-
> "rence."

I have found no authority for holding that the relation of aunt and niece per se creates a confidential relationship of the kind now under discussion, and I say that after consideration of the cases of *Archer v. Hudson* (1884) 7 Beav 551; 13 L.J. Ch. 380; *Maitland v. Irving* (1846) 16 Sim. 437; 74 RR. 115; *Griffiths v. Robins* (1818) 3 Mad. 191; 53 R.R. 34.

In the absence of any special relations from which undue influence is presumed, the burden of proof is on the person inpeaching the transaction (*Blackie v. Clarke* (1852) 15 Beav. 595; 92 R.R. 570; *Toker v. Toker* (1863) 31 Beav. 629; 32 L.J. Ch. 442), and he must show *affirmatively* that pressure or undue influence was employed. And in such cases the age or capacity of the donor and the nature of the benefit are material (*Rhodes v. Bate* L.R. 1 Ch. 252; see also Re *Coomber* (1911) 1 Ch. 174,723). Hanbury (Modern Equity 5th Ed.) page 717 has this to say:

> "Causes falling within category (b) are those in which one party can
> "show that the other has used some situation or set of circumstances, in
> "order to induce him to enter into some transaction into which he would
> "not, on his own unfettered judgment, have entered."

It was in effect argued by Counsel for the plaintiff that in every case where one person obtains by voluntary donation, a large pecuniary benefit from another, the person taking the benefit is bound to show that the donor voluntarily and deliberately performed the act, knowing its nature and effect and that for this purpose a voluntary donation means any transaction in which one person confers a large pecuniary benefit on another though it may be in the form of a contract and that such is the rule whether there is any confidential relation or not. In support of that proposition, the cases of *Cooke v. Lamotte* (1851) 15 Beav. 234, 240, 21 L.J. Ch. 371 and *Hoghton v. Hoghton* (1852) 15 Beav. 278, 298, 92 R.R. 421, 430 were cited to me; Counsel might also have cited Dent *v. Bennett* (1839) 4 My. and Cr. 269, 273. I find, however, the following note on page 397 of 92 Revised Reports (case of Cooke *v. Lamotte*):

> "There are expressions both in this case and in *Hoghton v. Hoghton*
> "from which it may be gathered that Sir John

> "Romilly regarded every voluntary disposition of property as liable to be "set aside unless supported by satisfactory evidence that the donor was "acting freely, deliberately and with a full apprehension of the conse- "quences of his acts. That opinion does not appear to have been adopted "or confirmed by other judges and is generally thought erroneous—See "*Henry v. Armstrong*, (1831) 18 Ch. D. 668, 44 L.T. 913."

Pollock asserts (op. cit. p. 478) that the dicta in *Cooke v. Lamotte, Hoghton v. Hoghton* and Dent *v. Bennett* are not law and that there is no general presumption against the validity of gifts as such. I adopt that as a correct statement of the legal position.

I deal now with the question *how* the donee may effectively rebut the presumption that he unduly influenced the donor, when the onus of proving that presumption lies upon him as it does in cases falling within class (a) mentioned above, namely, cases of a confidential relationship. Shortly stated, the rule is that the donee must show that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances. The surest way is, of course, by showing that the donor had independent advice and that the confidential relationship between the parties had ceased at the time of the gift, but it is submitted that in general the donee can rebut the presumption of undue influence by showing *either* that the relation has ceased or if it is still subsisting that the donor had *independent advice.* But as is emphasized by Hanbury (Modern Equity 5th Ed. p. 717) both the adjective and the noun are important. The advice is not independent if it is that of the solicitor who is also acting for the donor (*Powell v. Powell* (1900) 1 Ch. 243). Nor is it truly advice if, as in Inche Noriah's case (1929) A.C. 127 the adviser was not in possession of all the facts. The Judicial Committee of the Privy Council, the highest Court which lays down the law for the Colonies, discussed in Inche Noriah's case the questions:—

(a) whether the presumption can be rebutted in any other way than by proof of independent *legal* advice; and

(b) what constituted sufficient independent advice for that purpose.

The answers to those questions are so relevant to the present case that I propose to cite rather fully from the judgment (pp. 135—136):

> "But their Lordships are not prepared to accept the view that independ- "ent *legal* advice is the only way in which the presumption can be rebut- "ted; nor are they prepared to affirm that independent legal advice when "given does not rebut the presumption, unless it is shown that the advice "was taken. It is necessary for the donee to prove that the gift was the "result of the free exercise of independent will. The most obvious way "to prove this is by establishing that the gift was made after the nature "and effect of the transaction had been fully explained to the donor by "some independent and qualified person so completely as to satisfy the

"Court that the donor was acting independently of any influence from "the donee and with the full appreciation of what he was doing; and in "cases *where there are no other circumstances* this may be the only "means by which the donee can rebut the presumption. But the fact to be "established is that stated in the judgment already cited, of Cotton L.J., "[namely that the gift was the spontaneous act of the donor acting under "circumstances which enabled him to exercise an independent will and "which justify the Court in holding that the gift was the result of a free "exercise of the donor's will,] and if evidence is given of circumstances "sufficient to establish this fact, their Lordships see no reason for disre- "garding them merely because they do not include independent advice "from a lawyer. Nor are their Lordships prepared to lay down what ad- "vice must be received in order to satisfy the rule in cases where inde- "pendent legal advice is relied upon, further than to say than it must be "given with a knowledge of all relevant circumstances and must be such "as a competent and honest adviser would give if acting solely in the in- "terests of the donor.

"In the present case their Lordships do not doubt that Mr. Aitken "acted in good faith; but he seems to have received a good deal of his in- "formation from the respondent; he was not aware of the material fact "that the property which was being given away constituted practically "the whole estate of the donor, and he certainly does not seem to have "brought home to his mind the consequences to himself of what he was "doing, or the fact that he could more prudently and equally effectively "have benefited the donee without due risk to himself by retaining the "property in his own possession during his life and bestowing it upon "him by his will. In their Lordships' view the facts proved by the res- "pondent are not sufficient to rebut the presumption of undue influence "which is raised by the relationship proved to have been in existence be- "tween the parties; and they regard it as most important from the point "of view of public policy to maintain the rule of law which has been laid "down and to insist that a gift made under circumstances which gave "rise to the presumption must be set aside unless the donee is able to sat- "isfy the Court of facts sufficient to rebut the presumption."

It does not appear from the report of Inche Noriah's case whether or not the lawyers approved the transaction. It is true that in Re Coomber (1911) 1 Ch. 723, Lord Justice Fletcher Moulton observed that independent and competent advice did not mean "independent and competent approval," but according to Mr. Justice Farwell in Powell v. Powell (1900) 1 Ch. 243 at page 246: "It is not sufficient that the donor should have an independent adviser unless he acts on his advice." The explanation of these apparently contradictory statements is to be found, it is submitted, in the facts of the two cases. In *Re Coomber* the donor was an adult person of competent mind and it is for such persons to decide whether or not they will do an act; in Powell *v. Powell* the donor was a young lady just of age who was not capable in the broadest

sense of the word of managing her own affairs. The Judicial Committee, however, in *Inche Noriah's* case, lying down the law as they do for the Colonies, have stated that they are not prepared to affirm that independent legal advice when given, does not rebut the presumption unless it be shown that the advice was taken." *In Powell v. Powell* Farwell J. stated at p. 247, that it is the duty of the adviser to protect the donor against himself and not merely against the present influence of the donee and to refuse to act further for him if he persists in an imprudent transaction. It is noted that the Judicial Committee say nothing in *Inche Noriah's* case as to circumstances in which the legal adviser should refuse to act.

Inadequacy of consideration does not necessarily show want of consent and is not in itself a ground for relief in equity. "It is true," said Lord Westbury in Tennent v. Tennent (1870) L.R. 2 Sc. 6, 9 (as cited in Pollock op cit. p. 487): "that there is an equity which may be founded on gross inadequacy of consideration. But it can only be where the inadequacy is such as to involve the conclusion that the party either did not understand what he was about or was the victim of some imposition."

It is now clearly settled law that the absence of a power of revocation is not conclusive but is only to be taken into account as matter of evidence and is of more or less weight according to the circumstances of each case (Hall v. Hall (1873) L.R. 8 Ch. 430, *Toker v. Toker* 46 E.R. p. 744) and I apprehend that the same reasoning would apply to failure to reserve the life interest or to grant a life interest, of which we have heard so much in the case in connection with Trent House and Avoca House.

Mr. Edun submitted that in equity you do not have to prove fraud in the same way as in law. He referred in support of his proposition to the case of the *Earl of Chesterfield v. Janssen* 2 Vesey Senior 125. In that case Lord Hardwick said:

> "Fraud may be presumed from the circumstances and condition of the "parties contracting: and this goes further than the rule of law, which is, "that fraud must be proved, not presumed.

Storey (Equity Jurisprudence 3rd English Edition 1920 pp. 80—81 elucidates Lord Hardwick's words thus:

> "Courts of equity do not restrict themselves by the same rigid rules as "Courts of law do, in the investigation of fraud, and in the evidence and "proofs required to established it. It is equally a rule in Courts of law "and Courts of equity that fraud is not to be presumed; but it must be es- "tablished by proofs. *Circumstances of mere suspicion* leading to no cer- "tain results, will not, in either of these Courts, be deemed a sufficient "ground to establish fraud. On the other hand, neither of these Courts in- "sists upon positive and express proof of fraud: but each deduces them "from circumstances justifying inferences. But Courts of equity will act "upon circumstances as presumptions of fraud, where Courts of Law "would not deem them satisfactory proofs. In other words, Courts of eq- "uity will grant relief upon the ground of fraud, established by presump- "tive evidence which evidence

"Courts of law would not always deem sufficient proof to justify a ver-
"dict at law. It *is in this sense that the remark of Lord Hardwick is to be*
"*understood.*"

It is important to bear in mind in connection with this matter of undue influence that the question is not merely one whether a donor knew what he was doing, had done or proposed to do, but how the intention was produced. *Pollock* (op. cit. p. 477) citing Re Coomber (1911) 1 Ch. 723 as his authority, states that independent advice in cases outside the specially guarded classes is *not* necessary, save so far as is material to show that the act was not only voluntary but understood.

I propose at this stage to say something generally about the witnesses who were called before me, and to deal in particular with the more important witnesses. I will also speak of Mrs. Jack I will then go on and state shortly the conclusions at which I have arrived in this case and my reasons for those conclusions where those reasons have not already appeared from the view I will have expressed about the witnesses.

This case has been a refreshing change from so many of the cases which come before me in that I believe that each witness on either side has, generally speaking tried to tell me the truth as he or she saw it. I will, however, have to deal specifically at a later stage with a conflict of evidence between Mrs. Stafford (Defendant) on the one hand and the two servants at Trent House, (Julia Wharton and Flora Williams) on the other hand, as regards the wash stand incident. The professional gentlemen, medical and legal, who gave evidence struck me as having done so with care, moderation and a sense of responsibility which is, of course, only what one expects of them. I have no hesitation whatever in saying that each of those witnesses seemed to speak the truth on matters of fact and that where matters of opinion were concerned that each of them expressed his honest opinion. In perhaps the great majority of cases which come before these Courts, one expects to hear the Plaintiff give evidence and to have to base one's finding for or against to a considerable extent upon his or her testimony. In the present case Miss Coombs (plaintiff) did give evidence. She is nearly 90 years of age and had probably never been into a Court of Law before. The whole experience was distasteful to her and she showed that. I am sure that her legal advisers share my opinion that it was a pity that she had to be called as a witness, but if the case was to proceed it seemed unavoidable. She was, for reasons I give hereunder, a rather pathetic figure, quite unlike the witness Dr. Winkler who is also 90 years of age, but is still mentally very much alert. Miss Coombs was not an easy witness to deal with. She resented as I have said before having been brought to the Court and made one or two attempts to leave it before the Court and counsel had finished questioning her. At times I wondered whether she really knew where she was. In the light of her replies (see the Record), of the Medical evidence given by Dr. Grandsoult and Dr. Jardine, and of my own observations: of Miss Coombs, I have no hesitation in saying that I consider Miss Coombs to be now suffering from fairly advanced senile dementia. Her evidence contains much that, taken at its face value, supports the case of both the plaintiff

(herself) and the defendant. There is, for example, matters in her evidence from which it could be claimed that she never gave Trent House and/or Avoca House to the defendant and on the other hand there is matter from which it could be claimed that she had not authorised this present action and indeed had no action against the defendant. Again she denies having had any row with her niece, the defendant, and denies that the defendant left Trent House after such a row whereas both those incidents are abundantly established by the rest of the evidence in the case including the defendant's evidence. After careful consideration I have come to the conclusion that it would be unsafe to place any reliance upon her *testimony before* me because of her present senile dementia, a feature of which is forgetfulness of recent events and I have therefore, in coming to my conclusions, placed no reliance upon anything she said in Court. That has, of course, contributed to the difficulties of this case. I have no doubt that she did sign the authorisation to Mr. Nasir which appears on the Writ of Summons.

But whilst I place no reliance upon Miss Coombs' evidence, I have placed reliance upon her general attitude and demeanour including her flashes of independence, intolerance and quickness of temper whilst giving evidence in coming to the view, which I have come to, that before she suffered from senile dementia or before it had progressed far, she was self-willed, determined, forthright and generally of considerable force of character, not the sort of person who could be imposed upon or easily persuaded to do what she did not want to do (See Williams v. Williams 4 All E. Report (1937) p. 34). In coming to the above stated conclusion I have, of course, also taken account of the evidence of other witnesses including the two servants Julia Wharton and Flora Williams, and Mrs. Plumpton, Dr. Winkler, the defendant and Mr. Stafford, all of whom gave evidence which in effect supports the view — I have mentioned above of Miss Coombs' character.

I now wish to speak of Commander and Mrs. Plumpton. Commander Plumpton is, as I have said before, a very sick man. Even if Mr. Wharton had not stated that he abandoned any point he may have wished to make upon Commander Plumpton's evidence regarding the mode of execution of the special Power of Attorney (Exhibit "H"), I would have rejected Commander Plumpton's evidence on that point in the light of the evidence of Dr. Winkler and that of Mr A. G. King, Notary Public. I am quite satisfied that Miss Coombs signed the special Power of Attorney (Exhibit "H") in the presence of Mr. King and before the witnesses signed it. It would not perhaps be fair to say that Mrs. Plumpton does not like Mrs. Stafford (defendant) but she clearly does not admire her. I believe, however, that she tried to speak the truth as she saw it. She had this, *inter alia*, to say in her evidence:

> "The rows between Mrs. Stafford and Miss Coombs were more than the "ordinary little rows between women in the same house. I got the impres- "sion Mrs. Stafford was trying to dominate Miss Combs. I do not think "she was genuinely trying to protect Miss Coombs' interests in the board- "ing house" . . and again "If Mrs. Stafford got her properties by trick or "influence I would not be surprised."

but as will be seen hereafter I find myself unable, in the light of the rest of the evidence in the case, to accept as true what I have quoted above. Dr. Winkler, a witness called by the defendant, is a quite remarkable old gentleman. I call him old because he looks fairly old and gives his age as 90 years, but his mental reactions were so quick and he gave his evidence so clearly and coherently that he might well have been a man of 40 years of age. I have no reason to believe that he has any interest in the result of this case and accept his evidence as entirely truthful. His evidence goes far to support the view that Miss Coombs (defendant) was in sound mental state when she signed the special Power of Attorney, and knew what she was then doing.

I now come to Mrs. Stafford (defendant) and her husband (Mr. Sydney Lyons van Battenburg Stafford). Each of them gave evidence at considerable length and was closely cross-examined. As they were key witnesses for the defence, I naturally paid close attention to the demeanour and bearing of each of them and was favourably impressed by what I saw. I have come to the conclusion that save as regards the incident of the wash stand where her evidence conflicts with that of the two servants, Julia Wharton and Flora Williams, Mrs. Stafford has been a truthful witness. I believe that she has suppressed from me the fact that she accused her mother of stealing the wash stand. Her reason may be that now that tempers have cooled and the incident has moved into the past and her mother has died, she does not wish to admit having made such an accusation against her own mother, and I think it likely she did tell Mrs. Jack that Mrs. Wharton had seen the wash stand at Mrs. Jack's place. It is only fair to say that Mrs. Stafford candidly admitted having slapped Miss Coombs after the latter had accused her of theft and having failed to tell Miss Coombs of the change in plans which she, Mrs. Stafford, had made over the bathroom. As I have said, apart from those two incidents, I believe the story she has told in the witness box. I believe she is genuinely fond of Miss Coombs, her aunt, and though Miss Coombs does not seem to be the kind of woman who wears her heart on her sleeve, I believe Miss Coombs was, at least before the row about the transports, genuinely fond of Mrs. Stafford. I am satisfied that Mr. Stafford has been, so far as I can judge, an entirely truthful witness.

The name of Mrs. Jack, the married sister of Mrs. Stafford, the defendant, has been frequently mentioned in evidence during the hearing of this case and whilst I have kept it firmly in my mind that Miss Coombs is the plaintiff in this action and not Mrs. Jack, it is quite impossible for me to ignore Mrs. Jack and indeed it would, I feel, be wrong for me not to consider later in this judgment what part she may have played in the unhappy events which form the subject matter of this action. Mr. Edun, of counsel for the plaintiff, has, in effect, submitted in his final address that the role played by Mrs. Jack was solely that of coming to the assistance of her aunt of whom she considered an unfair advantage had been taken by Mrs. Stafford, the defendant. The defendant on the other hand has expressly pleaded:

> "that in instituting this action the plaintiff is acting under the influence "of the defendant's sister, the said Kathleen Brown

> "Jack who soon after the defendant's departure from Trent House took "charge of the plaintiff's entire affairs and who is seeking to have the "aforesaid transfers and transports rescinded for her own benefit and "that if the plaintiff were not under such influence and were exercising "her own free will she would not wish to have the said properties and "securities re-transferred and re-transported to her."
> (Paragraph 19 of the defence),

and Mr. Humphrys, for the defendant, in his final address has suggested, in effect, that it is Mrs. Jack who has stirred up Miss Coombs to go back upon what the defence say were the free and voluntary gifts of the two immovable properties, Trent House and Avoca House and of the bonds and other valuable securities and that it was Mrs. Jack who has instigated, for motives of personnal gain, the bringing of this action. In support of his submission, Mr. Humphrys invites attention to the fact that Mrs. Jack has failed to give evidence. He also in the same connection draws attention to the. outburst of Mrs. Jack (as sworn to by Mr. and Mrs. Stafford) on Christmas Eve 1951 to Miss Coombs and to the *acceptance* by Mrs. Jack by Deed of Gift (Exhibit T) from Miss Coombs on the 15th November, 1949, which date was only about three months after the date (8th August, 1949) of the passing of the transport by Miss Coombs of Trent House and Avoca House, of all the goods, chattels, furniture and household effects of Miss Coombs.

The submissions of both counsel have received my careful consideration in the light of all the evidence and my conclusion appears hereinafter. I may say that I would very much have liked to have heard Mrs. Jack give evidence, for there are many matters upon which I should have liked to question her. Mr. Wharton, of counsel for the plaintiff, had clearly intended to call her as a witness, for in his opening address, he indicated as much, saying amongst other things, that Mrs. Jack would say in evidence: why she never got on with the defendant; that defendant never allowed her to see Miss Coombs their Aunt and that from when Mrs. Strickland, the mother of Mrs. Stafford (defendant) left Trent House she, Mrs. Jack, never went back there. I may say that both the servants, Julia Wharton and Flora Williams, stated in evidence that Mrs. Jack was in the habit of visiting and entering Trent House after Mrs. Stafford had left it and in the absence of any evidence or denial from Mrs. Jack, I accept their evidence on the point. Mr. Wharton, in the event, decided not to call Mrs. Jack for reasons best known to himself and as this is a civil suit, it did not lie in my power to call her (Re *Enoch* (1910) 1 K.B. 327; *Lipton v. Powell* 65 S.J. 275). It is with regret that I record that I feel entitled and indeed obliged by the evidence as if stands, uncontradicted as it is by Mrs. Jack, to hold that Mrs. Stafford, the defendant, and Mrs. Jack dislike each other, are jealous of each other in relation to their aunt Miss Coombs, and are each fearful that Miss Coombs may favour one of them as against the other in the matter of the disposal of her property. Mrs. Stafford's reply under cross-examination by Mr. Wharton:

> "If I had given the properties back when she said I had stolen them, I "had no feeling with all the mischief making that was

> "going on that I would ever get them back, that she might not change "her will."

Mrs. Jack's remarks on Xmas Eve 1951 as deposed to by Mrs. Stafford "But Auntie, they (the properties) are all mine now" and the fact of Mrs. Jack having accepted the Deed of Gift dated the 15th November, 1949, (three months only after the challenged transport of Trent House and Avoca House in favour of Mrs. Stafford), are amongst the pieces of evidence upon which I rely for some of the things I have said above as to the feeling of these sisters for each other. It would have been interesting to know what dispositions were made in the will of Miss Coombs which the witness, Mr. Carlos Gomes, swore that he made for her and which was executed on the 31st October, 1949. My curiosity must remain unsatisfied for the will has not been exhibited. I am satisfied that there was little true affection between Mrs. Stafford and her mother Mrs. (Annie) Strickland, whereas Mrs. Jack and her mother were on affectionate terms as were Mrs. Strickland and Miss Coombs. To complete the picture, I believe that Miss Coombs whilst opposed to Mrs. Stafford's marriage to Mr. Stafford, grew to like him, whereas relations between Mrs. Jack and her mother, Mrs. Strickland, on the one hand, and Mr. Stafford on the other were always distant. I do not think the fault for that lay with Mr. Stafford.

I now turn to deal with the medical evidence. In considering that evidence the following points must be borne in mind, viz: Dr. Jardine. He has never . . . . . seen Miss Coombs as a medical man and whilst he had known her when he was a little boy, he has not seen her for 25 or 30 years. He has not had any particular practice with mental patients. To the best of my belief, he did not see her when she was giving evidence in Court. *Dr. Grandsoult.* For some time about 1919, he worked as a Medical man in the Lancaster County Mental. Hospital and had the responsibility for nearly 2,000 patients in that hospital. In British Guiana he was for four to five years employed in the Mental Hospital, Berbice, and eventually became the senior Medical Officer of it. He knew Miss Coombs because in 1922 he went to stay in her boarding house (Trent House) and remained there for "a period of years", but at no time was he her medical attendant. In 1951, he was called in to see Miss Coombs with a view to ascertain her age, but he made no physical examination of her. I now cite certain relevant portions of his evidence:

> "I was once called to see her as doctor as regards her age, but not for "physical examination. That was in February, 1951. At that time I gave "her age as between 80 and 90 years. I spoke to her and could make cer- "tain deductions. I was satisfied she was suffering from a mild form of "senile dementia. In simple words, her mind was enfeebled on account "of her old age. She must have had that condition for several years. I say "that from her old age and her filarial condition. In February 1951 she "seemed very anaemic, poor in blood. There was a vast difference be- "tween her then condition and when I knew her periodically in 1922. "She

"wandered in her mind. She would repeat herself several times within "the half hour in which I saw her. Her memory for distant events was "quite marked. She could tell me things which occurred when I was a "boarder there, but her memory for recent events was not so good—a "common phenomena with old . . . . . persons. A person in her condi- "tion could be easily influenced. She would yield more readily to per- "sons who had influence over her than she would to an outsider. She "told me she was never sick for a day in her life.

"*To the Court:*

"Last time I saw her before February 1951 visit was about 1925. I "think that her mild senile dementia and her forgetfulness must have "dated back for about 6 years from February 1951. Both those things are "a gradual process of decay.

"*Cross-examined by Humphrys:*

"Did not see her between 1925 and 1951. I was called in by Major "Jack to examine plaintiff as to age. Not at all called in to plaintiff in "1949 or 1950. It was in Trent House in the Dining room that I saw "plaintiff in February 1951. Mrs. Jack was then present but no one else "She (plaintiff) chatted with me. My examination took about half an "hour during which I talked to her and asked her questions on the past "and present. There was no physical examination at all. At her age it is "not at all surprising to find a person anaemic. As a rule senile dementia "is a slow process, but having started it may accelerate quickly. I did not "speak to her about business matters. Senile dementia might have been "coming on for six years. It may have come on quicker than that—it "might come on suddenly, but I think it was several years coming on "and I have my reason for thinking that. Between 1922 and 1925 whilst "a boarder there, I spoke to her several times. She was an interesting "person to talk to. She had a strong personality. In those days she had a "will and mind of her own. She was a very dominant person. She had in "1951 a very good memory as regards the past, but she was not so "strong as to immediate events. I went back in conversation with her for "five to six years. That is why I remarked on that period."

The doctor was not re-examined on his replies given under cross-examination. He gave evidence before Miss Coombs gave evidence. Both Dr. Jardine, (called by the defence), and Dr. Grandsoult are in agreement that senile dementia may be slow or may be rapid. Dr. Jardine in fact used the expression "very rapid". He had this to say:

"Senility may come on gradually over a long period of years or its "changes may follow up each other with almost startling rapidly. I have "had cases of rapid senile dementia. I have seen noticeable deterioration "within the period of a month and in that same patient the deterioration "became extreme in three months. At end of the three months one would "only call them senile dements".

He described senile dementia as "an enfeeblement of mental powers coming on in old age and due to old age" and went on to say (to the Court):

> "A possible manifestation of senile dementia would be forgetting that "one had made a gift and annoyance or dismay at the fact that the gift "had been taken possession of. Forgetfulness is the most noticeable "manifestation of senile dementia. When we speak of senile dementia, "we are speaking of a state of mental enfeeblement in which an old per- "son is not really fit or able to carry on their ordinary business, a patho- "logical stage of the normal forgetfulness of old age has been reached. "In senile dementia loss of memory for more recent events comes first "and loss of memory for older events comes last. A doctor (I believe I "had in mind Dr. Winkler who had been living in Trent House in August "1949), living in house with an old woman who is suffering from senile "dementia though he is not attending her as her doctor could not help "noticing the onset of senile dementia more quickly than would a lay- "man, his mind has been trained in a certain way and he cannot help ap- "plying his training to everything."

Under cross-examination the doctor admitted that sudden illness would bring on quicker senile dementia. Dr. Jardine did not agree that Dr. Grandsoult could say with accuracy that Miss Coombs must have been suffering from a mild form of senile dementia for five to six years prior to Dr. Grandsoult's examination of her in February 1951. Dr. Winkler also gave technical evidence as regards senile dementia. He has made no special study of mental diseases. He went to live in Trent House in 1948 then for a period he went to England, but was again living in Trent House in August 1949 when the special Power of Attorney for the challenged transport was executed. He witnessed the execution. He had this to say:

> "To your question whether senile dementia comes on slowly, I would "say 'Yes My Lord and no My Lord'. If it starts it sometimes progresses "quickly if the irritation is removed. If you nag at a person, then the se- "nile dementia accelerates, but if the irritation is removed the patient "will probably recover. I have had many cases of that kind in my prac- "tice."

The record here has the note " (I here tell witness the effect of Dr. Grandsoult's evidence regarding Miss Coombs' condition in February 1951, and the witness then continued):

> "I would not agree with him that Miss Coombs must have been suffer- "ing from mild senile dementia and forgetfulness for five or six years "before February 1951. I base what I say on my constantly being with "Miss Coombs."

Elsewhere in his evidence Dr. Winkler said:

> "During 1948 and till that document (this refers to the special Power of "Attorney) was signed, Miss Coombs absolutely did not appear to be suf- "fering from senile dementia. I am satisfied that when she signed that "document she was physically and mentally fit to sign any document or "do any

"work or anything. I cannot vouch for her memory. Whilst I was at "Trent House I did not get the impression she was suffering from forget- "fulness. She was an acute business woman. I will certainly vouch that "during the time I was there she had a good memory."

After careful and indeed anxious consideration of the evidence of those three medical men and of all the rest of the evidence in this case, including the evidence of *Mr. Carlos Gomes* (Solicitor), *Mr. A. G. King* (Solicitor and Notary Public), *Mr. H. C. B. Humphrys* (Solicitor) and *Mr. F. I. Dias* (Solicitor and Commissioner for Oaths), I have come to the conclusion that when Miss Coombs gave the bonds and other securities to Mrs. Stafford, as I hold that she did, and when she executed the affidavit of title dated the 16th July, 1949, and when she executed the special Power of Attorney dated the 4th day of August, 1949, she was not suffering, from senile dementia or any other form of mental unnes or mental weakness but was of sound disposing mind. I will have to return at a later stage to this matter of senile dementia.

I will now deal with the question whether or not Miss Coombs (the plaintiff) and Mrs. Stafford (the defendant) stood in a special confidential relationship to one another at any of the material times, that is to say, when any of the gifts were made. The answer to that question is of the greatest importance for if the answer to that question is in the affirmative then it will be assumed that the defendant has exerted the natural influence that position gave her, that is to say, has employed undue influence over Miss Coombs, her Aunt, and therefore, the Court casts on her the onus of showing at least that the influence was not then operative. This point arose earlier in the trial and before any evidence was lead for Mr. Wharton submitted that on the pleadings it was shown that such a confidential relationship existed and that the defendant should first lay her evidence before the Court in an attempt to show that she did not exercise undue influence over the plaintiff I ruled against his submission, but now that all the evidence is in, I have to consider the matter again.

The evidence in this action is extensive and I do not. propose to discuss it in detail but the plaintiff, to put the matter briefly, asks me to take this view of it. The defendant scheming to get all she could out of her aged aunt (Miss Coombs) and taking advantage of a summons from her aunt in July 1943 when her aunt was seriously ill for . . . . . assistance in the running of Trent House, a boarding house, moved into occupation of a part of Trent House with Mr. Stafford and two children. After her aunt had recovered from her illness in about five months' time, she and her family remained on at Trent House against the wishes of her aunt, Miss Coombs. Thereafter and until she was turned out of Trent House in 1949, when her aunt accused her of having stolen the bonds and other securities and of having obtained possession of Trent House and Avoca House by improper means, the defendant insinuated herself into the good graces of her aunt and assumed the effective control and management of Trent House, collecting rents from tenants, issuing receipts to them, hiring and

dismissing servants, paying servants, advancing moneys to her aunt, preparing and filing income tax statements and so on. She became the confidant of her aunt in money matters and otherwise, and was greatly trusted by her aunt in everything.

During the months between July and September 1949 Miss Coombs "fell into a state of infirm health and great bodily disability and suffered from a state of mental incapacity and was not likely, having regard to the state she was in, ever to recover." Generally, by virtue of all the foregoing, of the great disparity in the ages of the defendant and Miss Coombs (plaintiff) of her (defendant's) strong personality, of her behaviour, at times insinuating, at times bullying and overbearing, she, the defendant, acquired complete dominion over Miss Coombs, her aunt, and a confidential relationship between them existed at all material times. I would here remark that with the exception of the inference which Dr. Grandsoult drew from his examination of Miss Coombs in December 1951, there is no evidence that I can see to support the allegation that Miss Coombs during the months between July and September 1941, "fell into a state of infirm health and great bodily debility and suffered from a state of mental incapacity and was not likely ever to recover."

As I have indicated before, I believe that the story told by the defendant (with the exception of the incidents of the wash stand and its whereabouts) and that told by her husband is truthful. I believe after careful thought that the rest of evidence in this case as a whole supports their stories. In the result then, we obtain a picture which is very different from that depicted by the plaintiff's case. I will very briefly state what I believe to be the picture which emerges from the evidence of the defendant and her husband, supported as I think it is, by the rest of the evidence in the case as a whole. Mrs. Stafford was born a girl when her parents had hoped she would be a boy. Her parents were disappointed and at least so far as Mrs. Stafford and her mother are concerned, there was never much real affection between them. For some reason it is impossible for me to say why, but perhaps it was a case of Dr. Fell over again, or perhaps Mrs. Jack's views were coloured by those of her parents with whom she was on affectionate terms, Mrs. Stafford and her sister Mrs. Jack, grew to dislike each other, a dislike which clearly persists to this day. Miss Coombs at a very early date took a great liking for Mrs. Stafford and mothered her, paying for her education and that of Mrs. Jack in England and thereafter taking a close interest in Mrs. Stafford's general welfare. Mrs. Stafford returned that affection. Long before Mrs. Stafford went to live at Trent House, she had been living with Miss Coombs. Believing Mrs. Stafford's story as I do, it follows that I believe, though there is some contradictory evidence on the point, that there was in fact the family arrangement between Miss Coombs and the late Mrs. (Annie) Strickland as to the disposal of Miss Coombs' properties and those of Mrs. Strickland, and that it was always Miss Coombs' intention that when she died, Trent House and Avoca

House should go to Mrs. Strickland and the will (Exhibit L 1) and the codicil (Exhibit L 2), made the one as long ago as 1937 and the other in 1945, go far to support that inference. When Miss Coombs became gravely ill in 1943, she not unnaturally turned for help to the niece, Mrs. Stafford, for whom she had done so much and of whom she was so fond. I am satisfied that Mrs. Stafford went to Trent House at the request of Miss Coombs and that her staying on there with her family until when Miss Coombs turned her out, was entirely in accordance with the wishes of Miss Coombs.

There is no doubt that Mrs. Stafford did manage Trent House between when she went there in 1943, until Miss Coombs resumed the full effective management at the beginning of 1944. Thereafter and until Miss Coombs turned her out of Trent House, I believe that Mrs. Stafford assisted Miss Coombs to run the boarding house, but always under the direction of Miss Coombs. I have no doubt that during the period of her residence in Trent House, Miss Coombs trusted Mrs. Stafford in many matters and doubtless made a confidant of her, a not unexpected situation between the two women when one bears in mind the history of affection between them. I am satisfied, for I think that there is a strong preponderance of evidence in support of the conclusion, that Miss Coombs up till and including the time when she signed the affidavit of title and the special Power of Attorney was self-willed, determined, forthright, generally of considerable force of character, and not the sort of person who could be imposed upon or easily persuaded to do what she did not want to do. That friction sometimes occurred between Miss Coombs and Mrs. Stafford, I am prepared to accept. At the risk of appearing un-gallant, I will say this, that if two ladies are concerned in the running of a boarding house with all the frustrations and irritations which that entails, it does not surprise me that rows occurred from time to time. The row about the bathroom, a row which took place before Miss Coombs received the fateful letter, is an example of what I have in mind. Though in that instance Mrs. Stafford got her way, it is clear that Miss Coombs showed no lack of spirit or temper. The position of Mrs. Stafford in Trent House was that of a well-liked niece who assisted her aunt in her affairs and enjoyed her aunt's confidence, but the aunt remained the mistress of the household and was not under the influence or dominion of her niece, Mrs. Stafford. I have no reason to believe that any influence was acquired by Mrs. Stafford and abused, or that she betrayed any confidence her aunt reposed in her.

I am satisfied, on the evidence as a whole, that there existed no confidential relationship between Miss Coombs (the plaintiff) and Mrs. Stafford (the defendant) at any material time. Before coming to that conclusion I have, of course, given most careful consideration to the fact which I have earlier found, that both Mrs. Jack and Mrs. Stafford are jealous of each other in relation to their aunt, Miss Coombs, and are fearful that she may favour one of them as against the other in the matter of the disposal of her property. Such a state of affairs did clearly give Mrs. Stafford

a motive for wishing to get hold of Miss Coombs' property as soon as possible rather than wait till the will and codicil (Exhibits "L1" and "L2") came into operation on the death of Miss Coombs. The temptation was clearly there, but on the evidence as a whole, I do not think that Mrs. Stafford yielded to it.

Before coming to the conclusion that no confidential relationship existed I have, of course, given careful consideration to those features of the case upon which the plaintiff placed particular reliance, including the following: the incident of Mrs. Stafford accusing her mother Mrs. (Annie) Strickland of the theft of the wash stand; the bath room quarrel; the selling by Mr. and Mrs. Stafford of their newly built home at Hadfield Street; the giving of receipts by Mrs. Stafford to certain boarders at Trent House; the building of the offices; the possession by Mrs. Stafford of the script; the possession of Income tax returns, etc. by Mr. Stafford, and so on I will deal shortly with each of those.

The accusation of theft: I believe Mrs. Stafford did accuse her mother of having stolen the wash stand. Mrs. Stafford and her mother had no real affection for each other and they had a row during which Mrs. Stafford lost her temper and made the accusation of theft. I do not believe there is more in it than that. I am not prepared to hold that there was any sinister motive behind the matter. In particular I do not believe that in making that accusation she wished to cause her mother to leave Trent House so as to leave the field clear for Mrs. Stafford to exercise undue influence over Miss Coombs.

The bathroom quarrel: I accept Mrs. Stafford's version of this and her reasons for not having told Miss Coombs of the changes in plan which Mrs. Stafford had made. So far as I can see, the row about the bath room took place towards the end of September, 1949—(the transport, of Avoca House and Trent House was passed on the 8th August, 1949,) and the row about the transport, which row was set off by the receipt by Miss Coombs of a letter from someone whose identity we do not know, took place a few days after the bathroom row. The Staffords left Trent House on the 4th of October, 1949. If I am correct in the above, then the row about the bathroom took place about six weeks after the passing of the transport on the 8th August, 1949.

The selling of the newly built house at Hadfield Street: I have considered the possible bearing of that in the issues in this case, but viewed against the rest of the evidence, I see nothing sinister in it.

The giving of receipts: It is a factor which I have weighed. Some of the receipts tendered in evidence were signed by Miss Coombs herself. The incident of Mr. Bull goes far to explain the issue of the receipts. Viewed against the rest of the evidence I see nothing in it.

The building of the offices: I accept the defendant's explanation of this. Julia Wharton, one of the servants, says that Miss Coombs made no trouble about the offices, telling Wharton that she had

given Mrs. Stafford the bottom house to make the offices. Wharton added that the offices were made long before there was any first row.

The Script: In itself I see nothing surprising in Mrs. Stafford having possession on behalf of Miss Coombs of the will and the script. Miss Coombs trusted her and did not herself have a bank account and presumably had no safe deposit box. I may add that in the light of the evidence as a whole, I see nothing surprising in the matter of the Promissory note though, it is open to comment that if so particular to have a record in that connection why did Miss Coombs not insist on the affidavit of title making a reference to the arrangement about rents and profits.

The possession by Mr. Stafford of the: Income tax Returns, etc.: Mr. Stafford is a lawyer so I see nothing unusual in his wife asking him to help Miss Coombs with her income tax problems.

But though no confidential relationship has been shown to exist, has the plaintiff *affirmatively* established pressure or undue influence. I cannot see that she has done so. I say this after consideration of the whole of the evidence including of course the evidence of Mr. H. C. B. Humphrys (Solicitor, Mr. Carlos Gomes (Solicitor) Mr. A. G. King (Solicitor and Notary Public) Mr. F. I. Dias (Solicitor and Commissioner for Oaths) and Dr. Winkler who was a witness to the special Power of Attorney. The impression left on my mind by the whole of the evidence is that in connection with the passing of the transport, Miss Coombs thoroughly understood what she was doing, was of sound disposing mind, wished to make the gift and did so of her own free will and with knowledge (see her remark to Mr. Humphrys) that she was leaving herself with but little property. As I understand the law, if no confidential relationship existed, then no independent advice is necessary save so far as it is material to show that the act was not only voluntary but understood. I consider that the evidence in this case as a whole, including the evidence of the witnesses I have named above, shows that Miss Coombs' acts were voluntary and understood. In other words, I believe the gift of Trent House and Avoca House was the spontaneous act of the donor under circumstances which enabled her to exercise an independent will and which justify me in holding that the gift was the result of a free exercise of her will (Per Cotton J. in *Allcard v. Skinner* 36 Ch. D. 145, 171).

If I am wrong in holding that there was no confidential relationship, then the presumption of undue influence would have to be rebutted. The surest way of showing that, but not the only way (see *Williams v. Williams* 4 All E.R. (1937) p. 34) is, by showing that the donor had independent advice or that the relation had ceased. It may be objected that Mr. Humphrys was not in a position to give independent advice on the ground that he may be said to have acted for both Miss Coombs and the defendant in the matter of the transport. I think it arguable whether he did really act for the defendant. At any rate, the enquiries he made of Miss Coombs and the advice he gave her certainly seems to

have been impartial and proper and it was to him that Miss Coombs indicated that she knew if she passed the transport that she would have very little property left. But then there are Mr. Dias and Mr. King, It is correct that neither of them knew that there existed the agreement or undertaking between Miss Coombs and the defendant whereby Miss Coombs was to be permitted to remain in Trent House for the rest of her life and draw the benefit of some of the rent and profits from Trent House and Avoca House with the result that neither of them suggested to her that a life interest be reserved to her or an undertaking be given by the defendant to convey a life interest to her. I believe that some kind of informal understanding had been come to between Miss Coombs and the defendant whereby Miss Coombs was to continue to live in Trent House for the rest of her life after the transport was passed and to take what she needed from the rents and profits of Trent House and Avoca House, but I do not think that either she or Mrs. Stafford really thought that in terms of legal consideration or that any reference to it needed to be made in any legal document. Indeed, Miss Coombs in reply to a question by Mr. Dias said that she was making a *gift* of her property to the defendant. Again, neither of those gentlemen advised her to wait and dispose of her property by will, but it is clear that Miss Coombs was familiar with the effect of a will for she told Mr. Dias that some years earlier she had left the two properties by will to Mrs. Stafford. Mr. Dias did not know what proportion of her estate Miss Coombs was giving away though that fact was known to Mr. Humphrys.

I am prepared to hold, though not without doubt, that if a confidential relationship did exist, then in spite of the objections stated above, it has been rebutted *in the circumstances of this* case. In support of that view, I rely upon the case of *Inche Noriah v. Shaih Alli Bin Omar* (1929) A.C. p. 127 and the later Privy Council decision of *Williams v. Williams* 4 All E.R. (1937) p. 34. I seem to have been directing my attention mainly to the gifts of Trent House and Avoca House, but I would make it clear that I hold that the gifts of the bonds and other securities to the defendant were the spontaneous act of Miss Coombs in circumstances which enabled her to exercise an independent will and which justifies me in holding that they were the result of the free exercise of Miss Coombs' will.

I have now to ask myself the very pertinent question—why did Miss Coombs change her whole attitude to her favourite niece, the defendant, towards the end of September 1949, that is to say, about six weeks after the passing of the transport for Trent House and Avoca House and repudiate the gifts? This is a difficult part of this case, and it is impossible to be sure, but it is not, I think, an unreasonable inference from the evidence, that either one or a combination of both of the following things happened. Her old mind had been worked upon by some person or persons to turn her against the defendant, Mrs. Stafford, and the letter she received towards the end of September, 1949, brought things to a head. Nor, do I think it an unreasonable inference

from the evidence, including the medical evidence that due to worry over the matter, senile dementia set in and has since progressed to its present stage. It is in the belief that that may have happened that I have ignored in coming to my findings, the several things regarding the subject matter of this case, *e.g.* about wanting to stop this action and so on, that Miss Coombs said to Mrs. Stafford and Mrs. Hohenkerke in 1950 and 1951. The making of the deed of gifts (15th November, 1949) and the Will (31st October, 1949) have not been relied upon by me in determining that Miss Coombs was not suffering from senile dementia when the transport was passed on the 8th August, 1949; for if what I say above is correct, then she made them whilst suffering from some degree of senile dementia. The fact, however, that the deed of gift was made in favour of Mrs. Jack, and there is the evidence of Mr. Carlos Gomes as to how she interested herself in the matter, is interesting and is one of the pieces of evidence which lends support to the view I have come to that Mrs. Jack probably had a part in stirring up Miss Coombs for motives of self-interest, to repudiate her gifts to the defendant and to turn against her, and that she has been instrumental in seeing that the present action was brought and maintained. She had motive and I believe opportunity for doing those things. It is with regret that I say those things, particularly as I have not heard Mrs. Jack's side of the matter, but that is no fault of mine. She had ample opportunity of giving evidence had she wished to do so, having sat in Court during the hearing of most of the action.

There are a few small points with which I should perhaps deal. Mrs. Stafford said that when discussing the disposition of her property, Miss Coombs said something to the effect "Old people sometimes do things they do not know they are doing". I have long weighed that remark against the rest of the evidence in coming to my findings. It remains obscure to me why the Transfer of Script (Exhibit "Y") mentions a consideration of $2,300. Mr. Humphrys has contended that by virtue of section 21 of the Deeds Registry Ordinance, Chapter 177, even if undue influence was established, the transport could not be declared void because that section only refers to *actual* fraud. In my view, "fraud" in that section must be construed to include fraud of any nature and includes undue influence. In the evidence of Dr. Winkler and Mrs. Hohenkerke, there are certain contradictions and ambiguities as to how Miss Coombs had disposed of or intended to dispose of her properties. I have kept them in my mind in coming to my conclusions.

The law of undue influence may seem easy at first sight, but as Hanbury says: "it is in reality one of the most difficult branches of equity, firstly because psychological considerations must enter into the matter and secondly because it requires a most minute analysis of every circumstance before we can see in which category it falls and where, consequently, the burden of proof falls." I may say that I have found this case one of considerable difficulty.

In the light of all the foregoing, I find myself unable to make any of the orders asked for by the plaintiff or to issue the injunc-

tion prayed for. I dismiss the claim and give judgment for the defendant with costs.

Solicitors: S. M. A. Nasir for plaintiff
J. Edward deFreitas for defendant.

WHITEHEAD v. HIVE

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District, (Boland then C.J. (Ag.) Hughes J), October 26, 1951; January 19, 1952).

Landlord and tenant—implied agreement—statutory—fit for human habitation—security against burglars—not implied term.

The respondent, plaintiff in the court below obtained damages from the appellant his landlord, on the footing of the latter's negligence in failing to replace a missing pane of glass to the bedroom window and omitting to provide locks or fastenings to windows and doors in consequence of which the respondent suffered loss through burglary.

The landlord appealed.

Held: The implied condition in the Landlord and Tenant Ordinance 1947 that a landlord will keep the demised premises in repair and reasonably fit for human habitation during the tenancy does not mean that he must furnish adequate security against burglars or thieves.

Appeal allowed.

L. A. Low for appellant.

B. O. Adams for respondent.

Judgment of the Court: This is an appeal against the decision of a Magistrate of the Georgetown Judicial District who gave judgment in favour of the respondent ordering the appellant to pay to the respondent the sum of $170.00 and costs $10.28 in an action in which respondent as plaintiff claimed from appellant as defendant $250.00 damages alleged to be sustained by him through the negligence of the defendant in allowing to be in an unsafe condition premises which the plaintiff was renting from him. It was alleged in plaintiff's plaint that in consequence of the defendant's neglect to put the said demised premises in a condition to afford safety and security to him as tenant and to his property therein contained, the plaintiff suffered discomfort and inconvenience and on the 3rd November, 1949, a burglary was committed on the said premises by some person or persons unknown whereby the plaintiff lost cash and chattels of a total value of $170.68. The evidence disclosed that the defendant who, in the year 1947, was the owner of a two storeyed building at lot 35, Robb Street, Lacytown, Georgetown, rented to the plaintiff the eastern portion of the bottom flat, the plaintiff's apartment comprising three rooms therein while a Mrs. Terborg, another tenant of the bottom flat, was occupying the remaining western portion. Each tenant of this bottom flat had an independent stairway lead-

ing to his tenement and also his own box kitchen which was adjacent to the stairway allotted to him. There was a partition which divided the plaintiff's apartment from that of Mrs. Terborg's. Early in 1948 the defendant informed the plaintiff and Mrs. Terborg, as well as other tenants in the building, that he wanted to renovate the whole building and to convert it into a three storeyed building by raising the entire structure so as to enable him to set up under the apartments occupied by plaintiff and by Mrs. Terborg a new bottom flat. He is said to have promised to instal a W.C., bathroom and kitchen and that he would, on completion, if they agreed, charge an increased rent. A written agreement was drawn up and signed by all the tenants of the building whereby the tenants all agreed not to make any claim for any damage that might be sustained or for any loss of property occasioned by the premises being left insecure in the course of such "repairs". In consideration of this, the tenants were to be allowed to remain in occupation during the time the "repairs" were being effected.

In the written *agreement no time was* fixed for the *completion* of the "repairs". After the necessary preliminary of getting permission from the Mayor and Town Council, work on the building was commenced about the middle of 1948. While the house was being raised on blocks, the plaintiff and Mrs. Terborg were permitted, as agreed, to live in and occupy their respective apartments and they lived there free of rent for two months following the commencement of the work. During the time the work was in progress plaintiff, as he stated in his evidence, suffered much inconvenience in getting access to his apartment after its transfer to the higher floor. There was one stairway leading to the upper flat and it necessitated his going through Mrs. Terborg's apartment. For two years, the repairs remained uncompleted and plaintiff complained without avail to his landlord about the inconvenience he was enduring and particularly about a missing pane of glass in a window and the lack of proper locks or fastenings to windows and doors. On the early morning of the 23rd November, 1949, according to plaintiff's evidence, his apartment was entered by a man about 3 a.m.; he was asleep in his bedroom and awoke to see a man in the room with a flashlight in one hand and a dagger in the other. The man realising that he had been seen opened the bedroom door and ran through another open doorway to a landing and then down the steps which led into the yard from Mrs. Terborg's apartment. Plaintiff concluded that this man had gained entrance into his apartment through a window by putting his hand through the hole left in that window because of a missing pane and thus he was enabled to push up the window. Plaintiff observed that the lower half of this window which before going to bed he had left down was then pushed up. Afterwards plaintiff discovered the loss of his money and jewellery and he made a report to the police.

It may be mentioned that the defendant admitted that he had taken a long time in carrying out the alterations to his building but denied that the plaintiff had made complaints about the stair-

case or door. The outer doorway had, he said, no door as was agreed upon by the tenants.

The learned Magistrate accepted plaintiff's evidence and awarded plaintiff judgment for $170.60 as stated, as compensation for the loss of his money and the value of the missing jewellery on the ground that the plaintiff had negligently left his premises in a state unfit for human habitation. The loss of money and jewellery he held to be not too remote a consequence of the uninhabitable condition of the house. He took the view that the defendant was not exempt from liability by virtue of the written agreement which he held was intended to be binding only for a reasonable period and he construed the agreement accordingly. We may say at once that while we agree with the learned Magistrate that the exemption of liability for damage during the building operations must be construed as applicable only for a reasonable period, we do not consider for the reasons given below that the defendant need rely upon this agreement as a defence to the plaintiff's claim.

Before indicating our own view as to whether the defendant can be held liable for the loss sustained by the plaintiff in the burglary, which the learned Magistrate accepted as having occurred, we think we should point out what in law are the limits of the duty, under a common form tenancy agreement which is owed by a landlord of an unfurnished house towards his tenant in relation to the state and condition of the demised premises. It is clear that in the absence of express stipulation, or of a statutory duty, the landlord is under no liability to put the demised premises into repair at the commencement of the tenancy, nor to do repairs during the continuance of the tenancy. If repairs are done voluntarily by the landlord then he owes a duty to his tenant not to be negligent in undertaking the repairs.

In the instant case, it should be pointed out that what the landlord had undertaken to do with his tenants' consent was not to effect repairs to the premises but to do work in the nature of structural alterations to the whole building. The plaintiff had agreed to a complete transformation of his apartment. Not only was it to be raised from its position as a portion of a bottom flat to that of a higher flat, but it would appear that the internal arrangements were to be changed to some extent. New stairways, or a common stairway, were to take the place of the two smaller flights of steps which independent of each other led up to each apartment on the ground floor. It does not appear that the precise nature of the change to be effected was settled at the time of the agreement, but it was stated by the plaintiff that the defendant had promised to instal a W.C., bathroom and kitchen, and that if the tenants agreed to this he would charge them a little more rent. This confirms our view that the new upper flat was not to be the bottom flat merely repaired, but it was to be something in the nature of a new structure distinct from the old tenancy in the bottom flat. In the circumstances it seems to us that the plaintiff, by the written agreement, had agreed to relinquish his old tenancy and in its place to have the

right to exercise an option to take a new tenancy in the upper flat. For two months while work was in progress he was allowed to occupy the place free of rent. When afterwards he paid the same rent which he was paying before, he must be taken to have exercised his option to become the tenant of the new premises. What then were his rights as regards the condition of the place? Though the landlord was by the new tenancy agreement under no obligation to give him or to keep the house in general good repair, there was implied in the agreement by virtue of section 44 of the Landlord and Tenant Ordinance. 1947, a condition that the house at the commencement of the tenancy was, and an undertaking that the house will be kept by the landlord during the tenancy, in repair and in all respects reasonably fit for human habitation. "Reasonably fit for human habitation" means that the premises are not in a condition which might tend to endanger the health and well-being of its inmates. In our view the landlord's statutory obligation to repair is restricted to his maintaining the house fit for human habitation. It certainly does not mean that the landlord must furnish adequate security against burglars or thieves. Nor would the avoidance of mere inconvenience to the inmates, which is not likely to result in the impairment of their health, be deemed under the Ordinance to be warranted by the landlord as a term implied in the tenancy agreement.

Sub-section 3 of section 44 of the Ordinance reads:

> "When the property or the person or the health of an inmate of any house "to which this section applies is by reason of a breach by the landlord of "the condition or the undertaking in this section mentioned injuriously af- "fected, such inmate shall be entitled to recover damages from the land- "lord of the house in respect of such injurious affection."

In a claim for injury to property under this subsection, the plaintiff must show that the injury to such property arose as a direct result of the house being not reasonably fit for human habitation in the sense given above. In this case it cannot be said that the missing window pane (which it is alleged by the plaintiff facilitated the entry of the thief) rendered the premises unfit for human habitation.

Accordingly, in our view, the learned Magistrate was wrong in holding that the plaintiff was entitled to compensation from his landlord for the loss of money and articles which he sustained in the burglary at the rented premises and we therefore allow the appeal setting aside the judgment, and we award to appellant his costs of this appeal and of the proceedings in the Court below.

Appeal allowed.

Solicitor—*A. R. Sawh* for appellant

KENDALL v. THE DAILY CHRONICLE AND OTHERS

(In the Supreme Court, civil jurisdiction (Hughes J.) April 1, 23, 24, 25, 28; May 14, 1952).

Libel—fair comment—rolled up plea—qualified privilege.

On the 15th March, 1949, at about 7.30 p.m. George Hanoman, a merchant and landed proprietor was coming from his estate, in his motor car, to New Amsterdam when certain incidents took place at Palmyra, a village about 2 miles from New Amsterdam. The incidents involved six men one of whom was the plaintiff.

The next day the Daily Chronicle, a newspaper owned by the first defendant company published a news item headlined "Bandits hold up George Hanoman on Corentyne Road." The paragraph stated that hoodlums had held him up and attempted to rob him and he had managed to escape by a ruse.

The plaintiff claimed damages for libel.

The trial judge found as a fact that there was no attempt to rob Hanoman but that a brawl had taken place as the result of either Hanoman or the driver of the car in which the plaintiff was travelling failing to dip his head lights.

The defendants relied on fair comment and qualified privilege.

Held: The facts alleged in the article were untrue and the plea of fair comment failed.

Qualified privilege attaches to statements made in aid of justice but they must be reasonable in the circumstances and not calculated to inflict more harm than was necessary for discharge of the duty in question. This defence was not established and the plea failed.

Judgment for plaintiff.

J. T. Clarke with D. Jhappan for plaintiff.
C. V. Wight for defendant.

Hughes, J.: In this case the plaintiff seeks to recover damages for an alleged libel contained in "The Daily Chronicle" newspaper of which the second-named defendant is the Editor and the third-named defendant the publisher.

On the 15th of March, 1949, at about 7.30 p.m. George Hanoman, a merchant and landed proprietor was coming from his estate, in his motor car, to New Amsterdam: with him were his wife and four children, the eldest of the children being nine years old. When he reached Palmyra, some three miles from New Amsterdam, and after stopping his car, certain incidents took place between him and the six male occupants of another car which had been proceeding in the opposite direction. These six men had that afternoon come from No. 46 Village, Corentyne, to

Adelphi in the Canje District, where they attended a Pagwah Festival and there is no doubt that most, if not all of them were, at the time of the incident with Hanoman, to some extent under the influence of drink.

There is conflict in the evidence as to what took place between Hanoman and the six men. In this connection the evidence of Hanoman is, on some material points, contrary to the evidence for the plaintiff as well as to that for the defendants. In dealing with the evidence of Hanoman it is convenient to quote from the article published in "The Daily Chronicle" on the day following the incident for, subject to what is stated in the next following paragraph herein and apart from what may be regarded as comment by the writer of the article, the relevant portion of the article is in keeping with the evidence of Hanoman. That article is of course the one which it is alleged by the plaintiff contains the defamatory matter which has given rise to these proceedings. The portion of the article to which I refer is:-

> "Mr. Hanoman told the "Daily Chronicle" last night that he was returning home from a drive with his wife and four young children when he saw a car parked across the road at Palmyra on the Corentyne Coast. He stopped his car and about seven men came out of the parked car, pulled him out of his car and demanded that he turn over his money. His wife screamed for help as the men cuffed him about his face and body. Well built, Mr. Hanoman put up a fight, until a man who was in the vicinity hearing the screams of his wife came to his assistance. The hoodlums turned to the rescuer and Mr. Hanoman dashed to the bandit car, removed the switch key, got into his car and made a get away. He hastened to the Police Station, shirt and singlet badly torn and reported the matter."

Hanoman stated in evidence, with reference to the above extract, first, that he reported only to the Police and up to the time of the publication of the article had not given an account of what had happened to a representative of "The Daily Chronicle" and secondly, that the men from the other car did not demand money from him but one of them said "Bust his a.... and take away his money." In addition to what is contained in the extract quoted above, Hanoman said in evidence:-

> (a) that, with the bright lights of the car on, he stopped about one rod before reaching the other car and someone in that car shouted "Out your ..... lights.";
>
> (b) that after one of the men had said "Bust his a.... and take away his money" he felt persons pushing their hands in the pockets of his trousers which thus got torn, and he said "I have no money";
>
> (c) that after taking the ignition key from the other car he had to reverse his car and drive it partly off the road in order to pass the other car which, in his words, was "practically across the road, in a triangular position."

The evidence of the plaintiff, of John Singh, of Boodoo Khanai (three of the occupants of the car) and of David Grant (who lives

very near to the spot at which the incident occurred) is to the effect that the car, in which the plaintiff and others were, stopped on the left (and correct) side of the road and, almost immediately after, Hanoman's car stopped alongside that car and not, as he said, about one rod in front of it; that Hanoman asked Boodoo Khanai, the driver of the car, why he had not dipped his lights and Khanai replied by asking Hanoman the same question and in doing so used the same obscene word employed by Hanoman. Insults and threats, involving the use of further indecent language, were exchanged and then Hanoman came to Khanai, cuffed him, pulled him out of the car and kicked him. The occupants of Khanai's car then got out of the car and there ensued a fight between the six men and Hanoman. In the course of the fight Hanoman shouted for David Ramjeet, a man no less burly than himself. Ramjeet joined in the affray in support of Hanoman who then drove off to the Police Station with his family, after taking the ignition key from the other car.

The evidence, including that for the defendants, establishes beyond doubt that Hanoman's statement that the car driven by Khanai was across the road, is untrue. This fact is not an important one for if it were the case that Khanai's car had been stopped across the road this might be regarded as tending to support the view that there was on the part of the occupants of Khanai's car an intention to rob Hanoman. There is, too, the fact that the incident took place at a spot not far from a number of occupied houses in one of which there were at the time several persons taking part in a Pagwah Festival: the spot was in fact one most unsuited to the perpetration of the crime of robbery. A fact which is not without significance is that the only criminal proceedings arising, from this incident were the summary charges of fighting, common assault and disorderly behaviour.

Apart from what Hanoman has said there is no evidence of an intention or of an attempt on that occasion to take money from Hanoman and I find no difficulty in coming to the conclusion that the encounter between the occupants of the car driven by Khanai on the one hand and Hanoman (and Ramjeet) on the other, was nothing more than a brawl brought about by the failure on the part of Khanai or Hanoman, or more probably on the part of both of them, to dip or dim the lights of the car when approaching each other.

It is now necessary to consider the legal aspects of the matter in the light of the above finding of fact.

The first question for consideration is whether the words complained of are defamatory of the plaintiff. The relevant paragraph of the Statement of Claim is:—

> "3. In the issue of the said newspaper for the 16th March, 1949 the Defendants falsely and maliciously printed and published of and concerning the Plaintiff the words following, that is to say, "Bandits hold up George Hanoman on Corentyne Road", and again, "Mr. George Hanoman prominent New Amsterdam merchant was held up and beaten three miles

outside New Amsterdam around 7.45 last night by hoodlums who demanded that he turn over his money to them" and further that on a man coming to the rescue, "The hoodlums of No. 46 Village along with (and here the names of five other persons are given) were detained by the Police."

The sentence quoted in the above paragraph, "Bandits hold up George Hanoman on Corentyne Road" were in capital letters and formed the heading to the article.

It is alleged by the plaintiff that the defendants meant and were understood to mean that the plaintiff was a highway robber, a hooligan and a dangerous person in the community who should be shunned and feared by his fellow men and that he was guilty of the offence of assault with intent to rob.

In my view the words, in their primary and natural meaning, carry the interpretation placed upon them in the Statement of Claim and are quite clearly, defamatory of the plaintiff, for a reasonable person reading the article could understand it only as meaning that the plaintiff was one of the "bandits" and "hoodlums" by whom the "hold-up" had been carried out. As has been indicated earlier herein, what took place between Hanoman and the plaintiff (and others) was nothing in the nature of a "hold up" or of an attempt to rob. It may very well be that the writer of the article believed in the truth of the imputations made by him but this is immaterial.

I turn now to the defendants' plea of fair comment: this is contained in paragraph 7 of the Statement of Defence and takes the form of "the rolled up plea".

It is clearly the case that in the portions of the article quoted in paragraph 3 of the Statement of Claim allegations of fact (for example, that George Hanoman was held up and told to turn over his money) are mixed up with comment (that is the use of the words "bandits" and "hoodlums") and that both are *prima facie* libellous; that being the case the defendant must establish two things —

(a) that so much of the article as alleges fact is true or is privileged; and

(b) that so much of the article as expresses the defendants' opinion on the facts stated relates to a matter of public interest and is a fair and *bona fide* comment thereon.

As regards the first matter to be established, that is paragraph (a) above, it has already been stated herein that on the evidence the allegations of fact are unsubstantiated and it is therefore necessary to consider whether the defendants have proved, and the burden is on them, that the occasion was one of qualified privilege (sometimes called "defeasible immunity"). No authority has been cited in this connection and I have been able to find no decision which may be regarded as even tending to show that in a case such as this the defendants may properly claim the protection of qualified privilege. It is the case that such privilege attaches to statements made in aid of justice and

in paragraph 8 of the Statement of Defence it is alleged that the statements complained of were in fact so made. It is the public duty of everyone who knows, or reasonably believes that a crime has been committed to assist in the discovery of the wrongdoer and for that reason where defamatory matter is published with a view to the detection or punishment of any offence or offender the person publishing such matter may claim that the occasion is one of qualified privilege. It is, however, also the case that statements in aid of justice may be made only to the authority or person competent to investigate or deal with such offence or offender; the making of such statements are subject to the further limitation that they must be reasonable in the circumstances, that is, not calculated to inflict more harm upon the plaintiff than was necessary for the discharge of the duty in question. In the case of Whiteley v. Adams, (1863), 15 C.B. (N.S.) at page 418, Erle, C.J., said "Judges who have had from time to time to deal with questions as to whether the occasion justified the speaking or writing of defamatory matter, have all felt great difficulty in defining what kind of social or moral duty will afford a justification". In Stuart v. Bell, (1891) 2 Q.B. at page 350, Lindley, L.J., in indicating what would be covered by the term moral or social duty said ". . . . . would the great mass of right minded men in the position of the defendant have considered it their duty under the circumstances to make the communication?" The answer to that question, in relation to the instant case, is, in my view, that the defendants would be acting correctly and no doubt in accordance with their duty and in the interest of the public, in publishing the fact that a "hold-up" had been reported to the Police and in giving the time, place and manner of the alleged occurrence; this would serve the purpose of putting on their guard persons who find themselves in the locality in which the incident is alleged to have taken place. It cannot be said, however, that in publishing such report, with no certainty as to its truth, it was the duty of the defendants to link with the report the names of the persons believed to be implicated (and to refer to such persons as "bandits"). In the words of Earl Loreburn in Adam v. Ward (1917) A.C. 321, "A man ought not to be protected if he publishes what is in fact untrue of someone else where there is no occasion for his publishing it to the person to whom he in fact publishes it".

I find that qualified privilege does not attach to the words complained of in this case; this finding coupled with the finding that so much of words as allege facts is untrue can result only in judgement for the plaintiff.

It is perhaps not inappropriate, with reference to the plea of fair comment, to quote the observations of Fletcher Moulton, L.J., in Hunt v. Star Newspaper Co. Ltd. (1908) 2 KB.

". . . . . In the next place, in order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails. This has been so frequently laid down authoritatively that I do not need to dwell further upon it".

The question of damages in this case presents little difficulty.

There is no ground for holding nor has it been urged on his behalf that the reputation of the plaintiff, who is a labourer working on his father's property, has been seriously impaired as a result of the publication by the defendants of the words which form the subject matter of these proceedings.

Judgment against the defendants, jointly and severally, for twenty-five dollars damages. Costs to be taxed on the higher scale, to the plaintiff.

Solicitors: *P. M. Burch-Smith* for plaintiff
A. G. King for defendants.

BROWMAN v. MARTIN

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Bell C.J., Boland J.) March 14, 21; May 23, 1952)

Landlord and tenant—premises unfit for human habitation—possession—sale of premises—action for damages—misrepresentation rebutted.

The appellant rented a room from the respondent. It was admitted that the building was in such a bad state of disrepair that when the Rent Assessor visited it with a view to assessing the rent he advised the appellant to remove. The appellant did not do so and suffered injury through a defect in the flooring for which damages were recovered. The respondent gave the appellant notice to quit on the ground that possession was required to effect repairs. When the tenant did not leave the Magistrate in proceedings before him ordered the tenant appellant to vacate.

The appellant left the room but six weeks afterwards the respondent sold the premises without doing any repairs.

The tenant brought an action for damages against the landlord. The Magistrate dismissed the claim. The tenant appealed.

Held: Although selling the property without affecting repairs was *prima facie* evidence of misrepresentation that presumption can be rebutted by other circumstances. In this case the premises were in urgent need of repairs when the order for possession was made and the respondent sold only when she was unable to obtain money to affect the repairs.

Appeal dismissed.

J. Carter for appellant.

C .R. Wong for respondent.

Judgment of the Court: The appellant as plaintiff brought an action before the Magistrate claiming damages in the sum of $250. Against the decision of the learned Magistrate, Mr. Wills who gave judgment for the respondent, this appeal is brought.

The appellant rented from the respondent a room, in which she resided, at 6, D'Urban Street, Lodge Village. The building, it is admitted, was in such a bad state of dis-repair that on the application made by the appellant as tenant to have the rent of

this room assessed, the Rent Assessor in April, 1950, after inspecting the place, advised the appellant to remove from what the Rent Assessor considered to be a house unsafe for human habitation. The appellant did not remove, no doubt because of the difficulty of getting accommodation elsewhere. Later that month she fell through the floor and for the injuries she sustained thereby she recovered $30.00 in an action which she brought against her landlord, the respondent. On the 23rd May, 1950, the respondent gave the appellant notice to quit and on the appellant's failure to comply with the notice, respondent brought an action for possession advancing the grounds that she wanted the place for the purpose of effecting the necessary repairs. On this the Magistrate, Mr. Brown, made an order for possession to which the respondent consented. Possession was ordered to be delivered on 1st September, 1950. The Magistrate attached to the order a condition that when repairs were completed, the defendant should have the right to resume possession as tenant.

Incidentally, it may be observed that the Magistrate had no power to attach any such condition to the order (vide the judgement of this Court in W. A. Cameron v. Justino Daly—No. 210 of 1950—Appeal Case (not yet reported in B.G. Law Reports), but the fact that the Magistrate did wrongly make this a condition does not affect, the issue before us in this appeal.

The appellant, in obedience to the Magistrate's order, duly delivered up possession. On 16th October, the respondent sold the premises without having done any repairs. The appellant filed a plaint in the Magistrate's Court claiming damages for "considerable inconvenience" which she alleged she suffered through the misrepresentation made by the defendant both to the plaintiff herself and to the Magistrate who was thereby induced to make the order for possession, in compliance with which plaintiff went out of possession. It is obvious that the action was founded on the relief given to tenants by Section 7 (4) of the Principal Ordinance, as amended by Section 3 (1) of Ordinance No. 13 of 1947. For a tenant to obtain compensation by virtue of the above subsection, the Court must be satisfied that the defendant, landlord misrepresented that he required the premises for a particular use. In this case, the plaintiff had to show that it was this false representation of the landlord as to her intention to repair which induced the Magistrate to make the order for possession.

The legislature has in Section 7 A (2) provided a penalty to be imposed on a landlord who having obtained an order for possession on the ground of requiring the premises to repair, uses the premises subsequently for any purpose other than repairing without getting the Magistrate's permission to do so. The offence is committed by mere user of the premises for purposes other than repairs without first obtaining permission irrespective of whether or not the landlord had been guilty of misrepresentation in obtaining the order. But a plaintiff bringing, an action for compensation under Section 7 (4) must show some misrepresentation or concealment of material fact on the part of the landlord which induced the order for possession,

It is conceded that selling the property without effecting repairs *Prima facie* would raise a presumption of misrepresentation by the landlord, but that presumption can be rebutted by other circumstances. In this case, there was undoubtedly the urgent need to repair the premises, the obligation to do which Section 44 of the Landlord and Tenants Ordinance 1947, places upon the landlord where premises are unsafe for human habitation. Also, the respondent, without means, had sought from more than one source to get the necessary loan to defray the expenses, thus clearly showing her intention to have the repairs done. True she had been refused the loan; there is nothing on the record that she failed to disclose to the Magistrate in seeking the order for possession that she was having difficulty in raising the loan. But what was she to do. Could she let the tenant remain there and incur the not improbable risk of being made to pay further compensation to the tenant for injuries resulting from the uninhabitable condition of the place? Mr. Wills, the Magistrate by whom the action was tried, seemed to have taken the view that handicapped as she was by her age, the respondent nevertheless sincerely hoped to get the loan to do the repairs, and that it was only when she failed that she resorted to a sale. We cannot say that the Magistrate was wrong in the view he took of the facts. *Prima facie*, the respondent has committed an offence under Section 7 A in not applying for permission to sell and was liable to a penalty. But there was no misrepresentation entitling the appellant to the relief of an award of compensation provided by Section 7, subsection (4). Moreover, the appellant on whom the burden fell of establishing misrepresentation had failed to establish that the respondent was guilty of misrepresentation and in our view, the Magistrate was right in giving judgment for the defendant.

The appeal will accordingly be dismissed with costs to the respondent.

De FREITAS v. De FREITAS LIMITED AND OTHERS

In re the Arbitration Ordinance.

(In the Supreme Court, civil jurisdiction (Bell C.J.) January 14, 30; February 11; May 27, 1952),

Arbitration—agreement—distinction between agreement for valuation and submission to arbitration.

Disputes arose between the applicant who was a shareholder of the defendant company, and the company and the other defendants as a result of which the applicant presented a petition to the supreme court for the winding up of the company.

The disputes were resolved by the parties entering into an agreement, one clause of which provided for two persons to value the assets of the company and in case they failed to agree, for the appointment of a third valuer. There was no provision for the taking of evidence or hearing of arguments.

The three persons named in the agreement submitted their valuations.

The applicant applied pursuant to section 6 of the Arbitration Ordinance chapter 24 for the appointment of an arbitrator.

Held: Upon a fair construction of the agreement there was no submission to arbitration but the relevant paragraphs were intended to secure the making of a valuation.

Alternatively, if the agreement did provided for arbitration, then the application was misconceived as the persons named in the agreement were the arbitrators and had already arbitrated.

Application refused.

Jai Narine Singh for the applicant.

J. E. de Freitas for 1st, 2nd, 3rd and 4th respondents.

Fifth respondent in default of appearance.

Bell C. J.: The applicant on the Summons by Norbert Joseph de Freitas was for an Order pursuant to section 6 of the Arbitration Ordinance, Chapter 24, for the appointment of one Percy Claude Wight of 28 Forshaw Street, Georgetown, or some other fit and proper person as arbitrator under a submission to arbitration dated the 5th day of April, 1951, which submission was exhibited as Exhibit "A". The submission is contained in the following words:

> "15. If any dispute or difference shall arise between the parties "hereto relating to this agreement, the same shall be referred to the arbi- "tration of a person to be appointed by the Solicitors of the parties and "the decision of such arbitrator shall be final."

The submission forms part of an agreement signed between all the aforementioned parties on the 5th day of April, 1951,—it was exhibited as Exhibit "A"—which was designed to compose differences which had arisen between the parties and which had led to the present applicant (Norbert Joseph de Freitas) as a shareholder of the Company, presenting a petition in the Supreme Court for the winding up of the Company. Clauses 1, 2 and 3 of that agreement read as follows:

> "1. The petitioner shall forthwith apply for leave to withdraw the "said petition.

"2. The Company shall upon withdrawal of the said petition take "immediate steps to have all its assets valued and the value of its share "based on such valuation, its liabilities and the nature of its business as- "certained, by William Stanley Jones on behalf of the Directors and the "Shareholder, and Oscar Stanley Wight on behalf of the Petitioner, and "in case of disagreement on any item of property by an umpire valuer "appointed by the said valuers or incase of disagreement on the value of "such shares by Fitzpatrick Graham and Company, Chartered Account- "ants.

"3. The valuations so made and ascertained shall be final and bind- "ing on the parties hereto."

As I am now asked to exercise the power of appointing an arbitrator conferred upon me by section 6 of the Arbitration Ordinance, Cap. 24, it is as well that I should settle in my own mind what it is that has been done by virtue of paragraphs 1, 2 and 3 of the Agreement (Exhibit "A") by Messrs. Jones and Wight and Fitzpatrick Graham and Company. Have they carried out a mere valuation or an arbitration? There are a large number of cases to be found on this point as will be seen from the cases collected in the notes to Halsbury, Vol. 1, pages 622 to 623, and it is not easy to reconcile some of the decisions. Halsbury (Hailsham Edition) Vol. 1, para. 1,071 at p. 622 has this to say:

"In order to constitute a submission to arbitration there must be some "difference or dispute either existing or prospective, between the parties "and they must intend that it should be determined in a *quasi judicial* "manner. Therein lies the distinction between an agreement for a valua- "tion and a submission to arbitration for in the case of a valuation there "is not, as a rule, any difference or dispute between the parties, and they "intend that the valuer shall, without taking evidence or hearing argu- "ment, make his valuation according to his own skill, knowledge and "experience."

In *Taylor v. Yielding* (1912) 56 *Solicitors Journal* 253, Neville J. dealing with an agreement which provided for the appointment of two valuers and an umpire "in pursuance of and in accordance with the Arbitration Act 1889" whilst holding that in that case the parties intended an agreement for arbitration and not merely a valuation went on to say "you cannot make a valuer an arbitrator by calling him so or *vice versa*."

In re *Carus-Wilson and Greene* (1886) 18 Q.B.D. 7 at p. 9, Lord Esher, Master of the Rolls had this to say:

"If it appears from the terms of the agreement by which a matter is "submitted to a person's decision that the intention of the parties was "that he should hold an enquiry in the nature of a judicial enquiry and "hear the respective cases of the parties and decide upon evidence laid "before him, then the case is one of an arbitration. The intention in such "cases is that there shall be a judicial enquiry worked out in a judicial "manner. On the other hand, there are cases in which a person is ap- "pointed to ascertain

> "some matter for the purpose of preventing differences from arising—
> "not of settling them when they have arisen—and where the case is not
> "one of arbitration but of a mere valuation. There may be cases of an in-
> "termediate kind, where, though a person is appointed to settle disputes
> "that have arisen, still it is not intended that he shall be bound to hear
> "evidence and arguments. In such cases, it may be difficult to say
> "whether he is intended to be an arbitrator or to exercise some function
> "other than that of an arbitrator. Such cases must be determined each ac-
> "cording to its particular circumstances."

I have come to the conclusion though not without some doubt that upon a fair construction of paragraphs 1, 2 and 3 of the Agreement, of the 5th April, 1951, (Exhibit "A") read in the light of the rest of the agreement there was no submission to arbitration but that those paragraphs were intended to secure the making of a *valuation.* I consider that Messrs. Williams Stanley Jones and Oscar Stanley Wight were both valuers; that Fitzpatrick Graham and Company was also a *valuer* to make the valuation if the two other valuers could not agree; that it was not contemplated by paragraphs 1, 2 or 3 of the agreement that the valuers were to hold anything, in the nature of a judicial enquiry; that the parties bound themselves to accept and be finally bound by the valuation of those valuers.

If I am correct in the above stated view, then there is nothing upon which section 6 of the Arbitration Ordinance, Cap. 24 can operate and I cannot accede to the application for the appointment of an arbitrator. If. contrary to the view I have expressed above, the gentlemen mentioned above, and the firm of Fitzpatrick, Graham and Company are arbitrators, then the present application is misconceived, asking as it does, for the appointment of an arbitrator; for I cannot see that paragraph 15 of the Agreement (Exhibit "A") can have any room to operate if an *arbitration* has in fact already taken place by Messrs. Jones and Wight and the firm of Fitzpatrick, Graham and Company for there is no provision in the Arbitration Ordinance for the appointment of an arbitrator to sit in judgment on the three other arbitrators, if they be indeed arbitrators.

If the true position is that an arbitration has already taken place, then one would have expected the advisers of the applicant to have moved under either section 11 or section 12 of the Arbitration Ordinance, Cap. 24, but I must not be understood as suggesting that an application under either of those sections would necessarily succeed. Whether or not the fact that the valuation was made after the 31st day of May, 1951, is a matter which vitiates the valuation is not one I feel called upon to express a decision upon on the present application. I consider the present application to be misconceived and it is accordingly dismissed with costs in favour of the respondents, de Freitas Limited, Cyril Joseph de Freitas, Ursula de Freitas and Alvaro Joseph de Freitas.

NASCIMENTO v. HUMPHREY

(In the Supreme Court, Civil jurisdiction. (Stoby J.), June 16, 19, 30, 1952).

Declaration of ownership—estoppel by conduct—limitation.

The plaintiff claimed a declaration that a cottage occupied by the defendant was her property.

She acquired the cottage in 1940 from her godfather who originally owned it. In 1941 her godfather entered into an agreement with the defendant whereby he transferred the cottage to the defendant in exchange for a piece of land owned by defendant. The plaintiff knew of this arrangement but made no attempt to stop it.

In 1942 the plaintiff claimed the cottage from the defendant who immediately replied setting out the agreement of the previous year and claiming it as his own. The writ was not issued until 1950.

Held: The plaintiff allowed the defendant in 1941 to assume that she had no title to the cottage and made no attempt to undeceive him. She was estopped from claiming it.

Her claim in conversion arose in 1942 and was barred by the Limitation Ordinance chapter 184.

Judgment for the defendant.

Theo Lee for plaintiff.

J. O. F. Haynes for defendant.

Stoby J.: In this action the plaintiff claims:—

(a) A declaration that she is the legal and beneficial owner of a cottage at Bartica;

(b) Possession of the said cottage;

(c) Mesne profits; and

(d) an order that the defendant render a true account to the plaintiff of his dealings with the income derived from the said cottage.

The plaintiff is the wife of Carlos Nascimento and the daughter of Manoel Ferreira da Silva, but lived from childhood with Mr. & Mrs. Francis de Souza who were her godparents. In 1929 Sarah de Souza, the wife of Francis de Souza died. At the time of her death, Sarah de Souza owned two buildings situate on land belonging to the defendant at lot 4, First Avenue, Bartica. One building was a two storey house and the other a cottage which is the subject matter of this action. Sarah de Souza left a will by which she bequeathed the two storey house to the plaintiff and the cottage to her husband.

At the time of Sarah de Souza's death and for many years prior thereto, the cottage was occupied by the defendant He paid no rent because he was the owner of a property at lot 32, Second Avenue, Bartica, which was occupied rent free by the de Souzas under an arrangement which was completely satisfactory to all concerned.

On the 14th June, 1940, Francis de Souza signed a receipt as follows:

> "Received from Agnes Ursula Nascimento of Bartica the sum of Five hundred Dollars being the purchase price in full of one one-flat cottage on wooden blocks with galvanized roof and kitchen attached, the said cottage being

situate on the premises at lot No. 4 First Avenue, Bartica registered in my name in the records of the Bartica Local Authority as my property.

Francis F de Souza.

Witnesses:—

1. W. W. Nurse."

It appears that he had been collecting the rent of the two storey house which belonged to the plaintiff but was not accounting to her for all the money received, and in order to extinguish his indebtedness, the cottage which was his property, was sold to the plaintiff for $500 and thereafter became her property.

Counsel for the defendant invites me to find that the execution of the receipt Ex. "B" ought not to be regarded as any evidence of intention on the part of Francis de Souza to divest himself of the ownership of the cottage but merely as an admission of his impecuniosity and an expression of his intention to repay the plaintiff the rents he had misappropriated. Counsel seeks to support his argument on this point by stressing the plaintiff's conduct in not taking steps to have the property transferred in her name in the books of the Village Council of Bartica and in not demanding rent from the defendant.

I cannot accede to this viewpoint. The defendant is the brother of Sarah de Souza and the plaintiff knew that her godparents had allowed him to live rent free in the cottage in consideration of their living rent free in his house. If she demanded rent on becoming owner of the cottage, there was nothing to prevent the defendant insisting that Francis de Souza who was undoubtedly in financial difficulties should pay rent too. Her acquiescence in an arrangement of long standing in no way implies that the receipt was given as security and not for ownership. Similarly her neglect to transfer the cottage from de Souza's name to her's in the Village books, is not conclusive of knowledge on her part that the cottage was not her property. In my view the transaction of the 4th June, 1940, was a genuine one and the cottage passed to the plaintiff at that date.

Unfortunately, however, in 1941, a situation arose which forced Francis de Souza into a position from which he could only escape by courage and frankness which qualities he seems to have lacked. On the defendant's suggestion, it was agreed that E½ lot 32, Second Avenue, the property of the defendant, should be transported to Francis de Souza while the cottage should become defendant's property. It is possible to understand why Francis de Souza acquiesced in this proposition. He would naturally not wish to disclose that he had used his god-daughter's money; nor would he wish to offend the defendant; he may even have hoped that in course of time he could persuade the plaintiff to destroy the receipt. The relationship between all the parties was so close and so friendly that faced with an exposure, de Souza elected to follow the line of least resistance.

I have no hesitation in accepting the whole of the defendant's evidence and rejecting the plaintiff's wherever it conflicts with

his. He answered questions slowly but thoroughly and convincingly while the plaintiff struck me as being most unreliable.

My acceptance of defendant's testimony means that I believe that the exchange of properties referred to above was with the knowledge of the plaintiff. It is possible that the plaintiff did not wish to offend her godfather by reminding him that he had parted with ownership of the cottage, but whatever the motive, she elected to remain silent at a time when she must have realised that her godfather was deceiving the defendant.

Counsel for the plaintiff concedes that if the facts deposed by the defendant are true, his client is estopped from asserting her claims to ownership of the cottage. There is perhaps no clearer example than this of the equitable doctrine of estoppel by conduct. The following passage by the learned author of Halsbury 2nd Ed. Vol. 13 at p. 496 is peculiarly apt:

> "One who culpably stands by and allows another to hold himself out to the world as the owner of property, and thereby to sell it to a bona fide buyer, cannot afterwards assert his title against the latter."

The plaintiff finds herself estopped not merely because of her silence when she learnt that the defendant proposed to transport his property in exchange for the cottage he believed to be de Souza's but because she owed a legal duty to the defendant to take steps to assert her ownership before he had altered his position to his detriment. Estoppel does not arise where there is no legal duty cast on a person to speak or act. But where the nature of the transaction is such, that one party to it is entitled to assume that, if there is something peculiar in the transaction, it would be disclosed, then a duty to speak is imposed on the party who has knowledge of the peculiarity. It is not enough to say that the plaintiff was not a party to the transaction, for she allowed the defendant to assume that she had no title to the cottage and made no attempt to undeceive him. In the well known case of de Bussche v. Alt 1878 8 CD. 286 C.A. Thesiger L.J. stated the law as follows:

> "If a person having a right and seeing another person about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act."

Holding, as I do, that the plaintiff by her conduct is estopped from claiming the cottage, further consideration of the case is unnecessary but as counsel for the defendant has urged that on any view of the facts, the plaintiff's remedy is barred by effluxion of time and as the point has been fully argued, I propose to state my view of the law.

Assuming the plaintiff is not estopped, at the very highest, her case is that she became the owner of the cottage on the 4th

June, 1940. After Francs de Souza died, the defendant endeavoured to obtain her signature to a document by which she would have disclaimed any title to the property, vide Ex. "G". Thereupon her father and attorney to her knowledge instructed a solicitor to write the defendant demanding rent for the cottage. On the 24th day of April, 1942 her solicitor wrote:

"J. W. HUMPHREY, Esqr.

Bartica, Essequibo.

Dear Mr. Humphrey,

Mr. M. F. DaSilva, Merchant of Bartica in his capacity as one of the duly constituted Attorneys of Mrs. Agnes U. Nascimento of Bartica, Essequibo, has consulted me relative to your occupation and rental of a cottage situate at Lot 4 First Avenue, Bartica, the property of the said Agnes U. Nascimento which she bought from the late Francis DeSouza on the 4th June, 1940.

2. It would appear that rent is due and payable by you from that date to the present time and in order to prevent any further complications over the claim I shall be pleased if you will try and let us settle this matter in the most amicable manner possible.

Kindly give this matter your immediate attention and oblige.

Yours truly,
A. McL. OGLE,
Solicitor."

to which the defendant's solicitor replied on the 29th April, 1942 in these terms:

"A. McL, OGLE Esqr.,
Solicitor.
Commerce Street, City.

Dear Sir,

I have been handed your letter dated 24th April, 1942, by my client, Mr. J. W. Humphrey of Bartica, Essequibo, and have been instructed to reply.

My client occupies a cottage at Lot 4 First Avenue, Bartica it is true, but his occupation thereof is as proprietor. He does not recognise any right of ownership therein save his own.

If your client's principal alleges that she bought the same from her late adoptive father my client says that no transaction of sale took place and the late Francis DeSouza continued after the said 4th June, 1940, to exercise all rights of ownership in and over the said cottage thereafter with the full knowledge, approval and acquiescence of your client's principal. In addition the late Francis DeSouza entered into and completed a transaction of exchange with my client in July, 1941, in which the said cottage was involved and to which transaction your client's principal was a party and of which she had full knowledge. Your client was fully aware that my client was about to alter his position materially in the course of such transaction. Your

client's principal also knew that my client was absolutely unaware of any transaction whatever between the late Francis deSouza and herself and maintained complete silence on the subject. Indeed the first mention of any transaction as alleged by her took place after the death of her adoptive father.

In addition your client is in possession of a building and land at Bartica exchanged in good faith for the cottage in question by my client with the late Francis deSouza.

In the circumstances my client cannot entertain any claim from yours in respect of the said cottage.

Yours faithfully,
R. G. SHARPLES,
Solicitor."

The correspondence shows that the plaintiff did not claim possession of the cottage but rental for it, but it also shows that the defendant immediately advanced in clear and unmistakable terms that he was in possession not as a tenant, but as owner. The plaintiff, therefore, knew in 1942 that her ownership of the cottage was disputed and litigation would be essential to resolve the dispute. She took no further action until 1948 when a writ was filed claiming $720 against the defendant for use and occupation of the premises, but this action was abandoned on the advice of counsel, and the present one instituted.

Section 6 sub-section (1) of the Limitation Ordinance, Chapter 184 states: "Every action and suit for any movable property, ... shall be brought within three years next after the cause of action or suit has arisen". If the cottage belongs to the plaintiff, as it is on the defendant's land, it is movable property, and the question arises whether the present action is statute barred.

Council for the plaintiff has contended that the present action is for a declaration of ownership and possession of the house, that no claim to possession was ever made and as time would not run until such a claim is made the Limitation Ordinance is not applicable.

This argument ignores a recognised principle with regard to Statutes of Limitations and that is, that the period of limitation begins when the cause of action accrues, when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed. Coburn v. Colledge 1871 1 Q.B. 702.

Once the cause of action has accrued, the Limitation Ordinance cannot be circumvented by disguising the form of the action. The defendant's act in 1942 was an undoubted violation of the plaintiff's rights if she were the owner of the property; he not only refused to pay rent, he did more—he claimed the property as his and set out in detail how it was acquired. On that date he was liable in conversion and he was not less liable because the plaintiff had not demanded possession.

In an action grounded on conversion, time runs from the conversion. In R.B. Policies at Lloyds v. Butler 1949 2 All E.R. 226, a motor car was stolen in 1940. The identity of the thief was not known and the car was not traced until 1947. Plaintiffs (Successors in title to the owner of the car) then brought an action against defendant an innocent purchaser for value of the car or for its recovery. Defendant relied on the Limitation Act. It was held that a cause of action accrued against the thief in 1940 notwithstanding the fact that his identity was unknown and plaintiffs' right of action against defendant was statute barred. Although this case was decided under the special provisions of the Limitation Act 1939 which is not the law of this Colony it is relevant as illustrating when time begins to run in conversion,

It is recognised that the ordinary way of showing a conversion by unlawful retention of property is to prove that the defendant having it in his possession refused to give it up on demand made by the party entitled; and such a demand is a condition precedent to the action: Clayton v. Le Roy 1911 2 K.B. 1031. In such a case time does not run until the demand since the cause of action does not accrue without a demand. But a demand and refusal is not the only way of establishing conversion. Where a person uses or deals with property in a manner adverse to the true owner and inconsistent with the true owner's right to it a demand is no longer a condition precedent to the institution of an action in conversion. Fowler v. Hollins 1872 L.R. 7 Q.B. p. 627. Wilde v. Waters 1855 24 L.J. C.P. 193.

The defendant having explicitly claimed the property as his in 1942, the plaintiff's cause of action arose at that date and as the writ was not filed until 1950 her cause of action is statute barred.

The claim is dismissed with costs to the defendant. Certified fit for counsel.

Solicitors: *H. A. Bruton* for plaintiff,
H. V. Van B. Gunning for defendant.

EZE ANYANWU OGUERI v. ARGOSY COMPANY LTD., AND OTHERS

(In the Supreme Court, Civil Jurisdiction (Boland J.) June 30, 1952).

Power of Attorney—execution—Evidence Ordinance—requirements.

The Evidence Ordinance Chapter 25 requires a Power of Attorney executed outside of Her Majesty's dominions to be proved in any civil cause or matter by the affidavit or declaration of a subscribing witness sworn before one of various functionaries as set out in section 29.

The plaintiff who is residing in the United States of America executed a Power of Attorney in favour of D but there was no signature on it of a subscribing witness evidencing the due execution thereof. D as plaintiff's attorney filed a writ against the defendants. The defendants applied to set aside the writ of summons.

Held: There was non-compliance with the Evidence Ordinance as there was no declaration of a subscribing witness before a proper functionary.

Writ of summons set aside.

A. G. King for applicants (defendants)

C. M. L. John for respondent (plaintiff)

Boland J.: In substance, the application by the Defendants for the setting aside of the Writ of Summons and all subsequent proceedings was on the ground that the plaintiff who purported to be suing by his lawful and duly constituted attorney, Claude Hicks Augustus Denbow, had not executed the Power of Attorney in accordance with the directions on that behalf contained in section 29 of the Evidence Ordinance Chapter 25. That section provides that when any deed, letter of Attorney or other power or instrument in writing is made and executed or purports to be made or executed in any place out of His (now Her) Majesty's dominions, it may be proved in any civil cause or matter by the *affidavit or the declaration of a subscribing witness* sworn or made before one of a number of named functionaries. The functionary is required to make due attestation of that fact in the manner specified for each class of functionary as prescribed by the section.

The document produced in evidence does purport to be a Power of Attorney executed by the plaintiff by which he purported to give to Claude Hicks Augustus Denbow authority to bring these proceedings against the Defendants, but there is no signature thereon of a subscribing witness evidencing the execution thereof by the plaintiff. True there is on the document the signature of Mannard Plommer, British Vice Consul, Boston U.S.A. with the seal of that officer affixed thereto; this signature and seal of the British Vice Consul at Boston U.S.A., one of the functionaries which the ordinance names, vouches that the plaintiff had appeared before him and had stated and declared that for divers good causes and considerations and being away from British Guiana he the plaintiff (Eze Anyanwu Ogueri) was declaring and nominating the said Claude Hicks Augustus Denbow to manage his special business in the Colony of British Guiana and more particularly to bring and commence this action against the defendants.

The British Vice Consul thereby, it would seem, was the subscribing witness—however his statutory role was to take the declaration of the subscribing witness—not that of the person executing the deed. There is nothing to prevent a Consul or Vice Consul being himself the subscribing witness but if he is a subscribing witness he must himself as such make a declaration before a proper functionary that he had witnessed the execution of the deed.

Therefore I hold that there has not been compliance with the ordinance as there is no declaration of the subscribing witness before a proper functionary and accordingly on a challenge of the alleged power of attorney I am forced to hold that there is no proof of a valid power of attorney by the plaintiff authorizing the bringing of the action. The challenged power of attorney was through error received at the Registry and there registered, but the defendants are not thereby debarred from impeaching its validity.

On the question of costs I hold that there being no power of attorney authorizing the bringing of this action, I cannot make the plaintiff liable for costs, he being not properly a party to the action quite apart from his being outside of the Jurisdiction.

Denbow, I hold is liable for the costs incurred by the defendants in defending this action; these costs having been incurred as a consequence of an action filed by Claude Hicks Augustus Denbow on behalf of the plaintiff without lawful authority from the plaintiff. The Solicitor is also liable for these costs, for it must have been on his advice that the action was brought. Denbow may be well able to pay the costs but it can be imagined what hardship it would be to a defendant to find himself unable to get his costs from an impecunious person who, acting on the advice of a solicitor, brings an action on behalf of another without the necessary lawful authority. The Solicitor, who, as the record shows, was authorized to act for the plaintiff by Denbow would himself be acting without authority and the costs to Defendants would be the direct consequence of his acting without authority.

Writ of summons set aside.

MOONSAMMY v. HOSSAIN

(In the Supreme Court, civil jurisdiction (Stoby J.) June 19, 20, 30, 1952).

Master and servant—watchman—Minimum wages order—contracting out.

The Minimum Wages (Georgetown and New Amsterdam Watchmen) Order, 1949 fixed the maximum number of hours of work for a watchman and the minimum wage payable to a watchman for such work.

In an action by the plaintiff a watchman against his employer the defendant for arrears of wages it was submitted that if the watchmen worked in excess of the maximum number of hours fixed by the order his remedy was to prosecute the defendant criminally and not sue for unpaid wages.

Held: As a result of section 15 of the Labour Ordinance 1942 (No. 2) a watchman cannot contract out of the Ordinance and he was entitled to claim the wages to which he was legally entitled.

Judgment for the plaintiff.

H. A. Fraser for the plaintiff.

C. V. Wight for the defendant.

Stoby J.: A point of some importance to employers and employees arises in this action in which the plaintiff claims from the defendant the sum of $632.04 as wages for work done and services rendered as a watchman from the 1st of January, 1949, to the 27th April, 1950.

The defendant is the owner of a store situate in Regent Street and at the time when the events, the subject matter of this action, took place, there was next to him on the western side another store owned by M. Gonsalves Limited and known as the Cash Store. In September 1948, the defendant and M. Gonsalves Limited were without the services of a watchman. Mr. J. J. Thomas, the Secretary of M. Gonsalves Limited and President of a charitable organisation known as the St. Vincent de Paul Society, knew that the plaintiff was willing to work as a watchman, but not wishing to be worried over the details, sent the plaintiff to the defendant to arrange terms of employment. It was agreed between the plaintiff and the defendant that the plaintiff would be employed as a watchman and that his duties were to watch the premises of the defendant's store and M. Gonsalves' store. For that purpose he was required to commence work at 6 p.m. and perform his duties throughout the night until the following morning at 7.30 a.m. His agreed wages were $8 per week.

The defendant paid the plaintiff the weekly wage but received from M. Gonsalves Limited a contribution of $20 per month towards the sum paid by him. In other words the defendant's share of the $8 per week was approximately $3 per week. Although this arrangement for payment of the wages existed, it is evident from the evidence of Mr. J. J. Thomas that no question of joint employment arises. The contract of employment was solely between the plaintiff and defendant and although in the defendant's affidavit of defence the issue of joint employment was raised, at the trial the case proceeded on the footing that it was the defendant who had employed the plaintiff and the

defendant who would be liable for arrears of wages, if any, and any question of contribution would be a matter between the defendant and M. Gonsalves Limited.

The Minimum Wages (Georgetown and New Amsterdam Watchmen) Order, 1949, referred to herein as the 1949 Order, was published in the Official Gazette of the 23rd April, 1949. This Order, which was made under Section 8 of the Labour Ordinance 1942 (No. 2) fixed the maximum number of hours of work for a watchman and the minimum wage payable to a watchman for such work. For any number of hours worked at the request of an employer in excess of the maximum hours, certain specified rates of pay were prescribed.

There is a sharp conflict of evidence as to what took place after the publication of this order. The plaintiff alleges that he continued to work from 5.30 p.m. to 7.30 a.m. at the same rate of pay, while the defendant insists that following a conference with Mr. J. J. Thomas, it was decided to reduce the working hours of the plaintiff, in an effort to comply with the Order.

As neither plaintiff nor defendant was a satisfactory witness, the decision as to which one was speaking the truth on this issue depends on the testimony of the independent witnesses.

Mr. E. A. Richards, an Assistant Inspector of Labour who investigated this matter before proceedings were taken in Court, is positive that when he interviewed the defendant, it was admitted by him that the plaintiff worked from 6 p.m. Mr. Richards is certain that he is not mistaken because he remembers quite clearly that as a result of the plaintiff's complaint, he had informed the defendant that the plaintiff alleged that his hours of work were 5.30 p.m. to 7.30 a.m. On hearing the allegation, the defendant said that plaintiff commenced his work at 6 p.m. Mr. Richards went on to explain that as there was only half an hour's difference in time between the two versions, he advised the plaintiff to limit his claim for arrears of wages from 6 p.m. and on this suggestion being accepted, the figures were calculated and communicated to the defendant.

The defendant admits that Richards made some calculations and told him what were the arrears, but denied that he admitted that the plaintiff began work at 6 p.m.

Mr. J. J. Thomas who give his evidence with great sincerity and honesty of purpose, was not very helpful on this aspect of the case. I am prepared to accept all that Mr. Thomas said as being truthful but on the question of hours, he was at pains to explain that he could not speak from personal knowledge. He remembered discussing the plaintiff's position with defendant after the publication of the 1949, order, but what decision was arrived at, was not stated in evidence as it was inadmissible and whether the defendant complied with any decision which was made, he was not in a position to say.

I have come to the conclusion that Mr. Richards' evidence is reliable on this point and I accept it. Apart from the fact that he was obviously speaking the truth, the circumstantial evidence supports his statement.

The Hours of Work (Georgetown and New Amsterdam Watchmen) Regulations, 1948 (No. 6) were in existence since the 17th February, 1948. Under those regulations, the number of hours which should normally be worked by a watchman was not to exceed 64. Any person who committed a breach of the Regulations was liable to a penalty of fifty dollars. Despite this Regulation, the defendant on his own admission, had employed the plaintiff to work for 94½ hours every week from September 1948. The contention that he wished to comply with the 1949 Order lacks persuasiveness when one appreciates that he had broken the law consistently and flagrantly for nearly seven months and that his disregard for the law was not in respect of an hour or two but for 34 hours every week.

Another circumstance is that the 1949 Order fixed the minimum wage at $9.12 per week. If, as a result of this Order, the defendant was anxious to comply with the law, the very first requirement would have been to increase plaintiff's wages from $8 to $9.12. Yet he never discussed increased wages with the plaintiff. It cannot be said that the $5 per month paid by M. Gonsalves Limited *direct to the plaintiff was a wage* increase, because I understood Mr. Thomas to say that that sum was paid from the inception of the employment. Nor can it be forgotten that even if the plaintiff worked from 9 p.m. he was still entitled to an additional sum of $1.33 per week overtime payment. For these reasons I reject the defendant's evidence and accept the plaintiff's case that he worked from 5.30 p.m. but was willing to accept payment calculated from 6 p.m.

Counsel for the defendant submitted that even if the plaintiff were employed at less wages than prescribed by the 1949 Order, he could not recover as the only remedy was to prosecute the defendant criminally.

The short answer to this submission will be found in Section 15 of the Labour Ordinance, 1942, (No. 2) which states that:

> "Any agreement or payment of wages in contravention of this part of this "Ordinance shall be void."

The effect of section 15 is that a watchman cannot contract out of the Ordinance and although an employee might specifically agree to work for less than the fixed sum, he is allowed to ignore his agreement and claim the wages to which he is legally entitled. The sole condition to be fulfilled to qualify a watchman for overtime payment is that he must have performed the work at the request of his employer. Once he has not rendered voluntary overtime service, he is not precluded by agreement from claiming the wages which he ought to have been paid.

Counsel for the plaintiff expressed his willingness to credit the defendant with payments made by M. Gonsalves Limited direct to the plaintiff. I have not considered whether these payments may be properly credited or not, but as there was undoubtedly an arrangement between the defendant and that firm, any sum now credited can be adjusted between themselves. As the plaintiff received $5 per month for 16 months and a lump sum

of $80 there must be a deduction of $160 from the amount claimed. There will be judgment for the plaintiff for $472.04 with costs. Certified fit for counsel.

Solicitors: H. C B. Humphrys for plaintiff.

A. G. King for defendant.

RAMDEHOLL v. RAMDEHOLL

(In the Supreme Court, Civil Jurisdiction (Boland J) May 14, 15, 16, 20, 21, 27, 28; July 7, 1952).

Immovable property—recovery of possession—limitation.

This action for recovery of possession of a half share of land in defendant's possession and for which defendant has the legal title was dismissed on the facts but the judgment is reported in part for the statement of the law on a submission by the defence that the action was barred by the limitation ordinance.

Judgment for the defendant.

S. L. van B. Stafford Q.C for the plaintiff.

H. C. Humphrys Q.C. for the defendant.

Boland J.: Plaintiff and defendant are brothers. The defendant is retired Government Medical Officer. In the year 1925 while in the Government Medical Service of the Colony, he purchased at public auction for the sum of $12,500, Plantation Blankenburg situate on the West Coast of the County of Demerara. Included in the purchase were some livestock, the price of which was fixed at $500. Transport of the land was duly passed to defendant in August 1925, and on that transport, No. 832 of the year 1925, defendant's name is still registered as the sole owner of Blankenburg.

At the time of defendant's purchase, Blankenburg was an abandoned sugar plantation comprising an extensive acreage. A part of the lands was then being used for the pasturage of cattle and horses while a very small portion was given over to tenants for the cultivation of rice. This abandoned sugar plantation had been previously owned by Thomas Flood, the father of defendant's wife. Thomas Flood died in 1920 leaving his widow and his children, including defendant's wife, among the beneficiaries named in his will, which was in due course admitted to probate. It was after the death of Mrs. Flood, defendant's mother-in-law, that Blankenburg was put up for sale at public auction and defendant became the purchaser as stated above.

After purchase, defendant continued to employ as manager his brother-in-law Edgar Flood for about two years, after whom a man called Reece was appointed manager. The salary of the manager was $30.00 per month. Despite the realization of some monies from the proceeds of the sale of a few old buildings which were on the lands, the purchase of Blankenburg as an investment of $12,500 was proving unprofitable. Far from yielding a reason-

able rate of interest on the capital sum invested, the plantation in the year 1928, according to the statement of account rendered to the defendant, showed as profit nothing more than a sum in the neighbourhood of $300 which was the average maximum profit for the preceding three years. It was in these circumstances that defendant wished to secure the services of a manager after Reece had been there for two months.

In February 1928, the plaintiff took over the management of the estate. It is common ground that it was at defendant's request that plaintiff then became manager and that he was to receive half of the net annual profits. Plaintiff's taking over as manager, it is agreed by both sides, was in pursuance of an oral agreement between the two brothers which was entered into at Plantation Blankenburg some time during the end of the year 1927. While plaintiff's case is that by this oral agreement he was promised not only half of the net profits but also half of the estate itself, defendant maintains that there was never any reference in the oral agreement or at ,any other time to plaintiff's getting a share in the estate itself but that plaintiff had accepted the appointment of manager at the *remuneration* of half of the net profits.

Plaintiff remained at Blankenburg as manager with the right to half of the profits, till September 1950. He says that he made no demand on his brother to have his undivided half in the lands passed to him by formal transport until the year 1945, although he considered himself as having been given an undivided half of the lands on his going into possession as manager. In 1945, plaintiff says, defendant told him when he asked for transport that there was some legal difficulty as his daughter was objecting. However, in 1948 the defendant, he says, definitely refused to give him transport of the half share declaring that the transport was in his own name and he would "have nothing to do with him." In 1950 there appeared in the local press a notice that Blankenburg was to be put up for sale by public auction on defendant's instructions. In spite of plaintiff's protest, Blankenburg was sold at auction to one McDoom, since deceased, for the sum of $100,000. Following upon a letter to defendant written by Mr. Cabral, Barrister-at-Law, on his behalf, demanding transport of his half share, plaintiff received a letter from defendant's solicitor notifying him that his services as manager were terminated and that he would be receiving his half share of profits to the end of the year 1950. About a week later, an agent of defendant named Ghany came on the estate and broke and entered into the rice factory. In the circumstances, plaintiff felt compelled to leave Blankenburg.

This action is brought to enforce plaintiff's version as to what were the terms of the oral agreement made in 1927. Plaintiff asks the Court to declare that the plantation is, and was owned since 1928, in equal shares by plaintiff and defendant and that defendant is and was a trustee for plaintiff since 1928 of an undivided half part or share therein. Ancillary to this order, plaintiff asks for an injunction to restrain defendant from disposing of the said property without his consent and for an order for the specific performance of the agreement by directing defendant to

pass to him transport of an undivided moiety, and in default of his doing so, that the Registrar be empowered to pass the necessary transport. Plaintiff also asks for an order that he should be permitted to continue in possession as manager by virtue of the agreement and, in protection of his possession, he prays for an injunction in restraint of defendant interfering with him while in possession as such manager.

The agreement took place, as has already been said towards the end of the year 1927. The Statement of Defence in para. 15 gave notice of the intention of the defence to contend at the trial that the claims is statute barred. Para. 15 of the Statement of Defence reads as follows:

> "The defendant will rely on any statute or law of limitation which may be "applicable."

Before determining which of the two versions is true—that of the plaintiff which insists that defendant did agree to give him not only half of the profits but also half of the land and that in pursuance thereof he went into possession as half owner with a half share of profits, or that of the defendant who says that the plaintiff was merely to be manager with the remuneration of half profits and that plaintiff was in possession only in that capacity—it would seem appropriate first to decide whether the cause of action as put forward by the plaintiff is barred by a provision in any enactment prescribing the time within which such action should be brought.

What is the local Statute of Limitation which contains a provision applicable to the plaintiff's claim, which is, as indicated in the Statement of Claim, that the defendant in repudiation of plaintiff's ownership of a half share in Blankenburg purported to sell the entirety to McDoom and that defendant with the object of giving possession to the purchaser put plaintiff out of possession in violation of plaintiff's right as co-owner and in breach of the contract by which plaintiff was to be the manager? Plaintiff asks the Court for a declaration that he is half owner and was such half owner ever since 1928 when he went into possession in pursuance of the agreement and he asks for an order that he shall recover possession of the lands from which, though a co-owner, he was ousted.

It seems to me that the cause of action as put forward by the plaintiff in part is one at law asking for recovery of possession of his half share of the lands and it is none the less an action for recovery of immovable property although he mainly seeks to establish his title thereto, *vide Gledhill v. Hunter* 1880 14 C.D. 492. Now land, or a share of an estate or interest in land, held under freehold tenure is "real property" as understood by the common law of England, and is therefore "immovable" property in this Colony in accordance with the definition of this term given in section 1 of the Civil Law of British Guiana Ordinance, Chapter 7. Two local enactments provide *ipsissimis verbis* the period within which an action for the recovery of immovable property shall be brought. Section 4 (2) of the Civil Law of British Guiana Ordinance, Chapter 7 and section 14 of the Limitation Ordinance, Chapter 184, both read:

"No person shall make an entry or distress or bring an action or suit to re-
"cover any immovable property, but within twelve years after the time at
"which the right to make, bring or recover the same has accrued to him or
"to some person through whom he claims."

Plaintiff's claim to the half share of the lands is not one for breach of the contract made in 1927. His case is that when he was given possession in pursuance of the contract, he did get his half share in respect of which he was at once entitled to have formal transport—and in aid he now prays the Court in the exercise of its jurisdiction in equity to give him the equitable remedies of the declaration of a trust in his favour and the ancillary remedy of an injunction and specific performance.

A plaintiff not in possession who brings an action for the recovery of land has to establish title against the person actually in possession. If he claims to have only an equitable title, it would seem necessary for him to join as co-plaintiff the holder of the legal estate or make him a defendant if he refuses to join, *vide Allen v. Woods* (1893) 68 L.T. 143.

In the instant case, the defendant is himself the holder of the legal estate being holder by transport of the entirety; plaintiff admits that he himself has only an equitable interest in a half, and that is why plaintiff in this action for recovery of possession needs to ask that the defendant be declared a trustee for him of an undivided half.

Plaintiff will not get an order for recovery of possession unless he succeeds also in getting this equitable remedy of a declaration of trust, and the Court in considering the plaintiff's application for the exercise of its equity jurisdiction, though not strictly bound by a statute of limitation will act on the analogy of the statute quite apart from withholding, its equitable remedy from a suitor who is otherwise guilty of laches according to the principles governing the award of equitable relief.

Now the right of action for the recovery of possession of the half share which is claimed by plaintiff to have been enjoyed by him since 1928 arose only when, as he alleges, he was ousted from possession in 1950 or at the earliest, when defendant declared his denial of plaintiff's ownership of the half share. This, according to plaintiff, was not till the year 1948 when defendant was insisting that plaintiff was there only as manager. Accordingly, the period for the purpose of limitation commenced to run not earlier than 1948 and therefore the plaintiff's action for recovery is now not statute barred either at law or equity which, as I have stated, acts on the analogy of the statute. The question whether the plaintiff is guilty of laches disentitling him to the equitable remedies for which he prays is dealt with later in this judgment.

Plaintiff's other cause of action is, as alleged, for ejecting plaintiff from the management of Blankenburg. This clearly is one for breach of contract. A co-owner of land is not entitled to exclusive management of the land. Although claiming to be a co-owner, plaintiff can only claim a right to such exclusive management by virtue of the contract. He advances as breach of this

contract his ejectment from the management in 1950 when defendant's agent broke and entered into the rice mill. His right of action for this breach of contract arose in 1950 when this is alleged by him to have happened. He is not yet barred from beginning his action for this alleged breach of contract. Clearly this action was filed within the statutory period.

Here I may say that I do not subscribe to the view put forward by Mr. Stafford that under this contract there was to be the executed consideration on the part of the plaintiff by his going into possession and immediately assuming the management while defendant's obligation was to be merely executory; and that, consequently, time would commence to run from the time defendant, after demand, refused to pass transport of the half share or in the absence of demand had repudiated the plaintiff's claim to the half share of the lands. Clearly by law when under a contract one party on performing his part is entitled to performance by the other party, the period of limitation of the right to bring an action for damages for breach of the contract resulting from such non-performance commences to run from the date when the other party could have been called upon to perform his part and not from the date of his refusal to perform or his repudiation of the contract otherwise. An illustration of this is furnished every day by the shopkeeper's contract of the sale of goods. Immediately on the delivery of the goods sold, the purchaser in the absence of special agreement is under obligation to pay the price. The period of limitation would begin to run from the date of delivery when there arises the purchaser's obligation to pay the price, not on the purchaser's failure to pay after demand.

The issue raised by the defence of the Statute of Limitation was determined as above, as such defences must always be determined, on the assumption that the plaintiff's claim was otherwise good. On such an assumption too, must be considered the defence that the plaintiff's claim is in respect of a contract which is unenforceable because it was not to be performed within the year and should therefore have been in writing. But the contract is one which was capable of being terminated without breach within the year and therefore does not come within the provisions of Section 20 of Chapter 7 which adopts the language of Section 4 of the English Statute of Frauds 1677. At any rate, part of plaintiff's claim is, as I have indicated, for recovery of his half share and though he claims that his title arose out of this contract, he does not sue on the contract. It is only his claim in respect of his ejectment from the management which is dependent upon the contract being enforceable by action, and I hold, as I have said, that this contract is enforceable though, not made in writing.

His Lordship reviewed the evidence and concluded as follows: In the result, the plaintiff has failed to establish any right against the defendant either in law or equity, and accordingly there will be judgment for the defendant with costs.

Solicitors: *I. G. Zitman* for plaintiff
S. M. A. Nasir for defendant.

REPORTS OF DECISIONS

IN

THE SUPREME COURT

BRITISH GUIANA

DURING THE YEAR

1952

AND IN

THE WEST INDIAN COURT OF APPEAL

[1952].

EDITED BY
KENNETH S. STOBY, ESQ.,
Barrister-at-Law, Lincoln's Inn, Third Puisne Judge,
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 the Chief Justice, Chairman.

The Solicitor-General.

L. M. F. CABRAL, Esq., Barrister-at-law.

H. C. B. HUMPHRYS, Esq., Solicitor.

J. E. DEFREITAS, Esq., Solicitor, during the absence on leave of Mr. H. C. B. HUMPHRYS.

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1954.

JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1952.

EDWARD PETER STUBBS BELL,	—Chief Justice
FREDERICK MALCOLM BOLAND	—First Puisne Judge
HAROLD JOHN HUGHES	—Second Puisne Judge
FABIAN JOSEPH CAMACHO	—Third Puisne Judge
KENNETH SIEVEWRIGHT STOBY	—Registrar of Deeds and of the Supreme Court acted as a Puisne Judge throughout the year.
ALFRED CASIMIRO BRAZAO	—Solicitor-General acted as a Puisne Judge from 8th November, 1952, to the end of year *vice* Mr. Justice Hughes on vacation leave.

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 (1952) L.R.B.G.

SUMMARY

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