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CASES

DETERMINED IN THE

Supreme Court of British Guiana.

THOMAS *v*. THE QUEEN.

(In the West Indian Court of Appeal, on appeal from the Court of Grand Sessions of Barbados (Jackson C.J., Gomes and Boland Acting C.J.J.) July 26, 27, 28, 29, 31, 1954.)

Criminal law — Shooting with intent — Evidence — Statement in presence of accused — Admissibility — Witness' name on back of indictment — Discretion.

The appellant was convicted before a jury at the Court of Grand Sessions, Barbados, on an indictment charging him with shooting with intent.

On the night of the 17th July, 1953, a masked man entered a house and shot one of the occupants. He was wearing a khaki trousers. Another masked man was outside of the house.

On the 28th July, 1953, a labourer found a pair of khaki trousers about 2 to 4 miles from the house entered by the masked man. In one of the pockets, a penknife and a piece of plastic material in the shape of a mask were found. The trousers had patches and same stains.

Later that same day a witness, Myrl Harper, said in the presence of the appellant that the trousers belonged to the appellant. A policeman asked him whether he had heard what the witness said. He replied "O God, Myrl, O God" and then took the trousers from the policeman, placed them in front of him and said they were too big for him.

The prosecution also called two witnesses who gave evidence about events anterior to the 17th July, 1953. Clarke said that the appellant had spoken to him, prior to the 17th July, 1953, about getting money from the Parochial Treasury and that on the Thursday of the week after the shooting the appellant said to him "Don't forget the thing is next Friday." Gregoire gave somewhat similar evidence.

At the preliminary inquiry Myrl Harper gave evidence but she was not called at the trial before the Court of Grand Sessions.

The policeman gave evidence of what Myrl Harper said in the presence of the appellant and his reply and conduct.

After conviction the following questions were reserved for the consideration of the West Indian Court of Appeal:—

(1) Whether the trial judge was right in ruling that the evidence of Charles Christopher Clarke and Raymond

Gregoire was admissible as showing preparation and intention on the part of the accused; and

(2) Whether, upon the refusal of the Prosecution to call Myrl Harper whose name appeared on the indictment, the offer of the trial Judge to call her and make her available for cross-examination by the Defence and the Prosecution, cured any defect in the proceedings if defect there was, arising out of that refusal.

Held: It has long been settled that Counsel has a discretion as to what witnesses he should call of those whose names are on the back of the indictment.

Myrl Harper's statement in the presence of the appellant was admissible, although she was not called for the purpose of indicating or showing the demeanour or reaction of the appellant when her statement was made. R. v. Christie (1914) A.C. 545, applied.

(Editor's Note: An application to the Privy Council for leave to appeal has been lodged in this case.) See also Hassan Mohamed v. The Queen, Court of Criminal Appeal (1954) L.R.B.G.

Two questions of law reserved by the trial judge following the appellant's conviction for shooting with intent.

The substantial ground argued was whether the statement of a person in presence of appellant was admissible and even if admissible whether the evidence should not have been excluded as it was highly prejudicial and valueless as the appellant did not admit the truth of what was said in his presence.

In holding the evidence admissible, the Court stressed the restricted nature of its functions when compared with a Court of Criminal Appeal or other tribunal possessing more extensive appellate jurisdiction.

W. H. A. Hanschell and G. B. Niles for appellant.

C. Wylie, Q.C., Attorney General and D.E.G. Malone for the respondent.

Cur. adv. vult.

Judgment of the Court:

This matter comes before the Court for consideration by way of a case stated by the learned Chief Justice in pursuance of the provisions of sections 3 and 4 of the *West Indian Court of Appeal Act, 1920.*

The appellant was tried on indictment before a jury on the 14th, 15th, 16th, 17th and 18th days of December, 1953, at the Court of Grand Sessions, and was convicted on a count charging him with having on the 17th day of July, 1953, in the parish of Saint Joseph, shot at Henrietta King with intent to maim, disfigure or disable her or do her some grievous bodily harm. He was on the 23rd day of December, 1953, sentenced to 10 years' penal servitude.

Henrietta King lived at Horse Hill, St. Joseph with her husband, Alfred King, the Parochial Treasurer of Saint Joseph. On the night of Friday, 17th July, she was at home with three of their children Claye, Paul and Terry, aged 16, 12 and 2 years respectively. Her husband had left home earlier in the evening with their daughter,

Dorothy, aged 21, to keep some engagement. Mrs. King put her children to bed and she went to sleep with the baby, Terry, lying beside her, leaving alight an electric lamp in the ceiling. She awoke and found a masked man standing over her. The masked man covered her mouth with a gloved hand and treated her roughly, at the same time demanding "the keys." She screamed; he cuffed her son Paul who was by then in the room and shot at and severely wounded Mrs. King, leaving her helpless. Before that she had instructed her daughter Claye who had entered the room after hearing the scream, to look for the keys and give them to the assailant; the keys were not found and a search by the assailant himself proved fruitless. The man wore an old felt hat frilled over his forehead, a black mask with two holes by his eyes, and trousers looking like dirty khaki. Claye King ran out to the "landing" of the steps and shouted for help where she was swung around by another man, also masked. Ultimately both men escaped.

On the 28th July, 1953, at the house of the appellant's parents where he and other members of the family lived, police constable Lynch found between the mattress and spring of a bed in a room a piece of black cloth with two holes; this cloth when placed over Lynch's face looked like a mask. The appellant did not always sleep at home.

Eileen Arthur, a labourer who on the same day was "picking grass" out of canes near the highway about two to four miles from Mrs. King's residence, found a pair of khaki trousers rolled up, and in one of the pockets, a penknife and a piece of plastic material in the shape of a mask; the trousers had patches and some stains.

At the police station later that day the appellant was shown the mask found at his home; he was told by Corporal Sargeant that it was found in the bedroom occupied by him and his two brothers; he replied, "I have a mischievous brother at home who is always doing those things." At the station that day one Myrl Harper, after she was shown the trousers found in the field said in the presence of the appellant that he had taken the trousers to her home some Wednesdays before and asked her to patch them for him, and that as she was going to "wash" at his mother's home, she took the trousers there and patched them on his mother's machine, using a piece of old trousers she found at the house. Appellant was then asked by the corporal whether he had heard what Myrl related and, after being cautioned, said, "0 God, Myrl, O God"; appellant then took the trousers from the corporal, placed them in front of his body and said the waist was too big for him.

Myrl Harper gave evidence at the preliminary inquiry before the Magistrate—the nature of her evidence was not revealed—but she was not called at the trial. Counsel for the Crown refused to call her observing she was not a witness of truth. After the last witness of the prosecution had given evidence the trial Judge offered to call Myrl Harper but defence counsel stated that the defence did not wish the Court to call her. Myrl Harper had given three written statements to the police, one before appellant was confronted with her

one immediately after, and the third about three quarters of an hour later. In the last statement she denied all knowledge of the trousers.

At the trial counsel for the Crown opened the case indicating that he intended to prove that the trousers belonged to the appellant. The note on this point taken by the Judge is as follows:—"Pair of trousers found 1/4 mile away in field and identified as those of accused. C.I.D.—pants and patches put by a witness. Pants with safety pin. Accused said too long."

Two policemen were called to relate the conversation that took place when Myrl Harper spoke in the presence of the accused. No witness was called to identify the trousers as the property of the appellant.

Charles Christopher Clarke and Raymond Gregoire gave evidence about events anterior to the 17th July, 1953. Clarke said he worked at the Globe Theatre in the year 1953 and lived for some time during that year at Cliff Cottage, St. John, that one occasion in 1953 and before the incident of the 17th July appellant told him that he (witness) could get money from the Parochial Treasurer, St. Joseph, and he told the appellant he was not in that as he had been in trouble before; that on the Thursday of the week before the shooting appellant went in his car to him by the theatre and told him, "Don't forget the thing is next Friday"; that he replied, "What thing? You people have no uses for me. I ain't in that." Appellant then drove off. He further said that on Friday 17th July at 7.30 p.m. to 7.45 p.m. appellant went to him at the theatre and asked him "What about the deal tonight?" Appellant said that the deal was to take place that night. Clarke said he asked him "What deal?" and cursed him; that Raymond Gregoire was present and appellant said he could trust Gregoire but not him, Clarke.

Gregoire gave somewhat similar evidence as to the conversation which took place between Clarke and appellant at the car and at the theatre on Friday night, the 17th July.

An additional circumstance related in evidence was that on the occasion when Lynch placed the cloth over his face, appellant remarked, "Everything is pointing to me, the pants and now that."

Two questions in the following form were reserved by the learned Chief Justice for the consideration of this Court—

> "(1) Whether I was right in ruling that the evidence of Charles "Christopher Clarke and Raymond Gregoire was admissible as showing "preparation and intention on the part of the accused; and
>
> "(2) Whether, upon the refusal of the Prosecution to call Myrl Harper "whose name appeared on the indictment, my offer to call her and make "her available for cross-examination by the Defence and the Prosecution, "cured any defect in the proceedings if defect there was, arising out of that "refusal.
>
> "I refuse to reserve any questions arising out of Grounds 2, 4 and 5 of the application."

E. A. COLLYMORE

"NOTE: Amplification and explanation of the points reserved will "be found on a perusal of the arguments noted at pages 126 to 133 of "the record and on a perusal of the summing up."

E.A.C.

On the second day of the hearing before us, counsel for the appellant objected that the case was not stated in the manner and form required by section 4 of the Act, in that the whole record had been submitted with the questions reserved. We considered that, although the case was not stated in the usual form, counsel was afforded greater scope for argument on the submissions he had already made and was in the course of making on behalf of the appellant. It would have been unprofitable at that late stage to send the case back to be restated in a more restricted form, and undesirable as the appellant was not on bail. We therefore decided to continue the hearing of the appeal.

We may observe at the outset that the jurisdiction of this Court extends only to the determination of questions of law reserved for its consideration, and it is not competent for this Court to entertain and deal with any other question which may be cognisable by a Court of Criminal Appeal or other tribunal possessing more extensive appellate jurisdiction.

The second question was argued first; it was submitted that the evidence given by the police constables as to the identification of the trousers by Myrl Harper at the police station was inadmissable and highly prejudicial to the accused; that the prosecutor had no discretion but was bound to call Myrl Harper as a witness as her name appeared on the back of the indictment. With respect to the latter part of the submission, it is relevant to attract attention to the words of Alderson B. in *R. v. Woodhead, (1847), 2 C & K 520—*

"You are aware, I presume, of the rule which the Judges have lately "laid down, that a prosecutor is not bound to call witnesses merely "because their names are on the back of the indictment. The witnesses "however should be here, because the prisoner might otherwise be "misled; he might from their names being on the bill, have relied on "your bringing them here, and have neglected to bring them himself .... "This is the only sensible rule. . . ."

This rule was recognised in the case of *Adel-Muhammed v. Attorney-General for Palestine (1944) A.C. 167* where Lord Thankerton delivering the opinion of the Board said at page 169—

"It is consistent with the discretion of Counsel for the prosecutor, which is thus recognised, that it should be a general practice of prosecution counsel, if they find no sufficient reason to the contrary, to tender such witnesses for cross-examination by the defence, and this practice has probably become more general in recent years, and rightly so, but it remains a matter in the discretion of the prosecutor."

It has therefore long been settled that Counsel for the prosecu-

tion has a discretion as to what witnesses he should call of those whose names are on the back of the indictment.

The question whether the evidence of the policemen should not, because of its prejudicial nature, have been received stands on a different footing.

In regard to the question of prejudice Counsel for the appellant submitted that the evidence of the two police witnesses of what transpired at the police station when Myrl Harper was present was highly prejudicial to the appellant and of such little evidential value that it ought not to have been received; that the circumstances under which that evidence had been led deprived not only the appellant of an opportunity of objecting to its admission, but also the trial Judge of disallowing it; in other words, that it may have been the assurance indicated in the opening that 'Myrl Harper would be called which induced the trial Judge to admit the evidence—but had he known that Myrl Harper was not coming to testify, he might well have, in the exercise of his discretion, disallowed it. That may possibly be so, but there seems to be no reason why it should be assumed that the trial Judge, at the time the evidence was tendered, was not fully aware of the rule governing the admission of such evidence, nor is there anything to indicate that his discretion was not exercised independently, that is to say, irrespective of any expectation that Harper would be called.

On this question of prejudice we are clearly of opinion that even if it can be said that prejudice might have resulted from the admission of evidence in the proper exercise of a trial judge's discretion, that would not be a matter to be questioned as a point of law.

But counsel for the appellant did not only impeach on the ground of prejudice to the defence the admission of that evidence, but also maintained that the evidence was inadmissible because Myrl Harper was not called to testify: in other words, that the evidence would be admissible only if the foundation for its reception was laid by Myrl Harper's testimony. The Attorney-General on the other hand contended that the evidence was independently admissible for the purpose of indicating or showing the demeanour or reaction of the appellant; that is to say, it was admissible for that purpose irrespective of whether Myrl Harper was or was not called.

On this point the case of *R. r. Christie, (1914) A.C. 545* is attractive. Lord Atkinson in dealing with a similar question, after stating the rule of law, went on to say at page 555—

> "It is, therefore, in the application of the rule that the difficulty arises. The question then is this: It is to be taken as a rule of law that such a statement is not to be admitted in evidence until a foundation has been laid for its admission by proof of facts from which, in the opinion of the presiding judge, a jury might reasonably draw the inference that the accused had so accepted the statement as to make it in whole or in part his own, or it is to be laid down that the prosecutor is entitled to give the statement in evidence in the first instance, leaving it to the presiding judge, in case no such evidence as the above mentioned should

be ultimately produced, to tell the jury to disregard the statement altogether ?

In my view the former is not a rule of law, but it is, I think, a rule which, in the interest of justice, it might be most prudent and proper to follow as a rule of practice."

We consider that Christie's case governs the question and accordingly we hold that the evidence is admissible for the purpose of showing the behaviour and the demeanour of the appellant.

In answer to the second question reserved, we hold that there was no defect in the proceedings arising out of the refusal of the prosecution to call Myrl Harper as a witness and therefore consideration of the effect of the offer does not arise.

With regard to the first question we have no doubt whatever that the evidence was admissible. It was clearly relevant to the issue as tending to prove that the appellant was one of the two men on the premises on the night in question.

Other matters relating to the trial, some of which are apparent on the face of the record, were mentioned by counsel for the appellant in the course of his argument; but we indicated to counsel at the time that we could neither take notice of them nor express any views thereon as they did not come within the scope of our jurisdiction.

The appeal is dismissed and the conviction and sentence affirmed.

DE MENDONCA & De MENDONCA *v*. THOMPSON.

De MENDONCA and De MENDONCA as executors of Josephine Alice Houston, deceased, v. THOMPSON and another.

(In the Supreme Court, Civil Jurisdiction, In Chambers (Stafford J. Acting) May 12; June 17, 30; 1950.)

Will—"In the event of death"—Interpretation.

J.A.H, died leaving a last will and testament, dated the 14th day of April, 1945, the second clause of which was as follows:

> "I desire that the balance of my shares—197—remain invested in the "firm of Heirs L. de Mendonca Ltd., so long as the firm remains extant, "and the interest or dividends accruing therefrom from time to time he "divided equally between my sister — Caroline Elizabeth de Mendonca "—my grand-nieces—Yvonne Marguerita Belfast—Daphne Urma "Belfast and Averil Ursula Thompson, also my grand-nephews—"Wesley Ormond de Mendonca. Aubrey Fitzroy Belfast and Irvin Lloyd "Belfast. In the event of the death of my sister, the said Caroline "Elizabeth de Mendonca or anyone

"of the aforementioned grand-nieces and grand-nephews, then the interest or "dividends accruing from the said shares should be equally divided between "those surviving."

The following questions were submitted to a judge in chambers for interpretation:

(i) Is the bequest to the above-named legatees made to them as joint tenants or as tenants in common, or as tenants for life?

(ii) Could there be intestacy as to those shares in certain circumstances?

Held: As to the first question, all the legatees who survived the testatrix benefitted absolutely. The 197 shares were intended by the testatrix to be dealt with absolutely and finally by the provisions of the clause. As to the second question, the seven beneficiaries took the shares as tenants in common.

(**Editor's Note**: This decision was not published in 1950 through an oversight. The words "in the event of death" are of frequent use in wills in this Colony and it is considered desirable to publish this decision.)

Application by executors of a will for the interpretation by the Court of a clause in the will.

J. E. de Freitas for the plaintiffs.

P. M. Burch-Sm.ith for the first defendant.

H. B. Fraser for the second defendant.

Stafford J. (Acting):

This is an application by the executors under the will of Josephine Alice Ecclonason Houston, widow, deceased, for the interpretation of the second clause of the aforesaid will date the 14th day of April, 1945.

By order dated 6th March, 1950, directions were given for the appropriate representation of all parties likely to be interested and in pursuance of that order, the application came up for hearing on the 12th May, 1950.

The deceased died on the 16th day of April, 1946, and her aforesaid will was duly probated on the 19th July, 1946.

By her will the deceased provided for the payment of her funeral expenses, testamentary expenses and her debts "from the sale of my cattle, sheep and furniture." There are also specific bequests of a certain number of her cattle and sheep, which animals would of course be excepted from the proposed sale. Apart from these, there are specific bequests of shares, and of money, and a. residuary clause by which the testatrix bequeathed "the residue of my estate (whatever cash may be left after all my just debts and legacies have been fulfilled)."

The property left by the deceased consisted of cash, household goods, apparel, cattle, sheep and shares as is disclosed in the affidavit of the plaintiffs dated 24th March, 1950, filed herein.

The clause, the subject matter of the application reads as follows:

"I desire that the balance of my shares—197—remain invested in the firm "of Heirs L. de Mendonca Ltd., so long as the firm remains extant, and "the interest or dividends accruing therefrom

"from time to time be divided equally between my sister—Caroline "Elizabeth de Mendonca—my grand-nieces—Yvonne Marguerita "Belfast—Daphne Urma Belfast and Averil Ursula Thompson, also my "grand-nephews—Wesley Ormond de Mendonca, Aubrey Fitzroy Belfast "and Irvin Lloyd Belfast. In the event of the death of my sister, the mid "Caroline Elizabeth de Mendonca or any one of the aforementioned "grand-nieces and grandnephews, then the interest or dividends accruing "from the said shares should be equally divided between those surviving.

The questions put to me are:

(i) Is the bequest to the above-named legatees made to them as joint tenants or as tenants in common, or as tenants for life?

(ii) Could there be an intestacy as to those share in certain circumstances?

It is a rule of construction that a testator supposes that each part of his will is to take effect, and consequently cannot be said to have any intention to include in his- residue any thing that he has before given—Leake v. Robinson, 1817, 2 Mer. 363 at 393. In the instant] case one cannot but think, on reading the whole will, that the testatrix wished to consider her estate as divided into two classes of property, firstly cash, including the proceeds of the realisation of her cattle, sheep and furniture, and secondly, her shares in the company aforementioned. In fact the residuary clause of her will shows that she never contemplated that shares would fall into the residue.

Now what did she mean by "in the event of the death"? The learned author of Jarman on Wills 7th Ed., p. 2079 et seq. in discussing the use of such words says that they speak of death as a contingency whereas it is of all things the most inevitable, and says that in the absence of other words specifying some other contingency, they must refer to the contingency of death before the testator. He quotes "Hence it has become an established rule that where the bequest is simply to *A*, and in case of his death, or if he die, to B, A surviving the testator takes absolutely. Lowefield v. Stoneham, 2 Stra. 1261. The report of Trotter v. Williams, Prec. Ch. 78 is also to this point The rule is illustrated also in Clarke v. Lubboch, 1 Y. & C.C.C, 492 where the words used were "but in the event of the death of either" the whole of the interest to be paid to the survivor, and on his or her demise, should they have no children, then over," and it was held that "in the event of the death of either" was intended to mean "in the event of the death *before me* of either."

In the instant case therefore, I am of opinion that, subject to the arguments dealt with hereafter, as all the legatees survived the testatrix, the only one who died was the sister and on the 25th October, 1949, all benefited.

It has been argued by Mr. H. A. Fraser, of Counsel, for the defendant Babb, that the words of the clause under examination created a life interest in each of the named legatees with cross-remainders on

each dying in favour of the survivors, until they be reduced to one, and that on the death of the last the residuary clause, which he argued was wide enough in its terms, came into operation. But there are no specific words to indicate life interest and no "point of time" mentioned which could indicate a limitation of the interest to a period for the life of each legatee. The words "so long as the firm remains extant" cannot, in my opinion, be taken as indicating life interests, for if they have any effect at all they would apply with equal effect not only to the named legatees, but also the residuaries and even to any persons taking in intestacy. I construe them as expressing a pious hope that the company should not be embarrassed by the legatees by any realisation of the shares. For the above reasons I consider that the 197 shares were intended by the testatrix to be dealt with absolutely and finally by the provisions of the clause, without reference to the residuary clause.

I now deal with the question whether the bequest is limited to the dividends on the shares or touches the capital represented by those shares. Dowling v. Dowling 1865, 1 Ch. App. 612 is an instance of the rule that a bequest of the interest or profits from a fund or investment without any further bequest of the capital will operate as a bequest of the fund itself. This case follows the earlier case of Stretch v. Watkins, 1816, 1 Maddock 253 in which Plumer V.C. (at p. 256) held that if the rents and profits of an estate be given without limitation, the gift passes the absolute estate; that an unlimited gift of annual produce passes the thing itself. The distinction between words of limitation and the lack of such words is clearly shown in Clowes v. Clowes, 1838, 9 Simon, 403. I can find no words of limitation in the clause "secondly," and I hold that by its terms the testatrix passed the shares themselves to the named legatees.

There remains the question; did the shares pass to the legatees as joint tenants or as tenants in common. The rule as to this point at the present day seems to be: Any words which indicate that the legacy is to be divided and not enjoyed jointly will be sufficient to effect a tenancy in common, vide Re Davies, Public Trustee v. Davies et al, 1950, 1 All E.R. 120, in which case the words "in equal shares" were held to create a tenancy in common.

For the above reasons then, I interpret the clause "secondly" as having the effect of passing the 197 shares to the seven beneficiaries absolutely as tenants in common thereof.

The first-named beneficiary, Caroline Elizabeth de Mendonca, the sister of the testatrix, died, as I have mentioned, after the testatrix, testate. Her interest in the shares may, I think, be fairly left to be dealt with by her executor or executors. The other beneficiaries are infants. By reason of the provisions of clauses 17 and 23 of the Articles of Association of the Company, the shares are not capable of being transferred into their names, even if they were not infants. I order and direct that the shares be transferred into the names of such of their parents or other relatives willing to accept the trust as are capable of holding as trustees for the said infants, and that the dividends accruing from time to time on the said shares be paid to such trustees for the use and benefit of the said infants.

Actual division of the 197 shares equally amongst seven beneficiaries would mean that each obtained 28 shares, and one share would be left over to be held by all as tenants in common. That share may well be sold and the proceeds utilised in payment of administration expense if necessary, or divided amongst the beneficiaries. I give leave for this purpose.

IN THE MATTER OF JOSEPH RUDOLPH SPENCER LUCK
and
IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

(In the Supreme Court, Civil Jurisdiction (Boland C.J. Acting) May 29, 31; June 3, 1954.)

Habeas Corpus—Disorderly behaviour—Conviction—Magistrate ordering convicted person to sign bond to come up for sentence—Refusal—Correct procedure—Imprisonment—Illegality—Where Magistrate orders convicted person to sign bond to be of good behaviour—Refusal—Consequence.

The applicant was convicted by a Magistrate of the Georgetown Judicial District for disorderly behaviour and ordered to sign a bond to come up for sentence if called upon. He refused to sign the bond and was sentenced to two months imprisonment for failure to sign. it. The maximum punishment for disorderly behaviour is a fine of $50 and in default of payment a maximum term of imprisonment for two months. Imprisonment can only be imposed when there is default in payment of the fine. The Magistrate, it should be noted did not order the defendant to sign a bond to be of good behaviour in the future, as he could have done. Failure to sign such a bond is punishable by imprisonment.

The applicant having been committed to prison applied for a writ of *habeas corpus.*

Held: His imprisonment was illegal as his failure to enter into a recognizance to come up for sentence for the offence of disorderly conduct could not justify a sentence imposed on him in excess of that to which he was liable for his disorderly conduct. But his imprisonment would not have been illegal if he had been ordered to sign a recognizance to be of good behaviour in the future.

Application by J. R. S. Luck, a Barrister-at-Law, for a writ of *habeas corpus* in respect of his imprisonment after being convicted of disorderly

behaviour and his refusal to sign a bond to come up for sentence if called upon.

L. F. S. Burnham for applicant.

Solicitor General (*acting*) for the Magistrate and the Superintendent of Prisons

Boland C.J. (Acting):

I have directed that this matter which was taken by me on Saturday morning in Chambers be adjourned into open Court today with a two-fold object.

Firstly, I came to the conclusion at the hearing in Chambers that the detention of Mr. Luck in prison in pursuance of the order of the Magistrate is illegal, and I ordered that a Writ of Habeas Corpus should issue—that is to say that the Superintendent of Prisons is directed to produce the body of the prisoner in Court with an accompanying return setting out the grounds of his incarceration in the Georgetown Prison. Together with the Writ the Superintendent of Prisons is to be served with a notice that he must comply with the direction therein contained on Thursday the 3rd June next.

Now having come to the conclusion on Saturday that the continued detention of Mr. Luck is illegal, I had the power to direct his gaoler forthwith to discharge Mr. Luck without waiting to produce him in Court on Thursday, 3rd June, but I decided that, as this matter has aroused public interest I would in open Court tell Mr. Luck who was not present at the hearing in Chambers, why I was holding that he was entitled to be discharged.

Secondly, I wished to take the opportunity in open Court to utter a few words of warning to Mr. Luck as a Barrister-at-Law admitted to practise before the Courts of this colony.

Accordingly, I did not direct that Mr. Luck be discharged from the prison forthwith on Saturday morning but 1 ordered that he should be brought from the prison to my Chambers at once and there I ordered his release on his signing his own recognizance without a surety in the sum of $500:— conditioned for his appearance before me in Court this morning and the proceedings in Chambers were adjourned till this morning and to be taken in Court.

I propose at a later date, for the guidance of Magistrates to give a written decision, making reference to the relevant sections of the Ordinance, on the question of the legality of the Order of the commitment made in this matter by the Magistrate. It is sufficient now without reference to the Ordinance or to the authority of decided cases to give in outline the grounds for my holding that Mr. Luck is entitled to be discharged from prison.

Mr. Luck was found guilty and was convicted by the Magistrate for the offence of disorderly behaviour. Taking the view that the facts disclosed in evidence did not warrant his ordering any punishment, or at any rate only nominal punishment, the Magistrate, as he was empowered to do, told the defendant that he would discharge him conditionally on his entering into a recognizance, with a surety in the sum of $100:— for his coming up for sentence, if called upon, within the time specified in the recognizance. Mr. Luck, apparently with some petulance, declared that he did not intend to sign a recognizance.

In my view for the purposes of the point for decision in this matter, it is of no importance whether the Magistrate did tell the defendant, as appears in the formal order subsequently written up, that he was being given 10 days within which to sign the recognizance. It should be stated, however, that Mr. Luck in his affidavit filed in these Habeas Corpus proceedings denies that he was so told by the Magistrate. The substantive question in this case is—could the Magistrate require—the defendant to sign a recognizance on pain of being sent peremptorily to prison in default of his doing so. It was for his failure to enter into the recognizance after ten days that Mr. Luck was committed by the Magistrate to a term of two months' imprisonment with hard labour, Having regard to the view I take as to the illegality of the commitment to prison for non-compliance with the order, to sign the recognizance, it is necessary to consider whether Mr. Luck should have been called upon first to show cause why he should not be dealt with by the Magistrate for his non-compliance with the order. Perhaps I should hesitate to pronounce that an opportunity to show cause is necessary without the advantage of full argument on the point. I had stopped Mr. Burnham in his submissions on this point as I had wished to hear the Solicitor General in reply first to what seemed the unanswerable objection to the committal order otherwise. However, I would venture confidently to hold that on principle there is no need, in a ease, when a Magistrate is empowered to require a recognizance to be given, that the defaulter should be given the opportunity to show cause why he should not be dealt with for his default.

The recognizance into which the Magistrate required the defendant to enter was not one to guarantee his good behaviour in the future. It was, as expressed in the formal order as written up and as the Solicitor General appearing for the Magistrate respondent did not deny, merely to secure his attendance in Court for sentence, if called upon within the time specified in the recognizance. It is difficult to see how the failure to enter into a recognizance to ensure his coming up for sentence for the offence of disorderly conduct could justify a sentence imposed on the defendant in excess of that to which toy law he would be liable for the offence of disorderly conduct. The offence of disorderly conduct is punishable by a maximum fine of $50.00 in default of payment to undergo a maximum term of imprisonment of two months with hard labour. Imprisonment therefore can be imposed only when there is default in payment of the fine imposed. It is beside the point to urge, as was contended by the Solicitor General that there would be no necessity for the full term of imprisonment of two months to be served as Mr. Luck would be released so soon as he gave the recognizance. But it is possible to envisage a case where the failure to give the recognizance results from the inability to find a surety.

The Magistrate went wrong in the view he held that he could command the defendant to enter a recognizance merely to come up for sentence. What the Ordinance permits the Magistrate to do, though he convicts the defendant, is in certain circumstances to discharge him but the Magistrate may, if he thinks fit, make the discharge conditional upon the defendant entering into a recognizance to come up for sentence. On Mr. Luck's refusal to enter into a recognizance the Magistrate should have proceeded to deal with him for the offence of

disorderly conduct for which he had convicted him. If the Magistrate wished time to consider what fine to impose he could have remanded him for sentence perhaps fixing bail with a surety for his attendance at the adjourned hearing. The defendant's failure to get bail would have subjected him to detention in custody for eight days for the most—but not to imprisonment with hard labour for two months.

The Magistrate would appear to have confused his powers over a defendant whom he is willing to discharge there and then without sentence on condition that he signs a recognizance to come up for sentence at some future date with that of a defendant whom he requires to sign a recognizance to guarantee his good behaviour in the future. In default of compliance with the latter kind of recognizance the Ordinance provides for imprisonment for three months with or without hard labour. Had the Magistrate directed Mr. Luck to enter a recognizance for his good behaviour or to keep the peace the order of commitment for two months with hard labour would have been a punishment within the law. It is for the above reason that I now make the order that Mr. Luck be discharged from prison.

And now a word to Mr. Luck as I am discharging him. Mr. Luck, while the Court has no power over nor does it desire to control the political views and activities of members of the Bar or of Solicitors whose names appear on its rolls, the Court will take notice of offences by practitioners which show a determination to flout the law which has been prescribed by the proper legally constituted authority and which it is the duty of the Courts of the Colony to administer, and the Court will be compelled all the more to take notice of any such flouting of the law by a practitioner when serious disturbance in the community may result therefrom. For conduct of this nature it may be necessary for the Court to exercise its powers of disciplining a practitioner as is provided by section 20 of the Legal Practitioners' Ordinance, Chapter 26. That section of the Ordinance if invoked in the case of a Barrister-at-Law might, apart from his being dealt with by the Court, lead to the Barrister being finally disciplined by the Benchers of his Inn.

From what appears in the notes of evidence in the case of disorderly behaviour, the facts constituting the offence, though perhaps justifiably deemed trivial by the Magistrate, nevertheless would have warranted your being required to sign a good behaviour bond having regard to present conditions in this Colony. Had the Magistrate called upon you to sign such a bond, on your refusal or failure to do so the result of these Habeas Corpus Proceedings might have been very different. With these words of warning from the Bench you are discharged from further imprisonment.

Solicitors:

A. R. Sawh for the appellant.

Crown Solicitor for R. G. Sharples, Magistrate and Superintendent of Prisons.

IN THE MATTER OF JOSEPH RUDOLPH LUCK
and
IN THE MATTER OF AN APPLICATION FOR A WRIT OF HABEAS CORPUS AD SUBJICIENDUM.

(In the Supreme Court, Civil Jurisdiction (Boland, C.J. Acting), May 29, 31; June 3, 1954).

Memorandum of reasons for decision in the above matter. The case is reported on the previous page and this decision should be read in conjunction with the previous one.

Boland, C.J. (Acting):

In discharging Mr. Joseph Rudolph Spencer Luck from prison after hearing the application made on his behalf for the issue of a Writ of *Habeas Corpus,* I gave in open Court my reasons for the order of discharge. I did not think it necessary then to make reference to the relevant sections of the Ordinance under which a Magistrate is empowered to direct that a person be imprisoned for failure to comply with his order to enter into a recognizance. But I made it clear that it was my opinion that neither by Statute nor by the Common Law, could the order of imprisonment be sustained in the circumstances of the matter before the Magistrate. The analysis which is now submitted, of the law relating to the power of a Magistrate to require a person to enter into a recognizance and the liability to punishment of the person so required to give a recognizance because of his non-compliance with the order is intended for the information and guidance of Magistrates.

First, I shall deal with the fact in Luck's case in which the commitment warrant was issued consequent upon his non-compliance with the order of the Magistrate to sign a recognizance. Luck had been charged with the offence of disorderly behaviour in a public place in breach of Section 139 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13. He was found guilty and convicted and thereupon became liable to a fine of $50.00. The Magistrate had the power, under sections 36 and 37 of the Summary Jurisdiction (Procedure) Ordinance, at once to order Luck to undergo imprisonment with or without hard labour for such a period as would be in accordance with the scale in section 37 in the event of there being default of payment of the fine imposed. In other words the defendant had the option of paying a fine so as to avoid imprisonment, the duration of which in any event could not exceed two (2) months. However, on convicting him, the Magistrate told the defendant that he was not going to pass sentence there and then, and purporting to exercise his powers under section 42 of Chapter 14, the Magistrate discharged the defendant but ordered him to enter a recognizance with a surety in the sum of $100.00 to come up for sentence if called upon. The defendant thereupon declared that he did not intend to give any recognizance, and he was allowed to leave the Court. There is a conflict-between Luck and the Magistrate as to whether or not Luck was told by the Magistrate, before he left the Court, as is recorded in the Order written up by the Magistrate, that he was being given 10 days in which to comply with the direction to give this recognizance. Whether there was so or

not is I think, immaterial on the question of the legality of the commitment for failure to enter the recognizance. It is clear however that the Magistrate did not tell the defendant what liability would be incurred by him for failure to provide the recognizance, but sometime, after 10 days the Magistrate issued a commitment warrant against the defendant committing him to a term of imprisonment for 2 months with hard labour for not having furnished the recognizance within 10 days. The defendant was duly arrested and without having an opportunity to appear before the Magistrate was taken to the Georgetown Prison where he was undergoing imprisonment with hard labour until lie was released by the order made in the *Habeas Corpus* Proceedings.

Section 42 of Chapter 14 under which the Magistrate purported to require the defendant to give the recognizance by way of security for his appearance before him for sentence when called upon reads:

> "If, on the hearing of any complaint, it appears to the court that, although the complaint is proved, the offence was, in the particular circumstances of the case, of so trifling a nature that it is expedient to inflict any punishment, or any other than a nominal punishment,—
>
> (a) the court may, without proceeding to a conviction, dismiss the complaint and, if it thinks fit, order the defendant to pay such damages, not exceeding ten dollars, and such costs of the proceedings, or either of them, as the court thinks reasonable, and the damages shall be payable to the person directed by the court; or
>
> (b) the court may, upon convicting the defendant, discharge him conditionally on his giving security, with or without a surety or sureties to appear for sentence when called upon or to be of good behaviour, and either without payment of damages and costs, or subject to the payment of damages and costs, or either of them, the court thinks reasonable.

It is to be noted that subsection (b) provides for a discharge after conviction is being made conditional, if the Magistrate so chooses, on the defendant giving security (1) *for his appearance before the court for sentence;* or (2) *to be of good behaviour.* The recognizance by way security which the Magistrate called upon the defendant, and which the defendant refused to give was for his appearance *for sentence if called upon.* Could a Magistrate impose a punishment then or any subsequent date, on the defendant because of his refusal or failure to give security if or his appearance before the Court for sentence when called upon? The learned Solicitor General, in the course of his submissions in support of the legality of the Magistrate's war-rant of commitment, referred to section 58 of the Ordinance. Section 58 refers to offences which consist of the continuing omission to do an act which an Ordinance requires to be done or the continuation of acts which by Ordinance are prohibited. The Magistrate is often in such cases empowered by the Ordinance itself to require the offender to do the act or abstain from doing the act as the case may be. Accordingly, section 58 provides for the punishment to which the

defendant is liable for disobedience of the Magistrate's requisition. Where a power is by any statute given to him of requiring any person to do or abstain from doing any act or thing, other than the payment of money, and no mode is prescribed for enforcing the requisition, the Magistrate may exercise that power by an Order, and may annex to the Order any conditions as to time or mode of action or otherwise which the Magistrate thinks just. Subsection 2 provides what is the punishment incurred for failure to comply with the Magistrate's order. If the order of requisition on the defendant is made by virtue of a statute, the nature and manner of punishment for failure to comply with the Magistrate's order shall be as prescribed by that statue, but if no punishment is prescribed by the statute, then the Magistrate has a discretion to impose a penalty which shall not exceed $5.00 for every day in which there has been non-compliance of the order or to order the imprisonment of the defaulter with or without hard labour until he has remedied his default.

But section 58 is not applicable to the provision for the security which the Magistrate may take from a defendant under section 42(b). No more than it could be maintained that a defendant who is told he would be discharged if he enters into a recognizance conditioned for his appearance at an adjourned hearing is liable for punishment for failure to give a recognizance under section 31(2) (b). Neither sub-section 42(b) nor section 31(2) (b) empowers a Magistrate to require a defendant to give security. What each section enacts is that the Magistrate may make the defendant's discharge conditional on his giving security.

The failure or refusal to comply with the condition of giving security might determine the Magistrate to change his mind and not discharge the defendant whom he has convicted. In such case he should at once proceed to sentence him for the offence for which he was convicted, and of course such sentence would have to be within the limits of punishment prescribed by that section of the Ordinance for the offence in respect of which he was convicted. Luck was, as has been stated, liable under section 39 to a maximum fine of $50.00 in default of payment, 2 months' imprisonment. Also it was within the power of the Magistrate to postpone sentence and for that purpose he could remand the defendant for sentence and, as the sentence would be a money penalty, he should fix bail with or without a surety in some sum not exceeding the maximum penalty prescribed for the offence. If the defendant failed to provide the bail fixed it is within the power of the Magistrate to order that he be detained in custody on remand for not more than 8 days beyond which period the date of adjournment cannot be fixed (*vide* section 31 of Chapter 14). The foregoing observations relate to a case when a Magistrate calls upon a defendant to give security *for his appearance before the Court for sentence at a future date* as the condition of his discharge there and then. It was that particular condition which the Magistrate specified for Luck's discharge. But section 42(b) permits the Magistrate to impose an alternative condition for the defendant's discharge—that of the defendant giving security for his good be-haviour in the future. In either alternative the Magistrate may make

it a condition of the defendant's discharge that the security to be given shall by him be with or without a surety. In any case whether he dismisses or convicts the defendant, the Magistrate may, if he thinks it fit, by section 83 bind the defendant to be of good behaviour and may order him in default of compliance with the order to be imprisoned for any term not exceeding three months. Section 83 of Chapter 14 reads:

> "The court shall have power, in any complaint made for a summary conviction offence, whether the complaint is dismissed or the defendant is convicted, to bind both the complainant and the defendant, or either of them, to be of good behaviour, and may order the complainant or the defendant, in default of compliance with the order, to be imprisoned for any term not exceeding three months.

Imprisonment for non-compliance with the order to give a bond under section 83 may be ordered to be with or without hard labour (*vide* the provision in section 20 of Chapter 13 relating to an order of imprisonment for "a summary conviction offence" as defined in section 2 of Chapter 13).

It is to be noted that the language of section 83 of Chapter 14 does not expressly empower the Magistrate to require the defendant to have a surety to his bond as is expressly stated in the preceding section 82, and the point has been raised that unless the section under which the defendant was charged and convicted provides that any bond he is required to give for his good behaviour shall be with or without a surety, the Magistrate cannot require the recognizance to be with a surety. Section 82 is an instance of a section in which provision is made for the defendant being required to give a bond with or without sureties. That is where the complaint is that there is reason to fear that the defendant will do the complainant some bodily injury. However in the year 1937, it was held by the Full Court (Crean C.J., Verity and Langley JJ) in the case of H. B. Sadler v. Percy C. Wight (1937) L.R.B.G., page 1 that since a new section 83 A was added to the Ordinance, Chapter 14 in the year 1932 by Ordinance No. ll of 1932, section 83 now interpreted with and read with the addition of section 83 A, gives a Magistrate the power in any complaint to bind either a complainant or defendant with sureties to keep the peace and be of good behaviour. If this decision, which if one of the Full Court of three Judges, were not binding on me as it is, I should decide the point differently as I find it difficult, I say it with every respect, to follow the reasoning of this judgment. But the point is authoritatively settled now by the ruling of the Full Court which is binding on all courts in the Colony.

In the Habeas Corpus Proceedings, reference was made by the Acting Solicitor general to the provision contained in the Probation of Offenders Ordinance, Chapter 21 which gives power to a Magistrate of requiring a bond from a defendant without recording a conviction or passing sentence. Section 2(1) (b) of that Ordinance enables the Magistrate because of certain extenuating circumstances of the kind specified in the subsection, even where he is satisfied that the charge has been proved, to discharge the offender conditionally on his entering

into a recognizance, with or without sureties to be of good behaviour and to appear for conviction and sentence when called on at any time during the period, not exceeding three years specified in the Order. The Magistrate in addition may make a probation order as against the defendant, subject to the defendant consenting to be placed under probation. In Luck's case the Magistrate did not purport to deal with the defendant by virtue of the power conferred on him under the Probation of Offenders Ordinance. However there would seem to be no power in a Magistrate under the Probation of Offenders Ordin-ance to require a defendant to give the recognizance on pain of the refusal or failure to comply with such order being punishable by the Court.

INDERJEET TACKORIE *v.* PORT MOURANT LIMITED

(In the Full Court of the Supreme Court, on appeal from the Magistrate's Court for the Courantyne Judicial District (Hughes and Stoby J.J.) May 28; June 19; 1954.)

Adverse possession—Tenancy at Will—Title to Land (*Prescription and Limitation*) *Ordinance, 1952—whether retrospective.*

The respondents, the owners of an estate on the Courantyne coast, filed a complaint in the Magistrate's Court claiming possession of a house occupied by the appellant as a tenant at will.

The Magistrate found that the appellant who was in occupation for about sixteen years was there as a tenant at will and ordered him to deliver up possession.

The appellant appealed and it was submitted on his behalf that the effect of sections 9 and 13 of the Title to Land (Prescription and Limitation) Ordinance, 1952 was that assuming he was a tenant at will sixteen years ago, his tenancy determined by operation of law at the end of the first year, from which time adverse possession began to run and the title of the true owner was extinguished at the end of the thirteenth year from the original occupation.

Held: The Ordinance was not retrospective and the appellant was a tenant at will when the complaint was instituted.

Per Curiam; Possession to be adverse must still be sole and undisturbed, and a tenant at will rendering services to an owner who is in physical possession of the whole area of which the house is but an insignificant part can never be in adverse possession. A Magistrate is only justified in declining jurisdiction where he is convinced that there is a *bona fide* dispute as to title.

Appeal dismissed.

Appeal from a decision of the Magistrate of the Courantyne Judicial District ordering the appellant to deliver up possession of a house occupied by him as a tenant at will.

Dwarka Dyal for appellant.

C. L. Luckhoo for respondent. *Cur. adv. vult.*

Judgment of the Court:

This is an appeal from the decision of the Magistrate for the Courantyne Judicial District, in which he decided that the appellant was a tenant at will and ordered him to deliver up possession of a house occupied by him.

The sparseness of the Magistrate's notes as appears from the record of appeal makes us think that not sufficient attention was given

to an issue which is extremely important to those owners of land who employ labourers in large numbers and who extend to such labourers the facility of residence on their property.

The respondents, Port Mourant Limited, lodged a complaint in the Magistrate's Court alleging that the appellant Inderjeet Tackorie was a tenant at will of a house situate on their land at Plantation Port Mourant and that such tenancy was determined by notice to quit but the tenant had refused to give up possession.

The appellant in a written defence denied not only that he was a tenant at will but that any relationship of landlord and tenant existed. He pleaded that he was in possession of a piece of land and a house at Plantation Port Mourant and had occupied the same nee vi, nee clam, nee precario for over twelve years. He further claimed that the issue would involve a dispute as to title to immovable property which the Magistrate had no jurisdiction to try.

The facts proved before the Magistrate and accepted by him were that Plantation Port Mourant is owned by the respondents who hold the legal title to the land and house occupied by the appellant. The appellant lived in the house without paying rent as a tenant at will and in return for such occupation rendered services as a labourer to the estate. There was some argument addressed to us regarding the correctness of the finding of fact that appellant occupied the house because he rendered services as la labourer. As we have said, the notes of evidence occupy a minimum of space but the following passages occur; "Defendant has been in that house sixteen years. He pays no rent. He gives services as labourer to the Estate. This is the usual custom." As the appellant never favoured the Court with an explanation of how he came to be living in another person's house without paying rent, the conclusion, having regard to the context, that he was permitted to occupy because he was rendering services as a labourer to the estate is not an unreasonable one.

It was submitted on behalf of the appellant that assuming he was a tenant at will sixteen years ago the effect of Section 9 of the Title to Land (Prescription and Limitation) Ordinance, 1952 (No. 62) is that the tenancy determined at the end of the year, from which time adverse possession began and as section 13 gives a good title to land after twelve years adverse possession he cannot be ejected and can apply to the Supreme Court for a declaration of title.

Now it is a generally recognised principle of law that a statute takes effect from the date of enactment unless a contrary intention is expressed in the statute itself. But as was recently explained by Boland C.J. in Linde and Douglas v. Demerara Company Limited, Nos. 446 and 447 of 1951, decided on the 3rd March, 1954, where the provisions of a statute are merely procedural such provisions may have a retrospective effect. The state of the law prior to the introduction of Ordinance 62 of 1952 is of the utmost importance in deciding whether the Ordinance is procedural or not.

In 1950 a Committee known as the Law Revision Committee was appointed to make recommendations appertaining to any branch of the law which it thought was in need of consolidation or modernising. As

the Laws of British Guiana were about to be revised it was essential for the Committee to make its recommendation in a series of interim reports so that if accepted the necessary legislation could be presented to the Legislative Council before the 30th April, 1953, which was the last day any Ordinance could be incorporated in the revised edition of the Laws of the Colony.

One result of the Committee's labours was the enactment of Ordinance 62 of 1952. This Ordinance is modelled on the Limitation Act 1939 which itself came into existence as a result of an interim report of a Law Revision Committee appointed in England by the Lord Chancellor. The Act of 1939 consolidated the Limitation Act 1623, the Civil Procedure Act 1833, the Real Property Limitation Acts of 1833 and 1874. Except with regard to land the 1939 Act was essentially procedural.

In British Guiana the Limitation Ordinance, Chapter 184, section 14 and the Civil Law Ordinance, Chapter 7, section 4(2) contained the relevant provisions regarding land until the repeal of the former by Ordinance 62 of 1952. Prior to 1952 the Courts of this Colony have been unanimous in deciding that adverse possession of twelve years bars the legal owner from recovering his land but it does not extinguish his title to the land. The distinction was no mere legal conundrum for it meant that if the owner of the legal title could obtain possession of his land other than by action, the adverse possession is of no avail to the stranger.

Gondchi v. Hurril, 1931—1937 L.R.B.G. 509.

Frank et al v. Ali Buksh, 1943, L.R.B.G. 78.

Section 13 of Ordinance 62 of 1952 as did the Limitation Act of 1939, not only operates as a bar to the remedy for possession, but extinguishes the title of the owner. To that extent it has introduced a new doctrine into the law of immovable property and it would be abhorrent to commonsense and offend one's sense of natural justice if it were to be held that a person in adverse possession for twelve years prior to 1952 had succeeded in extinguishing the title of the true owner.

The next section which calls for examination is section 9. Under that section a tenancy at will is deemed to expire at the end of the year and if not renewed adverse possession begins to accrue from the expiration of the year.

At Common Law a tenancy at will was created by letting land without stipulating the period for which the land was let and mere permission to occupy land was held to create a tenancy at will. *Richardson v. Langridge* 1811, 13 R.R. 570. In order to determine such a tenancy either a demand of possession was necessary or circumstances exist from which the law would imply a determination. If no demand was made or no circumstances established the tenancy at will continued.

In England, the effect of the Real Property Limitation Acts of 1833 and 1874 was that an owner's right to recover possession from a tenant at will began at the expiration of one year from the creation of the tenancy at will, and as the right was barred after twelve years a tenant at will could not be dispossessed after being in possession for thirteen years.

In British Guiana such was never the law. There was no presumption of the determination of a tenancy at will at the expiration of a year. Until some positive act or circumstance could be shown to have caused the tenancy to cease the tenancy at will subsisted. Section 9 of Ordinance 62 of 1952 which enacts that:

> (1) A tenancy at will shall, for the purposes of this Ordinance, be deemed to be determined at the expiration of a period of one year from the commencement thereof, unless it has previously been determined, and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued on the date of such determination.

introduces a new doctrine into our law and is not procedural and not retrospective. As we hold that the Ordinance is not retrospective there is no presumption that the tenancy at will expired fifteen years ago. On the contrary the evidence is that a tenancy at will subsisted when the complaint was instituted.

Another aspect of the Ordinance deserves mention.

It is a canon of construction that the Legislature is acquainted with the actual state of the law. Before 1952 adverse possession to be of effect had to be in the language of the old pleaders *nec vi, nec clam, nec precario.* A person in possession at the will of the owner does not commence to acquire adverse possession until he did some act or acts in defeasance of the owner's will. When too the owner of the legal title remained in possession a trespasser was unable to acquire any right over the property since he was never in sole and undisturbed possession. Where the owner was not in possession several trespassers may acquire a joint possessory right but never when the owner is there. His occupation was not the occupation of an enemy seeking to acquire but of a friend or servant dependent on the grace of his master. Section 10 of Ordinance 62 of 1952 enacts:

> (1) No right of action to recover land shall be deemed to accrue unless the land is in the possession of some person in whose favour the period of limitation can run (hereafter in this section referred to las "adverse possession") and where under the foregoing provisions of this Ordinance any such right of action is deemed to accrue on a certain date and no person is in adverse possession on that date, the right of action shall not be deemed to accrue unless and until adverse possession is taken of the land.

The combined affect of sections 9 and 10 is to permit adverse possession to run although the original possession was at the will of the legal owner and there has been no overt act in defiance of the true owner's title. To that extent the necessity for pleading *nec precario* has gone but possession to be adverse must still be sole and undisturbed and a tenant at will rendering services to an owner who is in physical possession of the whole area of which the house is but an insignificant part can never be in adverse possession.

It was submitted that the Magistrate should have declined jurisdiction as title to immovable property was involved.

The submission is based on the decision of *Savary J.* in *Block Co-operative Credit Bank v. James,* where he held that where the owner of a house is also the owner of the land on which the house stands the house is immovable property.

On the assumption that the subject matter of this complaint is immovable property, a Magistrate is only justified in declining jurisdiction when he is convinced that there is a *bona fide* dispute as to title. Where the occupier of immovable property produces a transport for it or leads evidence of ownership by inheritance a Magistrate is justified in declining to proceed. Those examples are not exhaustive but illustrate what kind of dispute is contemplated. The mere assertion of adverse possession is not enough; the facts on which the adverse possession is claimed, must appear to be *bona fide.* Here the adverse possession depended on the retrospective effect of an Ordinance and the Magistrate was competent to decide that question.

We are of opinion that no *bona fide* issue was raised and the appeal is dismissed with costs; the appellant to deliver up possession on or before the 15th July, 1954.

Appeal dismissed with costs.

ETWARIA as administratrix of the estate of Jeboo (deceased) *v.* JAMES JEBOO, CECILIA JEBOO, NEVILLE JEBOO and DAVID JEBOO.

(In the Supreme Court, Civil Jurisdiction (Stoby J.) April 12; June 24, 1964.)

Contract—Rescission—Partial failure of consideration—Mistake—Policy of assurance—Assured—Death—Non-disclosure—Counsel's opinion regarding institution of proceedings—Insufficient—Duty of administratrix to persons interested.

When the plaintiff's husband died Intestate, his estate was valued at about $2,521.67. The wife thereupon became entitled to a first charge of $480 and one-half of the balance, and his parents to the remaining half. The parents claimed that he was indebted to them in the sum of $1,108 and refused to deliver a life insurance policy for $1,000 which was in their possession.

Eventually the wife and parents agreed in writing that the wife should waive her claim to the $480. and receive the proceeds of the. life policy and an amount due to the estate on a promissory note, while the parents would receive the remaining assets.

The Life Insurance Company declined to pay the $1,000 as the assured had not disclosed material facts, and the maker of the promissory note claimed to have paid it.

Held: If the Insurance Company was not legally liable to pay the $1,000 the contract could be rescinded on the ground of mutual mistake. As the plaintiff had acted on legal advice and accepted the Insurance Company's decision not to pay without consulting the defendants and affording them an opportunity to decide whether an action against the Company should be brought, the present action was premature.

Judgment for defendants with costs.

The wife instituted proceedings to rescind the contract and to have the remaining assets distributed as on intestacy.

Action for rescission of contract on the ground of failure of consideration and mutual mistake.

A contract was entered into between the plaintiff and defendants on the assumption that a third party would pay to the plaintiff a certain sum of money. The third party refused to pay but no legal proceedings were taken against them.

R. H. Luckhoo for the plaintiff.

H. A. Fraser for the defendants *Cur. adv. vult.*

Stoby J.:

When this matter came on for hearing, it was evident from the pleadings that there was substantial agreement with regard to the facts, and consequently, in order to save time and minimise costs, it was agreed that plaintiff's counsel should state the undisputed facts, and evidence would be taken on any issue upon which agreement was not reached.

Thereupon Mr. Luckhoo stated the agreed facts and after they were reduced to writing, the statement was read to both counsel and placed on the file for record.

The plaintiff's claim is for an order against the defendants rescinding an agreement entered into between them on the 30th April, 1952, on the ground that it was entered into under a mutual mistake and for certain consequential orders if the said agreement is rescinded.

The plaintiff is the widow and administratrix of the estate of her late husband, Herbert Oswald Jeeboo, who died intestate on the 21st December, 1951.

The assets of the deceased's estate as declared amounted to $2,729.25 which sum included a claim for $1,000.00 on a policy of life insurance with the Crown Life Insurance Company. Funeral expenses were $207.58 leaving a net estate of $2,521.67.

As the deceased died intestate without children, the plaintiff was entitled under the Civil Law of British Guiana Ordinance, Chapter 7, to a first charge of $480.00 of the net estate and after deduction thereof, the plaintiff was entitled to one-half of the balance and the parents the first and second defendants, as next of kin, to the other half.

This division was never effected because included in the assets was the policy already referred to for a $1,000.00 and the parents were in possession of it. They refused to deliver it to the plaintiff as they claimed that their son was indebted to them in the sum of $1,108.00 and his brothers the third and fourth defendants also made lands against the estate.

In a laudable attempt to avoid litigation, the parties after a conference, entered into a written agreement which, after reciting the existing differences, stipulated that the plaintiff was to waive her claim to her first charge of $480.00, and the brothers, the third and fourth defendants, were to waive any claims which they had against the estate. It was further agreed that the parents, the first and second defendants, were to receive certain specific assets of the

estate, to wit a cow, a two-storeyed building and another building, while the plaintiff was to receive the cash which was in the Post Office Savings Bank, a promissory note for $227.00, some other items and Life Insurance Policy for $1,000.00.

The settlement, at face value, was an excellent and equitable one, for not only was it designed to avoid litigation which may have consumed in costs the whole of this modest estate, but it resulted in a distribution in which the wife was to receive a little more than one half of the net estate, the parents the remainder and the brothers nothing.

In pursuance of the agreement the parents took possession of the property assigned to them and the wife applied to the Insurance Company for payment of the sum of $1,000.00. The Insurance Company rejected her claim on the ground that the deceased had not disclosed material facts. Her efforts to persuade the defendants to re-apportion the estate in the light of the changed circumstances were unavailing and this action was brought.

The legal issues which on these facts were submitted for my decision are:

1. Whether the plaintiff can have the agreement set aside on the ground that there was a failure of consideration; or
2. that there was a mutual mistake; or
3. that the agreement was based on the assumption that the plaintiff would receive from the Insurance Company the sum of $1,000.00 on the policy.
4. Whether it can be said that the $1,000.00 is not payable to the plaintiff until she has brought an action on the contract of assurance.

I propose to dispose of the first issue and then decide the other issues under one broad head.

Money paid on a consideration which has wholly failed can always be recovered in an appropriate action; but the right to sue for the rescission of a contract is founded upon an entirely different principle. In the former, the contract when it was entered into was properly executed and binding; in the latter the basis of the right to rescission is that at the inception there was misrepresentation fraudulent or innocent, or mistake which would make it inequitable for a contract so formed to remain in existence. Nor can it be said in this case that there has been a total failure of consideration. The defendants prior to entering into the contract were asserting a claim against the estate; their surrender of this claim and their undertaking to compromise rather than indulge in litigation in return for the plaintiff's promise to deliver specific chattels was valuable consideration moving from them to the plaintiff. The law is fully explained in *Trigge v. Lavalee* 15 E.R. 497 P.C., which was an appeal from the Court of Queen's Bench for Lower Canada to Her Majesty in Council. At page 292 the following passage occurs in the judgment of Lord Kingsdown: "It (the argument) falls under the head of what in French law is termed a "Transaction" and in English a "Compromise." It is an agreement to put an end to disputes and to terminate or avoid litigation, and in such cases the consideration which each party

receives is the settlement of the dispute; the real consideration is not the sacrifice of a right, but the abandonment of a claim." Although this case was dealt with under the principles applied by French law to "Transactions" Lord Kingsdown concluded by saying, "As this case is to be decided exclusively by French law, we have forborne to advert to the English authorities upon the subject. But one may observe that in the case of Stewart v. Stewart in the House of Lords (6 C1. and Fin. 911) which was a case from Scotland, very careful examination took place of the principles to be applied to this subject; and Lord Cottenham came to the conclusion that the rules of the Civil Law had been in effect adopted into the law, both of England and Scotland; and this appears to us to have been the case with the law of France." The non receipt of $1,000.00 is, indeed, a partial failure of consideration. The plaintiff's waiving of her first charge of $480.00 against the estate was in consideration of receiving $1,000.00 and other sums. Her consideration was executed—the waiving of her first charge—the defendants' liability has been partly performed. For long the principle of our law has been that consideration is "whole and indivisible. "It could never be a practical or commonsense doctrine to permit parties to a contract to accept part of a bargain and repudiate a part. The principle is well illustrated in *Linz v. Electric Wire Co. of Palestine* Ltd. 1948 A.C. 371 where the plaintiff who had purchased a number of preference shares issued by the defendant company sold them for substantially less than she paid for them. Subsequently it was admitted that the allotment of preference shares was void and the company offered to repay holders of preference shares the amounts paid by them for their shares. No offer was made to the plaintiff as she was not at the time the holder of the shares. Her action to recover what she paid for the shares was dismissed on the ground that there was no total failure of consideration.

If this contract is to be rescinded it must be on another principle, but not on partial failure of consideration.

The remaining issues may be suitably discussed as one broad issue. It is elementary that every simple contract presupposes agreement between the contracting parties, and since agreement is one of the fundamental elements without which there can be no contract, circumstances sometimes arise which justifies a Court in endeavouring to ascertain the intention of the parties prior to and at the time of the entering into the contract not for the purpose of varying what was done or of creating a new contract but in order to decide whether any contract exists at all.

Lord Wright, delivering the Judgment of the Judicial Committee in *Norwich Union Fire Ins. Soc. v. Wm. H. Price Ltd.* 1934, A.C. 455, said at page 463, "It is true that in general the test of intention in the formation of contracts and the transfer of property is objective; that is, intention is to be ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention. It is, however, essential that the mistake relied on should be of such a nature that it can be properly described as mistake in

respect of the underlying assumption of the conduct or transaction or as being fundamental or basic."

Again in *Lever Bros. Ltd. v. Bell* 1931, 1 K.B. at page 590, Lawrence L.J. agreeing with Pollock on Contracts said "The question is whether the existence of the thing contracted for or the state of things contemplated was or was not presupposed as essential to the agreement." Although this case was over-ruled in the House of Lords the passage cited above was not dissented from.

Returning to the instant case it is the fact that when the plaintiff and defendants made their reciprocal promises they all assumed that the Insurance Co. was liable to pay the $1,000.00. If they are not, then part of the subject matter of the contract does not exist; where two parties enter into a contract on the assumption that a third person, not a party to the contract, is compelled to perform a certain obligation and it afterwards transpires that there are legitimate grounds for the non-performance of the obligation, the contract can be rescinded on the ground of mutual mistake.

But the difficulty here is whether I can properly find that the Insurance Co. is not liable, or to put it another way, can I say at this stage that part of the subject matter in the contemplation of the parties is non-existent.

It was stated at the Bar, and not challenged, that the plaintiff refrained from instituting proceedings against the Company on the advice of Counsel whose opinion was that, in the light of the known facts an action could not succeed. The plaintiff after investigation discovered that the deceased had been guilty of material non-disclosure and mis-statement of facts when applying for his policy of assurance. As insurance contracts are all contracts *uberrimae fidei*, the non-disclosure and mis-statements, counsel advised, justified the Company refusing to pay.

Counsel for the defendants concedes that it was assumed by both parties that the Insurance Company would pay the amount for which the deceased was insured but contends that until a Court of competent jurisdiction has rejected a claim there is no ground on which the contract can be rescinded. The point is not free from difficulty. Manifestly, it is wrong for a person to file an action with full knowledge that it must fail on the facts and on the law. On the other hand, the opinion of Counsel however eminent does not bind the Court, nor is it unknown for Counsel's opinion to be ultimately incorrect. While it is reasonably clear from the contract that both parties expected the Insurance Company to pay without demur and that neither expected a law suit, it is indisputable that the Company can only obtain release from its contract by consent of the plaintiff or by a decision of the Court. As the plaintiff has to prove that part of the subject matter of the contract is nonexistent it was her duty to refuse to release the Company unless the defendants approved.

The ease with which the plaintiff concluded that the promissory note for $227.00 was paid and her failure to file proceedings against

the maker of it convinces me that she is adopting the, attitude that if the debts contemplated are not voluntarily paid it 'is no part of the bargain for her to seek to enforce payment.

The proper course which the plaintiff should have adopted was for her to file an action against the Insurance Company and disclose the facts adverse to her case to the defendants. She could have invited the defendants either to join with her as plaintiffs or to give her security for costs if they insisted that the action proceed. If they declined to do either then the action could have been abandoned and incapable of being revived by failure to file a statement of claim. The defendants would have been unable to impeach the plaintiff's conduct or bona fides because the facts would be known to them and the abandonment of the action brought about through their own neglect.

While in this age the Courts tend to 'brush aside form and administer justice according to the spirit of the law, the failure to prove satisfactorily that the $1,000.00 and $227.00 are irrecoverable is more than a mere technicality. The effect of that failure is to make the action premature and there is no option but that I must dismiss the action and order her to pay the defendants' costs.

Judgment for defendants with costs.

Carlos Gomes for plaintiff.

N. C. Janki for defendants.

SOOKDEO PERSAUD *v.* HANNAH RAMDIAL.

(In the Full Court of the Supreme Court, on appeal from the. Magistrate's Court for the West Demerara Judicial District, Boland C.J. (acting), Wills J. (acting) July 1, 14, 1954.)

Bastardy—Birth of child—Period of gestation.

The appellant was adjudged to be the putative father of a child born 260 days after coitus.

His main ground of appeal was that the average period of gestation is 275 to 280 days and he should not have been adjudged the father without proof that the child was not a normal birth.

Held: Although there was no evidence that the process of gestation was otherwise than normal there was no reason, in this case, to bold that the child was not the appellant's. Appeal dismissed.

Appeal from a decision of the Magistrate of the West Demerara Judicial District adjudging the appellant the putative father of a child.

A. T. Singh for appellant.

Theo Lee for Respondent. *Cur adv vult.*

Judgment of the Court:

This is an appeal against the decision of the Magistrate adjudging the appellant to be the putative father of a child named Khemranie born on the 8th August, 1952 to the respondent a single woman. The appellant was ordered to pay to the collecting officer the sum of $1.50 per week for the maintenance of the child and also to pay $3.96 for costs, in default of the payment of the costs to be imprisoned for 7 days.

Although the appellant denied that he had had sexual intercourse with the respondent on the 22nd November, 1951 or at any time we see no reason for interfering with the finding of the magistrate that he did have for the first time sexual intercourse with her on that day as she testified. Corroboration of the complainant's statement was furnished by evidence of a nephew of the respondent named Wilfred who lived with her and who spoke of the appellant in the year 1951 frequently visiting his aunt at her home at night when they would be alone together in the bedroom. These visits continued until the birth of the child. Also a few days after the birth of the child the respondent's sister spoke to the appellant in the presence of his wife about the birth of the child, and although the appellant denied that the child was his, he subsequently upbraided the respondent's sister for speaking in the presence of his wife instead of having spoken to him privately, but he gave her $15.00 to pay to the respondent. The respondent said that she received this sum of $15.00 having already got $5.00 from the appellant when he visited her on the third day after the birth. Evidence of this attitude towards the mother after the birth of the child, which the magistrate accepted, was sufficient corroborative evidence of the respondent's story that she had had sexual intercourse with the appellant on the 22nd November.

It was however contended on behalf of the appellant that, assuming that the appellant did have sexual intercourse with the respondent on the 22nd November, 1951, as the child was born on the 8th August, 1952 the period of gestation would be only 260 days which period would be much shorter than what has been accepted by the courts as the average period based on the pronouncements of experts in obstetrics. The average in normal cases has been stated to be 275 to 280 days. Decisions in reported cases have in the main beer concerned with the maximum number of days from the time of coitus beyond which it was not difficult to hold definitely that the birth could not be the result of such coitus. As Lord Simonds said in Preston-Jones v. Preston-Jones (1951) A.C. (391 at p. 401: "To prove that a period of so many days between fruitful coition and the time of conception is in a scientific sense impossible is itself, I suppose, a scientific impossibility. The utmost that a court of law can demand is that it should be established beyond all reasonable doubt that a child conceived so many days after a particular coitus cannot be the result of that coitus." On the question, however, of the shortness of the period Stone's Justices' Manual 86th Edition (1954) refers with approval in a foot note on page 500 to an excerpt from Burn's Med: "Many circumstances may render labour somewhat premature and it is even possible for the process to be completed and the child perfected to the usual size a week or two sooner than the end of the nine calender months." We see no reason to hold that although in this case the child concerning whose birth there was no evidence that the process of gestation was otherwise than normal, the conception was not the result of the coitus of the 22nd November, 1951.

In the result the decision of the Magistrate is upheld. The appeal is accordingly dismissed with costs to the respondent.

R *v.* R & M

(In the Supreme Court, Divorce and Matrimonial Jurisdiction (Stoby J.) April 6, 7, 8; May 10, 11, 12; June 21, 22, 23; July 13, 1954.)

Divorce—Adultery—Standard of proof.

Observations on the standard of proof required in a divorce case founded on adultery.

The facts of the case are not reported.

(Editor's note: An appeal to the W.I. Court of Appeal was dismissed).

Divorce petition alleging adultery and malicious desertion.

F. R. Jacob for petitioner.

C. Lloyd Luckhoo for respondent. *Cur. adv. vult.*

Stoby J.: This is a petition by R. usually referred to as E. L. for a dissolution of the marriage with his wife R. on the ground of desertion and adultery with M.

The petitioner, at the time when the incidents he complains of occurred, was a Catechist attached to the Evangelical Lutheran Church in this Colony and the co-respondent was and still is an ordained minister of that denomination. A finding of adultery against a person engaged in religious teaching may have repercussions on his future career and so I propose before adverting to the evidence to propound the principles on which, as I understand them, the Courts proceed in matters of this kind.

In *Ginesi v. Ginesi* 1948 1 All. E.R. 373 the Court of Appeal took the opportunity to make a pronouncement on the standard of proof required in divorce proceedings founded on adultery. At page 374 Tucker L.J. said "I am satisfied that the position was correctly stated by Hodson J. when he said that adultery must be proved with the same degree of strictness as is required for the proof of a criminal offence. Adultery was regarded by the ecclesiastical courts as a quasi-criminal offence and it must be proved with the same strictness as is required in a criminal case. That means that it must be proved beyond all reasonable doubt to the satisfaction of the tribunal of fact." Hodson J., it must be noted, had used the words ascribed to him in the same case in the Divisional Court. Before making the statement referred to above Tucker L.J. reviewed all the relevant authorities and cited passages from them to the same effect.

This decision was not followed by the High Court of Australia in *Wright v. Wright* (1948) 77 C.L.R. 191 or in *Watts v. Watts* (1953) 27 A.L.J. 52 nor,by the Supreme Court of Canada in *Smith v. Smith and Sinedman* and was criticised by Denning L.J. in *Gower v. Gower* 1949 T.L.R. 718, who thought that *Ginesi v. Ginesi* (supra) may have to be re-considered. But in *Bater v. Bater* 1950 2 All E.R. 458 Bucknill and Somervell L.J.J, expressly approved of a direction to the jury that a case of cruelty had to be proved beyond reasonable doubt, and Denning L.J. commenced his judgment by saying, "The difference of opinion which has been evoked about the standard of proof in these cases may well turn out to be more a matter of words than anything else." He then explained what is meant by the phrase "reasonable doubt" when used in a civil case, divorce case or criminal case and

concluded by agreeing that the use of the phrase "reasonable doubt" in the case appealed from was not a misdirection.

Finally in *Galer v. Galer* 2 W.L.R. 395 the Court of Appeal has once again re-affirmed that proof must be beyond reasonable doubt.

It will be seen that only the High Court of Australia and the Supreme Court of Canada have specifically rejected the use of the phrase "reasonable doubt" but that the majority of Judges in England are agreed that whatever the phrase used the standard of proof demanded is as high as in a criminal case. Goddard L.C.J. in *R. v. Summers*—1952 W.N. 185, suggested the abandonment of the phrase in criminal cases and the adoption of the words "not convict unless they are satisfied by the evidence given that the offence has been committed."

I think it ought to be recognized that no set formula can be devised to describe a concept which is really indefinable. A judge or jury charged with the duty of deciding a question of fact must depend on numerous factors to reach a conclusion. Instinct is not the least of the qualities which operate in man's mind before expressing an opinion on another's conduct. For myself I cannot see that whether the case be criminal or civil any different standard should apply; unless there is a feeling of certainty about a given set of facts then the fact has not been satisfactorily proved; once there is hestitation and uncertainty provided that state is not due to lack of resolution then the fact has not been proved. But it is useless to moralise on a point which has been well settled for generations past—the Courts are uniform in holding that the standard of proof in criminal cases is higher than in civil actions except that in England in divorce proceedings the standard should be as high as in criminal cases. It is with these principles in mind that I approach the decision in this case.

In this petition four acts of adultery are alleged and in three of the four there is evidence of "alleged eye witnesses or an eye witness. Normally in this type of case the proof depends on evidence of strong inclination or undue familiarity and opportunity and though this type of evidence when established does not necessarily mean that the Court is compelled to find that adultery is committed (*England v. England* 1952 W.N. 461) yet it affords strong *prima facie* evidence that it has; therefore a review of the evidence of undue familiarity and opportunity will serve as a useful starting point, always remembering that even if such evidence is established it must not be used to bolster the evidence of an eye witness who is unsatisfactory. In other words if the evidence of the eye witness is reliable nothing else is needed but if unreliable the fact that there has been familiarity and opportunity does not compel a finding of adultery.

His Lordship reviewed the evidence and found in favour of the petitioner in respect of two of the allegations.

J. A. Jorge, for petitioner.
Miss E. A. Luckhoo, for co-respondent.

THE QUEEN *v.* KARAMAT AND FIVE OTHERS.

(In the Supreme Court, Criminal Jurisdiction, (Hughes, J.) August 11, 1954.

Criminal law—Murder—Preliminary inquiry—Duplicity—Indictment.

The accused were charged before a Magistrate with the murder of two persons. The acts resulting in the death of the two persons were one transaction. The Magistrate took the preliminary inquiry and committed the six accused for the murder of both persons.

The six accused appeared before the Court on an indictment charging them with the murder of one of the two persons named in the single charge before the Magistrate.

After the indictment was read to the accused but before any plea was taken each Counsel moved to quash the indictment on the ground that the charge before the Magistrate was bad for duplicity and therefore the committal for trial was unlawful.

Held: The charge was not bad for duplicity and in any event the committal was not unlawful.

Editor's note: The prisoner Karamat was convicted and sentenced to death. The other accused were acquitted. An appeal to the Court of Criminal Appeal was dismissed but this point was not taken. An appeal to the Privy Council was dismissed.

Motion to quash indictment discharged. This was a Motion to quash an indictment charging six persons with murder on the ground that at the preliminary inquiry the murder of two persons was investigated. The Crown filed separate indictments in respect of each alleged murder.

Lionel Luckhoo, Q.C., for two of the accused.

E. V. Luckhoo for two of the accused.

Lloyd Luckhoo for Karamat and one other accused.

A. M. Edun for the Crown.

Hughes J.: The relevant facts are that the charge against the accused persons, before the Magistrate, and the one on which they were committed for trial by him, relates to the murder of the two persons named in that charge. The accused now appear before this Court on an indictment (hereinafter, for convenience, referred to as the first indictment) charging them with the murder of one of the two persons named in the single charge before the Magistrate. There has been filed also another indictment charging the accused with the murder of the other person named in the charge on which the accused were committed for trial.

At the preliminary inquiry Counsel for the accused objected to the charge on the ground that it related to two separate offences and was therefore bad for duplicity. An opportunity was afforded the prosecutor to consult with the Law Officers and, after doing so, he elected to proceed with the charge as laid.

The motion now before me is that the first indictment be quashed on the ground that the charge before the Magistrate was bad for duplicity and therefore the committal for trial was unlawful.

It is urged in support of the motion that the filing in this Court of two separate indictments leads inevitably to the conclusion that, in the view of the Attorney General, by whom the indictments are signed, the evidence contained in the depositions discloses two separate offences

of murder and from that it follows that as such offences were made the subject of one charge before the Magistrate that charge was bad for duplicity. Counsel for the accused has not referred to the depositions with a view to showing that the two homicides are not part of one transaction nor has any authority been cited to show that because the charge before the Magistrate related to the murder of two persons it is *ipso facto* bad for duplicity. From this it seems that as regards the submission relating to duplicity Counsel relies on the action taken by the Attorney General subsequent to committal for trial.

From the submissions two questions emerge for consideration: first, is the charge laid before the Magistrate bad for duplicity and, secondly, if it is bad, does that fact make the committal for trial unlawful. If the committal is unlawful then the motion must succeed. As regards the first question I have been able to find no authority to the effect that a charge before a Magistrate may not relate to the murder of more than one person; however, in arriving at my finding on this first point and in considering the second point I am guided by the following —

(a) the fact that an indictment (and there is no ground for saying that the principle should be different when considering a charge before a Magistrate) may charge a person, in the same count, with felonious acts with respect to several persons where those acts were all one transaction—in this connection I refer to the relevant cases cited at page 51 of Archbold's Criminal Pleading, Evidence and Practice, 33rd Edition;

(b) the fact that the depositions in this case indicate that the acts resulting in the death of the two persons were one transaction. This statement must not be interpreted as meaning that all the evidence taken at the Preliminary Inquiry is necessarily admissible at the hearing in this Court of the charge relating to the murder of one of the two persons named in the charge before the Magistrate. It is appropriate at this point to refer to the submission that if the deposition of a witness is put in evidence at this trial it may contain inadmissible evidence. As to this I need do more than state that the fact that a Magistrate has admitted evidence inadmissible in law (or the evidence of an incompetent witness) will not render the committal for trial unlawful —*R. v. Norfolk Quarter Sessions, ex parte Brunson* (1953) 1 All E.R. 346, overruling on this point *R. v. Grant and others,* 30 Cr. App. R. 124, and *R. v. Sharrock and others,* 32 Cr. App. R. 124, which were two of the cases cited by Counsel for the accused. In the first named of these cases it was held that as long as justices have taken depositions in accordance with section 17 of the indictable Offences Act, 1948, a committal for trial is good;

(c) that where a person has been committed for trial the indictment may include, either in substitution for or in addition to the offence for which he has been committed, count founded on facts disclosed in the depositions;

(d) Section 57 and section 88(2) of the Criminal Law (Procedure) Ordinance, Chapter 18:

(e) The fact that the offence charged in the indictment is the same as that in the information before the Magistrate: the particulars of the offence are of course not identical.

The fact that two indictments have been filed in this case cannot, in my view, make the charge before the Magistrate bad for duplicity nor can it make the committal unlawful. In the light of the above I hold that the charge before the Magistrate was not bad for duplicity and that the committal was not unlawful and accordingly I make no order on this motion to quash the indictment.

THE QUEEN *v.* KARAMAT AND FIVE OTHERS.

(In the Supreme Court, Criminal Jurisdiction (Hughes, J.) August 12, 1954.)

Criminal law—Jury—Criminal Law (*Procedure*) *Ordinance, Chapter 18—Peremptory challenges—Defence—Crown—Panel exhausted—Procedure.*

Six accused were indicted for murder and each one exercised the right of peremptorily challenging three jurors. The Crown exercised its right of peremptorily challenging three jurors with the result that of the panel of thirty jurors only nine were unchallenged.

Counsel for the Crown submitted that the appropriate procedure, in such a case, was contained in section 39 of the Criminal Law (Procedure) Ordinance, Chapter 18 and that it was proper for the Court, on request made by the Crown, to command the Registrar to name and appoint other men qualified to act as jurors who were then present,

The three Counsel for the accused submitted that Section 39 had no application where the full panel of thirty jurors had appeared but was exhausted by challenges. It was argued that the procedure of appointing men present to make up a full jury, only applied when a full panel of thirty had not appeared.

Held: The procedure laid down in section 30 of Chapter 18 is appropriate only where the insufficiency in the number of jurors is occasioned by the persons summoned to attend not appearing. As no provision existed in the local law regarding the procedure to be adopted when a full panel appeared but was exhausted by challenges, the procedure in England, to wit, the withdrawal of the challenge by the Crown, should be followed.

Upon the trial of six accused for murder the panel of thirty jurors was exhausted by peremptory challenges by each of them and by the Crown.

The trial Judge declined to command the Registrar to appoint qualified persons present in Court to make up a full jury but directed that the English procedure should be followed in the absence of any local provision.

Lionel Luckhoo, Q.C. for two of the accused.

E. V. Luckhoo for two of the accused.

Lloyd Luckhoo for two of the accused.

A. M. Edun, acting Crown Counsel, for the Crown.

Hughes, J.: The point to be decided has arisen in consequence of the exercise by the Crown Prosecutor and by each of the six accused persons of the maximum number of three peremptory challenges to which each is entitled. Of the panel of thirty jurors whose names

have been drawn in this case twenty-one have been peremptorily challenged with the result that three more jurors remain to be selected to make the full jury of twelve persons, with no waiting juror unchallenged. The procedure to be adopted, now that the panel is exhausted, is the subject of conflicting submissions by the Crown Prosecutor on the one hand and toy the three Counsels for the accused on the other. The Crown Prosecutor maintains that the appropriate procedure is contained in section 39 of the Criminal Law (Procedure) Ordinance, Chapter 18. That section must be examined closely and therefore it is desirable to set it out *in extenso:*

> "39. (1) Where a full jury do not appear for the trial of any issue, the court, on request made by the Crown, shall command the registrar to name and appoint, as often as required, so many of other men qualified to act as jurors then present as will make up a full jury, and the registrar shall, at the command of the court, return those men duly qualified who are present or can be found to serve on that jury, and shall add their names to the panel returned by him; and the Crown and the accused person shall in that case have their respective challenges for cause, but not otherwise, to the jurors so added, and the court shall proceed to the trial of every issue with those jurors who were empanelled, together with the talesmen so added, in the same manner as if all of them had been returned by the registrar in the original panel.
>
> "(2) Where two or more panels are returned the registrar may, on a tales being awarded, return a juror summoned on any one panel as a talesman to serve with the jurors returned on any other panel."

The Crown Prosecutor submits that the words "do not appear" which occur in the first thirteen words of the section are to be interpreted in a manner which permits of invoking, in the circumstances of this case, the procedure set out in that section. In other words, that it may be said that "a full jury" does not appear when a deficiency of jurors arises as a result of the panel being exhausted through the exercise of the right of challenge, as in this case. It is further submitted by the Crown Prosecutor that the expression "Where a full jury do not appear for the trial of any issue" refers, not to the panel of thirty, but to the jury of twelve who are to try a particular issue and, in support of this, reference is made to the sentence "If the panel is so far exhausted by challenges that a full jury is not left, a fresh panel will be returned" at paragraph 332 at page 185 of the 33rd Edition of Archbold's Criminal Pleading, Evidence and Practice in which, it is noted, the same expression "a full jury" occurs.

With the submissions of the Crown Prosecutor, mentioned above, none of the three Counsels for the accused agrees. Their joint submission is that the procedure set out in section 39 of Chapter 18 is to be applied where a deficiency of jurors arises by reason of the persons summoned to attend not appearing; so to construe the section, it is agreed, involves reading into the section the word "panel" between the words "jury" and "do not appear" in the first line. To adopt the

interpretation put forward by the Crown Prosecutor would, it is submitted by defence Counsel, necessitate doing violence to the ordinary and accepted meaning of the word "appear" as in this case it cannot be said that a full jury have not appeared for the panel of thirty answered to their names when called. In this connection reference is made to the passage "and if any of the persons whose names are so drawn do not appear, or are challenged and set aside" in section 37(1) of Chapter 18 in which the meaning of the word "appear" cannot be in doubt and in which, too, a distinction is clearly drawn between the appearance and the challenging of jurors. The submission is that, as the local law is silent, the procedure in England should be followed.

It has been stated that this is the first occasion on which this matter has come up for consideration by a court in this Colony and as the point is one of importance I deemed it desirable to give a written decision.

On going further into the matter I find that section 39 of Chapter 18 is no newcomer to the laws of this Colony as it is to be found in the Edition of the laws for the year 1895 and was probably introduced a not inconsiderable period before but with the limited time at my disposal it has not been possible for me to ascertain precisely when it first came into existence: it was repealed and re-enacted by Ordinance No. 25 of 1918. That section is unquestionably an adaptation of section 37 of the Juries Act, 1825 of England. In order to arrive at the interpretation to be given to the local provision it is necessary to compare it with the section from which it has been adapted and accordingly the latter is set out in full hereunder—

> "37. *Tales de circumstantibus*.— Where a full jury shall not appear before any court of assize, or before any of the superior civil courts of the three counties palatine, or before any court of great sessions, or where, after appearance of a full jury, by challenge of any of the parties the jury is likely to remain untaken for default of jurors, every such court, upon request made for the King by any one thereto authorised or assigned by the court, or on request made by the parties, plaintiff or demandant, defendant or tenant, or their respective attorneys, in any action or suit, whether popular or private, shall command the sheriff or other minister to whom the making of the return shall belong to name and (appoint, as often as need shall require, so many of such other able men of the county then present as shall make up a full jury; and the sheriff or other minister aforesaid shall, at such command of the court, return such men duly qualified as shall be present or can be found to serve on such jury, and shall add and annex their names to the former panel; provided that where a special jury shall have been struck for the trial of any issue the talesman shall be such as shall be impanelled upon the common jury panel to serve at the same court, if a sufficient number of such men can be found; and the King, by any one so authorized or assigned as aforesaid, and all and every the parties aforesaid, shall and may, in each of the cases aforesaid, have their respective challenges to the jurors so added and annexed, and the court shall proceed to the trial of every such issue with those jurors who were before

> the trial of every such issue with those jurors who were before impanelled, together with the talesmen so newly added and annexed, as if all the said jurors had been returned upon the writ or precept awarded to try the issue."

A comparison of the two provisions at once brings to light the fact that the draftsman of the local section has omitted, *inter alia* a portion of the English provision which, had he included it, would not only have removed any doubt whatever as to the meaning of the section, but would have specifically made it applicable to a case like the one under consideration. The portion to 'which I refer is "or where, after appearance of a full jury, by challenge of any of the parties the jury is likely to remain untaken for default of jurors." When this portion is considered in conjunction with the opening words of the section "Where a full jury shall not appear" it is abundantly clear that these opening words refer to a deficiency brought about by a failure of jurors to attend and it is accordingly no less clear that the opening words of the local section "Where a full jury do not appear" must refer to the same thing.

The draftsman of the local provision deliberately omitted the words quoted above, relating to challenge, and one concludes that he did so because there was at the time no right of peremptory challenge and he did not envisage the possibility of a panel of thirty jurors, being exhausted by the exercise of the right of challenge for cause. The right of peremptory challenge was introduced here by section 9 of Ordinance No. 2 of 1948.

To illustrate further the point under consideration I refer to paragraph 646 at page 309 of the 2nd Edition of Halsburg's Laws of England which reads—

> "646. When by reason of the persons summoned to attend not appearing, or of the number of those appearing being reduced by successful challenge or other cause, there is or there appears likely to be an insufficient number of jurors to discharge the duties devolving upon them, the Court may:—".

I have come to the conclusion that the procedure laid down in section 39 of Chapter 18 is appropriate only where the insufficiency in the number of jurors is occasioned *by* the persons summoned to attend not appearing. No provision exists in the local law regarding the procedure to be adopted in the instant case and therefore I hold that the procedure obtaining in England is to be followed.

In the matter of the Registration of Voters for the City of Georgetown

and

In the matter of Section 25 of the Georgetown Town Council Ordinance, Chapter 86.

ALEXANDER and others *v.* THE TOWN CLERK.

(In the Supreme Court, In Chambers, (Boland C.J. acting August 23, 1954.)

Georgetown Town Council Ordinance—Claims to be registered, as voters—requirements—Registering officer—Town Council Court—Procedure.

ISAAC ALEXANDER et al *v.* THE TOWN CLERK

Section 15 of the Town Council Ordinance, Chapter 86 directs the registering officer—usually the Town Clerk—on or before the 10th day of January in each year to cause to be published in the Gazette and to be posted in one or more conspicuous places in each ward, a notice requiring everyone entitled to vote at an election of a member of the Council to deliver or cause to be delivered to him before the 15th February **a** notice claiming to be registered as a voter.

The appellants' claims to be registered as voters were rejected by the Town Clerk, the registering officer, on the ground that they did not produce any deed or document or other evidence necessary to establish their claims to be registered. On appeal to the Council sitting in open Court as required by section 21 of the Ordinance, the Town Council upheld the decision of the registering officer.

The claimants appealed to a Judge in Chambers.

Held : A person claiming to be registered as a voter must produce a deed, document or other evidence necessary to establish his claim to be so registered.

The procedure by which the registering officer excluded names from the lists because of non-production of satisfactory proof as required was wrong. His functions were merely executive and it was the Town Council Court who should decide whether a person's claim should be rejected or not.

As the appellants had not furnished the required proof their appeals would be dismissed without costs.

Appeal to a Judge in Chambers from the decision of the Town Council Court upholding the decision of the Town Clerk as registering officer in refusing to place the names of a number of persons on the voters' lists because evidence as required by the Ordinance was not produced.

Decision of the Town Council Court confirmed but on other grounds. Correct procedure explained.

J. R. S. Luck for appellants.

B. O. Adams for respondent.

Roland C.J. (Acting): I have confirmed the decision of the Georgetown Town Council sitting as a court under section 21 of Chapter 86. By its decision the Council rejected the claims of the appellants to have their names included in the list of voters for the year 1954. There seems however to have been some confusion in the minds both of the Town Council Court and of the appellants as would appear from the arguments and submissions advanced before me by Counsel on both sides concerning the rights of claimants to have amendments made in the voters' lists which are prepared by the registering officer under the procedure outlined in the Ordinance. The relevant parts of the Ordinance are as follows:

Section 15 directs the registering officer on or before the 10th day of January in each year to cause to be published in the *Gazette* and to be posted in one or more conspicuous places in each ward la notice requiring everyone entitled to vote at an election of a member of the Council to deliver or cause to be delivered to him before the 15th February a notice claiming to be registered as a voter. A person already on the register of voters for the time being in force who still retains the same qualification need not put forward any claim.

Section 17 provides that the form specified in the first schedule to the Ordinance shall be used for the submission of any such claim; and as is set out in the form, a claimant is directed to produce any

deed or document or *other evidence* necessary to establish his claim to be so registered. I construe this to mean that if the claimant is unable to produce a document as evidence of his qualification he should state the nature of the evidence otherwise which he intends to submit.

With this and other information received by him which seems satisfactory the registering officer prepares his voters' lists on or before the 31st day of March as directed by section 18, and the registering officer is further directed to publish copies of such lists in the Gazette land also to post up copies in more than one conspicuous place in each ward until the 30th April.

Section 20 provides for the manner of putting forward objections to the list by persons claiming that their names should be included in the list or for any objection by a person, who having his name on the list, objects to the name of another person being wrongly placed on the list. Such objections must be in the form of a notice to the registering officer and, where there is objection against a person on the list, also to the person objected to, before the 30th April. The respective appropriate forms of notice provided in the Third and Fourth Schedules shall be used by the claimant or objector. Immediately after the 30th day of April the registering officer shall prepare a list of *all claims and objections* received by him, and shall cause a copy of the list of the names of claimants and objectors to be published in one or more newspapers in the city for two consecutive weeks.

These lists must be placed before the Council who by section 21 are directed to hold an open court for the purpose of revising the list of voters.

From the foregoing provisions of the Ordinance it is obvious that the registering officer exercises merely executive functions. He does not decide upon the merits or demerits of a claim or an objection. A notice of objection submitted to him which the registering officer is under obligation to place together with his voter' list before the Town Council Court is analogous with pleadings in support of a claim before a court of law. As regards a claim to be included in the list, what is required by the form in the Third Schedule respecting the alleged qualification and the evidence to be produced in proof thereof is in the nature of a pleading in support of the claim, to be heard by the Town Council Court. The placing before the Council of the notice by a claimant of his particulars of claim is to enable the Council to make a proper adjudication on the merits of the claim. It may be that the Council would require some opportunity itself to investigate the validity of a claim. As the claimant may not be aware as to the grounds of disqualification which caused the registering officer to omit his name, it would be a wise precaution for the claimant to allege particulars of his qualification in respect of the several matters set out as the necessary qualification for a voter by section 4 of the Georgetown Town Council (Amendment) Ordinance 1946 (No. 29 of 1946). For instance if he claims to be a British subject he should allege whether he is so by birth or by naturalization—the date of birth should be given if he claims to be over the age of 21; his title to ownership of the property,

or if his claim be that of tenant or subtenant, of a property the name of the owner of the property, and, if possible, the latter's title by transport, and also the nature of the evidence, documentary or other-wise, in proof of the payment of rent by him for the relevant period.

The Council in the absence of those particulars placed before it relating to a claimant's qualification would be entitled to strike out the claim.

The claimants in these cases did not furnish any particulars of their claims. They merely alleged that they were qualified in respect of each qualification prescribed as necessary by the Ordinance, and the Council was entitled to dismiss the claims.

But the Council would seem to have regarded that the registering officer had made an adjudication—and that its function was to consider the Council's Court as that of an appellate tribunal. I take the view that that attitude is not in keeping with the Ordinance. Moreover the Council would seem to have based its decision on this point—namely, that the non-production of documentary evidence to the registering officer justified the registering officer in excluding the names from the list and on appeal the Council confirmed the decision of the registering-officer.

In my opinion that view of the proceedings as prescribed by the Ordinance was wrong. For the above reasons while confirming its order I refuse to give the Council costs.

Order of Town Council Court confirmed.

Solicitor: F. I. Dias for the respondent.

JAGAN *v.* McFARLANE

(In the Supreme Court, on appeal from the Magistrate's Court for the West Demerara Judicial District (Boland, C.J. (Acting) Hughes and Stoby, JJ.) July 9, 10; August 28, 1954).

Criminal Law—British Guiana (*Emergency*) *Order-in-Council 1953—Emergency Order—Meetings—Directions prohibiting any meetings—Prohibition of meetings generally—Construction of penal statutes—Interpretation Ordinance—Intra vires—Official Gazette containing Directions—Evidence Ordinance—Public notice—Holding a meeting—More than presence necessary.*

As a result of unrest in the Colony it became necessary to suspend the Constitution by means of the British Guiana (Emergency) 0rder-in-Council 1953. Under the Order-in-Council an Emergency Order was issued section 19(2) of which was as follows: "The Governor may give directions prohibiting the holding of any meeting as to which he is satisfied that the holding thereof would be likely to cause a disturbance of public order or to promote disaffection."

In exercise of the power thereby vested in him the Governor gave the following directions which were published in the *Official Gazette*:—

"Whereas I am satisfied that any meeting together of more than five persons in "any public place or in any premises other than a place of worship to which "members of public are admitted whether by ticket or otherwise would be likely to "cause a disturbance of public order or to promote disaffection Now Therefore by "virtue of powers vested in me by section 19 of the Emergency Order and all other "powers enabling

"me in that behalf I DO HEREBY DIRECT that the holding of any such "meeting shall be prohibited unless the Commissioner of Police shall give his "permission in writing to the holding thereof ..... "

The appellant and nine others were convicted of holding a meeting at which more than five persons were present.

The conviction was challenged on the grounds, among others, that the Directions issued by the Governor were *ultra vires* the Emergency Order. It was conceded that the Emergency Order was legal.

Three grounds were advanced in support of the submission that the Directions were ultra vires:

(a) That they did not specify with sufficient particularity the Emergency Order under which they purport to have been given.

(b) That the Governor was empowered to prohibit a particular meeting and not all meetings of a certain class.

(c) That the recital in the Directions established that the Governor had exercised his mind with reference to a subject outside the scope of the powers given to him by the Emergency Order.

As to (a) **Held:** The Directions declared in express terms that they were made under Section 19 of the Emergency Order. There was only one Emergency Order and of the three subsections of Section 19 only one dealt with the holding of meetings. The source of authority under which the Governor issued Directions concerning the holding of meetings was not in doubt.

As to (b) **Held:** The paramount object in construing penal as well as other statutes is to ascertain the legislative intent. The phrase "any meeting" in the context of the subsection is not to be restricted to mean a particular meeting but includes all meetings which in the Governor's view are likely to lead to a public disorder or disaffection.

As to (c) Held: (Boland C.J. (acting) and Hughes J.) Stoby J. doubting.

It was obvious that the words in the recital indicated that the Governor was satisfied that an assemblage of more than five persons whether it be a chance concourse or a gathering by design, is fraught at this time of emergency with the danger of public disturbance or the promotion of disaffection, and because of that likelihood the holding of every public meeting of more than five persons is prohibited.

By Stoby J.: A pre-requisite for the prohibition of the holding of a meeting is the Governor's satisfaction that the meeting is likely to cause a disturbance or promote disaffection. In declaring that the meeting together of five persons constituted a public danger the Governor was extending his jurisdiction under the Emergency Order, but the operative words of his direction were not *ultra vires.*

Apart from the argument that the Directions were *ultra vires* it was submitted that the Directions were not legally proved. At the trial in the Magistrate's Court the Magistrate received in proof that the Governor had given the Directions a printed copy of the *Official Gazette* wherein the Directions appear.

Held: The Directions were not a "rule, regulation or by-law" made by the Governor under the authority of an Ordinance and could not have been accorded judicial notice under Section 25 of the Evidence Ordinance, Chapter 25. But the Directions were contained in a "public notice" issued by the Governor and were covered as to proof by Section 40 of the Evidence Ordinance, Chapter 25.

It was finally argued that the evidence did not prove that the appellant was holding a meeting.

JANET JAGAN *v.* GEORGE McFARLANE, ASST. SUPT. OF POLICE

Held: There was evidence to justify the Magistrate's finding that the appellant was holding a meeting,

Dictum Stoby J. The accidental assemblage of five persons does not necessarily mean that a meeting is being held. Under certain circumstances five people may meet without being guilty of any offence.

Appeal from the decision of the Magistrate for the West Demerara Judicial District convicting the appellant of holding a meeting at which more than five persons were present.

The appellant was the Secretary of a prescribed political party and resided in Georgetown, Demerara. On the 13th December, 1953, she and others crossed the Demerara River by the ferry boat and drove in a motor car to Cornelia Ida, a village on the West Coast of Demerara. On her arrival she was met by a number of people and they entered a nearby tent. A crowd of about three hundred persons gathered in the tent and the appellant began to address them. On the arrival of the police a Hindu Priest was seen performing religious rites and several articles used in religious ceremonies were found. One of the persons present claimed that he had organised a religious meeting.

The finding of the Magistrate that a political meeting was held under the guise of a religious ceremony was upheld by the Full Court of Appeal.

L. F. S. Burnham with *C. R. Wong* and *J. R. S, Luck* for appellant.

J.A.Luckhoo, Solicitor General (Acting) for respondent.

Judgment of the Court: *Cur. adv. vult.*

The appellant Janet Jagan and nine other persons were convicted by the Magistrate of the West Demerara Judicial District for holding at Cornelia Ida on the 13th November, 1953 without permission a meeting in premises other than a place of worship at which more than five persons were present contrary to Directions given by the Governor and published in the *Official Gazette* on the 9th October, 1953 under section 19 of the Emergency Order. It reads:

> "19. (1) The Governor, if satisfied, with respect to any area in the Colony, that the holding of public processions or of any class of such processions in that area would be likely to cause a disturbance of public order or to promote disaffection, may by order prohibit, for such period as may be specified in the order, the holding in that area of processions or processions of that class, as the case may be.
>
> (2) The Governor may give directions prohibiting the holding of any meeting as to which he is satisfied that the holding thereof would be likely to cause a disturbance of public order or to promote disaffection.
>
> (3) Any police constable or any member of Her Majesty's forces may take such steps, and use such force, as may be reasonably necessary for securing compliance with any order or directions made or given under this section."

This Emergency Order had itself been prepared and issued under section 5(1) of the British Guiana (Emergency) Order-in-Council 1953 and in accordance with the Governor's directions given thereunder. The appellant's nine co-defendants were reprimanded and

discharged by the Magistrate, but regarding the appellant, as he has stated in his Memorandum of Reasons for Decision, to be the "master mind" the Magistrate imposed on her a fine of $250.00 with costs $23.00 and ordered that in default of payment within 3 months she undergo three months imprisonment with hard labour.

We proceed to deal with the submission made on behalf of the appellant by which it is contended that the Directions purported to be made by the Governor were *ultra vires* the Emergency Order, which itself is however conceded to be legal and *intra vires.* Three grounds were advanced in support of the submission that the Directions are *ultra vires.* The first is that the Directions do not specify with sufficient particularity the Emergency Order under which they purport to have been given. It is easy at once to dispose of this contention that the Directions are not sufficiently specific in their reference to the Emergency Order. The Directions do in express terms declare that they are made by the Governor under powers vested in him by section 19 of the Emergency Order. There is only one Emergency Order and section 19 contains three subsections. Sub-section (1) relates solely to public processions, subsection (2) deals with the holding of meetings, while subsection 3 provides powers to the police to secure compliance with any order or directions made or given under the section. No one can claim to be in doubt as to the source of the authority under which the Governor issued Directions relating to the holding of meetings. Nor are the Directors lacking in particularity because they do not specify a definite period for their operation. On the authority of decided cases it is well established, nor has counsel for the appellant contended to the contrary, that the conclusion arrived at by the Governor as to the likelihood of public disorder or disaffection resulting from the gathering together of more than five persons in the period of emergency cannot be impeached or challenged. In bestowing on' him the power to prohibit the holding of any meeting it must have been appreciated that in certain circumstances it would be impossible to determine before-hand definitely the period when such likelihood of disorder or disaffection would cease. The Governor would therefore be empowered to fix no specified period for the operation of his Directions and it would be left to him to recall his Directions when he is satisfied that normal conditions were restored. The power of the Governor to revoke or vary the Directions is given by section 65 of the Emergency Order. Accordingly in our view the contention urged on this ground against the legality of the Directions must fail.

The second reason urged against the legality of the Directions is based upon what is advanced as the proper construction of the wording of section 19(2) of the Emergency Order from which the Governor derives his power to give Directions. Section 19(2) empowers the Governor "to give directions prohibiting *any* meeting as to which he is satisfied *that the holding thereof* would be likely to cause a disturbance of public order or to promote disaffection." It is contended that the phrase "any meeting" means a particular meeting the holding

of which the Governor is satisfied is likely to cause a disturbance. The Directions are, it was submitted, *ultra vires as* they purport to prohibit not the holding of a particular meeting but of all meetings of a certain type or class namely those comprising more than 5 persons To enforce his argument Counsel referred to other sections of the Emergency Order where the word "any" is obviously used in reference to a single object or fact and not to more than one, and notably to the last preceding subsection, that of subsection (1) of section 19, in which the Governor is empowered to prohibit public processions care is taken expressly to empower the Governor to prohibit "any class" of such procession. It is pointed out that that power given to the Governor by subsection (1) of section 19 is not left to be inferred by the words "any public processions." In his reply to this contention the learned Solicitor General drew the Court's attention to section 2 of the Interpretation Ordinance, Chapter 5 which directs that in any Ordinance passed since the 8th March. 1856 'and in every official document made or executed after the 15th July, 1891 words in the singular shall include the plural and *vice versa* dependent upon the context in which such words are used. It is obvious that having regard to the purpose of section 19(2) which is designed to enable the Governor to safeguard the colony against public disorder and disaffection during the existing state of emergency a power limiting him to prohibit a particular meeting would unduly hamper him in preventing public disorder or disaffection likely to arise from the holding of a public meeting. If only such a limited power were given to him, although quite satisfied that the holding of a certain class of meeting would induce public disorder, the Governor would be powerless to prohibit the holding of a meeting of that class until such meeting was being actually held or until he had become aware of arrangements to hold such a meeting, and the impracticability of the Governor exercising effective control over the holding of such a meeting becomes more apparent if meetings of that description are held or are proposed to be held in areas of the colony remote from the seat of government. It is clear that the phrase "any meeting" in the context of the sub-section is not to be restricted to mean a particular meeting but includes all meetings which in the Governor's view are likely to lead to public disorder or disaffection. In his Directions, the Governor, it should be noted, does not prohibit the holding of *all* meetings but meetings of a certain class namely public meetings comprising more than 5 persons. Accordingly the Directions prohibiting the holding of public meetings of more than 5 persons are in our view not repugnant to the power given to the Governor by section 19(2) of the Emergency Order, and are therefore *intra tires.*

A point much stressed by counsel for the appellant in his submissions against the legality of the Directions turned upon the words of the recital in the Directions which immediately precede the substantive operative portion, which we so describe because it is that portion in which is embodied the actual direction against the holding of the type of meeting purported to be prohibited. The words of the recital are as follows

"Whereas I am satisfied that *any meeting together of more than five per-*
"*sons in any public place* or in premises other than a place of worship to
"which members of the public are admitted whether by ticket or otherwise
"would be likely to cause a disturbance of public order or to promote disaf-
"fection."

Then follow the operative words—

> "Now Therefore by virtue of powers vested in me by section 19 of the
> "Emergency Order and all other powers enabling me in that behalf I
> "DO HEREBY DIRECT that *the holding of any such meeting* shall be
> "prohibited unless the Commissioner of Police shall give his "permis-
> sion in writing to the holding thereof ....."

In the above verbatim quotation we have italicized certain words in the Directions because this submission for the appellant is based upon what is claimed to be the effect of the use of those words by the Governor. It is contended that the words *"meeting together of persons"* denote the assemblage, without any preconceived design to meet, of persons who are present near each other at a certain site. The argument is that it is the meeting together in that sense of more than five persons which the Governor has declared that he is satisfied is likely to cause a disturbance or to promote disaffection. It is contended that the Governor has exercised his mind with reference to a subject outside the scope of the powers given to him by the Emergency Order when he declared his satisfaction, as his words in the Directions must be taken to mean, that the mere fortuitous concourse of more than 5 persons is likely to cause public disorder or promote disaffection and that that is what is advanced by the Governor as sufficient justification for the issue by him by virtue of section 19(2) of a prohibitive Direction against the holding of "any public meeting." It is moreover pointed out by counsel for appellant that the actual prohibition contained in the operative portion of the Direction is against *"the holding of any such meeting."* "Any such meeting" must it is urged, mean "such meeting together" as is mentioned in the recital that is to say a chance coming together of more than five persons which, as has already been stated, is the construction given to the phrase in the argument advanced for the appellant. To put it another way it is claimed that by the very language used the Directions purport to prohibit meetings formed by persons who by chance find themselves side by side together. That certainly the Governor is not empowered (by the Emergency Order to prohibit—he is restricted to prohibiting the holding of any meeting. We were not impressed by this argument, which may be ingenious but which has no other foundation but an unconvincing play with words. To us it seems obvious that the words in the recital indicate that the Governor is satisfied that an assemblage of more than 5 persons, whether it be a chance concourse or a gathering by design, is fraught at this time of emergency with the danger of public disturbance or the promotion of disaffection, and because of that likelihood the holding of every public meeting of more than five persons, subject to the exceptions specified, is prohibited as directed in the operative part of the Directions.

In rejecting the submission that the Directions are *ultra vires.* it should be stated that we have not overlooked the now well established doctrine relating to the limitations of delegated legislation and of orders and regulations issued by executive officers of government under powers given them by statute. To validate what is purported to have been done under the authority of a power conferred by statute it must be shown to have been strictly within the terms of the statute. There is also the principle that in construing a statute or order, which provides penal sanctions for violations of its provisions, any ambiguity as to whether there has in fact been such a violation, rendering the transgressor liable to the imposition of a penalty must be resolved in favour of the defendant. But there is an overriding rule of construction which applies even to penal statutes. That is as expressed in Maxwell's Interpretation of Statutes, 10th Edition at pages 275 and 276, which cites in support the case of Newman Manufacturing Co. v. Marrable 1931 2 K.B. 297. "The paramount object in construing penal as well as other statutes is to ascertain the legislative intent, and the rule of strict construction is not violated by permitting the words their full meaning, or the more extensive of two meanings, when best effectualising the intention. They are indeed frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belong or are popularly attached to them, *in order to carry out effectually the legislative intent,* or to use Lord Coke's words, *to suppress the mischief and advance the remedy."* And as Pollock C.B. said in *Dobson v. Collis* (1856) 1 H. & N. 81: "No doubt formerly it was the practice to construe not only penal statutes, but statutes which interfered with the Common law, as strictly as possible, but in my opinion that is not a proper course of proceeding. We ought faithfully to interpret Acts of Parliament as we think the legislature meant." The British Guiana (Emergency) Order in Council 1953 has the force of legislation in accordance with the power reserved to the Crown by the British Guiana Act. 1928.

Section 19(2) of the Emergency Order issued by the Governor is, as stated, *intra vires* the British Guiana (Emergency). Order in Council and therefore itself has all the operative force of a statute and its language is subject to the same canon of construction as a statute. As has been indicated, a cardinal rule of construction of a statute where there are words or phrases which have one or two more equally possible meanings is to select to be the proper meaning that which is shown to give more effect to the real purpose of the legislation. It is true that the Directions made under the authority of the Emergency Order are in the technical sense not a statute, but it is our view that in construing the language of the Directions so as to determine whether they are *intra vires* or not the purpose of the Emergency Order under the authority of which they were issued should be taken into consideration. It is true that the recital in the Directions may have better been phrased and with more exactitude,

but when the Directors are looked at as a whole—that is to say both the recital and the operative portion—no one can reasonably claim to have been misled as to the nature of the mischief which the Governor says that he is satisfied is likely to occur from meetings of more than 5 persons. It is *the holding* of a meeting of persons exceeding that number which, as directed by the Governor in unequivocal language, shall be prohibited. It is precisely that sort of mischief which the Emergency Order left to the Governor full power to control.

The point decided in the decision in *Chester v. Bateson* 1920 1 K.B. 829 one of the cases cited by counsel for appellant bears no analogy to the question involved as to the legality of the Governor's Directions in this case. In *Chester v. Bateson* an order prohibiting as an offence the bringing of a complaint for ejectment against a munitions worker without the consent of the minister of munitions was held, though purporting to be made under a Defence of the Realm Regulation, to be *ultra vires* the Defence of the Realm Consolidation Act 1914. The power of the Minister to deny the subject the right of redress before a court was so grossly an infraction of an elemental right of citizenship—that right which was yielded by the Crown to the "object under Magna Carta, the Bill of Rights and the Statute of Northampton—that unless there was an Act of Parliament expressly and in the most positive and unambiguous terms signifying that Parliament intended thus to prohibit resort to the Court, the order of the Minister would be deemed illegal. In that case what was insisted upon was that the Courts were paramount and were not to be debarred from adjudging disputes between the subject and the executive government. The decision in *Liversidge v. Anderson* 1942 A.C. 206 and similar decisions during and after the second world war cannot be regarded as instances of approval by the courts of encroachments by the executive on the power of the Court to determine the right of the citizen as against the Crown because it was the Courts, themselves, who on being called to exercise jurisdiction, held that in the circumstances of the very special emergency they would not question the *bond fide* exercise of the discretion of a minister who had by statute been given the power of arrest and detention of a citizen. The Minister was given wide powers over a person if there was reasonable cause to believe that he was of hostile association, and that by reason of such hostile association it was necessary for the executive to exercise control over him so as to prevent him from endangering the state. In those cases the court expressed itself as being satisfied that what would operate in the minister's mind might be various in character and its publicity might prejudice the defence of the realm, so that it would be against the safety of the state during the war emergency even to give information to the person aggrieved by the minister's order as to what were the circumstances of suspicion against him so as to enable him to challenge the act of the minister. In this case now before the court on appeal there is no claim made in the Emergency Order or in the Governor's Directions that recourse to the Court shall be excluded although for the same reasons as were given in *Liverside v. Anderson* the grounds on which the Governor is satisfied that public disorder or disaffection would be the likely result of

a meeting together of more than 5 persons will not be investigated by the Court. The case of the *Attorney General v. Brown* 1920 1 K.B, 773 (popularly described as the "pyrogallic acid case") which was also cited by counsel for the appellant was a case where the court found that the Order forbidding the importation of pyrogallic acid did not come within the authority conferred by the Customs Consolidation Act 1876, as that article was not *ejus generis* with arms, ammunition, gunpowder so as to be included among "any other goods" the importation of which was forbidden by the Proclamation issued under the authority of that statute. The principle to be deduced from these cases is that it is for the Court to determine whether or not the proclamation or order issued by the executive is within the power conferred on it. In this case before us on appeal, after full consideration, we have, for the reasons which have already been stated, come to the conclusion that the Directions are not *ultra vires.*

And now turning from the question whether the Directions are *ultra vires* or *intra vires* we pass on to consider the submission that the Directions were not legally proved. The Magistrate received in proof that the Governor had given those Directions a printed copy of an issue dated 9th October, 1953 of the *Official Gazette* where the Directions given by the Governor appear. This had been tendered by the complainant. No objection to the admission of this document in evidence was made when it was being tendered. At the hearing before the Magistrate Counsel for the defendant who is one of the Counsel appearing for the appellant must be assumed to have under-stood that the document was tendered in proof that the Governor had given the Directions. Although there was no other evidence in proof of this, no submission on this ground of no case to answer was made at the close of the case for the prosecution, and although Counsel at the close of the defence addressed at great length on both fact and law, not one single reference, as appears from a perusal of the certified copies of the notes supplied to us, was made in Counsel's address seeking to impeach the admission of the *Official Gazette* in proof of the Governor having given the Directions. For the first time the point is raised in the notice of Grounds of Appeal which follows upon the Magistrate's memorandum of reasons for decision in keeping with the directions relating to the sequence of the preliminaries which must be observed as contained in the Summary Jurisdiction (Appeals) Ordinance, Chapter 16. Consequently this Court has not had the advantage of seeing in his memorandum of reasons for decision the reason the Magistrate had for admitting the *Official Gazette* in evidence. An appellate court naturally is inclined to frown at an objection to the admission of evidence taken so belatedly when Counsel had appeared for a defendant in the court below and by his silence had led the Magistrate to believe that the evidence was legally receivable. However we are of the opinion that the Directions could not have legally been accorded judicial notice as coming within the provisions of section 25 of the Evidence Ordinance, Chapter 25. They cannot be deemed to belong to the class mentioned in V of section 25 of Chapter 25 as "a rule, regulation or by-law, made by the Governor under the authority of an Ordinance." But we are clearly of the

opinion that the Directions being contained in a *"public notice"* issued by the Governor, were covered as to proof by section 40 of Chapter 25. Section 39 of Chapter 25 mentions "proclamations, orders or regulations" issued in the United Kingdom under the authority of any department of the Imperial Government or officers mentioned in the First Schedule to the Ordinance as provable, besides in the ways specified in (b) and (c), by the production of the London Gazette purporting to contain proclamation, order or regulation. Section 40(1) in reference to the proof of such documents issued in the Colony reads—

> "The provisions of the last preceding section shall *mutatis mutandis,*
> "apply to any proclamation issued by the Governor, to any Order-in-
> "Council, to any rule, regulation or by-law, made or approved by the
> "Governor or Legislative Council, or by the Governor in Council not
> "being within the provisions of section twenty-live of this Ordinance,
> "and to any commission, warrant, *public notice,* order, or regulation
> "*issued by or under the authority of the Governor,* or any department
> "or officer of the Government, the Governor, or the head of that de-
> "partment or that officer as the case may be, being the certifying offi-
> "cer within the meaning of the last preceding section."

Our local Official Gazette corresponds to the London Gazette in the United Kingdom. The contents of the Directions were therefore properly proved by the production of the Official Gazette in which they were published. Accordingly there was proof before the Magistrate that the Governor had given the Directions as published in the Official Gazette which was admitted in evidence.

The next point for decision is whether appellant was "holding a meeting." This constituted the offence for which she was convicted. Counsel for the appellant has submitted that the evidence before the Magistrate does not disclose that appellant was "holding" a meeting. What is "holding meeting"? Certainly one's mere presence at a meeting does not make one a holder of the meeting. Something more than a passive attitude in relation to that meeting at which one is present is necessary. More than one person may be regarded as holders of the meeting if from their several acts it may reasonably be inferred that they were acting in concert in the holding of the meeting. Such persons would be joint holders of the meeting. Addressing the meeting may be some evidence that the speaker is a holder of the meeting but that by itself is not conclusive. On the other hand a person, who though not a speaker takes otherwise a prominent part—such as occupying a place on a rostrum where the speakers are gathered, or making arrangements for the meeting at which he himself is present—may be regarded as one of the holders of the meeting dependent on all the other circumstances including whether he was not a mere servant or agent. Certain other persons were charged jointly with the appellant for holding the meeting at Cornelia Ida. They were all convicted. The conviction of the others with the appellant indicates that the Magistrate came to the conclusion from the circumstances given in evidence that those con-

victed were acting in concert each with the other. It may be that the evidence did "disclose that a particular defendant was engaged in the performance of functions different from what the others were doing—hut functions none the less directed towards the holding of the meeting or directed to effect a deception as to the nature of the meeting; for the case for the prosecution was that the religious devotional exercises which were made to appear as taking place were a mere hoax. The design was to bring the meeting within the exception of one held in a place of worship. Accordingly it was competent for the Magistrate, once he bad determined that other persons charged with the appellant were all acting in concert with the appellant in perpetrating the hoax—and the conviction of the others with the appellant supports the view we take that the Magistrate so held—then the Magistrate was entitled to regard as evidence against the appellant not only the evidence relating to her own personal acts but also as against her the evidence relating to acts done by the others in furtherance of the joint design. It is unnecessary to point to all the evidence relating to the part played by the appellant personally, but we would particularly refer to the evidence of Inspector Belfon, who stated that he found the appellant with a book in her hand entitled "Towards Freedom," in which was a leaflet marked "Thunder" dealing with the subject of the mission of Dr. lagan and Mr. Burnham to Eng-land and India. The Magistrate did not accept the appellant's explanation as to why she had these papers with her at that time. Belfon said she asked him at the Stewartville Police Station whether she could bare back the loud speaker which the police had seized at the meeting; and when Belfon refused to give it up, appellant stated "We hired it from Gomes up to 2 p.m. and who is going to pay for it?" Indeed there was ample evidence on which the Magistrate could arrive at the conclusion that the appellant was an active party in the holding of a political meeting under the guise of a religious service. Counsel for the appellant cited the case of *Flockhart v. Robertson* 1950 2 K.B, 498 in support of his submission that the holder of a meeting must have been an organizer of the meeting. The charge in that case arose out of a procession which the appellant was alleged to have organised in breach of an order made by the Commissioner of Police of the Metropolis of London by virtue of the Public Order Act 1936. The Court of appeal held that the appellant was properly convicted because there was ample evidence on which a Court could hold that he directed the route of the procession in the prohibited area of London. A procession is in its' nature different from a meeting. Those in procession merely *proceed.* To convict a person of organizing a procession it must be shown that he did something in the nature of directing the procession in addition to proceeding with the others in the procession. Mere presence at a meeting is not enough. There must be some act or attitude showing prominence of the person deemed to be a holder of the meeting. It was a reasonable inference from the evidence relating to appellant's acts at the meeting that the appellant took an active part in the hoax and was acting in concert with others in the holding of the meeting.

And finally as to whether this meeting took place other than in "a place of worship." Like that of proving that the Commissioner of Police had given his permission the burden of establishing that the meeting was being held in a place of worship was on the defence. Whatever may have been the original purpose for erecting the place in which the meeting was being held—it was not a permanent structure but, as was described, it was something in the nature of a tent—the evidence was sufficient for the Magistrate to hold that the religious service was not genuine but a mere disguise of a political meeting. It was not therefore a place of worship at the time.

For the reason set out above we are of opinion that the conviction and sentence should be upheld and the appeal dismissed with costs to the Respondent.

Stoby, J.: I agree with the judgment delivered by the Chief Justice and I only desire to make a few observations of my own because of the importance of what I regard as the only substantial ground argued in this appeal-

The appellant was charged and convicted for holding a meeting at which more than five persons were present contrary to directions given by the Governor under Section 19 of the Emergency Order published in the Official Gazette of the 9th October, 1953.

Section 19 sub-section (2) of the Emergency Order is as follows: "The Governor may give directions prohibiting the holding of any meeting as to which he is satisfied that the holding thereof would be likely to cause a disturbance of public order or to promote disaffection."

It is apparent that a pre-requisite for the prohibition of the holding of a meeting is the Governor's satisfaction that the meeting is likely to cause a disturbance or promote disaffection. The process by which he arrives at his decision cannot be impeached in a Court of law nor did the appellant in this appeal so contend. But what can be challenged and what is challenged in this appeal is whether the Governor has not exceeded the power delegated to him under the Emergency Order.

The direction published in the Official Gazette of the 9th October, 1953 is: "Whereas I am satisfied that any meeting together of more than five persons in any public place or in any "premises other than a place of worship to which members of the public are admitted whether by ticket or otherwise would be likely to cause a disturbance of public order or to promote disaffection:

Now Therefore by virtue of powers vested in me by section 19 of the Emergency Order and all other powers enabling me in that behalf I DO HEREBY DIRECT that the holding of any such meeting shall be prohibited unless the Commissioner of Police shall give his permission in writing to the holding thereof;. . . . "

The recital thus declares that the Governor in the exercise of his discretion is satisfied that any meeting together of more than five persons in any public place is fraught with danger to the Colony. The

existence of such conditions is deplorable and undoubtedly requires the sternest measures for their suppression but the Emergency Order never contemplated such an extreme state of lawlessness, for it limits the Governor's powers to prohibiting the holding of a meeting. The accident of five persons meeting on the road does not constitute the holding of a meeting no more than does the assembling of five persons after leaving a cinema, a church or a law court. In declaring then that the meeting together of five persons constitutes a public danger the Governor while making a correct statement of fact was nevertheless extending his jurisdiction under the Emergency Order.

It is not difficult to appreciate why this error was promulgated. Under section 130 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13 it is enacted that "If any persons to the number of five or more, assemble together in a disorderly manner in any public way or public place in a proclaimed district or in any place adjacent to that way or place each of those persons who refuses to disperse, when required to do so by any peace officer shall, on conviction thereof, be liable to a penalty of fifty dollars or imprisonment for three months. The gravamen of the offence under the abovementioned section is the manner in which five or more persons assemble. If disorderly each commits an offence if peaceable no offence is committed. It matters not whether they assembled by accident or by design, the law enjoins them in riotous times to be subdued in their behaviour or suffer a penalty for their misconduct.

It would seem that when the Governor considered exercising his power under section 19(2) of the Emergency Order this piece of legislation was remembered, and as a peaceable meeting of more than five persons can be more harmful than a disorderly one of a corresponding number, it was decided to frame the recital to the direction in such a way that the Courts must hold that an assembly of five persons constituted a meeting. But a score of persons may meet without holding a meeting. The Emergency Order purposely leaves it to the Courts to determine what is or is not a meeting. The recital to the directions gives the impression that it is an offence for more than five persons to meet, and that if they do every one so assembling is guilty of an offence. That is not the law. If there is no disorder the only person or persons guilty of an offence is the person or persons who by holding the meeting has caused the assembly or who keeps an assembly together after an accidental meeting together. The direction issued by the Governor is not akin to the misdeamour of taking part in an unlawful assembly. Stephen J. in his Digest of the Criminal Law 8th edition page 77 defines an unlawful assembly as an assembly of three or more persons

(a) with intent to commit a crime by open force; or

(b) with intent to carry out any common purpose, lawful

or unlawful in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it.

Once that intent is proved all persons present at an unlawful assembly are guilty of an offence. If they are present from accident

or curiosity they are not committing any offence but in such a case the prosecution will have failed to prove the intent.

But where a recital in a statute is more extensive than the enacting part it does not result in the legislation being deemed invalid. The principle of the law is that a preamble to a statute cannot either restrict or extend the enacting part when the language and scope of the statute are not open to doubt. So although in the instant case the recital certainly purports to extend the scope of the Emergency Order the validity of the directions depends on whether the operative part is capable of interpretation within the object of the Order. The operative words of the direction are:

> "Now therefore by virtue of powers vested in me by section 19 of "the Emergency Order and all other powers enabling me in that behalf "I DO HEREBY DIRECT that the holding of any such meeting shall "be prohibited unless the Commissioner of Police shall give his "permission in writing to the holding there of....."

The submission is that "any such meeting" must refer to "such meeting together" and as the recital is *ultra vires* the operative words are *ultra vires.* The case of *Carltona Limited v. Worqs Commissioner* 1943 2 All E.R., 500 CA. explains how loath the Courts are to interfere with the discretion of the executive when a legislative body has delegated its functions to the executive.

Under Defence (General) Regulations 1939 reg. 51 (1) power was given to a competent authority to take possession of any land after notice if due to certain circumstances it was thought necessary so to do. The competent authority gave notice to the appellants of his intention to take possession but gave as a reason for his action something not authorised in the regulation. In an action against the competent authority questioning his power to take possession of the land it was submitted (as it has been submitted in this appeal) that as the notice referred to circumstances not authorised by the regulation the competent authority had not brought his mind to bear on the subject and his order was bad. It was held that Parliament had committed to the executive the discretion of deciding when a requisition order should be made and with that requisition, if *bona fide* exercised, the Courts should not interfere.

In the direction which is here challenged the Governor *bona fide* exercised his discretion and prohibited the holding of any such meeting. He is given power to prohibit the holding of any meeting. It is clear that when he referred to such meeting he could not mean such meeting together but a meeting of five or more persons. His direction therefore is not *ultra vires* for all he has in effect prohibited is that which he is empowered to prohibit.

In my view the law regarding crowds in times of danger can be divided into three categories as follows:—

(a) where the district is proclaimed more than five persons are prohibited from meeting in a disorderly manner. If they meet and disorder is proved each is guilty of an offence.

(b) If more than three persons meet under such circumstances as to form an unlawful assembly each is guilty of an offence.

(c) If a person holds a meeting prohibited by the Emergency Order he alone is guilty of an offence. The persons attending a prohibited meeting are not guilty of any offence unless the meeting became an unlawful assembly.

As already indicated I agree with the other members of court that this appellant comes within the third category and was properly convicted. The appeal is dismissed with costs.

DE ABREU *v.* THE QUEEN

(In the Supreme Court, Court of Criminal Appeal (Bell, C.J., Boland and Hughes, JJ.) December 11, 12, 18, 1953; January 4, 1954).

Larceny—Receiving stolen property—Accomplice—Corroboration Misdirection—Statement by one accused in presence of another—Summing-up—Inadequate warning—Consideration of proviso to section 6 of the Criminal Appeal Ordinance, 1950.

The appellant was indicted with others on two counts, one of larceny and the other of receiving. He was acquitted of larceny and convicted of receiving.

Important evidence on the receiving count was given against him by a witness for the Crown who was admittedly an accomplice.

The trial Judge properly directed the jury regarding the rule of practice which requires corroboration of an accomplice's evidence but in recapitulating the evidence he referred to evidence which was corroborative of the accomplice on the count of larceny but which was not corroboration in relation to that of receiving. He strongly advised the jury to acquit on the count for larceny.

Held: Without an express direction from the Judge as to corroboration of the accomplice in relation to the count for receiving the jury was likely to have understood the Judge to be directing them that the witness who corroborated the accomplice on the count for larceny also corroborated him on the count for receiving. As there was no such express direction this amounted to a misdirection.

During the police investigations each accused made a statement. The statement of one accused implicated the appellant who was told of it and in his own statement denied the allegations. The Police asked the maker of the implicating statement to repeat what he had said in the presence of the appellant. This was done and the appellant remained silent.

The trial Judge directed the jury (that a statement made by one accused in the absence of the other was not evidence against the other but omitted to direct them regarding a statement made in another's presence.

Held: A statement made by one accused in the presence of another accused is evidence against the other if by his words or conduct he acknowledges the truth of the statement. As the appellant had previously denied the truth of the statement the jury should have been specifically told that in the circumstances of this) case the damaging statement by the one accused in the presence of the other was not evidence" against the other.

It was submitted that this was a fit case for the application of the proviso to section 6 of the Criminal Appeal Ordinance, 1950.

Held: The damaging statement may have influenced the jury in believing the accomplice's evidence and the one witness who corroborated him, and the proviso could not to be applied as it could not be said that despite the misdirection the jury, acting reasonably would inevitably have arrived at the same verdict.

Appeal allowed. Conviction quashed,

DE ABREU *v.* THE QUEEN

At the Demerara Criminal Assizes the appellant was convicted of receiving jewellery knowing them to be stolen.

B. S. Rai for appellant.

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

Judgment of the Court was delivered by Boland J.:

This appeal is against a conviction for receiving on the 26th June 1952 certain articles of jewellery stolen from the East Bank Pawnbrokery at Meadow Bank, East Bank Demerara, with the knowledge that they were stolen. The indictment contained two counts. In the first count the appellant jointly with Compton Brathwaite was charged with breaking and entering on the said 26th June 1952 this pawnbrokery and stealing therefrom several articles of jewellery, and Edward Persaud, the Manager of the Pawnbrokery was charged in the same count with being an accessory before the fact. The jury returned a verdict of "Not Guilty" in favour of all who were charged on this count. But on the second count which charged the appellant, together with Compton Brathwaite and another man called Jaikaran Singh, with receiving some of the stolen articles the appellant as well as Brathwaite and Singh were found "Guilty" and appellant, Brathwaite and Singh were sentenced each to a term of penal servitude. There are only two grounds of appeal amongst those lodged by the appellant and argued by Counsel at the hearing before us which in our view merit consideration by the Court. Each of these grounds is based on alleged vital defects in the summing-up by the learned trial Judge by which, it is claimed; the jury were misled to the prejudice of the appellant. The first relates to passages in the summing-up which deal with the corroboration of the evidence of the prosecution witness Da Silva who, on his own admission was an accomplice. The second concerns the Judge's directions to the jury as affecting the appellant in regard to a. statement made to the police by the co-accused Singh in the presence of the appellant.

For a proper appreciation of the points raised it is necessary briefly to review in outline the facts which the evidence at the trial disclosed. Da Silva may be described as the star witness for the prosecution. He stated that on the 25th of June—the day before the date of the offence—appellant and Brathwaite, who are a brother and a cousin respectively of his (Da Silva) met him (Da Silva) about 5 p.m. near his house in Camp Street and they suggested a further meeting the next day to discuss a matter which appellant himself then merely referred to as something 'important.' Next day Brath waite alone came to Da Silva's house at 11.05 a.m. and Da Silva by the direction of Brathwaite went to the Post Office at Carmichael Street and sent a telegram addressed to Persaud at the Pawnbrokery purporting to be from one George Menzies, Pope Street, New Amsterdam. The telegram was worded, "Mother dying, come quickly." This, as Da Silva would seem to have understood even at that early stage of the conspiracy, was to make it appear later on that the Manager Persaud who lived over the Pawnbrokery had been induced by a false telegram to be away from the premises so as to provide an opportunity to thieves to break into the Pawnbrokery during his absence.

It may be here stated that the prosecution's case was that Persaud himself was a party to the arrangement to have this false telegram sent to him, but the jury as has already been mentioned, found Persaud 'Not Guilty' as an accessory. Da Silva described how after sending the telegram he went with Brathwaite to Meadow Bank. By arrangement between' them Da Silva himself went to appellant's house which was not far from and within view of the Pawnbrokery, but Brathwaite who was at the time an employee of the Pawnbrokery went to the Pawnbrokery and gave an agreed signal to let appellant and Da Silva know that Persaud had left the premises after receipt of the telegram. Da Silva went on to relate that after the signal was given him in keeping with the arrangement between them, he went over to the Pawnbrokery and received the grip from Brathwaite and that following appellant's instructions he rode along on his bicycle taking the grip with him. Afterwards appellant rode ahead of him and he followed him as directed. They dismounted and together went into a path leading to the koker and then by the direction of appellant, he handed the grip to the accused Singh who went with it towards the koker. On the 1st of July the police in the course of their investigations went to Singh's house near the Houston Koker and Singh dug up a grip which was identified by Da Silva as the grip which appellant handed to Singh at the koker path on the 26th June. That grip was found to contain the articles of jewellery which were the subject of the receiving charge.

It is clear that the facts deposed to by Da Silva would, if accepted by the jury, be sufficient in law to support a finding that appellant was a guilty receiver of the jewellery found in the grip. But as Da Silva was am accomplice, that would be subject to a warning to the jury by the Judge, in keeping with what is now well established in law, that though they could accept the uncorroborated evidence of am accomplice they ought not to do so, and that accordingly if there was no evidence, but that of the uncorroborated evidence of Da Silva, it would be unsafe to convict. We note from the transcript of the shorthand notes of the summing-up that the learned trial Judge did give proper warning to the jury about the need to find that there was corroboration of Da Silva's evidence, and he correctly directed them as to what the law required to be established as corroborative evidence upon which a conviction could be based. On the authority of decided cases it is now settled that there is no need for the Judge specially to indicate for the jury's consideration any evidence which in law would provide corroboration. But nevertheless it is generally a ground for quashing a conviction if the jury had been directed that some bit of evidence does provide in law corroboration of an accomplice's evidence when truly there was none. R. v. Smith (1924) 18 Cr. App. R. 19. R. v. Morton Ansell & Rose 24 Cr. App., R. 177. The learned trial Judge in the early part of his summing-up referred to Da Silva as an accomplice and after giving the proper directions about the need for them to consider what evidence there was in corroboration of his testimony addressed them in these words —

> “What is required is some independent testimony which affects the “accused by connecting or tending to connect him with the

"crime. Such evidence may be direct or circumstantial which affects the "accused, which confirms in some material particular, not only the evidence "given by Da Silva that the crime has been committed, but also the evidence "that the accused committed it. Among other things, gentlemen, the "prosecution invites you to look for that corroboration in the evidence of "Ruby Thompson, who cannot by any stretch of imagination be placed in the "category of an accomplice. Patrick Inniss and even the statement of No. 1 "accused (that is the accused Brathwaite) as regards the ease against himself "and the statement of No. 3 accused (that is accused Singh) as regards the case "against himself—statements which I have already told you will lead you to "a conclusion one way or the other as regards their innocence or their guilt."

The learned trial judge's reference to the crime which Da Silva testified "had been committed" must have been understood by the jury to be that of receiving—that is the offence charged on the second count, as the learned Judge later on in his summing-up virtually directed the jury to acquit both Braithwaite and the appellant on the charge of housebreaking and larceny. He told them, "I have pointed out to you that the evidence against Nos. 1 and 2 accused (that is Brathwaite and appellant) for larceny is rather flimsy and it may be unsafe for you to make a definite finding of guilty on that count. The jury acted in accordance with these directions and returned a verdict of "not guilty" on the first count.

It seems to us that although the learned trial judge need not have indicated to the jury any evidence which could be considered by them as being regarded in law as corroboration, having once told them that the prosecution relied on certain bits of evidence as corroboration of Da Silva, he should have given them express directions as to whether what the prosecution put forward as corroboration could be regarded as such in law and if so, that it was then for the jury to make their own findings of fact on that evidence. Did the Judge give directions to the jury respecting the bits of evidence on which he had told them the prosecution was relying for corroboration of Da Silva? It is the contention of appellant's counsel that he did direct the jury to regard that evidence as corroboration—of course excepting against the appellant the statements' given by Brathwaite and Singh which the Judge had specially warned the jury were to be corroboration of Da Silva only as against Brathwaite and Singh respectively.

In a subsequent passage in the summing-up the learned trial Judge refers to the evidence of Ruby Thompson. He commences his reference to Ruby Thompson by mentioning that she stated that she had seen on the 25th of June Brathwaite and the appellant between 4.30 and 5.00 p.m. coming from the direction of Singh's place at the koker. As Da Silva never spoke of any incident on the 25th of June—according to him he came into the conspiracy on the 26th June—the trial judge could not have been mentioning this bit of evidence given by Ruby Thompson as corroboration of Da Silva. It would appear that he was merely reminding the jury of the evidence for

the prosecution given by witnesses other than Da Silva. The fact that appellant and Brathwaite were together at the koker near Singh's place was something material as tending to establish the conspiracy between appellant, Brathwaite and Singh at that early stage. This could not have been misunderstood by the jury to be advanced by the judge as an instance of corroboration of Da Silva. However it may be mentioned that Singh in his statement to the police and in his unsworn statement given from the docg at the trial did refer to this incident of appellant and. Brathwaite coming to Ruby Thompson the day before at her place near the koker. We shall deal with the question of admissibility of Singh's statement later when dealing with the second of the two grounds of appeal which as we stated are the only grounds of appeal which merit consideration. It is enough now to point out that in this passage from the summing-up cited above the learned trial Judge did not expressly direct the jury to exclude Singh's statement from their consideration of the question of the guilt or innocence of the appellant. It is clear that what he was then stressing was that Singh's statement could be considered as corroboration of Da Silva against Singh himself only and not as corroboration of Da Silva as against any other accused.

After referring to that part of Ruby Thompson's evidence which describes what she saw near the koker on the 25th, the learned Judge proceeds to remind the jury about what this witness said concerning the 26th June—

> "Ruby Thompson the judge said also told you that the next day, whilst "she was in her kitchen she saw a Portuguese looking man, whom she "had never seen before with a grip in one hand and pushing a bicycle "with the other hand. Then she saw him standing behind a tree peeping "at her. She pulled in and began to peep at him. Then she heard a "whistle and she saw No. 2 accused (that is the appellant) beckon to the "strange man, and they went towards the watchman (that is the accused "Singh) who was forking his garden. Then she saw the three men go in "the direction of the watchman's house. It is for you to say whether you "are satisfied that her evidence is true. I can see no reason why she "should lie. She has nothing to gain. There is no suggestion that she is a "party to this affair, that she is any way related to Da Silva or anything "like that. She is in the role of an independent witness, one who has "given evidence as she has seen the incidents."

Though the above bit of evidence given by Ruby Thompson about appellant being associated with Da Silva and Singh in the possession of the grip near the koker on the afternoon of the 26th June would, if accepted by the jury, he corroborative of Da Silva on this point as against appellant, it does not seem that the judge was then dealing with the question of evidence in corroboration of Da Silva which as the Judge himself had told them was advanced by the prosecution. At that stage of the summing-up the Judge would seem, as already has been stated, to be detailing what evidence had been led for the prosecution apart from Da Silva's. And so the Judge next proceeds to recall to the jury the evidence given by another prosecution witness,

Patrick Inniss. Da Silva had given evidence that that same day after the delivery of the gift to Singh he, appellant and Braithwaite were concerned in the removal of a bag from the Pawnbrokery on the pretext that it contained firewood, but under a top layer of wood there was jewellery. Patrick Inniss' evidence may have been material on the question of larceny of the jewellery which was missing from the Pawnbrokery other than those found in the grip dug up near Singh's house at the koker. Inniss' evidence was accordingly of importance in proof of the charge under the first count as against appellant and Brathwaite whom he mentions he saw doing acts which related to the removal of that bag from the Pawnbrokery. But it is not corroborative of Da Silva's evidence relating to the possession by the appellant of the grip which was handed to Singh near the koker earlier that afternoon.

What we feel is that without an express direction from the Judge —and there was none—the jury were likely to have understood the Judge to be directing them that the evidence not only of Ruby Thompson—but that of Patrick Inniss as well—could be considered as against the appellant to be corroborative of Da Silva's evidence when Da Silva speaks of the part taken by appellant in the delivery of the grip to Singh. We consider that it may very well be that the erroneous notion that they might accept as corroboration of Da Silva the evidence given by both Thompson and Inniss materially contributed to the jury returning a verdict of guilty against the appellant on the charge of receiving the jewellery found in that grip. Accordingly we hold this omission of the Judge to direct the jury on this point was tantamount to a misdirection and we regard it as such. We propose later to discuss the applicability of the proviso to section 6 of the Criminal Appeal Ordinance 1950.

We shall now deal with the ground of appeal relating to the alleged misdirection of the Judge on the admission of Singh's statement to the police as affecting the appellant. The objection to the direction of the Judge relating to the statement given to the police by Singh is this. Singh had given this statement to Sergeant Deygoo at his' office at the C.I.D. in the presence of Brathwaite and the appellant. Brathwaite and appellant had, on the same day but before Singh had given that statement, been told that they were going to be charged for the offence of breaking and entering the Pawnbrokery and they were both duly cautioned. Appellant himself then gave a statement in which he declared that what the watchman Singh had said was not true. Apparently the appellant had been told what Singh had already told the police. Then Singh was asked to repeat in the presence of appellant and Brathwaite what he had already told Deygoo and on hearing what Singh said and which was then taken down in writing appellant and Brathwaite remained silent. Now, that statement was correctly received in evidence as being admissible as against Singh himself, but the jury should have been directed that as against either appellant or Brathwaite it was admissible only if there was evidence that by his conduct either of them must be taken to have acknowledge in whole or in part the truth of the statement, and that in some instances silence might be deemed to be such conduct. But

the jury should also have been directed that in the event of their finding that silence in this instance implied an acknowledgment of the truth of the statement, they are entitled to take that statement into consideration as part of the case against appellant and Brathwaite, not because the statement was evidence against appellant or Brathwaite of the matters contained in it, but solely because silence indicated an acknowledgment of its truth (R. v. Norton (1910) 2 K.B. 496)

It does not appear that the learned trial Judge gave any such direction to the jury. As regards statements made to the police by the four accused this is what the Judge said—

> "Now there is another aspect of the case to which I must draw your "attention and again I do so forcefully and emphatically. In this case you "have heard statements made by the accused. Some of the statements "were repeated in the presence of one or other. Some of the statements "were not given in the presence of any other accused. Now, I warned "you along those lines that the statement made by one accused person in "the absence of the other accused person is not evidence and cannot be "used against such other accused person . . . . . You will "remember that the four accused made statements to the police. Such "statements were admitted in evidence, but it is for you to determine the "weight to be given to them. The statements are admissible but it is for "you to place what weight you think fit on them."

It is argued that the jury may well have understood from this direction, that while a statement given by one accused person in the absence of another accused is not evidence against the absent accused but only may be used against the accused making the statement, it could be used as evidence against any of the accused who happened to be present. The Judge should have gone on to lay down as a condition for its admission as against the appellant who was present that they would have to find that appellant had by his words or conduct acknowledge the truth of the statement. Assuredly in the case of Singh's statement made in the presence of the appellant, the silence of appellant could not be taken as indicative of his acknowledgement of its truth, because he had already told the police that Singh was not speaking the truth,—a remark appellant had made after he had been warned that he was about to be charged with the breaking and entering of the Pawnbrokery and on being cautioned that he was not bound to say anything. Surely there was no need in the circumstance for him to request his denial of the truth of Singh's statement. It is true, as already mentioned, that in telling the jury what the prosecution was inviting them to consider was corroborative of Da Silva, the Judge referred to Singh's statement and pointed out that that could be corroborative of Da Silva, but only as against Singh alone. Obviously being an accomplice Singh could not corroborate Da Silva, another accomplice, as against any of the accused except himself. The Judge was not thereby directing the jury to ignore Singh's statement when considering the case against the appellant. We consider that the jury were misled into thinking that Singh's

statement, though not to be considered as corroborative of Da Silva, was evidence against the appellant and Brathwaite because they were present when the statement was given. How prejudicial to the appellant Singh's statement was will appear from the following extract from the statement—

> "Last week Tuesday (24th June 1952) about half past five to six in the "afternoon George De Abreu and he brother Compton Brathwaite come "to me ah Houston last Koker Waterside, and George tell me he gwan "send some jewels in a grip with ah boy and ah must bury it in me farm, "and me tell he alright and he and Compton Brathwaite went away."
> "Thursday afternoon (26th June 1952) about 3 o'clock George De Abreu "come to me ah Houston Last Koker Waterside and tell me the boy gwan "come just now with the grip with jewels and ah must remember to bury "am in me farm, and he go way. About half past three to four the same "Thursday afternoon (26th June 1952) the boy John Da Silva come with a "grip with jewels to me, and tell me George. De Abreu say we must bury "am. Me tek the grip with jewels from he and me carry am in me farm "and me bury am under ah pumpkin vine."

In the circumstances we hold that as regards Singh's statement the omission to mention the condition on which the statement was admissible against appellant was a misdirection very prejudicial to the appellant.

We now turn to consider whether the proviso to section 6 of the Criminal Appeal Ordinance 1950 which reproduces the proviso to section 4 of the corresponding statute in England may properly be invoked to support the conviction on the ground that despite the two misdirection mentioned above there has been no substantial miscarriage of justice. What we have to consider is whether, to use the words of Channel J. when delivering the judgment of the Court in Cohen v. Bateman (1909) 2 Cr. App. R. 197 at p. 207, on the whole of the facts and with a correct direction,. the only reasonable and proper verdict would be one of "Guilty." "In such a case," Channel J. said, "there would be no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso, notwithstanding the verdict actually given by the jury may have been due to some extent to such an error of the Judge, not being a wrong decision of a point of law." These words were quoted with approval by Humphreys J. in R. v. Haddy 111, L.G. 137 atpp. 140 & 141 which case was cited with approval by the House of Lords in Stirland v. Director of Public Prosecutions (1944) A.C. 315, and by the Court of Criminal Appeal in R. v. Farid 30 Cr. App. R. 168. Viscount Simon said in Stirland's case (30 Cr. App. R. at p. 46) confirming the recourse to the proviso. "It is evident that no reasonable jury, after a proper summing-up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken."

Applying the above test, we are of opinion that the acceptance by the jury of the statement by Singh was not unlikely to have influenced the jury to believe Da Silva and Ruby Thompson who said that appellant was on the road leading to the koker in possession of the

grip with the jewellery. These two were the only witnesses apart from the police who testified about the grip. The evidence of the police witnesses was that afterwards the grip was dug up by Singh in his garden near the koker. The police evidence in (no way connected appellant with the grip or the jewellery found in it.

Without Singh's statement it is quite possible that the jury might have rejected the evidence against appellant given by Da Silva and Ruby Thompson or, at any rate, they may have given him the benefit of a doubt which they might consider reasonable in the circumstances.

Accordingly this is not a case for the application of the proviso to section 6 and we allow the appeal. The conviction and the sentence are set aside.

4th January, 1954.

LYNCH *v.* LYNCH and HARRIS.

(In the Supreme Court, Divorce and Matrimonial Jurisdiction (Wills J. acting) September 3, 1954.)

Divorce—Decree nisi—Respondent and co-respondent never served—Proceedings set aside—Second petition filed—Procedure.

The petitioner obtained a decree nisi for the dissolution of his marriage ill June 1948. When he applied to have the decree made absolute it was discovered that the respondent and co-respondent had never been served with a copy of his petition and accordingly the decree nisi was set aside.

A fresh petition was filed without any action being taken in respect of the first one.

Held: It was open to the petitioner to serve the respondent and co-respondent with a copy of the petition and to proceed on it tout the long and established practice of the Courts is not to allow two petitions in respect of the same marriage to be on the files of the Court and the hearing of the second petition must be suspended until steps were taken to have the first one dismissed.

Proceeding stayed:

Husband's petition for dissolution of his marriage on the ground of his wife's adultery with the co-respondent.

A second petition was filed after a decree nisi granted in a previous petition was deemed a nullity and set aside. The first petition was not dismissed but remained on the files of the Court.

Sir Eustace Woolford, Q.C., for petitioner.

L. F. S. Bumham for respondent.

H. A. Fraser for co-respondent.

Wills J.: On the 27th January, 1950, the petitioner filed a petition against his wife, the respondent and Alonza Harris, the co-respondent and prayed for a dissolution of his marriage on the grounds:

(a) that the respondent had maliciously deserted him;
(b) that the respondent had committed adultery with the co-respondent.

By Rule 3 of the Rules of Court (Matrimonial Causes) 1921, a petition must state whether or not there have been any, and if so, what proceedings previous thereto with reference to the marriage by or on behalf of either of the parties to the marriage. The petitioner stated in paragraph 9 of the instant petition that "previous proceedings for divorce were instituted by him against the respondent in the Supreme Court of this Colony on the 4th day of June, 1948, and a decree nisi was for the dissolution of his marriage with the respondent granted on the 1st day of October, 1948. Pursuant thereto an appli-

cation for the said decree to be made absolute made by the petitioner was on the 25th day of April, 1949, refused by His Honour the Chief Justice of the Colony and the said decree nisi obtained by him set aside on the ground that the co-respondent named in the petitioner's suit had not been served with a copy of his petition."

The said petitioner by affidavit swore that the statements and averments contained in his petition were of his own personal knowledge true and correct.

On the instant suit coming up for hearing and upon a closer investigation as to paragraph 9 of the petition Counsel for the petitioner disclosed that when the decree nisi referred to was made both the respondent and co-respondent were in default of appearance and as a matter of fact the citation was never served on the co-respondent. Worley C.J. held that the proceedings were a nullity and accordingly set aside the decree nisi. The following passage occurs in his decision reported 1949 L.R.B.G. at page 77: "In my view, having regard to the provisions of Rule 12 of the Rules of Court (Matrimonial Clauses) 1921, there was no jurisdiction to make the decree nisi and it must be wholly set aside."

A decree nisi is in the nature of an interlocutory order and Section 12 of the Matrimonial Causes Ordinance, Chapter 143 empowers the Court inter alia: "at any time before the decree is made absolute, to reverse a decree nisi, or require further inquiry or otherwise as the justice may require."

The petitioner did not appeal from this decision and therefore it stands.

The question now is whether the setting aside of the decree nisi as aforementioned can be considered a dismissal of the petition or a final disposal of the same. I hold the view that the mere setting-aside of the decree nisi was not a dismissal or other final disposal of the petition but that the petitioner was afforded an opportunity of putting himself in order that is by extracting a citation and serving same with petition on the co-respondent named in the suit and complying with Rule 12 of the Rules of Court (Matrimonial Causes) 1921 and re-serving the respondent with petition. This the petitioner failed to do but instead filed a new suit.

The next question to be considered is whether a second petition can be filed when there is on the records of the Court a previous petition by the petitioner against the respondent and the same co-respondent and on the same facts which has not been dismissed or otherwise disposed of by a final order.

I can find no statutory provision in the Matrimonial Causes Ordinance, Chapter 143 or rule among the Rules of Court (Matrimonial Causes) 1921, prohibiting the filing of a second petition. Inter alia Section 2 of the Matrimonial Causes Ordinance, Chapter 143 enacts that the jurisdiction of the Court shall as far as possible be exercised in the same manner and in accordance with same principles and rules as jurisdiction in those matters is exercised by the Probate Divorce and Admiralty Division of the High. Court of Justice in England. I

can do no better than adopt the words of Sir Boyd Merrivale P. in the case of *H. v. H.* 1938, 3 All E.R. p. 418: In fact, the old petition was still on the file when this new petition was filed on January 1 and in accordance with what is acknowledged to be the established practice of the Court dating it is said back to the days of the old ecclesiastical courts, at any rate, established by authority and practice for 50 (fifty) years, it is impossible to have two petitions on the file in respect of the same marriage at the same time and "a fortiori" when the two petitions both deal with the same subject matter."

I now need only refer to the case of *Onslow v. Onslow, Jones and Campbell* 60, L.T. p. 681.

The facts of this case are by no means dissimilar and the words of Butts J. may be effectively applied in the instant suit. "During the hearing however it appeared that the petitioner had some years before, instituted divorce proceedings against his wife, charging her with adultery with a man named Clark who was made a co-respondent in that suit. That case was not heard owing, it was said, to some mistake as to the date, and it was called on in due course and was struck out. No application had ever been made to re-instate it in the list, or to have it dismissed and it still remained on the files of the Court. Counsel thereupon asked that that suit be now dismissed. Butts J. doubted the power of the Court to do that. Steps must be taken in the proper way by summons to get rid of the first suit. Until that was done no decree could be pronounced in the present suit. This unhappy petitioner had been so bandied about that, solely on his account, and in order to save him further expense in the matter the Court would consent to hear the evidence now.

"It must, however, be understood, 'that steps' should be at once taken on behalf of the petitioner to have the former suit called on and dismissed. Until that had been done the decree would be suspended."

In view of the long and established practice not to allow two petitions by the same party in respect of the same marriage to be on the files of the Court at the same time I accordingly suspend the hearing of this petition and the matter to be taken off the list and not refixed until such time as the proper steps be taken by the petitioner to have the former suit called on and dismissed.

Solicitors:

V. D. P. Woolford for petitioner.

H. B. Fraser for respondent and co-respondent.

IN THE MATTER OF THE INTOXICATING LIQUOR LICENSING ORDINANCE, CHAPTER 107. DE COSTA *v.* DINNANAUTH

(In the Full Court of the Supreme Court, on appeal from the District Licensing Board for the County of Berbice, (Stoby and Phillips, JJ.) August 23; September 13, 1954.)

Intoxicating Liquor Licensing Ordinance—Provisional grant of a Certificate—Final grant—Public auction—Ultra vires.

JOHN DE COSTA *v.* DINNANAUTH

The appellant was one of two persons who applied to the Licensing Board for the County of Berbice for the Provisional grant of a certificate for the issue of a spirit shop licence in accordance with section 27 of the Intoxicating Liquor Licensing Ordinance, Chapter 107 of the Laws of British Guiana (Major Edition). A third person applied for a Final grant in respect of the same locality.

The Board was of opinion that all three applications merited' consideration but that there was need for only one spirit shop. They therefore granted Provisional Licences to all three applicants and decided that they should all apply at a later stage for Final grants when the Board would direct that the right to a licence be put up at Public Auction.

The opposer to the appellant's application for a Provisional grant, appealed on the ground that the Board had no power to make the order it made, and consequently the Provisional grant should be set aside.

Held: The Board was wrong in affixing a condition to the grant of a Provisional Licence. Where a Provisional grant has been made the only discretion left to the Board is in relation to their being satisfied that the premises have been completed according to the plans.

Although the appeal was brought by an opponent and not by the applicant (respondent) the Court would not quash the Board's order but would vary it by setting aside the condition that the respondent's right to a Final grant would be subject to a bid at public, auction.

Order of District Licensing Board varied.

Appeal from an order of the District Licensing Board for the County of Berbice approving of a Provisional grant for the issue of a spirit shop licence to the respondent but affixing a condition thereto that a Final grant would not be made unless the respondent and two other applicants bid at public auction for the right to obtain the Final grant.

Dwarka Dyal for the appellant.

C. J. Fung-a-Fat for the respondent. *Cur. adv. vult.*

Judgment of the Court:

This is an appeal from a decision of the Berbice District Licensing Board made on the 8th December, 1953, granting to the Respondent herein on certain conditions the Provisional grant of a Certificate for the issue of a Spirit Shop licence in respect of his application for such a Certificate under the provisions of section 27 of the Intoxicating Liquor Licensing Ordinance, Chapter 107 as amended by ordinance No. 30 of 1952 in relation to a building then about to be constructed situate at No. 57 Village, lot 3, Section B, west of the Public Road, Courantyne in the County of Berbice. Against this decision of the Board attaching conditions to this Provisional Grant appellant, one J. De Costa, who had opposed the granting of this Certificate, has appealed.

At the hearing of the appeal the first ground of appeal that the application of the respondent was one not provided for by law and was a Certificate unknown to the law, was not argued and was abandoned. The appellant argued and relied on his only other ground of appeal namely:—

"That the Board has no power to grant provisional grants of Certificates for Spirit Shop Licences so as to allow the applicants to apply for final grants and bid for the right to the grant of a certificate."

A perusal of the record shows the following endorsation on this application—

"Provisional grant granted."

However the Memorandum of Reasons for Decision filed herein by the Board is brief and can be set out *in extenso* as follows :—

> "The Board was of opinion that there was need for a Spirit Shop in the area to be entered for by the three applicants. The Board felt that all three applications merited the grant of a certificate. Only the 'applicant Hemechand Poonai had however applied for a full grant. The Board therefore decided that the applicants should all be given provisional grants and they should all apply for final grants when the Board would direct that the right be put up at Public Auction."

There were three applications for licences in the same locality and apparently the Board came to the conclusion that to meet the needs of the neighbourhood only one of those would be granted. We have not to deal here with the application of Mr. Hemechand Poonai and we say nothing about his application which apparently originally was for a final grant.

Section 18 of the Intoxicating Liquor Licensing Ordinance, Chapter 107 reads—

> "When more applications than one are made to the board for certificates for the issue of hotel, tavern, or spirit shop licences for premises which, in the opinion of the board, are situate in the same locality, if the board considers that a certificate may be granted and that there is no objection to its being granted to any one of two or more applicants, the board may direct the district commissary to put up for sale the right to the grant of a certificate, either at public auction or by tender by notice in the Gazette and one daily newspaper for two successive Saturdays, at the time and place and amongst the applicants the board thinks fit, and the purchaser thereof shall be deemed to be a person whose application has been granted by the board."

and the relevant parts of section 27 of the same Ordinance reads as follows:—

> " 27. (1) A person by serving on the district commissary notice in form 6 in the schedule may apply to the board for the provisional grant of a certificate for the issue of a licence in respect of any premises about to be constructed or in course of construction for use as a hotel, restaurant, tavern, or spirit shop, or of any existing building which is being acquired with the intention of converting it into a hotel, Restaurant, tavern or spirit shop.
>
> (2) A provisional grant shall not be of any validity until declared to be final by an order of the board made after notice given as required by the board at a general annual licensing meeting or transfer sessions. The declaration shall be made if the board is satisfied that the premises have been completed in accordance with the plans aforesaid, and when a declaration has

been made the procedure and forms prescribed in section nineteen of this Ordinance, with the necessary variations, shall apply."

The question for decision is has the Board any power under the Ordinance to make the order made herein by the Board in view of the provision in section 27(2) above, namely—

"The declaration shall be made if the Board is satisfied that the premises have been completed in accordance with the plans aforesaid."

The short point made by the appellant was that so soon as the premises are completed, a Provisional Certificate having been already issued, the Board, if satisfied that the premises have been completed, must make the declaration for a final grant and cannot then invoke the aid of section 18 and put up for sale at public auction the right to the grant of a certificate where there are other applicants in the same locality.

Section 33 (1) and (2) of the Licensing (Consolidation) Act 1910 in England is almost identical with section 27(1) and (2) Of the British Guiana Intoxicating Liquor Licensing Ordinance above referred to as originally enacted before the same was amended by section 18 of Ordinance No. 30 of 1952, but with one important exception namely the following words appearing in section 33 subsection (2) of the English Act, namely—

"and are also satisfied that no objection can be made to the character of the holder of the Provisional licence."

These words do not appear in the local Ordinance. No provision in the English Acts can be traced to section 18 of the local Ordinance, namely, that the right to grant of a certificate can be put up for sale at public auction.

The opening words of section 18 read:—

"When more applications than one are made to the Board for Certificates for the issue of Hotel, Tavern or Spirit Shop licences."

No mention is made of

"Provisional grant of certificates for new premises."

It would seem therefore that the time when consideration should be given by the Board to the question of the needs of the community and of the number of licences which ought to be granted in a particular locality is at the time of the provisional grant of a certificate as there would appear to be no statutory provision for the putting up for sale at public auction the right of the grant of a certificate for a Provisional Licence as in the case of Final grants. If such be the contention then the words "or the provisional grant of certificates" should be inserted or read into the section after the word "certificates" 1 the second line and the words "provisionally or finally" inserted after the word been in the last line thereof.

Section 27 clearly states that the declaration for a final gram shall be made if the Board is satisfied that the premises have been completed in accordance with the plans. It would appear therefore

that the only discretion left to the Board is in relation only to their being satisfied that the premises have been completed according to the plans.

It has not been oversighted that the Provisional grant shall not be of any validity until declared to be final by an order of the Board: but this provision in our view would not give the Board any power to withhold the declaration for any other than the statutory reason above stated.

It would appear desirable that, in case of a provisional grant of a certificate, a person who is about to embark his money in the erection or alteration of a building should know before-hand that when the house is built he will get a licence at fell events and he will consequently not have spent his money wholly in vain. It may be that the difficulty in which the Board finds itself where there are three applications for Provisional Licences in the same locality, and only one licence is necessary to meet the needs of the community (and have granted all three provisional licences in the mistaken belief that the Provisions of section 18 would apply—is a difficulty which may not have been foreseen by the Legislature and was not therefore provided for, but it is not in our opinion one which ought to influence our decision if the construction of the section is in other respects reasonably clear.

In *Regina* vs. *The Justices of the County of London* (1890 24 Q.B.D. p. 344), referring to section 22 of the Licensing Act 1874 which corresponds (with the exception previously referred to) to section 27 of the local Ordinance, Coleridge C.J. says:—

> "The words are that the Justices may make a 'provisional grant of a licence' not 'provisionally grant a licence' that is to say may grant a licence subject to two conditions viz :
>
> (1) That the house should when completed be in accordance with the plans which they have sanctioned and
>
> (2) That a fit person is the holder of the licence" (not in the local Ordinance).
>
> "Those are the only two conditions on the failure of which the Justices can object to make the provisional licence final."

Per Matthews J.: "In accordance with the plans"—

> "A departure from the plans will not divest the Justices of their power of sanction so long as the building is substantially that which was originally proposed to be erected."

In (*Reg. v. Pownall*, 1890 54 J.P. p.438) Licensing Justices approved plans for provisional licences. When the site was about to be built on it was discovered that the plans had been drawn for a level site where the actual site was a slope. Justices having refused to sanction the requisite alterations built as nearly in accordance with plans as the altered site allowed. Justices then refused the final order on the ground that after the Confirming Authority approved they the Licensing Justices had no power to permit alterations of plans.

It was held that the Justices had power and were bound to exercise it, to make the final order if the building was substantially in

accordance with the plans and that the building being substantially in accordance with the plans the justices were bound to make the final order.

In the case of applications for provisional grants, in the absence of statutory authority similar to final grants or some provision whereby the right to a provisional licence can be auctioned for before completion of the building, it is the duty of the Bolard to make up its mind on the merits of the various applications and if unable to do so to refuse all and leave it to the applicants to decide whether they will erect their buildings and apply for final grants.

In our view therefore the respondent herein having been granted a provisional licence will be entitled, subject to the Board being satisfied that the premises have been completed in accordance with the plans, to a final order notwithstanding the provisions of section 18 which relate to certificates for the issue of final licences not to *provisional* grant of Certificates.

It follows from what we have said that we have come to the conclusion that the Board was wrong in affixing a condition to the grant of a provisional licence. This appeal however has not been brought by the applicant for the licence but by the opponent who submits that since the Board exceeded its jurisdiction this Court ought to quash the order.

It is apparent that if we vary the Board's order by deleting the condition imposed by the Board the respondent will obtain a benefit from this appeal for which he has not asked,

Section 28(a) of the Appeals Ordinance, Chapter 16, states that the Court may affirm, modify, amend, or reverse, either in whole or in part, the decision, sentence, or any order made by the magistrate with reference to the course or may enter any judgment or make any order which the magistrate ought to have made. Although the respondent has not appealed, the Board's decision is before us and it is our duty to ensure that the provisions of the Intoxicating Liquor Licensing Board are not violated.

It is hereby declared therefore that the Provisional grant herein is upheld and the order that the right to apply for a final grant will be subject to a bid at public auction pursuant to the provisions of Section 18 of Chapter 107 is set aside.

There will be no order as to costs.

CHANCE *v.* THE QUEEN

(In the Court of Criminal Appeal (Boland, C.J. (acting) Stoby, J. and Wills, J. (acting) August 27; September 21, 1954). Order of District Licensing Board varied.

Criminal law—Murder—Conviction—Appeal—Witness—Evidence—Differing from evidence at preliminary inquiry—Warning to jury—Sufficiency—Summing-up—Provocation—Inadequate direction—Manslaughter substituted.

The appellant was convicted for the murder of G and sentenced to death.

CHANCE *v.* THE QUEEN

At his trial a witness C.G. aged 12 the son of the deceased gave evidence which differed in one material respect from the deposition he had made at the preliminary investigation. The judge in his summing-up warned the jury about accepting either the whole of C.G.'s evidence or that part of it which differed from his previous evidence. It was submitted on appeal that the judge should have warned the jury to discard C.G.'s evidence. R. *v.* Harris, 20 C.A.R, 144 was cited in support of the submission.

Held: Where the evidence of a witness is contradictory to previous evidence, it is sufficient if the judge warns the jury about the acceptance of such evidence.

It was also argued on appeal that the judge did not give the jury proper and adequate directions to enable them to determine whether the killing was murder or manslaughter.

According to the case for the Crown the appellant had gone to the deceased's home and threatened to beat and kill him. On the deceased leaving his house and going on to the road the appellant attacked him and stabbed him with a knife.

It was established that the appellant emerged from the encounter with a cut on his forehead. A witness for the defence said that the deceased came out of his house with a cutlass but she disappeared from the scene before the fight or attack started.

The judge directed the jury adequately on the law relating to provocation but in dealing with the facts did not explain that if the wound on appellant's forehead was the result of a blow by the deceased in the course of the encounter it was for them to decide whether it was of sufficient severity to cause a reasonable man to lose his self control and whether the appellant did in fact lose his self control.

Held: Since the judge directed the jury that if they were satisfied that the appellant did use the knife and wound the deceased he was guilty of murder and did not explain that even if the use of the knife was due to his loss of self control because of the wound he received the summing up was inadequate and a conviction for manslaughter should be substituted for murder,

Appeal from a conviction for murder before a judge and jury at the Georgetown Criminal Sessions. The facts and arguments are fully dealt with in the judgment.

J. O. F. Haynes with *L. F. S. Bumham* for the appellant.

J. A. Luckhoo, Solicitor General (acting) for the respondent.

Judgment of the Court. *Cur. adv. vult.*

In this appeal which is against a conviction for murder, counsel for the appellant in his submissions, while not abandoning the grounds filed in the record which advance appellant's claim to have the entire conviction set aside, would seem more to have urged for the substitution in its place of a conviction for the lesser offence of manslaughter. Nevertheless we conceived it our duty before we approached the question whether the conviction should have been for murder or manslaughter to satisfy ourselves that, instead of either, the verdict of the jury should not have been for an acquittal, which would have amounted to a finding that the appellant was not guilty of homicide, that is to say neither of murder nor manslaughter.

At the trial certain facts would seem to have been established by the prosecution as they were unchallenged by the Defence.

(1) As established by the medical testimony the deceased died from shock and haemorrhage following a punctured wound

of the abdominal wall and liver and that a sharp-pointed knife could have caused that punctured wound.

(2) At the time when the deceased received the punctured wound the appellant and the deceased were engaged in fighting each other. In the course of fighting both men fell to the ground and they rolled across the road into a trench which bordered the road. In the trench the appellant had the deceased's neck under his arm and was holding on to a boat with the hand of the same arm with which also he was holding the deceased. He was seen to be there cuffing the deceased. A witness by the name of Blair who came up had to pull the deceased away from the appellant's grip and dragged him on to another boat nearby. Then the deceased was seen to have the wound on the right side of the abdomen which the doctor testified to have produced the shock and haemorrhage causing death.

(3) While they were in the trench it was impossible to see any feature of the encounter which might have occurred below the waists of the two men because of the depth of the water in the trench.

(4) The appellant had been seen immediately before the fight to have a knife stuck in a belt around his waist.

(5) Next morning a sharp-pointed knife—which the doctor testified could have produced the injury—was found 8 rods away from the place where the two men were seen having the encounter in the water.

(6) That knife was bent and it had what appeared to be blood stains which, on examination by the Government Bacteriologist were found to satisfy the presumptive test for human blood.

On this evidence excluding that of a witness, the son of the deceased Calvin Glasgow, who at the trial testified that he saw the accused take the knife from his side and actually stab the deceased, the appellant's counsel submitted that the Crown had not established that the wound was the result of a voluntary act of the appellant. It is proposed to deal later in this judgment with the question of the admissibility and value of Calvin Glasgow's evidence and the learned trial Judge's comments in his summing-up to the jury relating to that bit of evidence. Counsel for the appellant has objected to the trial Judge leaving to the jury for their consideration that bit of evidence given by Calvin Glasgow. For the moment we shall assume that Calvin Glasgow's evidence that he saw the stabbing blow inflicted by the accused should have been ignored by the jury, and we shall deter-mine whether, with that evidence excluded, the jury acting reasonably should have arrived at a verdict of not guilty on the ground that the rest of the evidence did not establish that the wound had been voluntarily inflicted by the appellant and that accordingly the death of the deceased was the result of pure misadventure. Counsel for the appellant suggested to us a number of ways in which the wound could have

deliberately inflicted by the appellant. He even included as a possibility that the deceased may have himself while struggling with the appellant endeavoured to pull the knife from the appellant's waist and may have accidentally wounded himself. It cannot be said that the jury did not give full consideration to the question of the possibility of the wound not being the result of a voluntary act of the appellant or being accidentally inflicted by the deceased himself. It was not for the Judge in his summing-up to suggest to the jury every possibility of voluntary wounding, more especially as the appellant did not go into the witness box nor did he either in his unsworn statement to the police or in that uttered by him in the dock at the trial give a description of the course of the struggle which might have lent support to a theory of accidental wounding.

The Judge, we think, could not have more fully directed the jury than he did on the possibility of the wound being accidental. We quote from the summing-up his directions on this point. It is true that he told the jury in that part we quote from his summing-up that if they found that the appellant deliberately inflicted the wound in the course of the struggle he would be guilty of murder, but his direction as to that being murder is in the context referable to a finding by the jury that appellant went into the struggle with the knife intending to use it. This is what the learned trial Judge said:

> "If you believe that the prisoner, holding the deceased in that "grip with the hand on the boat and his neck in that lock, drove that "knife in his body he is guilty of murder. Can you therefore infer "from Lottie Glasgow's evidence that whilst the prisoner was cuffing "the deceased, he had his knife in his belt, he drew it out and in-"flicted the injury?
>
> "There are many possible ways. You may ask yourselves could it "not have happened the ways suggested by the defence? the knife "being in the belt of the prisoner may have twisted whilst they fell, "the handle may have come on some hard surface, or the knee of one "or other of them and the point being twisted entered the body of the "deceased? If you come to the conclusion, members of the jury, upon "this evidence that that is the way it occurred then that would be "purely misadventure. The deceased would Wave come to his death "by accident and the prisoner would be entitled to be acquitted.
>
> "If you think on the evidence that whilst they were fighting on "the ground on the road the deceased may have taken out the knife "and in some scuffle for it inflicted the wound on himself, then also "the prisoner could not be responsible for something that was not "done by him.
>
> "If whilst they were struggling in the water and the prisoner was "holding the deceased in this lock, you might think that the hands of "the deceased were not being held and he could have used them, and "if you think that in the water none of the witnesses could see he "was injuring the prisoner in any way by probably holding on to his "testicles or some such thing and the

> "prisoner, finding himself being injured in this way, drew out the knife
> "which he had, not intending to use it originally but if held in this way
> "or some other way—there is no evidence actually; you may infer that
> "that might have happened because they were in the water and the de-
> "ceased's hands could not be seen—then the prisoner would be guilty
> "of manslaughter. If, of course, you are in doubt as I have already told
> "you, give the prisoner the benefit of the doubt. If you are in doubt as
> "to which verdict you should return, return that which is the lesser of
> "the two."

The doctor's description of the direction and nature of the wound and the degree of force necessary for its penetration into that part of the body was proof that the injury was not accidental. Dr. Mook Sang said when re-examined by Counsel for the Crown that "unless the knife got stuck in something hard, if the knife was kept in the belt of the accused, it is not possible that it would have caused the injury I saw—in a struggle or rolling with the knife remaining in its position."

There was ample evidence apart from that given by Calvin Glasgow from which the jury could reasonably infer that the wound was not accidental and that therefore a verdict of acquittal would not be justifiable.

Accordingly even if we were to find that the Judge misdirected the jury as regards the evidence given by Calvin Glasgow we are satisfied that even if Calvin Glasgow's evidence relating to his having seen the actual stabbing had been ignored by them, the jury acting reasonably would nevertheless not have returned a verdict of not guilty. Therefore if there was misdirection by the Judge this would be a case for the invoking of the proviso to section 6 of the Court of Criminal Appeal Ordinance so as to confirm the verdict of homicide—if not of murder at any rate of manslaughter dependent upon the circumstances under which the killing was committed as established by the evidence other than that of Calvin Glasgow.

We shall now refer to the evidence given by Calvin Glasgow as Counsel for the appellant has submitted that the trial Judge should have directed the jury as a matter of law that his evidence was to be discarded. This witness, a son of the deceased 12 years old, stated that he saw the appellant standing on the road in front of his father's house and heard when he called out first to his mother and then to the deceased inviting them in indecent language to come out of the house with threats of violence including a threat to "kill your tail." The appellant, Calvin Glasgow said, had a knife stuck in his belt. He went on to describe how on his father coming out appellant held on to his father "locked" his head and they both rolled inside the water in the trench. He saw the appellant actually take out the knife from his waist, bore his father in his belly, duck him in the water, start to cuff him in his back and belly. Appellant was cuffing the deceased with his left hand. It was with the left hand that the appellant held the knife. According to the Judge's notes this witness in demonstrat-

ing how the appellant had the knife showed the knife to be in the waist. It was established that, in his deposition before the Magistrate which was admitted in evidence at the trial it is not there recorded that it was mentioned by Calvin Glasgow that he saw the accused "take the knife and bore his father." On the contrary in his deposition it is recorded that under cross-examination he said:

> "The accused had the knife on the left side under his belt; the place "was bright enough for me to see from the time the accused locked "my father to the time my father was put on the road by Blair. I next "saw the knife in my house when a policeman brought it. *I did not "see how my father got cut on his belly.*"

Shown his deposition, while under cross-examination at the trial, Calvin Glasgow declared that he did not say before the Magistrate: "I did not see how my father got the cut on his belly." He insisted that he said to the Magistrate: "I saw the accused take the knife and bore my father." The learned trial Judge in his summing-up pointed out this contradiction between the witness' deposition and his evidence given at the trial. The Judge explained that the sole purpose for introducing at the trial the contradictory evidence given on oath before the Magistrate was to enable the jury to determine whether in view of this contradiction they should feel justified in relying on what Calvin Glasgow testified at the trial in relation to the manner in which the deceased had received the wound. It was, the Judge said, for the jury to consider whether in the circumstances they should discard the whole of his evidence. By way of illustration the learned trial Judge remarked:

> "Certainly it is true that if a witness gives one statement to the po- "lice outside the Court, when the witness comes into Court, if he gives "a totally different and contradictory statement you will be justified in "giving little regard to any other parts of that witness' evidence, or not "believing him at all, or disregarding the whole of his evidence. But "you must consider whether in this case you think it is proper for you "to do so in the circumstances."

Among the circumstances to be considered the Judge pointed out was the age, size and the intelligence of the lad, which might account for his contradictory statement before the Magistrate.

In support of his submission Counsel cited the case of R. v. Harris, 20 Criminal Appeal Reports p. 144, the head note of which reads—

"If a witness is proved to have made a statement, though unsworn, in distinct conflict with his evidence on oath, the proper direction to the jury is that his testimony is negligible, and that their "verdict should be founded on the rest of the evidence."

But when one reads the report itself, it is apparent that the Appellate Court merely expressed its approval of the direction of the trial Judge the jury in that case in which a girl had admitted she had given previously to the police a statement contradictory of that she was testifying at the trial. Lord Hewart C.J. delivering the judgment said in the course of his remarks—

"It is apparent that the learned Judge directed the jury in the proper "way, namely that the effect of the previous statement, taken together "with the sworn statement was to render the girl a negligible witness, "and the jury must consider whether the case was otherwise and by "others made out. In those circumstances it appears to us that here "was no misdirection."

We do not think that the direction by the Judge in the case under appeal in which it is true he did not expressly tell the jury that the evidence given by the witness relating to the manner in which the wound was inflicted was to be discarded was a misdirection in law. In our opinion the Judge had sufficiently warned the jury about accepting Calvin Glasgow's evidence, either the whole of it or that part where he stated that he saw the appellant inflict the wound. But with that warning the Judge left it to them to determine whether in view of his youthful age, Calvin Glasgow understood what he was being asked at the Magistrate Court, and if he did understand, whether in the circumstances they should discard what he said in his evidence at the trial. In our view like in cases where it is necessary as a rule of practice to give the jury a warning against the acceptance of the uncorroborated evidence of an accomplice, it is sufficient if the Judge gives a warning about accepting the evidence of a witness who has given a previous contradictory statement.

It is impossible to say whether the jury did accept Calvin Glasgow's evidence, but there was sufficient evidence otherwise, as we have indicated, on which they, acting reasonably, would have inevitably come to the conclusion that the wound was not accidental but was inflicted by the appellant. It was on this finding of a deliberate infliction of the wound by the appellant that the jury returned a verdict of guilty of murder.

We pass on to consider whether the learned trial Judge had given the jury proper and adequate directions to enable them to determine whether the killing was murder or manslaughter, and if he did give them a full and adequate direction, was the verdict of murder rather than that of manslaughter unreasonable and against the weight of evidence.

It is now settled that it is not available as a defence that the killing was done during a chance medley between the deceased and the appellant (R. v. Semini 33 Criminal Appeal Reports 51). Even when formerly homicide during a chance medley was deemed to justify a verdict for the lesser crime of manslaughter only it was held to be murder if the accused had taken into the encounter a lethal weapon with the intent of using it, if necessary, although the deceased was not similarly armed. Bosanquet, J. in his summing up to the jury in R. v. Smith 8 C. & P. 160 at p. 162 explaining the law in the following words:

"Did the prisoner enter into a contest with an unarmed man intending "to avail himself with a deadly weapon? for if he did it will amount "to murder."

The decision in R. v. Semini has now established definitely that even

where the accused did not take into the fight the dangerous weapon with which he caused the death of his antagonist, it will be murder unless the jury are satisfied that at the time he inflicted the fatal injury on the deceased he was labouring under such provocation as would reasonably cause in the circumstances a person of average temper to lose his self control so that it could not be said that he was guilty of the higher intent—"malice aforethought"—which is an essential factor in the crime of murder. If there was any reasonable doubt, that doubt must be resolved in favour of the accused who should be found guilty of manslaughter instead of murder.

The duty of the Judge in his summing-up in a murder trial where there may be a question of provocation is as stated by Viscount Simon in the course of his speech before the House of Lords in Holmes v. Director of Public Prosecutions, 1946 A.C. 588 at p. 597. Viscount Simon said:

> "In dealing with provocation as justifying the view that the crime may "be manslaughter and not murder, a distinction must be made between "what the judge lays down as a matter of law and what the jury decides "as a matter of fact. *If there is no sufficient material, even on a view of* "*the evidence most favourable to the accused, for a fury* (*which means* "*a reasonable jury*) *to form the view that a reasonable person so pro-* *"voked* could be driven, through transport of passion and loss of self- "control, to the degree land method and continuance to violence which "produces the death it is the duty of the judge as a matter of law to di- "rect the jury that the evidence does not support a verdict of man- "slaughter. If, on the other hand, the case is one in which the view "might fairly be taken (a) that a reasonable person, in consequence of "the provocation received, might be so rendered subject to passion or "loss of control as to be led to use the violence with fatal results, and "(b) that the accused was in fact acting under the stress of such provo- "cation then it is for the jury to determine whether on its view of the "facts manslaughter or murder is the appropriate verdict."

Before referring to the relevant passages in the summing-up it is well to bear in mind the material issues of fact relevant to the question whether the crime was that of murder or manslaughter which the jury had to determine; for it was the duty of the judge to point out to the jury all material issues of fact giving them the appropriate directions as to the law on the difference between murder and manslaughter so as to enable them to make a proper decision as to which form of homicide it was.

In substance the material issues were—

(1) Did the accused carry with him the knife with the intent of using it either in an attack on the deceased or his wife or at any rate if a fight ensued?

(2) Did the accused use threatening words which evinced his intention to kill?

(3) Did the deceased come out on the road and go towards the accused armed with a cutlass?

(4) Was the lacerated wound on the forehead of the accused the result of a blow with a cutlass given him by the deceased? or was it the result of the accused himself butting the deceased?

(5) Was the lacerated wound on the forehead of the accused, if the result of a blow by the deceased in the course of the encounter either with the cutlass or otherwise of sufficient severity to cause a reasonable man to lose self control and in the transport of passion to use the knife?

It is our view that a decision as to whether the killing was murder or manslaughter would depend upon the findings by the jury on the facts relating to one or all of the above questions after their minds had been directed by the Judge as to the importance of those facts in relation to the question whether it was murder or manslaughter.

The learned trial Judge very early in his summing-up before he commenced to review the evidence gave a very full and exhaustive direction on the law relating to provocation and he made special reference to provocation resulting from injuries received in the course of a fight and he added "these are matters for you to consider when you come to the facts of the case."

On issue (1) the learned trial Judge in the closing words of his very exhaustive summing-up said—

> “If you accept the evidence of the prosecution that the prisoner came “there armed, threatened these persons (the wife and the deceased) to “come out intending to use the weapon and did eventually use it as the “boy Calvin said—bored him in his belly —then you may be justified “in coming to the conclusion that the prisoner is guilty of murder. If “you are in any reasonable doubt give the prisoner the benefit of the “doubt.”

The judge had earlier referred to the threatening words alleged to be used by the prisoner asking the jury to consider whether those were idle threats not intended to be carried out. Therefore so far as his direction on issues (1) and (2) is concerned, no complaint can be made of that part of the summing-up. But the verdict of murder returned by the jury might not have been because of a finding adverse to the defence on that issue—they may have found that appellant did not go and stand on the road in front of the deceased's house with any intention to use the knife despite the use by appellant of threats which the jury perhaps considered to be of no real significance beyond the manner of abuse customary with people of that class, but the jury may have nonetheless returned a verdict of guilty of murder because of the appellant's unjustifiable use of the knife in the struggle with the deceased.

With regard however to the other issues set out above we notice that in referring to the circumstances of the fight as detailed by the deceased's widow the learned Judge said—"If you believe that the prisoner holding the deceased in that grip with the hand on the boat and his neck in that lock, drove that knife in his body he is guilty of murder." The Judge also said summarizing the effect of

Calvin Glasgow's evidence—"I say if you accept his evidence then you will be justified in coming to the conclusion that the prisoner is guilty of murder." In other words the Judge directed the jury that if the prisoner did use the knife and cause the wound he was guilty of murder. In giving this direction which the jury must have understood was one of law there was no reference by the Judge to the injury to the forehead of the appellant which is found by them to have been inflicted by the deceased might have been deemed by the jury as sufficient to cause a reasonable man to lose his self control and in the circumstances which in law would justify a verdict of manslaughter instead of murder. True the jury as we have mentioned, were given proper direction as to provocation which they were told to apply to the facts but when the learned trial Judge came to deal with the facts of the wounding of the deceased by the accused with the knife the jury may have understood the Judge to be giving them the direction in law that it was in law murder and not manslaughter so long as they found as a fact that the appellant had deliberately stabbed the deceased. Instead of telling them it was murder, he should have asked them to find whether the injury on the appellant was or was not self-inflicted or received in the course of the encounter, and. whether in the circumstances there was a degree of provocation which was likely to cause a reasonable person to make use of the weapon he had at hand in a transport of passion; and that if so found it would be manslaughter only. In view of the positive direction on the law that it was murder and nothing else so long as the fatal wound was inflicted by the appellant and with the jury's minds not directed properly as to provocation when the Judge was referring to this part of the evidence, despite his proper direction as to provocation in law at an early stage of his summing-up, it is impossible to say that the verdict may not have been one of manslaughter instead of murder. In the case of George Semini cited above and that of Mancini, (1942 A.C. 1) where the appeals were dismissed, neither appellant could establish that he emerged from the encounter with the deceased showing any mark of a wound or injury such as might have been such a degree of provocation as would give some foundation for a verdict of manslaughter instead of murder.

Because of the inadequacy of the summing-up as stated above we shall set aside the conviction for murder and substitute in its place one of manslaughter with a sentence of 15 years penal servitude.

IN THE MATTER OF THE ESTATE OF KAULESSAR, DECEASED.
JITU *v.* ODASEA.

(In the Supreme Court, Civil Jurisdiction (Stoby J.) June 10, 11; September 20, 1954.)

Will—Incapacity—Undue Influence—Practice and procedure—Substance of case—Circumstances of suspicion—Court's duty.

The plaintiff, the brother of the deceased, sought to propound a will

dated 31st March, 1950, under which he was appointed executor, and claimed that a will dated 17th November, 1950, under which the defendant was named executrix was not the true last will and testament of the deceased.

The testator had regarded the defendant as his wife for a long number of years and was alleged to have made a small bequest to her in the will of March 1950 which was not produced as it was said to have been destroyed by the defendant. He was undoubtedly suffering from a heart ailment prior to the 17th November, 1950, which a doctor said would impair his physical and mental condition.

Held: The testator's poor health and the making of a will in presence of the beneficiary shortly before his death were circumstances which should excite the vigilance and suspicion of the Court, but the evidence was satisfactory that the will of the 17th November, 1950, was not executed through undue influence.

Judgment for the defendant.

The defendant lodged in the Supreme Court Registry a will dated the 17th November, 1950, which she alleged was the last will and testament of K. A caveat was entered by the plaintiff, but no appearance was entered to the warning. The caveat was cleared off at the expiration of six months. The normal course which an action of this kind should take was not followed.

The Court criticised the way in which the plaintiff's pleadings were framed.

D. Jhappan and S. *D. S. Hardyal* for the plaintiff.

H. Matadial for the defendant. *Cur. adv. vult.*

Stoby J.: On the 22nd November, 1960, one Kaulessar died at No. 79 Village, Corentyne, Berbice. The defendant, who had been living with him as his wife for years, lodged in the Supreme Court Registry a will dated the 17th November, 1950, which she alleged was the last will and testament of the deceased; on the 5th February, 1951, she filed along with the said will, the relevant documents to lead to a grant of probate. Apparently a caveat was entered but was cleared off after six months as the caveator did not enter an appearance to the warning. For some reason not clear from the evidence probate of the will was delayed and on the 11th August, 1951, the plaintiff filed his writ of summons claiming:

(a) That he is the executor under the last will and testament of the deceased Kaulessar and that the said will is dated 31st March, 1950.

(b) That the will dated 17th November, 1950, was not executed in accordance with the provisions of the Wills Ordinance, Chapter 148, alternatively it was executed because of undue influence.

(c) That probate of the will of the 31st March, 1950, should be granted or alternatively a declaration that the deceased died intestate.

The plaintiff is the brother of the deceased and would be entitled to a share of the estate in the event of an intestacy.

After the defendant entered appearance to the writ of summons the plaintiff filed his statement of claim and included for the first time an allegation that the deceased was totally incapable of executing or making a will on the 17th November, 1950.

The defendant did not press for particulars of either the alleged incapacity or undue influence but was content to traverse the allega-

tions in the statement of claim and counterclaim for probate of the later will. The result of the omission to ask for particulars was that the defendant had no knowledge of the nature of the conduct alleged by the plaintiff to amount to undue influence, nor of the substance of the case intended to be relied on for proof of incapacity. Although in this colony there is no equivalent of the English Order XIX 25A which compels a defendant raising the issue of incapacity or undue influence to state the substance of the case on which it is intended to rely and which precludes the case being set down for hearing until the rule is complied with the Court has the power to order particulars by virtue of Order 17 Rules 7 and *S.* Had the normal course of entering appearance to the warning been followed, the present plain-tiff would have been the defendant, and as the Supreme Court in the absence of Probate rules follows the English practice, the Court of its own motion may have insisted on more detailed pleading.

In order to prove the testator's incapacity and also that undue influence was exercised the plaintiff called Dr. Ramdeholl, whose evidence on the material issues is as follows:

> "I attended Kaulessar on the 15th November, 1950, at my then Surgery, Springlands. He was accompanied by the defendant. Others accompanied them but I cannot remember who they were. I examined him. His feet were swollen, he was in a generally emaciated condition. Very weak physically. On examination I found he had an enlarged heart with incompetence of the aortic valve. In addition he was a chronic bronchitic and the apices of both lungs had begun to show signs of congestion; so also the bases of both lungs. Those are not uncommon findings in a heart that is beginning to fail. I formed the opinion that his life would be very short. I do not remember if I told that to anyone. Congestion of lungs may be called pneumonia but pneumonia is a very broad term. I was requested to make a will by, I think, the deceased. I would not be 100 per cent certain that deceased asked me but I am certain I was asked. That is not an uncommon request made to Government Medical Officers in outlying districts. I did not make the will. It is not my practice to make a will if a J.P. lives nearby or a lawyer is available; the other reason for not making a will in this case is because I formed the opinion that the physical and mental state of the patient was such as to impair the clarity of his thinking. Congestion of the apices of both lungs is more often than not the most fatal of all the conditions which affect the lung. An apical infection seems to have a greater impairment of the mental condition than others. If I were told that on the 17th November, 1950, a will was made by Kaulessar I would say that he could not have been better than when I saw him. In my opinion his mental condition on the 17th could not have been better than on the 15th and as in my opinion he could not make a will on the 15th, I do not think he could have made a will on the 17th—not with clarity and precision. He died on the 22nd. I expected him to die within a week of my seeing him. His heart must have failed and it could only fail from back-ward pressure of the lung and liver. A person in that state is

amenable to almost any suggestion. He would acquiesce much quicker to any suggestion than if he were not in that state. He would be loathe to offer argument which might entail opposition, because of physical embarrassment."

The nature of incapacity thus relied on is that which arises by reason of illness and the question I have to determine is whether the complaint from which the testator suffered deprived him of under-standing the nature of his act on the 17th November, 1950, or whether he had the capacity to understand the extent of his property, the claims of others and to appreciate what he was doing. The principles by which a Court should be guided in deciding whether a testator had testamentary capacity or not were discussed by Worley C.J. in S. Singh v. E. O. Subryan and the authorities reviewed.

In cross-examination Dr. Ramdeholl said that he saw the deceased once and he recorded in his note book the words "requested to make a will." He made no record of the reason which induced him to refrain from writing a will and it was not until the 1st June, 1954, nearly four years after that he was asked to recall the incident. According to the doctor, his invariable rule when a patient requests him to perform work which he considers is more suitable for a legally trained mind or for some person performing legal functions, is to refer the prospective testator to a Justice of the Peace. As Justices of the Peace can be found in the Springlands area it follows that Dr. Ramdeholl, what-ever the mental condition of Kaulessar, would not have acceded to his request, and no inference favourable to the plaintiff can be drawn from this circumstance.

But the doctor further attributed his refusal to make a will to the patient's mental and physical condition. On this part of his evidence I formed the opinion that his recollection of what had taken place in November, 1950, was hazy and that it was with difficulty that he was attempting to recall the details of the incident. On both occasions on which he was called upon in his evidence to express an opinion about Kaulessar's mental condition, he was purposely vague and declined to make a dogmatic statement, *e.g.* "I formed the opinion that the state of his mental and physical condition was such as to impair the clarity of his thinking"; and again "I do not think he could have made a will on the 17th—not with clarity and precision." In other words he could make a will but he could not be clear and precise about it. This view of the doctor would seem to foe inconsistent with his reply to me when he said: "He (Kaulessar) told me he had a wife with whom he was not living and that the defendant was taking care of him." There is nothing irrational or loose about that statement because it is the fact that the deceased was separated from his wife for many years and the defendant had been caring him for some time. If a will was then in existence which did not adequately provide for the woman who meant more to him than his wife, one would expect, in his then state of health that he would direct his mind to making pro-vision for her. In my view there is no sufficient ground for the contention that the testator was not of sound disposing mind.

The issue of undue influence remains to be decided. Apart from the medical evidence, all the circumstances preceding the making of

the will of 17th November, 1950, and the alleged execution of a will in March, 1950, must be closely examined.

The plaintiff gave a vivid account of an eventful voyage in the Corentyne river in March, 1950, which resulted in the deceased executing a will written by David Ramotar. Strange coincidences occur in everyway life but the fortuitous appearance of a witness possessing a rudimentary knowledge of the law of intestacy, the ability to write a will and who is a relative by marriage of the plaintiff, at a time when plaintiff and his brother were suffering from the after effects of their harrowing experience, is a little too remarkable for me to believe. David Ramotar struck me as a type which abounds in British Guiana and more particularly on the Corentyne coast. He is a witness of convenience whose evidence bore no relation to any event which took place but to a story concocted for the purpose of this case.

In dismissing the evidence of the plaintiff, Ramotar and Seetal Persaud it does not follow that there was no undue influence on the part of the defendant. It simply means that in my view there was no will of March 1950 in existence and the circumstances surrounding the execution of the November will must be viewed in that light.

What constitutes undue influence was dealt with in the well known case of *Boyse v. Rossborough* (1857) 6 H.L.C. 45 where the Lord Chancellor said at p. 49: "It is, however, extremely difficult to state in the abstract what acts will constitute undue influence in questions of this nature. It is sufficient to say, that allowing a fair latitude of construction, they must range themselves under one or other of these heads—coercion or fraud."

This was followed by Sir James Hannen in Wingrove v. Wingrove 1886 11 P.D. 81 when he said: "To establish undue influence sufficient to invalidate a will, it must be shewn that the will of the testator was coerced into doing that which he did not desire to do, and the mere fact that in making his will he was influenced by immoral consideration does not amount to such undue influence so long as the dispositions of the will express the wishes of the testator."

Since there is no evidence of fraud, the plaintiff must persuade me that there was coercion on the part of the defendant if the will in her favour is to be set aside.

When a will is made by a person in poor health, shortly before his death and in the presence of the beneficiary I am prepared to hold that the Court's vigilance and suspicion ought to be excited. This does not mean that a man, conscious of impending death, cannot leave all his worldly possessions to his wife and cannot make his will in her presence. It is in the normal course of nature for a man to wish to leave his wife or the woman he regards as his wife secure from the ravages of poverty and its consequent suffering. But when he has not been prudent enough to translate his intentions into writing at a time when his health is robust and his mental faculties unimpaired, then I apprehend it is the Court's duty to scrutinise the evidence carefully to ensure that the testator was not coerced into an act which he would

have resisted had his health not broken down.

The evidence of the defendant regarding the events of the afternoon of the 17th November is not very thorough. She does not say why the testator desired to make a will or whether there was any previous discussion, so I am left to draw inferences from the evidence I believe. I accept Seedal's evidence that he was sent for, and that on his arrival Kaulessar requested that a will be made. Having regard to Dr. Ramdeholl's evidence it is probable that Kaulessar instinctively realised that death was near. His heart was faulty and his physical condition was such that he could not feel happy about his future. As Dr. Ramdeholl had declined to make a will, there was no alternative but to get someone else, and as Seedal had made one previously then it was to Seedal that he turned for assistance.

I can find nothing in the evidence, vigilant and suspicious though I must be, which transfers suspicion into certainty or even probability that the defendant used pressure on the testator to get him to send for Seedal or that before the visit to the doctor she had pulverised his mind to such an extent that his actions were not the result of his own volition. I believe Seedal's evidence that the will which was destroyed did not properly provide for the defendant and I conclude that Kowlessar, being aware of that, desired of his own free will without any coercion to make some provision for her and that his will of the 17th November, 1950, was properly executed,

There will be judgment for the defendant on the claim and counterclaim with costs payable out of the estate; as the plaintiff was justified in putting the defendant to the proof of the later will, he may have one half of his costs out of the estate.

Judgment for the defendant.

R. N. Tiwari for plaintiff.

N. C. Janki for defendant.

B.G. LITHOGRAPHIC COMPANY LIMITED *v.* SPROSTONS LIMITED

(In the Supreme Court, Civil Jurisdiction (Stoby J.) March 25; May 5, 6, 14, 17, 18, 21; September 22, 1954).

Steamship agents—Cargo Warehousers—Bailees—Gratuitous or for reward —Principles applicable—Damage—Negligence.

A quantity of material for use in the plaintiffs' business was stored in a warehouse belonging to the defendants. Within a short time of the arrival of the goods some of them were damaged by termites.

In an action to recover damages for the loss thereby occasioned the defendants pleaded that they were gratuitous bailees and that there was no negligence on their part.

The plaintiffs did not contract with the defendants to pay for the storage of their goods but there was evidence that if the goods were not removed within 10 days of their arrival a storage charge might be made. In addition it was shown that the defendants, the warehousers, were the agents of the Company who chartered the ship which brought the cargo and that some part of the freight charges accrued to the warehousers.

Held: Once some benefit accrues to the bailee even though the benefit does not come directly from the bailor then the bailment is not gratuitous. As

the defendants were not storing the cargo without recompense they were bailees for reward.

Held further: The defendants had failed to exercise that care which a reasonable man would exercise over his own goods.

Judgment for the plaintiffs.

The liability of warehouse owners for damage to goods in their ware house was the subject of this action in which the plaintiffs who imported material for their business claimed damages from the defendants.

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

E. V. Luckhoo for defendants. *Cur. adv. vult.*

Stoby J.: The plaintiffs in this action are printers and publishers who carry on their business at La Penitence, East Bank, Demerara. The defendants own warehouses at La Penitence in which goods imported into the Colony are stored, and are also steamship agents.

The plaintiffs claim that during the months of May and June 1952, a large quantity of their goods which was stored in the defendants' warehouse was overrun by termites generally known in this Colony as woodants, which had infested the warehouse on account of the negligence of the defendants resulting in loss to them of $4,645.91. They claim that sum as damages.

The two main issues in this case are (a) whether the defendants are gratuitous bailees or bailees for reward and (b) whether they have been negligent or not.

There is no dispute that the plaintiffs were in the habit of importing large quantities of material for use in their business. In May, 1952, Heyden Brokers Incorporated shipped to the plaintiffs a large quantity of box-board which had been purchased from the Sutherland Paper Company. The goods were shipped by the S.S. "Sapho" which sailed from New York on the 5th May, 1952. The defendants are the agents in this Colony of the owners or charterers of the S.S. "Sapho" and on its arrival all the cargo it brought was discharged into warehouses belonging to the defendants.

According to the witness, Leon Schuler, a director of the plaintiff-company, no charge was made for storage. It was his belief that Messrs. Sprostons stored goods for fourteen days free of charge and then charged storage after that. But according to Tyrell, the Assistant Traffic Manager of the defendant-company, some part of the freight charges eventually accrue to defendants. In the face of those two contradictory statements, I must examine the circumstances and documents in order to decide whether the defendants were paid or entitled to be paid for their services as warehousemen, or whether, in some way, a benefit accrued to them.

Story in his work on Bailments, 3rd Edition, p. 9 states that: "A deposit is commonly defined to toe a naked bailment of goods to be kept for the bailor without recompense and to be returned when the bailor should require it." He goes on to point out at p. 58 that care should be taken not to confound cases where a compensation is allowed, with cases of pure deposit or where the case is of a mixed nature.

Is this then a case of pure deposit? The defendants concede that if goods are not removed from their warehouse, within ten days then

a charge for storage is exacted. It is difficult to believe that a commercial concern, whose very existence depends on profits, will build and maintain at their own expense a warehouse for the mere convenience of importers unless there is a corresponding benefit. The bill of lading, Exhibit "U" shows that plaintiffs paid or contracted to pay Alcoa Steamship Company Incorporated, the owners or charterers of the S.S. "Sapho" the sum of $4,101.49. Mr. Tyrell, in cross-examination, explained that there is an arrangement between Alcoa and Sprostons whereby Alcoa pays Sprostons a 'fixed sum for discharging and storing freight. If that statement is correct while it proves that the defendants are not philanthropists it does not prove that there is a contract in existence between plaintiffs and defendants for the payment of storage though as I shall show later a third person can sue on a contract made for his benefit without being a party to it. The inference I draw from the hill of lading and the evidence is that a steamship company trading in the Colony is forced through circumstances to enter into some arrangement with a warehouse owner in the Colony whereby the ship's cargo is stored until customs clearance is obtained. In the absence of some such arrangement no steamship company can solicit trade from importers, as on the arrival of the shin there would be no place for storing cargo. Good business policy demands that the steamer's freight charges should include a sum sufficient to cover not only the expenses of the ship's journey but expenses to foe incurred in unloading the cargo. Although this arrangement is between the shippers and the warehousers and not between the warehousers and the importers, it is a benefit accruing to the warehousers.

In dealing with this topic of whether what appears on the surface to be gratuitous is in fact for payment, Mr. Luckhoo cited from Halsbury 3rd Edition, Vol. 2 p. 104, where the law is stated as follows : "Where a customer leaves valuables with his bankers for safe custody or allows a printer or any other trader to retain his plates or chattels upon which the trader may have worked, it is not always easy to say whether the bailment is gratuitous (*depositum*) or one for reward to the bailee (*locatio custodiae*). Even if no specific charge for keeping is made, it may well be that the custodian gets indirectly some consideration for the service, either in being allowed to continue to keep the customer's account, or in the prospect of future work. As a general rule, however, it appears that such persons are to be considered as gratuitous bailees, on whom the duty lies of taking such care as a reasonable owner would take of his own property of a similar kind."

The case cited in Halsbury in support of the passage commencing: "As a general rule . . ." is *Bullen v. Swan Electric Engraving Co.* 1907 23 T.L.R. 258 C.A. The facts in that case were that the plaintiff, a publisher and writer, left with the defendants who were fine art engravers and printers, a quantity of engraved plates from original paintings for the production of book illustrations. The defendants made the printings and, as the trial judge found, kept them free of charge for the convenience of both parties. The defendants were unable to return the plates on demand as they were stolen or lost. On those facts Mr. Justice Walton held that the defendants were gratuitous bailees and his decision was confirmed on appeal.

The case was one depending on its own facts and is of no assistance

in deciding whether on the facts of this case the defendants were in receipt of payment.

Counsel also relied on *Gilbin et al v. McMullen* (1869) 38 L.J.P.C. 25 the head note of which reads: "A customer deposited with his bankers securities for safe keeping. The securities were stolen by a clerk in the employ of the bankers.

Held: that the bankers were not liable unless the loss was occasioned fey their gross negligence."

This case is an authority for the proposition that bankers are gratuitous bailees of their customer's securities unless the customer contracts to pay for the service. It was distinguished in *re United Service Company ex parte Johnson* 1871 L.R. 6 Ch. 212 where securities deposited with a banking company who undertook to receive the dividends for a small commission, were stolen by the manager. The bank was held liable, the distinction being that the securities came into custody of the bank in, the ordinary course of their business as bankers while in Giblin's case the box containing documents was placed at the bank for the purpose of convenient deposit and the customer alone had access to it.

The cases cited by Counsel for the plaintiffs are more in point. In *Cairns v. Robins and Mills* 151 E.R. 1034, goods were forwarded by a carrier's waggon to A. in London and delivered by the carrier to him, A. sent them back to the carrier's warehouse with directions that they should remain there to await his orders. They remained there for upwards of a year when they were lost out of the warehouse: —Held, that the carrier was not, under these circumstances, a mere gratuitous bailee of the goods at the time of their loss. Lord Abinger C.B. said at p. 1037 "Suppose the goods had not been lost and the plaintiff had demanded them, the defendants would, under the terms of their notice, clearly nave had a right to demand warehouse rent before they parted with the goods. It means this—for three months we will receive and keep the goods and consider the carriage sufficient for so doing, but after three months we shall demand warehouse rent. That is quite sufficient to sustain this verdict." See also *White v. Humphrey* 116 E.R. 391—Quite obviously the distinction between those two cases and this one is that the defendants were carriers. At the time of the loss they were not however acting as carriers but as warehousers, and were not in receipt of payment as such.

In *Andrews v. Home Flats Ltd.* 1945 2 All E.R. 698 C.A., the wife of a tenant recovered damages for loss of her cabin trunk deposited in respondents' baggage room. In that case it is important to note that although the consideration did not flow from the bailor yet it was held that the bailment was not gratuitous. In dealing with the degree of care necessary in respect of the different kinds of Bailments, Story says at p. 28: "When the bailment is for the sole benefit of the bailor the law requires only slight diligence on the part of the bailee." This passage implies that once some benefit accrues to the bailee even though the benefit does not come directly from the bailor then the bailment is not gratuitous.

Nor can it be said that the plaintiffs being strangers to any contract between Alcoa and defendants are not entitled to rely on such

a contract. Denning L.J. in one of his forthright judgments said in *Drive Yourself Hire Co. v. Strutt*, 1953 2 All E.R. 1482: "It is often said to be a fundamental principle of our law that only a person who is a party to a contract can sue on it. I wish to assert, as distinctly as I can, that the common law in its original setting knew no such principle. Indeed it said quite the contrary. For the two hundred years before 1801 it was settled law that if a promise in a simple contract was made expressly for the benefit of a third person in such circumstances that it was intended to be enforceable by him, then the common law would enforce the contract at his instance, although he was not a party to the contract." I am compelled to find from the evidence that the defendants were not storing cargo without recompense and as such are bailees for reward. In arriving at this finding I have accepted the defendants' explanation of the letter, Exhibit "C4" that the demand therein made for payment was done for the purpose of (forcing the plaintiffs to remove their goods, but it also shows that if the goods were not removed storage charges became payable and this would bring them within the principle of *Cairns v. Robins et anor* (supra).

The principle of law governing the kind of bailment I find existed is well settled.

With respect to a bailment for reward the rule of law is that if the chattel in possession of the bailee is proved to be lost, injured, or destroyed the onus of proof is on the bailee to show that he exercised the appropriate degree of care. See Halsbury 3rd Edition p. 117. *In re S. Davis and Co. Ltd.* 1945, 173 L.T. 41 and Beven on Negligence 4th Ed. Vol. 2, p. 971.

The standard of care and diligence imposed on the bailee for reward is admittedly higher than that imposed on a gratuitous bailee. In the 'former he is expected to exercise the care and diligence which a careful and vigilant man would exercise in the custody of his own chattels of a similar description and character in similar circumstances; in the latter he must exercise that care which men of common prudence exercise in their own affairs. See Halsbury 3rd edition, page 103 and 114. It follows that in the former he is liable for negligence and in the latter only for gross negligence.

I will now consider whether the defendants offered any explanation for the damage done to the plaintiffs' property and if not whether they have satisfactorily discharged the onus which thereby is imposed on them.

Counsel for the defendants submits that the damage done to the box-board may not have been due to wood-ants infesting the warehouse but due to the box-board becoming contaminated before entry into the Colony. If there is any foundation for this submission then it follows that no onus rests on the defendants to show reasonable care since the onus only shifts to them in the absence of an explanation for damage done in their premises.

The theory that the cargo was contaminated before entry into the warehouse is based on the fact that the witness Alexander who took the first deliveries did not observe anything unusual, that Phillips saw no trace of wood-ants around the area where the boxes were stacked,

that Lucas saw no wood-ants trails and that Tyrell had to climb to the top of the bundles before he saw evidence of termites. The cumulative effect of that evidence, it is said, entitles me to infer that the wood-ants never entered the building and attacked the cargo. The argument ignores certain other features of the evidence. In addition to what Mr. Tyrell said regarding his failure to see wood-ants on the walls he said that part of the Sapho shipment of box-board was stacked in the No. 1 Bond and that a day or two after the 4th June, 1952, Mr. Schuler spoke to him about the condition of the box-board in the No. 2 Bond. Now if the termites had mysteriously entered the ship between New York and Georgetown it is remarkable that none remained in the cargo placed in the No. 1 Bond or no other cargo from the Sapho in the No. 2 Bond was devoured. Again while Mr. Tyrell admits knowing of the presence of termites in the Bond as early as the 6th June, 1952, yet as late as the 10th July, 1952, Mr. R. J. Lucas, then the defendants' assistant traffic manager, wrote: "To the best of our knowledge our bond in which this cargo was stored is not infested by wood-ants and we are not prepared to accept responsibility for alleged damage of this nature." This letter was in reply to one from the plaintiffs' dated 7th July, 1952, paragraph 4 of which is, "If, as we understand, it is the case, that your premises are infested with wood-ants, we presume that you will admit liability for the damage. If, on the other hand, you do not admit liability, we shall be glad if you will state your grounds for disclaiming liability." It is appreciated that the defendants would hardly admit negligence or could not be expected to explain why liability was not accepted but I cannot understand why the defendants should refer to the alleged damage when it was known that actual damage was suffered and deny the presence of wood-ants when Mr. Tyrell had resorted to the use of gas oil in the hope of eradicating them. If indeed there was ground for believing that the box-board had entered the Bond in a harmful state I would have expected the defendants to say so at that stage and not to insist on statements which were incorrect.

There is no obligation on the defendants to show how the wood-ants came to be in the cargo, their duty, as I have said, is to exercise ordinary diligence, and consequently any rejection of a theory advanced on their behalf does not weaken their position in any way while the acceptance of the theory would dispose of the plaintiffs' case.

From the evidence I infer that the plaintiffs' goods were damaged while in the defendants' possession and as there has been no satisfactory explanation of the damage and as the circumstances show *prima facie* evidence of negligence the onus is on the defendants to rebut negligence.

In deciding whether the defendants have discharged the onus and in determining the standard of care demanded of them as warehousemen I have to be guided by certain definite legal principles. The standard of care exacted of a warehouseman was laid down by Lord Kenyon C.J. in *Cailiff v. Danvers* (1792) Peaks (N.P.) 155 where the plaintiff claimed against the defendant a warehouseman for negligently keeping a quantity of ginseng which had been deposited toy the plaintiff in his warehouse. The ginseng had been destroyed by rats; but several persons had looked at it on different days and every night: and the

lid of the box containing it was shut down though not nailed. Many rats were kept in the warehouse while all possible care was taken to destroy vermin. Lord Kenyon said: "that a warehouseman was only obliged to exact reasonable diligence in taking care of the things deposited in his warehouse; that he was not like a carrier to be considered as an insurer and liable for all losses happening otherwise than by the act of God or the King's enemies; and that the defendant having exerted all due and common diligence for the preservation of the commodity was not liable to any action for damage which he could not prevent."

Since a warehouseman is only liable for ordinary neglect, if he shows that he used due care and the goods were stolen or destroyed by fire or by accident, he is not liable. So where as in the Canadian case of *Page v. Defoe* Empire Digest Vol. 3 p. 73 para. 136 part of a warehouse collapsed through the breaking of a beam occasioned by dry-rot and no negligence was shown in the construction or in not discovering the dry-rot, the owner of the warehouse was held not liable for damages sustained to the goods in the warehouse.

Again, there is no warranty or obligation implied by law that a warehouseman's building is absolutely safe—*Searle v. Laverick* 1874. 9 Q.B. 122.

That the type of article in possession of the bailee is of some importance is evident from the following passage of Story's at p. 17: "And what constitutes ordinary diligence may also be materially affected by the nature, the bulk and the value of the articles. A man would not be expected to take the same care of a bag of oats, as of a bag of gold; of a bale of cotton, as a box of diamonds or other jewellery; of a load of common wood, as a box of rare paintings; of a rude block of marble, as of an exquisite sculptured statue.

Bearing the above principles in mind it remains for me to consider whether the defendants exercised that care which a reasonable man would exercise over his own goods.

The defendants' warehouse is constructed of greenheart walls and flooring and in design is not different to other similar structures in the Colony. In 1951 the defendants wished to reclaim a portion of land near the river and began the process of reclamation by causing earth and any other valueless stuff to be dumped in it. Refuse was not used but the ebb and flow of the tide would cause the land to be continually damp. On account of the prevalence of stealing on the waterfront it was the custom of Mr. Tyrell to inspect the warehouse to see whether there were any loose boards in the walls or on the flooring.

In order to establish that the defendants did not exercise the degree of care required of them, the plaintiffs called Mr. Carl McCowan, a corporate member of the Institute of British Engineers. Mr. McCowan's qualifications and practical experience of the habits of termites in the Caribbean area qualify him, in my view, to express an opinion on the activities of wood-ants in this Colony. Since no other witness accounted for the fact that the nest or the source of the wood -ants was never located, Mr. McCowan's evidence is important. I accept his testimony that termites have an uncanny knack of knowing

when people are around and disappear quickly. His evidence is consistent with the admitted fact that runways or tunnels were present, that they were treated with gas oil as early as the 6th June and yet on the 21st July, tunnels—not only the marks of tunnels—were still there. That shows that termites were still active and were coming from some where, the source of which was never discovered. It negatives the theory that the termites were brought into the Bond in the cargo, because by the 21st July, active steps had been taken to diminish or prevent the spread of the pests and it would have been detected quite easily if the box-board was the source.

I also accepted Mr. McCowan's evidence that he found new termite runways leading from the timber wall of the Bond and from under the timber decking terminating in the bundles that he traced the source of the runways and they led to the back to the bank of the river where the eastern end was connected to the wharf. His opinion that a nest of termites existed below the rubbish dump would seem on the circumstantial evidence, to be unassailable.

I have not overlooked his admissions in cross-examination that despite one's best endeavours termites still persist in this country and that if buildings are not properly constructed they become more vulnerable to the attack of termites and the use of insecticide may prove ineffective. If Mr. McCowan meant that the No. 2 Bond was not properly constructed. I would not accept his evidence on that point as I am satisfied it is constructed in accordance with the usual type of architecture and material considered suitable for this Colony. As an architect. Mr. McCowan was merely taking the opportunity to indicate that in his opinion the time had come for a more progressive outlook in the field of building.

It is not for me to say what steps the defendants could have taken to minimise the possibility of termites entering their warehouse but what I have no hesitation in finding is that they never appreciated their responsibilities as warehouse owners. I do not believe Arno's evidence that he was employed to keep a check on the building, for he is yet to explain how the termites took over unknown to him.

The box-board must have entered the Bond about the 29th May, and by the 4th June, ample opportunity would have presented itself for Arno, where he performing his alleged duty, to detect the termites and attempt to trace the source. It occurred to me that Arno was purposely brought for the purpose of showing that reasonable care had been taken. He was not a convincing witness. Had his evidence been truthful it is inconceivable that no mention was made in the correspondence of the precautions which were taken and not one word uttered on the 21st July, when a representative gathering met, that Mr. Arno could vouch for the purity of the building.

A reasonable or prudent man storing material which is susceptible to termites, in a building and in a climate where termites are difficult to control, would consult someone familiar with the topic or at least ensure that conditions favourable to their existence are not permitted to develop.

The presence of a refuse dump so near to a wooden building containing a variety of cargo would put a careful person on his guard,

and at the very least persuade him to fumigate the dump at regular and frequent intervals. A prudent owner of a wooden building should make constant use of insecticides and should have regular routine inspections designed to detect the presence of termites before they can overrun the building and do harm.

It follows from the facts I have found that the defendants are liable in damages and it remains now to assess the amount.

I must say at once that the plaintiffs' carelessness in not having a proper check made and a record kept of all the damaged stock has made it difficult for me to assess the damage properly.

The general rule in assessing damages was stressed by Denning L.J. in *Shand Electric and Engineering Co. Ltd. v. Brisford Entertainments Ltd.* 1952 2 Q.B. C.A. 253. He said: "In assessing damages, whether for a breach of contract or for a tort, the general rule is that the plaintiff recovers the loss he has suffered, no more and no less. This rule is, however, often departed from. Thus in cases where the damage claimed is too remote in law the plaintiff recovers less than his real loss: *Liesbosch, Dredger* (*Owners*) *v. Edison S.S.* (*Owners*). In other cases the plaintiff may get more than his real loss. Thus, where the damage suffered by the plaintiff is recouped or lessened owing to some reason with which the defendant is not concerned, the plaintiff gets full damages without any deduction on that account: *Slater v. Hoyle & Smith, Ld. Smiley v. Townshend; Haviland v. Long.* Again, in cases where the defendant has obtained a benefit from his wrong-doing he is often made liable to account for it, even though the plain-tiff has lost nothing and suffered no damage: *Reading v. Attorney-General."*

There is no doubt that on or about the 4th June, 1952; as a result of a report made to Mr. Schuler instructions were given to cease taking delivery of the box-board. There is no doubt too that at least by the 7th June, Tyrell, Corlette and Arno, all employees of the defendants, had full knowledge that wood-ants had attacked stock belonging to the plaintiffs. From then on whether through fear or lack of initiative they pursued a policy of non-co-operation. It was not to be expected that they would admit liability but the least that could have been done was to inform one of the Company's executives, admit the presence of wood-ants and arrange for a record to be kept of such stock as was removed and which was contaminated. This strange policy by the employees aforementioned was pursued by Messrs. Farrar and Lucas, for on the 21st July, when the latter visited the warehouse with Messrs. Tyrell and Chee-a-Tow, representing Sprostons, they seemed to have agreed on a conspiracy of silence, for not one word was uttered by any one of them.

The defendants' attitude explains why there was so much delay in removing stock, in addition to the obvious reason that wood-ants stock, if placed in plaintiffs' factory, would cause serious damage, so that great care had to be exercised in separating the good from the bad and in burning the latter.

Neither Schuler nor Alexander assists with regard to the quantity damaged but Phillips says that between the 4th June and 7th June he inspected two hundred and forty-seven packages and caused twenty-

eight of them to be opened. In view of the condition of two or three bundles opened in his presence he advised that twenty-eight bundles he saw should be "hand-picked." Hand-picking apparently is the commercial term for separating damaged from undamaged. After the separation had taken place Mr. Phillips placed the damage done at fifteen per cent. This means, of course, that after destroying the damaged stock in twenty-eight bundles enough material was left to comprise twenty-three or twenty-four bundles. It does not mean that whole bundles were valueless, but a little of each bundle was affected. Here then is positive evidence of about four bundles absolutely lost to the plaintiffs. Mr. Schuler said in cross-examination that each bundle contains one thousand six hundred sheets and it appears from the invoice that there are five-hundred sheets per ream. Four bundles will give 6,400 sheets or 12 4/5 reams. Mr. Schuler said that he was able to utilize 431,700 sheets from 282 bundles which mean that the equivalent of 39 reams were damaged.

Alexander and Caglin were quite hopeless in so far as evidence of damage is concerned. The latter's evidence was entirely useless and only served to explode the theory that business firms conduct their business in an efficient way. D'Abreu's figures seem very much like hearsay but it is clear he did do some burning and if Gilbert made a check in his presence and estimated the damage at 19,500 sheets I accept that figure.

The defendants' witness, Arno, estimated that 75 bundles were damaged. This does not imply that the whole of the contents of the 75 was unserviceable but it tends to support Schuler, D'Abreu and Phillips that the estimate of 39 reams damaged is not an exaggeration. Tyrell's evidence that be was never shown any damaged wood packing or box-board does not mean that there was no damage. He admits the presence of wood-ants and Lucas said that on the 21st July he saw wood-ants on the bottom of the wood packing and at the top of the box-board.

Their evidence as to what was seen on the 21st July, is more reliable than McCowan's, because Marshall more or less supports them; so in my assessment of damages I have worked from Phillips' evidence and drawn inferences from Schuler, D'Abreu, Arno, Tyrell, Lucas and Marshall's evidence.

With regard to the wooden packings the evidence is far too nebulous for me to arrive at any figure. D'Abreu did say, based on Gilbert's check, that 282 packings were burnt. But these wooden packings, a sample of which was produced in Court, appear to have no or very little commercial value and in the dissecting of the damaged stock some indiscriminate burning might have taken place. I take the view that the plaintiffs could not possibly suffer any great loss for damage to the wooden packings. Although a separate charge is made in the invoice, the cost of packing must be added to the goods to arrive at a selling price so that once the goods are saleable no loss flows from loss of packing. As 39 reams were packed in 39 bundles the plaintiffs are entitled to the cost of 39 wooden packings as there was no stock available to bear the cost of that packing, but having regard to the highly unsatisfactory evidence of loss, I am not prepared to assess the wooden packing at its invoice price.

Discarding then the loss of wooden packings, except as to 39 bundles, I assess the damage at 39 reams of box-board at $26.52 per ream or $1,034.28, 39 bundles at $2.00—$78.00. I allow the inspection and surveying fees at $348.55, being $100.00 less than claimed and allow for overcharges (see exhibits) and give judgment for the plaintiffs in the sum of $1,460.83 with costs.

Solicitors:
J. Gonsalves for plaintiff.

A. G. King for defendant.

MISIR et al *v.* DAVID KING, SUPT. OF POLICE

(In the Full Court of the Supreme Court, on appeal from the Magistrate's Court for the Georgetown Judicial District, (Boland, C.J. (acting) Stoby, J. and Wills, J. (acting) August 30, 31; September 29, 1954).

Emergency Order—Power in Governor to prohibit public processions—Prohibition of processions on any public road, street or dam—Interpretation of words "May be specified"—Permissive—"Any area"—Meaning—Holding a procession—Evidence—Aiders and abetters.

The six appellants were convicted toy the Magistrate for holding a procession on the 5th April, 1954, in Camp Street, Georgetown, a public road, in breach of an order made on the 9th day of October, 1953, by the Governor under Section 19(1) of the Emergency Order, which reads:

"The Governor, if satisfied with respect to any area in the Colony, that the "holding of public processions or of any class of such processions in that area "would be likely to cause a disturbance of public order or to promote "disaffection, may by order prohibit, for such period as may be specified in the "order, the holding in that area of processions or processions of that class, as "the case may be."

Acting under that Section the Governor on the 9th October, 1953, made the following order:

"Whereas I am satisfied that the holding of processions other than funeral "processions or processions of members of Her Majesty's forces or of the "British Guiana Volunteer Force or of the Police Force on or along or within "the immediate vicinity of any public road, street, dam or other public "highway in the Colony, would be likely to cause a disturbance of public order "or to promote disaffection:

"Now Therefore in pursuance of the power vested in me by Section 19 of "the Emergency Order and all other powers enabling me in that behalf. I Do "Hereby order And Direct that the holding of any such procession shall be "prohibited unless the Commissioner of Police shall have given his "permission in writing to the holding thereof."

The defence led no evidence before the Magistrate but rested its case on legal submissions made on their behalf.

It was submitted, on appeal, that the Order of the Governor was *ultra vires* the Emergency Order and four reasons were advanced in support of that contention:—

(a) That the Governor's order did not specify with sufficient particularity the provision of the Emergency Order under which it purports to have been made.

(b) . That the order prohibits processions in general whereas the power given to the Governor is to prohibit public processions only.

(c) That the Order did not specify, as it should have done, a time limit for its operation; and

(d) That the Order referred to the whole of the Colony instead of to an area of the Colony.

Held: As to (a): This point was concluded by the decision of the Court in Jagan v. McFarlane (1954) L.R.B.G.

As to (b)*:* A procession going along a public highway is a public procession and the Governor by his Order had prohibited what was beyond question a class of public procession.

Per curiam: The part of the Order prohibiting processions within the immediate vicinity of the public road may be *ultra vires* but it was severable from the rest of the Order.

As to (c): In Section 19(1) of the Emergency Order the expression "for such period as may be specified in the Order" was permissible and not compulsory.

As to (d): "Any area" includes the whole area of the Colony.

Another ground of appeal was that there was no proof that Camp Street is a public highway.

Held: There was *prima facte,* evidence that Camp Street was a public highway.

Per Curiam: If there was no such evidence it would be permissible to call a witness to give the formal evidence having regard to Section 27 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16.

Appeals dismissed.

Appeals from convictions for holding public processions contrary to Directions issued under the Emergency Order.

Five of the appellants and others left the Georgetown Magistrate's Court in company. They proceeded along High Street and after a short distance was traversed one or more of them raised the right hand with three fingers held aloft whereupon a crowd of about 80 persons emerged from surrounding houses and streets and followed the appellants.,

The crowd turned into Regent Street and the appellants stopped at a building in Regent Street. They then continued into Camp Street with the crowd following them. The appellants were walking in the van of the crowd holding each other's hands. In Camp Street one of the appellants shouted "Comrades follow me we are going to make the police .and follow us all about." They were shortly after arrested and charged.

L. F. S. Burnham with *J. R. S. Luck* for appellants.

J. A. Luckhoo, Solicitor General (acting) for respondent.

Judgment of the Court: *Cur. adv. vult.*

The question in this appeal is whether the six appellants were rightly convicted by the Magistrate for that they held on the 5th April, 1954 in Camp Street, Georgetown, alleged in the complaint to be a public road, a procession in breach of an Order made on the 9th day of October, 1953 by His Excellency the Governor as empowered by section 19(1) of the Emergency Order.

Eleven persons including the six appellants were charged by the police with the commission of this offence. The six appellants and another defendant Cheddie Jagan were convicted and were each ordered to pay a fine of $100:— in default to undergo 2 months imprisonment. The remaining four defendants were acquitted. Cheddie Jagan did not appeal.

According to the facts led in evidence by the prosecution at the hearing before the Magistrate, Jagan and all the defendants, excepting

the appellant Misir, on that day left the Georgetown Magistrate's Court in company. In the courtyard they were joined by Mrs. Jagan, the wife of the defendant Cheddie Jagan, and others. They proceeded together north along High Street and in the vicinity of the Victoria Hotel one or more of the defendants raised the right hand with three fingers held aloft whereupon a crowd of people numbering about 80 persons emerged from the surrounding houses and streets and in a body followed the defendants as they continued to walk along north in High Street. The defendants turned east into Regent Street and were being followed by an increasing crowd estimated to number between 200 to 500 persons. Also along the route a number of policemen on duty to prevent breaches of the peace were accompanying the crowd from the time they commenced to follow the defendants in High Street. On the way these policemen were reinforced by a party of 20 constables in a lorry. At the office of the People's Progressive Party which is in Regent Street east of Wellington Street, the defendants, or at any rate some of them, stopped for a few minutes, after which, with a crowd following them, the defendants continued to go east along Regent Street until they got to Camp Street when they turned south into Camp Street and then west into Charlotte Street. There the defendant Cheddie Jagan with some of the defendants and others went into Jagan's office. About a minute later Jagan came out of his office and with the appellants went east along Charlotte Street. Jagan and the six appellants were then holding hands and walking in the van of a crowd who were following them as they turned north into Camp Street. The defendants were walking side by side in a line, the appellant Misir being on the right of the line. Misir was heard to shout waving his hands to the crowd—"Comrades follow me we are going to make the police asses and follow us all about." Just then two police officers came up and arrests were made. Misir is stated to have been arrested when he made the remark. The other defendants also were soon arrested and all were charged with the offence of holding a procession in Camp Street. At the close of the prosecution Counsel for the defendants submitted to the Magistrate that there was in law no case to answer, advancing in support of his submission some of the grounds he has urged before us. The defence rested its case on Counsel's submission and called no evidence, whereupon the Magistrate convicted the defendant Jagan and the six appellants.

We shall deal first with the submission that the Order of the Governor is ultra vires the Emergency Order under the authority of which it purports to have been made. Four reasons are advanced in support of this contention. We have no need to deal with the first of those reasons—namely that the Governor's Order does not specify with sufficient particularity the provision of the Emergency Order under which it purports to have been made. In its judgment in the appeal of Janet Jagan v. McFarlane delivered on the 28th day of August, 1954 this Court expressed itself as being against a similar submission. It is true that the Court though comprised of three Judges was not then constituted by the same Judges as sit in this appeal. We are of the opinion that that decision is binding on us,

but even if the decision is not binding on the Court as it is now differently constituted we wish to say that we are in full agreement with the decision given on that point in Janet Jagan v. McFarlane and adopt as well the reasons set out in the considered judgment.

The second reason advanced in support of the contention that the Governor's Order is *ultra vires* is, as stated in the Notice of Grounds of Appeal, that it purports to prohibit processions in general whereas the power given to the Governor is to prohibit *public* processions only.

Subsection (1) of section 19 of the Emergency Order which is the source of the Governor's authority for issuing his order of the 9th October, 1953 reads:

> "19. (1) The Governor, if satisfied with respect to any area in the Colony, that the holding of public processions or of any class of such processions in that area would be likely to cause a disturbance of public order or to promote disaffection, may by order prohibit, for such period as may be specified in the order, the holding in that area of processions or processions of that class, as the case may be."

It is manifest from the language of the subsection that the Governor's powers of prohibition of processions are limited to such classes of public processions as he thinks likely to cause a disturbance of public order or to promote disaffection. He is given no power to prohibit processions other than public processions. The Governor purports to prohibit by his order what in our view is beyond question a class of public procession, namely processions on any public road, street, dam or other public highway in the colony excepting funeral processions or processions of Her Majesty's forces or of the British Guiana Volunteer Force or unless the Commissioner of Police shall have given his permission in writing for the holding thereof. What precisely is a public procession is not defined in the Emergency Order. It is left to the Court to determine whether a class of procession purported to be prohibited by the Governor's Order is or is not a public procession. Counsel for the appellant contends that a necessary element to render a procession a public procession is that it is one which members of the general public are expressly or impliedly invited to join. We cannot agree that this is an essential character of a public procession. We hold that a procession going along a public highway is a public procession, and so far as accessibility by the public is concerned, it must not be overlooked that other members of the public cannot be prohibited from the exercise of their legal rights to use the highway them-selves and therefore cannot be prevented, except by the police for traffic reasons, from joining in the procession. In the course of his argument against the validity of the order as affecting public pro-cessions Counsel pointed out that the Governor's Order included amongst the class of processions prohibited those which may not be actually going along a public highway but are *merely within the immediate vicinity of a public highway.* He instanced hypothetical

examples of processions taking place within the vicinity of a public highway but not within sight of the public, or, even if within sight, taking place on private lands from which the general public are effectually shut out by a fence or barrier. Moreover Counsel poses the question: what is to be deemed "immediate vicinity" of a public highway so as to render the procession held within such an area an offence? Is it intended to prohibit processions as being public processions because they happen to be *within sight of the public*? If it is intended to prohibit the use of private lands in this way, then power to curtail such private rights should be expressly given by some legislative enactment.

We confess to a feeling in agreement with Counsel's submission that that part of the Emergency Order relating to processions taking place within the immediate vicinity of a public highway is *ultra vires.* It offends against the rule that delegated legislation should be precise. "A by law is liable to be declared void if it is not certain and positive in its terms i.e. if it does not contain adequate information as to what it requires or forbids to be done, so that the persons affected may be in no doubt as to what they are required to do or abstain from doing and as to the penalty for non-compliance." (Craies on Statute Law 3rd Edition p. 271). Moreover the enforcement of that part of the by-law would involve encroachments on the rights to the enjoyment of private property which can be abrogated only by express legislative authority or by rules laid down by the Common Law. But Counsel for the appellants contents that the whole of the Governor's Order is bad if only a part of it is had. As against such a proposition there is the following dictum of Lindley, L.J. *in Strickland v. Hayes,* L.R. (1896) 1 Q.B. 290 at page 292 : "There is plenty of authority for saying that if a by-law can be divided, one part may be rejected as bad while the rest may be held to be good." That was a case where a County Council made by a by-law under the Local Government Act 1888 (C. 41) Section 16 in the following terms: "No person shall in any street or public place, *or on land adjacent thereto,* sing on recite any profane or obscene song or ballad, or use any profane or obscene language." This by-law was held invalid on the ground that it was unreasonable to prohibit such songs or language which might not cause annoyance to anyone. But Lord Lindley expressed the view that if there had been that condition of causing annoyance inserted in the by-law the whole by-law would not have been rendered invalid in consequence of the vagueness of the expression "or on any lands adjacent thereto." On the same principle it was held that where a British Columbia statute purported to prohibit the employment of Chinese or Japanese labour, the fact that as regards Japanese labour it was in conflict with a Dominion of Canada Statute, which had ratified a treaty between Great Britain and Japan and which thereby placed the subjects of the Empire of Japan "on the same footing as the subjects or citizens of the most favoured nation." did not make the entire provincial statute *ultra vires,* as the part relating to Chinese labour was valid inasmuch as it was severable from the *ultra vires* portion. (Brooks-Bidlake v.

Attorney General for British Columbia, 1923 A.C. 450). We are of opinion that that part of the Governor's Order which relates to processions taking place in the immediate vicinity of a public highway is severable from the rest of the Order, and even if that part may be deemed *ultra vires* it does not vitiate the entire Order.

We now pass on to deal with the third reason advanced by Counsel in support of his submission that the Governor's Order is *ultra vires.* It is contended that the Order was bound to specify a time limit for its operation. This contention involved a submission as to the meaning to be given to the word "may" in the phrase "for such period as may be specified in the order" appearing in section 19(1) of the Emergency Order. As we understood Counsel's argument, the meaning to be given to section 19 (1) is that an order of prohibition must be for a definite period and such definite period shall be specified in the order. The word "may" is not to be given a meaning denoting mere permissibility or discretion as to the inserting in the order itself the duration of a period of prohibition. It was urged that it is a cherished right of the citizen to move with other citizens in a public procession unless by its nature the procession is an offence by Common Law or infringes some existing legislative provision, as declared by express enactment or unless prohibited to someone to whom the legislature has delegated a power to prohibit or control such a procession. The exercise of any such delegated power must be in strict compliance with the authority bestowed. Any ambiguity as to whether an act purported to be in exercise of the power so authorised must be resolved in favour of a person prejudicially affected thereby.

But it seems to us that the primary sense of the word "may" is permissive. "May" is to be construed as mandatory only when it is manifest from the context that it could never have been intended to be permissive—that is to say when it was not intended to be regarded as denoting a power to exercise a discretion; and so it has been held that when the word "may" is used in relation to powers of the court to effectuate legal rights, and generally where in a public statute it is directed that a thing, which is for the benefit of the public, "may" be done—the word "may" is considered to have a compulsory force. Vide 31 Halsbury's (Hailsham Edition) p. 530 and the cases therein cited.

We do not agree that there is an ambiguity as to the meaning of the word "may" in the expression "for such period as *may* be specified in the order" contained in section 19(1) of the Emergency Order, despite the fact as was pointed out by Counsel that no such provision is contained in subsection (2) which relates to the Governor's power to prohibit meetings. In the Emergency Order it would seem to be contemplated that at a particular period a class of public procession may rightly in the view of the Governor be likely to cause a disturbance, though if the procession were held at any other period it would not be fraught with such dangerous consequences. Accordingly the Governor is empowered to prohibit by his order, processions for only a specified period if he thinks it fit to limit the prohibition in this manner. Such considerations would hardly apply to meeting the danger of public disorder attendant upon the holding of which would

generally be the outcome of the discussions at the meeting and the conduct of the holder or holders of the meeting and of those who attend at the discussion.

As to the fourth reason advanced in support of the submission of the Governor's Order being *ultra vires,* we may dispose of the submission in a few short sentences. "Any area" of the Colony includes in our opinion the whole area of the Colony. Counsel for the appellant had to agree that an order prohibiting public processions in more than one specified area would not be *ultra vires.* He further agreed that such an order would not be irregular if it specified the areas of the Counties of Demerara, Berbice and Essequibo as being placed under prohibition; which would toe that the whole area of the colony would thereby be under prohibition in relation to public processions. But Counsel has sought to impress us with an argument that the specifying of each county singly in a Governor's Order would indicate that the Governor must have directed his mind to the likelihood of public disorder in the area of each separate county, and that this would not be the case when his order issues a prohibition against the entire area of the colony without specifying each county individually. We hardly think such an argument was intended to attract our serious attention. Accordingly as a result of full consideration of each of the four reasons advanced in support of the submission, we have arrived at the conclusion that we must reject the claim made on behalf of the appellants that the Governor's Order is *ultra vires.*

It is easy to dispose of what we regard as a purely technical ground of appeal. It is contended that no proof was given that Camp Street is a public highway. We take the view that in order to obviate justice being frustrated because of the failure through an oversight to prove in the lower court what would seem so easy of proof, section 27 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16 specially bestows on the Full Court at the hearing of an appeal power to call additional evidence. This power we were prepared if necessary to exercise by calling as a witness some officer in the employ of the Georgetown Town Council or the Lands and Mines Department of the Civil Service, who would be qualified to give the required information We have however decided not to exercise our right to call such evidence because we have been impressed by the argument of the learned Solicitor General, who contended that a *prima facie* case was made out that Camp Street by its very name was a public highway. The Solicitor General drew our attention to Section 2 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13 where the definition of "public way" is given as meaning "any *highway,* market place, square, *street,* bridge, or other way lawfully used by the public" and he referred to the evidence which disclosed that the defendants and the crowd were seen traversing both up and down Camp Street as on a public highway without being opposed by anyone in challenge of their right to do so. That and its name he submitted must be taken as establishing *prima facie* that Camp Street is a public highway, and on the defence fell the burden of proving otherwise. No evidence to rebut the presumption had been given by the defence.

There remains to be considered whether on the facts led in evidence the appellants were rightly found by the Magistrate to have held a

procession in Camp Street. In the judgment delivered in the appeal of Janet Jagan v. McFarlane referred to above it was stated that something more than being a member of or taking part in a procession is required to justify a person being deemed to be the *organizer or one of the organizers* of the procession. That expression of view concerning a procession was no doubt merely an *obiter dictum* in the decision in that case in which the question for determination was whether or not the appellant Janet Jagan was the holder of a meeting. We would however state that we endorse that view relating to processions. Perhaps *organizing* a procession may not be exactly synonymous with *holding a procession.* Be that as it may it is our opinion that to me deemed to be *holding* a procession it must be established that a person is doing something more than being merely one of the procession. The holder of the procession must be shown to have purposely caused the procession to take place. Evidence of his words or conduct at the material time may be advanced in proof of his having exercised his influence to cause the coming into existence of the procession or at any rate to have its continued existence of the procession maintained. The evidence before the Magistrate established that there was an increasing crowd following the defendants (including the appellants) as they were going along the streets from the Magistrate's Court to the office of the People's Progressive Party in Regent Street. In High Street there was a sign made by some or all of them which resulted in people following them. There as no direct evidence that the sign made was by way of invitation to people to follow them. It may well have been an intimation to people in the street about the result of some matter in the Magistrate's Court which would be pleasing to those about the streets. The police in large numbers also followed no doubt with a view to preventing a breach of the peace or the obstruction of traffic which might result from the large concourse of persons following the appellants and their lawyers. Possibly a number of persons seeing the police going along were impelled to join the crowd through curiosity to observe what was going to happen. It cannot be said that the appellants proceeding along together on their way from the Magistrate's Court to the headquarters of their political party had by act or conduct purposely caused the large throng to follow their footsteps. Had they been convicted for holding a procession in High or Regent Streets, this Court would have had no hesitation in setting aside the conviction. But the conviction is for holding the procession in Camp Street. The evidence was that the police were endeavouring to disperse the crowd all the way right up to outside the headquarters of the appellants' political party. A crowd persisted in continuing to follow the appellants from the headquarters in Regent Street to Cheddie Jagan's office in Charlotte Street. It was after leaving Cheddie Jagan's office in Charlotte Street that turning into Camp Street the appellants were side by side holding each other's hands and then one of them, the appellant Misir, called on the crowd to follow them beckoning to them at the same time to come on. Then it was that Misir and the other appellants were arrested. There can be no doubt that appellant Misir was guilty of an act purposely designed to cause the people who were following behind not to disperse but to continue in procession. This was undoubtedly an invitation to the crowd to follow in the procession.

It was contended that Misir was arrested too prematurely—that there was no procession yet caused by what he said. It may or may not be strictly true that Misir was arrested before the crowd had time to respond. Constable Peters who arrested Misir said that he arrested him when he called out to the crowd to follow. However Superintendent of Police King who testified that he gave the order to arrest the appellants stated in his evidence that from a point in Camp Street just south of. Regent Street he saw the crowd coming north in Camp Street and that he recognized Jagan, the appellant Misir, and the other appellants coming north from Charlotte Street with their arms linked together followed by a crowd of about 200 persons. King said he blocked the road and himself arrested Jagan and directed that the appellants be arrested.

As we interpret the law it is immaterial whether the crowd had time to respond to Misir's invitation to them to follow. Section 56 of the Emergency Order provides that "Any person who attempts to commit or at any rate doing an act preparatory to holding a procession against any of the sections in this Order, shall be deemed guilty of an offence against that section." Misir was undeniably attempting to commit or at any rate doing an act preparatory to holding a procession when he called on the crowd to follow. It was argued that assuming on the evidence Misir was guilty of the offence there was no evidence that any of the other appellants did any act or made any remark to render any of them guilty of holding a procession in Camp Street. The evidence that Misir and all the other appellants were side by side holding hands as they turned from Charlotte Street when Misir called out to the crowd following that they should continue to follow them was, in our opinion, sufficient *prima facie* proof that the other appellants were acting in concert with Misir in holding a procession in Camp Street or at any rate in doing some act preparatory to the holding of a procession in Camp Street. If they were not acting in concert with Misir, it was sufficient *prima facie* evidence that they were aiding and abetting Misir in the Commission of the offence. No evidence was tendered by the defence in contradiction of the *prima facie* case thus established against them. In either instance, whether they were acting in concert with Misir or were aiders and abettors, the conviction for the offence of holding a procession was correct. By section 23 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13 it is an offence to aid and abet a summary conviction. That an aider and abettor can be convicted for the principal summary conviction offence which he aided and abetted has long been settled. (*Du Cros v. Lam-bourne* (1907) 1 K.B. 40).

By section 58 of the Emergency Order non-compliance with the provisions of any section of the Order by any person is an offence which is punishable on summary conviction or on indictment. When it was elected to treat the offence as one punishable on summary conviction the prosecution submitted a complaint for the summary conviction offence in accordance with the definition of that expression in section 2 of Chapter 13. The act of aiding and abetting such an offence is also punishable as a summary conviction offence and the procedure is that which is prescribed by the Ordinance Chapter 13. Therefore we find that appellant Misir and all the other appellants have been rightly

convicted of the offence of holding a procession in violation of the Governor's Order.

As the complaint was placed before the Magistrate to be dealt with as a summary conviction offence and as it was so dealt with we take the view that the burden fell on the defence of establishing that the procession came within the exception or proviso of a procession of which the Commissioner of Police had given his approval in writing. The appellants did not discharge that burden. The same remark would apply as to the burden of proof that the procession was a funeral pro-cession or a procession of members of Her Majesty's forces or of the British Guiana Volunteer Force. (Vide section 9 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 13). As to this latter proviso the description of the procession given by the witnesses for the prosecution established that the procession was not belonging to any of the classes excepted.

The appeals of all the appellants are dismissed. The convictions and sentences are upheld. There will be costs to the Respondent.

BEEKAM *v.* SOOBHA and MARQUES.

(In the Supreme Court, Civil Jurisdiction (Stoby J.) March 30, 31; May 19, 20; October 1, 1954.)

District Lands Partition and Re-allotment Ordinance—Partition Officer—Award—Appeal to Local Government Board—Dismissal of appeal—No further appeal—Finality.

The plaintiff's predecessor in title was the owner of land at Plantation Ross, West Coast Berbice. In 1934 a sworn land surveyor in his capacity as Partition Officer surveyed the plantation and awarded to plaintiff's predecessor in title the land claimed by him but reduced the width or facade by ten feet. There was an appeal to the Local Government Board who confirmed the officer's award. There was no appeal to the Supreme Court.

The plaintiff claimed that he remained in possession of the ten feet despite the Officer's award.

In 1940 the executrix of plaintiff's predecessor in title accepted transport of the reduced area. From 1934 the 10 feet so taken away formed part of the land awarded to defendant's predecessor in title who claimed to be in possession of it from that time.

The plaintiff's action was for a declaration that he was the owner of the ten feet of land and damages for trespass.

Held: As there was no appeal to the Supreme Court from the decision of the Partition Officer the latter's award was final and the plaintiff could not rely on adverse possession prior to the date of the award.

Alstrom v. Yhap (1952) L.R.B.G. not followed.

While the plaintiff could rely on adverse possession subsequent to the date of the award the facts in this case showed that plaintiff's possession of the ten feet was not uninterrupted.

Claim by the plaintiff against the defendants for a declaration that he was the owner of a certain strip of land and damages for trespass.

The defendants who held transport for the said land counterclaimed.

Judgment for defendants on claim and counterclaim.

F. R. Jacob for plaintiff.

H. C. Humphrys, Q.C., for defendants. *Cur. adv. vult.*

Stoby J.: The plaintiff's claim against the defendant is for:

(a) A declaration that the plaintiff is the owner of and in lawful occupation of a strip of land measuring 10 feet in width beginning from the western extremity of lot 12 in section A, section B and section C and proceeding in a westerly direction to a point 10 feet from the point of commencement and extending throughout the entire depth of the estate being parts of the W1/2 of Plantation Ross;

(b) The sum of $1,500.00 damages for trespass of the said 10 foot strip of land; and

(c) The sum of $500.00 damages for trespass of the Crown land in the rear of Plantation Ross.

The alleged trespass by the defendants on the strip of land is the culmination of a dispute concerning its ownership.

On the 4th July, 1935, one Bissoon died at Plantation Ross. Probate of his will was granted to his sister, Phoolcoomaree. Under his will he gave and bequeathed to his brother Beekham and all of his heirs a half share of land situated on the western half of Plantation Ross lot number 12, and to his sister-in-law, Rajbancy, a share and a half in lot 12.

The testator divided lot 12 into 5 shares and made bequests to his relatives in the following way: one and a half to Rajbancy, one half to his brother Beekham, one share to a nephew and niece, one share to his reputed wife and one share to his sister, but nothing turns on the manner in which he disposed of his property except to establish how the plaintiff obtained possession. The plaintiff is the son of Beekham and Rajbancy mentioned in the will and through them is interested in two shares. His father died intestate about 7 years ago but his mother Rajbancy is still alive-Prior to the year 1934, the W1/2 Plantation Ross was occupied in accordance with a plan prepared by C. H. Klautky, a Sworn Land Surveyor in 1909 and tendered as Exhibit "C." From the annotations on Klautky's plan it would seem that the proprietors of the W1/2 Plantation Ross desired to occupy specific portions of the plantation instead of undivided ownership. No doubt Klautky based his survey according to actual occupation, that is to say, there were 14 undivided owners in occupation but he did not give each undivided owner one fourteenth of the whole area, he gave each what by common agreement each was entitled to by occupation or purchase or inheritance. The result of the survey so carried out was that Bissoon acquired a specific portion of the W1/2 Plantation. Ross which was numbered 12 and which had a facade of 79 English feet.

There is no evidence that the undivided owners transported the lots to each other in consequence of the survey. They were content to rely on their title by inheritance and thereby sow the seeds of strife and litigation; for although in those days immovable property vested in the person entitled thereto on the death of his testator or owner yet, despite the occupation by consent of specific portions, it was an undivided portion which would vest and not a specific portion.

It was for this reason that by 1934, a situation must have arisen which necessitated further action on the part of the proprietors of

Plantation Ross. Roman Dutch Law was no longer in force, the 1909 owners, some of them, had died or sold their land and the persons in occupation of undivided interests wished a more convincing form of title than their undivided portions.

According to the evidence, Exhibit "H," Mr. H.O. Durham, a Sworn Land Surveyor, was appointed officer to partition the W.J of Plantation Ross, in March, 1934. Under section 3(1) of the District Lands Partition and Re-Allotment Ordinance, Chapter 169, it is 51% of the owners of the land sought to be partitioned who must petition the Governor in Council praying that the area be partitioned or re-allotted. The plaintiff presumably was not included in the 51% as he says he knew nothing about the partition. Be that as it may, Mr. Durham having been appointed proceeded to comply with the provisions of the Ordinance and eventually, as appears from the evidence, Exhibit "I," a list of the decisions made by him and approved by the Local Government Board was published.

In the list as published Bissoon was awarded lot 12. Section 15(1) of the Ordinance, as it then was, required the Partitioning Officer to transmit to the Board a report setting out briefly the claims made in respect of the land and his decision upon each, together with a plan of the land showing the proposed partition or re-allotment as the case may be. The weakness of this provision was that unless a claimant obtained permission to consult the plan at the office of the Board or unless the Partitioning Officer lodged the plan at the Lands and Mines or Deeds Registry (until 1934 he was under no obligation to do so) there were no means of knowing exactly what area of land had been awarded. An owner who claimed lot 12 and was awarded lot 12 in the published list could not know that 10 feet of his original lot had disappeared. This defect has now been remedied by the District Lands Partition and Re-Allotment (Amendment) Ordinance 1948, No. 17 which provides for a copy of the Partitioning Officer's plan to be sent to the District Commissioner of the District in which the land is situate so that anyone who wishes may inspect it and ascertain the precise nature of the award.

The plaintiff, however, was not handicapped by the limitations of the Ordinance as, on his own evidence, he was aware of what transpired during Durham's survey. According to him, Durham found that 10 feet of lot 14 had disappeared through erosion and proceeded to replace the land so lost by taking away 10 feet from lot 13 and so on until he came to lot 12. As lot 12 was 79 feet in facade and lot 11 only 60.7 feet it was not practicable to diminish lot 11 any more and therefore lot 12 was left to bear the 10 feet loss which should have fallen on lot 14.

From Klautky's plan the width of Plantation Ross is 874.8 feet and on Durham's plan it is 865.12 so it does seem that from 1909 to 1934 a little more than 9 feet of land had vanished. The award by Durham to 15 proprietors as compared with Klautky's 14 is of no significance as the natural inference is that the original proprietor of lot 14 had sold or died and left his 61.7 feet to two persons with the result that lot 14 was reduced to 30.33 feet and a new lot 15 with a facade of 30.33 feet came into being.

As I have said, the plaintiff knew that when Durham awarded Bissoon lot 12 it was a smaller lot 12 than heretofore. He did not accept Durham's decision but appealed to the Board who published its decision confirming the award. The decision is not couched in very explicit language as it does not say that Bissoon's appeal against the reduction of his area of land was considered and dismissed but merely states that an appeal was received and determined by the Board. The details of the Board's determination were recorded as follows:—

Item	*Name of Proprietor*	*Nos. of Lots*
		Sections A.B.C.
14	Bissoon	12/12/12/

As Bissoon had appealed not against the grant to him of lot 12 but against the area comprised in lot 12 it was farcical for the Board to say that his appeal had been determined by awarding him lot 12. Here again, however, the evidence is that the plaintiff was not prejudiced for he admits that he knew that the appeal was dismissed.

In publishing its decision the Board included in it a notice with the following words: "Any claimant or mortgagee who is dissatisfied with the determination may apply within two months to the Magistrate's Court or the Supreme Court in any manner and for any remedy now provided by law."

The plaintiff admits he took no further action except remaining in possession of the 10 foot strip of land, which Bissoon had occupied at least since 1909. Despite his objection to Durham's award, Phoolcoomaree, his aunt and the executrix under the will of Bissoon, authorised Mr. Durham to accept a transport of lot 12 in accordance with his survey. In pursuance of her authority Mr. Durham transported to Phoolcoomaree in her capacity as executrix under the will of Bissoon:

> "Lot number 12 (twelve) section A; lot number 12 (twelve) section B; lot number 12 (twelve) section C, portions of the said western half of Plantation Ross, situate on the west coast, of the county of Berbice and colony of British Guiana, the said lots being laid down and defined on a plan by H. Durham"

on the 2nd September, 1.940.

In 1937 Goolsaar, the owner of lot 13, had obtained his transport and on the 17th March, 1942, he transported his property to Mohan Sooba, the second defendant:

> "Lot number 13 (thirteen) section A; lot number 13 (thirteen) section B; lot number 13 (thirteen) section C, portions of the western half of Plantation Ross, situate on the west coast of the county of Berbice, and colony of British Guiana, the said lots being laid down and defined on a plan by H. Ormonde Durham."

Mr. Humphrys for the defendants submits that assuming the plaintiff can rely on Bissoon's possession to found a claim for adverse

possession (a proposition he disputes) he is in any event estopped from so doing as Durham's partition cannot now be impeached.

The submission is founded on the provisions of Section 16 of Chapter 169 by which a dissatisfied claimant or mortgagee can appeal to the Board against the awards of the Partitioning Officer and to the Magistrate's Court or the Supreme Court within two months after the determination of an appeal by the Board and failing to do so then the award is final.

This point has been canvassed in our Courts on several occasions but the decisions do not appear to be uniform.

In my own decision in *Steward v. Haynes,* No. 953 of 1951, decided on the 9th September, 1953, I held that an opposition to a transport founded on adverse possession prior to a partition was invalid as where there is no appeal from the award of a Partition Officer the award is final. I referred then to the cases of *Sewdin v. Ferreira* (1928) L.R.BG. 40 and *Dick v. Durham* (1980) L.R.B.G. 97 in each of which Gilchrist J. held that a plaintiff who knew of a partition and had not appealed could not subsequently attack the validity of the partition.

These decisions appear to conflict with Boland J.'s view in *ALstrom v. Yhap,* No. 484 of 1949 decided on the 19th March, 1952. In that case the defendant as Partition Officer allotted land claimed by the plaintiff to him but excluded certain portions for streets and drains. The plaintiff did not appeal but when the defendant sought to transport the reserved portions to the appropriate Country District he opposed the transport. On the action coming on for hearing objection was taken *in limine* that the plaintiff not having appealed against the Officer's awards had lost his right of opposition. Boland J. in ruling against the submission held that the plaintiff did not appear to be challenging the decision of the Partition Officer but was challenging the passing of a transport by the Officer to a party who was not a co-owner. He allowed the action to proceed although the plaintiff knew of the award and did not avail himself of his statutory remedy.

In view of this ruling by an accepted authority on the subject I have re-considered my decision in *Steward v. Haynes* and nevertheless adhere to the view that in the absence of fraud as in *Pereira v. Insanally* 1931—1937 L.R.B.G. 18 and in *Frank et ors v. Hiralall* No. 223 of 1946 (unreported) a claimant who knew of a partition and of the awards and did not appeal cannot subsequently attack the correctness of the award. The reason for insisting on an appeal to the Supreme Court within two months of the determination of an appeal to the Board is to put a time limit to litigation, so that when the Officer proceeds to give title to the various claimants, he does so on the assumption that the partition has been brought to finality and cannot be delayed toy an opposition action at the instance of a disgruntled claimant.

In *Patel v. Premobhai* 1954 A.C. 53 the judicial committee in order to obtain a true appreciation and effect of the Fiji sub-division of Land Ordinance 1937 gave a short summary of the doctrine of partition as it existed and developed in England. Lord Porter in his speech at pps. 41, 42, explained that until 1868 except for the right of partition

concurrent owners had no further remedy. Thus we see in English common law and in early statutory legislation, the feature of finality about a partition so that the purpose of giving a clear specific title could be accomplished.

In Roman Dutch Law partition would seem to have had its origin as a result of community of property and joint inheritance. Where lands were held in undivided shares it was the custom to apportion its use in proportion to the respective shares in the land; in some places it was permissible for the lesser proprietor to claim a division. Those who were desirous of a division had to hand over a list of the shares to the Judge who made the proprietors draw lots and in security of their title deeds gave them deeds of division at the expense of the common property (See Maasdorp Introduction to Dutch Jurisprudence of Hugo Grotius). Here too there was finality.

In British Guiana, the District Lands Partition Ordinance, No. 13 of 1914, specifically enacted that no appeal lay from the Board's decision to any court of law if proceedings were not lodged within three months of the Board's decision. When this Ordinance which was amended in 1920 was repealed and replaced in 1929 by the present Ordinance, Cap. 169 (also amended) the words "no appeal shall lie from the same (that is the Board) to any court of law" were omitted, but the intention to limit an appeal to the Supreme Court to a specific time, was preserved.

It is clear that under English Common Law and Roman Dutch Law, the object of a partition was to give a specific title to undivided owners and put a period to undivided ownership. Neither system allowed an aggrieved owner to dispute a partition for all time. In this Colony in each ordinance dealing with the subject, words are used which seem to me to leave no room for doubt that a partition officer's awards, not appealed from, are final and conclusive.

Having regard to my view of the law, the plaintiff is not entitled to rely on any adverse possession prior to 1934. Mr. Jacob submits that as the plaintiff ignored Durham's division of the land he cannot be dispossessed and can maintain an action for damages grounded in trespass against anyone who now seeks to dispossess him.

This submission requires a review of the evidence so as to obtain a true picture of the events from 1934 until this action was brought.

The plaintiff was born in 1915. His uncle Bissoon who owned the land permitted the plaintiff's father Beekham to live on it. Rajbancy or Rajwantia the wife of Beekham and mother of plaintiff says that Bissoon gave her two rods of land at the time of her marriage 62 years ago and she in turn gave it to the plaintiff about 20 years ago. This bit of evidence is palpably false; the true position I believe, is that plaintiff's father and mother occupied and planted a portion of Bissoon's land with his permission and on his death about seven years ago they continued to do so. The plaintiff who grew up with his parents and is now gradually assuming the position of head of the family has exaggerated his evidence in order to avail himself of his parents' possession; it is probably the first step too in his move to oust his brothers and sisters of any share in the land which he eventually hopes to own in its entirety. The portion allotted to plaintiff's parents undoubtedly:

included the 10 foot strip which was lost at the time of Durham's survey.

The important point is whether the plaintiff's parents or Bissoon ceased to occupy the 10 foot strip after 1934. The plaintiff insists that instead of vacating, a drain was dug on the basis of the old boundary which caused Goolsaar, the then owner of lot 13, to institute proceedings in the Magistrate's Court where jurisdiction was declined. The plaintiff's mother seemed to be under his influence and no reliance can be placed on any evidence she gave. Isaac Crawford and Philip Wade were the independent witnesses called to support the plaintiff's adverse possession. The former is the owner of lot 11 and the latter lives on the adjoining estate of Brabm. In this type of case it is a a matter of the utmost simplicity for witnesses to make a bold statement that X. or Y. was in possession and planted the land. A plaintiff who seeks to assert a possessory title against the holder of a legal title ought to prove his adverse possession by strong and convincing evidence. Neither witness can be regarded as giving convincing testimony; they both spoke of a fence which was in existence prior to 1933 and was never removed yet neither could explain what action Goolsaar took and whether he planted or not. They both seemed to know all about Bissoon's activities and nothing about Goolsaar's or Sooba's.

Goolsaar's evidence is that a part of Beekham's trash house continued to remain on a portion of the strip but he took possession of the land and planted it. According to him the trash house fell down and there was no need for further action. He further said he planted rice on the 10 foot strip. This evidence is reasonable as lot 13 under Klautky was 30 feet in facade; if 10 feet were not appropriated under Durham then lot 13 would have had a facade of only 20 feet. I am unable to believe that even in 1934 when land values had not soared or when rice cultivation was not the profitable venture it now is, that Goolsaar was content to permit his facade to be diminished by 10 feet.

Ramnarine Mohan's evidence disclosed that after his father, Mohan Sooba, purchased lot 13 from Goolsaar a fence was placed by Beekham. As a result the services of Mr. Nehaul, a Sworn Land Surveyor, were requisitioned and his survey disclosed that Beekham had appropriated a part of lot 13, Thereupon, the fence was removed with the authority of Mohan.

Alfred Marques, the second defendant, lived on lot 13 since 1942. He too explains about the erection of a fence and the subsequent action. He too declares that from 1943 he planted on the 10 foot strip. It is undeniable that he sub-let from the first defendant. It is the fact that Durham's paals were at all times in existence and open to public view. The natural thing for a tenant to do is to ascertain the extent of the land rented. My impression is that this defendant did some planting not on the whole strip but certainly on a part of it.

The evidence convinces me that while the plaintiff's parents did not readily relinquish possession, they certainly did so at some time after 1934. As plaintiff grew older and began to assert himself more and more and with the sale by Goolsaar to Sooba, further attempts were made to exercise acts of ownership over the 10 foot strip. Each attempt was successfully resisted by Sooba's son and Marques, to whom

lot 13 had been let. About 1946, when plaintiff erected a house — a part of the new structure was deliberately placed on the 10 foot strip and the fence placed on defendant's land. This resulted in the correspondence Exhibits "E" and "F" and the subsequent action of defendants in removing the fence on 7th July, 1950.

There was therefore a struggle for possession from 1934 to 1950. In *Brijlall et anor v. C. Jay Jay et al* 1948 L.R.B.G. 12, Worley C.J. said: "when the possession is doubtful it is attached by law to the title" per Lord Esher M.R. *Ramsey v. Magrett* (1894) 2 Q.B. at p. 25 and "where possession in fact is undetermined possession in law follows the right to possess" per Davey L.J. ibid at p. 27."

That is exactly the position in this case and I cannot find that plaintiff's possession of the 10 foot strip from 1934 was sole and uninterrupted.

I have dealt with the plaintiff's case on the assumption that he can rely on adverse possession since 1934. It has occurred to me that even if the plaintiff were indeed in possession from 1934 he may not be able to support his claim by any act or acts of his or his parents prior to 1940. Although the partition was concluded in 1934, Phoolcoomaree did not obtain title until 1940 and her acceptance of a transport in 1940 in which reference is made to Durham's plan might operate to preclude time running against the owner of lot 13 between 1934 and 1940. This point has not been argued and I do not propose to decide it.

The claim based on possession of the Crown Lands can be briefly dealt with.

The whole of the second, third and fourth depths of the W1/2 of Plantation Ross is leased from the Government by the 14 or 15 owners for agricultural purposes and cattle grazing. Government has not leased a specific portion to any individual proprietor but by agreement among the proprietors of the front land, they occupy a proportionate part of the back lands. If the plaintiff's front land has a facade of 69 feet then he is entitled to plant the back lands to the extent of 69 feet and no more. As plaintiff is not entitled to the 10 foot strip he is not entitled to the Crown Lands at the back of that strip. The plaintiff's allegation that in 1950 he ploughed land to the extent of 1,000 roods in depth, and that he planted paddy on the same area in 1951, 1952 and 1953 which the defendants reaped does not thereby entitle him to damages. He knew that ownership of the front strip was being vigorously disputed and yet deliberately attempted to exercise acts of owner-ship over the back lands so as to bolster his claim to the front. The defendants were compelled to take positive action to curb his acquisitive instinct. His claim based on the possession of back lands —a very recent possession—must also fail.

There will be judgment for the defendants on the claim and. counterclaim. The evidence of damage is so unsatisfactory that I am unable to award more than nominal damages to each defendant. The plaintiff will pay each defendant $100.00 damages and their costs.

Judgment for the defendants on the claim and counterclaim.

Solicitors: *N. O. Poonai* for plaintiff.
H. C. B. Humphrys for defendants.

IN THE MATTER OF THE CIVIL LAW OF BRITISH GUIANA ORDINANCE, CHAPTER 7. MADHOO *v.* RAMDASS and OTHERS.

(In the Supreme Court, Civil Jurisdiction (Stoby J.) April 5, 22, 28, 29; May 12; October 21, 1954.)

Declaration of title—Undivided ownership—Adverse possession—Equivocal.

The applicant in this petition for declaration of title was the owner by transport of a piece of land on the West Coast Berbice whose eastern boundary was the public road. He claimed to be in adverse possession of the portion east of the public road for the prescriptive period.

His application was opposed by several persons who held land in undivided ownership to the north and south of him and who had used all the land east of the public road for depasturing their cattle.

The petitioner relied on several minor acts as establishing adverse possession.

Held: The owners of undivided land in the area were depasturing their cattle and squatting on the land claimed and the petitioner did not demonstrate by any unequivocal act that he was asserting a right to the land.

Application refused.

Application for declaration of title on the ground of continuous possession for over forty years.

S. L. Van B. Stafford, Q.C, for the petitioner.

H. C. Humphrys, Q.C. for the opposers. *Cur. adv. vult.*

Stoby J.: The unsatisfactory state prevailing with regard to many of the titles to land in this Colony has been well illustrated in this application for a declaration of title.

About forty years ago the applicant Madhoo purchased from Mrs. Hart and Mrs. Henry a piece of land described as lot number 23 part of Plantation No. 7 situate on the West Coast of the County of Berbice.

Plantation No. 7 is also known as Willemstadt and as appears from transport No. 14 of 1897 was at one time owned by Susan Barclay Alves. After her death, James Alexander Richardson as attorney for her heirs sold and transported the property to eight persons on the 10th February, 1897. Susan Barclay Alves had obtained transport on the 1st August, 1860. Richardson was unable to, and did not transport, the whole of Plantation Willemstadt, because a piece of land measuring 10 Rhynland roods in facade and extending from the public road to the back of the said Plantation and referred to as lot number 23 was transported to Sarah Frances Hassell on the 1st August, 1860.

In exempting the land sold to Sarah Frances Hassell in transport No. 14 of 1897, reference is made to' a diagram by Duncan Eraser a Sworn Land Surveyor and dated the 27th July, 1853. This plan of Fraser's was tendered as Exhibit "P" and shows that Fraser divided Willemstadt into 50 lots numbering them from 1 to 50. At the time of his survey lot 23 was owned by Hugh Fraser.

A scrutiny of Fraser's plan makes it evident that at that time the boundaries of Willemstadt were, on the north Plantation No. 8, on the south Plantation No. 6, on the east the public road and on the west the back of the Plantation. As plantations in those days extended to a depth of 750 roods (See Madray v. E. Sealey et ors (1940) L.R.B.G. p. 124) that was probably the depth of the estate.

The applicant Madhoo did not obtain transport of lot 23 and so in

1942 applied for a declaration of title. The schedule to the order entered on the 11th June, 1943, Exhibit "A" shows that the Court held be was entitled to a conveyance of lot 23 and that the eastern boundary is the public road. It also shows that although lot 23 was originally 10 Rhynland roods the applicant was able to prove that he was in possession of 12 Rhynland roods and that his delay in obtaining a transport resulted in a benefit to him of 2 Rhynland roods. (See Exhibits "H," "P" and "A").

No evidence was led regarding the condition of the land east of the public road. All the transports and all the plans are unanimous in fixing the eastern boundary of Willemstadt as the public road. It may be that in 1860 the Atlantic Ocean was nearer to the public road than it is now and that there has been gradual accretion or that continual inundations of the sea made the land valueless. Whatever the reason and whatever the condition, the undoubted fact is that there is now a considerable strip of valuable land extending from the public road east of the ocean which is suitable for cattle farming and rice cultivation.

The applicant's case is that ever since his purchase of lot 23 some 40 years ago he has been in sole and undisturbed possession of that portion of land east of the public road to the extent of a facade of 148 feet more or less, that is to say if his northern and southern boundaries were each prolonged east, the land comprised within these boundaries. As proof of his possession he says that he dug a drain at the northern end of his land and one on the southern end, erected a cowpen, sublet a piece of the land, grazed his cows and cut wood. In order to prove that this application is no mere afterthought he produced Court records which established that in 1944 a legal practitioner was retained to take proceedings designed to obtain title for the land the subject of this application. The proceedings took the form of a writ of summons but after some considerable delay the case was dismissed for want of prosecution as a statement of claim was never filed. The evidence on this point makes it undeniable that in 1944 the petitioner was asserting a prescriptive claim to the land directly opposite lot 23.

Considerable argument was addressed to me regarding the legal principles applicable to a case of this kind, despite the fact that in his opening statement Counsel for the applicant opined that the case was solely one of fact.

It was submitted on behalf of the opposers that even if the facts stated by the applicant and his witnesses are true it is not competent for the Court to grant the relief claimed since title to a specific portion of undivided land cannot be acquired by one undivided owner against the other undivided owners who were always in possession.

The correctness of the proposition is not in dispute. In the petition by *Samuel Benjamin et al* (1931—1937) L.R.B.G. p. 168 where Van Sertima J. granted title by prescription to an undivided interest in land, he was at pains to explain that there are at least three sets of circumstances in which there can be granted title by prescription to an undivided interest in land. In respect of co-owners the principle enunciated was that the co-owner or co-owners claiming title must have been in exclusive possession for the required period of the share or

shares of the other co-owner or co-owners.

This petition however is not in respect of undivided land. The land east of the public road never formed part of Plantation Willemstadt; there is no evidence to whom it belonged in 1860 or 1897 but it was someone's property even though it was not worth any supervision or effort on the owner's part. This being so Mr. Humphrys' submission is not applicable to the facts of this case.

I return now to the evidence as a whole in order to arrive at conclusions of fact before discussing the legal consequences which flow from the facts I find.

The applicant said that at the time of his purchase of lot 23 or lot 6, as one surveyor numbered it, there was a small building on the sea side land owned by Mrs. Alves and he purchased it. Eventually one Lily Ramoo leased a portion of it from him and paid his rent for about 10 to 12 years before she refused to acknowledge him as her landlord. He admitted in cross-examination that the cattle of all the proprietors roamed uninterrupted over the whole front land.

The evidence of Douglas Pollard was to the effect that Madhoo built a cowpen on the sea side land and sub-let some land to Lily Ramoo. He spoke of dividing lines being cut separating lots 22 and 23 but as these lines were cut at the time of Insanally's survey in 1938 no favourable inference can be drawn from that fact.

William Sharpe gave corroborative evidence concerning the cowpen and Lily Ramoo's house.

Walter Madhoo spoke of his father cutting wood, making up the sea-dam and maintaining the drainage. He said that every owner of a lot is responsible for the corresponding portion of the front land. With this evidence the case for the petitioner was concluded.

As the several opposers gave evidence the main issue in the case tended to be overlooked as the examination-in-chief and cross-examination were not limited to disproving or proving adverse possession in Madhoo but included evidence designed to prove the right of each witness to be in possession and in some cases a right to apply for prescriptive title of land not the subject of this petition. Burath, for example, is the son of Sadewan who with seven others purchased lot 7 Willemstadt and was therefore the owner of an undivided 1/8th at his death. By his will he bequeathed 12 roods and 10 feet of his undivided l/8th to his sixth children and 3 roods to one Beephia. Sadewan must have assumed that Willemstadt extended to the sea-shore for after his death his children divided the 12 roods 10 feet into six equal parts and occupied specific portions from sea-side to back-dam.

The erroneous belief regarding the eastern boundary of the property was not confined to Sadewan and his children. It is clear from Megnauth's evidence that all the owners of Willemstadt and their descendants interpreted the transport, Exhibit "H," to mean that while the eight purchasers owned up to the sea-side Madhoo and Madhoo alone was precluded by the specific terms of Exhibit "H" from crossing the public road. The description is:

> “Lot number 7 (seven) or Willemstadt situate on the West Coast of
> “the county of Berbice with all the buildings and erections

"save and except a piece of land laid down on a diagram made by "Duncan Fraser, Sworn Land Surveyor, dated 27th July, 1853 as lot "number 23 (twenty-three) measuring 10 (ten) roods Rhynland in "facade and extending from the public road to the back of said "Plantation transported to Sarah Frances Hassell on the 1st of August, "1860, also save and except a piece of land containing one acre more "or less part of said plantation as laid down and defined on a diagram "by William Chalmers, Sworn Land Surveyor, dated March, 1877 and "deposited in the Registrar's Office in the County of Berbice on the "26th day of June, 1877 transported to the Colony of British Guiana on "the 16th day of July, 1877."

While the description in the transport is not as precise as one would wish, when reference is made to the various plans, no doubt exists in my mind that the public road was the true eastern boundary.

Megnauth's mother, Bundhoney, was one of the eight persons who purchased in 1897. She predeceased her husband Roopsingh and on his death he bequeathed the undivided l/8th to his ten children who divided the land among themselves.

The evidence of George Ramoo, Ramdeo, Budhia, John Persaud, Ramdass, Sookram Raghu and Lily Ramoo which I have carefully studied all follow the same pattern. As the original purchasers died leaving a small interest in land to a number of children and as those children died or married leaving more persons entitled to their interest specific portions of the sea-side land were occupied and cattle allowed grazing over the whole area. And since it was the common belief that the only proprietor not entitled to land east of the public road was Madhoo no specific portion was allocated to him and the land opposite lot 23 was treated as pasture land.

The principles on which the Court grants prescriptive title have been enumerated in several cases and there is no necessity for me to do more than refer to one or two of them. Langley J. in *Incorporated Trustees of Diocese of Guiana v. McLean* 1939 L.R.B.G. 182 said at p. 194: "The right to acquire by prescription is founded on negligence of the owner in not protecting his interests against strangers in possession but this foundation fails where the adverse possession is not patent to the owner and others."

Similarly in *Littledale v. Liverpool College* (1900) 1 Ch. 19 it was held that acts of possession which were equivocal and might have been done for a purpose consistent with the occupiers legitimate use of the land were not available as evidence of adverse possession.

It remains for me to state specifically the facts I find and what in my view is the legal result. *Sub-letting to Lily Ramoo:*

I accept the applicant's evidence on this part of the case that Lily Ramoo did pay him rent of a house-spot for some years.

I do not regard this sub-letting as an unequivocal act of adverse possession against anyone but Lily Ramoo. Numerous descendants were wandering, squatting and dividing up the land east of the public road; Lily Ramoo was the daughter of a previous owner and her living at

that spot was as consistent with possession in her own right as it was as a tenant of Madhoo's.

Digging of drains:

I do not believe that any drains to define Madhoo's specific portion were dug until the Insanally survey in 1938.

Erection of cowpen:

An old cowpen was probably on the land about 1914 or 1915 but after it fell down none was erected in its place. A fairly recent attempt to construct one was thwarted by Megnauth.

Cutting wood:

Undoubtedly this was done. Portions of the land were overgrown with courida trees and bush as a defence against the sea and it would be most unlikely if the residents in the area did not avail themselves of the facility of free wood.

On those findings can it be said that the petitioner has established adverse possession having regard to the other matters mentioned, namely, that the children of the undivided owners in the belief that they owned the land were despasturing their cattle and squatting on portions of the land? I think not.

At no time during his ownership and possession of lot 23 did the petitioner by any unequivocal act demonstrate to those who were grazing cattle over the whole area that he was asserting a right to that area. He did not surround it with a fence as one would expect in the circumstances of this case. The true owner if he is alive or other trespassers could have no knowledge that the petitioner or anyone else was in sole possession.

If the opposers to this petition had joined the petitioner in an application for prescriptive title it would seem that an undivided prescriptive title would be available to a good many of them; tout on the facts proved in this case it would be an entirely novel procedure if I permitted the petitioner or any one of the opposers to obtain a specific title to a small area of land and thus restrict for the use of one person what has hitherto been used without restriction.

If I am wrong in my interpretation of the transport and it is the fact that the land east of the public road is held in undivided ownership by the heirs of the persons who purchased in 1876 then the petitioner's position is even more untenable. The situation would be that the land opposite lot 23 is part of an area held in undivided ownership by a number of persons who were never out of possession and consequently a prescriptive title could not accrue to petitioner.

The application is dismissed with costs to the opposers.

Solicitors: I. G. Zitman for petitioner.
H. C. B. Humphrys for opposers

FRENCH *v.* PHILLIPS

(In the Full Court of the Supreme Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Boland, Phillips and Wills, JJ.) July 6; October 23, 1954.)

Landlord and tenant—Rent Restriction Ordinance—Building Land—Owner of building—No security of tenure if owner not occupier.

The definition of "building land" in section 2 of the Rent Restriction (Amendment) Ordinance 1947, No. 13 is —

> "land let to a tenant for the purpose of the erection thereon by the tenant of a "building used, or to be used, as a dwelling or for the public service or for "business, trade or professional purposes, or land on which the tenant has "lawfully erected such a building, but does not include any such land when let "with agricultural land."

The appellant was the owner of land at Agricola, East Bank Demerara, on which the respondent erected a building and paid a yearly land rent. The respondent did not occupy the building but let it out in apartments. Before this building was erected there was a house on the site owned by a Mrs. J. who lived in it. Mrs. J. offered her house for sale to the appellant who declined to purchase. The respondent purchased it, demolished it and built a more substantial structure. The landlady received rent from the tenant in 1949 and 1950 but gave him a notice to quit claiming that she desired the site to erect a building herself.

The tenant respondent claimed to be protected by virtue of section 2 of the Ordinance and resisted the claim for possession.

The Magistrate held that the Ordinance applied to the tenancy and as there was greater hardship on the respondent having to remove the house than the appellant being unable to get possession of the land, he refused the application.

The landlord appealed.

Held: (Boland and Wills JJ.; Phillips J. dissenting) A tenancy of land does not come within the protection of the Rent Restriction Ordinance unless the tenant is in occupation of the house built thereon.

Per Curiam: In this case the respondent attorned tenant of the land to the appellant and held the tenancy of the land under the same terms implied in the tenancy of the previous owner of the house who was in occupation. Consequently the Ordinance applied to the respondent.

Per Phillips J.: It should be open for argument in the future whether, as in the case of a Dwelling House a tenant of Building Land (to come within the protection of the Ordinance) must himself be the occupant, whether the building was erected to be used for example for business purposes or for the public service.

Appeal from the decision of the Magistrate for the Georgetown Judicial District refusing to grant possession to a landlord of a piece of land on which the tenant had erected a building and who had let the building to various persons.

The previous owner of the building (which was substantially rebuilt by the tenant-respondent) was in occupation of it and was undoubtedly protected by the Rent Restriction Ordinance. She sold the building to the respondent. The landlord accepted rent from the purchaser of the building but after two years gave him notice to remove the building as she required the land to erect a house.

The Magistrate held that the respondent was protected by the Rent Restriction Ordinance and that it was unreasonable to make the order. Decision confirmed but on different grounds.

John Carter for appellant.

H. A. Fraser for respondent. *Cur. adv. vult.*

Judgment of the Court (Phillips J. dissenting with reference to the interpretation of "building land" in the Rent Restriction Ordinance):

This appeal raises an interesting although difficult question concerning the respective rights and liabilities of landlord and tenant where the demised premises are "building land" giving the expression the meaning as it is defined in Section 2 of the Rent Restriction Ordinance 1941 as amended by Section 2 of the Rent Restriction (Amendment) Ordinance 1947 (No. 13 of 1947). The appeal is brought against a decision of the Magistrate dismissing an action lodged by the appellant landlord against the respondent, her tenant, claiming possession of a parcel of land rented as "building land." This piece of building land forms part of lot 43 Agricola, East Bank Demerara, which is within three miles of the boundaries of Georgetown; and accordingly the tenancy is claimed to fall under the control provided by the Rent Restriction Ordinance. Having regard to the various matters which a magistrate is directed by the Ordinance to take into consideration before determining whether it is reasonable in all the circumstances to make an order of possession it may be well to give a brief history, as found by the Magistrate, of the tenancy of this piece of land. The respondent was not the original tenant. It was after respondent had bought from the original tenant, a Mrs. Johnson, a house which the latter had on the land that he himself was accepted as tenant of the land. The Magistrate, as his Memorandum of Reasons for Decision discloses, attached great importance to the fact, as a ground for refusing to grant appellant an order of possession, that appellant did not avail herself of the opportunity of buying that house when Mrs. Johnson had given her the first option to purchase it.

The appellant had acquired jointly with a Mrs. Ifill by inheritance from the estate of July Fortune (deceased) of which Walter Reginald Smith was representative, the entire area of land of which the piece of land rented to the respondent is a portion. In 1927 Walter Reginald Smith had before his death under a written agreement to grant a lease rented this portion comprising then an area about 50 rods square to Mrs. Johnson. At the time of Smith's death Mrs. Johnson had on the site an old house which she herself was occupying as a residence. Before the agreement for a lease could become implemented by a formal lease Mrs. Johnson decided to sell her house, and eventually she sold it to the respondent for $250.00; but before concluding the agreement of sale with respondent, she offered it in 1947 to the appellant at the same price but appellant declined the offer saying that she did not wish to build a house on the site. Receipts for land rent were continued to be given in the name of Mrs. Johnson until 1949. Sometime in the year 1948 after Smith's death the respondent as owner of the house formerly owned by Mrs. Johnson approached the appellant with a view to getting from her a lease of the site. But appellant told the respondent she could not give him a lease without consulting her co-owner Mrs. Ifill and respondent apparently did not pursue further the idea of a lease. However later in the year 1948 appellant bought Mrs. Ifill's share and thus became sole owner of the land.

It is clear that the purpose for which respondent bought Mrs. Johnson's house was to demolish it and build on the site a larger and more substantial structure to be used not for occupation as a residence for himself or any member of his family nor for use by himself for business, trade, public or professional purposes but to rent it out to any tenants who would wish to have accommodation for any such purpose. It would seem that respondent expected that he would be entitled to the same right of security of tenure of the land as would be enjoyed by his tenant in respect of the occupation of the house rented from him. In reliance on this security of tenure respondent in the year 1949 proceeded to demolish the old house he purchased from Mrs. Johnson for $250.00 and build on the site a more substantial structure—a two-storeyed building—at a cost of about $3,200 and rented it out in apartments. While this new house was being built the appellant would seem to have protested against the change of building and she consulted a solicitor, Mr. H. B. Fraser, about having respondent ejected from the tenancy. Mr. Fraser had an interview with the respondent. Respondent stated in his evidence that he understood Mr. Fraser to agree at that interview that because of the Rent Restriction Ordinance he could not be ejected, and that he was encouraged to adhere to that view. Whether it is true or not that Mr. Fraser had encouraged the respondent to believe that he had in law that protection against ejectment it would seem that respondent was content to rely on his rights in law not to be ejected and he proceeded to continue to build his two-storeyed building which was completed in November 1949. He paid the yearly land rent of $7.84 and received from the appellant receipts for 1949 and 1950 in his own name. In keeping with his object in building this new house for the purpose of renting, he rented it out as apartments. The appellant served him with a notice to deliver up possession of the land on the 1st January, 1951, the reason given in the notice being that the appellant required the land for her personal use. At the hearing the appellant stated that she wanted the site to build a house so that she could live in it.

The question arises whether the Rent Restriction Ordinance recognizes the tenant of building land, who does not himself occupy the house on the land, to be a tenant within the meaning of that Ordinance and who as such tenant is to be accorded exemption from ejectment except in such circumstances as are specified in the Ordinance. Must the tenant of building land get protection only if he occupies the house on the land as a residence for himself, or as a residence for some member of his family or for a person in his employment or otherwise occupied by him or by such other person of the class above mentioned for a commercial, professional or a public purpose? Can the builder Of houses on land who builds for the purpose of renting them for such purpose claim the protection of the Ordinance? In England "building land" is not within the protection of rent restriction legislation, and therefore no assistance can be obtained by a reference to reported decisions before the courts in England.

The definition of "building land" in Section 2 of Ordinance No. 13 of 1947 is —

> "land let to a tenant for the purpose of the erection thereon

> by the tenant of a building used, or to be used, as a dwelling or for the public service or for business, trade or professional purposes, or land on which the tenant has lawfully erected such a building, but does not include any such land when let with agricultural land."

It is to be noted that this definition does not expressly prescribe that the tenant must himself or his dependants occupy the house he built. If the definition is to be interpreted as conferring on the tenant of the land, who thereon builds a house for the purpose of renting it out, the protection afforded a "tenant" by the Ordinance, then before an order for possession is made the magistrate would have to weigh as against the hardship to the owner of the land in not getting possession of his land, the hardship of an ejectment order not to the actual occupier of the house but to the tenant of the land. But the purpose of the Ordinance is to give a measure of security of tenure to the actual occupier of a house who holds under a tenancy agreement. The owner of the house is not entitled to an order for possession unless certain conditions specified in the Ordinance including that in all the circumstances it is not unreasonable to order the tenant to vacate the house in his favour. Often the case is determined by the decision as to which side has the balance in his favour after weighing the conflicting equities of the person in occupation of the house and those of the owner of the house. As the main purpose of the Ordinance is to give security to occupiers of houses under tenancy agreements, the definition of "building land" should be construed so as to give effect to this general scheme of the Ordinance.

An argument put forward in favour of including as a tenant a person who does not himself or by his family or dependants go into occupation of the house is that the legislature was anxious to encourage the building of houses of the class placed under control, and therefore accorded protection from ejectment to the builder of such houses on lands rented for the purpose, whether the builder or his dependants are in occupation or not. But if this argument were tenable classes of houses protected would apparently include every type of house; for with the exception of private clubs every house is either used as a residence or for professional, commercial or the public service or for any combination of such purposes. It can hardly be thought that the legislature decided to bring building land under control as a means of giving an impetus to building trade. In this connection it is worthy of note. that "building land" as defined in Section 2 means land rented for the purpose of erecting a building—not "a building or buildings." It contemplates some person in occupation, not several tenancies of a building. It is to be noted too that the tenant must be a person who erected a building. An assignee from such a tenant in attorning tenant to the owner of the land would either expressly or impliedly be accepted as tenant on the same terms and conditions as his assignor. If he rents the house to a tenant for any of the purposes specified by the Ordinance that would entitle his tenant under the Ordinance to protection against his own landlord the tenant of the land but one cannot see how in proceedings brought by the owner of the land against the landlord of the house as tenant of the land the latter can avail himself of such

considerations as the hardship to the tenant of the house consequent on an order for possession of the land, without the tenant of the house being a party to the proceedings, for it is the person actually in occupation of a house that rent restriction legislation was designed to protect—not a potential future tenant.

It is for this reason that in the course of the hearing of this appeal consideration was being given by the Court to the question whether the case should not be remitted to the Magistrate to enable the tenants of the house to be joined as parties to the proceedings so that the Magistrate should give them the opportunity of advancing hardship to themselves or the unavailability of alternative accommodation or some other matter which under the Ordinance might be deemed good ground for relief against ejectment.

However although we are satisfied for the reasons given above that a tenancy of land does not come within the protection of the Rent Restriction Ordinance unless the tenant is in occupation of the house built thereon, we hold that in this case the respondent when he attorned tenant of the land to the appellant held the tenancy of the land under the same terms implied in the tenancy to Mrs. Johnson, one of which was that she herself was in occupation of the house. Respondent's act of renting out the house was a breach of that implied term which was a condition of his tenancy, and consequently he was liable to be ejected. That is precisely the liability to ejectment to which a tenant of a house is subject who puts another in occupation without the consent of or a waiver of his rights to ejectment by his landlord.

In this case we consider that the receipt by appellant of rents for the year 1950 after knowledge that the respondent was not himself in occupation must be taken as a waiver of the appellant's rights to ejectment on the ground of a breach of the condition of the tenancy. True appellant did warn the respondent when the new house was being built that she might want the site to build a house for herself, but that warning in our opinion would not suffice to avoid the waiver of her rights which was to be inferred by her continuing to receive rents from the respondent after she had become aware that the respondent had rented out the house in apartments. Certainly Mrs. Johnson's tenancy fell within the control of the Rent Restriction Ordinance and respondent taking on assignment of Mrs. Johnson's house the tenancy of the land under the same terms as Mrs. Johnson was like her to have the protection afforded 'by the Ordinance. If Mrs. Johnson had rented out her house and the appellant had accepted rents from Mrs. Johnson after knowledge of this breach of the condition of her tenancy appellant would have been taken to have waived her rights to avail herself of this breach of the condition of the tenancy as a ground for ejecting Mrs. Johnson. Similarly appellant's acceptance of rents from respondent would debar appellant from ejecting the respondent for the breach.

The Magistrate would seem chiefly to have based his refusal to make an order of possession on the fact that appellant did not avail herself of the opportunity to buy Mrs. Johnson's old house. We are not in agreement with the Magistrate on this. On the question whether or not appellant had established a reasonable requirement to have the

land for the purpose of building a house for herself on it, the Magistrate had to regard the position of respondent as a tenant who for the reasons given above had protection under the Rent Restriction Ordinance. He had to direct his mind as to whether in all the circumstances it was reasonable to make the order for possession. The evidence disclosed that it would have been a much greater hardship to the respondent to remove the house, which would cause the occupants of the house to be ejected, than the hardship to the appellant in not being able to get possession of the land to 'build her own house there. It is clear that the area of land owned toy the appellant provides sufficient space for the appellant to put up her house on another part of the land although it would not be on a site fronting the road. On this ground we hold that it would have been unreasonable to make the' order of ejectment in those circumstances and the order dismissing the claim for possession was correct the appeal is dismissed with costs. Decision confirmed but on different grounds.

Phillips, J.:

I have had the benefit of reading the Judgment of my brother Judges and agree with their final conclusions in this appeal.

I must add nevertheless a word of my own as there is one matter in which I find myself in disagreement—a matter which, though not necessary in deciding this appeal, is yet one of considerable importance: That is the question of the interpretation of "Building Land" in the Rent Restriction Ordinance.

It should be open for argument in the future whether, as in the case of a *Dwelling House* a tenant of *Building Land,* (to come within the protection of the ordinance), must himself be the occupant, whether the building was erected to be used for example for business purposes or for the public service.

I differ in this respect only from their Judgment in that I do not think this is necessarily so upon a true construction of *Building Land* as defined in the Ordinance.

For the reasons set out I agree that the appeal should be dismissed and that the decision of the Magistrate on the issue of greater hardship should be upheld.

MCLEAN *v.* MOSES.

(In the Full Court of the Supreme Court, on appeal from the Magistrate's Court for the East Demerara Judicial District (Bell, C.J. and Boland J.) October 29; November 2; 1954.)

Criminal law—Larceny—Joint charge—Submission of "no case" on behalf of appellant at clone of prosecution's case—Overruled—Co-defendant Implicating appellant—Duty of Magistrate.

The appellant and another man were charged with the larceny of seven hags of padi. At the close of the case for the prosecution, his counsel declined to lead evidence and submitted that no case had been made out against the appellant. The submission was overruled. The other defendant then gave evidence which the Magistrate regarded as incriminating the appellant. The

appellant's Counsel declined to cross-examine the other defendant or to take any part in the trial after his submission was overruled.

The Magistrate convicted both defendants. The other defendant did not appeal.

Held: The evidence of the other defendant when properly examined did not incriminate the appellant and the Magistrate should have found him not guilty.

Dicta: Where a "no case" submission is made and overruled, if the defence lead evidence the Magistrate is entitled to look at the evidence as a whole, and if it supplies what was lacking and there is a conviction the conviction will not be quashed.

Quaere: Where there is more than one defendant and a Magistrate declines to discharge one against whom there is no evidence, and the evidence of the other defendants implicates that one who refrains from taking any further part in the trial, should his conviction be quashed?

Appeal allowed.

Appeal from a conviction for larceny by the Magistrate of the East Demerara Judicial District. No witness for the prosecution gave any evidence against the defendant, but the Magistrate refused to discharge him, as there was another defendant against whom the evidence disclosed a *prima facie* case. That other defendant gave evidence which the Magistrate treated as implicating the appellant and convicted both.

R. H. Luckhoo for the appellant.

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

Judgment of the Court: *Cur. adv. vult.*

The appellant Krisindath McLean was charged together with a man named Chatterpaul Singh alias Seewah with the larency of seven bags of padi valued at $44.10 the property of one Ramotar Singh. At the close of the case for the Prosecution Mr. R. H. Luckhoo, Counsel for the appellant, formally closed his case told the learned Magistrate that he did not intend to lead any evidence in defence and submitted that no case had been made out against his client the appellant. The Record does not disclose as it should have done, the ruling given by the Magistrate on the submission of "no case" but it can be inferred that he overruled it and called upon each accused for his defence. Thereupon the accused Chatterpaul Singh, who has not appealed though he was found guilty, gave evidence on oath and stated amongst other things that he had "assisted No. 1 defendant (the appellant) in removing the paddy from Ramotar's rice field." We are not satisfied however that the evidence of Chatterpaul Singh when examined as a whole incriminates the appellant Chatterpaul Singh called no witnesses. The appellant on the other hand when called upon for his defence by the Magistrate did not give evidence on oath or affirmation and indeed said nothing at all. Moreover his Counsel, Mr. Luckhoo, did not cross-examine Chatterpaul Singh and in fact took no further part in the proceedings after formally closing the appellant's case and making the submission of "no case."

We are satisfied that at the close of the case for the prosecution there was no case to answer, that is to say, there was no reasonable evidence to support the charge of larceny against the appellant and we are not satisfied that credence should have been given to the evidence of the defendant Chatterpaul Singh whose evidence should, we feel, have been viewed with considerable suspicion as one who may have

been seeking to exculpate himself. For that reason we are of the opinion that the conviction and sentence cannot stand.

We feel, however, that it will be useful if we say something about the consequences of making a submission of "no case" to answer. It is an accepted practice when the case for the prosecution is closed for the defence to submit that there is no case to answer, that is to say, that there is no evidence to support the charge. This submission means that there is no reasonable evidence (*Avery v. Bowden* (1856) 6 Ellis and Blackburn 953). It has been held that a "mere scintilla of evidence" ought not to be left to a jury (*R. v. Smith* (1855) 1 Leigh and Cave's Crown Cases Reserved 607) and we consider that the same rule applies to summary proceedings. In the absence, however, of a formal submission, a Magistrate is not bound to stop the case even where the defendant is not represented but it is a proper procedure to do so when the Magistrate is satisfied that there is in fact no case to answer (R. *v. A. George* (1908) 1 Cr. App. R, 169), But where the case is not stopped because the submission is either not made (*R. v. Jackson* (19101 5 Cr. App. R. 22) or rejected (*R. v. Power* (1919) 14 Cr. App. R. 17) though in actuality there is no case to answer, the defence by presenting a case may prejudice their position, because in presenting it they may provide the missing evidence as happened in *R. v.George* (1908) 1 Cr. App. R. 169; 25 T.L.R. 66. In that case the prisoner was charged with burglary, larceny and receiving. He was not defended and it was evident (the report states) that if he had been defended and counsel had submitted that there was no case to go to the jury the Chairman would have ruled to that effect .The prisoner, however, went on to defend himself and was convicted. The Court of Criminal Appeal felt that they were bound to look at the evidence as a whole; they held that the prisoner had been rightly convicted of receiving, but not of burglary and larceny. The principle in *R. v. George* has been confirmed in *R. v. Jackson* (1910) 5 C.A.R. 22 and *R. v. Power* (1919) 1 *K.B.* 572; 14 Cr. App. R. 17, the two latter cases deciding in effect that whether SUCH a submission is or is not made the Court of Criminal Appeal will not quash the conviction if the evidence given for the defence supplies that which was lacking on the part of the prosecution.

What we have already said is sufficient to dispose of this appeal but the interesting point has been argued before us that even if the evidence of the accused Chatterpaul Singh had supplied what was lacking on the part of the prosecution for making out the charge of larceny against the appellant, this Court would not be entitled to look at the evidence as a whole seeing that Counsel for the appellant did not cross-examine Chatterpaul Singh and did not take any further part in the proceedings after closing his case and making his submission of no case. The cases of *R. v. Power* (1919) 14 Cr. App. R. 17; 120 L.T. 577; 26 Cox 399; 88 L.J. K.B. 593; 83 J.P, 124; *R. v, Hogan* 16 Cr. App. R. 182 are relied upon in support of that argument. In R. v. Power Counsel for the appellant, after submitting "no case" cross-examined a co-defendant, called his own client and took part in the proceedings. At the hearing of the subsequent appeal Counsel argued that in view of his submission of "no case" the Court of Criminal

Appeal could not utilize the evidence given after he had made his submission of "no case" to support the evidence given for the prosecution. The Court of Criminal Appeal however held, per Darling, J., that it could utilize that evidence because "after the submission that there was no case had been unsuccessfully made Counsel for the appellant cross-examined the co-defendant and called his own client." Darling, J. then went on to use language which is relied upon by Counsel for appellant in the present appeal in support of his argument set forth above, namely, "To have been quite safe he should have taken no part in the subsequent proceedings."

On the other hand we note that an article in the Justice of the Peace and Local Government Review, April 25, 1936, pp. 275, 276, 277 suggests that R. v. Hogan is authority for the proposition that when "no case" is submitted and there is no case in fact and Counsel takes no further part in the case after making his submission, a conviction will be quashed save where other defendants give damnatory evidence.

As a ruling on the point under consideration is not necessary for the determination of the present appeal and as the point is one of importance we decline to rule upon it till we have had the advantage, in some future case of a fuller argument at the Bar than took place in the present appeal.

The appeal is allowed. The conviction and sentence the quashed. There will be costs in favour of the appellant.

HUTT *v.* BOOKERS BROTHERS McCONNELL AND COMPANY LIMITED and another

(In the Privy Council, on appeal from the West Indian Court of Appeal (Lord Morton of Henryton, Lord Keith of Avonholm, Mr. T. Rinfred and Mr. L. M. D. De Silva) November 9, 1954.)

Order X1l Rule 2—Shares—Claim for purchase price—Affidavit of defence — Triable issue.

The respondents claim from the appellant on a specially indorsed writ the sum of $17,000 being the agreed purchase price of 3,400 fully paid shares of $5;00 each in Bel Air Hotel Limited bargained and sold by the second respondent to the appellant on or about the 12th February, 1949. The second respondent assigned his right to receive the said sum to the first respondent;

The appellant in his affidavit of defence raised *inter alia,* two questions: — (a) whether the agreement to buy the second respondent's shares was not conditional on the performance by one S of his contract to buy a hotel which the appellant owned. (S and the appellant had entered into a contract on the 5th February, 1949 whereby S had agreed to purchase an hotel).

(b) Whether, in any event, the property in the shares had passed to him.

The Acting Chief Justice of the Supreme Court refused leave to defend on the ground that the affidavit of defence disclosed no triable issue and gave judgment for the sum claimed.

The West Indian Court of Appeal (Furness-Smith, Worley and Jackson, C.J.J.) affirmed this judgment.

On appeal to the Privy Council.

Held: A *prima facie* view of the agreement of the 12th February, 1949, read as a whole, appears to lend considerable force to the contention that the

fulfilment by S of his agreement to purchase the appellant's hotel was a basic condition of the agreement of the 12th February. 1949, and the non-fulfilment of that condition by S released the appellant from liability to pay for the shares.

Leave to defend should have been granted on that broad ground.

Held further: Nowhere did it appear from the documents that there was a completed sale of the shares. The documents supported at best no more than an agreement by S to sell the shares to the appellant.

Judgment of the West Indian Court of Appeal and of the Supreme Court of British Guiana set aside. Appellant given leave to defend.

This was an appeal from the decision of the West Indian Court of Appeal confirming the judgment of Boland, Acting C.J., refusing the appellant leave to defend an action brought against him by the respondents on a specially indorsed writ.

The agreement on which the amount claimed was based is fully set out in the judgment.

Judgment of the Lords of the Judicial Committee of the Privy Council:

This appeal arises out of an action brought by the respondents against the appellant in the Supreme Court of British Guiana by way of a specially indorsed writ of summons. The case came before the Acting Chief Justice who refused the appellant's application for leave to defend on the ground that his affidavit in reply disclosed no triable issue and gave judgment dated 22nd May, 1950, for the sum claimed. This judgment was affirmed by the West Indian Court of Appeal on 26th February, 1951. Leave to appeal to His Majesty in Council was granted by the Supreme Court of British Guiana on 18th September, 1951, and the appeal has now been heard by their Lordships' Board.

The circumstances in which the action arose may be shortly stated. By an agreement of 3rd January, 1949, the appellant agreed to sell and a certain Sue-a-Quan agreed to buy an hotel known as the Hotel Eldorado belonging to the appellant, with its goodwill, furniture and stock-in-trade, for a total sum of 120,000 dollars. The purchase was to take effect as from 3rd January, 1949, and apparently possession was to be given to the purchaser. A deposit of 6,000 dollars was made by the purchaser, and provision made for a further deposit of 5,000 dollars. Transport, (i.e., conveyance), of the property was to be completed within six months, or as soon as possible. It was provided that should the purchaser fail to complete the purchase within six months from the date of the agreement his deposit should be forfeited to the vendor and the agreement should become null and void. The other terms of the agreement are immaterial.

On 12th February, 1949, a further supplemental agreement was made between the same parties which made provision for the transfer of the hotel and other licences to the purchaser before payment of the further deposit of 5,000 dollars. It also contained the two following clauses:—

> 5. The Vendor having assigned the benefit of the Principal Agreement to Booker Brothers McConnell and Company Limited shall be at liberty notwithstanding the said Agreement to advertise and pass a Fifth Mortgage to the said Company for the sum of $17,000 :—

6. On the passing of Transport the Purchaser shall pay to the Demerara Mutual Life Assurance Society Limited the sum of $45,000:— in respect of the First, Second, Third and Fourth Mortgages on the property sold, and to Booker Brothers McConnell and Company Limited the balance of the purchase price, namely:— $64,000:—

These two clauses are clearly associated with the next agreement which follows. This was an agreement between the Bel Air Hotel Limited, the two respondents and the appellant. It was signed of even date with the supplemental agreement between the appellant and Sue-A-Quan.
It runs as follows:—

AN AGREEMENT made the 12th day of February, 1949. Between:—'BEL AIR HOTEL LIMITED, (hereinafter called "the Debtor Company") of the first part, JOHAN JOSEF FRANCOIS HUTT, (hereinafter called "the Purchaser") of the second part, LEON SCHULER, (hereinafter called "the Vendor") of the third part, and BOOKER BROTHERS McCONNELL AND COMPANY LIMITED, (hereinafter called "the Creditor Company) of the fourth part.

WHEREAS the Debtor Company is indebted to the Creditor Company in the sum of approximately $19,000:— under a First Mortgage, and in the sum of approximately $8,500:— in respect of supplies, and is also indebted to the Vendor in the sum of $17,000:—

AND WHEREAS the Vendor, who has the controlling interest in the Debtor Company, has agreed to sell to the Purchaser his shares in the Debtor Company for the sum of $17,000 :—

AND WHEREAS the Purchaser is the owner of the following property, viz.:—

"Firstly,

the immovable property known as—"E1/2 of lot A9; W1/2 of lot A9 and W1/2 of lot A10; SE part of lot A10; South Cummingsburg, Georgetown, with all the buildings and erections thereon"; as held under Transport No. 523 of 23rd day of April, 1946 ;

"Secondly,

the goodwill of the hotel business (including all Licences) carried on upon the property,

"Thirdly,

all the fixtures, fittings, furniture, trade utensils and other chattels in or about the hotel premises and used in or in connection with the said business and in and upon the property, save and except such furniture, personal belongings and chattels of hotel guests; and

"Fourthly,

all stock-in-trade in and upon the property";

but has agreed to sell and has delivered possession of the same under an Agreement dated 3rd January, 1949, to J. A. Sue-a-Quan for the sum of $120,000:— of which $11,000:— has been already, or will shortly be, received by the Purchaser and $45,000:— is to be paid to the Demerara Mutual Life Assurance Society Limited, in satisfaction of the First, Second, Third and Fourth Mortgages on the said property, leaving a balance of $64,000:— to be paid to the Purchaser on the passing of Transport :

AND WHEREAS the Vendor has assigned to the Creditor Company the sum of $17,000:— owing to him by the Debtor Company and the sum of $17,000:— owing to him by the Purchaser in respect of the sale of the said shares:

AND WHEREAS the Debtor Company has agreed to pass a First and Second Mortgage on its property to the Creditor Company as security for the payment of the said sum of $17,000:— with interest at the rate of FIVE per cent per annum from the date hereof within six months from the 3rd day of January, 1949, or the passing of the Mortgage and the Purchaser has agreed to pass a Fifth Mortgage on the said property to the Creditor Company as security for the payment of the said sum of $17,000, with interest at the rate of FIVE per cent per annum from the date hereof within six months from the 3rd day of January, 1949, of the passing of the Mortgage as the case may be :

NOW IT IS HEREBY AGREED as follows:—

1. The Purchaser shall forthwith deposit with the Creditor Company the Grosse Transport No. 523 of 23rd April, 1946, for the said property and hereby assigns to the Creditor Company the said balance of $64,000:— payable to him under the said Agreement dated 3rd January, 1949, and the full benefit and advantage thereof.

2. The Debtor Company and the Purchaser shall forthwith advertise the aforesaid Mortgages to the Creditor Company, and shall pass the same whenever requested by the Creditor Company.

3. On payment of the said sums of $17,000:— with interest as aforesaid, or on the passing of the said Mortgages, whichever shall first happen, the transfer of the said shares which has been signed by the Vendor, shall be handed to the Purchaser.

4. On receipt of the said balance payable under the said Agreement dated 3rd January, 1949, the Creditor Company shall apply the same to the payment of—

(a) the capital and interest of the said First Mortgage of $19,000:—

(b) the said sum of $8,500:— in respect of supplies; and

(c) the said sums of $17,000:—with interest as aforesaid.

5. All costs and expenses of and incidental to this agreement shall be paid by the debtor Company.

AS WITNESS the hands of the parties the day and year first above written in the presence of the subscribing witnesses. WITNESSES:—

1. J. Edward deFreitas.
2. Claudia Bond.

BEL AIR HOTEL LTD.,
Leon Schuler—Chairman.
Jocelyn Bostock—Secretary.
Joh. J. Hutt.
Leon Schuler.
Booker Bros., McConnell & Co., Ltd.,
by their attorney
W. S. Jones.

Seal of Bel Air Hotel, Limited.
Seal Affixed :
Jocelyn Bostock,
Secretary.

In the printed copy of the agreement placed before their Lordships clause 3 mentioned only one sum of 17,000 dollars but it is common ground that "sum" should be "sums" as set out above.

To complete the history of the matter, it would appear that Sue-A-Quan failed to implement his contract to buy the Eldorado Hotel belonging to the appellant : the fund to which the parties to the agreement of 12th February were apparently looking to satisfy the payments contemplated by that agreement thus never materialised ; no mortgages, so their Lordships were informed, were ever passed on the property of the Bel Air Hotel Limited or on the property of the Eldorado Hotel ; and the appellant has made no payment as the price of the shares which the agreement says Schuler agreed to sell to him.

In the respondents' statement of claim indorsed on their writ of summons the respondents claim 17,000 dollars as the agreed purchase price of the shares with interest on this sum at the rate of 5 per cent. per annum from the 12th February, 1949, to the date of the summons, amounting in gross to 18,038.63 dollars. It is alleged in the claim that the plaintiff Schuler bargained and sold to the defendant 3,400 fully-paid shares of 5 dollars each in Bel Air Hotel Limited on or about the 12th day of February, 1949. The statement of claim contains various other references to the agreement of 12th February and other matters to which their Lordships find it unnecessary to refer for the purposes of their judgment.

In his affidavit of defence the appellant raised *inter alia* two questions which have been fully argued before their Lordships' Board. These were whether the agreement by the appellant to buy Schuler's shares was conditional on the performance by Sue-A-Quan of his contract to buy the Eldorado Hotel and whether, in any event the property in the shares had passed to the appellant. The Supreme Court of British Guiana and the West Indian Court of Appeal held

that in these two matters the appellant had no stateable ground of defence. The matter is summed up by the Court of Appeal in the following passage:—

> " We are satisfied that the property in the shares passed to the appellant on the execution of the agreement of the 12th February, 1949, and the signing of the transfer form by the vendor; and that the sale of the shares was thereby effectuated. We are also satisfied that the part of the agreement which imposed upon the appellant the obligation of paying for the shares was correctly regarded by the trial judge as separate and divisible from the remainder of the agreement. It follows that there was no triable issue upon which leave to defend might be granted to the appellant, and that the present appeal must be dismissed with costs."

Their Lordships will deal with these two points in the order taken in this passage. In their Lordships view the claim of the respondents was misconceived. There nowhere appears from the documents to have been a completed sale of the shares. They support at best no more than an agreement by Schuler to sell the shares to the appellant. It is so stated in the preamble to the agreement. The only thing that respondent's counsel could point to suggest the contrary was the passage in the preamble which runs "And whereas the vendor has assigned to the creditor company . . . the sum of 17,000 dollars owing to him by the purchase in respect of the sale of the said shares." But a contract of sale of goods under the Sale of Goods Ordinance (assuming "goods" in the Ordinance covers shares, a point on which their Lordships offer no opinion) includes both a transfer of property in goods and an agreement to transfer property in goods and there can be no sale proper until the property in the goods is transferred. It is clear in their Lordships' view that the agreement refers to an agreement to sell. The conditions for the agreement to sell becoming a sale are set out in clause 3 of the agreement of 12th February, namely the payment of the two sums of 17,000 dollars or the passing of the two mortgages whichever shall first happen in which event the transfer of the shares was to be handed to the appellant. Neither of these events has happened. The true position is revealed in the fact, as their Lordships were informed and as appears from the affidavit in reply of the respondents, that a blank transfer of the shares was signed by Schuler at the same time as the agreement and was handed to a Mr. J. Edward de Freitas with the relevant share certificate. A copy of this transfer annexed to the affidavit shows that the transferee's name is left blank and that it is not signed by the appellant. It is their Lordships view that Mr. de Freitas was holding it if not as solicitor for the respondents at least as a neutral party for completion and delivery only on payment of the stipulated sums. In any event it is clear that no property in the shares has passed to the appellant. The learned Chief Justice who presided over the Court of Appeal, in holding that the property in the shares had passed to the appellants, says: "I appreciate that the effect of the provisions of paragraph 3 of the agreement is to make the sale of the shares a conditional rather than an absolute contract within the meaning of section 2 of the Sale of Goods Ordinance. The fulfilment of the condition was however wholly within

the control of the defendant himself." The same thing, their Lordships would point out, could be said of any buyer who wrongfully neglects or refuses to accept and pay for the goods. Nothing has been shown to their Lordships to suggest that this is other than a case of a buyer, either justifiably or not, refusing to pay for something he has agreed to buy. The remedy accordingly, if any, available to the respondents was not a claim for payment of the price but an action of damages for breach of contract. On this ground alone the appellant was entitled to leave to defend. His position in this matter is sufficiently set out in paragraphs 13 and 16 of his affidavit of defence.

But in their Lordships' view the appellant was also entitled to leave to defend on a broader ground. In his affidavit of defence he states in paragraph 15 that the fulfilment by Sue-A-Quan of the agreement to buy the Eldorado Hotel was a basic condition of the agreement of 12th February, 1949, and that the non-fulfilment of this condition released him (the appellant) from liability to make payment under the agreement of the 12th February, 1949.

A *prima facie* view of the agreement read as a whole appears to their Lordships to lend considerable force to this contention. The agreement to buy the shares is not made a stipulation of the agreement of 12th February, but it does not follow that the two agreements made at the same time, or sufficiently near in time as to be regarded as concurrent agreements, were not mutually interdependent the one on the other. It is at least a possible view that the respondents are not bound to pass the shares to the appellant unless the debts due to them and the price of the shares are met in the manner provided by the agreement. It is on the balance of the price of the Eldorado Hotel that they would seem ultimately to rely for payment as shown from clause 4 of the agreement. If the respondents are not bound except in the event of the Eldorado Hotel sale going through, neither can the appellant be bound. In the Supreme Court of British Guiana, Acting Chief Justice Boland expressed the view that the assignment of the balance of 64,000 dollars to the plaintiff company was merely by way of security. Without saying that this is not a possible view their Lordships are of opinion that on the terms of the agreement itself and other material before them it is not a necessary view. Clause 3 is also in their Lordships' view very relevant on this issue. It stipulates that the transfer of the shares is to be dependent not merely on the payment of the price of the shares but also on payment of the debt of 17,000 dollars due by the Bel Air Hotel Limited. Their Lordships have been referred to nothing to suggest that the appellant undertook to discharge this debt in any other way than out of the balance of 64,000 dollars to be received from Sue-A Quan. Unless therefore the sale of the Eldorado Hotel went through or the Bel Air Hotel Limited itself paid or secured its debt of 17,000 dollars there was no prospect of the appellant being entitled to his shares. This agreement was an agreement to which the Bel Air Hotel Limited was itself a party and the whole tenor of the agreement suggests strongly to their Lordships that its purpose was to secure to the respondents payment of the sums due to them and to relieve the Bel Air Hotel Limited of the debts due

by them, at the expense no doubt of the appellant but only in the event of the price of the Eldorado Hotel being received from Sue-A-Quan. If that was the basis on which the parties were transacting it is a short step to say that the sale of the shares to the appellant was dependent on the same consideration. The linking of the Bel Air Hotel Limited's debt with the price of the shares in clause 3 points strongly, in their Lordships' view, in that direction.

Their Lordships do not consider it expedient to express any concluded opinion on this issue in the present state of the procedure. There may be other facts and circumstances which, if competent and relevant for consideration in a properly contested case, may affect the question. But, in their Lordships' opinion, this was also an issue on which the appellant should have been given leave to defend.

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal, to set aside the judgment of the West Indian Court of Appeal of 26th February, 19.51, and the judgment of the Supreme Court of British Guiana of 22nd May, 1950, and to direct that the appellant be given leave to defend the action brought against him by the respondents. The respondents must pay the costs of the proceedings in this appeal and in the Courts below.

ABAUSE SATTAUR *v.* THE CENTRAL BOARD OF HEALTH.

(In the Supreme Court, Civil Jurisdiction, In Chambers (Phillips J.) November 16, 30; December 14; 1954).

Injunction—Declaration—Burial—Exhumation—Public Health Ordinance 1934*—Burial Grounds* (*Amendment*) *Regulations* 1954.

The plaintiff's father died on the 30th August, 1953, in New Amsterdam, Berbice, and was buried on the 31st August at lot 2 Main Street, New Amsterdam, Berbice, which was not a public burial ground. The plaintiff was not prosecuted for so doing.

On the 19th June, 1954, the Central Board of Health requested the plaintiff and others to exhume the body and inter it in the public burial ground. The Board indicated that if the request was not complied with, the body might be exhumed by them under the provisions of the Burial Grounds (Amendment) Regulations 1954 which came into operation on the 12th March, 1954.

The plaintiff, by way of summons, prayed an injunction against the defendants preventing them from so doing and a declaration that they had no right to do so as the Regulations were not in force at the time of the burial.

Held: Although the defendants had threatened to remove the corpse they had made no attempt to do so and it is not the practice of the Court to decide as to future rights.

Application for injunction and declaration refused.

Summons issued at the instance of the plaintiff for an injunction restraining the defendants from exhuming a corpse and for a declaration that they were not entitled to do so.

B. O. Adams for the plaintiff.

G. M. Farnum, Solicitor General, for the defendant.

Cur. adv. Vult

Phillips J:

By consent of the parties the hearing of the summons was treated as the trial of the action.

The plaintiff claimed:—

"(1) An injunction restraining the Central Board of Health its servants and "on agents or otherwise from exhuming the buried corpse of Abdool Sattaur "and from removing the tomb in which the said Abdool Sattaur is buried at lot "2 Essex and Main Streets, New Amsterdam, in the county of Berbice and "colony of British Guiana and from re burying the said corpse and "reconstructing the said tomb in the Stanleytown Cemetery New Amsterdam "or any where else.

"(2) A declaration that the defendants are not entitled to exhume the "body of Abdool Sattaur or to remove the tomb of the said Abdool Sattaur "from their present position at lot 2 Essex and Main Streets, New Amsterdam "aforesaid or to interfere in any manner whatever with the said corpse and tomb."

With respect to the first Claim for an Injunction the Court refused the plaintiff's application for an injunction* but with respect to the second claim for a declaration reserved its decision.

It will not be necessary to go into very great detail in this matter in view of my opinion that in the circumstances it is not right that the declaration should be made. It is not the practice for the Court to make declarations as to claims which may be made by some persons (other than the plaintiffs) under circumstances which may or may not happen. *In Jackson v. Turnley*, 1 *Brewery* 621, *p.* 587, the Court referring to 15 and 16 Vict. Oh. 86 an Act to amend the practice and course of proceedings in the High Court of Chancery in England, said that the Act did not intend to authorise a declaration, at the instance of a plaintiff that some other person who claims a right has no such right. The Court was then considering the provisions of Section 15 of that Act which reads as follows:—

"No suit in the said Court shall be open to objection on the ground that a "merely declaratory decree or order is sought thereby and it shall be lawful "for the Court to make binding declarations of right without granting "consequential relief."

In this matter by letter dated the 19th June, 1954, the Central Board of Health (the defendants) requested the plaintiff in conjunction with others to exhume the buried corpse of Abdool Sattaur which had been buried on the 31st August, 1953, and to remove the tomb and reconstruct another and there inter the corpse at the Stanleytown Cemetery at New Amsterdam in the prescribed burial ground.

At the time when the grave was being prepared at the Mosque at Lot 2 Main Street, New Amsterdam, Berbice, on the 31st August, 1953, Assistant Superintendent Hollington informed the plaintiff, who is the son of the deceased, that the body of his father should not be buried there as that would contravene the provisions of Section 193 of the New Amsterdam Town Council Ordinance, No. 25 of 1949. The plaintiff refused to obey and proceeded with the burial. The plaintiff having committed an offence under the Section could have been

* Lit*vinoff v. Kent*, 34 T.L.R. p 298.

prosecuted, but six months had expired and no prosecution was instituted (see Section 208 of the Ordinance). The plaintiff prayed an injunction to prevent the defendants from causing the Local Sanitary Authority or the Health Officer to exhume such corpse pursuant to the powers contained in Regulation 14 of the Principal Regulations made under the Public Health Ordinance (No. 15 of 1934) as amended by the Burial Grounds (Amendment) Regulations 1954 which came into operation on the 12th March, 1954, as the Regulations, it was alleged, had no retrospective operation. Regulation 3 of these Regulations states that Regulation 14 shall apply to the Town of New Amsterdam.

The Principal Regulations of 1952 did not apply to the Town of New Amsterdam but only to "village, country and rural districts" (see Section 22 of the Principal Burial Grounds Regulations, 1952). The defendant Board claimed that these enactments had retrospective operation and that they were entitled now to exhume the body under the regulations above set out. This right in the defendants the plaintiff denied and asked the Court to make the necessary declaration to this effect. In my view this is asking the Court to make a declaration at the instance of the plaintiff that the defendants have no such right. *In Curtis v. Sheffield,* 21 *Chancery Division,* 1882, *p.* 1, it was stated by Jessel, M.R.:

> "It is true that it is not the practice of the Court and was not the "practice of the Court of Chancery to decide as to future rights but to "wait until the event has happened."

In this case the defendants had threatened the plaintiff to remove the corpse. This event has not happened. When it does happen the plaintiff will be at liberty to pursue whatever remedy the law allows him. I have therefore been careful not to indicate or to give any indication of my own views on the law in this matter. I do not consider it right that the Court should be called upon to pronounce and make declarations as to defendants' rights with respect to future events and probable issues.

Application for injunction and declaration refused.

Solicitors:

I. Z. Zitman for plaintiff.

V. C. Dias, Crown Solicitor, for defendants.

TIWARI *v.* TIWARI.

(In the West Indian Court of Appeal, on appeal from the Supreme Court of British Guiana, In Chambers (Phillips J.) December 20, 1954.)

Divorce—Appeal—Alimony pendente lite—Interlocutory application Jurisdiction.

At the conclusion of divorce proceedings between husband and wife, the wife the respondent in the divorce suit, lodged an appeal to the West Indian Court of Appeal was not sitting in the Colony the petition was heard by a West Indian Court of Appeal for alimony pendente lite. As the West Indian Court of Appeal was not sitting in the Colony the petition was heard by a Judge of the Supreme Court of the Colony,

Counsel for the husband took a preliminary objection as to jurisdiction and submitted that a petition for alimony pendente lite was not an interlocutory application as envisaged by sub-section (g) of section 23(1) of the West Indian Court of Appeal Rules 1945.

Held: Petitions for alimony pendente lite are matters to be preferred to the Supreme Court of British Guiana in the first instance and are not cognisable before the West Indian Court of Appeal until they reach that Court by way of appeal.

Application refused.

Petition to the West Indian Court of Appeal by a wife for alimony pendente lite without making application to Supreme Court in the first instance.

West Indian Court of Appeal Act 1919.

West Indian Court of Appeal Rules 1945.

Rules of Court (Matrimonial Causes) 1921 referred to. .

B. O. Adams for husband (appellant) respondent in divorce suit.

H. C. Humphrys, Q.C., for wife (respondent) petitioner in divorce suit.

Cur. adv. vult.

Phillips J.: Counsel for the husband took a Preliminary Objection in this matter as to Jurisdiction—that this Petition for Alimony Pendente Lite was not properly before the Court in that the same was not an Interlocutory Application within the meaning of sub-section (g) of Section 23(1) of the West Indian Court of Appeal Rules 1945.

Counsel argued that in sub-section (g) the words

"any other interlocutory applications"

should be construed to mean applying the 'ejusdem generis' rule of interpretation,

any other interlocutory applications relative to the appeal and ejusdem generis the other preceding sub-sections (a) to

Mr. Humphrys in reply referred to:

(a) Sub-section (2) of the same Rule 23 which reads as follows:—

"Any such application shall be heard in the first instance by the Court unless the Court of Appeal is actually sitting in the Colony at the time"—which it was not. (Court means the Supreme Court in the Colony and includes a Judge thereof"

and

(b) The Interpretation Ordinance Chapter 5, Section 5(1) which enacts in the last paragraph as follows:

"or," "other" and "otherwise" shall be construed disjunctively and not as implying similarity unless the expression "similar" or some equivalent expression is added.

This original application for alimony pendente lite is brought, states Mr. Humphrys, to the West Indian Court of Appeal (and it is so stated in the rubric) under the provisions of Rule 23 mentioned above.

Rules 34—41 of the Rules of Court (Matrimonial Causes) 1921 provide the procedure in proceedings for alimony pending suit. Rule 2 of these Rules states:

Proceedings before the Court in divorce and matrimonial causes

shall be commenced by Petition (not "application") preferred unto the Supreme Court of British Guiana;

and by Rule 1 thereof

"the Court" includes a Judge thereof.

The West Indian Court of Appeal Act 1919 by Section 5 gives power to the Judges of the Court of Appeal to make Rules of Court for regulating its proceedings—and particularly Section 5(1) (c) thereof reads as follows:—

for regulating "Generally the practice and procedure of the Court of appeal or any matters relating thereto (including the right of audience in the Court of appeal) or to the duties of the officers thereof or to costs of or fees upon proceedings therein."

It is clear that there is no power given by this Act to make Rules of the Court for regulating the proceedings in Divorce in the Supreme Court of British Guiana. Consequently the words *"any other interlocutory applications"* (notwithstanding the provisions of the Interpretation Ordinance) cannot refer to Petitions for Alimony pendente lite at first instance which are (matters to be preferred unto the Supreme Court of British Guiana and at that stage are not cognisable before the appellate body—*"The West Indian Court of Appeal"*—.except and until the same reaches that Court by way of appeal, which is not the case here.

In my opinion therefore the submission made toy counsel for the husband succeeds and the service of the Petition in these proceedings for Alimony Pendente Lite is set aside. In view of the conclusion I have reached on this point it is unnecessary to enter upon any discussion of the other submissions made by Mr. Adams on behalf of the husband respondent herein.

Application refused.

QUINLAN *v.* TAYLOR and TAYLOR.

(In the Supreme Court, Civil Jurisdiction (Boland J.) September 2, 3, 7; December 6, 1954.)

Sale—Movable property—Agency—Authority—Estoppel.

The plaintiff was the owner of a house at lot 453, La Penitence, East Bank Demerara. The land on which the house was erected was owned by the Corentyne Sugar Estates Limited.

The plaintiff left the Colony in 1935 and authorised B to act for her while she was abroad. B died and his brother-in-law C wrote to her offering to supervise the property in place of B. She agreed to C collecting rents and paying the land rent. C experienced difficulty in obtaining rents and the plaintiff wrote telling him it would toe better to sell if he could not collect the rents. She never authorised him to sell.

C sold to the defendants. After the death of C, plaintiff claimed a declaration that the house was hers and an order on the defendants to deliver up possession.

The issues which fell to be decided were:

(a) Whether C had authority express or implied to sell.

(b) If C had no authority did plaintiff ratify the sale?

(c) If C had no authority did plaintiff by her conduct hold him out as

having authority and was she estopped from maintaining otherwise ?

There was evidence that after plaintiff wrote C telling him that it was better to sell, the estate manager sent her a printed' form with a request that she should sign it as authorising C to sell. Plaintiff signed; the estate manager returned it as it was not in order. She wrote C telling him she had sent an authorisation to the manager authorising him (C) to sell.

Held: C had, if not an actual, an implied authority to sell.

If C had no authority the plaintiff ratified the sale.

Any limitations on C's authority as to price was unknown to the defendants and plaintiff was estopped from repudiating the sale.

Judgment for the defendants.

Action for declaration of ownership of a house on the ground that the sale of the property by the person representing himself to be plaintiff's agent was not with plaintiff's authority express or implied.

H. A, Fraser for plaintiff.

John Carter for defendants. *Cur. adv. vult.*

Boland J.: The plaintiff in this action claims a declaration that she is the owner of a wooden house with the kitchen attached thereto valued by her at the sum of $1,600 which stands on a piece of land known as Lot 453, La Penitence, East Bank Demerara. The Court is further asked to implement the declaration of plaintiff's ownership by an order that the defendants do make delivery of this house with its appurtenant kitchen to the plaintiff.

The defendants are husband and wife. They are now jointly in possession of the house. They allege that they purchased from one

Albert Cox on 15th March. 1941, what was then an old dilapidated house standing on the same site, and that since then they have expended approximately about $800 in repairs and improvements, which, it is claimed, have enhanced the value of the house considerably beyond the amount of the purchase price agreed on in the year 1941.

In their evidence the defendants stated that they were given possession immediately though they did not pay the whole of the purchase price then. Four receipts from. Cox were produced—the first dated 15th March, 1941—the date of the sale—for the sum of $48.00 on account; the second receipt dated the 26th August, 1941, for another payment of $28.00; the third dated 15th October, 1941, for $18; and a fourth dated 30th September, 1946, for what is therein described as the balance $97.20. This however makes the total payment to be $201.20. The excess of $1.20 was no doubt for land rent paid by Cox which the purchasers had to refund. Cox, it is admitted, died sometime in the year 1948.

By consent plaintiff's evidence, taken on commission by the Registrar, was admitted in lieu of her oral testimony. Though denying Cox had any authority to effect a sale of the house on her behalf she admitted that at some period she was out of the Colony and she authorised Cox to be in charge of her house and that he was so in charge in the year 1941**.** But plaintiff maintained that Cox though an agent merely for the collection of rents had no authority expressed or implied to sell.

At the trial it was not in dispute that the plaintiff as far back as the year 1921 became the tenant of a house lot, No. 453 La Penitence,

on a lease from the then owners of La Penitence, The Corentyne Sugar Estates Limited. Soon after she had become the tenant of the lot, she left the Colony to live in Curacao but returned in the year 1935, and built a house on the site. She went back the same year to Curacao leaving her mother and sister residing in the house and a man called Edwin Hugh Bouyea was given by her a general power of attorney by registered deed to act for her while abroad. Sometime in the year 1939 plaintiff's mother and sister left the house, which thereupon became vacant and Bouyea as her attorney took charge. Whether or not Bouyea rented the house was not stated in evidence, but Bouyea after taking charge died in December 1939, and in February 1940 Cox who was Bouyea's brother-in-law wrote to the plaintiff in Curacao expressing his willingness to undertake looking after the property for her in the place of Bouyea. Her reply to Cox's letter offering his services could not be produced because of Cox's death but plaintiff gave what was her recollection of the contents of that letter. She further stated in her evidence in chief that she understood, when she agreed to Cox's proposal, that Cox was to act merely as an agent to collect rents and to pay land rent. In September 1940 as Cox had not furnished her with any account for rents she wrote, to him from Curacao asking for an explanation. In the same month Cox replied that he was experiencing difficulty in getting the persons who were living in the house to pay the rents. She wrote him saying that it would be better to sell if rents were not forthcoming tout never authorised him to sell. She got no further letter from Cox. She was not aware that Cox had purported to sell her house until she returned to the Colony in 1950 and found defendants in possession with a claim that they had bought from Cox.

The point for decision is whether or not Cox had authority, express or implied, to sell the house which at the time of sale was admittedly the property of the plaintiff. Alternatively there is a second question: Did the plaintiff although Cox may have had no authority to sell subsequently ratify the sale by Cox? And a third alternative is : Although the sale by Cox may have been in breach of authority were the circumstances in which Cox was left by plaintiff in charge of the house such as would justify a third party, without notice of any limitation on Cox's agency, reasonably to believe that Cox was fully authorised to sell? To express this last question in other words: Is plaintiff to be taken as having held out that Cox was a person authorised to sell on her behalf, with the result that plaintiff is now estopped from maintaining otherwise?

The onus lay upon the defendants to establish agency in Cox with authority express or implied to sell. Similarly the burden is on the defence to establish ratification by plaintiff. Bouyea had held a general power of attorney by registered deed, which empowered him to sell the house. But as the house is not immovable but movable property being held under different ownership from that of the land, there was no need, for the purpose of giving Cox authority to sell, that the plaintiff should execute a power of attorney in favour of Cox after Bouyea's death. An express authority to sell movable property need not be by deed or by any writing whatsoever. Such an authority may be implied

to have been given to an agent from evidence of the conduct of the alleged principal; also although there may have been no intention to create an agency to sell, the circumstances, as I have indicated, may have been such as would by the rule of estoppel preclude the plaintiff from disclaiming the grant by her of such authority to Cox.

There was no evidence of any express authority to sell given by the plaintiff to Cox, nor of any express ratification by plaintiff of this sale by Cox to the defendants. In determining whether the conduct of the plaintiff was such as to justify an inference of an implied authority given to Cox or whether the circumstances created an estoppel against her maintaining otherwise, the Court had to keep in mind the fact that ownership of the house is in a sense linked with the tenancy of the land on which it stands, and so it was necessary to examine the evidence relating to plaintiff's attitude not only to the ownership of the house but also her attitude in relation to the tenancy of the land. In accordance with the usual practice where there are several tenancies over an extensive area of land the plantation management who rent these lands forming part of the estate recognized as their tenants only those whose names are entered on their rent rolls. To be recognised as valid an assignment by a tenant must be by a written application to the management for permission to assign the tenancy whereupon in token of their consent to the assignment the name of the assignee is entered by the plantation authorities on the rent roll in substitution for that of the assignor.

It is clear that at the time of the sale by Cox the plaintiff had not applied for permission to assign the tenancy. Plaintiff neither signed such an application specifying the defendants as the proposed assignees nor did she ever give a written authority to Cox to obtain permission on her behalf of any transfer of the tenancy. Consequently after the sale of the house by Cox the tenancy continued to remain in the name of the plaintiff and when payments of land rent were made by the defendants, receipts for land rent continued to be given in plaintiff's name. But it is curious, as plaintiff in her evidence under cross-examination was forced to admit, that after she had written to Cox telling him it would be better for her to sell the house she received at Curacao a printed form from Mr. Delph of the Plantation Office "with a request that I should sign the form as an authorization to Cox to sell." Plaintiff stated that she filled in the form and sent it back to Mr. Delph. But Mr. Delph sent it back to her informing her that "it was not in order." Plaintiff was asked under cross-examination to produce this form which had been sent back to her by Mr. Delph as not being in order and she did so. It is a printed form of application for permission to transfer the tenancy duly signed by plaintiff, but undated, and the name of the assignee is not filled in nor was it witnessed by any functionary such as the British Consul or a lawyer. Plaintiff admitted that before she received back the form she had written to Cox telling him that she had sent an authorisation to Delph "for him" to sell the house. After she got back the form she was not, as she said in her evidence under cross-examination, able to get the British Consul to sign as he was away in Caracas and a lawyer would have been too expensive, and so she retained the form and did not pursue the matter

of selling the house any further. She admitted that "if the authorization was in order and Cox had sold the property for a sum approved by me then everything would have been in order."

If this letter of plaintiff to Cox is to be construed as intended to give Cox information that the sale of the house by him. would be accompanied by a transfer of the tenancy by her, then Cox would have had if not an express authority to sell, at any rate an implied authority to sell.

By the direction of Cox the names of the purchasers would have been filled in by Delph on the application for permission which Delph had received from plaintiff. Unfortunately the plantation authorities were not satisfied with the execution of the permission by the plaintiff. It would appear that the plantation management deemed it not in order for their purposes because the witnesses to plaintiff's signature did not include the British Consul or a lawyer or some such functionary. No doubt this was deemed necessary because plaintiff was not in the Colony. Plaintiff, as has been stated, did not get her signature to the document witnessed as required toy Mr. Delph, but abandoned the idea of transferring the tenancy. There is no evidence that she revoked this express or implied authority given to Cox by any letter to him informing him of her change of plans. But it has been contended that in her letter to Cox—oral secondary evidence of the contents of which was given by plaintiff as the original must have been lost since Cox's death—that she was intimating to Cox that she was authorising "him" Delph and not Cox to sell the house.

Three letters of a cousin of plaintiff, a Mrs. L. Williams, written to plaintiff in Curacao were admitted in evidence on a demand for their production by Defence Counsel when he was cross-examining plaintiff. Counsel for plaintiff objected to the admission of those letters and I upheld the abjection. Later however Counsel for plaintiff withdrew his objection and these three letters were admitted with the consent of both sides. In these letters Mrs. Williams who seemed very much against Cox for his dealings with the property expressed herself as glad to hear that plaintiff had authorised Mr. Delph to sell. I do not think much importance should be attached to what Mrs. Williams wrote in view of the attitude of plaintiff herself later with respect to the sale by Cox.

Whilst there was much contention about certain correspondence claimed to have been addressed to plaintiff in Curacao by Mr. Burton, Barrister-at-Law, in the year 1942, which was not legally admissible as the essentials of proof that they were received by plaintiff were lacking, there was a letter dated 1st December, 1942, which I am satisfied, though not bearing plaintiff's actual signature, must have been written toy someone who by plaintiff's instructions subscribed plaintiff's name thereto. This letter is clearly a letter in reply to one written from a lawyer's office on behalf of a client making the request that plaintiff should sign an agreement of sale. It is obvious that plaintiff had been asked in a prior letter to sign an agreement of sale of the

property presumably by way of confirmation of the sale by Cox alleged to have been effected some time before. This she refused to do, but, she declared in reply that she had intended to sell "but not in the way between Mr. Cox and your client." Plaintiff's real grievance would seem to have been to use her own words "I have not received any money on account of the sale of my house" and she added in the letter "I can agree to nothing until I hear from Mr. Cox."

The plaintiff still continued stolidly to refuse to transfer the tenancy. Why, it may pertinently be asked, did she not take some step to set aside the alleged wrongful sale? She was getting no rents from the house which she must have known was all the time being occupied. After the correspondence mentioned above she was apparently content to feel quite secure against the purchasers by reason of not having herself transferred the tenancy. She herself was not paying any land rent which she must have assumed was being paid. But the transfer of the tenancy to the defendants was entered by the plantation management in the year 1946 as a result of a request in a letter purporting to have been written for and on behalf of Mr. Jacob, Barrister-at-Law. Mr. Jacob testified that he knew nothing of this letter, nor was the person who signed it authorised to act as his clerk for the purpose. The fact that some improper stratagem was adopted to effect the transfer of the tenancy does not invalidate the sale of the house if Cox did have authority to sell.

Meanwhile plaintiff continued to remain inactive. The fact that she was in Curacao can hardly be accepted as an excuse for doing nothing considering the information she had about the sale by Cox as the letter in reply to the lawyer's letter has established. It was only after she came back to British Guiana in 1950 that, on finding the defendants in possession she took steps to claim ownership of the house as against the defendants whom she found in occupation and who asserted their right to be that of purchasers from Cox.

If Cox did have authority to sell it would be immaterial to the defendants that Cox in his accounts with the plaintiff acted in fraud of the plaintiff. Cox is dead, and it would be wrong to make a finding of fraudulent conduct against a dead man who has no opportunity of advancing something in exculpation of himself. Much evidence was given on behalf of plaintiff which sought to establish that the price alleged to be paid for the house was so much below its actual value that Cox and the defendants conspired to defraud plaintiff. There can be no doubt that improvements made by the defendants have greatly enhanced the value of the place quite apart from the rise in the money value of houses since 1941. There is no need for me to determine the issue between the parties raised by the evidence as to whether the house did or dirt not have a back gallery in the year 1941, or whether this was an addition which the purchasers made after the purchase. The plaintiff has not established a case of fraud by the defendants. It was insufficient for that purpose to point to the family relationship between defendants and Cox.

In the result I find —

(1) that Cox had, if not an actual expressed, yet an implied authority to sell.

(2) The permission to transfer the tenancy which she signed though unaccepted by the plantation authorities for reasons of their own gave Cox nonetheless an implied authority to sell, to at any rate, there was ratification of that authority if the sale had already been effected by him.

(3) Any limitation on Cox's authority which imposed a condition that plaintiff should approve of the price was unknown to the defendants at the time they bought, and plaintiff is therefore estopped now from repudiating the sale on the ground that Cox had gone beyond his ostensible authority.

The plaintiff's claim is dismissed and there must be judgment for the defendants with costs.

Solicitors: *H. B. Fraser* for plaintiff.
L. L. B. Martin for defendants.

BRAITHWAITE *v*. THE QUEEN.

(In the Supreme Court, Court of Criminal Appeal (Bell, C.J., Boland and Hughes, JJ.) December 4, 5, 7, 12, 1953; January 4, 1954).

Receiving stolen property—Accomplice—Absence of corroboration—Misdirection.

The appellant was convicted of receiving stolen property.

The evidence of an accomplice was not corroborated. The jury were directed regarding the meaning of corroboration and the danger of convicting in the absence of it hut were not told that in this case there was no corroboration. The prosecution invited the jury to regard as corroboration certain evidence which could not be so regarded.

Held: The Judge should have directed the jury that there was no corroboration. His failure to do so may have led the jury to accept wrongly as corroboration what the prosecution was inviting them to consider as corroboration. *De Abreu* v, *The Queen.* L.R.B.G. 1954 extensively referred to.

Appeal allowed. Conviction quashed.

At the Demerara Criminal Assizes the appellant was indicted jointly with others for larceny and receiving jewellery known to be stolen. He was convicted of receiving.

B. O. Adams for appellant.

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

Judgment of the Court was delivered by Boland J.:

Against the conviction of the appellant there are the same objections of misdirections by the learned trial judge which were referred to in our decision today on the appeal brought by George De Abreu who, charged jointly with the appellant was like him convicted of the offence set out in the second count of the indictment, namely with receiving articles of jewellery known to be stolen from the East Bank Pawnbrokery at Meadow Bank, East Bank Demerara.

The same reasons we gave in that decision for upholding the contentions made by De Abreu's counsel apply equally to the appellant Braithwaite. There is no need to refer again to the evidence given

by the accomplice Da Silva, the material parts of which we set out fully in our decision in De Abreu's appeal. We, however, would repeat that as against De Abreu the evidence of Ruby Thompson, as we pointed out, was in law cognizable by the jury for a finding by them of corroboration of Da Silva's evidence. But Da Silva never spoke of the appellant as being at or about the koker when he and De Abreu passed the grip over to Singh—on the contrary Da Silva said that he had left appellant on the Public Road and on his return to De Abreu's house at Houston after delivery of the grip to Singh near the koker, he saw appellant at De Abreu's house. Therefore when Ruby Thompson testified about appellant being with Da Silva and De Abreu at the koker path when the grip was handed to Singh, she may have been speaking the truth but certainly she was not corroborating Da Silva's evidence relating to possession by the appellant of that grip containing the jewellery the receiving of which was the offence for which appellant was convicted. Also we agree with Counsel for the appellant that there was nothing in the statement given by the appellant to the police which could be considered as corroborative of Da Silva. Admittedly the dispatching of the telegram to Persaud was a material part of the case for the prosecution, but although appellant in his statement stated that he was with Da Silva on that day at some period not long before and also after the time when the telegram was proved to have been sent, but for purposes unconnected with the sending of the telegram, appellant denied he knew anything of the telegram as Da Silva had testified. Da Silva, it should be noted, stated that he had left appellant at the corner of Camp and Middle Streets far away from the Post Office at Carmichael Street and that he rode on his bicycle to that Post Office where without the appellant he delivered the telegram to the postal clerk. We fail to see that appellant's admission in his statement that he was in the company of Da Silva that same day at the time stated by him in his statement would be corroborative of Da Silva that appellant was concerned in the sending of the telegram to Persaud. Our comments about Patrick Inniss' evidence as corroborative of Da Silva apply to appellant.

There was, we feel, no evidence at all corroborative of Da Silva in relation to the offence of receiving the jewellery for which appellant was convicted. Counsel for appellant cited authorities in support of a submission that where there is no corroboration in law of an accomplice's evidence the Judge should warn the jury that on the evidence there is no corroboration and he must go on to tell them that though they can convict on the uncorroborated evidence of the accomplice, it would be unsafe to so. The Judge, it was submitted, would be wrong to leave it to the jury to search for themselves for corroboration amidst the evidence, because the jury's selection of some evidence as being corroboration would be wrong when there was none in law or in fact. Apart from authority this proposition would seem correct in principle. The jury may very well have accepted wrongly as corroboration what the Judge told them the prosecution was inviting them to consider as corroboration.

For the reasons given above it is our view that the learned trial

Judge failed adequately to direct the jury on the question of corroboration of the evidence of Da Silva the accomplice.

We also hold that as we did in De Abreu's appeal that the judge railed to direct the jury as to the conditions under which Singh's statement could be received as against appellant. This was a misdirection which was very prejudicial to appellant's defence as we stated that it was to De Abreu's.

Counsel for appellant did not advance this prejudicial effect of Singh's statement as a ground of appeal but after reserving decision we thought we would invite the learned Solicitor-General to make any submissions he wished against this point. The Solicitor-General addressed the Court that he was of the view that it was a vital misdirection which, for the same reasons we gave in De Abreu's appeal, does not come within the scope of the proviso to section 6 of the Criminal Appeal Ordinance 1950.

Accordingly the appeal is allowed and we set aside the conviction and sentence.

GONSALVES *v.* GONSALVES.

(In the Supreme Court, Divorce and Matrimonial Jurisdiction (Hughes J) December 22, January 5, 1954)

Divorce—Desertion—Residing in same house at date of petition.

In this undefended petition for divorce on the ground of malicious desertion, the petitioner and respondent were living in the same house.

The petitioner stated that the respondent told him she was "absolutely finished" with him and intended to take up permanent residence abroad. He produced a letter written to him by a woman friend of the respondent which indicated the existence of an unnatural sexual relationship between them.

Held: The respondent had maliciously deserted the petitioner.

Decree Nisi granted.

Husband's petition for divorce on the ground of malicious desertion.

The wife did not enter an appearance. She was living in the same house as the petitioner.

E. V. Luckhoo for the petitioner.

No appearance of the respondent.

Hughes J.

Cur. adv. vult.

I adjourned this case in order to consider whether on the evidence of the petitioner and the documents tendered it may fairly be said that the respondent has deserted the petitioner despite the fact that the parties continue to live in the same house.

Very briefly the. facts are that the respondent left the petitioner in May, 1945, without any reason of which the petitioner was aware; she returned in February, 1946, and they resumed cohabitation. She again left for about one week in 1947.

With petitioner's permission the respondent went to the U.S.A. in March 1952, and returned in June of that year. On her return, the petitioner says, her attitude became worse and they would not speak to each other for weeks on end during which time she neglected her domestic duties. From July 1956, petitioner had to attend to the household duties himself and from that time the respondent ceased to live with him as man and wife, keeping the door of her bedroom locked. In that month the respondent wrote a note to the petitioner and from that note, though obviously written while the respondent was in a temper, it may be gathered what is the attitude of the respondent to the petitioner.

The petitioner has stated that the respondent has told him that she is "absolutely finished" with him and intends to take up permanent residence in the United States of America at the earliest opportunity. He states, too, that he has made repeated attempts at reconciliation but with no success.

There is, also, the matter of the letters written to the respondent by a woman in the United States of America. In my view it is not unreasonable to say that those letters disclose the existence of an unnatural sexual relationship between that woman and the respondent and it may be that this fact has contributed in part to the attitude of the respondent towards the petitioner.

In September 1953, a "Custody Agreement" was entered into between the parties and this must be taken as reflecting to some extent the relationship between the petitioner and the respondent.

The respondent has expressed herself as being "absolutely finished" with the petitioner and his evidence as to her conduct and neglect satisfies me that this is indeed the case and accordingly I hold that the respondent has maliciously deserted the petitioner and that the latter is entitled to a decree nisi which is hereby made. Custody of the two children mentioned in the Petition to the Petitioner.

LINDE *v.* DEMERARA COMPANY LIMITED

DOUGLAS *v.* DEMERARA COMPANY LIMITED.

In the Supreme Court, Civil Jurisdiction, (Poland, J.) October 20, 21, 22, 23, 27, 29; November 5, 6, 11, 12, 1953; March 3, 1954.)

Declaration of title—Possession—nec ri, nec clam, nec precario—Procedure—Title to Land (*Prescription and Limitation*) *Ordinance 195—Legal title after twelve years possession—Not retro-active.*

These two actions were tried together by consent of the parties.

The defendants were the holders of the legal title of an area of land at Golden Grove. Each plaintiff claimed a declaration of ownership of certain lands by virtue of possession *nee vi, nee clam, nee precario* for the prescriptive period sanctioned by law.

In order to establish their claims the plaintiffs adduced evidence that the father of the plaintiff Linde had been in possession of the land for many years before his death in 1915. It was possible that there were other next of kin alive who would have an interest in the lands.

It emerged in evidence that a portion of the land claimed by the plaintiffs was leased by the defendant company to plaintiff Linde's brother. The company admitted continuous possession in the plaintiffs of a portion of the land.

Held: The plaintiffs were not in continuous possession of all the land claimed by them.

The plaintiffs were in continuous possession of that portion of the land in which the company admitted continuous possession in the plaintiffs but as all the parties may not have been before the Court a decree nisi of possessory title would be granted.

(Editor's note: An appeal to the W.I. Court of appeal was dismissed).

In these actions for declaration of title it was held that the plaintiffs were entitled to a decree with respect to a portion of the laud as against the defendants but as other interested parties may have been involved only a decree nisi was granted. The decree nisi would become absolute on proof that they had published in the press a notice of their intention to have it made absolute unless there was intervention.

Observations on The Title to Land (Prescription and Limitation) Ordinance, 1952.

As the defendants had made their position clear in their Statement of Defence judgment with costs was entered in their favour.

E. W. Adams with B.O. Adams for the plaintiffs.

H. C. Humphrys, Q.C., W. J. Gilchrist with him for the defendants.

Boland C.J. (Acting): These two actions were tried together by consent of the parties. Each plaintiff claims a declaration of ownership of certain lands by virtue of possession nee vi, nee clam, nee precario for the prescriptive period sanctioned by law. Each also claims damages for trespass and an injunction to restrain the defendants from the continuance of further acts of trespass. The lands which are the subject of both actions form part of Plantation Golden Grove situate on the right bank of the Demerara River.

The plaintiff Linde's claim is in respect of a portion of Golden Grove said to be long known as "Our Retreat" and it is described in her Statement of Claim as comprising 3,758 acres and shown as lot (a) and delineated as part of Section Nona plan dated 2nd October, 1948, made by S.S.M. Insanally, Sworn Land Surveyor. This plan is on record in the Department of Lands and Mines as plan No. 5463.

The plaintiff Douglas advances his claim in respect of another portion of "Our Retreat" alleged in his Statement of Claim to comprise 0.5787 acres and shown on Insanally's plan as lot (b). Douglas claims that in the year 1935 he purchased this portion from the plaintiff Linde and her brother, William Trim Downer (since deceased) who were then in possession of the whole of "Our Retreat" and that he has been in undisturbed occupation of the portion lot (b) since then until the acts of trespass by the defendants complained of in this action. He bases his claim for a declaration of a possessive title to lot (b) by virtue of his own possession nee vi, nee clam nee precario, with the addition of the antecedent period of occupation by his vendors, the plaintiff Linde and her brother William Trim Downer, and that of their predecessors in title.

Linde's possessive title to lot (a), as well as that to lot (b) before

it was acquired by Douglas, is particularised in her Statement of Claim. Her father, William Ajax Trim Downer, a retired school-master was in possession of "Our Retreat" for several years up to the time of his death in 1915. Linde claims to be the sole 'surviving heir' under her father's will and that her father and his successors in title have been in peaceful undisturbed and continuous possession for a cumulative period of 75 years. They resided in a house which still stands on the lands and they farmed those lands. It is proposed later in this judgment to examine Linde's claim to a right by inheritance to any possessive title which may have been in her father at the time of his death but it is perhaps appropriate at this stage to say that the evidence before the Court did establish that from some early date after Linde's father's death her brother, William T. Downer, was in residence at the family house and that although Linde herself was living for most of the time at Berbice, the brother seemed up to the time of his own death in 1947, to have always acknowledged Linde as co-owner with him of the lands which their father had occupied. Whenever tenancies or sales of portions of the land were effected by the brother, William T. Downer, those transactions were regarded as the acts of an owner in possession of an undivided half share acting as agent for and on behalf of the co-owners. Linde acknowledges the sale to Douglas of lot (b) as claimed by Douglas.

The Defendant Company claims to be the holders by transport of the entire area of land which the plaintiffs describe as "Our Retreat." It is claimed that the whole of these lands are included, but not under the name of "Our Retreat," in Transport No. 402 of 1895 still held by Defendant Company. "Our Retreat" forms part of the lands fourthly described in the said transport. While the defendants deny that at any time Linde or Douglas or any of their predecessors in title occupied adversely to the Company, the lawful holders by transport, the entirety of the area defined as lot (a) and lot (b) in Insanally's plan, they concede that plaintiff's brother William T. Downer, was known to them prior to his death as a person who had occupied for years a piece of land at Plantation Golden Grove and that he was claiming the said piece of land by virtue of long possession. The Defendant Company had for some time decided not to challenge W. T. Downer's title to the ownership of this portion claimed to have been thus acquired by long possession adverse to their own ownership. In the year 1925 the Company employed a Sworn Land Surveyor, Mr. Henry Ormonde Durham to make a survey of part of Plantation Golden Grove for the purpose of defining certain lots along the Public Road claimed by various individuals including William T. Downer. Durham, it is alleged, made his survey and paaled off an area claimed by W. T. Downer without any objection on the latter's part as to the boundaries thereby indicated. Durham's plan which is duly recorded in the Department of Lands and Mines shows the area of the portion then claimed by William T. Downer. That portion is shown in Durham's plan as lots 29 and 30 and is thereon coloured yellow. An examination of Durham's plan of the year 1925 with that of Insanally's made in the year 1948, shows clearly that the combined areas of lots 29 and 30 of Durham's plan are only

a part of the total area comprised by lot (a) and lot (b) of Insanally's plan. Lots (a) and (b) in Insanally's plan extend from the trench alongside the Public Road on the west right down the Punt Trench on the east, while the eastern extremity of lots 29 and 30 in Durham's plan is some distance west of the Punt Trench. It is unnecessary to consider the details of the measurements of these two lots 29 and 30 about which there was some conflict between the evidence of Mr. Insanally who testified for the plaintiffs and that given for the defence by another surveyor, Mr. Moses. The Court is prepared to accept as substantially correct the statement given by Mr. Moses that the disputed area comprises' an acreage of 3.15 acres. Part of the lot claimed by Linde is outside of lots 29 and 30 of Durham's plan, while the whole of lot (b) which is claimed by the plaintiff Douglas to have been sold to him by W. T. Downer and the plaintiff Linde in the year 1935, is completely outside of the area comprised by lots 29 and 30 of Durham's plan. The Defendants contend that at no time subsequent to Durham's survey in 1925, did either the plaintiff Linde or her brother Downer or Douglas or any person claiming through them have such occupation of the lands outside of lots 29 and 30 of Durham's plan which would establish a prescriptive title thereto, as against the holder by transport. Accordingly it is obvious that the issue between the plaintiffs Linde and Douglas on the one side and the Defendant Company on the other in these two actions, is whether either of the plaintiffs has established such adverse continuous possession against the Defendant Company, the holder of transport, as would entitle either to a declaration of ownership by prescriptive title of the portion of "Our Retreat" outside of lots 29 and 30 of Durham's plan.

Although as I have stated, the Defendants are not opposing the application by the plaintiff Linde for a declaration of a prescriptive title if limited to that portion of "Our Retreat" which is delineated as lots 29 and 30 on Durham's plan, the question nevertheless arises whether it is competent for the Court in these proceedings to decree a possessive title in favour of the plaintiff Linde of the uncontested area comprised by lots 29 and 30 on Durham's plan. A decree of a possessive title is a *judgment in rem.* Such a decree made in favour of an applicant gives him good title against the whole world. When duly registered it confers upon the person in whose favour the declaration is made an absolute title to the land equivalent to that held by virtue of a transport. Accordingly, before making the declaration the Court ought to be satisfied not only that the applicant for the decree has been in occupation for the prescriptive period, but also that all persons whose interests may possibly be prejudiced thereby have had the opportunity of intervening to oppose the granting of the decree. That is why the Rules of the Supreme Court (Declaration of Title) 1923 which give directions as to the procedure by petition for a declaration of title by prescription make it obligatory that before the hearing certain persons shall be served with notice of the petition and that there shall also be publication of a notice of the petition and supporting affidavits in both the official and daily press. It would be improper therefore for the Court in this case to declare title by prescription in favour of plaintiff Linde only on the admission by the

Defendants that she and her brother were in occupation for the prescriptive period without providing an opportunity to others possibly interested to oppose the grant of the prescriptive title to her. For the same reason it was doubtful, before the passing of the Title to Land (Prescription and Limitation) Ordinance, 1952, whether the Court was competent to make a declaration of a possessive title in proceedings instituted in the form of an action against the legal owner. A special section inserted in that Ordinance was designed to settle the law as to what was the correct form of proceedings after there had been a conflict of judicial opinion on the point. It is now provided by Section 4(a) of that Ordinance that the Court may make a declaration of title in regard to land, or interest in land, in any action which is brought by or against the owner thereof or against any person claiming through him or in which all the parties interested therein are before the Court.

The writs in the two actions now before the Court were filed in the year 1951. The Title to Land (Prescription and Limitation) Ordinance, 1952, came into force on the date of its publication in the Official Gazette on the 27th December, 1952 as indicated in the printed copies of the said Ordinance. At that date the two actions against the Defendants were pending. The Ordinance is not made expressly retrospective. It certainly cannot be treated as retrospective in operation as to any alterations in the law the enforcement of which would prejudicially affect or impair existing rights. In general when the law is altered during the pendency of an action the rights of the parties are decided according to the law as it existed when the action was begun unless the new statute shows a clear intention to vary such rights (*vide* Maxwell on the Interpretation of Statutes 8th Edition, p. 195). But where the statute provides merely for an alteration in procedure any such provision would seem to be retroactive unless there be some good reason against it.

Welby v. Parker 1916 2 A.C p.l.

The direction in Section 4 (a) making it permissible for a declaration of title to be made in an action is one relating to procedure and there that Section may be deemed retrospective to include actions pending at the time when the Ordinance came into force. It also may be contended in favour of the retrospective effect of section 4(a) that the Legislature with full knowledge of the conflict of judicial authority as to the procedure to be followed for obtaining a declaration of title by prescription, enacted section 4(a) deliberately to declare that proceedings by action, subject to all interested parties being before the Court, had always been a lawful mode of procedure for that purpose. And so that part of the enactment embodied in section 4(a), it may be urged, did not alter or change the law, but was just declaratory of the existing law of procedure. As stated in Maxwell at p. 196, "if a statute is in its nature a Declaratory Act, the argument that it must not be construed to take away previous rights is not applicable."

Be that as it may, it is my view that for a declaration by the Court of a possessive title by prescription, whatever the form of the proceedings, whether initiated by action or by petition, every person

who has an interest, whether in law or in equity, which may be directly prejudiced by the decree, should have an opportunity to come forward and oppose the making of the declaration. Therefore what the Court has first to consider in this action is whether everyone who has an interest in the land, or any interest otherwise which may be prejudiced by the grant of the possessive title applied for, is before the Court or has been given the opportunity to come before the Court to oppose the decree of the possessive title asked for. The Rules of the Supreme Court (Declaration of Title) 1923 make it obligatory that amongst others adjoining owners shall be served with the petition for the obvious reason that the decree might include within the boundaries of the land to which title is given some encroachment on the adjoining lands. From a perusal of the survey plans produced in this action it is clearly evident that the lands adjoining the area claimed by the plaintiff Linde are occupied only by the Defendants and by the other plaintiff Douglas, while the piece the plaintiff Douglas claims adjoins lands in the occupation of the plaintiff Linde and of the Defendants. A woman called Jassoda occupies a house on a piece of land south of the piece Douglas claims. Jassoda, who in another action is sued by the Defendants for trespassing on the lands where her house stands was not called as a witness in these actions, but before the trial commenced Counsel for the plaintiffs stated that as counsel for Jassoda in the action brought against her by the Defendants he was willing to have the case against her taken together with those of the plaintiffs Linde and Douglas, to this Counsel for the Defendants refused to consent. In the circumstances Jassoda can be considered as not being unaware of these actions and she could have intervened if she wished. Accordingly it can be taken that no adjoining owner of the lands which in this action are the subject of the claims for a possessive title is without notice of the claims.

But are there any others not before the Court who have such interests as might be prejudiced by the decree of a possessive title which is sought by either the plaintiffs Linde or Douglas? It would be well to examine the title to the inheritance of the possession by her father William Ajax Trim Downer which the plaintiff Linde advances in support of her claim in this action, and on which also the plaintiff Douglas founds (his claim for a possessory title for as stated, the plaintiff Linde claims that she and her brother William T. Downer went into possession as heirs of their father William A. T. Downer. The possession of her brother William T. Downer and herself is not advanced by Linde as having been adverse to that of the estate of their father William Ajax Trim Downer (deceased), but it is pleaded to be merely the continuance of their father's possession by her brother and herself on whom, as the sole surviving heirs, the father's rights devolved. What I mean is this. According to the plaintiff's case, Linde and William T. Downer were not there in occupation exercising a right of ownership by virtue of their own independent rights, but by right of inheritance from their father. It may be that Linde and William T. Downer were, as alleged, the sole surviving children of William Ajax Trim Downer. But were they in law the sole inheritors of the estate? and did that estate include possessive rights over "Our Retreat"?

Now according to the evidence the father William Ajax Trim Downer at the time of his death in 1915 had been in possession of "Our Retreat" for many years. If that possession by him was continuous and as of right for 33} years—the period for prescription under the Roman Dutch Law, which was the system of law governing the right by prescription before the Civil Law of British Guiana Ordinance, Cap. 7 came into force in the year 1917—then the father had already acquired a prescriptive title at the time of his death. The plaintiff Linde who was born in the year 1873 stated that she remembers living with her father in the house on "Our Retreat" from the rime she was 9 years old. That would be in the year 1882 which would be 33 years before the father's death in 1915. It is most likely that the father had at his death already completed the full 331/3 years to give him full title against the Defendants who got transport in the rear 1895. But William Ajax Trim Downer was twice married. His first wife predeceased him, after she had borne for him at least 4 children, two of whom, the plaintiff Linde and William T. Downer, survived their father. Married to this first wife before 1904, he had therefore married in community of property in the absence of an ante nuptial contract to the contrary. On the death of his first wife her half share of the assets belonging to the married pair devolved on her next of kin, the surviving husband being left only with his half which he was free to dispose of as he wished. But William Trim Ajax Downer married a second time, most probably after the year 1904, and this second wife Constance, nee Grazette, survived him for about a year. He made a will in the year 1913 and in accordance with the requirements of the practice at the time this will was duly deposited in the Registrar's Office with an affidavit verifying its due execution which by the existing law gave it the same effect as probate in common form has by the law of England. By this Will William Ajax Trim Downer made a bequest in these terms "to my lawful wife Constance Downer (born Grazette) a 'Life Living' in my house, she can sell my 3/4 portion known as "Our Retreat" and the use of the provisions and fruit trees on the land. Should she marry again or live with any man: the house provisions and fruit trees above mentioned shall pass to my children viz: Edred Alban Trim Downer, Edith Agatha Downer, William Trim Downer and Evelina Downer and my niece Ethel C. Newton or to their Heirs. The property cannot be sold." It is to be noted that the testator who is making a will in the year 1913 when he has already married a second time declares that he has 3/4 portion known as "Our Retreat." Then who was the owner of the remaining 1/4 portion? Is it that he was in error in thinking that it was one-fourth only (the *legitima portio* of Roman Law) and not one half (her share in community of property under Roman Dutch Law) to which the first wife's next of kin were entitled on her death? The testator had been a schoolmaster—a class of individual often with that little learning in the law which is proverbially very dangerous. But perhaps the testator was right in saying that he had only three-quarters of "Our Retreat" after his first wife's death. If she died intestate leaving no child or descendant—that is to say if the children named in the will were not her children, then as surviving husband he

inherited by Roman Dutch Law half of the half share belonging to her by her marriage with him in community of property—which with his one half would make him the owner of three-quarters of "Our Retreat," the other quarter going to her next of kin. This Roman Dutch Law rule of distribution of a deceased spouse's estate on an intestacy has received statutory confirmation (*vide* Inheritance Ordinance, 1887 (No. 9) Section 2 *Official Gazette* of 25th May 1887, p.858 which is reproduced in the Deceased Persons Estates' Administration Ordinance 1909 (No. 9) Section 3).

The importance of this enquiry into the history of William Ajax Trim Downer's occupation of the land is because the plaintiff Linde claims to have inherited her father's rights, and therefore her own possession would be no more than that which her father held and which he made the subject of a gift to her in his will on his death. Prescription is said to be based on the presumption of a lost grant but when the nature and extent of the grant is known, the grantee who goes into possession does not by such possession for the prescriptive period acquire rights beyond what was expressly granted to him. (*Vide* Gardner v. Hodgson's Kingston Brewery Co. (1903) A.C. 229 per Lord Lindly). Can the Court be certain that it has had before it in this action all those who may have an interest in these lands? Are there any persons who may base their claims as successors in title to the wife's half of the rights to the land which fell to her next of kin on her death? Are there any who may claim the remaining one-fourth of the lands of which William Ajax Trim Downer declared he had only three-fourths in the year 1913. Are there any persons who would wish to advance the right to share with the plaintiff Linde and her brother the bequest of "Our Retreat" under the will? If all the testator's children predeceased him save and except the plaintiff Linde and her brother William, what about the testator's niece Ethel C. Newton and all their heirs who were by the will to have the remainder after the wife's interest had terminated in certain circumstances? It is repeated that in proceedings taken by way of petition the publication in the press that a petition has been presented to the Court, which is a requirement insisted on by the Rules of Court, furnishes an opportunity to any interested party to intervene in the proceedings. That opportunity has not been furnished in these proceedings by way of action. The son William Downer died leaving a widow Sarah Downer, who gave evidence and stated that she was making no claim to the lands. Are there any other persons claiming to inherit William T. Downer's share? This share did not devolve on the plaintiff Linde by right of survivorship.

There is no need for me to review in detail the evidence submitted on behalf of the plaintiff. I am satisfied that the evidence led established that William Ajax Trim Downer was in occupation of the land which was known as "Our Retreat" up to the time of his death, and although he may not have cultivated every inch of the ground, he purported up to the time of his death to be exercising dominion over the whole area of "Our Retreat" subject to the rights in one-fourth held by the heirs of his first wife on her death. His possession

extended from the Public Road on the West to as far east as the Punt Trench and in width from a trench which on the north separates "Our Retreat" from Plantation Diamond as far south to the southern boundary of the portion now in the occupation of Jassoda. From time to time he planted fruit trees here and there on the land and reaped the produce and he maintained at some time or other a sort of fence either enclosing the area completely on all sides or on some of the boundaries, and it does not appear that he was ever disturbed in his continuous occupation. Most probably before his death the length of his occupation entitled him to a possessive title under Roman Dutch Law which his first wife and her heirs were entitled to share with him as he and that wife were, if they did not vary it by an ante-nuptial contract, married in community of property. He married the second wife Constance after the year 1904 and therefore their marriage was not in community. At his death, because of the prior death of his first wife, William Ajax Trim Downer had only the remaining three-quarters or at least one half of whatever rights which he and his first wife had previously held. He made a bequest in his will to his second wife which might be construed as giving only a life interest to his wife with remainder over on her death or before her death in certain contingencies to his children and his niece and their heirs. After the death of the second wife, the surviving children, William Trim Downer and the plaintiff Linde, went into occupation by virtue of their father's will. The Court cannot give a possessive title to plaintiff Linde without being satisfied that there is no one—including the heirs of his first wife, the heirs of the other joint beneficiaries of William Ajax Trim Downer, who may be entitled in remainder after the termination of his first wife's interests, including heirs of his son W.T. Downer, against all of whom because of her claims to be in possession under the father's will; plaintiff Linde's possession cannot be adverse.

Although I did not understand Counsel for the plaintiffs to advance the submission that the plaintiffs are both entitled to invoke the proviso to section 3 of the Title to Land (Prescription and Limitation) Ordinance, 1952 which now fixes a period of prescription as 12 years (except in the case of land of the Crown or of the Colony), where all interested parties are before the Court, I think it would be well to make it clear that it is my view that even as against the Defendants who are before the Court as a party to the action such a claim would not be maintainable. Before that Ordinance came into force a period of 12 years occupation as of right merely barred the bringing of an action by the owner for trespass or to recover possession. It did not have the effort of terminating absolutely the interest of the legal owner on the land. If the legal owner could gain possession by some means other than by action he was not debarred from doing so. Nor did possession for 12 years give anyone the right to assert any claim against the legal owner which a decree of a prescriptive title now affords him. In other words before the passing of that Ordinance a period of possession for 12 years was a defensive title merely as distinguished from an assertive title. Before the Ordinance of 1952 the period of prescription was 30 years. In keeping with the

well established canon of construction of statutes none of its provisions can be given a construction in the absence of express words that it is to have an effect, which would impair or diminish any vested interest existing before it was enacted. Certainly it would be prejudicing a vested interest of the owner of the land if he is now not only barred from bringing an action against a person in possession for 12 years, but shall have his title as owner extinguished by a declaration of a possessive title on proof of 12 years possession by another. The proviso to section 3, it may be added, does not like section 4(a) provide a new form of procedure for which reason, as I have stated, an enactment may be deemed retroactive in effect; nor is it declaratory of what the law had been prior to its passing which is another reason for an enactment being deemed retroactive. Although, as I have stated, by possession before the year 1917, if it was for 33+ years continuously and as of right, there might have been established under Roman Dutch Law a prescriptive title equivalent to a legal title sufficient to extinguish the legal title held by the Defendants, the owners by transport, I would point out that such is not the claim put forward by plaintiffs in their pleadings in this action. Besides it is doubtful that the plaintiffs would have been able to maintain such a claim in this action even on an application at the trial to amend their Statements of Claim in which, as I understand it, the claim to a prescriptive title is made by virtue of the provisions of section 4 of the Civil Law of British Guiana Ordinance, Chapter 7, because of the aggregate period of possession by the plaintiffs and their predecessors in title continuously for more than 30 years immediately before the date of the bringing of these actions. Such an amendment would perhaps be in respect of an entirely different cause of action.

According to the authority of a recent unreported decision given on the 6th day of November, 1952, by the West Indian Court of Appeal (Perez, C.J., Trinidad, Jackson, C.J., Windward and Leeward Islands, and Bell, C.J., British Guiana, in Lanferman v. Bobb Semple, had a petition been presented by the plaintiffs for a prescriptive title supported by allegations in affidavits that they and their predecessors in title had been in possession for 33} years before 1917, the petition would have had to be rejected. There is on the proceedings no record of a written judgment delivered by the Court in that appeal which was allowed, but I understand that the ratio decidendi of the Appellate Court was that the petitioner having already acquired by prescription a good legal title by Roman Dutch Law should not have petitioned for a prescriptive title. It seems to me that the same objection would apply against the granting of a decree of a prescriptive title in this action, if the evidence has disclosed a good legal title already in the plaintiffs. In such circumstances, the plaintiff would have to seek in a different action a declaration of a legal title and the consequential relief. But what the Defendants were called upon in this action to defend and what they oppose is the claim of the plaintiffs for a declaration of a prescriptive title over the whole of "Our Retreat" based not upon plaintiffs having acquired a legal title by prescription under Roman Dutch Law but upon an allegation of possession for an aggregate period of more than 30 years of the entire area held by

William Ajax Trim Downer and the plaintiffs themselves in unbroken succession. The Defendants dispute such alleged continuous possession by the plaintiffs of the whole area which includes that portion of "Our Retreat" which is shown in Durham's plan as being outside of lot 29 and lot 30.

It is proposed to review the evidence relating to this disputed portion of "Our Retreat." If the plaintiffs though in long possession of a portion have failed to establish continuous possession of this disputed portion without interruption nec vi, nec clam, nec precario, for 30 years immediately preceding the bringing of their actions, then they would not be entitled against the Defendants to the decree which is sought by them in this action unless the disputed portion is excluded. If, as the Defendants claim, they themselves as the holders of transport were in possession of this disputed portion for any time during the past 50 years, then they effectually prevented the period of prescription to run against them, and the Defendants' opposition to plaintiffs' claim to a prescriptive title over this disputed portion would be conclusive as against the plaintiffs so far as this disputed portion is concerned. There would be no need to give an opportunity to other possible claimants to intervene in this action for the purpose of opposing the plaintiffs' claim. As to the portion in dispute between plaintiffs and Defendants as already has been stated, in the year 1925, the Defendants employed Mr. Durham, a Sworn Land Surveyor to make a survey of Plantation Golden Grove and to mark out certain portions which were claimed by persons then in occupation. Amongst such claimants in occupation was William Trim Downer, the brother of the plaintiff Linde. On the plan which Durham made and certified it is stated by him that the survey was made without any objection by the parties claiming to be in possession. Mr. Durham is no longer alive and therefore could not give testimony in support of Defendants' case, but by virtue of the provisions of section 4 (1) of the Evidence Ordinance 1952 that statement by Durham on the record is admissible in evidence. By his survey Durham assigns to William Trim Downer two lots which he designates on the plan as lots 29 and 30.

The Defendants maintain that plaintiff Linde's brother William T. Downer never after the year 1925 purported to occupy as of right the portion of "Our Retreat" outside of lots 29 and 30, and in the year 1947 they sent Mr. Moses, another Sworn Surveyor to check and mark out on the ground the lots 29 and 30 as delineated by Durham. William T. Downer was then, if not blind, suffering from defective vision of such acuteness that even if present at Moses' survey he would not have been able effectively to safeguard his interests. But I accept Moses' evidence that he found a paal of Durham there on the land and that he delineated the area of lots 29 and 30 more or less in agreement with Durham's plan. I also accept Moses' description of the vegetation he found then on the lands. He observed that on the area of lots 29 and 30 there were many full growing fruit trees there long in existence—but outside of lots 29 and 30 there were no big fruit trees—only a few orange trees about 2 or 3 feet high and a few small coconut trees of the same height. This indicated that whatever

cultivation there was outside of lots 29 and 30 were relatively recent. Although there may have been certain old trees like an old pois doux tree marking the boundary of "Our Retreat" which Moses admitted under cross-examination he saw there—neither this tree nor the type of tree like an old cashew tree nor a few mango trees can be considered as furnishing evidence that the area outside of lots 29 and 30 had been under continuous cultivation as that within lots 29 and 30.

But evidence of the absence of continuous occupation of this disputed area as of right by William T. Downer was furnished more conclusively by the evidence relating to a lease of part of this area from the Defendant Company to William T. Downer, bearing date 1st January, 1941. The Defendants brought an action in the Magistrate's Court against W. T. Downer for recovery of rent due under this lease, and judgment went against Downer for the rent claimed. An appeal against the Magistrate's decision given on 2nd June, 1948, was dismissed by the Full Court on the 10th November, 1948. The land leased is described in the deed of lease as lots 272/274, situate at Plantation Golden Grove on the East Bank of the Demerara River, and the period of lease was declared to be one from month to month commencing from 1st January, 1941, until the tenancy shall have been determined as therein provided, and the rental was fixed at $1.00 per month payable in advance. I am satisfied that lots 272/274—which numbering is that given to the lots in the Estate Books—fall within the lands which the plaintiffs and William Trim Ajax Downer described as "Our Retreat," but outside lots 29 and 30 in Durham's plan. The plaintiff Douglas in his evidence at this trial tried to convince the Court that the lands which were the subject of the lease and in respect of which judgment went against W. T. Downer for rent due were lands at Grove other than lands forming part of "Our Retreat." Where these other lands are situate Douglas in his evidence was not able to indicate. It is interesting to note that before the Magistrate Downer in his evidence stated that he did not sign any lease at all; he pleaded blindness at the time, but admitted that he had sent $2.00 in payment of 2 years rent and stated that he had stopped payment when he discovered the dimensions to be not as he thought was agreed. Ramoutar a witness called by the Estate Authorities in his evidence told the Magistrate that William. T. Downer who had his own lands there had been encroaching on the lands of the estate for about 5 years before he had agreed to sign the lease at a rental of $1.00 a year. There can be no doubt that the Defendant Company has satisfactorily established at this trial before me that lots 272/274 according to the numbers given in Estate Books, form portion of the disputed area of " Our Retreat," and that acceptance by Downer of the lease would have been inconsistent with a claim by him and his co-owner the plaintiff Linde for whom it is admitted he was authorised to act, that their possession of the disputed portion was nee vi, nee clam, nee precario. The plaintiff Douglas' possession of his portion which is claimed to be as a result of an assignment by Downer and Linde to him would be similarly affected. It is true that with reference to another portion of these lands that is a portion south of that claimed by Douglas there would appear to have been at one time some confusion in the minds

of the Estate Authorities as to whether it belonged to the Downers. About 2 years before the year 1931 a man called Robert McAlman was allowed by the Estate Authorities to select and occupy as a tenant a portion of land somewhere about where Jassoda's house now stands, which is south of what Douglas claims, and McAlman paid rent to the Defendant for about 2 years. William T. Downer was at the time away in the interior at the gold fields. On his return the Estate Authorities would seem to have consented to McAlman arranging to pay rent to William T. Downer who would appear to have laid claim to the place which McAlman occupied. This acknowledgement of Downer's ownership of the piece occupied by McAlman more directly concerns the issue to be determined between the Defendant Company and Jassoda in the trial of the pending action between the Company and Jassoda. But although the Company must have known that McAlman and afterwards Jassoda were in occupation under some agreement with W. T. Downer, I take the view that that is not sufficient to contradict the evidence furnished by Durham's plan in 1925 and the subsequent acceptance of the lease by Downer in 1941 that the Estate Authorities as holders by transport had not relinquished their claim to the ownership of the portion of "Our Retreat" outside lot 29 and lot 30 of Durham's plan.

In the result I reject as against the Defendants, the holders by Transport, the claim to a possessive title to the whole of "Our Retreat." Upon this is based the claim made toy the plaintiff Linde in her action, that made by the plaintiff Douglas in his action. I find that they both have failed to establish possession nee vi, nee clam, nee precario of any land which is outside the area of lots 29 and 30 in Durham's plan. If and when the Court is satisfied that all other parties interested in lots 29 and 30 are before the Court or have had the opportunity to appear the plaintiff Linde may succeed by virtue of the long possession by her and her predecessors in getting a decree of possessive title to those two lots. Accordingly as regards lots 29 and 30 shown on Durham's plan I shall now give only a decree nisi of a possessive title in favour of the plaintiff Linde the decree to become absolute and shall be registered on Defendants' transport after one month from the date hereof, if no person applies to intervene and is given leave to appear and show cause that the decree should not be made absolute; and I direct that the plaintiff Linde before applying to have this decree made absolute shall publish once the Official Gazette and in two successive Sundays issues of a daily newspaper published in the Colony a notice of her intention to have this order nisi made absolute unless some person interested obtains leave to intervene before that date. With regard to the area outside of lots 29 and 30 which includes the remaining portion of the area claimed by Linde and the whole of the area claimed by Douglas I dismiss the application for a declaration of possessive title and the claim for trespass against the Defendants for the digging of a drain ploughing up the lands in this portion. Accordingly as to this portion there will be judgment for the Defendants. The Defendants are entitled to their costs in the whole of the proceedings. Although the plaintiffs have obtained an order nisi with regard to a part of the

area, it was understood that the Defendants at no time were opposing a possessive title to the area referred to in the order nisi and the Defendants had made their attitude as to this abundantly clear in their Statement of Defence. The Defendants have not counterclaimed for any relief against either plaintiff.

In awarding Defendants their costs I certify the matter as fit for two Counsels.

E. JACK, N. JACK and DORA SUPERSAD *v.* IRVING SUPERSAD

(In the West Indian Court of Appeal, on appeal from the Supreme Court of Trinidad and Tobago (Mathieu Perez, Collymore and Malone C.J.J.) January 18, 1954).

Will—Onus probandi—Suspicious circumstances—Court's vigilance.

This was an action in which the trial Judge pronounced for the force and validity of the alleged last will and testament of a deceased person.

The appellants, the brothers and sister of the deceased, alleged that she died intestate while the respondent, her nephew, claimed that she made her last will on the 16th September, 1948.

The deceased, who died as a result of a motor car accident, was in good health up to the date of her death on the 17th October, 1948. She was accustomed to seek the advice of a solicitor friend. Her will was found in respondent's house five weeks after her death. It was not made by her Solicitor or by anyone with legal knowledge. The witnesses to her will lived about four miles from her residence. Her signature on the will when compared with her authentic signatures on other documents raised doubts as to its genuineness. The respondent's wife was the sole beneficiary.

On appeal.

Held: While the Court will not presume fraud or undue influence, yet when there are circumstances in connection with the preparation and execution of the will which excite the Court's vigilance it may pronounce against the will, unless such suspicion is removed, even though no fraud or undue influence can be brought home against the person propounding the will.

Had the trial Judge applied those principles, he could not have pronounced in favour of the will, in view of the suspicious circumstances.

Appeal allowed.

Claim that a deceased person died intestate and that the Court should grant Letters of Administration to the appellants. Counterclaim praying that the Court pronounce for the validity of a will alleged to toe executed by the deceased.

Judgment of the Court:

This case comes before this Court on appeal from a judgement of Mr. Justice Duke whereby he pronounced for the force and validity of the alleged last will and testament of Lucilia Salomon, deceased, bearing date the 16th September, 1948, and propounded on behalf of Irving Supersad, the executor therein named. The appellants are the brothers and sisters of the deceased who died on the 17th October, 1948, at the Colonial Hospital, San Fernando from injuries received that day in a motor car accident. The respondent is a nephew of the deceased and a son of Dora Supersad, one of the appellants. The appellants claiming that Lucilia Salomon died intestate and that they as some of the next of kin of the deceased are entitled to have a Grant of Letters of Administration of the estate of the deceased applied to the Supreme

Court of Trinidad and Tobago, on the 17th June, 1949, for such grant. On the 30th June, 1949, the respondent lodged a caveat against the application of the appellants on the ground that the deceased had left a will. The appellants then issued a Writ of Summons against the respondent on the 11th January, 1950. In their Statement of Claim they asked (a) that the Court pronounce against the validity of the alleged will of the 16th September, 1948, and (b) that a Grant of Letters of Administration of the estate of the deceased be made to them. The respondent by his Defence and Counterclaim delivered on the 6th February, 1950 (1) denied that the deceased died intestate (2) counterclaimed that the deceased executed her true last will dated the 16th September, 1948, whereby she appointed the respondent her executor, and claimed (3) that the Court should pronounce for the said will in solemn form of law.

It is well settled that the *onus probandi* lies in every case on the party propounding a will and in "all cases in which circumstances exist which excite the suspicion of the Court, and wherever such circumstances exist, and whatever their nature may be it is for those who propound the will to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will" (per Lindley L.J. in *Tyrell* v. *Painton* (1894), P.151 at p.157). The Court will not presume fraud or undue influence but where there are circumstances in connection with the preparation and execution of the will which excite the Court's suspicion and vigilance it may pronounce against the will, unless such suspicion is removed, even though no fraud or undue influence can be brought home to the person propounding the will.

It is necessary to apply this established rule to the facts of this case, and to bear well in mind that the Court is not to pronounce in favour of the will unless it is judicially satisfied that the document propounded is indeed the last will of the testatrix. The parties opposing the will are not required, for example, to prove that the signature of the deceased on the document propounded is a forgery. If the existence of matters which excite the suspicion of the Court are established the Court will not pronounce in favour of the will unless this suspicion is removed.

This Court is always reluctant to dissent from the conclusion on a question of fact at which a judge who has seen and heard the witnesses has arrived, but "If," as Viscount Simon points out in *Watt* (or Thomas) vs. Thomas (1947) 1 All E.R.582 at p,583, "there is no evidence to support a particular conclusion (and this is really a question of law) the appellant court will not hesitate to so decide, but if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in

determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given."

The deceased Lucilia Salomon, up to the time of the accident which resulted in her death on Sunday the 17th October, 1948, was in good health. She was a district creche nurse, aged 45, and a widow who had been married twice. She was stationed at the Usine Ste. Madeleine, and lived near the dispensary. She had acquired certain property, and at the time of her death was in comfortable circumstances. She was accustomed to seek the advice of her solicitors from time to time and indeed was on friendly terms with one Mr. Jack, a solicitor.

A man named Barclay was a boarder of the deceased woman and he had been pressing his attention upon her—attentions which were not welcomed.

Mrs. Salomon had several nephews and nieces and was very fond of children. The respondent and his daughter Yvonne (then aged 11 years) were among her favourites and it is quite probable that in making a will she would have regarded these two as objects of her bounty. This probability would have greater force were it a case of two opposing wills but it loses much of its effect where the contest is between the validity of a will and an intestacy.

No question arises as to the competence of the deceased to make a will nor is there any suggestion of undue influence, but there are several circumstances relied upon by the appellants which, they insist are suspicious and should be sufficient to prevent the Court from being judicially satisfied that the instrument dated the 16th September, 1948. is the will of the testatrix.

Firstly, there is the fortuitous finding of this document in a wardrobe in the respondent's house by the respondent's wife, on the 22nd November 1948 nearly five weeks after the death of Mrs. Salomon. The deceased was a frequent visitor at the respondent's house and one shelf of this wardrobe had been specially appropriated by the deceased for her sole use. Here, to the knowledge of the respondent, she kept certain documents, papers and clothing. When it is remembered that the respondent, believing as he said, that the deceased had left a will in his favour had made four or five days intensive search for it at the cottage of the deceased and elsewhere immediately after her death, it is passing strange that he should have omitted to search in one of the most likely places—the shelf referred to above. It is emphasised that it was quite by accident that the respondent's wife came upon this valuable document.

Secondly, it is not without significance that the deceased, who was accustomed to take the advice of solicitors in her important business matters, should, in the equally important matter of making her will, have avoided the solicitors who usually acted for her. Apparently she either made the will herself or got someone with little legal knowledge to make it for her.

Thirdly, there is the peculiar action which the deceased is alleged to have taken in going about four miles from her residence at the Usine Ste. Madeleine where she was well known, to obtain the two witnesses to her will, and have the will executed there. If this was done for secrecy then why did she disclose to the respondent's daughter (a child of eleven) the provision she proposed to make for the respondent. Furthermore, why, if secrecy was her aim should she disclose the contents of the alleged will to these two men whereas she could have obtained witnesses at the Usine Ste. Madeleine without any such disclosure.

Fourthly, there is the extraordinary evidence given by Yvonne Supersad the respondent's daughter, that the deceased on a Sunday in July 1948, the morning after the incident when Barclay allegedly pointed a gun at her, should show the witness a typewritten paper and, indicating the name 'Irving Supersad' on this paper, say to her, "This paper, all that I have is for your Daddy. I have no one else to give. Barclay is not going to get anything from me." If this paper writing was made because of Barclay's threat the previous evening then it was done very quickly. If it is the same document which the respondent seeks to propound as the will of the deceased then at the time it was shown to Yvonne it must have been undated, and the question must naturally be asked, why did the deceased wait for approximately two months before having it executed and witnessed? In any event the deceased who it is suggested was observing great secrecy in the making and execution of her will was now showing the contents of it to Yvonne.

Fifthly, there is the document itself which bears the date 16th September, 1948. It is written on thin paper which would lend itself readily to forgery by tracing. The signature 'Lucilia Salomon' on this document shows the presence of tremor, unequal and irregular pressure of the pen, as well as stoppages of the pen on the paper and unnecessary pen lifts. Comparison of this signature with authentic signatures of the deceased on other documents and papers raises doubts as to the genuineness of the signature on the document of the 16th September, 1948.

Sixthly, there is the circumstance that the respondent, whose wife accidentally discovered the alleged will of the deceased, is the sole beneficiary, and inherits by this document all the property left by the deceased.

All these matters must inevitably excite suspicion in the mind of the Court, and this suspicion must be removed by the party propounding the document before the Court can be judicially satisfied that the document is what is claimed for it.

The learned trial judge in coming to the conclusion that the document of the 16th September, 1948, is the true last will and testament of the deceased relied entirely on the evidence given by the subscribing witnesses Edward Bissoo and David Lallmansingh whose testimony he accepted as to the execution of the will by the deceased. He had the advantage of seeing and hearing these witnesses, which this Court has not had, and on their testimony there would be no doubt that the will was proved if there were no circumstances on the

other side to impeach it. In this case there are such circumstances and they are, in our view, so gravely suspicious and raise such a reasonable doubt that, had the learned trial judge applied the principle of law which we have enunciated above, and which we think he should have applied, he must have come to the conclusion that the Court was called upon to pronounce against the document dated the 16th September, 1948.

We have no hesitation in pronouncing against the document propounded by the respondent as the last will of Lucilia Salomon.

The appeal is allowed. The order made by the learned trial judge is annulled, and the plaintiffs' claim for a Grant of Letters of Administration of the estate of Lucilia Salomon (deceased) is allowed.

The respondent will pay the costs of the action and of this appeal.

SOODEEN *v*. RAMOUTAR

(In the West Indian Court of Appeal, on appeal from the Supreme Court of Trinidad and Tobago (Collymore, Bell, C.J.J. Malone, acting C.J.) January 29, 1954.)

Trust—Trustee—Beneficiaries—Action—Pleadings—Fraud—Trial of action —Relief claimed—Relief granted not claimed—Practice and Procedure.

The defendant-appellant was the sole surviving trustee of the estate of C.C.S., who died on the 26th April, 1926.

On the 6th June, 1947, the respondent instituted proceedings against the appellant for an order for the administration of the estate of C.C.S., and a judge ordered that the trusts of the will of C.C.S. ought to be performed and carried into execution.

By deed dated the 29th November, 1948, the appellant as personal representative of C.C.S, conveyed to his brother R.H.S. certain real property for the sum of $36,000.

On the 20th December, 1948, the respondent issued a writ of summons against the appellant as executor of C.C.S. and against R.H.S. in his personal capacity to have the deed of the 29th November, 1948, set aside on the ground of fraud. In the statement of claim an additional ground for setting aside the deed was asked for, namely, that the appellant had committed a breach of trust by selling the property below its true or market value.

The trial judge found that the value of the property sold was $54,000 and that the appellant had committed a breach of trust by selling it without obtaining the sanction 'of the Court. He did not find any fraud or that R.H.S. had notice of the previous administration proceedings. He found that R.H.S. was *bona fide* purchaser for value,

The judge dismissed the action against R.H.S. but ordered that the appellant be deemed to have received $54,000 and to account to the Trust Estate accordingly.

On appeal.

Held: The specific relief asked for in the pleadings was to have the deed of the 29th November, 1948, set aside. The judge granted relief on the ground of the trustee's wilful neglect and default but he was not justified in granting relief which was not claimed.

Appeal allowed.

Action by a beneficiary to set aside a sale by a trustee to another beneficiary on the ground of fraud and inadequacy of the purchase price.

The West Indian Court of Appeal while allowing the appeal on the ground that the relief granted by the judge was not the relief claimed nevertheless expressed the view that the purchase price of the property sold by the Trustee to one of the beneficiaries was not inadequate. The Court made some observations regarding what should be considered when endeavouring to arrive at the true market price of real estate.

Judgment of the Court:

In this appeal Charles Stanley Soodeen, the defendant-appellant is the sole surviving trustee of the estate of Charles Clarence Soodeen who died on the 26th April, 1926. By his will which was admitted to probate in November 1927, Charles Clarence Soodeen devised and bequeathed all his real and personal estate to trustees with power to sell and convert and after payment of the usual debts and expenses directed payment of the income to his widow during her life and after her death in equal shares to his sons who had attained the age of twenty-one years and to his daughters with the same attainment or who had married.

The widow died in 1935 and the interests of nine children accrued as at that date. Wilfred Harold Soodeen, a son and beneficiary under the will, died intestate in 1935 and the respondent (plaintiff), now Beryl Ramoutar, is his widow and the qualified administratrix of his estate.

On the 6th day of June, 1947, the respondent instituted proceedings entitled Beryl Ramoutar plaintiff and Charles Stanley Soodeen defendant, No. 57 of 1947 in the Supreme Court of this Colony, Sub-Registry San Fernando, for an order for the administration of the estate of the said Charles Clarence Soodeen.

On the 25th day of June, Mathieu-Perez J. in the said proceedings ordered, *inter alia*, that the trusts of the will of the said Charles Clarence Soodeen dated the 6th day of October, 1909, ought to be performed and carried into execution and ordered the usual inquiries and accounts.

On the 29th day of November, 1948, and at all material times Ralph Harvey Soodeen, a brother of the trustee and a beneficiary under the will, carried on business in certain premises in San Fernando art of the unadministered real estate of the deceased testator) known as 37 and 39 High Street, as the tenant of the trustee Charles Stanley Soodeen. The said Charles Stanley Soodeen on the 29th November, 1948, and at all material times worked on the said premises as a clerk of Ralph Harvey Soodeen who was one of the defendants in the action out of which this appeal arises.

By deed dated the 29th day of November, 1948, registered as number 2477 of the protocol of deeds for the year 1948, the appellant Charles Stanley Sooden as personal representative of Charles Clarence Soodeen conveyed to Ralph Harvey Soodeen the premises known as numbers 37 and 39 High Street in the Town of San Fernando for the sum of $36,000. This price, it has been alleged, is very much below the true market value of the premises.

On the 20th day of December, 1948, the respondent issued a Writ of Summons against the appellant as executor of Charles Clarence Soodeen, deceased, and against Ralph Harvey Soodeen in his personal capacity to have the deed of the 29th day of November, 1948, set

aside on the ground of fraud. The Statement of Claim was delivered on the 12th January, 1948. Paragraphs 14, 19, 22 and 23 contain the material allegations from which questions arise for consideration in this appeal. For the sake of clarity we think it desirable to set out these paragraphs in full:

> "14. On the 25th day of June, 1947, Mr. Justice J. L. Mathieu-Perez in the said proceedings ordered *inter alia* that the trusts of the Will of the said Charles Clarence Soodeen dated the 6th day of October, 1909, ought to be performed and carried into execution and ordered the usual inquiries and accounts.
>
> * * * * *
>
> 19. Another portion of the real estate of the said testator Charles Clarence Soodeen remaining unadministered on the 29th day of November, 1948, was a freehold property comprising Two Lots measuring 5,000 superficial feet and 4,896 superficial feet respectively with the building thereon situate and known and assessed as numbers 37 and 39 High Street in the Town of San Fernando where the defendant Ralph Harvey Soodeen carried on his business of a wholesale provision merchant.
>
> * * * * *
>
> 22. By deed dated the said 29th day of November, 1948, registered as number 2477 of the protocol of deeds for the year 1948, the defendant Charles Stanley Soodeen as personal representative of the said Charles Clarence Soodeen conveyed unto the defendant Ralph Harvey Soodeen the said premises known as numbers 37 and 39 High Street in the Town of San Fernando for the sum of $36,000 that is to say a price very much below the true or real market value of the said premises.
>
> 23. The plaintiff alleges that the allegations contained in paragraph 22 hereof constitute a breach of trust on the part of Charles Stanley Soodeen."

In the alternative the respondent says that on the 29th November, 1948, and at all material times the defendants unlawfully and fraudulently conspired and agreed together to cheat and defraud the plaintiff as administratrix of the estate of Wilfred Harold Soodeen from receiving the full share of the said estate in the hereditament 37 and 39 High Street in the town of San Fernando in the Island of Trinidad. And she claims:—

A. To have the deed of the 29th day of November, 1948, registered as number 2477 of the protocol of deeds in the year 1948 set aside.

B. Such other or further relief as the nature of the case may require."

The action was tried in November, 1950, and in June 1951, the trial judge made the following findings:

> "1. That the value of the hereditament No. 37 and 39 High Street, in the Town of San Fernando, sold by the trustee-defendant Charles Stanley Soodeen to the defendant Ralph Harvey Soodeen and conveyed by the Deed of Conveyance dated the 29th

day of November, 1948, and registered as No. 2477 of the protocol of Deeds for the year 1948 made between the defendant Charles Stanley Soodeen of the one part, and the defendant Ralph Harvey Soodeen of the other part, is fifty-four thousand dollars and not thirty-six thousand dollars.

2. That the defendant Charles Stanley Soodeen committed a breach of Trust in that he the said Charles Stanley Soodeen sold and conveyed the hereditament No. 37 and 39 High Street, San Fernando aforesaid, part of the Trust Estate of Charles Clarence Soodeen, deceased, without obtaining the sanction of the Court and so sold and conveyed the said hereditament without obtaining directions from the Court, for the sum of thirty-six thousand dollars, that is to say, for a sum less than fifty-four thousand dollars.

3. That the defendant Ralph Harvey Soodeen did not have notice of the Administration Order made by His Honour Mr. Justice J. L. Mathieu-Perez dated the 25th day of June, 1947, made in Supreme Court proceedings numbered 57 of 1947 in the Supreme Court of this Colony, Sub-Registry, San Fernando, and filed therein.

4. That the defendant Ralph Harvey Soodeen was a *bona fide* purchaser of the hereditament 37 and 39 High Street, San Fernando aforesaid for value without notice of the aforesaid Order of the 25th June, 1947."

and he ordered

"(a) that the application of the trustee-defendant Charles Stanley Soodeen that the sale of the hereditament No. 37 and 39 High Street, San Fernando aforesaid, for the sum of thirty-six thousand dollars be approved and confirmed by the Court, be, and the same is hereby refused;

(b) that the application of the trustee-defendant Charles Stanley Soodeen, that he be relieved under section 62 of the Trustee Ordinance, Ch. 8 No. 3 from personal liability for his breach of trust as aforesaid be, and the same is hereby refused;

(c) that the plaintiff's claim against the defendant Ralph Harvey Soodeen, be, and the same is hereby dismissed, and that judgment be entered for the said defendant Ralph Harvey Soodeen against the plaintiff with his costs of suit."

Judgment was given for the plaintiff (respondent) against the defendant (appellant) Charles Stanley Soodeen:—

"(1) For an order that, notwithstanding the fact that the consideration mentioned in Deed No. 2477 of 1948, as having been received by the defendant Charles Stanley Soodeen in his capacity as the sole surviving executor and trustee under the will of Charles Clarence Soodeen, deceased from Ralph Harvey Soodeen for the hereditament 37 and 39 High Street, San Fernando, is the sum of thirty-six thousand dollars, the defendant Charles Stanley Soodeen, in his capacity as aforesaid, shall be deemed to have received from Ralph Harvey Soodeen the sum which he ought to have received namely, the sum of fifty-four thousand dollars as the purchase price of 37 and 39 High Street, San Fernando.

(2) that the defendant Charles Stanley Soodeen in his capacity as aforesaid shall account to the Trust Estate in the same manner, and to the like extent, as if he had in fact received the sum of fifty-four thousand dollars from Ralph Harvey Soodeen as the purchase of 37 and 39 High Street, San Fernando.

(3) that the plaintiff's costs of, and incidental to this fiction, together with the amount of the costs recoverable under this Order by the defendant Ralph Harvey Soodeen against the plaintiff, are hereby recoverable by the plaintiff against the defendant Charles Stanley Soodeen in his own right."

The defendant-appellant Charles Stanley Soodeen has appealed to this Court against the whole of the judgment except in so far as it finds the appellant not guilty of fraud or conspiracy, and also in so far as it relates to the Judge's findings numbered 3 and 4.

The grounds of appeal come under two heads, the one relating to matters of practice and procedure arising out of the pleadings and the other involving the alleged inadequacy of the purchase price of $36,000 paid by Ralph Harvey Soodeen and accepted by the appellant for the trust property. With regard to the first of these there has not been and there cannot be any suggestion that irregularities, if such there were, were waived or acquiesced in, as objections thereto were taken before the trial judge.

On behalf of the appellant it has been contended (1) that nowhere in the Statement of Claim is any allegation or claim made that the trustee (the appellant) committed a breach of trust merely by selling the trust property.

(2) that nowhere in the Statement of Claim is any allegation or claim made that the Trustee committed a breach of trust by selling without the sanction of the Court, or that (because of the order made in Chambers on the 25th June, 1947, such sanction was necessary to validate the sale.

(3) that the claim was based, primarily, on fraud—a conspiracy to cheat and defraud; the only other ground of complaint adumbrated being that the Trustee had committed a breach of trust by selling (as it was alleged) at a gross under value.

(4) that the evidence does not warrant a finding that the purchase price of $36,000 was inadequate, and, in any event, mere inadequacy of consideration (however gross) would not entitle the plaintiff (respondent) to have the deed set aside.

(5) that the plaintiff-respondent by her Statement of Claim was limited to the specific relief asked for, namely the setting aside of the deed of the 29th November, 1948, and to such other and further relief as the nature of the case might require; and that the trial judge was not justified in making an order that the trustee should account to the trust estate for the sum of $18,000, that sum being the difference between the purchase price of $36,000 paid for the hereditament numbers 37 and 39 High Street, San Fernando and their true market value (as found by the trial judge) of $54,000.

(6) that it was not competent for the judge to order the appellant

to pay to the respondent such costs as were payable by her to the defendant Ralph Harvey Soodeen, or to award to the respondent the entire costs of the action.

It is quite apparent from the Writ of Summons that the claim which the plaintiff-respondent originally put forward was a claim against the appellant and Ralph Harvey Soodeen to have the deed of the 29th November, 1948, set aside on the ground of fraud. In her Statement of Claim, however, an additional ground was introduced for asking that this deed be set aside, and this ground was that the appellant had committed a breach of trust by selling the property at High Street, San Fernando to Ralph Harvey Soodeen at a price very much below its true or real market value. These two were the only grounds in respect of which the respondent sought relief, and the only relief she sought was the setting aside of the deed of the 29th November, 1948, and such other and further relief as the nature of the case might require. In the course of the trial it became evident that the appellant (trustee) had sold the property without the sanction or approval of the Court. This undoubtedly constituted a breach of trust. The judge invited counsel for the respondent to apply for an amendment to his pleadings so that this specific breach of trust might be raised on the pleadings. Counsel however submitted that the pleadings did not require amendment and declined this invitation. Although reference is made in paragraphs 14 and 24 (d) and (e) of the Statement of Claim to Mr. Justice J. L. Mathieu Perez' order of the 25th June, 1947, there is, as we have pointed out, no allegation in the Statement of Claim that the appellant committed a breach of trust because of his failure to apply under the terms of the order for the sanction or directions of the Court before selling the property at High Street, San Fernando; nor is any remedy sought for any such breach of trust. The reference to the order in paragraph 14 is merely as a matter of inducement, and in paragraph 24 (d) and (e) the knowledge of the two defendants of the existence of this order is given as a part of the particulars showing that the two defendants fraudulently conspired and agreed together to cheat and defraud the plaintiff. The judge negatived the allegations of conspiracy to defraud; found that Ralph Harvey Soodeen was a *bona fide* purchaser for value without notice of the order, and declined to set aside the deed of the 29th November, 1948. He found, however, that the appellant had committed a breach of trust in selling the hereditament at High Street without the sanction or directions of the Court and for a sum less than its true market value which he placed at $54,000. He ordered the appellant (trustee) to account to the trust estate for the sum of $18,000, that is, the difference between the sum of $36,000 paid by Ralph Harvey Soodeen for the said premises and the market value of $54,000 as found by the judge. The question raised for our consideration is whether, on the pleadings, as they stand, the judge was justified in making this order and giving relief in this manner.

Under Order 21, rules 5 and 6 of the Rules of the Supreme Court of Trinidad and Tobago the provisions of which order are the same as those of Order 20, rules 6 and 7 of the Supreme Court Rules

(Annual Practice) general relief may be given but it must be consistent with the relief specifically claimed.

In Daniell's Chancery Practice (8th edition) at p.370 the practice is stated in this way:

> "Every statement of claim must state specifically the relief which the plaintiff claims, either simply or in the alternative; but it is not necessary to ask for general or other relief. The framing of this part of the Statement of Claim requires in complicated cases great care and attention; for, although where the claim for relief does not extend to embrace all the relief to which the plaintiff may at the trial show a right, the deficient relief may be supplied as the Court may think just, to the same extent as if it had been asked for, yet such relief must be consistent with that specifically claimed, as well as with the case raised by the pleading; for the Court will not suffer a defendant to be taken by surprise, and permit a plaintiff to neglect and pass over the claim he has made, and take another judgment."

and at page 372 :

> "It is not enough for the plaintiff to allege that the defendant has committed breaches of trust, he must give particulars of the breaches. It is not the practice of the Court where one breach is proved to direct a roving inquiry whether there are any other breaches of trust. The plaintiff is not entitled to relief at the trial except in regard to that which is alleged in the pleadings and proved."

"There is no dispute about the rule on this subject," said Baron Parke in Cockerell v. Dickens (1840) 18 E.R. at p.347, "which is laid down by Lord Eldon in Hiern v. Mill 13 Ves. 119 in very distinct terms":

> "The rule is, that if the Bill contains charges, putting facts in issue, that are material, the plaintiff is entitled to the relief, which those facts will sustain under the general prayer; but he cannot desert specific relief prayed; and under the general prayer ask specific relief of another description; unless the facts and circumstances, charged by the Bill will, consistently with the rules of the Court, maintain that relief."

Applying this rule in the present case we find that the specific relief asked for in the pleadings is "to have the said deed of the 29th day of November, 1948, registered as number 2477 of the protocol of deeds for the year 1948 set aside." This prayer was made for the obvious reason that the respondent desired to have the property put up for sale again with the hope that a higher price would be realised. The judge however declined to set this deed aside because he found that there was no conspiracy to defraud and that the purchaser (one of the defendants in the action) was a *bona fide* purchaser for value without notice of the administration order made by the Court. Somewhat surprisingly there has been no complaint against this finding. A breach of trust, not raised as an issue in the pleadings, formed the basis of the relief granted. The plaintiff rejected an invitation to amend the pleadings whereby this breach of trust would

be specifically pleaded as such and specific relief claimed in respect thereof. It does not seem to us that in these circumstances and having regard to the rule referred to above a judge is justified in giving relief which is not claimed; nor can he be justified in granting relief altogether of another description, and, in our view, quite inconsistent with the relief claimed in the pleadings. The effect of the trial judge's order will be to charge a trustee with a sum of money which but for his wilful neglect and default he might have received; wilful neglect and default must always be distinctly charged on the pleadings, and no such charge has been made in this case.

This is sufficient to dispose of the appeal, but we think we should express our views on the appellant's contention that the evidence does not warrant a finding that the purchase price of $36,000 paid for the hereditament known as numbers 37 and 39 High Street was inadequate.

It is clearly the duty of a trustee to sell the estate to the best advantage he can in all the circumstances, and if he sells under circumstances of great improvidence and waste he will be personally responsible. In the case it is the market value of the property which has to be ascertained in order to arrive at a correct conclusion as to whether or not the sum of $36,000 is an adequate price.

It is well known that in endeavouring to arrive at the true market price of real estate consideration must be given to various factors among them being the net annual income, the rate of interest to be allowed for, any immediate expense of a capital nature necessary in order to secure the income, the likely people in the market, the highly important factor as to whether vacant possession can be obtained or not, and the special considerations affecting the particular property to be valued. Prices obtained for similar property in the vicinity must also be considered.

The only income to be derived from 37 and 39 High Street by any purchaser is the rent, which the evidence shows is $70 a month.

Because of the Rent Restriction Ordinance it is extremely unlikely that any appreciable increase of this rent can be obtained unless, for example, improvements are carried out to the buildings. It would also be extremely difficult and it may be impossible to eject the present tenant. The result is bound to be that in such circumstances the number of persons who would be willing to purchase will be very limited. Even if it were possible to increase the present monthly rental of $70 by 50% to $105 (from which should be deducted two months' rent to cover rates, taxes, cost of repairs and insurance) the total net annual income would be only $1,050. It can be safely assumed that no person looking for an investment would be likely to pay $54,000 for this property, as the yield from this investment would be less than *2%* per annum. It must be borne in mind, too, that the buildings are not in good order. The fact that vacant possession might not be obtained would also strongly deter prospective purchasers who might desire to purchase the property for business or residential purposes, as they would have only a speculator’s chance of ever enjoying the benefit of pleasure of occupancy.

It was established by the evidence that for various reasons real property on the North side of High Street, San Fernando fetches much higher prices than property on the South side of the same street; yet the witnesses Webster, Duverney and Harris who gave evidence as to the value of real estate in San Fernando, and made comparisons of prices paid for lands in the vicinity of 37 and 39 High Street, referred in practically every case to premises on the North side of High Street in respect of which vacant possession was obtainable. In practically each instance in which very high prices were paid, there was too, some special reason inducing the purchase. The true market value is not the fantastic price which is paid by a buyer who insists upon purchasing regardless of the yield on his outlay. The only reference made to the price paid for premises on the South side of this street was by Reece a witness for the appellant. In arriving at their opinions as to the value of 37 and 39 High Street, Webster, Duverney and Harris do not seem to have paid sufficient regard to the circumstances that vacant possession of these premises could not be secured, and little, if any, regard to the fact that the premises were situated on the South side of High Street.

The trial judge in coming to the conclusion that the value of 37 and 39 High Street is $54,000 was undoubtedly guided by the opinions as to value expressed by the witnesses Webster, Duverney and Harris and in so doing did not give due regard to the fact that the existence of the Rent Restriction Ordinance has materially affected the selling value of property to which the Ordinance applies. This Ordinance has limited the market and where vacant possession cannot be secured it has lowered the market value. It is true that owing to the scarcity of houses and to the operation of the Ordinance fabulous prices at times have been paid, but these' prices have dependent upon the fact that vacant possession was obtainable, or upon some whimsical desire to own a particular property for a particular reason. The appellant did not advertise the property for sale but the evidence shows that he sounded the market (in one instance with the aid of one of the beneficiaries) and endeavoured on more than one occasion to effect a sale, and each time the insurmountable obstacle was that vacant possession could not be secured. The question for the Judge's decision was the adequacy or inadequacy of the price paid for the particular property in a certain locality and subject to certain disadvantages and restrictions, and while there is no absolute yardstick whereby the market value can be determined there is the evidence relating to the sale of No. 35 High Street, San Fernando. This should furnish a basis for calculating the true market value of 37 and 39 High Street. The area of No. 35 was approximately half the area of No. 37 and 39 and the building on No. 35 was about one-half of the size of the building on No. 37 and 39 and was not in as good condition as the latter. $17,000 was the price paid for No. 35. In all the circumstances we have come to the conclusion that the price of $36,000 paid was not an inadequate one.

In the result the appeal is allowed. Those portions of the trial judge's order which have been appealed against will be rescinded and the costs of all parties in the Court below will be paid out of the trust estate. There will be no order as to the costs of the appeal.

BHIKOO *v.* SEESARAN and SITTAGEAH.

(In the West Indian Court of Appeal, on appeal from the Supreme Court of Trinidad and Tobago, (Mathieu Perez, Bell, C.J.J. and Malone, C.J. (Acting) February 3, 1954.)

Husband and wife—Enticement—Parents acting from principles of humanity.

The plaintiff-appellant was married to the daughter of the defendants-respondents in 1949 when she was sixteen years old.

The appellant, his wife and respondents lived in the same house and led a communal life but appellant and his wife occupied their own room. They lived happily for about three weeks when differences arose. He alleged that the disputes were caused by excessive financial demands by the respondents. They claimed that he assaulted their daughter.

The result of the disputes was that the wife withdrew to her parents' room and refused to associate with her husband. He left the house and brought an action claiming damages from the respondents for enticing, persuading or procuring his wife to leave him.

The trial Judge disbelieved his evidence and dismissed the action. He appealed.

Held: The evidence supported the Judge's findings of fact that the husband had threatened to injure his wife as a result of which she left him and went to her parents' room. The parents were entitled, if they believed their daughter's story, to offer her their protection.

Appeal dismissed.

Action by a husband against his wife's parents for wrongfully enticing, persuading or procuring his wife to leave him.

Place v. Searle 1932 1 K.B. followed.

Judgment of the Court:

The plaintiff-appellant Hamilton Bhikoo also called Ramsamoog Bhikhoo is a labourer employed by the Works and Hydraulics Department, San Fernando. On the 13th May, 1949, he married Ethel Bhikhoo who is a daughter of the defendants-respondents Balmakoon Seesaran and Sittageah. At the time of the marriage Ethel was only sixteen years old.

According to the plaintiff the room in which he lived with his wife after the marriage and until differences arose between him and the defendants had been attached to the defendants' house before the marriage, with lumber provided by the plaintiff. The parties led a communal life, all living together in the same house which contained three rooms with the plaintiff's wife Ethel performing the duties of servant of the home. The plaintiff and his wife lived happily together after the marriage for about three weeks when he alleges a dispute took place between him and the defendants in regard to the amount which he was to contribute to the expenses of the communal home for the maintenance of himself and his wife. According to him his wages for the fortnight amounted to $20.69 and out of that he gave the defendants $15 for the maintenance of himself and his wife but they were dissatisfied and took his wife to their room for some days during which his food was brought to him by a younger sister. He says that on his next pay day when he gave the defendants $16 from his wages they took his wife away from him and that it was only when they had been given the balance of his pay, namely $4.76, that they returned her to him. He also stated that on the 4th July, 1949, the defendants demanded all his pay and asked him to work

on their land and when he refused to comply with their demands they again took his wife to their room where she remained until eventually he left their house on the 3rd August, 1949. He alleged too that during the period from the 4th July, 1949, to the 3rd August, 1949, the defendants prevented his wife from speaking to him and that he was obliged to leave the communal home on the 3rd August because no one in the house would have anything to do with him.

The plaintiff claimed damages from the defendants for wrongfully enticing, persuading or procuring his wife to leave him and thereafter harbouring her.

The defence to the claim is a denial of the plaintiff's allegation coupled with a counter allegation that the plaintiff had insulted and assaulted his wife Ethel, their daughter, and had been guilty of cruelty to her.

The trial judge came to the conclusion that the plaintiff had failed to prove that his wife's parents (the defendants) had done any act or followed any course of conduct which would entitle him to succeed in his action. In other words, he was not satisfied that the plaintiff had discharged the onus of proof which lay upon him.

Counsel for the plaintiff has attacked the judgment in this case on several grounds and has argued on the authority of *Watt* vs. *Thomas* (1947) 1 All E.R. 582 that the matter is "at large" for the Court, and has submitted that the Court should draw such inferences from the printed evidence as would lead to a judgment being entered in favour of the plaintiff.

After careful consideration of all the submissions of counsel we have come to the conclusion that this is not a case in which we should treat the matter as being "at large" for we are of opinion that the trial judge was warranted in coming to the view that the plaintiff had not discharged the onus of proof which lay on him. This is a case in which the trial judge's findings of fact should not be disturbed. The manner in which he expressed the view he took of the evidence is no doubt open to criticism but it seems to us that his meaning is plain. He prefers the evidence given for the defendants to that given for the plaintiff and he saw and heard the witnesses. We would add that even if we were disposed to treat the matter as being "at large" our findings of fact would be against the plaintiff and would include a finding that he had without just cause or excuse threatened to kill his wife with a knife. The evidence seems to us to support the judge's findings. *Inter alia,* the defendants state, and the judge accepted the evidence, that they witnessed an incident on the 4th July, 1949, in which the plaintiff held his wife against the partition and with a knife in his hand was threatening to kill her. He left the house that evening and when asked by the defendants why he was doing this he replied, "I am going to my mother's place and you can keep your damn daughter." In August he returned with the Reverend Ramlogan who on his behalf asked the defendants to let the plaintiff's wife go to her husband. They answered that they would not send her. She was quite firm in her determination not to go to her husband because, she says, "he wanted to chook me with a knife." Whether this was

true or not it was sufficient justification for the defendants, if they believed it, to offer their protection to their daughter. Then there is the evidence accepted by the trial judge of the incident in December when the plaintiff and six other men came to the defendant's house, assaulted them and pursued the wife Ethel to another house.

Scrutton L.J. in the leading case of *Place* vs. *Searle* (1932) 1 K.B. at p.513 accepts as correct the statement of the law set out in Lush's "Husband and Wife," 3rd Ed. p.3 which he stated as follows:

> "It is the duty of a wife to reside and consort with her husband. This is a duty which she owes to him, and a person who tempts or entices her to violate this duty commits a wrong towards the husband for which he is entitled to recover damages; unless the person who harbours her acted from 'principles of humanity,' to protect her from her husband's ill-treatment, in which case no action can be maintained, even though it should turn out that the wife's allegation was unfounded."

The parents of a wife have no more right to entice away and harbour her than a complete stranger, though, where the husband is to blame, less misconduct on his part would justify a parent in receiving back a daughter than would justify a stranger.

As we have said before we see no reason to differ from the judge's view that the plaintiff failed in discharging the burden of proof which lay upon him and that is sufficient to dispose of this appeal; we would add that if we regarded the matter as "at large" we would be prepared to hold that the defendants in harbouring the plaintiff's wife Ethel acted from "principles of humanity" to protect her from her husband's ill-treatment.

The appeal is dismissed with costs.

FELIX BAPTISTE *v.* PEARL BAPTISTE.

(In the Full Court of the Supreme Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Bell, C.J. and Boland, J.) February 23, March 26, 1954.

Husband and wife—Complaint by wife against husband in a Court of Summary Jurisdiction—Stay of complaint pending petition by husband in Supreme Court for divorce—Dismissal of husband's petition—Res judicata.

After the wife, respondent in this appeal, filed a complaint in the Magistrate's Court against her husband (appellant) alleging desertion and wilful neglect to provide for her reasonable maintenance, the husband petitioned the Supreme Court seeking a dissolution of marriage on the ground of his wife's malicious desertion.

The Magistrate on the authority of Higgs v. Higgs (1935) 98 J.P. 413 stayed proceedings pending the determination of the divorce petition.

The husband's petition was dismissed and the Magistrate then proceeded to hear the wife's complaint. The husband relied in defence on the same facts which he had urged in his divorce petition.

The Magistrate found him guilty of desertion and ordered him to pay a weekly sum for the maintenance of his wife.

On appeal it was urged that the Magistrate had wrongly treated the dismissal of the husband's petition as a finding that he was guilty of desertion.

Held: The Magistrate did not treat the dismissal of the husband's petition as *res judicata* on the question of desertion by him, as the Magistrate on the resumption of the hearing proceeded to hear the case, but the Magistrate was justified in regarding the husband's defence that his wife was the deserting spouse as untenable because *res judicata* by the dismissal of his divorce petition before the Supreme Court.

Appeal dismissed.

This was an appeal from a Magistrate for the Georgetown Judicial District in which he found the appellant guilty of deserting his wife.

Cur. adv. vult,

E. V. Luckhoo for appellant.

J. R. S. Luck for respondent.

Judgment of the Court:

This is an appeal against an order of the Magistrate by which the appellant was ordered to pay to his wife, the respondent, the sum of $6.00 per week for her use and maintenance. This order was made on the 20th June, 1952, on the trial of a complaint filed by the wife dated 8th March, 1950 in which she alleged that she had been deserted by her husband since 4th February, 1934, and that from that time he had been neglecting to provide for her reasonable maintenance. The record shows that on the matter coming before the Magistrate for trial on the 14th April, 1950, it was disclosed that the husband had already on the 6th April filed a petition before the Supreme Court seeking a dissolution of the marriage on the ground, as therein alleged, that his wife had maliciously deserted him and was still continuing to do so. Accordingly the Magistrate at once stayed the hearing before him of the wife's complaint until a decision was given in the divorce proceedings. The staying of the proceedings respecting the wife's complaint was in accordance with the authority of the decision in Higgs v. Higgs (1935) 98 J.F. 443 that during the pendency of a divorce petition no order for maintenance should be made under the Summary Jurisdiction (Separation and Maintenance) Acts 1895 to 1925 by a Court of Summary Jurisdiction. It was possible that the Supreme Court might on the petition decree a dissolution of marriage on acceptance of the husband's allegation that the wife was the deserting spouse, which would be in conflict with a possible decision by the Magistrate that it was the husband who was guilty of desertion. In England it would seem to be established that a decision of the High Court on an issue coming directly or indirectly for determination before it would override a decision of a Court of Summary Jurisdiction on the same issue although the latter tribunal was acting quite within its jurisdiction in determining that issue. That would appear to be the effect of the decision in Knott v. Knott where the point in issue was adultery.

However, the record of this matter under appeal shows that the husband's petition before the Supreme Court was dismissed; following upon which the proceedings before the Magistrate which had been stayed were resumed. In those circumstances there arises the question, what was the effect of the dismissal of the husband's petition? That dismissal directly decided that the husband had failed to estab-

lish that the wife was guilty of desertion, but was the dismissal to be taken as deciding that she was not guilty of desertion because he was the deserting party? In other words was it *res judicata* on the issue whether he or she had not been the deserting spouse?

At the resumption of the proceedings before the Magistrate it was not contended on behalf of the wife that the decision of the Divorce Court was *res judicata* so as to make it obligatory on the Magistrate to hold that her allegation that he had deserted her had been established and that the only question remaining for decision was whether the husband had neglected to provide her with reasonable maintenance. Such a contention would have been untenable because while the judgment in the divorce petition was a decision that she had not deserted him, it did not include a finding that he had deserted her. The dismissal of the petition would be quite consistent with the position that both spouses were not entitled to claim that there was desertion against the other. On the resumption of the case before him, the Magistrate very correctly proceeded to hear the case and made the finding that the wife had been deserted by the husband. There was ample evidence to support this finding, which was a finding of constructive desertion by the husband the circumstances in which she left, having justified her in leaving him and not returning to live with him.

The defence set up by the husband was that she was the deserter —the Magistrate in his reasons for decision gave expression to his view that the husband was wrong to persist in coming back to the Magistrate, obviously meaning with the same defence after his failure in the Divorce Proceedings. Surely the Magistrate could not in the teeth of the dismissal of the petition which was based on the alleged matrimonial offence of malicious desertion by his wife dismiss the wife's complaint on the ground that it was the wife who was guilty of desertion. That the wife had not deserted him was *res judicata* by the Divorce Court's judgment. Mr. Luckhoo for the appellant (husband) sought to suggest that the dismissal of the husband's petition by the Divorce Court might have been because of the refusal of the Judge to exercise a discretion in favour of the petitioner in his confession of adultery. In the absence of a statement specifically declaring that the dismissal of the petition was because of the refusal of the Court to exercise a discretion in favour of the petitioner, it is to be assumed that the Court was not satisfied that the petitioner had made out a case of desertion by his wife.

Accordingly we dismiss the appeal and affirm the order for maintenance made by the Magistrate. There will be costs for the respondent.

RAGHUNANDAN *v.* THE COUNTRY AUTHORITY OF UNITY AND LANCASTER AND THE LOCAL GOVERNMENT BOARD.

(In the Supreme Court, Civil Jurisdiction (Stoby J.) March 15, 17 and 25, 1954).

Practice and Procedure—Pleadings—Rules of Court—Action deserted—Revivor —Failure to apply for—Action deemed abandoned.

By virtue of Order XXI, Rule 1, Order XXV Rule 6, this case became ripe for hearing on the 13th September, 1949.

On the 18th August, 1950, the plaintiff filed a request for hearing without first obtaining an order of revivor.

It was submitted on behalf of the plaintiff that Order XXXII, Rules 5(1) and 5(2) made it imperative, where an action has not been entered in the Hearing List six months after it became ripe for hearing, for an order for revivor to be obtained, and that if such order was not obtained after a further period of six months, then the action was abandoned and incapable of being revived.

Held: The request for hearing made more than eleven months after the action had become ripe for hearing was a nullity and the action must be deemed abandoned and incapable of being revived.

Action by the plaintiff for a declaration that he was still the overseer of the Country Authority of Unity and Lancaster and entitled to arrears of salary, and alternatively for $8,363.73 damages for wrongful dismissal.

The plaintiff was dismissed by the first-named defendants from his post as Overseer of the second-named defendants.

A submission *in limine* that his action should be deemed altogether abandoned and incapable of being revived was upheld.

S. L. ran B. Stafford, Q.C. for the plaintiff.

G. M. Farnum, Solicitor General for the defendants.

Stoby J:

The Writ of Summons in this action was filed on the 3rd August, 1948. On the 3rd September, 1949, the first-named defendant filed their defence, the second-named having done so some time previously.

The effect of Order XXI Rule 1 and Order XXV Rule 6 is that, the pleadings were closed on the 13th September, 1949 and the case was ripe for hearing from that day.

On the 18th August, 1950, that is to say, eleven months and five days after the action had become ripe for hearing the plaintiff filed a request for hearing.

Mr. Farnum, Solicitor General, who appears for the defendants, submits that on a proper construction of Order XXXII Rules 5(1) and 5(2) the plaintiff's action should be deemed abandoned.

The Rules are as follows:

5(1) "If any action which has become ripe for hearing shall not, on the request of either party, be entered in the Hearing List within six months after it shall so have become ripe,, the same shall be deemed deserted, and shall not be capable of being proceeded in to any effect until an order of revivor has been made by the Court, which order the Court may grant upon the application of any party."

5(2) "If no order of revivor be applied for within a further period of six months, or if such order shall have been made, but the action

has not, on the request of either party, been entered on the Hearing List within six months from the date of the order of revivor, or if in any action whatever there has been no proceeding for one year from the last proceeding had, the action shall be deemed altogether abandoned, and incapable of being revived. An action which has been thus abandoned shall be of no effect in interrupting prescription.

Mr. Stafford for the plaintiff submits that the request for hearing was a proceeding within the meaning of Order XXXII Rule 5(2) and consequently the action cannot be deemed abandoned. He further relies on Order LI, Rule 1 which provides that proceedings shall not be rendered void for non-compliance with the Rules unless the Court or a Judge shall so direct.

The submission on behalf of the plaintiff completely ignores the vital fact that Rule 5(2) is ancillary to Rule 5(1). The first part of the sub-rule is meaningless if it is disassociated from the main rule. Although there is no English equivalent of Rules 5(1) and 5(2) and therefore no English authority on the subject, the Courts of this Colony have consistently and repeatedly held that where an action has become ripe for hearing and no request is made for six months thereafter, it becomes a deserted action.

Hewick J. in Vaughn v. Richards O.G. 9.12.1905 treated it as settled law that an order for revivor was necessary where no proceedings had been taken for six months. The rules were again considered in Turton v. Vieira O.G. 26.7.1913. In that case the defendant's solicitor requested hearing of an action and then applied to have his request withdrawn. More than a year after his request for hearing he applied for a revivor and Earnshaw C.J. held that the action was abandoned and incapable of being revived. It would seem that his application to withdraw his request for hearing was approved with the result that no effective proceeding had been taken for more than one year. Further cases in which the rule was applied as of course are:

Faria v. de Castro 1919 B.G.L.R. p. 7.

Beaton v. Quintin 1943 B.G.L.R. p 71.

Mangar v. Mangri 1943 B.G.L.R. p. 258.

Argosy Co. Ltd. *v.* Booker Bros. McConnell & Co. Ltd. 1949 B.G.L.R. 145.

Where a plaintiff by his neglect or misfortune incurs the penalty of having his action deemed deserted he can restore his dying action by an application for revivor but by no other means. A late application to place the matter on the hearing list is ineffective, because the action has automatically been deemed deserted and the words in Rule 5(2) "if in any action whatever there has been no proceeding for one year from the last proceeding had," must be read subject to rule 5(1). If those words had to be construed without reference to rule 5(1) I would hold that they referred to actions which were not ripe for hearing, so that where a plaintiff files a Statement of Claim and there is no defence filed, if the plaintiff takes no proceeding for a year, such as applying for hearing, or the defendant, within the year, does not

move to set aside the writ, then the action is incapable of being revived. The nearest English equivalent to the latter part of Rule 5(2) is Order 64 rule 13 which states: "In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other party of his intention to proceed." In Webster v. Myer (1884) 14 Q.B.D. 231 it was held that where a defendant made default in appearance and plaintiff took no step for a year since the last proceeding had, he could not sign judgment without giving the prescribed notice. In this Colony on those facts the action would be deemed abandoned.

I have given consideration to the argument that the request for hearing should be treated as an irregularity within the meaning of Order LI Rule 1 and thereby save the plaintiff from the consequences of his lethargy.

The Courts have never found a completely satisfactory test for determining when a non-compliance is an irregularity or a nullity. All the cases were reviewed in Craig v. Kanseen 1943 168 L.T. p. 38 where the Court had to decide whether an order improperly made was a nullity or an irregularity. At p. 41 Green M.R. said, "An order which can properly be described as a nullity is something which the person affected by it as entitled *ex debito justitae* to have set aside." Where it is not the validity of an order that is in dispute but some act alleged to be done under the Rules of Court, I would treat as an irregularity an act authorised by the rules but improperly performed and as a nullity an act for which there is no authority. By that test the request for hearing in this action is a nullity.

Even were I disposed to regard the plaintiff's application as an irregularity or even if he had prayed in aid Order XLV rule 4 by which the Court or a Judge has power to enlarge or abridge the time appointed by the Rules for doing an act, and such enlargement may be made although the application is not made until after the expiration of the time appointed or allowed, I would refuse to grant an enlargement of time because of the nature of the defence. The defendants have both pleaded that they come within the provisions of the Local Government Ordinance, and the Justices Protection Ordinances and to grant a revivor now might deprive the defendants of a right which they contend they have acquired, to plead that the action is statute barred. See Argosy Co. v. Booker Bros, (supra).

Finally I might add as Duke J. did in Mangar v. Mangri that when an action is deemed deserted and incapable of being revived it does not mean that the cause of action is extinguished, another writ, claiming the same relief, can be filed, unless it is statute barred. It is for the plaintiff and those advising him to decide whether another writ should or should not be filed.

As I hold that the action is abandoned and incapable of being revived, there is no principle upon which I can award the defendants their costs of the whole action. They have however had to appear in Court as a result of a request made to the Register by the plaintiff.

They are therefore entitled to costs incurred as a result of the hearing on March 15, 17 and today.

Action deemed abandoned and incapable of being revived. Plaintiff to pay defendants their costs of proceedings of March 15, 17 and 25.

IN THE MATTER OF THE INCOME TAX ORDINANCE. CHEU LEEN EVAN WONG and EVAN WONG, the executors under the last will and testament of Robert Victor Evan Wong v. THE COMMISSIONER OF INCOME TAX.

(In the Supreme Court, Civil Jurisdiction, In Chambers (Boland C.J. Acting) February 11, April 1, 1954.)

Income Tax—Acquisition of Land (*United States of America Air and, Naval Bases*) *Ordinance 1940—Assessment—Interest thereon.*

Certain lands belonging to the taxpayer were expropriated in June 1911 by the Government of British Guiana in pursuance of powers under the Acquisition of Land (United States of America Air and Naval Bases) Ordinance 1910, No. 34,

The taxpayer made his claim for compensation in July 1941 and being dissatisfied with the sum awarded by the "claims settlement officer" filed a plaint in the Magistrate's Court in August 1942. A final award was. not made by the Magistrate until August 1948 who assessed the compensation at $83,084.00 as at June 1941 with interest at 5% amounting to $29,225.52.

The Commissioner of Income Tax treated the $29,225.52 as, income received by the taxpayer during the year 1949 and taxable in the 1950 year of assessment.

The taxpayer appealed on the ground that the amount received as interest was part of the compensation and should be treated as capital and not income and alternatively that if treated as interest then the total sum of interest should be appropriated for the purpose of assessment in the years in which the interest was actually due.

Held: Interest on a sum awarded to a landowner as compensation for lands expropriated by the Government was income.

Held further: The taxpayer derived his right to receive in the year 1940 the whole of the sum of $29,225.22 as interest. That amount was merely "quantified" on the basis of interest on a debt of a principal sum only notion-ally existing in 1941 and as the whole sum was received in 1949 it was correctly assessable for Income Tax in the assessment year 1950.

Appeal by a taxpayer with respect to assessment for income tax on a sum of money received as interest.

H. C. Humphrys, Q.C., for appellant.

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

Cur. adv. vult,

Boland C.J. (Acting):

The question raised in this appeal is whether a sum of $29,225.22 is capital, or is income received by the taxpayer from a source within the Colony during the year 1949 and so taxable in the 1950 year of assessment under section 5C of the Income Tax Ordinance, Chapter 38.

Since the filing of this appeal against the decision of the Commissioner of Income Tax who did not uphold the taxpayer's objection

to the above sum being taxed as income, the taxpayer died. These proceedings are continued by the executors of the taxpayer's will.

According to the facts certain lands in British Guiana belonging to the taxpayer were expropriated by the Government of this Colony in pursuance of powers under the Acquisition of Land (United States of America Air and Naval Bases) Ordinance 1940, (No.34 of 1940). This Ordinance was enacted with the object of implementing agreements between His then Majesty's Government and that of the United States of America relating to the establishment by the United States of air and naval bases in this Colony. By order of the Governor-in-Council made pursuant to the Ordinance the expropriation of the tax-payer's lands took effect from the 20th June, 1941 after which he was to cease to be in occupation. It was indeed unfortunate that the taxpayer, who had made his claim for compensation as early as 15th July, 1941 followed by the lodgment in August 1942 of his plaint before the Magistrate consequent on his non-acceptance of the award of compensation made by the "claims settlement officer," did not have a final award made by the Magistrate until 25th August, 1948. On that date the learned Magistrate assessed the compensation at $83,084.00 as at the 20th June, 1941—the date from which the expropriation took effect and he further awarded interest thereon at the rate of 5% from 1941 until payment. Full payment with interest due in accordance with the Magistrate's order was made in1949 and it is not disputed that the interest then paid amounted to $29,225.22.

These proceedings before the Magistrate were instituted under section 11 subsection 1 (e) of the Ordinance. Subsection 2 enacts that the Magistrate shall have the same powers, authority and jurisdiction and the procedure shall be the same as if the matter were a proceeding to recover a debt in the Magistrate's Court without limit as to amount. Following upon the landowner's refusal to abide by the assessment of compensation made by the "claims settlement officer" under section 5, the jurisdiction of the Magistrate is in essence an appeal against the assessment of the "claims settlement officer."

Section 7 (2) directs that for the purpose of assessment of compensation by the "claims settlement officer" the provisions of sections 18, 19 and 20 of the Acquisition of Lands for Public Purposes Ordinance, Chapter 70 shall apply. Section 18 of Chapter 70 directs that in determining claims for compensation for lands acquired under the Ordinance, the Court may take into consideration *the value of the land at the time of awarding compensation.* In that Ordinance the "Court" is the Supreme Court. The Supreme Court's powers as to the assessment of compensation are by Ordinance No. 34 of 1940 vested in the "claims settlement officer" in respect of the acquisition of land for the United States of America air and naval bases. The Magistrate therefore before whom is laid a plaint exercises a jurisdiction which is in essence an appeal from the assessment of the "claims settlement officer" and it is the Magistrate's duty to ascertain the value of the lands at the time of the award by the "claims settlement officer" in accordance with the directions of section 18 of Chapter 70. Subsection

3 of section 7 further empowers the "claims settlement officer" at any time before payment of compensation to vary his assessment because of any loss or damage suffered by the person. This would empower the "claims settlement officer," I hold, to vary his award by adding to the sum awarded as compensation interest thereon until payment in any case where he is satisfied that the landowner suffers a loss by not being paid promptly.

The Magistrate accordingly would similarly have the power to award interest if the landowner would suffer a loss by not being paid promptly at the date of the award.

The Magistrate in this case awarded interest on the compensation which he assessed on the basis of the value of the lands as at the 20th June, 1941—strictly in accordance with section 18 of Chapter 70 it should have been from the date of the award of the "claims settlement officer" which was a few weeks later. It is to be noted that in his plaint before the Magistrate the taxpayer claimed interest on the compensation to which he was entitled—that is interest on the sum by way of compensation to which he would have been entitled had the "claims settlement officer" properly assessed the compensation due to him. The Magistrate, I hold, in awarding interest as claimed was exercising the power of adding to an award, which the "claims settlement officer" should have made, a sum in variation of that award which it was competent for that officer to make under section 7 (3) of the 1940 Ordinance so as to provide for the loss the landowner would sustain because of the delay in payment. Interest at the rate of *5%* was awarded by the Magistrate, and the sum of $29,225.22 received by the taxpayer as an addition of interest at that rate 'on the amount assessed as compensation must be taken to have been accepted *co nomine* by the taxpayer. But it is now contended on behalf of the taxpayer that this sum although claimed as interest and accepted as such is part of the compensation itself, or at any rate damages for loss {sustained by him; the contention being that the giving of interest is an appropriate measure of the calculation of damages sustained by the delay in payment. I cannot agree with this submission, which is in conflict with the views expressed by Evershed J. in his judgment in Westminster Bank v. Riches 192 L.T. 337. As Morton L.J. said when that case came before the Court of Appeal (173 L.T. 148) "the true view is that a sum awarded as interest does not lose its quality as interest because it is awarded as compensation to the plaintiff for being deprived of the use of money"—and Lord Normand in the final appeal before the House of Lords said—"this matter of terminology is, however, of no great importance, for the liability of a payment to income tax does not depend on whether on not it is a payment of damages, but whether or not it is received as income." The Court of Appeal of New Zealand was unanimous in rejecting a claim that interest on a sum awarded to a landowner as compensation for lands taken from him by the Crown under the Public Works Act 1928 and the Finance Act No. 1945 (New Zealand) was not income to be taxed. This was the case of the Commissioner of Taxes New Zealand v. Marshall Vol. X part 3 Australian Tax Decisions 113;

a case which was referred to by the Solicitor General in the course of his submissions for the Commissioner of Income Tax. Although that decision is not an authority binding on this Court, I agree with the *ratio decidendi* of the New Zealand Court.

There remains to be dealt with the submission of Counsel for the appellant that, if treated as interest, the total sum of interest should be apportioned for the purpose of assessment in the years in which the interest was actually due—making only taxable in the assessment year 1950 a portion thereof, that is the sum of $1,509.42 which was the interest for the year 1949 up to and including the 31st May, 1949—the date of payment.

It is clear that where interest is due and owing in a particular year but has not been received it does not attract the tax as part of the income of that particular year. In Lambe v. Commissioners of Inland Revenue (1934) 1 K.B. 178, interest payable on advances secured by a mortgage on a business, amounted in the year 1931 to the sum of £491.11.0. A receiver and manager appointed by the Court in consequence of the mortgagor's financial difficulties carried on the mortgagor's business and advanced a further sum and he was understood to be likely to make other further advances. The Tax Commissioners were of opinion that the said sum of £491.11.0. being payable in the year 1931 should be included in the computation of the appellant's total income from all sources for that year, but they informed the taxpayer that the duty on the sum in question would not be collected until in fact it was received by him. On appeal Finlay J. had no difficulty in holding that the Commissioners had no power to make such a contingent "assessment. They could only confirm, discharge or modify an assessment on income actually received. In the course of his judgment Finlay J. poses the same question at that which arises for determination in this appeal now before me, namely the liability to tax of a sum of interest which although payable in respect of a particular year is not received by the taxpayer until a later year. Declaring that the tax is a tax on income, that is a tax on what in one form or another goes into a man’s pocket, the learned judge without hesitation held that the claim to tax interest as income before it is actually received must fail. But in his review of the authorities on the above point Finlay J. declared that while all are in agreement with the general principle above indicated "they do to some extent differ upon a point which no doubt is a difficult point upon which one may see that there might be a difference of opinion, and that point is this. What is the position when there is income receivable in a number of years, one, two, three, four and five and nothing is received in one, two, three or four but in five the whole of the five years' income is paid?" "It is a difficult question" continues Finlay J. "and one upon which it seems to me, looking at the authorities, opinion to some extent may well have fluctuated, whether, when that payment is made, it is to be treated as income of year five in which it was made, or income of the years one, two, three and four, in respect of which, as well as of the year five, it is paid." The learned judge referred to the decision of

Rowlatt J. in Leigh v. Inland Revenue Commissioners (1928) 1 K.B. 73, a decision which he understood had not been questioned. Leigh v. Inland Revenue Commissioners was a case where the appellant in the year 1918 had purchased bonds of a company incorporated under the law of Canada. Coupons for each year's half interest were attached to the bonds. At the time of appellant's purchase the interest on the bonds had remained unpaid since July 1914. After the purchase the arrears of interest as well as succeeding instalments remained unpaid till 1921. In that year in consequence of an arrangement binding on the parties the interest up to July 1, 1919 was paid and was received by the appellant who appealed against an assessment for super tax in the year 1922 which included as income for the year 1921 the whole of the interest received by him in that year. It was contended on appellant's behalf that the payments of the interest in arrears were *received* but not *receivable* in 1921—that those payments were receivable in 1914 and subsequent years and therefore the liability for super tax belonged to those years. The court rejected that submission and dismissed the appeal.

In the present appeal the abovementioned cases are sought to be distinguished by reason of the fact that there was in existence in each case at the time when interest was payable though not paid a debt as principal on which interest was payable. In the present case there was, as I understood the submission of counsel for the appellant, no principal sum as a debt until the award was made by the Magistrate in the year 1948, and it was that year that the debt of $80,000 was notionally deemed to have existed in 1941 and to have carried interest at 5% retrospectively as from 1941. The case of Champney's Executors v. Commissioners of Inland Revenue, 19 T.C. 375, was a case where it would seem that the question raised was whether a sum for arrears of interest received in a particular year, 1929, could attract tax payable on income for that year in the assessment year 1930 although there was not in fact existing in 1929 a debt for an amount considered as the principal sum on Which such interest was based. Incidentally it is to be noted that Finlay J. before whom the appeal come on a case stated by the Special Commissioners of Income Tax decided that the whole of the arrears of interest then received was taxable as income for the year 1929, stating that the decision of Rowlatt J. in the case of Leigh v. Commissioners of Inland Revenue and in Grey v. Tiley 16 T.C. 414, had conclusively decided the point "Whether this income is income of the year in which it was paid and income in respect of which tax at the rate applicable to that year was deducted, or whether it can be regarded as income in this case of a period some twenty or more years earlier." Put briefly the facts in Chempney's Executors v. Commissioner of Inland Revenue were that Champney who died in the year 1930 had since 1904 held a series of debentures, described as Class A debentures, in a certain company. Owing to financial difficulties the Company was unable to pay any interest on those debentures, and in 1920 a scheme between the debenture holders and the company was adopted by which it was agreed that the A debentures would be redeemed by payment on account and

by the issue of B debentures for the balance and that payment of some of the arrears of interest would not be made till a later date. . In pursuance of that scheme Champney in the year 1928 was paid £895 being the interest which had been payable from August 1904 to September 1907, and again in the year 1929 he was paid £820 in respect of interest payable from September 1907 to March 1910. Champney's Executors appealed to the Court of Appeal against the decision of Finlay J. that the £820 was taxable as income received in 1929. The appeal was dismissed but on grounds different from those advanced by Finlay J. in his judgment in approval of the views of Rowlatt J. in Leigh v. the Commissioners of Inland Revenue and in Grey v. Tiley. On the special facts of the case of Champney's Executors the Court of Appeal considered it unnecessary to decide the point as to the correctness of the grounds given by Finlay J. But Hanworth M.R., with some hesitation because, as he said, that point was not really argued, and declaring that his remarks were by way of obiter only, expressed himself to be in agreement with the views of Rowlatt J. as enunciated in Leigh v. Commissioners of Inland Revenue. The Court of Appeal in dismissing the appeal declared its decision to be based on the view that the interest received was not in fact interest referable from 1907 to 1910 but was attributable to the new arrangement in 1920—and that it was only "quantified" by the interest which ought to have been received earlier.

Applying that *ratio decidendi* to the facts in this case, the taxpayer derived his right to receive in the year 1949 the whole of the sum of $29,225.22 as interest by virtue of the award of the Magistrate in 1948. That amount was merely "quantified" on the basis of interest on a debt of a principal sum only notionally existing in 1941. Accordingly on the facts of this case, and like the Court of Appeal in Champney's case without having to decide the question posed by Finlay J. in Lambe v. Commissioners of Inland Revenue, I hold that the sum of $29,225.22 was income received in 1949 and correctly assessable for Income Tax in the assessment year 1950

Appeal dismissed.

Solicitors: *H. C. B. Humphrys* for appellant.
Crown Solicitor for respondent.

SARJUDAI *v.* MANRAM.

(In the Supreme Court, Civil Jurisdiction (Stoby J.), April 2, 27 and 30, 1954).

Immovable property—Trust—Husband and wife—Gift—Farm—Management by wife—Income.

The plaintiff is the wife of the defendant and claimed from him delivery of two title deeds in his possession.

The defendant admitted possession of the title deeds but counterclaimed for a declaration that he was true owner of the properties referred to in the deeds and that his wife was holding them in trust for him.

The wife alleged that both properties were purchased with her own money. She did not contend that the husband gave them to her. In evidence

she admitted that a substantial part of the purchase money for one of the properties was obtained from income received from a farm belonging to her husband but which she managed and the produce of which was sold by her.

Held: Although a wife is not entitled to retain any surplus money saved out of money given by her husband for a specific purpose, she is entitled to keep surplus profits made out of any department of the household which she is managing.

The wife's conduct in using some of the profits from the farm for the purchase of a property in her own name without challenge from the husband showed she was entitled to use such profits as she thought fit.

Judgment for the plaintiff.

ACTION by a wife against her husband for delivery to her of two title deeds in respect of properties in her name.

Counterclaim by husband for a declaration that the wife was holding the properties in trust for him as both properties were purchased by him in her name. He pleaded that at the time of purchase of each property he specifically told his wife to hold it in trust for him. Alternatively he relied on a resulting trust created through the purchase of property with his money.

The wife did not plead that the properties were a gift to her.

F. Ramprashad for plaintiff.

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

Stoby J.:

Although this action when instituted was for the delivery by the defendant to the plaintiff of certain title deeds in his possession, it eventually became a dispute over the ownership of property.

The plaintiff filed a specially indorsed writ on the 15th December, 1952, whereby she claimed that the defendant was in possession of two title deeds which belonged to her. The defendant obtained leave to defend with pleadings and after over a year's delay—a feat not uncommon in this Colony—filed a defence in which he admitted that he was in possession of two title deeds each of which on its face value would convey the impression that the properties referred to, belonged to the plaintiff but pleaded that both properties were his and that they were held by the plaintiff in trust for him. He alleged that the title deeds were in his possession as beneficial owner of the properties therein mentioned and counter-claimed for a declaration that he was the true owner and for an order compelling the plaintiff to transport the properties to him.

Unfortunately, this defence and counter-claim were not filed until three weeks before the date of trial and perhaps for that reason or through an oversight no defence to the counter-claim was ever filed. Her failure to do so, deprived her of an alternative limb to her own claim, that is to say, to contend that in the case of a wife there is a presumption in law—a rebuttable one—that property purchased by a husband in his wife's name is a gift to her. This aspect of the case will be discussed later in this judgment but I propose now to discuss the facts and my findings thereon.

The plaintiff was married to the defendant in 1941. She had been previously married according to Hindu customary law to a man named Itwaru who died in 1931. From 1931 until she became acquainted with the defendant she lived with one or more men as man and wife. I mention her amorous adventures not in order to condemn or criticize

her but because they have some bearing on the issues to be decided. When Itwaru died he left a will dated 30th January, 1922, and although the plaintiff had borne him four children he had omitted either by accident or design to leave anything for his reputed wife or her children. Economic circumstances or various other reasons could have accounted for her subsequent behaviour.

In 1941 after she married the defendant two properties were purchased the title for each of which is in her name. The plaintiff's case is that her reputed husband Itwaru was the owner by transport of lot 3, Two Brothers. After his death, although he devised the property to his brothers Brehaspat, Samarroo, and Ramsomar, she continued to live in a house on the land. He left money and cows which she took possession of, and by dint of hard work and saving obtained enough money to purchase lot 3 at execution sale with the knowledge and approval of Itwaru's sister Boodhia (who was by then the only surviving member of Itwaru's family). She also acquired enough to purchase lot 12.

On the other hand the defendant's case is that the plaintiff was a profligate woman. She was destitute when he befriended her and subsequently married her. As he was the owner of a farm at Anna Catherina he was in receipt of a steady income and with the assistance of his father he purchased the two properties.

The title to lot 3, Two Brothers is later in point of time than lot 12, but it is more convenient to dispose of this phase of the case first.

In order to find in favour of the defendant I must be satisfied that he has discharged the onus of proving that it was his money which brought the property at execution sale and/or that he arranged with Brehaspat, the executor of the estate of Itwaru, deceased, to purchase the property from him and obtain title at execution sale. I reject without hesitation his evidence that at the 'execution sale, an express trust was created by his purchasing in her name and telling her to hold it in trust for him. If there is any trust at all it must be a resulting trust arising from the use of his money. Their relationship at that time was not strained, the defendant was not in debt and no circumstances existed why he should specifically tell his wife to hold the property in trust.

The absence of a receipt signed by Brehaspat for the payment of any sum whatsoever is significant. A number of documents was produced but nothing to indicate that Brehaspat had any business negotiations with the defendant. Since Brehaspat sold lot 4 to defendant; it may have been enlightening to see how that receipt was worded. Nor can it be overlooked that lot 4 was transported to the defendant who has since sold to his sister-in-law. These two transactions took place about the same time and it is difficult to reconcile the fact that lot 4 was purchased in defendant's name and lot 3 in plaintiff's name with the creation of a trust. The plaintiff's association with lot 3 must not be forgotten. I do not think she lived there for the whole period of time from 1931 to 1941.

I said earlier in this judgment that in arriving at a decision on

the facts a proper conclusion could not be reached without paying due regard to her mode of life.

Her application for a brand records her address at Bordeau which admittedly was the home of one of her former associates.

This proves that her version that she lived at lot 3, until she met the defendants was not true but it also proves that she owns or was about to own cattle. It is not unlikely that with her gift for attracting male companions she would be able in the process to acquire material reward. Whether she did so in this manner or not the evidence does not disclose, though it indicates to me the type of woman who was not prepared to suffer the discomfort of poverty and who was determined to do the best for her children. In short she was not an idle, unambitious woman, but one who would endeavour to acquire something for herself.

I believe that she lived at lot 3 for some years after Itwaru's death, and I have no doubt that whatever money Itwaru left in the house was misappropriated by her and his cattle sold. The Irrigation and Drainage Rates were not high and I can see no reason why the modest sums were beyond her reach especially as no receipts with one exception for rates during the vital period 1939 to 1942 were produced. The one receipt for 1941 shows that the rates were paid by Boodhoo which by itself means nothing at all.

On the evidence I find that lot 3 is the plaintiff's property.

Other considerations arise in respect of lot 12. Not only was the purchase price much higher—$500.00—but over $300.00 was paid on one occasion. The defendant accounted for this money as coming from his Anna Catherina farm. The plaintiff admitted that some of that money bought lot 12, but explained that it was she who cultivated the land and sold the produce.

The law is settled that if a husband makes his wife an allowance for household purposes while they are living together the money being given for a specific purpose, the wife is not entitled to retain any surplus that she may save out of it. So that when a wife saved housekeeping money and used it as stake money in a football pools forecast, although the winning forecast was a joint effort of husband and wife the latter had no right to any part of the prize money. Hodinott v. Hodinott 1949 2 K.B. 406.

But a wife's thrift and far-sightedness do not always go un-rewarded. If some specific part of the household is allotted to her and she can make a profit out of funds allocated for the performance of her department then the profit is hers.

In this case the racial group and class to which these parties belong is not unimportant. The Immigration Ordinance, Chapter 208, Section 147 recognises the customs and habits of the East Indian community whereby a wife often works the farm or shares in the daily toil equally with her husband. The Ordinance gave her a right to claim a division of property acquired as a result of their joint earnings. The Supreme Court has limited the meaning of earnings by excluding domestic duties but the principle underlying the Ordinance remains.

When the plaintiff assisted in the cultivation of the land and journeyed to Georgetown and sold the produce, while all the money thereby obtained was not hers, and the issue of joint earnings is not before me, yet her conduct in using some of that money to purchase the property without challenge from the husband leads me to the conclusion that she was being allowed to manage the farm and was entitled to use for herself such profits as she thought fit.

Whatever view is taken of the use of that money—about $300.00—for the purchase of lot 12, I am convinced that the balance of money was the plaintiff's.

The defendant's attitude to the purchase and sale of property is not such as to lead me to believe that he would buy a property in his wife's name.

In 1928 or 1929 he bought two properties in his own name; lot 4 was purchased in his own name. He says he was holding another property in trust for his sister and his father held one in trust for him. This latter transaction probably means either that he bought a property from his father who would not transport until the purchase price was paid or his father lent the money to buy a property and held it until the loan was repaid. The sister's transaction may be the same. All these dealings are evidence of the shrewdness of the defendant and his family and I cannot think he would purchase property in another person's name. The plaintiff therefore is in any event entitled to the property. If that $300.00 was clearly the husband's he would have a lien on the title deed until payment to him of that sum but as I do not so find she is entitled to the deed without any condition.

There will be judgment for the plaintiff that the defendant delivers to her the two title deeds in his possession for lot 3 and lot 12.

The counter-claim is dismissed. The plaintiff will have her costs on the claim and counter-claim.

Solicitors: *N. O. Poonai* for the plaintiff.
I. G. Zitman for the defendant.

HASSAN MOHAMED *v.* THE QUEEN

(In the Supreme Court, Court of Criminal Appeal (Boland C.J., Acting, Stoby and Phillips JJ.) April 23, 1954).

Criminal Law—Murder—Locus in quo—Absence of Trial Judge—Not irregularity—Preliminary investigation—Witness—Not called at trial—Discretion of Grown Counsel—Inadmissible evidence at preliminary inquiry—Committal not invalid.

The appellant was convicted before a jury of murder. At the trial counsel for the Crown did not examine the witness F. Charran who had given evidence at the preliminary inquiry but he tendered him for cross examination. The evidence given by that witness at the preliminary inquiry was inadmissible.

The trial judge permitted the jury to visit the *locus in quo* in his absence as he felt that it was unnecessary for him to go there.

It was contended on appeal that under the provisions of section 76 (a) of. the Criminal Law (Offences) Ordinance, the accused should have been notified by the Crown of the non-attendance at the trial of the witness Charran; that the trial judge had wrongly excluded the evidence of Charran; that if Charran's evidence at the preliminary inquiry was inadmissible the committal for trial of the appellant was invalid; and that the absence of the trial judge on the visit by the jury to the locus *in quo* was an irregularity which vitiated the trial.

Held: (1) The provisions of section 76(a) of the Criminal Law (Offences) Ordinance, Chapter 10, were not applicable to a case where the witness who gave evidence at the preliminary inquiry was present at the trial and could have been called by the defence if desired.

Further it is in the discretion of counsel for the prosecution whether a witness should be called or not.

(2)i The evidence of Charran was rightly excluded and was in fact not offered by the Crown at the trial.

(3) The fact that evidence which was not admissible was given before the examining magistrate did not vitiate the committal by him of the appellant for trial.

R. v. Norfolk Quarter Sessions ex parte Brunson (1953) 1 All E.R. 346 applied.

(4) There was no irregularity such as to invalidate the conviction of the appellant by reason of the trial judge permitting the jury to visit the *locus in quo* in his absence.

H. Matadial with *Dwarka Dyal* for appellant.

G. M. Farnum, Solicitor General for respondent.

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

Stoby, J.: The appellant was convicted at the Berbice Criminal Assizes of Murder and sentenced to death. The prosecution's case at the trial was that three eye witnesses saw him attack the deceased and as a result of that attack the deceased died. The appellant's defence at his trial was an alibi. He made a statement from the dock that he was at home at the time of the alleged attack.

At the conclusion of the case for the prosecution the jury expressed a desire to visit the *locus in quo, as* so many juries do now-a-days. It might be that such a request was really unnecessary because the evidence was simple. The locus was clearly defined, but nevertheless, they asked permission to visit and the Judge acquiesced. The Judge, however, felt that it was unnecessary for him to go but he permitted the jury, Counsel for the Crown and Counsel for the accused to visit and it is now objected on appeal that that vitiated the trial because the Judge should have been present and his absence caused him to be unable to direct the jury properly in a material particular and, therefore, his direction with regard to what took place at the time of the attack amounted to a misdirection.

No case has been cited to us, and we know of none, whereby it is essential for the Judge to accompany the jury to the locus in quo. We permitted Mr. Matadial because Canadian Reports are not available in this Colony, to read a passage from the "Empire Digest" Vol. 14 and he has quoted a Canadian case in which a conviction was quashed because the Judge visited the locus himself and arrived at

the decision as a result of what he saw. Obviously, in that case which was tried toy the Judge without a jury, the cardinal rules of evidence were offended because no judge has the right to examine a locus in the absence of the parties and to decide on what he had seen. He might have visited the wrong place. He is not subjected to cross-examination. He has not given evidence and so to decide an issue on his own observation is obviously wrong. In this case, however, what took place was that the jury visited the locus in order to appreciate what the witnesses had said and the Judge, in his summing-up, reminded the jury that, having visited the scene, it would assist them in appreciating the evidence which had been given by the witnesses. We can see nothing wrong in that procedure.

It is also submitted by counsel for the appellant that, contrary to section 76(a) of the Criminal Justice Ordinance, No. 21 of 1932, the accused was not notified as required by Section 76(a) of the non-attendance at the trial of witnesses who had given evidence at the preliminary examination. That submission seems to have been made on a complete misunderstanding of what section 76(a) really requires and what it actually means. During police investigations it is quite possible that the police have taken a statement from a witness whose evidence conflicts with the general pattern of the case for the prosecution. It is quite possible that such a witness might be called in the Magistrates' Court. After that witness has given evidence if the Attorney General comes to the conclusion that he does not require that witness notice must be sent to the accused in order to give an accused person the opportunity of having that witness present, but if that notice is not given and the witness is present then the provisions of section 76 have not been infringed because the reason which caused that enactment did not exist—that is to say, if the witness is not present an accused person must have notice but if he is present no notice is required, because an accused person has the opportunity of calling the witness if he so desires.

It may be as well to make it clear that there is no obligation on the Crown to call all the witnesses whose names appear on the depositions. The view that it is the duty of the Crown to call the witnesses sprung from a remark by Hewitt, Lord Chief Justice, in the case of Rex. v. Harris reported at 137 L.T. page 535 in which he said that "In Criminal cases the prosecution is bound to call all the material witnesses before the Court in order that the whole of the facts may be before the jury," but many years after in the case of El. Dabbah versus the Attorney General for Palestine the Judicial Committee of the Privy Council put the matter at rest when they approved the decision of the Supreme Court of Palestine in holding that it is in the discretion of counsel for the prosecution whether a witness should be called or not. So that when in this case counsel for the Crown called Freddie Charran he need not have done so at all. He need not have tendered him for cross-examination but he did that in his discretion and the fact that notice was not given does not, in our opinion, affect the trial one way or the other.

It is also objected that the learned trial Judge failed to put the defence of the appellant adequately to the jury. We have examined

the record thoroughly and it seems to us that there is no substance in that contention whatsoever. It is not the duty of a judge to put every little bit of evidence which emerges from the cross-examination and which emerges from the defence. It is his duty to recall for the benefit of the jury the salient features of the case and in our view that is exactly what the Judge did in this case.

Mr. Dwarka Dyal, who has appeared as junior counsel for the appellant with the leave of this Court because he has not been assigned by the Chief Justice, sought and obtained such leave to argue three additional grounds. He contended that the cardinal principles which should govern every criminal trial were not properly put to the jury and he bases that submission on a passage which appears in the summing-up where the learned trial Judge pointed out to the jury that there were certain rules which he had formulated for his own guidance, and he told them that it was their duty to follow those rules. That submission overlooks the important fact that just two or three pages before, the learned trial Judge had explained thoroughly to the jury the cardinal principles which govern every criminal trial and then, in order to impress upon their minds the importance of those principles, he pointed out to them that even with his experience as a judge and as a judicial officer of many years standing he was guided by those rules. It seems to us that no objection at all can be taken to the way in which that was put.

It is further said that the Judge failed to direct the jury with regard to the issue of manslaughter and it is submitted that there is evidence at page 15 of the record—I do not propose to read it—from which the Judge should have told the jury that the question of manslaughter was a real one and that it was one worthy of their consideration. One gathers that that submission has been made—and that submission has often been made in this type of case—because of a passage which appears in Archbold and has appeared there for some years, that the Judge must leave the question of manslaughter to the jury even though counsel for the prisoner has not relied upon that defence and the well-known case of Prince is stated in support of that passage. It is a great misunderstanding if counsel thinks that that passage means that in every case of murder a judge must put the question of manslaughter to the jury. It is only necessary to put manslaughter to the jury where, from the evidence led either by the prosecution or by the defence, such an issue can properly arise. In a case of this kind where there is not a tittle of evidence to support the view that the appellant could have been convicted of manslaughter the trial Judge was correct in not leaving that issue to the jury.

The final submission made on behalf of the appellant is that admissible evidence of Freddie Charran was wrongly excluded and was ruled inadmissible. That submission somewhat contradicts the submission made by Mr. Matadial because Mr. Matadial submitted that Freddie Charran's evidence was inadmissible and that the evidence being inadmissible the committal was invalid and the indictment should have been quashed. That argument is in direct conflict with the decision in R. v. Norfolk Quarter Sessions Ex parte Brunson 1953 1 All E.R. p. 346 when it was held that the fact that evidence which

is not admissible or is given by an incompetent witness is given before examining justices, does not vitiate the committal by them of a defendant for trial. The case disapproved the decisions in R. v. Grant 1944 2 All E.R. p. 511 and R. v. Sharrock 1948 1 all E.R. p. 145 where support for Mr. Matadial's contention will be found and as it was wrongly excluded the conviction should still be quashed. In so far as the first submission is concerned that the evidence was inadmissible we agree that the evidence was inadmissible if led by the Crown and as I have said a committal based on inadmissible evidence does not affect the validity of the committal. In so far as Mr. Dwarka Dyal's submission is concerned it is important to bear in mind what took place at the trial. What took place was that the witness Freddie Charran who had given evidence in the Magistrates Court was called by counsel for the Crown who announced that in his opinion the witness' evidence was inadmissible and he did not propose to examine him.

We agree, as I have said before, that the evidence was inadmissible. His evidence was to the effect that a fight took place between him and the No. 2 accused (who was acquitted) earlier that night and that at the conclusion of the fight the No. 2 accused had threatened to murder. In Sureynauth's case No. 4 of 1951, the West Indian Court of Appeal decided that that type of evidence was wrong and the conviction in that case was quashed because evidence was led that an accused person had threatened, not the deceased person but a relative of the deceased some hours prior to the fatal attack, so on the authority of that case the Crown could not offer this evidence as admissible evidence. But the defence, it is now said, wished to obtain the benefit of the threat alleged to be used by the No. 2 accused in order to show that there was no connection between him and his father, the appellant, who were estranged; and Mr. Dyal says that if that evidence had not been excluded by the trial Judge the verdict might have been different: No. 2 might have been convicted and the appellant might have been acquitted. But what took place at the trial was that when counsel for the appellant asked Freddie Charran what happened he asked him about the fight and that fight was inadmissible even in cross-examination as being prejudiced to No. 2, not helpful to the appellant, and irrelevant to the issue, so the trial Judge properly excluded that evidence and at that stage counsel said that he had no further questions to ask. How can it be said that evidence had been excluded when the evidence has not been tendered? The proper thing to do would have been to point out that it was desired to ask another question—a question dealing with motive—distinguishing the threat alleged to be made by No. 2 accused from the fight, which took place between No. 2 and Freddie Charran; the Judge might have permitted that question to be asked in order to enable the appellant to found the argument which counsel desired to found; but as I say he never pursued it. He never gave the Judge an opportunity of ruling on that question and consequently, it cannot now be said that evidence was excluded because, as I said, that evidence was never tendered. We have come to the conclusion that the appellant was properly convicted and the conviction and sentence are affirmed.

STANUEL AND ALEXANDER *v.* THE QUEEN

(In the Court of Criminal Appeal, on appeal from the Supreme Court (Roland C.J. (acting) Hughes and Stoby JJ.) July 20, 1954).

Criminal law—Murder—Statements by persons not charged—Admissibility —Hearsay evidence.

The appellants were found guilty by a jury of murdering an old man between the 20th and 21st April, 1953. Three others who were tried at the same time were acquitted.

Originally eleven or twelve persons were charged with the murder and all were committed for trial by the magistrate, but the Attorney General entered a *nolle prosequi* in favour of six or seven of them. Some of those in whose favour the *nolle prosequi* was entered had made confessions but there was no other evidence against them.

The appellants had also made statements which, if true, amounted to a confession but the trial judge in the absence of the jury, ruled that the statements were not free and voluntary and they were not tendered in evidence.

Counsel for the appellants sought, at the trial, to get the statements of the persons not on trial tendered in evidence to show that those others had confessed. The judge ruled those statements inadmissible as being hearsay evidence.

The main ground of appeal was that the statements should have been admitted as they were favourable to the appellants.

Held: Statements made in the absence of an accused person are not admissible either against or for him. R. v. Thompson 1912 (7 C.A.R.) 276 applied.

STANUEL AND ALEXANDER *v.* THE QUEEN

(Editor's Note: An application to the Privy Council for leave to appeal was refused.)

Appeal from convictions for murder after a trial before a judge and jury at the Criminal Sessions, Georgetown.

Appeals dismissed.

C.E.R. Debidin for appellant .Stanuel.

N. J. Bissember for appellant Alexander.

A. M. Edun, acting Crown Counsel, for the Crown.

At the conclusion of the arguments the judgment of the Court was delivered by Boland C.J. (acting).

Boland C.J. (*Acting*):

This is a case in which two appellants were found guilty by the jury of the murder of an old man named Sookhraj between the night of the 20th and the morning of the 21st of April, 1953, at a place at Canal Polder on the West Bank of Demerara.

The evidence against the appellants was in the nature of circumstantial evidence. There were no particular eye-witnesses to the actual murder. The evidence disclosed that the old man was in his home that night with his wife and daughter and was aroused by the barking of the dogs. He had a torchlight which he took up and shone in the direction of the yard. Seeing nothing, he went back to bed where he was soon after strangled and given a blow on the head, which resulted in his death. His wife also received certain injuries. She saw a number of men. in the room, but could not identify them.

The case against the two appellants comprised evidence of wit-nesses who testified that on the Saturday before that fatal Monday night they were seen round and about that particular district, which is on the left bank of the Demerara River. They both belonged to Georgetown which is on the right bank of the Demerara River. There was some evidence, too, that on the Monday night they were seen on that side of the river. The appellants, in statements from the dock, denied that they were either on the Saturday or on the Monday at the West Bank of Demerara, where the killing took place. They did not give evidence on oath, but elected to make statements from the dock and so did not subject themselves to cross-examination.

The deceased man, who was a money-lender, had in his room a safe in which he had a lot of money and jewellery. The safe was found open and the money and jewellery missing. The Police, in the course of their investigations, detained and charged other persons besides the appellants, but certain articles of the missing jewellery were found at a room in Georgetown where the appellant Stanuel lived. He may not have been the actual tenant of the room, but the Police went there and found buried in a hole under the floor of the room articles of jewellery in a bag. Some of the articles were tied up in a piece of cloth, part of a pair of pyjama trousers which the Police established to be the property of Stanuel.

The conduct of Stanuel immediately before the discovery of the articles under the floor of the room caused the Police to draw the

inference that Stanuel had control of the jewellery which was secreted there. He had made an attempt to get the Police away from his room by telling them that some articles of jewellery had been brought to him there, but he would have nothing to do with them. This information was given by Stanuel to get the Police away from the scene, but he was seen soon afterwards throwing a mattress on the floor. This aroused the suspicion of the Police and caused them to investigate further. They looked at the floor and found that it had been tampered with at that spot. On removing the piece of the flooring at that spot they saw not very far away under the floor, buried in the earth, a bag containing articles of jewellery.

There was also a large sum of money in notes found in a coat in the room. On a shirt in the room there was a stain of blood. The blood-stained shirt, which was admitted by the appellant Stanuel to be his, was analysed by the Government Bacteriologist and found to be human blood. There was evidence from which the jury could have come to the conclusion that that coat hanging in the room was used by Stanuel to secrete the money. I do not think that there is any need to go into the whole of the evidence. This was a long trial and the jury arrived at their conclusion on all the facts which came out in the evidence.

The appellant Stanuel had the advantage of Counsel, who made submissions against the admissibility of some of the evidence tendered at the trial. These submissions were upheld by the learned trial Judges. The jury came to their conclusion on the facts of the case and we see no reason to disturb their findings.

There were a few points raised at the trial by Counsel for the appellants. One point raised at the trial was that jointly with the accused some other persons had been committed for trial by the Magistrate at the preliminary inquiry, but the Attorney General had entered a *nolle prosequi* in their favour. It was admitted by the police witnesses that in the course of the investigations those same persons had given statements to the Police. Counsel for both appellants had sought to get those statements admitted when cross-examining the police witnesses who took those statements. The learned trial Judge, after hearing the submissions of Counsel, ruled that the statements were inadmissible. In this Court, Counsel for the appellants argued that those statements were wrongly rejected by the trial Judge and that the appellants were entitled to have the statements put in at the trial. We have consulted the authorities on this point which were cited at the trial, especially the case of R. v. Thompson, decided in 1912 (7 C.A.R, p. 276) and we find that the learned trial Judge acted correctly in refusing the applications by Counsel to have the statements admitted. It is now well established that statements made in the absence of an accused person are not admissible either against or for him.

Mr. Debidin put forward eleven grounds of appeal on behalf of Stanuel. In the course of the argument, we expressed the view that there was no substance in any of them. The only one that merited

our attention was the one dealing with the rejection of the statements made to the Police by those persons in whose favour the Attorney General entered a *nolle prosequi.*

So far as the appellant Joseph Alexander is concerned, the evidence against him was not as strong as the evidence against Stanuel. But there was evidence of a substantial character from which the jury were entitled to draw the inference that he was on the scene and if he did not actually and physically strangle the old man and cause to be inflicted on him the injuries which resulted in his death, he was there acting in concert with the person or persons who did so. There was evidence that Alexander was round and about the Canal Polder on the Monday. He had some conversation with a witness who testified before the jury, from which it could be said that he and Stanuel were making plans to break into the deceased man's premises. The jury heard that evidence.

The jury also had evidence that a torchlight was missing from the old man's premises. That torchlight was traced to the possession of Alexander. He had passed it on to somebody in the market. Assistant Superintendent of Police Austin testified that Alexander had admitted that he was the person who sold the torchlight, which was amply identified by the widow of the deceased man as the one which her husband had in the house. The torchlight had certain features by which it was identified to be the property of Sookhraj. There were other bits of circumstantial evidence forging links in the chain tending to connect Alexander with the crime.

The jury heard all the facts. The main point which they had to consider was whether or not Alexander committed any act which led to the death of the old man. They came to a conclusion against him and we see no reason to disturb their findings.

The appeals are therefore dismissed. The convictions and sentences are affirmed.

JAIRAM GOPAUL *v.* THE QUEEN

(In the Supreme Court, Court of Criminal Appeal (Boland C.J. Acting, Stoby and Phillips JJ.) April 23, 24, 1954.)

Criminal Law—Falsification of Accounts—Co-accused—Unsworn evidence—Summing-up—Non-direction—Proviso to section 6 of the Criminal Appeal Ordinance.

The appellant was charged with falsification of accounts and convicted. At the trial a man named Balgobin was charged jointly with him of aiding and abetting the commission of the offence. Balgobin was acquitted.

At the close of the case for the prosecution Balgobin elected to give unsworn evidence from the dock. His evidence implicated the appellant.

The Judge directed the jury that anything said by one accused in the absence of the other was not evidence against the other, and if said in his presence, was evidence only if by words or conduct he adapted it. He did not direct the jury that Balgobin's unsworn evidence was not evidence against the appellant.

Held: The failure on the part of the Judge to tell the jury that they were not to consider Balgobin's evidence as affecting the appellant was a misdirection and as it could not be certain that the jury, acting reasonably, could despite the failure of the Judge to give them the (proper direction, inevitably have Come to the same conclusion, this was not a case for invoking the proviso to section 6 of the Criminal Appeal Ordinance.

Appeal allowed. Conviction quashed.

Appeal from conviction of falsification of accounts.

Appellant was convicted at the Berbice Criminal Assizes. The falsification alleged by the Crown was that he had entered in a book kept by him the name of one Balgobin as having worked whereas he knew that Balgobin had not worked.

Appellant's defence was that the overseer or headman had instructed him to enter Balgobin's name and he was unaware whether he had worked or not.

Balgobin who was charged with aiding and abetting in his own defence save an unsworn statement from the dock that he told the appellant he had not worked but was entitled to "holidays with pay" (a system by which a labourer is paid for two weeks without working) and the appellant promised to "fix it up." Balgobin was not entitled to "holidays with pay."

B. O. Adams for Appellant.

G. M. Fammn, Solicitor General for Respondent.

At the conclusion of the arguments, judgment of the Court was delivered by Boland C.J. (Acting).

Boland C.J. (Acting): This is an appeal against a conviction for the offence of falsification of accounts. At the trial the appellant was charged jointly with a man by the name of Balgobin, who was charged with aiding and abetting him (the appellant) in the commission of the offence of falsifying accounts. Balgobin was acquitted. The only ground of appeal which merits the consideration of the Court is one based on the submission that a statement given by the co-accused Balgobin—a statement made from the dock on his election not to go into the witness box and give evidence—was allowed to go to the jury without a warning from the Judge that it was not to be taken as affecting Jairam Gopaul, the appellant.

For a proper appreciation of the point in this case some reference must be made to the facts which were disclosed at the trial. Jairam Gopaul, the appellant, was employed as a field clerk at Plantation Rose Hall. He kept what is known as a Time Book and when labourers

were taken on it was his duty to write down their names in his time book as they were called out by a foreman or some field clerk. Balgobin at the material time—that is, during the week between the twenty-fifth day of June and the first day of July—was a person who used to be employed on the estate working on a tractor. The case for the Crown was that Balgobin did no work during that week and in the Time Book which was kept by the appellant his name appeared as having done some work from the twenty-fifth and succeeding days until the end of the week, and when one made an addition of the sums for which he was entitled to for work each day he was represented there as being entitled to the sum of $13.10.

The system obtaining at the Rose Hall estate is that entries in the Time Book kept by the appellant are entered by another employee in a book that is called a Pay List. It is the duty of the appellant to give to Richieram Beharry, the employee who keeps this Pay List, the information that is necessary for the entry in the Pay List, and there it appears that Balgobin did draw the sum of $13.10 for that week. It ought to be explained that labourers, when they present themselves for work each day, have their names called out, as I say, by a foreman and have their work allotted to them. Later on, it is the duty of the foreman or somebody else to inform the appellant, for entry in his Time Book, of the hours that these people had in fact worked. The] case for the Crown is that Balgobin did not work and that this week's entries in the Time Book made by the appellant were false and they were knowingly false, and that in making those entries he had the intention to defraud.

Evidence was given at the trial by Richieram Beharry that some day before the actual pay day Balgobin came to him and asked him about his right to holiday with pay. It would seem that the estate labourer became qualified after having worked for a certain number of days to be paid for certain days as holidays without working. Those days would be known as holidays with pay.

There is also evidence which the Crown was asking the jury to accept that there were certain erasures in this Time Book which was kept by the appellant where Balgobin's name appears on certain days as having worked and therefore entitled to receive certain sums of money. The Crown was asking the jury to say that in the Time Book where Balgobin was entered as having worked there were erasures and the jury were asked to accept that those erasures showed that the names of a man called Manbodh, in one instance Kennth Lord in another instance and another person in the third instance had been erased, and that it does seem strange that in the Pay List these three persons have their names appearing as person entitled to receive money for work done during that week. Those three men gave evidence that they had actually received money, too, as payment for their work during that particular week.

The appellant's defence at the trial as revealed by cross-examination, and in a statement given by him to the police which was put in evidence and a statement made by him from the dock which he

gave on his election not to go into the witness box and give evidence on oath was that he did make the entries in this Time Book as they appeared there. He did not admit that there were erasures. I am not sure that he said that, but at any rate that was put forward in cross-examination that it was not at all an unnatural thing that a person making entries like that in lead pencil would have cause to erase names when names are called out by the foreman and then changed. He maintained in effect that if these entries were false, if this man Balgobin had not worked, he was not aware that these entries were false; his duty was simply to take down the names as given to him by the foreman and he was under no obligation at all to go around and inspect the work and to see that the various people whose names he had entered were at work. So far as that latter submission was concerned there was some evidence given that during this particular week he was there and must have seen whether they were working or not. At any rate, the whole burden of his evidence was "I know nothing about it. I simply had to write down what was called out and I passed on what I had in my book to the man who was keeping the Pay List." I think there was also a report made by some other person in authority but I do not think for the purpose of this case that report is of any importance.

Balgobin had given a statement to the police and in that statement he stated that some time before the pay day he had been making representations that he was entitled to holiday with pay; that he had actually seen Richieram Beharry and he was told he was not entitled to it as he had not got the required number of days. That is what Balgobin says. He asked the appellant to see about it for him and the appellant told him he would fix it up, and in the dock he said that he was present on pay day and received his money without any knowledge that it was a fraud.

The Judge did warn the jury with regard to Balgobin's statement given to the police in the absence of the appellant that it should not be considered by them as evidence to affect the appellant (the co-accused). He went on to tell them that even if a co-accused were present the co-accused could not be affected by such a statement unless he had in express words or by his conduct shown that he adopted that statement. The jury could have made no mistake about that, that that statement given by Balgobin to the Police which certainly implicated the appellant as guilty of a fraud, was not to be taken as evidence against the appellant, but the Judge would seem to have forgotten to warn them so far as the statement given by Balgobin in the dock, not on oath, was concerned. That should also have been the subject of a warning to the jury that they were not to consider that evidence as affecting the appellant at all. This Court in other cases has made it quite clear that the Judge is under an obligation to inform the jury that this statement has no effect against the co-accused. What had been said by Balgobin to the Police and in the dock was extremely prejudicial to the appellant. There can be no doubt that it was fastening on him, unmistakably, the knowledge that the

entries would be false and that he would be a party to having money paid out by the estate authorities in pursuance of a fraud.

We have got to consider now whether that failure on the part of the Judge to tell the jury that so far as the appellant was concerned they were not to consider that evidence but they could consider it as affecting Balgobin himself, whether it is such a misdirection that would be sufficient to get the Court to order that the conviction be quashed. Balgobin, as I say, was acquitted. It is not for us to speculate why he was acquitted. It may be that the jury, accepting that these entries were false, was not satisfied beyond a reasonable doubt so far as Balgobin was concerned that he had an intention to defraud. It may well be that they thought that here was a man who believed in all sincerity that he was entitled to holiday with pay and therefore, they were not satisfied that there was an intent on his part to defraud the estate authorities. We need not go into that. What we have to see is the case against the appellant. This Court has to consider the case as against the appellant as if Balgobin had never said anything in the dock, that is to say, we have to consider what other evidence was there as affecting the appellant. I have already said that the Judge made it clear that the statement given by Balgobin to the Police was not to be considered as affecting the appellant —what other evidence was there?

First of all, there was the evidence that there was no work done by Balgobin. There is ample evidence so far as that" part is concerned, I think, to have permitted the jury to make a finding that Balgobin did not work that week and if the conviction depended merely on that, although the appellant does not admit that Balgobin did not work, there was sufficient evidence that he did not work. But another necessary element in the offence is that not only the entries were false but they were knowingly false—that is, that they were made false knowingly by the appellant. What evidence is there to support that? If the jury would accept that there were erasures] there is evidence from which it might be said that these entries referring to Balgobin were made knowingly false. If we were satisfied—and we had an advantage of looking at the book ourselves—that if the jury came to the conclusion that there were erasures on the book itself with nothing else to aid them we would not be inclined to disturb that finding. But what we would have to consider is whether they were not aided in coming to the conclusion that there were in fact erasures because of the statement of Balgobin, which they had taken into consideration that he had seen the accused before-hand.

Then there is another bit of evidence which the Crown had put forward and that is, in the Pay List I mentioned there appear the names of these other people Lord, Mandbodh and Persaud. How did they get into the Pay List. As I stated the Pay List is written up from information received from the Time Book which the appellant would pass on to Richieram Beharry, the keeper of the Pay List. It would seem that that goes a long way in establishing that there was

knowledge of the falsity of the entries because if the Crown's case was that these erasures were erasures of the names Lord, Mandbodh and Persaud then that might, as I say, go a long way in establishing knowledge on the part of the appellant that these entries were false. But a suggestion was made by the defence in cross-examination that other persons might have been concerned in the fraud. The Judge took some note of that because he gave some warning to the jury that if they thought other persons were implicated they would have to be considered as accomplices and he warned them as to the necessity for corroboration of the evidence of an accomplice. One does not know whether, having regard to the statement which the jury received as given by Balgobin in the dock, they may have set aside any possibility or the likelihood of other persons being concerned with the fraud. Balgobin was saying that he had spoken to this man (the appellant) and the appellant had said he would "fix it up," so the jury might have said "if even we might have had a reasonable doubt, now that we have heard what Balgobin has said we entertain no reasonable doubt in favour of the appellant after that." So, what this Court has to consider is if the statement of Balgobin were excluded would the jury, acting reasonably, have inevitably come to the same conclusion as they did that he was guilty? We feel that it would not be safe to say that.

We feel that there was a possibility that the acceptance of the other evidence—the findings that have been made with regard to the evidence given by witnesses as a result of the documentary evidence that those findings may have been made by the jury without giving the appellant the benefit of the reasonable doubt because of what they had heard from the lips of Balgobin in the Court. In those circumstances we think it would be wrong to invoke the proviso to Section 6.

The other grounds of appeal I need not refer to. I think that the Court made itself quite clear in the course of submissions by counsel for the appellant that there was no substance in those submissions nothing which would induce the Court to set aside the conviction. It is on this ground namely that we are not satisfied that a jury, acting reasonably, would inevitably have come to the conclusion in the absence of that statement which they heard given by Balgobin and about which there was no warning given by the trial Judge—we are not satisfied that they would have inevitably come to the conclusion that the appellant was guilty and return the verdict which they did. In those circumstances the conviction must be set aside. The appeal must be allowed and the conviction and sentence set aside.

JOHN CARTER *v.* MAHABIR SINGH

(In the Supreme Court, Civil Jurisdiction (Boland, J.) March 15, 22, 29, 30, 31; April 8; May 6, 1954.)

Immovable property—Contract—Sale and purchase—Misrepresentation— Warranty—Rescission.

A contract for the purchase of immovable property was entered into between the plaintiff and defendant.

The plaintiff refused to complete the transaction as he alleged that the defendant represented to him that the property had been assessed by the Rent Assessor and the income from rents determined whereas the property was not so assessed and' the income was lower than represented.

The plaintiff claimed a rescission of the contract and repayment of the amount paid on the purchase price.

The defendant counterclaimed for specific performance or alternatively damages for breach of contract.

Held: Misrepresentation made by one party to a contract to the other, whether such misrepresentation be fraudulent or innocent, so long as it has induced the other party to enter into the contract, is good ground for rescission of the contract. The defendant was guilty of innocent misrepresentation. A plea that the plaintiff could have discovered the true facts for himself is untenable, even in the case of innocent misrepresentation.

Judgment for plaintiff decreeing in his favour rescission of the contract. Defendant to repay sum received as part of purchase price. Counterclaim dismissed.

Action by the plaintiff for rescission of a contract entered into between the defendant and himself on the ground of innocent misrepresentation.

Counterclaim for specific performance.

Distinction between misrepresentation and breach of warranty explained.

J. O. F. Haynes for plaintiff.

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

Boland C.J. (Acting): *Cur adv. vult.*

In this action the plaintiff seeks an order for that relief which in certain circumstances is accorded to a suitor in equity—namely that there shall be a decree for the rescission of a contract into which plaintiff admits he had entered as a party. On the 19th March, 1952, the plaintiff and the defendant had both signed a written contract for the sale by the defendant to the plaintiff of the immovable property described as West half of lot 29 Second Street, Alberttown in the city of Georgetown. It is admitted by both parties that notwithstanding that it is expressly stated in the contract that the purchase price is $23,000:— it was in fact agreed between them that the price shall be $22,500:—; also the plaintiff paid on account not the sum of $1,500:— as therein stated, but the sum of $1,000:— It may be mentioned that the plaintiff consented to the written contract expressly specifying an untrue larger sum both in respect of the purchase price and the amount paid on account. It was so specified on the suggestion of the defendant who seemed to have thought that publicity of the sale at the lower price might expose him to claims from commission agents other than the one introducing the plaintiff to him as he had previously requisitioned their services to secure a purchaser at a price which was not to be less than the sum of $26,000:—.Accord-

ingly, as directed by the defendant, the plaintiff handed to the defendant on the execution of the agreement his cheque for $1,500:— on the latter's promise that when the cheque, which was made payable to the defendant or his order, was cashed at the Bank, the plaintiff would be refunded $500:—. This promise was duly carried out. The cheque for $1,500:— was cashed at the Bank two days after the day on which the agreement was signed whereupon the plaintiff was at once paid back $500:—. As stated in the written contract it was agreed that the sale was to be subject of two mortgages then subsisting over the property amounting to an aggregate mortgage indebtedness of $17,000:—, and accordingly the defendant on completion by transport was to pay a balance of $4,500:— so as to make the sum of $22,500:— the full price as agreed. In the issue now before the Court for determination nothing turns upon this oral variation of the written contract which, as has been said, was with the consent of the parties and which has not led to the dispute between them now before the Court. It is only mentioned because without this explanation the comment made by defence counsel on the evidence relating to the date on which the cheque was cashed would not be understood. Counsel sought to make a point against the plaintiff suggesting that he had for certain reasons delayed the presentation of the cheque at the Bank.

The ground put forward by the plaintiff in support of an order for rescission is that he was induced to enter into this contract by a misrepresentation made to him by the defendant and plaintiff urges that completion of the agreement would be prejudicial to him. Plaintiff asks not only for rescission but for the consequential relief of getting a refund of the sum of $1,000:— which he paid.

In his statement of claim the plaintiff alleged that the defendant knew that the alleged misrepresentation was untrue. However, on the Court pointing out that fraud was not expressly pleaded, Counsel for the plaintiff stated that plaintiff did not intend to urge that the misrepresentation was fraudulent, and it became clear that plaintiff is relying not on fraud but on misrepresentation, even though innocent, as a ground for the rescission of the contract.

The statement of defence pleads a denial of the alleged misrepresentation; alternatively that the plaintiff was not induced to enter into the contract by any such misrepresentation if made, declaring his willingness now and at all material times to complete the contract and to pass transport to the plaintiff. He counterclaims for damages alleged to be sustained by him as a result of plaintiff's repudiation of the contract; alternatively he claims to be entitled to forfeit the sum of $1,000:— paid by the plaintiff, or an order against him for specific performance of the contract.

The premises W 1/2 lot 29 Second Street, Alberttown, comprise four buildings standing on the land — a cottage and three two-storey buildings. The two-storey buildings are in a row one behind the other — one to the front, another in the middle — and the third at the back. All four buildings are rented out to monthly tenants — nine in number.

The front two-storey building is divided into two tenancies — one in the upper flat and the other in the lower flat. The middle two-storey building has four tenants; in the upper flat there are two tenants, each occupying a half of that flat, while the lower flat is similarly divided into two tenancies. The back two-storey has a tenant in the upper flat and one in the lower flat. The cottage is occupied by one tenant.

The misrepresentation about which the plaintiff complains as having induced him to enter into the contract is that he was expressly told by the defendant and defendant's agent, a Mr. Charles who had been authorised by the defendant to secure a purchase for the premises, that all four buildings on the lot had already been assessed by the Rent Assessor and that the total monthly rentals were at the time of the contract $259:—. The defendant denies that he made any such representation, but it is admitted by the defence that such a statement would have been untrue. It should be stated that these buildings had been re-constructed or transformed since the year 1941, and therefore the "standard rents," which would be the first rentals thereafter, were liable to be reduced on application to the Rent Assessor by landlord or tenant under the provisions of the amending Rent Restriction Ordinance of 1948. As a matter of fact, the defendant as landlord had since the year 1950 made application to the Rent Assessor to have the tenancies in the buildings assessed — or at any rate eight of them. Four were assessed during the same year 1950. These were the four tenancies in the middle building but in each of the four the existing rental had been reduced on assessment by two dollars because the water connections of the building were not yet completed. For some unexplained reason all the other applications for assessment were still pending in the Assessor's Court at the date of the contract between the plaintiff and defendant and they were not finally assessed until afterwards on the 9th April, 1952. The total maximum rents in respect of all the buildings on the land as disclosed by the assessment certificates tendered in evidence now amount not to $259:— but only to $243:—, in which amount is included the rental of one of the apartments in the middle building in respect of which there was no assessment certificate, but which is admitted to be similar in every respect to the adjoining apartment on the same floor.

Before I proceed to review the evidence upon which my findings on the facts in issue are based, it is well, I think, that I should state what are the principles governing a decree by the Court on the application of a party to a contract for the rescission of the contract based on the plea that he was induced to enter into the contract by some misrepresentation made to him by the other party. Misrepresentation made by one party to a contract to the other, whether such misrepresentation be fraudulent or innocent, so long as it had induced the other party to enter into the contract is good ground for rescission of the contract. When such misrepresentation was fraudulent, both at law and in equity the defrauded party is entitled in any proceedings brought against him for the enforcement of the contract, or for damages for its breach, to plead in defence the avoidance of the contract on the ground of the fraud practised on him. He can also counterclaim or himself initiate

his own independent proceedings for its annulment, or, at his option, for compensation for the damages sustained by him by reason of the fraud. But for innocent misrepresentation, that is misrepresentation innocently made to him by the other party, the deluded party's only remedy is one which is open to him by rules of equity that are based on a principle under which it is maintained that it would be a great hardship on him if, in the circumstances, the other party were able to enforce the contract. Accordingly equity would on his filing a suit decree in his favour that the contract should be rescinded.

In view of the submissions made at the hearing concerning the law relating to breach of warranty with respect to which many cases were cited in the course of the hearing, I think it appropriate that I should here point to the distinction between the plea of misrepresentation as a ground for rescinding a contract and that for the avoidance of the contract because of breach of warranty.

A warranty is a promise by one of the parties to a contract made to the other party or parties, which is subsidiary to the real subject of the contract the entering into which by them provides the consideration which makes the warranty enforceable. The real distinction between a cause of action based on warranty and that based on misrepresentation is that the promise embodied in a warranty is itself enforceable just as a promise which is a constituent element' of a valid contract is enforceable. It is immaterial whether the person giving the warranty did so innocently or with a fraudulent intent. If the warranty is a basic warranty — one on which the enforceability of the substantive contract is wholly based and which therefore is a condition precedent to its enforcement, a breach of the warranty entitles the other party or parties to the contract to claim avoidance of the contract, or, at his or their option, damages for the breach of the warranty— whether given fraudulently or innocently.

On the other hand the right to relief arising from misrepresentation is not one for breach of a contract constituted of the misrepresentation as an enforceable promise which the defendant has failed to fulfil or observe. As has been already indicated, to be guilty of fraudulent misrepresentation leading to some damage to anyone to whom it is made and who acts upon it is itself an actionable tort—in addition a contract into which the injured party has thereby been induced to enter with the tortfeaser may be annulled at the option of the former. If the misrepresentation was not fraudulent but innocently made, though it is not an actionable tort, the aggrieved party would be entitled none the less to have the contract set aside in a suit brought before the Court. What is here stressed is that misrepresentation, either fraudulent or innocent, is not a promise by one person to another which law requires as a necessary element of an agreement between two persons, the breach of which gives rise to a cause of action. Innocent representation falls under notice for redress by the Court only because of the way it affects a contract which it has induced. It is true that a warranty, particularly a basic warranty or condition precedent, given by one party to another is often the inducing cause for the other having decided to enter into the contract. In seeking redress

before the Court the latter may elect to advance his claim to relief not on the ground of the breach of the warranty, but on the principle governing the grant of the remedy for misrepresentation.

In this case whether or not the language of the alleged misrepresentation can be construed to import a warranty in the nature of condition precedent, the plaintiff by his statement of claim has shown that he does not advance his claim on breach of warranty but he prays the Court for the remedy of rescission of the contract because of misrepresentation. The Court therefore has to determine whether he is entitled to that relief in the light of the principles on which such relief is granted.

As to the facts disclosed in evidence at the trial it is undisputed that W1/2 lot 29 Second Street, Alberttown, in the city of Georgetown, was owned by the defendant and that as he wished to sell, first he instructed Mr. Oscar Wight, a licensed auctioneer, to put the premises up for sale at public auction with a reserved price fixed at $26,000:—. It is also not in dispute that there were no bidders at that sale which on a date late in February or early in March, 1952, was conducted by Mr. Wight, who for the purposes of his auction business shared an office with Mr. J. A. Charles, a property agent. Mr. Wight's failure to get any bid at the auction led Charles to approach the defendant, who eventually after much hesitation told Charles he would accept $22,500:—. I am satisfied on the evidence that Charles was not acting as the agent of the defendant in the negotiations preliminary to the written agreement of sale which was signed by plaintiff and defendant on the 19th March, 1952. True, Charles was defendant's agent employed to introduce to him a person willing and able to purchase, but in respect of any misrepresentations made by Charles, by way of, inducement relating to particulars of the property to be sold, Charles unless he was expressly authorised so to induce a prospective purchaser, would not be speaking as agent for the defendant as that would be outside the scope of his agency. Such a statement by Charles may have been solely for the purpose of furthering the earning of his commission. Accordingly though plaintiff said that Charles, as an inducement to him to buy, told him that the rents on the buildings were assessed at $259:—. I hold that unless defendant expressly authorised Charles to make that representation to the plaintiff it is not to be taken as a representation made to the plaintiff by the defendant through his authorised agent. But I believed the plaintiff when he testified that before he signed the agreement the defendant con-firmed what Charles had told him and that it was this assurance given him by the defendant himself personally that the rentals had all been assessed and that the total rentals were $259:— which had induced him to enter into the transaction. It is however contended that assuming that the defendant did give such an assurance to the plaintiff it is now not open to the plaintiff to say that he was induced by what the defendant said because he himself had easy means of verifying what was said. Plaintiff, it is urged, could have got the required information at the Magistrate’s Office in Georgetown. But, "No man can

plead as an excuse that he whom he has misled was wanting in sagacity or diligence in not testing the statement by inquiry." (*Vide* 23 Halsbury, Hailsham Edition, p. 85). On a fraudulent misrepresentation such a plea would, of course, be of "a shameless and impudent character" but even on an innocent misrepresentation—which is the nature of the misrepresentation on which the plaintiff is content to base his claim in this case — a plea of that nature would be untenable. As James L.J. observed in his judgment at page 261 of Re Arnold, Arnold v. Arnold (1880) 14 Ch.D 270. "How can the vendors be heard to say that the purchaser ought to have found out that very blunder which they never found out for themselves." Certainly equity would not, as against a purchaser so misled, decree specific performance of the contract of sale by rigid adherence to the rule embodied in the maxim *caveat emptor*. The plaintiff, it is true, did inspect the premises before signing the contract but no inspection of the premises could have disclosed whether the rentals were assessed, nor would any information, which plaintiff might have elicited on enquiry from the tenants, have been of such weight as against the information given by the landlord—the defendant himself.

Yet, although the plaintiff may be able to show that he did in fact rely on this untrue statement which defendant made about the rents, if the Court is to rescind the contract, the Court must be satisfied in addition that that statement about the rents was sufficiently material reasonably to induce the plaintiff to enter into the contract. The plaintiff says that he had made it known to the defendant that his proposed purchase was for the purpose of an investment. Even in the absence of any communication to the defendant that that was the plaintiff's object for purchasing, both parties must be assumed to have been aware that the premises were controlled premises within the meaning of the existing rent restriction law and that accordingly the tenants enjoyed the protection against ejectment and against increase of rents afforded them by the existing legislation. Moreover these premises as must have been known were "new premises," that is, premises built or rented after 8th March 1941 and that the rents, if not already assessed by the Rent Assessor, might at a future date be reduced on application for assessment by tenant or landlord. Whether a purchaser's object in buying is for the purpose of re-sale at a profit, or whether he may wish to retain the premises, it would be a very material circumstance —one which would influence the amount of the price—that the rentals had already been fixed by the Rent Assessor.

I did not accept the evidence for the defence given by the defendant and his son as to when a certain memorandum detailing the rents payable was prepared and passed on to the plaintiff for his information. The plaintiff produced this memorandum at the trial and explained how and when he got it. Four or five days after the agreement was signed, plaintiff went to the Magistrate's Court to get certified copies of the assessment certificates, and the information he got there which was different from that given by the defendant caused him to send for Mr. Charles, who eventually got the defendant to give this memorandum setting out the true position as regards assessments. I believed plaintiff also when he testified that when he protested that

this was not what the defendant had told him, defendant suggested that they should await assessment decisions in those cases which were pending, and, if there were reductions, the purchase price could by agreement be proportionately adjusted. To this the plaintiff assented as being not unreasonable in the circumstances. But when the remaining assessments were made by the Assessor, and the total rentals of the premises as certified became $220:— instead of $259:— as had been represented by the defendant, the defendant refused to reduce the price except by a sum which he said would not be more than $500:—. On the other hand plaintiff was claiming a reduction by $2,000:—. Correspondence then passed between the solicitors of the parties and ultimately these proceedings were filed.

In the correspondence the facts given by the plaintiff's solicitor in support of plaintiff's complaint as to how he was prejudiced by the defendant's misrepresentation are identical with those narrated by plaintiff in his evidence before the Court. But strange to say what Messrs. Cameron and Shepherd wrote on behalf of defendant in their letter dated 29th May, 1952—and this must have been on defendant's instructions—is in conflict with the defendant's own testimony.

Messrs. Cameron and Shepherd in their letter stated:

> "Mr. Mohabir Singh categorically denies that he guaranteed the rent at $259:— per month or so informed Mr. Carter or that such rent was actually the assessed rent fixed toy the Rent Assessor.
>
> "On the contrary our client says that *the only information he gave Mr. Garter before the sale was that the rent he was receiving* was $243:—*per month and that some of the rents had been assessed. The figure of* $259.78 *was only mentioned after the sale in a statement given by Mr. Charles to Mr. Carter. In any case the guarantee of rent was never a condition of sale."*

Charles corroborating the plaintiff explained how following upon Carter's protest to him he went to defendant and told him about the plaintiff's complaint and that on defendant's giving him particulars he typed out the memorandum on defendant's typewriter with defendant's permission, and that at once he took the memorandum to the plaintiff after he had got the defendant to sign it.

In contradiction with what his solicitors wrote in their letter, the defendant in his evidence tried to convince the Court that at the interview he had with the plaintiff immediately before the agreement for sale was prepared and signed, plaintiff told him that he understood that only one building had the tenancies assessed and that the tenancies in the other buildings were before the Rent Assessor for assessment. Defendant wished the Court to believe that the memorandum had been made by Charles at his dictation some weeks before and that Charles had passed on information to the plaintiff which enabled plaintiff to say that he understood that only one building was assessed. But the memorandum sets out the total rentals obtainable as $259.78 which includes an addition of $8.00 after certain repairs had been concluded at the building already assessed, and a sum of $8.73 said to be an increase that was permitted by law on an increase of rates and taxes. Defendant must have spoken about $259:— for it would be strange

indeed if defendant had given as he said, this memorandum to Charles some weeks before he would have withheld that information about the figure $259:— from the plaintiff, and would have mentioned only the sum of $245 :—as the total rents. I do not regard defendant and his son as witnesses of truth. There is no need to consider the comments made by defendant's counsel on the fact that the cheque for $1,500:— was not cashed until two days after it was drawn. That cheque was, by defendant's directions, deposited with Mr. Cabral, Barrister-at-law, who had revised the written agreement in defendant's behalf. There is no substance in the suggestion that plaintiff was responsible for the cheque not being cashed at the Bank until two days after the agreement because, as was alleged, plaintiff was awaiting the completion of another transaction in which he is said to have figured as a person speculating in buying and selling properties. The thinly veiled suggestion was that this purchase of lot 29 Second Street, Albertown, Georgetown, was another business speculation by plaintiff in buying and selling of properties, and that plaintiff on failure to get an immediate sale at a profit is now seeking to wriggle out of his obligations under the contract. I see no foundation for this suggestion.

Accordingly, I give judgment for the plaintiff, decreeing in his favour the rescission of the contract, and I order the defendant to repay the sum of $1,000:— he received as part of the purchase price and I dismiss the defendant's counter-claim. There will be costs to plaintiff on both claim and counter-claim.

Judgment for the plaintiff on claim and counter-claim with costs.

Solicitors: A. G. King for plaintiff.

J. E. de Freitas for defendant.

SHEIK M. YACOUB as executor of Maria Monnissan, deceased *v.* JANET NISSAU

(In the Supreme Court, Civil Jurisdiction (Hughes J.) April 27, 28, 29; May 3, 4, 13; 1954).

Will—Capacity to make—Senile dementia—Lucid intervals.

The testatrix died on the 2nd April, 1952, and the plaintiff propounded a document made and executed on the 8th, September, 1951; as her last will and testament.

The defendant alleged that at the time the will purported to have been made the deceased was not of sound mind, memory and understanding.

Medical testimony of the deceased's usual medical adviser was that from June or August 1951 to the 22nd March, 1952, the deceased was more or less senseless and in an advanced stage of senile dementia and was incapable of having a lucid interval in September 1951. His *locum tenens* saw the deceased on the day the will was made, having been summoned there to give medical treatment. On that occasion he was requested to make the will.

Another doctor gave evidence that a person suffering from senile dementia can have lucid intervals.

Held: The plaintiff had discharged the burden of proof. The deceased was in possession of her faculties and if suffering from senile dementia could have had a lucid interval,

SHEIK M. YACOUB, EXECUTOR MONNISSAN, deceased *v.* JANET NISSAU

Samuel Singh v. Eric Osmond Subryan, L.R.B.G, (1948) 110 applied, Judgment for the plaintiff.

(Editor's note: An appeal to the W.I. Court of Appeal was dismissed.)

Allegations of impersonation and mental incapacity in an action in which the plaintiff propounded a document as the last will and testament of his grand mother. The facts are fully set out in the judgment.

S. D. S. Hardyal for plaintiff.

B. O. Adams and *H. Matadial* for defendant.

Hughes J: *Cur. adv. vult.*

A document made and executed on the 8th September, 1951, is, in this matter, propounded by the plaintiff as the last will and testament of Maria Monnissan (hereinafter called the deceased) who died on the 2nd April, 1952.

The plaintiff is a grandson of the deceased and is the sole executor and trustee named in the alleged will; he is, too, the son of Kiroon Nissah to whom under the alleged will is left the property of the deceased, except for certain small legacies.

The defendant is a granddaughter of the deceased and a first cousin of the plaintiff.

The defendant puts the plaintiff to the proof that the will was duly executed and alleges, first, that at the time the will purports to have been executed the deceased was not of sound mind, memory and understanding and, secondly, that the alleged will was made in the absence of the deceased and in the presence of another woman who impersonated the deceased. By way of counter-claim the defendant alleges that she is one of the persons entitled on intestacy to the estate of the deceased and asks the Court to pronounce against the will propounded by the plaintiff.

Up to the latter part of the year 1950 the deceased lived at Palmyra, not far from her son Mohamed Bacchus. She then moved to the home of her eldest daughter, Kiroon Nissah at Adelphi Village, Canje, where she continued to live until her death and where, it is 'alleged by the plaintiff, the will was made.

According to the birth certificate produced in evidence the deceased was eighty-five years of age at the time of her death and not, as stated on the death certificate, ninety-two years of age.

The first matter which calls for consideration is the allegation of impersonation put forward by the defence, that is to say, that the document dated 8th September, 1951, was not made and executed by the deceased but by another woman, Lachrania, who impersonated the deceased. That allegation is based —

(1) on the evidence of Mohamed Zahoor (also called Issaback), a stepson of Mohamed Bacchus. This witness stated that in 1951 he saw Dr. Siung, by whom the alleged will was written and witnessed, at the house of the plaintiff, which is in the same yard or compound as the house of his mother Kiroon Nissah. Also present at that time, according to this witness, were Lachrania, Kiroon Nissah, the plaintiff's wife, his two sisters-in-law and one Seegolam. Dr. Siung and Lachrania, said this witness, were sitting on chairs and the former was questioning Lachrania as to whom she would give her property and that Lachrania had replied that

she would give "this daughter alone" (indicating Kiroon Nissah). This witness said that he was then sent to call Walterine Ross, who is the other witness to the alleged will:

(2) on the evidence of the defendant that whenever she visited the deceased at Adelphi she "always met Lachrania there":

(3) on the evidence of Mohamed Bacchus (also called Maxim), a son of the deceased, who said that about four months after the death of the deceased the plaintiff told him that Kiroon Nissah had made a false will which he, the plaintiff, would hand over to the witness if he were given $500:—;

(4) on the evidence of Muniram Nissah, a daughter of the deceased, who stated that about three months after the death of the deceased the plaintiff told her that his mother, Kiroon Nissah, had got Dr. Siung to make a false will for which she paid $400:—:

(5) on the evidence for the defence that at the date of the alleged will the deceased was hopelessly incapacitated both mentally and physically and therefore that document could only have been made and executed by someone other than the deceased. Opposed to the above evidence for the defence regarding impersonation there is, for the plaintiff—

(1) the evidence of Dr. Siung (a) that he could see a definite resemblance between the person for whom he made the will and Kiroon Nissah (the daughter of the deceased); (b) that the woman in the photograph exhibited (that is, the deceased) is the one for whom he made the will; (c) that he made the will, not at the house of the plaintiff as Mohamed Zahoor said, but at the house of Kiroon Nissah; (d) that, again contrary to what Zahoor said, when he questioned the person for whom he made the will only he (Dr. Siung) and that person were in the room; (e) that he got no reward for making the will;

(2) the evidence of Walterine Ross, a witness to the alleged will, to the effect that the will was made in the house of Kiroon Nissah and not in that of the plaintiff; that the person for whom Dr. Siung wrote the alleged will was the deceased with whom she (Ross) had come into almost daily contact since 1950; that only Dr. Siung and herself were in the room when the will was made;

(3) the evidence of Lachrania (the woman alleged to have been substituted for the deceased for purposes of making the alleged will) who denied knowing Dr. Siung or taking part in the impersonation alleged;

(4) the evidence for the plaintiff regarding the mental and physical capacity of the deceased at the time of the making of the alleged will.

I shall now examine the evidence, set out above, regarding the allegation of impersonation. The witness Mohamed Zahoor from the year 1950 lived in the house of Kiroon Nissah at Adelphi and worked for her as a house boy and on a bus; in June, 1953, he left there and went to live at Palmyra with his step-father, Mohamed Bacchus, who is a son of the deceased and one who no doubt expected to benefit under the will of the deceased for he stated that he looked after her cattle and

rice farming, collected rents for her and otherwise eared for her when she lived at Palmyra. The evidence of this witness, Zahoor, as regards the place at which the alleged will was made, the person by whom the will was made (Lachrania) and the circumstances attending the making of the will, is in direct conflict with the evidence of Dr. Siung and of Walterine Ross. There is, too, the fact that if Kiroon Nissah were causing a false will to be prepared it is most improbable that she would permit Zahoor to be present for in the alleged will the interest of his step-father, Mohamed Bacchus, is all but disregarded. In addition it is to be noted that though Zahoor, as he said, knew that Lachrania was being substituted for the deceased he took no steps to report the matter. I have no difficulty in coming to the conclusion that the evidence of Zahoor is the outcome of instruction by his step-father and therefore is not to be relied upon.

The evidence of the defendant that she often met Lachrania at the home of Kiroon Nissah is equivocal and cannot by itself be regarded as substantiating the allegation of impersonation.

The evidence of Mohammed Bacchus and of Muniram Nissah that the plaintiff told them that Kiroon Nissah bad made a false will may well be true for it is abundantly clear from the evidence that the plaintiff's object was to obtain for himself, by fair means or foul, whatever he could from his possession of the alleged will which had come into his hands in his capacity as sole executor named therein. In this connection it suffices to mention the plaintiff's admission, first, that he was "forcing the hand" of his mother (who was virtually the sole beneficiary under the alleged will) by not performing his duty as executor until he got transport from his mother of the land on which his house stood; and, secondly, that after the death of the deceased and until the time of delivery of the alleged will by him to Mr. Hardyal, he was "on the side of the others," that is, those who would benefit if the deceased had died intestate. There may be truth, too, in the evidence of Mohamed Bacchus that the plaintiff told him that he, the plaintiff, would hand over the will if Bacchus gave him $500:—.

The only matter that remains to be considered on this question of impersonation is the testamentary capacity of the deceased and that matter is one which must be considered also in connection with the other limb of the defence — that the deceased was not of sound mind, memory and understanding.

The evidence as to the mental condition of the deceased before the 8th September, 1961 (the date on which the alleged will was made), on that date and after that date will now be considered.

John Francis Todd, Sub-Registry Officer, New Amsterdam, stated that in the year 1946, he formed the opinion that the deceased's mentality was failing. On 27th October, 1950, the deceased executed *a* Power of Attorney at the Registry, before this witness, who stated that he then formed the opinion that she was not of full mental capacity as he "had to repeat things to her and she could not grasp quickly what was said to her"; that at no time, while executing the Power J Attorney, did she speak but only nodded or shook her head in reply to questions.

Mohamed Bacchus stated that before the deceased left Palmyra in 1950 he asked her, "Mother, what you doing?" and she replied, "I want to get married"; that she used to sing nonsense and sometimes talked "good" and sometimes "bad" — that she had "partly lost her sense."

The defendant stated that at Palmyra the deceased was "not so well as to remember everything she was doing"; "sometimes she would cry and sometimes laugh."

The evidence of Muniram Nissah was that at Palmyra the deceased would speak "so that you cannot understand what she say"; that she would say that she had a son in England.

Pulmuni, aged 19 years, stated that at Palmyra the deceased told her that none of her children, except Kiroon Nissah, used to look after her and that she (the deceased) wanted to go and live at Adelphi with her daughter, Kiroon Nissah.

The next period to be dealt with is the time that the deceased was at Adelphi, after ceasing to live at Palmyra. The evidence of Mohamed Bacchus, of the defendant and of Muniram Nissah is to the effect that from the early part of the year 1951 until the time of her death the deceased was incapable of understanding anything said to her or of recognising anyone. On the other hand there is the evidence of Ivy Fortune, Oscar Ross, Walterine Ross, Bahman Eman Bacchus (a Mohammedan Priest in charge of No. 2 Canje Mosque, and a witness whose evidence I considered to be reliable), Pulmuni, Moonsammy and the plaintiff, which is to the effect that up to and including the 8th September, 1951, and after that date, the deceased was able to carry on a reasonable conversation and was not confined to her bed. There was also much evidence of the presence of the deceased at the wedding of Mohamed Zide on 4th November, 1951, and of her having spoken with clarity and understanding on that occasion.

I turn now to the medical testimony as to the testamentary capacity of the deceased and I shall deal first with the evidence of Dr. Ferdinand because he saw the deceased at an earlier time than and after, Dr. Siung. Dr. Ferdinand stated that he first got to know the deceased about "June to August" 1951 and saw her on several occasions, on an average of once every five or six weeks up to the time of his last visit on 22nd March, 1952 (she died on 2nd April, 1952). He describes her as an old, enfeebled and bedridden person who had lost control of both bowel and bladder functions; she was unable to answer questions and had no memory either for recent or remote events; she was, he stated, more or less senseless and in an advanced stage of senile dementia. In Dr. Ferdinand's opinion the deceased was not capable of having a lucid interval in September, 1951, or at any time between the times he first saw her and the time of her death. On more than one occasion, Dr. Ferdinand said, he was asked by the relatives of the deceased to make a will for her but he declined to do so as it was impossible for her, on account of her condition, to make a will.

Dr. Siung was *locum tenens* for Dr. Ferdinand from 25th August to 10th September, 1951. In 1951, and before 8th September of that year, Dr. Siung, as a consequence of his acquaintanceship with one

Seegolam, had been introduced to and conversed with the deceased: on that occasion, he said the deceased was able to move about on her own and in possession of her mental faculties. He next saw her on 8th September, 1951, when he went to where she was living as a result of seeing a white flag placed outside her house—the usual signal to the passing doctor that his services are required. He went to the room where she was, in the house of Kiroon Nissah, and she moved, unaided, from a couch to a chair. She complained, Dr. Siung said, of a cough and of stuffiness in the nose; he examined her and gave an injection of penicillin to clear up the phyrngitis. She was then, he said, in full possession of her senses; quite capable of arriving at a reasonable conclusion or logical decision. As he was about to withdraw he was asked by the deceased, "Doctor, could you do me a favour?" and she then asked him to make her will and he agreed to do so. Kiroon Nissah was then called into the room by the deceased who asked for a blank form which was brought. Dr. Siung said that he then asked Kiroon Nissah and the plaintiff to leave the room which they did and he proceeded to put to the deceased a number of questions designed to test her mental capacity. Having satisfied himself that her mental capacity was "sound enough for her to make a will" he took her instructions as to the disposal of her property and wrote what she told him on the blank form which had been brought, including the appointment of the plaintiff as executor. After a number of other questions put by Dr. Siung to the deceased, Walterine Ross was fetched and it was explained to her that she was to be a witness to the will. The will was read to the deceased and to Ross and the former said that was exactly what she wanted. The deceased intimated that she could not write and her mark was made for her by Dr. Siung in the presence of Ross. The will was left with the deceased and Dr. Siung then went to the plaintiff's house. That, in considerably shortened form, is the evidence of Dr. Siung.

The evidence of Dr. Sharpies is that if a person were to answer correctly and intelligently the questions which Dr. Siung stated in evidence that he put to the deceased, then that person would be a fit and proper person to execute a will. It may here be stated that Dr. Ferdinand does not disagree with this view. In the opinion of Dr. Sharpies, and this opinion, which I accept, is shared by Dr. Siung, there may be lucid intervals in cases of senile dementia. Dr. Ferdinand does not agree with that view.

Before giving my findings on the evidence it must be stated that the legal aspects of this matter present no difficulty and have in fact not been the subject of conflicting submissions by counsel. The guiding principles applicable in this case are to be found in Samuel Singh v. Eric Osmond Subryan B.G.L.R. (1948) 110 and in the several cases cited by counsel for the defendant herein.

As regards the defence of impersonation there is good reason for saying that it is an after thought. That reason is to be found in the fact that the defence of impersonation was included in the Statement of Defence by an amendment thereto made at the trial; the submission of counsel for the defendant that such a defence

may be regarded as coming within paragraph 2 of the Statement of Defence is, in my view, without substance.

After careful consideration I have come to the conclusion that, not only have the provisions of the Wills Ordinance been complied with, but also that the evidence of Dr. Siung as to the identity of the deceased and as to her mental capacity at the material time (supported as I find by the evidence of Dr. Sharples, particularly as regards the matter of lucid intervals in senile dementia, and by the evidence of Bahman Eman Bacchus and other witnesses for the plaintiff) is to be believed. I hold that the plaintiff has discharged the burden of proof placed upon him and I am satisfied on the evidence that the deceased did know and approve of the contents of the will and that she intended to and did actually execute it and therefore the plaintiff is entitled to the Orders for which he asks and it is ordered accordingly.

In view of the unsuccessful defence of impersonation I make no order as to costs.

Judgment for the plaintiff.

R. N. Tiwari for the plaintiff.

N. C. Janki for the defendant.

IN THE MATTER OF THE INCOME TAX ORDINANCE
and
IN THE MATTER OF THE RULES OF THE SUPREME COURT
COMMISSIONER OF INCOME TAX *v.* BARCLAYS BANK (Dominion, Colonial and Overseas) and ROYAL BANK OF CANADA.

(In the Supreme Court, Civil Jurisdiction, In Chambers, (Stoby J.) March 29; May 2.5, 1954).

Originating summons—income Tax Ordinance—Request for information from Banks—Form of request.

In December 1952 the Commissioner of Income Tax acting under section 30 of the Income Tax Ordinance. Chapter 38, wrote the defendants requiring them to prepare a list containing a true and correct statement of any money or value, being income from any of tine sources mentioned in the Income Tax Ordinance of or belonging to any other person, of which they were in receipt, and to deliver the list to him when prepared. He also required them, under section 36A, to make and deliver to him a certified statement of the names and addresses of all persons holding Debentures issued by them or having money on loan or deposit with them and the interest paid to each person in a particular year.

As the Banks regarded the request as unusual, and one which might create suspicion in the minds of persons dealing with them, a summons was taken out in order to obtain the Court's decision on the interpretation to be placed on sections 30 and 36A.

The defendants objected to supplying the information under section 30 because the names of the persons and the nature of the securities required were not furnished. It was further objected that there was no obligation to give the particulars under section 36A.

Held: Section 30 does not require the Commissioner of Income Tax to send a notice containing the names of individuals about whom information is

required and a general notice was a compliance with the section.

Every person who may be required by the Commissioner to give information under section 36A includes the defendants.

Originating summons for the determination of two questions of law arising under the Income Tax Ordinance.

Questions determined in favour of the plaintiff.

G. M. Farnum, Solicitor General, for the plaintiff.

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

Stoby J: . *Cur. adv. vult.*

By virtue of Order XL (c) of the Rules of the Supreme Court 1932, the plaintiff applied by way of originating summons for the determination of the following questions of law:

1. Whether under section 30 of the Income Tax Ordinance, Chapter 38, it is competent for the Commissioner to require the defendants or either of them to prepare and forward to the Commissioner, on receiving due notice in writing from him proper lists containing a true and correct statement of any money or value being income from any of the sources mentioned in the Income Tax Ordinance of or belonging to any of the persons which the defendants or either of them in whatever capacity are in receipt of and in respect of which Income Tax is chargeable with the names and addresses of each and every person or whether it is not incumbent upon the Commissioner to name specifically the person or persons in respect of whom he requires the said information to be given by the defendants or either of them.

2. Whether under section 36A of the Income Tax Ordinance Chapter 38, as inserted by section 17, of the Income Tax (Amendment No. 2) Ordinance, 1951, it is competent for the Commissioner to require the defendants or either of them to furnish him with the names and addresses of all persons having money on loan or deposit with the defendants or either of them showing the total interest (exceeding $25:—) paid or credited to each such person during the year ended 31st December, 1952, or whether it is not incumbent on the Commissioner to name specifically the person or persons in respect of whom he requires the said information to be given by the defendants or either of them.

Mr. H. C. Humphrys, Q.C. who appeared for the defendants stated that the Banks had no desire to impede the process of the collection of Income Tax, but as the information required was unique in the West Indies, and would entail great hardship in preparation as well as undermine the confidence hitherto reposed in them by their customers, they wished to have the Court's ruling before complying with the demands.

The Solicitor General representing the plaintiff, readily agreed with the view expressed and stated that the questions for determination were agreed on by the parties after prior consultation and that it was agreed no costs should be awarded to either party.

It seems that as far back as the 17th December, 1952, the Commissioner of Income Tax, purporting to act under sections 30 and 36A of the Income Tax Ordinance, Chapter 38, wrote the defendants two letters, one of which reads thus;

COMMISSIONER OF INCOME TAX *v.* BARCLAYS BANK D.C.O AND ROYAL BANK OF CANADA.

INCOME TAX—YEAR OF ASSESSMENT 1953

LIST TO BE PREPARED AND DELIVERED BY ANY PERSON WHO IS IN RECEIPT OF MONEY OR VALUE BELONGING TO ANY OTHER PERSON.

1. By virtue of Section 30 of the Income Tax Ordinance, Chapter 38, you are required to prepare a List in the form prescribed, attached hereto, containing a true and correct statement of any money or value, being income from any of the sources mentioned in the Income Tax Ordinance, of or belonging to any other person of which you, in whatever capacity, are in receipt, and in respect of which Income Tax is chargeable, with the name and address of each such person and the other particulars specified, and to deliver the List to me, duly signed, on or before 31st January, 1953, under the penalties contained in the said Ordinance for neglect so to do.

2. Notes for your guidance are attached hereto.

(Sgd.) W. G. STOLL,
Commissioner of Income Tax.

Income Tax Office,
Georgetown, Demerara,
British Guiana.
Date 17th December, 1952.

To: The Manager,
Barclays Bank (D.C. & O.),
Georgetown,

and the other as follows :—

BRITISH GUIANA
(Income Tax Ordinance, Chapter 38, Sec. 36A)
RETURN OF INTEREST
Year of Assessment 1953.

Sir,

TAKE NOTICE that you are required to make and to deliver to me on or before 31st January, 1953, a certified statement in the form below of the Names and Addresses of all persons holding Debentures issued by you or your Company or having money on loan or deposit with you or in your Company, showing the total interest paid to each person during the year ended 31st December, 1952. Amounts under $25.00 need not be returned.

(Sgd.) W. G. STOLL,
Commissioner of Income Tax.

Income Tax Office,
Georgetown, Demerara,
British Guiana.
Date 17th December, 1952.

To The Manager,
Barclays Bank (D.C.&O.),
Georgetown.

Apart from the moral and sentimental reasons already stressed, the Banks resisted the application under section 30, on the ground

that, although the Commissioner of Income Tax is thereby empowered to ask for information, it was incumbent on him to condescend to particulars and specify, not only the names of the persons concerning whom information was sought, but also the nature of the securities in respect of which disclosure was important.

The case of Attorney-General v. National Provincial Bank Ltd. 1928, 44 T.L.R. 701, was cited in support of the submission. It was also 'cited in support of the plaintiff's view that the language of the section is clear and unambiguous and that the information ought to be given in the manner and form requested. In the cited case the defendants were required by the Commissioners of Inland Revenue by particular notice to render returns of the names and addresses of all persons on whose behalf they received interest or dividends on war loans and National War Bonds in certain circumstances. They contended that they were not liable to render the returns and a special case was stated by consent. Mr. Justice Rowlatt said he could not see the answer to the Crown's claim and gave judgment for the Crown.

Section 30 (1) of the Income Tax Ordinance, Chapter 38, provides that:

"Every person who in whatever capacity is in receipt of any money or value being income from any of the sources mentioned in this Ordinance of or belonging to any other person who is chargeable in respect thereof, or who would be so chargeable if he were resident in the Colony and not an incapacitated person, shall, whenever required to do so by any notice from the Commissioner, prepare and deliver within the period mentioned in the notice a list in the prescribed form, signed by him containing—

(a) a true and correct statement of all that income;

(b) the name and address of everyone to whom the income belongs.

A perusal of the Income Tax Act 1918 (8 & 9 Geo. 5, c. 40) s. 103 will show that section 30 was framed from section 103 and is in all material respects the same except that section 108 provides for obtaining the required information by a general or particular notice. It is the use of the words "particular notice" in Attorney-General v. National Provincial Bank Ltd. (supra) upon which the defendant's argument is founded. The submission is that a particular notice was given in that instance and as the Commissioner of Income Tax relies on that case, he too, should give a particular notice.

A study of the Act of 1918 reveals that section 98 of that Act provided for the appointment of assessors who were to cause general notices to be given requiring all persons to do certain things, while section 99 (1) provided that the assessors were to give particular notices to every person chargeable requiring every such person to do certain things.

The draftsman of section 30 of the Income Tax Ordinance, Chapter 38, omitted any reference to a general or particular notice, obviously not by accident, but because the scheme of our Ordinance simplified the procedure, and provision for the appointment of assessors and the various acts to be done by them was unnecessary. Section 30 then

makes no reference to a particular notice but only to a notice and once the Commissioner has sent a notice as required by the Ordinance—which he has done—this matter is indistinguishable from the case already cited and the Banks must comply with the request.

The request for information under section 36A is opposed on the same grounds as those already discussed and in addition it is submitted that there is no authority for demanding the information and the demand must have been made through an oversight or an incorrect appreciation of the terms of the section.

The argument is that section 36(1) provides for the Government, municipality and other public bodies supplying certain particulars on request and 36(2) for the submission of returns by employers regarding their employees and that as section 36A which was inserted by Ordinance 17 of 1951 provides that "Every person who may be so required etc. ..." it follows that "so required" in 36A refers to the employers mentioned in 36 and as the Banks are not mentioned in 36(1) nor is information wanted in respect of employees there is no authority in the Ordinance to compel the Banks to disclose the particulars.

The argument at first seemed irresistible, and perhaps wrongly, I got the impression that it was not being seriously challenged by the Commissioner. But after consideration I have come to the conclusion that section 36A is entirely independent of section 36(1) and (2) and can be construed without reference to it. The section makes it compulsory for every person on whom a request is made to give information demanded for the purpose of enabling the Commissioner to make an assessment or to collect tax. As I have stated before, section 36 (1) and (2) already makes it compulsory—on pain of incurring the penalty provided by the Ordinance for failure so to do—for certain employers to do certain things. When therefore 36A states "Every person who may be so required by the Commissioner shall . . . give such information, etc. . . ." "so" can have no reference to the employers mentioned because the Commissioner does not have to require them to comply with the Ordinance. The proper construction of 36A is "Every person who may be required by the Commissioner so to do shall etc. ..." This construction is consistent with section 36A (2) which states "For the purposes of this section the Commissioner may require any person to give him information or to permit him ... to inspect any records of any moneys, funds or other assets held by him on his own behalf or which may be held by him for, or of any money due by him to, any other person." If 36A(1) is limited to the persons referred to in 36(1) and (2), 36A (2) is bewildering since "any person" cannot mean "any employer" but means and can only mean any individual who is in a position to supply the required information.

The answer to the second question is that the Ordinance applies to the defendants and it is not incumbent on the Commissioner to name specifically the person or persons in respect of whom he requires information.

There will be judgment in favour of the plaintiff on both questions.
No order as to costs.

Crown Solicitor for the plaintiff.

J. Edward de Freitas for the defendants

CITY TOTE LIMITED, one of whose duly constituted attorneys in this Colony is Joseph Edward de Freitas v. J. A. CHIN.

(In the Supreme Court, Civil Jurisdiction (Boland C.J. Acting) February 9; May 31, 1954.)

Gaming and Wagering—Office of stake holder in United Kingdom—Event in U.K.—Stake placed in British Guiana—Lex loci contractus.

The plaintiff company is incorporated in England under the Companies Acts and carries on business as "Turf Accountants" in London,

The defendant, on certain dates, had by cablegram from British Guiana placed bets with the plaintiff company on the result of races to be run in England. He was indebted in the sum of $627.72 and on a claim being brought in connection therewith, did not dispute liability but contended that the amount was irrecoverable because the contract was a gaming contract and as such void in law.

Held : The circumstances of this case left no room for questions that both parties when contracting intended to submit themselves to the restrictions imposed by the law of England against gaming contracts, and consequently this contract was void.

Dictum : By the law of British Guiana a gaming transaction other than participating in a lottery or a transaction in a common gaming house is not an offence.

(Editor's note: On appeal to the W.I. Court of Appeal this case was sent back for re-hearing as there were no notes of evidence and no required statement of facts on the record).

This was an action to recover a debt due to a gaming transaction.

It was admitted by the plaintiff company that if the contract was governed by the Law of England, the sum admittedly due was not recoverable but it was contended that the transaction was governed by the Law of British Guiana and that gaming transactions were not void in this Colony.

The Court held that the contract was governed by English Law but expressed the view that certain gaming transactions were not void in this Colony.

L. A. Luckhoo, Q.C., for the plaintiffs.

J. R. S. Luck for the defendant. *Cur. adv. vult.*

Boland C.J. (acting):

This is a claim for the sum of $627.72 brought by the plaintiffs against the defendant arising out of a number of contracts between them, which, it is admitted, relate to bets on the results of horse-races which were at that time being run in England. The plaintiffs are a company, incorporated in England under the Companies Acts, which carries on a business of "Turf Accountants" in London. In the year 1951 the defendant who resides in British Guiana opened a credit account with the plaintiffs under the rules of the company, and thereafter from time to time on dates preceding the 9th May, 1952, he had by cablegrams, which were forwarded by him from British Guiana, placed bets with the Company on the results of races to be run in England. These earlier transactions preceding the 9th May, 1952, were all settled satisfactorily. However, on the 9th, 23rd, 27th and 29th May, 1952, the defendant, again from British Guiana, cabled to the plaintiff certain bets on races about to take place in England and these all resulted in losses to the defendant, in consequence of which the sum of $627.72 became payable to the plaintiff company which is the amount now claimed in this action.

The defendant does not dispute that the sum claimed represents his losses in these betting transactions, but it is contended by counsel on his behalf that the sum is irrecoverable because the contract is a gaming contract and as such is void in law. The defence submission is that the contracts are governed as to their validity by the law of England and in support of the submission cities the Gaming Act 1845 (8 and 9 Vict. c. 109) which enacts that all contracts by way of gaming or wagering in England are void, and that no action can be brought by the winner on a wager, either against the loser or the stakeholder, to recover what is alleged to be won. Alternatively it is contended that even if it is held that the law governing the contract is not that of England but of British Guiana, the sum claimed is nevertheless irrecoverable, because in British Guiana such contracts are illegal contracts and that the parties thereto are guilty of an offence punishable under the provisions of the Gambling Prevention Ordinance, Ch. 95 (Revised Laws B.G.1930). Against this submission the plaintiffs on the other hand while conceding that all gaming contracts are void by statute in England contend that the law governing these contracts in this case is not that of England but of British Guiana, and that except the contract is one forbidden by Ordinance or where the betting or wagering relates to a contingency which causes the consideration to be deemed to be against public policy, the law in force in this colony does not render void a contract by way of gaming or wagering.

In each transaction the contract between the plaintiffs and the defendant was made partly in British Guiana and partly in England. That would seem to be so whether the contract is to be deemed to have been constituted by defendant's offer, as expressed in his cable sent from British Guiana, followed by the plaintiffs' acceptance of the "commission" is reference to the particular race to be run, or whether the opening by the plaintiffs of an account in the name of the defendant constituted the offer by the plaintiffs to accept "commissions" from the defendant, if communicated to in accordance with the rules of the Company, while each cablegram sent by the defendant was an acceptance by him of the plaintiff's offer in each instance. At any rate in my view the place intended for performance of the contract was to be the Company's place of business in England; for I gathered that it was understood that gains and losses would be placed to the credit or debit respectively of the defendant's account kept by the company at their business place in England, and that whatever balance was found to be owing was to be liquidated in due course by the party in debit. I hold however that, although each would be an important factor to be taken into consideration, neither the place of the making of the contract nor that of its performance, whether it be in England or British Guiana, would be conclusive in the determination of the question as to which country's law would govern the essential validity of the contract. For the purpose of a decision on that point, as has been established by the authority of judicial dicta, what has to be considered is the intention of the parties as the time of the contract. Was it the intention of both that the law applicable to the contract in respect of its validity was to be that of England or that of British Guiana? What, to use the language of Professor Dicey in his treatise on "The Conflict of Laws" was the "proper law of the contract"? In other words did

The parties intend these contracts to be 'English Contracts' or 'British Guiana Contracts. The answer to that question will depend upon the circumstances existing at the time when the contracts were made, not ignoring the place intended for performance, the course of dealing between the parties and the nature of the business carried on by the plaintiff. I have no hesitation in saying that when the parties contracted they both knew that by the law of England such a contract is void—not because English law forbids the making of the contract—but by reason of the provision in the law of England that the consideration is regarded as illegal with the result that no action based thereon would be permissible. It must be borne in mind that the plaintiffs, an English Company, are carrying on their business of book-makers in England and solely in connection with horse and grey-hound racing run in England. Their clientele would appear mostly to be persons resident in the United Kingdom. The rules of the Company, a copy of which the defendant was given as they embody the terms of the contract, refer to the provision specially made for daily settlements of accounts for those clients who may wish such daily credit accounts opened—a Daily Settlement Department for this purpose had for some little time been established at the London Office. There is provision in the rules for bets to be made over the telephone and it is stressed in the Book of Rules that "a very useful part of our service is the giving of results race by race." "Just telephone us in the normal way" clients are advised, "giving your name and account number and the telephone clerk will give you the result in which you are interested."

All the contracts made under the Company's Rules would be gaming contracts and as such would be void by the law of England as it must have been understood by those reading the rules.

It is obvious that the plaintiffs regarded these contracts with the defendant in British Guiana as no different from those made with their other clients resident in England. Like contracts made with English clients these contracts made with the defendant, it must have been understood by the plaintiffs, would be void. Liability under the contract would in every instance be governed by the law of England. Payment by either side on the results would be dependent only upon the recognition of the obligation to pay under what was nothing but "a gentleman's agreement." That also must have been the view of the defendant when despatching his cable from British Guiana. The circumstances leave no room for question that both parties when contracting intended, or may fairly be presumed to have intended, to submit themselves to the restrictions imposed by the law of England against gaming contracts. As Lord Mansfield said in *Robinson v. Bland* 1760 Burr. 1077, "The parties had a view to the law of England. The law of the place (i.e. the lex loci contractus) can never be the rule when the transaction is entered into with an express view to the law of another country as the rule by which it is to be governed." And in the case of *Jones v. Oceanic Steam Navigation Company L.R.* (1924) 2 *K.B.* 730, Hewart C.J. accepts the principle enunciated by the Court of Appeal. *In re Missouri Steamship Company 42 Ch. Div.* 321 which he stated to be as follows: "Where a contract is made in one country to be performed wholly or partly in another, the Court will look at all the circumstances to ascertain by the law

of which country the parties may be presumed to have intended the contract to be governed, and will enforce it accordingly, unless it showed certain stipulations contrary to morality or expressly forbidden by positive law. "In the earlier case of *Ptninsular and Oriental Steam Navigation Company v. Shand* (1865) 3 Moo. P.C. (N.S.) 290 Turner L.J. said in reference to the contract before the Court, "The actual intention of the parties must be taken clearly to have been to treat this as an English contract to be interpreted according to the values of English law; and as there is no rule of general law or policy setting up a contrary presumption, their lordships will hold that the Court below was wrong in not governing itself according to those rules."

It may be conceded that generally there would be a presumption that parties to a contract supported toy valuable consideration intended that their contract should be valid, and that might give some ground for a contention that the Court before which an action is brought to enforce a contract which, for the purpose of a decision, calls for a choice of the law of one of two or more different countries would not ignore that presumption of intended validity.. But a presumption in favour of validity though always strong is nevertheless rebuttable. The circumstances relating to the contracts in this case are, in my view, overwhelmingly sufficient to rebut such a presumption.

Having regard to the view expressed above that the contracts in this case are "English contracts" and as such are void, there will be no necessity to decide whether or not the entering into of a gambling agreement is an offence in violation of the provisions of our statute law namely the Gambling Prevention Ordinance, Ch. 95 and the enactments amending the same. But it may be stated that while participation in a lottery or in certain specified games of chance is an offence, a gaming transaction other than those or unless it takes place in a common gaming house or in a public place is not an offence in British Guiana. Nor can it be said that every lottery, wager or gaming contract is against public morals seeing that the legislature has enabled the Demerara Turf Club and other bodies to run sweep-stakes or lotteries, provided certain specified conditions are fulfilled and observed. In the absence of an enactment declaring a contract of gaming void and except where the betting is an offence against the Ordinance or is with reference to a contingency which would cause the contract to be deemed to be against public policy there would seem to be no bar against a plaintiff in this colony bringing an action to enforce payment of money won at gambling within the colony. But as stated above I hold that these contracts are "English contracts" and are consequently void and this Court must so adjudge them. Accordingly, there must be judgment for the defendant with costs.

In concluding this judgment I should like to point to an irregularity on the record. The matter first came before me in the Bail Court on a claim made in a specially indorsed writ. In his affidavit in support of his application for leave to defend, the defendant alleged that "the affidavit was drawn by J. B. S. Luck, Barrister-at-Law, acting as solicitor for the defendant whose address for service is at his office No. 1 Croal Street, Georgetown." Mr. Luck duly appeared in the Bail Court for the defendant and resisted plaintiff's claim for entry of final judgment. In the Bail Court proceedings Mr. Luck, though a Barris-

ter-at-Law was, in keeping with defendant's affidavit's regarded as defendant's solicitor. After leave to defend had been given, there was filed on the record what purported to be an entry of appearance on defendant's behalf by Mr. J. E. Too-Chung, Solicitor giving the address for service, at 15 and 16 Croal Street, Georgetown, accompanied by an authority to Mr. Too-Chung signed by the defendant. It is obvious that as a Barrister, Mr. Luck was not competent to appear as solicitor in the proceedings subsequent to the grant of leave to defend, and Mr. Luck was retained to be defendant's counsel and to be instructed by Mr. Too-Chung solicitor, and that is how defendant was represented at the trial. What should have been done is that there should have been the usual notice of change of solicitor because of Mr. Luck being unable to act as such in the proceedings subsequent to the leave to defend. These observations are made so that they may be noted by practitioners for their guidance in future and the Registry should see that the proper procedure is adopted.

In awarding costs to defendant perhaps in the circumstances I should expressly certify this matter as fit for counsel and accordingly I so certify; and I include in the costs allowed fees for Mr. Luck as counsel.

H. C. B. Humphrys for the plaintiffs.

J. E. Too-Chung for the defendant.

REPORT OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1954

AND IN

THE WEST INDIAN COURT OF APPEAL

1954

EDITED BY KENNETH S. STOBY, ESQ.,
Barrister-at-Law, Lincoln's Inn, Puisne Judge, British Guiana.

CUMMINGSBURG, BRITISH GUIANA.

THE "DAILY CHRONICLE" LIMITED, PRINTERS TO THE GOVERNMENT OF BRITISH GUIANA.

1958.

JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1954

EDWARD PETER STUBBS BELL — Chief Justice

FREDERICK MALCOLM BOLAND — First Puisne Judge

HAROLD JOHN HUGHES — Second Puisne Judge

KENNETH SIEVEWRIGHT STOBY — Third Puisne Judge.

ROLAND RICKETTS PHILLIPS — Appointed Fourth Puisne Judge on 25th February, 1954.

JOSEPH LYTTLETON WILLS — Acted as Additional Judge from 1st January, 1 954, to 31st December, 1954.

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 (1954) L.R.B.G.

INDEX

SUMMARY

1.	John Albert Thomas	v. The Queen	W.I.C.A. 1954/1 Barbados
2.	Albert Stanuel and Joseph Alexander	v. The Queen	1954/21 and 22 C.C.A.
3.	Francis D. de Mendonca & Elise Evadne de Mendonca, executors of Estate, Josephine Alice Ecclonason Houston, deceased	v. A. Thompson & anor	1950/97
4.	George De Abreu	v. The Queen	1953/17 C.C.A.
5.	Compton Brathwaite	v. The Queen	1953/16 C.C.A.
6.	Manoel A. Gonsalves	v. Agatha R. Gonsalves	1953/883
7.	Edith A. Linde and James S. Douglas	v. The Demerara Co. Ltd. v. The Demerara Co. Ltd.	1951/446 1951/447
8.	E. A. Jack et al	v. I. Supersaud	W.I.C.A. 1951/15 Trinidad
9.	C. S. Soodeen	v. B. Ramotar	W.I.C.A. 1951/14 Trinidad
10.	Hamilton Bhikoo et al	v. B. Seesaran & anor	W.I.C.A. 1953/2 Trinidad
11.	Felix A. Baptiste	v. Pearl M. Baptiste	1953/299
12.	Raghunandan	v. The Country Authority of Unity and Lancaster and The Local Govt. Board	1948/454
13.	Estate R. V. Evan Wong, deceased	v. The Commissioner of Income Tax	1951/631
14.	Sarjudai	v. Manram	1955/1080
15.	Hassan Mohamed	v. The Queen	1954/17 C.C.A.
16.	Jairam Gopaul	v. The Queen	1953/21 C.C.A.
17.	John Carter	v. Mahabir Singh	1953/617
18.	Sheik M. Yacoub, Executor Monnissan, deceased.	Janet Nissau	1953/69
19.	Commissioner of Income Tax	v. Barclays Bank (D.C. & O.) and the Royal Bank of Canada	1954/4
20.	City Tote Limited	v. J. A. Chin	1954/96
21.	(i) J.R.S. Luck	v. Writ of Habeas Corpus	1954/530
	do.	v. do.	1954/530

SUMMARY

22.	Interjeet Tackorie	v. Port Mourant Ltd.	1956/66
23.	Etwaria, admin. Est. H. O. Jeeboo	v. J. A. Jeeboo & anor	1953/16
24.	Sookdeo Persaud alias Kaiser	v. H. Ramdial	1953/867
25.	Ramnarine	v. Ramkalia & P.A. Magalee	1953/868
26.	(i) The Queen	v. Karamat et al	Indictment No. 15028
	(ii) do.	do.	do.
27.	Isaac Alexander et al	v. The Town Clerk of Georgetown	1954/721
28.	Janet Jagan	v. George McFarlane. Asst. Supt. of Police	1954/527
29.	Leonard N. Lynch	v. Stella A. Lynch & anor	1950/639
30.	John De Costa	v. Dinnanauth	1954/729
31.	Bamfield Chance	v The Queen	CCA. 1954/24
32.	Jitu	v. Odasea	1951/9 Berbice
33.	B.G. Lithographic Co. Ltd.	v. Sprostons Ltd.	1952/36
34.	Pundit Misir et al	v. David King, Supt. of Police	1954/517
35.	Jaikissoon Beekam	v. M. Soobha & A. Marques	1950/442
36.	Madhoo	v. Ramdas et al	1947/203
37.	Margaret French	v. Frederick Phillips	1952/212
38.	Krisindath McLean	v. Edwin Moses PC No. 5156	1954/508
39.	Johan J. F. Hutt	v. Booker Bros. McConnell & Co. Ltd. et anor	1953/38 Privy Council
40.	Abause Sattaur	v. Central Board of Health	1954/756
41.	Eshwarpati Tiwari	v. Maniram Tiwari	W.I.CA. 1954/3 B.G.
42.	E. J. Quinlan	v. H. Taylor & V. Taylor	1950/706