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CASES

DETERMINED IN THE

Supreme Court of British Guiana.

In the applications of CLEOPATRA HUNTE and ROSE JERRICK

(In the Supreme Court, In Chambers (Phillips, J.) December 21, 1954; January 14, 1955).

Application for writ of certiorari—Application to quash order of magistrate—Recognizance to keep the peace and be of good behaviour—Summary Jurisdiction (*Procedure*) *Ordinance.*

At the hearing of a complaint without oath before a magistrate of the Georgetown Judicial District against Dorothy Doris for the offence of common assault alleged to have been committed on the applicant Cleopatra Hunte, the latter and the applicant Rose Jerrick gave evidence on behalf of the prosecution.

At the conclusion of the hearing the magistrate ordered the defendant as well as the applicants to be bound over in the sum of $50 on their own recognizance to keep the peace and be of good behaviour for the space of 12 months. The applicants duly entered into the recognizance.

They applied for writs of certiorari to quash the order of the magistrate.

Held: The Magistrate had power under section 83 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 14, to bind over an informant or prosecutor but he did not have power to bind over a witness who was not an informant, prosecutor or defendant.

L. F. S. Burnham for applicants.

J. A. Luckhoo, Legal Draftsman, for respondent.

Phillips J: On the 21st September, 1954, at 60 Hadfield Street, Georgetown, in the County of Demerara there was a fight between two women at which one Rose Jerrick was supposed to be an eyewitness. Rose Jerrick is one of the applicants herein.

The two women who it is alleged had this encounter were Cleopatra Hunte (the other applicant herein) and one Dorothy Doris. After these two contestants had been parted by the aforesaid Rose Jerrick, Cleopatra Hunte found herself at the Brickdam Police Station where she made a report to the Police.

In pursuance of this complaint on the 24th September, 1954, Police Constable Robert Bourne, No. 4366, made a complaint without oath before a Magistrate in the Georgetown Judicial District against Dorothy Doris for the offence of Common Assault contrary to Section 25 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13. The particulars of the offence alleged that Dorothy Doris on the 21st September, 1954, at Hadfield Street, Wortmanville, Georgetown, in the Georgetown Judicial District, unlawfully assaulted Cleopatra Hunte.

In the applications of CLEOPATRA HUNTE
and ROSE JERRICK.

Apparently no fees were paid in this Complaint and the Information is endorsed *"Free Public Interest."*

Cleopatra Hunte and Rose Jerrick were summoned as witnesses to give evidence in the case on behalf of the prosecution on the 10th November, 1954. The Magistrate, Mr. Robert Sydney Miller, having heard this complaint made an order under the power contained in Section 83 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 14 directing that the three persons, namely,

CLEOPATRA HUNTE (the person assaulted)
DOROTHY DORIS (the defendant) and
ROSE JERRICK (the witness)

should together be bound over in the sum of $50 on their own recognizance to keep the peace and be of good behaviour for the space of 12 months.

The defendant, Dorothy Doris, has not concerned herself with these proceedings.

The aforementioned parties duly entered into the recognizance and signed the same conditional as follows:

"The condition of the within written recogizance is such that if the "within bounden Dorothy Doris, Cleopatra Hunte and Rose Jerrick "keep the peace and are of good behaviour towards Her Majesty and "all her liege people and especially towards one another for the term of "twelve months now next ensuing then the said recognizance shall be "void but otherwise shall remain in full force."

Section 83 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 14 under which the Magistrate no doubt purported to act reads as follows :—

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

The question for decision is whether it was competent for the Magistrate to have made such an order under the powers contained in this Section, in the first place against *Cleopatra Hunte* the virtual complainant but nevertheless a witness in the case brought by the Constable on her information and also in the second place against the witness *Rose Jerrick* who was neither a complainant nor a defendant. It was conceded by Mr. Luckhoo that in the case of the witness Rose Jerrick the Magistrate would have been acting outside his jurisdiction unless he could be held to have been acting under his Common Law powers.

Reference in this connection was made to

(a) Section 4 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13, which reads—

"Subject to the provisions of this Ordinance and of any other "statute for the time being in force, all the rules and principles of "the common law of England relating to offences punishable on "summary conviction so far as they are applicable to the circum- "stances of the Colony shall be in force in the Colony."

(b) *The Queen's Peace* by C. K. Allen delivered as a Hamlyn lecture at page 63. When dealing with Sureties of the Peace he states—(Mr. Burnham observes for what it is worth, Sir Carlton Allen is alive and no reference to any authority has been given for this dictum)—

"The jurisdiction is not limited to complainant and defendant. "The Justices have power to bind over any person concerned "who is before the justices."

and

(c) *H. B. Sadler v. Percy Wight* 1938, *L.R.B.G., page* 1.
Mr. Luckhoo admits that this case is certainly not in his favour and points out that the case of *Lansbury v. Riley* was there discussed. It was held however that—

"That powers of a Magistrate in this Colony are limited to "those conferred upon him by Ordinance.: he has none of the "powers or of the jurisdiction which a Magistrate in England "has under the Common Law."

Not being a complainant or defendant it is clear therefore that with respect to the witness *Rose Jerrick* in making the order herein the Magistrate exceeded his jurisdiction. The order is bad in law in so far as it affects Rose Jerrick. Certiorari must go and the order in that respect is quashed without further order.

It now remains to deal with the case of Cleopatra Hunte, the virtual complainant.

It will be necessary first to refer to the relevant statutory enactments. By section 6 of Chapter 14:

"anyone may make a complaint against any person committing a "summary conviction offence (such as assault) unless it appears "from the statute on which the complaint is founded that a com- "plaint for that offence shall be made only by a particular person "or class of persons."

By section 2 of the same Ordinance:

" '*Complaint*' includes any information or charge relating to "a summary conviction offence."

" '*Complainant*' includes any informant or prosecutor in any "case relating to a summary conviction offence."

Section 25(c) (1) of the Constabulary Ordinances dealing with the duties of the Force reads thus:—

"It shall be the duty of members of the Force .....

(c) to summon before magistrates and prosecute persons reasonably suspected of having committed offences in the following cases :

(1) in all cases of offences whether punishable on summary conviction or on indictment where the *complainant or prosecutor* is, in the opinion of an officer unable through poverty to pay the costs and the expenses of the prosecution."

In this matter on the information of Cleopatra Hunte a free summons was obtained and the prosecution was undertaken on her behalf by the Police. In such a case it is urged the magistrate could not he precluded, acting in pursuance of Section 83 of Chapter 14, if he felt disposed to bind over the parties before him *i.e.* the two persons engaged in the assault, from doing so merely because the Constable at her request and on her information had laid the charge or signed the Information and therefore must be regarded as the complainant and not merely a nominal complainant.

"Complainant" means *informant or prosecutor.* The *"Complainant or prosecutor"* mentioned in Section 25(c) (1) above referred to could not possibly include the Constable who would lay the information on which the summons is issued.

In my view the substance of the matter must be looked at as well as the scope and intendment of the several enactments as a whole.

I have come to the conclusion that the word "complainant" in Section 83 above referred to also includes the informant or prosecutor which certainly was the role played by Cleopatra Hunte in this matter. The Constable knew nothing of the facts of the case until she informed the Police at the Brickdam Police Station. In my opinion the Magistrate had the power under Section 83 to bind over the *informant or* prosecutor Cleopatra Hunte.

The *Complainant* in Section 25(c) (1) in the circumstances there contemplated is identical with *Complainant* in Section 83 who in the present case is Cleopatra Hunte. The Magistrate would certainly have no desire, I should hope, in such circumstances to bind over the complainant-Constable.

The application for writ of certiorari to issue in the case of Cleopatra Hunte is accordingly refused. Both these applications were taken together. I therefore make no order as to costs now but reserve the question of costs for argument on the return of the Writ.

In the matter of The Deeds Registry (Sales in Execution) Ordinance, 1936,

and

In the matter of the proceeds of sale in execution of west half of lot 29, Second Street, Alberttown, Georgetown, at the instance of the Town Clerk of Georgetown

and

In the matter of an application by Ursula de Freitas, second mortgagee.

(In the Supreme Court, In Chambers (Boland, J.) March 22, 30; April 1; June 20, 1955).

Deeds Registry (Sales in Execution) Ordinance, 1936—Proceeds of sale of property in execution for non-payment of rates—Priorities as between claimants for payment out of proceeds of sale—Sale in 1954 resulting from levy made only in respect of non-payment of first moiety of rates for 1952—No levy made in respect of non-payment of rates and taxes in 1951, 1955 and 1954—Provision in mortgage deed for payment by mortgagor of all rates and taxes—Foreclosure proceedings by second mortgagee in respect only of interest due on mortgage—Purchase at sale in execution by second mortgagee—Amount bid by purchasers in belief that property will be obtained free from all rates and taxes due at date of sale in execution—Property purchased subject to rates and taxes remaining unpaid.

On a sale for the purpose of enforcing a statutory claim as defined by section 2 of the Deeds Registry Ordinance, Cap. 177, the purchased is entitled to take the property free from all registered encumbrances and registered leases and free also from any other statutory claim in respect of which the holder has given to the Registrar notice in writing not later than the day before the day of the sale (vide section 2 (d) of the Deeds Registry (Sales in Execution) Ordinance, 1936 (No. 4 of 1936).

Held: Where a property is sold at execution for non-payment of certain rates, and no formal notice of other claims is given in respect of other outstanding rates and taxes the purchaser at such sale holds the property encumbered by the amount due for all unpaid rates and taxes.

APPLICATION BY URSULA De FREITAS

Boland J.: This matter has come before me by way of a summons as an appeal against the decision of the Registrar determining the question of priorities as between certain claimants who advanced to him claims to have payments made to them out of the proceeds of a sale at execution of a property known as the West Half of lot 29 Alberttown, Georgetown. The sale which took place on the 16th day of November, 1954, was at the instance of the Town Clerk of Georgetown in pursuance of a levy effected for the recovery of the sum of $138:—which was the first moiety of rates in respect of the above-mentioned property for the year 1952. The claim by the Town Clerk for payment, of unpaid rates and taxes is a "statutory claim" as defined by section 2 of the Deeds Registry Ordinance, Chapter 177.

Ursula de Freitas the applicant under this summons became the purchaser at the highest bid of $20,500. She was the holder of a second mortgage on the property which was security for -payment to her of the sum of $2,000 with interest thereon at 12%. The mortgage transport in her favour was passed on the 31st July, 1951, by the mortgagor Mohabir Singh. It was in the prescribed form and contained the usual provision for payment by the mortgagor of all rates and taxes; the failure by the mortgagor to pay such rates and taxes would entitle the mortgagee herself to pay the same upon which such sum would become further charge on the property. The first mortgage was held by B.G. & Trinidad Fire Insurance Company. On the 21st October, 1954, Ursula de Freitas had taken foreclosure proceedings against the mortgagor and had obtained the usual judgment strengthening and confirming the willing and voluntary condemnatory decree of the 31st July, 1951. In her claim for foreclosure she did not allege the mortgagor's breach of the obligation to pay rates and taxes, but advanced as sole ground for foreclosure the latter's failure to pay interest upon which the principal became payable. The formal order for foreclosure as entered specifies that judgment was given for the sum of $2,500:—with interest on the principal sum of $2,000:—at 12% till payment in full.

It is this sum alone with interest as specified in the judgment which Ursula de Freitas was entitled to recover by the legal processes prescribed for the enforcement of a foreclosure decree.

The Registrar had no difficulty in rejecting a contention advanced to him by other claimants that to found a right to payment out of the proceeds of the sale in priority over them a mortgagee is bound to give notice of his claim in writing to the Registrar not later than a day before the sale. I am in full agreement with the Registrar's decision on this point. It is obvious that the requirement that notice shall be given which is mentioned in section 2 (a) of the Deeds Registry (Sales in Execution) Ordinance, 1936, is applicable not to registered encumbrances but only to statutory claims other than the statutory claim in respect of which the sale had been effected; nor was there any point in the submission, also rejected by the Registrar, which sought in the alternative to contend that in order to come within Class IV of section 4 and thereby gain precedence over other persons

entitled a mortgagee has to make a formal claim to the Registrar for such payment out of the proceeds of sale in hand.

But it was further submitted to the Registrar that in any event Ursula de Freitas is entitled to get out of the proceeds no more than the specific sum which is mentioned in her foreclosure decree, notwithstanding that since the date of the foreclosure decree according to her affidavit she was informed at the Town Hall that there was due not only the sum of $138:— for which the levy was made, but that certain other rates and taxes also remained unpaid, which induced her to take her bid up to an amount which would include not only the debt of $15,817.07 owing under the first mortgage and that due to her under her foreclosure order, but also the sum owing in respect of all other rates and taxes. These outstanding rates and taxes with interest and other charges amounted to $1,975.53.

The other claimants are John Carter, Betsy Fernandes and the firm of Wieting & Richter. John Carter had on the 17th June, 1954, levied on the property, subject to the abovementioned first and second mortgages, in pursuance of a writ of execution to enforce a judgment obtained by him against Mohabir Singh for $1,000:—and costs $940.86. Ranjit Singh had opposed the sale. Although no writ was filed by Ranjit Singh to enforce this opposition, no step has been taken by Carter to have the opposition declared as having been abandoned. The sale, was, however, stayed. Betsy Fernandes claims the sum of $741.52 to foe due to her by virtue of a judgment obtained by her against Mohabir Singh for $681.02 and costs $60:— on the 6th September, 1954. She obtained a writ of execution on the 12th November, 1954. A summons was filed by her seeking a direction to the Registrar to withhold payment out of the proceeds until further order. The claim of Messrs. Wieting & Richter is in respect of a judgment for $568.43 and costs $60.32 against Mohabir Singh, for the satisfaction of which a writ of execution was issued on the 17th November, 1954.

As has been stated, the sale in execution was to enforce payment of $138.00 which was the first moiety of the rates for the year 1952, but in addition there was due and owing a total sum of $1,975.53 for arrears of rates and taxes in respect of other half years. As the sale was for the purpose of enforcing "a statutory claim" the purchaser is entitled to take the property free from all registered encumbrances and registered leases and *free also from any other statutory claim* in respect of which the holder has given to the Registrar notice in writing not later than the day before the day of the sale (Vide section 2 (d) of Ordinance No. 4 of 1936). It is the effect of this provision which Ursula de Freitas desires to avoid. No formal notice of other claims was given by the Town Council in respect of those other outstanding rates and taxes and consequently after her purchase Ursula de Freitas would be holding the property encumbered by the amount due for all unpaid rates and taxes.

There can be no doubt that she bid the amount at the sale in the genuine belief that the sum of $1,975.53 would be considered as payment by her as mortgagee on the failure of her mortgagor to make payment

of these taxes, and that she would as a result get the property freed from the encumbrance of unpaid rates and taxes. But was that not confusing her position of mortgagee with that of purchaser? I have already pointed out that her claim for foreclosure did not include a claim to be re-imbursed for her payment of rates and taxes and accordingly it seems that if after her foreclosure decree she paid the rates and taxes in order to protect her mortgage, although she would not be debarred from getting re-imbursed her only remedy to get re-imbursement would be that of an ordinary creditor of the mortgagor. Still less strong is her position when she contrives to pay the rates and taxes by what in reality is part of the purchase price.

What are these outstanding Rates and Taxes which with interest and costs amount to $1,975.83? They are as set out hereunder:

Item	*Year*	*Description of tax or rate.*	*Amount*	*Interest*	*Cost*
1.	1951	2nd Rate ...	$ 115.00	$ 21.99	$ 9 25
2.	1952	1st Rate-Levy ...	138.00	21.64	9.25
3.	1952	2nd Tax ...	166.75	27.69	4.25
4.	1952	2nd Rate ...	138.00	17.87	4.25
5.	1953	1st Tax ...	178.25	19.01	2.00
6.	1953	1st Rate ...	126.50	12.26	2.00
7.	1953	2nd Tax ...	178.25	15.51	2.00
8.	1953	2nd Rate ...	126.50	9.03	2.00
9.	1954	1st Tax ...	178.25	8.31	—
10.	1954	1st Rate ...	126.50	4.64	—
		No. summations			
11.	1954	2nd Tax ...	178.25	4.81	—
12	1954	2nd Rate ...	126.50	1.32	—
			$1,776.75	$164.08	$35.00
		Interest	164.08		
		Costs .	35.00		
			$1,975.83		

Mr. de Freitas, solicitor for Ursula de Freitas, has urged that the levy should not have been merely for the moiety of the rate for 1952, while the second moiety of the rate for 1951 remained unpaid. He contends that she was entitled to assume that all previous rates and taxes had been paid. He submitted that the Town Clerk as directed by the statute should have taken the necessary steps leading to parate execution to recover the unpaid rates and taxes which remained in default after the statutory period of grace. But I think that while his failure to do so might expose the Town Clerk to a writ of mandamus

by a burgess, or by the Attorney General on the relation of a burgess or burgesses, a purchaser still takes the property subject to the statutory charge for payment of the rates and taxes. Possibly the purchaser at such an execution sale might be able to get the Court to set aside the sale on the ground of his having been induced to purchase by the implied misrepresentation that all prior rates and taxes were paid. Ursula de Freitas took no such step against the Town Clerk and consequently the property she purchased still is charged with the payment of the unpaid rates and taxes.

In the result I direct the Registrar to make payments out of the proceeds of sale in this order:

(1) To the Town Clerk the taxed costs of the execution and the taxed costs of enforcing the claim.
(2) To the Town Clerk the sum of $138; for which the property was sold.
(3) To the first mortgagee—the amount of his principal with interest to date of payment.
(4) To the second mortgagee—the amount specified in the foreclosure decree with interest thereon at rate specified in the second mortgage to date of payment.
(5) The residue to the claimants in the order of their writs of execution.

There will be costs as against Ursula de Freitas in favour of the other parties. I do not know whether any of the parties would wish to appeal. But as this is an important matter I would give leave to appeal to anyone dissatisfied with my decision.

Solicitor:

J. Edward de Freitas for Ursula de Freitas.

MOONOO also called Bajan v. THE QUEEN

(In the Court of Criminal Appeal, on appeal from the Supreme Court (Hughes, C.J. (ag.), Stoby and Phillips, JJ.) June 1, 29, 1955.)

Criminal Law—Murder—Juror over the aye of sixty years—Criminal Law (*Procedure*) *Ordinance—No allegation of impersonation of any of jurors—Trial not a nullity.*

The appellant was convicted before a jury of the murder of one Najeer. At the trial no challenge was made to any of the jurors empanelled.

On behalf of the appellant it was *inter alia* alleged that subsequent to the trial and conviction of the appellant it was discovered that one of the jurors empanelled was over the age of sixty years and it was submitted that the trial was a nullity and that the verdict should be quashed.

Held: There was no allegation of impersonation of any of the jurors and therefore the submission that the trial was a nullity could not be accepted.

The combined effect of the provisions of sections 24, 28 and 23 of the Criminal Law (Procedure) Ordinance, Cap. 18, is that if the officer revising a jurors list does not strike out from that list the name of a person who claims to be over 60 years of age, that person's name remains on the jurors book

and is lawfully there until an appeal from the revising officer's decision is brought and determined. Such jurors' book is to be taken as a true record of all persons qualified and liable to serve on juries for the county to which it relates for the twelve months subsequent to the first day of September in each year or until the next jurors' book for the same county has been prepared.

Appeal dismissed.

Judgment of the Court: The appellant was convicted at the Essequibo Assizes for the murder of one Ahamad Najeer.

At his trial the case for the prosecution was that on the 20th of September, 1954, the appellant and the deceased were sitting under the house of one Leonard D'Oliveira partaking of alcoholic refreshment from a white bottle. A short distance away—not more than 4 or 5 feet—a group of 4 men were indulging in a similar pastime.

After a period of about 15 minutes the alcohol in the white bottle was consumed and the appellant went into the D'Oliveira's house and returned with a small bottle containing liquid. The small bottle was described in evidence as a "cutdown" which, we understand, is the name given locally to a bottle which holds not more than half a pint of liquid to distinguish it from a half bottle which holds a pint.

When the appellant produced the small bottle, the deceased took two drinks from it and collapsed after the second drink. The appellant was not seen to drink from the small bottle although he had been drinking from the white bottle before it became empty.

While the deceased was on the ground frothing at the mouth and showing symptoms of poisoning the appellant was asked where he had got that bottle and its contents from, whereupon he replied that he had obtained it from D'Oliveira's shop upstairs. It was denied at the trial that this bottle and its contents were procured from D'Oliveira's shop. There was evidence that upon being thus questioned about the bottle the appellant attempted to wash out the remains in the bottle but was prevented from doing so: those remains were proved in chemical analysis to contain cyanide of potassium.

After the deceased collapsed the appellant was invited to drink from the small black bottle; he poured some of the liquid from that bottle in his glass and then threw it on the ground.'

The doctor's opinion was that death was due to poisoning by cyanide of potassium and the analyst who analysed what was left in the white bottle, the small black bottle and the earth where the liquid from the glass was spilled said that the black bottle and the earth contained cyanide while the white bottle contained no poisonous substance.

There was also evidence that the appellant was seen speaking to a man named Walter Newark who said that the appellant had told him that the deceased was a bad person and that "the fellow go dead today."

The case for the defence as extracted in cross-examination and as stated by the appellant and his witnesses was that there was no motive which could induce the appellant to bring about the death of Najeer, but on the contrary, two of the men who were drinking in the nearby

group of 4 had a motive in that one was caught being intimate with Najeer's wife and the other was a friend whose role in the association was to warn the adulterer of the approach of Najeer.

The appellant's unsworn evidence was that he met the deceased about mid-day and they went under D'Oliveira's house and drank rum. The deceased supplied two half or pint bottles and when the rum from those had been consumed, the appellant purchased a small black bottle of rum from D'Oliveira. He placed the bottle near the deceased but before either could resume drinking the appellant went to fetch some cigarettes and was overcome by an attack of high blood pressure from which he suffered. When he revived, he was at the police station and the deceased was dead.

The main point made on the appellant's behalf at the trial was that he was under the influence of alcohol and some cruelly disposed person, Martin or Inshan Ally, could have taken advantage of his condition to substitute a small bottle of rum containing poison for the wholesome bottle purchased by the appellant. It was urged in support of that possibility that the small black bottle brought by the appellant had a design with a star on it while the bottle found to contain poison had no such design.

The grounds of appeal filed on the 26th March, 1955, were expanded after the receipt of the notes of evidence and the transcript of the summing-up. These expanded grounds, leave to argue which was obtained at the hearing of the appeal, are 4 in number with several sub-divisions of each ground, but as many of the grounds overlap we propose to summarise the grounds as argued.

They were:

1. that the learned trial Judge directed the jury upon evidence which was not in fact given and thereby the accused was prejudiced.

The particulars of this misdirection alleged were:

(a) That the Judge told the Jury that Seymour, a witness for the defence, said that he lent the appellant a shilling and that appellant gave him $2.00 to buy beer whereas Seymour never said so;

(b) that the Judge told the jury that Kenneth D'Oliveira, a witness for the Crown, said that when the accused brought down the bottle tendered as Ex. "B" there was a star on it whereas he said no such thing; and

(c) that the Judge told the jury there was evidence of express malice as the accused said he would kill the deceased whereas no evidence to that effect was given :

2. that the Judge disdirected the jury and usurped then function when dealing with the defence theory that some evilly disposed person could have substituted a bottle containing poison in place of the bottle with unpoisoned rum which the appellant said he purchased from D'Oliveira.

3. that the defence of the accused was not adequately put to the jury;

4. that the Judge misdirected the jury in that though the law as to drunkenness was correctly explained it was not the accused's defence that he was so drunk as to be unable to form the intention to kill but that his condition of inebriation was such that he was unable to detect a well-planned and executed plot; and

5. that a grave irregularity took place at the trial in that a juror over the age of sixty was empanelled on the jury.

Before dealing with the grounds of appeal it should be noted that the older allegations in the notice of appeal regarding persons convicted of felony sitting on the jury were specifically withdrawn by Counsel.

The first ground of appeal deals with the alleged mis-statement of evidence to the jury, so it is necessary to compare what the witnesses said with what the Judge said. The witness Seymour after stating that he knew the accused and saw him about once a week said: "I gave him a shilling. When he asked me to lend him two shillings." The Judge told the jury that Seymour had lent the accused a shilling. Having regard to the context it is our view that Seymour's evidence means that he was asked to lend two shillings but lent one. In any event if there was a mis-statement it was in a very immaterial point and could not have prejudiced the appellant in any way. In Mason's case, 2 Cr. App. R.59, where a conviction was quashed because of a mis-statement the evidence wrongly put to the jury was with regard to identification which was of vital importance in that case.

We do not propose to analyse each alleged mis-statement of fact because each one is as trivial as the example given above and in each case we are satisfied not only that there was no mis-statement but that the variation, if any, was on very minor points.

Next it is said that the Judge usurped the jury's function. It has been reiterated in a series of cases, the last of which is *Joshua v. the Queen* (1955) 2 *W.L.R. Vol* 2 *P.* 8. that questions of fact are the sole province of the jury and consequently if it is correct that the Judge never left the issue of fact to the jury then the conviction must be quashed. Dealing with the point about the black half bottle not having a star the Judge said:

> "So far as the law is concerned, you will be bound by whatever directions I give you on that. So far as the facts are concerned, you are the sole judges. The comments made by me or whatever observations I may make you may accept them or you may reject them. That is your sole and entire province."

It appears then that the Judge in effect was telling the jury that the important point was whether the black half bottle found to contain poison was the same bottle which the accused handed to the deceased. He was explaining to them that although Ex. "B" had no star on it and although D'Oliveira had admitted that a star was on the bottle the accused brought the real point was whether the bottle was sufficiently identified. He used the words: "If on the evidence you are satis-

fied." Earlier in his summing-up he had said: "So far as the law is concerned, you will be bound by whatever directions I give you on that. So far

> as the facts are concerned, you are the sole judges. The comments made by me or whatever observations I may make you may accept them or you may reject them. That is your sole and entire province."

having regard to the positive directions of the Judge we are unable to entertain the submission that he usurped the jury's function.

The argument that the Judge did not put the defence adequately to the jury is founded on the omission in the summing-up of any specific reference to the defence theory that the bottles could have been changed when the accused was absent. Obviously the whole theory collapses if the accused did not leave the scene after producing the black bottle. The Crown's case was that he never left. The accused said he left intending to return but was prevented from so doing through high blood pressure. The Judge read to the Jury what the accused said from the dock and repeated the evidence of every witness for the defence. This was done after Counsel for the defence had addressed the jury for 8 hours in a case in which only 16 witnesses were called for the Crown. In repeating the accused's statement to the jury they must have understood that if his story was true or caused them to have a reasonable doubt then they must not convict as the opportunity for changing the bottles would exist. It is apparent that the defence was fully put and this ground too must fail.

The fourth ground of appeal is really a repetition of the third ground but differently expressed. The criticism is—and throughout the argument the gravamen of the argument against the summing-up was—that the Judge never stressed in favour of the accused, the state of intoxication reached by the accused resulting in his mental somnolence which prevented him from discerning the trap prepared for him. But we have pointed out that the defence was fully put, and if it was, then there could be no misdirection on this point. It is correctly said that drunkenness as understood in law was not the accused's defence, but there are cases, and this was one, where it is a Judge's duty to explain to the jury under what circumstances a verdict of manslaughter could be returned on an indictment of murder, even though the defence has not been advanced.

The final ground of appeal necessitates a brief review of the statutory requirements relating to juries.

By virtue of section 20 of the Criminal Law (Procedure) Ordinance, Chapter 18, as substituted by section 2 of the Criminal Law (Procedure) (Amendment) Ordinance 1948 (No. 2) certain male persons are qualified and liable to serve as jurors if not subject to any legal incapacity, and if not disqualified by reason of some other provision in the Ordinance. Section 22 of the Ordinance as substituted by section 2 of Ordinance 20 of 1939 made a male person over 60 years of age disqualified to serve on juries.

It is submitted that as a result of that provision there was a grave irregularity as a disqualified juror was empanelled. The cases of *Regina v. Mellor* 8 *Cox C.C.* 454 *and R. v, Wakefield* 1918 1 *K.B.* 216

were cited in support. In Mellor's case one person sat on the panel under the impression that his name was called whereas it was another juror's name which was called. After conviction a case was reserved for consideration by the Court of Crown Cases Reserved and heard before a Bench of 14 Judges. Six Judges held there was no mistrial (5) Five that there was and three that the Court had no jurisdiction to entertain the point. The conviction was therefore sustained. In Wakefield's case there was impersonation and the Court of Criminal Appeal set aside the conviction and ordered a *venire de novo.*

The most recent case would appear to be *Kelly's* 34 *Cr. App. R.* 95 when a juror who had been convicted of receiving stolen property and whose name was in the juror's book, was called, not challenged sworn and sat as one of the jury during the trial. After conviction, objection to the validity of the trial was raised, but was overruled by the Court of Criminal Appeal. Lord Goddard L.C.J. said at page 105:

> "So far as this Court has been able to ascertain, this result (*a venire de novo*) has only been achieved where there has been personation in one form or another. We can find no case, in which, where there has been no doubt as to the identity of the person called, the Court has ever set aside the verdict."

In this case there was clearly no personation and on the authority of Kelly's case we hold that the submission that the trial was a nullity cannot be accepted.

There is another reason which in our view prevents the trial from being irregular. Section 24 of Chapter 18 provides that:

> "No person whose name is in any jurors' book as a juror shall be entitled to be excused from attendance on the ground of any disqualification or exemption, other than illness, not claimed by him at or before the revision of the list of Jurors as hereinafter mentioned."

Succeeding sections provide for the annual revision of the Jurors' List by competent persons. Revising Officers can insert or strike out the name of any person on the list and there is a right of appeal to a Judge in Chambers from a decision of the revising officer. Then there is the proviso to section 28 which is important. It states:

> "Provided that an appeal shall not prevent or postpone the allowance of the list by the revising officer, or invalidate any act done thereafter in regard to the list, but if the decision of the Supreme Court on appeal necessitates any alteration of the list, the alteration shall be duly made by the registrar and shall take effect from the date thereof."

It follows that if the revising officer does not strike out the name of a person who claims to be over 60, that person's name remains on the juror's book and it is lawfully there until an appeal, if any, is brought and decided.

Finally section 29 states:

> "Every jurors' book so prepared and regulated shall be taken to be a true record of all persons qualified and liable to serve on juries for the county to which it relates for the twelve months subsequent to the first day of September in each year :
>
> Provided that each jurors' book shall remain in force until the next jurors' book for the same county has been prepared."

We have come to the conclusion for the reasons given above, that none of the grounds of appeal is well founded and accordingly the appeal is dismissed and the conviction and sentence affirmed.

WALKS v. WALKS AND CUMBERBATCH

(In the Supreme Court, Divorce & Matrimonial Jurisdiction (Phillips, J.) May 25, 27; June 3, 18, 30, 1955).

Divorce—Adultery—Respondent does not contest—Co-respondent contests—Standard of Proof—Beyond reasonable doubt—Evidence of opportunity.

The petitioner filed a petition for dissolution of marriage on the ground that his wife had committed adultery on several occasions with the co-respondent. The wife entered an appearance, but did not file an answer to the petition. The co-respondent entered an appearance and denied the allegations of adultery.

Held: The standard of proof in adultery, like proof of a criminal offence, is proof beyond reasonable doubt. The wife committed adultery with the co-respondent. Although the co-respondent was not guilty of adultery with the wife on some of the dates alleged, he was guilty in respect of the other dates.

Decree Nisi granted.

P. A. Cummings (with C. O. Tullock) for Petitioner.

J. O. F. Haynes for Co-Respondent.

Phillips J.: In this matter the husband petitioner prayed for dissolution of his marriage with the respondent, solemnized on the 6th day of December, 1947, on the ground of adultery. The wife Respondent entered appearance but filed no answer to the petition. Her counsel, Mr. Haynes, nevertheless asked leave, which was granted, to represent her in the issue of custody of the children which may be the subject of subsequent proceedings.

The co-respondent who entered appearance, filed an answer to the petition in which he denied the allegations of adultery contained in Paragraphs 8 and 9 of the petition, prayed to be dismissed from the petition and that he be granted costs of these proceedings.

The petitioner claimed damages against the co-respondent.

The allegations of adultery were as follows:

Paragraph 8.

> "That the respondent committed adultery with the co-respondent the said Charles Emanuel Cumberbatch at Rose Hall Village, Corentyne, Berbice, during the months of *April, May and June*, 1952."

Paragraph 9.

"That the respondent also committed adultery with the co-respondent the said Charles Emanuel Cumberbatch, at Georgetown, Demerara, during the months of *October, November, and December,* 1952.

The petitioner also alleged non-access. The last occasion on which the petitioner swore he had sexual intercourse with his wife was during the month of August, 1952.

To his surprise and astonishment he discovered symptoms of his wife's pregnancy in January, 1953, his suspicions were aroused but later confirmed when on the 16th February, 1953, his wife was medically examined by Dr. L. R. Sharples a consulting Physician of New Amsterdam, Berbice. Dr. Sharples gave evidence and said that on 16th February, 1953, when he examined the wife she was then between the second and third months of pregnancy.

The petitioner said that on that day after the interview with the doctor, when he asked his wife about it she replied that she was very sorry, but would say nothing more. The next day the wife packed up and left finally the matrimonial home at, Rose Hall, Berbice, for Georgetown. It was admitted that the wife however, did not give birth to a child as a consequence of that pregnancy. There was no eye witness to the fact of adultery in this case.

The co-respondent did not give evidence on oath nor did he call any witnesses. The wife was not called as a witness in the proceedings. The petitioner was therefore put to the strict proof of his allegations.

It is well settled that the standard of proof in adultery, like proof of a criminal offence, is proof beyond reasonable doubt. It was not contended otherwise and it will only be necessary for me to cite the local case in which this proposition was approved by The West Indian Court of Appeal in the case of *Sammah v. Sammah* (1948) L.R.B.G. p. 187 where *Churchman v. Churchman* 1945 A.E.R. p. 195 and *Ginesi v. Ginesi* 1947 (2) *A.E.R. p.* 438 were applied.

Each case must be decided on its own facts. The present case however, though brilliantly argued by counsel on both sides, and I must here acknowledge the able assistance given by them to the Court, has caused me much anxiety. The case is not free from difficulty and not as easy of solution as would at first sight appear. A considerable number of authorities were cited by counsel for the co-respondent but none can be traced on all fours with the facts of the present case. This is not unusual in these matters.

I am not prepared to enter into the controversy on the merits or demerits of the decision in *Ginesi v. Ginesi* on the standard of proof in cases of adultery. Mr. J. A. Coutts in the Law Quarterly Review (Vol. 65) of April, 1949 in an article "The Standard of Proof of Adultery" gives a very lucid exposition of *his* views which he summarises in part as follows :—

(1) "The requirement of the higher standard of proof in criminal proceedings was introduced as a measure of mercy 'thrown' to those potentially liable to punishment."

(2) "Since this reason does not (now) apply to matrimonial proceedings, the requirement of strict proof of adultery in such proceedings cannot be supported by an analogy drawn between matrimonial and criminal proceedings; a fortiori, it cannot be supported on the ground that adultery is a 'quasi-criminal offence'."

See also *Davis v. Davis* 1950 J.P. p. 56 per Denning L.J. where the same standard of proof was not extended to cases of cruelty. At page 58 he says:

> "There is a danger in asserting, what the statute does not assert, that the charge must be proved beyond reasonable doubt because of the temptation it affords to give effect to shadowy or fanciful doubts. That standard is a proper safeguard to persons accused in criminal cases, but if it were applied in divorce cases it might mean unjustly depriving an injured party of a remedy which he ought to have.

Denning L.J. at this point of his judgment was dealing apparently with all matrimonial offences—not alone cruelty—but did not dissent from the law as was enunciated in *Ginesi v. Ginesi.*

However in *Fairman v. Fairman* 1949 1 *A.E.R. p.* 938 the principle in *Ginesi v. Ginesi* was again applied and firmly established. Unlike *Fairman v. Fairman* the wife here did not give evidence on oath but two of her intercepted letters proved to be in her handwriting addressed to, but not received by the co-respondent (and of course not admissible against him) in which the wife admitted her clandestine and illicit affectionate relationships with the co-respondent and from the contents of which letters the Court has been asked to infer against her (as distinguished from against the co-respondent) an admission of adultery, were tendered in evidence.

The position in this case exactly conforms with one of the propositions propounded by Lord Birkenhead in *Rutherford v. Richardson* L.T.R. Vol. 128 N.S. p. 399. He says:

> "It is, of course, a commonplace that the decision of legal issues must depend on rigid rules of evidence, necessarily general in their scope, and very likely, therefore, in individual applications, to present an appearance of artificiality and even of inconsistency. But there must be a general code, for otherwise the admission or rejection of evidence would depend upon the caprice of an individual judge—*quot judices tot sententiae;* and it is undoubtedly true that it is even better that some slight degree of injustice should be done in an individual case than that the courts should abandon the sure anchorage of an established rule. Such an injustice may occasionally occur, for it is almost a commonplace that a sensible and experienced citizen, in the course of reaching a decision as to whether a certain thing has or has not happened, will allow his judgment to be influenced by evidence which would not be accepted in the courts. Indeed, I have no doubt that judges of the highest eminence reach conclusions in their own private and domestic affairs by reference to a standard

more relaxed than that which the courts allow. But this is not the point, or, at least, it is not the whole point. The issues pronounced upon by courts in criminal, and indeed, in civil, matters are attended with such decisive consequences that the adoption in matters of evidence of a standard of admissibility which is so cautious as to be meticulous may not only be defended, but is in fact essential."

"Applying these considerations to the kind of difficulty which has often presented itself in the Divorce Court, we find that a case which has sometimes been ignorantly derided is in fact both logical and defensible. For instance, A, a husband, brings against his wife, B, a petition for divorce on the ground of her adultery with a named co-respondent, C There is some independent evidence against both B and C, but not sufficient to justify a positive adverse conclusion. B, however, makes full confession. Here the court may very reasonably pronounce a decree against B, while concluding that the matter is not established as against C. Indeed, to hold otherwise would be to lay it down that the admission or confession of B, which may be quite untrue and may be induced by hidden and private motives, is to be treated as good evidence against C; and so it happens that the court may quite reasonably conclude that it is proved that B has committed adultery with C, but not that C has committed adultery with B. The law of England does not technically recognise a verdict of "not proven," but substantially this is the nature of the verdict which in the circumstances supposed exculpates C."

I shall later refer to the contents of those letters but will now deal with relevant facts in this matter. It will be necessary to deal with the case against the respondent and the co-respondent separately.

The petitioner, a public officer attached to the Co-operative Department, was married to the respondent, then 21 years old in 1947. For the first two years of married life they lived happily at Lamaha Street, Kitty in Demerara. The first child Barbara Yvonne was born on the 29th October, 1948.

On the 1st May, 1949, the petitioner was transferred by Government to Berbice and they took up residence at Rose Hall in that county. The wife accustomed to city life in Georgetown did not like the country and encouraged by her mother (who resided in Georgetown) made frequent visits to the city.

In 1950 the husband discovered a letter to his wife supposed to have been written by one Leon Hinds an Insurance agent in Georgetown. There was a quarrel about that letter. The Reverend Allen was called in as a mediator and the mother-in-law still continued to interfere to the husband's annoyance. However, on the 16th March, 1950, the wife gave birth to the only other child of the marriage—Bryan Cecil. The petitioner says however he did not want to break up his home because of that letter.

The next year the domestic life was still not without its rifts. Some quarrel again took place over the daughter and the wife went on

one of her periodic visits to her mother in Georgetown. After a stay of two weeks the husband went there and brought the wife back to the matrimonial home at Rose Hall.

By March of the year 1952 the relationship had became somewhat strained and it is at this period of their life that unfortuitously for the husband there appeared at Rose Hall a young public officer also on transfer to Rose Hall, Mr. Charles Emanuel Cumberbatch, who came to take up duties as a Collecting Officer attached to the Magistrates' Court—the co-respondent in this matter. Mrs. Walks showed undisguised elation at his arrival in the district. He took up residence in the home of Mr. Randolph Jacobs, the Bailiff of the Court and a friend of the Walks. Mrs. Walks had known the co-respondent previously and he soon (two days after his arrival) was formally introduced to the Walks' home by Mr. Jacobs.

The co-respondent's visit to the Walks' home became frequent and more so when Mr. Walks on one occasion had to repair to Georgetown for about a week to take some examination. A close friendship between these two young people was cemented.

It is during that period of Mr. Walks' absence that it is alleged the acts of adultery between the wife and Mr. Cumberbatch took place. The co-respondent's stay at Rose Hall lasted 4 months. He left again in July, 1952. I shall refer later to those incidents.

The petitioner related (and his evidence is not contradicted) how his wife at this period became frigid towards him, the relationship became even more strained. He said she became disgusted with *the place*, she declined him sexual intercourse and had now even become rude.

In August, 1952, the wife spent three weeks in Georgetown again when she was seen frequently (for a married woman) in the company of the co-respondent. In September, again on this occasion the husband went to Georgetown and she returned with him to the matrimonial home, but still refused to have sexual intercourse with the husband, during which time she had made secret arrangements for the delivery of letters from her to the co-respondent at the address lot T, D'Urban Street, Georgetown.

On the 9th October, 1952 the wife again wished to visit Georgetown, the husband would not consent to her going. She insisted and the husband asked Mr. Randolph Jacobs to speak to her. He wished to convey to her the seriousness of her disobedience. Notwithstanding the efforts of their friend Mr. Jacobs the wife left with her belongings for her mother's home at Charlotte Street, Georgetown.

The wife was again seen in company with the co-respondent. By this time it was obvious that, to use the words of the witness Elaine Persaud, there was a "strong" friendship between them.

Between the months of November, 1952 and January 1953 which followed letters passed between the wife and husband each accusing and denying (after the event) the desertion of the 9th October 1952. Suffice it to say the wife returned to the matrimonial home at Rose

Hall on the 18th January, 1953 possibly on advice but certainly not evincing any genuine desire for reconciliation. The last paragraph of her letter reads thus:

"As I am to be made out the liar will you please get the "girl to have the house cleaned and get in some groceries as "the children and I will be travelling up in a few days time.

Gwyneth."

It was about this time that the husband discovered what he considered to be symptoms of pregnancy and on the 16th February, 1953 she was taken to Dr. Sharples who examined her. The next day the wife finally departed from her husband.

In order that there may be no wrong interpretation placed on the two intercepted letters in evidence herein (Exhibits B and C) already referred to from the wife to the co-respondent which however were not received by the co-respondent—the letters as a whole must be considered and are reproduced hereunder as follows :

Ex. "B."

"My dear Charles,

I hope you're O.K. and was glad to hear from you Friday. It was long and quite newsy the kind that is appreciated by country folks.

It might be distressing to be popping in and not finding Mums, and yet its good on the other hand to know there's something she's found interesting. As regards the cricket I hadn't made any plans as regards coming knowing I won't have the money, but now I'm a bit suspicious over my health and I would try very hard to come as I would like to see a doctor but don't want to go to the one here. It might not be the correct thing to do. The children are fine and are very irregular at school as the weather here continues to be bad. Don't be mistaken for one minute and think I'm mixing with the people far from it more now I'm not quite sure of myself. I want to drop Mums a line now though she owes me so so long sweetheart and be good. This is a bit brief but right now I'm a bit distraught, but I'm just your same Gwyn who cares and loves you just the same and perhaps a little bit more.

Love and write soon.

Gwyn."

Ex. "C"

Rose Hall,
Wed. morning.

"My dearest Mannie,

I wrote you and mums last Sunday and post myself at P.O. and quite disappointingly I haven't heard from neither of you for the week. Its hard for me to think that you received same and didn't answer and I don't see any just reason why the letter shouldn't have been delivered.

Well I just seem to find myself running into a stream of ill-luck. Of all the confusion that has been for the few last months and now to find myself pregnant is a little too much

of a good thing. I thought you would be the first one to advise me on such an awkward condition but I just seem to find myself severally alone. Anyway I'm still depending on you to let me know exactly what I must do.

I'm terribly sorry for all this worry I seem to be putting you to but this is something I didn't quite expect always having your assurance. I felt pretty low about the whole affair all last week but I'm still looking for the silver lining that should be behind these thick dark clouds. I haven't yet given up hope.

I hope you're O.K. and the job is coming along nicely. Do write as early as possible.

With lots of love.

Gwyn."

When the evidence of the reluctant witness Elaine Persaud (whose evidence I shall in a moment deal with when considering the co-respondent's case) is examined together with the foregoing two letters it is clear and, I do find as a fact, that adultery has been proved on both of the occasions alleged in paragraphs 8 and 9 of the petition as having taken place between the wife respondent and the co-respondent.

The very difficult question arises as to whether in view of the inadmissibility of the contents of the two letters above (Exhibits B and C) against the co-respondent, it has been proved beyond reasonable doubt that adultery has been proved against the co-respondent.

The evidence disclosed that during the months of October, November and December 1952 there was ample opportunity for the commission of adultery, if they so desired, while the wife and co-respondent were in Georgetown visiting and seeing quite a lot of each other. Such an inference of opportunity may quite *reasonably* be drawn.

The positive evidence only established that they were seen together, in company with others, and on one occasion, again in the company of others, the co-respondent in a drawing room placed his arm around Mrs. Walks and she called him on that occasion by his Christian name "Mannie."

From the incidents of June, 1952 related by Elaine Persaud I have come to the conclusion that adultery was then committed and proved as against both wife and co-respondent.

Can therefore the fact of adultery in June 1952 at *Rose Hall* be such a circumstance as to change the character of proved opportunity merely in Georgetown to that of the fact of or inference of fact of adultery in November or December in *Georgetown,* I think not. So the odd finding is that notwithstanding the wife's letters of tantamount admission of adultery with the co-respondent, the letters not being evidence against the co-respondent—the co-respondent is found not guilty of adultery with the wife in relation to the allegations in paragraph 9 of the petition. To use the words of Lord *Birkenhead in Rutherford v. Richardson* (above)

"The law of England (and of course of British Guiana) does not technically recognize a verdict of "not proven" but substantially this is the nature of the verdict which in this circumstance exculpates the co-respondent of this charge."

It now remains to consider the allegations as contained in paragraph 8 of the Petition against the co-respondent. I find the wife guilty of adultery on both occasions set out in Paragraphs 8 and 9.

Mr. Randolph Jacobs, the Bailiff now Marshal of the Supreme Court at whose house the co-respondent resided gives evidence of an incident in June 1952, when the husband was away in Georgetown taking his examination. About 9 p.m. one night he says he was passing by in the street, he saw Mrs. Walks and the co-respondent together a little way in from the Gas Station and that on that night the co-respondent returned home at about 11 p.m. Of course as it was pointed out there was no evidence to show that he remained from 9 p.m. until the hour of 11 p.m. with Mrs. Walks or was in her company until that hour. This is in my view only evidence of opportunity and no more.

The witness Elaine Persaud said that she lived in the same yard as the Walks at the back and would be asked to stay with her whenever Mrs. Walks' husband was away and did so in particular in June, 1952 when Mr. Walks went to Georgetown for the purpose already mentioned.

On a certain night in April, 1952 she says that the co-respondent and Mrs. Walks were in the drawing room together (the husband had gone away for about a week) that she left them alone at 9 p.m. and went to bed in an adjoining room (Mrs. Walks and herself slept in the same bed). The children had gone to bed. When the witness went to bed the lights in the drawing room were still on and that she heard them talking in murmurs. Later in the night she knew that Mrs. Walks had come to bed but she could not tell what hour or what hour Mr. Cumberbatch had left the house. Mr. Cumberbatch returned for three nights. He was dressed in shirt and pants on each night the husband was away.

On one of the nights she says during the night she was awakened by Mrs. Walks scratching a match, having as usual left them at about 9 p.m. alone together in the drawing room. Mrs. Walks seeing that the witness was awakened said that she was not to be afraid that it was her Mrs. Walks). The witness said when she got awake the lights were not on but they had been on when she had left them and gone to bed. She relates that on one of the three nights, she could not recall which, she said:

"I heard Mrs. Walks saying: "Mannie! Mannie! in usual nice manner as if calling somebody very nicely. I heard the low murmur of a male's voice."

The witness further said that it was between 11.00 to 11.30 p.m. when Mrs. Walks came in and scratched the match, that Mrs. Walks opened the vanity and took out something like a kerchief, a tissue or a piece of rag and returned out to the drawing room. A few mornings after that, she said, that she saw Mrs. Walks who was then washing the children's clothes was washing a kerchief that she asked

Mrs. Walks whose it was and she told her that it was Mannie's kerchief. Mrs. Walks said Mannie left it there, it was dirty and she was washing it. It was an ordinary white handkerchief. In answer to the Court she said she saw no stain on it.

This bit of evidence was admitted as evidence against the wife that it was not her husband's handkerchief. In my view it is also relevant in the circumstances against the co-respondent (not that the wife proved that it was his) but as to the interpretation to be put on the use of the tissue or kerchief by her or both of them. A man's dirty handkerchief is seen being washed by the wife—not the husband's. How did the handkerchief become dirty? Was it for the same reason that the wife, at near midnight (when she should be asleep) but returned to the co-respondent who was still in the drawing room, might have required the tissue or rag? What was the reason? And why only one male handkerchief.

Counsel for the co-respondent has argued that it had not been proved with certainty that it was the co-respondent who was the male who was in the drawing-room at 11.30 p.m. merely because he had been proved to have been the person there at 9 p.m. To my mind the inference is irresistible. I find as a fact it was the co-respondent in the drawing room when the wife returned there with the tissue or whatever it was. I find the co-respondent guilty of adultery on this occasion.

It was after these occurrences that Mrs. Walks (according to the witness Elaine Persaud whose evidence 1 accept) asked her secretly to deliver letters to the Post Office addressed to the co-respondent at D'Urban Street, Georgetown where it is proved the co-respondent resided.

Finally this witness said that Mrs. Walks told her (not evidence against the co-respondent of course) that Mannie said that if Mr. Walks divorced her he would marry her—this was in January 1953 when Mrs. Walks had returned home to Rose Hall after sending to her husband the peremptory letter of the 6th January 1953 (Ex. K.) about getting in some groceries and that she would be arriving with the children.

I have come to the conclusion that the co-respondent was guilty of adultery with the wife respondent here on the occasions mentioned in June 1952.

The fact that the co-respondent in this case did not give evidence has made no difference whatever to my mind—See *Poyser v. Poyser* 1952 (2) *A.E.R. p.* 949. On the question of damages against a co-respondent the principles are well settled and clearly stated in *Butterworth v. Butterworth* 1920 *p.* 126.

I find on the facts in this case that at the time when the co-respondent entered into the life of these two spouses there had already been strained relationship between them but not of so serious a nature that time would not probably heal. The wife was distraught and languishing having been prevented from enjoying the bright lights of the city and having found someone else on whom she could lavish her affections to the hurt of her husband for not allowing her

to return to Georgetown to reside, fell a victim to the passion of youth and pressed her affections on the co-respondent in a manner that must have caused some embarrassment to the co-respondent when she at once commenced incipient love-making (not at the time, perceived by the unsuspecting husband) in the presence of others, at the earliest possible opportunity.

This is not the case where the co-respondent has deliberately set out (as in *Wheating v. Wheating* L.R.B.G. 1945 p. 91.) to entice the wife and to wreck the husband's home however much his conduct in the end may have caused and culminated in that result.

The husband was doubtless a stern and uncompromising spouse but he suffered a severe blow by the co-respondent's conduct, for notwithstanding the petitioner's apparent stern behaviour he was still underneath in love with his wife. By the honest and frank manner in which he gave his evidence he demonstrated that he still would do nothing to harm his wife not even to say anything that would in the least savour of exaggeration or falsity in order to bolster his case, undefended by her. The petition is granted on the ground of adultery with the co-respondent.

I assess the damages that the co-respondent must pay to the husband at $400.00 and give judgment accordingly" with costs.

No order as to costs against the respondent.

Upon application of Mr. Haynes for co-respondent stay of execution granted for 6 weeks.

H. B. Fraser for the Petitioner.

A. R. Sawh for the Respondent.

C. M. L. John for the Co-Respondent.

In the matter of the Estate of ZULEIKA ANGELINA WHITE (deceased). In the matter of the application by OSCAR ALFRED (applicant).

(In the Supreme Court, Probate and Administration (Stoby J.) June 7, July 6, 1955).

Intestacy—Letters of Administration—Claim by descendant of aunt of illegitimate child—Legitimacy Ordinance.

Maria Henry an unmarried woman died intestate leaving fi7e children two of whom were Catherine Bruce and Maria Todd. Maria Todd had one child Herman Alfred born out of wedlock who was lawfully married and died leaving two children, one of whom is the applicant. Catherine Bruce had two children born out of wedlock, one of whom was Zuleika Angelina White, deceased, the second cousin of the applicant. The other died without issue.

The applicant applied for an order that he is entitled to a share in the deceased's estate and consequently for the grant of Letters of Administration on the ground that he is an heir *ab intestate* of the deceased.

Held: The applicant is not an heir *ab Untestato* of the deceased.

The words "persons entitled to succeed them" in section 11(2) of the Legitimacy Ordinance, 1932, mean the persons entitled to succeed the legiti-

mate and illegitimate children of the intestate illegitimate child's mother, that is his legitimate brothers and sisters, and his illegitimate half-brothers and half-sisters through his mother. They do not include the descendants of an aunt of an intestate illegitimate child.

B. O. Adams for applicant.

J. O. F. Haynes for interested parties.

Stoby J.: This is an application by Oscar Alfred who claims to be an heir *ab intestate* of Zuleika Angelina White who died on the 11th February, 1955, for an order that he is entitled to a share in the deceased's estate, and consequently for the grant of Letters of Administration for which he has applied but which was refused by the Registrar on the ground that the applicant is not an heir *ab intestate*

According to the facts sworn to in the affidavit filed in support of the application, one Maria Henry an unmarried woman, died intestate leaving 5 children namely: Catherine Bruce, Maria Todd, Mary McKenzie, Angelina Smith and Keturiah Haynes. Maria Todd had one child Herman Alfred born out of wedlock. The said Herman Alfred, who was lawfully married, pre-deceased his wife who is still alive, leaving two children, Winston and Oscar the applicant herein.

Catherine Bruce the sister of Maria Todd had two children out of wedlock, one of whom was Zuleika Angelina White, deceased, the second cousin of the applicant.

The point for decision involves the interpretation which is to be placed on section 11 (2) of the Legitimacy Ordinance 1932 (No. 14).

Prior to the introduction of this Ordinance the rules for intestate succession were contained in section 6 (1) (a) to (i) of the Civil Law of British Guiana Ordinance Chapter 7. It was provided by subparagraph (h) of that section that illegitimate children should be entitled to succeed in intestacy as heirs of their mother as if they were legitimate children of their mother. The West Indian Court of Appeal in *Sita Parvati v. Pragdut and Seetal Janki* (1922) *L.R.B.G. '* 190 held that the words in the section "heirs of their mother" were equivalent to "representatives of their mother," thereby permitting an illegitimate child to claim through its mother. The converse, however, was not possible as a mother could not claim under or through her illegitimate child although she was able to do so under Roman Dutch Law. It was this anomaly which section 11 of the Legitimacy Ordinance was designed to correct and it did so by enacting:

Right of i1-legitimate child and mother of illegitimate child to succeed on intestacy of the other

11(1) Where, after the commencement of this Ordinance the mother of an illegitimate child such child not being a legitimated person, dies intestate as respects all or any of her property, the illegitimate child, or, if he is dead, his issue, shall be entitled to take interest therein to which he or such issue would have been entitled if he had been born legitimate.

(2) Where, after the commencement of this Ordinance, an illegitimate child, not being a legitimated person, dies intestate in respect of all or any of his prop-

> erty, his mother if surviving shall be entitled to take any interest therein to which she would have been entitled if the child had been born legitimate and she had been the only surviving parent and if his mother does not survive him then such legitimate and illegitimate children of his mother as survive him and the persons entitled to succeed them on intestacy shall be entitled to take any interest therein to which they would have been entitled if all such children and the child had been born legitimate."

In this application it is submitted that the words: "And the persons entitled to succeed them on intestacy" in section 11 (2) are not limited to the representatives of the children of the illegitimate child but to descendants of an aunt of such child.

The submission ignores the clear language of the section and seeks to place an illegitimate child in the same category as a legitimate one as regards intestate succession, whereas what the Legislature has done is to preserve part of the Roman Dutch Law of intestate succession by entitling an illegitimate child to succeed to or through its mother's estate and a mother to succeed to her illegitimate child's estate.

Under Roman Dutch Law an illegitimate child succeeded to its mother's estate, but Dutch jurists were divided in their opinion regarding the succession to the blood relatives of their mother. Van der Linden in his Institutes of Holland, 3rd edition, page 85 says:

> "That illegitimate children succeed to the mother on intestacy, as she cannot make a bastard. But whether they can also succeed to their mother's relatives is a question in which we are most inclined to agree with those who answer in the negative."

He mentions Bynkershoek, Vorm, and Keesel as taking the negative view. Lee in his Introduction to Roman Dutch Law 5th edition page 31 says:

> "But with the mother it is different; her illegitimate issue succeeds to her and to her blood relations. Such was the opinion of Grotius, though as regards these last Van der Linden inclines to a contrary view."

It is possible then, that the Legislature deliberately resolved this conflict by limiting, in the case of illegitimate children, succession to the mother and her issue, for when section 11 (2) is analysed it will be evident that the words: "Persons entitled to succeed them" mean the persons entitled to succeed the legitimate and illegitimate children of the intestate illegitimate child's mother, that is his legitimate brothers and sisters, and his illegitimate half-brothers and half-sisters through his mother.

Applying this interpretation to the facts of this application it appears that Angelina White the illegitimate daughter of Catherine Bruce had no children. Catherine Bruce had two illegitimate children namely: the deceased, and William Gardener who died without issue.

In the matter of the Estate of ZULEIKA ANGELINA WHITE (deceased) and Application by OSCAR ALFRED (applicant)

As the applicant and others claiming to be interested are not the issue of descendants of the issue of Angelina White or of Catherine Bruce they are not entitled to succeed to the deceased's estate and the Registrar of the Supreme Court was right in refusing to entertain the application.

I may add that as long ago as 1937 in *The Public Trustee v. St. Clair* (1931—1937) *L.R.B.G.* 504 *Crean C.J.* held that section 11 (2) of the Legitimacy Ordinance 1932 made no provision for the sister of the mother of an illegitimate person succeeding to such person on intestacy. In the light of that carefully reasoned decision which has stood the test for 18 years any further extension of the claims of illegitimate children would seem to call for Legislative enactment and not judicial interpretation.

Solicitor:

A. Vanier for applicant.

ROSE v. HANOMAN

Application by Archibald Rose a party dissatisfied with the certificate or allocatur of the Registrar with respect to certain items in a Bill of Costs.

(In the Supreme Court, In Chambers (Stoby, J.) May 10; June 3; July 6,1955).

Bill of Costs—Certain items objected, to before Registrar—Items Reconsidered and reviewed in accordance with Order—XLVI rule 21 (*55*) *and* (*56*) *of Rules of Court, 1932—Application by party dissatisfied with certificate or allocatur of Registrar—Exercise of taxing master's discretion in allowing fees to second Counsel.*

After an action had engaged the attention of a judge of the Supreme Court, R the unsuccessful party appealed to the West Indian Court of Appeal and on a preliminary point taken by the Court the appeal was dismissed. The Court of Appeal ordered that no costs be allowed to either party in the Supreme Court or the Court of Appeal.

From this judgment H, after leave, successfully appealed to the Privy Council whose formal order after reciting the matters in issue between the parties and the decision of the Board concluded:

> "And in case Your Majesty should be pleased to approve of this Report then their Lordships do direct that there be paid by the Respondent to the Appellant his costs of this Appeal incurred in the said Court of Appeal and the sum of £605. 4s. 7d. for his costs thereof incurred in England."

Solicitor for H. thereafter submitted a bill of costs to the taxing master. After taxation Solicitor for R. applied to the taxing master to consider certain objections to the bill of costs among them an objection to disbursements for second counsel. The objections were considered by the taxing master who adhered to his previous taxation except that four minor items were withdrawn by solicitor for H.

R. thereupon applied to a judge to review the taxation and raised the same objections as he did before the taxing master.

Counsel for R submitted that no order for payment of disbursements for second counsel was made and in the absence of a direction to pay by the

West Indian Court, of Appeal there is no authority in the taxing master to allow payment.

Held : Under Order XLVI rule 21 (44) of the Rules of Court 1932, the costs of retaining only one counsel are allowed in certain cases unless the judge certifies for more than one counsel.

The Rules of Court 1900 and the Rules of Court 1932 govern taxations from the Court of Appeal.

As the Court of Appeal ordered that no costs be allowed to either party in the Supreme Court or in the Court of Appeal, His counsel never toad the opportunity of applying for two counsel and the Court of Appeal was not afforded any opportunity of exercising its discretion on the point

The successful party before the Court of Appeal should apply for two counsel it he desires to have these costs but where an unsuccessful party appeals to the Privy Council and succeeds the general rule that the taxing master has a discretion whether he will allow more than one Counsel applies and the taxing master's discretion can be exercised as the Court of Appeal's discretion was never invoked.

Application refused. Cases considered:

(1) *Friend v. Solby* 10 Beav. 329.

(2) *Sinclair v. Great Eastern Railway Co.* L.R. 5 C.P. 135.

Stoby J.: This is an application by Archibald Rose a party dissatisfied with the certificate or allocatur of the Registrar with respect to certain items in a Bill of Costs which were objected to before the Registrar and which items were reconsidered and reviewed in accordance with the procedure defined in Order XLVI rule 21 (55) and (56) of the Rules of Court 1932.

The Bill of Costs was presented to the Registrar for taxation in this way. In 1947 Archibald Rose issue a writ of summons against George Hanoman claiming damages and an injunction in respect of certain acts alleged to be committed by Hanoman. Hanoman filed a defence to the action and in turn counterclaimed for an injunction and damages.

The Acting Chief Justice dismissed Rose's claim and entered judgment in favour of Hanoman on the counterclaim.

Rose appealed to the West Indian Court of Appeal and on a preliminary point taken by the Court, the appeal was dismissed and the judgment on the counterclaim set aside. The Court of Appeal ordered that no costs be allowed to either Rose or Hanoman in the Supreme Court or the Court of Appeal.

From this judgment Hanoman, after leave, appealed to the Judicial Committee of the Privy Council. On the 14th December, 1954, the Board delivered judgment, the final paragraph of which is:

> "For these reasons their Lordships will humbly advise Her Majesty to allow the appeal, to recall the judgment of the Court of Appeal, to remit the case to the Court of Appeal with a direction to serve the note of appeal on Bookers Demerara Sugar Estates Limited and thereafter, subject to such further procedure as may be necessary and under reservation of all parties' rights and pleas, to hear and determine the appeal upon the merits. The Respondent must pay the costs of the appeal to their Lordships' board

and the costs of the hearing which has already taken place in the West Indian Court of Appeal."

The formal order dated the 21st December, 1954, after reciting the matters in issue between the parties and the decision of the Board concludes:

"And in case Your Majesty should be pleased to approve of this Report then their Lordships do direct that there be paid by the Respondent to the Appellant his costs of this Appeal incurred in the said Court of Appeal and the sum of £695. 4s. 7d. for his costs thereof incurred in England."

As a result of this Order solicitor for the appellant Hanoman submitted a bill of costs to the taxing master which included disbursements and charges commencing from December 7th, 1951, when solicitor for Rose served on solicitor for Hanoman the notice of appeal to West Indian Court of Appeal from the decision of Acting Chief Justice Boland.

After taxation, solicitor for Rose applied to the taxing master to consider certain objections to the bill of costs. The objections were considered and in a written decision which is attached hereto as an appendix the Deputy Registrar and taxing master adhered to his previous taxation except that four minor items were withdrawn by the solicitor for Hanoman.

The notice of application to a Judge to review the taxation, contains the same objections as put forward before the taxing master. The objections are:

(a) to all the items other than disbursements to one Counsel for his appearance in Court before the West Indian Court of Appeal; and

(b) to disbursements for second Counsel in any event.

Counsel who appeared in support of the objections submitted with regard to the first objection that if the history of the litigation is appreciated and the judgment and order of the Judicial Committee properly interpreted it will follow that the only costs to which Hanoman is entitled at this stage are the costs of the two or three days hearing before the West Indian Court of Appeal. He contended as the fact is, that the appeal proper has not been heard, that Rose may be successful and become entitled to costs and these costs must necessarily include items, for example: preparation of the record, perusal of the record, etc., which have been taxed in favour of Hanoman and therefore the proper course is to await the final determination of the appeal.

The taxing master answered this objection by drawing attention to the language of the judgment as compared with the language of the order. In the judgment Rose was ordered to pay the "costs of the hearing which has already taken place in the West Indian Court of Appeal" while in the order he was ordered to pay Hanoman's costs "incurred in the Court of Appeal."

In my view although the language of one differs from the other the meaning is the same, that is to say the Board intended Rose to

pay all the costs occasioned by reason of the fact that he had appealed against the judgment of the Acting Chief Justice. There could be no hearing before the West Indian Court of Appeal without the filing of a notice of appeal, consultation on the appeal, preparation of the record and all the steps necessary before an appeal is listed for hearing, Every such step involves expenditure and it is expenditure recoverable as costs and therefore recoverable as costs incurred in the Appeal or as costs attributable to the hearing of an Appeal, or as costs of the hearing of the Appeal.

If Rose is eventually successful in the Appeal, he will, if the appropriate order is made, be entitled to the costs incurred by him; what he is now liable to pay and seeking to avoid paying are the costs incurred by Hanoman. He is clearly liable to pay those costs and I decline to interfere with the taxing master's decision on that point.

The second objection is to the payment of fees to second counsel. It is submitted that no order for such payment was made and in the absence of a direction to pay by the West Indian Court of Appeal there is no authority in the taxing master to allow payment.

The general rule is that the Taxing Master has a discretion whether he will allow more than one counsel on any hearing. That was the effect of the decision in *Friend v. Solby* 10 *Beav* 329 where the Taxing Master in his discretion disallowed the costs of one of two counsel and his discretion was not interfered with.

Sinclair v. Great Eastern Railway Company L.R. 5 C.P. 135 is authority for the statement that if a Taxing Master fails to exercise his discretion then a Judge on review may refer the taxation back to him for his discretion to be exercised. In Sinclair's case (supra) it was the view of the Taxing Master that there was an inflexible rule that in arbitration proceedings the costs of one Counsel only should be allowed but on a review the Court held there was no such rule and it was for him to decide whether he would allow costs of more than one Counsel or not.

But that general rule can be whittled down by rules of Court. In England up to 1926 by order 65 r.27 reg. 46 only one Counsel was allowed in certain cases unless the taxing officer for special reasons was of opinion that more than one was proper. That rule was annulled in 1926 and the present rule Order 65 r.27 reg. 47 is:

> "When the costs of retaining two counsel may properly be allowed such allowance may be made although both such counsel may have been selected from the outer bar."

In this Colony the Taxing Master has no discretion because by the Rules of Court 1932 0. XLVI r.21 reg. 44 it is provided that:

> "In any case in which under rule 7 of this order the scale of costs in scale 1 of Appendix 1 is applicable, the cost of briefing more than one counsel shall not be allowed, unless the Judge certifies for more than one counsel."

This means that the local rule is similar to the English rule up to 1926 except that it is the Judge who must certify for more than one counsel and not the taxing officer.

It follows that if this rule is applied to taxations resulting from appeals before the West Indian Court of Appeal only one counsel can be allowed unless the Court of Appeal certifies for more than one or unless as I shall show, the Court of Appeal was precluded from considering an application.

Does O.XLVI r.21 reg.44 apply to taxations which are the result of appeals from the West Indian Court of Appeal? Rule 31 (4) of the West Indian Court of Appeal Rules 1945 states that:

> "Costs shall be taxed in accordance with the law and practice of the Court."

Court means the Supreme Court in the Colony and includes a Judge thereof. As the rules are otherwise silent on the subject of taxation of costs I am forced to the conclusion that the Rules of the Supreme Court of the Colony that is to say the Rules of Court 1900 and Rules of Court 1932 govern taxations from the Court of Appeal.

In this taxation it is conceded that the West Indian Court of Appeal did not certify for two counsel. Normally its failure so to do should conclude this application in favour of the applicant Rose on that point, but there is another circumstance which is to be taken into account. The other circumstance is that the West Indian Court of Appeal ordered that no costs be allowed to either Rose or Hanoman in the Supreme Court or in the Court of Appeal. Hanoman's counsel therefore never had the opportunity of applying for two counsel and the Court of Appeal was not afforded the opportunity of exercise its discretion on the point.

The conclusion I come to is that the successful party before the West Indian Court of Appeal should apply for two counsel if he desires to have these costs but that where an unsuccessful party appeals to the Judicial Committee of the Privy Council and succeeds the general rule of law applies and the Taxing Master's discretion can be exercised as the Court of Appeal's discretion was never invoked.

It follows from what I have said that in my view the taxing Master was competent to allow on this taxation the costs of two counsel and I may add that apart from the fact that his discretion will rarely be interfered with I think he correctly exercised it in an appeal which was from a judgment after a hearing of twenty-seven days and in which the Acting Chief Justice had certified for two counsel.

Solicitors:

J. Edward de Freitas for respondent (defendant).

W. D. Dinally, for appellant (plaintiff).

MADRAY v. T. D. CAMERON, administrator of the Estate of Millicent Cameron, deceased.

(In the Supreme Court, Civil Jurisdiction (Stoby, J.) April 25; July 11, 1955).

Will—Trust—Gift.

Up to the 11th March, 1947, R. was the owner of 16 roods of land. On 29th August, 1944, she made her last will and testament by which she bequeathed to her daughter T, 14 of the 16 roods and to her grandson M. 2 roods.

On 6th February, 1946, at R's direction T wrote two documents, one giving R a life interest in the 14 roods and in the other T stating that "she has with her full sense and understanding given" to M 2 roods.

On 11th March, 1947, R transport to T the whole 16 roods. Before the said property was conveyed M had taken possession of 2 roods and was still in possession when this action was brought.

On T's death, her husband in his capacity as the administrator of her estate sought to pass transport of certain property, which included the 2 roods, to one Dabi Persaud. M. opposed the passing of the transport on the ground that he was the owner of the 2 roods.

It was submitted on behalf of the plaintiff M that a trust had been created on the 6th February, 1946, in favour of M when T at R's direction wrote the document "giving" M 2 roods. On behalf of the defendant it was submitted that the document was evidence of an incomplete gift and that there was no evidence of a trust.

Held: The documents of the 6th February, 1946, were as consistent with the possibility of a trust in favour of the plaintiff as they were with a gift to T.

There was no evidence that a condition had been imposed on T which if not agreed to would have resulted in no gift being made to her.

A trust in favour of R had been created in 14 roods and if T had failed to maintain R, R could have maintained an action against T but M could not have maintained such action in T's lifetime.

Editor's Note: An appeal against the decision in this matter was allowed by the West Indian Court of Appeal;

Stoby J.: The defendant is the administrator of the estate of Millicent Cameron also known as Tulashiama, and in his aforesaid capacity he advertised a conveyance by way of Transport in favour of one Dabi Persaud.

On the 6th day of March, 1954, the plaintiff entered an opposition to the passing of the said conveyance, his reasons being:

> 1. On the 6th day of February, 1946, my aunt the said Millicent Cameron who was the owner by transport of the property now sought to be transported, wrote out, signed and handed me a document, a true copy of which is as follows :—
>
> "6.2.46"
>
> "I TULSEEAMAH born (MADRAY) of 188 Almond St. Queenstown has with my full sense and understanding given to my nephew CYRIL MADRAY two roods of land at Pln. Good Faith given to me by my mother RAMPIARY and has nothing to do with either paddy rent or cocoanuts on the said two roods of land belonging to CYRIL MADRAY Tailor of Pln. Good Faith, Mahaicony from the 6th of February, 1946.
>
> TULSEEAMAH

Witnesses

ALFRED WILLIAM NORMAN LASHLEY."

2. Pursuant to the aforesaid document I immediately took possession and went into occupation of the said two roods of land and started to cultivate the same; and I have from that time remained in undisturbed possession and occupation of the said land and cultivated it.

3. My aunt told me that she did not wish her husband the said Thomas Dorman Cameron to know about the land or her gift of the said two roods to me, and that she would transport it to me when she could do so without the knowledge of her husband.

4. That the Transport now sought to be passed does not exclude the said land, the value of which does not exceed $500, although notice of my claim was given to the proponent as well as to the purchaser.

5. It is not competent for the reasons stated for you the proponent to seek to transport the property as advertised without first excluding the said two roods of land given to me as aforesaid."

As the opposition did not result in the proponent withdrawing or amending the advertisement the plaintiff in due course filed his writ and statement of claim, the latter, as is usual, being a repetition of the grounds of opposition.

The defendant in his defence denied that the deceased wrote the document ascribed to her and in any event submitted that the document was not sufficient to pass ownership of the property therein mentioned and contended that the statement of claim disclosed no cause of action. He counterclaimed for an order for possession of the two roods claimed by the plaintiff. A reply and defence to this counterclaim was later filed but I do not propose to make any comments on this pleading at this stage of the narrative.

The evidence offered by the plaintiff and his witnesses was not lengthy and not seriously challenged in cross-examination. The defendant led no evidence and relied on certain legal submissions with which I will deal hereunder.

The facts which I consider proved in evidence are that up to the 11th day of March, 1947, one Ramchurreah was the owner of the eastern three-fourths of lot number 2 Good Faith; the lot was 16 roods in facade and commenced from 40 roods from the western boundary of Good Faith and extended in an easterly direction by the whole depth of the estate.

On the 29th August, 1944, she made her last will and testament by which she bequeathed to her daughter Tulashiama 14 of the 16 roods at Good Faith and to her grandson 2 roods. Other bequests not relevant to this case were made.

On the 6th February, 1946, Mrs. Ramchurreah and her daughter Tulashiama went to the house of one Alfred Lashley. Mrs. Ramchurreah told Lashley that she wished her daughter to write a document.

Thereupon the mother dictated and the daughter wrote two documents both of which were witnessed by Lashley.

One of the documents is set out in paragraph 1 of the grounds of opposition and has been referred to earlier in this judgment. The other document is as follows:

"6.2.46"

"I MILLICENT TULSEEAMAH (born MADRAY) have with my full sense and understanding this day 6th of February, 1946, given my mother RAMPIARY the power to receive rents, sell cocoanuts and all taxes due to be paid on the said fourteen roods of land given to me by her must be paid by the said Rampiary and to maintain her until her death and I further agree to carry out her funeral arrangements between myself, my nephews Jack and George and my niece Walterine Jeebode all residing at Pln. Good Faith at the time of her death.

TULSEEAMAH

Witnesses

ALFRED WILLIAM NORMAN LASHLEY.

On the 11th day of March, 1947, Mrs. Ramchurreah transported to her daughter Tulashiama the whole 16 roods at Good Faith and in her affidavit leading to transport she swore "through mutual love and affection of my daughter Tulashiama I have on the 21st November, 1945, made an absolute gift of all that piece or parcel of land . . . .and having a facade of 16 roods . . . .and I am now conveying the said property to complete the said gift."

Before the said property was conveyed the plaintiff had taken possession of 2 roods and is still in possession.

Mr. Fraser, counsel for the defendant, elected to close the defence without leading evidence and submitted that on any view of the facts the plaintiff must fail as:

(a) The document Ex. "A" was evidence of an incomplete gift.

(b) There was no evidence of a trust as there was no proof that Mrs. Ramchurreah had not made a later will and in any event she had transported her property in a manner inconsistent with the bequests in her will; and

(c) The evidence supported the view that Mrs. Ramchurreah made an unconditional gift of all 16 roods to her daughter and relied on the daughter to give 2 roods to the plaintiff.

Mr. King Counsel for the plaintiff agreed that if the evidence went no further than showing that there was an imperfect gift to the plaintiff then his case must fail and he also agreed that there was no evidence that the will produced was the last will and testament of Mrs. Ramchurreah.

He submitted, however, that there was proof of a trust because:

(a) The will was evidence of intention.

(b) The document Ex. "A" was written before the property was conveyed, and

(c) The plaintiff went into possession.

He cited the cases of *Davies v. Atby* 35 Beav Rep. (1865—1866) 208 at p. 213 and *Rochefoucauld v. Boustead* (1897; 1 *Chancery* 196 in support of his arguments. What those cases decide is that the Statute of Frauds does not prevent proof of a fraud, and that if land is conveyed to a person as a trustee he cannot afterwards deny the trust and claim the land as his own simply because the trust is not in writing. Those were cases of an express trust but the same principle applies where there is a constructive trust. In *Bannister v. Bannister* (1942) 2 *All E.R.* 133 *Scott L.J.* said at page 136:

> "It is, we think, clearly a mistake to suppose that the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest, which, according to the true bargain, was to belong to another, is confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act, 1925, cannot be called in aid of cases in which no written evidence of the real bargain is available. Nor it is, in our opinion, necessary that the bargain on which the absolute conveyance is made should include any express stipulation that the grantee is in so many words to hold as trustee. It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another."

Although Counsel for the defendant referred to the Civil Law of British Guiana Ordinance section 30 (d; Ch. 7 and the Deeds Registry Ordinance Ch. 177 section 21, he only faintly argued that the provisions of those Ordinances could, if a trust existed, defeat the plaintiff's claim. In the light of the authorities, the day is long past when the absence of writing can be prayed in aid to assist a fraudulent trustee.

What then is the proper inference is to be drawn in this case? Can I say, as Counsel for the plaintiff presses me to say, that the circumstances are such as to be consistent only with Tulashiama being a trustee for the plaintiff to the extent of 2 roods of land at Good Faith?

In *Bentley v. Mackay* (1851; 15 Beav 12 the Master of the Rolls said at page 18 :

> "There are two classes of cases upon voluntary gifts which are distinct and obvious: the one, where the donor is the legal owner of the property which is the subject of the voluntary settlement; and the other, where he is merely the equitable owner. In all cases where the legal owner intends voluntarily to part with the property in favour of other persons, the Court requires everything to be done which is requisite to make the legal transfer complete; for if anything remains to be done, this Court will not be made

an instrument for perfecting it. That principle, however, does not apply to the present case, and therefore it is not necessary to dwell upon it.

The second class is where a mere equitable owner, the legal right being vested in another person, is desirous that this trustee shall become a trustee for the object of his bounty. That is the present case; and the principle as settled by the reported cases is, that to give effect to such a gift, the Court requires clear and distinct evidence of a declaration of trust in favour of the donee; and for that purpose, it looks at the acts and writings of the donor, to see if from them clear evidence of a declaration of trust can be gathered. It is said, that the acts must be unequivocal. That is in some sense true, but it means no more than this: that the evidence must be sufficient to satisfy the Court that a declaration of trust has been made in favour of the party, and, when that is proved, the Court will act on it."

I think the principle with regard to the standard of proof enunciated in Bentley's case is applicable to a case of this kind although I appreciate the difference in the facts and the difference in the law.

The plaintiff's contention is that the legal owner Mrs. Ramehurreah divested herself of the property and the gift as to 14 roods was complete, and as to 2 roods a trust created.

The argument leads one to compare the reply and defence to counterclaim, with the Statement of claim. When the latter is examined, it is evident that the plaintiff's opposition was founded on ownership by means of a gift. True, the word trust is mentioned, but in the context, it is clear that the view held at the time was that, the deceased was a trustee for the plaintiff because she had given him the land and always intended him to have it. The suggestion that the deceased took 16 roods and was a trustee of 2 roods was made for the first time in the reply and defence to counterclaim. The manner of pleading to some extent supports the view I have taken that no declaration of trust was made on or before the 6th February, 1946, but that the plaintiff's grandmother wished the deceased to have the whole 16 roods and left it to her to give him what she thought fit.

The documents of the 6th February, 1946, are as consistent with the possibility of a trust in favour of the plaintiff as they are with a gift to Tulashiama especially when the affidavits Ex. "C" are studied. Mrs. Ramchurreah swore on the 11th March, 1946, that she was completing a gift made in November, 1945, so that when the documents were written in July, 1946, she had already given the 16 roods to her daughter. In the same manner as the precaution was taken to give. Pompareddy Madray certain rights and the donor protected herself by making it obligatory for the donee to maintain her until death, so too, some indication could have been given in the documents that the deceased would not have got the 16 roods unless she agreed to hold 2 roods in trust for the plaintiff.

Had Tulashiama failed to maintain her mother then on the authority of Bannister's case (supra) the mother could have maintained an

action against the daughter by asserting that despite the absolute character of the conveyance a trust in her favour attached. But could the plaintiff have taken such action in the lifetime of Tulashiama?

Apart from the absence of any expression about a trust in the documents no witness has said that the deceased took the land on condition that she transported 2 roods to the plaintiff. I appreciate that circumstantial evidence may be as conclusive as direct but the circumstances do not impel me to that one conclusion. I am left in doubt and my doubt is not due to any failure to weigh carefully Pomapareddy Madray's evidence especially where he said: "She (meaning Ramchurreah) told me that the reason Cyril's 2 roods were not transported was because it was a small amount and his aunt intended to give him more and she would make one transport." Therein perhaps lies the misfortune in this case. Mrs. Ramchurreah abandoned her intention of giving the plaintiff any land and left it to her daughter to do as she thought fit, or it may be that she intended the plaintiff to obtain 2 roods but nevertheless did not create a trust. In other words there is no evidence direct or circumstantial that a condition was imposed on Tulashiama which if not agreed to would have resulted in no gift being made to her.

The suggestion that a transport for 2 roods could not passed is without foundation. The Local Government Ordinance No. 14 of 1945 section 122 (1) precludes the Registrar from conveying less than a quarter lot without the consent of the Local Government Board, but the section is limited to land in villages and country districts and has no application to parts of plantations. There is no conveyancing reason why 2 of the 16 roods could not have been transported in 1946.

It is with regret that I have come to the conclusion that the plaintiff's action must fail. I express the hope that even at this late stage the defendant will perfect the gift made by his wife and not deprive his nephew of this small area of land.

There will be judgment for the defendant on the claim and on the counterclaim. The plaintiff will deliver up possession on or before the 1st January, 1956, and pay the defendant's costs.

Solicitors:

H. C B. Humphrys for plaintiff.

N. C. Janki for defendant.

ALLEN v. RAMSINGH

(In the West Indian Court of Appeal on Appeal from the Supreme Court of Trinidad and Tobago (Mathieu-Perez, Collymore and Jackson, C.J.J.) January 18, 1955).

Landlord and tenant—Creation of tenancy—Contract—Occupation—Attornment.

The facts appear from the judgment.

Per Curiam: "It is settled law that it is essential for the relationship of landlord and tenant that there should be a demise, and this is a matter of contract between the parties. A tenancy at will, which must be founded on contract binding both parties may be created by express words, it may also be created impliedly but mere occupation without showing some affirmation (as distinguished from silent) consent on the part of the owner is not sufficient."

Judgment:—This is an appeal from the judgment of Ward J. dismissing a claim by the appellant founded on statutory trespass under the provisions of the Summary Ejectment Ordinance Cap. 27 No. 17.

The respondent was and is the owner of certain premises known as 12 George Street, Port-of Spain. He let the first floor of these premises to one Dowlatt, a female relative, in 1948. Shortly after this letting Dowlatt was taken ill and she arranged with one Leo Allen the father of the appellant whereby he was allowed to occupy these premises on the understanding that should' she recover she would resume occupation. Leo Allen continued in possession of the premises which he used at first as a proprietary club and subsequently as a members' club. During this period rent was paid by or on behalf of Leo Allen to Dowlatt and receipts were given accordingly. Dowlatt died in October 1949 and Leo Allen shortly afterwards. From that time the appellant occupied the premises and conducted therein a members' club of which he was the Secretary. He paid the rent and receipts were given as heretofore. At no time did Leo Allen or the appellant or anyone connected with him live on the premises.

On 20th March, 1950 the respondent by letter notified the appellant that the personal representatives of Dowlatt had given him notice of their intention to quit and deliver up possession of the premises on the 31st March, 1950; he further told the appellant that he had never authorised the subletting of the premises to him or his club, that he was not prepared to have him as his tenant and that he wanted him to "move out" by 30th April.

The appellant did not vacate the premises and on May 25th, 1950, the respondent in a complaint against Mary Rampersad one of the personal representatives of Dowlatt obtained a warrant of possession from the magistrate in respect of these premises then occupied by the appellant.

The appellant as a result of the obtaining of this warrant of possession filed an action against the respondent claiming (a) a declaration that he is the tenant of the aforesaid premises (b) an order that the judgment herein prayed for shall supersede the said warrant under the provisions of the Summary Ejectment Ordinance Cap. 27 No. 17, (c) damages for trespass.

The respondent denied that the appellant was ever his tenant or in occupation of the premises with his consent and sought:

(i) delivery of possession
(ii) recovery of possession
(iii) a sum of $210 for use and occupation of the premises.

The respondent was successful in his defence and on his counterclaim. The appellant appeals on the following grounds:

"1. That the judgment is unreasonable and/or against the weight of evidence and/or cannot be supported having regard to the evidence.

"2. That the learned Judge erred in holding that, on the relevant date, the respondent had a lawful right to possession of the premises.

"3. That the learned Judge erred in finding that there was no tenancy or sub-tenancy and that there is no evidence that the appellant was ever a tenant or a sub-tenant in his own right or in lawful occupation and/or that there was no evidence of attornment or acceptance. (as amended).

"4. That the learned Judge erred in finding that on the relevant date the respondent was entitled to compensation from the appellant for the amount claimed in the Counterclaim or any part thereof."

It was contended on behalf of the appellant that he was accepted by the respondent as his tenant and indeed on a request for particulars the appellant through his (Solicitor stated that "the said acceptance was oral."

The foundation of appellant's case is based on the allegation that the legal relationship of landlord and tenant subsisted between him and the respondent.

The onus was on the appellant to satisfy the Court that there existed the relationship of tenant and landlord between him and the respondent and/or that he was in lawful occupation in his own right with the consent and knowledge of the respondent. That he was in occupation cannot be denied.

It is settled law that it is essential for the relationship of landlord and tenant that there should be a demise and this is a matter of contract between the parties. A tenancy at will, which must be founded on contract binding both parties may be created by express words, it may also be created impliedly but mere occupation without showing some affirmative (as distinguished from silent) consent on the part of the owner is not sufficient.

On this fundamental issue the learned trial Judge's finding is:—

"The evidence is conflicting, but I am satisfied that the defendant did let the premises to one Dowlatt, who for a short time in 1948 carried on a cookshop there. In April 1948 she sub-let the premises to Leo Allen, I am also satisfied that this sub-letting was done with the knowledge and consent of the defendant, who,

according to the evidence of Lopez, his agent, sometimes received the rent from Leo Allen, and gave him receipts purporting to be signed by Dowlatt. After the death of Leo Allen the plaintiff continued to pay rent to the defendant who gave receipts in the name of Leo Allen signed with Dowlatt's name, although both Allen and Dowlatt were dead. There is no evidence that the plaintiff at any time attorned tenant to the defendant or was accepted as such by him."

This finding negatives any form of contractual relationship between the appellant and respondent, and there was ample evidence to support the conclusion arrived at by the trial judge. It follows from this that as no sum of money was ever received by the respondent as rent from the appellant, the argument that the receipt of any sum amounted to a waiver of notice to quit is not well founded.

Although Dowlatt died in 1949 a receipt dated 6th March 1950 to Leo Allen is signed "Miss Dowlatt, May Rampersad" and in May 1950 the respondent gives a receipt signed by him, headed "Without Prejudice" and reading as follows :—

"Received from Dowlatt per Aubrey Allen the sum of Thirty Dollars for use and occupation of upstairs of 12 George Street Port of Spain due 10.5.50.
$30.00

Ramsingh."

and on 8th July 1950 the appellant writes to the respondent as follows :—

"Mr. Ramsingh,
George Street,
Port-of-Spain.
Dear Sir :

I enclose Inland Money Order No. 42939 for the sum of thirty dollars ($30) in payment of rent due 30th June, 1950 in respect of upstairs premises at No. 12 George street.

Please forward me your receipt for same.

Yours faithfully,
Aubrey Allen
Tenant."

This letter was written after the Statement of Claim was delivered and clearly could have no effect in establishing a legal relationship which in fact did not exist nor could the letter of the respondent dated 11th July, 1950, in reply have the reverse effect.

It is indeed true that by his letter of 20th March, 1950, the respondent allowed the appellant to 30th April, 1950, to "move out" but in view of the finding that no tenancy existed this can only be regarded as a concession.

In the result the appeal is dismissed with costs and the judgment of the trial Judge affirmed.

DE CASTRO v. GOMES

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Boland and Stoby, JJ.) December 15, 1954; July 21, 1955).

Bastardy—Married woman—Evidence to bastardise child—Rule in Russell v. Russell—Section 3 of the Evidence Ordinance, 1952—Title of enactment—Construction.

The appellant was adjudged the father of the respondent's child. Respondent, a married woman whose husband lives in England, gave evidence before the magistrate that her husband left the Colony in August, 1951, and that they have lived apart since then. The child was born on 6th June, 1953. She also gave evidence the effect of which was to bastardise the child. There was no other evidence seeking to establish non-access by her husband.

For the appellant it was contended that the long title to the Evidence Ordinance, 1952, "An Ordinance to amend the law of evidence in proceedings between husband and wife and in civil proceedings" bore no reference to the affiliation proceedings and that therefore the provisions of section 3 of that Ordinance has no application to such proceedings; the rule in *Russell v. Russell* therefore applied to exclude evidence of the wife of non-access by the husband.

Held: As the provisions of section 3 of the Evidence Ordinance, 1952, were unambiguous it was not reasonable to hold that the provisions of section 3 were to be limited merely because, in the title, the Ordinance is described as an Ordinance to amend the law of evidence in proceedings between husband and wife and in civil proceedings.

The rule in *Russell v. Russell* has been abolished by the provisions of section 3 of the Evidence Ordinance, 1952, and it is competent for a husband or wife to give evidence bastardising a child in any cause or matter.

Appeal dismissed.

Judgment of the Court: At the conclusion of the argument in this appeal we announced our decision dismissing it, but undertook to put our reasons for so doing into writing, in view of the fact that the point of law argued frequently must arise in a Magistrate's Court.

The appellant was adjudged the putative father of the respondent's child, by the Magistrate for the Georgetown Judicial District. Before the Magistrate the respondent gave evidence in proof that she is a "single woman" within the meaning of the Bastardy Ordinance Section 2 of Chapter 147 for the purpose of bringing her complaint for an affiliation order against the appellant. She is a married woman whose husband lives in England. According to her evidence her husband left this colony in August, 1951, and they have lived apart since then. The child was born on the 6th June, 1953. She also gave evidence the effect of which was to bastardise her child. There was no other evidence seeking to establish non-access by her husband.

Mr. John for the appellant contended that the well-known rule in Russell v. Russell still applies to affiliation proceedings despite the provisions of section 3, ss. 1 & 2 of Ordinance No. 46 of 1952. He submitted that the only evidence of non-access by the husband being the inadmissible evidence of the complainant, the child born during the period of wedlock must be deemed to be the child of the complainant's husband.

Section 3, ss. 1 & 2 of Ordinance No. 46 of 1952 enacts:

"Evidence of non-access.

3. (1) Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any

proceedings to prove that marital intercourse did or did not take place between them during any period.

(2) Notwithstanding anything in this section or any rule of law, a husband or wife shall not be compellable in any proceedings to give evidence of the matters aforesaid."

Mr. John argues that the long title to the Ordinance is: "An Ordinance to amend the law of evidence in proceedings between husband and wife and in Civil proceedings," and therefore the section has no application to affiliation proceedings which are not, of course, proceedings between a husband and wife.

Section 3 of the Evidence Ordinance 1952, No. 46, has its origin in section 32 of the Matrimonial Causes Act of 1950, 14 Geo. 6, Ch. 25. Perhaps it should be noted that the long title of this Act is:

"An Act to consolidate certain enactments relating to matrimonial causes in the High Court in England and to declaration of legitimacy and of validity of marriage and of British nationality, with such corrections and improvements as may foe authorised by the Consolidation of Enactments (Procedure) Act, 1949."

In England the law before the passing of that statute was that the rule in *Russell v. Russell* was absolute. Before the Act of 1950, in *Ettenfield v. Ettenfield,* 1940, 1 *All E.R.* 293, Goddard L.J. delivering the judgment of the Court of Appeal stated that the rule laid down by the House of Lords in the Russell case was in the widest possible terms and that it applied to all cases of whatever nature where the paternity ' of a child was in question. Moreover since *Ettenfield v. Ettenfield* all text book writers are agreed that the Matrimonial Act has abolished the rule in *Russell v. Russell.*

In Halsbury's Laws of England 3rd Ed., Vol. 3, p. 90, it is stated:

"The common law rule that neither husband nor wife was competent to give evidence proving or tending to disprove the fact of sexual intercourse between them has been abrogated by statute."

In Lushington's Laws of Affiliation and Bastardy, 7th Ed. p.9 the author states referring to *Russell v. Russell:*

"All this has been swept away by section 32(1) of the Matrimonial Causes Act, 1950, which makes both husband and wife competent witnesses as to no access."

Similar passages occur in Knox's Introduction to Evidence p. 161 and in the notes p. 415 of the Complete Statutes of England Vol. 43.

The questions now arises whether the long title to our Ordinance 46 of 1952 controls and limits the construction of the ordinary English words used in Section 3, so as to give the words of the section a meaning other than their ordinary meaning. It is correct to say that the title of a statute may be looked at in order to remove any ambiguity in the words of the Statute.

Huddleston B. at p.33 in *Coomber v. Berks JJ.* (1882) 9 Q.B.D. 17 said:

"There is ample authority for saying that the title of an Act

may be looked at in order to remove any ambiguity in the words of the Act."

Bray J. said at p. 176 in *Sage v. Eichotz* (1919) 2 K.B. 171:

"In my view the words of the Act are perfectly clear and unambiguous. The word "knowingly" is deliberately used in the third paragraph instead of the word "corruptly," and "knowingly" does not necessarily involve any element of corruption."

and again *in the estate of Groos* (1904) P269 Gorell Barnes J. said at p. 273:

"It does not seem reasonable to hold that in this case section 3 is to be limited merely because, in the title, the Act is described as an Act to amend the law with respect to wills of personal estate made by British subjects. I am of opinion that the Act ought not to be construed in the restricted sense."

We can find nothing in section 3 of the Evidence Ordinance of 1952, which is ambiguous. On the contrary to construe the section in the manner contended, we would have to import into it the words "husband and wife" after the words "admissible in any proceedings" and as to do so would be to give a meaning to the section different from its natural meaning we have come to the conclusion that the rule in *Russell v. Russell* is now abolished in this Colony and that it is competent for a husband or wife to give evidence bastardising a child in any cause or matter.

Solicitors:

C. M. L. John for appellant.

H. A. Bruton for respondent.

YOUNG and others v. BUNYAN

(In the Full Court on appeal from the Magistrate's Court of the East Demerara Judicial District (Boland and Stoby, JJ.) January 21, 25; July 23, 1955).

Local Government Ordinance, 1945—District By-Laws, 1939—Meetings of Local Authority—Public meeting—Right of member of public to attend meeting—Right of chairman of Local Authority to order removal of member of the public who has not contravened the provision of by-law 19—Forcible removal—Assault.

By-Law 10 of Districts By-Laws, 1939 made under the provisions of the Local Government Ordinance, 1945, provides as follows:

"The public shall be admitted to all meetings of the Local Authority so far as there is accommodation but—

(a) at any meeting the Local Authority may temporarily exclude the public from such meeting owing to the special nature of the business being dealt with or about to be dealt with if they deem such exclusion advisable in the public interest;

(b) if a member of the public interrupts the proceedings of any meeting, the Chairman may, after warning, order his removal. "

At a meeting of a village council over which the first named appellant presided and at which the second and' third appellants attended the respondent was present and sat in that part of the hall which is allotted to members of

the public. Acting on the instructions of the first appellant the second and third appellants forcibly ejected the respondent from the hall. At the hearing in the Magistrate's Court where the respondent summoned the appellants for assault the Magistrate found that the respondent at no time conducted himself in an improper or disorderly manner or interrupted the proceedings at the meeting.

Held: There was no special business then before the council, or to be dealt with by the council, and when a by-law directs a council or its officers to proceed with the business of the council in a particular mode or manner, it is defining and regulating the powers and duties of the council and its officers, and neither the counsel nor its officers can act in a manner contrary to that express direction.

The Mayor, Alderman and Burgesses of Tenby v. Mason, 90 L.R. 1908, 1 Ch. 457 (C.A.) distinguished.

Appeal dismissed.

L. F. S. Burnham for appellants.

E. V. Luckhoo for respondent.

Judgment of the Court: This appeal involves the necessity for the determination by the Court of the limits of the right conferred on Village Councils by virtue of the Local Government Ordinance, 1945 (No. 14 of 1945) and the District By-laws made under the repeals Ordinance Chapter 84, which are still in force, to exclude a representative of the press from a meeting of the Council to which the general public is given access. The three appellants were convicted by the Magistrate for assaulting the respondent in the course of ejecting him from a meeting of the Village Council of Friendship and Buxton, East Coast Demerara, which was being held at the Village Hall of the Council at Friendship on Thursday, 7th October, 1952. According to the evidence the appellant Younge was at that time the Chairman of the Council, and as such occupied the chair at the meeting; the appellants Williams and Wright, both Rural Constables, were in attendance at the meeting. Known to the appellants as a correspondent of the Daily Argosy newspaper, the respondent before the meeting began entered and took a seat in the Hall on one of the benches allotted to members of the public. Acting on the oral instructions given by the Chairman, the appellant Younge, to eject the respondent from the Hall, the appellants Williams and Wright, as Rural Constables, held on to the respondent and ordered him to go out of the Hall; the appellant Wright actually pulling him from his seat and dragging him for a distance of six feet. The Magistrate found that at no time had the respondent conducted himself in an improper or disorderly manner or interrupted the proceedings of the meeting and that no misconduct could be urged as a ground for his being ejected.

As stated in his Memorandum of Reasons for Decisions the Magistrate found the assault on the respondent to be not of a severe nature but having regard to the circumstances including the status of the respondent and the public place where this assault was committed, he took a serious view of the offence and on conviction imposed on each appellant the maximum punishment provided for an assault, namely, a fine of $25.00 with costs $3.96 in default one month's imprisonment with hard labour. It may be stated that though the offence of the appellant Younge was in fact that of an aider and abettor of the

assault committed by the other appellants, as such he was liable to the same penalty as the assailants and to be charged for the assault itself. He was so charged and convicted in this case.

In the grounds of appeal filed in the record by each appellant it is alleged that "the decision was unreasonable and could not be supported having regard to the evidence." But the appellant Younge added a further ground, namely, that "the learned magistrate had committed a specific illegality in the course of the proceedings in hearing and determining the matter and in convicting the appellant in his absence; the Appellant having been led to believe by an Officer of the Court that the matter was not fixed for that day."

After a report on the facts relating to this ground of appeal was furnished toy the Magistrate to the Court at our request, Counsel for the appellants who was informed of the terms of the report withdrew on behalf of the appellant Younge this ground of appeal.

The submission on behalf of the appellants that "the decision was unreasonable having regard to the evidence" did not seek to challenge the findings of the Magistrate concerning the main facts as disclosed in his Reasons for Decision, viz., that the respondent was a correspondent of the Daily Argosy newspaper, that as a member of the public he had entered and taken a seat in the hall at which the meeting of the Village Council was being held and to which the public was not being excluded because of the special nature of any business being-dealt with or to foe dealt with, that while the appellant was occupying the seat the appellant Younge, who was at that time Chairman of the Council, gave oral instructions to the appellants Williams and Wright, who were rural constables, to eject the respondent from the hall, and that acting in obedience to the appellant Younge, those two other appellants did lay hands on the respondent and despite his protests cause him to leave the hall.

Counsel disputed the correctness of the finding of the Magistrate as to the precise nature of the assault but this seems to us to be immaterial inasmuch as the Magistrate neither based the conviction nor assessed the penalty he imposed because of the physical nature of the assault. On the evidence the Magistrate found as we have stated that at no time the respondent had conducted himself in an improper or disorderly manner or interrupted the proceedings of the meeting or committed any act in contravention of the by-laws.

The first submission advanced on behalf of the appellants was grounded on an alleged legal right of the Council acting through its Chairman to exclude from its meeting the representative of any particular newspaper as the Chairman thinks fit, as against the claim of the respondent of a right to attend the meeting as a member of the public.

It was contended that a Village Council has like all groups of persons who agree to assemble together an inherent right to regulate the manner and procedure of its meetings which includes the right of excluding all other persons or any others, as they may decide, who do not belong to the membership of the group. In support of this propo-

sition Counsel cited the case of *The Mayor, Alderman and Burgesses of Tenby v. Mason reported at* 90 *L.R.* 1908 1 *Ch.* 457 (CA) where the headnote reads :

> "In a municipal borough neither the public, nor the burgesses, nor reporters for newspapers have the right to attend the meetings of the borough council without the consent of the Council expressed or implied. *Semble* the same principle applies to the meetings of a district council or of a county council."

In our view on a perusal of the case as reported, the decision was founded on the absence of a provision in the Municipal Corporation Act of 1882 giving expressly the public the right to attend meetings of the Council. The Municipal Council of Tenby was a creature of that statute, and its obligations to the public were only such as were imposed by the statute by virtue of which the council had existence. The terms of the Act and certain by-laws made by the Council in pursuance of powers conferred on it by the Act made provision for a measure of publicity of the Council's activities by means of notices to be exhibited at the Town Hall and also to be sent to certain newspapers giving dates of intended meetings and the business to be transacted thereat. It was held that although the practice of the Council had been to admit reporters at its meeting no right in the press to attend could be rested on this invitation even by a *bona fide* representative of a newspaper, because even if the Council had issued the invitation, it was always entitled to withdraw such invitation in any particular case. Consequently the claim of the Council for a declaration of its right to exclude from their meetings the defendant who was the proprietor of a newspaper was upheld on the ground that neither as a member of the public nor as a representative of the press was he entitled to be present without the Council's permission.

Village Councils are in this Colony creatures of a statute. The relevant existing Ordinance is No. 14 of 1945 which repealed and superseded the Local Government Ordinance, Chapter 84 of the Revised Edition of the Laws of British Guiana, 1930. The repealed Ordinance set up a body known as the Local Government Board which was given the power in Section 19(1) to make by-laws respecting certain matters included amongst which were those mentioned therein in (e) "the definition and regulation of the powers and duties of Village Councils and Country Authorities and of their officers." By virtue of this power the Districts By-Laws 1939 were made and duly published. The subsequent repeal of Chapter 84 by the Ordinance of 1945 still leaves in operation and in full force and effect those by-laws (vide Section 222 (1) (c) of the Ordinance of 1945).

The Districts By-Laws, 1939 in Fart II deal with the powers and duties of Local Authorities and their officers. A "local authority" is defined in the Ordinance as including a "village council." By-law 19 reads—

> "The public shall be admitted to all meetings of the Local Authority so far as there is accommodation but—
>
> (a) at any meeting the Local Authority may temporarily exclude the public from such meeting owing to the

special nature of the business being dealt with or about to be dealt with, they deem such exclusion advisable in the public interest;

(b) if a member of the public interrupts the proceedings of any meeting the Chairman may, after warning, order his removal."

We have considered the contention advanced by Counsel for the appellant that the by-laws were *ultra vires.* The submission was that it was a right at common law which every gathering possessed of excluding others from being present at the gathering and that such a right inherent in a gathering can only be taken away by express statutory enactment. But the argument overlooks the fact that a meeting of the Village Council has no legal rights whatsoever as a gathering save and except such as are conferred on it by the Ordinance creating it, and that Ordinance giving the Council its existence expressly conferred on the Local Government Board the power of limiting and defining its rights and duties within the limits of which it must function.

We are of opinion that when a by-law directs a Council or its officers to proceed with the business of the Council in a particular mode or manner, it is defining and regulating the powers and duties of the Council and its officers, and neither the Council nor its officers can act in a manner contrary to that express direction.

As by-law 19 does no more than the above it is not *ultra vires* as Counsel for the appellant has contended.

It seems clear from the above that only the Council itself has the power to exclude the public from the enjoyment of their right to attend a meeting and only because of the special nature of some business before the Council. But the Chairman has the right to order the removal of a member of the public who interrupts the meeting and only after warning.

There was no special business then before the Council or to be dealt with by the Council—there was no intimation by any councillor that there was any such business to be discussed. Even if there had been such business a motion would have had to be made and carried according to the rules of debate in By-law (11) subject to the provisions of By-law (8) as to giving of notice of motion. The exclusion of the respondent alone whilst other members of the public were permitted to remain would have been irregular as an invidious distinction. But there was no such motion made.

So far as the respondent's capacity as a representative of the press is concerned, By-law (8) provides for the exclusion of the press by the provision at (j) which permits motions to be made for the exclusion of the press. Such a motion does not require to be preceded by a notice as required for motions generally under By-law (7). We feel that a motion to exclude not the whole press but only a section of the press might be irregular, but there is no need for us to consider that in this appeal, because there was no motion whatsoever relating to the press.

In our opinion the respondent was unlawfully ejected either in his capacity as a member of the press or as a member of the public. Accordingly we affirm the convictions of all three accused for unlawfully assaulting the respondent.

As regards punishment we feel that appellant Younge though not guilty of physical assault was in fact the cause of the offence. He was in a position of authority as Chairman; the other appellants would naturally be expected to execute his orders. The Magistrate, we think, should have made a distinction between the punishment imposed on the Chairman and that imposed on these two rural constables obeying him. Accordingly we affirm the sentence of a fine of $25.00 on appellant Younge, but vary the punishment imposed on appellants Williams and Wright by substituting for the fine of $25.00 a fine on each of them of $10.00 in default 14 days hard labour.

The respondent is entitled to his costs from all the appellants.

EBRAHIM v. THE QUEEN

(In the Court of Criminal Appeal (Stoby, Phillips and Luckhoo, JJ.) August 12, 26, 1955).

Indictment—Two accused charged jointly—Offence committed by one accused—Facts same in respect of each accused—Indictment good.

The appellant was convicted by a jury for driving a motor car dangerously. He was charged jointly with another person for manslaughter in respect of one incident. At the trial the appellant's case was that he was not the driver of the vehicle at the relevant time while the other accused person claimed that he was the driver of the vehicle. The jury convicted the appellant and acquitted the other accused person.

It was argued on appeal that the indictment was bad in that the appellant could not be indicted jointly with another person, because (a) the offence charged could not have been committed jointly, and (b) the Crown did not allege that the two accused committed this offence jointly.

Held: That the indictment was good on the facts of the case because it did not charge each accused with a separate act but with committing one act, and there was ample evidence to support the conviction.

P. N. Singh for appellant.

G. L. B. Persaud, acting Solicitor General, for respondent.

Judgment of the Court: Stoby J. : On the last occasion when this appeal was heard we indicated that we were not prepared to disturb the conviction of the appellant on any of the grounds which were then filed and which were argued, but Counsel for the appellant obtained leave to file an additional ground of appeal. That additional ground is that the indictment was defective and bad in law in that the appellant could not have been indicted jointly with another person, because (a) the offence charged could not have been committed jointly and (b) the Crown did not alleged that the two accused committed this offence jointly. Leave was given for that ground to be filed and the hearing was adjourned until today to give the Solicitor-General an opportunity of replying to the argument adduced by Counsel for the appellant.

The reason why this ground of appeal arose is because of the nature of the evidence which was led by the prosecution at the trial of the appellant and another person, who was charged and who was acquitted;

It appears that a motor vehicle was proceeding along the East Bank road when an elderly man was knocked down and he died as a result of the injuries he received. Certain witnesses, who were called by the Crown, said that the driver of the car was the appellant, while another person who was sitting in the car, and who appears to have been a servant of the appellant, said that he was the driver of the car. In that state of the evidence the Crown decided to charge the person who said that he was driving the car and the person whom the witnesses said was driving the car and they were charged jointly in one indictment.

No objection was taken either before plea or after the close of the case for the prosecution to the form of the indictment. (I say so not because it is suggested that if an objection is not taken at the trial it cannot be taken in this Court, because it can be taken. I merely point that out to show that it never occurred to anyone at the trial that the appellant and the acquitted person were wrongly joined.

Now, the law with regard to the joinder of defendants is expressed in various ways in various books. In *Stephen's Commentaries of the Laws of England*, 21st Edition, Volume 4, page 250, it is stated: "There may be a joinder, not only of various charges, but of various defendants in the same indictment. Where several persons join in the commission of an offence, they may all be indicted together."

That passage is more or less supported by all the old textwriters and also by the modern writers. Sir Matthew Hale, in his *Pleas of the Crown*, states at page 173, volume 2: "touching the joining of several offences of the same nature, but distinctly committed by several offenders, some have been ruled insufficient as an indictment of several persons." But yet in 21 *T* 21 *Jac, B.R.*, A, B, C, and D, were indicted for erecting 'four several inns. It was ruled that for several offences of the same nature several persons may be indicted in the same indictment, but then it must be laid separately and for want of that word 'separately' the indictment is quashed. And it is common experience at this day that twenty persons may be indicted for keeping disorderly houses or bawdy houses and they are daily convicted upon such indictment if the word 'separately' makes them several indictments.

Again, in *Hawkins Pleas of the Crown*, volume 2, page 331, it is stated: "It seems certain at this day, that notwithstanding the offence of several persons cannot but in all cases be several, because the offence of one man cannot be the offence of another, but every one must answer severally for his own crime, yet if it wholly arise from any such joint act which in itself is criminal, without any regard to any particular personal default of the defendant as the joint keeping

of a gaming-house or the unlawful hunting and carrying away of a deer, or maintenance, or extortion, etc., the indictment or information may either charge the defendants jointly or severally."

Now, it must be noted here that not one of these text-writers is saying that where one of two defendants might or might not be guilty of one offence they cannot be joined in the same indictment. What they are saying is that where there is a common purpose they can be joined, but they cannot be joined where separate offences have been committed by several persons.

The law, perhaps, is best stated in *Chitty's Criminal Law* volume 1, page 271, where it is said: "As each individual is, in all cases, responsible only for his own criminal actions or omissions, the result whether the defendant be indicted alone or with others will be similar and no inconvenience can arise to the defendants from being jointly indicted; for if, on the trial, the evidence affects them differently, the Judge in this discretion, will select such parts of it as are applicable to each, and leave their cases separately to the Jury in order that each individual may have an impartial trial, unprejudiced by the case of his associates. If two be improperly found guilty separately on a joint indictment, the objection may be cured by producing a *nolle prosequi* as to the one of them who stands second on the verdict."

The case of *Hemstead and Hudson*, reported at Russell and Ryan, Crown Cases Reserved, page 344, is cited in support of that passage. This is what the head-note says in the case of *Hemstead and Hudson:* "On an indictment against two, charging them with a joint offence, either may be found guilty; but they cannot be found guilty separately of separate parts of the charge. If they are found guilty separately, upon a pardon or *nolle prosequi* as to one who stands second upon the verdict judgment must be given against the other."

What happened in that case is that twenty-seven penknives valued *£6.* 10s. were stolen from two persons. The two accused were servants of the owners of the penknives and there was evidence that they had stolen the penknives and so they were charged. When the case came on the Jury were of the opinion that, although the prisoners were in the same room, there was not sufficient evidence to prove that they acted together. That is important, because that is the point which Mr. Singh has been making. The Jury found that the two accused were not acting together, but they found that Hemstead, one of the accused, was guilty of stealing some of the penknives worth £6 and that Hudson, the other accused, was guilty of stealing the remaining penknives worth 10s. and they convicted them both.

The Recorder reserved the following questions for the opinion of the Judges:

> Whether sentence of death can be passed upon the one capitally convicted, or whether the verdict of the Jury was a virtual acquittal of both.

In other words, the Recorder was doubtful whether the verdict of the jury was a proper verdict, or whether both should be acquitted because they were jointly indicted. The Jury found that they were not acting in concert, but that the offences were committed separately.

The case was considered by the Judges and they were of the opinion that judgment could not be given against both the prisoners, that the one who was convicted first was properly convicted and that the one who was convicted second should be pardoned. In other words, what the case decides is that on a joint indictment the Jury cannot convict both accused of separate offences and that if they are not acting together only one can be convicted.

It is obvious that accused persons can never be indicted jointly where the allegation is that separate acts have been committed by each accused, because a person is entitled to a separate trial in respect of an offence alleged to be committed by him alone—an offence which he does not commit with someone else, or an offence which is entirely different and has no relation to the one committed by the other person who is on the indictment. Not only is he entitled to be on a separate indictment, but he cannot be tried together with a person on another indictment, nor can he be tried even with his own consent with another person on a separate indictment. We repeat that in the case of *Hemstead and Hudson* there were separate offences committed by each accused person and the allegation was not that one offence either had been committed jointly by the two accused persons or by one or other of the two accused persons.

The distinction between this case and the case of Weston, cited by Mr. Singh, is that in the case of Weston the six persons who were there indicted had each committed a different offence. There was no question of one of the six accused having committed the offence. The allegation was that each one of the six defendants had committed separate offences and the Court held that they could not be joined.

The case of *Lipscombe*, 1862, 26 Justice of the Peace, page 244, also supports the view which we are taking, that this indictment was not defective on the face of it. That was a case in which several persons were joined in one indictment and the point was taken that they could not be joined and Cockburn, Chief Justice, in giving the judgment of the Court said: "As to the point that the men were all tried together in the lump, it appears that the facts were entirely the same in all the cases, and it is not suggested that the men made any application to be taken separately, or that the intention of the justice was to deprive them of this advantage and, therefore, there will also be no rule on that point."

We are not laying stress on the fact that in this case no application was made for a separate trial, but we are laying stress on the point that the facts of this case were entirely the same with respect to each accused person.

We do not consider it necessary to consider the Crown's view-point that the appellant could have been convicted of aiding and abetting or, alternatively, that he was properly joined, because on that indictment one could have been convicted of being the principal offender and the other of aiding and abetting, as that was not the Crown's case. In our opinion, the indictment was good on the facts of this case, because it did not charge each accused with committing a separate act but charged them with committing one act and there was ample evidence to support the conviction.

We have, therefore, come to the conclusion that the appeal must be dismissed and it is accordingly dismissed. The conviction is upheld and the sentence affirmed.

RAMBALLI v. SCHULER

(In the Supreme Court, on appeal from the Rent Assessor (Hughes, J.) July 20, 21, 1954; September 12, 1955).

Rent Restriction—Assessment—Inspection of premises—Procedure—Section 4B (1A) of the Rent Restriction Ordinance.

On the hearing of an application by the tenant to have the premises assessed the Kent Assessor inspected the premises and came to the conclusion that the rent of six dollars was unfair and unreasonable. In the purported exercise of the powers given by section 4B (1A) of the Rent Restriction Ordinance, 1941, he reduced the standard rent to the sum of three dollars. No evidence was given of the year in which the premises were first let.

Held: The Rent Assessor could not properly invoke the provisions of section 4B (A) of the Rent Restriction Ordinance, 1941, as those provisions applied only to premises first let as separate premises subsequent to the eighth day of March, 1941, and there was no evidence to that effect.

Appeal allowed.

J. S. Jaikaran for appellant.

Respondent in person.

Hughes, J.: This is an appeal from the decision of the Rent Assessor in a case in which the tenant applied to have the standard rent ascertained and certified and the maximum rent assessed, fixed and certified. The tenant was, at the time of the application to the Rent Assessor, paying the sum of six dollars a month for the premises which he rented from the landlord who is the appellant in this appeal.

In the course of the hearing of the application the Rent Assessor inspected the premises and in his Reasons for Decision stated, *inter alia*, that the premises "are roughly constructed . . . . of exceedingly poor materials and both in the walls and the floor the boards have shrunk leaving large unsightly spaces and rendering the dwelling not proof against the weather. The premises themselves stand on an abominably kept side road in a small village . . . . a considerable distance from any bus route or the like amenities. The Rent Assessor came to the conclusion that the rent of six dollars was unfair and unreasonable and in purported exercise of the powers given by section 4B (1A) of the Rent Restriction Ordinance, 1941, he reduced the

standard rent to the sum of three dollars; he declined to allow any increase under paragraphs (a), (b) or (c) of section 6 (1) of the Ordinance.

As regards section 6 (1). (b) the Rent Assessor has stated in his Reasons for Decision that he was unable to assess any increase under that provision because "the Landlord has led no evidence . . . . of the year in which the premises were first let . . . . " In the light of that finding the Rent Assessor could not properly invoke the provisions of section 4B (1A) for that section applies only to premises first let as separate premises subsequent to the eighth day of March, 1941, and there was no evidence to that effect. The appeal is accordingly allowed and the decision of the Rent Assessor set aside.

SINGH v. KHAN

In the matter of the Infancy Ordinance, Chapter 141
and
In the matter of the infant, JOY BEVERLY SHERRIOT.

(In the Full Court, on appeal from the Magistrate's Court of the Georgetown Judicial District (Hughes and Stoby, JJ., and Miller, J. (Ag.)) September 5, 13, 1955).

Infant—Bastard—Mother dead—Application to Court by putative father for guardianship—Principles to be applied—Equitable principles—Welfare of child paramount consideration—Wishes of putative father and of relations on mother's side to be considered Infancy—Ordinance, Cap. 141, ss. *16 and 21.*

The appellant, a married man living with his wife and their three children, is the putative father of a child who was born to a female servant employed at his wife's factory. The servant was dismissed from his wife's factory and had the custody of the child until she died. On her death her mother, the respondent, was on her application to the Supreme Court appointed guardian of the child by a judge in Chambers. On appeal, it was contended for the appellant that the judge applied wrong principles in considering the application; that the Court must be guided by equitable principles coming to a decision concerning the welfare of the child and that a parent has the natural right to his child and should not be deprived of its custody except for some grave misconduct.

Held: A court must in determining such applications be guided by equitable principles concerning the welfare of the child.

The child's welfare is of paramount importance but the wishes of the putative father and of the relations on the mother's side cannot be ignored. A child's welfare is not restricted to worldly possessions—love and self-respect must count for something.

Appeal dismissed.

B. S. Rai for appellant.

A. T. Singh for respondent.

Judgment of the Court: This is an appeal from an order of Mr. Justice Boland in Chambers whereby he confirmed an order made *ex parte* by Mr. Justice Phillips appointing Buddhia Khan, the respondent, as the guardian of an infant.

Counsel for the appellant has submitted that the Judge in Chambers applied wrong principles in considering the application. He contended

that sections 16 and 21 of the Infancy Ordinance, Chapter 141, mean that the Court must be guided by equitable principles in coming to a decision concerning the welfare of the child and that the cases *Barnardo v. McHugh* (1891) A.C. 388 and *In re Carroll* (1931) 1 K.B. 317 decide that a parent has the natural right to his child and should not be deprived of its custody except for some grave misconduct.

The first limb of the submission is not open to any objection.

The Roman-Dutch common law under which a father had the custody and control of his legitimate children and a mother the guardianship of her illegitimate children was abrogated by the Infancy Ordinance, Chapter 141, as pointed out by Gilchrist, J., in *The King v. Norman Griffith* (1928) L.R.B.G. 33.

What then were the equitable principles exercised by the English Courts in 1916 which is the year that the Infancy Ordinance was passed?

By 1916 the Supreme Court of Judicature Act had been in existence for 40 years but before the coming into force of that Act the common law courts had no power to depart from the common law and to administer equity. As Lord Esher, M.R., said in *Reg. v. Gyngall* (1893) 69 L.T.R. 481 at page 483:

> "The Court of Queen's Bench acted by way of *habeas corpus* for the purpose of determining between two or more people what were their rights *inter se* in a case where an application was made for *habeas corpus* when a person had been illegally detained. That jurisdiction was exercised though there might be no relation of parent and child in the case, as well as to decide questions between parents or guardians of children and people who were neither parents nor guardians. Under that jurisdiction, when the case was one of disputed custody of a child of one of the parties, the question for the court was whether the child was being detained as against its parent, and whether the person detaining the child had any right to do so. I think the parent of a child had, *prima facie*, an absolute right against the world to the custody of his child, unless by certain classes of misconduct he had for-forfeited that *prima facie* right."

It is of the utmost importance to remember that when Lord Esher spoke of an absolute right of a parent to the custody of his child he was expounding the common law and not equity. Under the English common law a father was guardian by nature of his legitimate children. His wife had no rights as guardian until the death of her husband when she became guardian by nurture. Those rights could not be taken away except for grave misconduct. But in the case of illegitimate children neither the father nor the mother had any right at common law unlike the Roman-Dutch law under which a mother had the right to be guardian.

This strict doctrine of the common law was modified by the Chancery Courts. The Court of Chancery exercised a paternal jurisdiction substituting itself for the parents and making the child's welfare its principal concern. In considering what was best for the

child it kept in mind however the doctrine of the common law where legitimate children were involved and where illegitimate children were concerned it paid heed to the wishes of the mother, the putative father and the mother's relations.

After the fusion of law and equity the doctrines of equity prevailed so that in 1916 in England whenever the question of a child's guardianship arose whether that child was legitimate or illegitimate the welfare of the child was of paramount importance.

We will refer now to the two cases cited on behalf of the appellant. *Barnardo v. McHugh* (supra) was a case in which an illegitimate child was placed by his mother in Dr. Barnardo's Home for destitute children, a Protestant institution. The boy had been baptized a Roman Catholic and the mother was a Roman Catholic. After two years the mother desired to remove him to place him in a Catholic institution. The issue in the case was stated toy Lord Halsbury, L.C, in his speech at page 394 as follows:

> "The question which this House has to determine is whether or not under the circumstances of this case Dr. Barnardo is entitled against the will of the mother to retain the child in his Home."

The House of Lords upheld the view that he was not so entitled. Lord Halsbury cited with approval Sir George Jessel's statement of the law in *Reg. v. Nash*, 10 Q.B.D. 454. He said:

> "In *Reg. v. Nash* this very question came for decision before the Court of Appeal, and Sir George Jessel appears to me to have pointed out the distinction between strict legal rights as to guardianship and the jurisdiction which a Court of Equity does and always did exercise in regard to such orders as are now in question. Sir George Jessel pointed out that that Court is now governed by equitable rules and that in equity regard was always had to the mother, the putative father, and the relations on the mother's side. Natural relationship was thus looked to with a view to the benefit of the child. "There is in such a case" (he says) "a sort of blood relationship which, though not legal, gives the natural relations a right to the custody of the child." His Lordship, I think, did not mean an absolute right; but such a right as he had already described to be considered by a Court of Equity in making such orders."

It will be seen from the above-mentioned case that in respect of illegitimate children equity consulted the wishes of the relations on the mother's side in the same way as the putative father's wishes were consulted.

In re J. M. Carroll (*supra*) was another case in which a mother who was a Roman Catholic gave her illegitimate child to a Protestant Society and then subsequently desired to have it back to place it with a Roman Catholic Society where it could be brought up in its own' religion. The Protestant Society refused to deliver the child but the Court of Appeal held that she should have it overruling the decisions of the Judge in Chambers and the Divisional Court who had decided against the mother. Scrutton, L.J. said at p. 333:

"I think in the present case the Courts have not given sufficient attention to the question of the parent's right to control the religion of a very young child, too young to have any wishes of its own."

The important point in Carroll's case is that the contest was between a mother and a stranger to decide on the child's religious upbringing so the Court was at pains to stress the natural right of a parent to choose a religion for her child. Neither case decides that as between a putative father and the relations on the mother's side, the putative father has some prior right.

As we can find no support in the authorities for the view that a putative father ought not to be deprived of his illegitimate offspring except for grave misconduct we propose to act on the equitable principle that the child's welfare is of paramount importance but we shall not ignore the wishes of the putative father or of the grandmother.

The facts of this application are that the appellant is a happily married man living with his wife who has borne him three children.

A servant employed at his wife's rice factory gave birth to a child of which he is the father. The servant was dismissed from his wife's employment and had the custody of her child until she died. On her death the grandmother of the child obtained the custody. The grandmother is 65 to 70 years of age and is without means. The appellant earns $175 a month and is in regular employment. The financial advantage is clearly with the appellant but a child's welfare is not restricted to worldly possessions—love and self-respect must count for something.

We do not for one moment suggest that a wife is incapable of loving her husband's illegitimate offspring but we think it to be a fan-assessment of the female temperament to say that when a wife has children of her own and when her husband has committed adultery with a person of inferior status then the presence of the illegitimate child in the home may be a permanent memorial of her husband's infidelity. The child's presence may result in disharmony to such an extent that gradually it will be relegated in the background and become no more than a servant. The appellant has not asked that the child be placed with his mother or unmarried sister—if there be any—but in his own home and with our knowledge of local conditions we cannot think that the child's interest will be best served by removing it from its present custody.

We conclude this judgment by referring to a passage in Eversley on Domestic Relations, 6th edition, page 450 where it is said "The father of a bastard will not as a rule be appointed its guardian unless he settles properly on it." It will be a gracious act therefore if the appellant makes the child's grandmother a liberal allowance and thereby demonstrate in a practical way his love and affection for his daughter.

Appeal dismissed. Costs to respondent to be taxed.

DHANRAJ v. THE QUEEN

(In the Supreme Court, Court of Criminal Appeal (Stoby and Phillips, JJ., and Miller, J. (ag.)), July 1, 22; September 16, 1955).

Criminal Law—Trial—Statement made by counsel for Crown and by judge in presence of jury—Jury not discharged—exercise of Judge's discretion—Juryman taken by police to police station during trial for enquiries—No application for discharge of jury by defence—Publication in daily newspaper that juryman arrested—No direction by judge in summing up that jury ought not to allow the action of the police to have any prejudicial effect on their minds in arriving at their verdict.

The appellant was convicted by a jury on indictment. During the trial Counsel for the Crown reported to the judge in his chambers that he had been informed by the Police that one of the jurors had' been seen that day in conversation with certain near relatives of the appellant. Counsel for the Crown and Counsel for the defence were told by the judge in his chambers that the Court would be adjourned until the following day in order to allow further investigation to be made into the matter.

On the following day the judge after reading the statements taken by the Police regarding the above mentioned matter considered that it was not necessary to discharge the jury and informed' both counsel to that effect. Counsel for the defence was informed that a statement had been taken by the Police from the juror concerned and on being asked by the judge whether he wished to make any application in connection with the matter stated that he did not wish to do so and that he considered that the matter should be allowed to remain as it was.

The trial thereupon was continued. The juryman concerned had either been taken to or gone at the request of the Police to the police station where he was question and later allowed to go.

Publicity was given to the matter by a daily newspaper in which it was recorded that before adjourning the trial the trial judge said:

> "In order to permit further investigations to be made into a matter connected with this trial. I consider it necessary that this case should be adjourned at this stage until tomorrow morning."

It was submitted on behalf of the appellant that a specific illegality substantially affecting the merits of the case was committed in the course of the proceedings; that the trial judge erred in not discharging the jury, alternatively that he should, as a matter of law, have directed the jury that they ought not to allow the action of the police or his (the judge's) pronouncement in court to have any prejudicial effect in arriving at their verdict.

Held: The verdict of a jury may be set aside if it is subsequently discovered that some grave irregularity had taken place at the trial which might have resulted in a miscarriage of justice even if the incident was unknown to the presiding judge.

In the present case the appellant was not prejudiced in any way by the juror's detention at the police station nor did the newspaper publication complained of having the effect of interfering with the proper administration of justice.

Appeal dismissed.

B. O. Adams for appellant.

G. L. B. Persaud, Solicitor-General (acting) for respondent.

Judgment of the Court: The two grounds argued in this application for leave to appeal were:

> "1. that some specific illegality other than hereinbefore mentioned, substantially affecting the merits of the case was committed in the course of the proceedings in as much as:—
>
> (a) The learned trial Judge erred whilst in the course of the proceedings of the trial just before the case of the prose-

cution was near completion he pronounced from the bench in open Court to the jury, and Counsel for the Defence and Counsel for the Crown that on account of a certain matter that had been brought to his knowledge closely associated with the present case he was adjourning the case, in order that certain investigations should be made by the Police into the said matter.

(b) The learned trial Judge erred when he proceeded with the trial of the accused (Appellant) in the present case with the said jury empanelled, notwithstanding that:

(i) Superintendent of Police Austin and Inspector Talbot of the Brickdam Police Station arrested and took into custody a Juryman named Balgobin, (No. 12 on the panel) to the Police Station under Police escort as he was about to leave the Court in the presence of the other jury, an act which would prejudice the mind of the said Juror Balgobin and of other jury men who witnessed the apprehension in as much as it might have caused a verdict prejudicial to the accused (Appellant).

(ii) The learned trial Judge should, as a matter of law have informed and/or directed the Jury that they ought not to take or allow the action of the police or his pronouncement in Court to have any prejudice in their minds in arriving at their verdict;

and 2. that "the jury mind were prejudiced in. the trial in as much as the said case was published in the newspaper of the Guiana Graphic and words to the effect that the jury were locked up were so published."

In view of the nature of the allegations made, we obtained a report from the trial judge pursuant to the provisions of section 11 of the Criminal Appeal Ordinance, 1950, and at the hearing of the appeal we directed the Registrar to obtain statements from Mr. C H. E. Miller, Crown Counsel and Inspector Talbot. We expressed the hope that it would be possible for Counsel for the Crown and Counsel for the defence to meet and agree on what took place and then file the agreed statement but this hope did not materialise and in the result in the consideration of this appeal (leave having been granted) we have had to be guided by the Judge's report and the statements filed.

It is common ground that by virtue of section 165 of Chapter 18, the Criminal Law (Procedure) Ordinance, the Judge, in his discretion, can discharge the jury if an emergency arises. What is being attacked in this appeal is his failure to exercise his discretion in the prisoner's favour although an emergency arose which had the effect, it is alleged, of intimidating the jury and which might have resulted in their verdict being influenced by fear.

As Lord Summer said in his speech in *Crane v. Director of Public Prosecutions*, 15 Cr. App. R. 183, the provisions of the Criminal Appeal Act are wide enough to justify the Court in quashing a conviction when there has been some miscarriage of justice and we are conscious

that if an irregularity occurred at the trial which in our opinion precluded the jury from considering their verdict impartially and without fear or favour we ought in the interests of justice either to quash the conviction outright or to quash it and order a new trial.

In deciding whether this incident affected the jury in such a manner as to warrant interference by this Court it is necessary to set out all the surrounding circumstances.

The Judge's note is as follows:

Thursday 27th January, 1955,

> "It is reported to me in chambers by the Crown Prosecutor that he has information from the Police that one of the Jurors in this case was this morning seen, by Arthur Bowen and others, in conversation with certain near relatives of the accused. The Crown Prosecutor and Mr. Adams (defence Counsel) are called into chambers and informed that the Court will be adjourned until tomorrow morning in order to allow further investigation to foe made into the matter.
>
> The Court is adjourned accordingly."

Friday 28th January, 1955.

> "After reading the statements taken by the Police regarding the allegation referred to over page, I do not consider it necessary to discharge the jury.
>
> Mr. Miller and Mr. Adams are informed. Mr. Adams is asked whether he wishes to make any application in this connection and is told that a statement was taken by the Police from the Juror concerned: Mr. Adams states he does not wish to make any application and considers that the matter should be allowed to remain as it is."

It is now stated to us that Counsel did not know nor did the Judge know that a juror was arrested in the presence of the other jurors, taken and detained at the police station, questioned and then released.

The law is clear that the verdict of the jury may be set aside if it is subsequently discovered that some grave irregularity took place which might result in a miscarriage of justice even if the incident was unknown to the presiding judge. *Ras Behari Lal and others v. The King Emperor*, 30 *Cox C.C.* 17 was a case where convictions for murder were quashed because one of the jurors was ignorant of the English language although his inability to understand the proceedings was not known to the trial Judge.

It is important too to note that if an irregularity takes place which is known to Counsel but not to the Judge it is Counsel's duty to bring it to the attention of the Court. In *Neal's case*, 33, Cr. App. R. at p. 195, Goddard, L.C.J., in delivering the judgment of the Court said:

> "Before leaving this part of the case we desire to make an observation for the guidance of counsel should a similar case arise in the future. If some irregularity comes to the knowledge of counsel before the verdict is returned, he should bring it to the attention of the Court at the earliest possible moment so that the

presiding Judge may consider whether or not to discharge the jury without giving a verdict. Matters of this sort ought not to be held in reserve with a view to taking them (before this Court when it may be, as here, too late to remedy the mistake."

We advert now to the incident about which complain is made. According to Inspector Talbot's statement the allegation made about the juror was that he was seen speaking to two relatives of the prisoner. We digress here to observe that while it is not an offence for a juror empanelled in a case to speak to relatives of an accused person it is unwise for him to do so as suspicion might arise concerning the integrity of the juror especially when it well known that allegations of bribery are frequently made on the flimsiest pretext. For the guidance of jurors in the future we would advise them to avoid association not only with the accused and his relatives but with all those connected with the case whether for the Crown or for the defence. Although jurors are permitted to separate at the end of each day's hearing, the jury should so conduct themselves during the adjournment that the prisoner on trial should feel confident that their impartiality is not open to doubt and the Crown assured that the verdict will rest on the evidence in Court and nothing else.

As we have said the allegation against the juror was that he had spoken to the prisoner's relatives. Whether he was arrested or invited to the police station we think it was undesirable and unnecessary that the arrest should have taken place or the invitation issued in the precincts of the Court. However the juror was taken to the police station and questioned and he denied conversing with any relative of the prisoner. The police must have accepted his explanation and he was allowed to depart. Now according to the Judge's note the nature of the allegation made against the juror was known to Counsel for the defence, who nevertheless told the Judge that he had no application to make. How can we say that the jury were terrified by what took place? The sole purpose of questioning the juror was to find out if he had been conversing with two people. His explanation was accepted: why then should other jurors, against whom there was no allegation and who were not questioned, be prevented through fear from giving a true verdict.

The case of *Twiss,* 13 Cr. App. R. 177, is authority for saying that not every irregularity necessitates a discharge of the jury. In Twiss' case a juror quite wrongly discussed the facts of the case with a witness for theCrown and the Court of Criminal Appeal declined to quash the conviction being satisfied that the prisoner was not prejudiced.

In this case while we do not approve of the conduct of the police we are unable to find that the appellant was prejudiced in any way and this ground of appeal must fail.

The other ground of appeal is closely associated with the one just dealt with. Counsel contends that publicity was given to the incident which must have affected the mind of the jury. He tendered a copy of the Guiana Graphic, a newspaper circulating in the Colony in which it was recorded that before adjourning the trial the judge said:

"In order to permit further investigations to be made into a matter connected with this trial, I consider it necessary that this case should be adjourned at this stage until tomorrow morning."

The case of *Rex v. Dyson* (1943) 169 L.T.R. 236 was cited in support of the proposition that a conviction ought to be quashed where a prisoner is prejudiced by a newspaper report. In *Dyson's case* a list of 40 previous convictions was published. The judgment of Asquith, J., *in Dyson's case* concludes with these words—

"In the present case, the fact that the previous convictions were broadcast in one organ, at any rate, of the local press, seems to us most unfortunate, and in our view, in the special circumstances of this particular case, the appeal ought to be allowed and the conviction quashed."

Dyson's case was considered by the Court of Criminal Appeal in *Rex. v. Armstrong*, 35 Cr. App. R. 72, where the prisoner's previous convictions were published in the newspapers before trial. Lynskey, J., delivering the judgment of the Court said at p. 74:

"It is said that the decision of this Court in DYSON (1943) 29 Cr. App. R. 104, compels this Court to say that publication in local newspapers of the information given to the magistrates with regard to previous convictions is of itself sufficient to require the quashing of the conviction. That case lays down no such principle. It was a similar type of case in which the Court thought it proper that in the special circumstances of that particular case the appeal ought to be allowed and the conviction quashed. But the Court was not laying down, and we do not propose to lay down, a rule that merely because a newspaper, either local or national, discloses what has happened at the Magistrates' Court, although it is very undesirable that such a disclosure should be published, on that and on that ground alone, this Court must quash a conviction of a man who on the evidence is clearly guilty.

The position is that, so far as the publication of that information is concerned, this Court has no power to compel the Press, but this Court agrees that it is undesirable that such information should be given in the Press. But the fact that such information is given is no ground for this Court to infer either that the jurors who tried the case had read it or that, if they had read it, that they were unfit to try the case or biased against the prisoner for the purpose of the trial.

In our view there is no reason in this case for the interfering with the verdict of the jury, and the application will be refused."

We cannot find that the newspaper publication interfered with the proper administration of justice any more than did the jurors's temporary detention at the police station and consequently the appeal will be dismissed.

CECIL v. EDWARDS

(In the Full Court, on appeal from the Magistrate's Court of the East Demerara Judicial District (Stoby and Phillips, JJ.) July 27, September 16, 1955).

Intoxicating Liquor Licensing Ordinance—Excise (*Transfer of Duties*) *Ordinance, 1952—Excise Officer—Institution of complaint—Authority—Sale of spirituous liquor in unlicensed premises.*

The respondent, an excise officer, charged the appellant with selling rum in unlicensed' premises contrary to section 41(1) of the Intoxicating Liquor Licensing Ordinance.

The complaint was brought by the respondent by virtue of an authority in writing signed by the Comptroller of Customs and Excise. The appellant was convicted.

On appeal it was admitted by the respondent that the authority was invalid but it was contended by him that under the provisions of section 2 of the Excise (Transfer of Duties) Ordinance, 1952, it was not intended that an officer of Customs and Excise should be authorised in writing in order to bring the complain.

Held: The words "authorised in writing" in section 2 of the Excise (Transfer of Duties) Ordinance, 1952, qualifies not only the words "any district commissioner" but also the phrases "any officer of the Department of Customs and Excise and "any warden or sub-warden of a mining district" appearing in that section and that it was therefore necessary for the respondent to have been authorised in writing in order to bring the complaint.

Appeal allowed.

S. Mohabir for appellant.

A. M. Edun for respondent.

Judgment of the Court: The appellant, Cecil called Harry Singh, was convicted by a Magistrate of the Corantyne Judicial District on the 1st July, 1954, for the offence of selling rum without being the holder of a licence for the sale of spirituous liquor, contrary to section 41 (1) of the Intoxicating Liquor Licensing Ordinance, Chapter 10, and fined $250 and in addition ordered to pay the sum of $9.00 costs and in default of payment to be imprisoned for the period of three months.

The grounds of appeal were—

1. That the decision was erroneous in point of law because
   (a) the authority was improper in that it did not properly authorise the Complainant to prosecute as an Excise Officer;
   (b) the learned Magistrate failed to direct his mind to the fact that the Police witness Rambarran was a Police decoy whose evidence ought to be approached with caution.
2. The decision was such that the learned Magistrate viewing the circumstances reasonably could not properly have so decided in as much as there was no satisfactory proof that the witness Rambarran bought rum.

The main ground of appeal argued was ground 1 (a) and we reserved our decision on this point. We saw no merit in the other grounds of appeal.

The witness Rambarran, a police decoy, swore that on the 18th January, 1954, on instructions from the Police he entered the cake shop in question which was not licensed for the purpose and he asked the appellant to sell him a half bottle of rum, which the appellant did and for which the witness tendered to the appellant a $2 note and received $1 change. His evidence was supported by Lance Corporal John Clowes. The Magistrate accepted this evidence and we see no reason to disturb his finding of fact.

Mr. Wilton Guilford Edwards who was the prosecutor gave evidence that he was an Excise Officer stationed at Springlands, Corentyne, in the East Berbice Administration District and in the Corentyne Judicial District, that he was *authorised in writing* by the Comptroller of Customs and Excise to perform any or all of the functions and duties conferred on him by the Intoxicating Liquor Licensing Ordinance, Chapter 107. He produced to the Court his authority in writing admittedly an invalid authority which was tendered in evidence and marked Exhibit "A." This authority is worded as follows:

"TO WHOM IT MAY CONCERN.

Be it known that Mr. W. G. Edwards shall have, use and exercise all the powers and authorities and have and possess all the privileges which are or may be exercised, had or possessed by an Officer of Customs under the Customs (Consolidation) Ordinance, 1952, or any other act now in force or hereafter to be passed *in relation to the Customs.*

J. W. GREGORY,
Comptroller of Customs and Excise."

Section 93 (1) of Chapter 107 as amended by Ordinance No. 31 of 1937 and by section 2 of the Excise (Transfer of Duties) Ordinance, 1952, No. 66 of 1952, reads as follows :

"93. (1) All fines and penalties to which anyone is liable under this Ordinance shall be sued for, prosecuted, realised and recovered, and all proceedings in respect of forfeitures under this ordinance shall be prosecuted and carried on by The Comptroller of Customs and Excise under the Summary Jurisdiction Ordinances."

With reference to this section it is not disputed

(a) that if an authority in writing is required it must be in existence at the time when the fine or penalty is being sued for, prosecuted, realised or recovered; and

(b) that therefore in this case the defect could not have been cured even had there been an adjournment of the trial for the purpose of rectifying the invalid authority or calling additional evidence. (See however *Kates v. Jeffrey,* 83 *L.J.K.B. p.* 1790.)

In this appeal the relevant section for interpretation is section 2 of Ordinance No. 66 of 1952 which read thus—

"2. In this Ordinance unless the context otherwise requires—

"the Comptroller" means the Comptroller of Customs

and Excise and includes any officer of the Department of Customs and Excise, any warden or sub-warden of a mining district and any District Commissioner *authorised in writing* by the Comptroller of Customs and Excise to perform any of the functions and duties conferred on the Comptroller of Customs and Excise by this Ordinance."

It was urged that the authority in writing produced was not a proper authority and that the section quoted above properly construed means that an *"authority in writing"* is required not only by *any District Commissioner* but also by

"any officer of the Department of Customs and Excise, any warden or sub-warden of a mining district"; and

that the Excise Officer herein, Mr. W. G. Edwards, had not been proved therefore to have been duly authorised in writing to prosecute in this matter and consequently the conviction ought to be quashed.

The question therefore for determination is what is the true interpretation to be placed on this section 2 of the Excise (Transfer of Duties) Ordinance, 1952, No. 66 of 1952.

The main object of the Ordinance No. 66 of 1952 was to transfer the duties formerly performed in relation to *Excise* matters by the District Commissioner (see Chapter 85) to the Comptroller of Customs. Section 3 of Ordinance No. 66 of 1952 provides:

"3. Notwithstanding the provisions of section three of the District Administration (Transfer of Duties) Ordinance, 1937, on the commencement of this Ordinance—

(a) the Comptroller shall have and exercise all the powers and functions and perform the duties of District Commissioners under the Ordinances and Regulations set out in the Schedule hereto;

(b) where in any of the Ordinances and Regulations set out in the Schedule hereto or in the Regulations made by the Governor and Court of Policy on the 3rd day of October, 1905, under the provisions of section one hundred and thirty of the Spirits Ordinance, 1905, and published in the Gazette of the 4th day of October, 1905, or in any contract, agreement or document relating to or made in pursuance of any of them the Comptroller of Customs, the comptroller, the commissary or a District Commissioner is mentioned or referred to the Comptroller shall be intended and taken in place thereof."

The respondent therefore contended that it was not intended by section 2 of Ordinance No. 66 of 1952 that any officer of the Department of Customs and Excise should be authorised in writing and that such construction would be contrary to the whole scheme of the transfer of duties Ordinance, 1952, that the section should be so construed as

to give effect to the intention of the legislature and that indeed such would be the true interpretation of the section.

The Customs Ordinance, Chapter 33, was repealed by the Customs (Consolidation) Ordinance, 1952, No. 69 of 1952.

The Customs (Consolidation) Ordinance, 1952, and the Excise (Transfer of Duties) Ordinance, 1952, No. 66 of 1952, came into force on the same day, namely, *the* 31*st December,* 1952. The effect of these two ordinances (The Customs (Consolidation) Ordinance, 1952, and the Excise (Transfer of Duties) Ordinance, 1952) was to set up, it would seem, the new Department of Customs and Excise and to transfer certain duties previously performed by District Commissioners (and in particular—as far as this appeal is concerned—those duties in relation to the Intoxicating Liquor Licensing Ordinance, Chapter 107) to the Comptroller of Customs whose Department was for the first time designated "The Department of Customs and *Excise"* under the management of the Comptroller of Customs now styled the Comptroller of Customs *and Excise.*

By section 3 of Ordinance No. 31 of 1937 the words "District Commissioner" were substituted for the words "Commissary of Taxation." The Commissary Department Ordinance (Chapter 36) was by that Ordinance repealed and a new definition given by the same Ordinance to "District Commissioner" as follows:

> "District Commissioner" means the Commissioner of the district appointed under the District Government Ordinance and any assistant District Commissioner of a district and includes any warden or sub-warden of a mining district *and any public officer appointed to the staff of any administrative or mining district office who is authorised in writing by the Colonial Secretary* to perform any of the functions and duties conferred on District Commissioners by this or any Ordinance."

By section 3 of Ordinance No. 66 of 1952 the words "Comptroller of Customs and Excise" were substituted for the words "District Commissioner" and "Comptroller" is defined by section 2. In this definition three types of officers are referred to,

(a) any officer of the Department of Customs and Excise;
(b) any warden or sub-warden of a mining district;
and (c) any District Commissioner.

"Officer" by section 2 of Ordinance No. 69 of 1952—The Customs (Consolidation) Ordinance, 1952 is defined as follows:—

> "Officer" includes any person employed in the Department of Customs *and Excise,* and all members of the Police Force, as well as any person acting in the aid of any officer or any such person; and any person acting in the aid of an officer acting in the execution of his office or duty shall be deemed to be an officer acting in the execution of his office or duty."

By section 2 of Ordinance No. 31 of 1937, it might be observed, it is only

> "any public officer appointed to the staff of any administrative or mining district office "

who previously had to be authorised in writing by the Colonial Secretary.

Turning to section 2 of Ordinance No. 66 of 1952 one observes also that the definition of District Commissioner there is altered to suit the purpose of the transfer of duties legislation. It reads thus:

> "'District Commissioner' means the Commissioner of the district appointed under the District Government Ordinance, any assistant District Commissioner of a district and any public officer appointed to the staff of any administrative or mining district office."

From the foregoing there would seem to be some ground for thinking that the draftsman may have intended that the phrase "authorised in writing" was only intended to qualify the words "any District Commissioner." The matter is not free from doubt.

The rule of law upon the construction of all statutes is to construe them according to the plain literal and grammatical meaning of the words: but this rule is subject to the condition that however plain the *apparent* grammatical construction of a sentence may be if it be properly clear from the contents of the same document that the apparent grammatical construction cannot be the true one then that which upon the whole is the true meaning shall prevail in spite of the grammatical construction of a particular part of it.

> "In order properly to interpret any statute it is necessary now as as when Lord Coke reported Heydon's Case, to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief. In interpreting an Act of Parliament *you are entitled, and in many cases bound, to look to the state of the law at the date of the passing of the Act;* not only the common law but the law as it then stood under previous statutes, in order properly to interpret the statute in question."
>
> (See Craies on Statute Law, 5th Edition, p. 91.)

And in Colquhoun v. Brooks, (1899) 14 AC. 493, Lord Herschell said at p. 506:

> "It is beyond dispute, too, that we are entitled and indeed bound when construing the terms of any provision found in a statute, to consider any other parts of the Act which throw light upon the intention of the legislature and which may serve to shew that the particular provision ought not to be construed as it would be if considered alone and apart from the rest of the Act."

If however it was intended that the three types of officers mentioned in the definition were to be regarded *separately* the disjunctive "or" instead of the conjunctive and cumulative "and" could have been used. Moreover if it was the intention that only "any District Commissioner" should be "authorised in writing" then that intention could have been clearly and unequivocally effected by placing first in the "trilogy" any District Commissioner authorised in writing etc. The section would then read:

The Comptroller means The Comptroller of Customs and Excise and includes

any District Commissioner authorised in writing by the Comptroller of Customs and Excise to perform any of the functions and duties conferred on the Comptroller of Customs and Excise by this Ordinance, and

any officer of the Department of Customs and Excise and any warden or sub-warden of a mining district.

"It is very desirable in all cases (of construction) to adhere to the words of an act of parliament, giving to them that sense which is their natural import in the order in which they are placed."

E. v. Ramsgate Inhabitants (1827) 6 *B* & *C* 712.

"The beliefs or assumptions of those who frame Acts of Parliament cannot make the law.

Per Lord Radcliffe in *I.R.C. v. Dowdall O'Mahoney* & *Co., Ltd.,* 1952 *A.C.* 401.

The rule of construction is to intend the legislature to have meant: what they have actually expressed.

We have therefore come to the conclusion that the present section under review construed as a whole must be given its ordinary grammatical meaning and its legal meaning, that is to say, that the adjectival phrase "authorised in writing" qualifies not only the words any District Commissioner but also the phrases *any officer of the Department of Customs and Excise* and also *any warden or sub-warden of a mining district*—joined together as the phrases are by the conjunctive and cumulative "and".

The "authority in writing" therefore produced in evidence herein being an invalid authority it is, in our view, clear that the provisions of section 93 (1) of Chapter 107 have not been complied with and the conviction is bad in law. The contention of the appellant succeeds.

The appeal is allowed and the conviction quashed with costs. Hearing fee fixed at $25.

EAST BANK UNITED BUS COMPANY v. SHEIK M. ABRAHIM AND OTHERS.

(In the Supreme Court, Civil Jurisdiction (Phillips, J.) November 18, December 9, 10, 16, 30, 1954; February 8, 1955).

Road Traffic—Motor buses and hired cars—Exclusive road service licence—Hired car licence—Operating hire cars by taking up and setting down passengers along bus route—Loss thereby sustained by holder of exclusive road service licence—Claim for damages—Claim for injunction.

The plaintiffs, a company duly incorporated in the Colony and registered under the Companies (Consolidation) Ordinance, Chapter 178, for the purpose of operating motor buses to carry passengers for reward, were the holders of an Exclusive Road Service Licence granted by the Governor in Council pursuant to the provisions of section 70 of the Motor Vehicles and Road Service Ordinance, 1940 (No. 22 of 1940).

Each of the defendants was the holder of a hire car licence granted by the Prescribed Authority under the provisions of section 71(d) of the above-mentioned Ordinance, as inserted by the Motor Vehicles and Road Traffic (Amendment) Ordinance, 1946 (No. 21 of 1946). Each of the defendants during the month of April, 1950, unlawfully used their hire cars to take up and let down passengers for single fares between Georgetown and Grove, East Bank, Demerara, part of the route of the plaintiffs' buses operated under the Exclusive Road Service Licence granted the plaintiffs.

The plaintiffs claimed damages in the sum of $1,000 for the infringement of the terms and conditions of the Road Service Licence in respect of their motor buses and an order of injunction restraining the defendants and their servants and/or agents from repeating such acts of infringement of the terms and conditions of the said licence in respect of those motor buses.

For the plaintiffs it was contended that they had been granted a monopoly similar to a grant made to a patentee and the acts of the defendants amounted to a violation of a right of property and consequently an actionable tort.

For the defendants it was contended—

(a) that the plaintiffs were holders of a bare licence and had no cause of action against the defendants with whom they had no contractual relationship;

(b) that the Motor Vehicles and Road Traffic Ordinance itself provided the remedy for breaches of the provisions relating to Exclusive Road Service Licences by imposing severe penalties for such breaches and did not either specifically or by implication give any additional civil remedy to the holders of such licences.

Held: The Motor Vehicles and Road Traffic Ordinance, 1940, (No. 22 of 1940) gave no right of action for infringement of the plaintiffs' exclusive rights under their Exclusive Road Service Licence. Their claim for damages therefore failed.

While the Court could grant an injunction in the terms asked for although the claim for damages had failed, in the circumstances of this case the claim for an injunction would be refused.

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

R. H. Luckhoo for defendants.

Phillips J.: By consent of the parties these four cases, all involving the same legal issues were heard together.

The Plaintiffs are a Company duly incorporated in this Colony and registered under the Companies Consolidation Ordinance, Chapter 178, for the purpose of operating motor buses to carry passengers for reward and are the holders of an Exclusive Road Service Licence

granted by the Governor in Council on the 17th November, 1947, pursuant to the provisions of Section 70 of the "Motor Vehicles and Road Traffic Ordinance, 1940," which licence was in force at all material times and which expires on the 31st December, 1958.

This licence was published in the *Official Gazette* of 29th November, 1947,—Exhibit "1" in evidence.

Each of the Defendants was the holder of Hired Car Licence granted by the Prescribed Authority under the provisions of section 71(d) of the Ordinance, No. 21 of 1946.

At all material times:

(1) The Defendant Eugenie Leung's car was licenced No. H7782 and driven by V. Wong (and on one occasion by Basil White).

(2) The defendant Sheik M. Abrahim's car was licenced No. H7830 and driven by Sheik M. Ferrose.

(3) The Defendant Eileen Luck's car was licenced No. H8460 and driven by Nadir Khan; and

(4) The Defendant Millicent Bacchus' car was licenced No. H7835 and driven by K. Bacchus.

The holders of such Hired Car Licences may not take up and let down passengers along the Plaintiffs' Bus Route (or indeed at all) for single fares. The conditions attached to the issue of such Hired Car licence were tendered evidence by consent. (Exhibit "2" in evidence).

The Motor Vehicles and Road Traffic Ordinance creates offences and imposes heavy penalties for breaches relating to infringement of Exclusive Road licences (See Section 19(2) of Ordinance 22 of 1940) and also creates offences and imposes penalties for breaches relating to Hired Car Licences (See Section 71(d) of Ordinance No. 21 of 1946 and in addition this Ordinance gives power to the Prescribed Authority in certain circumstances to suspend or revoke Hired Car Licences.

With respect to the incidents under review no prosecutions were ever instituted against the Defendants under the Ordinance, nor were the Defendants' licences ever suspended or revoked.

The Plaintiffs' main contention was that—Each of the Defendants during the month of April, 1950, had unlawfully used their vehicles (sometimes described as station waggons) and were continuing to use them to take up and let down passengers *for single fares* along the Plaintiffs' Bus Route—namely between Georgetown and Grove on the East Bank, Demerara.

Bisnaught v. Wahab—1949 L.R.B.G. p.127.

Harris v. Ablack—1949 L.R.B.G. p.233.

The Plaintiffs contended therefore that the Defendants by operating their Hired Cars in this manner were infringing the Plaintiffs' rights under the terms of their Exclusive Road Licence for which they had to pay to the Government a much higher tax or duty than the

operators of Hired Cars and were entitled to claim against the Defendants :

(a) *Damages for loss* sustained thereby; and

(b) *Injunction to restrain* such illegal conduct by the Defendants.

The Plaintiff called in support of their case a witness, Edgar Hamilton, then a rural constable whose services they had employed specifically to observe and record the movements and operations of the Defendants' Hired Cars at or about the lawfully erected Bus Stop at Grove between the period 3rd to 11th April, 1950. This Bus Stop is conveniently placed near the Grove Sterling where passengers alight coming from the Ferry or intending to take the Ferry. This witness' evidence was to the effect that on each day from early morning to late afternoon the Defendants' Hired Cars came frequently to this Bus Stop deposited "single" passengers and took up "single" passengers from the Plaintiffs' Bus Stop. He said that on many occasions while he did not actually see money pass from the passengers to the drivers he did see the passengers pay something or so conducted themselves as if they were paying their own individual fares. He also gave instances of occasions when he actually did see passengers pay their individual fares. His evidence was attacked and he was subjected to a very "searching" cross-examination. He undoubtedly was a partisan witness who was prepared in my opinion; to do all he could to assist his former employers' case. He frequently gave full rein to his imagination but nevertheless the main theme of his testimony remained, if not completely intact, at least clearly recognisable. He produced a book from which he refreshed his memory but informed the Court that, the names of persons he mentioned and conversations he recalled occurred in April, 1950, and that though not entered in his "refreshing book," were nevertheless definitely recorded in his Police Note Book the pages of which he had not very long before scanned and which was then at his home. At the resumption after a luncheon adjournment this Police Note Book he regretted to inform the Court (which did not come as a surprise) he could not find and not unnaturally could give no account of its disappearance.

His evidence was, however, supported in a few instances by other witnesses who said in effect that at one time or another they had travelled in the Defendants' Hired Cars on the same Bus Route and paid their separate fares.

Antonio Phillipi swore that on the 3rd of April, 1950, he travelled with other passengers in Hired Car No. H7782 (Eugenie Leung's car) and had paid 1/- for his individual fare from Agricola to Grove.

One *Percy Graves* corroborated. He said that on that journey he also had paid 1/- for his single fare from Georgetown to Grove.

Demetrius Waldron said that on the 4th of April, 1950, he had travelled with others in Hired Car No. H7830 (Sheik Abrahim's car) from La Penitence to Grove and that he had paid his individual fare, of 24c.

Peter Collins corroborated this witness and swore that he had also travelled on that journey from Stabroek Market to Grove and had also paid his own fare of one shilling.

Leo Perreira said that on a day in April, 1950, he had travelled with others in Hired Car No. H8460 (Eileen Luck's car) driven by Nadir Khan from the Esso Filling Station at Georgetown to Grove and had paid his own fare of 1/-. These passengers were let out at the Bus Stop, earlier referred to, at Grove.

No witness in support was called by the Plaintiffs in relation to the Hired car of the Defendant Millicent Bacchus. However, the witness Edgar Hamilton gave a detailed account of the frequent arrivals and departures of this Hired car No. H7836 on the 3rd, 4th, 5th and 6th April, 1950.

Again these witnesses were not altogether convincing but their testimony in the main was unshaken.

The result is that by the weight of the evidence I am constrained to accept the fact, and so find as a fact, that the Defendants did operate their Hired cars during the period mentioned in the manner alleged toy the Plaintiffs.

I have not lost sight of the observation made by the Defendants' counsel, that even though Edgar Hamilton's evidence merely proves that individual passengers only paid their separate fares at the Bus Stop at Grove and does not prove from whence they had come, nevertheless, with the frequency of the return trips, that these Hired Cars made over the distance it is a reasonable inference to draw, taken in conjunction with the evidence of the other witnesses referred to above that these Hired Cars were plying for hire between Georgetown and Grove and the passengers who alighted at the Bus Stop at Grove, had been taken up at Georgetown or en route.

The Defendants called two witnesses only:

(1) Sheik Mohamed Ferrose (the driver of the Defendant Sheik M. Abraham's car No. H7830) ; and

(2) Nadir Khan (the driver of Eileen Luck's car No. H8460).

They denied having taken up any passengers at separate fares on the route in question. I did not accept these witnesses of the defendants as witnesses of truth.

It having been established therefore that the Defendants were thus committing breaches of the Ordinance for which statutory penalties have been imposed and were, toy infringing the Plaintiffs' Exclusive Road Licence, operating to the detriment and *obvious loss*** of the Plaintiffs, the question for decision was what, in those circumstances, were the Plaintiffs' rights. The Plaintiffs claimed:—

(a) Damages in the sum of $1,000:—(One thousand dollars) for the infringement of the terms and conditions of the Road Service Licence in respect of Motor Vehicle No. H8224 et al, and of the terms and conditions of the

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** Aerial Ad. Co. v. Bachelor's Pics. Ltd., 1938, 2A. Eng. R. p.785.

Exclusive Road Service Licence issued on the 17th of November, 1947, to the Plaintiffs and which came into force and effect on the 1st January, 1948, and is still in force;

(b) An order of injunction restraining the Defendant and his servant and/or agent from repeating such acts of infringements of the terms and conditions of the Road Service Licence in respect of Motor Vehicle No. H8224 and of the terms and conditions Of the Exclusive Road Service Licence issued on the 17th November, 1947, to the Plaintiffs and which came into force and effect on the 1st day of January, 1948;

(e) Any other order as to the Court shall seem fit. (And similarly in each case.)

The Defendants contended:

(1) That the Plaintiffs being the holders of a bare licence had no cause of action against the Defendants with whom they had no contractual relationship; and

(2) The Ordinance itself provided the remedy by imposing severe penalties for breaches and did not specifically give the Plaintiffs any additional civil remedy nor could the Ordinance as a whole be so construed as to have given such a remedy by implication.

The Plaintiffs' counsel argued that the Plaintiffs had been granted by the Governor in Council a *monopoly* and were entitled to protection; they had been put to considerable expense in order to maintain their Bus Service, had to pay to Government a higher rate of duty and are subject also to severe penalties for breaches in relation to their exclusive Bus Licence, that this *monopoly,* so runs the argument, is similar to a grant to a Patentee and is a violation of a right of property and consequently an actionable tort.

1913 A.C.—A.G. v. Adelaide S.S. Co. Ltd., p.794:

> "The right of the Crown to grant monopolies is now regulated by the statute of monopolies, but it was always strictly limited at common law. A monopoly being a derogation from the common right of freedom of trade could not be granted without consideration moving to the public, just as a toll being a derogation from the public right of passage could not be granted without the like consideration. In the case of new inventions the consideration was found either in the interest of the public to encourage inventive ingenuity or more probably in the disclosure made to the public of a new and useful article or process. In the case of sole rights of trading with foreign parts it might be found in the interest of the public in new countries being opened to trade. But for the validity of every monopoly some consideration moving to the public was necessary. Many of the monopolies purported to foe granted by the Tudor or Stuart Sovereigns were bad for want of such consideration, and it was the vexatious interference with trade under cover of these invalid grants which led to the passing of the Statute of Monopolies."

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The grant of monopolies by the Crown (with an exception of Patents) was long ago (1623) declared to be contrary to law by statute (21 Jac. I.C. 23) which in 1937 was made applicable to this Colony by Proclamation in accordance with the provisions of the Civil Law of British Guiana Ordinance Chapter 7, published in the *Official Gazette* on the 18th September, 1937, at p.869.

The grant of Patents is now governed by the Patents Ordinance Ch. 62 which Ordinance contains elaborate provisions for the protections of Patentees against infringement of their rights and similar to the English Patents and Designs Act of 1907. Here there is an exclusive licence granted under the powers contained in the legislation with consideration moving from the Licencee to the public in the form of a tax or duty and not a grant by Letters Patent from the Crown.

There is, here, no grant or licence coupled with an interest in land. The Plaintiffs must found, their action, if any, under the Common Law as no remedy is provided in the Motor Vehicle and Road Traffic Ordinance No. 22 of 1940 as amended by Ordinance No. 21 of 1946.

Lord Du Parcq's often cited dictum in *Cutler v. Wandsworth Stadium Ltd.* 1949 *A.C. p.*410 can bear repetition:

> "There are no doubt reasons which inhibit the legislature from revealing its intention in plain words. I do not know, and must not speculate, what these reasons may be. I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned."

Section 89 *of Ordinance No.* 22 *of* 1940 *reads:*

> "....nothing in this Ordinance shall affect any liability of the driver or owner of a Motor Vehicle by virtue of any Ordinance or at Common Law."

I can only trace one section in this Ordinance dealing with the Recovery of Damages and that is Section 75, which enacts as follows:

> "If by reason of an offence against this Ordinance any injury is caused to any road or Bridge the road authority may cause such injury to be made good and may . . . recover the estimated or actual cost thereof from the owner of the Motor Vehicle by the use of which the offence was committed."

The Defence urged that the Plaintiffs were mere licencees and as such had no cause of action either at Common Law or under the Statute that the right in the Plaintiffs herein was not a right *in rem.*

The case of *Heap v. Hartley* 1889 42 *Ch. p.* 461 was cited and relied on in support. In this case a Patentee registered under the Patent Designs and Trade Marks Ordinance of 1823 had granted contemporaneously two exclusive licences to two separate firms to operate his patented invention.

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It was held that in any action by one of those firms against the other that the exclusive licence being simply an authority to do lawfully that which would otherwise have been unlawful and not being a licence coupled with or equivalent to a grant did not entitle the licencee to sue in his own name without joining the patentee.

It was argued that the position of the Plaintiffs in the present action was similarly that of a licencee and not analogous to a Patentee.

Heap. v. Hartley 1889 42 *Ch.—L. J. Fry* s *p.* 470 ;

> "An exclusive license is only a license in one sense; that is to say, the true nature of an exclusive license is this. It is a leave to do a thing, and a contract not to give leave to anybody else to do the same thing. But it confers like any other license, no interest or property in the thing. A license may be, and often is, coupled with a grant, and that grant conveys an interest in property, but the license pure and simple, and by itself, never conveys an interest in property. It only enables a person to do lawfully what he could not otherwise do, except unlawfully. I think, therefore that an exclusive licensee has no title whatever to sue."

The Defendants therefore submitted that the Plaintiffs could not sue the Defendants—third parties—with whom they had no contractual relationships, as the Plaintiffs had a mere license and not a license coupled with any interest in land.—1904 1 *K.B. p.* 713—*Frank Warr & Co. Ltd. v. London County Council.*

Words and Phrases Supplement:

LICENCE — LICENSE.

> "A licence created by a contract is not an interest. It creates a contractual right to do certain things which otherwise would foe a trespass. It seems to me that, in considering the nature of such a licence and the mutual rights and obligations which arise under it, the first thing to do is to construe the contract according to ordinary principles. There is the question whether or not the particular licence is revocable at all and, if so, whether by both parties or by only one. There is the question whether it is revocable immediately or only after the giving of some notice. Those are questions of construction of the contract. It seems to me quite inadmissible to say that the question whether a licence is revocable at all can be, so to speak, segregated and treated by itself, leaving only the other questions to be decided by reference to the true construction of the contract. As I understand the law, rightly or wrongly, the answers to all these questions must depend on the terms of the contract when properly construed in the light of any relevant and admissible circumstances."
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> *Millennium Productions Lid. v. Winter Garden Theatre (London) Ltd.* (1946). 1 *All E.R.* 678, *C.A. per Lord Greene M.R. p.* 680.

(The questions at issue were whether upon the true construction of s.16 of the Road and Railway Transport Act (Northern Ireland) 1935, a local carrier's licence granted under that section is transferable *inter vivos* and whether such a licence forms part of the estate a deceased licensee passing to his personal representatives and may be disposed of by will.)

"What are the attributes of a local carrier's licence granted under the provisions of section 16 of the Act? The word licence has a well recognised signification in English law. According to our law a licence properly so called is merely a permission granted to a person to do some act which but for such permission it would have been unlawful for him to do. Being in its nature a mere personal privilege and nothing more than a mere personal privilege—a privilege personal to the individual licensee—such a licence cannot be transferred by him to anyone else and it dies with the person to whom it was given.

Wharton's Law Lexicon, 13th Ed. 1925 p. 506;

Odgers' Common Law, Vol. 1, p. 574;

Bouvier's Law Dictionary S.U. Licence.

"There are, of course, different types of licence. A man may grant another a licence to use the grantor's property in some particular way. Or a statute may authorise the granting of a licence to carry on some trade or business which the statute does not allow to be carried on without such a licence. But whatever may be the type of licence, the presumption is that it is a purely personal privilege, that it is not capable of being assigned or transferred by the licensee to anyone else, and that it comes to an end on the death of the licensee. No doubt one frequently hears the phrase 'transfer of a licence' especially in connection with the law relating to the sale of intoxicating liquors. But it is well established that even in this connection the phrase, though convenient, is nevertheless quite inaccurate and misleading. What is referred to as a transfer of a publican's licence is not in strict law a transfer at all. A licence to sell intoxicating liquors is a personal privilege granted to a named individual. And what the assignee of licensed premises gets is a new licence and not the old licence transferred."

(*R.* (*Hore*) *v. Wexford JJ.* ((1904) 2 *I.R.* 51) per Fitzgibbon, L.J. at p. 54;

R. (*Duggan*) *v. County Court Judge of Fermanagh*, ((1909) 2 *I.R.* 132) per Madden J. at p. 154: and Gibson J. at P. 161) . . . . .

"When one finds the word 'licence' used in a statute the presumption is that it is intended to designate a purely personal privilege, a privilege not capable of being assigned or transferred by the licensee to anyone else and which comes to an end on the death of the licensee. . . . I have not been able to find in the Statute any *clear* indication that the licences are to be anything more than this."

Russell v. Ministry of Commerce for Northern Ireland (1945) *N.I.* 184, *per Black, J. at pp.* 188, 193.

In my view the terms of the Ordinance in question (22 of 1940) when properly construed give no right of action for infringement of the Plaintiffs' exclusive rights under his exclusive Road Licence.

It was next submitted that the Ordinance created penalties for breaches and, when construed as a whole, was intended to benefit the whole body of the public and not any particular class of persons. The question is what is the scope and purpose of the Statute and in particular for whose benefit is it intended.

(See *Groves v. Winborne* (*Lord*) 1898 2 *Q.B.* 602)

The Ordinance is entitled, if this can give any assistance in this regard:

Ordinance No. 22 *of* 1940.

> An Ordinance to make provision for the licensing, regulation and use of Motor Vehicles, the regulation of traffic on roads and otherwise with respect to roads and vehicles thereon.

It certainly gives no room for saying that the Ordinance was enacted to benefit persons to whom exclusive road licences would be granted. Mr. Stafford for the Plaintiffs nevertheless relied on the majority decision of the Court of Appeal in: *Solomons v. R. Gertzenstein Ld.* 1954 3 *W.L.R. p.* 317, in which the whole matter is fully reviewed.

Somervell L.J. gave a very illuminating dissenting Judgment but it was however decided by the majority as the head note reads that

> "as the duties imposed by the London Building Acts were imposed primarily for the protection of a particular ascertainable class namely the persons in a building, those persons, would have a right to an action for damages for a breach of statutory duty notwithstanding that the Statute had imposed penalties for such breaches."

The case of *Watt v. Kesteven County Council* 1954 3 *W.L.R. p.* 729—a more recent case decided by Omerod J. was also referred to. I have, however, come to the conclusion that the remedy provided by the Statute is the only remedy.

The Plaintiffs therefore have no cause of action against the Defendants and consequently the claim for damages must fail.

It remains to consider whether the Court nevertheless in the circumstances of this case can grant injunction to restrain the Defendants.

In *White v. Mellin* 1895 *A.C. p.* 154 the House of Lords decided that where an action will *not* lie (for) example in an action for a false statement disparaging a trader's goods where no special damage is proved an Injunction will not be granted.

However, in the case of *Bonsor v. Musicians Union* 1954 2 *W.L.R.* p. 687 the Plaintiff was expelled from a Trade Union and sought damages and Injunction against the Trade Union (for reasons we are not in this case concerned with).

It was held that despite the fact that the claim for damages could not succeed, the Court could nevertheless make a declaration and also grant an Injunction restraining the Union from depriving the expelled Plaintiff from exercising his rights as a member of the Union.

It is now nearly 5 years since the acts of infringement complained of were committed—whatever was the cause of delay is now immaterial—there was no evidence that since 1950 there has been any continuation or any indication of an intention to continue the illegal acts. Whether that is so or not—in the exercise of the Court's discretion, I decline to grant Injunction as prayed.

The imposition of penalties for offences and the invoking of the power of revocation of Hired Car Licences (section 71D of Ordinance 21 of 1946) in my view are, for the reasons given, and were intended by the Legislature to be, sufficient safeguards against infringement of the Plaintiffs' Exclusive Road Licence.

Judgment will therefore be entered for each of the Defendants with Costs to be taxed.

Solicitors:

A. G. King for Plaintiffs.

S. M. A. Nasir for Defendants.

BEEGAN v. THE QUEEN

(In the Supreme Court, Court of Criminal Appeal (Stoby and Phillip.), JJ., and Miller, J. (ag.)), July 25; August 5; October 21, 1955),

Criminal Law—Murder—Admissibility of evidence—Separate incidents—Res gestae—Summing-up—Misdirection—Provocation.

The appellant was convicted' before a jury of the murder of one Lokhi Persaud. At his trial the judge admitted evidence that the appellant shot one Beepat very shortly before he shot and killed Lokhi Persaud.

On appeal it was submitted by counsel for the appellant that the evidence relating to the shooting of Beepat was inadmissible, and did not form part of the *res gestae.*

It was further submitted that in his summing up the judge misdirected the jury when dealing with the law relating to provocation.

Held: The evidence relating to the shooting of Beepat did form part of the *res gestae* and was admissible.

The summing up read as a whole indicated that the trial judge directed the jury in accordance with the law relating to provocation.

Appeal dismissed.

B. O. Adams for appellant.

G. L. B. Persaud, Solicitor-General (acting) for respondent.

Judgment of the Court: As one of the grounds in this appeal relates to the alleged inadmissibility of certain evidence adduced by the Crown, we shall summarize the evidence which was led and then determine whether any violation of the law of evidence was committed.

The appellant is the son-in-law of one Ramnarine Beepat and lived with his wife in the father-in-law's home. On the 2nd August, 1954, Beepat returned home and met the appellant and a friend Sulaiman standing in the sitting room of the house. The appellant asked Beepat to go and purchase some rum as Sulaiman wanted a drink. Beepat replied that he did not care who wanted a drink he was not going to buy any. The appellant said "Sulaiman go on, you going to hear." Beepat changed his clothes and went and sat on the verandah. Shortly after, the appellant came towards him with a gun pointing at him. Being afraid, he jumped through the window and hid, and he heard a sound as if the gun was fired. Beepat while running to a place of safety was shot in his legs and abdomen by the appellant.

Sylvanus McKenzie an engineer living nearby heard the first shot and then heard a second shot and saw Beepat fall. As Beepat fell he saw the appellant going towards him with a gun in his hand. Before the appellant could reach Beepat who was lying on the ground, the deceased was seen walking in a westerly direction, that is, in the direction of Beepat's house. The appellant stopped going towards Beepat, turned back and shot and killed the deceased.

Rose Erasmus supported the story of Beepat and McKenzie and in addition said that after the first shot was fired and before the shooting of Beepat, the appellant had pointed the gun at a man in the yard.

Henry Erasmus confirmed the evidence of Beepat and Sylvanus McKenzie.

Corporal Corlette of the Beterverwagting Police Station said that he went to make inquiries into the incidents and after cautioning the appellant he admitted shooting Beepat because he had become annoyed and that he shot Lokhi Persaud, deceased, because the deceased had called him a stray dog, had attempted to throw a stick and rushed at him.

Other evidence established that a friend of the appellant who owned a gun and ammunition earlier the same day had gone to the Beach leaving his gun in his house. On his return at 6.15 p.m. it was gone. That was the gun the appellant used when he shot at Beepat and with which he killed the deceased.

The doctor's evidence and evidence on some minor points completed the Crown's case.

The appellant's story from the dock, denied by all the witnesses for the Crown, was as follows:

> "I couldn't manage to get away nowhere as people were all around Lokhi Persaud running through the yard with a short stick about a foot and a half he told me "you dam stray dog, you come in this place here to make row." I told him "you don't know nothing about this story"; he kept on cursing me: when he kept on cursing me he make attempt to throw the stick at me and rush at me. While he throw the stick and rushing towards me, I "make so" (demonstrates) with the gun to bar the stick and the gun went off and I notice him fall down." The appellant was convicted of murder and sentenced to death.

Objection is taken to all the evidence concerning the appellant's shooting at Beepat on the ground that the "evidence was not relevant to the issue being neither a part of the *res gestae* nor relevant to the proof thereof and was highly prejudicial to the prisoner."

In Phipson on evidence, 9th edition, page 59 the *res gestae* rule is stated as follows:

> "Acts, declarations and incidents which constitute, or accompany and explain the fact or transaction in issue is admissible for or against either party as forming parts of the *res gesta."*

No tribunal has attempted to lay down any rule as to what constitutes one transaction. Indeed no such rule can be devised, for whether an incident is part of a transaction or not depends on the particular circumstances under review. But if the basis for the *res gestae* rule is understood, some assistance can be gained in determining when to apply proffered evidence and when to reject such evidence. Whenever a Court or jury has to arrive at a conclusion regarding a fact in issue or regarding a fact relevant to a fact in issue (either of which is of course always admissible) it is important and indeed essential to have a complete picture of those facts so that if certain other facts are so interwoven with the fact in issue as to become a part of it then the evidence is admissible. The main factors for its admission are its proximity in time and place to explain the relevant facts. Two cases which demonstrate the principle are *R. v. Cobden* (1862) 3 F. and F. 833 and *R. v. Ellis* (1826) 6 B. and C. 145. In *Cobden's* case where

four men were charged for burglary at X, evidence of three other burglaries by the same men on the same night was admitted firstly because they were "so intermixed that it is impossible to separate them" and secondly to explain why none of the property taken from the burgled place was found on one of the prisoners. The second ground for admitting the evidence was because the absence of stolen property was relevant to the issue but the first ground for its admission was because it was a part of the *res gestae.*

In *Ellis'* case a shopman was indicted for stealing six shillings from a till. These shillings had been marked and were removed along with fourteen unmarked shillings during the day and by means of several takings. As it was impossible to say at which taking the six marked shillings were abstracted evidence of all the takings was permitted. *Per Bayley, J.* —

> ". . . where several felonies are connected together, and form part of one entire transaction, then the one is evidence to show the character of the other. Now all the evidence in this case tended to show that the prisoner was guilty of the felony charged in the Indictment. It went to show the history of the till from the time when the marked money was put into it up to the time when it was (found in the possession of the prisoner. . . . . therefore . . . .the evidence was properly received."

On the other hand in *R. v. Butler* (1846) 2 Car. and Kir. 221 where a marked shilling placed in a till was found in the prisoner's possession, and the prisoner on being questioned admitted taking unmarked shillings from the till, the statement concerning the unmarked shillings was excluded as it related to a distinct offence. By contrasting the decisions in Ellis and Butler the *res gestae* principle is clearly demonstrated. In the former it was essential to have evidence of all that took place although the taking of the unmarked shillings was not the fact in issue. In the latter the case was provable and understandable without evidence of the taking of the unmarked money.

In this case the shooting of the deceased cannot be dissociated from the previous shootings. While one witness estimated the fatal shot was not fired until 10 minutes after the first shot, it is difficult to escape the conclusion that the shootings were so interwoven that they formed one transaction. The evidence of Sylvanus McKenzie if recounted in detail is perhaps the best answer to Counsels submission. McKenzie said:

> "On 2nd August, 1954, I was at home between 5—6 p.m. sitting on my step when I heard the sound of a gun: did not pay attention. Shortly after I looked on the road and saw Beepat, going from south to north on the East Triumph dam, walking—he was looking back as he walked along. I heard another shot and I saw Beepat fall. I then saw Accused with a gun standing on the bridge leading to his house—gun looked like Ex. "G": Accused then went in the direction where Beepat was—Accused had the gun. After he had gone a little distance (about one lot) he turned back—at the time "Minay" (Lohki Persaud the deceased) was coming from

east to west through a yard—Accused was on the road going from north to south; he stopped and said to Deceased "stop"; "get off, get off"; at that time Deceased was in the yard leaning against a paling: Accused pointed the gun at the Deceased, fired it, and Deceased fell to the ground": It is impossible to read that clear straightforward story unshaken in cross-examination without finding that the evidence of the earlier shots was properly admitted.

In Sureynauth's case in which a conviction for murder was quashed by the West Indian Court of Appeal, evidence of previous shootings by the appellant at the deceased's relatives 29 minutes before the deceased was shot was held to be inadmissible as not being part of the *res gestae.* The important passage in that judgment is:

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

The West Indian Court of Appeal on a review of the record came to the conclusion that the previous incidents had ended and were independent of the subsequent incident. Such a finding makes Sureynauth's case easily distinguished from the present case in which the evidence could not justify such a conclusion.

The only other point which was argued related to the Judge's direction to the jury when dealing with provocation. He said:

> "The law is to the effect that if you are satisfied that there was express malice existing, of course before the actual shooting, well, then, no amount of provocation afterwards will avail the accused; in other words, if you find that the accused had malice in his mind before the receipt by him of any provocation well, then, subsequent provocation is no answer. I mention that for this reason, because in the first statement of the accused to the police you will remember he said that in the morning his wife and himself had a misunderstanding and "she used me with some words which I can't bear."
>
> "I asked her to press my shirt, she refused me whenever I ask her anything. She always used these words which deeply oppressed me."
>
> That is what is in his statement. It is for you to say whether you believe it or not. He has not challenged it. He says—
>
> "This afternoon I came with a gun. I go home and sat down.
>
> I call upon my wife father and her mother to sit down, to explain the whole story."

If you think, gentlemen, that those circumstances represent what in fact did take place and you feel that what was in this man's mind was this;—it is for you to decide and I must put it to you—if you feel that what was in the accused's mind was this—"I have had this unpleasantness, this misunderstanding (call it what you will) with my wife and I am deeply oppressed"—to use his own expression, and he goes out and returns with the gun and calls the mother and father and says "now sit down here and let us go into this matter"; if you think that he brought that gun there—however he obtained it, whether he borrowed it or whether he took it without permission—intending to use it, should matters not develop as he wished them to as a result of the discussion with the mother and father and that there was at that time malice in his mind before any thing else took place, (whether you believe there was a cutlass used by Ramnarine Beepat and all the other items of provocation which have been urged) if you believe there was malice existing in his mind before the provocation, if there was any, took place well, gentlemen, subsequent provocation cannot avail. He cannot put forward provocation as a partial answer to the charge of murder if you find that malice existed in his mind before the provocation. In other words, if you feel he brought that gun there, not to go shooting but to be used in the event of the family conference not going as he hoped, and if you think that this is malice on his part well, then, subsequent provocation is of no avail to him at all."

The submission is twofold. It is said that the direction is incomplete as the effect of express malice, if any, was directed to the deceased's relatives in the absence of the deceased and could not be treated as malice towards the deceased.

In Archbold's Criminal Pleading and Practice, 33rd edition, page 929, the law is stated thus: "No provocation, however great, will extenuate or justify homicide, where there is evidence of express malice." In our view this passage is not happily worded and without qualification is not a correct statement of the law. In R. v. Mason, Fost. 132 which is the case cited in support of the passage the facts were that the prisoner and the deceased had a fight after which the prisoner vowed he would fetch something to stick the deceased and run him through. He obtained a deadly weapon, concealed it and then deliberately renewed the previous fight and took the opportunity to kill his opponent. It was held that all the circumstances considered it appeared that the prisoner returned with a deliberate resolution to take a deadly revenge for what had passed and consequently the previous provocation was of no avail.

In East's P.C. Vol. 1, at p. 239 it is said:

> "In no case however will the plea of provocation avail the party, if it were sought for and induced by his own act in order to afford him a pretence for wreaking his malice."

There seems to be no need to stress the obvious fact that since the loss of self-control resulting from a sudden transport of passion or heat of blood is what reduces the crime of murder to manslaughter then where the killing has taken place in pursuance of a preconceived plan whatever provocation there may have been is immaterial.

When the trial Judge's direction on this point is studied and when the whole of the summing-up is read it will be appreciated that the Judge directed the jury in accordance with the law we have just enunciated. The Judge explained to the jury what constituted murder in law and told them that they must be "satisfied that the killing was with malice aforethought express or implied." Later in his summing-up he concluded his directions on express malice in relation to provocation by saying:

> "In other words, if you feel he brought that gun there, not to go shooting but to be used in the event of the family conference not going as he hoped, and if you think that this is malice on his part well, then, subsequent provocation is of no avail to him at all."

We cannot think that any jury could have misunderstood language so unambiguous and expressive as meaning something which was not said. We are of opinion that in its context the jury must have understood the judge to be directing them that if the accused went to the family conference intending to use his gun if the conference was not successful then provocation by the deceased was of no avail because the shooting was the result of a preconceived plan and not because of any sudden loss of self-control.

The second part of the submission is in brief a contention that there was no evidence of express malice by the appellant. Counsel laid some stress on the absence of the deceased when the incident amounting to express malice, if it was, took place.

We cannot hold that the deceased's absence was of any importance at all. Universal malice exists when a person intends to inflict injury in general and yet if injury is done to a particular individual then by a legal fiction the law presumes that there was malice against the individual injured. See *Fretwell* (1864) *L. and C.* 443. If then, the appellant expressed malice against the deceased's family the circumstances of the deceased being absent did not make it any less malice or any less important. If the facts are such that universal malice has to be established, as in this case it must be open to the prosecution to prove facts from which this "universal malice" or intention on the part of the accused may be reasonably inferred: if this were otherwise the defence of accident would be irrebuttable and would lead often especially in cases of death by shooting to a miscarriage of justice.

We are inclined to agree with the argument that the viewpoint put by the Judge to the jury, that the appellant's taking the gun to the family conference might be treated as an indication of his intention

to shoot if the conference did not end as he desired, was a somewhat unusual theory, but nonetheless, in our view, not an improbable one in all the circumstances. The Judge, however, was clearly expressing his opinion and just as clearly left it to the jury to adopt or reject his observation on the facts. If they rejected this theory, and we cannot say that they did or did not, then the other directions concerning malice must have guided them. If they accepted his theory then the direction in law was correct and there was evidence from which the inference of express malice to the family could be drawn.

Had we found that the Judge's direction to the jury on express malice was wrong we would have been constrained to apply the proviso to Section 6 (1) of the Criminal Appeal Ordinance, 1950, as we are of the opinion that on the facts of this case, if the jury had been properly directed they would inevitably have come to the same conclusion: this being the principle upon which the Court of Criminal Appeal acts as explained in *R. v. Haddy* (1944) K.B. 442 and *Stirland v. Director of Public Prosecutions* (1944) A.C. 315.

The appeal is accordingly dismissed and the conviction and sentence affirmed.

BOOKERS DEMERARA SUGAR ESTATES, LIMITED v. THE COMMISSIONER OF INCOME TAX

In the Full Court off the Supreme Court of British Guiana (Holder, C.J., Stoby and Phillips JJ.; August 8, 9; November 11, 1955).

Income Tax—Excess profits tax—Company incorporated, in U.K. and. trading in Colony—Allowable deduction—Income Tax payable in U.K.—Not deductible expense in colony.

Interpretation—Income Tax Ordinance—Excess Profits Tax Ordinance—Omission of negative provision contained in earlier statute—Not necessarily substantive affirmation.

The appellants a company incorporated' in England and registered in the Colony had been carrying on business in the Colony for a number of years including the year 1939. They were assessed for the payment of excess profits tax and for the purposes of such assessment the year 1938 was selected as the standard year. The appellants objected to the assessment and contended that United Kingdom income tax was deductible both with respect to the standard period and the chargeable accounting period (1st September, 1939 to 31st December, 1939). On the consideration of the appellants' objection one point arose, namely, whether the disallowance by the Commissioner of the amounts paid in respect of United Kingdom income tax on the profits of the appellants when ascertaining the profits for the purpose of the assessment of excess profits tax was lawful.

The appellants appealed to a Judge in Chambers who dismissed the appeal and held—

(a) that there is no affirmative provision authorising the deduction of United Kingdom income tax in the computation of income for excess profits tax and that such a deduction can only be justified if it can be shown to be outgoing or expense incurred in the production of the income; and

(b) that if the profits have been earned in the country which is charging excess profits tax on them, there is no reason why income tax paid or payable in another country whether

the taxpayer is resident or is incorporated, should be regarded as an expense incurred in earning those profits.

The appellants appealed from tie decision of the Judge in Chambers by way of case stated to the Full Court of Appeal. The questions to be decided by the Full Court were—

(i) whether the respondent was wrong in law in not allowing as a deduction the United Kingdom income tax paid by the appellants in respect of the profits assessed for excess profits tax, and in particular did the respondent in so doing fail to give effect to the provisions of paragraph (3) of Part I of the first 'Schedule to the Excess Profits Tax Ordinance, 1941 ;

(ii) whether the amount paid by the appellants in respect of United Kingdom income tax is an outgoing wholly and exclusively incurred by them in the production of the profits and whether it is deductible for the purpose of ascertaining the profits of the appellants chargeable for excess profits tax.

Rule 3 of the Rules made under Part I of the first schedule to the Excess Profits Tax Ordinance, 1941, provides as follows—

"The provisions of paragraph (g) of section 12 of the Income Tax Ordinance (which disallows deductions on account of the payment of United Kingdom and Empire income tax) shall not apply."

Held, following the decision in the *Union Steamship Company and New Zealand v. Robin* that "the mere omission in a later statute of a negative provision contained in an earlier one cannot of itself have the result of a substantive affirmation. It is necessary to see how the law would have stood within the original proviso and the terms in which the repealed section are re-enacted."

Held, further that the United Kingdom income tax is not, as such, a deductible expense as being an expenditure laid out by the appellants for the purposes of earning profits.

Appeal dismissed.

The following cases were referred to:—

(1) *Inland Revenue Commissioners v. Dowdall O'Mahoney and Co.* (1952) 1 T.L.R. 560.

(2) *Union Steamship Company of New Zealand v. Robin* (1920) A.C. 654.

(3) *Strong & Co. Ltd. v. Woodifield* (1906) A.C. 448.

(4) *Robins v. National Transport Trust Co.* (1927) 96 L.J. 84.

H. C. Humphrys, Q.C., with J. A. King for appellants.

G. L. B. Persaud, Solicitor-General (*acting*) for respondent.

Judgment : This is an appeal from Worley, C.J., by way of Case Stated in respect to an assessment made by the Income Tax Commissioner who decided that in the computation of Excess Profits Tax for the chargeable accounting period ending 31st December, 1939, income tax paid in the United Kingdom by the appellant company on profits accruing in or derived from British Guiana was not a proper deduction from profits for Excess Profits Tax purposes.

The material facts are set out in a statement dated 15th September, 1948, prepared by the Income Tax Commissioner and are as follows :—

1. The Appellants are a company incorporated in England and registered in the Colony and have been carrying on business in the Colony for a number of years including the year 1939.

2. (1) On the 28th December, 1944, the Appellants were assessed to payment of Excess Profits Tax in respect of the Chargeable

Accounting Period 1st September, 1939, to 31st December, 1939, in the sum of $32,130.

(2) For the purposes of assessment under the Excess Profits Tax Ordinance, 1941, the Appellants had selected the year nineteen hundred and thirty-seven as their standard period, and the aforesaid assessment was made on that basis.

3. On the 3rd January, 1945, the Appellants applied to the Commissioner by notice of objection in writing to review and to revise the assessment made upon them.

4. On the 21st September, 1945, the Appellants made application to the Commissioner for the substitution of the year nineteen hundred and thirty-eight for the year nineteen hundred and thirty-seven as the standard period.

5. On the consideration of the objection to the assessment of the Appellants to Excess Profits Tax only one point arose, namely, whether the disallowance by the Commissioner of the amounts paid in respect of United Kingdom Income Tax on the profits of the Appellants when ascertaining the profits for the purpose of assessment of Excess Profits Tax was lawful.

6. The appellants contended that United Kingdom Income Tax was deductible both with respect to the standard period aforesaid and the Chargeable Accounting Period, and if these deductions were made the Appellants' liability to Excess Profits Tax for the Chargeable Accounting Period 1st September, 1939, to 31st December, 1939, would only amount to $9,521.

7. (1) After consideration of the objection by the Appellants, the Commissioner recomputed the Appellants' liability on the basis of year nineteen hundred and thirty-eight as their standard period, but disallowed the claim for deduction of United Kingdom Income Tax

(2) By letter dated 23rd July, 1948, the Commissioner notified the Appellants of his determination of their objection to Assessment No. 20/39, whereby the tax liability of the Appellants was reduced from $32,130 to $12,600 for the Chargeable Accounting Period 1st September, 1939, to 31st December, 1939. Against the assessment as finally determined by the Commissioner the Applicants appealed.

The reason given by the 'Income Tax Commissioner in support of the assessment was that United Kingdom Income Tax was not an allowable deduction because—

(a) section 6 (1) of the Excess Profits Tax Ordinance, 1941, provides that the profits arising from a trade or business in the standard period or in any chargeable accounting period shall be computed on the principles on which the profits from the trade or business are computed for the purposes of income tax under the Income Tax Ordinance, Chapter 38, as adapted in accordance with the provisions of Part I of the First Schedule to the Excess Profits Tax Ordinance, 1941:

(b) paragraph 3 of the First Schedule to the Excess Profits Tax Ordinance, 1941, which provides that section 12 (g) of the Income Tax Ordinance (which disallows deductions on account of the payment of United Kingdom and Empire Income Tax) shall not apply, cannot by itself have the result of effecting a substantive affirmation;

(c) the income in respect of which the Appellants have been assessed is income accruing in or derived from the Colony:

(d) there are no provisions in the Income Tax Ordinance under which United Kingdom Income Tax can be allowed as a deduction in ascertaining such income.

Against the assessment of the Income Tax Commissioner the appellants appealed. This appeal came before Worley, C.J., who, having heard the arguments of Counsel for the appellants and for the respondent on the 18th January, 1949, and 30th March, 1949, held

(a) that there is no affirmative provision authorising the deduction of United Kingdom income tax in the computation of income for Excess Profits Tax and that such a deduction can only be justified if it can be shown to be an outgoing or expense incurred in the production of the income; and

(b) that if the profits have been earned in the country which is charging Excess Profits Tax on them, there is no reason why income tax paid or payable in another country, where the tax payer is resident or is incorporated, should be regarded as an expense incurred in earning those profits.

Pursuant to section 12 (2) and the Second Schedule to the Excess Profits Tax Ordinance, 1941, a special case was stated by the learned Judge and further in pursuance of the provisions of Rule 15 (2) he directed that Bookers Demerara Sugar Estates Limited should be deemed the appellants.

The question of law for the opinion of this Court appear in paragraph 5 of the Special Case Stated and are as follows:—

(a) Whether the respondent was wrong in law in not allowing as a deduction the United Kingdom Income Tax paid by the appellants in respect of the profits assessed for Excess Profits Tax, and, in particular, did the respondent in so doing fail to give effect to the provisions of paragraph 3 of Part I of the First Schedule to the Excess Profits Tax Ordinance, 1941.

(b) Whether the amount paid by the appellant in respect of United Kingdom Income Tax is an outgoing wholly and exclusively incurred by them in the production of the profits and whether it is deductible for the purpose of ascertaining the profits of the appellants chargeable for Excess Profits Tax.

The appeal was heard by this Court on 8th and 9th August 1955.

The question resolves itself on the proper interpretation to be

placed upon rule 3 of the rules made under Part I of the First Schedule to the Excess Profits Tax Ordinance, No. 1 of 1941, which is as follows :—

"The provisions of paragraph (g) of section 12 of the Income Tax Ordinance (which disallows deductions on account of the payment of United Kingdom and[1] Empire Income Tax) shall not apply."

It was contended by the appellants both before Worley, C.J., and in this Court that the only meaning to be given to the rule is that it is an affirmative direction that, in the computation for Excess Profits Tax, a deduction shall be made for United Kingdom and Empire Income Tax paid or payable on the income chargeable with Excess Profits Tax.

On the other hand the respondent contends that rule 3 means that the relevant income tax principles have to be ascertained by reading the Income Tax Ordinance as if paragraph (g) of section 12 had never been enacted and to see whether there are in that Ordinance any affirmative provisions under which deductions of United Kingdom Income Tax is allowable.

An examination of the principles contained in the Income Tax Ordinance indicates that the scheme of the Ordinance is (1) to impose a tax upon the chargeable income of any person "accruing in or derived from or received in the Colony" and that for the purposes of ascertaining the chargeable income to set out certain deductions which are inadmissible, but (2) to allow as deductions items which are proper to be debited against the incomings of the trade or business.

Ascertainment of chargeable income is dealt with in sections 10 to 26.

It is necessary to refer here to section 10 (1) and section 12 of the Income Tax Ordinance.

Section 10 (1) provides that for the purpose of ascertaining the chargeable income of anyone there shall be deducted all outgoings and expenses wholly and *exclusively incurred during the year immediately preceding the year of assessment by that person in the production of the income.* The section then sets out a number of particular items which shall be so allowed, including, as set out in sub-paragraph (g) such other deductions as prescribed by the Governor in Council. It was admitted that no other deduction had been prescribed by the Governor in Council. The section does not include any allowance for local, United Kingdom or Empire Income Tax.

Section 12 then prescribes certain deductions which are not to be allowed of which the material one is " (g) Any amounts paid or payable in respect of the United Kingdom income tax or super tax or Empire income tax as defined in sections 48 and 49 of this Ordinance."

It was argued for the appellants

(a) that the repeal or non-application of paragraph (g) of section 12 was intended to and could only have the effect of giving

the tax payer the right to have the deduction made as a matter of law in the computation of Excess Profits Tax, and

(b) that the payment of United Kingdom income tax by a trader is a disbursement wholly and exclusively laid out for the purposes of his trade and that this is so whether such tax is United Kingdom tax or foreign or dominion tax.

On the other hand the respondent submitted that for the computation of income tax the principle contained in section 5, read with section 12 (g), is that "income" means the full amount of the income accruing in the place where it arises and without deduction of any amount there paid or payable in respect of income tax and further that in the computation for excess profits tax, the effect of the repeal of section 12 (g) is that income tax paid or payable on the income becomes an allowable deduction if it is an outgoing expense incurred in the production of the income: and that, as regards income *accruing in or derived from* the Colony, United Kingdom or Empire income tax is no more such an outgoing or expense than is Colony income tax. As regards income *received* in the Colony, it may be so considered and, in such case, the income to be charged for excess profits tax is the net income or the actual amount received in the Colony after deduction of income tax paid or payable in the country where the income arose.

It was also contended that the effect of rule 3 is to provide that in applying the enactments of the Income Tax Ordinance which contain the income tax principles, paragraph (g) of section 12 is to be omitted. Or, to put it in another way, if the relevant income tax principles had been set out *in extenso* in the Excess Profits Tax Ordinance instead of being incorporated by reference, paragraph (g) would be no express positive enactment prescribing the deduction of United Kingdom and Empire income tax.

If that is so there is merit in the contention of the respondent that there is no affirmative provision authorising the deduction of United Kingdom income tax in the computation of income for Excess Profits Tax and that such a deduction can only be justified if it can be shown to be an outgoing or expense incurred in the production of the income.

In *Inland Revenue Commissioners v. Dowdall O'Mahoney and* Company (1952) 1 T.L.R. 560, the House of Lords had to decide whether a proper interpretation of paragraph 5 of Part I of the Seventh Schedule to the Finance Act (No. 2) 1939 gave the effect of an affirmative enactment by implication that certain dominion taxes were deductible in the computation of United Kingdom Excess Profits Tax. The point arose because an Irish Company incorporated, managed and controlled in Eire had two branches in the United Kingdom and they were assessed to excess profits tax in the United Kingdom in respect of profits of those branches. They had paid taxes in Eire in respect of the profits of those two branches and they maintained that they were entitled to deduct as a business expense taxes which they had paid in Eire in arriving at their profits assessable to excess profits

tax in the United Kingdom. Their claim was allowed before the special commissioner and the Court of Appeal but the House of Lords held the contention to be unfounded. Lord Radcliffe in his speech at page 573 said:

> "Two main questions are involved in the respondents' claim to deduct a proportion of the income and profits taxes that they have paid in Eire when computing their trade profits for the purpose of assessment to excess profits tax in this country. The first question is whether such a deduction would be admissible in a computation of profits under case I of schedule D, apart from any special statutory rules about excess profits tax. The second question is whether there is to be found in the legislation imposing excess profits tax some rule that makes this a permissible deduction, even if it would not be so in an ordinary case of assessment to income tax."

The relevant English Statutory provisions are paragraphs 5 and 8 of the Finance Act (No. 2) 1939. Paragraph 5 enacts:

> "The provisions of subsection (4) of section 27 of the Finance Act, 1920 (which disallows deductions on account of the payment of Dominion income tax) shall not apply."

Paragraph 8 enacts:

> "No deduction shall be made on account of liability to pay, or payment of, United Kingdom income tax, the national defence contribution, or excess profits tax."

The corresponding local provisions are found in Rules 3 and 6 of the rules made under Part I of the First Schedule to the Excess Profits Tax Ordinance, No. 1 of 1941, and are as follows:

Rule 3 — "The provisions of paragraph (g) of section twelve of the Income Tax Ordinance (which disallows deductions on account of the payment of United Kingdom and Empire income tax) shall not apply."

Rule 6 — "No deduction shall be made on account of liability to pay, or payment of income tax or excess profits tax."

The relevant part of section 27 (4) of the Finance Act 1920 reads as follows:

> "Notwithstanding anything in the rules applicable to case IV or case V of schedule D or in any other provision of the Income Tax Acts, no deduction shall be made on account of the payment of Dominion income tax. . . . "

The corresponding local provision is section 12 (g) of the Income Tax Ordinance, Chapter 38. Section 12 is as follows:

> "12. For the purpose of ascertaining the chargeable income of anyone no deduction shall be allowed in respect of—
>
> (a) domestic or private expenses;
>
> (b) any disbursement or expenses not being money wholly and exclusively laid out or expended for the purpose of acquiring the income;

(c) any capital withdrawn or any sum employed or intended to be employed as capital;
(d) any capital employed in improvements;
(e) any sum recoverable under an insurance or contract of indemnity;
(f) rent of or cost of repairs to any premises or part of premises not paid or incurred for the purpose of producing the income;
(g) any amounts paid or payable in respect of the United Kingdom income tax, or super-tax, or Empire income tax as defined in sections forty-seven and forty-eight of this Ordinance."

At this point it may be observed that section 30 of the Finance Act 1940 which deals with relief in respect of excess profits tax in dominions corresponds *mutatis mutandis* to section 11 of Ordinance No. 1 of 1941, it has been admitted that no arrangements have been made by the Government of this Colony with the Government of the United Kingdom in this regard.

In *Inland Revenue Commissioners v. Dowdall O'Mahoney and Company* (supra) Lord Radcliffe said at p. 574

"But I do not think that the repeal of sub-section (4) of section 27 of the Finance Act, 1920, has any bearing on the present problem. That subsection did away with the deduction of any sum paid by way of Dominion income tax, 'notwithstanding anything in the rules applicable to case IV or case V of schedule D or in any other provision of the Income Tax Acts": it gave in exchange the relief provided by the rest of section 27. There can be no doubt what rules of case IV and case V were being referred to: they were in each case rule 1 of the rules applicable to those respective cases (the case V rule being a mere echo of the case IV rule), and they did provide for the deduction of income tax paid abroad in respect of income assessable under those cases, and they also said that such tax could be deducted by the authority of those rules "where such a deduction cannot be made under any other provision of this Act."

Again at p. 575 he said—

"What it comes to is this. Parliament has not made any enactment that requires or authorizes the making of the allowances now claimed. It has not declared the law to be that such allowances are proper deductions. The most that can be said is that it is fairly certain that those who framed section 30 of the Finance Act, 1940, believed that such allowances ought to be given or were in fact being given (which is not always quite the same thing in this field). But if that is all that can be said it is, with all respect to the Court of Appeal, a misuse of words to say that the Law Courts ought to give effect to the "intention" of Parliament that overseas excess profits tax should be allowed."

It will thus be seen that the House of Lords decided that the repeal of the section referred to did not have the effect of creating an affirmative enactment. In *Union Steamship Company of New Zealand v. Robin* (1920) A.C. 654 it was decided that—

> "The mere omission in a later statute of a negative provision contained an earlier one cannot by itself have the result of a substantive affirmation. It is necessary to see how the law would have stood without the original proviso, and the terms in which the repealed sections are re-enacted."

This being a correct statement of the law applicable to this aspect of the case the appellants can in our view succeed only if the tax is a disbursement or expense being wholly and exclusively laid out for the purpose of acquiring the income as stated in section 12 (b) of Chapter 38 which is similar to rule 3 (a) of the rules applicable to the English cases I and II.

This point was dealt with in the case of *Strong & Co. Ltd. v. Woodfield* (1906) A.C. 448 where Lord Davey said that the words—

> "for the purpose of the trade" mean "for the purpose of enabling a person to carry on and earn profits in the trade, &c, I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits."

This interpretation is authoritative and was re-affirmed in *Inland Revenue Commissioners v. Dowdall O'Mahoney* where Lord Reid said at page 571:

> "Lord Normand, dealing with the reason why income tax is not deductible in computing profits for income tax purposes, said :
>
> "There is the more substantial reason, that income tax is an impost made upon profits after they have been earned, and that unless the observations of Lord Davey in *Strong & Co. Ltd. v. Woodfield,* which have often been referred to and applied in later cases, are to foe disregarded, a payment out of profits after they have been earned is not within the purposes of the trade carried on by the taxpayer. But excess profits tax also is levied on profits after they are earned and, apart from the statutory provision, is *in pari casu* with income tax."
>
> My Lords, I trust that I have not misrepresented the speeches of noble Lords by giving these short extracts from them. I have read and re-read those speeches and they appear to me to establish conclusively, first, the distinction between money spent to earn profits and money spent out of profits which have been earned, and, secondly, the fact that income tax and excess profits tax payments come within the latter category. I have not dealt separately with national defence contribution or its equivalent in Eire, but there was no argument that this can foe distinguished from

the other two taxes for the purpose of this case. It is true that the payments which the respondents seek to have allowed as deductions were payments of Eire taxes and not of United Kingdom taxes, but the parties have admitted that the relevant legislation in Eire corresponds to that in the United Kingdom, and I cannot see that there is any distinction in principle between them for present purposes. Certainly no authority for any such distinction was cited. It therefore appears to me to be established that there is not and never was any right under the principles applicable to case I to deduct income tax or excess profits tax, British or foreign, in computing trading profits."

While we fully appreciate the argument addressed to us by Counsel for the appellant we see no reason to differ from the opinion expressed by the House of Lords.

Counsel for the appellant apart from inviting us to hold that we were not bound by O'Mahoney's case sought to distinguish it on the ground that the English Statutes referred to Dominion Income Tax whereas Eire was a Republic and therefore did not come within the ambit of the Acts. He suggested that the appeals in England proceeded on a mistaken notion of Eire's constitutional status and that the judgment of the House of Lords went on the basis that a foreign tax came under the same head as Dominion income tax and contended that Eire was a foreign country and as such did not come within the purview of English Statutes which dealt with Dominion income tax.

The following passages from the judgment of Lord Oaksey in Dowdall O'Mahoney's case at p.562 show that Counsel's contention is unfounded:

"On the first question, it was contended on behalf of the appellants that the authorities establish that the payment of such taxes by a trader is not a disbursement wholly and exclusively laid out for the purposes of his trade, and that this is so whether such taxes are United Kingdom taxes or foreign or Dominion taxes . . . . "

"On behalf of the company it was contended that the principle of these cases ought not to be extended and that Dominion and foreign taxes stand on a different footing from United Kingdom taxes and ought to be considered as disbursements which the trader has as a matter of fact and not of law to pay for the purposes of his trade in the United Kingdom."

There is nothing, in our view, in the judgment of the House of Lords in Dowdall O'Mahoney's case to suggest that the House did not have present in their minds and did not give consideration to Eire's particular constitutional status. In fact, as we have already shown, the House dealt specifically with this aspect of the matter.

If in British Guiana there is no positive statutory enactment (and indeed there appears to be none, as we have attempted to show) allow-

ing the deduction of the United Kingdom Income Tax for Excess Profits Tax purposes and the United Kingdom Income Tax is not, as such, a deductible expense as being an expenditure laid out by the appellant company for the purpose of earning profits, then the appeal must fail.

In any event by the Ireland Act of 1949 (12 and 13 Geo. 6, c. 41) section 2 (1), although the Republic of Ireland was declared to be no longer a part of His Majesty's dominions, it is not a foreign country and by section 3 (2) (a) until provision to the contrary is made, any Act of Parliament containing a reference to His Majesty's Dominions shall include the Republic of Ireland even though that part of Ireland is no longer one of His Majesty's dominions.

Finally the appellant submitted that while the House of Lords decision is binding on the Court of Appeal in England it is not binding on this Court and that this Court was only bound by a decision of the Privy Council. But in *Robins v. National Trust Co.* (1927) 96 L.J. 84 it was held that a Colonial Court is bound by a decision of the House of Lords. Viscount Dunedin said at p. 86:

> "When an appellate Court in a colony which is regulated by English law differs from an appellate Court in England, it is not right to assume that the Colonial Court is wrong. It is otherwise if the authority in England is that of the House of Lords. That is the supreme tribunal to settle English law, and that being settled, the Colonial Court, which is bound by English law, is bound to follow it."

In the result the appeal fails and is dismissed with costs to be taxed.

Solicitors:

H. C. B. Humphrys, for appellants.

V. C. Dias, Crown Solicitor, for respondent.

LOY v. THE QUEEN

(In the Supreme Court, Court of Criminal Appeal (Holder, C.J., Phillips, J., and Miller, J. (ag.)), August 5, 26; November 26, 1955).

Murder—Manslaughter—Misadventure—Direction to jury.

The appellant was charged with the murder of Virginia D'Oliveira. The jury returned a verdict of guilty of manslaughter and the appellant was sentenced to 12 years penal servitude.

The case for the prosecution was that the appellant after consuming a lair amount of alcohol left his home with his single barrelled gun and three cartridges and went to the home of one Lutchman Singh. There the appellant uttered certain threats to Singh who thereupon left his home. The appellant followed him and discharged a shot from his gun at him. The deceased D'Oliveira was then seen holding on to the gun which the appellant had in his hand. Shortly thereafter, the report of a gun was heard coming from

that direction and about four or five minutes later a third report. D'Oliveira was found dead with a gunshot wound on the left side of her face. The appellant was found with a gunshot wound on the left cheek.

In a statement given to the Police the appellant said that he fired a loaded gun at Singh and did not know what had occurred thereafter.

In a statement from the dock the appellant stated that he had been drinking and did not know how he had got shot and that he did not shoot the deceased.

On behalf of the appellant it was contended that there was no evidence fit to go to the jury that the accused caused the death of the deceased and consequently the trial judge should not have left the case to the jury; that the judge omitted to direct the jury on the legal aspects of an attempt to commit an offence and in particular as to the distinction to be drawn between an intention to commit a crime and preparation to commit a crime; and that the judge misdirected the jury on a material part of the evidence when he told them that the appellant was seen putting a shot into the gun.

Held: From the evidence it was an irresistible inference—

(a) that the appellant reloaded his gun and further that the appellant having fired one shot at Singh was intending to carry out his purpose of inflicting some grievous bodily harm; and

(b) that as a consequence the deceased was attempting to dissuade or prevent him from doing so.

The judge in his summing up clearly left the issue of death by misadventure to the jury which was rejected by them.

The appellant was therefore properly convicted.

Appeal dismissed.

B. S. Rai for appellant.

G. L. B. Persaud, Solicitor-General (acting) for respondent.

Judgment of the Court: The appellant was charged at the Demerara Assizes in November, 1954, for the murder of Virginia D'Oliveira. The jury returned a verdict of guilty of manslaughter on the 3rd November, 1954, and the appellant was sentenced to 12 years penal servitude. The appellant appeals against his conviction and sentence.

The grounds of appeal were as follows:—

"1. The Learned Trial Judge misdirected the jury as to facts constituting the offence of Manslaughter.

2. The Learned Trial Judge omitted to direct the jury that there was no evidence from which they could reasonably infer that the accused was committing an unlawful and dangerous act prior to the time when the deceased and the accused were seen holding to the same gun.

3. The verdict was unreasonable or cannot be supported having regard to the evidence.

4. The sentence imposed was excessive.

5. The Learned Trial Judge misdirected the jury on the evidence.

6. The Learned Trial Judge misdirected the jury that the accused was committing an unlawful and dangerous act at the time the de-

ceased met her death.

The deceased, Virginia D'Oliveira, was a young Amerindian woman of 21 years and resided with her young baby, in the house of one Lutchman Singh also called Busy Maid who lived in concubinage with Boodnie Mangal also called Loria at 24 Third Avenue, Bartica, in the County of Essequebo. There is no suggestion that the deceased was ever intimate with the appellant nor had she any previous quarrel with him. The appellant had for some time been separated from his wife and for three or four months prior to the 3rd August, 1953 (the date of the death of Virginia D'Oliveira) had also separated from Marian Jagoo the niece of Lutchman Singh's common law wife, Boodnie Mangal who is also called Loria.

It would appear that the appellant worked at a place called Camaria up the Cuyuni River; when not working there he lived at 21 Third Avenue, Bartica. The witness Sonny Barrat resided in the same apartment as the appellant.

In this appeal it is necessary to refer in some detail to the evidence adduced at the trial. About 6 o'clock in the morning of the 3rd August, 1953, the appellant and his room-mate, Sonny Barrat, had started drinking. In some conversation with Barrat the appellant stated that Loria (that is Lutchman Singh's "wife") had told him (the appellant) to take the gun which he had to her "before he shot anybody and get himself in trouble." The significance of this remark or the circumstances surrounding it were not examined at the trial. It appears however that the appellant after consuming a fair amount of alcohol left home about midday and went to the home of Lutchman Singh which is about 20 rods away at 24 Third Avenue, Bartica. He took with him his single-barrelled gun and, it may be inferred from the evidence of Sonny Barrat, three cartridges. Sonny Barrat says he had seen the appellant with the three cartridges in his (appellant's) ration bucket but that after the appellant had left with the gun he did not see the cartridges where they had been. Sonny Barrat then fell asleep only to be awakened later in the afternoon, about 3 p.m., when he learns of the death of the deceased.

Lutchman Singh after the appellant had uttered certain threats to him left his home. The appellant followed him and discharged a shot from his gun at him. Lutchman Singh continued his way running in the direction of the Police Station when he heard two other shots. The material part of the evidence of Lutchman Singh who said that he had known the appellant for 25 years is as follows :—

> "About 1.30 p.m. I heard the voice of Virginia D'Oliveira. Heard her saying "where are you going with this gun." I then heard the accused say "shut your mouth." I came out from under my house and looked at the platform. There is a step leading from the road to a platform. The doors of each apartment lead to platform. When I looked at platform I saw the accused with a gun. I asked him where he was going with the gun. The gun he had was a single barrelled shot gun like this, Ex. "A." When I spoke to him he said "you rass is you I going shoot, you make my wife lef me." The gun was broken but not separated. (Demonstrates). Only the breach open. The accused put his hand in his pocket." I ran

in direction of the Police Station. That is I ran south. D'Oliveira was sitting on a chair on the platform. She had a child in her hand. Nothing else. After I had run about 15 rods I looked back and I saw the accused pointing gun in my direction. He discharged a shot at me. I spoke to him. I said "Loy you shoot at me I going to the station." I cannot say whether he heard, I then began to run in direction of Station. I heard another report. Whilst running I heard a third report. Three reports in all. One at me and two others."

A child 14 years of age—Cicely Wray who lived with her parents across the road and opposite to Lutchman Singh's house gave evidence and though she does not give in detail how exactly the gun "went off," she says:—

"On 3.8.53, I was at home after midday. I saw the accused. Under Loria's house. He had a gun. I saw Virginia D'Oliveira. She held on to the gun which accused had in his hand. Accused was holding the back of the gun. A gun like this Ex. "A." *By* back of gun I mean the stock (points to stock, does not use the word). D'Oliveira was holding the barrel. Before I saw her holding the gun 1 had heard a loud report. It was the sound of the loud report which caused me to look. As soon as I looked and saw accused and D'Oliveira holding the gun then I ran back in the house. As I did so I heard another loud noise. Later I came out and stood on the step and saw the dead body of D'Oliveira being carried away."

Louise Alexander of lot 21 Third Avenue, Bartica, another witness, testified that at about midday she was awakened by reports of a gun; there were three reports, about four or five minutes between each other.

The doctor Edward Asregadoo, said that as a result of his *post mortem* examination he came to the conclusion that the cause of death was secondary shock resulting from bleeding of the external and internal maxillary arteries and their branches.

The doctor said he found—

"A round cratered wound on the left side of face. This wound had jagged edges and was 1 1/2″ in diameter about 3" in depth reaching the spinal column at the cervical region. A part of the maxilla (upper jaw), the zygomatic bone (cheek bone) and the mandible (lower jaw bone) were fractured. The type of fracture was comminuted (broken in pieces). The left transverse processes of the first, second and third cervical vertibrae were fractured. From the wound I extracted five pieces of metal and four pieces of round wadding. These are metals and wadding, Ex. C.l to C.4, D.l to D.6. On the scalp and skull there was a contused area on the right frontoparietal area. No fracture of the skull. The vessels of the wound which were injured were the external and internal maxillary arteries. They were shattered. I examined the brain. Found a contusion on the brain in the region of the

left central sulcus. All other organs normal but pale. Paleness due to bleeding."

The doctor also examined the accused. He was suffering from shock. He had a lacerated wound of the left cheek, lower jaw broken and there was profuse bleeding. Left eye was injured and the wound was pointing upwards which was consistent with a gun shot wound. He thought there was an odour of alcohol. The doctor was cross-examined by Counsel for the defence and said—

"The accused had an odour of alcohol but I cannot say if he was drunk. For a person to have a black out through drunkenness he must reach the anaesthetic stage. I cannot give an opinion as to whether a person very drunk would not know what he is doing. In my opinion no matter how drunk a person is he has some knowledge of what he is doing. If he has reached the stage where he does not know anything he would be asleep. A man under influence of alcohol has his senses diminished. He has less control over himself. The less he knows of what is happening." The doctor also said:

"The shock from which accused was suffering was due to injury. In some persons alcohol makes the senses keener. It depends on the quantity.

A drunken man's senses can never be keener than when he is sober. I referred in answer to Mr. Edun to a man who has taken a drink or two.

Shot was fired from in front. It was stopped by the bone." Boodnie Mangal said—

"I am the wife of Lutchman Singh. I know Virginia D'Oliveira. She rented place next to me. On Monday, 3.8.53, after 2 p.m. I went to latrine. D'Oliveira had 2 children. Younger about 2 years. When I left to go to latrine I did not see Frederick Loy. While in latrine I heard gun go off. I came out of latrine. I saw Loy standing on my back step. I went to my neighbour's yard and I hid. While there I heard a second shot. I came from there and went under my neighbour's house. Ishmael's house. I heard a third shot.

After seeing Loy on the back steps I did not see him anymore. I ran under neighbour's house because I was afraid.

I only saw Loy's back. Recognized his clothes. Distance from witness box to jury box. I could not see from where I was."

Frederick Loy, the appellant, in his statement to the Police said:

"I leave Sonny cooking and come out to buy a drink for me and he. When I reach opposite Loria, she call me in and ask me is holiday what I doing and ask me to bring a drink. I then go to Jubilee Rum Shop at First Avenue Bartica and buy a big bottle of rum. I carry this bottle back to Loria and me, Loria and the Indian girl living near Loria start to drink. They say they want

aerated drink and I go and buy aerated drinks three bottles at Wyatt shop. When I go back I meet Busy Maid in the house with them, and he start to quarrel with me, and he chuck me down, he push he hand in my pocket and I get away from him because Busy Maid and the girl was trying to rob me of my money, they thought I did draw my salary. I get vex and pick up the gun from the house and the cartridge which been in a drawer and I fire a load at he Busy Maid and he run away. I was sweet all this time. I don't know what happen after, when next I caught myself I was in the Bartica Hospital, then the Police carry me to town Hospital."

And in his statement from the dock:

"On Sunday in question I came down from Camaria in company with Sonny Barrat and another fellow to Bartica. The Sunday afternoon we started to drink; we drank until late at night and we went and slept and early the next morning before daybreak we started drinking again. I got drunk. I went over to Busy Maid's place and I was there a little while and then I went out on the road and buy some drink. I came back. The girl had not done me anything. I had nothing against her. 1 did not shoot her. I do not know even how I got shot myself. When I caught myself I was in the steamer. I was in the hospital a little while. Then police came and took me to Brickdam. I spent a few days at Brickdam and then I went to Bartica. I was not better yet when I went to Bartica. I used to get periodical spells. I cannot remember really what I told the police at Bartica. The gun I got I got it through my work at Camaria, as sometimes I usually go far in the line. The surroundings where I live no one else lives there. I came back from Bartica to prison and then back to hospital where I spent a long time. The Preliminary Inquiry took place about June or July, 1954. I am innocent. I do not know how I got shot"

Counsel for the appellant contended

(a) that there was no evidence fit to go to the jury that *the accused caused the death of the deceased* and consequently the trial Judge should not have left the case to the jury;

(b) that the trial judge misdirected the jury when the jury returning after retirement of 1 hour and 47 minutes enquired :

> *"If an. accused person attempting an unlawful act on another and somebody else is killed whether that is manslaughter or not."*

that the Judge omitted to direct the jury on the legal aspects of an attempt to commit an offence and in particular as to the distinction to be drawn between an "intention" and "preparation" in this regard in accordance with the rule in *R. v. Harry Woods,* 22 C.A.E. p. 41—

> "A summing up in such a case should distinguish

between intent to commit a crime and the attempt to commit it."

It should be pointed out that in this case, however, the appellant was not charged with an attempt to commit murder nor was the summing up being directed to the possibility of such a verdict.

and (c) That the Judge misdirected the jury on a very material part of the evidence, namely, that the Judge told the jury :

"If all danger to Lutchman Singh had passed, but the accused has reloaded the gun—and there is evidence that the gun was reloaded—*and he was seen putting a shot into the gun* and he was involved in an unlawful act . . . . "

"If, however, he came under the house or he was going behind Lutchman Singh who was out of danger *but he put the cartridge into the gun* ..."

—that there was no direct evidence (as the Judge told the jury) that the accused had loaded the gun after the first shot had been fired and that consequently the conviction should be quashed following the principle applied in *George Hagan* alias *William Small,* 9 C.A.R. p. 25—

"a misstatement of fact in directing a jury *may* be a good ground for quashing a conviction."

The question is whether there was evidence from which the inference could reasonably be drawn

(a) that the appellant reloaded his single-barrelled gun and further that the appellant having fired one shot at Lutchman Singh was intending to carry out his purpose of inflicting some bodily harm and

(b) that as a consequence the deceased was *attempting* to dissuade or prevent him from doing so. The word "attempting" is here used advisedly and is used in the same sense that the Jury in their request to the Judge for further directions must have used the word.

It was the appellant's contention that these could not be reasonable inferences to draw. It would seem to us that such inferences are irresistible, that the appellant reloaded his gun, a single-barrelled gun; as immediately prior to the fatal discharge of his gun it had been in his possession; indeed he had actually discharged it at Lutchman Singh with whom he had had an altercation and against whom he appeared to have had a grievance, and he was known to have had three cartridges. The only other persons present, who had not been proved to have been in possession of a gun or cartridges, were:

(i) *Lutchman Singh* who when fired at had run away in the direction of the police Station.

(ii) *Boodnie Mangal* (wife of Lutchman Singh) who having heard the first shot ran and hid herself in a neighbour's yard.

(iii) *Cicely Wray*, the 14 year old girl, who upon seeing the accused and the deceased holding on to the barrel of the gun had run back into the house; and lastly

(iv) the deceased and her baby in arms.

It was urged that because Boodnie Mangal had said that when she came out from the latrine upon hearing the first shot that she saw the accused on the *back steps* it was possible to infer from this that someone else (other than the accused) could have reloaded the gun: it was not suggested which of those persons could have done so or had any inclination or any purpose to do so. This suggestion appeared to us to be farfetched and unconvincing.

It is important to observe that Lutchman Singh deposed that before the first shot was fired he heard the deceased saying to the accused "where are you going with this gun?" and then heard the appellant say "shut your mouth": and further when the sequence of events as told by the girl Cicely Wray is examined, she says:

> "I saw the accused under Loria's house. He had a gun. I saw Virginia D'Oliveira (deceased). She held on to the gun which accused had in his hand."

It does appear reasonable to suppose that the deceased was again pursuing her protective role. By her quick perception and appreciation of what the appellant intended she tried to prevent him from carrying out his intentions.

(a) she followed the appellant down the steps under the house, during which time it may be reasonably inferred that he was reloading the gun which is a single-barrelled gun and which had already been discharged by the appellant at Lutchman Singh,

(b) Whereupon the deceased apprehensive as she was of the intention of the appellant, held on to the barrel of the gun and as described by the witness Cicely Wray was endeavouring to prevent him from using it to carry out his intention.

The appellant must be taken to have known that someone might intervent to prevent him from doing so and must be taken to have known that any rash or careless handling of such a lethal weapon was fraught with danger and would be likely to cause death or severe injury.

From the medical evidence the appellant was found to have a lacerated wound consistent with a gun shot wound which broke his left jaw. The jury may have reasonably come to the conclusion that the injury to the appellant was as a result of a third shot after the deceased had been fatally injured and that his unlawful and universal malice continued and resulted also in the injury to himself.

It is well known that the estimates of time and distance by witnesses vary and this is more likely to be so in the case of these simple country folk and consequently no great reliance can be placed on their accuracy in this regard. Nevertheless the witness Louise Alexander, a seamstress, who was awakened by the first shot said she

heard three reports and that there was about four or five minutes between each shot. Upon the evidence of all these witnesses it is reasonable to conclude that the shots were fired in comparatively quick succession inasmuch as the same may be rewarded as one continuous incident.

For the reasons given above we do not agree with the contention of appellant's Counsel that there was no evidence fit to *go* to the Jury that the appellant caused the death of the deceased. We think that at the close of the case of the prosecution there was sufficient evidence to go to the jury that the appellant caused the death of the deceased.

The jury after retiring for an hour and forty-seven minutes returned to Court for further directions and asked:

> "If an accused person *attempting* an unlawful act on another and somebody else is killed whether that is manslaughter or not."

The Judge directed as follows:

> *"Where an act which a person is engaged in performing is unlawful then, if at the same time it is a dangerous act, that is an act which is likely to injure another person, and quite inadvertently the doer of that act causes death to another person then he is guilty of manslaughter."*

"Just let me repeat or paraphrase it:

> If a person is performing an unlawful act which is dangerous and which is likely to injure another person and a third person intervenes and death results as a result of that intervention, the doer of the act is guilty of manslaughter; if the doer of the act causes death to the person intervening because the act is not only unlawful but dangerous; if the act is not only unlawful but in doing that same dangerous and unlawful act he is doing an act which amounts to a felony, meaning some such offence as robbery, shooting to kill a person or causing grievous bodily harm and a third person intervenes and as a result of that intervention death results the doer of the act is guilty of murder.
>
> In order to apply these general principles to the facts of this particular case, I pointed out that if, the accused was shooting at Lutchman Singh, if you find that Lutchman Singh was near enough for him to be shot at and D'Oliveira got in the way whether the accused shot her intentionally or accidentally, is still murder.
>
> If, however, he came under the house or was going behind Lutchman Singh who was out of danger but he put the cartridge into the gun and was going behind him and she tried to prevent him and death resulted as a result of that, then he will only be guilty of manslaughter, because in those circumstances the act was unlawful and dangerous, he was going to shoot but it would not amount to a felony."

It was argued that the Judge should have, at that stage, directed the jury (which he did not) as to the full legal aspects of an attempt

to commit a crime and further in so doing to distinguish between a mere "intention" and "preparation" to commit a crime and that in failing to do so the jury must have been misled.

An *unlawful act* in these circumstances does not necessarily mean the commission of a crime: ' To give an illustration—a person may be shooting at a target as a sport quite legitimately and lawfully but, in not taking sufficient precautions to prevent injury to others, may be acting recklessly and if death results such a person may properly be convicted of manslaughter. *R. v. Salmon et al,* 6 Q.B.D. 79 and see also *R. v. Bateman,* 19 C.A.R. p. 8". The evidence was that Lutchman Singh after having been fired at by the accused had run off in the direction of the Police Station and it was open to the jury to say whether in the circumstances it could reasonably be inferred that the accused was attempting to go after him and was being prevented.

From the question asked by the jury it would appear that what the jury really wanted to know was that—

> if in the attempted unlawful act (i.e. the attempt to go at Lutchman Singh and being prevented) someone else is killed if that can be manslaughter although the person killed is not the one against whom the unlawful act was being attempted.

If a person causes death by an act known to be in itself dangerous to life be is guilty of murder—*R. v. Serne,* 16 Cox C.C. p. 311. In manslaughter however the *unlawful act* may be a dangerous act involving culpable negligence, as here, in the negligence handling of a loaded firearm for the purpose of an unlawful object—not necessarily involving a substantive crime and consequently not necessitating any examination of the constituent elements of a crime.

Earl, C.J., said in *R. v. Bruce, 2* Cox C.C. p. 262—

> "Where the death of one person is caused by the act of another while the latter is in pursuit of any unlawful object the person so killing is guilty of manslaughter although he had no intention whatever of injury to him who was the victim of his conduct."

In Fenton's case (1830) 168 E.R. 1004 it is there enunciated that—

> "If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse it is not accidental death, but manslaughter."

The Judge in his summing up clearly left the issue of death by misadventure to the jury which was rejected by them. The Judge said:

> "There is a distinction between intention and attempt at performance. Intention is never a criminal offence although an attempt is a criminal offence. So in the three examples given before, the accused must have been shooting at or attempting to shoot at or was going to shoot at Lutchman Singh. In each case, if it was only an intention, no offence was being committed and if the gun went off accidentally in each case, he will be guilty of no offence at all,"

"If he abandoned the attempt to shoot and the gun was being taken away from him and it went off accidentally, then death was due to misadventure and you must find him not guilty of anything at all. You see, if in doing an unlawful act and that gun was being handled by D'Oliveira to put it down or to plead with him, telling him how stupid he was and the gun went off accidentally then this is misadventure and you must find him not guilty of any offence."

Having already shown his intention by firing at Lutchman Singh, the interference by the deceased was justified as there was nothing to show, as far as she was concerned, that the appellant had desisted from his unlawful purpose and the question therefore was in his further resisting her with this dangerous weapon in the manner described, was the accused committing an unlawful act. If so, it would not matter whether Lutchman Singh was actually at that time out of danger or not: nor would there be any necessity to enter upon a dissertation upon the law as to attempts to commit a crime. The accused had demonstrated his intention and the Judge told the jury that a mere intention to commit a crime is not a crime—*i.e.* the mere intention to go after Lutchman Singh with the loaded gun was not a crime but it *may* be a dangerous and so an unlawful act in the circumstances. The Judge directed the jury that they could in those circumstances convict of manslaughter. We consider that these directions given by the Judge in consequence of a request by the jury for further directions were adequate and could in no way mislead the jury or cause any confusion in their minds in this connection.

"If there is no evidence for the jury to make a finding it is immaterial if the summing up is defective by an omission to refer to it or is erroneous.

It is not disputed here that there was as a matter of law no evidence from which the jury could find any attempt to shoot at Lutchman Singh *a second time;* it was immaterial therefore to consider whether the direction to the jury on this question was a proper one. (See *Reg. v. Wilkinson* (1955) Cr. L.R. (Sept.) p. 575.)

The last point for consideration is whether the Judge misdirected the jury on the facts.

No witness said that the accused was actually seen putting the cartridge in the gun but as we have already shown this inference was irresistible. The parts of the summing up complained of in this respect are as follows:

"If all danger to Lutchman Singh had passed, but the accused had reloaded the gun—and there is evidence that the gun was reloaded —and he was seen putting a shot into the gun and he was involved in an unlawful act . . . . "

and

"If, however, he came under the house or was going behind Lutchman Singh who was out of danger but he put the cartridge into the gun . . . "

Each sentence, it will be observed, starts with the word "If." The Judge is here putting the possible alternative findings of fact by the jury and then directing them on the law according to how they may find the facts. The Judge was not here reciting to the jury what the facts were—that he had already done. He was here dealing with probabilities in respect to each of the several alternatives and the legal consequence that would follow should the jury find those facts.

Reading the summing up as a whole this can be the only interpretation as the Judge had already dealt with each witness' testimony and nowhere did he say then that any witness had said that he or she had seen the accused reload the gun. It our view the jury could not have thought otherwise.

It is quite usual and indeed obligatory for the Judge at the end of the summing up to deal also with the possible inferences of fact and the resulting legal consequences and possible verdicts.

For these reasons the appeal fails.

The appeal is dismissed. The conviction and sentence are affirmed.

FRASER v. FRASER AND ANOR.

(In the Supreme Court, Probate (Phillips, J.) October 14; November 2, 3, 28, 1955).

Will—Action to establish—Circumstances of suspicion—Person seeking to establish will must prove that testator knew and approved of contents of the will.

Lex domicilii—Will to be executed in accordance with—Wills Ordinance (*Cap. 1, 8*)*—Civil Law of British Guiana Ordinance* (*Cap.* 7).

The deceased, a native of and domiciled in British Guiana, travelled to the United States of America for medical treatment. While in the United States, he executed a holograph will in which he made certain bequests and in which his wife was named a beneficiary. On the day before his death the deceased executed another will, revoking the former will, making certain bequests, and increasing his wife's share to include certain company shares. The second will was executed in the presence of the medical practitioner then attending the deceased, although the latter did not affix his signature as a witness. The medical practitioner testified to the mental capacity of the testator.

The plaintiff sought probate of the second will and the defendants contended that.

(a) the will in dispute was not duly executed according to the provisions of the Wills Ordinance (Chapter 148), or of the provisions of section 8 of the Civil Law of British Guiana Ordinance (Chapter 7); and

(b) that the deceased at the time of the execution of the will in dispute neither knew nor approved of the contents thereof, and that the deceased was not at the time of the execution thereof of sound mind, memory and understanding.

Held: That the will was properly executed in accordance with the law of the *lex domicilii*, and that the deceased fully approved of his will. Ordered accordingly.

H. C. Humphrys, Q.C., with *H. A. Fraser* for plaintiff.

B. O. Adams for defendant.

Phillips, J.: The deceased Fred Malcolm Fraser died in New York in the United States of America, whither he had gone for medical treatment for cancer of the tongue, on the 15th September, 1954. His remains were brought back and interred in British Guiana where he was born and where he had lived all his life.

The division of his modest earthly possessions is the subject of this action.

During his short sojourn in New York undergoing medical treatment the deceased, before his wife joined him there some weeks prior to his death, had been in constant communication with his wife and also other members of his immediate family, and is alleged to have made there two wills: the first on or about the 9th June, 1954 (referred to herein as the first will) and the other (which I shall refer to as the will in dispute) on the 14th September, 1954, the day before his death.

The wife of the deceased, the plaintiff herein, seeks probate in solemn form of this disputed will of which she is one of the executors: the other executor, the defendant herein, has renounced probate. The defendant, Walter Ogle Fraser, a brother of the deceased, the other executor named in this will in dispute, has opposed the grant of probate of this disputed will on the grounds that

(a) the will in dispute was not duly executed according to the provisions of the Wills Ordinance, Chapter 148, or the provisions of the Civil Law of British Guiana Ordinance, Chapter 7, Section 8, and

(b) the deceased at the time of the execution of this will in dispute neither knew nor approved of the contents thereof and that the deceased was not at the time of the execution thereof of sound mind, memory and understanding.

The defendant counterclaimed and prayed that the Court do pronounce against the will in dispute of the 14th September, 1954, and that the Court decree letters of administration with the will annexed of the first will in solemn form of law.

The first will is a holograph will and the date "3.3.54" appearing thereon has been explained in this wise. The witnesses to that first will both of Georgetown, British Guiana, were on a temporary visit to New York in June, 1954, and there witnessed the testator's signature: but for facility of proof the testator back dated the date of the execution thereof to make it appear that the will had been made in British Guiana in March, 1954, and before his departure for America. The first will in evidence Exhibit L4 is as follows:—

> "Last Will and Testament of Fred Malcolm Andrew Fraser.
>
> I hereby leave to my Wife Catherine Fraser list of Investments as under

	No. of Cert:	Value
B.G. & T'dad Mutual Fire Ins Co Ltd	317	525.00
do.	398	1,050.00
B.G. & T'dad Mutual Fire Ins. Co Ltd	9052	1,666.00
Enmore Estates Ltd	514	1,250.00
	567	3,750.00
	658	5,000.00
Hand In Hand Mutual Fire ...	250	774.00
do. ...	788	3,000.00
Rupununi Development Co ...	558	1,106.00
do.	627	700.00

All my Insurances & Widow & Orphans Fund my Motor Car and all my Personal Effects.

To my Brothers and Sisters Walter Ogle Fraser, Winniefred Fraser, Marguerite Humphrey, Hugh Fraser, Muriel Fraser And Evelyn Fraser all my share and Interest in Gladys Hicken Ltd. to share and share alike.

My Massy Harris Tractor and John Deere Plow and Raleigh Bicycle for Gladys Hicken Ltd. (Pln. Drill).

From my Insurance & Widows & Orphans Fund I expect all my expenses to be paid from.

Witness: Ruby Bannister
273 Peter
Rose St.
B.G.

F. M. A. Fraser
3. 3. 54
250 Forshaw & Oronoque St.
Georgetown
Br. Guiana

Witness: J. A. Applewhaite
8 Rodrigues Street
Bel Air Park, Georgetown, B.G."

This first will the testator had sent from New York to his sister in Georgetown, British Guiana, Mrs. Margaret Humphrey, enclosed in a letter of date 9th June, 1954. In this letter, Ex L1, the testator wrote as follows:

"I thought it best to make another will as my first one was made when I was a bachelor; but Dr. Charles think I should get a Notary Public or it may not be legal. I do not know, but I guess; it would be alright if nobody opposed it. I thought it best to exclude my wife from any interest in Gladys Hicken Ltd. I have therefore mentioned in connection with it all my brothers and Sisters by name so as to keep out half sisters & Brothers etc.

My Tractor & Plow & Bicycle have been left for Gladys Hicken Ltd (Drill) for I do not know whether I will be able to complete paying for them. . . . ."

In the disputed will, however, in evidence Exhibit A, contrary to the provisions of the first will and to what he wrote his sister above, the testator revoked all former wills and bequeathed the tractor to hi3 wife and with respect to the shares in *"Gladys Hicken Ltd"* bequeathed 89 of the shares in "Gladys Hicken Ltd" to his brothers and sisters, naming them, and the balance of 50 shares to his wife. The final sentence of the third paragraph of the disputed will reads thus:

"The balance of the 50 shares I own in the said Gladys Hicken, Ltd. I hereby devise and bequeath and give unto my wife, Catherine Fraser."

It is partly on this account together with other cogent evidence, which 1 shall in a moment relate, that the defendant contends that his brother, the deceased, when he executed this disputed will could not have had and did not have the necessary testamentary capacity to adopt and approve the contents thereof.

This disputed will, Exhibit A in evidence reads as follows:—

"LAST WILL AND TESTAMENT OF FRED MALCOLM ANDREW FRASER

I, FRED MALCOLM ANDREW FRASER, of Georgetown, British Guiana, now residing at 134 McDonough Street, in the Borough of Brooklyn, County of Kings, City and State of New York, in the United States of America, being of sound and disposing mind and memory, and bearing in mind the uncertainty of mortal life, do make, publish and declare this as and for my Last Will and Testament.

FIRST : I hereby direct my executors hereinafter named to pay all my just debts, funeral and testamentary expenses as soon after my demise as may be practicable.

SECOND : I give, devise and bequeath unto my beloved wife. CATHERINE SYLVIA SABINE FRASER, who has been so devoted and loving to me, and who has cared for me in sickness and in health, all the shares of stock of which I may die seized, whether preferred or ordinary script, in the B.G. & T'dad Mutual Fire Insurance Co. Ltd., Enmore Estates Ltd., Hand-in-Hand Mutual Fire Insurance Co. Ltd. and Rupununi Development Co.

THIRD : I give, devise and bequeath unto my brothers an d sisters, WALTER FRASER, MARGARET HUMPHREY, HUGH FRASER, EVELYN FRASER, MURIEL FRASER and WINNIE FRASER 89 shares, a part of the stock I own in Gladys Hicken Ltd., to be divided equally among them, share and share alike. The balance of the 50 shares I own in the said Gladys Hicken Ltd. I hereby devise and bequeath and give unto my wife, CATHERINE FRASER.

FOURTH : To my wife, CATHERINE FRASER, I devise, bequeath and give the rice crop, tractor, car and all other property, whether real, personal or mixed, whether owned and possessed by me, or to which I may be entitled at my death. To her also I give the residue and proceeds from any life insurances to which I may now be entitled or of which I may die seized, together with all the rest, residue and remainder of my household goods and property, of whatever kind, and which I have not otherwise bequeathed or devised.

FIFTH : I hereby nominate, constitute and appoint my brother, WALTER O. FRASER, and my wife, CATHERINE SYLVIA SABINE FRASER, to be the executors of this my last will and testament and direct that they shall be required to furnish no bond or obligation for the faithful performance of the duties hereunder. I further direct that in the event that either should predecease the other before the final accounting under this will, that the survivor be the sole executor or executrix as the case may be of this my last will and testament.

SIXTH : I do hereby revoke all former wills or codicils by me at any time made and decree this and this alone to be my last will and testament.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 14th day of September, 1954.

Fred M. A. Fraser (L.S.)

The foregoing instrument, consisting of two pages, including this page, numbered consecutively, was, on the 14th day of September, 1954, signed, sealed, published and declared by the testator, FRED MALCOLM ANDREW FRASER, therein named, to be his last will and testament in our presence, and in the presence of each of us, and each of us thereupon at his request, and in his presence, and in the presence of each other, has hereunto affixed his name as subscribing witnesses.

Henrietta Ross
Residing at 363 Franklin Ave.
Brooklyn 5 N.Y.

Residing at *Clarissa S. Oliver* 815 *Marcy Ave*
Bklyn 16 N.Y

STATE OF NEW YORK: COUNTY OF KINGS: SS:

On the 14th day of September, 1954, before me personally came FRED MALCOLM ANDREW FRASER, to me known and known to me to be the individual who executed the foregoing Will, and he acknowledged to me that he executed the same.

Cornelia V. Street
Notary Public"

This will in dispute (Ex. A) bears on its face evidence of authenticity. The signature of the testator thereon is not in dispute. It

shows that it was duly executed in the presence of a Notary Public and that it was signed, witnessed and attested by two witnesses in due form of law.

The Notary Public, one Miss Cornelia V. Street of New York, gave evidence at the trial of the due execution of the will and of the testator's testamentary capacity to understand and approve the disposition of his property, the contents of the will and the due execution thereof.

The two witnesses to this will in dispute

Mrs. Henrietta Ross of 363 Franklin Avenue,
Brooklyn 5, New York, U.S.A.
and
Clarissa S. Oliver of 815 Marcy Avenue,
Brooklyn 16, New York, U.S.A.

did not give evidence at the trial but sworn affidavits of the due attestation of the will executed by them before the British Consul in New York, U.S.A., were submitted by the plaintiff with her application for probate of the will.

There has been no evidence that these two attesting witnesses have been kept out of the way by one side or the other.

On the 7th September, 1955, an order by a judge of the Supreme Court of British Guiana was made for the taking of the evidence on oath of Mr. Charles Kellar who was then about to leave the Colony for New York, U.S.A., by the Deputy Registrar of the Supreme Court. The evidence of this witness was duly taken on oath and forms part of the record herein—Exhibit C in evidence. Mr. Charles Kellar is an Attorney at Law practising in New York and testified that he took the instructions from the testator for the preparation of his will, that the same way typed by his Secretary the said Notary Public above referred to, Miss Cornelia Street; that the will was duly executed by the testator who signed in his presence as also in the presence of the two witnesses, Henrietta Ross and Clarissa Oliver, both being present at the same time; that the testator acknowledged and approved the contents of his will. Mr. Kellar in his evidence swears:

> "While I was with Mr. Fraser on the 14th September, 1954, he spoke sensibly, coherently and intelligently. He gave prompt and intelligent replies to my questions."

The will was executed on the 14th September, 1954, at 134 McDonough Street, Brooklyn, New York City, U.S.A., the home of Dr. Albert Charles, the medical adviser of the testator.

Dr. Charles gave evidence at the trial on this issue to the same effect.

All the property to which the will relates is situate in British Guiana. Section 4 of the Wills Ordinance of British Guiana, Chapter 148, provides:

> "No will made in the colony shall be valid unless it is in writing and executed in manner hereinafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or by

some other person in his presence and by his direction, and the signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and those witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Section 8 of the Civil Law of British Guiana Ordinance, Chapter 7 enacts as follows:—

"Where the Wills Ordinance, and any other Ordinance now or hereafter dealing with wills or testaments, is silent, the Wills Act, 1837, except section seven thereof so far as it relates to personal property, shall be part of the law of the colony and shall apply to both movable and immovable property as if the provisions dealing with personal property were specifically enacted to apply to both movable and immovable property, and in the absence of any provision by Ordinance or Act the English common law, including the rule against perpetuities, shall apply."

I therefore find that the will in dispute in respect to the formality of execution was made and executed in conformity with the laws of British Guiana.

It was not seriously disputed that the deceased was a British subject domiciled in British Guiana at the time of his death. I find however, that the deceased was domiciled in British Guiana at the time of his death.

The Common Law principle is that a will must satisfy the formalities of the testator's last domicile.

The *lex domicilii,* in accordance with which the English law-requires that a will should be made, is the law of the testator's domicile at the time of his death, which in this case is British Guiana. England and the North American United States compel the testator to adopt the form prescribed by the *lex domicilii.* Phillimore—Commentaries upon International Law, IV, 627—8. See also Cheshire's Private International Law 4th Ed. p. 522. The main issue in this matter is whether the testator had the testamentary capacity to make this will, Exhibit A in evidence.

The defendant alleged that the circumstances surrounding the making of this last will by the testator ought generally to excite the suspicion of the Court and further contended that as the *onus probandi* lies on the plaintiff —the party propounding the will—to satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator the Court ought to find on the evidence that the onus of proof has not been discharged by the plaintiff herein. It is well settled that the *onus probandi* lies on the party propounding a will to satisfy the conscience of the Court that the instrument propounded is the last will of a free and capable testator.

If a party propounding a will takes a benefit under it, as is the case of the widow, the plaintiff herein, that is a circumstance which ought generally to excite the suspicion of the Court, and calls on it to

be vigilant and zealous in examining the evidence in support of the instrument in favour of which it ought not to propound, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased. *Persaud vs. James and Khedaroo* (1940) L.R.B.G. p. 80.

The Rule was laid down in *Perera vs. Perera* (1901) A.C p. 381 as follows:

> "In *Parker v. Felgate* Sir James Hannen lays down the law thus : If a person has given instructions to a Solicitor to make a will and the Solicitor prepares it in accordance with those instructions all that is necessary to make it a good will if executed by the Testator is that he should be able to think thus far :
>
> > "I gave my Solicitor instructions to prepare a will making a certain disposition of my property. I have no doubt that he has given effect to my intention and I accept the document which is put before me as carrying it out."
>
> Their Lordships think that the ruling of Sir James Hannen is good law and good sense. They could not therefore hold the will invalid even if they were persuaded that Perera was unable to follow all the provisions of his will when it was read over to him by the clerk."

The Rule does not authorise the Court to consider suggestions of fraud or undue influence of which no foundation is laid in evidence.

In this case there has been no allegation of fraud or undue influence.

The question for the Court to decide is: Was the document the uninfluenced act of the Testator deliberately entertained and carried through with entire knowledge of its effect. *Low v. Guthrie* (1909) A.C. p. 278.

It will be necessary to examine the evidence adduced at this long trial in some detail. The deceased, Fred Fraser, 48 years of age, was a member of the Civil Service of British Guiana and resided at 250 Forshaw and Oronoque Streets, Georgetown. For some 12 years he had been in association with one Miss Catherine Melville whom he only married on the eve of his departure to the United States of America for medical treatment in 1954.

The eldest sister of the deceased, Mrs. Gladys Hicken, who it is alleged had inherited some fortune had taken exception to his association with this lady so that when the time came for this Mrs. Gladys Hicken (now deceased) to make her will on the 24th September, 1947, she, on that account, proposed to exclude him as one of the objects of her bounty. She however was prevailed upon and on the deceased promising not to marry her or part with his shares but only to other members of the Fraser family he was included as one of the devisees and given l/9th share in the residue of her estate. This oral undertaking however was not embodied in the will. Mrs. Gladys Hicken died on the 17th October. 1947.

Shortly however before Mrs. Gladys Hicken died she formed a limited liability company which was incorporated on the 14th October, 1947, (3 days before her death) known as *Gladys Hicken Ltd.* The Capital of the Company was $120,000 divided into 1200 shares of $100 each with power from time to time to increase or reduce such capital. One of the objects of the Company, by paragraph 111 (1) of the Memorandum of Association was—

> "To take over and carry on as a going concern the business at present carried on by Gladys Hicken and to take over all or any of the assets and liabilities of the said business together with the immovable properties and live and dead stock as enumerated in the Agreement referred to in Article 3 of the Articles of Association of the Company."

By article 17 of the Articles of Association the "transfer and transmission" of shares was as follows:—

> "No share shall be transferred by any member or person to any person who is not a member, so long as the Governing Director or failing her any member or failing any member any person or persons (whether a member or members or not) selected by the Governing Director and the Directors is willing to purchase the same at the fair value. But if the Governing Director or any member or person selected as aforesaid is not willing to purchase such share then the same may, be transferred to any person whether such person is a member or not. Such shares shall be offered in the first place to the Governing Director then equally to all the members of the Company who are willing to purchase and any balance undisposed of shall be offered to such person or persons as the Directors shall decide."

To all intents and purposes the deceased had acquired by devise l/9th of the Estate of Gladys Hicken as represented in the Company-Gladys Hicken Ltd.

It was not disputed that the deceased at the time of his death had 139 shares in Gladys Hicken Ltd. By his will in dispute 50 of those shares he bequeathed to his wife and the remaining 89 he left to his brothers and sisters—Walter Fraser, Margaret Humphrey (nee Fraser), Hugh Fraser, Evelyn Fraser, Muriel Fraser and Winnie Fraser.

Mr. Walter Fraser, the defendant, is the present respected and revered head of the Fraser family in whom his brother, the deceased, placed the utmost confidence.

Mrs. Margaret Humphrey is the present Secretary of Gladys Hicken Ltd. The deceased if not in as close and intimate a relationship with her as with his brother, the defendant, nevertheless while in America kept up a correspondence with her, perhaps more particularly on financial matters and it was to this sister he sent his first will made in New York in June, 1954. These two witnesses, Mr. Walter Fraser and his sister Mrs. Humphrey, maintained that not only did the deceased promise his sister, Mrs. Gladys Hicken, that the shares of the

Company would always remain in the family but it was a pledge and an undertaking made by each member of the family, one of the other, that they would not allow any of the shares to he sold to or devolve on by transmission to any other than the immediate members of the family. It was therefore a matter of great surprise to them that their brother by his will in dispute had bequeathed some portion of those shares to his wife, especially after in his earlier will made in New York and despatched to his sister, Mrs. Margaret Humphrey, for safe keeping he had so faithfully carried out his undertaking to the family and also fey his emphatic exclusion of his wife to any participation in those shares in his letter to the said Mrs. Margaret Humphrey of the 9th June, 1954, (Exhibit L1 in evidence) to which I have already referred.

The deceased was not a well man. He had in the previous year gone to England for an operation for cancer. It was a matter of great disappointment and concern to himself as well as to his family and friends that in 1954 there was a recurrence. It was after seeking other medical opinion in British Guiana that he, advised by his friend and medical specialist in Cancer diseases, Dr. Albert B. Charles, who is also a native of British Guiana but then practising in New York, that he decided to go to New York, United States of America, for treatment. Dr. Charles, it was admitted, was a man of some means, with some property and investments in his homeland, British Guiana.

The deceased was married to his wife, the plaintiff, shortly before leaving for America and left with Dr. Charles from Trinidad for New York in March, 1954. It was not seriously disputed that the deceased received in America skilful and proper treatment for his disease in Hospital and elsewhere, but the *bona fides* of Dr. Charles in respect to the execution of the will of the deceased and the disposition of his property has indeed been seriously challenged.

When the deceased came out of Hospital he remained at Dr. Charles' home and was treated free of charge. When the wife of the deceased arrived in New York she also resided with her husband in the home of Dr. Charles. Dr. Charles gave the Court to understand that he did all this to help his friend who was then in dire need of expert medical and surgical treatment for malignant Cancer.

One ugly fact emerges, according to the defence, and one must admit that it is not surprising that it arouses some suspicion in the minds of some that soon after the death of the deceased, the widow of the deceased (the plaintiff herein) became the Attorney for Dr. Charles in British Guiana. No further evidence in this regard was led.

The wife of the deceased had been at his bedside in Dr. Charles' home in New York when the deceased died. She was an eye-witness to the execution of his will by the deceased and was certainly aware of his condition at the time the deceased was giving instructions for, and later at the execution of the will. She, however, was not called as a witness in her own behalf. This circumstance was made much of by

the defence and cursorily explained by her Counsel as being unnecessary in the light of the testimony of the other witnesses.

I shall return to the medical testimony but will at this juncture make some observations dealing with the conduct of the wife (the plaintiff herein) both in New York and on return to British Guiana which has been the subject of considerable criticism by Counsel for the defence.

The plaintiff left Georgetown to join her husband in New York in August, 1954. In New York she resided with her husband at Dr. Charles' home in Brooklyn where the deceased having undergone an operation for Cancer of the tongue was being medically treated by Dr. Charles and she took care of her husband during his illness until his death and was present at the making of his will the day before his death.

On the 13th September, 1954, she sent a Cable to Mr. W. O. Fraser (defendant) Ex. F as follows:

> "Fred taken sudden turn for worse trying get him home Wednesday if possible will cable further inform mother."

She sent another Cable to the defendant on the 14th (Ex. G.) as follows:

> "Deeply regret impossible Fred make trip condition slowly worsening Kellar advancing one thousand US Pay Erna Forte 1700 BG immediately."

After her husband's death on the 15th, she sent another Cable (Exhibit H) as follows:

> "Fred passed away 1210 p.m body arriving cargo flight Sunday evening I arrive passenger flight hour later await my arrival airport arrange transportation home inform family."

Even if the wife said in her cable of the Tuesday that the condition of the deceased was *slowly worsening* and it was not possible for him to travel, that would not by itself displace the evidence of Dr. Charles as to the *mental capacity* of the deceased to make his will at 10 a.m. on that Tuesday. It is not at all beyond the bounds of possibility that the deceased may very well have felt cheerful yet nevertheless his condition generally was slowly worsening. I am not prepared to find that this circumstance controverts the positive medical testimony.

The body was sent over to British Guiana and Mrs. Fraser followed immediately after and attended the funeral with other members of the Fraser family. After the funeral she is supposed to have had certain conversations with the female members of the family in which it is alleged she made certain statements as to the condition of the deceased shortly before his death which did not coincide with the allegation now made by Dr. Charles that the deceased on the day before his death was speaking quite coherently, making jokes and receiving visitors in his bedroom.

Mrs. Humphrey said the plaintiff told her that—

"On the Saturday before he died the deceased had some kind of

turn on going to the bathroom; that he fell down unconscious, she got Dr. Charles to come and have a look at him and treat him; that he got the deceased back to bed where he recovered consciousness somewhat. She said that Dr. Charles asked the deceased what about making a will and that the deceased said "But I have a will" and that she (the plaintiff) then remarked "Don't be foolish Fred, don't you know that that will is no good," and that the deceased then said "I will think about it."

Mrs. Humphrey further related that "the plaintiff told us that the deceased was much brighter the Monday from blood transfusions and *that on the Tuesday he was brighter still. He was bright and jolly* and that he called for Kellar to come and make his will; that Kellar came and that *the will was made and signed some time after* 4 *p.m. that Tuesday afternoon* and that at 8 p.m. that night the deceased went to sleep and seemed to have fallen in a coma as he never got up during the night nor aroused her during the night as he usually did; that when she awoke in the morning he looked funny and was breathing funny so she called Dr. Charles who worked on him and told her he could do nothing more for the end was on him."

Evidence to the same effect was given by Mrs. W. O. Fraser (wife of the defendant) but in addition Mrs. W. 0. Fraser swore that the plaintiff told her that Mr. Kellar had dictated the will of the deceased to her, the plaintiff, while she (the wife of the deceased) typed.

The evidence for the plaintiff is that the will was typed by Miss Street, the Notary Public and Secretary to Mr. Kellar.

The plaintiff would certainly not be possessed of the intelligence attributed to her to have made such a damaging statement when the document had been typed by Mr. Kellar's Secretary for she must have known that that fact would have had be brought to light in any case.

Mrs. Humphrey said that while the plaintiff was recounting these sad details the plaintiff showed no sign of remorse and not a tear fell from her eyes.

The plaintiff has not gone into the witness box to deny these allegations: on the other hand it must be borne in mind that these ladies (members of the Fraser family) are also financially interested in and are participators of the "Gladys Hicken" fortune to which they do not hide a certain resentment to this latest and undesirable entrant—the widow of the deceased—as, they suggest, by way of the prohibited and forbidden testamentary backdoor.

A half-sister of the deceased, Mrs. Lena Winifred Romney, a retired nurse resident in New York, was called and gave evidence for the defence. She said that on the Sunday the 12th September, three days before the death of the deceased, she called at Dr. Charles' home to see her half-brother. She had taken him some grapes and

an orange but she found him in bed in a dying condition. She described his condition as follows:

> "I arrived at 1.30 p.m. I saw my brother. I went upstairs to see him. I understood he was travelling on the Tuesday following. When I got into the room I was greatly shocked to see his condition as I did not expect to see him in such a poor condition. I was told he had taken ill that very morning. Mrs. Fraser told me he would get over it. He was in such a condition that I was sure the end would soon come. He did not seem conscious. He was taking intravenous injections and he had stomach feeding tubes in him at the time through his mouth into stomach. I had the impression he did not know what was going on around him. I did not see him move. He was regurgitating. He was bringing up plain mucous. I remained in the room probably an hour or more. There was a thin band of gauze around his neck. His neck and throat were terribly burnt—consistent with burns from the therapy treatment he had been getting. I left and went downstairs when I could not stand it any more and then I returned upstairs again. He died on the Wednesday following."

The deceased in the first will of the 9th June, 1954, and letter to his sister, Ll-4, had made it plain he did not wish to include any of his half-brothers and sisters into any participation of the Gladys Hicken Ltd. shares, which one must presume would exclude Mrs. Romney.

Dr. Charles in his evidence gave the Court to understand that from what he gathered from the deceased this half-sister of his was not a "welcome" visitor. I shall later refer to Dr. Charles' version of this incident.

Dr. Hulbert Hugh a member of the Royal College of Surgeons of England was called by the defence to give expert evidence. He had never seen the deceased. The effect of his evidence was that if the deceased had been recently operated on for malignant cancer of the tongue and was in the condition described by Mrs. Romney on the Sunday, three days before his death, the deceased would then have been in a state of inanition and would not be of sufficient understanding to make a will or to give instructions therefor or to approve the disposition of his property. The fact that a medical man gives evidence, however honest he may be in his opinion, does not necessitate that his evidence must be accepted. *Gillett v. Rogers* (1913) T.L.R. p. 732.

Dr. Hugh was not an impressive witness.

It may be desirable here to note the following passage from Taylor on Evidence, 7th Edition, Vol. 1, page 74:

> "Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These gentlemen are usually required to speak not to facts, but to opinions; and when this is the case, it is often quite surprising to see with what facility, and to what extent, their views can be made to correspond with the wishes or

the interests of the parties who call them. They do not, indeed, wilfully misrepresent what they think: but their judgments become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of expressing a candid opinion. Being zealous partisans, their belief becomes synonymous with Faith as defined by the Apostle (11 Hebrews, 1), and it too often is but "the substance of things *hoped for,* the evidence of things not seen." To adopt the language of Lord Campbell "skilled witnesses come with such a bias in their minds to support the cause on which they are embarked that hardly any weight should be given to their evidence.

It will be necessary therefore to examine the evidence of Dr. Charles and to give in some detail the diagnosis and treatment of the deceased (surgical and medical) while in New York and especially of the treatment and care given to the deceased while under Dr. Charles' professional care in his home in New York and of the mental condition of the deceased at the time of the making of his will as deposed to by his then medical adviser, Dr. Charles, and also by Mr. Charles Kellar.

Mr. Charles Kellar, the Attorney at Law, said that the testator was fully aware of the instructions he gave for his will and fully approve and assented thereto; in particular with regard to the shares in certain companies. Mr. Kellar's evidence is as follows:

"I asked Mr. Fraser what property he had to dispose of by will and he asked the nurse to prop him up in bed and he began going through some papers which were at the side of the bed. Mr. Fraser said that he did not find what he was looking for and asked his wife, the plaintiff, to bring his glasses. He continued to search and then asked his wife to bring a particular document dealing with shares he had in companies. His wife brought the document and he said that was what he wanted.

He wrote on the document and then handed it to me. I then asked questions about what he had written on the document, made notes of the answers and dictated those notes to my secretary. I then asked him about his other property and he described what property he had and said whom he wanted to leave it to.

My secretary and I then left the room."

"My secretary typed the will and she and I returned to Mr. Fraser's room. The nurse propped up Mr. Fraser in bed, he was given his glasses and I gave him the original copy of the will. I kept a copy and I asked him to read it through and he did so. I said to him "You have read it, is that the will you want to execute?" He replied 'Yes'."

"Again I asked Mr. Fraser whether the will was as he desired it and in order. In the presence and hearing of everyone he said 'Yes.' Mr. Fraser then signed the will, which was resting on some magazines given to him for that purpose in everybody's presence—the nurse, Miss Oliver, Miss Ross, the housekeeper, Dr. Charles, my secretary

Miss Street, the plaintiff and myself. I then requested Henrietta Ross to sign as a witness and she did so, and Clarissa Oliver who likewise did so. Each signed in the presence of the other and of the testator. After that Cornelia Street, ray secretary, signed as a Notary Public in the presence of the testator, the other witnesses and the other persons present.

I see this document—exhibit A—now produced to me. It is the said last will and testament executed by the testator Fred Malcolm Fraser on the 14th September, 1954."

It is clear therefore that if the evidence of Mr. Kellar is to be believed the will was properly and lawfully executed by the testator.

Without alleging fraud or undue influence the defence nevertheless asks the Court to say that when taken with other relevant facts the fact that Mr. Kellar is a partner with Dr. Charles in some business or property in their homeland, British Guiana, ought to have raised a suspicion in the mind of the Court which the plaintiff has not been able, by the evidence she called, adequately to eradicate.

The evidence of Mr. Kellar was taken on commission. The defence thought fit, though in an emergency not to attend to cross-examine him. The Court has not seen nor heard Mr. Kellar give his evidence. It has not been denied that Mr. Kellar is a man of some means and it has not been suggested that he is not a respectable member of his profession. On what evidence therefore is the Court to suspect that Mr. Kellar has conspired with the plaintiff and others to falsify or forge the will of the testator (which bears on the face of it the genuine signature of the Testator) and has committed perjury in relation to its execution—supported as his evidence is by Dr. Charles and the Notary Public, Miss Street, his Secretary.

It is stated by the deceased that he had not taken to Mr. Kellar and that he preferred Mr. Kellar's brother, a person of some personality. The letter dated 9.7.54, to his brother, the defendant, (Exhibit K) states as follows:—

"Dear Wattie,

> Dr. Charles asked me to write a letter of introduction for Mr. Charles Kellar to you as they feel Kellar would get through his affairs better, *personally I have nothing against Mr. Kellar but I don't take to him although* on the other hand he has a brother with a very pleasing personality and I like but I guess life is like that however Mr. K is a successful businessman over here, he owns a Restaurant, is a director of a Loan & Trust Co and owns a very nice home, but as I said Dr. C asked me to do it so it is the least I could do, perhaps you could pass Mr. K. over to the Minister of Agriculture who has more time than you.

Mr. Charles Kellar's character nevertheless has not been impugned in any way.

In *Ann Holtam* (*deceased*)—*Gilleit v. Rogers el al* (1913) L.T.R. p. 732, a testatrix who was incapable of speaking or writing owing to

an apoplectic stroke, only assented by nods of her head and several pressures of her hand in answer to questions put to her by the person drawing her will. She made a mark with a pen in lieu of her signature. It was held that if the jury believed that the document was in accordance with the wishes of the testatrix they could find in favour of it.

I shall now deal with the evidence of Dr. Charles.

Dr. Albert Basil Charles said in his evidence on oath that he resided at 134 McDonough Street, Brooklyn, New York City, United States of America; that he was a Doctor of medicine and surgery of Howard University, Washington, and also a Registered Medical Practitioner of this Colony; that he has been practising for twenty-six years; that he had been Assistant Attendant and Visiting Surgeon at the Cumberland City Hospital for fourteen years and Visiting Surgeon of the Unity Hospital, Brooklyn, New York, and the Brooklyn Hospital, New York. He was a member of the American Medical Association, the Brooklyn Surgical Society and Associate of the International College of Surgeons. He was an Executive Trustee of the Provident Clinical Society, a member of the Committee of Forensic Medicine at Kings County Medical Society; has done post graduate work in Cancer since 1026 and has written and published papers on the subject of Cancer. Certainly a person of vast experience in this field.

Dr. Charles said that three days before he left British Guiana in March, 1954, he visited the home of the deceased at Forshaw Street, Georgetown, examined the deceased and found that he had a cancer of the tongue which, in his opinion, was not being adequately treated. He advised that the lesion demanded an incision of the entire half of the tongue and that it should be removed followed by Radium and deep Xray therapy.

The deceased on Dr. Charles' advice left tog-ether from Trinidad on the 8th March and stayed in Dr. Charles' home in New York. Mr. Fraser was examined by Dr. Charles and other physicians at the Cancer Hospital, New York. Specimens of the tumour were taken and the plan of treatment decided upon. Mr. Fraser had been previously operated upon for Cancer in London and a record of the treatment in London was obtained. It was decided that the tumour and half of the tongue adjacent to the tumour should foe removed. Subsequently Mr. Fraser remained in the John Jennings Memorial Hospital (a Hospital which specializes in Cancer and allied tumours) where he was visited by Dr. Charles and treated by the resident Surgeon of the Hospital. After leaving the Hospital Mr. Fraser returned to the Clinic for treatment and was also treated by Dr. Charles at his office which is located at his residence.

It was later observed, Dr. Charles said, that there had been an incomplete excision of certain glandular elements along the chain of glands on the left side of the neck. The operation performed in London had to be revised: there was noticed, in June, 1954, a spread of

the tumour to the thyroid gland and that had to be removed. Radium treatment and deep Xray therapy were then the other means of help. Mr. Fraser was informed that he would have to return to Hospital. He did not wish to go and Dr. Charles cabled for deceased's wife who arrived in New York in the month of August, 1954. Mrs. Fraser consulted a Specialist at John Jennings Hospital. Thereupon Mr. Fraser daily visited the hospital for Xray treatment accompanied by his wife. Dr. Charles said that during this time he had on several occasions accompanied the deceased to check up on the effects of the treatment as he still visited Dr. Charles' office too for examination, dressings and diagnostic Xray. Mr. Fraser had had three operations in all at John Jennings Memorial Hospital—the first in April, the second a week or two after that and the third in June. At the end of the treatment Mr. Fraser was informed that they had done in New York everything that was possible to be done and the rest was left to nature and the Almighty. Mr. Fraser then took up residence at Dr. Charles' home.

Dr. Charles said that Mr. Fraser mentioned to him that his wife had been very kind and dutiful to him, that he had made a previous will but that he wanted to change that will because of certain omissions, that his wife had stayed up all hours when he wanted anything and that he wanted to give her something more than he had given her.

Dr. Charles said he consulted the British Consul as to the formalities for the making of a will on American soil. This conversation, he said, took place about a week before he died. At this time (three of four days before his death) the deceased was getting forced feedings and blood transfusions.

On the Sunday before his death, the deceased was confined to bed and forced feedings continued. The next day, *the Monday,* the deceased asked Dr. Charles to write a letter in order that he might resign from his position in British Guiana. The following morning, *the Tuesday* (14th September, 1954) according to Dr. Charles the wife of the deceased called him from his office and the deceased asked him about the will he wanted to make. Dr. Charles promised to get a lawyer and his friend Mr. Kellar, the Attorney at Law before referred to, was called in. Mr. Kellar arrived soon after accompanied by his. Secretary, Miss Street, and proceeded to receive from the deceased the instructions for the making of the will. Dr. Charles said that during the process of drawing the will he went to his office downstairs and continued his work but before going downstairs he had seen Mr. Fraser with a paper in front of him on which he was making certain marks and making certain requests: that after they had finished Mr. Kellar and Miss Street went down to his office and started to draw up the will. After some time they returned upstairs to the deceased bedroom and he followed. Mr. Fraser was in bed in a semi-sitting position. The will was read by Mr. Kellar. He said he heard Mr. Kellar say to the deceased "Is this what you want? Is this your will and pleasure?" and Mr. Fraser replied "Yes." Then Mr. Fraser signed the will (Exhibit A in evidence) and Mrs. Ross and

Miss Oliver signed as witness in the presence of the deceased, Mrs. Ross, Miss Oliver, Miss Street, Mr. Kellar, Mrs. Fraser (wife of deceased) and himself all being present, and that Miss Street attested the will as a Notary Public.

Dr. Charles said he was asked to sign as a witness but declined. He said he did not wish to bother with these legal things.

Dr. Charles said that Mr. Fraser felt much better and was making many jokes after the will was made; that visitors came to see the deceased that afternoon—one Miss Hunter and one or two others from British Guiana and the deceased was joking with them until 8 to 8:30 p.m.; that the deceased asked him to remove the tubes from his stomach and he did so. The next day about 7 a.m. (the 15th September Dr. Charles said that he heard some stertorous difficult breathing. Mrs. Fraser called to him, that he found the deceased in a semi-conscious condition, the pulse then was rather weak. He made an examination and found that an infected clot had broken away from the site of the lesion, traversed the blood stream and lodged itself in one of the large vessels of the heart. This accounted for the sudden drop in blood pressure and difficulty in breathing. The deceased was given the necessary medical aid; response however was poor and the deceased died about 4 1/2 hours after that attack.

Dr. Charles swore that Mr. Fraser's mental condition was clear—there was no deterioration of his mental condition based on his own personal contact and observation.

In cross-examination Dr. Charles gave in more detail his diagnosis, the treatment by him and at the Hospitals and the surgical operations the deceased had undergone. He said that the death of the deceased in September was unexpected by him; that the deceased was not feeling pain at the time of his death and that in September he gave the deceased aspirin when he complained of some degree of pain; that he administered Penicillin and Terramycin and Coramin, a cardiac stimulant, but that he never gave the deceased Morphia.

Dr. Hugh, the expert, thought that in his opinion at that stage of the disease as was described to him it would be usual, and he would expect Morphia to be administered and in heavy doses as that was the stock prescription and that we would expect the deceased to be in pain and such measures as cutting of nerves to relieve pain to be adopted. He said that Cancer of the tongue involving the throat and thyroid glands would be very productive of suffering. Dr. Hugh however admitted that the operation for Cancer of the tongue followed by radiation treatment is correct and accepted treatment, and also that if a person had had three major operations for Cancer in which half a tongue to its base had been excised and the thyroid and other neck tissues removed and the operations were successful in removing the Cancer, then the pain should be absent, if the operations were successful.

Dr. Hugh further said that if the following three major operations had been performed on a person suffering from Cancer, namely:

(1) a local excision of the tongue and a modified neck dissection;

(2) the removal of half of the tongue and

(3) removal of the thyroid gland and other tissues of the neck in July, 1954,

and the patient died as a result of Cancer, he would expect the person to be suffering a great deal of pain between the time of the last operation and death, if death occurred in September, 1954.

Dr. Hugh also said that Xray Therapy would have a debilitating effect on the patient—the patient would go into the condition described as inanition—the mind would be weak as the patient who is given morphine would be kept asleep most of the time, heavy doses being necessary. A person, he said, however, dying from Cancer would be in a better condition to make a will if no morphine is administered than if morphine is administered as in the latter case the patient's mind would in addition be affected by the action of the drug.

Finally Dr. Hugh gave it as his opinion as follows: He said—

> Assuming the cancerous patient died on the 15th September, 1954, and assuming the patient's condition on September 12th (three days before) was as follows:
>
> (a) the patient could not recognize his half-sister who was well known to him;
>
> (b) the patient was thin and wasted and could not swallow;
>
> (c) that he was being fed by tubes;
>
> (d) the wound in his neck was still open and
>
> (e) the patient had to be spoken to in a loud voice before he could be aroused,
>
> in those circumstances he would not expect such a patient to be mentally clear, laughing, talking and receiving friends. "I would not expect such a patient," he said, "to be able to sit up in bed nor read nor give instructions for the making of his will."

Dr. Charles on the other hand maintained that the deceased in September was not being given morphine nor was he having frequent doses of narcotic drugs nor did he perform any operation on the deceased of "cutting nerves" for preventing or relieving pain. Dr. Charles stated emphatically that on the Tuesday the deceased was not in any coma and that the deceased was in a condition to make his will.

It is probably worthwhile to give Dr. Charles' account of the visit paid by Mrs. Lena Romney, the half sister of the deceased, on the Sunday, the 12th, whose evidence forms the basis of Dr. Hugh's expert opinion. Dr. Charles said that Mrs. Romney who lives at Long Island called to see the deceased and he heard the deceased "muttering

that he did not want any of the half brothers or sisters or something of the sort."

The deceased does mention this in one of his letters to his sisters (Mrs. Humphrey) about the "Gladys Hicken" shares.

Dr. Charles further said that Mrs. Romney came at about 3:30 p.m. She did not remain long with her brother—about 10 to 15 minutes. Mrs. Romney had supper with Dr. Charles and he left her there in the home. While she was with her brother, the deceased said nothing and was quiet. It was not that the deceased was in a semi coma and could not recognize her but that the deceased did not want to recognize her. He said he asked the deceased if he would allow Mrs. Romney to go with him to British Guiana and the deceased would not answer because he did not want to answer.

Mrs. Romney, according to Dr. Charles, paid another visit on the Wednesday morning (the day of his death) before the deceased had the coronary attack. He had occasion to speak roughly to Mrs. Romney that morning before the deceased died as she was acting not in good taste. Dr. Charles said he told her that she should sympathise rather than reprove the people and she apologised to him.

I accept Dr. Charles' version to that of Mrs. Romney.

Neither of the three witnesses, Dr. Charles, Mr. Kellar nor Miss Street, is a beneficiary under the will in dispute.

Counsel for the defence suggested that Miss Street, the Notary Public from New York, by her evasiveness in the witness box and the manner in which she gave her evidence showed that she was untruthful and, being Secretary to Mr. Kellar, may very well have been drawn into this conspiracy.

Again apart from the fact that she is Mr. Kellar's Secretary nothing has been brought to light that would tend to shake her testimony which, in my view, was given in a forthright and clear manner. She impressed me favourably as a witness of truth. .

The fact that the widow of the deceased after her husband's death became the Attorney in this Colony of Dr. Charles is a matter that might excite some suspicion and cause some misgiving, but no evidence was led as to any impropriety or any illicit association of any sort or description or any indirect gain to be derived by Dr. Charles. If Mrs. Fraser consented to act as his Attorney in British Guiana for profit or from a sense of gratitude for the help given by him to her late husband in his illness, what evidence is there to show it was otherwise? None. I decline to assume to the contrary.

The suspicion insinuated is vague, illusory and evanescent. I consider Dr. Charles to be a man of ambition, industry and enterprise; a person of high professional skill in his profession and one not likely to do anything that would tarnish or endanger his professional reputation. He is not, in my opinion, a man destitute of means or character as would sell his soul for a mess of pottage.

I find as a fact that Dr. Charles did all that was medically possible to help his friend and fellow countryman then in dire need of highly technical and scientific medical care and treatment. His resentment shown in the witness box to the attack made on his skill and integrity was not a sham, a disguise, or put on to deceive but a resentment that sprung from wounded pride and righteous indignation. I accept his evidence and rely implicitly on his testimony given as to the mental capacity of the Testator at the time of the making of his will.

The deceased in his letter to Mrs. Humphrey (Ex. O dated 12.4.54) refers to the purchase of a *House* by his wife in Georgetown and states:

> "Thanks very much for helping my wife out with the money for the *House.* She will certainly have to work and pay for it and the Interest off early for it's her idea of buying the *House* and of course everybody told her it's such a good idea."

However in a letter to his wife (Ex. P dated 17.4.54) he writes, what Mrs. Humphrey admits, is directly opposite to what he wrote to her about the *House.* His letter reads:

> "I wrote Maggie but I am afraid it was not a business like letter as I mentioned nothing about how I am going to repay the money only I must have committed a *faux pas* by thanking her etc. You could look up my securities and you will see I have some B.G. Mutual and some Hand in Hand Scrip which I could realize for the *House* but by no means will I sell my Rupununi or Enmore Shares, if anybody would buy the B.G. Mutual and the Hand in Hand Scrip well O.K."

The deceased, as to the method of paying for the house, is here telling his sister one thing and telling his wife another: but this is, in a measure, what the deceased has done with regard to the Gladys Hicken Ltd. shares.

The sudden desire of the deceased to marry after so many years of association with the plaintiff is indicative of a change of heart in more ways than one.

Torn between the conflicting desire to appease the members of his family and a desire to give some fitting bequest to his wife for her devotion to him not only during the long years of his bachelorhood but during the last days of his illness, made, I have no doubt, a compromise with his conscience. It is not unreasonable to suppose that he gave way in favour of his wife who was constantly at his bedside, not in defiance of his blood relatives but in some added recompense and reward for her devotion.

After close examination of all these several aspects of the case and in the final analysis I am constrained and compelled to say that all suspicions aroused in this matter have been completely removed from

my mind. I find as a fact that the testator fully approved of his will made and duly executed by him on the 14th September, 1954, and pronounce for it accordingly.

The counterclaim of the defendant fails. The first will purporting to have been made on or about the 9th June, 1954, but bearing date "3.3.54" I find to have been duly and effectively revoked by the last will of the Testator of the 14th September, 1954, above referred to and herein described as the will in dispute, and I declare accordingly.

Judgment will be for the plaintiff with costs to be taxed.

The defendant in my opinion has come to Court with insufficient evidence but I think the peculiar circumstances and the conduct of the deceased justified him in putting the plaintiff to proof in Solemn Form.

The costs of both parties must be taken out of the Estate.

For the plaintiff I certify for two Counsel.

Solicitors :

H. B. Fraser for plaintiff.

A. G. King for defendant.

ARMSTRONG v. THE GUIANA GRAPHIC LTD.

(In the Supreme Court, Civil Jurisdiction (Stoby, J.) November 4. December 7, 1955).

Master and servant—Notice of dismissal—Ground for dismissal—Wrongful dismissal—Quantum of damages.

The plaintiff was employed by the defendants publishers of a daily newspaper known as the "Guiana Graphic" as Woman's Page Editor, and later as Country News Editor. As a result of an altercation with the managing-director on the 9th of June, 1954, he dismissed the plaintiff who was paid her salary for June, and was given one month's salary in lieu of notice.

Held: From the facts, the plaintiff gave no cause for summary dismissal and was wrongfully dismissed.

Held further: The measure of damages to be awarded to a servant wrongfully dismissed is a sum referable to the wages he was in receipt of and taking into account the time likely to elapse before other employment is secured, subject, however, to two exceptions, viz., where there is a special term in the contract providing for a definite period of notice when the measure of damages would be the wages for that period; and in the case of servants engaged in manual labour, the measure of damages is related to the manner of payment, a weekly or monthly servant being entitled to a week's or month's wages as the case may be.

Judgment for plaintiff.

John Carter for plaintiff.

H. C. Humphrys, Q.C., with *J. A. King* for defendants.

Stoby J.:—The plaintiff's claim against the defendant company is for damages for wrongful dismissal.

The defendant company are the printers and publishers of a daily newspaper known as the Guiana Graphic circulating in the Colony

and of a Sunday newspaper called the Sunday Graphic. In 1947 the plaintiff obtained employment with the company as Woman's Page Editor at $50 per month and in subsequent years obtained promotion until she was appointed Country News Editor and correspondence account clerk at $100 per month.

On the 9th June, 1954, she was in the editorial office when Mr. Brittain the then Managing Director entered. In language which may be described as pungent but certainly not offensive he reproved the plaintiff and another employee for being in the office at 10 a.m. instead of being engaged in obtaining news to enhance the popularity of the newspaper. The plaintiff told Mr. Brittain that she was not accustomed to being spoken to in that way. This remark apparently incensed the Managing Director as he replied that he was not accustomed to being told how to speak to people and instantly dismissed the plaintiff. She was paid her salary for the month of June and one month's salary in lieu of notice.

In the pleadings the company disputed the allegation that the dismissal was wrongful but at the hearing Counsel for the company submitted that the question of justifying the dismissal did not arise as the plaintiff received all the damages to which she was entitled and could not recover anything more. Mr. Humphrys contends as a matter of law that a monthly servant is entitled to a month's notice and no more and since the plaintiff was paid a month's salary she has no cause of action.

Before deciding this legal point I must first decide as a matter of fact whether the plaintiff was wrongfully dismissed as the defendants have not admitted the wrongfulness of the dismissal either in the pleadings or at the trial.

The plaintiff's evidence that Mr. Britain said: "I am the boss get to hell out of here," is unchallenged. It is trite law that an employer can dismiss an employee without notice and without being-liable to damages for insolence or grave misconduct. I cannot regard the plaintiff's remark to the Managing Director that she was not accustomed to being spoken to in that manner as being insolent and deserving of summary dismissal. I must not be understood to mean that I think the remark justified. Employees who work; in commercial firms ought to accept without demur forceful language designed to stimulate their efforts. In a newspaper office speed, keenness, enthusiasm and industry are essential, and all that Mr. Brittain was intending to convey to the plaintiff when he said "I want people who can work and get news. Get to hell out of here and go and find news," was that a newspaper thrives on news and news cannot be found in the editorial room. Mrs. Armstrong's remark then was unnecessary but not insolent. She received a classic reply which all thin-skinned employees should note and had the incident ended there I have no doubt harmonious relationship would have been restored. But Mr. Brittain completely lost his temper and summarily dismissed the plaintiff. As she gave no cause for summary dismissal I find that she was wrongfully dismissed.

I return now to Mr. Humphrys' submission. As long ago as 1847 in *Beckham v. Drake and Surgey,* Vol. 2 H. of L. Cases, 597, Mr. Justice Erle gave the following opinion at page 606:

> "The measure of damages for the breach of promise now in question is obtained by considering what is the usual rate of wages for the employment here contracted for, and what time would be lost before a similar employment could be obtained. The law considers that employment in any ordinary branch of industry can be obtained by a person competent for the place, and ' that the usual rate of wages for such employment can be proved, and that when a promise for continuing employment is broken by the master, it is the duty of the servant to use diligence to find another employment; *Elderton v. Emmens.* Upon these principles, in the present case, if the place of foreman in a type-foundry could not probably be again obtained without delay, and if the wages in the contract broken were higher than usual, the damages should be such as to indemnify for the loss of wages during that delay, and for the loss of the excess of the wages contracted for above the usual rate."

The law was again discussed in *Addis v. Gramophone Company, Limited* (1909) A.C 488, where the plaintiff was employed by the defendants as manager of their business at Calcutta at £15 per week salary and a commission on the trade done. He could be dismissed by six months' notice. In October, 1905, the defendants gave him six months' notice but at the same time appointed another manager and took steps to prevent the plaintiff from acting any longer as manager. In 1906 he brought an action for damages for breach of contract and for an account. He was awarded £600 for breach of contract and £340 for loss of commission. The Court of Appeal by a majority held that there was no cause of action for breach of contract although he was entitled to an account. On appeal to the House of Lords it was held that he had a good cause of action for breach of contract. Lord Atkinson said at page 493:

> "The rights of the plaintiff, disembarrassed of the confusing methods by which they were sought to be enforced, are, in my opinion, clear. He had been illegally dismissed from his employment. He could have been legally dismissed by the six months' notice, which he, in fact, received, but the defendants did not wait for the expiry of that period. The damages plaintiff sustained by this illegal dismissal were (1) the wages for the period of six months during which his formal notice would have been current; (2) the profits or commission which would, in all reasonable probability, have been earned by him during the six months had he continued in the employment; and possibly (3) damages in respect of the time which might reasonably elapse before he could obtain other employment."

The two cases cited above, and there are many others, show quite clearly that the measure of damages to be awarded to a servant wrongfully dismissed is a sum referable to the wages he was in receipt of

and taking into account the time likely to elapse before other employment is secured. There are however two exceptions to this principle. Firstly, where there is a special term in the contract providing for a definite period of notice the measure of damages would be the wages for that period and secondly in the case of what in olden times were called menial servants but might now be more correctly described as servants engaged in manual labour the measure of damages is related to the manner of payment, a weekly or monthly servant being entitled to a week's or month's wages as the case may be.

I do not regard the decision in the case of *Mendelson Ltd. v. De Abreu* (1926) L.R.B.G. 13 as inconsistent with the settled principles I have enunciated. In that case the plaintiff entered into defendants' service at a monthly salary of $75. There was an understanding that the service might be mutually determined by a month's notice from the 8th September and he contended that the notice was not reasonable. Mr. Justice Gilchrist held that a month's notice was reasonable but that it could not be given from the 8th September but should have been from the 1st October. He therefore gave damages for $134 being $59 balance of October's salary and $75 for November. On appeal to the Full Court Sir Charles Major was of opinion that notice should have been given to expire on 31st October and that the measure of damages should be $59 being the balance of salary for October. Mr. Justice Berkeley would have allowed the appeal. The case does not decide that in every instance where there is a wrongful dismissal of a monthly servant a month's wages is the measure of damages. It decided that on the facts of that case there was evidence to justify the Judge in finding that a month's notice was reasonable. Sir Charles Major in the course of his judgment said: "The learned Judge, therefore, had to inquire into the nature of the hiring in order to ascertain what in the circumstances of the case was a reasonable notice." After discussing the evidence led he said "That was evidence whereon the Judge was justified in finding that notice for a month was reasonable."

I must consider then the evidence in this case to determine whether in this case a month's notice is reasonable bearing in mind that the method of payment is a factor, but not the only factor to be taken into account. It may of course be conclusive as it was in *Mendelson Ltd. v. De Abreu* (supra) where no other evidence is led, but where there are other circumstances the method of payment is not necessarily conclusive.

Now in this case the plaintiff said, and her evidence has not been disputed, that after she was dismissed, she applied to the Daily Argosy, the Public Free Library, the Public Service and elsewhere for employment but failed to obtain any. Mr. A. H. Thorne, the present editor of the Guiana Graphic, said that the newspaper field in this Colony is limited, that there are dozens of people applying for employment and there is a waiting list. He added that there are only three daily newspapers in circulation in the Colony.

In the light of this evidence and applying the principles of law already discussed I take the view that a month's notice was not adequate. I recognize that the plaintiff is not entitled to damages because she was annoyed at the manner of her dismissal nor is any sum to be added because of the difficulty in finding employment if that difficulty is due to any slur attaching to her name as a result of her dismissal. But I. am entitled to treat her different from a domestic servant or a clerk in a commercial firm or a saleswoman in a shop because from the very nature of those occupations and the number of opportunities open for employment a month's notice may be—I do not so decide for such a case is not before me—considered adequate.

The evidence of Mr. Thorne that it was his custom to give a month's notice did not establish that he entered into such a contract with the plaintiff or that there is such a custom prevailing in the Colony with respect to the type of work performed by the plaintiff. Mr. Garhutt's evidence was of little help as he spoke of conditions in England which as shown by his cross-examination are not comparable to conditions in this Colony.

Mr. Humphrys invited me to treat this case as one of the utmost importance to the commercial community and insisted that an adverse decision would mean that commercial undertakings would have to enter into written contracts with each employee in order to safeguard themselves. I have endeavoured to show that his fears are entirely groundless as each case of wrongful dismissal depends on its own facts. A more decisive reply to Counsel's anxiety if a reply is necessary, is to advise commercial firms to refrain from dismissing employees without just cause. An employee can be dismissed without notice and in some instances without payment for grave misconduct. An employee who is redundant or whose services are no longer required for some reason or the other should be given reasonable notice such notice according to the nature of the work may be a week, a month, six months or twelve months as the case may be.

It was further contended on behalf of the company that the acceptance by the plaintiff of $200 precluded her from bringing an action. No authority was cited for this- proposition of law and my own researches have hot unearthed any. When a servant is wrongfully discharged he is entitled to treat the contract as continuing and institute an action against his master for the breach of the contract. His acceptance of wages up to the date of the breach does not affect the merits of his action as the contract is presumed to exist until damages have been awarded. Nor can his acceptance of a sum of money sent through the post affect the issue in any way unless prior to the sending of the money there was an agreement express or implied that the sum to be sent would be received in satisfaction of the breach. To hold otherwise would mean that a master who commits a breach of contract can by his own unilateral action assess the damages he ought to pay. The plea advanced by Counsel really amounts

to the defence of accord and satisfaction and as is well known accord and satisfaction involve an agreement. In the absence of an agreement the defence is untenable and in this case no agreement has been pleaded or proved.

As all the submissions made on behalf of the defendant company have failed, the plaintiff is entitled to damages which I assess at $200, being four months' salary ($400.00) in lieu of four months' notice less $200 already paid. The defendant will pay the plaintiff's costs. Certified fit for counsel.

Solicitors :

L. L. B. Martin for plaintiff.

H. C. B. Humphrys for defendants.

KARAMAT v. THE QUEEN.

(In the Judicial Committee of the Privy Council, on appeal from the Supreme Court of British Guiana before Lord Goddard (Lord Chief Justice), Lord Tucker, Lord Somervell of Harrow l4th December, 1955.

Trial—View of locus in quo by jury—No objection to witnesses who hate already given evidence attending view and taking part—Presence of Judge desirable—View part of the evidence—Substitution for or supplemental to plans, photographs and the like—Essential that every effort be made to sec that witnesses make no *communication to Jury except to give a demonstration—Witnesses taking part to be recalled for cross-examination if desired.*

Absence of prisoner from view—Prisoner declining to attend—May be allowed by judge to be absent.

The facts are fully set out at the first and second paragraphs of the judgment.

Held: There is no objection to witnesses who have already given evidence attending a view and taking part.

A view is part of the evidence. It is in substitution for or supplemental to plans, photographs and the like.

So long as the witnesses taking part are recalled to be cross-examined, if desired, the prisoner is in no way prejudiced but it is essential that every effort should be made to see that the witnesses make no communication to the jury except to give a demonstration.

It is eminently desirable that the trial judge should be present at the view.

(*R. v. Martin* & *Webb* (1872) I.R. 1 C.C.R. 378 considered).

If the prisoner declines to attend a view and is allowed by the judge to be absent be cannot afterwards raise the objection that his absence of itself made the view illegal and a ground for quashing the conviction if ore follows.

Judgment of the Board delivered by Lord Goddard:

This was an appeal by special leave from a judgment of the Court of Criminal Appeal in British Guiana dismissing the appellant's appeal against a conviction for murder after a trial before Hughes J. and a jury which their Lordships were told had lasted some 14 days, At the

close of the argument their Lordships announced that they would humbly advise Her Majesty to dismiss the appeal and now give their reasons for the advice which they tendered.

The appellant was indicted with five other persons, all of whom were acquitted, for the murder of Haniff Jhuman who occupied land which adjoined that on which the appellant and members of his family and other relations lived and farmed. There had been frequent disputes between the occupants of the two estates arising out of cattle trespass and undoubtedly there was much ill-feeling between them. There were a series of events and quarrels during the 26th and the early part of the 27th September, 1953, and after a fight in the morning of the latter day it was alleged by the Crown that the appellant obtained a twelve bore gun and two cartridges. Later in the day when the deceased man with others approached a cow pen the appellant who was engaged in milking shot at Haniff and killed him and also shot at and killed the latter's mother. The appellant's defence in the main was that he shot in self defence, while the others who were indicted with him, rested their case on an alibi, contending they were not present when the shooting took place. The case involved the calling of a large number of witnesses, many if not all of them other than the police were, as is evident from the transcript of their evidence, illiterate and of low intelligence with a very poor command of the English language, a class no doubt with whom the judges in the Colony are quite accustomed to deal in their Courts. It is unnecessary for their Lordships to deal with the evidence in any detail because the case before the Board was in substance confined to one matter relating to a view which took place during the hearing. Suffice it to say that not only were there numerous witnesses but a good deal depended on the locality of the crime and where the various witnesses were at the times to which they spoke in their evidence. During the course of the trial and before the case for the prosecution was finally closed, all counsel concerned applied to the judge to direct a view of the locality. It is quite clear from the record, for what purpose a view was desired and the reason why the learned judge granted the application. It was so that the witnesses might indicate to the jury the positions at which they alleged they were at the material times and the direction from which others approached the scene of the shooting and to test the opportunity afforded for identification. The Criminal Law (Procedure) Ordinance of British Guiana provides that the judge if he considers it to be in the interest of justice may direct that the jury have a view of any place person or thing connected with the case upon the terms and conditions which seem to him proper. It is also provided that the practice and procedure in criminal trials including the practice and procedure relating to juries should conform as nearly as possible to that which obtains in England. When counsel applied for a view counsel for the present appellant and counsel appearing for two of the other prisoners submitted that none of the witnesses who had already given evidence should be allowed to attend the view or to indicate any of the points referred to in their evidence. Counsel for two other of the prisoners did not join in this objection and it was disallowed by the learned judge. He asked the jury to indicate which of the witnesses they desired to attend and indicate positions and stated that counsel would have full opportunity to recall and cross-examine any witness on any matter arising from

the view. The jury did intimate the witnesses whom they desired should be present and the learned judge said that the defence might wish some of their witnesses to attend to point out particular places though they had not yet been called. He gave no direction that they were to attend; he only gave permission for them to do so if the defence desired it. Thereupon the appellant's counsel declined to take any part in the view or to cross-examine any of the witnesses who attended and he informed the Court that his client would not attend. The learned counsel did himself go to the view as the appellant's representative but took no active part in the proceedings there nor did he subsequently cross-examine any of the witnesses when they were recalled after the view was held.

The first submission on behalf of the appellant is that a "view" ceases to be a view and is not authorised by the Ordinance if witnesses attend and indicate places by pointing or by words. Their Lordships do not accept this submission. In their opinion the learned judge was perfectly right in deciding that witnesses who had given evidence could attend at the view. In fact there was every reason why they should, and it was just those witnesses from whom the jury would desire to get ocular demonstration of their positions at the material times. It would or at least might enable the jury to understand the evidence they had given. As the Chief Justice pointed out in giving the judgment of the Court of Criminal Appeal the average witness in the Colony is not as capable of giving intelligible descriptions of places as generally speaking are witnesses in the English Courts. As already pointed out these witnesses were illiterate and no doubt would have difficulty in explaining themselves and probably considerable difficulty in following a plan, a difficulty often experienced with witnesses in this country if in a humble station of life. To have held a view in their absence would have destroyed its whole value for it would not have demonstrated to the jury just what they wanted to know. If a view were ordered at some stage of a criminal trial in England, their Lordships are of opinion that it would be no objection to a witness attending and taking part that he had already given evidence. It might well be that it was for that very reason that a view would be valuable. For instance the evidence of a police constable or other witness who might testify that he was keeping watch on a certain place and saw an incident might be challenged on the ground that from the place where he was concealed he could not possibly have seen what he said he had. It might be of the utmost value then to let the jury see the place with the witness in the position to which he had spoken; he might well be able to demonstrate that while a shorter man would not have been able to see the incident or a taller man might have been exposed to view; he could though concealed have seen what he said he did. If a witness at the view put himself in a position different to that which he had described in his previous evidence that would naturally expose him both to cross-examination and comment but as the Court of Criminal Appeal observed this would go to the weight but not to the admissibility of his evidence. In *R. v. Martin and Webb* L.R. 1 C.C.R. 378 a view was directed and two constables went to it to point out where they stood when observing the acts complained of. The Court did not quash the conviction but would not go into the question of whether questions

were asked of the witnesses in the absence of the judge and the prisoners, as there had been no inquiry into this below. Their Lordships are of opinion that witnesses who had already given evidence took part in the view in the sense of placing themselves in the positions in which they said they had been at the material times or indicating the positions of others and that this was unobjectionable. That ground of appeal therefore fails.

It is now necessary to deal with what took place at the view. When giving special leave to appeal their Lordships asked to be supplied with an agreed statement of what took place at the view and one prepared by the respective Counsel engaged has been before them. A marshal and constables having been sworn to keep the jury they were taken in motor cars to the scene of the shooting where they were joined by the judge, counsel and Court officers. At their destination the jury were checked by the marshal and were also checked at any other place where they stopped during the day. Any juror who wanted to ask a question put it through the judge and the witness gave a demonstration as the answer, and counsel were invited by the judge to ask questions through him hut no cross-examination was allowed. Owing to the nature of the locality at some points small boats had to be used to cross or get along trenches and cuts and at some points it was inevitable that jurors, counsel and witnesses got into the same boat or had to walk together along a dam but no witnesses were then asked to show anything. It seems that on one occasion a juror and a witness were in the same boat as one of the counsel for some of the accused who has stated that there was no conversation relating to the case. It is to be specially noticed that the learned judge was present the whole time so that he could observe and control the proceedings. That a view is part of the evidence is in their Lordships' opinion clear, It is in substitution for or supplemental to plans, photographs and the like. In such a view as took place here and the purpose for which it was held there can in their Lordships' opinion be no objection to the judge asking a witness to place himself at a particular spot which he has mentioned in his evidence or to show to the jury the place where someone else stood or the direction from which someone came. There is nothing to show that any more than this took place. The Chief Justice in the Court of Criminal Appeal observed that in the Colony views are far more frequent than in England, for the reasons that have been mentioned above, and the learned judges of that Court who are doubtless thoroughly accustomed to this procedure saw nothing wrong in it nor does this Board. So long as the witnesses taking part are recalled to be cross-examined if desired their Lordships are unable to see that the accused person is in any way prejudiced but they would observe that it is essential that every effort should be made to see that the witnesses make no communication to the jury except to give a demonstration. In *R. v. Martin & Webb* (*supra*) it is clear from the report that neither the judge nor the prisoner attended the view which was held after the summing-up. The Court said there was no irregularity in allowing such a view though such precautions as may seem to the Court necessary ought to be taken to secure that the jury should not improperly receive evidence out of Court. Here everything was done in the presence of the judge who throughout was in control

of the proceedings. It was eminently desirable that he should be present and it is possible that had he not been a different result would have followed. It was however strenuously argued before this Board that as the accused was not present this is a fatal objection. A short answer to this point was made by Mr. Le Quesne for the Crown who pointed out that under the Criminal Procedure Ordinance it is competent for the Court to allow the accused to be absent during a part of the trial. The holding of a view is an incident in and therefore part of the trial and as the Court, on being informed that the accused did not desire to attend, did not insist on his presence this is equivalent to allowing him to be absent. But in addition to this their Lordships desire to say that if an accused person declines to attend a view which the Court thinks desirable in the interests of justice he cannot afterwards raise the objection that his absence of itself made the view illegal and a ground for quashing the conviction if one follows, though he could of course object if any evidence were given outside the scope of the view as ordered. He had the opportunity of attending and declined it. Their Lordships would further observe that the absence of the accused was not made a ground of appeal to the Court of Criminal Appeal and does not appear to have been raised at all in that Court.

One further ground of appeal was raised before the Board; it was said that there was misdirection by the learned judge in that he did not point out or at least sufficiently stress to the jury that the unsworn statements of the various accused persons were only evidence against the maker of the statement and not against the others. Their Lordships have considered the various passages in the summing-up to which their attention was directed and are satisfied that there is no substance in this objection and for the same reasons as were given by the Court of Criminal Appeal.

On all grounds therefore this appeal failed.

LUCK v. SHARPLES

(In the Supreme Court, Civil Jurisdiction (Clare, J.) October 27, 28; November 1, 2; December 17, 1955).

Summary Jurisdiction (*Procedure*) *Ordinance—Section 42* (*b*)*—Justices Protection Ordinance, section 3—Discharge of defendant upon entering recognisance—Refusal to enter recognisance—Arrest for refusal Imprisonment—Writs of Habeas Corpus and Certiorari—Action for false imprisonment.*

L. was found guilty of disorderly conduct by S a magistrate who dealt with the matter under section 42 (b) of the Summary Jurisdiction (Procedure) Ordinance (Cap. 14) (now Cap. 15), and ordered L to enter into a recognisance of $100 with a surety in a like sum to appear for sentence if called upon within 0 months. L refused to comply with this Order. He was allowed to leave the Court, but some 11 days later, he was served with a minute of order signed by S and he was thereafter arrested on a warrant and committed to prison where he was incarcerated for two months. L applied to the Supreme Court for a Writ of *habeas corpus* and a *writ of certiorari*, and the committal was held had, L was discharged from prison,

Upon L bringing a suit against S for false imprisonment.

Held: L should not have been allowed to leave the Court on the day of his conviction upon his refusal to give security, but that he should have been sentenced for the offence for which he was convicted, and that section 58 of Chapter 14 did not apply; that S exceeded his jurisdiction in ordering the imprisonment of L.

Held further: The writs of *habeas corpus* and *certiorari* did not take the place of an appeal, and that L not having appealed, the conviction stands; that having regard to the provisions of section 3 of the Justices Protection Ordinance, Cap. 254 (now Cap. 18), the action must be dismissed.

Action dismissed.

L. F. S. Burnham for plaintiff.

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

Clare J.: In this action the plaintiff's claim is against the defendant for the sum of $50,000.00 (Fifty Thousand Dollars) as damages for false imprisonment of the plaintiff by the defendant at the City of Georgetown, in the County of Demerara and Colony of British Guiana between the 3rd and 29th days of May, 1954, inclusive.

At the trial the plaintiff's case was closed after he gave evidence and the only person who testified for the defence was Frederick Cannon, a Superintendent of Police.

The plaintiff stated in the witness box on affirmation that he is a Barrister-at-Law practising in British Guiana from late in the year 1953. The defendant is and was a Magistrate for the Georgetown District.

On 15th April, 1954, a case of disorderly conduct against the plaintiff was heard and determined by the Magistrate, Richard Sharples, who found him guilty of the offence. This Magistrate then said:

"I find the defendant guilty but I shall treat the matter under "section 42 (b) of Chapter 14.

"A conviction will be recorded and I shall also order you to enter "into recognizance of $100 with a surety in a like sum to appear for "sentence if called upon within 6 months."

The witness continued—

"I there and then intimated to this defendant that since I was conscious "of my innocence I will not sign any bond. I did not sign the Bond. I "did not leave the court immediately. I left the court after the court was "adjourned.

"Immediately I finished speaking the Magistrate replied in nearly "these words:—

" 'The court will not accept the invitation of the defendant however "pressing.'

"I heard him say he would act according to law.'

"Immediately after that he called another case in which I was not "concerned. I was not told by defendant that I was not being given ten "days within which to enter into recognizance,

"Before leaving court I spoke to my counsel,

"On 26th April, 1954, these documents (exhibit 2) were served "upon me.

"I read it and decided not to comply with it. I never complied with "it.

"On 3rd May, 1954, I was arrested by Superintendent Frederick "Cannon and taken to Brickdam Police Station thence to Georgetown "Gaol."

He then recited what he had to endure in prison.

During cross-examination he was asked: "Did you invite him (the Magistrate) to send you to prison?"

He replied:

"I told him that conscious as I was of my innocence I would not "sign any bond nor pay any fine and I invited him to impose the high- "est penalty allowed by law and that he should forthwith commit me to "prison. I never had a fixed determination to go to gaol."

In answer to other questions he said that as an officer of the court he realised that he was flouting the court. He was ready and willing to obey the order the court could legally make. He was convinced that the court could not properly act under that section of the Law.

He did not deliberately go to gaol as part of a concerted plan.

When he got the minute of order signed by the Magistrate he was satisfied that it did not contain the true order made by the Magistrate and he felt that the correct course was for the Magistrate to send for him and ask why he did not sign the bond and sentence him. In any case he felt that the Magistrate could not impose peremptory imprisonment.

When asked: "Were you willing to sign the Bond when notice was served on you?"

He replied—

"I would not have signed the Bond ordered as I knew he was wrong. "Had he ordered me to sign a bond of good behaviour I might have "signed it, if so advised.

"I was prepared to go to gaol rather than sign that Bond."

He was also asked: "If you felt the proceedings were wrong why did you not appeal?"

To this he replied:

"I was represented by my lawyer and he did not advise me it was a fit "one for appeal."

In answer to other questions he said: "I know of the Court of Appeal. I have come to that court on behalf of my clients.

"I do not know that if I had appealed and my views were right that "I would not have gone to gaol."

The evidence of Superintendent of Police Frederick Cannon was

as to the execution of the warrant and the composure of the plaintiff. That comprised the evidence for the plaintiff and the defence.

It was contended on behalf of the plaintiff that—

(1) The English Common Law does not apply to British Guiana as this Colony was ceded to England, Therefore the Magistrate has no Common Law rights as he is entirely a creature of Statute. *R. v. Spratling* not applicable.

(2) A Judicial Act where there is a mistake of fact is protected but not protected where there is a mistake of Law and proof of malice is not a prerequisite where there is a mistake of Law.

(3) A Magistrate's jurisdiction is regulated wholly by Law and section 4 of Chapter 13 regulates Magistrates Common Law Jurisdiction as to offences.

Section 58 of Chapter 14 is irrelevant.

(4) The defendant did not give the plaintiff ten days in the verbal order within which to sign the bond. The defendant therefore subsequently altered the order which he was incompetent to do. Therefore the order on which the warrant was issued was invalid. It was an act in excess of his jurisdiction.

(5) If acting under section 42 of Chapter 14, defendant cannot claim protection offered by section 2 of Chapter 254.

He deemed the offence trivial and was acting under section 42 (b) of Chapter 14. Also cannot claim protection under section 3 of Chapter 254. *Roach v. Luckhoo* (1945) B.G.L.R. 99.

(6) As to the matter of an appeal the order was not a decision within the meaning of section 3 of Chapter 16.

(7) The defendant had no power to make the order. The order was in excess of his jurisdiction.

(8) The plaintiff is entitled to judgment for damages in a substantial sum together with costs.

For the defence it was argued and submitted that—

(a) If the defendant acted honestly and in good faith in the performance of a judicial act he is absolutely protected by the Ordinance and the plaintiff must plead and prove malice and this is supported by *The Royal Aquarium v. Parkinson* (1892) 1 Q.B. 431.

(b) The order is a Judicial Act. The verbal and written orders are one. The Magistrate exercises his discretion in interpreting section 58 of Chapter 14.

(c) The defendant has not exceeded his jurisdiction by reason of anything he did. If he acted honestly under colour of the Ordinance empowering Magistrates to act, even if he has acted wrongly and made an illegal order he is protected by the Ordinance and the plaintiff must plead and prove malice and want of reasonable and probable cause, Supported by *Rati v. Parkinson,* 20 L.J, Mag. Cases 208.

(d) The Magistrate had jurisdiction to make the order. He purported to act under section 42 of Chapter 14 and after conviction which has not been upset or quashed, he purported to order the plaintiff to sign a bond so the question seems to be whether the Magistrate had power to make the order.

Such an order can be made under section 58 of Chapter 14.

(e) Common Law of England is Common Law of British Guiana as set out in section 4 of Chapter 13.

(f) Conviction not having been quashed the plaintiff has no right of action. See Section 3 of Chapter 254.

(g) The powers of a Magistrate arise from Statute but if the Common Law enabled Justices to bind over and punish in default then similar powers would be vested in Justices of this Colony. Supported by *R. v. Spratling* (1911) 1 K.B. 77.

(h) As to damages the plaintiff is not entitled to any but if successful the damages awarded should be nominal having: regard to his conduct and the fact that no special damage has been proved.

A spate of authorities was cited by Counsel for the plaintiff as well as Counsel for the defence and a list was submitted by each. I paid great attention to the arguments and considered the authorities.

The plaintiffs behaviour in the witness box, his demeanour and the manner in which he answered the questions put by the defence convinced me that he was not a witness of truth.

I accepted the evidence of Superintendent Cannon.

1 have considered the evidence of the plaintiff and that of the defence and I find as a fact that—

(1) The order of the Court was never altered.

(2) It was the plaintiff's intention to suffer imprisonment and so he elected not to avail himself of the right of appeal.

As is agreed by both sides the Magistrate purported to act under section 42 of Chapter 14 which reads as follows:—

> "42. 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 ease, of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment—
>
> (a) .....
>
> (b) the Court *may* upon convicting the defendant discharge him conditionally on his giving secur-

> ity, 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."

I find as a fact that upon convicting this plaintiff the Magistrate, this defendant, declared that he would be proceeding under section 42 (b) of Chapter 14. So therefore in accordance with the above section he must discharge the convicted person (this plaintiff) *conditionally* on his giving security, with or without surety, to come up for sentence, thereby merely postponing sentence for the period of six months.

In my opinion the case of *R. v. Spratling* does not apply as it relates to the Probation of Offenders Act, but it is interesting to note the words of Pickford, J., at page 81—

> "To bind him over to appear for sentence when called upon is only "to postpone sentence, and in the meanwhile release the prisoner on "bail."

Upon the defendant refusing to give security, the Statute authorises the Court to do nothing more than to sentence him for the offence for which he has been convicted, namely, Disorderly Conduct. However, the Magistrate may still postpone sentence for 8 days by remanding him in custody. In my opinion section 58 of Chapter 14 does not apply to this type of offence. It is only applicable to offences of a continuing nature. The defendant having refused to give the security the Magistrate had no power to discharge him. He should not have been allowed to leave the Court in the manner described in the evidence.

I am therefore of the opinion that the Magistrate had no authority to order the imprisonment of the defendant Luck for two months for refusing to give security to come up for sentence. By so doing the Magistrate acted in excess of his jurisdiction and cannot claim protection under section 2 of Chapter 254 as is set out in *Palmer v. Crone* (1927) 1 K.B. 804 at p. 808.

In the present case I have to take into consideration the fact that the plaintiff Luck did not appeal and after the time for appeal-had expired he applied for writs of *Habeas Corpus* and *Certiorari.* These writs do not take the place of an appeal so that the conviction is in full force and effect. Goddard, C.J., in *Re Corke* (1954.) 1 W.L.R. 899 said that release on *habeas corpus* is not an acquittal nor may the writ be used as a means of appeal.

The Proviso to Section 3 of Chapter 254 reads as follows:—

"Provided that the action shall not be brought for anything done

"(a) under the conviction or order until after it has been quashed."

This action is for something done under the conviction which is still in full force and effect not having been quashed on appeal.

This case differs from *Reach v. Luckhoo* (1954) B.G.L.R. 99 in that there is a conviction and order from which to appeal.

That being so I am compelled to give judgment for the defendant with costs.

Certificate for Counsel.

Solicitors:

A. R. Sawh for plaintiff.

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

MAHAMMED v. CONYERS

(In the Full Court, on appeal from the Magistrate's Court of the East Demerara Judicial District (Holder, C.J., and Luckhoo, J. (ag.) December 9, 17, 1955).

Dangerous driving—Elements constituting—Whether intention to do dangerous act necessary element—Motor Vehicles and Road Traffic Ordinance, 1940, s.35 (*1*).

The appellant was convicted on a charge that he drove a motor car in a manner dangerous to the public.

On behalf of the appellant it was contended that to constitute the offence of dangerous driving it was necessary for proof to be given of some mental element on the part of the appellant—an intention to do a dangerous act—in addition to proof of negligence on his part.

Held: The proof of a sufficiently high degree of negligence on the part of the driver of a motor vehicle is all that is required to render him liable to conviction of the offence of dangerous driving.

Appeal dismissed.

B. S. Rai for appellant.

G. M. Farmom, Solicitor-General, for respondent.

Judgment of the Court: On the 5th day of May, 1955, the appellant was convicted by the Magistrate of the East Demerara Judicial District on the charge that he, on the 14th day of February, 1955, at Lusignan Public Road, drove car HB 235 in a manner which was dangerous to the public. This charge was laid under the provisions of section 35 (1) of the Motor: Vehicles and Road Traffic Ordinance, 1940 (No. 22 of 1940).

The learned Magistrate fined the appellant the sum of $125 and costs $16.88 in default two months imprisonment with hard labour and in addition he ordered the particulars of the said conviction to be endorsed on the appellant's driving licence. Against this conviction and order the appellant has appealed.

It was argued on behalf of the appellant that the decision of the learned Magistrate was erroneous in point of law because the evidence on the record, even if believed in its entirety, does not constitute the offence of dangerous driving and the decision was one which the learned Magistrate viewing the evidence reasonably could not properly make.

Counsel for the appellant at the commencement of his argument stated that he was not aware of any reported local decision wherein was stated elements which must be proved to constitute the offence of dangerous driving as distinct from the offence of careless driving.

It is to be observed that the provisions of section 35 (1) of the Road Traffic and Motor Vehicles Ordinance, 1940 (No. 22 of 1940) except in so far as they relate to penalty are identical with those of section 12 of the Road Traffic Act, 1930, as amended by the Road Traffic Act, 1934, of the United Kingdom.

Section 35 (1) of Ordinance No. 22 of 1940 provides as follows:—

> "If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable, on summary conviction, to a fine not exceeding two hundred and fifty dollars or to imprisonment for a term not exceeding six months, and in the case of a second or subsequent conviction either to a fine not exceeding five hundred dollars or to such imprisonment as aforesaid or two both such fine and imprisonment."

Counsel for the appellant has urged upon us that while proof of negligence *simpliciter* is necessary in respect of the offence of careless driving, in the case of dangerous driving it is necessary for proof to be given of some mental element in addition to proof of negligence. There must be an intention on the part of the defendant to do a dangerous act.

In support of this submission Counsel referred us to an article appearing in the Criminal Law Review of April, 1953, at pp. 238, 239 under the caption "Dangerous and Careless Driving" where it is stated that the difference between the offences of dangerous driving and careless driving has not been authoritatively defined and that in a case heard a year or two ago at the Birmingham Assizes (unreported) Mr. Justice Sellars said by way of *obiter dictum* that for an offence under section 11 of the Road Traffic Act, 1930, it is necessary to prove some deliberate act as opposed to mere inadvertence.

It appears to us that where, for example, manslaughter is charged as a result of negligent driving of a motor vehicle, a

degree of negligence amounting to recklessness has to be proved by the prosecution. Such a degree of negligence may mean gross neglect to carry out a duty which the law has imposed on the driver to drive the vehicle with the requisite degree of care.

The leading case on this question is that of *Andrews v. Director of Public Prosecutions* (1937) A.C. 576, H.L. At p. 583 Lord Atkin, in the course of his judgment in which the other members of the Court concurred (after referring to the various epithets which were used by Judges in explaining to juries the test which they should apply to determine whether the negligence in the particular case amounted to a crime) said:

> "Here again I think with respect that the expressions used are not, indeed they probably were not intended to be, a precise definition of the crime. I do not myself find the connotation of *mens rea* helpful in distinguishing between degrees of negligence, nor do the ideas of crime and punishment in themselves carry a jury much further in deciding whether in a particular case the degree of negligence shown is a crime and deserves punishment. But the substance of the judgment is most valuable, and in my opinion is correct. In practice it has generally been adopted by judges in charging juries in all cases of manslaughter by negligence, whether in driving vehicles or otherwise. The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide *by* negligence. Simple lack of care such as will constitute civil liability is not enough: for purposes of the criminal law there are degrees of negligence: and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied "reckless" most nearly covers the case. It is difficult to visualize a case of death caused by reckless driving in the connotation of that term in ordinary speech which would not justify a conviction for manslaughter: but it is probably not all-embracing, for "reckless" suggests an indifference to risk whereas the accused may have appreciated the risk and intended to avoid it and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction."

Again at page 584—

> "Sect. 12 of the Road Traffic Act, 1930, imposes a penalty for driving without due care and attention. This would apparently cover all degrees of negligence. Sect. 11 imposes a penalty for driving recklessly or at a speed or in a manner which is dangerous to the public. There can be no doubt that this section covers driving with such a high degree of negligence as that if death were caused the offender would have committed manslaughter. But the converse is not true, and it is perfectly possible that a man may drive at a speed or in a manner dangerous to the public and cause death and yet not be guilty of manslaughter."

It therefore appears to us that on the authority of Andrews' case the proof of a sufficiently high degree of negligence on the part of the driver of a motor vehicle is all that is required to render him liable to conviction of the offence of dangerous driving.

In so far as the facts of the instant case are concerned the evidence led by the prosecution was not rebutted. The learned Magistrate rejected as untrue the story told fey the appellant in his statement, Exhibit "A", made to the Police.

The evidence disclosed that around 8 o'clock on the night of the 14th February, 1955, motor lorry No. L 8388 was proceeding west along the public road at Lusignan, East Coast Demerara, on its proper side (southern side) of the road in a westerly direction while motorcar HB 235 driven at a fast rate by the appellant was proceeding east along the said public road. There was a parked motor car on the northern side of the road leaving a clear space of 13 feet 3 inches of the roadway on the southern side of it. The driver of the lorry brought his lorry to a standstill about 30 feet in front of the car which was parked and while the said lorry was stationary, the appellant's car passed the parked car and then struck the right front fender of the lorry.

It was conceded by Counsel for the appellant that this evidence if believed contained all of the elements of careless driving and that the appellant could be convicted for that offence but that elements additional to those required to support a charge of careless driving were necessary to support a charge of dangerous driving, namely, that there must be evidence of intention on the part of the appellant to do a dangerous act.

This Court cannot say that there was no evidence on which the learned Magistrate could have come to the conclusion that he did, namely, that the appellant was guilty of the offence of dangerous driving.

The appeal is accordingly dismissed with costs fixed at $20:—and the conviction and sentence affirmed.

SOLTYSIK v. JULIEN

(In the West Indian Court of Appeal (Mathieu-Perez, Collymore and Jackson, C.J J.) November 21, 22; December 19, 1955).

Tort—Libel—Defamatory letter—Defences—Qualified Privilege—Rolled-up plea of privilege and fair comment.

The appellant (plaintiff) was at the material time the surgeon specialist at the Colony Hospital. The respondent (defendant) was a member of the local legislature. The appellant had attended in his professional capacity the respondent's son, and as a result of a demand by the appellant of his fees, the respondent wrote the letter which appears in the judgment.

In the Court of first instance, the judge held that the letter was written on an occasion qualified by privilege, but that such privilege was destroyed. He also held that whatever views a commentator may express short of mere abuse or invective they cannot constitute a libel so long as they are the commentator's honest views.

On appeal held: The letter contained statements of fact and the onus was on the respondent to prove that the statements of fact were true or that there had been no mis-statement of facts in the statement of the materials upon which the comment was based and that the comment based on such facts was warranted in the sense that a fair minded man might *bona fide* hold the opinion expressed upon them.

Appeal allowed. Judgment for plaintiff-appellant in the sum of £500 and costs.

F. M. Henry with *Denis Henry* for the Appellant.

H. E. L. Hosten, for the Respondent.

Judgment of the Court: This appeal arises out of an action for libel and slander 'brought by the appellant, who is and was at the material time the Surgeon Specialist at the Colony Hospital, against the respondent. The statements complained of are contained in a letter to the appellant dated 2nd November, 1953. The letter is as follows:—

St. George's
2nd November, 1953.

Dr. Soltysik,
Colony Hospital,
St. George's.

Dear Sir,

You are claiming that my son Wilfred Julien owes you $30 for "consultation fee" when in fact you never had a consultation prior to his operation for appendicitis.

This afternoon you met him and asked for your money and in the presence of a witness you literally threatened him by using these words "You don't intend to pay me but next time you will see." Now, doctor, those words used by a surgeon to a supposed debtor can be interpreted to mean two things to a jury, but to me, that threat can mean one thing only.

I am responsible for the non-payment of that bogus consultation fee, and I tell you this so that if you have the pleasure of knifing me at any time, you may by way of revenge allow your knife to slip because I am not afraid to die. But let me warn you

that I would not stand by and let you or any other man threaten my son for a debt which was not incurred.

Many Grenadians have borne with a heavy heart your demands for the now famous "consultation fee" because they are afraid that "next time they would see."

I am demanding from you an explanation of that threat to my son because now you have started the ball rolling the time for the show-down has arrived.

A copy of this letter has been forwarded to the Administrator and one to the Governor. I expect to have your explanation by noon on Wednesday 4th instant.

Yours sincerely,

W. E. JULIEN.

On the same day the respondent sent a copy of the letter with a covering letter to His Excellency the Governor and a copy to the Administrator. The covering letter to the Governor reads thus:—

St. George's,
2nd November, 1953.

His Excellency,
The Governor,
Grenada.

Your Excellency,

The enclosed copy of a letter which I have just despatched to Dr. Soltysik is intended for your information. I take a grave view of the Doctor's threat and, since I intend to take legal proceedings, failing an immediate satisfactory explanation I have thought it prudent to inform you and the Administrator about my action.

I have the honour to be,
Sir,
Your obedient servant,

W. E. JULIEN.

WEJ:EB

In the statement of claim which was filed on 14th December, 1953, the appellant claimed *inter alia* "that by the words of that letter the respondent meant and was understood to mean that the plaintiff is a cruel, inhuman, revengeful and dangerous person and unfit to be employed as a surgeon at the Colony Hospital because with respect to patients who object to pay the consultation fee charged by the plaintiff, he would in the discharge of his professional duties, by way of revenge take the opportunity to bring about the death of such patients by deliberately causing his knife to slip; and that many Grenadians have paid such consultation fee because they are afraid of the possibility that refusal by them to pay such fee would cause them to be victims of the plaintiff's revenge."

In the defence filed on 18th February, 1954, the respondent admitted publication of the letter, denied that the letter was written

falsely or maliciously, that the words bore or were understood to bear or are capable of bearing any of the meanings alleged by the plaintiff or any defamatory or actionable meaning. Further he set up the defence that the letter was written on a privileged occasion without malice and in a rolled up plea that the contents of the letter amounted to fair comment on a matter of public interest. During the course of the trial for reasons which appear on the record the allegation of slander became of little importance and the case proceeded in the Court below and before us on the allegation of libel only.

In February, 1953, the appellant was under contract with the Government of Grenada receiving a fixed salary. He was not entitled to any operation fees but claims he was entitled to so called consultation fees for consultation practice. On the 17th February, 1953, he operated for appendicitis on one Wilfred Julien, the son of the respondent who was at the material time a member of the Legislative Council. On the patient's discharge he handed him personally a bill for consultation amounting to six guineas. This bill was not paid then and has not in fact been paid. In November, 1953, the appellant saw Wilfred Julien in the street, spoke to him and according to the appellant said "Do you remember if I have examined you before the operation in my office or did I see you in the private block?" Julien replied, "Oh no, you did not see me in your office. I went to Dr. Alexis who told me I had appendicitis. In the night I felt worse and went to hospital and you saw me in the private block." I told him "I see you did not want to pay but next time you will see you will have to pay." At that time one Harbin was present. Harbin in his evidence stated "that he was with appellant and Wilfred Julien came up. The appellant asked him if he was going to pay him his money and Wilfred Julien said he had no intention of paying him as he had paid Dr. Alexis his consultation fee. The doctor asked him who would pay for his girl friend. Wilfred said he did not know. The doctor said "Next time you see what happened." Another version of what took place on that occasion is to be found in the evidence of Wilfred Julien whose evidence was taken *de bene esse* and who stated "while at the hospital and before being operated on I was examined by Dr. Soltysik, the plaintiff, and he advised me to have my appendix removed the same day and it was accordingly done. Before I was discharged the plaintiff presented me with a bill for six guineas for consultation. I did not have a consultation with him at any time. I did see the plaintiff on the 2nd November. He asked me when I was going to pay him his money. I replied I was not aware that I had any consultation with him. He said, "You don't intend to pay me my money; the next time you come to the hospital you will see." This incident was reported by Wilfred Julien to his father, the respondent, as a result of which the respondent wrote the letter complained of. The learned trial Judge stated "There is a sharp difference between the version of the incident in November given by the plaintiff and that given by Wilfred Julien. Oliver Harbin though called as a witness for the plaintiff supported the evidence of Wilfred Julien. Having regard therefore to the weight; of evidence the Court accepts the version as

related by Wilfred Julien as being substantially correct." It is difficult to see why the Judge preferred the version of the incident as given by Wilfred Julien to that given by the appellant, the more so as he was denied the opportunity of seeing or hearing Wilfred Julien and Harbin's testimony does not, in our view, tend to lend any more support to Wilfred Julien's version than to that of the appellant.

In the course of his judgment the learned trial Judge said:

"Notwithstanding the circumstances which provoked the letter, it is a fundamental legal principle that no one shall be permitted to libel or slander another in the course of his professional calling. The plaintiff is a Surgeon Specialist and as such has responsibilities towards his patients, the public, and his employers the Government of the Colony. To ascribe to him willingness to breach those high demands of his professional conduct merely because certain fees were not paid him is undoubtedly *prima facie* a defamatory statement, which can only be countenanced or excused by the legal defences of justification, privilege, or fair comment."

The respondent in the letter under complaint states that "those words used by a surgeon to a supposed debtor can be interpreted to mean two things to a jury but to me that threat can mean one thing only" and that is if the appellant had at any time "the pleasure of knifing" him he may "toy way of revenge allow his knife to slip" because he the respondent was not afraid to die.

It is clear that the letter as a whole is defamatory in the extreme of the appellant in his professional capacity and we agree with the Judge's finding in this respect.

The Judge found that the letter was written on an occasion of qualified privilege but that such privilege was destroyed. With this finding we are in entire accord and against this finding there has been no cross appeal by the respondent. He further found that the defence of fair comment had been established and gave judgment for the respondent with costs.

The grounds of the appeal are:

1. That the judgment in so far as it rested on findings of fact upon which any alleged comment was made or was alleged by the defendant-respondent to have been made was unreasonable and/or against the weight of evidence; in particular, the learned trial Judge mis-directed himself in holding that the witness Oliver Harbin supported the evidence of Wilfred Julien.

2. That the learned trial Judge failed to appreciate and/or was wrong in law in that he failed to appreciate the fact that a true interpretation of the terms of the contract of the plaintiff-appellant with the Government of Grenada was irrelevant to the issues of the action: and that in any event he was wrong in holding that the plaintiff-appellant had no legal or moral right to charge a consultation fee in the circumstances referred to in the said judgment.

3. That the finding of the trial judge as to fair comment is erroneous in the law in that:

(a) He failed to appreciate and give proper effect to his finding of malice in the defendant-respondent the existence of which destroyed both the defence of qualified privilege and fair comment.

(b) That the comment expressed by the defendant-respondent was intrinsically unfair and is not protected merely because it is not inspired by any malicious motive.

(c) That the attack on the moral and professional character of the plaintiff-appellant was not warranted by the facts stated even if they were true, and that such comment was perversely unjust.

4. That the decision of the learned trial Judge is unreasonable and/or against the weight of evidence and accordingly should be set aside.

Before us it has been urged on behalf of the respondent, that he the respondent and his son were the aggrieved parties in as much as the son was called upon to pay a bogus bill and on non-payment thereof was threatened by the appellant that the "next time you will see." There have been no proceedings taken by the respondent as intimated in his covering letter to the Governor.

With regard to fair comment, it is clear law that for a comment to be fair the following conditions must be satisfied :

(a) It must be based on facts truly stated.

(b) It must not contain imputations of corrupt or dishonourable motives on the person, whose conduct or work is criticised, save in so far as such imputations are warranted by the facts.

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

A writer may not suggest or invent facts or adopt as true the untrue statements of fact made by others and then comment upon them on the assumption that they are true. If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail. "If the defendant makes a mis-statement of any of the facts upon which he comments, he at once negatives the possibility of his comment being fair." (*Per Collins M.F. in Digby v. Financial News Ltd.* (1907) 1 *K.B. at page* 508). "In a case where the facts are fully set out in the alleged libel each fact must be justified and if the defendant fails to justify one even if it be comparatively unimportant he fails in his defence." (*Per Lord Porter in Kemsley v. Foot* 1952. *All—E.R. at P.* 506). Further fair comment is not absolute but relative; criticism must not be used as a cloak for mere invective nor for personal imputation not arising out of the subject matter and not based on fact. "Where the public conduct of a public man is open to animadversion and the writer who is commenting upon it

makes imputation on his motives which arise fairly and legitimately only honest but also well founded an action is not maintainable. But out of his conduct so that a jury shall say that the criticism was not it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty he is therefore justified in assailing his character as dishonest." (*Campbell v. Spottiswoode* 3 *B* & *S* 777. 122 *E.R.* 291).

The respondent further contended that as a member of the Legislative Council it was his duty to bring to the notice of the proper authorities the conduct of the appellant in relation to the so-called consultation fees. It is significant that in the letter he states that "many Grenadians have borne with a heavy heart your demands for the now famous 'consultation fee' because they are afraid that "next time they would see." While it may be true that there is some evidence that certain people questioned the consultation fees charged by the appellant there is no evidence of payment by anyone because of fear that non-payment may result in the appellant allowing 'his knife to slip' should further surgical treatment of those persons become necessary. Furthermore an examination of the evidence of the respondent shows that he failed completely to support that allegation; albeit no justification in respect thereof was pleaded. When questioned on this point the respondent sought refuge in this answer: "I meant that though fees were paid by many people in Grenada, is that when people go to the doctor that unless they paid first they would get no attention or proper medical care." It is impossible to see any analogy between the statement given by the respondent in this explanation and the statements recorded in the letter.

The mere fact that the defendant honestly believed the charge to be true is in itself no defence. The learned trial Judge in summing up the situation said: "The language used, the Court has already indicated, was indeed strong, but the point to find is whether, from the language itself, or from the surrounding circumstances, it can be held that the commentator was not expressing his real honest view (though it might differ from a jury's), but rather indulging in abuse or invective under the guise of criticism. The onus is on the plaintiff and if he does not discharge this onus of satisfying the Court that the view was not the honest view of the commentator, he must fail. This onus may of course also be discharged from the document itself. Throughout his evidence, the defendant has impressed the Court that the views expressed are his honest views. The plaintiff, on the other hand, has not been able to destroy that impression or to satisfy the Court, that the views expressed by the defendant were dishonest or so exaggerated as to be incapable of being the reasonable views of an honest man however prejudiced he may be." The Judge evidently thought that whatever views a commentator may express short of mere abuse or invective they cannot constitute a libel so long as they are the commentator’s honest views; on this he is seriously in error and his view is in conflict with authority for the views must not only be honest but also be well founded.

If the contents of the letter had been properly confined to the question whether the appellant was or was not entitled to charge consultation fees, there could be no complaint and we have no doubt that the respondent honestly believed that such consultation fee was not payable. But the contents go much further and impute that the appellant when operating on people who had questioned his fee "may allow his knife to slip"—a graver accusation against a surgeon would be difficult to conceive. Counsel urged that implicit in the words alleged to have been used by the appellant to Wilfred Julien was a threat that should Wilfred Julien return to hospital for surgical treatment that the appellant would do him "harm as a surgeon in that capacity". Assuming that the words used were as deposed to by Wilfred Julien, we are convinced that they are not in the nature of a threat to do violence as interpreted by the respondent.

The onus lay on the respondent to prove not only that the subject matter was one of public interest but also that the words of the letter were a fair comment on it. The Judge, as has already been indicated, found that it was a matter of public interest and that the qualified privilege was destroyed. The letter here contained statements of fact and the onus was on the respondent to prove that the statements of fact were true or that there had been no mis-statement of facts in the statement of the materials upon which the comment was based and that the comment based on such facts was warranted in the sense that a fair minded man might bona fide hold the opinion expressed upon them. It is only when the above onus has been discharged that the burden to prove that the words exceed the limits of fair comment shifts to the appellant. The respondent failed to prove that all the statements of fact contained in the letter are true and we are of opinion that the language used, is so extreme that no fair minded man could in the circumstances honestly have used it. We find the letter defamatory of the appellant and the defences set up fail.

The question of damages remains. The Court in assessing the damages is entitled to take into consideration the conduct of the respondent before action, after action and in Court at the time of the action. The letter was written on 2nd November, 1953; it contains a request for an explanation by a certain time; before that time had elapsed and indeed on the very day the letter was written copies were sent to the Governor and the Administrator. On 10th November, 1953, a letter on behalf of the appellant was written to the respondent. It is as follows:—

10th November, 1953

W. E. Julien, Esq.,
Young Street,
St. George's.

Dear Sir,

I am instructed by Dr. Soltysik, Surgeon Specialist, to write you on the subject of your letter to him dated the 2nd day of November, 1953, which constitutes a grave libel upon my client, in respect of which he is entitled to damages.

The defamatory matter was published by you to persons other than my client, whose professional reputation you have injured considerably.

Dr. Soltysik, is, however, prepared to waive his claim for damages, provided you will sign a suitable withdrawal and apology in terms to be approved by him and will pay the costs he has incurred in this matter.

If you are not prepared to adopt the course indicated above, my instructions are to commence proceedings against you without further notice.

Please let me have a reply before Monday the 16th inst.

Yours faithfully,

F. M. HENRY.

No reply to this letter was sent and indeed the respondent in his evidence stated "When I read letter I tore it up after reading it. I felt I was injured party and I treated the letter with the contempt it deserved." At no time throughout the proceedings has there been any sign of regret shown by the respondent.

In the result the appeal is allowed. The judgment of the trial Judge is reversed, the order set aside and judgment will be entered for the appellant for £500 damages. The respondent will pay the costs incurred in the Court below and of this appeal.

RAMPHUL v. THOMAS

(In the Full Court, on appeal from the Magistrate's Court for the East Demerara Judicial District (Holder, C.J., and Luckhoo, J. (ag.) December 9, 23, 1953).

Sentence—Severity of—Circumstances to he considered.

The principles by which courts should be guided in imposing sentences upon prisoners considered.

L. A. Luckhoo, Q.C., with A. T. Singh for appellant.

G. M. Farnum, Solicitor General for respondent.

Judgment of the Court: The appellant and three other persons were charged before the Magistrate of the East Demerara Judicial District with having broken and entered the shop of Philip Chan and with having stolen therein certain articles and $4 in cash all to a total value of $27.28, the property of Philip Chan, contrary to the provisions of sections 229 (a) of the Criminal Law (Offences) Ordinance, Chapter 17.

The charge laid against the four accused persons including the appellant was an indictable one. On the application of the prosecuting officer and with the consent of the accused as permitted under the provisions of section 60 of the Criminal Justice Ordinance, 1932 (No. 21 of 1932), the matter was taken summarily by the Magistrate.

No evidence was offered against one of the accused and the case against him was accordingly dismissed by the Magistrate. The other three accused including the appellant pleaded guilty to the charge as laid and after statement of facts by the prosecuting officer, were each sentenced by the Magistrate to six months imprisonment with hard labour.

The appellant has appealed against the sentence imposed by the Magistrate on the ground that it was unduly severe. The two other accused elected to serve and are presently serving the sentences imposed upon them by the Magistrate.

At the hearing in the Magistrate's Court, the appellant was represented by Counsel, Mr. A. T. Singh, who shortly before the Magistrate imposed sentence brought to his attention the fact that the appellant was 18 years of age and asked the Magistrate to put the appellant on a bond. The prosecuting officer stated to the Court that the offence for which the appellant and the other accused had been convicted was very prevalent in the District.

In this Court Counsel for the appellant urged upon us that the appellant yielded to sudden temptation; that his was not the act of a professional thief or seasoned criminal and that the appellant was 18 years of age and had a clean record. That the appellant's father is a rice farmer and the appellant assists his father in the cultivation of his rice lands.

Counsel also stated that the appellant was willing to make restitution to the owner of the goods stolen.

Counsel asked that the Probation Officer be directed to make enquiries as to the character and background of the appellant and to report to this Court and that if the report of the Probation Officer is favourable to the accused a fine be substituted for the sentence imposed upon the appellant by the Magistrate or that the appellant be put on a bond.

The Solicitor General contended, however, that the sentence on the appellant imposed by the Magistrate was one half of the maximum sentence which the Magistrate could have imposed on the charge.

In view of the importance of the question of punishment to be imposed upon a prisoner we think it desirable if we restated the principles therein by which Courts should be guided. In the case of *R, v. Kenneth John Ball* (1951) 35 Cr. App. R. 164 Hilbery, J., in restating the principles which must guide a Court in deciding what is the right sentence to pass on a prisoner said :

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court

that when it was passed there was a failure to apply the right principles, then this Court will intervene.

In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe."

A similar view was expressed recently by the Court of Appeal in New Zealand in the case of *R. v. Radich* (1954) N.Z.L.R. 86, where Fair, J., giving the judgment of the Court said :—

"One of the main purposes of punishment is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilised countries, in all ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should hot obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment. If a court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment."

With those views we are in entire agreement.

We have considered very carefully the report of the Probation Officer and while we appreciate the arguments pressed upon us by Counsel who urged a variation of the sentence, yet, having regard to the circumstances of the case and the principles governing the question of punishment to which we have already referred, we are unable to accede to his request to vary the sentence.

The appeal is therefore dismissed with costs fixed at $20 to the respondent. The sentence of the Magistrate is affirmed.

KHAN v. SINGH

(In the Supreme Court, on appeal from the Magistrate's Court for the East Demerara Judicial District (Holder, C.J., Luckhoo, J. (acting) December 16, 23, 1955).

Practice—Magistrate's Court—Jurisdiction—Non-suit.

The plaintiff's statement of claim set out *inter alia* where the plaintiff and the defendant resided and where the occurrence took place. The defence in answer to the plaintiff's claim contained an admission of the facts therein stated and a statement that there was only the question of a *quantum meruit* to be determined by the Court. In those circumstances the defendant had accepted that the Magistrate did have jurisdiction to determine the case and agreed that the only point for the magistrate's determination was the amount of damages payable.

The magistrate declined jurisdiction and nonsuited the claim.

On appeal at the request of the parties the Court assessed the amount of damages to be awarded to the appellant.

The circumstances in which a non-suit may be entered considered. Appeal allowed.

B. S. Rai for appellant.
P. N. Singh for respondent.

Judgment of the Court : In this appeal the Magistrate of the East Demerara Judicial District held that he did not have jurisdiction to hear and determine this case and at the conclusion of the plaintiff's case non-suited the plaintiff.

With regard to the question of jurisdiction, the plaintiff's Statement of Claim set out *inter alia,* where the plaintiff and the defendant resided and where the occurrence took place and the defence in answer to the plaintiff's Statement of Claim was an admission of the facts and a statement that there was only the question of *quantum meruit* to be determined by the Court. In those circumstances the defendant had accepted that the Magistrate did have jurisdiction to determine the case and agreed that the only point for the Court's determination was the amount of damages payable.

This was a civil action and the issues were narrowed down by the parties to the question of *quantum meruit.* In connection with the non-suit of the plaintiff's case it is to be observed that section 3 of

the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, enacts that unless the contrary is in any case expressly provided by Ordinance, any person dissatisfied with a decision of a Magistrate may appeal therefrom to the Full Court of the Supreme Court. As stated by Lucie-Smith, J. in the case of *Smith Bros. & Co. Ltd. v. Scotland* (1907) Applte. J. 13.2.07 "at common law a non-suit was nothing more than a declaration by the Court that the plaintiff had made default in appearing at the trial to prosecute his writ, and no plaintiff could be non-suited against his will. See *Poyser v. Minors,* 7 Q.B.D. 329 and *Kershaw v. Chantler* 26 L.T. 474. Now however, non-suits in the proper sense of this term no longer exist in the High Court, Fox v. Star Newspaper (1898) 1 Q.B. 636 appl. H. of L. (1900) A.C. 19." We are of the opinion that there is nothing in the Summary Jurisdiction (Petty Debt) Ordinance, Chapter 15, which gives the plaintiff a right to claim to be non-suited.

It was laid down in *Giblin v. McMullen* 5 Moo. P.C.C. N.S. 434 (458), if at the close of the plaintiff's case there was no evidence upon which the jury could reasonably and properly find a verdict, the Judge ought to direct a non-suit.

Under the provisions of section 19 of the Summary Jurisdiction (Petty Debt) Ordinance, Chapter 15, if the plaintiff appears tout does not make proof of his claim to the satisfaction of the Magistrate the Magistrate may non-suit him or give judgment for the defendant.

Under the provisions of section 33 of the Summary Jurisdiction (Petty Debt) Ordinance, with certain exceptions, every judgment of the Court shall be final and conclusive between the parties; but the Court shall have power to non-suit the plaintiff in every case *in which satisfactory proof is not given* entitling the plaintiff or the defendant to judgment. As stated by Lucie-Smith, J., in his judgment referred to above and with which we are in complete agreement, such a case contemplates the plaintiff giving proof of his claim and the defendant producing evidence which makes the proof produced by the plaintiff unsatisfactory to the mind of the Magistrate, and the Magistrate also is not so satisfied with the defendant's evidence as to be able to give judgment in his favour. We are also of the opinion that the abject of the legislature was to allow the plaintiff in such cases the right to bring his action again, if he could at any time produce any further evidence which might satisfy the Magistrate.

There was evidence given on behalf of the plaintiff in this matter on which the Magistrate could have found for the plaintiff. In our view satisfactory proof had been given entitling the plaintiff to judgment.

We are accordingly of the opinion that in the particular circumstances of this case the Court of appeal could consider whether the Magistrate was right in determining the two issues and in determin-

ing them as he did. In our view the moment the question of jurisdiction was wrongly concluded by the Magistrate this Court was in a position to hear again the issues which should have been settled by the Magistrate. Under the provisions of section 28 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, this Court is empowered to

> "(a) affirm, modify, amend, or reverse, either in whole or in part, the decision, sentence, or any other made by the magistrate with reference to the cause, or may enter any judgment or make any order which the magistrate ought to have made";

and accordingly this Court is a Court of re-hearing. We therefore entertain the appeal and in the particular circumstances of this case we do not propose to remit the case to the Magistrate with directions for it to be reheard and determined. Both Counsel have agreed that this Court should assess the amount of damages to be awarded to the appellant and accordingly we assess the amount of damages and order that judgment should be entered for the appellant in the sum of $82.50 and costs, $14.70 costs in the Court below and $15.00 costs in this Court.

FRASER v. HEYLIGER

(In the Full Court, on appeal from the Magistrate's Court of the Georgetown Judicial District (Holder, C.J., Luckhoo, J. (acting) December 9, 29, 1955).

Fraudulent conversion—Partnership—Conversion by one partner of partnership property—Fraudulent intent.

The respondent had been entrusted by C at the request of his wife H.C. with the sum of $100, for the purpose of paying duty on goods imported into the Colony by the respondent in partnership with H.C. and had misappropriated that sum of money in order to pay certain of his own debts thereby converting the money to his own use.

The magistrate found, however, that at the time of the conversion the respondent did not have the intention fraudulently to convert the money to his own use.

It was contended on behalf of the respondent that one partner could not in law be entrusted with partnership funds and therefore could not be guilty of fraudulent conversion of the same.

Held: On the evidence as a whole including the respondent's answers to C and to H.C, when questioned by them about the payment of the duty, his statement to the Police and his evidence on oath before the magistrate, the only reasonable conclusion which could be drawn therefrom was that the respondent did have a fraudulent intent when he applied the money given him by H.C. in payment of his debts.

One co-owner can commit an act of conversion in respect of joint property. If one of the two does an act which can be justified only by the right to exclusive possession, then he converts the property. A fraudulent conversion of partnership property to a partner's separate use is wilfully dishonest conduct which amounts to stealing the partnership property.

Appeal allowed.

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

N. J. Bissember for respondent.

Judgment of the Court : On the 12th April, 1955, a Magistrate of the Georgetown Judicial District dismissed a complaint brought *by* the appellant against the respondent for having on the 23rd December, 1954, fraudulently misappropriated the sum of $159.20 the property of Hyacinthe Cunningham, contrary to section 94 (1) (a) of the Summary Jurisdiction (Offences) Ordinance, Chapter 13 as inserted by section 2 of the Summary Conviction Ordinance, 1930 (No. 24 of 1930, and amended by section 4 (b) of the Summary Jurisdiction (Offences) Ordinance, 1946, (No. 6 of 1946). Against this decision of the Magistrate the appellant appeals.

The evidence of the prosecution was to the effect that the respondent and one Hyacinthe Cunningham on the 16th day of October, 1954, entered into a written agreement of partnership whereby the respondent agreed to exert himself to the best of his ability and strictly along commercial lines, to make the business of the partnership—the sale of goods—a profitable one carrying out all the business activities of the partnership and Hyacinthe Cunningham agreed to finance legal transactions of the partnership. The nett profits of the partnership were to be divided equally between the respondent and Hyacinthe Cunningham.

On the morning of the 23rd December, 1954, Hyacinthe Cunningham went with the respondent to the Customs Department to pay the duty on some goods which the partnership had ordered from Germany and which had arrived on that day in the Colony. It was then too late and Hyacinthe Cunningham handed the amount of $160 for payment of the duty to her husband Dr. Cunningham for him to hand to the respondent. Later on the 23rd December, 1954, Dr. Cunningham gave to the respondent at Hyacinthe Cunningham's request the sum of $160 for the specific purpose of paying duty on some goods imported from Germany by the partnership.

Sometime in January, 1955, Dr. Cunningham after making enquiries at the Customs Department discovered that the duty in question had not been paid. Before he went to the Customs Department, Dr. Cunningham had spoken to the respondent and enquired from him if he had paid the duty on the goods and the respondent said that he had done so.

Later that month Dr. Cunningham again spoke to respondent and told him that he had discovered that the duty on the goods had not been paid. Respondent admitted that he had not paid the duty.

Hyacinthe Cunningham also spoke to the respondent on several occasions after the goods had arrived in the Colony and after Dr. Cunningham had given respondent the sum of $160 to pay duty thereon, about the respondent's delay in paying the duty. The respondent told Hyacinthe Cunningham that they were very busy at the Post Office

and that he could get no attendance—that the Parcel Post Office was busy. Later when Hyacinthe Cunningham taxed the respondent with his omission to pay for the duty the respondent stated that he had not paid the duty because he had a "mix-up" with one of the Customs Officers.

In his statement to the Police the respondent alleged that he had borrowed $160 from Dr. Cunningham for the purpose of paying off some debts incurred by him (the respondent) before the partnership was formed and that Dr. Cunningham requested him to apply that amount towards the payment of the amount of duty on the goods abovementioned.

At the hearing the respondent who gave evidence on oath stated in cross-examination:

> "I admit I got the $160.00 from Dr. Cunningham. There was a rush at the Bond which caused me not to pay off the $160.00. Mrs. Cunningham has not asked me several times why I had not paid off the duty. Mr. Cunningham asked me on several occasions why I had not paid the duty and I told him that I could not get clearance of the goods as there was a rush at the Bond. Owing to the strike in London, England, all the ships had come in one rush and had caused confusion at the Bond. I did not return the $160.00 as I had to do the work. I paid off my private debts with the $160.00 and I told the Doctor about this and promised the Doctor that I would give him a note for it. Exhibit "A" is the note and I signed it."

On the 25th January, 1955, the respondent at Dr. Cunningham's request signed what purports to be a promissory note whereby he promised to repay to Dr. Cunningham, on demand the sum of $160 which he received for the purpose of paying duty on goods imported by the partnership.

In his evidence Dr. Cunningham stated that he took this note from the respondent as evidence of his receipt of the money. This the Magistrate said he did not believe but that Dr. Cunningham took the promissory note in settlement of the matter.

The learned Magistrate found as a fact that Dr. Cunningham did give the respondent the sum of $160 for the purpose of paying duty on goods imported into the Colony by the partnership and that the respondent misappropriated this sum of money in order to pay debts and thus converted it to his own use.

The Magistrate found, however, that at the time of the conversion the respondent did not have the intention fraudulently to convert it to his own use, and that at the time the respondent signed the promissory note it completely nullified any fraudulent intent on his part.

The Solicitor General has contended that having regard to the evidence of Dr. Cunningham and of Hyacinthe Cunningham, of the respondent's answers to them when questioned about the payment of

the duty, his statement to the Police and his evidence on oath before the Magistrate, the only reasonable conclusion which could be drawn therefrom is that the respondent did have a fraudulent intent when he applied the money given him by Hyacinthe Cunningham in payment of his debts.

With this contention we are in complete agreement. In our view the reasons given by the Magistrate for his finding that there was an absence of fraudulent intent are unsound.

Counsel for the respondent contended that the learned Magistrate erred when he found that the respondent had converted the money to his own use and further submitted that one partner cannot in law be entrusted with partnership funds and therefore could not be guilty of fraudulent conversion of the some; he also argued that the property in the amount of $160 became money in joint ownership of Hyacinthe Cunningham and the respondent.

We do not agree with this contention. In the case of *Baker v. Barclays Bank, Ltd.* ((1955) 1 W.L.R. 822, in the course of his judgment at p. 827 Devlin, J., said :

> "I think it quite clear that one co-owner can commit an act of conversion in respect of joint property. Of course, the mere fact that he takes possession of it will not be sufficient to amount to a conversion, because he is entitled to the possession of it. Neither party, however, is entitled to exclusive possession, and if one of the two does an act which can be justified only by the right to exclusive possession, then he converts.
>
> That proposition is illustrated by a number of cases. *Wilkinson v. Haygarth* (1846) 12 Q.B. 837 was cited in support of it, and I have looked also at *Morgan v. Marquis* (1853) 9 Exch. 145 and Farrar v. Beswiek (1836) 1 M. & W. 682 where I think that proposition was made abundantly clear. The point is summarised in Pollock on partnership 15th Ed. p. 155, in these words: 'First, what is a fraudulent conversion of partnership property to a partner's separate use within the meaning of the rule? A wilfully dishonest intention, or conduct, which, in the language of Lord Eldon, adopted by Jessel M.R., amounts to *stealing* the partnership property."

We agree with this statement of the law.

On the evidence in this case we are of the view that there was ample evidence that the respondent did fraudulently convert the sum of $160 entrusted to him by Hyacinthe Cunningham for the purpose of applying the same in payment of the duty on the good imported by the partnership.

In the course of his argument Mr. Bissember submitted that the document signed by the respondent and tendered in evidence in this case as Exhibit "A" is not a promissory note but merely an acknowledgement of the receipt of the sum of money stated therein.

Whatever the true nature of Exhibit "A" may be, we are of opinion that it does not have the effect of nullifying and thereby shielding the respondent from prosecution and conviction on the charge as laid. We are of the opinion that the decision of the learned Magistrate cannot stand and that the respondent should have been convicted of the charge as laid.

In the result the respondent is hereby convicted of the charge as laid and is sentenced to pay a fine of $200 in five equal instalments commencing on the 31st January, 1956 in default three months imprisonment with hard labour.

CHAN v. NARAYAN

(In the Full Court, on appeal from the Magistrate's Court of the Georgetown Judicial District (Holder C.J., and Luckhoo, J. (ag.) October 12; December 31, 1955).

Intoxicating Liquor Licensing Ordinance—Grant of Certificate—Application for provisional grant—Application for final grant—Whether deposit of plan of premises sought to be licensed required with application for final grant.

The respondent applied for the provisional grant of a certificate under the Intoxicating Liquor Licensing Ordinance, Chapter 107, in respect of a building about to be constructed on premises situate at D'Edward Village, West Coast, Berbice, for use as a spirit shop. A plan of the proposed building was filed with the application. The application was granted and subsequently the respondent applied to make final the provisional grant. A plan of the building was not filed with the latter application but at the hearing of that application the plan filed with the former application, and which had not been uplifted after the determination of the former application, was tendered in evidence at the hearing of the latter application which was granted.

On behalf of the appellant it was contended that a plan of the building sought to be licensed should have been filed with the application to make final the provisional grant.

Held: On an application under the provisions of section 27 (2) of the Intoxicating Liquor Licensing Ordinance, Chapter 107, to make final a provisional grant of a certificate for the issue of a licence in respect of new premises constructed for use as a spirit shop it is not necessary for a plan of the building sought to be licensed to be filed with the application.

Appeal dismissed.

H. Matadial for respondent.

B. O. Adams for appellant.

Judgment of the Court: On the 10th August, 1953, the Intoxicating Liquor Licensing Board for the County of Berbice granted an application made by the respondent for the provisional grant of a certificate for the issue of a licence in respect of a building about to be constructed at West Half of lot 19, Section F, at D'Edward Village, West of the Public Road, D'Edward, West Coast, Berbice, for use as a spirit shop.

As required by See. 13 (1) of the Intoxicating Liquor Licensing Ordinance Chap. 107 "a plan of the proposed building had been filed with that application.

On the 20th November, 1953, the respondent made application for a certificate for a spirit shop licence to sell Intoxicating Liquor in the building situate at the abovementioned place. The form of this application closely followed that set out at form 1C in the schedule of forms to the Intoxicating Liquor Licensing Ordinance, Chapter 107.

A plan of the building sought to be licensed was not filed with this application but it is to be observed that the plan filed with the application for the provisional grant had not been uplifted until it was tendered in evidence on the hearing of the application made on the 20th November, 1953.

The Intoxicating Liquor Licensing Board for the County of Berbice after hearing evidence of the applicant and of his witnesses and evidence for the opposers, granted the application on the 18th January, 1954.

From that decision of the Board the appellant, who was one of the opposers to the application, appealed. At the hearing of the appeal Counsel for the appellant submitted that the Board exceeded its jurisdiction because—

(a) the applicant (respondent) failed to deposit with his application with the Comptroller of Customs and Excise, a plan of the house, shop or premises sought to be licensed;

(b) the applicant (respondent) made an application for an original grant and not an application to make final a provisional grant for a certificate for a spirit shop licence to sell intoxicating liquor, as the Board wrongly held in its memorandum of reasons for decision.

Counsel for the appellant argued that the application made by the applicant on the 20th November, 1953, was one for the original grant of a certificate for the issue of a spirit shop licence and not one to make final the provisional grant made on the 10th August, 1953; that even if the application could be regarded as one to make final the provisional grant it would in either case be necessary by reason of the provisions of section 13 (1) (b) of the Intoxicating Liquor Licensing Ordinance, Chapter 107, for the applicant to deposit together with his application a plan of the building sought to be licensed, failing which the application would be void. Counsel for the appellant further contended that the respondent having made the application in that form it must be presumed that he had abandoned the provisional grant made to him.

Counsel for the respondent, however, contended that the application was one to make final the provisional grant made on the 10th August, 1953, and was not one for the original grant of a certificate for the issue of a spirit shop licence; that no form of application for

making final a provisional grant has been prescribed by the Ordinance and that the respondent accordingly drafted his application using form 1C as a model.

Counsel for the respondent farther urged that having regard to the provisions of section 27(2) and (3) of the Ordinance it is not contemplated that on the application to make final provisional order there should be any hearing of objections by the Board. That so long as notice of such application has been given as required by the Board at a general licensing meeting and if the Board is satisfied that the premises have been completed in accordance with the plans submitted by the applicant with his application for the provisional grant, the final order must be made by the Board.

Counsel for the appellant has not suggested that the Board at any general licensing meeting required notice to be given by the applicant in the way prescribed by paragraph (b) of subsection (1) of section 13 of the Ordinance.

We are of the opinion that in the circumstances of this matter the application made by the applicant on the 20th November, 1953, was an application to make final a provisional grant and although it could have been framed in clearer terms this Court does not find such failure on the part of the applicant substantial enough to vitiate the application, having regard to the fact that no set form of application has been prescribed by the Ordinance and that the nature and purpose of the application may be gathered from its terms. We do not agree with the contention of Counsel for the appellant on this point.

On the second point of the ground argued, Counsel for the appellant contended that even assuming that the application was one for making final a provisional grant the applicant was required to deposit with the application a plan of the building sought to be licensed. He further submitted that the provisions of paragraph (b) of subsection (1) of section 13 of the Ordinance applied to such an. application.

Counsel for the respondent submitted in reply that the provisions of paragraph (b) of subsection (1) of section 13 of the Ordinance did not apply to applications for making final a provisional grant but that such applications fell within the provisions of subsection (2) of section 27 of the Ordinance. Counsel contended that these latter provisions did not require the deposit with such an application of any plan of the building sought to be licensed, and that having regard to the words "The declaration shall be made if the Board is satisfied that the premises have been completed in accordance with the plans aforesaid" in that subsection, and that there is no previous mention of plans in that subsection, it is clear that the plans with which the Board is to be concerned are the plans referred to in subsection (1) of that section—that is the plan annexed to the application for the provisional grant.

Counsel for the respondent referred us to the provisions of section 33 (2) of the Licensing Act, 1910, of the United Kingdom (which is in the material provisions identical with those of section.27 (2) of the

local Ordinance) and to note (b) of Paterson's Licensing Acts, 39th Edition (1929). At that note it is stated:

> "(b) It is imperative on the justices to grant the final licence after the provisional grant is made and confirmed if satisfied that the plan has been carried out, and as to the character of the applicant; but they cannot be said to be merely acting ministerially when called on to do so. In one case the justices assented to the grant, subject to the applicant finding a more satisfactory site, which he agreed to do. The justices never met again nor assented to any other site, and it was held that the applicant was entitled to act upon the original plan shown to the justices (*R. v. Cox* (1884), 48 J.P. 440). "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., that the house shall when completed, be in accordance with the plans which they have sanctioned, and that a fit person is the holder of the licence. These are the only two conditions on the failure of which the justices can object to make the provisional licence final": Lord Coleridge, C.J., in *R. v. London County JJ., infra.*

Should the building not be completed within the licensing year, the owner is entitled to apply for a renewal as in other cases, and to appeal to quarter sessions if such renewal is refused (*R. v. London County JJ.* (1889), 24 Q.B.D. 341; 54 J.P. 213; 59 L.J.M.C. 71; 62 L.T. 458; 38 W.R. 269). So, too, if the house is completed, or a final order asked for but refused, the provisional grant may be still renewed by the justices, or on appeal, to enable alterations to be made (ibid.). The licensing justices are to make the final order, and the confirming authority need not again confirm the final licence.

The application for a provisional grant must be made at the general annual licensing meeting or the adjourned meeting. The final order is to be made after such notice has been given as may be required by the justices at the general annual licensing meeting or a special sessions held for licensing purposes. There seems to be no limit of time within which the applicant must apply for the final order; but a reasonable time may be said to be implied, for if delayed the interests of third parties, who would otherwise apply, may be interfered with.

Where the plan approved by the justices had been designed for a level site, and the owner, when about to build, asked the justices to allow certain small alterations adapting to a sloping site, which they refused, the court held the owner was entitled to make the alterations on his own authority, as they were not material (*R. v. London County J.J., supra*). And in a similar case, on the justices refusing to make a final order because the original plan had been confirmed by the confirming authority,

> the court held that the licensing justices had power, without consent of the confirming authority, to make a final order, notwithstanding the alterations, as these were not substantial alterations (*R. v. Pownall* (1890), 54 J.P. 438; 62 L.J. M.C, 174; 62 L.T. 418; 6 T.L.R. 282)."

This appears to us to be the correct view of the law on this point.

We are in complete agreement with the submissions of Counsel for the respondent and consequently are of the view that it was not necessary for the applicant to deposit with his application of the 20th November, 1953, a plan of the building sought to be licensed as a plan of the building had already been deposited by the applicant with his application for a provisional grant.

Counsel for the appellant at the hearing of this appeal either abandoned or did not press upon the Court any argument in regard to the further grounds of appeal.

In the result we are of the opinion that the appeal fails.

Appeal is accordingly dismissed with costs fixed at $60 to the respondent.

SAMPAT v. SANSCULOTTE

(In the Supreme Court, Civil Jurisdiction (Stoby, J.) June 9, 14, 1954; February 9, 1955).

Slander—Innuendo—Fair comment—Qualified privilege—Imputation of dishonesty.

The plaintiff from 1950 to 1952 was Chairman of the Sheet Anchor Local Authority. In August, 1952, the defendant was not a councillor but was a person interested in village affairs.

The plaintiff alleged that on the 11th August, 1952, at Sheet Anchor Village, the defendant falsely and maliciously spoke and published of and concerning the plaintiff the following words:

> "One pay day I came in the Village Office when labourers were being paid and I peeped through the window and observed that the Chairman had just finished paying labourers and that there were still remaining a coil of notes about $80:—which the Chairman shoved into his pocket and walked out the office, and it would appear that he wants to start the same racket this year and we are not prepared to stand to it."

The plaintiff claimed damages for slander. The defendant admitted that he spoke and published the said words but made no attempt to justify the use of the words if they were interpreted as meaning that the plaintiff had committed and was committing a criminal offence. For the defendant it was contended that the words were not in their natural meaning slanderous and were capable of two interpretations one innocent and one defamatory.

The defendant also relied on the defences of fair comment and qualified privilege.

Held : The words were *prima facie* slanderous and therefore the onus shifted to the defendant to show by circumstances known to persons to whom the words were published that they were not understood in a defamatory sense. This onus the defendant failed to discharge.

The facts stated were untrue and the plea of fair comment failed.

The defendant was actuated by malice in making the statement which he knew to be untrue and therefore the defence of qualified privilege also failed.

Judgment for the plaintiff.

Stoby, J.: The Plaintiff's claim is against the Defendant for $1,000:— damages for slander.

In paragraph 2 of the Statement of Claim, it is pleaded that, on the 11th August, 1952, at Sheet Anchor Village, Canje, Berbice, the Defendant falsely and maliciously spoke and published of and concerning the Plaintiff the following words:

> "One pay day I came in the Village Office when labourers were being paid and 1 peeped through the window and observed that the Chairman had just finished paying labourers and that there were still remaining a coil of notes about $80:—which the Chairman shoved into his pocket and walked out the office, and it would appear that he wants to start the same racket this year and we are not prepared to stand to it."

The innuendo which the Plaintiff places on these words are that, he was a man of a dishonest character and that after he had completed the payment of labourers, he had stolen about eighty dollars ($80:—), the property of the Sheet Anchor Local Authority; that he was in the habit of stealing money from the Authority by making false entries in the paylist and collecting the excess after paying off labourers and was thereby guilty of falsification of accounts or fraudulent conversion.

The Defendant by paragraph 1 of his defence admits that he spoke and published the said words but by subsequent paragraphs pleads that they are incapable of having the alleged meaning and without such meaning they are true in substance and in fact.

At the close of the evidence Mr. Fung-a-Fatt submitted that the words were capable of two interpretations, one innocent and the other defamatory and in consequence thereof the circumstances under which the words were used should be taken into account in deciding which interpretation ought to be ascribed to the words. In support of his submission he cited the case of *Capital and Counties Bank v. Henty* (1882) 7 *A.C* 741. What that case really decided, is that where words In their natural meaning are not libellous and there is an innuendo which gives to the words a secondary meaning, then unless the inference suggested by the innuendo is one which reasonable persons would draw, the onus is on the Plaintiff to adduce evidence of circumstances from which the secondary meaning can be imputed.

In an action for slander a Plaintiff who alleges he has been slandered can contend that the words published of and concerning him are actionable without an innuendo or he may place an innuendo on the words. In this latter case he is entitled to show by evidence that the persons to whom the words were published understood them to have a special meaning in view of facts or circumstances known to them. If, however, the words cannot be said to have a plain and definite

meaning hut are ambiguous so that they might or might not bear the meaning ascribed to them, then witnesses can be called to say how they understood them. If the Plaintiff can lead evidence designed to prove that the words were understood in a certain way, there is nothing objectionable, as I see it, in permitting a Defendant to show by previous conduct and known facts that the words even though capable of bearing a slanderous meaning could not be so understood by the persons to whom they were published. But in such a case the onus is on the defendant.

The first consideration then, is to arrive at the natural meaning of the words admittedly published of and concerning the Plaintiff.

In Grey v. Jones (1939) 1 *All E.R.* 798 *at p.* 803 *Atkinson J.* referring to the argument that the words "you are a convicted person" were not actionable without proof of special damage as the words could not mean that the person was in jeopardy of a criminal prosecution but had already been convicted said: "I think the real test is whether or not reasonable people could reasonably take those words to mean that the Plaintiff had done something for which she could be put in prison."

Applying the test which that case decides is the proper test to be applied I find no difficulty in construing the words set out in paragraph 2 of the Statement of Claim. A reasonable man not knowing anything of the ramifications of village politics, unfamiliar with the conflict between rival racial factions and innocent of the intrigue which abounds in small communities where lust for power is more important than opportunity for service, could have no illusions as to what was meant if a councillor said of his chairman that while he (the councillor) was peeping through a window of the Village Office he saw the Chairman place a roll of notes in his pocket after paying wages, and walk out of the office and he was not prepared to permit it to continue.

Prefacing his observations with the words "peeping through the window" implies and can only imply that the councillor had previous knowledge of the Chairman's unscrupulousness and it was only through being vigilant and discreet the fraud was discovered. The concluding words that the Chairman "wants to start the same racket this year and we are not prepared to stand to it" could only mean, in its context, that the Chairman had appropriated Village funds the previous year and had begun to do so again. The word "racket" although not mentioned in any dictionary is of sufficiently common use in this country for any Guianese to know its meaning and implications. I have no hesitation in finding that the words are unambiguous and in their ordinary meaning are slanderous.

If the words are *prima facie* slanderous, the onus is shifted to the Defendant, as I said, to show by circumstances known to the persons to whom the words were published that they were not understood in a defamatory sense.

Tomlinson v. Brittlebank (1833) 4 *B.* & *Ad.* 630; 110 *E.R.* 593.

Not only has the defendant made no effort to discharge this onus but the plaintiff has called some of the persons to whom the words were

published and those persons gave no support to the defendant. It is enough to say that he has not discharged the onus.

The defendant made no attempt to justify the use of the words if they were interpreted as meaning that the plaintiff had committed and was committing a criminal offence. In fact, in his evidence he categorically states that he never meant that the plaintiff was guilty of a criminal offence but that his personal business was so interwoven with the Council's business that it ought not to be tolerated.

In *Newstead v. London Express Newspaper Ltd.* (1940) 1 *K.B.* 377 the principle of law was once again reaffirmed that the intention of the defamer is immaterial except on the question of damages. A councillor who avails himself of his democratic right of freedom of speech should be careful when criticising, to avoid fits of rage and should guard against the use of intemperate language. He must say what he means and not defame his fellow councillors and seek to excuse his language by the childish statement that he did not mean to be insulting. The weakness of a defence of this nature is illustrated, when I confess that until the defendant went into the witness-box I was under the impression from the cross-examination that the defendant was going to prove some impropriety in the plaintiff's conduct. I never gathered that it was conceded that the plaintiff was entitled to the $80:—he put in his pocket. I was of the opinion that the suggestion was that the Chairman had taken the $80:—as a result of giving work to various persons and was a bribe.

Although in the light of the defendant's admissions, there is really no defence to this action—I will deal with the question of privilege and fair comment at a later stage—it is relevant in assessing damages to take some account of what admittedly happened at the Village Office in August, 1951.

From 1950 to 1952 the plaintiff was Chairman of the Sheet Anchor Local Authority. During 1951, the necessity arose for certain work to be done to a culvert and one Azeez was employed to do it and authorised to engage labour. On the completion of the work the pay-sheet was prepared by the Chairman, the plaintiff, as the overseer was ill. The amount due to Azeez was $182:—and he was paid on the 3rd August, 1951. While work was in progress Azeez was in the habit of obtaining goods from a shop owned by the Chairman and on the day when payment was made he owed the Plaintiff $70:— or $80:— This transaction is the cause of what transpired at the Village meeting in August, 1952. In August, 1951, the defendant was not a councillor but was interested in Village affairs. He says that as a result of a letter written by some of the labourers employed by Azeez he went to the Village office on the 3rd August, 1951, and in looking through the window saw the Chairman who was paying labourers put about $80:—in his pocket. He felt at the time that the Chairman was mixing his personal (business with the Village business. If that is truly what the Defendant felt about the transaction he is, for this Colony, an unusually liberal-minded individual. The average person who hears of a village chairman paying labourers would regard that act alone as enough to excite suspicion and if in addition the chairman pockets $80:—of the

money on the pay table he would consider his suspicions confirmed. But in those circumstances a prudent person should report the matter confidentially to the District Commissioner or to the Superintendent of Police in charge of the country station and not store it away and make wild accusations a year after.

The Plaintiff denies that he paid labourers on the 3rd August although it is evident that the pay-sheet was prepared by him. There is a preponderance of evidence in favour of the plaintiff that he did not make the payment. The overseer says that despite his illness he it was who paid, and Azeez corroborates him. Azeez admits owing the plaintiff $70:—which was paid the same day.

I take the view that the Defendant heard of the letter Ex. "D" to the District Commissioner in which certain labourers complained:

> "We worked cleaning trenches in the Sheet Anchor section, No. 2 section and Palmyra section. We agreed to do the work at whatever price was being paid by the Village. This we were told by Azeez who headed the gang that the price was 14 cents per rod all through, but we subsequently found out that the price for No. 2 and Palmyra is 16 cents per rod.
>
> We got advance by way of foodstuffs and rum from the Chairman Mahadeo Sampat which we are prepared to pay for but we understand we will not be paid individually by the overseer but that the overseer will pay Azeez who will pay Mr. Sampat for goods etc. that he Azeez had as well for that which we had. This we object to and would like the individual amounts we worked for entered in each man's name who will give a receipt for his amount.
>
> We would like also that you be apprised of the fact that Azeez owes the Chairman quite a lot of money individually for goods, liquor and cash and we are quite sure that if our money is paid through Azeez it will be paid over to the Chairman for his debt. We assure you Sir that the chairman overseer and Azeez has been together drinking in the Chairman's premises and are in league with all this we complain of.
>
> We further must report to you that the culvert for which $15:—is in the pay list has not been cleaned only the muck or dirt which was in front and behind the culvert was removed.
>
> We again assure you Sir that there are quite a few things we can say further *re* collusion between the Chairman and men in general who head gangs that work in the District"

and also heard of the payment by Azeez to the Chairman and concluded that the chairman was enriching himself at the expense of the Village.

In my view the incident is brimful of suspicion and careful investigation should have been undertaken by the District Commissioner. There is nothing wrong in a Chairman of a Village extending credit to employees of the Council but in such a case he ought not to play a prominent part, as this Chairman did, in awarding the contract, sanctioning a payment, of one penny a rod to the contractor in excess

of what the contractor paid to his labourers, and preparing the pay-sheet.

Without casting any doubts on the importance of the functions of a Chairman of a Village Council it ought to be remembered that owing to the temporary nature of a chairman's tenure of office his main function is as a policy maker while the proper administration of the Village should be left to the permanent officials. A Chairman ought not to so conduct himself as to give rise to the suggestion that he personally employs labour and prepares pay-sheets in order to obtain an unfair advantage over his competitors. When I come to assess damages I shall take into account the circumstances of suspicion that I have mentioned.

The defence of fair comment on a matter of public interest can be shortly dealt with. The law is stated in *Joynt v. Cycle Trade Publishing Co.* (1904) 2 *K.B.* 292 *at p.* 753 *by Kennedy J.* where he said:

> "The comment must be such that a fair mind would use under the circumstances, and it must not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and further it must not convey imputations of an evil sort, except so far as the facts truly stated warrant the imputations."

The Defendant as a Councillor was entitled to criticise the Plaintiff's method in obtaining payment of money due to him. If he suspected that Azeez was bribing the Chairman he was entitled to move a motion for the appointment of a committee to investigate the circumstances under which the money was paid. But as he did not see the Chairman take any money and as he had no evidence of bribery or falsification of accounts or of any criminal offence, and as he himself admits that his language was intemperate and he was not accusing the Chairman of dishonesty, he ought not to have made unfounded statements of fact.

It is recognised that the Defendant's defence is not one of justification hut of fair comment and that there are vital differences in the two defences, the most important being that in the former the comment as well as the facts were to be justified while in the latter it is enough if the comment is fair and the facts justified. As I have said the defendant has not justified the facts and consequently this limb of the defence fails.

In paragraph 4 of the Defence the defendant pleaded:

> "That the defendant was at that said date a member of the Sheet Anchor Local Authority. The meeting of the said Local Authority of the said 11th day of August, 1952, was convened to discuss the affairs of Sheet Anchor. The defendant made a speech and in the course of such speech the defendant spoke the words set out in paragraph 3. The defendant did so in the bona fide discharge of his duty as a councillor and without malice towards the plaintiff; and the said words were published only to the members of the said Local Authority, the District Commissioner and the Assistant District Commissioner, who had a corresponding

interest and duty in the matter. The occasion was therefore privileged."

All the authorities on the subject of qualified privilege were reviewed in *Watt. v. Longsden* (1930) 1 *K.B.* 130 *C.A.; at p.* 142 *Scrutton L.J. said:*

> "By the law of England there are occasions on which a person may make defamatory statements about another which are untrue without incurring any legal liability for his statements. These occasions are called privileged occasions. A reason frequently given for this privilege is that the allegation that the speaker ha3 "unlawfully and maliciously published," is displaced by proof that the speaker had either a duty or an interest to publish and that this duty or interest confers the privilege. But communications made on these occasions may lose their privilege: (1) they may exceed the privilege of the occasion by going beyond the limits of the duly or interest, or (2) they may be published with express malice, so that the occasion is not being legitimately used, but abused."

Again, at page 147 he refers to what Lord Atkinson said in *Adam v. Ward* (1917) *A.C.* 309 *at p.* 335:

> "It was not disputed, in this case on either side, that a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential."

A Village Councillor at a duly constituted meeting clearly has an interest or a duty to comment on the affairs of the Village and the councillors present as well as the District Commissioner and members of the public have, I doubt not, a corresponding interest or duty to receive the comments. It would seem then that a qualified privilege attached to the occasion when the slanderous words were used and the privilege will only be lost, if I think, as I do, that there was malice.

When there is qualified privilege it matters not that the words are slanderous provided the person uttering the slander honestly believes the statement to be true.

The very nature of the language used by the defendant and my previous finding of fact are sufficient for me to hold that the defendant was not actuated by any honesty of purpose but by express malice. No man who says I saw something happen when in truth he did not see anything happen can afterwards expect to be believed when it is urged that his motive in being untruthful was the honourable one of protecting the community's interest.

Apart, however, from the inference to be drawn from my finding that the defendant never witnessed any incident at the pay office, there is abundant evidence of express malice. The previous conduct of the defendant towards the plaintiff and his attitude at meetings shows that he was obsessed with the idea that the plaintiff is dishonest and he was determined to expose him. He may be right in his belief and if he relied at meetings on what he was told he may be

on safe ground, but when he exaggerates and when he accuses the plaintiff of being a damn scamp as he did to Mohamed Faizol, accused him of stealing as he did to Sonny Morgen and James Ince, then the privilege is completely lost.

Early in this judgment I indicated that I was entitled to take all the surrounding circumstances into account in assessing damages. Added to what 1 have already said I bear in mind that in these Village communities accusations of dishonesty are not attended with the same serious results as would be expected in a large town. For these reasons I award the plaintiff the sum of $300.00 damages with costs to be taxed. Certified fit for Counsel.

Solicitors:

R. N. Tiwari for Plaintiff.

M. E. Clarke for Defendant.

de FREITAS v. THE COMMISSIONER OF INCOME TAX

(In the Supreme Court, on appeal from the Commissioners of Income Tax (Boland, J.) February 16, 23, 1955).

Income—Scrip in Fire Insurance Company assigned to minor by way of absolute gift—Income therefrom taxable against the transferor even where transfer not made for purpose of avoiding payment of tax—Whether scrip "property"—Section 41C of Income Tax Ordinance—Section 11(2) of the Hand-in-Hand Fire Insurance Company Ordinance, 1938.

The appellant in 1052 assigned scrip in a Fire Insurance Company to the total value of $69,050.00 to his daughter M. J. de F. a minor by way of absolute gift. The assignment was duly registered by the Company.

During 1952 the interest on the scrip amounted to $1,395.87 which the. Commissioner of Income Tax claimed to be taxable as against the appellant by virtue of the provisions of section 41C of the Income Tax Ordinance, Cap. 38, as inserted by section 20 of the Income Tax (Amendment No. 2) Ordinance, 1951.

It was submitted on behalf of the appellant that proof by the appellant that the transfer of the scrip was not made for the purpose of avoiding the tax would exempt the appellant from payment of tax during the minority of the transferee.

It was also submitted on behalf of the appellant that scrip was not "property" within the meaning of that term in section 41C of Chapter 38.

Held: That having regard to the provisions of section 11(2) of the Hand-in-Hand Fire Insurance Company Ordinance, 1938, the word "property" includes scrip in that company and that accordingly the appellant was liable to tax under the provisions of section 41C of Chapter 38 even though the transfer of the scrip was not made for the purpose of avoiding tax.

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

G. M. Farnum, Solicitor General for respondent.

Boland J.: The question in this appeal is whether interest in certain scrip in the Hand-in-Hand Mutual Fire Insurance Company, Limited, is correctly taxable as against the appellant. The facts are not in dispute. The appellant assigned scrip to the total value of $69,050.00 to his daughter, Mary Johnette de Freitas, some time during the year 1952 by way of absolute gift. The assignment was duly registered by the Company. During the year 1952 the interest on the

scrip amounted to $1,395.87, which the Income Tax Commissioner claims to be taxable as against the appellant, and so assessed him in the Assessment year 1953 by virtue of section 41C of the Income Tax Ordinance, Chapter 38, as amended by the insertion therein enacted by section 20 of the Income Tax (Amendment No. 2) Ordinance, 1951.

Bound by the decision of the West Indian Court of Appeal in *Commissioner of Income Tax v. Mackenzie and Mackenzie* (*No.* 2 *of* 1953 *Barbados*), where an enactment similar to that of section 41C of the Ordinance, Chapter 38, operates, I have rejected the submission of Mr. Stafford that proof by the appellant that the transfer of the scrip was not made for the purpose of avoiding the tax would exempt the transferor from payment of the tax during the minority of the transferee. But Mr. Stafford and Mr. Gomes in reply also contended that the West Indian Court of Appeal in the case cited would not seem to have considered the meaning of "property" in the Barbados enactment, and he contended that "property" is to be given a meaning which he submitted was that in Common Law, namely, tangible property, and not mere rights to enforce payment of income derivable from such property.

But a reference by the Solicitor General to section 11(2) of the Hand-in-Hand Fire Insurance Company Ordinance, 1938, shows quite clearly that "scrip" is that Company is "movable property" albeit with certain restrictions against the holder.

Movable property is without doubt a form of "property." In *Jones v. Skinner* (1836) 5 *LJ.* (*N.S.*) 87 the Master of the Rolls in giving judgment says at p. 90—"property" is the most comprehensive of all the terms which can be used, in as much as it is indicative and descriptive of every possible interest which the party can have."

I have no hesitation in saying that the word "property" includes scrip in the Hand-in-Hand Mutual Fire Insurance Company, Limited. Accordingly the appellant is liable to tax under the provisions of section 41C of the Ordinance, Chapter 38.

The appeal is dismissed with costs to the respondent fixed at $200, inclusive of Counsel and Solicitor.

Solicitors:

Carlos Gomes for appellant.

V. C. Dias, Crown Solicitor, for respondent.

KARAMAT v. THE QUEEN

(In the Supreme Court, Court of Criminal Appeal (Bell, C.J., Boland and Stoby, JJ.) December 9, 10, 1954; February 24, 1955).

Murder—Visit by jury to locus in quo—Alleged irregularities on visit to locus in quo—Direction in slimming up by judge as to applicability against appellant of statements of co-accused made in absence of appellant.

The appellant was convicted by a jury on a charge of murdering H.J. In the indictment five other men were charged jointly with the appellant. They were acquitted. In the course of the trial evidence was led by the prosecution that at the same incident of the shooting at which H.J. received his fatal injuries, B., his mother, was also shot dead by the appellant.

During the trial at the request of counsel for the appellant and for the other accused a view of the *locus in quo* took place at which the trial judge, counsel for the appellant and for the other accused, all of the accused except the appellant, the jury and certain witnesses were present, All counsel for the defence had been invited by the trial judge to bring any defence witnesses they wished to indicate points at the *locus in quo* which were intended to be referred to in the evidence for the defence but none of them availed themselves of the opportunity so to do. There questions were asked of witnesses by the trial judge in some instances at the request of the jury. On the resumption of the trial in court each witness who had been taken to the *locus in quo* at the request of the jury was recalled and stated in evidence what he or she pointed out at the *locus in quo.* Counsel for the defence were then given the opportunity to cross-examine each witness but counsel for the appellant declined to do so in view of the objection he had earlier taken regarding the way in which the visit to the *locus in quo* should be conducted.

Counsel for the appellant contended that the provisions of section 44 of the Criminal Law (Procedure) Ordinance, Cap. 18, did not authorise either a judge or jury to question a witness at the *locus in quo* and was equivalent to the giving of unsworn evidence. Further that what had taken place at the view was irregular and was prejudicial to the appellant

It was also contended on behalf of the appellant that the trial judge misdirected the jury in his summing up as to the applicability against the appellant of statements made to the police by the other accused in the absence of the appellant.

Held: There can be no objection to a witness being asked such questions at a *locus in quo* which are in the opinion of the trial judge necessary and relevant. No unauthorised person should be permitted to ask or answer questions. There can also be no objection to the conduct of some tests, demonstrations or experiment at the *locus in quo,* but all questions and answers and all tests, demonstrations and experiments should be made in the presence and hearing of the judge, all members of the jury, the prisoner (if present) and his counsel. Where there has been such questioning of witnesses at the *locus in quo* and the holding of tests demonstrations or experiments on return to Court the witness concerned should be called or recalled to give evidence and to be cross-examined as to what was done or said at the *locus in quo.*

As there was in this case no substantial departure from the principles stated above the appeal on this ground failed.

Held Further: Even if there are passages in the summing up which by themselves would amount to misdirection by the judge, that was not a sufficient ground for setting aside a conviction on the ground of misdirection. The summing up must be looked at as a whole so as to determine whether the jury could reasonably be said to have been misled.

In all of the circumstances the jury were not misled as to the manner in which they should consider either the unsworn statements made by the other accused to the police or the unsworn statements made by the same other accused' from the dock.

Appeal dismissed.

Editor's note—An appeal against conviction to the Privy Council was dismissed in January, 1956.

Judgment of the Court: The appellant was sentenced to death following upon a verdict returned by a jury who found him guilty of having murdered one Haniff Jhuman on the 27th September, 1953. The evidence at the trial established that Haniff Jhuman died from injuries received as a result of the discharge of a gun by the appellant. In the indictment five other men were charged jointly with the appellant with the murder of Haniff Jhuman. The case for the prosecution was that those five others were present on the scene at the time of the shooting by the appellant and were acting in concert with him. The jury returned a verdict of not guilty against those five other persons but found the appellant alone guilty as stated above.

In the course of the trial evidence was led by the prosecution that at the same incident of the shooting at which Haniff Jhuman got his fatal injuries, Batulan, Haniff Jhuman's mother, also was shot dead by the appellant. Very properly the indictment in the case under appeal was limited to a charge with respect to one murder only, that of Haniff Jhuman; and quite rightly no objection was taken against the admission of evidence relating to Batulan's death as such evidence was clearly admissible as being part of the *res gestae* of Haniff Jhuman's murder. A reference to Batulan's death is here made by the Court in this judgment only because, while not challenging the admissibility of the evidence relating to the circumstances of the incident in which both Batulan and Haniff Jhuman met their death, Counsel for the appellant impugns the admission of a bit of evidence, and the trial Judge's direction thereon, which a witness gave of a threat to kill Batulan alleged to have been uttered by the appellant, not at the site of the shooting, but at another spot and prior to the incident of the shooting.

At the hearing of this appeal several of the grounds of appeal filed in the record were abandoned, namely the last five lines of ground 5, the whole of grounds 6, 8, 9, 11, 12, 13, 15, 17, 18; and 19. Of the remaining grounds of appeal grounds 14 and 16 were only faintly argued and in our opinion contain no merit. The grounds really relied on by Counsel for the appellant fall under seven heads which we enumerate hereunder though not in the order in which they appear on the record. Counsel contended that the conviction should be set aside because of—

(1) Irregularities prejudicial to the appellant which had occurred when the jury in the course of the trial were taken to view the site.

(2) Failure of the judge to tell the jury that Jeremiah Inniss did not say at the Preliminary Inquiry that appellant said "But she (referring to Batulan) not going to live

for come ah road" whereas he gave that evidence at the trial.

(3) An alleged omission by the trial Judge to explain to the jury that although it was for him to decide whether the statement by the appellant, Ex. J, was admissible as being free and voluntary it was for them to decide what weight was to be attached to it.

(4) That the statement of the appellant, Ex. J, was wrongly admitted in evidence.

(5) Misdirection in the summing-up on the law as regards provocation.

(6) Misdirection in law in the summing-up as to the applicability against the appellant of statements made to the police by the other accused in the absence of the appellant;

and (7) (as already mentioned) the wrongful admission of evidence of a threat alleged to have been uttered by the appellant to kill Batulan.

We propose to deal in turn with the above grounds seriatim.

As regards (1)— the visit to the site. The ground of appeal challenging the validity of what took place at the view reads as follows:

> The witnesses Mohamed Haniff, Henry Bradshaw, Cleveland James, Bibi Khariman, Henry Bacchus, Abdool Essuf Jhuman, Alfred Katriah and Sergeant No. 3500 Tappin were permitted to review vital portions of their evidence and to describe positions and movements and to point out spots and places where they claimed to be and to go at certain times, although there was no opportunity to cross-examine the said witnesses on the spot.

As we note from a perusal of the record view of the locus was during the course of the evidence which was being led for the prosecution and after several witnesses had already testified. All Counsel had approached the trial Judge in his chambers and made a request that the locus be visited; but each of the defence Counsel submitted "that witnesses should not be permitted at the view to indicate points at which a witness claims to have been when any incident relevant to this case took place or the point at which any such incident took place. To permit the witnesses to do so would," it was submitted, "afford them an opportunity of reconstructing or altering their evidence given in Court. The view of the Court of the *locus* should be restricted to the indication of fixed points."

The learned trial Judge granted the request to view the locus but overruled the abovementioned submission declaring that "it was for the jury to decide what points or places at the scene they wish indicated including points at which a witness claims to be at any material time, or at which it is claimed any object was at any such time." The Judge further intimated that Counsel would have full opportunity for recall and cross-examination of any witness in connection with any matter arising from the view of the locus.

The jury having indicated what witnesses they wished to be present at the view, it was arranged what particular places should be viewed. All Counsel for the defence were invited to bring any defence witnesses they wished to indicate points at the locus which were intended to be referred to in the evidence for the defence but none of them availed himself of the opportunity to do so.

Mr. Lloyd Luckhoo, Counsel for the appellant, who also appeared for the appellant at the trial, has told this court the appellant was not present at the visit to the *Locus in quo* because he Mr. Luckhoo, informed the Judge that he did not 'wish the appellant to be present but Counsel himself accompanied the Judge and jury to the view as appellant's representative. Adhering to his submission that the pointing out by witnesses of various points, save and except fixed places like houses and roads, was irregular and unlawful, Mr. Lloyd Luckhoo on behalf of the appellant made no request at the locus to have features pointed out by witnesses. It should be mentioned that Mr. E. V. Luckhoo, Counsel for one of the other five accused, stated to the Judge that he did not associate himself with Mr. Lloyd Luckhoo's submission, "subject to there being no communication between witnesses at the view."

The view duly took place and Counsel for the appellant has informed this Court that it was the trial Judge who asked the questions at the locus in some instances at the request of the jury. On the resumption of the trial in Court each witness who had been taken to the *locus in quo* at the request of the jury was recalled and stated in evidence what he or she had pointed out at the *locus in quo.* Counsel for the defence were then given the opportunity to cross-examine each witness but Counsel for the appellant declined to do so in view of the objection which he had earlier taken regarding the way in which the visit to the *locus in quo* should be conducted.

The submission of Mr. Lloyd Luckhoo, Counsel for the appellant on this ground of appeal may be summarised as follows:

> The authority in this Colony for allowing a visit to a *locus in quo* is *statutory* namely section 44 of the Criminal Law (Procedure) Ordinance (Chapter 18 of the Revised Laws). In view of the express provisions of section 44 there is no room for section 17 of that Ordinance to operate so as to permit of the introduction into the Colony of any practice and procedure in England relating to visits to a *locus in quo.* Section 44 must be strictly construed and on such strict construction it only sanctions the witness identifying some object or thing, e.g. a tree, a house, mentioned in the evidence but it does not sanction any witness describing or pointing out the position at the *locus in quo* which had been occupied by himself or any other person at the time of the alleged crime or describing or pointing out at the *locus in quo* what he or any other person did there at the time of the alleged crime. The section does not authorise either Judge or jury to question any witness at the *locus in quo.* In the case under appeal the witnesses who visited the *locus in quo,* the

presence of whom at the scene of the alleged murder was disputed, made the visit after they had been cross-examined and had had the opportunity to sit in Court and listen to the evidence of other witnesses. One witness made a major reconstruction of his evidence after his visit to the *locus in quo.* There were serious discrepancies in the evidence given in Court before the visit to the *locus in quo* the effect of which may have been destroyed by the irregularities which it is alleged took place at the visit to the *locus in quo.* A visit to the *locus in quo* should not be used as an opportunity to seal up holes in the evidence of a witness. If witnesses are given the opportunity at the *locus in quo* to "synchronise" their testimony then the benefit of admissions made by them under cross-examination before the visit may be lost. If a witness is permitted to indicate at the locus where he claims to have been when any relevant incident took place or the spot where it took place, then the jury improperly obtain a more vivid and dramatic impression than would be conveyed by the witnesses' mere description in Court. What took place at the *locus in quo* was equivalent to the giving of unsworn evidence. The fact that the Judge does not invariably visit the *locus in quo* with the jury and that accused need not be present indicates that what takes place at the locus should be of a strictly limited nature. What took place at the visit went beyond what is sanctioned by section 44 of Chapter 18, was highly irregular and was prejudicial to the appellant. The subsequent oral testimony in Court by the witnesses who repeated what was said at the view, would not cure what was done unlawfully at the view, even though defence Counsel were given the opportunity in Court to cross-examine the witnesses on that testimony.

Section 44 of the Criminal Law (Procedure) Ordinance, Chapter 18 reads as follows:

“44. (1) Where in any case it is made to appear to the Court or a judge “that it will be for the interests of justice that the jury who are to try or “are trying the issue in the cause should have a view of any place, per- “son, or thing connected with the cause, the Court or judge may direct “that view to be had in the manner, and upon the terms and conditions, “to the Court or judge seeming proper.

“(2) When a view is directed to be had the Court or judge shall “give any directions seeming requisite for the purpose of preventing “undue communication with the jurors:

“Provided that no breach of any of those directions shall effect the “validity of the proceedings, unless the Court otherwise orders.”

We have been unable to find any enactment passed in England by Parliament similar to section 44 of Chapter 18 and consequently we have found no decision of the Courts of the United Kingdom which can be invoked as authority for the proper construction to be put upon section 44, but the power to view is a Common Law power exercised

for centuries in England and supplemented by statute, namely, sections 23 and 24 of The Juries Act 1825 (6. Geo. 4, Chap. 50) which enable some members of the jury to view places out of Court before trial. The power to grant a view during trial is the Common Law power and the position is set forth in Archbold 33rd Edition (1954) at page 196—

> "It is competent for the judge to permit the jury to view the *locus in "quo* at any time during the trial, if it is within the County of the trial "(*R. v. Whalley,* 2 *C. and K.* 376), and even after his summing-up, but "he should take precautions not to allow improper communications be- "ing made to them at the view (*R. v. Martin, L.R.* 1 *C.C.R.* 387)."

In England the practice of viewing the *locus in quo* is not as freely followed as it is in this Colony where the average witness is not as capable of giving an intelligible description of places as, generally speaking, are witnesses in the English Courts with the result that there seem to be but few decided cases on the matter of viewing the *locus in quo.* We have only been able to trace the following cases, namely, *R. v. Martin and Webb* (1872) 12 *Cox C.C.* 204; 41 *L.J. M.C* 113; *R. v. Whalley* (1847) 2 C. *and K.* 376; *London General Omnibus Co. Ltd. v. Lovell* (1901) 1 *Ch.* 135; *Senevirante v. R.* (1936) 3 *All E.R.* 36; *Goold v. Evans* (1951) 2 *T.L.R.* 1189. In *London General Omnibus Co. Ltd. v. Lovell, Lord Alverstone, C.J.,* stated that he always understood that a view is "for the purpose of enabling the tribunal to understand the questions that are raised, to follow the evidence and to apply the evidence." In *R. v. Martin and Webb,* 12 *Cox C.C.* 204, the jury, at their request, were taken to see the *locus in quo* (a urinal where an alleged act of indecent exposure had taken place) after the summing-up of the Judge. The headnote to the case reads as follows:

> "Upon the trial of an indictment for indecent exposure in a urinal a "Court of Quarter Sessions may allow the jury to have a view of the "*locus in quo* after the summing-up of the judge.
>
> "But it is indiscreet to allow the witnesses to accompany the jury "in the absence of the prisoner or his advocate, or the presiding judge.
>
> "*Quaere,* whether if the facts have been examined into by the "Court, and are properly stated on the record, the Court can order a "*venire de novo* where the witnesses accompany the jury, and are "asked by them to point out the precise spot where they stood and saw "what they had stated they saw.
>
> "But if the case sent up to the Court merely states that the Court "below has been informed that the circumstances specially set forth "took place, this Court will not act upon such statement."

In *R. v. Whalley* (1847) a case of rape, the jury were permitted to visit the *locus in quo* escorted by bailiffs and a party of the sheriffs' javelin-men. The procedure followed is interesting as showing that someone must point out to the jury the particular places mentioned

in the evidence. The under-sheriff having knowledge of the locality was appointed to show the places referred to by the witnesses, and took the plans produced for the prosecution and the defence to assist in the view. It should be noted that the oath administered to the under-sheriffs bound them to do nothing but to point out the place in which the offence charged is alleged to have been committed and not to speak to the jury touching the offence; and the oath to the bailiffs bound them not to allow anyone to speak to the jury concerning the offence charged except the persons sworn and appointed as showers and not themselves to speak to the jury.

In *Senevirante v. R.*, a case from Ceylon, one of the grounds of appeal was that the statutory procedure for holding of a view had not been followed. This is what the Judicial Committee had to say on the point—

> " . . . . The Criminal Procedure Code (No, 15 of 1898) s. 238 provides "for a view by the jury and lays down definite and strict conditions for "its conduct. The Evidence Ordinance, s: 165 provides for the judge "asking questions at any time of any witness. The proceedings on June "8, 1934, seem to have been a combination of a view and a further "hearing with the introduction of some features permitted by neither "procedure, such as the performance of an experiment with chloroform "by a Dr. Pieris, who does not appear to have been sworn as a witness, "the judge and the foreman of the jury being present with Dr. Pieris in "a room and the rest of the jury being somewhere else. The jurors seem "also to have been divided for the purpose of other experiments in "sight and sound and to have been asked questions as to the impres-"sions produced on their senses. Their Lordships have no desire to "limit the proper exercise of discretion or to say that no view by a jury "can include inspection or demonstration of relevant sounds or smells, "but they feel bound to record their view that there were features in the "proceedings of June 8 which were irregular in themselves and unnec-"essary for the administration of justice. Their Lordships do not find it "necessary to consider whether any injustice resulted in this particular "case (the conviction was quashed on other grounds) but they regard "proceedings so conducted as tending in the words used in Ibrahim's "case at p. 615 to divert the due and orderly administration of the law "into a new course, which may be drawn into an evil precedent in future."

It is to be noted that in Senevirante's case it is clear that there were grave irregularities at the view which is not the case in the present appeal. Moreover while criticising these irregularities the Judicial Committee expressly stated that they have no desire to limit the proper exercise of discretion or to say that no view by a jury can include an inspection or demonstration of relevant sounds or smells."

In many cases all that would be required at the *locus in quo* to enable the jury in the words of Alverstone, L.C.J., in *London General Omnibus Company v. Lovell* (1901) 1 *Ch.* 135 "to understand the

questions that are being raised, to follow the evidence, and to apply the evidence" would be for the jury to look at the physical features, *e.g.* the buildings, paths, trees, etc., etc. But even in that case it is obvious that *someone* must identify those features to the jury which can only be adequately clone by his speaking to them for it will hardly be contended that he must be restricted to making his identification by dumb pantomime. The obvious person to make that identification would be the particular witness who has mentioned those physical features in his evidence but where, as in *R. v. Whalley,* an officer of the Court is familiar with the locality we can see no objection to his being appointed by the Judge to act as shower "upon the terms and conditions to the Court or Judge seeming proper" to cite the words of section 44 of Chapter 18. We assume that one of the conditions would be that the shower should take an oath, as in *R. v. Whalley,* to restrict his activities at the *locus in quo* solely to describing the relevant features at the *locus in quo.* He should, of course, give evidence of what he did at the view. There must, however, be many cases in which it would be helpful to the jury and "for the interest of justice" that a witness should, to give merely a few examples, be asked to indicate or point out at the *locus in quo* the spot at which he claims to have been when any incident relevant to the case took place or the spot at which such incident took place: or to indicate or point out the spot at which he saw some other person at a material time or to demonstrate the feasibility or otherwise of something which is said to have been done at the *locus in quo* at some material time; or to conduct some other demonstration, experiment or test. We can see no valid reason why any of the things of which we have just spoken may not properly be done at a view of the *locus in quo* subject to what we have to say hereafter.

A certain amount of questioning and answering would be unavoidable in carrying out the matters of which we have spoken but we can see no objection to that provided that no more questions are asked than in the opinion of the Judge are strictly necessary and relevant: that no unauthorised person be permitted to ask or answer questions; that all questions and answers be asked and answered and all tests, experiments and demonstrations be made in the presence and hearing of the Judge, all members of the jury, the prisoner (if present) and or his Counsel.

It is of course essential that where there has been such questioning of witnesses at the *locus in quo* and the holding of tests, experiments or demonstrations on return to Court the witnesses concerned should be called or recalled to give evidence as to what was said and done at the *locus in quo* and that ample opportunity be given to cross-examine them. In that way there will be no departure from the basic principle of our law that there must be nothing whatever in the conduct of the proceedings which might be calculated to give rise to the impression that the accused has been judged on anything other than the evidence which has been brought forward against him in open hearing in his presence and before the full Court. It may well be,

of course, that a witness who has already given evidence may vary or amplify his testimony as a result of a visit to the *locus in quo* or may alter it to make it accord with the testimony of some other witness. None of those things, in our view, go to the admissibility of his evidence though they clearly go to its weight and could properly be the subject of comment toy Counsel for the opposite party and of the trial Judge. It would, of course, be wrong for the Judge to direct a view of the *locus in quo* for the sole purpose of enabling the prosecution to "seal up holes in the evidence of a witness" to quote the words of Counsel for the appellant. We are sure the Judge had no such object in mind in the present case, and it must not be overlooked that the suggestion to visit the *locus in quo* came from Counsel for the defence.

We may add that we think that a view of the locus can be considered as being no different in principle from looking at a photograph of the locus when admitted in evidence as an exhibit, except that a photograph is brought into Court where it is exhibited by the photographer who testifies as a witness as to its being a photograph taken toy him of the particular site. Instead of a photograph being brought into Court for inspection by those whose duty it is to give a decision on the issue before the Court—be it a Judge or a jury— the Judge or the jury, whichever has to make the decision, elects to go to the actual site.

In support of this opinion we would quote the words of Denning, L.J. in *Goold v. Evans* (1951) 2 *T.L.R.* 1189 *at p.* 1191—

> " .... *a view is part of the evidence,* just as much as an exhibit. *It is real evi-*
> "*dence.* The tribunal sees the real thing instead of having a drawing or a
> "photograph of it. But, even if a view is not evidence, the same principles
> "apply. The Judge must make his view in the presence of both parties, or,
> "at any rate, each party must be given an opportunity of toeing present.
> "The only exception is when a Judge goes by himself to see some public
> "place, such as the site of a road accident, with neither party present.
>
> "The usual procedure at a view is that nothing is said by either party
> "unless the Judge asks for an explanation or demonstration. Usually, tooth
> "parties behave so fairly that there is no dispute. But if there be a dispute
> "as to the explanation or demonstration, there is only one way of resolving
> "it, and that is toy taking evidence and letting witnesses be cross-examined
> "on it."

As there would not seem to have been any substantial departure in the present case from the principles we have set forth above, we are of the opinion that this first ground of appeal must fail.

The submission regarding the failure of the trial Judge to stress that Jeremiah Inniss had in his evidence at the trial enlarged on what he said at the preliminary inquiry can toe dealt with shortly.

As will be seen from the record at page 223, the Judge in his summing-up said:

> "The defence has to no little extent sought to establish, by

"directing attention to a number of contradictions, that is to say, differ-
"ences between what a witness is recorded as having said in the deposition
"before the magistrate and what he has said here and differences in the ac-
"count of the same incident given by different witnesses—that such a wit-
"ness is untruthful."

Again at page 285 the Judge said:

"Inniss is the next witness with whom I shall deal. . . .There has
"been contradiction in Inniss' evidence and your attention has been di-
"rected to it. At the Preliminary Inquiry he said someone in Jhuman's
"house told him something but here he said he went there and called but
"got no answer."

The above passages show that while all the discrepancies were not repeated to the jury, their attention was directed to the fact that his evidence differed. Moreover it ought not to be overlooked that the three defence Counsel between them spent seven days in addressing the jury and as indicated in the summing-up had dwelt on those discrepancies. During the trial the depositions of several witnesses including Inniss' were admitted and read to the jury. The jury could hardly have failed to notice the discrepancies between the evidence given by a witness at the trial and that which he had given at the preliminary inquiry. They must have appreciated from the Judge's directions which appear on page 223 of the Record that they had to assess the value of a witness' evidence in the light of such discrepancies after having duly considered the materiality of the discrepancy and the intelligence of the witness.

The ground which we have set out above as number three in this judgment is based, it would seem, on the decision of the Court of Criminal Appeal in *R. v. Murray* (1951) 34 *Cr. App. R.* 203. In that case it was explained that the weight and value of a confession remained matters for the jury, and where a Judge after hearing evidence in the absence of the jury has ruled that a confession is admissible, defending counsel has still a right, in the presence of the jury, *again* to cross-examine witnesses who have given evidence in their absence on the circumstances in which the confession was made and, where the prisoner had been cross-examined on the confession, to re-examine him on its circumstances.

The witness who tendered the appellant's statement was Sergeant Tappin. He was fully cross-examined in the absence of the jury and again in their presence. It was put to him by Counsel for the appellant, in the presence of the jury, that he forced the appellant to make a statement by threats and physical violence and did not read over the statement which was eventually made. The appellant, when he testified before the jury gave his version of how the statement was taken. The Judge correctly directed the jury on the manner in which they should approach the statements tendered by the Crown. He reminded them at page 266 that (Sergeant Tappin had said that the statement was free and voluntary while the appellant had said that it was not, as he was handcuffed and compelled to give it. He then continued at page 267: "It is for you gentlemen to consider whether on the evidence before you can say that the

statement was a voluntary one or whether you feel that the accused were forced into making them and they are not voluntary." The Judge also told them to discard it if they found it was not voluntary, or that it was forced from him.

We think the direction was a very clear one and there was no infringement of the principle enunciated in *R. v. Murray* (*supra*).

It was said that the Judge ought not to have admitted the statement Ex. J. in evidence. The correctness of the procedure adopted at the trial is not challenged. The jury withdrew, Sergeant Tappin was cross-examined and the appellant gave evidence on the issue in dispute and was cross-examined. The Judge then ruled that the evidence of Sergeant Tappin as to the circumstances in which the statement was taken was to be believed in preference to the evidence of the accused Karamat. The statement was then admitted by the Judge in what we think to have been a proper exercise of his discretion.

Counsel attacks the Judge's reasoning that the certificate by Sub-Inspector Carmichael on the statement tended to support the Sergeant's evidence regarding the presence of Carmichael at the material time. The appellant said Carmichael was not present. Carmichael was not called as a witness on the issue. Counsel's contention is that Carmichael may have signed without being present or without being continually present and the Judge misdirected himself in treating the certificate as truthful.

The short answer to that is that the Judge expressed his preference for Tappin's evidence rather than the appellant's. We see no reason for thinking that the Judge's acceptance of Tappin's statement that Carmichael was present throughout the taking of the statement depended upon the certificate signed by Carmichael. And we would point out that the Judge expressly stated that Tappin's evidence as to the circumstances in which the statement was taken was to be believed in preference to the appellant.

We turn to consider the alleged misdirection by the trial Judge as regards provocation. It was submitted that the trial Judge had erred in directing the jury that if there was evidence of express malice then no amount of provocation would avail the appellant to reduce the killing to the lesser offence of manslaughter. It is the following direction in the summing-up on which Counsel bases his submission. The learned trial Judge, as appears on page 243 of the Record said—

> "If the evidence satisfies you that malice existed, if you accept what "some of the witnesses have said that the number (1) accused Karamat "had said he was going to shoot Haniff's so and so, if you believe that, "and if you believe that the proper inference or conclusion to be drawn "from that is there was express malice, that he was going to do this no "amount of provocation whatever can excuse his killing. In other words, "provocation is disposed of, as it were, if you find that there was express "malice, and there is evidence which you may feel in this case if you ac- "cept it, indicates the existence of express malice."

This direction by the learned trial Judge that the existence of express malice nullifies a plea of provocation is fully supported by authority. Archbold 33rd Edition at p. 929, citing as authority R. v. Mason, Fost. 132 states: "No provocation, however great, will extenuate or justify homicide where there is evidence of express malice." The trial Judge at page 235 of his summing-up defines for the benefit of the jury what is express malice. He said "express malice is where a person by some overt act makes it clear what his intention is. . ." Counsel for the appellant is his submissions would seem to have limited the reference by the trial Judge to the threat alleged to have been uttered by the appellant "that he was going to shoot Haniff's so and so" to mean the threat uttered by appellant as testified by the witness Bhagwandin when appellant, armed with the gun, was on his way to where he expected to find Haniff but not yet in sight of Haniff. Counsel contended that appellant might well have abandoned the idea of killing Haniff before he came up to him thus not having any express malice at the time of the shooting. But the evidence of Bibi Kariman at page 10 of the record and Henry Bacchus at pages 50—51 of the record was that appellant repeated the same threat to shoot Haniff immediately before he fired at Haniff, and that this had caused Haniff's mother, Batulan, to interpose herself between Haniff and appellant. If the jury accepted this bit of evidence given by Bibi Kariman and Henry Bacchus then there would be express malice which would exclude any defence of provocation based on appellant's allegation that Haniff attempted to use a revolver.

Accordingly we reject the submission of Counsel for the appellant on this point.

We now proceed to deal with the submission that the defence of the appellant was prejudicially affected by an error made by the Judge in his directions to the jury when he was referring to the statements made to the Police by other accused in the absence of the appellant. The submission is that the Judge led the jury to believe that they could take into consideration as against the appellant these statements of the other accused in determining whether at the time appellant fired the gun the deceased was armed with a revolver. Admittedly that fact was of importance on the question whether the appellant fired the gun in self-defence or, if not justifiably in self-defence, whether it would support a plea of a degree of provocation which induced him mistakenly to believe that he could then in self-defence shoot at the deceased. The appellant in his defence elected to give evidence on oath and in describing what happened at the site of the shooting appellant testified that he saw the deceased with his right hand in his pocket, and that after the deceased had uttered a threat that no one would "milk cow at this place no more," the mother Batulan said "shoot the bitch!" Appellant in his evidence continued: "I then had my gun in my hand. Batulan and Haniff moved forward. Haniff took out a revolver and as soon as I saw the revolver I raised my hand and shot at Haniff." But in a statement given to the police on the 27th September, 1953, which was admitted in evidence as Exhibit J. after objections to its admission had been overruled, appellant in describing what happened said nothing about Haniff

having a revolver, although he did say in that statement, as in his evidence before the Court, that Haniff had uttered a threat that "no one would milk a cow that day and they rushed me and me fired a load." The defence of each of the other five accused was a denial of being present at the shooting. Each in his statement given to the police in the absence of the other accused and in his unsworn statement from the dock put forward this defence of an alibi and consistently with his story of not being at the site of the shooting none of them, we consider, could be expected to say that there was a revolver at the site. However as against these five others the evidence for the prosecution was that they were all present at the site with appellant. Now this is what the Judge said about statements by the several accused to the police when summarizing for the jury the evidence against the appellant as appears on page 267 of the record—

> "It is a matter of importance, gentlemen, to decide about those "statements, if you find they were not properly taken that the accused "were not cautioned or that the statements were forced out of one or all "of the accused, you are to disregard them completely. If, however, "you find that the statement in any case is a voluntary one, you may "properly take into consideration and give it what weight you think it "deserves. *The importance of that is that in the statements, there is no "reference by any of the accused persons, including number one ac- "cused* (*i.e. Karamat*) *of the use by Haniff of a revolver or of the taking "of the revolver by Henry Bacchus.* So if you think it is a voluntary "statement giving an account of what took place, it might lead you to a "certain conclusion. It is entirely a matter of fact for you."
>
> "If you find that no reference had been made to the revolver in the "statement you may feel it is a reasonable conclusion that no revolver "had in fact been used in this incident at all. Having regard to its im- "portance you may feel reference would have been made to it in the "statement."

The second paragraph of the above quotation must have been understood as referring only to the statement given by the appellant himself; the omission in appellant's own statement of a reference to a revolver would quite rightly be a matter which the jury could consider as against the appellant when determining whether Haniff had a revolver, because appellant had stated in his evidence before the Court that Haniff had taken out a revolver from his pocket. The possession of a revolver by Haniff was a matter of vital importance in appellant's defence and it was a matter for comment that appellant did not speak of the revolver in his statement to the police. But when the Judge drew the jury's attention to the absence of a reference to a revolver at the site in the statements given by the other accused in the absence of the appellant, it is difficult to see how the jury could make use of any such omission in the statements of the other accused even as against those other accused, as each of these five other accused throughout had set up an alibi. And certainly we would hold that it would be a misdirection if the jury were induced by the Judge to understand that he was then

directing them that as against the appellant the absence of a reference to the revolver in the statements of the other accused, if given voluntarily by them and in the absence of the appellant, was something tending to establish that there was no revolver held by Haniff. However, as has been often said in this Court following decisions by the Court of Criminal Appeal in England, even if there be passages extracted from the summing-up which by themselves would amount to misdirection by the Judge, that is not a sufficient ground for setting aside a conviction on the ground of misdirection. The summing-up should be looked at as a whole so as to determine whether the jury could reasonably be said to have been misled. We note from what appears on p. 230 of the Record that the learned Judge earlier in his summing-up referred to the fact that statements were given by the several accused to the police and he took particular care to give the jury proper directions as to the use they were to make of statements made by one accused in the absence of the others. This is what the Judge said—

> "Gentlemen, it is the case that you must not allow to operate in "your minds against any accused anything that may be said either by "someone else or by one of his co-accused either in his presence or in "his absence. Anything said by another accused or by another person "either in the presence or in the absence of any accused person cannot "be taken as evidence against him: subject to this qualification that if "something is said in the presence of an accused person, if either by "his words or by his conduct he accepts it either in whole or in part, "well, then, in such circumstances you can take it into account. But you "must not allow to weigh against an accused anything said either in his "absence or in his presence, that is not on oath, of course. The first ac- "cused (Karamat) has given evidence on oath and anything that he has "said which you may find either favourable or unfavourable to any of "the accused you may properly take into account either against himself "or against any of the other accused. But only in such circumstances— "only in the case of the number 1 accused (Karamat). You must bear "that in mind because it is of importance. You must not allow to weight "against an accused person matters which have been said not on oath."

Counsel for appellant has pressed upon us that this was a lengthy summing-up—the typescript occupies 108 pages of foolscap, that is from pages 216 to 324 of the Record—and that the general directions given by the Judge about the use of statements made by one accused in the absence of another which appear on page 230 were not unlikely to have been nullified by what he said later as appears on page 267 when dealing more particularly with the statements themselves in relation to the important question of whether or not Haniff, the deceased, took out a revolver before he was shot. We have carefully considered that submission but would point out that in the closing words of the summing-up the Judge repeatedly warned the jury that they must deal with the case against each accused separately.

"I stress again," said the judge, "that you must deal with each ac-
"cused separately. Examine the evidence in respect of each separately.
"That is why I endeavoured to put the evidence in relation to each one
"as far as it directly effects him. Examine the evidence in relation to
"each one separately. Make up your minds as regards each one sepa-
"rately because at a later stage you will be asked your verdict in rela-
"tion to each one of the accused separately. So deal with each one separ-
"ately."

We are of the opinion that in all the circumstances the jury were not misled as to the manner in which they should consider either the unsworn - statements made by the other accused to the police or the unsworn statements made by the same other accused from the dock. The jury must, we think, have found that there was no revolver in the hands of the deceased contrary to what the appellant had asked them in his evidence to believe. We feel satisfied that they accepted the evidence of the witnesses for the prosecution in preference to that of the appellant who himself, they must have thought, would have mentioned in his statement to the police, if true, a fact so vitally important in his defence.

And lastly we turn to deal with the point sought to be made that evidence relating to a certain threat alleged to be made by appellant to the effect that we would kill Batulan was wrongly admitted. This bit of evidence was given by a witness Jeremiah Inniss. Inniss said that he had heard appellant shout "Bring the gun" and he saw when one of other five accused—a man named Saffie Mohamed—went into a house and bringing out a gun hand it to the appellant who started to run along the road. As appellant was crossing a railway line he was spoken to by Bhagwandin but he went on with the gun ignoring the entreaties of Inniss and a person called Katriah that he should go back with the gun. He was heard to say "Them people come over in man pen and beat man rass up, and the woman kick me, *but she nah go live fa come ah road."* Inniss saw there were people coming along the Carlton Hall dam and he soon recognised them to be the Jhumans including the deceased Haniff and his mother Batulan. Inniss heard a "load fired off" and he saw Batulan fall. Then he heard "another load fired off" and Haniff Jhuman fell. Where the shots were fired was a distance estimated by Inniss to be about 60 rods or 720 feet from the railway line—that is something less than one-eighth of a mile from the railway line.

The whole of what was said by appellant including this remark about Batulan not going to live to come on the road was, in our view, clearly admissible. Appellant was going towards where he knew or expected he would find the Jhumans and, armed with the gun, he was, according to Inniss, evincing by his conduct and words an intention to do violence not only to Batulan but the whole of "them people" amongst whom was the deceased Haniff. This statement by appellant as testified by Jeremiah Inniss disclosed a feeling of resentment against the Jhumans including Haniff for their having come into his pen and beaten him ("come in man pen and beat man rass"). This

evidence of the state of mind of the appellant at a time prior to his shooting Haniff is, we are of opinion, admissible.

Counsel for the appellant cited to us *Sureynauth v. The King, L.R.B.G.* (1951) but according to the facts of that case there were two distinct and separate incidents with an interval of about twenty-nine (29) minutes and there was no nexus between the two.

On a consideration of the whole of the facts including the significant omission by the appellant in his statement to the police that Haniff had a revolver, we have come to the conclusion that even if there was a misdirection in relation to the use of the statements made by the other accused to the police, reference to which we have made above, the only reasonable and proper verdict would have been one of guilty of murder and consequently this would be a fit case to invoke the proviso to section 6 of the Ordinance to sustain the conviction. To use the words of the proviso "there was no miscarriage of justice, or at all events no substantial miscarriage of justice."

Having given full consideration to all the grounds of appeal that were advanced by Counsel for the appellant, we have come to the conclusion that the appeal must fail. The learned trial Judge in his long and exhaustive summing-up carefully put to the jury for their consideration every aspect in favour of the appellant, and the jury could not reasonably have returned any other verdict than that of guilty of murder against the appellant.

Accordingly the appeal is dismissed.

Solicitor:

Miss E. A. Luckhoo for the appellant.

In the matter of a petition by ALBERTHA CADOGAN for a Declaration of Prescriptive Title.

CADOGAN *v.* CADOGAN

(In the Supreme Court, Civil Jurisdiction (Stoby, J.) January 18, 1955).

Declaration of title—Application made in petitioner's men name—Necessity for application to be Drought as administratrix—The Title to Land (*Prescription and Limitation*) *Ordinance,* 1952 (*No.* 62 *of* 1952)*—Adverse possession—Effect of payment of rates and taxes by petitioner in name of another person.*

—In a petition for declaration of title brought in 1954 the petitioner claimed prescriptive title of land which was in the occupation of her husband from

1916 until his death in 1953, intestate. There were two children of the marriage alive at the time of his death. The rates and taxes for the property were always paid in the name of R.C. the father of the petitioner's husband. Title to the land was in the name of R.C.

Held: It was not competent for the petitioner to bring the petition in her own name. The proper procedure would have been for her after obtaining letters of administration to apply for prescriptive title in her capacity as administratrix of the estate of her husband so that if any declaration was to be made it would be made in the name of the estate and the children's interest thereby protected.

Each payment of the rates and taxes was an admission in favour of the true owner that no claim to the property was being made. No right of action could be deemed to accrue to R.C. because petitioner's husband preserved the property by annual payments of the rates and taxes thereby placing himself in the same position as if he were paying an annual rent.

L. F. S. Burnham for opposers.

This is a petition for declaration of title by Albertha Cadogan, widow, who claims a prescriptive title to the North half of lot 28 Queen Street, Kitty. Her application is opposed by Joseph Cadogan, Administrator of the estate of Richard Cadogan, and by Philip Cadogan, executor of the estate of Catherine Cadogan, deceased.

On the matter coming on for hearing, Mr. Burnham, counsel for the opposers submitted *in limine* that the petition ought to be dismissed because:

(a) It was intituled in the matter of the Civil Law of British Guiana Ordinance, Chapter 7;

(b) That Albertha Cadogan was claiming prescriptive title in her own name when her affidavit showed that the application should have been in the name of her late husband Boaz Alexander Cadogan ;

(e) That the affidavit of Samuel Wesley Wilson, filed in support of the petition disclosed that the rates and taxes for the property were always paid in the name of Richard Cadogan the father of Boaz Alexander Cadogan.

With respect to the first submission it is clear that the petition is wrongly intituled. The Title to Land (Prescription and Limitation) Ordinance, 1952, No. 62, came into force on the 31st December, 1952. By section 24 of that Ordinance, section 4 of the Civil Law of British Guiana Ordinance was repealed and consequently when the petition in this matter was filed on the 4th of February, 1954, the section of the Civil Law Ordinance relating to prescriptive title was repealed. It follows that this application should have been intituled in the matter of Title to Land (Prescription and Limitation) Ordinance, 1952. I do not consider the mistake fatal as it is one which can be corrected by an amendment, and if I had not come to the conclusion that the other submissions are 'fatal to the applicant I would have given leave to Mr. John to amend his petition.

In paragraph 6 of the affidavit of Albertha Cadogan she states that Boaz Alexander Cadogan died on the 16th July, 1953, and in paragraph 4 it is stated that he went to live on the land in the year 1916 and remained in possession until his death. As he died intestate and as there are 2 children of the marriage still alive it is incompetent for Albertha Cadogan to bring this application in her own name. The

proper procedure would have been for her, after obtaining Letters *of* Administration to apply for prescriptive title in her capacity as Administratrix of the estate of Boaz Alexander Cadogan so that if any declaration was to be made it would be made in the name of the estate and the children's interest thereby protected.

The necessity for the application to be made in the name of the Administratrix is because of the language of section fourteen of the Limitation Ordinance, Chapter 184. It states that:

> "No person shall make an entry or a distress or bring any action or suit to recover any immovable property, but within twelve years next after the time at which the right to make the entry or distress, or to bring the action or suit, has accrued to him or to some person through whom he claims :
>
> Provided that thirty years shall be the utmost allowance for periods of disability under this Ordinance preventing the running of the term of limitation aforesaid."

As a result of that section the true owner of property cannot recover possession if he has allowed twelve years to elapse, after some person, who is not disqualified from relying on the Ordinance, has taken possession. Time begins to run against the true owner, the moment there is adverse possession. If on the facts of this petition there was any adverse possession it was by Boaz Alexander Cadogan. The right of action in the true owner to recover the property from Boaz would be barred twelve years after time began to run, but the action is not barred against his wife.

Had the true owner attempted to obtain possession against the petitioner in her personnel capacity her defence would have to be that she was claiming through her husband. She could not assert adverse possession in herself since it was her husband who entered the land and built the house and she lived there as his wife. If she could not defend except through him, she cannot claim except through him.

The Title to Land (Prescription and Limitation) Ordinance, 1952, which repeals section fourteen of the Limitation Ordinance does not in any way affect the principle above mentioned, as section five of the 1952 Ordinance retains the principle and in any event when the alleged adverse possession commenced it was the Limitation Ordinance which was relevant. The Ordinance was designed to introduce into this Colony certain of the provisions of the Limitation Act 1939, which, of course, had replaced the Real Property Act, 1833, and it is unnecessary in this case to discuss the effect of section 6 of the Ordinance and those other sections which relate to land. It may be noted, however, that section three prescribes how a prescriptive title may be acquired while section four empowers the Court to make a declaration of title in regard to land and to order that "the land ... be registered in the name of the person who has so acquired such land."

As I am of opinion that this petition should have been brought in a representative capacity it must be struck out on this ground.

I regard the third submission, too, as fatal' to the success of the Applicant's petition.

Before the abolition of the' Roman Dutch Common Law, that is to say, before the 1st January, 1917, a prescriptive title could only be

acquired by proof that the possession was sole, undisturbed, and adverse to the true owner (see Madray v. Sealey and others (1940) L.R.B.G. 124 at pp. 137-138).

The Courts of this Colony it seems, despite the existence of the Limitation Ordinance, gave to the term "adverse possession" the same meaning that the English Courts had given to those words, prior to the enactment of the Real Property Limitation Act of 1833. After that Act was passed the term "adverse possession" lost much of its meaning. The learned Editors of Carson's Real Property Statutes, second Edition, at page 130, cites Lord St. Leonards as saying: "Adverse possession is no longer necessary in the sense in which it was formerly used. Mere possession may be and is sufficient under many circumstances to give a title adversely; although perhaps now no better expression than adverse possession can be used, yet it is not adverse in the sense in which that phrase was used before this Act was passed." After 1917 our Courts still leaned towards a stricter interpretation of adverse possession than was the case in England, probably because those sections of the 1833 Act relating to tenants at will for instance were not introduced into this Colony until 1952 by the Title to Land (Prescription and Limitation) Ordinance.

However, in whatever sense adverse possession was used it was never adverse if the possession was referable to a lawful title. In Thomas v. Thomas (1855) 2 K. & J.79, Page Wood V.C. said at page 83: "Possession is never adverse if it can be referred to a lawful title."

The affidavits filed on behalf of the petitioner in this application disclose that the title to the land claimed is in the name of the petitioner's father—it was stated at the Bar that grandfather should be substituted for father. The affidavit of Wilson discloses that the rates and taxes were paid year after year in the father or grandfather's name.

In my view each payment is an admission in favour of the true owner that no claim to the property is being made. To succeed in this petition, the petitioner must show that the true owner had an accrued right of action because time was running in her husband's favour. No right of action could accrue or be deemed to accrue to a parent or grandparent if his son or grandson preserves the property by an annual payment of the rates and taxes thereby placing himself in the same position as if he were paying an annual rent.

Mr. John submits that the petitioner's husband erected a house on the land and paid rent to no one and there was nothing more he could do. I disagree. His correct course would have been to refrain from paying the rates and taxes and to purchase the property at execution sale instead of acting in such a manner as to give the other heirs the impression that no claim to the property was being made.

I accordingly dismiss the petition on this ground in addition to the ground dealt with earlier in this judgment. The petitioner will pay the respondents' costs.

Solicitors :

C. M. L. John for Petitioner.

L. L. B. Martin for opposers.

MANGRA v. THE QUEEN

(In the Supreme Court, Court of Criminal Appeal (Bell, C.J., Boland and Stoby, JJ.) January 28, February 1, 24, 1955).

Murder—Statement made by Crown Prosecutor before jury that he hat; been informed that Grown witnesses have been threatened by persons connected with the appellant—Observations by trial judge to effect that if any person is found attempting to interfere with any witness for Crown that person will be charged by Police—Whether prejudicial to appellant and necessitating discharge of jury and order for new trial—Exercise by judge of discretion—Criminal Law (*Procedure*) *Ordinance. Cap. 18 s. 165—Participant in felony or accessory after the fact—One who may be concerned otherwise in criminal transaction—Whether accomplice in the crime of murder—Whether need for trial judge to warn jury concerning corroboration of the evidence of an accomplice.*

The appellant was convicted by a jury on a charge of murdering a woman. On the day of the murder the deceased was seen just outside of her house wearing certain articles of jewellery and about an hour after the appellant was seen to go to her house. Later that day the deceased was found lying dead in her home and it was established by medical testimony that her death was due to injuries she had received just before death. The jewellery which the deceased was seen wearing that day before her death was missing tout was on that day and on the following day seen in the joint possession of the appellant and one Drepaul. There were certain other circumstances proved in evidence which clearly implicated the appellant in the murder of the deceased.

Drepaul had been arrested and charged jointly with the appellant with murder but after the preliminary inquiry a *nolle prosequi* was entered in his favour and he was called as a witness for the Grown at the trial of the appellant. In his evidence Drepaul stated that the appellant had handed him the jewellery on the morning of the murder so that he should pledge it to obtain a loan for the appellant. Apart from his possession of the jewellery after the murder there was no evidence against Drepaul directly associating him with the murder either by acting alone or jointly with the appellant.

The trial judge in his summing up told the jury to approach Drepaul's evidence with caution but did not tell them that he was to be considered as an accomplice.

During the course of the trial counsel for the Crown in the presence of the jury stated that he had been informed that witness for the Crown had been threatened by persons connected with the appellant. Thereupon the trial judge also in the presence of the jury stated that if any person was found attempting to interfere with or dissuade any witness for the. Crown from giving his or her evidence freely and voluntarily at the trial, that person would be charged by the Police and brought to justice.

Counsel for the appellant made no immediate observation in connection with the trial judge's remarks but on the following day he made a formal objection to what the trial judge and counsel for the Crown had stated in the presence of the jury. He, however, did not make an application at the time for the jury's discharge.

It was contended on behalf of the appellant that the observations of the trial judge and of counsel for the Crown were so prejudicial that the jury should have been discharged and a new trial ordered.

Held: The judge's warning was directed at those persons who may have, as was reported, used threats and no jury could reasonably have interpreted what was said as reflecting against the appellant in any way.

Where a witness for the Crown is one who has not participated in the actual felony or is not an accessory after the fact of that felony as distinct from one who may be concerned otherwise in the criminal transaction there is no need for jury to be directed on the question of corroboration of the evidence of an accomplice.

Appeal dismissed.

Editor's Note—Application for special leave to appeal was made to the Privy Council but was refused.

F.Vieira for appellant.

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

Judgment of the Court: On the second day of the appellant's trial on an indictment charging him with murder, Counsel for the Crown at the commencement of the day's proceedings stated:

"My Lord, before we proceed with the trial this morning, I would like to "say that I have been informed that witnesses for the prosecution have been "threatened by persons connected with the accused. Thereupon the trial Judge "made the following observations:

"Mr. Foreman and members of the jury and Mr. Vieira, as you have "heard, the Crown Prosecutor has made a report as regards witnesses for "the Crown being threatened or molested by relatives or friends of the ac- "cused. I would like to say this and I am sorry that the parties concerned "are not present to hear for themselves that it is a grave offence to threaten, "molest, intimidate or suborn any witness giving evidence in any case. It is "an offence punishable by this Court. If any person

"is found attempting to interfere with or dissuade any witness for the "Crown from giving his or her evidence freely and voluntarily at this "trial, that person will be charged by the Police and brought to justice "when punishment will be meted out to them. The fount and streams of "justice must be kept pure. This country would not be a safe place to live "in if the streams of justice are contaminated by threats and intimidation "of witnesses. I sincerely hope that the Press would give publicity to "what I have said in order to dissuade persons from threatening and in- "timidating witnesses."

Counsel for the appellant made no observations but the next day he asked leave to refer to the incident and made a formal objection to what was said by Counsel for the Crown and by the Judge.

The trial proceeded and the appellant was convicted of murder and sentenced to death.

He now appeals against his conviction and the first ground argued on his behalf is that the observations referred to above were so prejudicial to him that the jury should have been discharged and a new trial ordered.

The power to discharge a jury is prescribed by section 165 of Chapter 18 of the Criminal Law (Procedure) Ordinance. Under subsection (1) of that section—

"The Court may, in its discretion, in case of any emergency or casualty "rendering it, in its opinion, expedient for the ends of justice to do so, "discharge the jury without their giving a verdict, and direct a new jury "to be empanelled during the same sitting of the Court, or may postpone "the trial on such terms as justice may require."

Subsection (3) provides for the discharge of the jury if one or more of them becomes or become ill. These provisions are merely statutory authority for what was the unquestionable right of a Judge at Common Law to discharge a jury if the necessity arose. As long ago as 1865 the point was settled in Winsor v. The Queen (1865) 1 Q.B. 289 that where the jury failed to arrive at a verdict after a reasonable time, the judge in his discretion may discharge them.

It would seem then that if the trial Judge thought as a result of the allegations made that the accused was likely to be prejudiced he could, in the interest of the accused, have discharged the jury. It is to be conceded that the Judge must exercise this discretion judicially and not arbitrarily. If there should occur at a trial any circumstance which would glaringly result in serious prejudice either against the defence or the prosecution we would be inclined to hold that it would not be in proper exercise of his discretion for the Judge not to discharge the jury and direct a new jury to be empanelled.

In reviewing the Judge's exercise of discretion in this case it must not be overlooked that Counsel made no application at the time for the jury's discharge.

Counsel for appellant who represented appellant at the trial has given this Court his reasons for not having made that application but they do not seem sound to us. We concede that there may be cases

where a Judge should discharge a jury of his own motion, but this is not such a case. Moreover the information concerning threats to witnesses for the prosecution was far too nebulous to be of any value. It was not suggested that the appellant who had been in custody for many months was in any way implicated in the efforts which it is alleged were being made to intimidate witnesses for the Crown. The Judge's warning was directed at those persons who may have, as was reported, used threats and no jury could reasonably have interpreted what was said as reflecting against the appellant in any way.

Without in any way attempting to fetter the powers of Judges presiding over criminal trials in the future or to curtail the right of those who may prosecute for the Crown to bring to the notice of the Judge such matters as it may be thought fit, we think that where the police are in possession of information, as in this case, which relates to interference with witnesses the more desirable procedure is for the information to be withheld from the Judge unless it is sufficiently substantial either to warrant a prosecution of the individuals involved or to justify the Judge exercising his discretion to put an end to the trial.

Accordingly we hold that this ground of appeal must fail.

The other ground of appeal raises, once again, a point concerning the important rule regarding the warning to be given to a jury when an accomplice gives evidence.

The case for the Crown was that the murdered woman lived with her husband at De Kinderen, West Coast Demerara. On the morning of the 4th May, 1954, the date of the murder, her husband left for work leaving her in good health and wearing certain ornaments of jewellery. Shortly after her husband's departure she was seen by witnesses just outside of her home. She was then wearing the jewellery, and about an hour after the appellant was seen to go to her house. Later that morning he was heard to ask his wife to wash his clothes and on her remarking that his clothes were clean when he left the house that morning, he replied "If you talk too much I put something on you . . . . too." The deceased was found lying dead in her home in a pool of blood and it was established by medical testimony that her death was due to injuries she had received just before death. The jewellery was missing.

Those articles of jewellery which the dead woman was wearing on the morning when she was murdered were clearly established by the evidence of witnesses to have been in the joint possession of the appellant and one Drepaul later on the same day and on the day following the murder. One witness said the jewellery was in the appellant's possession and he saw him hand it to a man named Drepaul. Drepaul had been arrested and charged jointly with the appellant with murder but after the preliminary inquiry a *nolle prosequi* was entered against Drepaul and he was called as a witness for the Crown at the trial. In his evidence he stated that the appellant had handed him the jewellery that morning so that he should pledge it to obtain a loan for the appellant.

The Judge in his summing-up exhorted the jury to approach Drepaul's evidence with caution and to scrutinise the evidence to sea

whether any witness supported Drepaul. He said at page 81 of the Record—

> "We come now, gentlemen, to another phase of the case. Let us see "where the accused went after he left his house. The Crown says that "he went to the house of a man named Abdool Drepaul. Now, gentle- "men, Drepaul is a very important witness and I charge you to view his "evidence very carefully. As a matter of fact, you must approach it "with caution. Bear in mind that Counsel for the defence pointed out "that Drepaul was also charged by the Police in connection with this "offence. He is a competent witness but it is 'for you, having heard his "evidence, to say what credibility you are going to place on his testi- "mony and the weight you are going to give it. I urge you to approach "his evidence with caution."

The Judge did not tell the jury that Drepaul was an accomplice nor did he leave it to them to decide whether he was or was not an accomplice. If Drepaul were an accomplice, we would hold that the caution given the jury in the words quoted above would not be the appropriate warning regarding corroboration.

Counsel for the appellant has submitted that Drepaul was clearly an accomplice and since there was no direction or no proper direction to the jury on the correct approach to an accomplice's evidence, then on the authority of *Davies v. Public Prosecutions Director* (19541 1 *All E.R.* 507, the conviction must be quashed.

We have already indicated that the Judge gave no proper directions to the jury on how an accomplice's evidence must be evaluated. But was Drepaul an accomplice? In *Davies v. Public Prosecutions Director* (*supra*) *Lord Simmons, L.C.,* in his speech at page 513 said:

> "On the cases it would appear that the following persons, if called "as witnesses for the prosecution have been treated as accomplices:
>
> "(1) On any view, persons who are *particeps criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is surely the natural and preliminary meaning of the term 'accomplice' "

It will be seen from that authoritative definition an accomplice to a felony is one who participates in the actual felony or is an accessory after the fact of that felony as distinct from one who may be concerned otherwise in the criminal transaction.

From the short summary of the evidence we have recited above the only circumstance against Drepaul was his custody of the jewellery after the murder. There was not a shred of evidence directly associating him with the actual murder of Sumintra either by acting alone or jointly with appellant. It was suggested, however, that the Judge should have directed the jury that Drepaul was an accessory after the fact, and so an accomplice, or at least it should have been left to the

jury to find whether he was an accessory after the fact of murder in which case they would have to deem him an accomplice.

It is unnecessary to labour the point that before Drepaul could have been treated as an accessory after the fact of murder not only must he have known that the appellant had committed a murder but he must have done something to assist him to escape detection. There was no evidence direct or circumstantial sufficient to impute to Drepaul knowledge that a murder had been committed by appellant. There was evidence from which it may have been rightly inferred that Drepaul knew the articles were stolen. He was undoubtedly affording appellant assistance to dispose of the stolen articles. His acts or conduct may have brought him within the limits of the offence of receiving or at least an accessory after the fact of the felony of larceny but not an accessory after the fact of murder. He may rightly have been considered an accomplice of larceny. We are of opinion that the Judge quite rightly did not hold Drepaul in law an accomplice to the murder, and on the evidence he was right not to leave it to the jury to find whether he was so as a fact. Accordingly there was no need to introduce into the summing-up the warning concerning corroboration of the evidence of an accomplice.

Had we come to the conclusion that Drepaul was an accomplice we would have felt constrained to apply the proviso to the Ordinance. The evidence against the appellant was overwhelming, including, as it did, not only the evidence that he was the original possessor of the jewellery but also that he was seen by many witnesses round about the scene of the murder immediately prior to the time, when the murder was committed. There was also the evidence of his directing his wife to wash the clothes he was wearing that morning. We are of opinion that a reasonable jury properly directed (*ex hypothesi* Drepaul being an accomplice) would have considered the evidence as a whole ample to justify them to return a verdict of guilty of murder.

The appeal is accordingly dismissed.

MITCHELL v. BAKSH

(In the Supreme Court, Civil Jurisdiction (Stoby, J.) February 7, 8, 26, 19550.

Practice—Substantial variance between facts alleged by plaintiff in his statement of claim and evidence of plaintiff—Application for amendment of statement of claim—Principles on which amendments are granted.

The rules of Court exist to regulate practice and procedure, to prevent parties being taken by surprise and to assist in the speedy administration of justice. They must not be interpreted in a manner which may lead to an injustice instead of preventing one.

However negligent or careless may have been an omission and however late a proposed amendment to remedy that omission, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.

Amendment granted.

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

B. S. Rai for defendant.

MITCHELL v. BAKSH.

Stoby J.: This case came on for hearing on the 7th and 8th February, and on the conclusion of the evidence Mr. Rai for the defendant submitted that on any view of the facts judgment must be entered for the defendant since there was substantial variance between the evidence for the plaintiff and the facts alleged by the plaintiff in his Statement of Claim.

The action by the plaintiff is in his personal capacity and as executor of the estate of Henry Alfred Mitchell (deceased). In paragraph 1 of the Statement of Claim it is pleaded that "on the 17th July, 1951, the plaintiff purchased from the defendant all the defendant's right title and interest under conditional grant No. 7079 dated the 18th day of April, 1934, in and to:

> "A tract of Crown Land situate lying and being on the left bank of the Abary River commencing at a paal C.H.P. 66 feet from High Water Mark and about 14855 feet below a point opposite Bush Lot Water Path and next to and above a tract of 13.98 acres held by Seetohul under Lease A2298 and extending thence in facade South (true) 400 feet by a mean depth West (true) 1089 feet in the County of Demerara and Colony aforesaid, and containing 10 acres as shown on a diagram dated the 3rd day of November, 1980, by C. H. Parsley Government Surveyor, hereunto annexed, a duplicate of which diagram together with a duplicate of this grant is deposited in the Office of the Department of Lands and Mines."

for the sum of $50:—(fifty dollars) which sum the plaintiff on the said day paid to the defendant.

In evidence the plaintiff said inter alia :

> "I am the son of the late Dr. H. A. Mitchell. I did not know of the 1929 transactions but learnt of it later from my father. The defendant admitted to me that my father had fully paid him for the Lands. In 1951, the defendant and Hyder Ali Khan came to me at Sandbach Parker where I work, Defendant told me he had come about the transfer of the land and if I gave him $50:—for his trouble he would transfer the two sections. I agreed."

It will thus be seen that there was indeed a substantial variance between what was pleaded and what was said.

Counsel for the plaintiff on the point being urged, applied for an amendment which was submitted to me and a copy was served on the defendant. In the amended statement of claim the contract of 1929 is pleaded and the payment of $50:—on the 18th July, 1951, is treated as an implementation of the original contract.

Mr. Rai submits that the amendment ought not to be allowed because:

(a) It was an amendment which could have been foreseen at the conclusion of the plaintiff's case and should have been asked for them; and

(b) Fraud was alleged by the defendant and an amendment should not be allowed when the defence was alleged fraud.

The cases of *Edevain v. Cohen* 43 *Ch.D.* 190 and *James v. Smith* (1891) 1 *Ch.* 384 were cited in support of his submission. In *Edevain v. Cohen* (*supra*) the plaintiff was the owner of furniture which he claimed had been wrongfully removed from a dwelling house by five persons. In a previous action he obtained damages against three persons and sought in this action to obtain damages against the remaining two. There was some evidence of acts by the defendants subsequent to the former action which might give the plaintiff a fresh cause of action. After the close of the plaintiff's case and after one of the defendants had given evidence, an application was made to amend the defence by pleading that the cause of action was merged in the previous judgment. The trial judge refused leave to amend and his decision was upheld on appeal.

The case is not fully reported but Cotton L.J. in his judgment said:

> "The point was one which was not taken at once by the defendants so as to be insisted upon directly it appeared from the evidence; tot leave was only asked when the plaintiff's case had been finished and the defendants' case gone into for some time. I think it is not a case in which an amendment should be allowed."

I do not understand this case as deciding as a matter of law that an amendment cannot be granted after the close of the defendants' case. The reason it would seem, 'for refusing the amendment was because the grant of it would have entitled the plaintiff to file an amended statement of claim setting out the subsequent conduct of the defendants from which a fresh cause of action arose. This in turn would have meant a fresh defence and so in the circumstances of that case the judge exercised his discretion against the grant of the amendment.

The other case cited *James v. Smith* (*supra*) was one which the defence pleaded that the action was not maintainable because section 4 of the Statute of Frauds required the transaction to be in writing. After defendant's counsel had addressed the Court, plaintiff's counsel in reply was able to refer to an authority deciding that section 4 did not require writing. The defence then attempted to amend by pleading section 7 of the Statute of Frauds. It was agreed that section 7 was the one which should have been originally pleaded and would have been fatal to the plaintiff's case. Mr. Justice Kekewich declined to allow an amendment and said:

> "I think that I should be going too far to allow an amendment of this kind and introducing laxity into the practice. A man relies upon one particular section, and when he finds that the authorities are against him, he says, I wish to rely upon something else. I think I ought not to allow the amendment."

In the result the case was dismissed so the point was never taken to appeal. A decision of a High Court Judge in England is not binding on a Judge of the Supreme Court of this Colony, and as this decision is in my view, with respect, contrary to the principles on which amendments are granted I must decline to follow it.

The recognised principles on which amendments are granted are stated *by* Brett M.R. in *Clarapede v. Commercial Union Association* 32 *M. R. p.* 263:

> "However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."

In *Loufti v. G. Czarnikow Ltd.* (1952) 2 *All E.R.* 823 *Sellers J.* allowed an amendment to the statement of claim after both counsel had addressed him: dealing with one of the proposed amendments he said at page 824:

> "I think it would be only in conformity with well-established rules that I should allow that amendment because it is simply setting out in the pleadings that which has emerged in the course of the case as an issue between the parties."

What has occurred in this case is that the plaintiff gave all the evidence referable to a 1929 contract and was fully cross-examined on his evidence. The defendant gave his version of what took place between him and the plaintiff's testator and explained why the payment of $50:—was made in 1951. All the facts are before the Court: but for the anxiety of plaintiff's counsel to have the case disposed of, it would have been necessary to adjourn the hearing on the 7th February to enable the defendant to file his defence again after obtaining the Court's leave. On a previous occasion he had obtained leave to file a defence and had omitted to do so within the prescribed time. Either the consent of the plaintiff or fresh leave was necessary; the defence was filed without either course being adopted.

The real issue in this case is whether the defendant sold to the plaintiff's testator two conditional grants or one. The plaintiff says two, the defendant says one. If this action were dismissed at this stage on the ground raised by the defence the plaintiff would not be precluded from filing a fresh action tomorrow; while the Rules of Court exist to regulate practice and procedure, to prevent defendants being taken by surprise and to assist in the speedy administration of justice, they must not be interpreted in a manner which may lead to in injustice instead of preventing one. It is one of the aims of the Court to prevent multiplicity of actions. This will be achieved by granting the amendment applied for subject to the order that the costs of and occasioned by the amendment will be defendants in any event. And subject to the further order that the defendant will be at liberty to file an amended defence and to recall the plaintiff or any witness for further cross-examination.

Amendment granted.

Solicitor:

I. G. Zitman for Plaintiff.

BOVELL v. A. K. KALAMADEEN executor of Estate of KALAMADEEN, deceased.

(In the Supreme Court, on appeal from the Rent Assessor (Boland, J.) March 1, 1955).

Rent Restriction—Assessment—Applicant ejected from premises by landlord while assessment proceedings pending—Applicant still out of possession at time of hearing of application—Application struck out.

At the time an application was made to have the premises assessed the applicant was in occupation of the premises. While the assessment proceedings were pending the applicant was ejected from the premises as the landlord regarded her as a mere trespasser. At the time of the hearing of the application the applicant was still out of possession.

The application was struck out by the Rent Assessor.

Held: No assessment could he made on the assumption that the applicant was a tenant until that issue between the parties was determined in a competent court. The application was therefore correctly struck out.

Appeal dismissed.

F. Ramprashad for respondent.

Boland J.: The record discloses that the applicant although in occupation at the time of filing her application was whilst these assessment proceedings were pending ejected from the premises as the landlord regarded her as a mere trespasser; and the applicant is still out of possession. I agree with the Assessor that no assessment could be made on the assumption that applicant is a tenant, until that issue between the parties is determined by a competent Court. It was open to the applicant to take proceedings against the respondent for violating her rights as tenant by his act of ejecting her. That was the necessary preliminary to seeking to get the Assessor to make an assessment of the premises.

The application in my opinion was correctly struck out. That would not prejudice the right of the applicant to apply again for assessment, if she is successful against the respondent in her claim that she was a tenant wrongly ejected. The issue as to tenancy in this case the Assessor should have declined to determine.

Appeal dismissed.

Solicitor:

C. M. L. John for appellant.

D'ALMADA v. ROBERTS and RHEBURG
RHEBURG v. ROBERTS

In re Estate of ROBERTS (deceased).

(In the West (Indian Court of Appeal, on appeal from the Supreme Court of British Guiana (Perez, Jackson, Bell, C.J J.) February 25; March 7, 1955).

Originating summons—Will—Interpretation.

These were two appeals taken together by consent of the parties from a judgment on an originating summons asking for the construction of certain clauses of the will of the deceased Roberts.

The questions to be determined on the appeal and the decisions of the Court thereon are set out in the judgment.

Appeal of appellant D'Almada allowed.

Appeal of appellant Rheburg dismissed.

S. L. Van B. Stafford, Q.C., for appellant D'Almada.

B. O. Adams for respondent Roberts.

F. H. W. Ramsahoye for respondent-appellant Rheburg.

Judgment of the Court: These two appeals, taken together by consent of the parties, are from a judgment of Hughes, J. on an originating summons asking for the construction of certain clauses of the will of Cyril Copeland Roberts, deceased.

The deceased died on the 19th February, 1944, after having made and published his last will and testament dated 4th January, 1944, probate of which was granted on 31st March, 1944. The will was made by the testator himself. Lily Roberts, the widow of the deceased, died on 21st October, 1951, intestate, and Letters of Administration *de bonis non* of her estate were granted to Paul Rheburg on 7th June, 1952; the said Paul Rheburg is a nephew of the said Lily Roberts and claims to be entitled to a share in whatever property passed from the estate of Cyril Copeland Roberts to the estate of Lily Roberts. The clauses that call for construction are—

> "Thirdly: I give, and bequeath to my wife Lily Roberts a property "in Georgetown constituting of land and buildings and erections for the "term of her natural life in the said property which must be kept in "proper repairs; and all Rates and Taxes paid by my Executor and she "is to receive Forty Dollars in each and every month from the Interest "of my scrip in the Royal Bank of Canada, Humphrey & Co. and in the "Hand-in-Hand Insurance Co. for the term of her natural life.
>
> "Fourthly: I give and bequeath as follows one half to my son Ge- "rald Stanley Roberts, one hundred Dollars to Florence D'Almada born "(Roberts) and the balance to my Grandson Francis Albert D'Almada.
>
> "Fifthly: After my death ;I request my executor to sell my Motor "Car and Property 262 New Garden Street, and the proceeds from the "property buy a small cottage with the approval of my wife Lily Rob- "erts . . . . . and the balance to be placed in the Government Savings "Bank for the use and benefit of my Estate and any other property I "may die possessed of not herein stated

"or named whether in this Colony or any other Country I leave and be-
"queath to my son Gerald Stanley Roberts."

In the course of his judgment the Judge stated that—

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

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

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

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

As regards the fourth clause the Judge stated that that clause was "certain only as to the objects, and, except as regards the bequest of one hundred dollars to Florence D'Almada, contains no reference whatever to the subject" and it seemed to be "entirely reasonable to conclude that the testator, having called to mind and disposed of his property outside the Colony and his immovable property in the Colony, would then proceed finally to deal with the remainder of his property (excluding that part to which he had already referred in making provision, in the third clause, for the maintenance of his wife); that remainder would be his other investments in local undertakings and cash in the Bank. To say either that it was not the intention of the testator to dispose of that remainder or that it was his intention that it should be included in the expression "any other property" in the fifth clause, would, in my opinion be to do violence both to the presumption against intestacy and to the general scheme of the Will."

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

The effect of the construction placed on these clauses by the Judge is as follows:—

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

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

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

Against this conclusion the appellants have appealed.

On behalf of the appellant D'Almada it was contended that the true construction should be that by clauses 3 and 4 of the will all the property, apart from the gift of one hundred dollars to Florence D'Almada and the life interest of the widow, should pass as to one-half to Gerald Stanley Roberts and the other half to the appellant Francis Albert D'Almada; that the first part of clause 5 is directory and that the latter part deals with property not specifically stated or named in the instrument.

On behalf of the appellant Paul Rheburg it was contended that clause 4 was void for uncertainty resulting in an intestacy.

On behalf of the respondent Gerald Stanley Roberts it was contended that save for the gift of $100.00 in clause 4 to Florence D'Almada that clause made no effective disposition of any property whatever but nevertheless no intestacy resulted as clause 5 provided against such an event; that the true meaning of the words "not herein stated or named" is "not effectively disposed of" and that the effect of the latter part of clause 5 is to give all such undisposed of property to the said Gerald Stanley Roberts.

It is agreed that clauses 1 and 2 of the Will present no difficulty. We agree with the learned trial Judge when he says—

> "The third clause is, to my mind, quite unambiguous and can be interpreted only as meaning that the testator
>
> "(a) gives to his wife for her natural life the land and buildings at 262 New Garden Street;
>
> "(b) makes provision for the payment of rates and taxes; and
>
> "(c) provides for the payment to his wife for her life of the sum of forty dollars a month from the interest derived from the investments named."

With regard to clause 4 we are of the opinion that that clause read, as it must be, in the light of the prior clauses 1, 2 and 3, clearly refers to a disposition of the immovable property in Georgetown and the scrip in the Royal Bank of Canada, Humphrey & Co. Ltd. and the Hand-in-Hand Fire Insurance Company.

In regard to clause 5 it is clear to us that the first part thereof is merely directory and that the property, No. 262 New Garden Street, is the same property as that referred to in clause 3. Indeed all parties admit that the only immovable property owned by the testator in Georgetown at the time of his death was No. 262 New Garden Street. That latter part of (this clause in our view deals with property not specifically mentioned in the testament and does not refer to No. 262 New Garden Street or the movable property mentioned in clause 3.

The contention that there was any intestacy in relation to any part of the estate does not find favour with us; and indeed the words of the latter part of clause 5 "and any other property I may die possessed of not herein stated or named whether in this Colony or any other

Country I leave and bequeath to my son Gerald Stanley Roberts" were intended to and did in fact effectively dispose of everything the testator possessed which was not already disposed of.

The submission that the words "not herein stated or named" in the latter part of clause 5 mean "not effectively disposed of" is not in consonance with the authorities or with common sense.

The effect of the construction which we place on the disputed clauses is that:—

(i) Apart from the life interest to the widow mentioned in clause 3 and the one hundred dollars to Florence D'Almada mentioned in clause 4, all the property stated or named in clauses 3, 4 and 5 of the will pass as to one-half to Gerald Stanley Roberts and as to the other half to Francis Albert D'Almada.

(ii) All property that may form part of the estate of the testator and that is not stated or named in the will pass to Gerald Stanley Roberts.

The appeal of Francis Albert D'Almada is accordingly allowed and the appeal of Paul Rheburg dismissed, the costs of all parties to come out of the estate.

Solicitors:

Carlos Gomes for appellant D'Almada.

J. A. Jorge for respondent Roberts.

I. G. Zitman for respondent-appellant Rheburg.

SEERAM SINGH v. DARIAU SINGH

(In the Supreme Court, Civil Jurisdiction (Phillips, J.) December 3, 1954; March 12, 31, 1955).

Opposition—Equitable interest in immovable property—Breach of contract—Remedy—Proprietary right in land or portion thereof.

The case for the plaintiff was that he and the defendant had entered into a contractual relationship whereby the defendant promised that he would devise and bequeath the residue of his estate (which includes the land now in dispute) to the plaintiff and make him the executor of the defendant's will (as he purported to do on the 14th October, 1950, when he did in fact execute a will in those terms) upon the consideration and promise made by the plaintiff by which he undertook the sole maintenance and support of the defendant who was then of advanced age, declining health and impoverished circumstances.

The plaintiff and defendant had some domestic differences as a result of which the defendant apparently unequivocally demonstrated his intention no longer to regard the contract in existence and binding. In December, 1952, the defendant left the plaintiff's home for the home of one Rochan and proceeded to sell out the land in dispute to one Sanichar.

The plaintiff thereupon entered opposition to the passing of transport of the land by the defendant to Sanichar.

Counsel for the defendant took a preliminary point at the hearing of this matter that the plaintiff's statement of claim disclosed no cause of action and that even if it did an opposition suit was not the proper remedy.

Held: The law and practice of the Courts seem well settled' and recognise only two categories of claims as founding oppositions, namely,

(a) claims in or to the property about to be conveyed, mortgaged or leased; and
(b) claims by simple contract creditors against the owner of the property.

The plaintiff may be taken to have had the following rights—

(a) an equitable interest as tenant at will of some portion of the immovable property in question but which had been determined by implication; and
(b) a right to bring an action for unliquidated damages for breach of an executory contract prematurely determined.

No proprietory right in the land or any portion thereof had been shown to exist in the plaintiff.

The interests in the property alleged were not appropriate to found an opposition suit.

Preliminary objection upheld.

W. R. Adams for plaintiff.

Sir Eustace Woolford Q.C. for defendant.

Phillips J.: This was an opposition suit in which the defendant's Counsel when the matter came on for hearing took a preliminary point that the Statement of Claim disclosed no cause of action and that even if the plaintiff had any cause of action it was self-evident from the Reasons of Opposition filed herein that an opposition suit was not the appropriate remedy. *Ajubun vs. Abdul Amir,* (1931-37) *L.R.B.G. p.* 348. The plaintiff's Counsel on the other hand argued that the Reasons of Opposition show 'that the defendant had an equitable interest in the immovable property sought to be transported and that equitable interests in land can lawfully found and be the proper subject of an opposition suit.

No evidence was taken.

Mr. W. R. Adams cited *"Duke on Immovable Property."* At page 21 the learned author states: "The Court will protect any equitable interest of the opposes in the Res opposed." The cases *Coltress vs. Coltress,* 1931-37 *L.R.B.G. p.* 523 *and Sunicharry vs. Sooknanan* (a decision of the Full Court on 30th April, 1943) to a certain extent support that proposition. The question is what are the interests herein equitable or otherwise claimed by the opposer in the property.

The following are the Reasons of Opposition.

"1. That the Opponent is the nephew of the vendor, the said Dariau Singh, with whom he lived from his boyhood days about twenty-four years ago. From the age of about twelve years, the Opponent tended the cattle belonging to the said Vendor and worked for him generally, without payment, hence the Opponent was not sent to school by the Vendor, but kept at home for his service, as abovementioned.

2. That the Opponent, as he grew older, worked as a labourer, on various lands bordering the Pomeroon River for various employers, and in this way accumulated money, with which he built his own house on the Vendor's Land at Charity, Pomeroon, now sought to be transported, and also cultivated the surrounding area with cocoanuts, cassava, greens, etc., the said Dariau Singh obtaining the benefit thereof.

3. That during or about the year 1943, owing to the keen competition and general falling away of business in the Rice trade, in which the said Dariau Singh was engaged, as well as his failing-health, he was forced to discontinue such occupation.

4. That owing to the advanced age, declining health and impoverished circumstances of the said Dariau Singh, the Opponent at his request and in consideration of his bequeathing to the Opponent the said immovable property now sought to be transported, assumed the sole maintenance and support of the said Vendor from the year 1943 to the present time.

5. That in accordance with and fulfilment of his said promise and undertaking, the said Dariau Singh executed a Will on the 14th October, 1950, in which he bequeathed the residue of his estate to the Opponent herein and also nominated the Opponent as executor of the said Will.

6. That after the death of Mullia, the wife of Dariau Singh, and soon after the Opponent had assumed full responsibility as agreed for his maintenance and support, the Vendor disposed of his house (a troolie structure, which was erected many years previously and was in a state of great disrepair) to one Rochan, male East Indian, who lives at New Road, Charity. The said Rochan dismantled the same and removed it from the said land, as the Vendor moved over into the Opponent's said house, where he has resided since that time up to the month of December, 1952, when he removed therefrom and took up residence at the home of the said Rochan.

7. That early in December, 1952, the Opponent and the said Vendor had some domestic differences, and acting on inducement by the said Sanichar, the said Dariau Singh in a moment of pique and weakness, entered into an agreement of sale of the said land, transport of which is hereby opposed, by him to the said Sanichar.

8. That by concluding a sale of the said piece of land to the said Sanichar, the said Dariau Singh acted fraudulently and in collusion with the said Sanichar in order to deprive the Opponent from obtaining ownership of the said piece of land, as was previously agreed between the said Dariau Singh and the Opponent.

9. That the Opponent, when he learnt of the proposed sale to Sanichar, offered to pay to the Vendor the purchase price agreed on between him and Sanichar, so as to protect his (the Opponent's) interests, but his request was ignored and the transport later published.

10. That by reason of the circumstances herein appearing it is not competent for the said Dariau Singh to pass transport of the said piece of land to Sanichar, as advertised as aforesaid.

11. That in view of all the prevailing circumstances and in order properly to give effect to the said promise and undertaking which the said Dariau Singh made to the Opponent and also to safeguard the Opponent's interests and recompense him for his

labour, the said agreement of sale made between the Vendor and the Purchaser should be nullified and transport of the said piece of land hereby opposed should instead be advertised and passed immediately by the said Dariau Singh to the Opponent herein the land being sold to him at the same price as agreed between the said Dariau Singh and Sanichar, the would-be purchaser."

By paragraph 2 it would seem that if such facts as there stated could be established the plaintiff would be a tenant at will of some part of the property and having therefore not a legal estate but an Equitable Interest necessitating in the special circumstances reasonable notice to quit.

Errington v. Errington, 1952, 1 *K.B.* 290.

In a tenancy at will the exercise of an act of ownership, however, on the land which is incompatible with the continuance of the tenancy operates as an implied determination. The alienation of the land herein and sale in December, 1952, to Sanichar referred to in paragraphs 7 and 8 would seem to be an implied determination of the tenancy at will here.\

Paragraphs 4, 5, 7 and 8 would seem to imply that a contractual relationship existed between the plaintiff and the defendant (Dariau Singh), the promise of the defendant being that he would devise and bequeath the residue of his estate to the plaintiff and make him the executor of the defendant's will (as he purported to do on the 14th October, 1950, when he did in fact execute a will in those terms) upon the consideration and promise made by the plaintiff by which he undertook (it is assumed for life) the sole maintenance and support of the defendant who was then of advanced age, declining health and impoverished circumstances. However it would appear that the plaintiff and defendant later had some domestic differences; as a result the defendant apparently unequivocally demonstrated his intention no longer to regard the contract in existence and binding. In December, 1952, the defendant left the plaintiff's home for the home of one Rochan and proceeded to sell out the land to the aforesaid Sanichar.

If this be the true state of affairs the plaintiff is not obliged in law to wait (to bring his action) until the death of the defendant to see whether, as the defendant had promised, the residue of the estate had been devised to him, but may bring at once an action upon this unequivocal determination of the contract and claim damages for such breach. If this is a correct statement of the legal position based on the stated facts his would be a claim for unliquidated damages—a claim not permissible in these *"opposition"* proceedings.

The law and practice of the Courts seem well settled and recognize only two categories of claims as founding oppositions namely,

(a) claims in or to the property about to be conveyed, mortgaged on leased, and

(b) claims by simple contract creditors against the owner of the property.

Ajuman v. Abdul Amir, (1931/37) *L.R.B.G. p.* 384.

In this matter the plaintiff may be taken to have had the following rights :—

(a) an Equitable Interest as tenant at will of some portion of the immovable property in question but which had been determined by implication,

and

(b) a right to bring an action for unliquidated damages for breach of an Executory Contract prematurely determined.

The crucial element in converting a contractual right (such as above) enforceable only against the promisor or his estate, into a *proprietary right,* enforceable against third parties, is the *availability of an equitable remedy by Specific Performance or Injunction.* A Court of Equity acting *in personam* would not undertake to grant Injunctions or order specific performance of Contracts when the carrying out of its orders would be impracticable or require supervision which the Court could also not undertake.

Lumley v. Wagner, 21 *L.J. Ch.* 898.

The Court would not, it is submitted, make an order to compel a person to continue to accept the charity of another against his wishes even though it be a breach of some agreement so to do.

No proprietary right in the land or any portion thereof has been shown to exist in the plaintiff. I have therefore come to the conclusion that the interests in the property alleged herein are not appropriate to found an opposition suit. It must not be taken that there is anything said here or intended to convey that the plaintiff is in any way precluded, if he so desires, from pursuing any other course to establish or enforce his rights.

The preliminary point is upheld. This opposition suit is dismissed and declared to be not just, legal and well-founded.

Judgment will be entered for the defendant with costs to be taxed.

GRANT v. McARTHUR

(Civil Jurisdiction (Stoby, J.) February 17, 21, 22; March 31, 1955)

Lease—Provision therein for right of renewal—Whether perpetually renewable.

The plaintiff claimed *inter alia* that a lease entered into between himself and the defendant in respect of certain land was perpetually renewable. The plaintiff entered into a written agreement with the defendant the relevant clause of which is as follows:

> "That for and in consideration of the Tenant paying to the Landlady the sum of $240: (two hundred and forty dollars) per annum in monthly instalments of $20.00 (twenty dollars) each commencing from the 1st day of July, 1946, payable in advance, (the first of such instalments is duly-acknowledged as being received), the Landlady hereby agrees to lease all that plot or parcel of land aforesaid to the tenant to have and to hold as tenant to the Landlady for a period of three years with right of renewal."

It was submitted on behalf of the plaintiff that this agreement entitled the plaintiff to be a perpetual tenant of the defendant and the property would only be conveyed subject to a lease in his favour.

Held: In each case in which a lease or an agreement for a lease has to be construed, the document has to be considered having regard to what actually took place between the parties and having regard to the language of the document and bearing in mind that if a perpetual right of renewal is not clearly embodied in the document, no such inference ought to be drawn.

On a consideration of the plaintiff's version as to how the agreement for the lease came to be signed and' the relevant provision of the agreement, the words "with right of renewal" mean a right for a further period of three years. On the conclusion of the second term the agreement gave the plaintiff no further right to renew as there is an absence of words indicating an intention to renew perpetually.

Judgment for defendant.

Cases considered:

(1) *Bridges v. Hitchcock* (1715) 2 E.K. 490.
(2) *Iggulden v. May* 127 E.R. 703.
(3) *Parkus v. Greenwood* (1950) Ch. 644.
(4) *Hare v. Burges* 4 K & J 45.

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

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

Stoby, J. : In this action the plaintiff's claim against the defendant is for specific performance of an oral agreement alleged to be entered into between the plaintiff and defendant whereby the defendant agreed to sell lots 5 to 11, Friendship, East Bank Demerara, for the sum of $5,000: and for consequential orders.

By amendments to the Statement of Claim, one before trial, and the other during the trial, the plaintiff claims in the alternative that a lease entered into between the plaintiff and defendant in respect of the said land is perpetually renewable and the defendant ought to be compelled to renew it, and in the further alternative, $2,000: damages in that the defendant fraudulently represented that she was willing to sell the said lands and by such fraudulent representation induced the plaintiff to spend considerable sums in the improvement thereof.

The lands at Friendship the subject matter of this litigation were owned by the late Joseph Sydney McArthur, King's Counsel, who died in this Colony on the 13th day of September, 1927. Probate of his last will and testament was granted to his wife the defendant herein on the 6th day of December, 1927.

The deceased was married in community of property but in his will he dealt with the whole of the common property held in community and strongly advised his wife to adhere to the directions in his will. On the 24th November, 1927, the surviving spouse elected to take under the will and renounced her right to the community arising under her marriage. On the 14th December, 1927, she filed a corrective declaration in which she claimed her half share in the common property and received a refund of some of the duty paid on her previous application, and therefore, by implication, repudiated directions in her husband's will and elected to accept her half share of the common property held in community.

It is unnecessary, in this action, to decide whether it was legally possible for Mrs. McArthur to renounce her right and then change her mind at a later date. The sequence of events relating to the probate of her husband's will are enumerated herein because it is suggested for the plaintiff that, the defendant and her then legal adviser, were of opinion that there were insuperable difficulties in the way of conveying the deceased's immovable property to a purchaser and it was that belief which resulted in the plaintiff remaining in possession of the property, ostensibly as a tenant but in fact a purchaser.

After the death of her husband, the defendant let lots 5 to 11 Friendship, to various persons and eventually about 1942 to one S. N. Collins; while Collins was tenant he sublet to the plaintiff and after Collins determined his tenancy the plaintiff entered into an agreement in writing with the defendant. The agreement has been tendered as Ex. "A."

It is submitted, on behalf of the plaintiff as an issue of law, that this agreement entitles the plaintiff to be a perpetual tenant of the defendant's and the property can only be conveyed subject to a lease in his favour.

The relevant clause of the agreement, which is not very elegantly drawn is as follows:

"Clause 1—That for and in consideration of the Tenant paying to the Landlady the sum of $240: (two hundred and forty dollars) per annum in monthly instalments of $20.00 (twenty dollars) each commencing from the 1st day of July, 1940, payable in advance, (the first of such instalments is duly acknowledged as being received), the Land-lady hereby agrees to lease all that plot or parcel of land aforesaid to the tenant to have and to hold as tenant to the Landlady for a period of three years with right of renewal."

Counsel for the plaintiff read a passage from Redman and Hills Landlord and Tenant 11th Ed. p. 48: the passage is :—

> "The covenant may foe a covenant for perpetual renewal (a), but the Court will not give it this effect unless the intention in that behalf is clearly shown (b); as, for instance where the covenant expressly states that the lease is to be renewable for ever (c)."

and the case of *Bridges v. Hitchcock* (1715) 2 *E.R.* 490, *H.L.* is quoted as the authority for the editors statement. In *Bridges v. Hitchcock* (supra) the covenant in the lease which the court had to construe was "that if the lessee, his executors . . . should at anytime thereafter before the expiration of the term thereby demised, be minded to renew and take a further lease of the said premises; that then upon application made . . . the appellant . . , should grant such further lease as should by the lessee . . . be desired, without any fine to be demanded therefor and under the same rents and covenants only as in this lease." At the expiration of the time stated in the original lease the lessee demanded a renewal and wished to insert in the new lease a covenant to grant him another lease at the end of the second term. This was

objected to by the lessor on the ground that such a covenant would be in the nature of a perpetuity on his estate. The Court over-ruled the objection and held that the lessee was entitled to a second lease containing a covenant to renew.

This case was explained in *Iggulden v. May* 127 *E.R.* 703 where the lessor had covenanted to grant the lessee another lease for 21 years: "with all covenants, grants, articles, as in this indenture are contained." The Court refused to treat the covenant as meaning that the lease was perpetually renewable and held that the true construction was that it could be renewed once for 21 years and no more. Bridges v. Hitchcock was distinguished on the ground that there the lessee might have required a new lease for 9,000 years under the covenant—the covenant being as already indicated "to grant such further lease as the lessee should require."

The principle on which the courts act in deciding whether a covenant in a lease ought to be construed as containing a perpetual right of renewal or not was stated by Lord Selbourne in *Swinburne v. Milburn* 9 *App. Cases* 844 at *p.* 850 where he says: "I am not inclined to adopt the language which is to be found in some authorities, to the effect that there is a sort of legal presumption against a right of perpetual renewal in cases of this kind; but those authorities certainly do impose upon anyone claiming such a right the burden of strict proof, and we are strongly against inferring it from any equivocal expressions which may fairly be capable of being otherwise interpreted."

In each case then in which a lease or an agreement for a lease has to be construed, the document has to be considered having regard to what actually took place between the parties and having regard to the language of the document and bearing in mind that if a perpetual right of renewal is not clearly embodied in the document, no such inference ought to be drawn.

In *Parkus v. Greenwood* (1950) *Ch.* 644, the Court of Appeal had to decide whether a lease containing a covenant that a landlord would on request of his tenants grant to them a tenancy containing: "the like agreements and provisions as are herein contained including the present covenant for renewal," was a perpetually renewable lease. The Court decided that it was and Evershed M.R., said at page 650:

> "The truth is, I think, that it has long been established that, as a matter of conveyancing machinery, a well-recognised method of producing perpetually renewable leaseholds was by just this form of covenant which has been adopted here. The authority, and it has stood not only unchallenged but affirmed and cited time and again over nearly one hundred years, is that of *Hare v. Burges* (2), a case which came before Sir William Page Wood V.C."

In the course of the judgment reference was made to the judgment of Sir William Page Wood V.C. in *Hare v. Burges* 4 *K. & J.* 45 where he traced the history of the law and explained that since the courts would not construe a covenant in a lease as being perpetually renewable if the language of the covenant was generally worded and not specific, that

conveyancers resorted to the policy of inserting words which could leave no room for thinking that the lease was not perpetually renewable. The general practice, it was pointed out, was to state that the lessee could renew, if he so desired, subject to the same covenants *including the covenant to renew.*

I turn now to consider the plaintiff's version of how the agreement for a lease Ex. "A" came to toe signed. According to him, the defendant took him to her solicitor who prepared the document. As there was some doubt about the limits of her estate it was agreed that he would obtain a surveyor and pay the cost of the survey which the defendant was to repay. The survey cost $130 and the amount has never been repaid.

It will be seen that assuming the plaintiff's version is correct in every detail there was no large expenditure of money contemplated, no discussion about permanent crops or any circumstance to indicate that a long lease was contemplated. With that background and reading clause 1 of Ex. "A" as a whole I am of opinion that the words: "with right of renewal'" mean a right to renew for a further period of three years. On the conclusion of the second term I hold that Ex. "A" gives the plaintiff no further right to renew as there is an absence of words indicating an intention to renew perpetually and the language of the covenant is equivocal. The plaintiff's claim to a perpetual renewal must fail.

The claim for specific performance is founded on an oral agreement to sell followed by acts of part performance. It follows that the first question, is to determine as a matter of fact, whether any such agreement was entered into and while for this purpose the alleged acts of part performance are relevant, it does not necessarily follow that if those acts were performed there was a contract because they may not be referable to any contract of sale.

The plaintiff's evidence on this important issue is as follows:

> "At the end of June, 1949, I did not give up the land or the agreement. In July, 1949, I went to the defendant and demanded the amount owed to me for the survey. Also a renewal of the agreement. She asked me why don't I buy the estate and agreed to pay $5,000 for it. It was agreed that I should offset the amount due to me for survey as an advance of the $5,000. I then told her to let us go to Mr. Morris' office to have the matter arranged. She told me that she could not go that day and I must come to Georgetown on Saturday and we would meet at Mr. Morris. I went to Mr. Morris as arranged on a Saturday in August, 1949. She was already there. She went in to Mr. Morris and spoke to him. I was then called in. Mrs. McArthur then said "Grant I would not be able to give you a transport now." I asked why. She said there was a little matter she would have to get Mr. Morris to settle for her before she could give me a transport tout in the meanwhile I must keep on paying any rent. I agreed to that. I returned to the land and extended my operations. I did so because I considered I had made a purchase."

In support of his claim he called Mr. T. A. Morris, Solicitor, who said that about August, 1949, the defendant went to his office followed by the plaintiff. The defendant appeared to be worried over the fact that she had 'been unable to repay the cost of a survey undertaken at her request. The plaintiff was demanding payment and told Mr. Morris that the defendant had agreed to sell Friendship for $5,000 and he was to deduct the $130 due to him from the purchase price. The defendant who was present did not offer any objection to what Mr. Morris was told.

The defendant who is so deaf that questions to her had to be written and read to her, denied that she agreed to sell, but on account of her age and infirmity I am unable to place much reliance on her evidence as it seemed to me that her memory was failing and that she did not all times follow the proceedings.

Before dealing with the other evidence in the case I will advert to the correspondence as offering some assistance as to the existence or otherwise of a contract of sale.

A letter of the 27th July, 1949, Ex. "F" written by the defendant to the plaintiff contains a sentence on which counsel for the plaintiff places great reliance. The sentence is "God knows Collins was to bury me and own the farm." It is suggested that prior to 1949 the defendant had some arrangement with Collins by which he would eventually own the property and as Collins died it is not unlikely that she was willing to sell in August, 1949. The defendant herself has not been able to assist by saying what she meant when she wrote Ex. "F" but despite her inability to be helpful I am unable to regard that letter as confirmatory of the plaintiff's case. It is evident that prior to 1949 Collins and the defendant were at enmity. He had not been paying the rent properly and had brought an action against her for specific performance. She was about 74 years of age in 1949. It is more than likely that in Ex. "F" she was simply expressing thanks that her life had been spared to thwart what she felt was a wrongful effort on Collins' part to deprive her of her property.

The other letters Ex. "M" and "N" are important because they were written by the plaintiff. In Ex. "M" written on the 7th March, 1951, after explaining how mechanisation had diminished the trade in para grass he wrote: "I then had to turn to farming; when I decided so to do and at the time I had to make an agreement with you I ask of you to make a stipulation a reasonable condition that I can plant permanent plants you did not refuse but at the same time you did not make it possible for -me so to do fully". Later in the same letter he wrote: "As you know the estate had to be surveyed you promised to pay that in parts now and again up to the present you never ask or offer to pay any money."

There has been no explanation, and I can think of none, which will reconcile the plaintiff's evidence that he purchased in 1949 and the surveyor's fees were to be deducted from the purchase price, with his written reproof in 1951 that the defendant had promised to repay and had never kept her word. It appears from Ex. "F" that the defendant had written to ask for a contribution to the Church fund and to inquire about certain crops she thought were on the land.

The defendant did not reply to say what he had done since his purchase but he was bemoaning the fact that the defendant was not assisting financially in improving the drainage etc. whereby his efforts as a tenant could be more adequately rewarded.

Again in Ex. "N" dated the 31st March, 1951, the plaintiff wrote "In the first you stated that you have had no notice from me that the lease is up or ended. If I was anxious of ending my lease with you I would have done so in the prescribed way." Making every allowance for lapse of time, faulty recollection and the inability of an unlettered farmer to express the facts in concise language I cannot ascribe to the language used in the letter any other meaning than that the plaintiff regarded himself as a tenant and not as an owner.

In so far as the evidence of Mr. Morris is concerned I formed the impression from his demeanour that he was an unwilling witness not only because of his long association as adviser to Mrs. McArthur but because his recollection was hazy. There was probably some discussion about a sale but Mr. Morris clearly did not think it was to Mrs. McArthur's advantage to sell and nothing was finalised. He is wrong when he says that the plaintiff told him that defendant had agreed to sell; his recollection is faulty, and I cannot rely on his evidence in the light of the correspondence and the other facts to which I will now make reference.

The other facts are the evidence of Mr. A. G. King and his clerk and the acts relied on by the plaintiff as indicative of a concluded sale.

Apart from their importance as acts of part performance of an oral contract the plaintiff relies on his planting permanent crops and the digging of trenches on the estate as proof that he was acting as an owner, and that there must have been a contract or he would not have expended large sums of money. It is indeed the case that the subsequent conduct of an individual often contributes to the correct appreciation of some incident which had previously occurred. But care must be taken to ensure that the correct inference is drawn because subsequent conduct which may be attributed to a certain set of facts may in reality be the result of another set of facts. In this case the plaintiff argues that he would never have incurred considerable expense in digging trenches had he not agreed to purchase. In the first place I do not accept the evidence that the trenches were as expensive as alleged; in the second Place the plaintiff had sublet some of the land to tenants who required proper drainage for their own protection and in the third place the planting of permanent crops is explained by the plaintiff himself in the correspondence Ex. "M" and "N" as being a necessary adjunct to the short term crops which by themselves were not proving an economic proposition.

In stating that I do not accept the evidence that the trenches were as expensive as alleged and in attributing the digging of trenches to the fact that plaintiff had sub-let the land to tenants I have been guided by the evidence of some of the plaintiff's witnesses Hydar Noor, for example, said that the plaintiff engaged him and five others to dig a trench in 1946 and that they had rented the land from the plaintiff for provision farming. James Dookie who worked with Noor

said that they "took up" the farm lands on completion of the trench. A reasonable inference would seem to be that they were putting the drainage in order preparatory to planting the land, a quite natural precaution for even with this precaution they were flooded out in 1949. It is noteworthy too that the trench digging took place in 1946 long before the alleged contract of sale.

The evidence of Durga and Khan with regard to the other trench follows the same pattern except that their earnings are hopelessly exaggerated and I place very little reliance on their evidence. I reject the plaintiff's subsequent conduct as affording reliable or corroborative evidence of his claim.

On the other hand Mr. A. G. King's evidence although it must be carefully scrutinised, in that the incident took place during the turmoil of an election campaign, supports the view I have formed that the plaintiff fully expected to have the first opportunity of purchasing the property and on hearing that it was sold sought the assistance of Mr. King to have the sale cancelled so that he could buy.

The findings of fact I have made dispose of the plaintiff's claim to specific performance as well as the amended claim to damages made on a false representation. Mr. Stafford contends that if he is not entitled to specific performance the "Court should find that some representation was made to the plaintiff to induce him to expend his money and improve the land and plaintiff is therefore entitled to damages."

While a plaintiff does not have to plead law it behoves him to plead the facts on which he relies for relief. The court has no roving commission to invent theories in order to assist a plaintiff who may have suffered damage. The plaintiff undoubtedly has spent some money in digging trenches and in planting crops, the full benefit of which he has not obtained. But he has not done so because of any improper of fraudulent inducement by the defendant, or because he entered into a contract of sale with the defendant. He is not entitled to any damages on the claim as it is framed or on the facts disclosed although I decline to express any opinion as to whether it would be proper for the defendant or the purchaser to seek to eject him without some reasonable compensation.

There will be judgment for the defendant with costs. Opposition declared not well founded.

Solicitors:

H. A. Bruton for plaintiff.

A. G. King for defendant.

RAMSANKAR v. THE QUEEN

(In the Supreme Court, Court of Criminal Appeal (Bell, C.J., Boland and Phillips, JJ.) December 3, 4, 5, 1954; April 15, 1955).

Carnal knowledge of a girl under the age of 12 years—Competency of child to give sworn evidence—Sections 50, 64 and 71 of the Evidence Ordinance—Nature of questions to be put by judge to child—Circumstances in which superior court will interfere when lower court exercises discretion on question of competency.

The appellant was convicted by a jury on a charge of having had carnal knowledge of S a girl under the age of twelve years.

At the trial S in answer to the trial judge when examined by him as to her competency to give evidence on oath made no answer to his question "If you do not speak the truth what will happen?" In answer to his question "If you do not speak the truth in school what will happen?" S said "Me go get lick." At the conclusion of that question the judge ruled that the witness was competent to give evidence on oath.

Counsel for the appellant in the course of his cross-examination of S asked her questions in an endeavour to test her competency to give evidence on oath but he was stopped by the judge from pursuing that line of cross-examination.

It was submitted on behalf of the appellant that the questions put by the judge to S were not appropriately framed to elicit whether S was of sufficient intelligence to give evidence at all and to understand the nature and obligation of an oath and that the judge therefore did not exercise a true discretion.

Held: The question whether a witness is competent is a preliminary question to be determined by the judge and not by the jury and such determination must take place in the face of the jury.

The modern practice of determining the question of competency of the witness is either to interrogate him before swearing him, or to elicit the facts upon his examination or cross-examination.

The examination of S by the judge showed that she knew she *ought* to speak the truth but it was not of a kind as to enable the judge reasonably to come to the conclusion that S was aware of the *nature* and *obligation* of an oath.

A superior court will not interfere with a discretion vested in a lower court if there are grounds upon which that lower court could properly have exercised that discretion however different the view of 'the superior court might be; but if the lower court without any material or any sufficient material exercised or purported' to exercise a discretion when no facts or no sufficient facts are adduced which would justify that exercise, that is an appealable matter because the lower court has not really exercised any discretion at all.

The trial judge did not have sufficient facts before him to enable him to exercise a proper discretion as to the competency or otherwise of S to take the oath of a witness and erred in allowing her to be sworn.

Appeal allowed.

Judgment of the Court: The appellant was sentenced to three years' penal servitude following upon a verdict by a jury who found him guilty of having had carnal knowledge of Sonamatie a girl under the age of twelve years, contrary to Section 72 of the Criminal Law (Offences) Ordinance, Chapter 17.

The appellant has appealed on several grounds but we intend to deal only with the following, namely, that

> "1. the learned Trial Judge misdirected himself on the law governing the competency of a child witness when he held that the child Sonamatie was big enough to be sworn.

2. The learned Trial Judge wrongly admitted the sworn testimony of the child Sonamatie when according to her answers she was obviously not competent to give evidence on oath.

7. The verdict was unreasonable or cannot be supported having regard to the evidence."

Our decision upon those ground will dispose of this appeal.

As Counsel for the appellant considered that the Judge's notes and the transcript of the Judge's summing-up did not contain a full record of what Counsel thought had taken place at the trial regarding the determination of the competency of the child Sonamatie, he sought amplification of the record in that respect from the Judge and the letters which were exchanged through the Registrar have been made available to us at the hearing of this appeal. We say, with the assistance of those letters, that it would seem that what took place at the trial regarding the matter of competency was as follows :—

When Sonamatie was tendered as a witness she was sworn. Counsel for the appellant before she had given any evidence then raised the question of her competency to give evidence on oath. The Judge no doubt with the requirements of Sections 50, 64 and 71 of the Evidence Ordinance, Chapter 25, in mind proceeded to question her to determine her competency to give evidence on oath or at all. The provisions of those sections read as follows:

"50. A witness is incompetent to give evidence if, in the opinion of the judge, he is prevented by extreme youth, disease affecting his mind, or any other cause of the same kind, from recollecting the matter on which he is to testify, from understanding the questions put to him, from giving rational answers to those questions or from knowing *that he ought to speak the truth."*

"64. Except as hereinafter provided all oral evidence must be given upon oath."

"71. Anyone who, being—

(a) an Aboriginal Indian; or
(b) an African; or
(c) an East Indian or Chinese immigrant or a person of East Indian or Chinese descent; or
(d) a child,

is ignorant of the nature and obligation of an oath, may be allowed to give evidence without oath or affirmation;

Provided that the judge shall determine whether the witness is of competent understanding to give that evidence."

The Judge's questions and the answers given to him by Sonamatie were as follows:

Q. "If you do not speak the truth, what will happen?"
A. No answer. Witness is mute.
Q. "If you do not speak the truth what will happen?"
A. No answer. Witness remains mute.
Q. "If you do not speak the truth in school, what will happen?"
A. "Me go get lick."

At the conclusion of that questioning the Judge ruled that the witness was competent to give evidence on oath and directed that she be sworn. Mr. Rai, Counsel for the appellant, raising no objection. After Sonamatie had given evidence in chief she was cross-examined by Mr. Rai and the early part of his cross-examination, as shown on page 9 of the record, seems to have been directed to testing the competency of Sonamatie to give evidence on oath. He was stopped by the Judge from pursuing that line of cross-examination. Nothing further took place regarding the child's competency till the Judge was summing-up to the jury. Then the exchanges took place between the Judge and Counsel which are recorded at pages 30 and 31 of the record. It seems clear from what is said there, that on the one hand Counsel was complaining that the examination of the child had been inadequate; that he had been wrongly stopped when cross-examining Sonamatie to test her competency to take the necessary oath as a witness and that, in his view, the judge's notes did not adequately record what had taken place regarding the testing of the competency of Sonamatie. On the other hand it is clear from those pages of the record that the Judge was of the opinion that it is within the discretion of the Judge and not that of the jury to say whether or not a witness is competent to give evidence on oath and that his ruling cannot be challenged on appeal. After the exchanges to which we have referred Counsel for the appellant did not again raise the matter of competency.

Counsel's submission to us on the above stated grounds of appeal may be summarized as follows:

> He challenged the competency of the child to be sworn as soon as the Judge had her sworn for the first time. The Judge should then have satisfied himself by appropriately framed questions put to the child that the child was of sufficient intelligence to give evidence at all and understood the nature and obligation of an oath. The questions in fact put to the child were not appropriately framed to elicit the required information. They should have been framed so as to test whether the witness believes in God, in a future state of rewards and punishments and on the moral obligation of the oath she is about to take. The answers given were not such as to justify the Judge in coming to the conclusion that Sonamatie was intelligent enough to give evidence and understood the nature and obligation of an oath. Instead of her having been asked what would happen to her if she did not speak the truth *in Court* she was asked what would happen if she did not speak the truth *in school* to which she replied "me go get lick." Counsel did not question Sonamatie as to her competency after the Judge had finished his questions and before she was resworn as the Judge did not invite him to do so. If it can be shown that a Judge has not really properly directed his mind to ascertaining the competency of a witness he has exercised no true discretion and his ruling can be appealed against.

The general rule as to competency of witnesses is laid down in Section 49 of the Evidence Ordinance, Chapter 25, which declares that

all persons are competent to give evidence in all cases and matters whether civil or criminal, except as is provided in such later sections of that Ordinance as fall within Part III thereof. The only exceptions which concern us in the present appeal are those set forth in Sections 50 and 71.

The question whether a witness is competent is a preliminary question to foe determined by the Judge and not by the jury and such determination must take place in the face of the jury (*R. v. Reynolds* (1950) 1 *K.B.* 606). It would seem that it was at one time permissible to determine the question of the competency of the witness by the Judge examining the witness on the voir dire (*i.e.* vrai dire), the witness toeing sworn "to answer truly all such questions as the Court shall demand of him," but since if he can be sworn on his examination he can also foe sworn in chief, and if incompetent on the latter he must also be so on the former, this test was not very satisfactory. The modern practice therefore is either to interrogate the witness before swearing him, or to elicit the facts upon his examination or cross-examination.

When the competency of the child Sonamatie was challenged before the Judge he had first to satisfy himself that she was not excluded from giving evidence on any of the grounds of exclusion contained in Section 50 of the Evidence Ordinance and in particular those which relate to very young persons. The matter of mental disease apart, it should generally necessitate but brief questioning of a child by the Judge and a careful observance of the child's demeanour to determine whether the child is able to understand questions put to him, to give rational answers thereto and to know that he ought to speak the truth.

As we understand Counsel's submission, the objection against the evidence given by the child 11 years old was not because of her lack of intelligence but because of her incompetence to take the necessary oath.

We turn now to consider what test the Judge should apply in deciding whether or not a child is aware of the *nature* and *obligation* of an oath. We adopt as a correct statement of the law what is said at page 2111 of Volume 2 of Russell on Crimes and Misdemeanours. 8th Ed. 1923, as follows:

> "The competency of the child is a question for the Court to decide after due inquiry. Before a child is examined the judge must be satisfied that the child feels the binding obligation on an oath from the general course of its religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature and not merely from instructions, confined to the nature of an oath, recently communicated to it for the purpose of the trial."

It would not, however, seem necessary to establish that the child is aware of the legal consequences of false swearing (*R. v. Dent* 71 *J.P.* 511).

In determining competency to give evidence on oath it is a common practice to ask some such questions as these: "Have you been taught the Bible?" "Is it a good or a bad thing to tell lies?" "If you kiss the Bible here in Court would it then be wrong to tell untruths?" "What happens to children after they die who tell lies to a Court?", but the precise form of questioning must be left to the trial Judge. The questioning may well be brief, but it must, however, be such as to establish that to speak falsely on oath would be a violation of the moral law, and the child should not be sworn unless he recognises that it is more serious to tell a lie when on oath than when not on oath (*R. v. Dent,* 71 *J.P.* 511).

Now while the examination of the child Sonamatie by the trial Judge showed that she knew she *ought* to speak the truth, we are of the opinion that it was not of such a kind as to enable the Judge reasonably to come to the conclusion that the child was aware of the *nature* and *obligation* of an oath. Normally a Superior Court will not interfere with a discretion vested in a lower Court if there were grounds upon which that lower Court could properly have exercised that discretion however different the view of the Superior Court might be; but if the lower Court without any material or any sufficient material exercised or purports to exercise a discretion when no facts or no sufficient facts are adduced which would justify that exercise, that is an appealable matter because the lower Court has not really exercised any discretion at all. The trial Judge, in our opinion, did not have sufficient facts before him to enable him to exercise a proper discretion as to the competency or otherwise of the child Sonamatie to take the oath of a witness and there erred in allowing her to be sworn.

The trial Judge warned the jury that there was no corroboration of the evidence of the child Sonamatie and we agree with him. If Sonamatie had been competent to give evidence on oath or affirmation the jury would have been entitled to convict on her uncorroborated evidence if satisfied of its truth after having been warned by the Judge that it was not safe to convict on her uncorroborated evidence.

In England by the Children and Young Persons Act, 1933, Section 38, the unsworn evidence of a child of tender years, who, in the opinion of the Court, does not understand the nature of an oath, may be received in any proceedings against any person for an offence, if the child is in the opinion of the Court possessed of sufficient intelligence to justify the reception of such evidence and understands the duty of speaking the truth, but a person shall not be convicted of the offence unless such evidence is corroborated by other material evidence in support of it implicating the accused. There is no similar provision in the Laws of British Guiana, but corroboration of the evidence of a child of tender years not given on oath or affirmation is always looked for in practice in charges of sexual offences and the jury should be so warned. It would obviously be dangerous to convict without such corroboration.

In the light of all we have said above we are satisfied that this conviction cannot be sustained. The appeal is allowed and the conviction and sentence are quashed.

ETWARU v. FAIRBAIRN

Petition by ETWARU for admission of appeal to HER MAJESTY IN COUNCIL.

(In the West Indian Court of Appeal, on appeal from the Supreme Court of British Guiana (Bell, C.J., (In Chambers) March 29; April 19; May 19, 1955).

Practice—Application try petition for leave to appeal from a decision of the West Indian Court of Appeal to the Privy Council—Value of matter in dispute not £300 or more—Evidence of value shown on record of appeal before the West Indian Court of Appeal—Affidavits as to value of matter in dispute filed with petition not to be considered.

An appeal brought by the applicant was dismissed by the West Indian Court of Appeal on a preliminary objection taken on behalf of the respondent that the Court had no jurisdiction to hear the appeal because the value of the property in respect of which the action was brought did not exceed two hundred and fifty dollars.

There was sufficient evidence on the record before the Court from which the value of the property could be derived and the Court declined to permit the appellant to file an affidavit to show that the value of the property exceeded two hundred and fifty dollars.

On a petition by the applicant to a judge of the Court in Chambers for leave to appeal from the decision of the Court to the Privy Council it was sought to be shown by the applicant by affidavits that the value of the matter in dispute was in fact of the value of £300 or upwards and that therefore an appeal to the Privy Council would lie as of right by virtue of the provisions of rule 2 of the Rules enacted by the Order of His Majesty in Council dated 7th February, 1921. The judge gave leave to the respondent to file counter-affidavits as to value.

Held: Having regard to the reasons why the Court had declined to admit affidavits of value, they should not have been admitted by the judge on this application and they should not be acted upon.

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

H. A. Fraser for respondent.

Bell C. J.: On the 8th of January, 1952, the appellant brought an appeal to the West Indian Court of Appeal from a judgment of Ward, J. given in favour of the respondent (Matilda Fairbairn). The appeal came before the West Indian Court of Appeal on the 18th of February, 1952, the 6th November, 1952 and the 25th of February, 1955. At the hearing of the 25th of February, 1955, Counsel for the respondent raised the preliminary objection that the Court had no jurisdiction to hear the appeal because the value of the property in respect of which the action was brought did not exceed two hundred and fifty dollars and he invoked in support of his objection section 94, subsection (1) (b) (i) of the Supreme Court of Judicature Ordinance, Chapter 10. This preliminary objection was argued on the 1st of March, 1955, when Counsel for the petitioner sought the leave of the Court to file an affidavit to show that the value of the property exceeded two hundred and fifty dollars. The Court after referring to the cases of *Hiralal v. Elizabeth Frank and others, W.I.C.A.* 1948 *No.* 1 *British Guiana and Falkner's Gold Mining Company v. McKinnery* (1901) *A.C.* 581 and distinguishing them from the facts in the present case on the ground that in the present case there was evidence and sufficient evidence from which the value of the property could be derived, declined to permit the filing of the affidavit. The Court then expressed itself as not being satisfied that the value of the property in dispute

exceeded two hundred and fifty dollars and struck out the appeal with costs.

The appellant now desires to appeal as of right to Her Majesty in Council against the judgment of the West Indian Court of Appeal of the 1st March, 1955, striking out the said appeal and brings his petition under Rule 2 of the Rules which are enacted by the Order of His Majesty in Council dated the 7th February, 1921. Rule 2 reads as follows:

> "Subject to the provisions of these Rules an appeal shall lie as of right from any final judgment of the Court where the matter in dispute on the appeal amounts to or is of the value of (£300) three hundred pounds sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of (£300) three hundred pounds sterling or upwards."

Now if the value of the subject matter exceeds £300 and the judgment complained of is a final judgment, an appeal will lie as of right under Rule 2 but this does not dispense with the leave of the Court appealed from:

> "Appeals though of right must be allowed by the Court from which the appeal is brought. The right given is not to operate automatically; it forms the basis of application to the Court for leave to appeal, and it is the duty of the Court to form a judgment whether the appeal lies or does not lie. Failure to express an opinion on the right while accepting the necessary security from the appellant for the prosecution of the appeal is incorrect and in such a case the Judicial Committee will determine for itself if the appeal is within the grant and allow it or refuse it accordingly." (Halsbury's Laws of England, 2nd Edition, Vol. 11 para. 429 at p. 222).

When it appears to the Court that the case is one where an appeal lies as of right, leave to appeal cannot be refused if it is applied for within the prescribed time and the appellant is willing to fulfil the prescribed conditions, but it is clear from what has been said above that even where an appeal lies "as of right" the grant of leave to appeal is not a mere formality but is a judicial act to be performed only after due consideration and hearing of all proper objections. In *Falkner's Gold Mining Company v. McKinnery* (1901) *A.C.* 581 *at page* 586. Their Lordships while saying that they appreciated the difficulty which confronts a Court in deciding, upon conflicting affidavits, a question of appealable value, nevertheless clearly indicated that the difficulty was one which had to be faced and a decision arrived at.

Affidavits have been sworn to in support of this petition and counter-affidavits have been sworn to on behalf of the respondent. The affidavits sworn to on behalf of the petitioner if believed by me after carefully considering what is said in the counter-affidavits, and if I felt free to act upon the petitioner's affidavits show that the appeal lies as of right. It was by my Order of the 29th March, 1955, that the counter-affidavits were sworn to on this petition but after consideration I have come to the conclusion that I am not free to act upon any

of the affidavits for these reasons. There is evidence on the Record in this case from which the value of the land, the subject of the dispute, can be derived and which the West Indian Court of Appeal in its judgment of the 1st March, 1955, considered sufficient. I have, it is true, admitted affidavits in this Petition but it seems to me in the light of the abovementioned judgment of the West Indian Court of Appeal and of the reasons why it declined to admit affidavits that I should not have admitted them either and that I should not now act upon them. That being so all that appears before me relating to the value of the land is what appeared before the West Indian Court of Appeal on the 1st of March, 1955 and that clearly shows that the appealable amount of £300 has not been reached. I am accordingly not satisfied that this appeal lies as of right under Rule 2 the Rules enacted in the Order of His Majesty in Council on the 7th of February, 1921. I may add that in arriving at the above conclusion I have put out of my mind the fact that I happened to be a member of the West Indian Court of Appeal which gave the judgment of the 1st of March, 1955.

The Petition is therefore dismissed with costs in favour of the respondent to the Petition.

Solicitor:

J. E. de Freitas for the appellant.

WALKER v. RICHARDS

(In the West Indian Court of Appeal, on appeal from the Supreme Court of Trinidad and Tobago (Collymore, Jackson and Bell, C.J.J.) January 12, 13, 14 and 18, 1955).

Will—Action to establish—Circumstances of great suspicion in respect of will sought to be propounded—Suspicion not removed—Probate of that will refused—Probate of earlier will granted.

The plaintiff (respondent) applied to the Court for probate in solemn form of a will dated 12th March, 1952, alleged to have been made and duly executed by Alonzo Richards, the deceased. Defendant (appellant) disputed this will, alleging that it was not executed in accordance with the provisions of the Wills and Probate Ordinance (Chapter 8, No. 2); that the deceased did not know or approve of the contents: that the will was not signed by deceased or by any person for him or in his presence or at his request; and further that the will was a forgery. The defendant prayed for a pronouncement of a will dated 26th October, 1949, the genuineness and the due execution of which was not in dispute.

The trial judge granted probate in solemn form of the will dated 12th March, 1952. The plaintiff appealed.

Held: The case for the respondent (plaintiff) was fraught with circumstances of grave suspicion; this being so it was for the respondent who propounded the will of the 12th March, 1952, to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of that document This he had completely failed to do and therefore the will of the 12th March, 1952, could not stand. The order made in favour of the validity of the will dated 12th March, 1952, must be annulled, and the probate recalled. Probate in solemn form granted in respect of the will of the 26th October, 1949.

Appeal allowed.

Baker v. Batt, (1838) 2 Moo P.C. 319, referred to.

L. Wharton, Q.C. with *Algernon Wharton* for appellant.

E. P. Bruyning for respondent.

JUDGMENT

The action out of which this appeal arises is one in which the plaintiff, Cyril Alonzo Richards, asked the Court to decree probate in solemn form of a will dated 12th March 1952, alleged to have been made and duly executed by Alonzo Richards, deceased. The defendant Hilary Walker disputed this will alleging that it was not executed in accordance with the Wills and Probate Ordinance, Chapter 8, No. 2; that the deceased did not know or approve of the contents of the said will; that the will was not signed by deceased or by any person for him or in his presence or at his request; and further that the will was a forgery. The defendant by way of counterclaim prayed the court to pronounce in favour of a will dated 26th October, 1949, the genuineness and the due execution of which were not in dispute.

The Court found for the plaintiff, dismissed the counterclaim, pronounced for the validity of the will dated 12th March 1952, and accordingly decreed probate. The defendant appealed.

Alonzo Richards and the appellant, Walker, had known each other for upwards of forty years. Richards died on the 2nd April, 1952, and was then seventy-two years old. Appellant is now about 73 years of age and like the deceased is a native of Barbados. They both served in the Police Force in Trinidad. They were very friendly and UP to time of Richards' death this intimacy continued. It seems

quite clear that deceased trusted and relied on the appellant. Such was the character however of the deceased that in spite of this close friendship, and in spite of the frequent visits of the appellant to his home, the notes that have been put in evidence disclose that the deceased used formal appellations and terms, and was wont to set down in writing what he required of his friend both in business and in domestic matters. It is equally clear that deceased generally displayed method and regularity in the conduct of his affairs. Early in 1949 appellant became agent of deceased for the purpose of collecting his rents and his monthly pension and up to three days before his death was being reminded by deceased to go for his pension the next day.

Prior to 1949 deceased had made a will by the terms of which his brother benefited. Desiring to change this instrument because of discord between him and his brother, he wrote certain instructions and gave them to the appellant to take to a solicitor's clerk. One Edwards, a solicitor's clerk, was interviewed and he drafted a will according to the instructions. The will was taken to deceased at his home and on the 26th October, 1949, it was duly signed and executed. Deceased kept the original and a copy of it was left at the office of Mr. Wong, a solicitor. In 1951 deceased sent the will and his two bank books to the applicant for safe keeping.

Respondent Cyril Richards and Albert Richards, his brother, are two nephews of the deceased, being sons of his late brother who largely benefited under the will which the will of 26th October, 1949, superseded. Respondent and Albert were each to receive merely $100 under this later will and save for a disposition of five shillings to his wife the deceased left the residue to the appellant.

In 1949 deceased became ill with a bowel complaint. This condition seemed to continue and during the latter part of 1951 he grew worse. It seems undoubted that from November 1951 respondent used to visit the deceased and sometimes slept at his home, the frequency of these visits increased as the deceased grew worse in health and likewise the occasions on which he slept.

Under the terms of the will of the 12th March, 1952, which has been propounded by the respondent who is appointed sole executor, these two nephews, respondent and Albert, are made "tenants in common share alike in fee simple of 19 Gallus Street, Port-of-Spain," and are also made tenants in common in fee simple with one Charles Raeburn of the two acre parcel of land at Rose Hill. Laventille, while the appellant is to receive the sum of $200 and is given a share with the respondent in the residue, if any, of the estate. There are some other pecuniary legacies.

Evidence tendered on behalf of the respondent was to the effect that one Tyson by arrangement met the deceased along with the respondent on 11th March, 1952, at an office in Sackville Street, a considerable distance from the home of the deceased. Tyson left and prepared the will and they met again the next day at Sewdass Trace, El Socorro Road, San Juan, several miles out of Port-of-Spain. This meeting took place at the house of respondent and there were present several members of the family in addition to the respondent, Tyson

and Joseph. At this meeting it was alleged that the will was duly signed by the deceased and by the two witnesses, Tyson and Joseph. Tyson said the instructions were not signed by the deceased but that respondent was present when the instructions were taken. He further said he destroyed the instructions after he had prepared the will and that he had informed de Nobriga respondent's solicitor, that he had destroyed them. No affidavit of script was filed. One George Atkins, Who gave evidence in support of the defence and counterclaim, said that he had been approached by Tyson after the death of Alonzo Richards and asked to assist in the preparation and execution of a will in order to help respondent and his brother. He further said the respondent was in attendance at their meetings.

The Judge completely rejected the evidence of George Atkins characterising him as a shameless and inexpert liar. One of the reasons which prompted this pronouncement was due to a complete mistake by the Judge as to the date on which Easter Monday fell in 1952, and it must be borne in mind that a person with a character Such as George Atkins bore would immediately suggest himself as a willing tool for the furtherance of any discreditable project. When the evidence of George Atkins is scrutinised along with the evidence of de Nobriga the then solicitor for the respondent, grave grounds for suspicion must immediately arise for the solicitor gave this extraordinary testimony—that he had had in his possession a statement signed by George Atkins which would have damnified any evidence given by him on behalf of the appellant but that at Atkins' request he had returned the statement when Atkins told him respondent 'had not lived up to an arrangement,' which he, respondent, had with Atkins.

With regard to the illness of the aged testator the conflict of evidence is mainly concerned with the seriousness or otherwise of the malady from which he was suffering and its effect on his physical powers, his mental capacity not being in question. On the one hand it is stated that at all material times the testator was able to walk about and conduct his business away from his house, while on the other it is said that he was almost bed-ridden and had been unable to leave his house for some considerable time. Taking into account the care he exercised in the management of his affairs and the unlikelihood of his almost surreptitious visit from his home in Woodbrook to some house in Sackville Street, Port-of-Spain, and the unlikelihood of his visit to San Juan to execute the propounded will of the 12th March 1952, we are strongly of opinion that consequently, considerable suspicion should have been aroused with regard to the due execution of that will.

The witness Elaine Chrysostom gave evidence to the effect that on the morning of the day before Alonzo Richards died, respondent with a hammer broke open the locked drawers of the bureau in the house of deceased and searched for papers; that respondent removed some papers from the bureau but deceased took them and put them under his pillow; that a little later she saw respondent with a paper in his hand and he said to her "You ever see a worthless old man like that. I wanted this piece of paper and he took it and put it under his pillow."

It was further stated that on the day of the death respondent asked the appellant to show him the benefit society's contribution card and that on appellant's refusal respondent shook his finger in appellant's face and said: "This house you want. It will be blood and sand. One for the gallows and one for the grave."

The appellant said that on the day of the funeral at the home of the deceased he told respondent that deceased had left respondent $100 in his will. Respondent made no reply but walked "right outside." Appellant further related that on the 7th April, 1952 his house was stoned about midnight and that respondent was the only person outside at the time. He added that later respondent returned and told him "It is a lucky thing you didn't look out or I would wipe yourself and your family out."

A witness for the defence, one Enid Thomas, who it cannot be denied was apparently impartial and disinterested, said that a short time after the death of deceased, Tyson and respondent and another man went to her home at Laventille Road, Port-of-Spain, where she rented land from deceased; and that respondent said he was now the owner as his uncle had made a will three days before he died; she continued that Tyson asked her if she had any of the old receipts of the deceased, she produced one and he asked her if deceased always signed his receipt in that way. She replied in the affirmative and upon her refusal to let him take the receipt away, he returned it after he and respondent had conferred over it.

Many of the circumstances so far related inevitably excite suspicion and call for denial or explanation, but none is offered.

Furthermore in our view it is highly significant that the respondent although within the precincts of the court and available, was not called to give evidence to deny, if he could, the allegations of strange behaviour on his part or to explain away these allegations. This failure to give evidence (either in support of his case or in rebuttal") was commented on by the trial Judge in the following terms:—

"It is unfortunate that the Court did not hear the evidence of the Plaintiff who could have explained the relationship existing between his uncle and himself, the state of his uncle's health and the frequency and duration of his visits to the house."

Although the absence of the respondent from the witness box operated on the mind of the trial Judge, with due respect to him, we are satisfied that he dealt in his judgment with the issues involved as though there was a contest between the appellant and the respondent, and that alone.

The Judge before setting forth his final conclusions sums the matter up in this way:—

"This case resolves itself into a question of belief or disbelief of the respective witnesses and a weighing of the probabilities of the case."

While it is true that in certain circumstances probabilities is to be taken into account these and the reasonableness of the document itself must be related to the circumstances of each particular case.

Here the Judge says, "On the face of it the dispositions of his property by the deceased in the will of March 12, 1952, are most reasonable. A testator normally provides for his family before strangers."

In the normal case a testator would provide for his widow; but here there is nothing strange in the fact that he leaves in the will of October, 1949, but five shillings for his wife from whom he had been long estranged. To us, it does not seem remarkable that he should prefer in his disposition his aged long trusted friend and companion to his nephews.

The approach by the learned Judge in this matter is not in consonance with authority. Heavy is the burden which lies on the person propounding a controverted will especially when there exists a previous true and valid testamentary document.

"Where the *onus probandi* most undoubtedly lies upon the party propounding the will, if the conscience of the Judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the paper in question does contain the last will and testament of the deceased he is bound to pronounce his opinion that the instrument is not entitled to probate. For if the party upon whom the burden of the proof of any fact lies, either upon his own case, where there is no conflicting testimony, or upon the balance of evidence where there is, fails to satisfy the tribunal of the truth of the proposition which he has to maintain, he must fail in his suit." (Baker v. Batt 1838, 2 Moo P.C. at pp. 319, 320 per Parke B).

Undoubtedly the case for the respondent is fraught with circumstances of grave suspicion; this being so it is for the respondent who propounds the will of the 12th March, 1952 to remove such suspicion and to prove affirmatively that the testator knew and approved of the contents of the document. This he has completely failed to do and therefore the will of the 12th March, 1952 cannot stand.

In view of what we have previously stated it is unnecessary for us to make a definite pronouncement with regard to the allegation of forgery even though the circumstances of the case and an examination of that document may tend to lend colour to the allegation.

In the result the appeal is allowed. The judgment of the trial Judge is reversed; the order made by him pronouncing in favour of the validity of the will dated 12th March, 1952 is annulled and the probate recalled. We pronounce in favour of the will of the 26th October, 1949 in solemn form.

It is an undoubted fact that the executor under the will of the 12th March, 1952 which has been disallowed has dealt with a large portion of the *corpus* of the estate. We therefore allow the appellant his costs here and in the court below against the respondent personally (executor under the will of 12th March, 1952).

YOUNG LAI v. CHO FOOK LUN and anor.

(In the Privy Council (Lords Oaksey, Radcliffe and Cohen) May 23, 1955).

Divorce—Adultery—Evidence—Credibility—Findings of facts of trial judge—Case not at large on appeal.

The petitioner sought a dissolution of his marriage to the respondent on the ground of her adultery with the co-respondent. He led evidence to prove that they were caught in *flagrante delicto.* The trial judge disbelieved his evidence and that of his witnesses, and dismissed the petition. On appeal to the West Indian Court of Appeal, that court held that the case was at large and disagreed with certain findings of fact by the trial Judge. The decision of the trial judge was reversed and the petitioner was granted a *decree nisi* on the ground of the said adultery.

The respondent appealed to the Judicial Committee of the Privy Council.

Held: The case was not at large on appeal to the West Indian Court of Appeal. There was no good ground for disturbing the judgment of the judge of first instance, he having seen and heard the witnesses, and having made a careful review of the evidence in arriving at his findings of fact.

Appeal allowed.

Lord Oaksey : This is an appeal by special leave from a judgment of the West Indian Court of Appeal (Mathieu-Perez, C.J., Trinidad and Tobago; Collymore, C.J., Barbados; and Bell, C.J., British Guiana) dated the 30th day of January, 1953, whereby the decision of the Supreme Court of Trinidad (Duke J.) dismissing with costs the petition of the first respondent for the dissolution of his marriage with the second respondent on the ground of her adultery with the appellant was set aside and the first respondent was granted a *decree nisi* on

the ground of the said adultery and the appellant was ordered to pay the costs of both respondents in both Courts.

The now first respondent was the petitioner in the case and the appellant in the West Indian Court of Appeal (hereinafter called the Court of Appeal), the now second respondent was the respondent in both Courts, and the now appellant was correspondingly the co-respondent and respondent. To avoid confusion the parties will be called herein petitioner, respondent and co-respondent respectively.

The petitioner's case at the trial was that on his return to his home in San Fernando, Trinidad on 6th June, 1949, at about 9.50 p.m. he found the door locked on the inside and after climbing in through a window he found on looking through a small hatch in a partition the respondent committing adultery with the co-respondent on a table and bench and that on his calling out the co-respondent ran away and escaped through another door. His story was supported by his two clerks Young Ping and Young Poy who said they saw the respondent and a man whom the petitioner told them was the co-respondent and by a former servant of the petitioners named Howard who said he had seen the co-respondent come out of the house get in his car and drive away. The petitioner gave no evidence as to his wife's adulterous association with the co-respondent on any other occasion although he alleged it in his petition. A plan of the premises drawn by the petitioner was put in evidence but it is incomplete and has not been explained.

The respondent's case was that there was no truth in the petitioner's story: that he had said on various occasions that he wanted to get rid of her and marry another woman: that when he came home on the night in question he asked whom she had been speaking to on the telephone and then after some violent abuse went off to the police station to make a report. She then telephoned to a friend of the family Mrs. Yhap who came at once and they went together to the police station.

The co-respondent's case was that he was not in the petitioner's house at all on the night in question and both he and his wife swore that he was at his own home some miles off from before 9 p.m. onwards.

In these circumstances it is apparent that the main question for determination was as Mr. Justice Duke said whether he was satisfied on the evidence that the respondent had committed adultery with the co-respondent or with any other man on the night in question and after a careful review of the evidence the learned judge came to the conclusion that he was not so satisfied.

The learned judge said in the course of his review of the evidence that he was satisfied the door was not locked on the inside and that the petitioner did not climb in through the window. The Court of Appeal seized upon these two findings of the learned judge and found that there was no justification for either of them and that therefore the matter was at large and they proceeded to criticise the respondent's case among other grounds because she did not call the police to prove the nature of the statement made to them by the petitioner on the night in question.

In their Lordships' opinion this criticism is without any foundation whatever.

The respondent's case was that the petitioner's case was concocted throughout and there was therefore no reason to think he might not have told the same story to the police, or that he was not lying when he said the door was locked and he had climbed in through the window.

As has been frequently pointed out by their Lordships' Board, and by the House of Lords, a judge, who like Mr. Justice Duke has seen the witnesses is in a much better position to decide who is telling the truth than any Court of Appeal.

Mr. Justice Duke not only saw the witnesses, he also took down their evidence apparently in longhand and carefully reviewed it in his judgment.

Whilst making the fullest allowance for the local knowledge of the Court of Appeal their Lordships after reading Mr. Justice Duke's judgment and all the evidence are satisfied that no Court of Appeal would be justified in disturbing the judgment of Mr. Justice Duke.

Mr. Stranger-Jones who appeared for the petitioner before their Lordships' Board very properly conceded that unless he could satisfy the Board that the case was at large as the Court of Appeal said it was he could not argue that there was any good ground for reversing the trial judge. Apparently the Court of Appeal thought that there was no satisfactory ground for the trial judge's finding that the door was not locked or that the petitioner did not enter by a window. But the view which the learned judge took was that the petitioner's whole story was a concoction and having seen the witnesses and heard the respondent's account which he was just as much entitled to believe or disbelieve as he was the evidence for the petitioner he was in their Lordships' opinion entitled to find as he did find that the door was not locked and that the petitioner did not enter by the window.

Their Lordships do not understand the Court of Appeal's criticism of the co-respondent's *alibi* on the ground that it was not co-extensive with and does not cover the entire material time. The petitioner said he arrived home at 9.50 p.m. and the co-respondent's wife said that the co-respondent was with her miles away from before 9 o'clock until she went to bed after ten and that he came to bed about half an hour later having been reading a book.

Their Lordships also consider that due consideration was not given by the Court of Appeal to the evidence of Mrs. Yhap who said that the petitioner did not mention the co-respondent to her on the night in question or say that he had seen a man in the house but did say that his wife was talking to a man and that he asked her who was the man she was talking to.

For these reasons their Lordships have humbly advised Her Majesty that the appeal ought to be allowed. The petitioner must pay the costs throughout.

DEVONSHIRE CASTLE CO-OPERATIVE SOCIETY LIMITED v. SALISBURY and others.

(In the Supreme Court of British Guiana—Civil Jurisdiction (Stoby, J.) March 7, 8, 28; May 23, 1955).

Contract of sale of land—Breach of contract—Uncontemplated turn of events—Failure of performance by vendor—Purchase price paid in full—

Order of Court—Rules of Court, 1900, O. XXXVI, rr. 7, 94, 95, 96—Title not in vendor—Specific performance—Order for payment into Registry of Court by vendor of sum in order to procure conveyance to him of property sold to him at execution sale.

Third party—Joinder—Mortgage by first defendant in favour of third party—Security for money lent prior to order for specific performance.

The facts appear from the judgment.

Order for specific performance made as damages not adequate remedy.

P. A. Cummings and *C. O. Tullock*, Counsel for the Plaintiffs.

H. C. Humphrys, Q.C., Counsel for first-named defendant.

Jai Narine Singh, Counsel for fourth-named defendant.

The Devonshire Castle Co-operative Savings Society Limited is registered under section 6 of the Co-operative Societies Ordinance, No. 12 of 1948. The Society through its properly constituted officers claims against the defendant Salisbury *inter alia* specific performance of an agreement in writing whereby the Society purchased from the defendant Plantation Walton Hall for the sum of $20,000.

Plantation Walton Hall is situated in the County of Essequibo. It appears from the evidence that the full title to this property was never vested in the defendant but that he has title to an undivided two-thirds and his father Seudhani Singh has title to an undivided one third. The defendant alleges that he purchased his father's interest prior to 1947 but as he could not obtain transport was compelled to institute proceedings for specific performance in 1947. It is regrettable that the business of the Supreme Court is so heavy that this action was only determined by me on the 5th May, 1955. The action between the defendant and his father is not unimportant because it helps to explain the nature of the agreement entered into between the plaintiff Society and the defendant.

On the 13th July, 1953, the Society entered into an agreement in writing with the defendant which it is necessary to set out in full:

> THIS MEMORANDUM of agreement of purchase and sale made and entered into at No. 8 Henrietta, in the county of Essequibo, this 13th day of July, One Thousand Nine Hundred and Fifty-three, by and between RAMSAGAR better known as and called MORTIMER EMROY HEIMSTITCH SALISBURY, residing at L'Union, Essequibo, aforesaid, hereinafter referred to or called "the Vendor"; and the DEVONSHIRE CASTLE CO-OPERATIVE SAVINGS SOCIETY LIMITED duly registered under section 6 of the Co-operative Societies Ordinance No. 12 of 1948, hereinafter referred to or called "the Purchasers"; which said terms or expressions whenever the context so permits or requires shall be deemed to extend to and include their heirs executors administrators and/or assigns; and their successors representatives and/or assigns respectively. WITNESSETH that in consideration of the premises hereinafter

mentioned the Vendor hereby sells to the Purchasers who hereby buy from the Vendor the property herein described that is to say :—

> "Plantation Walton Hall, situate on the west sea coast of the county of Essequibo, in the colony of British Guiana, with the building and wire fences thereon, save and except all those lots numbered 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, laid down and defined on a plan thereof by E. S. E. Parker, Sworn Land Surveyor, dated the 17th day of February, 1941, and recorded in the Department of Lands and Mines as Plan No. 4398, sold to other parties but not yet transported, with all the buildings and erections thereon with the right of the purchasers of the said lots to obtain legal and valid transports therefor from the Purchasers at their own cost and expense, upon full payment to the Vendor of the full purchase price thereof, and with all the rights, easements and obligation at length mentioned and set forth in the transport of the said plantation."

hereinafter referred to or called "the said plantation," upon and subject to the terms, conditions and stipulations hereinafter mentioned that is to say:—

1. That the purchase price of the said property is the sum of $20,000.00 (TWENTY THOUSAND DOLLARS) on account whereof the Purchasers have paid to the Vendor a sum of $500.00 (FIVE HUNDRED DOLLARS) the receipt whereof by the Vendor is hereby acknowledged.

2. That in the event of the said property being sold at execution as is anticipated, for funded rates or otherwise, the Vendor shall bid at the sale thereof and acquire the same and convey it by way of transport to the Purchasers within one month from the date of such sale at execution.

3. That in the event of the said property being so sold at execution sale and acquired by the Vendor, the Purchasers shall pay to him on the knock of the hammer a further sum of $5,000: (FIVE THOUSAND DOLLARS) and the balance of the said purchase price within one month from the date of such sale at execution.

4. That in the event of the said property not being sold at execution, the Purchasers shall be bound to await the decision of the Supreme Court of this Colony in the action depending therein between the Vendor as plaintiff and Seudhani Singh, his father as defendant, in which the issue involved a specific performance by the said Seudani Singh of his sale to the Vendor of the former's one undivided third part or share of and in the said property.

5. That in the event of the said property being conveyed by transport in the usual manner after decision has been delivered by the Supreme Court, the Purchasers shall pay to the Vendor the whole of the balance of the said purchase price at the time of passing of such transport.

6. That after decision has been duly delivered by the said Supreme Court in the said action, the Vendor shall as soon as formal judgment has been entered therein, proceed to advertise transport of the said property in favour of the Purchasers each party hereto to bear one-half of the costs thereof.

7. That possession of the said property is to be given by the Vendor to the Purchasers immediately on the execution of this contract the Purchasers to be liable for all taxes, rates, and/or assessments, drainage and irrigation rates and/or other outgoings levied by competent authority in respect of the said property as and from the First day of July Nineteen Hundred and Fifty-three, and to be entitled to all rents and other revenue arising out of and from the said property as and from 1.5.53.

8. That the said property whether sold at execution sale or otherwise, is to be acquired by the Purchasers free from all or any statutory claims, registered encumbrances, registered interests, registered leases, and any and all charges in favour of any minor or minors.

THUS DONE AND EXECUTED in duplicate on the day and in the year first above written in presence of the subscribing witnesses.

The event foreshadowed in clause 2 of the agreement duly took place and on the 10th November, 1953, Pln. Walton Hall was sold at execution at the instance of the Drainage and Irrigation Board who had levied on it for non-payment of rates. The first advertisement in the Official Gazette of the 25th July, 1953, shows that lots 1 to 14 Pln. Walton Hall were not being sold, but in a later advertisement notice was given that the whole estate was levied on and it is the whole estate which was sold on the 10th November, 1953. No explanation has been given concerning the change in the description of the property except that the plaintiff has sworn that he never levied on lots 1 to 14. It is possible that since the title to those 14 lots is still in the name of the defendant and his father, and the drainage rates are payable in respect of the whole estate and not on separate lots, the Marshal responsible for the advertisement decided that it was correct to include those 14 lots or the Board insisted on their inclusion. In this action I am not called upon to decide as to the validity of the levy on the 14 lots and I can see no reason why the error, if one was committed, should occasion any insuperable difficulty. The Society did not buy them and does not claim them, and the defendant admits he sold them to various persons, so whatever problems may have arisen, if the estate had been purchased by a stranger to the contract, Ex. "A," are not problems of any moment in the circumstances of this case.

At the sale at execution on the 10th November, 1953, the property was knocked down to the defendant for $25,000.00 and as this price exceeds *by* $5,000 the price agreed to be paid by the Society I have to decide an important question of fact, as to what really took place when the Marshal was selling the property.

According to the defendant he made the first bid of $6,000 for the property and thereafter Messrs. C. R. Chan, A. P. Singh, Ramnarine Singh, and Issri Persaud competed among themselves until a bid of $20,000 was made. At that stage Rajco, the Chairman of the Society and who was present in the Society's interest made a bid of $21,000, which was exceeded by one of the gentlemen who had previously bid. Thereupon Rajco turned to the defendant and said: "Skipper bid"; the defendant then re-entered the bidding and eventually it was knocked down to him for $25,000.

In that version he is supported in the main by Issri Persaud, his brother-in-law, except that Persaud's evidence is that Rajco said: "Skipper go on bidding I will take it for $25,000," and by Ramsay a Marshal of the Supreme Court.

Rajco Bridgmohan's version is that he attended the sale at execution, but as he was never authorised to bid, he took no active part in the proceedings and never authorised the defendant to bid in excess of $20,000.

Ulric Marks, a civil servant attached to the Co-operative Department was present at the sale on the 10th November, 1953. He attended because his department is interested in fostering the growth of Cooperative Societies in the Colony. His evidence supports Bridgmohan's testimony that no request was made to the defendant to bid above the agreed price, and it follows no promise to pay any amount in excess of $20,000.

In resolving this conflict of evidence, 1 will not overlook how important it was for the plaintiff society for the estate to be acquired by the defendant. The members of the Society were in possession of the estate and all their plans 'for the future would be shattered if the estate was acquired by a stranger, so it was vital for the defendant to buy. Despite that aspect of the matter I am compelled to find that Rajco Bridgmohan and Marks are to be believed in preference to the defendant and his supporting witnesses. The defendant is the type of person who is imperturbable in the witness-box but who is transparently dishonest. He struck me as having planned and falsified his evidence for the purpose of keeping the Society's money as long as possible in order to bolster his financial embarrassment.

I have carefully considered the evidence of the witness Ramsay as he is an officer of the Court, and is a disinterested party, but I think somehow or other he has been imposed upon and has allowed himself to be influenced. He said that immediately after the sale Salisbury came to him and requested him to prepare a statement of what took place. Now Ramsay was the most junior of all the Supreme Court Registry Officers present. Mr. Kerry a senior officer might have been there, Mr. Ramsammy then acting Chief Marshal, and Mr. Rockliffe an assistant sworn clerk were present. Apparently none of them was invited to note what had occurred, and I see no reason why Ramsay should have been selected in preference to them. Nor can I reconcile the defendant's case that the bidding was at the request of Rajco Bridgmohan, with the anxiety alleged to be evinced by the defendant to procure a statement of what took place. There was then no threat of litigation; the parties had separated on terms of friendship; there was no cause for suspicion, and I believe no cause for the preparation of statements. With regret I have to reject Ramsay's evidence as well as that of Issri Persaud's, who was obviously endeavouring to assist his brother-in-law.

A scrutiny of the contract Ex. "A" is of assistance in understanding the mentality of the defendant and appreciating his attitude in bidding up to $25,000.

In clause 4 of the agreement, provision is made, that in the event of the estate not being sold at execution sale then the Society was to await the decision of the Supreme Court in the litigation pending between the defendant and his father, but so confident was the defendant of the outcome of the litigation that clause 6 provides for the defendant to transport the estate as soon as decision was delivered. Now if the defendant was the sole owner of the estate as he represented himself to be at the time, or if he was not the sole owner but predicted he was going to be in the near future, then the amount at which the property was sold was immaterial to him. If sold for less than $20,000 he was protected as the Society had contracted to pay him that sum, and if sold for more, he could not lose, for as sole owner (as he believed) the Registrar would be compelled to pay over to him the surplus proceeds after deducting the claim of the Drainage and Irrigation Board.

Moreover the agreement recognised that eleven lots were sold to certain persons and it was to the defendants interest to acquire title to those lots. If he could not convey to the Society he could not convey to the various individuals who had purchased and his failure to get title in his own name would result in the owners of the eleven lots taking proceedings against him. True it is, that as Marks said, no one gave any heed as to what would happen if the price exceeded $20,000, but in so far as the defendant is concerned his failure to raise the point was probably due to the circumstances mentioned above.

It is not without significance that of the four competing bidders, three were related to the defendant, and yet the defendant appears to have made no attempt to dissuade them from interfering by explaining the real purport of the execution sale.

Having come to the conclusion that the defendant was not instructed to bid in excess of $20,000, and consequently that there was no agreement express or implied for the plaintiff Society to pay more than the agreed price I have to decide what legal consequences flow from this finding of fact.

In clause 2 of the contract Ex "A" the defendant had agreed to bid at the execution sale and acquire the property and convey it to the Society within one month from the date of such acquisition.

The manner in which the Society was to pay the agreed purchase price is stipulated in clause 3. It is admitted that the sum of $5,000 was paid on the 10th November, 1953, and the balance paid into the defendant's account within a month of the 10th November, 1953, and it is admitted that the defendant although he acquired the property at execution sale and although he has received $20,000 from the Society has only paid $509 into the Supreme Court Registry and cannot convey the property purchased unless he pays $24,500 more.

The defendant did not plead nor was it argued on his behalf that the circumstances in which the contract Ex. 'A" was made ought to be examined in order to see whether a term should be implied that in the event of the property being sold for more than $20,000 the Society would be liable to pay the excess.

The defendant relied on an express oral contract as extending the written one, but I have nevertheless conceived it to be my duty to examine the authorities on the subject.

After such examination I express the view that the contract in this case is one to which the genera] principle of the construction of contracts is applicable and that the parties intended what they said. Viscount Simon L.C. in *British Movietone News Ltd. v. London and District Cinema Ltd.* (1952) *A.C.* 166 (a case of frustration of contract) at p.185 in commenting on the judgment of the Court of Appeal delivered by Denning L.J. said:

> "The suggestion that an "uncontemplated turn of events" is enough to enable a court to substitute its notion of what is "just and reasonable" for the contract as it stands, even though there is no "frustrating event," appears to *be* likely to lead to come misunderstanding. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not all anticipate—a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances existing when it was made, shows that they never agreed to 'be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point—not because the Court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation."

As I said when discussing the events at the execution sale, it is very likely that the Society never imagined that the price of the estate would exceed $20,000 but the possibility must have occurred to the defendant and so far as he is concerned no unusual circumstance has emerged. Even if that possibility did not occur to him then I think the circumstance which caused the estate to be sold for $25,000 was merely an unexpected obstacle and did not create a fundamentally different situation.

Such being the case the defendant has broken his contract and the appropriate remedy to which the Society is entitled is what I must now consider.

It is settled law that in an action for specific performance, the Court will decline to make a decree if damages are an adequate remedy, or where, if specific performance is decreed, the court will be unable to enforce its judgment.

Damages in this case are not an adequate remedy because the members of the Society purchased Pln. Walton Hall for the purpose of planting rice and to obtain security of tenure by ownership rather than on feeing dependent on the Rice Farmers (Security of Tenure) Ordinance, 1945.

The real difficulty in this case and one which has caused me no little concern is whether I can properly compel the defendant to perform his

contract involving as an order for specific performance would involve an order for him to pay money into the Supreme Court Registry.

It was held in *Dunn v. Vere* 23 L.T.R. 432 that when a purchaser fails to pay the purchase money after toeing ordered to do so within a specific time, it was open to the Vendor to apply to have the contract rescinded and for the purchaser's deposit to be forfeited.

Here, the Vendor has $20,000 of the plaintiff Society's money and the machinery of the Court is not so impotent that a method cannot be devised to force him to disgorge, providing there is evidence that he is possessed of the means to repay. The evidence is that he is possessed of other immovable property in the colony, and I am convinced that he is more unwilling than unable to pay.

I therefore order that the defendant pay into the Supreme Court Registry the sum of $24,491.00 within two weeks from the date when this judgment is entered and that transport be advertised to the plaintiff Society within twenty-one (21) days after the payment of the said sum and to be passed as soon as it is ripe. If the said sum is paid but the transport is not advertised or if advertised the estate is not conveyed as aforesaid then the Registrar is hereby authorised to pass and/or advertise the said transport.

The position which will arise if the defendant fails to pay the sum remains to toe clarified. Counsel for the Society submitted that it is competent for me, at this stage, to order that a writ of sequestration against the estate and effects of the defendant, be issued.

The procedure where a writ of sequestration can be obtained in appropriate cases is regulated by the Rules of Court 1900 Order XXXVI R.7 and Rs. 94 to 96. Order XXXVI R.7 states:

> 'A judgment or order for the payment of money into Court may be enforced by a Writ of sequestration, or in cases in which attachment is authorised by law by attachment."

R.94 and R.95 read as follows:

> 94. "Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of a copy of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person seeking to enforce such judgment or order shall at the expiration of the time limited for the performance thereof be entitled to issue a writ of sequestration against the estate and effects of such disobedient person.
>
> 95. No sequestration shall be issued unless by leave of the Court or a Judge."

The English equivalent in the Rules of the Supreme Court is Order 43 R.6 which provides that:

> 6. "Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall

> at the expiration of the time limited, for the performance thereof, be entitled, without obtaining any order for that purpose to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery had immediately before November 1, 1875, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration were before the same date dealt with by the Court of Chancery."

The English rule is obviously an improvement on the local rule in that the person prosecuting a judgment or order is entitled to issue the writ without obtaining the Court's order for the purpose.

In this Colony the Court's leave is necessary for the issue of the writ and in my view the effect of rules 94 and 95 is that this leave cannot be given in anticipation of a failure to comply with the judgment but is dependent on an actual failure.

As I said earlier in this judgment the Court will not make an order it cannot enforce and as it was decided in *Hulbert v. Cathcart* (1894) 1 *Q.B.* 244 that an order for the payment of money cannot be enforced by sequestration I have intentionally made an order in this case for payment into Court.

Apart from the defendant Salisbury there are three other defendants in this action, the Registrar, the Drainage and Irrigation Board and Norbert Joseph de Freitas.

As against the Registrar and the Drainage and Irrigation Board the plaintiff Society asks for an injunction restraining the former from selling the property in dispute at the instance of the latter until the determination of this action. Neither has entered an appearance or taken any part in these proceedings.

It is the usual practice in these matters for Government Departments to await the Court's decision and as I have heard nothing to the contrary no orders are necessary against either of them.

The position of the fourth defendant is unusual. In the action as originally filed the fourth defendant was not a party to the proceedings. The plaintiff, however, moved a Judge in Chambers *exparte* for an interim order by way of injunction to restrain the defendant Salisbury from mortgaging his immovable property—not Plantation Walton Hall—to the fourth defendant. The Judge in Chambers, so I have been informed refused to hear the application unless the proposed mortgagee—the fourth defendant—was joined. After he was joined an interim order was made but the summons to continue it until the final determination of the action has not been heard as it was obviously more advantageous to hear the action rather than to have two hearings of the same issues. By consent the interim order made *exparte* was to continue until the hearing of the summons. There was no consent that it was to continue until the determination of the action. It is to suit the Court's convenience that the action is being disposed of before the summons.

Although plaintiff's counsel submitted, when opening his case, that the interim order could have been made without joining the fourth defendant, he seems to have appreciated, as the case developed, the necessity for, and the importance of, joining the fourth defendant. It would be wrong to restrain the fourth defendant from obtaining adequate security for any money lent by him to the plaintiff without giving him an opportunity of being heard.

No attempt was made to challenge at the hearing the truth of that part of Salisbury's evidence wherein he said that he was mortgaging his immovable property to give the fourth defendant security for money advanced some time previously and that he had no more money to get.

Counsel for the plaintiff does not impute fraud or any improper motive to the fourth defendant but submits that the plaintiff is entitled to restrain the defendant Salisbury from mortgaging his property as he has a considerable sum of money in his possession for the plaintiff. He relies on *The Demerara Storage Co. Ltd. v. The Demerara Wharf and Storage Co. Ltd.* (1942 *L.R.B.G.* 306 where the plaintiff company obtained an order restraining a judgment creditor of the defendant company from levying on its property. The reason for the decision in that case was that in a previous action the Court had ordered the defendant company to specifically perform a contract; the defendant company was in default of compliance with the Court's order and in the meanwhile its Chairman had obtained a judgment against the company and sought to defeat the Court's order for specific performance by levying on the company's property.

In this case it is not the property sold which is being mortgaged nor has the money been lent after the decree for specific performance but long before. The fourth defendant's money-lending transaction with Salisbury is a perfectly legitimate one and I can find no legal ground to deprive him of his security. I decline to make any order against him, and there will be judgment in his favour with costs. Such costs to be paid by the defendant Salisbury.

One matter is left for mention. During the trial the defendant Salisbury offered some evidence regarding a padi barn and the land on which it is situate. This barn is claimed by the Society as having been included in the contract Ex. "A", but Salisbury has indicated it is his wife's property and that he never sold it. I have no hesitation in finding that he represented that the barn was his and that he sold it. He has purchased the whole property at execution sale and can convey the estate including the barn, but as his wife was not a party to these proceedings she will be at liberty, if so advised, to oppose the transport to the Society.

For the reasons already stated there will be judgment for the plaintiff against the defendant Salisbury. The defendant Salisbury is ordered to specifically perform his contract with the plaintiff Society by paying into the Supreme Court Registry within 14 days (two

weeks) from the date of this order the sum of $24,491, and thereafter the proceedings to be followed are as already indicated.

There will be judgment for the defendant de Freitas.

The plaintiff's costs and de Freitas's costs are to be paid by defendant Salisbury.

Fit for 2 Counsel.

Solicitors :

Carlos Gomes, for plaintiffs.

H. C. B. Humphrys for No. 1 defendant.

A. R. Sawh for No. 4 defendant.

PERSAUD v. SPELLEN

(In the Supreme Court, Civil Jurisdiction (Stoby, J.) June 6, 7, 8, 9, 15, 1955).

Negligence—Failing to exercise reasonable care—Motorist of average skill—Taking action through lack of skill and not through the agony of the moment—Contributory negligence.

Pleadings—Deviation from particulars—Must not embarrass defendant—Plaintiff not compelled to plead every little detail—Must not indulge in generalities and vagueness.

The plaintiff claimed damages from the defendant for injuries received as a result of a collision between plaintiff's motor cycle and defendant's motor car. Defendant claimed that collision was clue entirely to plaintiff's negligence, or alternatively that there was contributory negligence, or in the further alternative that the accident was due to inevitable accident.

Held: The defendant was negligent, and there was no contributory negligence on the part of the plaintiff.

Judgment for plaintiff.

Editor's note—An appeal to the West Indian Court of Appeal in this matter was allowed.

C. L. Luckhoo for plaintiff.

H. C. Humphrys, Q.C., J. A. King with him, for defendant.

Stoby J.: The plaintiff claimed from the defendant the sum of $5,000 damages for injuries received as a result of the defendant's negligent driving. The defendant denied negligence and alleged that the accident was due entirely to the negligence of the plaintiff and pleaded in the alternative that if he were negligent there was contributory negligence on the part of the plaintiff and in the further alternative that the accident was due to inevitable accident. He counter-claimed for $1,000 damages.

The plaintiff's case was that on the afternoon of the 1st October, 1950, he was riding his motor cycle on the Windsor Forest public road in a westerly direction. A friend was sitting on the pillion.

In the vicinity where the accident occurred the road was straight for some distance and about 20 feet wide. He was travelling on his near or correct side of the road about 2 feet from the southern parapet. He saw a car travelling about 15 to 20 m.p.h. approaching him. The car was on the north or correct side of the road. The car suddenly swerved in a south-easterly direction that is to say in the plaintiff's

direction. The plaintiff swerved to avoid the oncoming car but at the same time the car swerved to resume its correct course and a collision occurred.

The defendant's version was that he was driving his car in an easterly direction along the Windsor Forest public road on his near or correct side of the road about 2 feet from the northern parapet. He was travelling at about 15 to 20 m.p.h. He saw a girl standing on the northern parapet looking north. There was nothing in the girl's demeanour to indicate that she was not going to remain on the parapet and so he continued on the same course and at the same speed. Suddenly the girl turned around jumped on the road and started to run to the other side in front of the car. In an effort to avoid the girl he instinctively swerved to the south. As a result of this manoeuvre the child was saved from a direct hit but she ran into his front near side fender and fell. He then swung back and straightened up his car and while stationary or nearly so the plaintiff on his motor cycle crashed into him.

I say at once that had I accepted this version of the accident I would have found in favour of the defendant but for reasons which I give hereunder I did not believe the defendant's account in certain important respects.

The principles of law applicable to a case of this kind would seem to me to be well settled but in view of the defences raised and the arguments addressed to me I propose to record the manner in which I approached the case.

The definition of negligence in *Blyth v. Birmingham Waterworks Co.* (1856) 11 Ex. 781 is regarded as authoritative.

> "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

In considering what the hypothetical reasonable man would do in certain circumstances one has to assume that he possesses reasonable or average skill expected of one performing the act under review. The driver of a motor vehicle who is involved in an accident cannot escape liability, I conceive, because he did all in his power to avert the accident if the evidence shows that a reasonable man driving with reasonable skill could easily have avoided the accident. The test is not what one individual did to the best of his ability, the test must relate to a certain standard of skill which the average driver of a motor vehicle ought to possess.

I propose to examine the evidence now in some detail in order to show why I did not accept the defendant's version in certain respects and why I found the defendant negligent.

At a very early stage of the case it became apparent that a girl standing on the northern side of the Windsor Forest road had run across the road when she saw the defendant's car approaching and it was admitted by the very first witness called for the plaintiff that the avoiding action taken by the defendant was to swerve. As I will endeavour to show it did not seem to occur either to the defendant)

or his Counsel until it was too late that the distance the child was from the car at the time she began to run was of any importance. The defendant's defence right up to the moment he went into the witness box was that the child was 20 to 22 feet away from him when she ran across the road and had he not swerved he would have killed her. I say up to when he went into the witness box because it was only when he gave evidence that for the first time to the surprise even of his Counsel he sought to explain that the girl was 20 feet away when he saw her, that she was looking towards the sea, that she had to turn around then run and as his car was travelling all the time he must have been so close to the girl that a swerve was unavoidable.

It is important to scrutinise the cross-examination of each witness for the plaintiff Earle Wilson said that "About 2 rods before the car reached the child, the child ran across the road." No question was put to him suggesting that his estimate was wrong and that the car was much nearer to the child when she stepped on to the road. Instead he was asked whether he agreed that the child would have been killed if the defendant had not swerved and he agreed. Apart from the fact that his concurrence on that point is not binding on me, the answer is clearly illogical and was due to the fact that the witness is a typical country labourer without any knowledge of driving a car. His reasoning probably was, a child is on the road, a car is going in direction of road, if it does not swerve it will kill the child. He was not asked, and if asked, could not answer the question "could the car have stopped?" So I said his answer was illogical because any driver of average ability as distinct from a nervous, or over-cautious or incompetent driver can stop a car travelling at 20 m.p.h. with its brakes in good condition in 20 feet and especially when the girl is running away from the oncoming car. I will develop this aspect as I deal with the other witnesses. At the moment I am endeavouring to show that Counsel for defence was not disputing the evidence that the child was at least 20 feet away from the car when she ran across the road as opposed to 20 feet away when the driver saw the child.

The evidence and cross-examination of Fred Martin and Boodhoo Seepersaud followed the same pattern. One said the child ran, the other that she "go to run" across the road when the car was 2 rods away and the car swerved. Each one agreed that the child would have been killed if the car had not swerved but in neither case was any reason given for this conclusion and in neither case was it suggested that the car had got closer than 2 rods before the swerve was made.

Indeed the defence up to the close of the plaintiff's case was consistent with its own pleadings for in the particulars to paragraph 3 of the defence it is pleaded "When suddenly and without any warning a little girl, when the car was only about 20 feet away from her, started to run across the road from the northern to the southern side " I realise that in drafting pleadings, Solicitor or Counsel may misunderstand instructions and consequently it does not follow that because the pleadings place the distance at 20 feet I am not free to find a different distance if the defendant's version justifies such a finding.

I merely refer to the pleadings as illustrating consistency in the defence up to a certain stage.

The defendant's evidence in chief has' been already summarised. In cross-examination he said that when he saw the child for the first time she was about 20 feet away. Previously he had admitted that visibility was good for about 100 yards; the road was straight, he was not engaged in conversation and yet did not see the child until 20 feet from her. It will be accepted, I think, that the driver of a motor vehicle does not fix his gaze immediately in front of his car but his vision encompasses the area say 50 or more yards in front of him. One would expect a driver who is vigilant and careful to observe a pedestrian much further away than 20 feet. I am sure that it is a reasonable inference to draw from the evidence that the defendant did see the child at a distance much more than 20 feet but he was untruthful in his answer in order to reconcile it with his belated defence of placing the child 8 or 9 feet away at the time of crossing the road.

On this issue I find as a fact that:

(a) the child was not facing seawards; and

(b) she was at least 20 feet away from the defendant's car when she ran across the road.

Having reached that conclusion I now have to decide whether the defendant's action in swerving was negligent. In this connection I directed myself and referred in my oral judgment to the well known passage in the well known case of *Swadling v. Cooper* (1931) A.C. 1 at page 9 where Viscount Hailsham said:

> "The plaintiff has no right to complain if in the agony of the collision the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances."

Although Viscount Hailsham was referring specifically to the legal position of a defendant where a plaintiff complains of negligence, yet the principle is the same. In other words the defendant could not be held negligent if his swerving to avoid the child was done in the agony of the moment even though it afterwards transpired that had he not swerved no injury would have occurred to the child or to anyone else.

My conclusion that the defendant was negligent was based on the defendant's own evidence and on Burns' evidence. In cross-examination the defendant said:

> "At about 10 or 12 m.p.h. I have stopped within half a car's length. I may be able to stop within 12 feet travelling at the rate I was travelling that afternoon when I swerved."

Later on he said:

> "If my defence states that girl was 20 feet away when she ran on to the road it is wrong. If she ran on to the road 20 feet from me I could have easily stopped.

The witness Burns said that according to the accepted formula a motor car travelling at 10 m.p.h. should be able to stop within 5.55

feet; a car travelling at 20 m.p.h. within 22 1/4 feet, and one at 15 m.p.h. with 17 3/4 feet. In cross-examination he said:

> "If a child jumps off parapet on to road in path of oncoming vehicle 20 feet away nothing should happen." (Note here the suggestion was not 9 feet as defendant said in his evidence.)

There is evidence by the defendant then that he could have stopped and evidence on behalf of the plaintiff that he could have stopped and yet he elected to swerve. In my view he swerved because he is an incompetent driver. It is not impossible and indeed in my experience of drivers in this Colony not unusual to find a licensed driver of many years experience who really knows nothing of the mechanics of driving a car. Here is a motorist in the habit of driving with his foot on the clutch after 30 years of driving who did not have sufficient presence of mind or skill to realise that in the circumstances of this case to swerve was the worst possible thing. I do not share the view of the witness Burns that swerving is always wrong. In a large city with a continual flow of traffic it is suicidal for a motorist to swerve under any circumstances because he will probably set up a chain of accidents much worse than killing the thoughtless pedestrian who steps off the pavement on to the road. But in a Colony like this and more so the countryside where traffic is sparse the natural instinct of man is to save life and so if a pedestrian steps in front of an oncoming car and the motorist swerve even though the result is fatal his conduct is understandable and not blameworthy. But that is where the stepping on to the road is within a short distance of the motorist. Here the instinct to save life should never have arisen; with a motorist of average skill the child's life was never in danger. If one stops to think about it, the logic of Burns' evidence is apparent. When a motorist swerves 20 feet away from someone who is running across the road, he is chasing and not avoiding the moving object. If he applies his brakes and keeps a straight course it takes 1 1/2 seconds (according to Burns) travelling at 20 m.p.h. In 1 1/2 seconds the child at the very least would be half way across the road and if the child had changed its mind and turned back the car would then be at a standstill.

If a motorist of average skill could have brought the car to a standstill and would not have swerved and the defendant elected to swerve not through the agony of the moment but through unskilfulness then in my view he is negligent. As was said in *McCrone v. Riding* (1938) 102 J.P. 109 (a case of driving without due care and attention) there are not two standards of care for motorists one for the unskilful and another for the skilful. There is one standard only.

On the evidence as a whole I came to the conclusion that the defendant was negligent and whether his negligence was due to inefficiency, nervousness or failing to keep a proper look out the result is the same, he is liable.

As I came to a decision adverse to the defendant on the ground that the swerve amounted to negligence I did not consider Mr. Luckhoo's alternative argument that even if the swerve was necessary the defendant was still negligent as he lost control of his car and

continued for some distance before bringing it to a stop. Not having dealt with the case on that basis in my oral judgment I do not think I ought to deal with it now, except to say that in my view the car did travel for some distance beyond the point where the child was hit and that a driver of ordinary ability could have swerved, applied the brakes and stopped without continuing in a south-easterly direction.

It was submitted for the defendant that in any event the plaintiff's claim must fall as the accident was solely due to the plaintiff's negligence or alternatively there was contributory negligence. The case of *Swadling v. Cooper* already referred to was cited and I had the report before me when I gave my judgment and so kept in mind that if the plaintiff could have avoided the collision by the exercise of reasonable care he must fail as the injury would be due to his own negligence in failing to take reasonable care.

On this aspect of the case the defendant was able to give very little assistance as he admitted not seeing the cyclist until after the swerve and when he had resumed a straight course. He attributed his inability to see the oncoming cyclist to the dust in the air. As the weather was dry and the road built of burnt earth I have no doubt that the atmosphere was dusty not only from the movement of the cyclist but from the movement of the car. I cannot appreciate why be could not see the cyclist and certainly his statement that his car was stationary at the time of the collision was untrue.

When the plaintiff's evidence is examined it will be noted that he said he saw the car about 16 to 17 rods away (64 to 68 yards). He did not notice the child but saw the car swerve in his direction and so slowed down. As the car continued to come towards him he swerved north, the car swerved back and the collision occurred. At first I was taking the view that the plaintiff should have seen the child and his failure to do so was evidence that he was not keeping a proper look out. As the case developed and especially after the defendant was cross-examined and when I heard the addresses I arrived at the definite conclusion that the defendant did not swerve, straighten up and stop, but that he swerved, panicked, continued not due south but diagonally and did not attempt to resume a straight course until a collision was inevitable. That is why the plaintiff did not see the child. The child had been struck down and the car continued. The plaintiff who was on his correct side was entitled to assume that the car would not continue south-easterly. His keeping to his near side until the car was about 8 yards from him was the correct thing to do. I considered whether he should have stopped. There was no reason why he should. So far as he was concerned it was not a child in his path or a dog or a drunken man lying on the road but a motor vehicle coming in his direction. There was nothing to indicate that behind the steering wheel was a driver in a panic, so it was reasonable to depend on the driver reverting to his correct course. When it became clear that something was wrong he swerved. He could not, in my opinion, be held solely negligent or guilty of contributory negligence, even though from the nature of his injuries I am satisfied that he was travelling perhaps at 25 to 30 m.p.h. and not at 10 or 15 m.p.h. as he said.

With regard to my finding that the car did not stop after coming into contact with the child, I accepted the evidence of Earle Wilson that even after the collision with the plaintiff, the cyclist was dragged for 1 1/2 rods which shows that the car was in motion, and also that of Boodhoo Seepersaud who estimated that the car travelled 5 rods after striking the child.

Henry Chung, a witness for the defendant, did not estimate the distance hut might have intended to infer that the car was near to the child as he said "soon reach." In the absence of some rough estimate of distance I did not accept his evidence in preference to that of the plaintiff's witnesses. In this connection it was unfortunate that the policeman who took the statements and measurements (the distances being shown to him by the defendant) was unable to say that the copy of his own statement in possession of the Solicitors was accurate. As a result I was deprived of hearing what the defendant told the police at the first opportunity.

For the above reasons I held the defendant negligent and gave judgment for the plaintiff on the claim and counterclaim.

I have not yet made any reference to a submission made by Mr. Humphrys when Counsel for the plaintiff was opening his case. It was submitted that plaintiff was going to deviate from the particulars to paragraph 2 of the statement of claim in that it was pleaded that the "car driven by the defendant pulled over and swerved from off its course on to the wrong side of the road and knocked down the plaintiff," whereas Counsel was indicating that the defendant's car swerved on to the wrong side of the road and the plaintiff swerved and then the collision occurred. He submitted that Mr. Luckhoo should ask for an amendment. The invitation to amend was declined by Mr. Luckhoo and the case proceeded. I have to note that any objection was taken at the appropriate time, that is to say, when the evidence was being given, so I never had to rule on the point. Counsel for the defence referred to the matter again in his address at the conclusion of the case and in my oral decision I indicated that had objection been taken I would have ruled against the submission.

I took the view that if there was any change it was a subject for comment, just as the defendant's adjustment from 20 feet to 9 feet when he realised the importance of distance was a fit subject for comment, but that an amendment was not necessary in the circumstances.

In *Phillips v. Phillips*, 4 Q.B.D. at p. 139 Cotton, L.J., said:

> "What particulars are to be stated must depend on the facts of each case. But in my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard and tell them what they have to meet when the case comes on for trial."

See also *Weinberger v. Inglis* (1918) 1 Ch.D. 138 in which reference is made to *Spedding v. Fitzpatrick,* 38 Ch.D. 410, 413.

The plaintiff's particulars not only stated facts which put the defendant on his guard but they enabled the defendant to call a witness (Chung) who said that after the defendant's swerve the plaintiff also swerved. There could be no embarrassment to the defendant because he was prepared to answer an allegation of negligence and he brought a witness to support his contention that he was not negligent and to say what took place. In any event a plaintiff is not compelled to plead every little detail providing he does not indulge in generalities and vagueness. The plaintiff's case was that he was knocked down as a result of the defendant's swerving. That was the case the defendant had to meet. That was the case he came prepared to meet and that was the case on which the plaintiff succeeded. Although no formal objection was taken I have indicated how I would have decided, as at the preliminary discussion when the point was mentioned, I may have expressed an opinion against the submission.

Solicitors:

A. G. King for plaintiff.

F. I. Dias for defendant.

REPORT OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1955

AND IN

THE WEST INDIAN COURT OF APPEAL

1955

EDITED BY
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The Editor acknowledges the valuable assistance rendered in the preparation of these reports by the following members of the Law Reporting Committee:

The Honourable the Chief Justice, Chairman.

The Solicitor-General.

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JUDGES
OF THE
SUPREME COURT OF BRITISH GUIANA
DURING 1955

SIR EDWARD PETER STUBBS BELL Kt. — Chief Justice. Left the Colony on 26th May to take up appointment as Chief Justice of Northern Rhodesia.

FRANK WILFRED HOLDER — Appointed Chief Justice; assumed office on 1st July, 1955.

FREDERICK MALCOLM BOLAND — Puisne Judge. Went on pre-retirement leave from 16th April, 1955.

HAROLD JOHN HUGHES — Puisne Judge. Acted as Chief Justice from 27th May, 1955, to 30th June, 1955. Acted as Attorney General from 1st July, 1955 to 28th August, 1955. On vacation leave from 15th September, 1955 to the end of the year.

KENNETH SIEVEWRIGHT STOBY — Puisne Judge.

ROLAND RICKETTS PHILLIPS — Puisne Judge.

NEVILLE ADOLPH ST. LOUIS CLARE — Puisne Judge. Assumed office on the 24th October, 1955.

JOSEPH LYTTLETON WILLS — Additional Judge from 1st January to 14th January, 1955.

ROBERT SYDNEY MILLER — Additional Judge from 17th January, 1953 to the end of the year.

JOSEPH ALEXANDER LUCKHOO — Additional Judge from 11th July, 1955 to the end of the year.

WEST INDIAN COURT OF APPEAL

No reports of decisions of the West Indian Court of Appeal arc published separately, the decisions in that Court are included in the British Guiana Law Reports.

METHOD OF CITATION

These reports will be cited as (1955) L.R.B.G.

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