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CASES

DETERMINED IN THE

Supreme Court of British Guiana.

WILLIAMS v. CHESTNEY

In the Full Court, on appeal from the Magistrate's Court of the Georgetown Judicial District (Boland, Hughes and Stoby JJ.) March 27, May 30, 1952; January 5, 1953.

Summary Jurisdiction Appeals Ordinance—Notice of grounds of appeal—Non-compliance—Effect.

The appellant gave notice of appeal within the prescribed time and complied with the requirements as to the giving of security but did not draw up his notice of grounds of appeal and lodge it with the clerk of the Magistrate's Court and serve a copy thereof on the respondent within the time limited by the Ordinance.

The respondent submitted that the Court had no jurisdiction to entertain the appeal.

Held: BOLAND J. The Full Court in the exercise of the inherent power of a Court to control its procedure in the absence of a positive enactment or of a rule of court to the contrary, could in a proper case, where justice so demands, excuse an appellant who through unavoidable circumstances has failed to comply with the directions of the Ordinance as to the procedure relating to grounds of appeal.

The failure to comply with the directions of the Ordinance in this appeal was not unavoidable.

Hughes J.: Without deciding whether the Court had jurisdiction to entertain an application for extension of time to appeal, the reason given for the delay would not merit the grant of an extension of time.

Stoby J.: The Full Court has inherent power to extend the time for carrying out a direction concerning a matter of procedure, but the provision requiring an appellant to draw up a notice of his grounds of appeal within a specified time is not procedural, and consequently the Court had no jurisdiction to entertain the appeal or an application for extension of time to appeal.

Appeal struck out.

P. A. Cummings for the appellant.

Clinton Wong for the respondent.

Boland J.: A submission made in limine by Respondent's Counsel against the jurisdiction of the Court to entertain this appeal raises once again a very interesting point of law as to the consequences that shall follow upon an omission by an appellant to comply with the provisions of the Summary Jurisdic-

tion (Appeals) Ordinance Chapter 16 which gives directions to an appellant as to the performance of certain acts as preliminaries to the hearing of his appeal. The appellant had given notice of appeal within the prescribed time and had also complied with the requirements as to the giving of security, but it is admitted by his counsel that appellant did not draw up his notice of grounds of appeal, lodge it with the clerk of the Magistrate's Court and serve a copy thereof on the respondent within fourteen days after delivery at his address of the notice from the clerk informing him that a copy of the proceedings and of the Magistrate's reasons for decision was ready for delivery to him on his paying the proper fee. Section 8 of Chapter 16 does expressly direct that he shall do so within 14 days of the receipt by him of the clerk's written notification. In this case the clerk's notice was forwarded to appellant by registered post at his last known place of abode as specified in the record of proceedings, which happened in fact to be his proper address at the time. It occurred that appellant was away from home on the day when the registered letter was delivered there and he did not receive it personally until the next day. It would seem that appellant made the mistake in the calculation of the period. He apparently thought that it commenced to run from the date of the actual receipt by him of the clerk's notice, and consequently he was one day late in his transmission of his grounds of appeal. There can be no question that he thereby had failed to comply with the directions given in section 8 of Chapter 16. This Court has on more than one occasion decided that unless an appellant complies strictly with the directions contained in Sections 4, 5 and 8(3) his appeal will not be heard. The reason advanced for refusing to entertain the appeal in such circumstances is that the Court is without jurisdiction. The Full Court has no jurisdiction with respect to appeals from Magistrates' decisions expect such as is given expressly by the Ordinance. The Ordinance now in force is the Summary Jurisdiction (Appeals) Ordinance Chapter 16, and it was accordingly held that it is a condition precedent to jurisdiction that the appellant shall perform at the time and manner prescribed in Section 4, 5 and 8 (3) thereof all that he is directed to do before the hearing of his appeal. Not only must the notice of appeal be strictly in conformity with the provisions of Section 4 and 5 (subject however to the exceptions contained in Section 6) but there must also be undeviating compliance with Section 8 (3) which relates to, the drawing up and service of the notice of grounds of appeal. This Court (Crean C.J. and Verity J.) so decided in the case of James Henry v. David Foo (1931-1937) B.G.L.R. 443. In that case the notice of grounds of appeal was signed by counsel, but the *copy* served on the opposite party was not signed, neither did his name appear thereon. It was held that this was not a strict compliance with Section 8(3) which prescribed that the notice of grounds of appeal shall be in a particular form and that that was a condition precedent to an appeal—and accordingly the Court ruled that it had no juris-

diction to entertain the appeal. The Court expressed its regret that for want of jurisdiction it had no power to grant an application to amend the notice so as to make it conform with the prescribed form. In the written considered judgment delivered by the Court in that case the decision in the Duke of Atholl v. Head (1834) 50T.L.R. 264 is referred to. According to the facts in that case the appellant's failure to comply with what was prescribed as a pre-requisite for an appeal was not an omission of something relating merely to his grounds of appeal but was one affecting his notice of appeal. He had applied to the Justices to state a case for the opinion of the High Court, and in contravention of Section 2 of the Summary Jurisdiction Act 1857, which prescribed the procedure for a reference to the High Court by way of an appeal from a decision of Justices, the appellant had transmitted to the High Court the case stated without having first served on the respondent a notice of appeal with a copy of the case stated. By no enactment in England, it would seem, is an appellant, as he is here by Section 8(3) of Chapter 16, authorised to serve grounds of appeal independently of his notice of appeal. Grounds of appeal in England are always included in the notice of appeal. Consequently the decisions in England relating to the non-compliance by appellant with the directions pertaining to the notice of appeal although referring to the grounds of appeal which are contained in the notice of appeal cannot be taken as applicable to a case in this Colony where the appellant has complied with all the directions relating to the notice of appeal but has been guilty of some omission with regard to his notice of grounds of appeal which is a separate document from the notice of appeal. Though it may be questionable whether this Court is bound by an earlier decision given by the Court, it is certainly not bound by an earlier decision given when the Court is constituted only of two judges. Undoubtedly such a decision given by a Bench of two Judges, more particularly when it involves the determination of a point of law relating to the Court's jurisdiction, must carry considerable weight, and that is more so when it is stated, as in the judgment in James Henry v. David Foo, that the point had always been so determined in previous decisions of the Court extending back over many years. If my own views are not restricted by the authority of a binding previous decision I would be inclined to hold that the directions as regards a notice of appeal as set out in Sections 4, 5 and 11 are imperative while what is directed in Sections 7 and 8 is merely directory. The opposite party in whose favour the Magistrate has given a decision is entitled to expect that the matter has been finally determined in the Magistrate's jurisdiction if he has not been served with a proper notice of appeal within the time limited by the Ordinance. If he is served with the notice of appeal within the time limited, and all the other conditions as to security for the costs and for the due prosecution of the appeal is fulfilled then he must appreciate that the dissatisfied party has resorted to the jurisdiction of the Full Court

for the further determination of the matter. I cannot see why the Full Court has not been deemed to be given jurisdiction so soon as the conditions relating to the actual notice of appeal are fulfilled. Certainly what is directed to be done by the Magistrate and his clerk in Section 8 is merely directory a failure to comply with which cannot oust the jurisdiction of the Full Court. Why should directions to the appellant as to his notice of grounds of appeal and as to the copies to be filed for the judges of the Court be so mandatory or imperative that a failure to comply with any of them however trivial and excusable is sufficient as a bar to the jurisdiction of the Full Court. It is to be noted that the Full Court has power by]Section 23 to allow amendments to the grounds of appeal after a notice of grounds of appeal is filed while no such power is given in respect of a notice of appeal. This is understandable as a notice of appeal and the fulfilment of the conditions as to security operate to suspend the finality of the Magistrate's jurisdiction, while the opposite party resorts to the jurisdiction in appeal which is conferred on the Full Court by Ordinance.

It is because of the hardship to an intending appellant entitled to appeal who through some unavoidable circumstances has been prevented from doing so within the prescribed time that Section 14 was enacted to allow him to make application for special leave of appeal. This Court in Sharpies v. Lawrence published in the Official Gazette of the 22nd September, 1951 page 609 (Worley C.J. and Ward J; but Hughes J dissenting) held that Section 14 did not apply to an appellant seeking to get an extension of time for serving notice of grounds of appeal on the plea of unavoidable circumstances preventing his doing so. If I may say so with respect, I agree with the majority judgment in that case. It is my view that the legislature did not make provision for an application for extension of time for the service of the notice of grounds of appeal as is vouchsafed in Section 14 to a person entitled to appeal, because the Full Court, in the exercise of the inherent power of a court to control its procedure in the absence of a positive enactment or of a rule of court to the contrary, could in a proper case, where justice so demands, excuse an appellant who through unavoidable circumstances has failed to comply with the directions of the Ordinance as to the procedure relating to grounds of appeal To instance a hypothetical case it would be an absurd result, which the Ordinance could never intend, that in a case where one of two convicted persons is able to show that because he had contracted a serious illness during an epidemic and had been prevented thereby from filing his notice of appeal in time he can by an application under Section 14 get an extension of time, while the other convicted defendant who, though filling his notice of appeal in time subsequently contracts the same type of infection which causes him to be late with his grounds of appeal, should find himself completely shut out for all time from having his appeal heard. The consideration that such a

result might occur if the direction were imperative is of assistance in determining which of two equally possible meanings should be given to the words of Section 8(3)—that is whether is therein required to be done is imperative or merely directory.

It is beyond question that provisions even in an enactment which require that something shall be done or done in a particular manner or form may be either imperative or merely directory dependent upon the inference which may be attributed to the legislature. That inference may be gathered from the scope and object of the enactment. "It may perhaps be found generally correct to say that nullification is the natural and usual consequence of disobedience but the question is in the main governed by considerations of convenience and justice, and when that result would involve general injustice to innocent persons, or advantage to those guilty of the neglect *without promoting the real aim and object of the enactment,* such as intention is not to be attributed to the legislature", (Maxwell Interpretation of Statutes 8th Edition p. 321.). It is submitted that the real aim and object of the preliminary steps to be taken before the hearing of an appeal is that a person entitled to appeal shall within a precise time from the decision of the magistrate clearly indicate to the opposite party and to the Full Court that he proposes not to accept the magistrate's jurisdiction as final but that he will resort to the appellate jurisdiction of the Full Court, which the provisions of Chapter 16 confer on that Court. As unmistakable indication of that resolve on his part is his filing his notice of appeal in the proper form and serving it within the time allowed on the other party who otherwise would be entitled to ensure that the magistrate's order or judgment has finally decided the matter. He must also give security within the time. Consequently those directions with regard to the notice of appeal and as to security are clearly imperative. I cannot see that once an appellant has filed his notice of appeal and has given the necessary security the requirements as to the grounds of appeal can be anything more than directory. *In Leslie Slater v. Wieting & Richter Ltd.* 1942 L.R. B.G. 420 this Court (Verity C.J. and Duke J.) held that the Full Court has no jurisdiction to extend the time limited by Section 13 (2) of Chapter 16 for lodging with the Registrar two additional copies of the record for the use of the Court at the hearing of the Appeal. With all respect I cannot agree with that view. In that judgment a distinction is sought to be drawn between the fixing of time in a provision contained in an ordinance and that fixed by a provision contained in rules made in pursuance of powers given the Court to regulate its procedure.

But, as the passage cited from Maxwell's Interpretation of Statutes above indicates, directions contained even in a statute may be either mandatory or just directory dependent upon the scope and object of the enactment.

In this colony prior to the year 1929 an intending appellant

was directed by the Ordinance then in force to file and serve notice of appeal within 14 days and also to serve on the respondent a notice of reasons of appeal within the same time. True he need not have had the notice of reasons for appeal included in the notice of appeal nor was it necessary to have the notice of reasons served at the same time as the notice. But the fact that the legislature had fixed the same time limit for the notice of reasons of appeal as for the notice of appeal itself would lend, I feel, some foundation for the view that it was intended that the compliance with the direction as to the time within which the notice of reasons for appeal should be served was as imperative as that relating to the notice of appeal. Accordingly, it is not strange to find that in all decisions earlier than 1929 it is declared to be obligatory on an appellant that he shall be in time with his notice of reasons for appeal as well as with his notice of appeal if he wishes to resort to the Appellate Jurisdiction of the Supreme Court to hear Magistrate's appeal as conferred by the Ordinance. But the provision which made the time limit of notice of appeal and the notice of reasons for appeal co-extensive was repeated by Ordinance No. 6 of 1929 which introduced the provision that the appellant shall serve his notice of reasons of appeal within 14 days of the time of his receipt from the Magistrate's clerk of the notice that a copy of the proceedings and of the Magistrate's reasons for decision is available. That as I have stated is still the law, as enacted by Section 8 (3) of Chapter 16. The reason for holding as imperative the former direction as to time within which the notice of reasons should be given in my view no longer holds good, because the respondent on his receipt of the notice of appeal within the prescribed time must be taken to have been at once fully notified that the appellant had elected to avail himself of the Statutory appellate jurisdiction of the Full Court.

I must concede that the case of Barker v. Palmer 51 L.J. K.B. 110 would seem to support the view taken by Verity C.J. and Duke J in Slater v. Wieting and Richter as to the imperative nature of directions as to time contained in the enactment. Barker v. Palmer was a case where a plaintiff in an ejectment suit to recover land before the County Court had failed to deliver his summons with the bailiff forty clear days at least before the return day. A County Court rule required that a plaintiff in an action to recover land shall deliver the summons at least 40 days before the return day and the bailiff was to serve the summons on the defendant 35 days before the return day. The bailiff though he received the summons late was nevertheless able to serve it 35 days before the return day. Objection was taken by the defence that the plaintiff was out of Court because of his not delivering the summons to the bailiff in time. The County Court judge rejecting this objection gave judgment for the plaintiff. On appeal it was held by the Divisional Court that the County Court did not have jurisdiction to entertain the suit because of the summons not having been left with the bailiff in time. The matter was not taken to appeal, no doubt because it was less expensive for the respondent to file his

action again in the County Court taking care to leave his summons the bailiff in proper time before the return day. Within two years of the decision in Barker v. Palmer the county court rule was amended so to avoid in future the effect of that decision. Consequently there has been no opportunity to test the correctness of that decision since.

I have been at some pains to set out at some length my views on the question as to the consequences of a failure by an appellant to observe strictly the directions in the Ordinance relating to the notice of grounds of appeal as distinguished from those relating to the actual notice of appeal. It is with regret that I find myself in disagreement with previous decisions given in the Full Court, which though entitled to respect are nevertheless not binding on the Court. I may add that I have read the decisions in Balkissoon and Resal Singh v. Corporal George Williams 1938 L.R.B.G. 187 and Edward Ramcharran v. Ramsaluk 1931—1937 L.R.B.G. 568 but I do not find that in either it is held that the court has no inherent power to extend the time for carrying out a direction concerning a matter of procedure. Whether I am right or wrong in the views I hold, I join in expression of hope repeated in many of the judgments that there will be early legislative enactment which would confer express power on the Court to avoid the hardship which an aggrieved party may experience as a result of an excusable omission on his part to comply with the directions of the Ordinance relating to the notice of grounds of appeal.

In this particular case the reasons put forward by appellant's counsel are not such as can be accepted as excusable. An appellant who has given notice of appeal must make provision for the receipt and early delivery to him of the Magistrate's Clerk's notice should it be left at his' home during his absence. He has 14 days from the date of delivery for the filling and service of his notice of grounds of appeal. In my view an extension of time should be granted only if the delay was unavoidable and not because of mistake. It was not unavoidable in this case.

In the circumstances there being no grounds of appeal before the Court—the appeal will be dismissed with Costs to respondent.

Appeal struck out.

Hughes J.: I have read the judgment to be delivered by Bo-land J. in this matter, and while I refrain from expressing agreement with his opinion that the Court has jurisdiction to entertain an application for the extension of time for lodging and serving of grounds of appeal, I feel satisfied that even if the Court had such jurisdiction, the reason in this case given for the delay is not such as would merit the grant of an extension of time.

Accordingly I agree that the appeal should be dismissed.

Stoby J.: I agree with Boland J. that the Full Court has inherent power to extend the time for carrying out a direction concerning a matter of procedure but I do not agree that the provision of section 8 (3) requiring an appellant to draw up a notice of his grounds of appeal within a specified time is procedural.

In order to prosecute an appeal an appellant must not only give notice of appeal but must state the reasons. The consequence of a default in the due prosecution of an appeal is, that it is deemed abandoned in accordance with section 16 (1) Chapter 16. This is a salutary and necessary provision. In the absence of such a section a person convicted and sentenced to imprisonment could give notice of appeal and do nothing more because the execution of the decision under appeal is suspended as enacted by section 12 of Chapter 16. Section 16 was specially designed to prevent delaying tactics and if it were held that the grounds of appeal are not an indispensable part of the prosecution of an appeal it would follow that the section is valueless, as a Magistrate could not properly sign a commitment warrant until an appeal is deemed abandoned and if the Court has power to extend the time for filing the reasons of appeal, it cannot be said that an appeal is abandoned until an application for extension is made and refused.

Subject to this qualification I am in entire agreement with the view expressed by Boland J.

In the matter of the Estate of Sukhrania in the will written Sookrani.

SAMAROO v. RAGHUNAUTH

(In the Supreme Court, Probate and Administration (Boland J.) September 7, 1953).

Wills—Caveat—Warning—Entry of appearance—Failure to disclose interest—Necessity for so doing.

Prior to the plaintiff's filing an application for probate in common form the defendant lodged a caveat claiming to have an interest in the estate. The defendant duly entered an appearance to the warning filed by the plaintiff, but did not disclose the nature of the interest which he claimed to possess in the testator's estate.

The plaintiff took no steps to set aside the caveat but issued a writ followed by a statement of claim for probate in solemn form. The defendant did not file a defence.

The matter was set down for hearing.

Held: The interest of the caveator in the estate must be disclosed. As this was not done and the plaintiff had not taken any steps to set it aside, costs would be allowed only in respect of the application for probate in common form.

T. Lee for the plaintiff.

J. O. F: Haynes for the defendant.

At the conclusion of the arguments the following decision was delivered.

Boland J.: The Writ in this action was filed by plaintiff who as executor claims to have the Will of Sukrania dated 12th December, 1951, admitted to probate in solemn form of law. Depositing the said will in the Registry the executor had made the usual application, supported by the prescribed affidavits and documents, for a grant of probate in common form. But prior to the filing of the application in the Registry, the defendant lodged there a Caveat claiming to have an interest in the estate. The defendant duly entered an appearance to the warning filed by the plaintiff—hut did not disclose the nature of the interest which he claimed to possess in the testator's estate. The plaintiff should have taken out a summons to set aside the caveat unless the interest was disclosed. This is in accordance with the practice in England under the Probate Rules. "The entry" (i.e. entry of appearance to the warning) "must disclose the interest of the caveator in the estate" (Mortimer 2nd Ed. p. 507). This is a practice that should be adopted here as it has its usefulness in avoiding contentious proceedings at the earliest stage. It may be established on the hearing of the summons that the caveator has no such interest in the estate of the deceased as would entitle him to oppose the grant of Probate of the will. The estate might thus be saved the heavier costs of proof of the will at a hearing before the Court.

The executors of this will however took no steps to set aside the caveat—but at once commenced proceedings by issuing the writ against the defendant for probate in solemn form of law.

Service of the writ was effected on the defendant who formally entered appearance. Then the Statement of Claim followed and the defendant not filing a defence the plaintiffs caused the matter to be set down on the Hearing List.

At the hearing Counsel for defence, intimated to the Court that the defendant was not opposing probate. I asked what was the interest claimed in the estate which had induced the filing of the caveat. Counsel, who was not responsible for the caveat, declared that he was instructed that the defendant was interested in an alleged earlier will, but he had since been satisfied that the later will now propounded had been properly executed and attested according to law.

On the evidence the Court is satisfied that there was proper execution and attestation of the will and grants probate in solemn form.

In my view the testator's estate should not have the burden of bearing the costs of the proceedings in solemn form.

In the circumstances and in order to insist upon the observance of the proper practice being followed where a caveat is lodged, I have refused to give the plaintiff his costs out of the estate in respect of the writ and subsequent proceedings in this action, Costs will be payable out of the estate only in respect of the application for probate in common form including the proceedings relating to the caveat which proceeded the filing of the writ.

Solicitors : *H. A. Bruton* for plaintiff.
A. R. Sawh for defendant.

S. MISIR AND RAMOTAR v. J. S. DOUGLAS AND T. S. WHEATING

In the matter of an Election Petition for the Electoral District No, 2 (Pomeroon).

SIRIDHAR MISIR and RAMOTAR,

Petitioners.

v.

JAMES SHALTO DOUGLAS and THOMAS SHERWOOD WHEATING,

Respondents.

(In the Supreme Court, Civil Jurisdiction (Bell C.J.) June 22, August 10, 11, 12, 13, 14, September 3, 4, 24, 1953).

Election petition—Candidate—Voter—Nomination—Returning Officer—Rejection—Election void.

On the 27th April, 1953, the respondent Douglas attended at the Court house at Charity, Essequibo for the purpose of receiving the nominations of candidates for the Pomeroon Electoral District.

The petitioner Misir was an intended candidate at the Election but his nomination paper was not signed by his proposer and seconder when it was handed to the Returning Officer. It was received by him without comment, and after the statutory period for receiving nominations had expired he announced that the nomination of Misir was rejected.

The respondent Wheating was elected.

The petitioner Ramotar was a person entitled to vote at the election.

An election petition praying that the election of Wheating was void was brought by the petitioners.

It was submitted that Misir not being a candidate could not bring the petition and that Ramotar could not be a joint petitioner with someone who could not be a petitioner.

Held: The Legislative Council (Elections) Ordinance 1945 permits a person alleging himself to have been a candidate to institute an election petition. In any event the second petitioner was a person entitled to vote and could lawfully bring or join in bringing a petition.

Held further : The Returning Officer although acting in good faith should have returned the unsigned nomination paper to the proposer and notified him why it was irregular before the expiration of the statutory period.

In failing to do so his conduct was a circumstance by reason of which the majority of the voters may have been prevented from electing the candidate whom they preferred.

Election held to be void.

J. O. F. Haynes. Akbar Khan and C. *R. Wong* for the petitioners.

H. C. Hurnphrys Q.C. and *Amino Sankar* for the respondent Wheating;

G. M. Farnum, Solicitor General for the respondent Douglas.

Bell C.J.: This petition is presented by Mr. Siridhar Misir who alleges in the petition that he was a candidate at the election held in Electoral District No. 2 (Pomeroon) on the 27th April, 1953, and by Mr. Ramotar who alleges that he was a person who had a right to vote at that election.

At the election the respondent Mr. Thomas Sherwood Wheating was elected as the Member of the House of Assembly for the Electoral District No. 2 (Pomeroon) and the petition of Mr. Misir and Mr. Ramotar prays that for the reasons set forth in the Petition it be determined by this Court that Mr. Wheating was not duly elected or returned and that the said election was and is void in law. The petitioners allege, *inter alia*, that the election was not conducted in accordance with the principles laid down in the Legislative Council (Elections) Ordinance 1945 and the Representation of the People Ordinance 1953 and of the Common law and that such non compliance affected the result of the election. They further allege, inter alia, in an amendment to their petition which amendment was allowed by this Court to be made, that the alleged facts set out in their petition constitute a circumstance or circumstances by reason of which the majority of voters may have been prevented from electing the candidate whom they preferred.

It is the Legislative Council (Elections) Ordinance 1945 (Ordinance No. 13 of 1945) Section 82 as applied by Section 3 of the Representation of the People Ordinance 1953 (Ordinance No. 5 of 1953) which states when the election of a candidate as a Member of the House of Assembly shall be declared void. Section 82 reads as follows:

> "82 (1) The election of a candidate as a member of the Council (Member of the House of Assembly) shall be declared void on an election petition if any one of the following grounds be proved —
>
> (a) that by reason of general bribery, general treating or general intimidation or other misconduct or other circumstance whether similar to those before enumerated or not the majority of the voters were or may have been prevented from electing the candidate whom they preferred;
>
> (b) if it appears that the election was not conducted in accordance with the principles laid down in the Ordinance and that such non-compliance affected the result of the election;
>
> (c) that a corrupt or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;
>
> (d) that the candidate was at the time of his election a person not qualified, or a person disqualified, for election as a Member;" .

The petitioners contend that they have established that the election falls to be avoided under both (a) and (b) of Section 82 as set out above.

With the agreement of Counsel for petitioners and respondent Mr. Wheating, Mr. Douglas who was the Returning Officer for Electoral District No. 2 (Pomeroon) on the 16th April, 1953.

was called as the very first witness in this case so as to permit him to go to England on long leave of absence. He left the Colony with the Court's permission after he gave evidence but in the event the decision to let him leave the Colony when he did leave is regretted for this reason. The petitioners called Mrs. Janet Jagan as a witness regarding a conversation which she had with Mr. Douglas on the afternoon of the 16th April, 1953—nomination day in the Electoral District No. 2 (Pomeroon)—with respect to the alleged failure of Mr. Douglas to accept the nomination of the petitioner Mr. Misir. As the result of Mrs. Jagan's evidence, from which it could be contended that Mr. Douglas had tacitly admitted that he had been tendered a second nomination paper within the statutory hours by Mr. John Caldeira the proposer of the petitioner Mr. Misir, I should very much have like to recall Mr. Douglas and further question him in an attempt to establish whether or not such a second nomination paper had been so tendered to him. He denied it in his evidence which was, of course, given before Mrs. Jagan gave evidence. As Mr. Douglas was not available I sought to have the evidence of Mr. Yhap who had been clerk to Mr. Douglas on nomination day the 16th April. 1953, at Charity Court House but he proved to be absent in England. It should be borne in mind that Mrs. Jagan admits that she did not specifically ask Mr. Douglas if the second nomination paper had been tendered to him and that Mr. Douglas never specifically said that it had been tendered to him. Her evidence on that point amounts to this that he never denied that there had been such a tendering and that their conversation took place, in his opinion, on the footing that there had been such a tendering. The further evidence of Mr. Douglas and the evidence of Mr. Yhap may well have thrown decisive light upon this matter of the alleged tendering of the second nomination paper upon which there is a very sharp conflict of evidence. Mrs. Jagan gave her evidence in a moderate manner and left me with the impression that she was telling the truth, but in the light of all of the rest of the evidence in this case, her evidence is not, in my opinion, conclusive on the point whether or not a second nomination paper for the petitioner Mr. Misir was tendered to Mr. Douglas by Mr. Caldeira within the statutory hours on the 16th April, 1953.

I turn now to deal with three legal submissions which have been made on behalf of the respondent Mr. Wheating.

It was submitted, after Mr. Douglas had given his evidence, that the petition did not properly lie as the only remedy open to the petitioners on the facts as then known, was by way of Mandamus, or alternatively, that there was vested in this Court a discretion to say that if it considers that the remedy of Mandamus was, in all the circumstances of this case, more convenient, remedial and effective, then that remedy should have sought by the petitioners in preference to that of election petition and to hold that the present petition does not lie. I gave a written ruling on that submission on the 11th August, last but I do not

propose to repeat it here. In that ruling I held that the present petition is properly before this Court.

It was however later submitted by Mr. Humphrys that neither the petitioner Mr. Misir nor the petitioner Mr. Ramotar is a person who is entitled to bring this petition. The law as to who may bring an election petition in respect of elections for membership of the House of Assembly is to be found in Section 80 of the Legislative Council (Elections) Ordinance 1945 as applied by Section 3 of the Representation of the People Ordinance 1953 (Ordinance No. 5 of 1953). Section 80 reads as follows:—

> "80—An election petition may be presented to the Supreme Court by anyone or more of the following persons, that is to say —
>
> (a) some person who voted or had a right to vote at the election to which the petition relates;
>
> (b) some person claiming to have had a right to be returned or elected at such election;
>
> (c) some person alleging himself to have been a candidate at such elections;"

Mr. Humphrys has contended that "candidate" in paragraph 1 (c) of Section 80 means a candidate who has been duly nominated and that as, (in his submission) the facts show that the petitioner, Mr. Misir, was never in fact nominated on nomination day the 16th April, 1953, he is not a candidate within the meaning and intendment of paragraph (c) of Section 80. and therefore cannot properly bring the present petition. In support of his contention he has cited to me the case of *Morris v. Burdett* 1813 Maule and Selwyn p 212; *Monks v. Jackson* 1 Common Pleas Reports p. 683; *Harford v. Lynskey* (1899) L.T.R. Vol. 80 p. 417. Mr. Haynes has contended, on the other hand. that there is nothing in Section 80 to show that by "candidate" is meant a duly nominated candidate; that a study of other provisions of the Legislative Council (Elections) Ordinance 1945 e.g. Section 34, shows that "candidate" does not have the meaning contended for by Mr. Humphrys, but (he in effect argues) means one who has since the date of the issue of the Governor's writ for the holding of the election show by his words and deeds that he is holding himself out as a candidate for election and is a person seeking the suffrages of the electors. There is no definition of "candidate" in the Legislative Council (Elections) Ordinance 1945 such as was considered in Cambridge County Council Election Petition—Fordham v. Webber (1925) 2 K.B. 740; at page 747 whereof it is said: —

> "With regards to the true meaning of the words "a person alleging himself to have been a 'candidate" light is thrown upon them by the judgment of Wright J. in Harford v. Linskey (1899) 1 Q.B. 852, 859 where the learned judge says: "The words 'a person alleging himself to have been a candidate' cannot of course mean that a mere allegation without any colour of foundation in fact would suffice. Such a merely false

> allegation would be properly dealt with in a summary way. But the words used seem designed to express something wider than absolutely valid candidature, and they are at any rate consistent with "the view that any person who was in fact a candidate may present and maintain a petition just as a person who voted in fact may do so whether or not they had a right to vote." Upon that the question arises whether the petitioner who, in the words of the petition is alleging himself to have been a candidate at the election in question, was a person who in fact was a candidate at that election for the purpose of deciding that question it is necessary to return to the definition clause in s. 77 of the Municipal Corporations Act of 1882: " 'Candidate' means a person elected or having been nominated, or having declared himself a candidate for election, to a corporate office". It is clear that the petitioner in the present case was not elected, no one contends that he was, nor of course, is there any finding in the special case to that effect. No one contends that he was a person who had declared himself a candidate for this election, and therefore the only question is whether he can be said to have been nominated a candidate for election on this occasion".

It is upon Monks v. Jackson 1 L.R C.P 688 that Mr. Humphrys mainly relies in support of his contention that "candidate" in paragraph (c) of Section 30 mean a "duly nominated candidate". Each of the judges who decided that case confined himself to very brief reasons for coming to his decision. So far as I can discover there was not before them to be construed the words "some person alleging himself to have been a candidate at such election". If Mr. Humphrys is correct in his contention, then any course of misconduct by a Returning Officer (whereby the "candidate" is prevented from being nominated) such as refusing to accept a properly made out nomination paper tendered in strict compliance with Section 17 of the Representation of the People Ordinance 1953, because he did not like the look of the person tendering it to him, or because of some other whim or fancy which he saw fit to indulge would preclude the "candidate" from being able to bring an election petition. Mr. Humphrys' reply to that is that the "candidate" could proceed by way of Mandamus. That is so startling a proposition, that one hesitates to think that the legislature ever intended to bring about such a result. For the reasons which I give later, I do not find it necessary for the purpose of my decision on this petition, to decide whether Mr. Humphrys' contention as to the meaning of "candidate" in paragraph (c) of Section 80 is correct; perhaps in some future election petition the point can be reserved under Rule 37 of the Legislative Council Election Petition Rules 1948 for consideration by the Full Court of the Supreme Court. I incline however strongly to the view, though, I do not now decide the point that his contention is wrong and that

"candidate" in paragraph (c) of Section 80 is not confined to a person who has been in fact nominated in due form but includes something wider than an absolutely valid candidature and includes any person who was, in fact, a candidate such as a person who by his words and actions since the date of the Governor's writ for the holding of an election, has clearly shown that he proposes to contest the election and to offer himself to the suffrages of the electors. Such a construction seems to me to be called for because: —

(a) it is deducible from a reading of the Legislative Council (Elections) Ordinance 1945 *as a whole;*

(b) it gives effect to the very wide words "some person *alleging* himself to have been a candidate at such election" which were not under consideration in *Monks v. Jackson;*

(c) it is consonant with an Ordinance whose object would seem to be to enable misconduct, illegalities, irregularities by election officials to be challenged (see in particular Section 82 of the Ordinance) by election petition by persons who genuinely seek to be returned to the House of Assembly.

It is a fact, I hold, that the petitioner Mr. Ramotar was entitled to vote in the Electoral District No. 2 (Pomeroon) on the 27th April, 1953. In other words he was, within the meaning of Section 80 (a) a "person who .....had a right to vote at the election to which the petition relates." But Mr. Humphrys asks me to consider whether the Ordinance intended it to be possible for Mr. Ramotar to be a petitioner in respect of a petition which, Mr. Humphrys contends, it is not possible for Mr. Misir lawfully to bring. I have carefully c o n s i d e r e d Mr. Humphrys' submission but find no substance in it. It should not be overlooked in this connection that Section 80 makes it clear that 'any one or *more'* of the persons enumerated therein are competent to bring an election petition. I am quite satisfied that Mr. Ramotar is entitled and qualified to bring the present petition and in the result I am satisfied that a valid petition lawfully brought is before me.

I have had no difficulty in coming to the conclusion that the petitioner was not nominated by the first nomination paper (Exhibit Al) which was handed to Mr. Douglas the Returning Officer on the morning of the 16th April, 1953—nomination day at Charity Court House. It was not signed by Mr. John Caldeira (who intended to be Mr. Misir's proposer) or by Mrs. Wilhelmina Caldeira (who intended to be Mr. Miser's seconder) before it was handed to Mr. Douglas unsigned and at no time before the expiring of the statutory period which expired at 11 a.m. on that day was it ever signed by either of them. If then Mr. Misir was ever nominated on the 16th April, 1953, it was not by virtue of that first nomination paper; I accept it as a fact that the Caldeiras intended to sign it in the presence of Mr. Douglas, the Returning

Officer, and I can only surmise that they either thought that to be required by law or thought it prudent that he should see them so sign. Be that as it may, there is no doubt that their omission to sign it before handing it to Mr. Douglas, for which they have only themselves or their advisers to blame, set off a chain reaction of events which led to the invoking of the jurisdiction of this Court. I may here say that I am satisfied, mainly on the evidence of Mr. Douglas and Mr. Duke, that that first nomination paper was in fact handed back to Mr. Misir pinned up with other papers of Mr. Miser's by Mr. Douglas' clerk before 11 a.m. on the 16th April, 1953 at Charity Court House, but I am not satisfied that Mr. Miser was aware that it had been handed back to him. But in view of what I have to say as to Mr. Douglas' attitude on the matter of Mr. Miser's attempted nomination, it does not seem to me to matter whether or not Mr. Misir was aware that the paper had been handed back to him.

This case has presented me with a sharp conflict of evidence upon the very important point as to whether or not a second nomination paper, duly completed, was actually tendered to the Returning Officer by Mr. John Caldeira, the intended proposer of Mr. Misir, before 11 a.m. on the 16th April, 1953 in Charity Court House. Mr. Douglas has denied that there was any such tendering and I have already indicated how much I have felt my inability to question him further on that point in the light of the evidence in support of the view that there was such a tendering of such a nomination paper given by Mr. Misir, Mr. Vibart Wight, Mr. A. Khan (Mr. Wight's clerk), Mr. John Caldeira and Mrs. Janet Jagan. If, on the other hand, the testimony is to believed of Mr. Thomas Sherwood Wheating, Mr. Eustace McDonald Duke, Mr. John Cuthbert Dummett (an employee of Messrs. Wieting and Richter of which firm Mr. Wheating is the Chairman), Mr. James Anthony (Police Constable 4590) and Mr. Neville Grant (Police Constable 5303), there was no such tendering of such a second nomination paper. Of the witnesses named above, there are three, namely Mr. Eustace McDonald Duke, Mr. James Anthony and Mr. Neville Grant whom one would expect to be free from any interest in the result of this petition and I have not overlooked that in coming to my conclusions. It is of course, incumbent on a Court in every case to consider the *probabilities* of the matter and in the present case there can, I think, be no doubt that it is probable that Mr. Misir and his proposer and seconder were very anxious to ensure that Mr. Misir was duly nominated.

I am satisfied that Mrs. Jagan had furnished the Petitioner, Mr. Misir, with two Nomination Papers before the 16th April, 1953, and I see no reason to doubt that Mr. Caldeira did fill up the second Nomination form (Exhibit "D") in the Charity Court House between 9 a.m. and 11 a.m. on the 16th of April, 1953. It is a fair inference that he filled it up with the intention of tendering it to Mr. Douglas, the Returning Officer; But did he in fact do so? After careful consideration, I have come to the conclusion that there was no formal tendering of it to Mr. Douglas, the Return-

ing Officer, and it follows, therefore, that I am not satisfied that he ever held it out or up visibly to Mr. Douglas in the way some of the witnesses have described. Nor am I satisfied that Mr. Caldeira ever said to Mr. Douglas "Sir, as the "first Nomination Paper was not in order, here is another", or used any words to the same effect. I am, however, satisfied, beyond a reasonable doubt, after careful consideration of the whole of the evidence in this case, (but I do not propose to discuss that evidence in detail), that the attitude adopted by Mr. Douglas during the hours 9 a.m. to 11 a.m. on the 16th of April, 1953,—Nomination Day—in Charity Court House, was such as to cause Mr. Misir and his proposer and seconder reasonably to assume that Mr. Douglas was of the opinion that they had "shot their bolt" by tendering to him the first unsigned Nomination Paper (Exhibit "A1"), and that nothing they could do between the time they handed that to him and the expiration of the statutory period at 11 a.m. could avail to undo that error and put themselves in order, and that he was not disposed to take any further Nomination paper from them. In coming to the above conclusion, I have placed much reliance upon the inherent probabilities of the case, the evidence of Mr. Douglas himself, the estimate I formed of his probable attitude on the morning of the 16th of April, 1953, both from his evidence and his bearing as a witness. I have no reason to think that Mr. Douglas is otherwise than an honourable, conscientious public servant, and I wish to make it perfectly clear that I am satisfied that whatever he did on that Nomination Day was done in perfect good faith. But there can be no doubt that so impressed was he with the importance of the occasion, and of the need to maintain a strict impartiality between the several candidates that he adopted a timid and legalistic approach to his duties and was ambiguous in his behaviour which led him into difficulties. I would say nothing here which would lessen the care which Returning Officers should use to be, and remain, strictly impartial as between the several candidates at an election, but I cannot for the life of me see why when the unsigned first Nomination paper was tendered to Mr. Douglas he did not say to Mr. Caldeira "Look, you have not signed it, please do so". Is it possible that any modern Election Court would hold that essentially commonsense act to be a partial act? I do not now answer that question, but confine myself to saying that Mr. Douglas' failure to call attention to the absence of the signatures is one example, (there are several others), of what I regard as his legalistic approach to the performance of his duties on the morning of the 16th of April, 1953. Some other examples of the same legalistic and, I think definitely misleading behaviour of Mr. Douglas appear from the following piece of his evidence—

> “next Mr. Misir, sometime after that but before 11 a.m. I would say,
> “came towards me and said he wanted to substitute another nomina-
> “tion paper for the one I already had which was the same one he had
> “earlier handed in unsigned. I replied that I could not accept it, that I

"could not do that. I felt that I could not substitute a paper".

"If when Misir asked to be allowed to substitute another nomination "paper the other candidates did not object I would have accepted a "fresh nomination from Misir

"If a fresh nomination paper had been handed in meaning a fresh "nomination with fresh signature on it I would have asked the other "candidates if they accepted it—I was not clear on the point. This "distinction between a substitution and a fresh nomination has not "got into my head as the result of legal advice I may have since "sought. At the time I did not think a substitution was in order but I "was doubtful as to a fresh nomination; on that account if a fresh "nomination had been tendered I would have asked the other candi-"dates if they had any objection. I did not tell Misir or his proposer "or seconder that I would not accept a fresh nomination if handed to "me. No such fresh nomination was handed to me. It did not occur to "me to tell Misir that I could not let him have the form back but to "put in a fresh form. I did not tell him that for I did not think there "was any authority for advising him. I think I did make some remark "when Caldeira wanted to take back the first nomination paper that I "already had a nomination paper. I said that to Caldeira himself I "think."

As the first nomination paper was patently worthless I can see no reason why it should not have been returned to Mr. Caldeira when he asked for it and I consider he was entitled to have it returned to him the Returning Officer noting on it if he so wished, the fact that it had been tendered to him unsigned.

I am of the opinion that the conduct of the Returning Officer was a circumstance by reason of which the majority of the voters may have been prevented from electing the candidate whom they preferred (The Legislative Council (Elections) Ordinance 1945 Section 882 (1) (a)) and that it appears that as a result of that conduct the election was not conducted in accordance with the principles laid down in the immediately above cited Ordinance and that such non-compliance affected the result of the election.

In the result, I feel obliged to declare the election held in Electoral District No. 2 (Pomeroon) on the 27th April, 1953, to be void, and I declare accordingly. I will certify that declaration to the Governor as required by law.

I desire to have Counsel, at some later day, address me on the question of costs.

Election held to be void.

Solicitors :

S. M. A. Nasir for the petitioners.

H. C. B. Humphrey for the respondent Wheating.

Crown Solicitor for the respondent Douglas.

SAMAROO v. LEOPOLD, KELLY AND SANDY

(In the West Indian Court of Appeal, on appeal from the Supreme Court of Trinidad and Tobago, (Mathieu-Perez, Collymore, Jackson C.J.J.) January, 20, 29, 1953).

Objection in limine—Interlocutory order—Negligence—Res ipsa loquitur.

The respondent claimed damages from the appellant for the alleged negligent driving of appellant's motor ear by his agent or servant resulting in personal injuries to the respondents.

The car had overturned in a ditch.

Finding that there was negligence by the owner, the trial Judge concluded his judgment with the words, "There will be judgment for the plaintiffs with costs. The damages if not agreed will be assessed by me in Chambers".

The respondents objected in limine that the appeal was premature, the action not yet having been determined.

Held: (1) The issues between the parties had been finally decided and disposed of and their rights settled. The appeal was not premature.

(2) A prima facie case of negligence is not raised merely by the fact of the car overturning in a ditch since the evidence at the close of the plaintiffs' case also showed that the defendant's, agent was driving carefully and did his best to control the vehicle. Accordingly, the doctrine of **res ipsa loquitur** did not apply.

L. C. Hannays Q.C. with *N. Scipio-Pollard* for appellant.

H. O. B. Wooding Q.C. with *Ellis Clarke* for respondents.

Judgment of the Court: The action out of which this appeal arises was instituted by the respondents who claimed damages from the appellant for alleged negligent driving of his motor car by his servant or agent resulting in personal injuries to them.

To the hearing of the appeal the respondents have raised a preliminary objection on the ground that the appeal is premature, the action not yet having been determined. It is contended that the order is merely interlocutory.

The trial Judge concluded his judgment with the words, "There will be judgment for the plaintiffs with costs. The damages, if not agreed; will be assessed by me in Chambers"; the order which was entered on the 12th day of January, 1951, states in its operative part:

"IT IS ORDERED

That judgment be entered for the plaintiffs with costs to be taxed, for damages to be agreed upon by the parties herein: and in the event, of the parties not agreeing to same, that the damages be assessed by His Honour, Sir Cecil, in Chambers."

In opening the case in the court below counsel for respondents intimated that "evidence will be given only to determine liability damages if any will then be agreed." Thus counsel in effect limited the scope of the trial to be determined by the trial Judge by an undertaking that if the respondents were successful in proof of their claim there would be nothing more to engage the attention of the Court. The case proceeded on that basis with the result indicated in the Judgment and Order.

It was submitted to us for the respondents, that before a plaintiff could succeed against a defendant in this class of case he must prove:

(a) a duty to take care;
(b) breach of that duty;
(c) damage arising from that breach;

and further that since the gist of the action is damages until the facts and the extent of the loss and injuries are ascertained any order made would be "ineffectual and interlocutory only".

The attention of the Courts has from time to time been occupied with the consideration as to what is the true test applicable to determine whether a judgment or order is final or interlocutory; the result has been certain decisions which are not easy to reconcile; but since the case of *Bozson vs. Altrinchan Urban District Council* 1903 I *K.B.* 547 it has been accepted that the weight of authority is in favour of the following test: "Does the judgement or order, as made, determine the matter in dispute or the rights of the parties"? If it does then the order is final, if not, it is interlocutory.

Counsel however drew a distinction between the cases where an injunction is sought or where an order for an account or for a declaration or for the delivery of a bill of costs for taxation is prayed, and that in an action on the case where the claim is for damages only. He urged that in the former group of cases the order may be final on one of the main issues and interlocutory on another; whereas in the latter the essential factor is the ascertainment of the damages; that there is no such thing as a right, to recover damages simpliciter. In the course of his argument reference was made by counsel to Order 13, rr.3 to 7 and Order 28, rr.2 to 6 of the Rules of the Supreme Court, 1946. These however deal with the procedure in cases of default of appearance or defence in varying circumstances; in our view they are inapplicable as it was not until appearance had been entered and the pleadings completed and closed that this trial took place.

It was stressed by counsel in support of his argument that no authority can be found which states that in the class of case before us there can be finality on which an appeal will lie while

there remains outstanding to be ascertained by agreement or, it may be, assessment, the quantum of damages. This is not surprising. This practice which has been lately introduced in this type of case seems to us without precedent or example. It may have been and probably was introduced with a view to saving time and expense but the inconvenience and difficulties which arise from its employment far outweigh any possible advantage that may be claimed for it, and it is a practice that should be abandoned. Cases of this nature which are now generally tried by a Judge alone were hitherto tried by a Judge and jury; it is impossible to conceive that a verdict as to quantum of damages on a finding of liability would be postponed for assessment by the same or another jury subsequently to the trial of the action.

In the absence of authority which, as we have pointed out, is of necessity lacking we adopt the analogous principles as laid down in the cases where the issues between the parties have been decided and finally disposed of and there only remained the working out of the results flowing from the establishment of those rights. Here the judgment says that the appellant by his negligence is responsible for the accident which befell the respondents; the respondents are entitled to damages in respect of the injuries which they have received as a result, and that the respondents are entitled to have those damages assessed either by agreement as suggested by counsel, or by a judge.

Thus the issues between the parties have been finally decided and disposed of and their rights settled.

Accordingly we overrule this objection and are of opinion that the appeal is not premature. The appellant will have the costs of this issue in any event.

Editor's Note: The appeal was heard on a later date and the following judgment delivered at the conclusion of the arguments.

Judgment of the Court: This is an appeal from the judgment of Furness-Smith C.J. wherein he gave judgment for the plaintiffs for damages to be assessed.

On 3rd February 1947 the plaintiffs were being driven along the Churchill Roosevelt highway in a car driven by a servant of the defendants, the car overturned in a ditch and the plaintiffs all suffered injuries. No evidence of negligence was given but the plaintiffs say that the mere fact of overturning is negligence and they invoke the doctrine of *res ipsa loquitur*. There is no evidence of negligence and the plaintiffs themselves say that the car was being driven in a careful and normal manner.

The record discloses that at the time there was another car approaching in the opposite direction on its wrong side and with bright headlights and the driver of the defendant's car stated that he was dazzled thereby and had to pull away more to his side and it was then that his car overturned.

For the doctrine of *res ipsa loquitur* to apply the narrative of the event itself must show that there was negligence and that the defendant alone was responsible. If the surrounding circumstances are not wholly within the defendant's control the plaintiffs will not have discharged the burden without proof of some negligent act or omission On the part of the defendant. There is none here.

A *prima facie* case of negligence is not raised merely by the fact of the car overturning in a ditch since the evidence at the close of the plaintiffs' case also showed that the defendant was driving carefully and did his best to control the vehicle. In our view the doctrine of *res ipsa* is not applicable.

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

SKINNER v. CUKE

SKINNER as Administrator of the Estate of
CLIFFORD SKINNER v. CUKE

(In the West Indian Court of Appeal, on appeal from the Court of Common Pleas Barbados (Mathieu-Perez, Jackson C.J.J.; Malone J.) October 8, 19, 1953).

Appeal—Death of defendant after judgment—Actio personalis mortur cum persona.

Judgment was given against Clifford Skinner for the negligent driving of a motor car. He died about seventeen months after judgment. The judgment was not entered in Clifford Skinner's life time, but after his death was entered against him **eo nomine**. The administrator of his estate appealed against the judgment.

The respondent submitted **in limine** that the personal representative of the defendant Clifford Skinner could not prosecute the appeal.

Held : The administrator of the defendant's estate would not have been liable to be sued for the defendant's tort and he was not competent to prosecute the appeal.

Appeal Dismissed

W. W. Reece, Q.C. with Miss M. A. Reece for appellant.

D. E. L. Ward for respondent.

Judgment of the Court: The action out of which this appeal arises was one in which the plaintiff claimed damages from the defendant Clifford Skinner for negligent driving of a motor car on the 7th November, 1947 along Colleton Road in the parish of St. Lucy, whereby the plaintiff suffered personal injuries. The cause was tried by a Judge and Jury and on the 18th October, 1950 the Jury returned a verdict in favour of the plaintiff and awarded him £4-3-4d. special damages and £3,000 general damages; the Court gave judgment accordingly.

The defendant died on the 4th September, 1951 and on the 29th April, 1952 the plaintiff entered judgment against the defendant *eo nomine.* On the 2nd July, 1952 an order was made that all further proceedings in the action be carried on between the plaintiff and Clifford Edward Lewton Skinner as Administrator of the estate of the defendant, the respondent consenting to the making of the order.

After the making of the above order an appeal was filed on behalf of the said Clifford Edward Lewton Skinner as administrator of the estate of the defendant Clifford Skinner on 7th July, 1952. At the hearing of the appeal counsel for the respondent took the following preliminary objection:—

> "That this action is an action for personal injuries and the maxim *'actio personalis moritur cum persona'* applies and on the death of the defendant his personal representative cannot be a party to and/or prosecute an appeal in this action".

Counsel referred to section 73 of the Common Pleas Act which is as follows:—

> "A cause or matter shall not become abated by reason of

> the marriage, death, or bankruptcy of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation or devolution of any estate or title *pendente lite;* and, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict or finding of the issues of fact and the judgment, out judgment may in such case be entered notwithstanding the death".

The wording of this section is identical with that of Order 17, r. 1, of the Rules of the Supreme Court (Annual Practice).

Counsel while relying on the maxim contended that its application was restricted only to the appellant, inasmuch as judgment in a. sum fixed for damages had already been given in favour of the plaintiff before the death of the defendant and further that the plaintiff was at liberty to enter judgment even after the defendant's death.

It seems clear from the authorities and the notes to the Order that if the cause of action be one that does not survive, the action abates and cannot be continued. We are of opinion, and indeed it was conceded by Counsel for the appellant, that the cause of action herein does not survive. The administrator of the defendant's estate would not have been liable to be sued for the defendant's tort and he is not in our view competent to prosecute an appeal which is in effect a continuation of the action.

The above suffices to dispose of the appeal but it is right to refer to one other matter that emerged during the argument. Judgment was given on the 18th October, 1950 but it was not until the 29th April, 1952 that such judgment was entered, i.e. after the death of the defendant, no explanation has been offered for this delay and such judgment was entered against the defendant Clifford Skinner *eo nomine.* The entering of a judgment is an essential step in the proceedings and as the action abated with the death of the defendant, no such step could be taken without the leave of the Court. The entry of the judgment herein is, in our opinion, null and void.

The preliminary objection that the action was a personal one and died with the death of the defendant is sustained and further we hold that the appellant could not revive a cause which had already abated by operation of law. The appeal is dismissed, and having regard to the course acquiesced in by both parties since the death of the defendant, we make no order as to costs.

CARRINGTON v. SEALES and SCANTLEBURY
CONNELL v. SEALES and SKINNER
BEST v. SEALES and HARRIS
SEALES et al v. CARRINGTON
SEALES et al v. CONNELL
SEALES et al v. BEST.

(In the West Indian Court of Appeal, on appeal from the Court of Chancery Barbados (Mathieu-Perez, Jackson C. J. J., Malone J.) October 12, 29, 1953).

Trust — Perpetuity — Uncertainty — Dispute between trustees — Partition — Refusal — Receiver.

From some time about the year 1907 and thereafter, there was in existence in Colon a society called "The Barbadian Progressive Society", the members of which were all Barbadians and there was also a society of the same name in Panama. The two branches constituted one society.

In or about the year 1941 it was decided that lands in Barbados should be purchased with the object of benefitting the members of the society. From 1941 to 1943 five plantations were purchased in Barbados for a total sum of £53,000.

At the time of the purchases the Society was and still is unincorporated and unregistered and for that reason the conveyances for the respective plantations were taken in the names of the appellants and respondents who each made declarations of trust.

Disputes arose between the trustees with the result that the general manager of one plantation had to relinquish his position because he was unable to obtain funds to finance it. All the plantations were in an appalling condition.

The appellants moved the Court for a partition and accounts and submitted that the plantations were not held in trust as the alleged trust offended the rule against perpetuities and was bad for uncertainty.

The Vice-Chancellor refused partition and accounts and ordered that a Receiver be appointed for each of the plantations.

The plaintiffs appealed against the refusal to grant partition and to order accounts and the defendants against the appointment of a Receiver contending that no existing beneficiary had complained of their conduct as trustees.

Held: There was clearly an implied trust which was valid as it was for the existing members of a society and not for future members.

The trust did not offend the rule against perpetuities as it was for a class, the individual members of that class and the interest they take can be ascertained at any time within the perpetuity period.

The trust was not bad for uncertainty.

As the trustees were in conflict and some had been excluded from the plantations it was proper for the Court to intervene for the protection of the trust property and the interests of the beneficiaries.

Appeals and Cross-Appeals dismissed

W. W. Reece, Q.C. and *C. S. Husbands* for the plaintiffs-appellants.

G. H. Adams, Q.C, and *E. H. A. Bishop* for defendants-appellants.

Judgment of the Court: These appeals arise out of three separate suits filed in this Court of Chancery of this Island which by order of the learned Vice-Chancellor dated the 15th of May, 1952 consolidated and treated at the trial as one action. The learned Vice-Chancellor gave judgment on the 14th of Novem-

ber, 1952 and ordered that a Receiver be appointed for each of the plantations mentioned in the suits, declined to grant the relief sought by the Plaintiffs in the nature of partition and accounts and directed that the costs of the parties be allowed them.

From this order both the Plaintiffs and the Defendants have appealed. From the evidence it would appear that from some time about the year 1907 and thereafter, there was in existence in Colon a society called "The Barbadian Progressive Society", the members of which were all Barbadians, and there was also a society of the same name in Panama. It is contended by the Plaintiffs that these were and are two separate societies and by the Defendants that there was one society only with two branches. We are satisfied that there is one and not two societies. An examination of the evidence of Reginald Oscar Carrington, one of the Plaintiffs ,throws light on the situation. Although he states that there are two societies it is curious that in examination-in-chief he stated positively that "Seales was President of the Colon Branch—perpetual President of the Colon Branch. He was named President for life.....We worked under the same book of Rules." There is also the evidence of Percy George Seales who said, "We were the people who brought the money from the two branches"—"All the money belonged to the Barbadian Progressive Society." The declarations of trust hereinafter mentioned tend to support this view.

The rules of the Society were put in evidence; rules 4 and 12 are germane to the question in dispute. Rule 4 provides that

> "The business of this Society shall be conducted by a Committee of Management and Elective Officers which shall be comprised of the President, Vice-President, Secretary, Assistant Secretary, Check Secretary, Treasurer and three Trustees."

Rule 12 provides that—

> "This Society shall be governed by a Committee of Management which shall consist of a Chairman, Secretary, and 24 Financial Members which shall include the President, Vice-President, Secretary, Assistant Secretary, Treasurer and three Trustees who shall be members *ex officio*....."

In or about the year 1941 it was decided that lands in Barbados should be purchased with the object of benefitting the members of the Society who raised large sums by subscriptions, rallies, dances and other entertainments. In 1941 the plantation known as "Colleton" situated in the parish of Saint Peter was purchased for the sum of £6,200 and was conveyed to Percy George Seales, John Randolph Scantlebury and Reginald Oscar Carrington as joint tenants. On the 1st of January, 1942 the plantation known as "Trents", situated in the parish of Saint James was conveyed in consideration of the sum of £10,000 to the said Percy George Seales and John Randolph Scantlebury as joint tenants. On the 3rd of May, 1943 in consideration of the sum of £ 12,000, the plantation known as "Lascelles" was conveyed to the said Percy George Seales, Charles Clifford Skinner and James Gustavus Connell as joint tenants. On the 5th of July,

1943 the plantation known as "Mount Prospect" was in consideration of the sum of £12,000 conveyed to the said Percy George Seales and Charles Clifford Skinner as joint tenants. On the 20th of December, 1943 the plantation known as "Four Hills" was in consideration of the sum of £ 12,500 conveyed to Percy George Seales, Hugh Mostyn Best and George McDonald Harris their heirs and assigns. The money for the purchase of these plantations was supplied partly from the funds of the Colon branch and partly from the funds of the Panama branch of the Barbadian Progressive Society.

At the time of the purchases the Society was and still is unincorporated and unregistered in this Island and it was for that reason that the conveyances were taken in the names of the individuals mentioned; they were well aware that such conveyances were so effected for that reason. It was always fully understood that the plantations should be held in trust for the benefit of the members of the Society and not for the purchasers in their personal capacity. This view is fortified by the five declarations of trust put in evidence. These are—

(1) The declaration dated the 17th of October, 1941 relating to the plantation known as "Colleton" whereby Seales, Scantlebury and Carrington declared that each of them being seised in fee simple of the plantation held it in trust for the Barbadian Progressive Society;

(2) The declaration dated the 4th of May, 1943 relating to the plantation known as "Lascelles" whereby Seales, Skinner and Connell declared that they stood seised of the plantation in trust for the said Society;

(3) The declaration dated the 24th of December, 1943 relating to the plantation known as "Four Hills" whereby Seales, Best and Harris declared that they stood seised of the plantation in trust for the said Society;

(4) The declaration dated the 5th of October, 1946 relating" to the plantation known as "Mount Prospect" whereby Seales and Skinner declared that they stood seised of the plantation in trust for the said Society;

(5) The declaration dated the 5th of October, 1946 relating to the plantation known as "Trents" whereby Seales and Scantlebury declared that they stood seised in fee simple of the plantation in trust for the said Barbadian Progressive Society.

In each case the trustees further agreed to grant and convey each of the said plantations at the request of the said Barbadian Progressive Society to such person or persons at such time or times and in such manner as the said Barbadian Progressive Society shall direct or appoint. We must emphasize that the funds with which these plantations were purchased were funds administered by the Committee of Management of the Barbadian Progressive Society for the benefit of the members for the time being of that Society and that each member had an interest in those funds.

All these plantations are sugar plantations and after purchase were managed by persons appointed by the purchasers. According to the evidence the plantations have been seriously neglected. One witness stated that, " 'Colleton' and 'Lascelles' were in a very bad condition—the estates were out of cultivation, they wanted cleaning up, jacking, ploughing and making ready for planting." Another witness said—".....the state of cultivation was very rotten. . . . The young crops were poor and irregular.... There was just as much grass in the fields from which they were reaping the canes as there were canes ... The canes they were reaping were poor and the young canes also were poor and irregular The ratoon canes did not seem to be weeded since they were reaped.....The estates were badly worked." That this neglect was not confined to the fields but also extended to the machinery necessary for the proper working of a sugar estate is evident. Another witness said he paid a visit to the Lascelles boiling house and got the impression that they were taking out the machinery, this witness bought certain syrup boxes and others were sold and taken out. He deposed, "....It was no longer a Boiling House. As far as I saw part of the machinery was gone. I bought some and took it out.....Another man was buying a press. I noticed that one tayche was taken out. The plantation looked 'dirty' to me."

The manager of the plantation "Lascelles" experienced great difficulty in obtaining money to work the plantation and was forced to borrow money from different people which he repaid when the crop "came round". After being the manager there for four and a half years he had to leave as he could get no money "to run" the plantation.

The above fairly describes the appalling condition into which the plantations had fallen.

The first question for consideration is whether there is a trust—either an express trust by reason of the declarations of trust already referred to or a trust implied from the circumstances attendant on the purchases. It is on the determination of this question that the vital issues hang. We find that there is clearly an implied trust. It has been established beyond doubt that the plantations were bought by Carrington. Seales and the others with money supplied from the funds of the Barbadian Progressive Society in which funds the members of the Society for the time being have a joint interest. It is implicit in these circumstances that the parties to whom the plantations have been conveyed are trustees and hold them in trust for the persons who have an interest in the funds with which they were purchased, namely, the members of the Barbadian Progressive Society.

Counsel for the Plaintiffs-Appellants contended that there is no trust at all for the following reasons, viz: —

(i) The Barbadian Progressive Society is not a corporate body;

(ii) The Committee of Management is the Society;

(iii) The trust offends the rule against perpetuities;

(iv) It is bad for uncertainty as it is impossible to ascertain the beneficiaries.

He added that these same considerations prevented there being any resulting trust.

It is indeed true that the Barbadian Progressive Society is not a corporate body in this Island and that a trust on behalf of an unincorporated society as such will be invalid provided that it is not a charitable trust, for in such a case the trust would be without a beneficiary. Although a trust (which is not charitable) in favour of an unincorporated society as such will fail for want of a beneficiary because the society has not the capacity to own property, there is a number of decided cases which establish quite clearly that a trust for the existing members of a certain society will be valid. In effect this is nothing more than a trust in favour of a definite class jointly, the members of which are ascertained or ascertainable by discovering who are the members of the society. The beneficiaries may change periodically but they nevertheless constitute a definite class and as long as the class is definite it is immaterial that the members of the class fluctuate. In contradistinction a trust in favour of present and future members of a society will be invalid for uncertainty, for it is never possible to ascertain the whole class of beneficiaries.

With respect to the contention that the rule against perpetuities applies in this present case so as to render the trust invalid, we would observe that this rule makes it essential that a gift should vest in a particular individual or class within what is commonly called the perpetuity period. We are of opinion that the rule does not apply in the present case, for here property is held in trust for a class; the individual members of that class and the interest they take can be ascertained at any time within the perpetuity period.

As to the submission that the trust is bad for uncertainty, it is manifest that the members of the class are the members for the time being of the Barbadian Progressive Society, the interests these members take are derived from the fact that the funds of the Society belong to them in joint ownership and are ascertainable because those funds have been invested in the plantations; these interests both as to the class of the beneficiaries and as to the property involved can be ascertained at any given time.

The evidence reveals that certain individuals—whether members of the Society or not—loaned at various times sums of money to the Society on which they have received interest from the Society. This lending does not confer on the lenders as such any rights in the funds or other property of the Society beyond the right to repayment of the sums loaned and the interest thereon. It has already been remarked that the Society is governed by its Committee of Management which conducts the affairs of the Society and deals with the disposition of its funds.

The learned Vice-Chancellor by his judgment appointed one Receiver for each plantation mentioned. The Defendants-Appellants have appealed against this order and it is contended by their Counsel that no existing beneficiary had in these suits complained of the conduct of the Defendants-trustees or joined in initiating the said suits and that the learned Vice-Chancellor was wrong in law in holding that there are grounds on which a Court should appoint a Receiver to protect the trust properties.

It is beyond question that one of the Plaintiffs-Appellants, Carrington, was a member of the Barbadian Progressive Society and he is in our view both a beneficiary and a trustee. It is true that there were originally three separate actions. It is already stated these were consolidated and treated as one. Apart from this, however, each of the Plaintiffs-Appellants and each of the Defendants-Respondents is a trustee. The evidence is clear that the plantations have been sadly mismanaged and neglected to the detriment of the beneficiaries and as the learned Vice-Chancellor found, the condition of the estates is getting progressively worse. He pointed out—"In the unhappy state of affairs revealed in these proceedings, it cannot be denied that the trustees are at variance. There is entire disagreement between one section of them and another and having failed to agree, they still remain at variance in spite of efforts made at reconciliation. In addition, certain of the trustees have been excluded by the others from the performance of their trust duties." It is obvious that under existing conditions the trust cannot be administered properly; the Court cannot pass all this by unnoticed; it must intervene to prevent further waste and to protect the interests of the beneficiaries in the trust property.

This matter has come before the Court, the proceedings have been instituted by a beneficiary and both plaintiffs and defendants are trustees. If ever there was a case in which it is proper for the Court to intervene for the protection of the trust property and the interests of the beneficiaries, this is one. The trust, as has already been indicated, cannot be properly administered, some of the trustees are prevented from acting as such and their pooled assistance is unavailable. (See judgment of Romilly M.R. in the case of *Swale v. Swale,* 22 *Beav.* 584: 52 *E.R.* 1233)

It must always be borne in mind "that the law is concerned with the intention of the parties in so far as it is necessary to ascertain what the parties wish to accomplish, that is, what legal result they wish to achieve." In this case it seems to us that when the members of the two branches of "The Barbadian Progressive Society" in Colon and Panama entrusted their "delegates" with money, part of the funds of the Society, for the purpose of purchasing plantations in Barbados, it was their intention that these plantations should be held for the benefit of the members for the time being of the Society subject to its rules. It might be observed, too, that if the Society is dissolved the trust upon which the common property of the members of the Society is

held terminates, and subject to the payment of the Society's debts, the members, as beneficiaries, become absolutely entitled to the trust property. (See the case of Serjeants' Inn referred to in The Times newspaper for April 10, 1902).

This Court feels that it is incumbent upon it to declare that notwithstanding anything in any declaration of trust to the contrary, the intention of the members of the Barbadian Progressive Society is that—

(a) Percy George Seales, John Randolph Scantlebury and Reginald Oscar Carrington stand seised in fee simple as trustees of the sugar work plantation called "Colleton' 'situate in the parish of Saint Peter in the Island of Barbados UPON TRUST for all the individual members for the time being of the two branches of "The Barbadian Progressive Society" in Colon and Panama subject to the rules of the Society;

(b) Percy George Seales, Charles Clifford Skinner and James Gustavus Connell stand seised in fee simple as trustees of the sugar work plantation called "Lascelles" situate in the parish of Saint James in the Island of Barbados UPON TRUST for all the individual members for the time being of the two branches of "The Barbadian Progressive Society" in Colon and Panama subject to the rules of the Society;

(c) Percy George Seales, Hugh Mostyn Best and George McDonald Harris stand seised in fee simple as trustees of the sugar work plantation called "Four Hills" situate in the parish of Saint Peter in the Island of Barbados UPON TRUST for all the individual members for the time being of the two branches of "The Barbadian Progressive Society" in Colon and Panama subject to the rules of the Society;

(d) Percy George Seales and Charles Clifford Skinner stand seised in fee simple as trustees of the sugar work plantation called "Mount Prospect" situate in the parish of Saint Peter in the Island of Barbados UPON TRUST for all the individual members for the time being of the two branches of "The Barbadian Progressive Society" in Colon and Panama subject to the rules of the Society;

(e) Percy George Seales and John Randolph Scantlebury stand seised in fee simple as trustees of the sugar work plantation called "Trents" situate in the parish of Saint James in the Island of Barbados UPON TRUST for all the individual members for the time being of the two branches of "The Barbadian Progressive Society" in Colon and Panama subject to the rules of the Society.

The order of the learned Vice-Chancellor must stand subject to the following variation, namely, that after the word "Court" in the last line but one of the order, these words will be inserted —"for the benefit of all the individual members for the time being of the two branches of 'The Barbadian Progressive Society' in Colon and Panama".

The appeal of the Plaintiffs-Appellants is dismissed and the cross-appeal of the Defendants-Appellants is dismissed.

Each side will bear its own costs of the appeal.

Appeals and Cross-Appeals dismissed.

COMMISSIONER OF INCOME TAX *v.* MACKENZIE AND MACKENZIE

(In the West Indian Court of Appeal, on appeal from the Court of Common Pleas of Barbados (Mathieu-Perez, Jackson, C.J.J. Malone J.) October 15, 29, 1953).

Income Tax—Transfer of shares—Assessment.

Section 11 (b) (2) of the Barbados Income Tax (Amendment) Act 1945 reads as follows:

"Where a person transfers property to a minor, either directly or indirectly, or through the intervention of a trust or by any other means whatsoever, such person shall, nevertheless, during the period of the minority of the transferee, be liable to be taxed on the income derived from such property or from property substituted therefor, as if such transfer had not been made, and subsequent to such period of minority, the transferor shall continue to be taxed in respect of the income derived from such property, or from property substituted therefor, as if such transfer had not been made, unless the Commissioner is satisfied that such transfer was not made for the purpose of avoiding tax."

The Commissioner of Income Tax assessed one of the respondents in respect of income arising from shares transferred to his son, a minor,

A Judge in Chambers held that the section gave the Commissioner a discretion and allowed the appeal.

The Commissioner appealed.

Held : The sub-section imposed on the transferor of property an absolute liability to tax on the income derived from this property during the minority of the transferee and the section does not permit the exercise of any discretion on the part of the taxing authority.

Appeal Allowed.

C. Wylie, Q.C and *D. E. G. Malone* for appellant.

E. N. Walcott, Q.C. and *J. S. B. Dear* for respondents.

Judgment of the Court: This is an appeal from a judgment of a Judge of the Court of Common Pleas in respect of an assessment by the Commissioner of Income Tax and Death Duties with regard to the income arising from shares transferred by one of the present respondents to his son, a minor.

On the 5th of November, 1952, the Commissioner of Income Tax assessed the respondent, Charles S. MacKenzie, to pay tax in respect of the income for the year of assessment 1952 derived from certain shares which had been transferred by him to his minor son—the respondent objected to this assessment and the Commissioner confirmed the said assessment. Against this the respondents appealed to the Judge of the Court of Common Pleas who allowed the appeal and held that on a true construction of Section 11 (b) (2) of the *Income Tax* (*Amendment*) *Act,* 1945 the Commissioner was given a discretion exercisable both during the minority of the transferee and after to assess such income to tax either in the name of the transferor or in the name of the transferee. Against this decision of the learned Judge the Commissioner has appealed. He had stated that if he had such a discretion he would have exercised it in favour of the transferor.

The question that falls to be decided is the proper interpretation to be placed on Section 11 (b) (2) of the Act of 1945 which reads as follows —

> "Where a person transfers property to a minor, either directly or indirectly, or through the intervention of a trust or by any other means whatsoever, such person shall, nevertheless, during the period of the minority of the transferee, be liable to be taxed on the income derived from such property or from property substituted therefor, as if such transfer had not been made, and subsequent to such period of minority, the transferor shall continue to be taxed in respect of the income derived from such property, or from property substituted therefor, as if such transfer had not been made, unless the Commissioner is satisfied that such transfer was not made for the purpose of avoiding tax".

It was contended on behalf of the Commissioner that the decision of the learned Judge allowing the appeal was erroneous in law. It was argued *inter alia* that the language used in the sub-section is clear and unambiguous and plainly means that the discretion given to the Commissioner under the sub-section referred to is not exercisable during the minority of the transferee. The respondents, on the other hand, contended that the language used in the sub-section is not clear and definite and therefore resort must be had to the rules for the interpretation of statutes.

It is settled law that in construing any statute (taxing or otherwise) the Court "has to determine the intention as expressed by the words used. And in order to understand these words it is natural to enquire what is the subject-matter with respect to which they are used and the object in view". (*Direct U.S. Cable Co. v. Anglo-American Telegraph Co.* (1877) 2 *A.C.* 394.)

If the words of the statute are themselves precise and unambiguous then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver; "Where the language of an Act is clear and explicit we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the Legislature". (See Craies on Statute Law, 5th edition at page 64). "If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law, he might otherwise appear to be".—per Lord Cairns in *Tarlington v. Attorney General* (1869) *I.R.* 4 *H.L.* 100.

Upon reading the section in question, interpreting it as it stands, and bearing in mind that the natural meaning of the language used by the Legislature should only be departed from for cogent reasons, we entertain no doubt that the meaning of the words used in the sub-section is plain and unambiguous. The golden rule is that the words of a statute must *prima facie* be

given their ordinary meaning. It is only when the intention of the Legislature as expressed in a statute is not clear that the Court in interpreting it will have recourse to special rules of interpretation. A statute is not ambiguous merely because the words used in it are difficult to construe. It must not be overlooked that at the present day a taxing statute is to be construed as any other statute (*Attorney General v. Carlton Bank* (1899) 2. *Q.B.* 158).

It is perfectly clear to us that, by this sub-section, it is the intention of the Legislature to impose on the transferor of property an absolute liability to tax on income derived from this property during the minority of the transferee, and that this section does not permit the exercise of any discretion on the part of the taxing authority during such period. It is only after the transferee has come of age that the taxing authority, if satisfied that the transfer of the property was not made for the purpose of avoiding tax, may exercise his discretion and relieve the transferor of liability to tax on the income derived from the property. The obvious intention of the Legislature shown by the language used is to deal with two quite distinct situations—the position of the transferor and his liability to tax during the minority of the transferee, and the position of the transferor and his continuing liability to tax after the transferee has come of age. The words, "And subsequent to such period of minority, the transferor shall continue to be taxed " introducing the latter part of the sub-section, indicate beyond doubt that the tax which the transferor was liable to pay during the first period will continue[1] to be paid by the transferor after the minority of the transferee has ceased unless the taxing authority is satisfied that the transfer had not been made for the purpose of avoiding tax.

The appeal is allowed with costs.

BARROW *et al* v. HOYTE *et al*

LARRIER et al v. HOYTE et al
HOYTE et al v. BARROW et al
HOYTE et al v. LARRIER et al

(In the West Indian Court of Appeal, on appeal from the Court of Chancery of Barbados (Mathieu-Perez, Jackson C. J. J., Malone J.) October 19, 20, November 2, 1953)

Ordinance—Provisions—Mandatory or directory—General Superintendent—Election—Nullity.

The Christian Mission was created a corporate body by the Christian Mission Act 1909-5. The Act made provision for the due appointment of a General Superintendent and other officers. To achieve this end it was provided that a meeting should be held annually in the month of January at which certain representatives were to be summoned. The bye-laws regulated the procedure for giving notice of the meeting and other matters connected therewith.

A meeting summoned by persons without authority was held in January 1949, at which the appellant Barrow was elected General Superintendent,

Barrow claimed a declaration that he properly elected and Hoyte counterclaimed. The Vice-Chancellor held that the meeting of January 1949 was irregular, that the provision for a meeting in January was mandatory and as no proper one was held neither Barrow nor Hoyte was Superintendent. He appointed a receiver for the protection of the Church property.

Both parties appealed

Held: The provision in the Christian Mission regarding the holding of a meeting in January was directory. Unless there is express provision for the retirement of an officer of a corporation at the end of the year that officer will hold over in his office until his death or removal or the proper appointment of another officer takes place.

The meeting held was irregular and consequently Barrow was not the Superintendent. As no valid meeting was held in January Hoyte held over as Superintendent until a proper one was summoned.

Plaintiffs' appeal dismissed
Defendants' appeal allowed.

W. W. Reece Q.C. and *J. S. B. Dear* for plaintiffs-appellants.
G. H. Adams Q.C. and *D. H. L Ward* for defendants-appellants.

Judgment of the Court: In the actions out of which these appeals arise the plaintiffs by their amended Bills of Complaint claim that Frederick Adolphus Barrow is the General Superintendent of the Christian Mission and together with the other plaintiffs comprise and constitute the Board of Management of the Mission for the year 1949, that Joseph Thomas Larrier was duly elected Superintendent for the year 1951, and that he and the other plaintiffs constitute the Board of Management for that year. They ask for a declaration to that effect. The defendants on the other hand by their answer and counterclaim deny that Frederick Adolphus Barrow is the General Superintendent or that he and the other plaintiffs constitute the Board of Management. They claim that the General Superintendent for the years 1949, 1950 and 1951 was Dalton Leopold Hoyte and that he and the other de-

fendants comprise and constitute the Board of Management in those years. The defendants ask for a declaration to that effect.

The actions came on for hearing before the learned Vice-Chancellor who pronounced and decreed that "neither the plaintiffs nor the defendants in these cases are entitled to a declaration as claimed" and that "a Receiver or Receivers preferably an officer or officers of another denomination be appointed,' to whom the plaintiffs and defendants would give undertakings to retain intact that property of the Christian Mission which is in their possession until a proper election of a General Superintendent and Treasurer be held." He further directed that steps should be taken by the Receiver to convene a meeting of the representatives of the churches to be held in the latter part of January, 1952 for this election.

Against this order the plaintiffs and the defendants have appealed.

The grounds of the plaintiffs-appellants' appeal are these:—

The learned Vice-Chancellor was wrong in holding that,

(a) The established mode of summoning meetings of the representatives of the churches of the Christian Mission was by notice in the Christian Mission Herald;

(b) The established usual mode of summoning meetings of the representatives of the churches of the Christian Mission became impossible;

(c) The election of Frederick Adolphus Barrow as General Superintendent and Treasurer of the Christian Mission in January 1949 was a nullity;

(d) There was no valid election of a General Superintendent and Treasurer of the Christian Mission in the year 1951 because the purported meeting of the representatives of the churches in that year was convened by persons who themselves were not lawfully appointed and whose appointment was invalid;

(e) In making a decree that a receiver or receivers, preferably an officer or officers of another denomination, be appointed and such receiver or receivers should convene a meeting of the representatives of the churches of the Christian Mission for the election of a General Superintendent and Treasurer for the year 1952.

The grounds on which the defendants-appellants attack the judgement of the learned Vice-Chancellor are that he erred: —

(1) In that portion of his judgment where he ruled as follows:—"From the above it seems clear to me that the term 'annually' is mandatory, and it would follow that the term' for the past year' and 'for the ensuing year' having been used, and the first meeting of representatives under the Act having been held in January, the meeting of representatives must of necessity take place in the month of January. With regard to the remaining provisions of the section, in my view these are directory only, for to hold otherwise would mean that non-compliance with them would result in a serious general inconvenience, and it may be, an injustice

to persons who have no control over those entrusted with the duty".

(2) In that portion of his judgment in which he ruled as follows:—"It may well be that the framers of the rule referred to above thought that the term 'meeting of the Mission' would comprehend 'meeting of the representatives', but in view of the definition in the statute of the term 'representative', and in view of the declaration that all members of the Mission, of which the representatives form a select body, constitute the corporate body, it is my view that rule IV (5) of the 1914 rules" is inapplicable to the meeting of the representatives, whose duty is two-fold—to receive a statement of affairs and to elect a General Superintendent and Treasurer."

(3) In that portion of his judgment where he rules that the principle established in the case of *Prowse v. Foote,* (2 *Bro. Pari. Cases,* 289) was inapplicable in the present cases.

(4) In holding that the Reverend Dalton Leopold Hoyte did not continue to be the rightful Superintendent of the Christian Mission and that the defendants-appellants should not continue to be the Board of Management of the Christian Mission after the year 1946.

(5) In his judgment when he purported to appoint a receiver or receivers to whom the plaintiffs-appellants and the defendants -appellants were to give undertakings and who were to convene a meeting of the representatives of the churches of the Christian Mission for the purpose of electing a General Superintendent and Treasurer for the year 1952 .

The Christian Mission is a corporate body incorporated by the *Christian Mission Act,* 1909-5 "for the purposes of preaching the Gospel in its fullness in the West Indies and South America, of promoting evangelical domestic and foreign Missions, with reference to the needs of destitute and unoccupied fields of the world; and of publishing and distributing tracts and other works which may be adapted to the same purpose; and of training missionaries for such work." By Section 3 of the Act all real and personal property of every kind and description belonging to the Christian Mission is vested in the Christian Mission for the purposes aforesaid Section 4 provides as follows:

> "A meeting of the representatives of the churches of the Mission shall take place annually in the month of January at such time and place and upon such notice as shall be provided for by the bye-laws, at which meeting a statement of the affairs of the Mission for the past year shall be submitted by the Board of Management; and a General Superintendent and Treasurer shall be appointed for the ensuing year, and such General Superintendent and Treasurer shall thereupon also immediately nominate a Board of Management for the ensuing year, and such nomination shall be submitted to the same or any subsequent meeting of the representatives to be convened for that purpose for their confirmation."

And by Section 7 it is provided that—

> "The Board of Management shall have power to make and from time to time to alter, amend and repeal, rules and bye-laws prescribing the qualifications, duties, and powers of the officers of the Mission and of the Board of Management, and providing for the filling of vacancies in the said Board of Management, and generally for regulating the business and affairs of the Mission."

Much argument revolved around the question of the effect of non-compliance with the provisions of Section 4, and criticisms were levelled by Counsel for the plaintiffs-appellants at the phraseology used in the rules and bye-laws made under the authority of Section 7.

In endeavouring to arrive at a decision as to whether the plaintiffs-appellants or the defendants-appellants are entitled to the declarations sought it is necessary to examine the provisions of Section 4, and to determine whether these provisions are mandatory or directory. It has been authoritatively observed time and again that no general rule can be enunciated as to when an enactment is to be considered absolute or mandatory and when merely directory. Lord Penzance at page 211 in *Howard v. Bodington,* (1877) 2 *P.D.* 203 on this subject said—

> "I believe, as far as any rule is concerned, you cannot safely go further than that in each case, you must look to the subject matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect, decide whether the enactment is what is called imperative or only directory.....I have been very care fully through all the principal cases, but upon reading them all the conclusion at which I am constrained to arrive is this, that you cannot glean a great deal that is very decisive from a perusal of these cases."

The learned Vice-Chancellor after noticing particularly the case of *Montreal Street Railway Company v. Normandin,* (1917) A.C. 170 found "that the term 'annually' is mandatory and it would follow that the terms 'for the past year' and 'for the ensuing year' having been used, and the first meeting of representatives under the Act having been held in January, the meeting of representatives must of necessity take place in the month of January. With regard to the remaining provisions of the section, in my view these are directory only, for to hold otherwise would mean that non-compliance with them would result in serious general inconvenience, and it may be, in injustice to persons who have no control over those entrusted with the duty."

With great respect we differ from the learned Vice-Chancellor in his finding; were we to uphold it, if for some reason or other a meeting was not held in January, the persons charged with the duty of convening the meeting would be powerless to do so at any other time during the year and the representatives would

be deprived of the opportunity to elect a leader of their choice. In Vol. 8 of Halsbury's Laws of England (Hailsham Edition) at page 37 it is stated:

> "Where the Charter of a Corporation provided that a particular officer shall be chosen annually, it is directory only."

The object of the Act is to create the Christian Mission a corporate body; to make provision for the due appointment of a General Superintendent and other officers, and for the general good management of the business of the body. An examination of the provisions of the Act and their relation to its general objects reveals that the holding of a meeting in January cannot be held to be so imperative as to prevent the accomplishment of the paramount aims of the Act. In our view the whole of Section 4 is directory save for that part which requires that a statement of the affairs of the Mission for the antecedent year shall be submitted by the Board of Management and this is mandatory only in the sense that accounts must be submitted, thought not in the sense that this must be done in the month of January.

Counsel for the plaintiffs-appellants referred to bye-law IV of the Rules and Bye-laws of the Christian Mission of the 7th of August, 1914 made by virtue of the provisions of Section 7. This bye-law provides that the Mission shall meet annually at such time and place as the Board of Managers shall appoint; he argued that these make no provision for the convening of a meeting of the representatives of the Mission as distinct from the Mission. He also referred to the Rules of Procedure in the Annual Business Meeting passed on the 9th of February, 1943.

> Rule 2 of these is as follows:
>
> "On the occasion of an annual Church Meeting, after the appointment of delegates has been concluded, each Church in fellowship with the Mission shall be entitled to state openly and freely its desire, according to divine leading with respect to the nomination of a General Superintendent and Treasurer of the Christian Mission for the ensuing year. Such expression shall take the form of a written declaration described as 'The Church's Mandate to the Annual Business Meeting'."
>
> Rule 12 is as follows:
>
> "The election of a General Superintendent and Treasurer shall proceed in the following order.
>
> (a) The Secretary shall announce to the Assembly that he is prepared to receive nominations.
>
> (b) Nominations shall be made and seconded.
>
> (c) If there is more than one nomination, the Secretary shall put each nomination to the Assembly in the order in which they are made. He shall count the votes of delegates present, and, in the absence of a delegate or delegates of a church at Headquarters or overseas, shall according to the Church's Mandate include the number of votes to which the said church is legally entitled. Should any delegate

present vote contrary to the Mandate of the church which he represents, his vote shall there and then be disqualified. If there be an equality of votes, the Secretary shall exercise a casting vote.

(d) The Secretary shall inform the Chairman of the result of the election.

(e) The Chairman shall make formal announcement to the Assembly.

(f) The newly-elected General Superintendent and Treasurer shall immediately assume entire control of the meeting and appoint the Board of Management for the ensuing year in accordance with the Act of Incorporation."

Counsel contended that these rules and bye-laws are repugnant to the Act and that they do not specially provide for the convening of a meeting of the representatives as required by Section 4. We have considered the argument, and although the Rules and Bye-laws are not artistically worded they nevertheless carry out the intention expressed in the Act. The word "representatives" is not used but words conveying the same meaning are employed. As to that portion of Rule 12 (c) which purports to render nugatory a vote which has been cast contrary to a mandate, this is repugnant to the Act, but this repugnancy does not invalidate the remaining portion of this rule or the Rules and Bye-laws as a whole. We must point out, however, that there has been no challenge to the validity of any election on the ground that a representative has voted other than according to his mandate.

Section 4 of the Act, as we have seen, enacts that the time and place for the holding of the annual meeting shall be provided for by the bye-laws. Bye-law IV (5) of the bye-laws of the 7th of August, 1914 makes the following provision—

"Notice of all meetings of the Mission shall be printed in the Christian Mission Herald at least one month previous to such meeting."

The Christian Mission Herald was the official organ of the Christian Mission and notices of meetings were duly published therein in compliance with this bye-law until 1946, when the organ went out of existence. The publication of this organ was then discontinued owing to financial stringency. We have to consider what effect the non-publication of a notice in the Herald would have on the validity of a meeting and the election held thereat; we take the view that the provisions of the bye-law are directory only, therefore the omission to publish in the Christian Mission Herald notice of the annual meeting would not invalidate an election properly conducted thereat, provided that due and proper notice had been given to all concerned. No complaint has been made that the representatives did not receive due and proper notice of the annual meetings of 1947 and 1948. The elections that took place in these years are in order. Moreover, the plaintiffs admitted in their pleadings that the defendant Dalton Leopold Hoyte was the General Superintendent and together with

the other defendants comprised and functioned as the Board of Management of the Mission for the year 1948.

For many years after its incorporation the work of the Mission appears to have moved on smoothly and with due decorum, but within recent years misunderstandings and disagreements have arisen among the members culminating in a distinct cleavage, the members became divided into two factions, one supporting the plaintiffs and the other the defendants. Feeling ran high. An example of this feeling is to be found in the incidents that occurred on the 1st of January at the Gospel Tabernacle, the principal place of worship of the Mission in Bridgetown. When the then General Superintendent was about to hold a New Year's service, he was assaulted by some members of the Mission and the key of the Tabernacle snatched from him; rival singing took place in the Church at one and the same time, pandemonium reigned and the conduct was such as to prevent the holding of any service.

The defendant Hoyte had summoned a meeting of the representatives for the 6th January, 1949 but he was advised by his legal adviser whom he had consulted on the 1st January after the incident narrated above, that the meeting so summoned was improperly called in that the notice convening the meeting had not been published in the Christian Mission Herald as required by the rules and bye-laws of the Mission; acting on this advise Hoyte did not attend this meeting and sent word to the delegates through one Ramsay, a member of the Mission, that he was advised that the meeting of the 6th was illegal and he would not be attending; Hoyte himself also notified certain representatives that the meeting was illegal and that he would not attend.

A meeting was nevertheless held under Ramsay's chairmanship on that day. From the minutes themselves, it is obvious that this meeting of the 6th of January as held was not, and was not intended to be, the annual meeting as required by Section 4 of the Act, in addition the proceedings at the meeting were conducted in an irregular and improper manner. There was a meeting of some sort on the 15th of January but there is no record of this meeting in the minute book kept by the plaintiffs-appellants. The evidence discloses that at this meeting of the 15th it was decided to summon a meeting of the delegates for the 26th of January. The notice is in this form —

"Christian Mission
Headquarters
Tudor Street,
Bridgetown.

This is to notify you that the annual meeting that was schedule to take place at the Gospel Tabernacle on the 6th January in which Elder Hoyte has failed to carry on. We the act. Board of Managers summons the delegates of your church to appear at the Gospel Tabernacle on the 26th Jan. at 11 a.m. to appoint a fit and proper person to be General Supt. for the year 1949-50.

T. M. Ramsay, Actg. supt., Joseph
S. Davis Actg. Sect."

This meeting of the 26th was irregular in that is was convened by persons having no authority so to do; proper notice was not given and the proceedings were improperly conducted, with the result that the elections of the General Superintendent and Board of Management purporting to have been made at that meeting are null and void. The meetings which purported to be the annual meetings of the Mission in the years 1950 and 1951 and everything that occurred thereat are in our view also null and void for the reason that they were convened by persons having no authority. We may remark incidentally that the Christian Mission Herald published in September, 1949 and thereafter with the intention of satisfying the requirements of the bye-laws was not the official organ of the Christian Mission, as it was published by people having no authority to do so.

The plaintiff Barrow was therefore not entitled to hold the office of General Superintendent of the Mission for the year 1949; nor was the plaintiff Larrier entitled to hold that office for the years 1950 and 1951; nor did the other plaintiffs comprise and constitute the Board of Management of the Mission for any of the same periods. The plaintiffs-appellants are not entitled to the declaration sought.

What then is the position in view of our findings in regard to the office of General Superintendent and officers of the Board of Management of the Mission? There is no question that Hoyte was properly elected as General Superintendent in 1946 and there is no challenge by the plaintiffs-appellants before us as to the validity of the elections for 1947 and 1948. We now consider whether Hoyte by virtue of his election in 1948 and in view of our findings is entitled to hold over as General Superintendent or whether that post is vacant.

In Vol. 8 of Halsbury's Laws of England (Hailsham Edition) at page 37, paragraph 57 the following statement of the law relating to the tenure of office of officials of a corporation appears:

> "Where the charter of a corporation provides that a particular officer shall be chosen annually, it is directory only, and must not be construed as terminating the office at the end of the year after his election; but he will continue in office until his death or removal or another is elected and (if necessary) admitted. But the constitution of the corporation may expressly provide for the retirement of the officers at the end of the year."

In the instant case no express provision is made for the retirement of the General Superintendent at the end of any year. All that is stated is that at the annual meeting in the month of January a General Superintendent and Treasurer shall be appointed for the ensuing year. The case of *Rex v. Phillips,* (1720) 1 *Stra.* 394: 93 *E.R.* 588 was cited as authority for the proposition that where a Mayor is elected to hold office for one year then next following the right of holding over was taken away, but we do not agree that that case supports that proposition; a close examination of

the case will show that the reason why a holding over was held to be impossible was that a new charter had been issued in substitution for an old charter which had expressly provided for holding over. This new charter created a new method of election, and specifically omitted the holding over clause in the old one. The Chief Justice in delivering judgment said, "Now the validity of the defendant's title, as he makes it in his plea, depends on the question, whether the right of holding over subsists under the second charter. And I hold it does not; for it is very observable, that the second charter where it recites the former, takes express notice of the clause for holding over; and then when it comes and abolishes all the former method of election, and appoints it to be in another manner, and that the Mayor shall continue in for a year, it cannot be imagined but that this right of holding over was intended to be abolished also."

In the absence of any special provision to the contrary there is, in our view, a general right of holding over. Holding over is a privilege which often serves to save a corporation from extinction. It can hardly be conceived that the Legislature intended that this corporation which it had created should ever be without a head. We are of the opinion that the right of holding over subsists in Hoyte under his former election and appointment and so also in the members of the Board of Management nominated by him. The defendants-appellants are entitled to the declaration sought.

The learned Vice-Chancellor held that neither the plaintiffs nor the defendants were entitled to the declarations sought, this Court finds that the defendants are entitled to the declaration which they claim. The trial of this action proceeded on the footing for a declaration only and in these circumstances while appreciating the reasons which prompted the learned Vice-Chancellor to make the order for a receiver we must with great respect differ from him on this point as we do not think a receiver should have been appointed. A state of internecine strife had undoubtedly existed and still exists between the parties, necessitating their resort to a secular Court to settle their differences. It may well be, having regard to what occurred in the Tabernacle on the 1st of January, 1949 and the tension in the course of the trial, the learned Vice-Chancellor felt the appointment of a receiver might have the immediate effect of preserving the Church property and promoting the harmony envisaged in the preamble to the Act and expressed so often in correspondence.

We have already declared that the right of holding over subsists in Dalton Leopold Hoyte and in the members of the Board of Management nominated by him. This right of holding over continues until January, 1954 and it is hereby ordered and directed that the said Dalton Leopold Hoyte take all necessary steps to convene a meeting of representatives of the churches of the Mission to be held in the month of January, 1954, that previous notice of this meeting be given by registered post to all parties concerned and in addition notice of the meeting be published in

a local daily newspaper at least one month previous to such meeting. At this meeting a statement of the affairs of the Mission shall be submitted by the Board of Management; and the General Superintendent and Treasurer shall be appointed for the ensuing year and such General Superintendent and Treasurer shall thereupon also immediately nominate a Board of Management for the ensuing year.

The appeal of the plaintiffs-appellants is dismissed and the appeal of the defendants-appellants is allowed with costs.

RAMCHARRAN v. RAMCHARRAN

(In the Full Court, On appeal from the Magistrate's Court of the Georgetown Judicial District (Boland, Hughes JJ.) September 30, November 13, 1953).

Husband and wife—Summary Jurisdiction—Persistent cruelty—Neglect to maintain—Previous proceedings—Withdrawal—quasi criminal offence—No bar—Summary jurisdiction (*Procedure*) *Ordinance—Limitation.*

The wife respondent in this appeal lodged a complaint against her husband on the 3rd July 1951, alleging that he had been guilty of persistent cruelty from February 1950 to June 1951 and had wilfully neglected to maintain her. This complaint was withdrawn.

On the 22nd February, 1952, she filed another complaint alleging persistent cruelty for the same period as before, and wilful neglect to maintain. She had left her husband on 2nd July, 1951, and had not returned to the matrimonial home.

The husband pleaded not guilty to the second complaint and at the close of the wife's case his Counsel submitted that he was entitled to rely on a plea of autrefois acquit.

The Magistrate rejected the submission, found the husband guilty of persistent cruelty and ordered him to pay the sum of $8.50 per week for the use and maintenance of his wife. The husband appealed.

Held: The violation of a wife's rights to her husband's consortium is in essence a wrong against her personally and of a civil as distinct from a criminal character but as the legislature thus provided a summary remedy to enforce a wife's rights these civil matters are called quasi criminal and as there was no adjudication on the merits there could be no bar to another summons based on the lodgment of a fresh complaint, provided that the complaint was not in respect of wrongs alleged to have occurred more than six months preceeding the date of the fresh complaint.

As the last act of cruelty alleged in the second complaint occurred more than six months before the filing, it was out of time.

There was no evidence of wilful neglect to maintain.

Pickavance v. Pickavance explained.

Appeal allowed.

L. F .S. Burnham for appellant.

R. M. Morris for respondent.

Judgement of the Court: This is an appeal against the order of the Magistrate of the Georgetown Judicial District whereby on the ground of his persistent cruelty towards the respondent, his lawful wife, appellant was ordered to pay the sum of $8.50 a week for her use and maintenance. Before the Magistrate the appellant when called upon to plead did not enter the special plea of *autrefois acquit.* He then pleaded "not guilty," but at the close of the case for the complainant, defendant's counsel submitted that there was no case to answer on the ground that "the defendant can enter a plea of *autrefois acquit."* The Magistrate rejected this submission and made the order as above specified.

The sole question to be determined in this appeal is whether the appellant was entitled to be acquited on the ground that he was *autrefois acquit.*

It was established in the evidence before the Magistrate that prior to this complaint which was lodged on the 22nd February, 1952, the wife had on the 3rd July, 1951, lodged a complaint against her husband. In that earlier complaint she had alleged that during the period from February 1950 to June 1951 her husband had been guilty of persistent cruelty and/or wilful neglect to provide her with reasonable maintenance. It was the identical allegation she made in her subsequent complaint of the 22nd February, 1952. When that earlier complaint of the 3rd July, 1951, had come on for hearing before the Magistrate on the 21 August, 1951, the husband pleaded not guilty, and evidence was led by the wife. The case continued during two subsequent sittings of the Court during which one other witness testified. Ultimately at a hearing on the 7th December, 1951, the wife according to the Magistrate's record withdrew her complaint.

Under cross-examination in the case which she subsequently filed, the wife admitted that all the evidence concerning cruelty she was then giving she had given in the earlier case and that since July 1951 she had not been living with her husband nor had he visited her. She did not deny that at the time of her withdrawal of the previous case, her Solicitor had suggested that her husband should give her $8.00 a week, and that she had agreed to accept it. She admitted that she had been receiving that sum as was acknowledged by her receipts given to her husband for three sums of $34.67 in payment in full for her maintenance for the months of December 1951 and January and February 1952.

It is obvious from the foregoing that by its withdrawal the first case ended without a decision by the Magistrate on the merits.

The proceedings brought by the wife were in each case instituted by virtue of the provisions of section 41 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 9 the procedure for which is regulated by the Summary Jurisdiction (Procedure) Ordinance, Chapter 14. That is the same procedure which is therein prescribed for the trial of summary conviction offences before a Magistrate. Also an order for the payment of money by

a husband to his wife made by a Magistrate in such proceedings is enforceable in the manner provided in Part IV of the same Ordinance Chapter 14 for the payment of a penalty not made enforceable by the alternative of a term of imprisonment. Apart from certain instances which are offences in broach of the vagrancy laws under section 146 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13, the violation of a wife's rights to her husband's consortium and protection and to her maintenance by him are in essence wrongs against her personally which are of a civil as distinguished from a criminal character. In enforcement of these rights the legislature has vouchsafed to the wife the summary remedy of criminal proceedings before the Magistrate and these civil matters because of this procedure prescribed for their enforcement have been properly classified as quasi-criminal. In considering the validity of a plea of *autrefois acquit* raised in such proceedings it is of importance, we think, to bear in mind that these quasi-criminal matters are really civil wrongs to which is attached the remedy by proceedings prescribed for criminal offences. The essential principle underlying recognition of the plea of *autrefois acquit* in criminal charges is that an alleged offender should not be punished twice nor placed in jeopardy to be punished twice, for what is virtually the same criminal offence. Accordingly if a person on a criminal charge is after adjudication on the merits acquitted by the Court, he shall not again be called upon to answer a charge' for the same offence or for what is in essence the same offence. Nay, more, even if there had been no formal acquittal on the merits, yet if he had been placed in jeopardy of a conviction and punishment in the course of the prior proceedings, he shall not be liable to be placed again in such jeopardy in subsequent proceedings.

On the other hand in civil proceedings, withdrawal or discontinuance of his case by a plaintiff before adjudication is not a valid bar to subsequent proceedings but when there was an actual adjudication of the same matter arising in issue in subsequent proceedings between the same parties it is deemed to be *res judicata* and this would be a plea of *estoppel by record* if the prior adjudication was made and entered on the record of a Court of Record.

It is, we think, the failure to appreciate that the matrimonial offence of persistent cruelty furnishing the ground for a complaint by the wife against the husband under the Summary Jurisdiction (Married Women) Act 1895 is not a criminal offence but a civil wrong against the wife, which largely contributed to the misunderstanding as to what was the real decision in Pickavance v. Pickavance (1901) P. 60. In that case, which was an appeal against an order for maintenance made on a complaint of persistent cruelty, it was established that after some evidence was given there had been the withdrawal of an earlier complaint for the same alleged cruelty. At the time of the fresh complaint the last act of cruelty had occurred, as was alleged, more than 6 months before and so clearly out of time as fixed by the Summary

Jurisdiction "Act, 184(8, which governed the procedure for the hearing of such complaints. It was on this ground that the Divisional Court (Sir F. Jeune P. and Barnes J) allowed the husband's appeal against the order made by the justices ordering him to pay a weekly sum for his wife's maintenance. Sir F. Jeune in his judgment, by way of *obiter dictum*, expressed his view that the effect of the withdrawal of the summons, which must have been with leave of the justices, was to disentitle the complainant from obtaining the issue of a fresh summons on the same complaint—obviously meaning thereby the same com-plaint which was lodged to initiate the proceedings subsequently withdrawn. The head-note to the report of Pickavance v. Pickavance in the Law Reports as well as that in 84 L.T. 62 where the case is also reported is misleading in giving a wrong construction to the meaning of Sir F. Jeune's utterances by way of *obiter*. It is wrongly put forward in the head-note as the substantive effect of the decision that on withdrawal no fresh summons can be issued on the same cause of complaint. The use of the phrase *"same matter of complaint"* in the head-note to the report of the case in 70 L.J. P. 14 is equally misleading.

The case of Hopkins v. Hopkins 1914 P. 282 was referred to by both counsel in the course of the argument before us. In that case while agreeing that the *ratio decidendi* in Pickavance v. Pickavance was that the second complaint was out of time, Sir Samuel Evans P. and Bargrave Deane, J. expressed approval of the view which they wrongly attributed to the *obiter dictum* of Sir F. Jeune by giving the same wrong construction to his words as appears in the head-note of the report. The Court went on to hold that the view that the withdrawal of a summons brought by the wife in a matrimonial complaint necessarily disposes of her right on similar facts to take further proceedings, is too wide. In such cases, it was pointed out, the withdrawal may well have been understood to be on conditions and not absolutely, and although on the facts of the particular case of Hopkins v. Hopkins then under appeal the withdrawal was in fact absolute and without conditions, the Divisional Court would seem to have thought that if the withdrawal had been conditional, the wife would not have been estopped from taking further proceedings on similar facts *should the condition be unfulfilled.*

In the more recent case of Land v. Land (1949) 2 All E.R. 218, which also was an appeal from an order made by justices, Lord Merriman P. in his judgment disagreed with the law enunciated in Hopkins and Hopkins and points to what was the real *ratio decidendi* in Pickavance and gives the true meaning of Sir F. Jeune's *obiter dictum* as set out earlier in this judgment In Land v. Land there had been a first summons for desertion which was withdrawn. On a second summons for desertion, based upon the same facts, the plea of *autrefois acquit* was rejected by the justices and an order made against the husband. On appeal to the Divisional Court it was held that as desertion is a continuing offence the second summons was not out of time and therefore

tenable. This was in accordance with the real decision in Pickavance v. Pickavance.

To summarize our views on the effect in law of the withdrawal by a wife of proceedings brought against her husband under section 41 of the Summary Jurisdiction Ordinance, Chapter 9, her complaint is in respect of a civil wrong alleged to be suffered by her by reason of the husband's violation of her rights to consortium, protection or maintenance. Though by statute she is given her remedy in summary criminal proceedings, these wrongs are not criminal offences. In such proceedings the transgressing husband is not liable to be punished as a criminal offender for his wrongful acts of commission or omission but the wife on his being found guilty may obtain an order that she be maintained by him according to his means and/or that she be protected from him by an order that she is not bound to cohabit with him. Just like an order in favour of a plaintiff in a civil suit, the enforcement or not of the order in her favour is entirely at her option. The order is not one of punishment and therefore at no stage of the proceedings before the actual adjudication can a defendant husband claim that he is exposed to the risk of punishment. If no order is made on the merits he is not entitled, if subsequently there is another complaint lodged against him for the same matrimonial offence, to plead that he is being subject again to the risk of punishment for the same offence. We hold that in these matrimonial cases the plea of *autrefois acquit* is untenable unless the husband can establish that the matter is *res judicata* on the ground that there had been an adjudication in his favour on the merits. This is the law with regard to claims for civil wrongs within the civil jurisdiction of Magistrates. The withdrawal of a complaint may be some evidence that the wife has condoned the husband's matrimonial offence in a case where condonation is a good defence. The withdrawal of her complaint may also conceivably support a plea for a compromise between the parties. In this case neither condonation nor compromise was advanced as a defence before the Magistrate. Both before the Magistrate and on appeal the husband relied solely on the defence of *autrefois acquit.*

Part IX of the Summary Jurisdiction (Civil Procedure) Rules 1939 makes provision for discontinuance of actions or matters. Rule 1 of Part IX empowers a plaintiff who desires to discontinue any action or matter to give notice to the defendant, who after receipt of such notice may apply for the costs incurred before such notice. (The right to such notice or to costs may of course be waived by the defendant). It is to be noted that "matter" is defined as meaning a proceeding not commenced by writ of summons. Rule 2 declares that discontinuance or withdrawal shall not be a defence to any subsequent action.

The Rules of the Supreme Court deal similarly with the discontinuance of matters before the Supreme Court in its civil jurisdiction.

In this matter under appeal the withdrawal, it must be assumed ,was with leave of the Magistrate, who it would appear made no order for costs in favour of the defendant. There was no adjudication on the merits. Therefore there could be no bar to another summons based on the lodgment of a fresh complaint provided that the complaint was not in respect of wrongs alleged to have occurred more than six months preceding the date of the fresh complaint—which is the period of limitation prescribed for the bringing of a complaint before the Magistrate by the Summary Jurisdiction (Procedure) Ordinance, Chapter 14.

The fresh complaint which is dated 22nd February complains that the defendant *during the period of February* 1950 *to February* 1952 *and up to the present* is guilty of —

(1) persistent cruelty to the complainant; and/or
(2) Wilful neglect to provide reasonable maintenance for the complainant.

As regards the persistent cruelty which is stated in the order itself to be the sole ground for the order, the complainant in her evidence admitted that she was referring to the same act of cruelty which she had related in evidence in the previous case. According to the notes of evidence in the previous case she was beaten on the 2nd July, 1951, and left the house that day. She admitted in her evidence that she and her husband were never together again. This therefore was the last act of cruelty and it occurred more than 6 months before the filing of her second complaint on the 22nd February, 1952. So far as cruelty is concerned, her second complaint was therefore out of time.

Perhaps it should be stated so as to avoid any possible misconstruction of the views above expressed that persistent cruelty by a husband would justify a wife leaving her husband and staying apart from him through a reasonable fear of the continuance of the cruelty. In such circumstances she would be able not only to meet any plea by him that she is guilty of desertion but she can claim that he has deserted her—this form of desertion is referred to as *constructive desertion.* Provided that the apprehension of further cruelty is reasonable in the circumstances, the desertion by her husband, albeit constructive, would be a continuing matrimonial offence. In this case the wife did not base her complaint on desertion, either actual or constructive, nor did the magistrate in finding that there was persistent cruelty, think it necessary to order that because of persistent cruelty she was not bound further to cohabit with her husband. Had he made such an order an accompanying further order that he pay for her maintenance and support might have been understandable.

With regard to the further complaint that he had wilfully neglected to provide reasonable maintenance for her, what was the position at the date of the fresh complaint on the 22nd February? Her receipts dated 21st December, 1951, 30th January, 1952 and 28th February, 1952 established that she was accepting the payments of $34.67 at the end of each month for that month's

payment. She never suggested that that amount which was approximately at the rate of $8.50 a week was not reasonable—and the Magistrate too would not appear to have so thought, seeing that he made an order for the payment of $8.50 a week. It is to be noted that the Magistrate's order is declared to be on the sole ground that the defendant was guilty of persistent cruelty.

In the result we hold that as the last act of cruelty had occurred more than 6 months before the date of the complaint the proceedings in relation to persistent cruelty were barred by lapse of time, and that the appellant was therefore not liable to have the order made against him. It should be added that the setting aside of the Magistrate's order would be no bar to her bringing a complaint if she can establish at some later date that she was then being, left without reasonable means of support.

Accordingly the appeal must be allowed and the Magistrate's order set aside.

BABB v. INDARAKALLI BACCHUS

In the Supreme Court, Civil Jurisdiction (Boland J.) November 4, 7, and 24, 1953.

Agency—Immovable property—Sale—Commission—Tax Ordinance—Licence—Unlicensed agent—Validity of contract to pay commission.

Section 27 of the Tax Ordinance, 1939, provides that every person other than an auctioneer who carries on the business of a house agent for the sale of immovable property shall take out an annual licence for so doing.

The plaintiff carried on the business of a house agent without being licenced and claimed commission for securing a purchaser for the defendant's property.

It was objected that he was not entitled to succeed as he did not hold a licence.

Held: The provision in the Tax Ordinance, 1939, for the payment of a licence is concerned merely with revenue collecting and the contract to pay commission was not illegal and void.

Judgment for the plaintiff.

A Vanier for the plaintiff.

Akbar Khan for the defendant.

Boland J. : In this case I find as a fact on the evidence led before me that the defendant did agree to pay to the plaintiff two per cent of the purchase price of seven thousand four hundred dollars as commission on his bringing a purchaser ready and willing to buy the property, 33 Plantation Kitty, at that figure, and that the plaintiff did secure such a purchaser whose offer the defendant accepted. This purchaser paid to the defendant the sum of $7,400.00 and has since had transport passed to him.

The Solicitor for the defendant contends that nevertheless the plaintiff is not entitled to succeed on his claim for commission because at the time of his contract with the defendant for commission the plaintiff did not hold a licence as a commission agent for the sale of houses, tenements or immovable property. The plaintiff who is employed at the Demerara Electric Company admitted that he also engages in the business of securing purchasers or vendors of properties for a commission. He stated that he had during the past four years obtained licences to act as a real property broker. In some of those years he had obtained a licence available only for a half year. On the 29th March, 1952, when the defendant agreed to pay him a commission he was not holding a licence for that year. It was only afterwards on the 27th May, 1952, that he obtained a licence and that was to expire on the 31st December, 1952. He was given a discount on the full year's fee of $50.00 because of the year being so far advanced—he paid only the sum of $33.00 for the licence.

It was contended on behalf of the defendant that the plaintiff's undertaking to engage in the business of a commission agent was in breach of law, and that the contract for commission was therefore an illegal contract which as such was not enforceable by the Court.

The Tax Ordinance, 1939, provides in Section 27:

> "Every person, other than an auctioneer, who acts as, or carries on the business of, a house agent or commission agent for the sale of houses, tenements, or immovable property, shall take out an annual licence for so doing and pay for the licence the sum of fifty dollars a year".

The non payment of the tax with interest thereon is enforceable by the Colonial Treasurer by the process of parate execution (*vide* Section 68).

What the Court has to determine is whether the provision in the Tax Ordinance relating to property agents acting as such without having first obtained a licence was designed merely to supply revenue or to protect the public. In Victoria Daylesford Syndicate Limited v. Dolt (1905) 2 Ch. 624, the question was raised as to whether the defendant, who was admittedly carrying on the business of a moneylender and who had not obtained a moneylender's licence under the Moneylenders Act 1900, could legally contract as a moneylender and enforce the contract. Buckley J. in his judgment at p. 629 says dealing with this point—"The next question is whether the Act is so expressed that the contract is prohibited, whether expressly or by implication. For this purpose statutes may be grouped under two heads—those in which a penalty is imposed against doing an act for the purposes only of the protection of the revenue and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public."

The learned Judge goes on to point out that in the case of a moneylender it is abundantly clear that the whole purpose of

the prohibition is the protection of the public. The moneylender has to be registered and has to trade in his registered name, obviously and notoriously for the protection of those who deal with him. There was no difficulty in holding in that case, that the purpose of the legislation was a public purpose, and that a contract by an unregistered moneylender was forbidden by statute and illegal. Accordingly the defendant's counterclaim for repayment of the loan to plaintiff was dismissed.

With regard to house and property agents it should be pointed out that there is no enactment relating to real property agents and house agents., other than what is enacted in the Tax Ordinance, which is a statute concerned merely with the provision for revenue collecting. This Ordinance replaces annual Tax Ordinances passed formerly every year making provision for the collection of revenue during the current year.

The Solicitor for the defendant has referred to liquor licences and points out that a contract by a person not holding the relevant liquor licence in respect of the sale of liquor is unenforceable because the sale would be illegal and prohibited as an offence. But it should be stated that though the Tax Ordinance for the purpose of providing revenue fixes the amount payable for liquor licences, the Intoxicating Liquor Ordinance and other Ordinances contain provisions prescribing powers and restrictions of holders of liquor licences. It may be true that the major purpose of enactments relating to liquor licences is to provide revenue, but that is not the sole purpose. There is also the purpose to give some measure of protection to the public.

I hold that while plaintiff may have rendered himself liable to parate execution at the instance of the Treasurer for a breach of the Tax Ordinance, the contract was not illegal and void; and accordingly I give judgment for plaintiff for the sum of $148.00 that is 2% on the purchase price of $7,400.00 and I award plaintiff his costs. Leave is granted him to withdraw the sum of $248.00 in deposit in Court, or whatever sum less that amount which my be sufficient for full satisfaction of this judgment and taxed costs.

Judgment for the Plaintiff.

(In the West Indian Court of Appeal, on appeal from the Supreme Court of Trinidad and Tobago, (Collvmore, Jackson, Bell. CJJ). January 15, 16, 29, 1953).

Trespass—Ejectment complaint—Falsity—Damages.

The appellant purchased two lots of land at Petit Bourg, San Juan, from one L. G. in 1946. In 1941 L.G. had let to the respondent one and a half lots of land at Petit Bourg, San Juan, upon which he erected a house and cultivated a garden.

The land was surveyed after the appellant's purchase and altercations thereby arose regarding the land occupied by the respondent.

With knowledge that a dispute existed concerning the boundaries of the land the appellant falsely swore that the respondent was a tenant at will and obtained an ejectment order. He then broke down the respondent's house and dispossessed him.

The respondent obtained damages for trespass.

The appellant (defendant) appealed.

Held: The ejectment complaint contained false and misleading statements and the Magisterial proceedings were wholly irregular. The appellant did not have the right to the whole of the area on which the respondent's house stood and his high handed action in demolishing respondent's house could not be justified.

Appeal dismissed.

M. Butt Q.C. with Ellis Clarke for the appellant.

B. Ramkeesoon for the respondent.

Judgment of the Court: This is an appeal in a case of trespass from a judgment by which the respondent (plaintiff) was awarded against the appellant (defendant) special damages in the sum of $2,050, the value of his house and for the loss of personal effects, and general damages in the sum of $1,500. Judgment with costs against the respondent was entered for a second defendant in the suit, one Laura Germain, against whom as alleged landlord of the respondent there was an alternative claim for breach of an implied covenant for peaceful enjoyment. Laura Germain did not appear and was not represented at the hearing of this appeal, of which it seems she received no formal notice.

In the year 1941 by oral agreement Laura Germain let to the respondent Terah Alfred at a monthly rental of $1.25, one and a half lots of land at Petit Bourg, San Juan, and at the time of the letting pointed out the boundaries of the land to the respondent,

who in her presence and with her approval drove wooden pickets to delineate the boundaries of his holding. On the land the respondent built a three-roomed house with gallery, which save for minor improvements was completed by the end of 1942. He also planted and cultivated a garden and remained in quiet and peaceful enjoyment of the demised premises for some years. On the 21st January, 1947, the respondent's house was broken into and demolished and his goods scattered and destroyed, all in his absence, by the appellant, Lumpress Munroe, his servants and agents.

Now, in 1946, the appellant had purchased two lots of land at Petit Bourg, San Juan, which land was vested in him by Deed of Conveyance dated 16th February of that year. The land is described in the Deed as:

> "TWO LOTS measuring ONE HUNDRED (100) FEET SQUARE more or less and bounded on the North by lands of Papin, on the South by lands of Darcey, on the East by lands of Papin and on the West by lands of Shedrack Bajnath or howsoever otherwise the same may be butted or bounded."

The immediate predecessors in title of the vendors to the appellant were, it is significant to observe, Laura Germain and one Lucius Valentine Papin her brother, who at one time owned several acres of land at Petit Bourg, San Juan. It seems incontrovertible that the two lots sold to Munroe are identical with those conveyed by deed of 1936 to his vendors. This latter Deed states:

> "TWO LOTS measuring ONE HUNDRED FEET square more or less and bounded on the North by lands of Papin on the South by lands of Darcey on the East by lands of Papin and on the West by lands of Shedrack Bajnath."

In September, 1946, a licensed surveyor surveyed for the appellant the land he had purchased but in the absence of the respondent. After certain altercations prior to and after the survey, between the appellant and the respondent with regard to their rights over the land occupied by the respondent, the appellant gave respondent notice to quit his tenancy of the land he had rented from Laura Germain and followed this with an ejectment summons.

The complaint in this matter reads: —

> EJECTMENT COMPLAINT No. 19218.
>
> LUMPRESS MUNROE..... (owner) .....10 Irving St, San Juan.
>
> TERAH ALFRED . . . . . Defendant.
>
> The complaint of . . . . . L. Munroe . . . . . .made before me . . . the undersigned Stipendiary Magistrate . . . . . for the County of St. George West who maketh oath and saith that the said Complainant did let to the Defendant . . . . . a tenement consisting of a parcel of land at Irving St, Petit Bourg, San Juan . . . .for . . . . Tenant at Will. . . . . .under

the rent of . . . . and that the said tenancy expired on the 4th day of October, 1946, by notice to quit . . . . . given by the said complainant on the 20th day of September, 1946, that the said . . . . defendant . . . refuses to deliver up possession of the said tenement, and still detains the same although (he) hath been required to deliver up the possession thereof.

(Sgd.) L. Munroe Cpl.
Signature of Complainant.

Before me this 9th day of October, 1946.

(Sgd.) Victor C. Ramsaran
Acting Magistrate.
15/11/46."

Thus the appellant, with full knowledge that a dispute between himself and the respondent existed about their respective rights over the one and a half lots let by Laura Germain to the respondent, sought by criminal process the establishment of his alleged rights instead of having recourse to civil procedure in the course of which Laura Germain doubtless would have become or been made a party and the question of ownership as between Laura Germain and the appellant properly determined. The ejectment complaint contained false and misleading statements. It is not true that the appellant let to the respondent a tenement consisting of a parcel of land at Petit Bourg, San Juan. It is not true that the respondent was ever a tenant at will of the appellant or that the respondent refused to deliver up possession of any tenement held by him from the appellant as landlord. Moreover, the appellant sought to eject the respondent from his holding in its entirety, whereas in the case under review his defence to the respondent's action is concerned with only a portion of respondent's tenement and particularly a part of that portion on which the demolished house once stood.

However, the magistrate issued an ejectment order and suspended it for thirty days. On the strength of this the appellant devastated and demolished the respondent's house and goods as previously mentioned. The appellant's contention is that he is owner of that portion, and therefore has the light to possession and the right at Common Law to eject the respondent as a trespasser.

Before the trial Judge exception was taken to the evidence relating to the survey on. the ground that it was made without sufficient regard to the surrounding properties and that the measurements were based on what the appellant pointed out to the surveyor as the boundaries he claimed for his land Under cross-examination the surveyor said, "I did not survey all the Papin land; I went there to survey 'two lots' of land for Munroe. Munroe pointed out the approximate position of the two lots to me" In addition the plan which was prepared by the surveyor for. and tendered at, the magisterial proceedings was not produced at the trial. The Judge found, and we agree, that the reasons

adduced for its non-production before him are entirely unsatisfactory. The appellant who might have offered an explanation did not give evidence.

Counsel for the appellant briefly outlining his case in the Court below said:

> "I propose to call a surveyor who will say the plaintiff's house fell on the defendant's land. The plaintiff was a trespasser and even without an order he could have been ejected. The' warrant for possession was obtained *ex abundante cautela.* Plaintiff was asked to move his house from the land; he did not avail himself of the opportunity".

In this Court counsel frankly admits the errors of the surveyor and urged: "Only in one sentence are we challenging the judgment of the learned trial Judge. The crucial sentence is 'the expression two lots cannot in this case. I consider, be taken to mean land with a frontage of one hundred feet". We cannot in view of the language of the deed support that finding of the learned Judge and cannot in law justify it. That however does not put an end to the respondent's case for it remains to be ascertained whether appellant was entitled to the possession of the land occupied by the respondent or merely a portion of it.

The Surveyor in course of his cross-examination said:

> "I knew Munroe had bought 100 feet square, yet I gave him an L shaped portion of land I knew he had purchased 10,000 square feet, yet I gave him 10,976 square feet. Alfred's house I knew was enveloped. The portion of land on which the house stood was 400 square feet. I did say, probably, that: 'When I ran my line. I was cutting the house five feet' "

On this point the notes of the evidence of this witness before the Magistrate which were by consent admitted in evidence at the trial are as follows: —

> "The house is on Munroe's lands. When I ran my line, I was cutting the house five feet. The house falls on the lands of Munroe, however you take it".

From the above the obvious conclusion must be, when appellant's case is put at its highest, that only a portion of respondent's house stood on the land appellant claims. Nevertheless the appellant demolished the whole house.

We are impressed by the argument of counsel with regard to the boundaries claimed for the appellant and it would appear that the establishment of the southern and western boundaries as contended for would result in the inclusion in appellant's land of a portion of respondent's holding. A decision as to the rights in fee simple must however await appropriate proceedings in which Laura Germain would be a party and after a comprehensive survey of all the original Papin land has been made by a competent licensed surveyor,

The authorities show that where a landlord having the right to possession evicts a tenant, but in the course of his so doing, the tenant suffers assessable special damage the tenant is entitled to recover such damage. In this case the appellant cannot be protected by the order for ejectment because he was never the respondent's landlord, and as pointed out, the Magisterial proceedings were wholly irregular. Even if the appellant at Common law had a right to the possession of any part of respondent's alleged holding, he certainly had not the right to the possession of the whole of the area on which respondent's house once stood.

In our view the high-handed action of the appellant cannot be justified. The respondent is entitled to the sum of $2,050 special damages as found by the trial Judge and in the circumstances we are of opinion the additional sum of $200 would be a just award as general damages.

The judgment appealed from is affirmed. The appeal is dismissed with costs here and in the Court below, and the award is varied to the sum of $2,250.

Appeal dismissed.

SAMAROO AND EZAZ v. THE QUEEN

(In the Supreme Court, Court of Criminal Appeal (Bell C.J., Boland and Wills JJ.) December 1, 2, 1953).

Robbery with aggravation—Alibi—Conviction by jury—Summing up—Defective.

The appellants were convicted by a jury on charges of robbery with aggravation. Their defence at their trial was an alibi. They appealed on the ground that their defence was not adequately put to the jury by the trial Judge in his summing-up.

Held: It is of paramount importance that the Judge in his summing-up must fairly put an accused's defence to the jury and as that had not been done in an otherwise careful and meticulous summing-up the convictions and sentence must be quashed.

Appeals Allowed

B. O. Adams for appellants.

G. M. Farnum, Solicitor General for respondent.

At the conclusion of the arguments the judgment of the Court was delivered by Bell, C.J.

Judgment of the Court: Bell C.J.: These appeals, which were heard together are appeals against convictions and sentences. The appellants had appeared before the Judge and a jury on charges of robbery with aggravation. Learned counsel for the appellants argued a number of points. He abandoned two of the points recorded in the grounds of application for leave to appeal. We are against him on two other points, namely, that there was no proof of what the grounds of appeal call ownership, and that the possession of the stolen goods, the money, was not fully established. We are against the appellants on those two grounds.

The main grounds argued were that the learned trial Judge failed to include in his summing-up the defence as led and that the learned trial Judge failed in his summing-up to deal fully with the evidence of the prosecution, particularly with the cross-examination of the witnesses. We have had the benefit of considerable argument by learned counsel for the appellants, to which the learned Solicitor General replied.

Now, it is clearly settled law that it is of paramount importance that the summing-up must fairly put the case for the defence, whatever it may be, No matter how trivial or stupid, or unlikely the defence may be, it is of paramount importance that the Judge in his summing-up must fairly put that defence to the jury. If authority were needed for that proposition, there is plenty of it in the books; for instance, the cases of *Totty* (1914) 10 C.A.R.; *Immer* (1917) 13 C.A.R., and *Dinnick* (1909) 3 C.A.R.

But while it is settled law that the summing-up must fairly put the case for the defence, there is no need for the Judge to go into every detail of the case ,nor is there any need for him to put the defence in technical language. For instance, if the defence is an alibi, there is no need for the Judge to put the defence to the jury under that name, or to use any technical names for the defence offered. There is no need, as we understand the law, that the Judge should put the defence at any particular stage of his

summing-up. He can deal with it as he deals with the witnesses for the prosecution, but there are obvious advantages of emphasis and orderly arrangement that the Judge should put the defence story to the jury after he has finished with the story for the prosecution, and that is the mode that we would certainly recommend. It is also quite clear that it is sufficient if the defence is put substantially, that is to say, if it emerges from an examination of the summing-up as a whole that the issues in the case were, in substance, put to the jury by the Judge.

Now, as regards this particular case, we have come to the conclusion that in an otherwise meticulous and careful summing-up by the learned trial Judge, who is careful and meticulous, it cannot fairly and reasonably be said that the defence of either of the appellants was put to the jury clearly or in such a way that their attention was sufficiently and emphatically drawn to the nature of that defence. It cannot be enough, we feel, merely to assume that because the jury have heard both sides of the case they are cognisant of the defence which is put forward. Something more that that is necessary. Something must be done to emphasise to the jury the defence which an accused person is offering.

Now, unquestionably, throughout the learned trial Judge's summing-up he did make reference to statements which had been made by the two appellants, but we are of the opinion that he did so for purposes other than the purpose of putting the defence to the jury in the way we feel it ought to be put. It would not be enough, we feel, to say: "Well, when these statements were being dealt with by the learned trial Judge it must have been apparent to the jury that the statements raised the defence of an alibi in each case." Something considerably more than that was required in our view, so we are left in the result with the view that at no stage can it be said that the defence, as put forward by the appellants, was sufficiently clearly and emphatically put to the jury and we are forced to the conclusion that that very vital principle has been infringed.

It must be, we feel, the duty of this Court to ensure that Judges trying cases with juries do not overlook that important principle. We would reiterate that it is the function of the Court to make sure that a Judge sitting with a jury never loses sight of the fact that at some stage of his summing-up and in some language and method he must alert the jury to the defence which has been offered to them by the accused. That is a very fundamental duty which we, as a Court of Appeal, would fail in if we did not emphasise it.

Now, we have given very earnest consideration to the question whether the proviso to the Criminal Appeal Ordinance should be applied in this case and after that careful thought and consideration we have come to the conclusion that it would not be a proper case in which to apply the proviso. We have been unable to satisfy ourselves, on the principles laid down in the cases of *Haddy* (1944) K.B., *Stirland* (1944) and *R. v. Farid,* that had

there been proper direction the jury would have come to the same conclusion as they did, which is really the test that we must apply. For these persons, we feel that the appeal in each case must be allowed and the convictions and sentences quashed. That being so, we direct the discharge of the appellants.

Appeals allowed.

KELSICK v. J. W. THURSTON & CO. LTD. and others

(In the West Indian Court of Appeal on appeal from a Board of Assessment, St. Christopher (Mathieu-Perez, Collymore, Jackson, C.J.J.) December 7, 8, 10, 1953).

Land acquisition—Compensation—Principles applied.

Land was acquired under the Land Acquisition Act in the Presidency of St. Christopher, Nevis and Anguilla.

The respondents, the owners of the land claimed at first $6,273.90 compensation and later amended their claim to $18,000.00.

The Board of Assessment without indicating the method of valuation or the process toy which the sum arrived at was fixed, awarded the owners $9,410.40.

The Authorised Officer appealed.

Held: As no question as to the credibility of witnesses arose the Court was in as good a position as the Board to review the matter and reach a conclusion as to the proper figure of assessment.

Assessment fixed at $3,450.66.

Principles which should guide a Board of Assessment discussed.

C. A. Kelsick, Acting Attorney General with *W. E. Jacobs.* Crown Attorney for the Appellant.

G. P. Boon with *G. R. Boon* for the Respondents.

Judgment of the Court: This is an appeal by the Authorised Officer from a decision of a Board of Assessment in relation to compensation for the acquisition of certain lands, 1 acre, 1 rood, 9.13 perches in extent, situate on the North-west corner of Warner Park in the parish of St. George, in the Presidency of St. Christopher, Nevis and Anguilla.

On the 18th June, 1951 the land was acquired by the Governor-in-Council of the Presidency in accordance with the provisions of the Land Acquisition Act, 1944, and the necessary declaration of acquisition was made by the Clerk of the Executive Council. In accordance with the provisions of Section 3 (2) of the Act the declaration was published in two ordinary issues of the *Gazette* on the 12th and 19th days of July, 1951. On the 27th August, 1951, receipt of the notice of acquisition was acknowledged and a claim for compensation filed on behalf of the Respondents by their agent J. L. Wigley, wherein the value of the land is stated to be six thousand two hundred and seventy-

three dollars and ninety cents ($6,273.90). On the 12th August, 1952, a notice of claim for compensation in substitution for that referred to above was filed by a Solicitor on behalf of the Respondents and in this the value of the land is placed at eighteen thousand dollars ($18,000.00). There was a further claim under the head of Disturbance in respect of estimated loss of prospective earnings; this claim was disallowed and is not a subject of appeal.

The Board of Assessment came to the conclusion that the proper value to be placed on the land was nine thousand four hundred and ten dollars and forty cents ($9,410.40) and awarded that amount. The Board stated that it was satisfied that the land is in a first class residential area and admirably suited for use as a building site but gave no indication as to the method of valuation or as to the process by which the total sum was arrived at. Consequently, this Court is in as good a position as the Board, no question as to the credibility of witnesses arising, to review the matter as a whole and to reach a conclusion as to the proper figure of assessment.

In the notice of motion of appeal several grounds are set out; of these some relating to the jurisdiction of the Board were abandoned, and we think rightly. The argument was then confined to the question as to the proper value to be placed on the land.

The rules for assessment of compensation are set out in section 19 of the Act as follows: —

> "19 (a) the value of the land shall, subject as hereinafter provided, be taken to be the amount which the land, if sold in the open market by a willing seller, might have been expected to have realized at a date twelve months prior to the date of the second publication in the Gazette of the declaration under section 3 of this Act."

The date of the second publication was the 19th July, 1951.

The principles which should guide a Board of Assessment in arriving at the amount of compensation to be awarded in a case of this description as put before us by Counsel on both sides are clear and well defined. "The market value or market price of a particular property is the amount of money which at any given time can be obtained for the property from persons able and willing to purchase it"; (Lawrence and May on Modern Methods of Valuation of Lands, Houses and Buildings, 1943 ed. p. 2) and in this case on the 19th July, 1950.

Our attention has been drawn to various authorities but we consider that the main principle which should guide us in assessing compensation is to be found in the judgment of Swinfen Eady L. J. at p. 473 in the case of Inland Revenue Commissioners v Clay and Buchanan (1914) 3 K.B. 466.

'In assessing compensation, then, it must be assumed that the owner is offering the property for sale of his own free will, but is taking all reasonable measures to insure a sale under the most

favourable conditions. The compensation payable will be that price which a properly qualified person, acquainted with all the essential facts relevant to the property and to the existing state of the market, would expect it to realise under such circumstances.'

We pass now to a consideration of the question of the value of the land at the relevant date, namely, 19th July, 1950.

The land previous to the sale to the Respondents was owned by Wade Plantations Ltd., by which Company a conveyance was executed in favour of the Agent of the Respondents on 21st August, 1951 for six hundred and fifty-three pounds ten shillings and eight pence (£653 10. 8.) or three thousand one hundred and thirty-six dollars and ninety-six cents ($3,136.96) following upon negotiations conducted by correspondence and evidenced by letters that form part of the record.

In the course of the hearing before the Board testimony as to the value of the land was given by many witnesses and their opinions on this point varied greatly. It is true that the price paid on behalf of the Respondents to Wade Plantations Ltd., is not conclusive as to the value in the open market on the 19th July, 1950, yet it is an important factor to be taken into consideration. The evidence on behalf of the Respondents as to the value of the land is in our view unacceptable as a guide to the market value of the land on the material date. Much of it is hypothetical, conjectural and unrelated to the true test which is the value of building land in that area on the relevant date. The award of the Board bears no relation to the first claim, to the substituted claim or to the amount paid to the vendors Wade Plantations Ltd., on behalf of the Respondents.

Reviewing the case as a whole we come to the conclusion that the evidence as to value which should have been accepted is that of the Authorised Officer Ronald Earl Kelsick and in accordance therewith we award the Respondents the sum of three thousand four hundred and fifty dollars and sixty-six cents ($3,450.66) as compensation for the land acquired The sum will carry interest at the rate of four per cent. per annum, calculated from the date of the entry of the Authorised Officer on the land, namely the 31st July, 1951, to the date of payment of the sum we now award, save and except for the period between the 22nd October, 1951, and the 12th August, 1952, during which the holding of the Board of Assessment was delayed at the request of the Respondents.

Appeal dismissed. One half of costs payable to appellants.

CARVALHAL v. PEREIRA; and J. FRASER, JACOB, CAMPBELL, ROSS and H. FRASER (added defendants by order of Court). And in consolidation therewith PEREIRA v. CARVALHAL

(In the Supreme Court, Civil Jurisdiction (Boland J.) June 22, July 27, Sept. 14, 15, 16, 17, 18, 22, 23, 24, 25, Oct. 14, 15, 16 and Dec. 15, 1953).

Crown Lands—Lease—Transfer as security—Constructive trust—burden of proof—trespasser ab initio.

The lease of certain Crown Lands was in the name of Pereira who claimed to be the owner thereof. Carvalhal claimed that Pereira held the lease in trust for her. The lease had previously been in the names of Carvalhal and two others as joint lessees, and they had jointly transferred it to J. as security for a loan and subsequent advances. Throughout the currency of J.'s security Carvalhal (by her husband as agent) and her co-owners remained in possession. Subsequently J. sold the lease to Pereira who got the lease transferred in his own name.

Carvalhal, who acquired the shares of her co-owners, alleged that Pereira, whose cattle as well as those of Carvalhal were being kept on the land at the time of his purchase and minded by Carvalhal's husband knew that J. was holding the lease as a security merely and that Pereira at the time he bought had promised her to re-transfer it to her when she repaid him what he had paid J. Knowledge that J was holding the lease as a security was denied by Pereira, and he also denied that he ever promised to re-transfer the lease to Carvalhal. After Pereira's purchase Carvalhal's husband remained in possession and continued to supervise Pereira's cattle and those of Carvalhal and others on the land, but in violation of Pereira's express orders planted rice and was maintaining rice cultivations as well. On her husband's death Carvalhal went on the lease and continued the rice cultivations. Pereira claimed damages against Carvalhal for trespass.

Held:—

(1) What Carvalhal was seeking to establish was not an express trust but a constructive trust, that is to say not a trust which the legal owner had declared in express language which must be in writing as required by Section 3 of the Civil Law of British Guiana Ordinance, Chapter 7, but one which equity would impose on him as being implied from the circumstances.

(2) The burden of establishing such circumstances as would create a constructive trust would fall upon Carvalhal as the person claiming the trust.

(3) The facts in evidence were against the finding of a constructive trust.

(4) Although Carvalhal's entry on the land for the purpose of rounding up her cattle after her husband's death was not an act of trespass by her, the continuation of rice cultivations which her husband had been carrying on made her a trespasser **ab initio.**

E. W. Adams and *J. O. F. Haynes* for Carvalhal.

H. C. Humphrys, Q.C., and *Miss A. Sankar* for Pereira.

No appearance for any of the added defendants.

Boland J.: The main issue in these two consolidated actions is whether J. G. Pereira whose name is recorded as lessee on Crown Land Lease No. A 3474 is the true beneficial owner of the lease-hold lands therein described, or whether he is a trustee in respect of same for Mrs. Philomena Gonsalves Carvalhal as claimed by her. This alleged trust is, as admitted, not evidenced by any writing as is required for a declaration of an express trust by the proviso (d) to section 3 of the Civil Law of British Guiana Ordinance, Chapter 7, but it is submitted for Mrs. Carvalhal that in accordance with the doctrines of equity she is nevertheless entitled to have the trust declared in her favour having regard to what she alleges to have occurred at the time when Pereira's name came to be placed on the record in the Lands and Mines Department as the holder of the lease.

It is well settled that he who seeks against the legal owner of property a declaration of trust in his favour has the burden of establishing the trust. *Prima facie* it would be sufficient to show that there was some special relationship between him and the legal owner which placed him at a disadvantage *vis a vis* the legal owner, and equity will then shift the burden on to the legal owner who in such circumstances would have to establish that he is not a trustee. It would appear that Pereira and the Carvalhal household were on very friendly terms. Mrs. Carvalhal's husband, since deceased, for many years used to supervise the maintenance of cattle belonging to Pereira's father and, after the latter's death in 1927, for Pereira himself, for which Carvalhal did not exact any payment but accepted whatever Pereira gave him from the proceeds of sale of cattle from time to time. Equity would certainly not regard these relations sufficient to presume that Pereira held a fiduciary position towards the Carvalhals. As regards Pereira's title in law as holder of the lease the evidence discloses that Pereira as shown by an indorsation dated 3rd December, 1935 on lease A. 3474 had these leasehold lands transferred to him as from the 18th November, 1935, by Charles Ramkissoon Jacob. A prior indorsation records the transfer to Charles Ramkissoon Jacob as from the 25th April, 1930 by Joseph Fraser, Philomena Gonsalves Carvalhal and Elizabeth Fraser. These three joint transferors were themselves the original grantees from the Crown of this lease A. 3474, which is dated December, 1932. The term is therein stated to be a period of 99 years from the 1st May, 1927. The land is described as comprising 485.362 acres on the left bank of the Abary River, and it is stated in the lease that it formerly was the same parcel of land comprised in a cancelled Lease No. A. 1421. It has been very difficult to ascertain anything about this earlier lease No. A. 1421. There were two joint grantees by name, Babooran and Parbhu Sawh. It was for the latter that the survey was made in compliance with the Crown Land Regulations.

The records of the Lands and Mines Department relating to this cancelled lease were stated to have been misplaced. Mrs. Carvalhal in her evidence declared that she and the Frasers pur-

chased the lease No. A. 1421 from the grantees in the year 1927, immediately after which they went into possession; but that before a formal transfer was effected one of the two vendors had died, and the survivor became an insolvent. It was in those circumstances that it was deemed more expedient to allow the Crown to cancel the lease A. 1421 and for the purchasers, Mrs. Carvalhal and the two Frasers to obtain a new lease rather than to have the contract of sale by the old grantees completed by a formal transfer. Further reference will be made in this judgment to this alleged purchase as it is of importance on the material question of the value of the lands in view of the evidence given by Mrs. Carvalhal and Joseph Fraser as to what was the purchase price under the alleged contract of sale in 1927.

The case for Mrs. Carvalhal in support of her claim for a declaration of trust against Pereira is that Pereira agreed with her and her husband to buy from Jacob this lease A. 3474 and that he then further agreed that on his being repaid the purchase price and whatever monies he may have further advanced in defraying expenses during his tenure of the lease he would transfer the lease to Mrs. Carvalhal. There had been, she says, a similar agreement between Jacob and herself and the two Frasers at the time of their transfer to Jacob. Jacob had then taken over the lease from them on his advancing a small sum to them for the purpose of paying off some indebtedness of theirs. Although this small sum advanced by Jacob was declared in the records to be the consideration for an absolute sale, the transaction was in reality not an absolute sale because of the undertaking by Jacob to re-transfer the lease to them whenever there was repayment of this advance and any other further advances.

In other words the trust which Mrs. Carvalhal asks this Court to declare in her favour against Pereira is a constructive trust—one which the legal owner did not declare in express language but which equity would impose on him as being implied from the circumstances. If this Court is satisfied on the evidence that despite its formal appearance as an absolute sale the transfer to Pereira was in essence a transfer of a security held by Jacob, Pereira would be compelled by order of the Court to hold the lease as a mortgage, which would give to Mrs. Carvalhal the right of a mortgagor to the equity of redemption; for in equity "a transaction which from the beginning is intended to be a mortgage cannot be disguised as a conveyance so as to render the property irredeemable". (*Vide* Hanbury's Modern Equity p. 396).

Accordingly though the records at the Lands and Mines Office show that at time of the transfer to Jacob solemn declarations were made by Mrs. Carvalhal and the Frasers as transferors on the one side and Jacob as transferee on the other side setting out that the true consideration for the transfer was the small sum stated to have been paid by Jacob as purchase price with no reference to the transfer being by way of security, equity will not deem the transferees estopped from showing the true nature of the transaction to have been, not an absolute transfer,

but a security; and equity would in a suit brought by the transferees grant them the appropriate relief. Similarly as regards the transfer from Jacob to Pereira equity would endeavour to get at the real nature of the transaction despite the formal solemn declarations otherwise on the records of the Lands and Mines Department. Mrs. Carvalhal stated that she was advised that Government as lessors never consents to assignments of these leases unless they are absolute transfers, and that accordingly it is the practice for an absolute transfer to be made even if the transfer is by way of security. Of course, to effect such a transaction, there was nothing to prevent a deed of mortgage being executed in accordance with the procedure at the Supreme Court Registry relating to mortgages by transport. In the case of an intending mortgage of a Crown Lease it would be necessary for the lessee to obtain beforehand Government's consent to the assignment to the mortgagee. The procedure of a mortgage of a lease effected by transport is expensive and cumbersome as compared with an absolute transfer of the lease with an accompanying collateral agreement, oral or written, between the parties stating that the transfer is by way of a security only. Equity will always lean on the side of the borrower whom it considers likely to be at some disadvantage in a loan transaction with the creditor, and accordingly, this Court in the exercise of its equity jurisdiction would not prevent a borrower from showing that despite the form of a transfer the transaction was one of a mortgage security.

EDITOR'S NOTE: The judge then considered the facts in evidence and held that no constructive trust was established. He then proceeded to deal with the claim brought by Pereira against Carvalhal for trespass, and continued:

Accordingly, in the action brought by Mrs. Carvalhal against Pereira (No. 173 of 1953) I give judgment for defendant Pereira with costs—and in the Action of Pereira against Mrs. Carvalhal (No. 371 of 1953) I make the declaration that the defendant, Mrs. Carvalhal and/or agents are neither in law nor in equity entitled to the said land held by Pereira under Crown Land A. 3474, and an injunction is issued against Mrs. Carvalhal, her servants and agents restraining them from entering and trespassing on the said lands and a further mandatory injunction is issued enjoining her and her agents and servants or any person authorised by her forthwith to cease from ploughing or planting rice on the said lands.

Pereira has also claimed damages against Mrs. Carvalhal for trespass. Her liability for any acts of trespass must be restricted to the acts relating to the cultivation of rice which were done on the lands by Mrs. Carvalhal, her servants and agents and other persons authorised by her since the death of Carvalhal in October, 1952. Mrs. Carvalhal's husband during the later years of his life, while in occupation as agent for Pereira to look after Pereira's cattle, was himself cultivating rice on the lands and was renting portions to rice farmers without, as I have found, any authority from Pereira, the owner. Such acts may have been acts of trespass on his part, but although Carvalhal may have purported to be so acting as the agent of his wife, there was no evidence submitted that Mrs. Carvalhal had either expressly or impliedly authorised her husband to plant rice there

He was, she declared, her general agent with authority to transact business on her behalf, but that general authority would not suffice to render Mrs. Carvalhal liable for every tortious act committed by her husband. It is admitted that in addition to Pereira's cattle, Carvalhal had cattle reputedly his own, but presumably his wife's because Carvalhal himself was an undischarged bankrupt. There were on the lands also cattle belonging to other persons which Carvalhal looked after. This cattle minding by Carvalhal was admittedly with the knowledge and authority of Pereira. On the death of Carvalhal his wife would be lawfully entitled to go upon the lands to make arrangements about her cattle and those of others. But though her entry on the lands was lawful for the above purposes, her continuing her deceased husband's rice cultivations made her a trespasser—that is a *trespasser* ab initio (The Six Carpenter's Case 77 E.R. 695).

Mrs. Carvalhal not only continued the unauthorised rice cultivations, but she and her agents were determined to exclude Pereira from entry on the lands—a determination clearly evinced when she applied for and obtained an interim injunction restraining Pereira from entry. Though that interim injunction was eventually dismissed, Mrs. Carvalhal remained in possession and it was obvious that she and her agents were resolved to resist by force any attempt on the part of Pereira to gain possession. Pereira had sold his cattle and had been making arrangements to commence tillage operations for the cultivation of rice. He claims damages for loss of anticipated profits from rice cultivations. It is very difficult to assess these damages. If there had been pleadings, there would have been allegations of special damage which Mr. Carvalhal would have had an opportunity to resist. There was not much evidence of a helpful character relating to special damage. Evidence about the expenditure incurred in making purchases of mechanical equipment for tillage purposes is not to be taken into account in the assessment of special damage, for obviously these purchased articles are still available for use on the lands. Padi now fetches a high price, but the cost of labour has also increased. That Pereira has suffered some loss as a result of the trespass by Mrs. Carvalhal cannot be doubted. I assess the damages (both general and special) for the trespass at $600.00.

In the result, in the action of Carvalhal v. Pereira there will be judgment for defendant Pereira. In the action Pereira v. Carvalhal, there will be judgment for plaintiff—Pereira for $600.00 damages for tresspass, the Court making in his favour the declaration and the order that the injunctions against Mrs. Carvalhal and her agents be issued as stated above.

Costs in both actions are awarded to Pereira and I certify for two Counsel.

AGOSTINI v. AGOSTINI
and
AGOSTINI v. AGOSTINI, COBB and PADILLA

(In the West Indian Court of Appeal, on appeal from the Supreme Court of Trinidad and Tobago (Collymore, Jackson, Bell C.J.J.) January 20, 21, 22, 23, 24, 26, 27 and 29, 1953).

Divorce—Cruelty—Cross petition—Adultery—Discretion statement Procedure—Judicial discretion.

This was a petition for judicial separation by a wife on the ground of her husband's cruelty and a cross petition by the husband on the ground of his wife's adultery with the co-repondents Cobb and Padilla. The husband prayed the discretion of the Court in respect of his own adultery and lodged a discretion statement.

The trial Judge dismissed the wife's petition, found her guilty of adultery with both co-respondents and granted a **decree nisi** in favour of the husband.

The main grounds of the wife's appeal were that the trial Judge misdirected himself, drew wrong inferences and came to conclusions against the weight of evidence.

Held: In some respects certain of the Judge's reasons and findings were not satisfactory and the Appellate Court was free to reach its own conclusions.

With regard to two of the wife's allegations of cruelty the proof was satisfactory and legal cruelty established.

The wife had committed adultery with Cobb. It was stated that the practice of the Supreme Court was for the Judge to open the discretion statement after a finding of adultery against the respondent and then without disclosing its contents determine whether it is a case fit for the

exercise of his discretion in favour of the petitioner. This course was adopted by the trial Judge.

Held: The proper practice was for the discretion statement to be tendered in evidence and opportunity should be given to respondent's counsel in a defended case to cross-examine on it should he wish to do so.

Wife's appeal dismissed.
Decree nisi on the ground of wife's adultery with Cobb upheld.

M. Butt Q.C. with Eric Butt for the appellant.

H. O. B. Wooding with Bruce Procope for the respondent husband.

Judgment of the Court: The appellant Charlotte Mary Agostini is the wife of the respondent Carl Agostini. On the 29th October, 1949, she filed a petition seeking judicial separation on the ground of alleged cruelty by her husband. The husband filed an answer denying the alleged cruelty and on the 5th December, 1949, filed a cross petition praying a dissolution of the marriage on the ground of his wife's adultery with one John Cobb. On the 12th April, 1951, the husband filed a supplemental petition alleging adultery of his wife with one Herman Padilla; in his petition he prayed for the exercise of the discretion of the Court in his favour and duly lodged in the Registry a discretion statement. Particulars in respect of the adultery alleged in the supplemental petition were on request supplied by the husband's solicitors in a letter dated 24th April, 1951. The wife in answer to the husband's petition denied all charges of adultery as alleged and averred in her answer to the supplemental petition that if she committed adultery, which she denied, her husband by his neglect, misconduct and cruelty conduced to the said adultery.

After close association over a period of years the parties were married on the 21st October, 1940, the wife having been divorced from her previous husband Lucien Joseph Granie for whom she bore two children.

After a trial lasting over three weeks the Judge delivered a short judgment on the last day of hearing 4th February, 1952, and later on the 26th February, 1952, set out his "Reasons for Judgment". Neither of the co-respondents had appeared or defended the suit.

The trial Judge dismissed the petition for judicial separation, found the wife guilty of adultery with both co-respondents, and granted a *decree nisi* in favour of the husband, ordering costs against each of the named co-respondents jointly and severally, these costs to include the wife's costs against the husband.

The main grounds of the wife's appeal, to put them shortly, are that the trial Judge misdirected himself, drew wrong inferences, took a wrong view as to where the onus lay, came to conclusions against the weight of evidence and wrongly admitted inadmissible evidence; it is also a ground of complaint that the husband's proven conduct conduced to the adultery if so found, or alternatively amounted to connivance.

It was put to us on behalf of the wife that the Judge came to the three ultimate findings with regard to cruelty, adultery with Cobb, and adultery with Padilla, after an erroneous approach to the consideration of the facts in issue and that these facts cannot support his conclusions. It was submitted that the reasons given by the trial Judge being therefore not satisfactory the matters are all at large for this Court.

The circumstances of this case are varied and complicated and many of the incidents alleged are in no way inter-related. Each set of circumstances therefore must be examined separately with due regard to the general background.

A careful and general review leads us to the conclusion that in some respects certain of the Judge's reasons and findings are not satisfactory and cannot be sustained, although on certain other issues as will later appear we agree with his findings. We take the view that the matters in issue are at large and we are free to reach our own conclusions.

It is clear to us that the Judge's finding with regard to the cruelty alleged in May 1949, cannot be justified. The wife alleged that during the month of May, 1949, a short while before she entered a nursing home for an operation for appendicitis the husband had assaulted her a few times and bruised her all over her right breast and side; the husband denied this assault but when regard is had to the evidence of Dr. Pierre, a professional man of admittedly unimpeachable character who saw the bruises, there can be no doubt the husband was not speaking the truth, for Dr. Pierre says when he taxed him with it "he related a number of incidents showing that they did not get on and under extreme aggravation he had handled her. He seemed worried as to whether what he had done had anything to do with the cause for the operation." We are satisfied the husband was guilty of the acts complained of in May 1949.

Similarly with regard to the incident alleged on the 15th November, 1947, we are convinced that the husband whilst returning home in his car from the Perseverance Club struck his wife certain blows one of which injured her nose causing it to bleed; his excuse that this resulted from her nose coming into contact with the dashboard when he braked the car is not warranted by the evidence which satisfies us that he violently assaulted her. It is true that the wife is of a jealous nature and volatile disposition and doubtless frequently exasperated her husband. On this and on other occasions she was the aggressor and had assaulted him; nevertheless this cannot justify his conduct in the circumstances.

We find that the allegations of other acts of cruelty have not been proved but the two to which we made special reference are in our view sufficient to constitute legal cruelty in these proceedings.

In the course of his judgment the Judge found that the wife was of an adulterous disposition; he based this finding largely on replies made by the wife to questions put by himself. With this finding we are not in agreement and we now pass to consideration

of the charges of adultery on their own merits and having regard to the testimony relating to them.

In respect of the allegation of adultery with the co-respondent John Cobb the undisputed facts are that the wife who about this time was frequently in association with members of the United States armed forces then stationed in Trinidad first met this corespondent on 5th April, 1949. This resulted in daily and at times clandestine meetings between the two. There is evidence that he gave her presents. There was to be a dance on the 17th April. The husband was out of the Island on a visit to Venezuela. The wife had arranged to go to that dance with her friends the Vieiras. She had previously planned that she along with her son Raymond should spend the weekend at a house at Bayshore. Ultimately she did not carry out this engagement but sent her son giving as a reason for her not going to Bayshore a family dispute amongst the people with whom she was to stay. It is more than strange that in these circumstances Raymond should be permitted to go while she remained in Port of Spain. On receipt of a telephone message from Cobb in the evening of the 17th April she cancelled her arrangement with the Vieiras and proceeded to the dance in a car driven by Cobb who when calling for her drew up his car at her front door. During the dance the wife said she became dissatisfied with Cobb's desire to monopolise her. She added that she refused to dance with him exclusively and that led to his going off to the bar and beginning to drink. As a result they left the dance while it was still in progress and returned together in Cobb's car to her home. It may be remarked here that Cobb was an uninvited guest at the dance. On arrival about midnight Cobb did not drive the car to her door as he did when he called for her earlier but stopped the car in a side street some little distance away. A sharp conflict of evidence then arises as to whether or not Cobb entered the house with her. The wife denies that Cobb entered the house. The detective Johnson states that the two of them entered the house and that he saw a blue light switched on in the bedroom and that subsequently the light was put out; there was darkness till about 1.15 a.m. when the blue light went on again. A little after 1.15 a.m. the detective states the wife and Cobb came to the gallery she wearing a house coat. She let Cobb out of the house and he drove away in his car. Another detective who watched the house with Johnson has since died and therefore could not be called to give evidence. In this setting and on this evidence we are satisfied that misconduct took place between the wife and the co-respondent Cobb. Thus we agree with the finding of the Judge on this issue but entirely for the reasons we have stated above.

With regard to the allegations of adultery of the wife with the co- respondent Padilla the setting and background are entirely different. It is to be noted that they are both of Venezuelan origin and doubtless have bonds of friendship for that reason. It is true that much of the evidence in regard to their association gives cause for grave suspicion but bearing in mind the submissions advanced to us we are not convinced that any of those allegations

are satisfactorily proved. The fact that when particulars were supplied these did not include an allegation that adultery had been committed in the morning of the 9th April—we refer to the evidence of the two detectives that they saw the wife and Padilla in bed that morning at 59a Archer Street—in our view renders that evidence inadmissible, and in our opinion that evidence cannot be related back to prove an allegation with regard to the night before of which particulars were given. Had this evidence been excluded the Judge may well have taken a view different from that on which he based his finding of adultery. In the result the charges of adultery with the co-respondent Padilla brought by the husband against the wife fail.

The adultery with Cobb having been proved it becomes necessary for us to deal with the discretion statement as we are satisfied the husband's conduct did not conduce to the adultery. We are told the practice of the Supreme Court here since the Divorce Jurisdiction was established is for the Judge to open the discretion statement after a finding of adultery against the respondent, and then without disclosing its contents determine whether it is a case fit for the exercise of his discretion in favour of the petitioner. This was the course adopted by the trial Judge but it is not in keeping with the practice in England which it is desirable to follow and which should' be followed. In our view following the English practice the discretion statement must at some stage be put in evidence by the petitioner who is asking for the exercise of the discretion and opportunity should be given to respondent's counsel in a defended case to exercise a right of cross-examination thereon should he wish' so to do. We also think the discretion prayed should not be exercised by the Court if the statement is not put in evidence.

At the trial the wife's counsel asked to see the statement in order to found a petition for divorce on the ground of adultery disclosed therein. This application the Judge rightly rejected.

With the agreement and consent of counsel on both sides we examined the discretion statement and made it available to counsel. With our leave the husband was called; he put the discretion statement in evidence and was cross-examined on it. Thereafter counsel addressed us on the exercise of the discretion.

The discretion statement contains relevant facts upon which a judicial discretion may be exercised. We have some doubt as to the husband's truthfulness when he expressed inability under cross-examination to remember important details of the few instances of the adultery he confessed; there can be no doubt however that the marriage has utterly broken down. In *Blunt* vs. *Blunt* (1943) 2 A.E.R. 76 Viscount Simon (at page 78) delivering the judgment of the House of Lords said that one of the circumstances which warranted the exercise of the judicial discretion in a petitioner's favour was "the interest of the community at large to be judged by maintaining a true balance between respect for the sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union

which has utterly broken down." He went on to say that it was noteworthy that in recent years that consideration had operated to induce the Court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have 6een refused. We have, after careful consideration of all relevant circumstances, come to the conclusion that this is a proper case for the exercise of our discretion in the husband's favour, We accordingly refuse the decree of judicial separation sought by the wife and we grant a *decree nisi* on the husband's petition on the ground of the wife's adultery with the co-respondent Cobb.

The husband shall pay the costs of the wife in the Court below and two-thirds of her costs in this appeal. The co-respondent Cobb shall pay in respect of the issue of adultery against him the husband's costs here and in the Court below.

Wife's appeal dismissed. Decree nisi on the ground of wife's adultery with Cobb upheld.

CHO FOOK LUN v. CHO FOOK LUN AND YOUNG LAI

(In the West Indian Court of Appeal, on appeal from the Supreme Court of Trinidad and Tobago (Mathieu-Perez, Collymore, Bell C.J.J.) January 6, 7, 8, 30, 1953).

Divorce—Facts—Function of Appellate Court.

The appellant petitioned for a dissolution of marriage on the ground of his wife's adultery with the second respondent. The trial Judge disbelieved the appellant in respect of two material portions of his evidence and concluded therefrom that so much doubt was cast on his evidence that he could not believe any of it. He rejected the testimony of appellant's witnesses although with one exception he did not comment unfavourably on their demeanour. The petition was dismissed.

Held : As an examination of the evidence disclosed no justification for the Judge's disbelief of the appellant's story on the two matters, the grounds for the Judge's disbelief of the appellant's evidence failed and it was the duty of the Appellate Court to review the evidence and arrive at his own conclusion. In the Court's view the respondent and co-respondent committed adultery. Appeal allowed.

L. Wharton, Q.C. and *W.J. Alexander* for the Petitioner-appellant.
R.C. Archbald Q.C. and *W.H. Agimudie* for Respondent-respondent
M. Butt, Q.C. and Eric Butt for Co-respondent-respondent.

Judgment of the Court: This is an appeal by the Petitioner-appellant Benjamin Cho Fook Lun from a decision dismissing his petition for the dissolution of his marriage with the Respondent-respondent Estelle Cho Fook Lun and dismissing his claim for damages against the Co-respondent-respondent Harry Young Lai and ordering the said Petitioner-appellant to pay the costs of the Respondent-respondent and Co-respondent-respondent. The appeal also seeks the reversal and setting aside of the learned Judge's order that the sum of money deposited into Court by the Petitioner as security for the Respondent's costs (or so much thereof as is required to satisfy such costs) should be paid out to the Respondent's solicitor.

CHO FOOK LUN v. CHO FOOK LUN AND YOUNG LAI

The Petitioner and the Respondent were married on the 10th February, 1935, in British Guiana. The Petitioner came to Trinidad in 1937 and the Respondent in 1938 and since that time they have lived and co-habited in San Fernando. The Petitioner carried on a provision and rum shop business in San Fernando at 127 Coffee Street; in 1948 he became a partner in the business known as The Shantung Restaurant, Port of Spain. From June 1948 to October 1948 he managed that business, and the Respondent looked after the business in San Fernando.

While the Petitioner was managing the Shantung restaurant he became acquainted with one Phillipa Acham who used to have her meals at that restaurant, and the Respondent became of the opinion that the Petitioner was paying too much attention to her.

There is not and never has been any issue of the marriage and the Respondent was of opinion that the Petitioner for that reason wanted to "get rid of her" and marry Phillipa Acham.

The Petitioner's shop is situate at the corner of Coffee and Drayton Streets, San Fernando, and at the material time the Petitioner and Respondent lived together on the premises. The two clerks Young Poy and Young Ping also lived on the premises. There is a galvanised gate leading to Coffee Street and through this gate access is obtained to the Petitioner's garage, the sleeping quarters of the clerks and the portion of the Petitioner's premises used by him as his residence. Access to the Petitioner's residence is also obtained through a door leading to the provision shop; this door can be locked by a padlock on the outside and can be bolted on the inside. There is a door between the Petitioner's bedroom and his sitting room there is also a door between the Petitioner's sitting room and the No. 2 private room, and there is a door from No. 2 private room into the back yard, and there is a galvanised gate leading from the back yard into Drayton Street.

Between the No. 2 private room and the shop there is a hatch through which drinks can be handed and this hatch was referred to in the evidence as the hole.

The Petitioner's case is that on the 6th June, 1949, he left his premises in the morning, leaving the Respondent there and that he told her he may not come home that night but would try and do so, that he returned home about 9.50 p.m., that one of the clerks Young Poy opened the gate, and he drove his car in the garage, that he went to the door leading to the provision shop which he found locked, he pulled it and could not open it, called out and nobody answered. He saw the bedroom window open and he placed a ladder on a box in the storeroom climbed that ladder, got into the bedroom, went into the sitting room, and saw no one; he then passed from the sitting-room into the rum-shop and then he looked through the hatch between the rumshop and No. 2 private room and saw the Respondent committing adultery with the Co-respondent. He returned towards the garage, called his two clerks who both looked through the hatch and saw the Respondent and Co-respondent, and that as they did so the Petitioner called out, "Look" and the Co-respondent got up

and ran. At that time the Respondent was wearing a nightgown. The Petitioner stated that he told the Respondent that he was going to make a report at the Police Station. The Respondent then telephoned to a mutual friend one Mrs. Yhapp who arrived immediately.

Mrs. Yhapp gave evidence and stated that she spoke to the Petitioner and attempted to dissuade him from making a report but he insisted. The Petitioner left to go to the Station and as he got outside his premises he saw Sydney Howard in a car and Howard spoke to him. The Petitioner went on to the Station and made a report. The Respondent and Mrs. Yhapp also went to the Station it is said to find out what report the Petitioner made.

The defence of the Respondent was that the story was untrue and that it was a fabrication made up in order to "get rid of her" so that Petitioner would be able to marry the woman Phillipa Acham. This defence is based on the fact that the Petitioner taught Phillipa Acham to drive, that he is supposed to have told both Mansing and Mrs. Yhapp that he wanted to marry Phillipa Acham. It is to be observed that Mansing although alive was not called and Mrs. Yhapp though called gave no such evidence.

The defence of the Co-respondent was an alibi.

The decision of this appeal involves the application of the proper principles to be applied by an appellate Court when it is asked to take different view of the facts from those taken by a Judge sitting without a jury. Those principles were clearly enunciated by Lord Thankerton in three propositions when delivering judgment in Watt (or Thomas) vs. Thomas (1947) 1 A. E. R. 582. The case of Yuill vs. Yuill (1945) I A. E. R. 183 is also in point dealing, as it does, with the matter of the demeanour of witnesses.

In deciding whether this case falls within any, and if so which of those three propositions we have carefully examined the evidence in the light of the critical analysis of it which was made by each of the Counsel who argued this appeal and of the several submissions made by each Counsel, keeping clearly in mind the contention of Counsel for the Respondent and Counsel for the Corespondent that: —

> "It can of course only be on the rarest occasions and in circumstances where the appellate Court is convinced by the plainest considerations, that it would be justified in finding that the trial Judge had formed a wrong opinion".
>
> (Yuill vs. Yuill).

The trial Judge stated that he was of opinion that the Petitioner did not speak the truth when he said (a) that the door by which he sought to enter his premises was locked from the inside and (b) that he got into the bedroom by climbing a ladder, and as a result of the above declared that so much doubt is cast on his evidence as to the act of adultery which the Petitioner says he saw committed that he the Judge is not satisfied that the Petitioner did

in fact see his wife committing adultery. The Judge has also stated, without giving any reason that he did not believe that either Young Poy or Young Ping the Chinese clerks of the Petitioner who gave evidence that they looked through the hole between the rum shop and the No. 2 private room and saw the adultery being committed did in fact look through that hole. It is to be noted that the Judge nowhere comments unfavourably on the demeanour of either of these clerks or of any other witness with the single exception of Sydney Howard.

We have asked ourselves what is the evidence that (a) the door in question was secured and (b) the Petitioner entered by climbing a ladder. After an examination of the evidence on those points we can find no justification for the Judge's disbelief of the Appellant's story on those two matters. We are satisfied that the door was secured that night from the inside and that the Petitioner did obtain access through the window; that being so the grounds for the Judge's disbelief of the Petitioner's evidence on the other matters fail and consequently we are of opinion that the matter is at large.

We are satisfied that the Respondent and the Co-respondent did commit adultery in the No. 2 Private Room as alleged.

In coming to that conclusion we have paid particular attention to the subsequent conduct of the Petitioner on that night for we consider that conduct to be entirely consistent with his version of the events. Immediately after the Petitioner saw what he has said he saw he went to the Police Station despite the attempts of Mrs. Yhapp to dissuade him and made a report to the police. What was the nature of that report? In cross-examination he stated that he told the police "that he looked through the hole and saw the man", it was suggested that he made no report of that nature to the police; but the Respondent went to the Station with Mrs. Yhapp and spoke to Corporal Springer. The best method of proving what report the Petitioner made to the policeman would be to call the policeman. The Petitioner could not do so but the Respondent could. Why did she not call the policeman? The answer seems obvious—because his evidence would be likely to support the Petitioner's case and discredit hers. To us it is a matter of extreme significance that the policeman was not called either the Respondent or Co-respondent. Although as stated the contents of the report have not been disclosed its ominous nature can be gauged by the following reply given by the Petitioner to Mr. Archibald, under cross-examination: —

> "I went in motor car to police station. I don't know my wife rang up Mrs. Yhapp. I made a report to police. I think No. is 2233 Springer. I didn't tell him I saw a man lacing up his boots. I told him I looked through a hole and saw the man."

and by the reply given by the Respondent under cross-examination to Mr. Wooding : —

> "I told Cpl. Springer what my husband had done. He came outside with me by door of Station. I don't know if he wrote it down. I told him I would like to know what report my

husband made. Springer was coming out. Springer told me my husband said that if he had a gun in hand he would shoot me. I asked him if I should go home or stay out. He advised me to stay with Mrs. Yhapp if I am afraid. I told Police Corporal Springer that my husband had threatened me. Springer never told me my husband had said he found Young Lai in shop".

It has been submitted in effect by Counsel for the Respondent and Counsel for the Co-respondent that Mrs. Yhapp was a friend of both the Petitioner and the Respondent; that she was a completely neutral witness, and one upon whose character no attack was made; that it was open to the Judge to accept her testimony and that if it was accepted it was quite inconsistent with the adultery having taken place. The trial Judge has nowhere in his judgment commented upon the evidence given by Mrs. Yhapp or given any indication as to what reliance he placed upon her evidence. We have come to the conclusion that Mrs. Yhapp's whole behaviour is suggestive of the fact that she was well aware that the Petitioner had cause for grave displeasure with his wife on the night of the 6th June, 1949, but that she was anxious to persuade him not to pursue the matter. We have considered her evidence against the rest of the evidence in this case in coming to our conclusion that the adultery complained of was in fact committed. We have had regard to all that has been said by way of criticism of the evidence of Sydney Howard and it does not appear to us to be open to serious objection. We believe that he made a genuine mistake as regards the date he gave for his conversation with the Petitioner; but even if his evidence is put aside as it was put aside by the Judge the adultery of the Respondent and the Co-respondent is established on the rest of the evidence.

The Judge without expressly stating whether or not he believed it has allowed the alibi put forward by the Co-respondent to influence him in deciding that even if adultery was committed on the night of the 6th June, 1949, by the Respondent it was not committed with the Co-respondent. We are of the opinion that the alibi is open to serious criticism in that it is not co-extensive with and does not cover the entire material time. The Corespondent is vague as to the times and the evidence of his wife does not disclose that she had any reason to pay particular attention either to the time of his return on that night or his movements on that night and in fact it was not until two weeks after the alleged act of adultery that she knew that her husband was suspected. How can she throw her mind back two weeks and remember with certainty in these circumstances what her husband did that night?

We are of the opinion that the evidence establishes with all the certainty that can be required that the Respondent did commit adultery with the Co-respondent as alleged and it follows that this appeal is allowed. There will be a *decree nisi* and the Co-respondent will pay the costs of the Petitioner and Respondent here and in the Court below. As the question of damages was

not argued at the trial or before us we make no order thereon.

The sum of money deposited in Court by the Petitioner as security for his wife's costs will be paid out to him.

Appeal allowed.

DEOLART v. MOHAMMED AND MOHAMMED (Infants by their next friend Abdul Mohammed) and DEOLART v. ROSS

(In the West Indian Court of Appeal, on appeal from the Supreme Court of Trinidad and Tobago (Mathieu Perez, Jackson, Bell, C.J.J. February 4, 1953).

Negligence—Motor truck towing jitney—Negligence of driver towing vehicle —No negligence of driver of towed vehicle.

A motor truck was towing a jitney along the Southern Main Road, Trinidad, and the tow rope broke and the jitney went across the road and injured two children who were at the side.

In the resulting action the plaintiffs Mohammed and Mohammed obtained damages against the appellant Deolart, the driver of the towing vehicle, but the case against Ross, the driver of the towed vehicle, was dismissed. The appellant Deolart was ordered to pay Ross' costs.

The evidence disclosed that the appellant's vehicle was being driven fast and that Ross remonstrated with the driver, and after travelling a considerable distance he suddenly felt a pull and a severe swerve which landed his vehicle on the bridge causing injury to the plaintiffs.

Held: Although there is a duty on the driver of a towed vehicle to exercise proper care in regard to other users on the road, there was no evidence of negligence against Ross.

Appeal dismissed with cost.

Judgment of the Court: This action arose out of an incident occurring on the 12th August, 1947, when a motor truck was towing a jitney along the Southern Main Road and the tow rope broke and the jitney went across the road and injured two children who were at the side. The action was tried in 1952 and judgment entered for the plaintiffs against the defendants Hansraj Deolart and the case against the defendant Ross was ordered to be dismissed with costs to be paid by the defendant Hansraj Deolart. Against that judgment the defendant Hansraj Deolart has appealed.

It has been argued that there is a duty on the driver of the vehicle that is being towed just as there is a duty on the driver of the vehicle towing to exercise proper care in regard to other users of the road. It is not disputed that the driver of the towing vehicle was guilty of negligence but it is contended that Ross the person in charge of the towed vehicle was also negligent. We agree that there is a duty cast on the driver of the vehicle being towed and in order to ascertain whether there is a breach of that duty amounting to negligence which will render him liable we have examined the evidence.

The evidence in the case is very short consisting only of that called on behalf of the plaintiffs. The appellant Hansraj Deolart did not himself give evidence and no evidence was given on his behalf, and the same position exists in the case of the other defendant Ross.

The plaintiffs in the course of their case put in by consent the statement given by Ross to the police and a copy of his evidence in the Magistrate's Court. That evidence shows in fact that at one stage Ross was of opinion that the towing vehicle was being driven too fast and that he brought this to the attention of the driver of that vehicle by putting on his brakes, with the result that that driver sent for him and they had a talk. That is evidence of the exercise of care on the part of Ross. In his statement to the police given on the date of the accident he says that after travelling a considerable distance on approaching a bridge at Warrenville he suddenly felt a pull and a severe swerve which landed his vehicle on the bridge on the right side of the road where some children, were standing and two of them got injured.

From the evidence it appears that the acceleration and consequent swerving across the road to the bridge happened so quickly that there was no time to afford the defendant Ross any reasonable opportunity to check this sudden acceleration or take any other step to prevent the swerve or to indicate to the driver of the towing vehicle that he was driving too fast.

We are of opinion that the evidence does not disclose negligence against Ross and therefore the appeal is dismissed with cost.

Appeal dismissed with costs.

DE ABREU v. DEANE

(In the West Indian Court of Appeal, on appeal from the Court of Common Pleas, Barbados (Mathieu Perez, Jackson, C.J.J. Malone, J.) October 26, November 2, 1953.)

Agency—Trial before judge and jury—Judgment for defendant—Failure of judge to submit questions to jury—Question by jury—Usurping functions of jury—Misdirection.

The plaintiff claimed from the defendant £720 as commission due him by the defendant on an agreement. The action was tried by a Judge and jury. The jury returned a general verdict of judgment for the defendant.

The Judge did not submit proper questions for the consideration of the jury.

Held: It was the duty of the Judge to submit to the jury, questions which he considers involve the real issue in the case.

Another matter which arose at the trial was that after the jury were considering their verdict they returned and asked the trial Judge the following question "Was the stating of the price by the plaintiff part of his duty in the carrying out of the contract?"

The Judge in replying to the question made a statement of fact without telling the jury that the question of fact was for their decision. The Judge further told the jury that if they found certain circumstances the plaintiff would be guilty of dishonesty without explaining that such dishonesty must be connected with his duty as an agent.

Held : In both instances the Judge misdirected the jury.

Appeal allowed with costs. New trial ordered.

G. H. Adams, Q.C. and *D. H. L. Ward* for the Appellant.

E. K. Walcott, Q.C. and *J. S. B. Dear* for the Respondent.

Judgment of the Court: This appeal arises from an action wherein the plaintiff claimed £720 as commission due him by the defendant on an agreement.

The action was tried by a Judge and jury. The jury returned a general verdict of judgment for the defendant and judgment was entered accordingly.

The plaintiff's claim is for money payable for work done by him for the defendant as agent on an oral agreement made between them on the 6th of August, 1948, whereby the defendant agreed to pay to him a commission of £3 per centum on the purchase price of any sugar plantation in this Island bought by the defendant for himself or on behalf of others as a result of the introduction to the defendant by the plaintiff of a prospective vendor of any such plantation.

The defendant denied that the plaintiff was employed by him to act as agent, that he entered into any oral or other agreement with the plaintiff or that he agreed to pay the plaintiff £3 per centum or any other commission on the selling price of any sugar plantation bought by the defendant for himself or others as alleged, and further that the plaintiff in breach of the duty which he was called upon to perform in respect of the agreement, failed to disclose material information at his disposal and/or gave incorrect information to the defendant.

From the above it is evident that several issues fell to be decided by the jury. The general verdict of judgment for the

defendant returned by the jury at the conclusion of the case left undisclosed the determination of the several issues. Those issues could only have been properly determined by the submission of suitable questions, for it was essential to learn from the jury their findings of fact in relation to those issues.

We think it was the duty of the Judge to submit proper questions to the jury. It was also the duty of Counsel to formulate and submit to the Judge such questions, if any, as they thought should be asked; this does not, however, relieve the Judge of his obvious duty. As was stated by Lord Morris in the case of *Seaton v. Burnand,* (1900) *A.C.* at page 144.

> "The duty and labour are thrown upon the judge of finding out what are the real questions that will decide the case between the parties; and according to my experience, which is not an inconsiderable one, a judge, in any case of importance where he thinks the case is deserving of it, submits the questions which he considers involve the real issue between the parties to counsel on either side; he hears them if they disagree, and he hears them to suggest any new question which ought to be put; and, finally, he submits the questions to the jury."

Vaughan Williams L.J. in *Weiser v. Segar,* (1904) *W.N* 93 expressed the opinion that the judge cannot shift from his own shoulders the responsibility of putting proper questions to the jury by asking Counsel whether there were other questions which he desired to have put to the jury.

In this case no questions were put to the jury and the general verdict returned did not answer specifically the questions which arose for determination at the trial; for example, it would seem that the jury might have been asked whether the plaintiff and defendant had entered into an agreement, and if Yes the terms of this agreement. It must be understood that these examples are not intended to exhaust the questions that might have been put, but having reached the conclusion that this is a proper case in which the Court should exercise its discretion to grant a new trial we refrain from any further observations on this aspect of the case.

Another matter to which we would like to refer is this—after retiring for two and one-half hours considering their verdict the jury returned into Court and through the Foreman asked the trial Judge the following question, "Was the stating of the price by the plaintiff part of his duty in the carrying out of his contract?" to which the trial Judge replied, "The plaintiff is employed to get a plantation which the defendant wants to purchase at a price acceptable and he got in touch with Mr. Gill and mentioned a plantation. The plaintiff was employed to bring the parties together but the price would of course be arranged by the two parties, Mr. Gill and Mr. Deane. So directly that was no part of his duties to arrange the price. But you will have to remember that his commission was based on the price and my in-

structions to you are that if he gave what he knew to be a wrong price then he would be guilty of dishonesty. In other words, for you to come to a conclusion, this is the question you must ask yourself: 'Did Mr. Gill say £24,900 or did he say £26,900?' That is a matter for you to decide. If you come to the conclusion that Mr. Gill said £26,900 then it is no question at all. If you don't come to that conclusion and you come to the conclusion that the plaintiff knew that the price was £24,900 and he knowing that, he said £ 26,900 without Mr. Gill's sanction that would be dishonesty I would submit."

With respect to the first part of the trial Judge's answer in which he stated, "So directly that was no part of his duties to arrange the price" —the learned trial Judge was making a finding of fact, and thus usurping the functions of the jury; had he gone further and informed the jury that the question was really one of fact for their decision and not for his, no objection could be taken to his statement but in the absence of any such advice or any indication that he was only expressing his opinion, this must be regarded as a misdirection.

Now as to the latter part of the trial Judge's answer to the Foreman of the jury we would make this observation,—it was not sufficient for the trial Judge to tell the jury that the plaintiff in the circumstances referred to would be guilty of dishonesty; he should have gone further and made it plain to them that if the plaintiff were guilty of dishonesty, that dishonesty must be so connected with his duty as an agent that it would amount to a breach of that duly. Here also there has been misdirection of the jury and this Court is unable to say to what extent these misdirections may have influenced the jury in arriving at their general verdict.

The result is that the appeal is allowed and a new trial is ordered, the appellant to have the costs of this appeal.

CABLE AND WIRELESS (WEST INDIES) LIMITED v. THE CROWN ATTORNEY

(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.) May 4, 8, 1953).

Negligence—Transmission of cable—Condition relieving company from liability for negligence—Valid.

The Government of St. Lucia caused to be delivered to the Appellant Company a message, to be transmitted by them to the Crown Agents for the Colonies in London, requesting delivery of a quantity of materials including 300 tons of reinforcing steel. The Government agreed to be bound by the conditions printed on the back of the telegraph form. One of the conditions relieved the Company from liability for any loss or damage suffered as a result of any error in transmission.

In the course of transmission the wording of the telegram indicating the quantity of reinforcing steel required was changed from 300 tons to 1.400 tons. Government disposed of the amount in excess of their requirements and suffered a loss of $42,740.37.

In an action to recover the said sum as damages, the Judge held that the condition relieving the Company from liability was contrary to public policy and good manners and awarded judgment in the sum claimed. The company appealed.

Held: Although it well may be that the change in the telegram was due to the negligence or error on the part of the Company, the condition relieving the Company from liability was valid.

Appeal allowed with cost.

Garnett Gordon with *Guy Mathurin* for Appellant-

P.C. Lewis, Acting Attorney General for Respondent.

Judgment of the Court: In December, 1950 the Crown Attorney of St. Lucia filed an action on behalf of the Government of that Colony against Cable and Wireless (West Indies) Limited claiming damages, which it is alleged accrued as a result of an error in the transmission of a cable.

The facts found or admitted can be shortly summarised. On the 23rd June, 1948, the Government of St. Lucia caused to be delivered to the Defendant Company on the Company's printed form a telegram message to be transmitted by them to the Crown Agents for the Colonies in London, requesting delivery to the Government of a quantity of materials including 300 tons of reinforcing steel. On the face of the telegraph form at the end of the message and above the signature of the sender the following words appear:—"I request that the above telegram may be forwarded subject to the conditions printed on the back of the form by which I agree to be bound." The condition on the back of the form that is pertinent to this case is condition 2, which reads:

> "Neither the Company nor any Telegraph Company or Government "Telegraph Administration, by whom this telegram is or would in the or- "dinary course of the telegraphic service be forwarded, nor any of their re- "spective officers or servants shall be liable to make compensation for any "loss, injury or damage arising or resulting from non-transmission or non- "delivery of the telegram, or delay or error, or omission in the transmission "or delivery thereof, through

"whatever cause such non-transmission, non-delivery, delay, error, or "omission shall have occurred even though occasioned by the neglect "or default of such Company or Administration or any officer or ser- "vant in their employ."

In the course of transmission the wording of the telegram indicating the quantity of reinforcing steel required was changed from 300 tons to 1,400 tons and an order for the latter amount was placed by the Crown Agents. The delivery of the steel in St. Lucia was effected in three separate and distinct quantities:—the first of approximately 489 tons on or about the 1st November, 1948, the second of approximately 415 tons on or about the 5th December, 1948, and the third of approximately 491 tons on or about the 10th December, 1948.

Thus, it may be observed, the first delivery was in excess of the amount mentioned in the telegram as handed in and the Government should have realised this on receipt of the first shipment. The amount in excess of their requirements was disposed of and the Judge found that the Government had suffered a loss of $42,740.37 in consequence and gave judgment accordingly. From this judgment the Defendant Company has appealed.

It cannot be disputed that the acceptance of the telegram for transmission for reward created a contractual relationship between the Government and the Defendant Company. In our view the determination of this appeal rests upon the answer to the question as to whether the condition hereinabove set out is valid and binding or, whether as the Judge decided, invalid as being contrary to public policy and good manners. The Judge in this connection attached great importance to the contention, which he accepted, that the action was in its nature quasi-delictual and that by virtue of Article 985 of the St. Lucia Civil Code liability on the part of the Company was inescapable.

This Article reads: —

"985 Every person capable of discerning right from wrong is re- "sponsible for damage caused either by his act, imprudence, neglect or "want of skill, and he is not relievable from obligations thus arising."

The corresponding Article in the Quebec Code is as follows: —

"1053. Every person capable of discerning right from wrong is re- "sponsible for the damage caused by his fault to another, whether by "positive act, imprudence, neglect or want of skill."

Thus the Articles are similar in essence but the concluding words in the St. Lucia Article "and he is not relievable from the obligations thus arising" do not appear in the Quebec Article. The St. Lucia Article simply provides that every person capable of discerning right from wrong is liable for his delictual and quasi-delictual acts as he would be under the Common Law of England, and the addition of the words "and he is not relievable from obligations thus arising" merely serves to emphasise that responsibility. Despite the absence of these words in the corresponding

Article in Quebec responsibility under that Article for delictual and quasi-delictual acts in that Province was and is the same as that in St. Lucia. The learned Judge held that these additional words "and he is not relievable from obligations thus arising" in the St. Lucia Article make absolute the liability of the Defendant Company rendering the condition of non-responsibility of no avail. In our view these words cannot have that additional force and effect attributed to them by the Judge.

With regard to the question as to the validity or otherwise of non-liability clauses of the nature of that set out in the condition at the back of the telegram form, it was the judicial view in Quebec until 1897 that such clauses were invalid as being contrary to "bonnes moeurs et l'interet publique." In that year however, when this question first came under review by the Supreme Court of Canada in the case of *The Glengoil Steamship Company v. Pilkington,* 28 *Can. S.C.R.* 146 it was decided that such clauses were no longer to be so regarded. This decision of the highest tribunal of Canada affected a complete reversal of the hitherto accepted judicial view in Quebec of these non-responsibility conditions. In dealing with the case Perrault in his book "Des Stipulations de Non-Responsabilite" (1939 edition) at p. 83 states: "A condition in a bill of lading, providing that the ship-owners shall not be liable for negligence on the parts of the master or mariners, or their other servants or agents, is not contrary to public policy nor prohibited by law in the Province of Quebec" and concludes "Cela est precis et ne laisse place a aucum doute." Taschereau J., on p. 155 of the report says: "It strikes one as an astounding proposition to say the least, that what is undoubtedly licit in England, under the British flag, which covers over two-thirds of the maritime carrying trade of the world, should be immoral and against public order in the Province of Quebec, and that what is sanctioned by law in six of the provinces of this Dominion, should be prohibited in the seventh because of its immorality." The judgment and the principles laid down in the Glengoil case received the approval of the Privy Council in the case of the *Canadian Steamship Lines v. Regem* (1952) 1 *All E. R.* 305 where at p. 310 Lord Norton of Henryton in delivering the opinion of the Board said:—

> "Their Lordships think that the duty of a Court in approaching the "consideration of such clauses may be summarised as follows: (i) If "the clause contains language which expressly exempts the person in "whose favour it is made (hereafter called the '*preferens*') from the "consequence of the negligence of his own servants, effect must be "given to that provision. Any doubts which existed as to whether this "was the law in the Province of Quebec were removed by the decision "of the Supreme Court of Canada in Glengoil S. S. Co. v. Pilkington."

In this case the Judge was rightly of opinion that such conditions are valid and binding in Quebec, but he considered that the words "and he is not relievable from obligations thus arising"

are "material words of the St. Lucia Code which create a vital difference." As we have previously pointed out these words do not create any difference vital or otherwise between the law of Quebec and that of St. Lucia and accordingly cannot be held to render the condition void.

Appellant's counsel submitted that the respondent's declaration was in contract and that the learned Judge dealt with the case on the basis of quasi-delictual and not on contractual responsibility. Indeed the Judge stressed in his decision that "this case comes under the head of quasi-delict." Although it well may be that the change in the telegram was due to the negligence or error on the part of the Company and/or its servants and/or agents, holding as we do that the condition relieving the Defendant Company from liability is valid we are of opinion that it is immaterial whether the action be founded in contract or in quasi-delict.

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

MAHADAYAH v. RAMBEROSE OHREE

(In the West Indian Court of Appeal on appeal from the Supreme Court of Trinidad and Tobago (Mathieu-Perez, Jackson, Bell, C.J.J.) January 13, 14, 15, February 6, 1953).

Real property—Crown Grant—Torrens System—Registration—death of registered owners—Escheat—Transfer by Crown—Fresh registration purported cancellation—Registration of subsequent transfer by Crown—Whether effective.

A parcel of land was granted by the Crown to two persons the survivor of whom subsequently died intestate and without next of kin with the result that the land became escheated to the Crown.

The Crown transferred the land to the appellant in 1946 and she was put in possession and was still in possession at the time of action brought.

The Appellant's name was entered in the Real property Register and duly endorsed on the Crown Grant as proprietor.

In 1947 the Crown purported to cancel the grant to the appellant and transferred the land to one Ramlogan the administrator of the estate of one of the original owners. Before the expiry of a year from the grant of Letters of Administration, Ramlogan purported to transfer the land to the Respondent.

The respondent filed a writ against the appellant claiming recovery of possession of the land.

The trial Judge gave judgment in the respondent's favour.

On appeal.

Held : The purported cancellation of the grant to appellant was invalid as there was no authority by which the Crown could cancel the grant to the appellant.

The only way the respondent could obtain possession of the land was by proving title in himself. As Ramlogan had purported to transfer the land before the expiration of the twelve months mentioned in section 29 of the Real Property Ordinance and before the removal of the caveat entered in accordance with the Ordinance, he did not have the legal state and could not pass the legal estate to the respondent.

Appeal allowed

Editor's note: Although the law involved in this case is not applicable

to this Colony, the Torrens Land System on which the Real Property Ordinance of Trinidad is based, is of general interest, and it is not unlikely that, one day, it may be introduced in British Guiana.

L. C. Wharton Q.C. with W. J. Alexander for the appellant.

M. *Butt Q.C.* with *L. F. Holder* for the respondent.

Judgment of the Court: On the 7th day of October, 1949, the Plaintiff-respondent filed a writ against the Defendant-appellant claiming recovery of possession of all and singular a parcel of land comprising two roods described in Crown Grant registered in Volume DXV, folio 465 of the Real Property Register. No evidence was led at the trial and the facts which are not in dispute are set out in the pleadings and the judgment of the learned trial Judge, who, at the conclusion of the argument by counsel, gave judgment for the Respondent with costs. Against this judgment the appellant has appealed.

The parcel of land in dispute was leased by deed dated 25th September, 1914, by His Majesty the King to Seepaul and Longee for the term of 999 years and in 1921 the Crown granted the said parcel of land to the said Seepaul and Longee, their heirs and assigns forever by deed dated 15th November, 1921, and registered in Volume DXV, folio 465. Satisfactory evidence of the death of Seepaul was produced to the Registrar-General on the 4th November, 1931, and is so endorsed on the Crown Grant. Longee who was left as the sole registered proprietor of the land died in March, 1945', intestate and without next of kin and thus the parcel of land became escheated to the Crown.

By warrant of transfer No. 66 dated 21st August, 1946, all the estate and interest of Longee was transferred by the Crown to Mahadayah (the appellant herein) and this was registered on the 29th August and is endorsed on the Crown Grant; this warrant of transfer was purported to have been cancelled by warrant No. 11 dated 28th August, 1947, and this was registered on 28th August, 1947, and is so endorsed on the Crown Grant

By warrant of transfer No. 93 dated 24th October, 1948, all the estate and interest of Longee in the said, parcel of land was purported to have been transferred by the Crown to one Ramlogan; this warrant was registered on 21st February, 1949, and is endorsed on the Crown Grant and on 30th August, 1949, Ramlogan by memorandum of transfer No. 96 purported to transfer the land to the Respondent herein; this warrant of transfer was registered on 2nd September, 1949, and is endorsed on the Crown Grant.

At the time of the trial of the action the Appellant was in possession of the said land and the basis of her claim was that she was in possession by virtue of the warrant of transfer dated 21st August, 1946, hereinabove mentioned.

This parcel of land is under the Real Property Ordinance 1945, and it is therefore pertinent to enquire as to what is the aim and object of that Ordinance and the method of land holding created thereby. The existence of two estates side by side the "legal" and the "equitable" under the Common Law system of land holding was one of the difficulties in the system of land holding and conveyancing that the Real Property Ordinance is

designed to remedy. To obtain full ownership in land under the Common Law system a person is required to "get in" both the legal and equitable estates both of which may be so surrounded with difficulties as to make their easy and safe transfer impossible. The intention of the founder of the Torrens system, on which the Real Property Ordinance is based, was to establish one estate in land only, to have it certified in a public register, and to provide that subject to a few specified exceptions any person who acquired that registered estate bona fide should by the act of registration acquire the ownership of the land. As is stated in the case of *Gibbs* vs. *Messer:* 1891 A.C. 248, at page 254:

> "The main object of the Act and the legislative scheme for the attainment of that object, appear to them (their lordships) to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of their author's title and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases bona fide and for value, from a registered proprietor and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title".

This parcel of land as stated is under the Real Property Ordinance and upon the death of Longee intestate and without next of kin it was escheated to the Crown; it has been contended that upon that escheat it was, to use Counsel's word, "lifted" from the Real Property Register and was no longer subject to the provisions of that Ordinance.

Kerr in his book on the Australian Lands Titles (Torrens) System 1927 Edition at page 120 states:

> "When once an estate in land has been brought under the Torrens System it remains under the Torrens System and cannot be withdrawn therefrom"

and Thom in his treatise on the Canadian Torens System 1912 edition at page 125 says:

> "There is nothing to be found in the Canadian Acts to indicate what becomes of the title to land when it escheats or is surrendered to the Crown".

Hog*g* in his Australian Torrens System 1905 edition deals with the matter and concludes that it is impossible to come to a definite conclusion in the absence of judicial decision. No such decision has been brought to our attention. The Real Property Ordinance makes no provision for land escheated to be removed from the register. We are of opinion that it is not so removed but always remains subject to that system.

Having come to the conclusion that the land in question was, after the death of Longee, still subject to the provisions of the Real Property Ordinance and was not removed therefrom owing to its escheat to the Crown we now have to consider the effect of the purported registration of the Respondent on the Crown

Grant as the registered proprietor. The main object of the Act and the legislative scheme for the attainment of that object appear to be equally plain. The object as stated above is to save persons dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of their author's title and to satisfy themselves of its validity.

It is contended that the cancellation of the transfer to Appellant is void, that there is no authority in the Crown to cancel the transfer and therefore all ensuing transactions are null and void as they flow from a null instrument.

Was the cancellation valid, or to put it another way, has the Crown power to cancel the Grant to Mahadayah?

The document purporting to cancel the warrant of transfer states that:

> "I . . . . . Governor's Deputy . . . . .pursuant to the provisions of section 29 of the Administration of Estates Ordinance Ch. 8 No. 1, hereby in Executive Council direct that the Warrant of Transfer signed by. His Excellency Andrew Barkworth Wright, C.M.G., C.B.E, M.C. on the 21st day of August, 1946, and registered in the Registrar-General's office on the 30th day of August, 1946, whereby in pursuance of sec. 29 of Ch. 3 No. 1 All and Singular the parcels of land mentioned and described in the said Warrant of Transfer, formerly belonging to Loungee also called Longee also called Lungee also called Launee, deceased, were granted unto Mahadaya her heirs and assigns be and the same is hereby cancelled and made null and void".

The Section mentioned gives no such power. We have not been referred to any section, Ordinance or other law giving the Crown power to cancel such a transfer and we have not been advised of any such power.

There has been much argument as to whether it is competent to go behind the register to examine the title of anyone who has been registered as a proprietor.

Section 45 of the Ordinance states:

> "Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Ordinance might be held to be paramount or to have priority, the proprietor of land or of any estate or interest in land under the provisions of this Ordinance shall, except in case of fraud, hold the same subject to such mortgages, encumbrances, estates, or interests as may be notified on the leaf of the Register Book constituted by the grant or certificate of title of such land; but absolutely free from all other encumbrances, liens, estates, or interests whatsoever, except the estate or interest of a proprietor claiming the same land under a prior grant or certificate of title registered under the provisions of this

> Ordinance, and any rights subsisting under any adverse possession of such land; and also, when the possession is not adverse, the rights of any tenant of such land holding under a tenancy for any term not exceeding three years, and except as regards the omission or misdescription of any right of way or other easement created in or existing upon such land, and except so far as regards any portion of land that may, by wrong description of parcels or of boundaries, be included in the grant, certificate of title, lease, or other instrument evidencing the title of such proprietor, not being a purchaser or mortgagee thereof for value, or deriving title from or through a purchaser or mortgagee thereof for value".

It is plain that the title of a registered proprietor shall, subject to certain exceptions be indefeasible. These exceptions as set out are, (a) fraud, (b) a claim under a prior grant, (c) adverse possession.

Fraud is not alleged here.

Prior grant in this connection does not mean as was con-tended prior endorsement on the same grant but it means what it says, that is a separate grant prior in time to the grant under consideration. As is stated in Kerr, "Where two or more certificates are registered in respect of the same land the title originally first in date of registration is to prevail".

Adverse possession in this connection means possession by the person claiming the benefit of that exception for a period of time that would satisfy the requirements of the Real Property Limitation Acts and so ensure to him a Possessory title—that is the result to be gathered from the learning to be found in Kerr and Hogg in their respective works on the Torrens System; as the Appellant here has not been in possession for that period she cannot claim the benefit of that exception.

Whether registration confers an indefeasible title as con-tended or whether it is competent to us to go behind the register—it is undoubtedly competent for us to look at the register. An inspection of the register reveals to us as it must have done to the parties that there are certain flaws apparent on the face thereof.

The transfer to Ramlogan was made under Section 28 of the Administration of Estates Ordinance Cap. 8 No. 1 and the endorsement on the Crown Grant is as follows:

> "Warrant of Transfer No. 93 dated 24th October 1948. Under Section 28 of Cap. 8 No. 1.
>
> To Ramlogan of all the estate and interest of Longee deceased in the lands herein subject to the reservation to H.M. the King of all gold, silver and other precious metals coal, oil and other minerals upon or under the said lands and to the rights and liberties therein mentioned. Reg. on 21/2/1949 at 24 mins. before 10 a.m.
>
> (Sgd.) Samuel A. Huggins
>
> Reg. Gen."

It will be noticed that the transfer was registered more than twelve days after it had been executed. We do not think that that, lapse of time affects the matter.

Section 29 of the said Ordinance is as follows:

> "A transfer of land under either of the two last preceding sections shall be entered, in the case of land subject to the provisions of the Real Property Ordinance, on the Real Property Register, and in the case of land not so subject, in the protocol of deeds, on the delivery thereof to the Registrar General within twelve days from the same being signed, and at the expiration of one year from such registration shall be deemed to have passed the legal estate in such land according to the terms of such transfer; and administration obtained to the estate of such intestate after the expiration of such year shall not be deemed to vest in the real representative to whom such administration shall have been granted or in the next of kin the legal or beneficial estate respectively in such land :
>
> Provided that in the case of lands subject to the provisions of the Real Property Ordinance, on the entry of any such transfer the Registrar General shall enter a caveat on behalf of the Administrator General and all persons entitled to take out letters of administration, and shall remove the same at the expiration of one year from such registration".

In accordance with the proviso the Registrar General endorsed the caveat required on the Crown Grant; the object of that caveat is to protect the rights of any persons who may be entitled to come in and ask for letters of Administration. Moreover by the terms of the section it is clear that the legal estate does not pass until after he expiration of one year from the date of registration and it is incumbent on the Registrar General to remove such caveat after the expiration of one year.

The memorandum of transfer to the Respondent from Ramlogan was dated the 30th August, 1949, the relevant terms thereof being:

> "And I, Ramlogan, being registered as the proprietor of an estate in fee simple subject however to such mortgages and encumbrances as are notified by memorial underwritten or endorsed hereon in all that parcel or lot of land described in the Second Part of the said Schedule hereto, in pursuance of the said agreement and in consideration of the premises Hereby transfer to the said Rambrose Ohree of the aforesaid Ward of Tacarigua, proprietor, all my estate and interest in the parcel of land described in the Second Part of the said Schedule hereto".

Be it noted this transfer was executed and endorsed on the register prior to the expiration of the twelve months mentioned in section 29 and before the removal of the caveat. Ramlogan at that time did not have the legal estate and therefore could

not pass the legal estate to the Respondent. Moreover the section under consideration does not give any power to the Registrar General to remove the caveat before the expiration of the fixed period of twelve months.

The Appellant was to the knowledge of the Respondent in possession at the time of the purported transfer to the Respondent; against that possession the only way he Respondent can obtain possession is by proving title in himself. We are of opinion that he has failed to do so for the reasons given above.

Taking the view that we do on this aspect of the case, we consider it unnecessary to deal with the other points raised. The appeal is allowed with costs.

(In the Supreme Court, Civil Jurisdiction (Stoby J.) December 1, 12, 1952, February 7, 1953).

Rice Farmers (*Security of Tenure*) *Ordinance,* 1945—*Tenancy—Implied agreement—Rental—Time for payment—Non-payment—Notice to quit—Ejection—Damages—Remoteness.*

The plaintiff was tenant of the defendant of rice lands to which the Rice Farmers (Security of Tenure) Ordinance, 1945, applied. He was ejected in May of one year for alleged non-payment of the rent for the previous year.

In an action for damages for breach of the implied agreement of tenancy, the defendant relied on a notice to quit given before the 31st December and contended that if there was a breach the damages were too remote.

Held: Assuming the rent was not paid, one month's notice to quit is a precedent condition and this notice must be given after the 31st December and not before.

The damages were not too remote and could be assessed on loss of profits such loss being the natural and immediate result of the breach of contract.

D. Jhappan for the plaintiff.

C. J. E. Fung-a-Fatt for the defendant.

Stoby J.: The plaintiff claims damages for breach of agreement by the defendant whereby the defendant ejected the plaintiff from certain rice lands and prevented him from planting rice for the 1950 season.

The defendant is the owner of land at Phillipi, Corentyne which is suitable for rice cultivation. A portion of the land about 17 acres was overgrown with bush and trees and in May 1949 the plaintiff and defendant agreed that if the plaintiff at his own expense cleared the land of its foliage he could plant rice thereon and pay a rental of $6.50 per acre.

As a result of that agreement the plaintiff cut down 8 acres covered with trees and bush, ploughed the land and planted padi.

In the ordinary course of events he should have reaped his crop about November 1949, but just when water was necessary

for the proper growth of his cultivation, the Drainage Board who control irrigation in the district, found it necessary to clean a canal in the immediate vicinity, with the result that the water was drained from the land and the plaintiff's rice cultivation seriously affected. This calamity would never have occurred if the defendant had erected a suitable smouse or "stop off" to regulate the flow of water.

The defendant had built a stop off which proved ineffective, no doubt because he was unwilling to incur the expense involved; but it is obvious that the obligation to construct work of this nature is the landlord's and not the tenant's.

The plaintiff expected to obtain about 160 bags of rice from the 8 acres of land planted but as a direct consequence of the misfortune referred to above he did not obtain more than 98 bags. He was naturally dissatisfied with the result of his labour and wrote the District Commissioner explaining what had taken place and requesting his intervention with regard to the rental demanded.

The District Commissioner met the plaintiff and defendant by appointment and after some discussion the defendant agreed to accept $26 as rental instead of the $52 he normally should have received.

This finding is not in accord with the defendant's version because he denied ever agreeing to any reduction in rent. The plaintiff, however, was a much more convincing witness and the subsequent conduct of the parties was consistent with his evidence.

Although the defendant denied that the incident concerning the return of a receipt took place yet he admitted that Sergeant Butts was brought to him by the plaintiff at some time in 1950. Butt's story was a much more reasonable and probable one and I accepted his evidence that $26 was returned to the plaintiff because he objected to the manner in which the receipt was written as not representing the true transaction.

I have come to the conclusion that the defendant while promising the District Commissioner to reduce the rent to $26, never really intended to do so, and consequently, wrote the receipt in such a way that, when he claimed rent at a later date, the document in plaintiff's possession would show that $26 had been paid as repayment of a loan transaction and not for rent. In other words, he would be able to recover by means of a device the full rent of $52.

This finding of fact now involves a consideration of the respective legal positions of the plaintiff and defendant at this juncture.

The Rice Farmers (Security of Tenure) Ordinance, 1945 stipulates by section 3 that in respect of the letting of rice lands every agreement of tenancy shall be deemed to be an agreement of tenancy from year to year unless terminated by the landlord or tenant as in the Ordinance provided. It follows that the plaintiff was entitled to plant the same land for the 1950 rice

season as he had done in 1949 unless he voluntarily surrendered his tenancy or it was legally terminated.

I reject at once the suggestion that it was voluntarily given up by the plaintiff on account of the loss suffered by him. The history of rice cultivation in this colony abounds with examples of farmers suffering repeated misfortunes through rains or drought and yet steadfastly pursuing their occupation year after year. I cannot believe that the plaintiff who had expended time and energy in clearing abandoned land would, because of one misfortune, which was avoidable, refrain from continuing his vocation.

The defendant, in the alternative, insisted that he had given the plaintiff in December one month's notice to vacate the land as the rent had not yet been paid.

The Ordinance requires the tenant to pay his rent not later than the 31st December in every year and entitles a landlord to give his tenant not less than one month's notice to quit if the rent is not so paid.

The defendant alleged that he gave the plaintiff notice to quit in December 1949. It is true that the rent was not paid until about May 1950 but unless the notice required by the Ordinance was given the plaintiff was entitled to assume that his tenancy was still subsisting.

It was not until May 1950 when the plaintiff commenced to make preparations for planting that he was summarily ejected and informed that if he wished to plant he must again repeat the process of clearing abandoned land. Not unnaturally the plaintiff refused so arduous a task and filed this action instead.

Defendant's counsel submitted that assuming there was a breach the plaintiff would not be entitled to damages as they were too remote. I do not agree with the submission. According to the evidence the land was bought for the purpose of rice planting and so it must have been in the contemplation of both parties at the time of the original letting that if the plaintiff was deprived of the facilities for planting the probable result to him would be pecuniary loss. It is said that excessive rain may have fallen and damaged the cultivation or some third party may have created unfavourable conditions for the growing of rice as happened the previous year. If the defendant had not broken his contract an independent intervening cause not brought about by the defendant's default resulting in damage to the plaintiff would be too remote, but it cannot be presumed that such an act would have occurred merely because the defendant has broken his contract. The possibility of excessive rain may be taken into account in arriving at the quantum of damages but does not affect the right to damages. I say it affects the quantum because this is the type of case in which damages must be assessed on loss of profits such loss being the natural and immediate result of the breach of contract.

In Halsbury 2nd ed. vol. 10 at page 98 the law is stated as follows: "Where a contract is made with reference to goods of a particular character, or articles, the use or purpose of which is

obvious or in respect of which, it may be a warranty of fitness is implied, the damage within the contemplation of the parties is that which naturally arises in the ordinary course from the breach of contract in respect of such goods, having regard to such character, use, or purpose or from the breach of such an implied terms of the contract."

The plaintiff's unchallenged evidence is that he could obtain 200 bags of padi from 8 acres at a selling price of $3 per bag and a profit of $500. His actual yield in 1949 was 98 bags. I assess the damages on the basis of 120 bags at a net profit of $1.50 per bag.

There will be judgment for the plaintiff for $186 with costs.

STEWARD v. HAYNES

(In the Supreme Court, Civil Jurisdiction (Stoby J.) September2, 24, 25, 1952, February 7, 1953).

Immovable property—Possession for over 40 *years—Partition—Failure to appeal from published awards—Continued possession—Owner by transport—Sole—Opposition.*

The plaintiff was in open and continuous possession of a parcel of land from 1903. About 1938 or 1939 the portion occupied by her was in. eluded in an area of land partitioned in accordance with the District Lands Partition and Re-allotment Ordinance, Chapter 169. Her portion was allotted to a claimant. She did not claim. The list of awards was published by the Partition Officer and transport passed to the successful claimant. There was no appeal against the Partition Officer's award because the plaintiff did not know of it although she subsequently learnt in 1940 that another person was awarded her land. She took no action but continued in possession.

The holder of the title sought to transport the land to a bona fide purchaser and the plaintiff opposed.

Held: The opposition founded on possession prior to the partition was invalid as where there is no appeal from the award of a partition officer the award is final. As the plaintiff did not know of the award at the time it was her duty to institute appropriate proceedings after she learnt of it.

As the plaintiff was in possession for 12 years after the award she had acquired a negative title and could oppose on that ground.

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

Theo. Lee for defendant.

Stoby J.: The defendant caused to be advertised in the Official Gazette of the 10th, 17th and 24th November, 1951 a conveyance by way of transport of one undivided third of three undivided fifth parts or shares of and in the following:—"Lot number 6 (six), section A, lots numbers 4 (four) and 19 (nineteen) section E, parts of the south half of Plantation D'Edward situate on the left bank of the Berbice River, in the County of Berbice, the said lots being laid down and defined on a plan by S. S. M. Insanally, Sworn Land Surveyor, dated 31st day of August, 1928, and duly deposited in the Deeds Registry of British Guiana on the 18th

day of February, 1930, no building thereon", to and in favour of one Thomby.

As a result of that advertisement the plaintiff entered an opposition and claimed among other things a declaration that she was in sole open and continuous possession of lot 6 section A, S 1/2 Plantation D'Edward *nec vi, nec clam, nec precario,* since the month of December, 1903 and was still in such possession and entitled to the ownership thereof.

The defendant made no attempt at the trial to challenge the evidence of the plaintiff and her sister that at the time of the plaintiff's marriage in 1903 her father gave her a parcel of land on the S 1/2 lot 6 Plantation D'Edward a part of which is the subject matter of this action and that she has lived there from then until the present time.

The defendant relies on two incidents as interrupting the plaintiff's possession, either of which, Counsel submits, is sufficient legal ground for disentitling the plaintiff to the declaration claimed.

Before dealing with the legal aspects of the two incidents above referred to it will be convenient to recite the facts in chronological order.

In 1928 or 1929 after the plaintiff had been in undisturbed pos-session of a parcel of land on the S 1/2 Plantation D'Edward for 25 or 26 years, Mr. S. S. M. Insanally, Sworn Land Surveyor, was appointed partitioning officer under the District Lands Partition and Re-allotment Ordinance, Chapter 169 for the purpose of partitioning and/or re-alloting the North and South halves of Plantation D'Edward.

He conformed with the procedure laid down in section 6 of the Ordinance and eventually forwarded his report and plan to the Local Government Board. He then caused a list to be published in the Gazette and the newspaper giving the sections and numbers of the lots into which the land had been partitioned and re-allotted, and the names of those entitled to each lot. In the published list, Ex. "E", dated the 7th December, 1929, lot 6 Section A of the S 1/2 Plantation D'Edward was allotted to William, Egbert, Simon and Thomas Vanderstoop. There was no appeal from this decision.

Mr. Insanally swore that while he was carrying out the partition he saw the plaintiff and her sister nearly every day and they were fully aware of what was happening. I cannot accept his evidence on that point because if they indeed knew that he was partitioning the S 1/2 of Plantation D'Edward their behaviour is unexplainable. The plaintiff was in occupation of land on the N 1/2 of the estate and when that was being partitioned she made a claim to her land and was successful. There is no logical reason why, if she knew that the S 1/2 was being partitioned, a similar claim would not have been made. It is the fact that she made no claim, it is the fact that she was in possession for over 23 years and her father had been in possession for a much longer period hence I conclude that her failure to claim is consistent with her

evidence that it was never brought to her attention that a partition of the S 1/2 was being made. In any event whether she knew or not, I am satisfied that she did not know of the published awards.

As the law then was, even knowledge of the published awards would have availed her little. By section 9 of the Ordinance the partitioning officer, if a sworn land surveyor, may survey the land and prepare a plan to show among other things the boundaries and extent thereof and to permit new titles to be issued. This requirement did not go far enough. There was no provision compelling the officer to lodge the plan so prepared within a specific period. Nor was there any way of ascertaining from the published list whether the land in one's occupation had been awarded to someone else. The plaintiff, for example, was in occupation of a piece of land but that land was never known as lot 6 until a survey was made and a plan prepared. Without reference to the plan she could not know that lot 6 awarded to the Vanderstoops was the lot she was occupying and as the plan was not deposited until about two years after the published list of awards I cannot find that she had notice that her land was allotted to someone else.

As a result of the partitioning officer's awards and since no appeal was lodged, in due course transport of three undivided fifth parts or shares of lot 6 was passed to the Vander-stoops who sold an undivided third to one Dunbar. In 1942 Dunbar having tried without success to obtain possession of the land, brought an action in the Magistrate's Court against the plaintiff. It is not clear whether evidence was taken and the case dismissed or whether it was withdrawn, but whatever the result, the plaintiff remained in possession and no further attempt was made to deal with the land until this transport was advertised.

I do not accept the evidence of Hannah Romondt that in 1946 and 1948 she visited the estate and the plaintiff agreed to leave the land.

The two incidents on which Mr. Lee relies are

(a) the partition of 1928 or 1929 and

(b) the proceedings in the Magistrate's Court.

Ever since the lucid judgment of Savary J. in Abdool Rohoman Khan -v- Boodhan Maraj et al 1930 L.R.B.G. p. 9 it has never been questioned that a person in possession of land for the statutory period does not lose his rights if he does not oppose an intended sale or mortgage of which he has not had actual notice. Counsel for the plaintiff submits that by analogy, a person in possession of land for the statutory period does not lose his rights, if he does not appeal from the decision of a partitioning officer of whose awards he has no notice or if he does not oppose a partitioning officer's transport to the person awarded land. This argument is entirely untenable as a careful perusal of the reasons which led to the decision in Abdool Rohoman Khan v. Boodhan Maraj (supra) will show. Although

the Civil Law of British Guiana Ordinance, Chapter 7 abolished the Roman Dutch Common law, it was expressly provided that the right of opposition in the case of both transports and mort-gages shall be the law and practice now administered in the Supreme Court. When therefore Savary J. had to decide in A. R. Khan v. Boodhan Maraj whether failure to oppose caused the plaintiff to lose rights already acquired, he had to examine the Roman Dutch authorities in order to decide the effect of absence of knowledge, by a person in possession, that a transport or mortgage of the land in his possession was being passed. This decision was based on Roman Dutch Law because that was the law and practice administered in the Supreme Court prior to 1916 and it was that law which was preserved with respect to oppositions by the Civil Law Ordinance. The District Lands Partition and Reallotment Ordinance, Chapter 169 modified the law of opposition with respect to awards made under it, for by section 3 it is enacted that the owners of undivided shares in any and in a district who desire that it shall be partitioned may present a petition to the Governor in Council praying that the area specified in the petition be partitioned or re-allotted. Subsequent sections set out the procedure to be followed when a partitioning officer has been appointed and after the partition is complete, and there is provision if a claimant is dissatisfied either for appealing to the Board or applying to the Court within a definite period of time. Section 10 further provides that if there is neither appeal nor application to the Court within the prescribed time, the partitioning officer's decision is final.

The Court has never had to decide, as far as I can discover, what the legal position is, when a partition has been conducted and awards published without the knowledge of a person in possession. The cases of Sewdin v. Ferreira (1928) L.R.B.G. 40 and Dick v. Durham (1930) L.R.B.G. 7 were both cases in which the respective plaintiffs were aware of the partition and the awards but neglected to take appropriate action within proper time. In each case Gilchrist J. held that the action was not maintainable.

In Bridglall & anor v. C. Jay Jay & ors (1948) L.R.B.G. 12 Worley C.J. held that the plaintiffs who had knowledge of a partition award and had accepted benefit under it were estopped from subsequently questioning it. On the other hand Worley C.J. held in Frank & ors. v. Hiralall No. 223 of 1946 (unreported) that claimants who were satisfied with the decision of a partitioning officer and who subsequently discovered on reference to the plan that the lot they thought was awarded to them was not the one allotted, were not estopped from asserting their rights to the land they were occupying by virtue of long possession. The defendants lodged an appeal to the West Indian Court of Appeal against this decision but the West Indian Court declined jurisdiction on the ground that the value of the property in dispute did not exceed $250.00.

A perusal of the decision will show that Worley C. J. found that the partitioning officer had told the plaintiffs he was award-

ing them a certain lot and then fraudulently awarded that lot to a nominee of his so that it would be purchased to his own advantage. In those circumstances he held that the failure to lodge an appeal was no bar to their action.

The difficulty, as I see it, in remaining passive even after knowledge of a partitioning officer's fraud has become known is, that innocent persons are in danger of suffering seriously financial loss by such auction. A purchaser of immovable property is entitled to assume that one who is in possession of a transport obtained as a result of a partition is the legitimate owner of the land mentioned in the transport. He is entitled to assume that if the partition was fraudulently conducted that owners of land in possession would seek to set aside the officer's findings as soon as they had knowledge of the fraud.

Ever since 1942 the plaintiff knew that Insanally had awarded her land to others and yet she took no action to set aside the award in any way.

In my view a partitioning officer's awards are final unless the provisions of section 16 of Chapter 169 are compiled with and if because of lack of knowledge or fraud or some similar reason a person in possession has lost the opportunity to appeal an appropriate action should be brought against the partitioning officer as soon as the facts come to the owner's knowledge. Until the award is set aside, a person in possession cannot oppose the passing of a transport by the person who has the legal title to the land. This conclusion does not dispose of this action as the plaintiff in an amended statement of claim sought a declaration that she was in possession of the said land for a period of 12 years immediately preceding her opposition and relied on the protection offered by section 14 of the Chapter 184 the Limitation Ordinance.

It is undisputed that despite the award of the land to the Vanderstoops the plaintiff remained in possession and continued to exercise acts of ownership. Counsel for the defendant submits that her possession was interrupted by proceedings to eject her taken in the Magistrate's Court of the Berbice Judicial district. The first attempt, if it can be so regarded, to disturb her second period of possession was not taken until 1942 when she had already acquired a negative right to remain in possession, that is to say undisturbed possession from 1929 to 1942. Moreover the action taken in 1942 cannot be regarded as determining her possession. It was a challenge which was successfully resisted and her possession has continued to the present time.

Counsel for the defence does not dispute that if the plaintiff was in possession from 1929 and if the magisterial proceedings of 1942 are not regarded as an interruption of that possession then she would be entitled to the protection of section 14 of Chapter 184 and section 4 (2) of Chapter7. As I find that she was in possession for a period of at least 12 years immediately preceding her opposition there will be a declaration accordingly and in addition an injunction restraining the defendant his agents and

assigns from entering upon and from passing or seeking to pass any transport of the said property. The defendant will pay the plaintiff's costs.

OUTAR v. SOOKRAM.

(In the Supreme Court, Civil Jurisdiction (Stoby J.) December 3, 4, 1952; March 16, 1953).

Landlord and tenant—Nuisance—Cumulative effect of defendant's conduct—Notice—Latent defects—Occupier.

The lower flat of a two-storeyed building was let by defendant to the plaintiff. The defendant occupied the upper flat and during the continuance of the tenancy his servant or agent was responsible for various acts of annoyance, each of which might not be regarded as actionable. In the alternative the defendant landlord proved that one of the acts alleged to constitute a nuisance was due to a latent defect of the premises.

Held: The acts of the defendant, her servants or agents, if isolated, would not amount to a nuisance but the cumulative effect was such that nuisance was established especially as they were done maliciously.

The occupier of premises is liable for a nuisance not created by him if he allowed it to continue after he knew of its existence.

S. D. S. Hardyal for plaintiff.

D. Dharry for defendant.

Stoby J.: The plaintiff is a tenant of part of the lower flat of a two storey building situate at lot 13 sub-lot A, Rose Hall, Corentyne, Berbice, and claims damages from the defendant, the owner of the property, for nuisance, negligence and breach of contract for various acts of the defendant or her agents between the 1st January, 1952 and the 22nd July, 1952.

In 1951 the property was owned by a Mr. Swamber who let part of the lower portion to the plaintiff for residential and business purposes. When Swamber wished to dispose of the property the plaintiff offered him $8,000:—which was rejected in favour of the defendant's higher price of $10,000:—For some reason not clearly apparent from the evidence, the defendant before obtaining transport in November, 1951, entered into an agreement of lease with the plaintiff whereby the plaintiff became her tenant for five years at an agreed monthly rental. The agreement was extremely favourable to the plaintiff for while he could vacate the premises on three months' notice no such reciprocal clause was inserted on behalf of the defendant, with the result the tenant may have been difficult to dislodge under five years should the landlord for any reason desire to terminate the tenancy.

As the plaintiff was anxious to obtain his own property, he purchased one in Rose Hall Village, but being indebted to sundry creditors, and because he was doubtful whether his prospective site would prove to be as advantageous a commercial centre as his present site he refrained from giving the defendant notice of his intention to remove, and instead, let the upper-flat of his newly acquired property to a nurse as a residence.

He alleges that the defendant who resides with her husband and children in the uppers-flat of the premises of which he is a tenant and carries on a business in part of the lower flat and who wishes to extend her business and must have hoped that with the acquisition of his own property his departure would be eminent, disillusioned: when the upper flat was let and shortly thereafter conducted a campaign by herself her servants or agents designed to compel his withdrawal. The acts alleged are:

(a) that on the 18th April, 1952 there was excessive noise;
(b) that on the 27th April, 1952, urine dripped from the upper flat;
(c) that on the 7th May, 1952 urine again dripped from upstairs;
(d) that on the 4th June, 1952, a structure near plaintiffs quarters was broken down;
(e) that on the 10th June, 1952, human faeces was thrown from upstairs near to his wife, standing in the yard; and
(f) that on the 9th July, 1952, urine again dripped from upstairs.

The defendant's answers to these allegations are :—

(a) that her husband was repairing a sign board on the 18th April, but kept no excessive noise;
(b) that on the 27th April, 1952, water might have dripped below as a result of her children drying themselves outside of the bath;
(c) that no incident took place on the 7th May;
(d) that the structure was removed because it was rotten and replaced by a superior one:
(e) that no indictment took place on the 10th June, 1952; and
(f) that on the 9th July, the bath was being washed and some water may have dripped downstairs.

Since the continuous doing of something which interferes with another's health or comfort in the occupation of his property is a nuisance and as the amount of annoyance or inconvenience necessary to constitute a nuisance depends on all the circumstances proved, I propose to consider whether the alleged acts were done, and if done whether they were done maliciously.

It is not denied that some noise was kept on the night of the 18th April, but it is contended that the amount and nature of it were exaggerated. P.:C. Hope, a disinterested party did not strike me as exaggerating and I accept his evidence.

With regard to the other incidents, other than the structure I accept the evidence of the plaintiff and rural constables Smith and Mercurius in preference to the defendant, her husband, and rural constable McJohn. Smith was a particularly impressive witness and his account, of the 7th July especially, struck me as being impartial.

The authorities are clear that in the absence of motive the question of noise as a nuisance is one of degree, Christie v. Davey 1893, 1 Ch. 316.

Putting the plaintiff's evidence at its highest I could not

regard the hammering on the night of the 18th April, as by itself constituting a nuisance.

The occupier of a house in a busy village area cannot expect the quietude associated with residence in a lonely country district where the silence of night is unbroken save for the noises expected in tropical parts.

A neighbour who selects the night time to repair his signboard is being inconsiderate of the welfare of his fellow citizens but he is not necessarily thereby committing a nuisance. I said, not necessarily, because his conduct must be examined in the light of past and subsequent events.

I turn now to the subsequent events of the 27th April, 7th May and 9th July. I say at once that the occupier of the lower flat of premises should not be over sensitive in relation to the behaviour of the occupants of the upper flat. The type of dwelling house in this colony is not sound proof nor is the flooring of the average house water proof. The accidental upsetting of a vase or water jug causing water to percolate below ought to be overlooked by a reasonable tenant but this does not mean that conduct which if isolated would not be actionable does not become actionable when repeated and the cumulative affect thereof is considered. Believing as I do that it was urine and not water which descended in the plaintiff's quarters on the dates abovementioned and bearing in mind the conduct of the defendant's husband when remonstrated with on the first occasion I have come to the conclusion that the dripping of urine was no mere domestic misfortune but deliberately done to annoy and inconvenience the plaintiff.

Taking this view of these acts the hammering of the 18th April is placed in its true perspective and was done I have no doubt with a malicious motive.

In coming to the conclusion that defendant's conduct was actuated by malice, I have taken note of the condition of the premises as seen by me when I visited at the request of the defendant's counsel. An extension of the lower portion of the building was in progress. This extension according to the defendant was for the purpose of letting it when completed, as a parlour. The plaintiff carries on a parlour and if there is no enmity between him and defendant then it is an extraordinary act of friendship to instal a competitor next to him in the same building. The more plausible explanation is that defendant is intent on expanding her own business and the plaintiff's reluctance to remove is delaying this expansion.

I have not dealt specifically with the throwing of human Excreta and the removal of the structure. The former I believe to have been done and deserves the fullest condemnation, the latter, it is possible, was done for the safety of her own children and in arriving at my decision I have disregarded it.

I have endeavoured to show that while the acts, of the defendant, her servants or agents if isolated may not be treated as a nuisance yet the cumulative affect of those acts causes me to so regard them. I have also found that there was malice within the

principle of such cases like Christie v. Davey and Holywood Silver Fox Farm Ltd. v. Emmett 1936 21 KB. 468.

On these findings I conceive that the defendant would also be liable in negligence. In Abelson v. Brockman 1889, 54 J.P. 119 plaintiff occupied the ground floor and defendant third and fourth floors of the same building. Defendant's employees without his knowledge were in the habit of emptying her leaves into a sink leading from his premises to a pipe and in consequence the pipe was choked and an overflow of water ensued. The water came through the ceiling of plaintiff's rooms and did damage to certain goods, held: plaintiff was entitled to recover as a duty was cast upon the defendant to prevent an overflow which duty he had failed to discharge.

The defendant owed a duty to the plaintiff to prevent water or urine going through the plaintiff's ceiling. The acts which took place were not the malicious acts of strangers nor were they due as in Ross v. Ledden 26 L.T. 966 to latent defects.

Counsel for defendant urged that she should not be held liable for latent defects and that if water percolated through her floor it was due to latent defects. In my view this aspect of the case does not arise because an act which is done intentionally presupposes knowledge in the wrong doer that circumstances exist favourable to his wrongful act. In other words knowledge that the flooring was in disrepair-Assuming I am wrong in holding that the defendant, her servants or agents acted maliciously, I would still decide against her on the point urged by Mr. Dharry.

In the case cited by him of Sedleigh Denfield v. St. Joseph's Mission Society, 1940, Vol. 109 L.J.K.B., 893, the House of Lords held that occupiers of land who did not themselves create a potential nuisance but who presumably had knowledge of its existence were nevertheless liable if they failed to take reasonable means to bring it to an end. Lord Porter in his opinion at pages 911-912 said "It is clear that an occupier may be liable though he be (1) wholly blameless; (2) is not only ignorant of the existence of the nuisance, but also without means of detecting it; and (3) entered into occupation after the nuisance had come into existence. Such a liability is, I think, inconsistent with the contention that the occupier is not liable for acts of a trespasser of which he has knowledge though possibly it might be contended that he is responsible for the acts of his predecessor in title but not for those of a trespasser. Such a contention, however, is I think unsound, and the true view is that the occupier of land is liable for a nuisiance existing on his property to the extent that he can reasonably abate it, even though he neither created it nor received any benefit from it. It is enough if he permitted it to continue after he knew or ought to have known of its existence. To this extent, but to no greater extent, he must be proved to have adopted the act of the creator if the nuisance."

The defendant's own witnesses Veeren and Chandisingh established that the premises were in need of repairs and that the

flooring was so bad that as one witness put it "it leaked like a basket." The defendant's husband in examination in chief said that he had seen marks along the walls of plaintiff's room. He retracted this statement after the adjournment but on my visit, the marks were clearly seen and no purchaser could have failed to see them unless the property was bought without inspection. The evidence is clear that the nuisance existed prior to defendant's purchase and that she knew of its existence. She is therefore liable in damages which I assess at $150.00 with costs.

JOHN v. JOHN AND BRAITHWAITE.

(In the Supreme Court, Divorce and Matrimonial (Stoby J.) January 30; February 6, 11, 12, 14; March 16; 1953).

Divorce—Unsuccessful wife's costs—Rules of Court (*Matrimonial Causes*) 1921—*Court's discretion.*

In a divorce petition the correct procedure in this Colony is for the wife's solicitor to tax a Bill of Costs up to setting down and then apply for security for her costs of and incidental to the hearing of the petition. Where a Solicitor neglects to apply for security the wife may be deprived of costs of the hearing.

R. H. Luckhoo for the petitioner.

J. N. Singh for the respondent.

A. J. de Souza for the co-respondent

Stoby J.: At the conclusion of this divorce petition on the 12th February I found that the respondent had committed adultery with the co-respondent and reserved the question of costs for further consideration.

The petition was filed on the 1st February 1952 and served on the 17th March 1952. Entry of appearance was made on behalf of the respondent on the 19th March, 1952, and on behalf of the co-respondent on the 26th March, 1952, but no answer was file by either of them until 22nd January and 28th January, 1953 respectively. On the 3rd October, 1952, the respondent's *Bill* of Costs up to setting down was taxed in the sum of $140.68 which sum I was informed from the Bar was paid by the petitioner before the commencement of the bearing of the petition.

Rule 63(1) of the Rules of Court (Matrimonial Causes) 1921, states:

> "After a cause has been set down for hearing, or at an earlier stage of a cause by order of court to be obtained on summons, a wife who is petitioner, or who has entered an appearance as respondent, in the cause, may file her bill or bills of costs for taxation against her husband"; and Rule 63 (2)

that

> "The Registrar, when the cause has been set down for hearing, shall ascertain what is a sufficient sum of money to be paid into the Registrar, or what is a suffi-

> cient security to be given by the husband, to cover the costs of the wife of and incidental to the hearing of the cause and shall thereupon issue an order upon the husband to pay or secure the said sum within the time to be fixed by the Registrar."

These rules envisage two acts on the part of the wife's solicitor, that is to say, taxation of her Bill of Costs up to setting down and the obtaining of security for her costs of and incidental to the hearing of the petition. These rules are similar in all respects to the English rules prior to 1947. By the English Matrimonial Causes rules 1947, rule 74 (2), it is now provided that the wife who is a petitioner or has filed an answer may apply for security for her costs up to setting down and her costs of and incidental to such hearing at one and the same time. Accordingly in England, the wife's solicitor can file a bill estimating the sum sufficient to cover the whole costs that the wife will incur from the beginning to the end of the suit, and the Registrar in fixing security may take into consideration the means of the husband and wife and any other information which may assist him in estimating the proper sum. The cases prior to this 1947 rule show that although discretion of the court was never fettered, yet the costs granted to the unsuccessful wife were usually limited to the amount secured, Sopwith v. Sopwith, 1860, L.T.R., Vol. 2, N.S. 472. Although the practice was disapproved in Robertson v. Robertson 1881, 6 P.D., 119 C.A. and a new rule substituted by which an unsuccessful wife's costs were payable in full, it is clear that the old practice was condemned because of the state of the law in England at that time by which on marriage all a wife's property passed to her husband. That is not the law of England now and is not the law of this Colony so that the whole basis for the rule in Robertson v. Robertson is gone. In Williams v. Williams 1928 P.D. 118 Hill J., said "The main object of security in recent years at any rate is that justice may be done by the wife being enabled to procure the assistance of solicitor and counsel and come into Court. That is the main object in modern times".

In this petition the wife without security was able to obtain the services of solicitor and counsel and would seem to fall within the decision of Thompson vs. Thompson 1886, 57 L.T. 374 where a wife's solicitors who had not obtained security were deprived of their costs.

When rule 63 (3) of the Matrimonial Causes 1921 rules is considered, it will be seen that it is logical to limit the unsuccessful wife's costs to the amount secured and that if the solicitor has neglected to obtain security for costs of and incidental to the hearing, none may be awarded.

Rule 63 states:

> "If the husband, by reason of his wife having separate property, or for other reasons, disputes her right to recover against him any costs pending suit, the Registrar may suspend the order to pay the wife's costs or

> to pay or secure the sum ascertained to be sufficient to cover the costs of and incidental to the hearing of the cause, for such time as seems to him necessary to enable the husband to obtain the court's decision as to his liability".

This rule means that the husband who is dissatisfied with the Registrar's or taxing officer's assessed sum for security may appeal to a Judge in Chambers to reduce or set aside the amount assessed. If the wife's solicitor refrains from applying for security and the court grants her costs of the hearing of the petition, the husband is deprived of the opportunity of proving that his wife has separate estate or of offering to the court evidence of other circumstances which may operate in his favour. Normally the evidence is not given at the trial because the wife's means are not in issue. As the wife's solicitor in this petition only taxed his bill up to setting down and omitted to take the further step contemplated by the rule abovementioned, he ought to be deprived of his further costs but as the practice in the Colony never seems to have been settled and as it emerged during the hearing of the petition that the wife was entirely without means, I propose to exercise my discretion in her favour and allow her costs of and incidental to the hearing limited to $75:—. The co-respondent must pay the petitioner his costs including all costs paid by the petitioner to his wife.

Solicitors:

S. M. A. Nasir for the petitioner.

A. R. Sawh for the Respondent.

H. A. Bruton for the co-respondent.

CARVALHAL v. PEREIRA

(In the Supreme Court, In Chambers (Stoby J.) February 25, 26, March 9, 16, 17, 1953).

Interim injunction—Summons to continue—Legal title—Principles on which Courts acts.

The plaintiff obtained an interim injunction ex parte and applied by way of summons to continue the injunction until the determination of the action.

It was contended for the defendant that the interim order should not continue as he was the holder of the legal title to the land.

Held: In the affidavits there was so much doubt as to who had the legal right to the land in dispute that the application must be refused.

Principles on which interlocutory injunctions made discussed.

B. O. Adams for the plaintiff.

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

The following judgment was delivered at the conclusion of the arguments.

Stoby J.: This is an application by way of summons for an interlocutory injunction to continue the interim order by way of an injunction granted on the 26th day of February, 1953. Plaintiff's case on the affidavits is that she was one of the owners of a piece of land held under lease in 1927 and she became the sole owner in 1933; that in 1933 she borrowed some money from C. R. Jacob, and the land was transferred to him to be held in trust for her until the money was repaid; that in 1935 her husband who is now deceased was called upon to repay the money due to Mr. Jacob and that as he was unable to do so a loan was obtained from the defendant and Mr. Jacob repaid and the land transferred to the defendant until the money borrowed had been repaid.

The defendant's case on the affidavit is that he purchased the land from Mr. Jacob; that he was in occupation since 1935; that he was grazing his cattle on the land and that the only association which the plaintiff has with the land is that her husband was employed to look after his cattle.

Mr. Humphrys' submission is that the defendant is the holder of a legal title and that there is no evidence to show that the defendant is a trustee other than the affidavits of plaintiff, her relatives and one Gobind admittedly her agent, and that if an injunction was not granted there would be no irreparable damage, that is damage that could not be compensated for by payment of money.

Mr. Adams' submission is that it is not necessary for the purpose of praying for an injunction to have legal title. The plaintiff's case is one in trespass and all that is necessary for her to show is that she is entitled to an injunction. If an injunction was not granted there would be irreparable damage, that is damage that could not be compensated for by payment of money.

I do not understand Mr. Humphrys' submission to mean that the Court cannot grant an interlocutory injunction against a person who holds the legal title. If that was his submission, it certainly is not the law. His argument as I understand it is that

since one of the functions of the Court in its equitable jurisdiction is to protect legal rights to property from irreparable damage or at least from serious damage pending litigation the Court must first determine who prima facie has the legal right to the property. By legal right is not meant only legal title but includes a trustee who is in possession of the trust property. For if it is clear that the defendant is a trustee then it is the cestuis que trust who has the legal right although not the title.

I must turn therefore to the affidavits to see whether the plaintiff is able to show a fair prima facie case in support of the title she asserts always bearing in mind that all that is necessary is for her to show that she has a fair question to raise in support of the legal right she asserts.

The documentary evidence discloses no trust and since normally by the provisions of the Civil Law of British Guiana Ordinance, Chapter 7 the trust must be in writing, one has to consider without deciding the issue whether the affidavits disclose enough to bring this trust within the exceptions with regard to writing, e.g. fraud or creation of trust by the operation of law or as some-times called a resulting trust.

At the moment but without deciding the point, I am inclined to think that if it is satisfactorily proved that the defendant agreed to hold the property in trust, it would be a fraud to permit him to keep the property merely because there is no writing but the difficulty is that it is by no means clear from the affidavits that she has a fair prima facie case. She says she was in possession since 1927, yet she admits defendant's cattle grazed on the land since 1935. She says she planted rice regularly since 1927 and yet she admits his possession in the sense that his cattle were on the land. She says her machinery was old, yet it was only purchased in 1952. Added to that is defendant's affidavit in which he denies the existence of a trust and which denial is supported by the documentary evidence. The rule of the law is that when the Court is doubtful as to the legal right and is not prepared to pass an opinion until trial of the action, the proper course is either to grant the injuction until the trial of the legal right or dismiss the interlocutory application where it is by way of summons to continue an interim order or if the application is by way of motion to hold it over until speedy trial of the action. In deciding which course I ought to adopt, one of the circumstances to be looked at is, I think, to see who has the legal title and the length of time that legal title has been in existence. From 1935 defendant had the legal title, paid yearly licence, grazed his cattle and only on the death of plaintiff's husband, seventeen years after the alleged creation of a trust when it is not quite clear how the sum alleged to be borrowed was repaid that she demanded of her trustee that he reconvey the land to her. What would have been the position if the defendant had come by way of interlocutory application to restrain the plaintiff from planting? He could have advanced as good a case on affidavits as the plaintiff has; I am of the opinion that there is so much

doubt as to who has the legal right that the interim order by way of injunction ought not to be continued.

Had I not decided in defendant's favour on that point, I would have decided in his favour on the ground that an injunction is not necessary as plaintiff has not satisfied me that Court's intervention is necessary to prevent her from irreparable damage. For this reason; Plaintiff asserts that defendant is about to plant rice on the land. Since the area of land is known and the selling-price of rice regulated, it can be easily estimated what would be the yield in a normal year and what profit the defendant will make from his exertions. It is not suggested in the affidavits that he is unable[1] to pay damages and since the burden of proof is on the plaintiff, I hold that she has not established that this is the type of action in which she cannot be adequately compensated by damages.

In so far as the balance of convenience is concerned there is nothing to choose between the two parties. If I grant an injunction he is left with the machinery and deprived of planting, and if I refuse it she is left with machinery and deprived of planting. It seems to me I would be preserving the status quo if on this ground too I refused interlocutory application.

The application is refused. Plaintiff to pay costs of this application in any event and to bear her own costs of ex parte application in any event.

Solicitors: — A. Vanier for plaintiff
J. E. de Freitas for defendant.

GONSALVES v. THE ARGOSY CO., LTD. et al

(In the Supreme Court, Civil Jurisdiction (Bell C.J.) February 18, 20, 24, 25, 26, 27; March, 2; April 10; 1953).

Libel—"Rolled up" plea—Fair comment—Implication of dishonourable motives—Unwarranted by facts.

The Daily Argosy is a newspaper circulating in the Colony and owned by the first-named defendant.

The defendants did not plead the defence of justification but relied, amongst other defences upon the defence of fair comment by what is known as the "rolled up" plea. As pleaded by the defendants it read as follows:—

> "In so far as the said words consist of allegations of fact, they are true in substance and in fact in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts which are matters of public interest."

The plaintiff is a dental surgeon and was an elected member of the Legislative Council and in the latter capacity was a member of a Committee appointed to consider and report on the desirability or otherwise of further amending the Colonial Medical Services (Consolidation) Ordinance, Chapter 186, for the purpose of extending its provisions to enable dental mechanics who have acquired the necessary skill and competence to be registered as dentists and thereby be permitted to practice dentistry. Whilst the Committee was still deliberating the plaintiff gave notice of his intention to move a Motion in the Legislative Council which, if approved, would result in the law being amended to permit the police to seize and destroy all the tools and appurtenances found in possession of anyone for the purpose of the illegal practice of dentistry.

The article published by the defendant company imputed that the plaintiff had a dishonourable motive in tabling his Motion in the Legislative Council.

Held: The words published by the defendants were defamatory of the plaintiff.

The general rule is that a man's moral character is not a permissible subject of adverse comment and that is so even though the person attacked occupies some public position which makes his character a matter of public interest.

The words, though written without malice, contained a mis-statement of fact, and were not protected by the plea of fair comment.

The second defendant's belief as to the improper motives of the plaintiff was not well founded and without cause, and therefore the adverse comments upon the plaintiff's character and motives were not a permissible subject of adverse comment.

Judgment for the plaintiff with costs.

H. C. Humphrys Q.C., L.M.F. Cabral with him for the plaintiff.

C. V. Wight, B. O. Adams with him for the defendant.

Bell C.J.: In this case the Plaintiff seeks to recover damages for an alleged libel contained in "The Daily Argosy" newspaper of which the first-named defendant is the proprietor and of which the second-named defendant and the third-named defendant are the Editor and Publisher respectively.

It is not disputed that the alleged libel was published in the said newspaper and that it was written of and concerning the Plaintiff.

The defendants do not plead the defence of Justification, that is to say, they do not allege that the words complained of are true

but rely amongst other defences upon the defence of Fair Comment and do so by what is known as the "rolled up" plea. As pleaded by the defendants it reads as follows:

> "In so far as the said words consist of allegations of fact, they are true in substance and in fact in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts which are matters of public interest."

That plea, it should be noted, itself states the matters upon which the comment is based and the defendants thereby tie themselves down to the admission that it is the statement of fact contained in the alleged libel and no others, on which they intend to rely. (Aga Khan v. Times Publishing Co. (1924) 1 KB. 675 C.A.). But it has been decided that that plea does not purport to be a plea of justification of the imputations, if any, contained in the libel but is only a plea of Fair Comment and nothing else (Sutherland v. Stopes (1925) A.C. at pp. 62, 77, 99). By way of further defence, the defendants deny that the words complained of are capable of the defamatory meaning given to them in paragraph 10 of the Statement of Claim or of any defamatory meaning. They further deny that the words complained of constitute a libel on the plaintiff.

The plaintiff is a duly qualified dentist who has been practising his profession in British Guiana from the end of 1935 up till now. He has been an elected member of the Legislative Council of the Colony from 1947 up till and including the 18th February, 1953, when he gave evidence in this action. He has served the public as a member of a number of Boards and Committees and was an elected member of the New Amsterdam Town Council from 1944 to 1947 and was Mayor of that Town Council from 1946 to 1947. On the date of the publication of the alleged libel, namely the 29th of August, 1950, the plaintiff was, as is clear from what has been already said, an elected member of the Legislative Council of the Colony and he was on that date a member of the Dental Mechanic Registration Committee of which we have heard so much during the hearing of this action. At the time of the publication of the alleged libel the plaintiff was a member of the British Guiana Dental Association and had been a member of that Association for some time before that. There can be no doubt that he was at all material times strongly opposed to the claims of the members of the British Guiana Dental Assistants and Technicians Association (hereafter called the Dental Mechanics Association) to be allowed to practice dentistry in the Colony or any parts of it as if they were fully qualified dentists and wished to see them strictly confined to the carrying out of the mechanical and artisan functions normally carried out by Dental Mechanics and Dental Technicians. There can also be no doubt that the second defendant, Mr. Seal Coon, was at all material times a strong supporter with certain • reservations, of the claims of the members of that Association and did much to further those claims. I believe that both the plaintiff and the second defendant have truthfully stated the reasons which moved them, prior to the date

of the publication of the alleged libel, to oppose or support as the case may be the claims of the Dental Mechanics Association. I express no opinion as to the soundness of their respective reasons but I can see nothing improper in those reasons.

In March, 1950 a Committee, the Dental Mechanic Registration Committee was appointed with the following terms of reference, *viz:* —

> "to consider and report on the desirability or otherwise of further amending the Colonial Medical Services (Consolidation) Ordinance, Cap. 186, as amended by the Colonial Medical Services (Consolidation) (Amendment) Ordinance, 1939, for the purpose of extending its provisions to enable dental mechanics who have acquired the necessary skill and competence to be registered as dentists and thereby be permitted to practise dentistry."

The plaintiff was a member of that Committee and whilst the Committee was still deliberating (it first sat on the 20th April, 1950, held its final meeting on the 5th September, 1950, and signed its report on the 14th September, 1950) he gave notice (namely on the 7th July, 1950) as a member of the Legislative Council of the Motion which was put in evidence as Exhibit B. That Motion sought the recommendation of the Legislative Council for an amendment of the law so as to make provision for the seizure and destruction by the police of all tools, chattels and appurtenances found in possession of anyone for the purpose of the illegal practising of dentistry. The plaintiff had given notice of a Motion in identical terms as long ago as the 17th February, 1949, which was about one year before the appointment of the Dental Mechanic Registration Committee. He has given what he says are the reasons why that Motion lapsed and was never debated and the reasons why he did not take steps to give fresh notices of the Motion before the 7th July, 1950. I do not propose to discuss all those reasons but will say that I am prepared to accept the reasons why the original motion lapsed but consider that it should have been possible for the plaintiff to have found time, busy man as he doubtless was, to have given fresh notice of the Motion long before the 7th July, 1950, had he desired to do so. We have had considerable evidence and argument as to whether or not the Motion of which notice was given on the 7th July, 1950, was a fresh Motion or merely a *retabled* Motion. It does not seem to me to make very much difference what it is called as the important point is whether or not it was proper and opportune for the plaintiff to have given notice of the Motion at a time when he was a member of the Dental Mechanic Registration Committee *and* when that Committee was still deliberating. I have taken due regard in this connection to the contention of the plaintiff that the subject matter of his Motion was essentially different from that which was being deliberated by the Committee. I am satisfied that the plaintiff was within his strict legal and constitutional right as a member of the Legislative Council in giving notice of the Motion when he did, namely on the 7th July, 1950, but I am also satisfied firstly, that his action in so doing was un-

wise, untimely and such as to invite adverse criticism and secondly, that his action was a proper subject of comment by the defendants as being a matter of public interest. I do not feel justified in holding that the plaintiff's action in giving notice of the Motion on the 7th July, 1950, was a deliberate attempt to influence the findings of the Committee but I consider that some of the members of the Committee might, even unconsciously, have been influenced by the plaintiff's action into a less favourable attitude towards the case of the Dental Mechanics if only when they came to frame their Report. It is true that the Dental Mechanics had concluded their evidence before the date (7th July, 1950) of the giving notice of the Motion but the facts remain that the Committee had not yet signed its Report and there was always the possibility that the Dental Mechanics might have wished to tender further evidence to the Committee. If I am right in the views I have been expressing in this part of the case then the action of the plaintiff could, I think in a wide sense, be said to support the use of the words "intimidate" and "bedevil".

I turn now to consider whether or not the alleged defamatory words are defamatory of the plaintiff and for that purpose I adapt the following definition to be found at page 372 of the 10th Edition of Salmond on the Law of Torts: —

> "A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends, that is to say, to lower him in the estimation of right thinking members of society generally and in particular to cause him to be regarded with feelings of hatred, contempt, ridicule, fear, dislike or disesteem."

With regard to the proper construction to be placed upon the passage containing the alleged defamatory words, Counsel for the defendants has, pressed me with the argument that the meaning of the words—

> "Of this we should have no doubt were it not that among a number of respected and reputable personalities, there are also some who by their action in the past have shown that they will stop at little to defeat the applicants' pretensions".

is that all the members of the Committee including the plaintiff, Dr. Gonsalves, were respected and reputable persons. I find myself quite unable to accept his contention. It is essential in construing any words to pay due regard to the context in which the words occur and to the passage as a whole in which the words occur. In determining whether a statement is defamatory or not, the meaning to be attributed to it is not necessarily the meaning with which the defendant published it, but that which is, or may be presumed to be reasonably given to it by the persons to whom it is published. The statement means in law what it naturally and reasonably means to them. After careful consideration of all the evidence in this action and of all the submissions of Counsel for the defendants, I am satisfied that the passage complained of in this action *prima facie* and on the face of it in effect says this of the plaintiff, viz: —

> The Dental Mechanic Registration Committee appointed by

Government to investigate the claims of certain. Dental Mechanics and Dental Assistants to practise dentistry contains amongst its members a number of respected and reputable persons but it also included the plaintiff who was not a respected and reputable person; that the plaintiff was not a person who would discharge his duties as a member of that Committee thoroughly or discharge them honestly in the sense that he would not view fairly, honestly and objectively the evidence submitted to the Committee; that the plaintiff had misused his position as a Legislator to propose the enactment of a law to confiscate the equipment of anyone practising dentistry illegally and that his actions in proposing the enactment of such a law was an attempt to intimidate and bedevil the Dental Mechanics at a critical stage of the matter; that it can be seen from plaintiff's actions in the past that he would be unscrupulous if that were necessary to defeat the claims of the Dental Mechanics and Dental Assistants; that the plaintiff was a person who was unfit to be a member of the Legislative Council of the Colony. I am accordingly of the opinion that the passage complained of in this Action is defamatory of the plaintiff.

I turn now to consider the defence of fair comment which defence assumes that the matter to which it relates would be defamatory if it were not protected by the defence of fair comment (Hunt v. Star Newspaper Co. Ltd. (1908) 2 K.B. 323). It is a good defence to a libel that the words complained of are a fair comment on a matter of public interest. The right is available to everyone for it is not the peculiar privilege of the Press. It has been said that a newspaper has the right, and no greater or higher right, to make comments upon a public officer or person occupying a public situation than an ordinary citizen would have (Langlands v. John Long and Co. Ltd. (1916) S.C. (H.L.) at p. 110) and again "To whatever lengths the subject in general may go, so also may the journalist but apart from statute law, his privilege is no other and no higher. The responsibilities which attach to his power in dissemination of printed matter may, and in the case of a conscientious journalist do, make him more careful, but the range of his assertions, his criticisms or his comments, is as wide as, and no wider than, that of every other subject. No privilege attaches to his position" (Crawford v. Albu (1917) App. Div. (Sup. Court of S. Africa at p. 117 as cited in Gatley on Libel and Slander 2nd Ed. p. 368). In order to succeed in a defence of fair comment the words complained of must be shown to be fair comment on some matter of public interest. I am satisfied as I have said before, that the plaintiff's action in the matter of the Motion was a matter of public interest and a fit subject of comment, even of severe comment, but I am not satisfied that the comment applied to it by the defendants has been fair comment as recognised by the authorities. There is no specified definition of fair comment but the authorities make it clear that in order that a comment may be fair the following conditions must be satisfied (Catley 2nd Ed p. 379). —

(a) It must be based on facts truly stated;
(b) It must not contain imputations of corrupt or dishon-

ourable motive on the person whose conduct is criticized save in so far as such imputations are warranted by the facts;

(c) It must be the honest expression of the writer's real opinion.

Comments, in order to be fair, must be based upon facts and if a defendant cannot show that his comments contain no mis-statements of fact he cannot prove a defence of fair comment (Digby v. Financial News (1907) 1 K.B, 502 per Collins M.R. p. 507 and again, "if what is intended to be comment appears in the guise of a fact and there is nothing to show on what it is based, then it must be treated as a statement of fact which may be protected by a plea of justification, but not by one of fair comment." per Bristowe J. in Crawford v. Albu (1917) South Africa L.R. (App. Div.) at p. 105 as cited in Gatley 2nd Edition p. 376) and again "Any matter which does not indicate with reasonable clearness that it purports to be comment and not statement of fact cannot be protected by the plea of fair comment." (Hunt v. Star Newspaper Co. Ltd. (1908) 2 K.B. 320. It is in my view perfectly clear that the words". .....there are also some who, by their actions in the past have shown that they will stop at little to defeat the applicant's pretensions" relate and refer to the plaintiff, and carry the suggestion that the writer knows of discreditable actions in the past by the plaintiff, but he does not specify those facts so as to give the public an opportunity of judging the nature of the comments, if any, made upon them. I have considered whether those words can be said to refer with reasonable clearness to the plaintiff's action in giving notice on the 7th July, 1950 of his Motion but have reached the conclusion that they do not so refer. I hold therefore that the suggestion of discreditable actions in the past is a mis-statement of fact which is not protected by the plea of fair comment and that the plea of fair comment for that reason fails. I am of the opinion that the plea of fair comment fails on this further ground. The general rule is that a man's moral character is not a permissible subject of adverse comment and that is so even though the person attacked occupies some public position which makes his character a matter of public interest. This limitation upon the right of criticism was established by the judgment in Campbell v. Spottiswoode (1863) 32 L.J.Q.B. 196 in which it was said "A writer in a public paper may comment on the conduct of public men in the strongest terms, but if he imputes dishonesty he must be prepared to justify". Again (at p. 199) "It seems to me that a line must be drawn between hostile criticism on a man's public conduct and the motive by which that conduct may be supposed to be influenced; and that you have no right to impute to a man in his conduct as a citizen—even though it be open to ridicule or disapprobation —base sordid, dishonest, and wicked motives unless there is so much ground for the imputation that a jury shall be of opinion not only that you have honestly entertained some mistaken belief upon the subject, but that your belief is well founded and not without cause." Sitting as a Jury I am not of the opinion that the second

defendant's belief as to the alleged base and improper motives of the plaintiff were on the facts truly stated well founded and with cause. I accordingly hold that his adverse comments upon the plaintiff's character and motives were not a permissible subject of adverse comment.

I am not satisfied that the defendants have been actuated by malice in the comments they made.

In the result then I hold that the defence of fair comment has failed and that the defendants have libelled the plaintiff.

Now as to damages. The plaintiff has not proved any special damage but he still has the right to recover general damages for the law presumes that the publication of a libel has of itself a natural and necessary tendency to injure the plaintiff and though the plaintiff offers no evidence of actual damage the Jury or Judge is not obliged to award nominal damage only, (Halsbury 2nd Edition Vol. 20 p. 507) though in such circumstances it is generally nominal damages which are awarded. In all the circumstances of this case including the fact that the libel was disseminated of a public man in a newspaper with a wide circulation, I do not consider the damages should be restricted to nominal damages. In an action for libel tried before a Judge without a Jury the Judge is able to express disapproval, which I do, of the libel on the plaintiff and may take that fact into consideration in assessing the amount of damages the defendants should pay.

I assess the damages at $480:—(Four hundred and eighty dollars) and enter judgment against the defendants for that sum with costs to be taxed. I certify fit for two counsel.

Judgment for plaintiff with costs.

Solicitors:

H. C. B. Humphry's for the plaintiff.

A. G. King for the defendants.

DANIELS v. GORDON

(In the Supreme Court, Civil Jurisdiction (Stoby J.) February 19, 20, May 11, 1953).

Immovable property—Opposition—Abandoned—Transport obtained—Claim for possession—Resisted by previous opponent.

The owner of property, Mrs. de Gracia, sold it to the plaintiff. When transport was advertised the defendant opposed but the proceedings were never continued to a conclusion and were deemed abandoned and incapable of being revived under the Rules of Court 1900.

The transport was advertised again and passed to the plaintiff without opposition.

The defendant remained in possession and when the plaintiff sought to obtain a declaration of ownership and to have possession he pleaded that he had purchased from one Stephenson who had purchased from Mrs. de Gracia and that both purchases were prior in point of time to the plaintiff's.

Held: On the facts there was no evidence that Stephenson had concluded a binding agreement with Mrs. de Gracia although he had purported to sell her property to the defendant.

The defendant could not claim that de Gracia was holding the property in trust for him because he had abandoned his opposition to her transport allowed the plaintiff to obtain title and was guilty of laches.

S. L. van B. Stafford Q.C with *W. R. Adams* for the plaintiff.

P. A. Cummings for the defendant.

Stoby J.: In this action the plaintiff claims to recover possession of certain land at Buxton owned by him. mesne profits, damages and an injunction restraining the defendant, his servants or agents from erecting or maintaining any buildings on the said land.

The land which the plaintiff owns was, in the year 1948 owned by one de Gracia. It was purchased from her by the plaintiff on the 23rd August, 1948, and transport advertised by her to him in the Official Gazette dated the 28th August, 1948 and 4th September, 1948 for the first and second times respectively. On the 9th September, 1948, the defendant opposed the passing of the transport on the ground that the property sought to be transported was purchased by him from one William A., Stephenson on the 3rd September, 1946, for $180:00 and that in consequence of such purchase he took possession of the said property. For reasons immaterial to this case the opposition action was never brought to hearing and on the 10th July, 1950, the action was deemed abandoned and incapable of being revived in accordance with the Rules of Court, 1900. Order XXXII, Rule 5(2). As opposition to the passing of the transport no longer existed the property after due re-advertisement was transported to the plaintiff on the 14th August, 1950.

From the documents tendered in this action Ex. G. and G.I., dated the 3rd September, 1946, and 12th December, 1946, there is no doubt that one William A. Stephenson did purport to sell the identical property to the defendant. Indeed, immediately before the hearing of this action, I heard and determined the case of Gordon and Stephenson in which the present defendant was then the plaintiff and in those proceedings he sought to obtain against

Stephenson an Order for specific performance of the 1946 contract for sale of the land. I dismissed that action as I held that Stephenson, when he purchased from de Gracia, was acting as the agent of Gordon but Counsel for the defendant asked me to ignore, as I think I ought to ignore, all evidence in that case which has not been offered in this case. This means that I am not free to find in this case, that Stephenson was an agent of the defendant Gordon, unless evidence upon which I can so find has been led. Mr. Cummings' view that this case should be decided without reference to the previous one is consistent with his insistence at all times that Stephenson was never the agent of Gordon, and quite understandably, he does not wish to adopt a finding of fact which he contends is erroneous. That being the position the defendant's defence is that, he purchased the land from W. A. Stphenson in 1946, and was put into possession of it, and that when the plaintiff purchased, he knew that the land had already been sold.

If that defence is accepted Counsel for the defendant submits:

1. That I can find either:
   (a) that there was an uncompleted transaction between Mrs. de Gracia and Gordon. Stephenson being Gordon's agent; or
   (b) two uncompleted transactions, one between Mrs. de Gracia and Stephenson and another between Stephenson and Gordon.

2. That whatever finding is made there emerges clearly the relationship of vendor and purchaser with de Gracia a constructive trustee either for Gordon or Stephenson as the case may be.

Having regard to the fact that the evidence in the previous case was purposely not admitted in this case, there is not a tittle of evidence on which I can find that Stephenson was Gordon's agent. It is not so pleaded by Gordon, although it is pleaded I the plaintiff in the amended pleadings, not so asserted by defendant or any of his witnesses and not so stated by plaintiff or any witnesses. The evidence therefore on which I am asked to hold that de Gracia is a constructive trustee for defendant is the mere proof that defendant purchased from Stephenson. Counsel for defendant founds this proposition on the well-known equitable principle that the vendor of land becomes, from the date of the contract of sale, a constructive trustee for the purchaser. But on the facts proved in this case, Stephenson is not and never was the owner of the land. The argument presented on behalf of the defendant is based on non-existent facts. The whole of defendant's argument must rest on proof that Stephenson sold a property which he owned and in this case for all that has been proved, Stephenson may have been obtaining money by a false representation. The truth of the matter is that the defendant was in a dilemma. He could not call Stephenson because he would not support his case and he could not prove ownership in Stephenson without calling him. When I say proof of ownership, I do not mean that it was necessary to prove that Stephenson held a trans-

port for the property but that there was a binding contract between him and de Gracia. Until I could find that de Gracia had sold to Stephenson, I could not hold that she was a constructive trustee for Stephenson and a fortiori for the defendant. Assuming that I am wrong in holding that there is no evidence on which I can find that Stephenson purchased from de Gracia, it would still be necessary in order to uphold the submissions on behalf of the defendant to find that the plaintiff purchased with knowledge of the trust. A bona fide purchaser of land without knowledge of the original sale, obtains a good title thereto. Williams on Vendor and Purchaser, Vol. 1, 3rd Edition, page 50, Note (4).

The evidence on which it is suggested that the plaintiff had notice of a previous sale was the plaintiff's admission that he had heard that the defendant had purchased the property and the defendant's evidence that Stephenson informed plaintiff that the rents must be paid to defendant. It struck me that when plaintiff said he heard of defendant's purchase he was probably referring to rumour in the district in which no reliance should be placed. Nor do I believe that Stephenson took defendant to plaintiff. My view is that plaintiff did pay rent on one occasion because the defendant must have said that he had purchased, but I am satisfied that on enquiry Mrs. de Gracia denied all knowledge of a sale. I do not accept the other portions of defendant's evidence as to picking coconuts and being put in possession. He was the owner of a house on the land before his purchase, so his collecting rent from his tenant could hardly be regarded as an act of possession.

The absence of Stephenson from the witness box and the absence of reliable or any evidence regarding the alleged contract between de Gracia and Stephenson is of the utmost importance on this point. If de Gracia had indeed sold, the contract might have contained a provision authorising the owner to re-sell if the purchaser was unable to pay the purchase price or the contract might have been rescinded for breach of some term of the contract. All of this lies in the realm of speculation and in the light of what took place subsequently as related hereunder, I cannot come to the conclusion that plaintiff had notice, actual or constructive.

In England under their system of conveyancing there is provision for a purchaser of land registering his purchase as a land charge. Such a registration operates as actual notice. In this Colony no such provision exists. A purchaser who has heard that ownership of the land is disputed can protect himself by paying a small deposit and. await developments when transport is advertised. Our law enables a person claiming an interest in the land to oppose. The defendant having opposed the transport to the plaintiff and his opposition proceedings having been abandoned could not oppose again unless there was a fresh advertisement as distinct from a re-advertisement.

advertisement as distinct from a re-advertisement. (Worley C J in Marks vs. Butts *et al* (1950) L.R.B.G. 44)

Had he attempted to proceed by way of injunction to restrain de Gracia from transporting to the plaintiff the defence of estoppel could have been successfully raised against him. Marks vs Butts (supra) or the defence of laches—Boland J. in Sirpaul vs. Dennison. Action No. 379 of 1946. Since he neglected to take the proceedings a second time in an effort to restrain the plaintiff from obtaining title, I am of opinion that the plaintiff was entitled to assume that the rumours he heard were groundless and that Mrs. de Gracia was speaking the truth when she said she had not sold. Furthermore since, if he had taken proceedings, those proceedings must have failed, it would be ridiculous to permit defendant in these proceedings to contend that the property was being held in trust for him when he sat by and allowed his trustee to dispossess herself of it.

As the defendant collected the sum of $6:00 per month from his tenant who is in occupation of a building used as a shop, I consider the sum of $3:00 per month a reasonable sum to fix as mesne profits.

The order of the court is:

(a) that the plaintiff is entitled to the possession of the W. 1/2 of lot 146 Section A, Friendship;
(b) that the defendant deliver up possession to the plaintiff of the said land on or before the 1st August, 1953;
(c) that the defendant pay to the plaintiff the sum of $108:00 as mesne profits to the 31st July, 1953;
(d) defendant to pay the plaintiff's costs.

Certified fit for counsel.

Solicitors:

L. L. B. Martin for the plaintiff.

I. G. Zitman for the defendant.

BUDHOO v. ALLIM, as the Executor of the estate of Sogra or Soogra, deceased, and Budho added defendant by order of Court dated 24th March, 1952.

(In the Supreme Court, Civil Jurisdiction (Stoby J.) April 29, 30, May 13, June 5, 1953).

Immovable property—Opposition—Pleading—Amendment—Rules of Court (*Deeds Registry*) 1921.

At the trial of this action the plaintiff sought to amend his Statement of Claim by introducing an allegation not contained in the reasons for opposition.

Held: In an opposition action where an amendment enlarges or alters the plaintiff's case as set out in his reasons for opposition, the amendment ought not to be allowed, but where it corrects an error or explains the reasons for opposition, it is permissible.

W. J. Gilchrist for plaintiff.

N. O. Poonai for first defendant.

L. M. F. Cabral for second defendant.

Stoby J. : When the hearing of this case was resumed on the 13th May, counsel for the plaintiff applied for leave to amend paragraph 2(1) of his statement of claim by permitting him to plead that a receipt dated the 1st July, 1949, given by the first defendant: to the plaintiff acknowledging that the sum of $75.00 was paid on account of the purchase price of the property, the subject matter of this action was a sufficient note or memorandum signed by the party to be changed within the meaning of section 3 of the Civil Law of British Guiana Ordinance, Chapter 7. The amendment desired was reduced to writing and placed on the file as part of the record.

Mr. Cabral for the second defendant objected to the plaintiff being permitted to amend and submitted that the application infringed rule 9 of the Rules of Court (Deeds Registry) 1921.

It is settled law that in what is commonly called an opposition action an opponent may not allege in his statement of claim any reason for opposition other than those contained in his reasons for opposition, unless the Court on summons has granted leave. Such leave to be given before delivery of the statement of claim. De Silva v. Sukra (1942) L.R.B.G. 153; Blackett v. Pollard (1942) L.R.B.G. 71. But in Sooklall v. Gourisankar and Lachun (1942) L.R.B.G 56, Luckhoo J., allowed an amendment on the ground that the proposed amendment was not an alteration of the grounds or reasons for opposition but was intended to correct an error in the description of the land opposed.

According to the above authorities the test is whether the proposed amendment would enlarge or alter the plaintiff's case as envisaged by his reasons for opposition.

In his statement of claim incorporating these reasons, the plaintiff pleads that the defendant had entered into a contract with him for the sale of land on the 28th January, 1950. It is not now open to him to allege an earlier or later contract, for the

moment he does so, his evidence would be inconsistent with the contract on which his opposition is based. In this case the time when the contract was entered into may be an important or even the decisive factor in the case and to grant the amendment as applied for would defeat the provisions of rule 9.

If, however, the purpose of the amendment is not to set up a fresh contract, but merely to plead the circumstances leading up to the contract of the 28th January, 1950, then such an amendment, would not alter or enlarge the grounds of opposition and can be granted. The proposed amendment contains a paragraph which claims that the receipt of the 1st July, 1949, is a note or memorandum within the meaning of section 3 of the Civil Law Ordinance Chapter 7. This implies that the plaintiff intends to rely on a contract of the 1st July, 1949 as an alternative to the contract originally pleaded. This he cannot do. Furthermore, the original allegation was that $75 *has* been paid on account of the contract of the 28th January, 1950. The revised allegation is that $75 *had* been paid on the 1st July, 1949. This is self contradictory for the reason that no contract had been entered into when the $75 was paid. If $75 was paid it was on an uncompleted contract which was not concluded until 28th January, 1950. It seems then that the amendment as framed is a belated attempt to change the plaintiff's case.

I would be prepared to allow an amendment which will clarify the plaintiff's case without changing it. The evidence is that $75 was paid on 1st July, 1949, and a receipt given. There can be no objection to substituting "had" for "has" and concluding at the word plaintiff.

The amendment is allowed up to the word plaintiff and refused as to the rest.

Solicitor: Carlos Gomes for the plaintiff.

HARVEY ALUMINUM INC. AND ANOR. v. REYNOLDS METALS COY., AND ANOR.

HARVEY ALUMINUM INC., by their joint and several attorneys and attorney Howard L. Heckmann and Carlos Gomes, and HARVEY MACHINE CO., INC., by their joint and several attorneys and attorney Howard L. Heckman and Carlos Gomes,

Plaintiffs,

v.

REYNOLDS METALS COMPANY, by their joint and several attorneys and attorney Edward Victor Luckhoo and Claude Lloyd Luckhoo, and BERBICE COMPANY, LIMITED (in voluntary liquidation),

Defendants.

(In the Supreme Court, Civil Jurisdiction (Stoby J.) March 30, 31; April 8, 9, 10; May 15, 21; and June 12; 1953)

Crown Lands Regulations—Lease—Transfer—Opposition—Practice and procedure—Misjoinder—Immovable property—Right title and interest—Power of attorney—Evidence Ordinance—Ratification.

Regulation 13 of the Crown Lands Regulations 1919 is as follows:

"Any person may oppose any transfer on the ground that he has any right, title or interest in the lease, licence or permission or that he is a creditor for a liquidated sum of the person applying for such transfer to be made, an d if such person give notice of opposition in writing to the Commissioner within seven days after the last publication of the notice, such transfer shall not be approved until the opposer has withdrawn his opposition or his claim has been rejected by a Court of law: Provided always that if within seven days after notice of opposition has been given legal proceedings to enforce such claim are not commenced and notice of them given in writing to the Commissioner, such opposition shall be no bar to the transfer. On production to the Commissioner of a certificate from the Registrar or the Clerk of the Magistrate's Court as the case may be that such claim has been satisfied or dismissed, the application shall be proceeded with as if no notice of opposition had been giver.'.

The second named defendants were the holders of a lease and permission under the Crown Lands Ordinance and advertised transfer of them to the first-named defendant.

The first-named plaintiffs entered opposition and filed a writ written seven days.

The second-named plaintiffs were joined in the writ although they never entered opposition.

Held: The second-named plaintiffs were improperly joined. When the first-named plaintiffs entered opposition the power of attorney made in favour of their constituents in this Colony was bad for want of compliance with the Evidence Ordinance.

Before the writ was filed a power of attorney in favour of the same persons, properly executed, was filed in the Deeds Registry in accordance with the legal requirements of this Colony.

Held: As the principals could have entered opposition themselves such opposition being neither illegal or void, the second power ratified the acts of the principals agents and the opposition was properly brought.

Eze Anyanwu Ogueri v. The Argosy Company Limited et al (1952) L.R.B.G. considered.

The defendant filed a motion praying that the plaintiffs' opposition should be struck out on the grounds above mentioned and in addition.

(a) That regulation 13 and 14 of the Crown Lands Regulations limited the Court's jurisdiction in that after filing notice of opposition the sub-sequent procedure except in a liquidated claim was not by way of filing a writ but was dependent on the Governor's discretion, and.

(b) In any event the transfer of a lease was not a right title and interest in land.

Regulation 14 provides:

"If any notice of opposition has been given.....the Commissioner shall report the opposition....to the Governor, who shall make such order as to the transfer as he may think fit."

Held: It is the Governor's function to decide whether plaintiffs or the first-named defendants are suitable as prospective lessees but it is the Court's function to restrain the holder of a lease of Crown Lands transferring the lease to a third person in breach of a contract.

Held further: The lease in question was immovable property and as it was alleged in the Statement of Claim that the first-named defendants had promised to abandon the lease and assist the plaintiffs to obtain it but were transferring it instead, the plaintiffs had a right, title and interest in it.

S. L. van B. Stafford, Q.C., L.M.F. Cabral and *P. A. Cummiongs* with him for the plaintiffs.

E. V. Luckhoo, L. A. Luckhoo and *C. L. Luckhoo* for the first-named defendants.

H. C. Humphrys Q.C., W. J. Gilchrist with him for the second-named defendants.

Stoby J.: This is a motion by the defendants Reynolds Metals Company hereinafter referred to as Reynolds and Berbice Company Limited (in voluntary liquidation) hereinafter referred to as Berbice praying that the writ of summons and statement of claim filed by the plaintiffs Harvey Aluminum Inc., and Harvey Machine Co., Inc., be set aside for reasons which will be fully discussed hereunder.

Berbice now in voluntary liquidation are the lessees of a tract of Crown land for a period of 99 years and the occupiers of another tract of Crown land under Permission for a period of 5 years.

In British Guiana there are four categories of land. There is Crown land, Colony land, freehold land alienated prior to 1803 and freehold land alienated by the Crown. Ninety percent of the land in the Colony is Crown land. It is the property of the Crown and can only be alienated by the Governor acting on behalf of the Queen. The manner in which this land is dealt with for the purposes of these proceedings is regulated by the Crown Lands Ordinance, Chapter 171 and the Crown Lands Regulations. The Lease and Permission in favour of Berbice were granted in accordance with the Crown Lands Ordinance.

In the Official Gazette of the 31st January, 1953, 7th February, 1953 and 14th February, 1953, Berbice advertised a transfer of their right, title and interest in and to the aforementioned Lease and Permission to and in favour of Reynolds. On the 14th February, 1953, the plaintiffs Harvey Aluminum Inc., by attorney Carlos Gomes opposed the transfer and on the 21st February, 1953, the same plaintiffs and in addition the second plaintiffs Harvey

Machine Co.Inc. by their attorneys and attorney Howard L. Heckman and Carlos Gomes filed a writ of action claiming: —

(a) a declaration that the opposition by the first-named plaintiff is just legal and well founded, and

(b) an injunction restraining the defendants their servants and agents from in any way approving or concurring in aiding or affecting the transfer to, and acquisition by, the defendant Reynolds Metals Company of the Lease and Permission held by Berbice as aforesaid.

Before dealing, with the specific grounds on which it is submitted that the writ of summons and statement of claim ought to be set aside, I propose to comment on the principles on which the court acts in agreeing or refusing to set aside a writ of summons as the case may be.

In this Colony, the equivalent of the English Order 25 rule 4 is Order 17, rule 30, and is as follows:—"The Court may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or give judgment as may be just".

Under the above rule the nature of the action or the defect in the pleading must appear by the pleadings or particulars, and affidavit evidence is not admissible. See Davey v. Bentinck 1893 1 Q.B. 188; Republic of Peru v. Peruvian Guano Co., Ch.D. 498 and cases cited in the annual practice 1952 ed. p. 421.

The power of the Court to strike out pleadings is not confined to the authority given to it under Order 17 rule 30. The Court has an inherent jurisdiction to protect itself from abuse and when acting under this inherent jurisdiction, evidence by affidavit is receivable to show that a pleading is an abuse of the process of the Court. In Metrop Bank v. Pooley 10 App. cases 210, it was pointed out, however, that the rules extended the inherent jurisdiction of the Court.

The Earl of Selbourne L.C. in his speech at page 214 said "Before the rules were made under the Judicature Act, the practice had been established to stay a manifestly vexatious suit which was plainly an abuse of the authority of the Court, although so far as I know, there was not at that time either any statute or rule expressly authorising the Court to do it. The power seemed to be inherent in the jurisdiction of every Court of Justice to protect itself from the abuse of its own jurisdiction. Another reason why that should have been very rarely done before the recent rules is this, that if the objection was one which could be raised on the face of the pleadings, that always might be done by demurrer. But when the rules of 1883 were settled and came in force, which they did before the present action was brought, it was thought that the formal and technical practice of demurrer might with advantage be abolished, and that more easy and summary, or at least equally summary modes of applying to the court to get rid of an action on the face of it manifestly groundless might be substituted."

Accordingly, in deciding whether I shall grant the defendants' application or reject it, I must decide from the affidavits, the pleading or admitted facts whether the plaintiffs' case is obviously frivolous or vexatious or an abuse of the Court's process, or whether no reasonable cause of action is disclosed. The Court's power is not limited to cases where the facts are not in dispute as reference to Lawrence v. Lord Norreys 15 App. cas. 210 will illustrate. I shall bear in mind, though, that the inherent jurisdiction to strike out ought to be sparingly exercised and only in very exceptional cases. (Lord Herschall in Lawrence v. Norreys). Nor shall I be unmindful that the mere fact that a case on the pleadings appears to be weak and not likely to succeed is no ground for striking it out. Moore v. Lawson 31 T.L.R. 418.

The first point taken by Mr. Lionel Luckhoo on behalf of the first defendants Reynolds is that the second-named plaintiffs never entered opposition to the transfer of the Lease and Permission and consequently were improperly joined in the writ and statement of the claim. Such he submits is the affect of regulation 13 of the Crown Lands Regulations 1919.

As reference to this regulation will occur frequently in this judgment, I shall set it out here in full: —

> "Any person may oppose any transfer on the ground that he has any right, title or interest in the lease, licence or permission or that he is a creditor for a liquidated sum of the person applying for such transfer to be made, and if such person give notice of opposition in writing to the Commissioner within seven days after the last publication of the notice, such transfer shall not be approved until the opposer has withdrawn his opposition or his claim has been rejected by a Court of law: Provided always that if within seven days after notice of opposition has been given legal proceedings to enforce such claim are not commenced and notice of them given in writing to the Commissioner, such opposition shall be no bar to the transfer. On production to the Commissioner of a certificate from the Registrar or the Clerk of the Magistrate's Court as the case may be that such claim has been satisfied or dismissed, the application shall be proceeded with as if no notice of opposition had been given."

There is little room for argument that the undoubted effect of regulation 13 is that, in the absence of opposition within the prescribed time, the Commissioner of Lands and Mines unless instructed to the contrary by the Governor will execute a transfer of a lease or grant permission to occupy. It is admitted that the first-named plaintiffs gave notice of opposition within seven days of the last advertisement and thereby complied with the provisions of regulation 13. It is apparent from the record that the first-named plaintiffs filed a writ within seven days of their notice of opposition and assuming that the correct procedure was to issue a writ, then in this respect, too, they complied with regulation 13. Such being the case, the Commissioner of Lands and Mines was prevented from executing the transfer because of the first plaintiff's opposition.

Counsel for the second-named plaintiffs contends that in the light of the above facts, the subsequent proceedings were regulated by the Rules of Court 1900, and the joinder of the second plaintiffs valid and proper.

The simple issue here is whether the Rules of Court 1900 govern this action or not. Section 75 of the Supreme Court of Judicature Ordinance Chapter 10 provides, among other things, for the making of rules and orders for regulating the pleading, practice and procedure, the execution of process, the duties of the officers of the Court, and the transaction of business during any vacation or non-session thereof. The Rules of Court 1900 were made under the authority of that ordinance rule 2 of which as amended in 1910 is "subject to the provisions of the following Rules of this order, all proceedings in the civil or appellate jurisdiction of the Supreme Court save and except so far as special provision is made by any ordinance shall be regulated by the Rules and not otherwise."

The regulations make no provision for the time within which a statement of claim or defence should be filed and unless the Rules of Court apply, a situation may arise where an opponent can delay the passing of a lease indefinitely. If the Rules do not govern proceedings subsequent to opposition when the regulations are silent, an opponent who has filed his writ can decline to file a statement of claim.

In Chapman and Archer No. 637 of 1949, Worley C.J. had to consider whether the 1900 Rules governed proceedings brought as a result of an opposition to the passing of a transport and after analysing the Deeds Registry 1921 rules, commonly called Opposition Rules said: "In my judgment in Mankuar v. Pearson, action No. 288 of 1948, I expressed the view that after the opponent has complied with Rule 7 of the Rules of Court (Deeds Registry) 1921, the procedure in his action is (save in cases where rule 9 applied) governed entirely by the Rules of Court 1900. I might perhaps more correctly have said "save where these rules make express provision to the contrary" for rule 10 makes special provision governing actions, but I adhere to the principle expressed in that passage."

He then permitted a plaintiff who had filed a specially indorsed writ following a notice of opposition, to amend the statement of claim, by including, the reasons of opposition which had been omitted.

But an analysis of the Crown Lands Ordinance and regulations made thereunder show that special provision is made with respect to the transfer of leases. Notice of opposition and the filing of the writ must be performed within a limited time, the reason for which is that the mere filing of documents enables the opposer to obtain what is in practice an interlocutory injunction. In the normal course a litigant who desires to obtain an interim order by way of injunction must establish by affidavit a fair *prima* facie case and must in addition give an undertaking as to damages. But under the Crown Lands Regulations a great privilege is bestowed on an opposer however factitious the claim

may eventually prove to be. Good reason then there is for insisting that anyone who seeks to avail himself of this remedy must do so within a certain time or relinquish not his right to bring an action (this he can always do) but his right to obtain an interlocutory injunction without recourse to the Courts.

Fraser & another v. Bishop (1921) L.R.B.G. 21 was a case in which the defendant had levied on a property to satisfy a judgment obtained against a third person. The first plaintiff who claimed an interest in the property opposed the sale at execution and subsequently issued his writ and filed a statement of claim. When the action came on for hearing, Dalton J ordered the second plaintiff to be joined as he was the executor of a person who had purchased the lot at a prior execution sale. At the conclusion of the action, objection was taken to the joinder of the second plaintiff but Dalton J over-ruled it on the ground that the order for joinder was made by the court after the defendant had an opportunity of being heard and was not appealed against.

It may be noted that this case was an opposition to a sale of execution. The procedure to be adopted is defined by order 36 rules 42 to 44 and is similar to the procedure in opposition to transports and mortgages and not unlike regulation 13 of the Crown Land Regulations.

It does not appear that the rule requiring opposition to be entered before the issue of the writ was canvassed at the time when Dalton J made the order for joinder. The argument was not advanced until it was too late.

In any event the distinction between this case and Fraser and Bishop is that the provisions of order 14 rule 13 appear to have been complied with. It is the Judge who decides whether joinder is necessary, for the court retains a discretionary power to refuse the order—Lancaster Banking Co. v. Cooper 9 ch. D 594 where Jessell M.R. set aside a judgment and dismissed the action instead of joining another defendant.

In my view the second plaintiffs were entitled if so advised, to bring independent proceedings and apply if they thought fit for consolidation but to obtain the benefit of an interlocutory injunction without complying, with regulation 13 which imposes a time limit within which proceedings are to be taken, is contrary to the decision in Mabro v. Eagle Star 1932 1 K.B. 485 C.A.

The second plaintiffs, I find, are improperly joined and their name must be struck out the writ and statement of claim.

The second point taken on behalf of both defendants is an objection to the Court's jurisdiction. The argument may be summarised as follows: —

The Court has no jurisdiction to entertain this action because:—

(a) The Crown Lands Regulations 1919 limit an opponent who opposes on the ground that he has a right, title and interest in the lease, to giving notices of opposition in writing to the Commissioner of Lands and

Mines. The subsequent procedure rests with the Governor.

(b) Plaintiff's claim discloses no right, title and interest.

As stated in an earlier part of this judgment, the issue of Grants, Leases and Licences of Crown Lands are regulated by the Crown Lands Ordinance Chapter 171. Section 3 (b) of the Ordinance states "subject to the provisions of this Ordinance, or the Forestry Ordinance, the Governor in the name and on behalf of His Majesty, may grant leases of any Crown Lands or forests of the Colony for such terms and subject to such conditions (if any) as he thinks fit or as are provided by these regulations."

If, in accordance with this section, the Governor grants a lease of Crown Lands to a person or company, the ordinary relationship of landlord and tenant is immediately created. It does not follow that special rights or consequences unknown to the law, flow, because the owner is the Crown. The lease like any other lease entitles the lessee to the exclusive possession of the land subject only to any restrictive covenants contained in the lease. Like any other lessee, he is entitled to seek the protection of the Court if his lessor endeavours to act contrary to the terms of the lease.

In the absence, then, of some express and explicit provision in the Ordinance or regulations ousting the Court's jurisdiction, it is the undoubted right of lessor, lessee or anyone interested in the lease to approach the Courts of the Colony.

The cases cited by Counsel for the defendants in their careful and ingenious argument on this aspect of the motion do not derogate from the correctness of the above statement.

The principle that the case of Wilkinson v. Barking, Corporation 1948, 1 All E.R. 564 re-affirmed was what was enunciated by the House of Lords in Passmore v. Oswaldwinkle Urban Council 1898 A.C. 394. In the former case, Asquith L.J. cited the Earl of Halsbury as saying in the latter case "the principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law."

In the Wilkinson and Barking Corporation case, the plaintiff who was employed by a local authority resigned his post. The local authority decided: he was not entitled to an annual superannuation allowance under the local Government Superannuation Act 1937. He brought an action claiming a declaration that he was. The local authority relied on section 35 of the Act the relevant portion of which was "Any question concerning the rights or liabilities of an employer of a local authority.....shall be decided in the first instance by the authority concerned and if the employer is dissatisfied with such decision.....shall be determined by the Minister, and the minister's determination shall be final". It was held that the court had jurisdiction to decide whether or not it could deal with the matter but that section 35 of the Act applied and the employee had no cause of action.

Again in East Midlands Gas Board v. "Winchester Corporation (1953) 1 Weekly Notes 54, Hallet J. said at page 58 "where the legislature has thought it proper to lay down that the determination of a certain question should be made by some authority other than the courts, then the courts have no jurisdiction to over-ride what Parliament has so laid down".

It is said that regulations 13 and 14 deprive the Courts of its jurisdiction or to be more exact, limit the Court's jurisdiction. The words relied on are in regulation 14. "If any notice of opposition has been given .... the Commissioner shall report the opposition .... to the Governor, who shall make such order as to the transfer as he may think fit".

But surely the other regulations must not be ignored and the whole scheme of the regulations must be considered if one is to place the correct interpretation on regulation 14.

Regulation 11 permits a grantee to transfer lease or mortgage the land comprised in the grant, subject to the provisions of the ordinance and provided the conditions of the lease are complied with. A grantee may deal with the land as if such land was private land.

Regulation 13 as we have seen makes provision for filing oppositions and contains the important words that a transfer shall not be approved until the opposer has withdrawn his opposition or his claim has been rejected by a court of law. It would be astounding if the legislature after bestowing on a grantee the right to alienate his interest in the land and after recognising the jurisdiction of the Magistrates and Supreme Courts to adjudicate in respect of liquidated claims deprived these same courts of the right to decide questions of law in respect of the land. Had that been the intention, no more successful way of concealing that intention could have been devised than the language used in regulation 13.

The lease in favour of Berbice a copy of which was tendered by consent, can be looked at to see whether any assistance can be derived from a perusal of its contents. It contains a clause requiring the lessees to obtain the consent of the Governor before transfer, or mortgaging their interest in the land. Once this consent has been obtained, there is nothing to prevent the lessees transferring the land. All that regulation 14 is designed to prevent is the possibility of Government giving its consent although a lessee owes money or has entered into a contract with a third person. Government, by this regulation, endeavours to be kept informed about the behaviour of its tenant. A claimant who is not diligent and vigilant may find the land transferred, but such a person cannot complain about Government's bona fides. Regulation 13 does not deprive a prospective claimant moving the Court for an injunction if he has omitted to comply with its provisions. He may even ignore Regulation 13 and approach the court. The argument for the defendants on this point is unconvincing because it assumes that these proceedings are aimed at fettering the Governor's prerogative to decide the

fate of Crown Lands. That is wrong. The proceedings are intended to prevent two companies from dealing with the land to the detriment of the plaintiffs.

The Court is being asked to prohibit Berbice from transferring to Reynolds. It is the Governor's function to decide whether Reynolds are suitable as prospective lessees or whether the plaintiffs are suitable. The Governor may cancel Berbice's lease, if grounds exist for so doing and, grant one in his absolute discretion to any fit and proper person. But it is the court's function and the court's function alone to restrain Berbice from transferring a lease which is in their name to a third person in breach of their contract, and regulation 13 does not oust nor was it intended to oust the court's jurisdiction.

The second limb of the submission as to jurisdiction can be dealt with briefly.

Section 3B(c) of the Civil Law of British Guiana Ordinance Chapter 7 provides that the relief by judgment for specific performance shall be granted in the case of immovable property on the same principles on which it is granted in England in the case of contracts relating to land or to interest in land. The lease, the subject matter of this case, is immovable property, (even though the proviso to section 13 of the Deeds Registry Ordinance chapter 177 exempts Crown Lands from its provisions), and ordinarily an agreement to assign the unexpired portion would clearly be an interest in land and therefore could be specifically enforced if in writing. Even where a lease contains an express provision against assigning or underletting without the consent of the lessor, an assignment in breach of the condition is not void. Paul v. Nurse 1828, 8 B & *C* 486. The lessor can treat the assignment as a cause for forfeiture and re-enter or can waive the breach and accept the assignee as his new lessee, Williams v. Earle 1868 L.R. 3 Q.B. 739 or can sue for damages.

I recognise that the instant action is not one for specific performance or damages or for a declaration that the second defendants as lessees assigned their right to the plaintiffs, but the foregoing discussion on a lessor's right to assign is valuable in determining whether the allegations made by the plaintiffs constitute a right, title and interest.

Paragraph 1 sub-paragraph (1) of the statement of claim alleges "that Berbice Company Limited sold to the Opposers in the month of November, 1952, for the sum of $400,000.00 United States currency all their physical and/or tangible assets in the county of Berbice and colony of British Guiana, contingent on the Opposers obtaining the approval by the British Crown's Representative in Washington, D.C., United States of America, of the Opposers as the prospective holders and/or bauxite miners of the Crown leases and Permissions held by Berbice from the Crown in British Guiana, and on the conditions (*inter alia*) that Berbice abandon the said leases and permissions and make their best endeavours and faithfully assist the opposers to obtain for the opposers the approval of the Governor-in-Council of British

Guiana of, and the issue or transfer to the opposers of the afore-said Crown leases and permissions held by Berbice, the transfer of which are opposed herein".

It will be seen that apart from the physical assets, it is pleaded that Berbice were to abandon the leases and permissions and make their best endeavours and faithfully assist the opposers to obtain for the opposers the approval of the Governor-in-Council of British Guiana of the transfer to opposers of the said leases.

It is not disputed that the Governor might refuse to approve of a transfer to the plaintiffs, even if Berbice were to make the application, but Berbice has no right to assume that the Governor's consent will be withheld. If the plaintiff's allegations are established it is the duty of Berbice either to abandon the leases or to advertise them in favour of the plaintiffs. They can hardly be said to be using their best endeavours to assist the plaintiffs when they are doing their utmost to transfer to Reynolds. The whole scheme of the regulations show that although the Governor retains the right to make a final decision, that his decision, except where questions of policy are concerned, will be in accordance with the lessee's obligations. Regulation 17 for instance allows a lessee to mortgage his right, title and interest without obtaining the Governor's consent, and Regulation 15 makes it obligatory on the Commissioner of Lands and Mines to execute a transfer if there is no opposition and no reason to the contrary appears to the Governor. Had Berbice applied to transfer to the plaintiffs, there might have been no opposition and according to the statement of claim, good reason to believe that the Governor would have permitted the transfer. Furthermore the lease, Ex. A contains a condition that the lessee will not transfer without the Governor's consent. This connotes that with his consent transfer is possible and since as I have shown, an agreement to assign is an interest in land even though the agreement was entered into without the lessor's consent, I take the view that the attempt by Berbice to assign to a company other than the plaintiffs' is a breach of their contract; the plaintiffs on their claim are entitled to demand that Berbice if they are not abandoning the lease, will transfer it to them. The right to demand that transfer is a right, title and interest as required by regulation 13.

The final submission on behalf of the defendants is that, it is not competent for the plaintiffs or either of them to bring this action by their joint and several attorneys Howard L. Heckman and Carlos Gomes by the Power of Attorney, recorded in the Deeds Registry on the 21st February, 1953, for the reason that this action is brought on the basis of an opposition filed by Harvey Aluminum Inc., on Saturday 14th February, 1953, and the attorney named in the notice of opposition is Carlos Gomes who purported to act under a Power of Attorney recorded in the Deeds Registry on the 15th January, 1953, and which Power is bad for want of compliance with section 29 of the Evidence Ordinance Chapter

I propose to consider, firstly, whether the Power recorded in the Registry on the 15th January, 1953, was improperly executed and if so what consequences, if any, result therefrom.

Section 19 (3) of the Deeds 'Registry Ordinance Chapter 177 enacts that the due execution of every instrument or document filed as of record or recorded in the registry, if executed beyond the limits of the colony, shall, before it is filed or recorded, be proved in accordance with the provisions of the Evidence Ordinance dealing with the proof of public and private documents. The Evidence Ordinance Chapter 25', Section 29 requires a Power of Attorney executed out of Her Majesty's dominions to be proved in any civil cause or matter by the affidavit or declaration of a subscribing witness sworn or made in one of various ways as set out in the section.

The Power of Attorney by Harvey Aluminum Inc., in favour of Carlos Gomes and filed in the Registry on the 15th January, 1953, is devoid of any subscribing witness (see Ex. A. of E. V. Luckhoo's affidavit). As there was no subscribing witness to the Power there could be no affidavit of a witness made before an Ambassador, consul, notary public or any of the other functionaries mentioned in section 29 of the Evidence Ordinance. There was, instead, a declaration by a Notary Public that the two executives executing the Power had appeared before him and acknowledged executing it and that they were personally known to him. As Boland J. decided in Eze Anyanwu Ogueri v. The Daily Argosy Company, Limited *et al.* No. 1102 of 1952, there is nothing to prevent a consul or notary public being a subscribing witness, but if he is, he must make a declaration before a proper functionary that he had witnessed the execution of the deed. To me, it is unchallengeable, that the Power in favour of Carlos Gomes was not evidenced in accordance with the Evidence Ordinance.

I turn now to the question whether the consequence of Carlos Gomes' filing a notice of opposition based on a Power which was improperly executed is to cause a writ filed by virtue of a new Power properly executed or at least not challenged to be a nullity in the circumstances of this case.

The clear intention of section 19 (3) of the Deeds Registry Ordinance is to authorise the Registrar to reject Powers of Attorney not properly executed. The sole object of section 3 of the Powers of Attorney Ordinance No. 16 of 1932 is to make invalid an act done in pursuance of a Power of Attorney which has not been recorded. When the Power is recorded, albeit wrongly recorded , it is possible to contend that acts done under it are not invalid. As this line of argument was not fully discussed and in view of the decision to which I have come, I refrain from expressing any view on the affect of an improperly executed Power which has been recorded in the Deeds Registry especially as Boland J. in the case cited above in a considered judgment decided that the validity of an improperly executed Power wrongly recorded can be subsequently impeached.

HARVEY ALUMINUM INC. AND ANOR. v. REYNOLDS METALS COY., AND ANOR.

The plaintiffs in this action filed their writ on the 21st February, 1953, by their attorneys Howard L. Heckman and Carlos Gomes, who were so constituted by a Power executed on the 4th February, 1953, and recorded in the Registry on the 21st February, 1953. It must be assumed that this power is valid and unimpeachable as is has not been challenged, consequently when the writ was issued the plaintiffs had complied with the Powers of Attorney Ordinance 1932, the Deeds Registry Ordinance Chapter 177 and the Evidence Ordinance Chapter 25.

The contention is that the writ is a necessary corollory to the notice of opposition and if there is no notice of opposition the writ based on a non-existent opposition must be set aside. I agree that such would be the result if there is no opposition, but an opposition filed without authority is not a nullity in the sense that it cannot be ratified. In Danish Mercantile Co., Ltd. v. Beaumont 1951 1 All E.R. 925 an action was started in the name of a company without its authority and later the company went into liquidation and the liquidators adopted the proceedings on behalf of the company. The defendants applied by motion to strike out the name of one of the plaintiffs on the ground that the action had been brought without the authority of the company. Roxburgh J. refused the application. The Court of Appeal dismissed the appeal. Jenkins L.J. after reviewing a number of authorities said at page 929 "I find nothing in any of these cases to constrain me to hold that the issue of a writ and the commencing of an action without the authority of the purported plaintiff is a matter which admits of no validation by subsequent ratification of the act of the solicitor concerned. So to hold would be to introduce, as I see it, an entirely novel doctrine into the ordinary law of principal and agent, and to make a new exception to the general rule that every ratification relates back and is deemed equivalent to an antecedent authority".

The cases of Burns v. Campbell 1951. 2 All E.R. 965, and Hilton v. Sultan Steam Laundry 1945, 2 All E.R. 425 were not cases of principal and agent. In the former, the plaintiff claimed in England as an administratrix before a grant issued in Ireland was sealed in England. Clearly, at the date of the issue of her writ she was not an administratrix in England. The decision turned on the interpretation of section 109 (1) of the Supreme Court of Judicature (Consolidation) Act 1925. In the latter case the plaintiff brought an action as administratrix before obtaining letters of administration. After the issue of her it was decided in Ingall v. Moran 1944 1 K.B. 160 that the sequent grant of letters of administration did, not operate retro-actively. The plaintiff then attempted to amend her writ by bringing the action in her personal capacity. The amendment was refused as 12 months had elapsed since the cause of action accrued and to allow the amendment would deprive the defendants of the benefit of a plea that the action was statute barred.

By analogy it is submitted that when Carlos Gomes filed an unimpeachable Power of Attorney on the 21st February 1953 the time for filing notice of opposition had expired and the doctrine

of ratification ought not to be applied to defeat a plea that this form of action is statute barred. This argument over-looks the vital rule of ratification—As a general rule every act may be ratified whether legal or illegal if it was not void in its inception, provided, that it was capable of being done by the principal himself—Halsbury Laws of England 3rd ed. Vol. 1 page 173.

The plaintiffs in executing a second power in favour of Carlos Gomes fulfilled all the requirements of ratification and I hold that the writ was properly issued.

The motion is refused with regard to the first plaintiffs who will have their costs against the defendants.

The question of costs with regard to the second plaintiffs who have been struck out will be decided after argument.

Solicitors:

Carlos Gomes for the plaintiffs.
Miss E. Luckhoo for Reynolds Metals Company.
H. C. B. Humphrys for Berbice Company Limited.

KAILAN v. MENDONCA AND MENDONCA.

(In the Supreme Court, Civil Jurisdiction, (Wills, J. acting) January 9, 10, 1953.)

Promissory note—Money lender—Signature to note obtained by a subterfuge —Dismissal of claim.

The plaintiff claimed from the defendants the sum of $3,347.72 capital and interest on a promissory note dated 14th March, 1951.

The defendants admitted liability in the sum of $140. As to the balance they established that the plaintiff was a money lender and that in June 1949 they signed a promissory note for $2,000 and subsequently passed a mortgage of their immovable property in favour of the plaintiff as security for the loan. The plaintiff foreclosed the mortgage in July 1951 and sold the property at execution sale for $5,000.

The defendants pleaded that the note of March 1951 was made because the plaintiff led them to believe that he wanted further security for the mortgage debt and that the 1951 note was a renewal of the 1949 note.

Held: The note of March 1951 was obtained by a trick and subterfuge on the part of the plaintiff and he was not entitled to recover more than the $140 admitted by the defendants.

Judgment for plaintiff for $140.

Judgment for defendants with costs in respect of the balance claimed.

A. T. Singh for plaintiff.

W. J. Gilchrist for defendants.

Wills J.: In this action the plaintiff sought to recover from the defendants the sum of $3,347.72 being capital and interest due on a certain promissory note dated 14th March, 1951 and payable on demand with interest at the rate of two per centum per month.

The defendants did not admit the whole of the plaintiff's claim. An affidavit of merits was filed on the 9th February, 1952 in which

the defendants admitted indebtedness in the sum of $140.00 and no more. The defendants requested leave to defend as to the balance of claim. On the 11th February, 1952 judgment was entered by the Court for the plaintiff in the sum of $140.00 with costs and leave to defend as requested by defendants was granted.

On 9th January, 1953 the action as regards balance claimed by plaintiff came on for hearing when the plaintiff and defendants were the only witnesses who gave evidence on oath in the case. The plaintiff relied on his promissory note and the defendants among other things urged as and by way of defence that plaintiff had induced and tricked them by means of a subterfuge to sign the said note—further that whatever sum or sums of money they had owed to the plaintiff such amount or amounts had been secured by a mortgage on immovable property in favour of the plaintiff and that the said mortgage property had been seized and levied upon and sold at execution by the plaintiff and that plaintiff had been fully paid off.

At the close of the whole case, both Counsel submitted to the Court that the question was one of fact for the Court to decide.

On a perusal of the whole evidence it was disclosed that the plaintiff was a money lender and had had previous money lending transactions with the defendants.

The evidence established that the plaintiff kept no books and was unable to produce any record or records touching upon the several previous money lending transactions.

The plaintiff stated in his evidence that he kept a loose leaf ledger but was only able to produce Ex. "C" dated 14th March, 1951 and which dealt specifically with the instant transaction.

The plaintiff stated in his evidence that he did not regard the keeping of the leaves of his ledger book touching upon the several transactions with defendants to be of any importance as showing the "bona fides" of his business and the plaintiff said quite unabashed "I don't consider it necessary to keep any books."

The plaintiff admitted that he had made advances to defendant Lydia Mendonca and that she owed him in 1949 the sum of $1,600: —on a promissory note made in the month of June 1949 and that when the interest was added on to the capital the total of her indebtedness amounted to $2,000:—and that such debt was subsequently secured by a mortgage on her immovable property and hat on the 23rd July, 1951, the plaintiff foreclosed the said mortgage. The plaintiff then levied upon and sold this property at Execution Sale for over the sum of $5,000: —

The defendants stated in their evidence that it was on account of this mortgage debt that plaintiff was able to induce them by a subterfuge and trick on the 14th March, 1951 to put their signature on the promissory note now sued on. The plaintiff had told them and led them to believe that he wanted some further security for the mortgage debt and represented to them that the note Exhibit "A" was in the nature of a renewal of the note for the mortgage debt.

The plaintiff credited the defendants with having paid three sums of money to wit: the sum of $40:—on the 5th May, 1951; $40—on the 12th June, 1951 and lastly $20:—on the 6th July, 1951. It must be noted that these several sums were paid before the foreclosing of the mortgage. Nothing was paid thereafter by the defendants.

The plaintiff stated in his evidence that he gave Lydia Mendonca a credit for the sum of $240:—and gave her a receipt as having been paid by her the said sum as and by way of interest on the mortgage debt.

The defendant Lydia Mendonca denied that she ever paid this sum of money to the plaintiff. On being cross-examined on this point the plaintiff had to admit that Lydia Mendonca never paid him that sum of money or asked him to credit her with such sum or any sum at all on account of the mortgage interest but that he the plaintiff made such a credit of his own accord.

By the pleadings the plaintiff was fully aware that the defendants were alleging that the note, Ex "A" was obtained by means of a trick and subterfuge. The plaintiff had ample opportunity of preparing and presenting his case fully and calling such witness or witnesses to support his testimony.

It is a rule of law that it is the duty of a plaintiff to make out his claim against a defendant and must succeed by the strength of his own case. In other words, a plaintiff must satisfy the Court that his case is a genuine one and fully proved before he is entitled to obtain judgment.

The plaintiff stated in his evidence that at the time when he took foreclosure proceedings on the 23rd July, 1951 he had in his possession the note now sued on; further he admitted that he did not tell his lawyer that he was in possession of such a note against the defendants.

The plaintiff had not only seized and taken into execution the defendant Lydia Mendonca's property, but he caused same to be sold at Public Sale for a sum in excess of his claim. The plaintiff could have and was in a position to recover his money on the note Ex "A" as this note, if plaintiff's story is true was due and payable, but no, the plaintiff stated that he did nothing. The question therefore must be asked, can this conduct of the plaintiff be considered that of an experienced and prudent money lender?

The plaintiff stated in his evidence without giving any date or month that when he demanded payment on the note the defendants sent him for payment to Mr. John Fernandes the Executor of the Estate of John Mendonca, deceased, the husband of Lydia Mendonca and that the defendant Vera Mendonca accompanied him to Mr. Fernandes.

The Executor John Fernandes is alive and could have been called by plaintiff as a witness to support his case, as such evidence would have tended to prove the truth of plaintiff's story, but the plaintiff refrained from so doing and did not avail himself of Mr. Fernandes. It may well be, that the plaintiff never went to Mr.

Fernandes at all, because when the evidence of the defendants is considered, it disclosed that defendant Vera Mendonca denied going with plaintiff to Fernandes and the defendant Lydia Mendonca denied that the she ever sent the plaintiff to Fernandes for payment at all. The defendants were emphatic on this point.

The plaintiff tendered Exhibit "A" the promissory note sued upon and dated 14th March, 1951. On looking at the back of this note there is written in the plaintiff's handwriting Cash lent $2,826:—. This statement was untrue for under cross-examination, the plaintiff grudgingly admitted that he did not give any cash to the defendants at all as stated on the note.

The defendants on oath stated that since the loan made to them by the plaintiff and which loan had been subsequently secured by the mortgage deed, that they had not received one cent from the plaintiff.

It is interesting to note that after defendant's property was sold at execution and plaintiff had been paid off, there remained in the hands of the Marshal a surplus of about $3,000:—more or less. The plaintiff did nothing to enforce payment on his promissory note until the defendants instructed Solicitor to write a letter to plaintiff demanding the return of their transport which he had taken from them as a security for the repayment of the mortgage debt Vide Exhibit B.

The plaintiff is an experienced money lender, the defendant Lydia Mendonca is an aged, feeble, sick and emotional widow, the defendant Vera Mendonca, the daughter of Lydia Mendonca is young, unmarried and inexperienced in business.

The Court had the opportunity of seeing, hearing and noting the demeanour of the parties as they gave evidence in the witness box and having heard the whole case found that the evidence of the plaintiff was not reliable and free from doubt.

The plaintiff was at times shifty, vague and evasive. The evidence of the plaintiff did not bear the stamp of truth and was of such a nature that the Court considered that a prudent man would not act upon it.

The Court found that the evidence of both defendants was reasonable, convincing and more consistent with truth and was of such a nature that a prudent man would act upon it.

The Court having taken into consideration the possibilities, probabilities and the circumstances of the case, was satisfied from the evidence that plaintiff had failed to prove his case and that the defendants had established that no cash was given by plaintiff to them on the date as stated in writing on the promissory note Ex "A" and dated 14th March, 1951. That the said note did not disclose the true nature of the transaction between the plaintiff and the defendants and that the signature of the defendants on the said promissory note Ex. "A" was obtained by a subterfuge and trick on the part of the plaintiff and without negligence on the part of the defendants.

The Court applied principles of law as enunciated in the case of Foster v. Mac Kinnon, 1869, L.R. 4 C.P. page 704.

The plaintiff having obtained judgment for the sum of $140:—with costs on the 11th day of February, 1952, the Court accordingly dismissed the plaintiff's action as to the balance claimed by the plaintiff from defendants with costs to be taxed.

Judgment for plaintiff for $140.

Judgment for defendants with costs in respect of the balance claimed.

STEPHENS v. STEPHENS

In the Supreme Court, Divorce and Matrimonial. (Stoby J.) May 5, 7, 9, 11, 20, 23, June 19, 1953).

Divorce—Malicious desertion—Roman Dutch Law.

This was a petition for dissolution of marriage on the ground that the wife had deserted her husband.

The petitioner's case was that the wife had refused him marital intercourse and refused to perform the normal domestic duties inseparable from married life. After tolerating this indignity for many years her conduct forced him to leave the matrimonial home.

The wife's case was that the petitioner had formed a friendship, albeit an innocent one, with one V.F. as a result of which he had no desire to remain at home.

Held: In Roman Dutch Law refusal of marital intercourse even without a withdrawal from the matrimonial home constitutes malicious desertion. On the facts of this case it was not satisfactorily proved that there was such a refusal or any constructive desertion by the wife.

Petition dismissed.

J. O. F. Haynes for the petitioner.

E. W. Adams for the respondent.

Stoby J.: This is a petition in which the husband Herman Adolphus Stephens seeks a dissolution of his marriage with his wife Elsie Rubina Stephens on the ground of desertion.

The parties were married on the 6th of August, 1932 at the Ebenezer A.M.E. Church, Georgetown. At the date of the marriage the petitioner was twenty-three years of age and the respondent twenty. Before her marriage, the respondent had given

birth to a child in 1930 and another in 1931; the petitioner admitted he was the father of these children. After the marriage four children were born to them, the last being in 1941, so that over a period of twelve years the wife gave birth to six children. I mention this bald fact because a great deal of the evidence and argument centred around the alleged failure by the wife to allow full marital intercourse. As I do not accept either the petitioner's or respondent's evidence in its entirety, I will be compelled to proceed on the basis of that portion of the evidence of each, which I believe, and any reasonable inference to be drawn therefrom, bearing, in mind, that it is not for me to reconstruct a case not presented by either side.

Before making any specific findings of fact, I shall advert to the law applicable to this case and decide what the petitioner must prove if his petition is to succeed.

In England law, it is generally recognised that a comprehensive definition of desertion is not possible and that the offence can only be established by reference to the facts of the case and the circumstances of the parties. The editor of Phillips' Divorce Practice 4th ed. at page 17 says "desertion arises when there has been a wilful termination of the joint lives of the spouses by one spouse without due cause and without the consent of the other spouse"; while the editors of Rayden on Divorce 5th ed. p. 101 say "desertion is the separation of one spouse from the other with the intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse".

From both these definitions it will be seen that one of the essential factors running) through the English concept of desertion is the necessity for the joint lives of the spouses to terminate. For the reason, perhaps, that until 1858, desertion in England was not an offence on which a decree of separation could be founded and until 1937 it was not a matrimonial offence which by itself enabled a spouse to obtain a decree for the dissolution of marriage, the Courts repeatedly held that the joint lives of spouses were not terminated unless there was a withdrawal from the matrimonial home. Gradually the law developed to suit changing conditions and the Courts have held in a series of cases that the joint lives can be terminated even though the parties are living under the same roof, provided they are not part of the same household. Powell v. Powell 1922 p. 278; Smith v. Smith 1937, 4 All E.R. 533; Shilston v. Shilston 1946, 174 L.T. 105; Wanbon v. Wanbon 1946, 2 All E.R. 300.

When the wife refused marital intercourse but continued to perform her wifely duties, no desertion was possible. Littlewood v. Littlewood 193 p 1; Weatherly v. Weatherly 1947 A.C. 628.

The nearest the English courts came to holding that refusal of marital intercourse amounts to desertion was in Rice. v. Reynold-Spring-Rice 1948, 117 L.J. 675 where a husband left the matrimonial home because of that fact and because she nagged at and abused him. It was held that he had just cause for leaving. The judgment of Lord Merriman at page 679 shows that the Court

was not departing from the settled rule for he said "There is nothing irrevocable about either of these matters. The wife can mend her ways. She can determine and show she is determined to resume cohabitation in the full sense of the word and to render her husband wifely duties not merely in connection with sexual matters but in the daily conduct of married life".

Again in Cackett v. Cackett 1950 1 All E.R. 677 the Court held that where a husband practised coitus interruptus notwithstanding the protest of his wife, he was guilty of cruelty. At the date of this decision cruelty had become a ground for divorce in England and the petition was brought not on the ground of desertion but of cruelty.

In the natural evolution of the law, the time may come when refusal of marital intercourse unless due to illness or the husband's adultery or some reasonable cause will by itself constitute desertion, but in the present state of the law in England, I am compelled to find that the refusal must be accompanied by separation not necessarily withdrawal from the home but withdrawal from normal everyday contact of the other spouse.

Both Mr. Haynes for the petitioner and Mr. Adams for the defendant conducted the case on the assumption that there is no difference between the English interpretation of desertion and malicious desertion as known to our law. In deference to their views, I have set out above the principles governing a case of this kind if their assumption is correct.

In Matthews v. Matthews 1931-1937 L.R.B.G. 459 and in Melbourne v. Melbourne Action No. 25 of 1950, Verity C.J. in the former and Ward J. in the latter recognised that malicious desertion was peculiar to Roman Dutch Law. Ward J after examining the Roman Dutch authorities said "I have no doubt that a persistent refusal of marital intercourse, evidencing a final determination to withhold the enjoyment of this marital right from the other spouse was held to constitute malicious desertion".

In addition to the authorities referred to by Ward J, I have consulted the case of Husband v. Wife 1923 Natal Law reports p. 172 in which a wife deliberately, finally and without good reason denied her husband marital privileges though she continued to reside in his house. Carter J and Hatton J held that the husband was entitled to a decree of restitution of conjugal rights on the ground of malicious desertion. This meant, of course, that if the wife refused to comply with the order, a divorce would follow.

I am persuaded that broadly speaking, there is no distinction between the English concept of desertion and the Roman Dutch interpretation of malicious desertion, except in this one respect that under the latter system by virtue of a different approach to the subject by Dutch jurists and judges, a husband or wife who wilfully and without reasonable cause persistently declines to have sexual relationship with the other is guilty of desertion even though they remain under the same roof.

This conclusion will be of little practical advantage to either spouse for as Lord Reid said in Little v. Little 1949 Vol. 45 T.L.R. p. 768 "If it be accepted that refusal of intercourse can by itself be a ground for divorce it would be necessary to have a very high standard of proof. In a case where there is no overt separation this burden of proof would be so great as to be almost impossible to discharge, and the law would be left in the very unsatisfactory position of affording a remedy in theory which it denied in practice".

In turn now to the facts. The petitioner's case is that, very early after the marriage disputes arose because his wife neglected her domestic duties and showed a tendency to be extravagant in financial matters. In 1953 difficulty arose over their marital relations as his wife became averse to having more children and insisted on coitus interruptus until 1944 when relations finally ceased. From 1944 although living in the same house, they never ate together, seldom spoke, communicated with each other through the children or by writing and the wife constantly cursed him and did everything to humiliate him.

The respondent on the other hand insists that except for the domestic misunderstanding attendant on the average family, it was not until 1944 that they had the first serious quarrel over V. F. She admits that she first heard of the friendship in 1941 and did not approve of it but their martial relationship never changed except that in 1944 the husband suggested coitus interruptus.

When the petitioner was giving evidence, I formed the impression that he was an astute and fundamentally honest man but was not entirely frank with regard to certain phases of his married life. The respondent struck me as an embittered woman who would not flinch from lying not because that is a normal characteristic of hers but because she wishes to hurt her husband. She seemed to have learnt, somehow, that the question of a joint life might be of importance and her evidence about the latter part of her married life was clearly exaggerated, as was her daughter's The truth, I think, lies somewhere in between. I believe the petitioner that coitus interruptus began in 1935 for the reason that his wife was anxious to avoid more children. She had begun her sex life at an early age, they were not in affluent circumstances in the early years, and her life must have been a continual drudgery with little relaxation.

I do not accept the petitioner's evidence that his wife ceased to have anything to do with him in 1944. I have no doubt that her attitude towards him changed but the fault is entirely his. He had formed a friendship with Miss F. in 1940 which it is agreed was an innocent friendship; he wrote poetry and she was fond of elocution; but it is expecting too much of a wife for a husband to leave home regularly at night and spend his leisure hours in company with a lady and expect to be welcomed on his return home. The following answers by the petitioner indicate that for all his education, he was refreshingly innocent about a wife's reactions to

a husband's conduct. He said "Early in 1941 my wife criticised Vera and seemed not to appreciate my friendship with her". And again "I did not tell my wife I was visiting, (Vera) because I do not usually give an account of my social activities". There can never be domestic bliss unless there is complete confidence between spouses and his failure to discuss his nocturnal adventures must have created suspicion, jealousy and resentment in his wife. My view is that, although she did not refuse him intercourse she probably became callous and disinterested. Her version of complete harmony is untrue, but I accept her evidence that she did not shut him out. To do so would have been the surest way to lose him and I think she loved him and cared too much for her children.

I am not going to deal in detail with the sleeping arrangements at Ketley Street except to say that if the petitioner genuinely desired privacy, the house was his, the money was his and nothing could have prevented him erecting a partition.

Regarding the allegations that his wife never cooked or communicated with him, I am of the opinion that the petitioner's version of this phase of their life was not true. With so many children in the house, some conversation and discussion on their activities was essential and both husband and wife must have joined in this.

So far the witnesses have not been dealt with. Mrs. Baptiste was truthful, but the incident she spoke about must be placed in its correct perspective. The petitioner was apparently being parsimonious and the wife in an outburst said she wanted money and not man. She must not be taken too seriously.

In view of my findings, I shall not discuss the other evidence except to say it has been fully considered.

I have no hesitation in finding that this marriage has been wrecked because of the petitioner's friendship with V. F. His absence from the house at night made his wife sullen and resentful so that he thought she was disinterested in him, whereas the truth is that she was being consumed with jealousy Had he been prepared to sacrifice his love for poetry and elocution, the events which culminated in his departure from his home may have taken place. It is to be hoped that even now for the sake of his children and their future, a reconciliation might be attempted.

The petition will be dismissed with costs.

Solicitors:

A. Vanier for the petitioner.

A. R. Sawh for the respondent.

CODDETT v. THE PUBLIC TRUSTEE as administrator of the Estate of Jose Vieira, deceased.

In the Supreme Court, Civil Jurisdiction (Stoby J.) February 3, 4, 5, 6, 9, 10, July 24, 1953.

Specific performance—Agency—Authority—Section 3(*B*) (*d*) *Civil Law of British Guiana Ordinance Chapter* 7*—Note or memorandum—Part performance.*

The plaintiff sought to enforce specific performance of a contract alleged to be entered into between the original defendant's agent and himself. The agent had authority to collect rents and institute proceedings in the Magistrate's Court and had delegated this authority to the plaintiff. The agent on one occasion leased the defendant's land but this fact was not known to the plaintiff when the alleged contract was entered into.

Held: The agent had no authority express or implied to enter into the alleged contract. The principal did not hold out the agent as possessing authority to contract and was not estopped from denying the agency. It was agreed that if the agent had authority to contract it was essential for it to be evidenced by a note or memorandum in writing. The plaintiff relied on letters written by the agent after the alleged breach and by acts of part performance.

Held: Although the note or memorandum containing the terms of the contract may be written after breach yet it must show the terms and subject matter of the contract and be by the party to be charged or someone lawfully authorised. Since the agent was not authorised the letters were of no avail.

The acts of part performance were not necessarily referable to the oral contract as they benefitted the plaintiff more than the defendant.

Action dismissed

P. A. Cummings for the plaintiff.

L. M. F. Cabral for the defendant.

Stoby J.: In this action the plaintiff seeks to enforce specific performance of a contract alleged to be entered into between the original defendant's agent and himself whereby it was agreed that in consideration of the plaintiff's altering and improving a portion of one of the properties owned by the original defendant at lot 4 Wapping Lane, New Amsterdam he would have an option to purchase the said property. He also claims damages.

As the contract on which the plaintiff relies was made not by the original defendant, but by his agent and as he denies that his agent possessed any authority to bind him in a transaction of this nature, it is requisite to recall the events which preceded the alleged contract of 1942.

Jose Vieira the original defendant, owned property at Main Street and Wapping Lane, New Amsterdam and at lot 7, Charlotte Street, New Amsterdam, (he died in 1950 and the Public Trustee was substituted as defendant).

In April 1942, one Johnson, a P.W.D. contractor who was supervising Vieira's properties in New Amsterdam employed the plaintiff to collect the rents of Vieira's properties. He authorized the plaintiff to expend money on necessary repairs to the houses

and recoup the money so spent from the rents collected. The plaintiff was to secure in return for his services a commission of 8% calculated on the gross rentals collected. He was to forward to Johnson for submission to Vieira a half-yearly statement of receipts and expenditure.

In July 1942, the plaintiff, with Johnson's consent, became a tenant of the lower flat of Wapping Lane and Main Street property. The premises needed some repairs of a substantial nature and also required re-arrangement to accommodate the plaintiff's family and for the convenience of his business. After some discussion with Johnson it was agreed that if the plaintiff expended his own money in repairing and making the structural alterations to the property it would not be sold without first informing the plaintiff.

This short summary of the incidents which culminated in the alleged contract is based on the evidence of the plaintiff and is confined to those portions of his evidence dealing with what took place between Johnson and him from April to July 1942. Later in this judgment when I deal with other aspects of the case, I state my findings of fact with respect to the subsequent events but I propose to consider now the important question of Johnson's agency.

Johnson admitted that his authority was derived from the document Exhibit N. that document which is signed by J. Vieira appoints Johnson a true and lawful attorney for the special purpose therein expressed. Those purposes are later stated to be asking, demanding, suing and levying for rent and arrears of rent and appearing in the Magistrate's Court in connection with claims for rent. Evdently what Vieira had in mind when he executed Exhibit N was section 18 of the Summary Jurisdiction (Petty Debt) Ordinance Chapter 15 which enables a Magistrate to permit an agent of a plaintiff to appear in Court on his behalf. Since Vieira lived on the West Coast Demerara and the properties were in Berbice, the appointment of Johnson to collect the rents and appear in Court, if necessary, was a convenient one.

It has not been contended that Johnson's authority as evidenced by Exhibit N includes a power to sell or enter into a contract of sale of immovable property, and indeed, in the light of the unequivocal language of the document any such submission would have been puerile.

But circumstances sometimes arise which make it necessary to go outside of a document regarding an agent's authority. Agency is not always limited by a written document. It may be implied from the conduct of the parties or the principal may be estopped from denying that he authorised his agent to enter into the contract, or he may ratify his agent's unauthorised contract. It is on one or a combination of these principles that the plaintiff urges that a binding contract is established.

In order to decide whether Johnson and Vieira so acted that the plaintiff is entitled to rely on the doctrine of implied authority a further consideration of the facts is necessary.

It appears that after Johnson was constituted an agent for the purposes hereinbefore mentioned, he delegated some of his functions to the plaintiff. He instructed the plaintiff to collect the rents of the New Amsterdam and Courantyne properties, perform minor repairs and pay the taxes. For this service the plaintiff received a gross commission of 8 per centum of rents collected. The net balance was paid over to Johnson half-yearly. Vieira obviously approved of this arrangement because he signed a number of forms authorising the plaintiff to appear as his agent in the Magistrate's Court for the purpose of claiming rents from tenants and issuing execution if necessary.

In the course of supervising the land on the Courantyne, Vieira permitted Johnson to lease the land and eventually to sell it but it is not unimportant that before the sale was concluded Vieira visited Berbice, inspected the property and valued it. None of these incidents was known to the plaintiff when he entered into the contract sued on.

The doctrine of agency by estoppel is illustrated in several cases. In Vickers v. Church Extension Association 1888, 4 T.L.R. 674 the plaintiff and advertising agent arranged with S who conducted the advertising business of certain magazines belonging to defendants for insertion of a certain advertisement in defend-ant's magazines for twelve months. Subsequently defendants refused to insert the advertisement on the ground that they disapproved of it. It was held that they were bound by the contract made by S as they had held him out to the public as having authority to contract. Again, in Pickering v. Bark 104 E.R. 158 it was decided that a principal is bound by a contract with a warranty for fitness entered into by his servant who had a general authority to sell although the authority was circumscribed by express directions not to warrant for fitness.

What clearly emerges from the authorities, however, is that the person who has contracted with the agent must have entered into the contract because the previous conduct of the agent induced him to think that the agent had the necessary authority. In the instant case the isolated sale of the Courantyne property was unknown to the plaintiff, so far as he was concerned Johnson was a house agent and nothing more and Vieira never held him out to be anything else but a house agent. The requisites upon which the doctrine of agency by estoppel is founded are therefore lacking in this case.

The further point is taken that Vieira ratified the contract entered into by Johnson. The evidence in support of this submission depends on the construction and inference which may be drawn from a letter written by Johnson to Coddett and dated the 29th December 1948. In view of the importance of the letter Exhibit P, I set it out here in full:
"Dear Mr. Coddett.

This letter tells you that since my return I have called on Mr. Vieira towards the sale of the property without notifying me.

I explained to him the expenses that you have gone through, due to the assurance that I gave you at the time, he said that he told his nephew to inform me of the sale that he was about to make, but his nephew forget, and made the sale without doing so.

Just at this time his nephew came in and said that he posted a letter to you and one to me on the 25|12|48, but up to the time of writing I have receive none.

However Mr. Vieira instruct his nephew to stop the passing of Transport on the 3rd January 1949 until the matter is fix with you.

I remain,
Yours truly,
J. V. Johnson.

In order for this letter to be of any value to the plaintiff's case I would have to construe it as meaning that Johnson informed his principal of the contract prior to the sale of the property and that it was approved of. The case of Marsh v. Joseph 1897 1 Ch. 213 is one in which the essentials for ratification are fully explained; (a) The acts, must have been done for and in the name of the supposed principal and (b) full knowledge of them and unequivocal adoption after knowledge must be proved.

It is simple commonsense to say that a principal cannot ratify a contract unless he is conversant with all the agent has done. The principal must have an opportunity of weighing the pros and cons, using his own judgment and rejecting the agent's unauthorised act if he thinks fit. Mere knowledge of a contract without acquiescence either by positive action or conduct from which it can be inferred that the agent's acts are adopted can never amount to ratification.

Johnson's evidence in cross-examination regarding the contract is, "If at any time Mr. Vieira was going to sell I would tell Mr. Vieira what improvements he had done so that he (Coddett) could buy if he wanted to. I never told Mr. Vieira of this arrangement until the 30th December 1948". Later he said "I did not give Coddett any assurance about the property but I told him I would ask Mr. Vieira to give him the first chance".

The above answers show that Johnson never intended to enter into any contract with Coddett but at the same time he never expected Vieira to part with the property without informing him. That is the crux of this case. Johnson's association with his principal was so close that he never conceived of Vieira disposing of the property unless he told him.

With this background the true meaning of Exhibit P readily appeared. When Johnson learnt of the sale of the property and Coddett remonstrated with him and threatened action, then for the first time, Johnson hastened to Vieira and tried to repair the damage.

He outlined the undertaking he had given and Vieira realising the position in which 'his agent was placed, explained that his

nephew was negligent. It is not unlikely that Vieira would have wished his rent collector to know that the property was being sold; in fact that is exactly what one would expect. But that is not evidence to support a ratification, for the reason that Johnson admits he never told Vieira until it was too late and even if he had told him in time, his evidence is conclusive that he could not have informed Vieira that he had entered into a contract because he himself never intended to enter into one.

It follows from the above that on this point alone the action fails but as I may be wrong on the view I have taken on this part of the case and as several other questions of law have been fully argued, I propose to consider another point which is equally fatal to the plaintiff's case.

By the Civil Law of British Guiana Ordinance Chapter 7, Section 3 (B) (d) no action shall be brought whereby to charge anyone upon any contract or interest in or concerning immovable property unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged or some other person thereunto by him lawfully authorised.

The plaintiff's alleged contract being an interest in land, it is requisite for the success of his case that there be a note or memorandum of the agreement. Counsel for the plaintiff relies on Exhibit "H" or "P" in conjunction with Exhibit "O" both of which are letters written by Johnson. The objection to these letters as constituting the contract is apparent, not because they were written after breach (for this is permissible—Benjamin on sale 11th edition page 250 note X), but because in the words of the Ordinance they were written neither by the party to be charged or some other person thereunto by him lawfully authorised.

A further objection to Exhibit "H" or "P" and "O" is that it does not contain the terms and subject matter of the contract with sufficient certainty in order to be deemed a sufficient note or memorandum. McLean v. Nicol 123 R.R. 953 is a good instance of a contract not containing an important term. It was a contract for the sale of plate glass of the best quality, but the documents produced to prove the contract omitted any reference to the quality of the glass and were consequently inadequate to establish the contract.

The authorities are clear that the writing must show the terms and subject matter of the contract. As I have previously shown Exhibit "P" or "H" is equivocal, as the more likely meaning is that Vieira was expected to notify his rent collector, but was under no obligation to do so; nor can it be inferred from the letter that he should notify Johnson for the purpose of the plaintiff exercising any option. Exhibit "O" is even more unsatisfactory as it is self contradictory. It alleges an agreement to remove fixtures as an alternative to the exercise of an option.

It is further argued that the alleged contract is taken out of the Ordinance as it was partly performed.

Farwell J. in Broughton v. Snook 1938 1 Chancery at pages

511 and 512 cites with approval Fry, on specific performance where the law is stated as follows:

"In order then to withdraw a contract from the operation of the statute, "several circumstances must concur: 1st, the acts of part performance must "be such as not only to be referable to a contract such as that alleged, but to "be referable to no other title; 2ndly, they must be such as to render it a "fraud in the defendant to take advantage of the contract not being in wri- "ing; 3rdly, the contract to which they refer must be such as in its own na- "ture is enforcible by the Court; and 4thly, there must be proper oral evi- "dence of the contract which is let in by the acts of part performance."

The point I must now decide is whether the acts of improving and altering Vieira's premises are necessarily referable to the oral contract. As a general rule it is safe to assume that no tenant, especially in this Colony, would spend large sums of money on his landlords premises unless there existed a contract of some kind. Similarly if a landlord stands by and permits a tenant to reconstruct his property and receives benefit therefrom, he ought not to be surprised, if litigation ensues, that the Court leans to the view that benefits are not obtained without some corresponding obligation being incurred. But in this case unlike Broughton v. Snook all the benefits were received by the plaintiff. The enlarged premises, the electric light and the other improvements did not result in additional income to Vieira, but to the plaintiff. It was he who was able to sub-let part of the premises and receive a monthly income of $4.50. Electricity was needed for his refrigerator and light for his parlour. In these days when labour saving devices are the rule rather than the exception, it is not extraordinary to find a tenant installing an electric stove and incurring the expense of the additional wiring requisite for the proper use of the electrical appliance. The conversion of an unsuitable room to a habitable place for his mother to dwell in was entirely for the plaintiff's benefit. So too was the construction of a room for storing wood for sale. In every instance the expense incurred by plaintiff is consistent with the view that the investment was profitable to him. The moment it is found that the acts relied on are not referable to the oral contract or that it is doubtful whether such acts are referable or not the doctrine of part performance fails and with it the plaintiff's action.

The action is dismissed with costs to the defendant.

Solicitors:

H. B. Fraser for the plaintiff.

F. I. Dias for the defendant.

JAMES GRAHAM v. F. O. VAN SERTIMA

In the matter of an Election Petition for the Electoral District No. 13 Georgetown North.

JAMES GRAHAM,
Petitioner.
and
FRANK OBERMULLER VAN SERTIMA,
Respondent.

In the Supreme Court, (Bell C. J.) June 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27 and 30, July 1, 2, 3, 8 and 13, August 18, 1953.

Legislative Council (Elections) Ordinance 1945—*Representation* of *the People Ordinance* 1953—*Voting—Compartment—Election—Void—Principles on which Court acts.*

General elections were held throughout the Colony on 27th April, 1953.

This petition was brought by James Graham a registered voter in respect of the election of Frank Obermuller Van Sertima for the Georgetown North Electoral District.

The grounds upon which it was sought to avoid the election were that the "election was not conducted in accordance with the provisions of the Representation of the People Ordinance, 1953, relating to the secrecy of the ballot and as a result thereof the result of the election was affected".

It was proved at the trial

(a) that at each of four Polling Stations in the area the arrangements for voting were faulty and lent themselves to the secrecy of the ballot being violated;

(b) at all of the Polling Stations it was possible for the Polling Agents to have seen each voter as he went through the action of voting as distinct from seeing for whom he voted;

and (c) 295 ballot tickets were marked by Presiding Officers. Knowledge of that fact became known in the Electoral District and some voters expressed the fear that it afforded a means of its becoming known for whom a voter had voted.

Section 82 of the Legislative Council (Elections) Ordinance 1945 reads as follows:

> "82. (1) The election of a candidate as a member of the Council (Member of the House of Assembly), shall be declared void in an election petition if any of the following grounds be proved:—
>
> (a) that by reason of general bribery, general treating, or general intimidation, or other misconduct or other circumstances whether similar to those before enumerated or not the majority of voters were or may have been prevented from electing the candidate whom they preferred;
>
> (b) if it appears that the election was not conducted in accordance with the principles laid down in this Ordinance and that such non-compliance affected the result of the election;
>
> (c) that a corrupt or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;
>
> (d) that the candidate was at the time of his election a person not qualified or a person disqualified for election as a Member."

Held: The contrivance used at the election was not a compartment of the kind contemplated by the Ordinance and Regulations, In addition the principles of the Representation of the People Ordinance, 1953 and the mode thereunder were infringed and the election was not really conducted under the existing election laws and such non-compliance affected the result of the election.

Election declared void.

H. C. Humphrys, Q.C., C. R. Browne, and *Amina Sankar* with him for the petitioner.

J. O. F. Haynes, L. F. S. Burnham, Clinton Wong and *R. Luck* with him for the respondent.

Bell C.J.: This petition is presented by Mr. James Graham, a registered voter against the return of the respondent Frank Obermuller Van Sertima a Member of the House of Assembly for the Electoral District No. 13 (Georgetown North) at the General Elections held on the 27th April, 1953 in this Colony.

The grounds upon which it is sought to avoid the election is (as alleged in the Petition dated the 23rd May, 1953) that the "election was not conducted in accordance with the provisions of the Representation of the People Ordinance 1953, relating to the secrecy of the ballot and as a result thereof the result of the election was affected".

It is the Legislative Council (Elections) Ordinance, 1945, (Ordinance No. 13 of 1945) Section 82 as applied by Section 3 of the Representation of the People Ordinance 1953 (Ordinance No. 5 of 1953) which states when the election of a candidate as a Member of the House of Assembly shall be declared void. Section 82 reads as follows:—

> "82 (1) The election of a candidate as a member of the Council (Member of the House of Assembly) shall be declared void in an election petition if any of the following grounds be proved: —
>
> (a) that by reason of general bribery, general treating, or general intimidation, or other misconduct or other circumstances whether similar to those before enumerated or not the majority of voters were or may have been prevented from electing the candidate whom they preferred;
>
> (b) if it appears that the election was not conducted in accordance with the principles laid down in this Ordinance and that such noncompliance affected the result of the election;
>
> (c) that a corrupt or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;
>
> (d) that the candidate was at the time of his election a person not qualified or a person disqualified for election as a Member."

The petitioner contends that he has established that the elec-

tion falls to he avoided under both (a) and (b) of Section 82 as set out above.

The hearing of this petition has occupied the better part of 17 days; much evidence has been led by both sides and we have "heard much argument about it and about". In the result however the difficulties which this petition presents are difficulties of law and not of fact.

The General Election of the 27th April, 1953, from which this petition has arisen, was the first General Election under the New Constitution recently granted to British Guiana by Her Majesty's British Guiana (Constitution) Order in Council 1953. The Election presented the Law Officers and the Registration Officer (Mr. H. R. Harewood) who was responsible for the general conduct of the election, with a number of difficult decisions to make both as regards the content of the law regulating the election and the administrative arrangements which were necessary to carry out the law. The election was the first one to be held with full adult suffrage and not the least of their problems was to devise satisfactory machinery for the casting of votes by a population very many of whom had never voted in their lives before, and very many of whom could not read and write. The existence of such illiteracy is established by what Mr. Harewood, the Registration Officer, said in evidence namely that he had no reason to doubt that the illiteracy rate amongst East Indians in British Guiana was still over 40%. He went on to say: —

> "When we set up the election machinery we did not contemplate ballot tickets being left outside ballot boxes and between them and on the floor. It was quite a surprise. The fact that we had such a high rate of illiteracy controlled the type of mechanical arrangements we had to make. About two thirds of the total number of voters had not voted before at any election. It did not occur to us to have the Poll Clerk come to the compartment and see that the vote had been put into the box. We did contemplate having the vote cast behind a screen with a Poll Clerk within the screen but we abandoned that as it would lead to too many difficulties".

To complete the picture, it should not be forgotten that because of the illiteracy of so many of the prospective voters the Representation of the People Ordinance 1953 (Ordinance No. 5 of 1953) made it obligatory for each candidate for election to have a symbol; that symbol and a photograph of the candidate appeared on each of that candidate's ballot boxes. The responsible authorities had a difficult task and so far as I can judge they seemed to have given much thought and care to the devising of the machinery for conducting the election. I shall however regard it as my duty later in this judgment to criticise some aspects of that machinery but I am fully conscious that when I make those criticisms I am being wise after the event.

Putting aside for the moment any expressions of opinion as to

whether the administrative arrangements made at this election in the Electoral District No. 13 (Georgetown North) on the 27th April, 1953 complied with the requirements of the Representation of the People Ordinance, 1953, and the Regulations made thereunder I have come to the following findings upon the evidence as a whole and upon the visits of inspection which I made in the company of Counsel on both sides and of several witnesses to four of the Polling Stations viz: —

The Polling Station at Mr. Hamlet's residence,
The Polling Station at the Universal Garage.
The Polling Station at Mr. Robinson's residence, and
The Polling Station at Dr. Foo's residence.

These visits were not, of course, made until long after Polling day but it is my understanding and I believe that of Counsel, that it had been attempted by the election authorities to reproduce as accurately as possible for our visit, the physical arrangements (e.g. site of polling compartments; height of screens; position of ballot boxes behind the screens and in relation to top of screens etc etc.) which had obtained on Polling day at each of those four stations. There was some criticism of those details by some of the witnesses whom we met by arrangement at those Polling Stations and I have borne those criticisms in mind.

I am of the opinion that at each of those four Polling Stations it could have been possible for Polling Agents (either by accident or of set purpose) to have seen how the ballot boxes were grouped together behind the screen; what position each had occupied in relation to its fellow; what was the position occupied by each box in relation to the length of the screen behind which they were placed. My reason for holding those views are these: each of the four rooms in which the actual voting compartment was placed was quite small with the result that, when seated in their places the Polling Agents were in no case at any greater distance than say an average of 20 feet from the voting compartment. The ballot boxes (save at Dr. Foo's Polling Station) were at no greater distance below the top of the screen than say an average of eight inches, so that if a Polling Agent had (either before the voting-started or during its progress) on some pretext stood up and strolled close to the voting compartment, it is possible, I believe, that he could have obtained the information I have mentioned before. I concede that there is no evidence that any such strolling and looking took place, but I have mentioned the matter for it shows (at least in my view) that the arrangements were faulty and lent themselves to the possibility of the secrecy of the ballot being violated at those four stations. I accept it as proved that at the Polling Station at the Weights and Measures Office, Kingston, the Presiding Officer, Mr. Douglas changed the position of the ballot boxes throughout polling day and permitted the Polling-Agents to see the new positions occupied by the boxes after he had changed them.

Mr. Humphrys of Counsel for the petitioner has argued as

part of his case that when Regulation 5 (1) of the Representation of the People Regulations 1953 says that —

> "each polling place shall be furnished with such number of compartments in which the voters can cast their votes as the Returning Officer thinks necessary."
>
> (2) "each compartment shall be so screened that no person other than the person voting can see the ballot boxes,"
>
> (3) "several compartments may be constructed in the same room,"

it means that the compartments shall be so constructed that the voter goes bodily within them in order to cast his vote and so constructed that no one but the Polling Clerk referred to in Section 32 (5) of the Representation of the People Ordinance, 1953, shall be able to see him as he goes through the actions of casting his vote. I will deal with that argument at a later stage, I am not satisfied that any of the witnesses who gave evidence before me did, in fact, see for whom any voter cast his vote but I am satisfied that with the arrangements as they were at the four Polling Stations which I visited it was very likely that the Polling Agents in those four Polling Stations could have had a shrewd idea for whom some of the voters had voted (particularly if the voter stood sideways on to the screen as he voted and the Polling Agent watched the direction in which the voter's arm moved) and could have definitely known for whom some of the voters had not voted. It must, of course, be clearly understood that these immediately preceding findings of fact are based on the assumption that the Polling Agent had seen how the ballot boxes were grouped together behind the screen and which position each box occupied in relation to its fellow; and what was the position occupied by each box in relation to the length of the screen behind which they were placed.

I pause here to say that it seems to me to be as important to secure that it should not be known for whom a voter did not vote as it is to secure that it be not known for whom he did in fact vote; an infringement of either of those principles would be an infringement of the secrecy sought to be secured by the principles of secret voting first laid down in the English Ballot Act 1872 and incorporated in the law of British Guiana.

A replica of the voting compartment as used at all Polling Stations throughout the Electoral District No. 13 (Georgetown North) on the 27th April, 1953, was exhibited in Court during the hearing of this petition and we have had much evidence as to the position occupied by Polling Agents at several of the Polling Stations during the casting of votes. I do not recollect that there is direct evidence on the point but I hold it to be a fair inference from the evidence as a whole that at no Polling Station did the voting compartment take the form contended for by Mr. Humphrys. It follows then that it was possible in the case of several of the Polling Stations, indeed, I think it is a fair inference from

the evidence that it was possible at all the Polling Stations, for the Polling Agents to have seen each voter as he went through the action of voting as distinct of course from seeing for whom he voted. In other words, the voter was within full view of the Polling Agents as he stood before the screen and cast his vote. Put in another way, each voter voted in the presence of the Polling Agents as well as in the presence of a Poll Clerk and all other officials who were on duty in the room in which the voting compartment was erected, but the Poll Clerk was closer to the voter when the voter voted than were the Polling Agents.

It has been established beyond any doubt, that 295 ballot tickets were marked by Presiding Officers in Electoral District No. 13 on Polling Day, the 27th April, 1953, with the registered number of the voter or some other mark whereby the voter might have been identified. Those ballot tickets were properly rejected at the count. I have no reason to believe, however, that as a result of that irregularity it became known during polling hours for whom any voter had cast his vote. I am, however, quite satisfied that knowledge of the fact that tickets were being so irregularly marked became known in Electoral District No. 13 (Georgetown North) from early in the morning of polling day and that a number of persons in that district were openly talking about that irregularity and expressing fears that it afforded a means of its becoming known for whom a voter had cast his vote. It has been proved to me that two registered voters of that district—Johanna Thorpe and Conrad Smith refrained from casting their votes in that Electoral District on the 27th April, 1953 because each of them had heard of that irregular practice and feared that by reason of it might become known for whom she or he respectively had cast, her or his vote if she or he had in fact voted. Georgetown is not a large town; the report of those irregularities were being talked about during the daylight hours when people normally move about the town; there is evidence that this report was being talked about at places in Electoral District No. 13 (Georgetown North) as far removed from each other as Fourth Street, Alberttown (Evidence of Mrs. Thorpe) and the Lighthouse Kingston (Evidence of Mr. C. A. M. Sharples). I am accordingly satisfied that the report had spread over a considerable area of that Electoral District during Polling hours. Before coming to the above mentioned conclusion, I have kept in mind the evidence of the several witnesses called for the respondent who stated that they did not hear the report on Polling day. They may well be telling the truth but a rumour or report can fairly be said to be widespread in a particular area and yet a number of persons in that area do not hear it. On this aspect of the case, the respondent had the difficult task of trying to prove a negative.

It can never be known how many people were influenced by this report to refrain entirely from voting or to vote for a candidate different from the one for which they would have voted had the improper marking of the ballot tickets never taken place; but the possibility that it had either of those effects upon a majority of the electorate in Electoral District No. 13 is one of the factors

which I have had to weigh. It has been said that the Presiding Officers were not responsible for the spreading of the report. That is true enough but it is equally true that their improper marking of the ballot tickets was the subject matter of the report and gave rise to it. Mr. Harewood, the Registration Officer has stated that in addition to the 295 ballot tickets which were rejected because of markings on them there were 103 ballot tickets in the Electoral District which were considered as "spoilt" and he went on to say "99 of those were said to have been found outside the ballot boxes". His evidence as to where those ballot tickets were found may strictly be hearsay but no objection was taken to it, and at another stage of his evidence he stated without qualification that 99 ballot tickets were found on the ground in this Electoral District. A witness named Owen, Presiding Officer, Owen's Polling Station, said that 4 ballot tickets were found on top of the table on which the ballot boxes stood. The witness Sharples said (and I see no reason to reject his evidence) that he noticed a lot of ballot tickets lying outside ballot boxes: that he saw that at 8 or 10 stations that some of them were on top of the boxes, some between them and some on the floor. One can only assume that the presence of those ballot tickets in those odd places rather than in the ballot boxes was due either to ignorance on the part of the voters or a desire to spoil their votes.

There would not seem to have been any machinery at the polling in this Electoral District to ensure that the voter cast his ballot ticket in one of the ballot boxes and did not leave it lying about as I have described. The Polling clerk who was stationed close to the voting compartment in purported execution of Section 32 (5) of the Representation of the People Ordinance, 1953, re-restricted himself to seeing that the voter's hands were empty when he withdrew from in front of the voting compartment. It is, I suggest for consideration that the law should contain some suitable provision whereby the Polling clerk should be entitled or indeed obliged to call a voter's attention to the fact that instead of putting his ballot tickets into one of the ballot boxes he has left it on top of a box, between the boxes or on the floor as the case may be, and to request him to cast his ballot paper in one of the boxes. It must be obvious that if the Polling clerk is not given such power there is a great danger that some voter wishing to help the candidate whom he favours, will proceed to insert as many of such ballot tickets as he can get hold of into that candidate's ballot box. Indeed the possibility that that may have happened at this election cannot be ruled out. It should not be possible for ballot tickets to be left lying about outside the ballot boxes a temptation to the dishonest voter.

A great deal of evidence was given as to an alleged attempt by the witness Charles Alexander Maynard Sharples to induce a man named Angus Lynch Curry to come before this Court and tell a lying story in support of the petitioner's case. Curry did give evidence but he was asked to do so by me. I do not propose to discuss all the ramifications of that evidence but confine myself to these remarks. I formed so unfavourable an impression of the

witness Angus Lynch Curry and of the other witnesses who spoke in support of his allegation against the witness Sharples, that I am not prepared to believe the grave allegation made against Sharples. There are features of Sharples' evidence that I do not accept where it conflicts with the evidence of some other witness. Thus I am not prepared to accept his version of the incident of the absence on Polling day of cardboard from the lattice work at the Universal Garage near the Polling compartment. I believe rather that that defect was put right on the day before (Sunday) polling began. Again, I place no reliance on his evidence that he saw for whom one woman voted and it is clear to me that he is overstating the matter when he says that the visibility at Robinson's Polling-Station on Polling day was so poor that voters had to pull the screen aside in order to see. Nevertheless, I do not feel justified in rejecting his evidence completely and I have accepted certain pieces of his evidence e.g. hearing persons speaking about the report of the marking of the ballot tickets by the Presiding Officers. I think it most unlikely that anyone using the staircase at the Universal Garage could have seen how persons were voting assuming that the lattice work near the voting compartment was completely covered with cardboard as I believe it to have been before voting began.

I have now to consider the legal aspects of this case.

Petitioner, as I have said before claims to have established that the election falls to be avoided under subsection (1) (a) and subsection 1 (b) of Section 82 of the Legislative Council (Elections) Ordinance, 1945. With regard to subsection 1 (a) he contends that the improper marking of the 295 ballot tickets and the spreading in Electoral District No. 13 (Georgetown North) of the report that that was being done together with the fear which was thereby engendered in the minds of the voters of that district that it would become known for whom they voted if their ballot tickets were similarly marked with their registered number, was a circumstance by reason of which the majority of voters in that district were or may have been prevented from electing the candidate whom they preferred. As regards subsection 1 (b) of section 82 he contends that the following are principles of the Representation of the People Ordinance 1945 and the Regulations made thereunder, and that each of those principles has been violated:

(a) that every voter shall vote in secrecy in a compartment;
(b) that every ballot ticket shall be marked on the back with an official mark and that nothing else except the serial number by which the voter can be identified;
(c) that every voter shall place the ballot ticket in a closed ballot box in the presence of the poll clerk only to whom he has shown the official mark;
(d) that no one except a poll clerk shall see how a voter votes, meaning thereby that no person but a poll clerk should see either for whom the voter

casts his vote or see the voter as he goes through the action of voting;

(e) that it shall not be known and that it shall not be possible for it ever to be known for whom any voter cast a valid vote;

(f) that every voter either at the election at which he votes or at any future election shall be unaffected by any fear of it being discovered at any time for whom he voted;

As part of the argument with regards to sub-section 1 (b) above he has submitted that the general rule of interpretation of Statues is that mandatory provisions in a statute must be obeyed and directory provisions substantially complied with and that in either case if they are not, such non-compliance renders what has been done void unless the statute otherwise directs; and further that if any provision enacted to secure secrecy in transgressed or violated, there is a presumption in law that the result has been affected or in other words that if the statute make provision to ensure that the result will not be affected it must be presumed if those provisions are transgressed or ignored that the result has been affected unless it can be established affirmatively that the result was not affected or could not have been affected. Mr. Humphrys further contends that if the propositions just stated are sound then the onus is shifted to the respondent to show that non-compliance with the principles of the Ordinance has not affected the result of the election. I am of the opinion that these propositions have no room to operate in the face of the express provisions of Sub-section 1 (b) of section 82 which I construe to mean that the onus of proving non-compliance with the principles of the Ordinance lies upon the petitioner and that the onus of proving that such non-compliance affected the result of the election also lies on him but I will have something later to say as to what is meant by "affected the result of the election".

I now take in order the alleged principles (a) to (f).

I agree that it is a principle that every voter shall vote in secrecy in a compartment but what is meant by a compartment, After careful consideration I have come to the conclusion that the contrivance used at the election in Electorial Disrict No 13 (Georgetown North) was not a compartment of the kind intended by the Representation of the People Ordinance and the Regulations made thereunder.

The relevant portion of Regulation 5(1) of the Representation of the People Regulations, 1953, reads as follows: —

5 (1) Each Polling place shall be furnished with such number of compartments in which the voters can cast their votes as the Returning Officer thinks necessary.

(2) Each compartment shall be so screened that no person other than the person voting can see the ballot boxes".

It is true that that does not say, as, in effect, did Regulation 31 of the Legislative Council (Elections) Regulations 1945, which it

replaces, that the voter shall be screened from observation but I have no doubt that the word "compartment" must be given a meaning which accords with the cardinal principle of the Representation of the People Ordinance, 1953, namely that the ballot shall be secret. I am fortified in that view by a consideration of sub-section" (5) of section 31 and section 33 of the Representation of the People Ordinance, 1953. I understand subsection (5) of that Ordinance to mean that the voting shall be done in the sole presence of the Poll Clerk. Such a reading of that sub-section is consonant with the cardinal principle of secrecy to which I have already referred and in turn receives support from section 33 which by way of exception (as I understand it) allows the Polling agents to be present when a blind voter or one incapacitated by other physical cause is casting his vote. Now if I am right in thinking that save where section 33 is operating the voting shall be in the presence of the Poll Clerk alone does it not follow that the voting compartment must be so constructed as to achieve that end provided (I surmise) however that the Poll Clerk does not see the ballot boxes when the voter is actually voting If that is once conceded then must not the compartment be so constructed that either the voter goes bodily into it to vote or at any rate is so screened as to prevent anyone from seeing either for whom he is voting or from seeing him as he goes about the action of voting. But would a compartment constructed is the way that I have indicated prevent the Polling Agents from seeing a voter as he went about the process of voting? I think it would have that effect but I can find no authority in the law for saying that they are entitled to see that. Indeed I am of the opinion (in view of what I have already said) that they are not entitled to see that. It is clear from Regulation 17 of the Representation of the People Regulations that Polling Agents enjoy no roving com-mission in the Polling Station but can only interfere in certain specified cases. Now it may be said that if the voter is screened from observation as he votes there would be nothing to prevent him from tampering with the ballot boxes or putting into the ballot box of a candidate of his choice any ballot tickets which he might find lying, about in the voting compartment having been left there by a previous voter. But is not the answer to that that the Poll Clerk will be so placed as to be in a position to prevent that; and if compartments of that kind had been in use in the Electoral District No. 13 (Georgetown North) on Polling day the 27th April, last then it should not have been possible for anyone but the Poll Clerk in whose presence the vote must be cast (— it is by no means clear to me whether or not the Poll Clerk is permitted to see the voter actually cast his vote) to have seen either for whom a voter voted, or for whom he did not vote.

It was one of Mr. Humphrys' points that the fact that a voter had to cast his vote in the sight of the Polling Agents must have had an unsettling effect upon him and may well have deterred the voter from voting for the candidate of his true choice. No voter has come forward to say that, but it is a point which I nevertheless feel entitled to consider.

I am accordingly satisfied that the voters at the election in

Electoral District No. 13 (Georgetown North) did not in fact vote in a compartment of the kind required by the law.

As regards the alleged principle (b) I agree that it is a principle and that it was infringed at this election. I agree that alleged principle (c) is a principle of the Ordinance and that it was infringed.

I agree that alleged principle (d) is a principle of the Ordinance but subject to what I have next to say, I do not think that that principle had been infringed. I hold it to be a principle of the Ordinance that it shall not be possible for anyone but possibly the Poll Clerk to see for whom a voter did not vote. As I have said before, I believe that that possibility existed at the election as far as the four Polling Stations are concerned and that being so I hold that that principle was infringed.

I agree that alleged principle (e) is a principle of the Ordinance provided that it is understood as excluding those occasions on which the law allows it to be known for whom a voter voted, and that it is understood as including the case of knowing for whom a voted did not vote, and I regard it as having been infringed at the election as regards the possibility of its being known for whom a voter did not vote at any of the four polling stations I visited.

I accept that alleged principle (f) is a principle of the Ordinance and I consider it to have been infringed at this election in Electoral District No. 13 (Georgetown North).

I have carefully considered all the authorities to which counsel here referred me and consider that I should be guided by the following principles in deciding whether the petitioner has established a case under either subsection 1 (a) or 1 (b) of Section 82 of the Ordinance for declaring the election void.

1. Non-compliance with one or even several principles of the Ordinance does not *ipso facto* raise a presumption that the non-compliance has affected the result of the election;
2. That the return of a member is a serious matter and not lightly to be set aside;
3. "An election ought not to be held void by reason of transgressions of the law committed without any corrupt motive by the Returning Officer or his subordinates in the conduct of the election when the Court is satisfied that the election was notwithstanding those transgressions, an election really and in substance conducted under the existing election law—and that the result of the election, that is, the success of the one candidate over the other was not and could not have been affected by those transgressions. If on the other hand, the transgressions of the law by the officials being admitted the Court sees that the effect of the transgressions was such that the election was not really conducted under the existing election laws, or if it

> is open to reasonable doubt whether those transgressions may not have affected the result and it is uncertain whether the candidate who has been returned has really been elected by the majority of the persons voting in accordance with the law in force relating to elections the Court ' is then bound to declare the election void." (Islington West Case (1901) 17 T.L.R, 210).

Those principles are easy to state but are not so easy to apply for so many factors require to be weighed.

After long and careful consideration I have come to the conclusion:

(a) that in view of the principles of the Ordinance which I consider to have been infringed the election was not really conducted under the existing election laws and that it has been established beyond a reasonable doubt that such non-compliance affected the result of the election;

(b) that the result of the circulation in Electoral District No. 13 (Georgetown North) of the report about the improper marking of ballot tickets was a circumstance which may have prevented the majority of the voters in that district from electing the candidate whom they preferred.

In the result then I feel obliged to declare the election held in that district on the 27th April, 1953, to be void and I declare accordingly. I will certify that declaration to the Governor as required by the law.

This is no victory for any political party. This Court is not concerned with the struggles of political parties, but is only concerned to ensure that elections are conducted in accordance with the law.

I desire to have counsel at some later day address me on the question of costs.

Election declared void.

Solicitors :

J. E. DeFreitas for Petitioner.

S. M. A. Nasir for the Respondent.

REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1953

AND IN

THE WEST INDIAN COURT OF APPEAL

1953

EDITED BY

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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.

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1955.

JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1953

EDWARD PETER STUBBS BELL	— Chief Justice
FREDERICK MALCOLM BOLAND	— First Puisne Judge
HAROLD JOHN HUGHES	— Second Puisne Judge
FABIAN JOSEPH CAMACHO	— Third Puisne Judge. Acted as Second Puisne Judge from 1st January, 1953 to 4th May, 1953. Appointed a Puisne Judge in Trinidad, B.W.I and he left the Colony to take up his new appointment,
ALFRED CASIMIRO BRAZAO	— Acted Third Puisne Judge from 1st to 4th January, 1953.
KENNETH SIEVEWRIGHT STOBY	— Appointed Third Puisne Judge on 13th July, 1953. Acted as Third Puisne Judge from 5th January, 1953 to 4th May, 1953 and as Additional Judge from 1st to 4th January, 1953.
JOSEPH LYTTLETON WILLS	— Acted as Additional Judge from 5th January, 1953 to 31st December, 1953.

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 (1953) L.R.B.G.

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