JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DUING 1956.

FRANK WILFRED HOLDER, C.M.G., Q.C.	— Chief Justice
HAROLD JOHN HUGHES	— Puisne Judge to 11th July, 1956.
KENNETH SIEVEWRIGHT STOBY	— Puisne Judge
ROLAND RICKETTS PHILLIPS	— Puisne Judge
NEVILLE ADOLPH ST. LOUIS CLARE	— Puisne Judge
JOSEPH ALEXANDER LUCKHOO	— Appointed Puisne Judge with effect from 12th July, 1956. Acted Puisne Judge from 1st January to 11th July, 1956.
WILLIAM ADRIAN DATE	— Appointed Puisne Judge with effect from 30th October, 1956.
ROBERT SYDNEY MILLER	— Acted Puisne Judge from 1st January to 31st December, 1956.
HAROLD BRODIE SMITH BOLLERS	— Acted Puisne Judge from 15th June to 31st December, 1956.

LIST OF CASES REPORTED

A

B

C

D

E

F

G

H

J

K

L

M

N

P

Q

R

S

T

V

W

CASES

DETERMINED IN THE

Supreme Court of British Guiana.

SALISBURY v. DEVONSHIRE CASTLE CO-OPERATIVE SOCIETY LIMITED *et anor.*

(In the West Indian Court of Appeal, on appeal from the Supreme Court of British Guiana (Collymore, Jackson and Holder. C.J.J.). January 17, 18, 19, 25, 1956).

Immovable property—Agreement of Sale—Specific performance—Property subject of agreement of sale sold at execution together with other property and bought in by vendor—Vendor can be compelled to complete sale.

The respondent Society entered into an agreement of sale and purchase of certain lands with the appellant. At time of entering into the agreement it was contemplated by the parties thereto that the lands together with certain other property would he put up for sale at execution for non-payment of drainage and irrigation rates. It was further agreed between the parties that the appellant would purchase the entire lands and pass title for the lands specified in the agreement of sale and purchase to the Society. The Society was put into possession of the lands under the agreement of sale and purchase and paid the agreed purchase price to the appellant.

The appellant purchased the entire lands at execution sale but later refused to complete the purchase and as a result was in breach of his agreement with the Society. The Society instituted proceedings against the appellant for specific performance of the agreement of sale and purchase.

The trial Judge made an order against the appellant for specific performance of the agreement. The appellant appealed against that order.

For the appellant it was contended that the contract entered into between the parties did not require the appellant to bid at execution sale over and above the sum of $20,000; that as the property at the execution sale fetched $25,000, there was a frustration of the contract and the appropriate relief to be awarded for the appellant's breach of contract was in the nature of damages only.

Held: The Court will not stand by and allow a wrongdoer to take advantage of his own wrong. The order for specific performance made by the trial Judge was correct.

Appeal dismissed.

S. L. Van B. Stafford, Q.C., with *J. A. King* for appellant.

P. A. Cummings for the respondents Devonshire Castle Co-operative Savings Society Ltd.

J. N. Singh with *P. N. Singh* for respondent de Freitas.

Judgment of the Court:

The appellant was the owner of an undivided two-thirds of Plantation Walton Hall in the County of Essequibo and his father Seudhani Singh was the owner of an undivided one-third. On the 13th July, 1953, the appellant entered into an agreement in writing with the respondents, the Devonshire Castle Co-operative Savings Society Limited, hereinafter in this judgment referred to as the Society, for the sale of certain property which is described in paragraph 2 of the agreement. This reads as follows:—

"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 Emory 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 obligations 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 $5,000.00 (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 pending therein between the Vendor as plaintiff and Sewdany Singh, his father as defendant, in which the issue involved is specific performance by the said Sewdany 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 outgoing 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 the First day of May Nineteen Hundred and Fifty-three.

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.

RAMSAGAR otherwise M. E. H. SALISBURY
Vendor.

DEVONSHIRE CASTLE CO-OPERATIVE SAVINGS SOCIETY LIMITED.

Rajco Bridgmohan	Members of the
Goberdhan	Committee of
Bipta	Management.
Seudhan	Secretary

Purchasers.

AS WITNESSES:—

1. W. I. Sousa
2. Deo Narayan."

In pursuance of this agreement the Society was put into possession of the property described in paragraph 2 of the agreement and has remained in possession until now, cultivating and looking after the land. At the same time the Society paid the appellant $500, on the 10th November, 1953, a further sum of $5,000 and subsequently on the 10th December, 1953, the Society paid into the appellant's account at the Royal Bank of Canada the balance of the agreed purchase price $14,500 thus fulfilling its obligations as set forth in the terms of the agreement.

It was in the contemplation of the parties that the property described in the agreement might be put up for execution sale; it was levied on at the instance of the Drainage and Irrigation Board for non-payment of rates and it formed part of Plantation Walton Hall which as a whole was on the 10th November, 1953, sold as a result of the levy. At this execution sale the appellant purchased for $25,000 property in excess of but including the property which he had agreed to sell to the Society. He paid $509.52 on account of the purchase price "on the knock of the hammer" and signed the requisite document along with two sureties binding himself to complete the purchase.

Reference to a letter under date 9th December, 1953, from the appellant's legal advisers to the Registrar clearly shows that appellant's obligations to complete the sale at execution were fully recognised at that date. The letter reads as follows:—

Georgetown, Demerara,
British Guiana,
December 9th, 1953.

The Registrar,
Deeds Registry,
Georgetown.
Dear Sir,

On behalf of our client Mr. M. E. H. Salisbury we hereby apply for an extension of six to eight weeks in which to pay the balance of the purchase price of the sale of Plantation Walton Hall.

Yours faithfully,
Cameron & Shepherd.'

The appellant failed to complete the purchase and as a result was in breach of his agreement with the Society.

The Society instituted the proceedings, the subject matter of this appeal and claimed **inter alia** against the appellant

(i) specific performance of the agreement

(ii) in the alternative damages for breach thereof and resulting loss of profit.

In an affidavit sworn to by the appellant which by agreement was accepted as his defence in the suit he stated:

> "I was insisting on the agreed purchase price of $25,000.00 for the property sold under the Agreement and would not agree to include all the property purchased by me at execution sale.
>
> The circumstances under which the said purchase price was agreed at $25,000.00 were as follows:—
>
> (a) At the aforesaid execution sale, after some bidding, the said Rajco Bridgmohan (Chairman of the Society) made a bid of $21,000.00. As the price had exceeded $20,000.00 I lost interest in the sale as my obligation under the Agreement of Sale had then ceased. The bidding proceeded, and when a bid of $22,900.00 by Mr. C. R. Chan was made the said Rajco Bridgmohan said to me—"Skipper bid up to $25,000.00 we (meaning the plaintiffs) will take it for that price." I therefore continued bidding and the property was eventually knocked down to me for $25,000.00."

The Judge after a careful review of the evidence found in favour of the Society and there is no contention before us that this finding is wrong. He then ordered "the defendant Salisbury 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" to carry out his contract with the Society by obtaining transport and transporting to the Society the property he agreed to sell.

Before us it was urged that there was frustration of the contract entered into between the appellant and the Society, and it was contended that the appropriate remedy and relief to be awarded for appellant's breach of contract was in the nature of damages only.

In support of this contention Counsel argued that the contract entered into between the parties did not require the appellant to bid at the execution sale over and above the sum of $20,000; that as the property at the execution sale fetched $25,000 there was a frustration of the contract; that the bidding in excess of $20,000 by the appellant was at the request of the Society; and that inasmuch as the property sold at the execution sale was not the same as that mentioned in the agreement the learned trial Judge erred in granting an order for specific performance.

In dealing with the proceedings at execution sale the trial Judge states:

> "According to the defendant he made the first bid of $6,000 for the property and thereafter Messrs. C. R. Chan, A. P. Singh, Ramnaraine 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 Co-operative 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, I 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 or 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 Marshall 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."

The Judge found 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".

Before us no attempt was made to controvert the findings of fact and we are satisfied that the appellant of his own volition purchased the whole of the property at execution sale which includes the property he contracted to sell to the Society. The fact that the land bought by appellant was larger than that required for the purpose of enabling him to comply with the terms of the agreement or that he paid more than $20,000, cannot relieve him of his obligation especially as the excess comprised lots which he had previously sold to several farmers who were in possession and to whom he owed a duty to pass transport. It was in his own interest to acquire the excess amount. Nowhere in the contract is it stated that the appellant should buy any specified area for any specified amount. If he had bought for $15,000 it could not be said that he should return $5,000 to the Society, while on the other hand if he had bought a very vast area for an exorbitant price it could not be said that his action would relieve him of his responsibility.

The Judge found the appellant guilty of dishonest dealings in this transaction. Furthermore it seems to us remarkable in the extreme that the appellant who contends that if the Society would give him an additional $5,000 he would transport to the Society the property under the agreement admits in his evidence

> "I got $20,000 from plaintiffs. Have not got it now. Absorbed in purchasing padi and milling. I did not pay in the $5,000 because Rajco had promised to pay balance to make up 25%. If Rajco had paid me 25% I would not have paid money to Marshal because I had one month to pay balance of purchase price."

With regard to the ordering of specific performance it is well established that 'no principle can be more sacred than that a man shall be compelled to perform his contract' and that where the sale of land is involved for reasons of local convenience or suitability or accommodation, a compensation in damages would not be an adequate relief. A Court of Equity will not stand by and allow a wrongdoer to take advantage of his own wrong. We have therefore no hesitation in saying that the order for specific performance made by the trial Judge is correct. Further as previously pointed out the appellant having put himself in a position in which he was capable of carrying out his contract with the Society we agree that in order to give effect to the order for specific performance he should be ordered to pay to the Marshal of the Supreme Court the sum of $24,490.48 balance of the purchase price along with any interest that may be due, within one month of the date of entry of this order and thereafter to take the necessary steps to obtain title and to transport to the Society the property he sold under the agreement.

There remains the question of costs to Norbert De Freitas. He was joined as a defendant in circumstances which are somewhat peculiar. An injunction was sought to restrain the appellant from granting a mortgage over other property of his to Norbert De Freitas. By the order of a Judge the Society was granted liberty to join Norbert De Freitas as a defendant in these proceedings, which the Society did.

The trial Judge found that the object of attempting to obtain the mortgage was to secure a prior debt owed by the appellant to De Freitas. He further found that these dealings were **bona fide** and in no way tainted. The trial Judge dismissed the action against Norbert De Freitas and ordered the appellant to pay his costs. In the above circumstances we see no justification for such an order as Norbert De Freitas was joined at the instance of the Society which in our view should pay his costs. Fit for one Counsel only.

Save in respect of Norbert De Freitas' costs the appeal is dismissed and the judgment of the Court below affirmed with a variation in the order to the effect that payment of $24,490.48 be made to the Marshal of the Supreme Court. The respondents will have their costs of this appeal and in the Court below but will have to pay the costs of respondent De Freitas here and in the Court below.

Solicitors : H. C. B. Humphrys for appellant.

Carlos Gomes for respondents Devonshire Castle Co-operative Society,Limited.

A. R. Sawh for respondent de Freitas.

BROOMES v. GREGORY and ARJUNE

(In the Full Court, on appeal from the District Licensing Board for the County of Essequibo (Holder, C.J. and Stoby, J.) August 29, 1955; March 27, 1956).

Intoxicating Liquor Licensing Ordinance—Publication of notice of general licensing meeting—Duty of Comptroller of Customs and Excise to make publication—Publication not in accordance with provisions of the Ordinance—Dies non intervening causing non-publication on one day—Publication made on following day—Whether sufficient compliance with provisions of Ordinance—Whether provisions mandatory or directory.

Under the provisions of section 10 (4) of the Intoxicating Liquor Licensing Ordinance, Cap. 316, the Comptroller of Customs and Excise is required to cause to be published simultaneously in the Gazette and in one daily newspaper circulating in the Colony on at least two consecutive Saturdays a notice stating the day, hour and place at which general licensing meetings are to be held.

The Comptroller caused to be published in the gazette of the 10th, 17th and 24th April, 1954. a notice stating the day, hour and place at which a meeting of the Board was to be held but as Friday the 16th was Good Friday a *dies non* and there was no publication of the *Daily Argosy* on Saturday the 17th April, a public holiday, he caused to be published a similar notice in the *Daily Argosy* of Saturday the 10th, Sunday the 18th and Saturday the 24th April, 1954.

It was contended on behalf of the appellants that the non-compliance with section 10 (4) of the Ordinance was a specific illegality affecting the grant of a certificate authorising the respondent to obtain a spirit shop licence for the sale of Intoxicating liquor.

Held: the object of enacting Section 10 (4) of the Ordinance was to bring to the notice of members of the public who might be interested for one reason or the other in opposing an application for the grant of a Spirit Shop Licence that the Board is about to sit to consider applications.

In the present case the object for which section 10 (4) was enacted was achieved as the appellant saw the advertisement and filed his opposition.

Held further: the direction to advertise on three consecutive Saturdays is directory and not mandatory and as publication was made at the earliest possible opportunity after the second consecutive Saturday the Board had jurisdiction to sit on the appointed day.

Appeal dismissed.

J. O. F. Haynes for appellant.

Judgment of the Court: On the 29th June, 1954, the district Licensing Board for the County of Essequibo granted to the respondent a certificate authorising him to obtain a spirit shop licence for the sale of Intoxicating liquor in a building at Kumaka.

The appellants had filed an opposition to the grant of a certificate to the respondent but when the application was heard he did not appear nor was he represented.

Applications for the issue of spirit shop licences are regulated by the Intoxicating Liquor Licensing Ordinance, Chapter 316. Section 10 is as follows:

> "(1) Each board shall hold four sessions (to be called the general licensing meetings) in each year, at such times and at such places as the chairman of the board may determine, for the purpose of dealing with applications for the issue or transfer of licences for hotels, restaurants, taverns or spirit shops, and applications for the renewal of licences for hotels, restaurants, taverns or spirit shops shall be dealt with by the board at the last general licensing meeting in each year.
>
> "(2) The meetings of the board shall be held not later than the 31st March, the 30th June, the 30th September, and the 31st December in each year.
>
> "(3) At the last general licensing meeting each year the chairman of the board shall fix the dates and times of the meetings to be held the following year and the places where such meetings shall be held, and shall inform the Comptroller accordingly.
>
> "(4) The Comptroller shall at least sixty days before a meeting cause to be published simultaneously in the Gazette and in one daily newspaper circulating in the Colony on at least two consecutive Saturdays a notice stating the day. hour and place at which the meeting is to be held, and shall cause to be published in a like manner at least fourteen days before the meeting the names and addresses of all applicants for the grant of new licences and the situation of the premises in respect of which each application is made."

At the hearing of this appeal we were informed that with respect to the requirements under section 10 (4) the Comptroller was unable to comply strictly with one of them. He caused to be published in the Gazette of the 10th, 17th and 24th April, 1954, a notice stating the day. hour and place at which the meeting of the Board was to be held but as Friday the 16th was Good Friday a **dies non** and there was no publication of the Daily Argosy on Saturday the 17th April a public holiday, he caused to be published a similar notice in the Daily Argosy of Saturday the 10th, Sunday the 18th and Saturday the 24th April, l954.

As a result of the Comptroller's inability to publish on the 17th, the required notice was not published simultaneously in the Gazette and a daily newspaper for two consecutive Saturdays as required by section 10(4) of the Ordinance.

The sole point for consideration in this appeal is whether the noncompliance with section 10(4) is a. specific illegality affecting the grant of a certificate and requires us to set aside the decision of the Board.

It must be noted that although section 10(4) requires the Comptroller to cause certain things to be done no penalty is provided for non-

compliance and no indication is given as to what ought to be the consequence of non-compliance. Where a section in an ordinance is so framed the Court has to determine what the legislature intended should result from an omission to carry out the statutory provisions and this in turn depends on whether the provisions are mandatory or directory.

The rule for ascertaining whether the provisions of a statute are directory or imperative is stated in the judgment of Lord Campbell in *Liverpool Borough Bank v. Turner,* 30 L.J. Ch. 1. 379. at 380 where he said:

> "No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of Courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed."

That the scope and effect of a statute are of paramount importance in deciding whether certain provisions are mandatory or not was well illustrated in *Montreal Street Railway Company & anor. v. Normandin* (1917) A.C. 170; 106 L.T. 162. The facts of that case were that the respondent obtained damages against the appellants in an action for personal injuries sustained while travelling in a tramcar of the appellants. The appellants subsequently ascertained that the revising board for the district had not revised the list of jurors under art. 3426 for several years, and they challenged the verdict.

The appeal to the judicial Committee of the Privy Council was based on the fact that the jury list had not been revised for some years and as a result the jury which tried the case was without jurisdiction.

It was held that where the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who had no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, such provisions are directory only, and the neglect of them, though punishable, does not affect the validity of the acts done. The material part of the Judgment of the Privy Council reads as follows:—

> "It is necessary to consider the principles which have been adopted in construing statutes of this character, and the authorities so far as there are any on the particular question arising here. The question whether provisions in a statute are directory or imperative has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case the object of the statute must be looked at. The cases on the subject will be found collected in Maxwell on Statutes, 5th Edit., p. 596, and following pages. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only, the neglect of them, though

punishable, not affecting the validity of the acts done. This principle has been applied to provisions for holding sessions at particular times and places (2 Hale, P.C. 60; *Rex v. Justices of Leicester,* 7 B & C. 6; and Park, J. at pp. 39 and 40, in *Gwynne v. Burnell, 2* Bing. N.C. 853), to provisions as to rates (*R. v. Fordham,* 11 A & E. 73; and *Le Feuvre v. Miller,* 26 L.J. 175, M.C.) to provisions of the Ballot Act (*Woodward v. Sarsons, 32* L.T. Rep. 867: L. Rep. 10 C.P. 733: and *Phillips v. Goff,* 17 Q.B. Div. 805), and to justices acting without having taken the prescribed oath, whose acts are not held invalid (*Margate Pier Company v. Hannam,* 3 B & A. 266).

In the case now before the board it would cause the greatest public inconvenience if it were held that neglect to observe the provisions of the statute made the verdicts of all juries taken from the list *ipso facto* null and void, so that no jury trials could be held until a duly revised list had been prepared." An examination of the provisions of the Intoxicating Liquor Licensing Ordinance, Chapter 316, leads us to the conclusion that the object of enacting section 10(4) was to bring to the notice of members of the public who might be interested for one reason or the other in opposing an application for the grant of a spirit shop licence that the Board is about to sit to consider applications.

In the present case the object for which section 10(4) was enacted was achieved as the appellant saw the advertisement and filed his opposition.

Were we to hold that the Comptroller's omission to advertise on three consecutive Saturdays although he advertised on Saturday the 10th, Sunday the 18th and Saturday the 24th resulted in the Board's having no jurisdiction grave injustice would be done to those who had no control over the action of the Comptroller and consequently we hold that the direction to advertise in three consecutive Saturdays is directory and not mandatory and as publication was made at the earliest possible opportunity after the second consecutive Saturday the Board had jurisdiction to sit on the appointed day.

We might add that the case of *The Queen v. Dyott and others* (1882) 9 Q.B. 47 where it was held that the omission to give public notice of a rate for the relief of the poor in the parish the next Sunday after it was fixed by the justices made the rate not collectable is distinguishable on the ground that the provision there was held to be mandatory. In that case the object of publication was to overcome the unlimited power of churchwardens and overseers who frequently on frivolous pretences and for unjust ends made unjust and illegal collection of rates in a secret and clandestine manner. To put an end to that practice public notice was a necessity.

On the other hand in *Mayer v. Harding 2* Q.B. L.R. 410 an appellant applied to justices to state a case. The Act required an appellant to transmit the case to the appropriate court within three days after receiving it. The appellant received the case on Good Friday. The offices of the Queen's Bench Court were closed from Good Friday to the following Tuesday. The appellant lodged the case in the Queen's Bench on the Wednesday following Good Friday. The respondent obtained a rule **nisi** calling on the appellant to show cause why his appeal should not be struck out.

In discharging the rule Mellor, J., said:

> "I am of opinion that the rule must be discharged. Where a statute requires a thing to be done within three days, or six months, or within any particular period, the time may no doubt be circumscribed by the fact of its being impossible to comply with the statute on the last day of the period so fixed. But this is not the present case. Here it was impossible for the appellant to lodge his case within three days after he received it. As regards the conduct of the parties themselves, it is a condition precedent. But this term is sometimes used rather loosely. I think it cannot be considered strictly a condition precedent, where it is impossible of performance in consequence of the offices of the court being closed, and there being no one to receive the case. The appellant lodged the case on Wednesday, that is, he did all that it was practicable for him to do. I think we should strain the statute, if we gave it the construction contended for by Mr. McMahon, which might be productive of very inconvenient results. This does not interfere with the principle that the parties themselves cannot extend the time by their own acts. Here all that was possible was done, and I think that is sufficient."

In our opinion the public had ample notice of the days on which the Board would sit and the omission to advertise on three consecutive Saturdays did not result in any injustice to anyone.

The appeal is dismissed with costs fixed at $20:

Solicitor:

A. Vanier for respondent Arjune.

RIDLEY v. BISHOP

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Holder, C.J. and Stoby, J.) July 12, 1955, March 28, 1956).

Magistrate's Court—Jurisdiction—Case heard on merits—Jurisdiction declined—Appeal against adjudication—Whether proper procedure for challenging Magistrate's decision is by way of appeal or by application for rule.

On a claim for damages for trespass to land the Magistrate having heard the evidence of both parties and their witnesses agreed with the submission made on behalf of the defendant that the case involved a dispute with regard to title to land and declined jurisdiction.

The plaintiff appealed against the decision of the Magistrate on the main ground that the Magistrate erred in declining jurisdiction.

On appeal, it was submitted *in limine* that the proper procedure to be followed in a matter of this kind was an application for a rule calling upon the Magistrate to hear and determine the case on the merits and not by way of appeal.

Held: Where the Magistrate has not dealt with a case on its merits but has disposed of it without coming to a conclusion on the facts the proper procedure would be to make application for a rule calling upon him to hear and determine the case on its merits.

Where, however, the Magistrate has considered the facts of a case and reached a conclusion on the merits even if such a conclusion is that he has no jurisdiction then he has adjudicated the matter on its merits and the proper procedure by an aggrieved party is by way of appeal and not by an application for mandamus.

W. R. Adams for appellant.

Judgment of the Court: This is an appeal from the Magistrate of the Georgetown Judicial District arising out of a claim by the appellant for damages against the respondent in respect of an alleged trespass by the respondent on appellant's land. The Magistrate having heard the evidence of the appellant and the respondent and their witnesses agreed with the submission that the case involved a dispute with regard to title to land and declined jurisdiction. The appellant appealed against this adjudication.

The main ground of appeal was that the learned Magistrate erred in law in declining jurisdiction as he considered there was a dispute as to the title of the land.

Before us the Solicitor submitted *in limine* that the proper procedure to be followed in a matter of this kind was by an application for a rule calling upon the Magistrate to hear and determine the case on the merits and not by way of appeal: in support of his contention he cited the cases of *Nascimento v. Henriques*, (1923) B.G.L.R. 13 and *Re Bryden* (1912) B.G.L.R. 49.

The decision in both of these cases was based upon the judgment of the Court in its General Jurisdiction in the case of *Collins v. Durant ex parte Collins* (Bovell, C.J., Hewick, J., and Nunan, J.), Supreme Court decisions. 1st June. 1906. In the course of his judgment Bovell, C.J., said:

> "The principal question in this case is whether the applicant should not have appealed in accordance with the provisions of Ordinance 13 of 1893, as to appeals, instead of applying for a rule against the Magistrate under section 46 of that Ordinance. Under section 3 of the Ordinance, an appeal lies from every decision of a Magistrate "acting in the exercise of his jurisdiction." while under section 46, a rule is obtainable in any case where a Magistrate "refuses" to act. In other words, in cases where a Magistrate exercises jurisdiction, an appeal may be brought from his decision, but where he declines to exercise jurisdiction, a rule may be applied for (cf. section 9 prescribing the admissible reasons for appeal, which include acting without or in excess of jurisdiction but not, declining to exercise jurisdiction). The question for decision, therefore, is, did the Magistrate exercise jurisdiction, or did he decline jurisdiction? Apparently, he ceased hearing the case after entering on it. on the ground that a police constable who, while acting in the execution of his duty as peace officer is assaulted, cannot bring a complaint for a common assault, but can only bring one for an assault committed on him while in the execution of his duty as peace officer.
>
> We know of no authority for the doctrine that a police constable, under such circumstances, is not a person qualified and competent to bring a complaint for a common assault, on the contrary, section 74. Ordinance 10 of 1891, appears to be to the opposite effect; and in accordance with the decision of the Full Court *in re* Johnson (13 Feb. 1903), that a Magistrate declines jurisdiction if he abstains from adjudicating on the merits, on the ground that the complaint was not made by a competent person, and following the decision in Roy v. Hodgson (7 Nov, 1902), that section 46 applies to every case in which a Magistrate has declined jurisdiction at whatever stage of the proceedings he may have done so. (cf. R. v. Brown, 26 L.J., Ma. Cas. 183), we think the Magistrate declined jurisdiction in this case, and that the right procedure has been adopted."

In the case *of The Queen v. Brown and others* (1857) L.J. M.C. 183 the information was brought against one of several joint owners of a colliery for disobedience of the rule and after evidence had been gone into on the merits the Justices dismissed the complaint on an objection taken by the defendant that the proceedings should have been against all of the joint owners. The Magistrate declined jurisdiction and the rule was obtained against them. In the course of his judgment Lord Campbell, C.J., said at p. 184:

> "The only question is. whether the Justices, having heard evidence, and said that the other owners ought to have been brought before them, have adjudicated upon the case so as to prevent us from calling upon them to hear and determine. I think that they have not adjudicated but have only declined jurisdiction. I am not prepared to lay down any general rule as to what amounts to a declining of jurisdiction. But in the present case there is no difficulty at all in saying that the objection taken was preliminary—and to which weight was given by the Justices—that in point of form all the proper parties were not before the Court, analogous to a plea in abatement. This was a declining of jurisdiction, and not an adjudication on the merits. I have, therefore, no difficulty in saying that the rule ought to be made absolute."

It seems clear that the *ratio decidendi* is that when a Magistrate has considered the facts of a case and has reached a conclusion on the merits even if such a conclusion is that he has no jurisdiction then he has adjudicated the matter on its merits; the proper procedure by an aggrieved party is by way of appeal and not by an application for mandamus.

In the cases cited the Magistrate had not dealt with those cases on the merits but had disposed of them without coming to a conclusion on the facts. In this case the Magistrate addressed his mind to the facts and decided that title to immovable property was in dispute and consequently section 3 subsection 3 of the Summary Jurisdiction (Petty Debt) Ordinance, Chapter 16 made applicable.

We agree that the proper procedure was by way of appeal; accordingly the preliminary objection is overruled. The appeal will be heard on a date to be fixed. The question of costs is reserved until the determination of the appeal.

Solicitor: T. A. Morris for respondent.

IN THE MATTER OF ORDER 36 OF THE RULES OF THE SUPREME COURT, 1955.

(In Chambers (Stoby J.) March 19, April 4, 1956).

Interpretation—"proprietor", "owner" "legal owner" in rules 2, 3 *and* 4 *of Order* 36 *of the Rules of the Supreme Court*, 1955.

Originating summons filed by the Registrar of Deeds for an order determining the interpretation of the words "proprietor", "owner" and "legal owner" as they appear in rules 2, 3 and 4 of Order 36 of the Rules of the Supreme Court, 1955.

Rules 2(1) provides that in parate execution the summation is to be served personally upon the debtor or proprietor of the property upon which execution is sought.

Held: "Proprietor" in rule 2 (1) means the person holding the legal title to the property and no one else.

IN THE MATTER OF ORDER 36 OF THE RULES OF THE SUPREME COURT, 1955.

Rule 3 provides that the party applying for execution shall state the name of the person appearing in the books of the party applying as the owner of the lot or lots……but the name of such person…….shall not be deemed to show that such person is the legal owner.

Held: "owner" in rule 3 means the person whose name appears in the assessment book of the authority whether he is the legal owner or not.

"legal owner" means the holder of the legal title.

Rule 4 provides for the obtaining of a sworn valuation by the Registrar of the property taken in execution unless the proprietor thereof shall otherwise request.

Held: "Proprietor" in rule 4 means the holder of the legal title to the property.

The Registrar of Deeds, the Town Clerk of Georgetown and the Commissioner of Local Government appeared in person.

Stoby J: This is an Originating Summons filed by the Registrar of Deeds applying for an order determining the interpretation of the words "proprietor", "owner" and "legal owner" as they appear in rules 2, 3 and 4 of Order 36 of the Rules of the Supreme Court, 1955. The relevant rules of Order 36 are as follows:

> "2. (1) In cases where any sum is authorised by law to be recovered by parate execution, the summation shall be served personally upon the debtor or the proprietor of the property upon which execution is sought. If such person or proprietor is dead or cannot be found, or such proprietor is not known, application shall be made by the party seeking execution to a Judge who may give such direction for substituted service as he may think fit. After service or substituted service except where otherwise specially provided by an Ordinance, the like writs may thereafter be issued in the case of any sum so authorised to be recovered as may be issued under the rules of this Order, in the case of any sum directed to be paid by any judgment or order.
>
> (2) Subject to the provisions of these rules the practice and procedure relating to parate execution shall continue in force".
>
> "3. In all cases of proceedings to recover rates or taxes or other assessments by parate execution the party applying for execution, shall state the name of the person appearing in the books of the party applying as the owner of the lot or lots in respect of or against which proceedings are being taken and the advertisement of the execution sale of such lot or lots shall state that the person so named appears in such books as the owner, but the naming of such person in such advertisement shall not be deemed to show that such person is the legal owner, nor shall it in any way affect any question which may arise as to the ownership of the said lot or lots."
>
> "4. Before the day fixed for the sale of any property at parate execution or at any execution in proceedings in rem, the Registrar shall unless the proprietor thereof shall otherwise request in writing, obtain from a competent valuer a sworn valuation of such property. The cost of such valuation shall be part of the cost of execution."

The reasons which induced the Registrar, he said, to apply to the Court for an interpretation of the words "proprietor", "owner," and "legal owner" are twofold; (a) there is no definition of any of those

words in the rules and (b) the fact that according to the law of this Colony ownership of immovable property is dependent on transport.

It will be convenient to deal with the second reason first.

It has been established by a series of cases that title to land in this Colony cannot be transferred except by transport.

In Brown v. Administrator General representing the estate or John Alt. 11.3.1872, it was said:

> "It is well settled by the law of this colony that immovable property is not considered as delivered or that the legal possession is parted with, except by transport before a Judge of the Supreme Court."

In Parikan Rai v. La Penitence Estates Co., Ltd. and Douglas (1926 L.R.B.G. 142, the head-note reads:

> "Immovable property was conveyed by transport to A. and the said transport contained a covenant on the part of A. as proprietor to payB. for such expenditure as might be incurred by B. on B.'s land for the purpose of draining A.'s land. A. subsequently sold his land to C. but did not pass transport thereof to C.
>
> Held, that A. remained liable under the covenant contained in his transport, on the ground that the term "proprietor" used therein connoted the legal owner and did not include the beneficial owner."

These case show and indeed the principle of law is not questioned by the Registrar that even though the owner of immovable property has sold it and received the purchase money once title remains in his name he is still the legal owner of the property. This does not mean of course that in such a case the purchaser is without remedy for he has the right to oppose the passing of the transport to anyone but himself and the right to enforce his contract in an action for specific performance.

I propose to consider now the other reason which caused the Registrar to file the Originating Summons, that is, the absence of any definition of the word "proprietor" or "owner".

Rule 2 (1) commences by providing that in parate execution the summation is to be served personally upon the debtor or proprietor of the property upon which execution is sought.

In order to ascertain the meaning of the two words "debtor" and "proprietor" it will be useful to advert to the state of the Law prior to the 1955 Rules and having considered what the law and practice was with regard to parate execution to consider what was the mischief the Rule-making Authority desired to remedy.

No better explanation of parate execution will be found then the passage in Duke's Immovable Property where he cites Sir Crossley Rayner C.J., as saying in *Attorney General v. Mangal Singh,* 19.12.13 :

> "Parate execution is an extraordinary remedy peculiar to Roman-Dutch law by means of which the Government enforces payment of some sum due to it. It is entirely unknown to English law....It is a speedy and drastic remedy. On a certificate by a public officer that money is due to the Government the Court issues execution against the property of the debtor. Originally, parate execution appears to have been a remedy available only to the Government, but, in this colony, the Government has from time to time allowed the remedy to be used by various public bodies, such as Town

Councils, Boards of Commissioners appointed for public purposes and the like. There are a number of Ordinances which enable these bodies to recover rates, taxes and other sums due to them by parate execution. In every case, however, the power is given by statute, and the body to which it is given is named. Anybody to which it is not expressly given must enforce payment of its debts by the ordinary process of law."

From the above it will be seen that the law did not require personal service of the summation on the owner with the result that it was possible for a property to be levied upon and sold for non-payment of taxes without the owner knowing that his property was levied upon.

It must have been to remedy this defect in the law and to minimise the harshness of what Sir Crossley Rayner called "this drastic remedy" that the Rule-Making Authority decided to make personal service an imperative. Now whom did the authority wish to protect? Obviously the taxpayer and usually the taxpayer is the legal holder of the title. Instances may occur where the property has been sold but transport has not passed for some reason or the other or the legal owner may have died and some one has been in adverse possession but nevertheless the person responsible for the payment of the tax as is the proprietor or legal owner and it is the duty of any person who has limited ownership or a *jus in rem* to be vigilant in his own cause.

In my view then the meaning of proprietor in rule 2 (1) is the person holding the legal title to the property and no one else.

The Town Clerk who appeared to represent the Town Council mentioned that the rule has resulted in administrative chaos as there is difficulty and delay in tracing the legal owner.

I can see no reason for any delay although I have no doubt that after a further period of trial some improvement may result from a conference between those who make the rules and those who execute them.

Section 227 (i) of the Georgetown Town Council Ordinance provides that—

"Everyone who becomes the owner of immovable property in Georgetown either by transport or otherwise shall, within three months after acquiring that property exhibit to the Town Clerk for annotation by him in the books of the Council the transport or other documents evidencing the ownership".

In so far as the Town Clerk is concerned the person whose name appears in the books of the Council is *prima facie* the legal owner. In any event it is not the duty of the Council to serve summations but only to forward the necessary documents to the Registrar for service of them by the Marshal. The duty therefore of effecting proper service is the Registrar's and not the Town Clerk's.

My opinion is also sought with regard to rule 3 of Order 36. Rule 3 provides that the party applying for execution shall state the name of the person appearing in the books of the party applying as the owner or the lot or lots . . . This rule is self-explanatory. The Registrar submitted that "owner" in this rule also means legal owner and the Town Clerk agrees with him. I differ. I have already shown that in Georgetown there is an obligation on the part of the purchaser of immovable property to

notify the Town Council of his purchase so that his name may be recorded. Where however there is failure to carry out this statutory duty and a person's name appears in the books of the Council although he is no longer the holder of the title, the Town Clerk must still state the name of the previous owner as owner for the simple reason that the rule says so.

The object of this rule is to ensure that the Registrar is aware of the name of the person recorded in the assessment book as owner. It is particularly useful in districts other than Georgetown. In Georgetown the person whose name appears in the books may not be the legal owner but a past legal owner but in the country the converse is more likely to be true. That situation may occur as a result of section 104 of Chapter 150, the Local Government Ordinance which states:

> "The local authority of a village or country district shall, before entering in the assessment book of the village or country districts the name of any person claiming to be the proprietor of any lot or subdivision of a lot or any building in the village or country district, satisfy itself that the claimant is legally entitled thereto by transport. letters of decree, intestacy, will or otherwise, and for that purpose may, in the case of a lot or subdivision of a lot, call for the production of documents of title and. in the case of a building, for any sufficient evidence".

As a result of this section an overseer of a village or country district who satisfies himself that immovable property has been purchased may enter the purchaser's name in the Village Books before transport is passed. In such a case the purchaser is not the proprietor within the meaning of rule 2 but he is the person who is paying the rates and who does not wish the property sold for non-payment of rates. Under rule 3 the local authority could submit the name of such a person as the owner and if on checking the title the Registrar finds that he is not the present or past legal owner he is put on his guard and may consider the advisability of notifying such a person that the taxes or rates are unpaid. Service on such an owner would not be good service but the precautionary action of notifying such an owner cannot be over estimated.

The final application in the summons is for an interpretation of the word proprietor in rule 4, but it must follow from what I have said above that proprietor in that rule means the holder of the legal title.

TROTZ *et al* v. THE ATTORNEY-GENERAL

(In the Supreme Court, Civil Jurisdiction (Stoby, J.), February 13, 15 April 4, 1956).

Crown Lands—Resumption under Crown Lands Resumption Ordinance, Cur 176*—Claim by third party—Procedure—Prima facie right to the land.*

Under section 3 (1) of the Crown Lands Resumption Ordinance (Cap. 176) notice of intended resumption by the Crown of Plantation Noordenbeck or lot 49 Plantation Oud Osterbeck or lots 50, 51 and 52 and lots 53 and 54 on the right bank of the Essequibo River appeared in the *Official Gazette.* The claimants thereupon claimed the land intended to be resumed as the lawful successors upon intestacy of George Hendrick Trotz.

Held: A claimant under the Crown Lands Resumption Ordinance must show that either he or his predecessor in title was the owner of the land by transport or letters of decree, or alternatively, that he was in adverse possession for

upwards of 12 years immediately preceding the publication of the notice. In this case neither the fact of ownership of the land by George Hendrick Trotz nor the fact that the claimants were his successors upon intestacy was established, and since the claimants were never in possession, the claim failed and the decision of the Commissioner of Lands and Mines rejecting it confirmed.

J. O. F. Haynes for claimants.

G. M. Farnum, Acting Attorney for respondent.

STOBY J.: On the 23rd September, 1955, the Governor in pursuance of section 5(1) of the Crown Lands Resumption Ordinance. Chapter 172, now section 6 (1) of Chapter 176 (Kingdon edition) referred to the Supreme Court for investigation by a Judge a claim by Lionel Barrington Trotz and others to the ownership of Plantation Oud Osterbeck situate on the right bank of the Essequibo River.

The Registrar of the Supreme Court, acting in conformity with rule 1 of Order 59 of the Rules of the Supreme Court. 1955, applied to the Commissioner of Lands and Mines for a transcript of all proceedings taken and evidence given before him relating to the claim by Trotz *et al* and of his report to the Governor. Upon receipt of the documents requested the matter was eventually set down for hearing before me on the 13th and 15th February, 1956, some delay being occasioned through the inability of Mr. P. A. Cummings, Barrister-at-law, to appear on behalf of the claimants.

Reference to the certified copies of the documents and report received from the Commissioner of Lands and Mines will show that in the Official Gazette of the 14th January. 1950. and subsequent days a notice appeared to the effect that the Crown would resume possession of Pln. Noordenbeck or lot 49, Pln. Oud Osterbeck or lots 50, 51 and 52 and lots 53 and 54 all situate on the right bank of the Essequibo River if no person was able to establish a claim to the aforesaid plantations within six (6) months of the last publication of the notice.

As a result of the notice, Lionel Barrington Trotz, Fleetwood Dixie Trotz also known as and called Fleetwood Dixie Mortimer. Beatrice Anna De Camp, Edith McDonald. Annie Smith and Madina Elizabeth Perry also known as and called Classie Perry filed a claim to Plantation Oud Osterbeck or lots 50, 51 and 52.

The claimants based their claim to the property on the ground that they were the lawful heirs of George Hendrick Trotz who was Commander of the River and appertaining districts of Essequibo in or about the period 1779 to 1804 during the Dutch occupation of this Colony. It was alleged that George Hendrick Trotz was at the time of his death the owner of Pln. Oud Osterbeck and the estate has devolved to the claimants through intestacy.

The Commissioner of Lands and Mines found that the claimants failed

"(a) to produce valid title to the land either in the name of George Hendrick Trotz, Adrian Christian Trotz or anyone else:

(b) to adduce any evidence to the effect that George Hendrick Trotz, Adrian Christian Trotz, or anyone else ever held a valid title to Pln. Oud Osterbeck;

(c) to adduce evidence that anyone of the said claimants had ever occupied the said land within 8 years up to the 14th day of January 1950, or at any time;

(d) to adduce evidence that would move the Supreme Court to grant to them a declaration of title to the land."

but after consideration of the report the claim was referred to the Supreme Court.

At the hearing before me Mr. Haynes for the claimants was granted leave to file an additional ground of opposition as follows:

> "Claimants further say that the land in dispute cannot be properly resumed by the Crown in any event unless it is proved by the Crown that the said land had been or was alienated within the meaning of section 3. Chapter 176, and it is alleged that the said land was never so alienated by the Crown."

Mr. Haynes led no evidence before me but in addition to the point he made regarding the inability of the Crown to resume the land without proof that it was alienated, relied on the arguments adduced by Counsel who represented the claimants before the Commissioner of Lands and Mines. He also submitted that in considering whether claimants have established a right to the property or not the Court should not require greater proof than that demanded by the Ordinance. He referred to section 6(1) of the Crown Land Resumption Ordinance, Chapter 176, which states:

> "6. (1) If the Governor in Council, upon the report, or after any further inquiry he deems expedient, is satisfied that a *prima facie* right to the land has been established, all further proceedings under this Ordinance in respect of the land shall cease;"

I agree with this last submission. It seems to me to be logical that if the Governor-in-Council will refrain from resuming the property so soon as a *prima facie* right is established then all that is required of the Court is to decide whether the claimants have established such a right. But. I conceive, by *prima facie* right is meant a right resulting from operation of law such as a right to succeed on intestacy or a right to obtain a declaration of title because of adverse possession for upwards of thirty years.

It is on that basis that I have now to consider the evidence of the claimants and arguments adduced on their behalf.

The submission by Mr. Haynes that it is the duty of the Crown to prove that the land was alienated came about in this way.

This matter came on for hearing before me on the 10th November, 1954, when Mr. Cummings appeared for the claimants for the sole purpose of explaining his personal position and to apply for an adjournment. As proceedings of this nature had not occupied the Court for many years I took the opportunity of outlining the procedure to be followed and referred to Order 59 of the Rules of the Supreme Court, 1955. I also stated that it would be useful if the Crown led some evidence that the land in question was alienated by the Crown. The Solicitor General expressed the view that it was unnecessary for the Crown to lead any such evidence and doubted whether such evidence was available.

On the resumed hearing when Mr. Haynes appeared. I mentioned what had taken place on the previous occasion and he thereupon adopted the point regarding proof of alienation.

Although proceedings under the Ordinance were frequent prior to 1925 I have not been able to trace in the records of the Deeds Registry any judgment indicating that the point was ever dealt with.

I have had access to a file from the Lands and Mines Department in which is recorded a minute stating that the point was raised by Mr. Justice Dalton while reviewing the decision of the Commissioner of Lands and Mines in respect of proceedings taken by the Crown to resume certain estates in Berbice.

As the law stood in 1925, it was possible to contend that in British Guiana land alienated prior to the cession to the Crown in 1803 did not come within the provisions of the Ordinance. This was probably what Mr. Justice Dalton meant when he said that in proceedings under the Ordinance the Government must prove that the land had been alienated by the Crown. But the Ordinance was amended in 1950 and now by section 3(2) of the Crown Lands Resumption Ordinance. Chapter 176:

> "3. (2) Any land in the Colony which was alienated before the cession to the Crown in the year 1803 of the Colony of Demerara and Essequibo and the Colony of Berbice by or on behalf of the Governments thereof, shall, for the purposes of subsection (1) of this section, be deemed to have been alienated by or on behalf of the Crown."

As a result of the amendment to the Ordinance the point, in that form, no longer arises.

Mr. Haynes, however, goes further and submits that the Crown must prove that the land is not Crown land in order to give the Commissioner of Lands and Mines and the Court jurisdiction.

But the claimants cannot have it both ways. Section 3(1) of the Ordinance states:

> "When any land in the Colony which has been or is hereafter alienated by or on behalf of the Crown appears to the Commissioner to have been abandoned by the owner thereof for eight years or upwards, and the owner, or anyone lawfully claiming under him. cannot be ascertained, notwithstanding every reasonably diligent inquiry made by the Commissioner, he may with the sanction of the Governor declare, by a notice which shall be published six times at least in the Gazette and in any two local newspapers and posted on that land, containing a description thereof which will enable it to be identified by reference to a survey or natural features, that if no claim thereto is made to him by or on behalf of anyone able to establish a title thereto within the period, not being less than six months, specified in the notice, the land will be resumed by the Crown."

The claimants base their claim to the estate on the ground that it was alienated by the Dutch to Governor Trotz and that it passed to A. C. Trotz whose descendants they are. Their only right to be heard is on account of their admission or acceptance of the fact that the estate was at one time alienated. In the circumstances of this claim to deny the alienation is to defeat their claim.

In any event the Report of the Titles to Land Commissioners on claims to land in the County of Essequibo was tendered by consent. At page 369 of the report the Commissioners refer to a claim made in 1855 and to the fact that the 1855 Commissioners reported:

> We cannot discover any grant, transport or other legal title on record of Oud Osterbeck to A. C. Trotz, senior."
>
> "We are aware, however, that it has for a great length of time been claimed by the Trotz family as their property and that they have exercised rights of ownership over it without opposition."

The Crown, as far as I can ascertain from the documents before me, has never disputed the fact that Oud Osterbeck is private property and since that fact is conceded proof of it is unnecessary.

I must now consider what a claimant has to establish in order to preclude the Crown resuming possession of land under the Ordinance.

Section 4 of the Ordinance enacts:

"If no claim is made in pursuance of the notice the Commissioner shall make a report to the Governor of the proceedings taken by him. containing the description of the land, together with the boundaries thereof, and shall state that no claim has been made thereto; and upon receipt of the report, the Governor in Council may make order that the land shall be resumed by the Crown, and thereupon it shall be resumed by and become the property of the Crown free from all incumbrances."

Section 3 refers to a claim being made by anyone able to establish a title. A strict legal interpretation of these two sections would mean that a claimant should show a title by letters of decree or transport in himself or the person through whom he claims as in this Colony title to land can only be established by transport. While it is possible to have a right to land or a right to obtain title to land or a right to remain in possession of land it is not possible to be the legal owner without being the holder of a transport. See *Parikan Rai v. La Penitence Estates Co., Ltd., and Douglas* (1926) L.R.B.G. 142.

As section 6 of the Ordinance provides that all proceedings under the Ordinance should cease if the Governor in Council is satisfied that a *prima facie* right to the land exists, I am of opinion that a strict legal interpretation ought not to be given to "title" in sections 3 and 4 of the Ordinance and that the Crown should not be permitted to resume possession of land if a claimant establishes

(a) that he or his predecessor in title was the owner of the land by transport or letters of decree; or

(b) that he was in adverse possession of the land for upwards of twelve (12) years immediately preceding the notice published in accordance with section 3 of the Ordinance.

In other words, if the owner, that is, the holder of the legal title, abandons land for upwards of 8 years, the Crown can take proceedings under section 3 of the Ordinance but the moment the owner, that is, the holder of the legal title or someone claiming under him. is discovered, the Crown's right ceases. If no owner is discovered then a person in adverse possession for upwards of 12 years can prevent the Crown taking possession.

This view is in accord with previous decisions of the Court as appears from the following judgment reported in the Daily Argosy of the 27th

August, 1925:

"His Honour said in the matter of Mittelholzer, *et al* exctrs. *re* Berenstein that 'this property was owned by a Mr. Hendrick Mauren-brecher who left the colony in 1862, leaving his cousin, Capt. Jan. Vincent Mittelholzer as his attorney with sole control, management, use and occupancy of Pln. Berenstein. Mr. Maurenbrecher has not been heard of since his departure. Since the death of Capt. Mittelholzer, his son, the Rev. John Herbert Mittelholzer (now deceased), has been in possession. This claim is made on behalf of the heirs.

'Possession by Capt. Mittelholzer gave him no prescriptive right.

'The claim has not been established and the Crown has the right of resumption. The fact that three generations of the Mittelholzer family have been in occupation of at least part of the estate may induce the Crown to take some notice of the alleged claim.'"

It would seem from the above and other judgments that if the Court were satisfied that a claimant was in adverse possession, opportunity was afforded him to apply for a declaration of title.

There remains for consideration the evidence led in support of the claimants' claim.

No question of adverse possession arises.

In the report of the Commissioner of Lands and Mines (paragraph 7) he said:

> "In the course of the evidence it was admitted by claimants L. B. Trotz and F. D. Mortimer that neither they nor any one of the claimants ever lived on Pln. Oud Osterbeck."

This finding of fact has not been challenged and indeed Mr. Haynes concedes that it is quite true that they have never been on the land.

Not only have the claimants never been on the land but they do not assert that anyone on the land has been put there by them or by anyone through whom they are claiming. Their claim therefore is not founded on adverse possession but on ownership.

In order to succeed on the footing of ownership the claimants must establish, by which I mean must lead prima facie evidence, that the original owner died owning the property and either devised it to persons who in turn eventually devised it to the claimants or that the property has devolved to them by intestate succession.

Mr. Haynes admits that the claimants cannot establish ownership by means of a will and must rely on intestate succession proof of which is dependent on what he called evidence of reproduction.

The principal evidence relied on by the claimants to establish their descent from George Hendrick Trotz are the affidavits of Mortimer, Trotz and Eytle. When one reads the affidavits and looks at what is alleged to be a genealogical tree and then compares them with what is contained in the Report of the Titles to Land Commissioners, Ex. BB, one gets the impression that each deponent has a vivid imagination.

Apart from the fact that some of the claimants have the same name as the one time Governor of Essequibo there is not the slightest foundation for assuming that any legitimate relationship exists. There is nothing to show, for example, that A. C. Trotz, Senior, had a legitimate son by the name of A. C. Trotz or that Josiah Trotz was the legitimate son of A. C. Trotz, Junior. I am not unaware of the fact that an illegitimate child can take through its mother, but if Josiah Trotz is illegitimate the chain of succession is broken.

The failure of the claimants to establish by acceptable evidence that Josiah Trotz was legitimate is enough to justify the conclusion reached by the Commissioner of Lands and Mines but there are other factors equally decisive against the claimants.

Under the will of George Hendrick Trotz, Ex. AA, all of his estate movable and immovable was bequeathed to his children. The usufruct to which his immovable property was subject only arose if he died without issue. As the claimants allege they are descended from A. C. Trotz and Theodorus Marinus Trotz, the brothers of George Hendrick Trotz they have to prove that the latter died without children. The children of A. C. Trotz were only left a usufruct if their uncle died childless. Again, only three children of A. C. Trotz are mentioned; they are Sophia, George and

Helene. As the bequest is a specific one a child born to A. C. Trotz, Senior, after the will was made would take no share in the estate, hence A. C. Trotz, Junior, was not entitled.

Finally the Solicitor General's submission that Oud Osterbeck was not the property of George Hendrick Trotz at the time of his death is, in my opinion, correct. There is *prima facie* evidence that the Crown alienated it at some time and that the Trotz family was claiming that it was to their ancestor that it was alienated. But there is not a shred of evidence that George Hendrick Trotz was still the owner of the estate when he died. All the documentary evidence is to the contrary and on this ground too the claim fails.

For the above reasons the report of the Commissioner of Lands and Mines is confirmed.

TAMESHWAR *et anor* v. THE QUEEN.

(In the Court of Criminal Appeal, on appeal from the Supreme Court (Holder, C.J., Stoby and Phillips, J.J.) October 28, December 21; 1955; February 11, April 4, 1956).

Criminal Law—Trial—View of locus in quo with witnesses—Absence of judge.

The appellants were convicted of robbery with aggravation before a judge and jury. At the trial there was a view of the *locus in quo* by the jury directed by the judge but the trial judge did not himself attend that view. Five witnesses, the Clerk of Court, the Marshal, and Counsel for the Crown and for both appellants as well as both appellants attended the view. On return into Court one of the witnesses who attended the view was recalled and cross-examined by counsel for one of the appellants while another was recalled for cross-examination but was not cross-examined. Each counsel for the appellant then intimated that it was unnecessary to recall the other witnesses and they were not recalled. There was no allegation made either at the trial or on appeal that any irregularity apart from the absence of the trial judge occurred at the view.

On appeal, it was contended for the appellants *inter alia* that the absence of the trial judge from the view was an irregularity which vitiated the trial.

Held: (Holder, C. J. and Phillips, J.) that no such irregularities occurred as would warrant the trial being held as irregular. The mere conduct of the view-by the Clerk of Court (an Assistant Sworn Clerk) acting under the direction of the judge, is not an irregularity of a nature that goes to the root of a fair and proper trial.

(Per Stoby, J. dissenting):— A view being part of the evidence, the absence of the judge from the view with witnesses vitiated the trial.

Appeals dismissed by a majority.

(Editor's note: On appeal to the Privy Council the convictions were quashed on the ground that it is a defect which would vitiate a trial for a view with witnesses to take place in the absence of the judge).

B. O. Adams for appellants.

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

S. S. Ramphal, Acting Solicitor General, for respondent on 11th February, 1956.

Judgement by Holder, C.J. and Phillips J.

The appellants were indicted on a charge of robbery with aggravation contrary to section 222(c) of the Criminal Law (Offences) Ordinance. Chapter 17, and on the 17th February, 1955, they were both convicted on the said charge and each sentenced to ten years penal servitude and ordered each to receive six strokes. Against this conviction the appellants

applied for leave to appeal under section 5(c) of the Criminal Appeal Ordinance, 1950. Fourteen grounds of appeal were submitted.

At the hearing of the Appeal on the 28th October, 1955. Counsel for the appellants sought and obtained leave of the Court to file an additional ground of appeal as follows: —

"The visit of the jury to the *locus in quo,* as recorded at pages 48, 49 and 50 of the notes of evidence, was conducted in an improper and/or illegal manner because

(a) the jurors were not at all times kept apart and separate from the witnesses.
(b) the witnesses, in answer to questions put to them, demonstrated and made statements not on oath in the presence of the jury and
(c) the learned trial judge was absent during the jury's visit to the *locus in quo."*

Counsel at the same time requested the Court to adjourn the hearing in view of the fact that an appeal—*Karamat v The Queen*—was being heard by the Judicial Committee of the Privy Council in which one of the grounds of appeal was similar to that in respect of which he applied for and was granted leave to file. In the circumstances the Court granted a postponement. The appeal of *Karamat v. The Queen* was dismissed by the Privy Council on the 13th December. This appeal was accordingly refixed to be argued on the 21st December.

Counsel then informed the Court that he did not propose to argue all the grounds of appeal. He argued three grounds of appeal mentioned hereunder and referred to the fourth ground in his submission under ground three; he abandoned the others.

Counsel contended that —

1. Inadmissible evidence was wrongly admitted and wrongly treated by the learned trial Judge when he admitted the following exhibits, "E" (cutlass), "L" (gent's Raleigh cycle), "H" (Khaki trousers), "J 1" and "J 2" (cartridges).

2. The learned trial Judge failed to direct the jury that the case of each accused must be considered separately.

3. The defence of the accused was not adequately put by the learned trial Judge to the jury and in particular the cross-examination of the various witnesses which tended to their discredit and the evidence as elicited in cross-examination in support of the defence.

4. The learned trial Judge misdirected the Jury in regard to the evidence of Etwaria when he directed the jury not to consider the evidence of the witness Etwaria and her friendship with the police in considering the truth or otherwise of their evidence

The case for the prosecution was that at 7 a.m. on the 25th February, 1954, one Sherry Browne, a Postal Apprentice was proceeding on his cycle to the Nigg Post Office from the Albion Police Station in the County of Berbice, with a Post Office Bag containing $13,129.68. Whilst travelling on the Public Road he was attacked and robbed of the bag and contents by two men whom he later identified as the two appellants. The appellant Tameshwar was armed with a gun and the other appellant with a cutlass. The men were chased but escaped. Whilst they were escaping however they were seen running away from the scene by witnesses who identified them.

The defence of each appellant was an alibi. The appellant Tameshwar's defence was that at the time of the robbery he was working in his rice field aback of Plantation Albion and was never on the Nigg Public Road. The appellant Seokumar said that he at the time of the robbery was at his home and was never at that hour on the Nigg Public Road.

With regard to the first ground Counsel for the appellants argued that the exhibit "E" (the cutlass) should not have been admitted as there was insufficient evidence connecting it with the accused, in other words it should not have been admitted—on the ground of relevancy; that the jury might have felt that this cutlass was the cutlass used by one or other of the accused and from that therefore draw the improper inference that they were guilty of robbery with aggravation; that the visible evidence tended to influence the minds of the jury prejudicially; that secondly there was nothing to connect the cycle with the case except that it belonged to the first-named appellant; that this visual evidence might have exercised a strong influence on the minds of the jury; and thirdly that there was no evidence that the cap and trousers picked up on the dam with two cartridges in the pockets belonged to the first-named appellant.

In our opinion the evidence was relevant. Before the jury addressed their minds to the issue of whether the appellants were the men who had robbed Sherry Browne, they had to decide whether Sherry Browne had in fact been robbed. His evidence was that the men who robbed him were wearing certain clothes and armed with a cutlass and a gun and they took a certain route after relieving him of Government property. Clothing similar to that described by him was found on the route taken by the assailants and cartridges found in the pocket of the trousers. True that the garments were not proved to belong to the appellants and true that no one had traversed the path immediately before the robbery to establish that the garments must have been deposited after the robbery, but that affected the weight of the evidence and not its admissibility. It was not an unreasonable inference that these garments, etc. were dropped by the robbers in their flight. Similarly, the cycle admittedly owned by one of the appellants was produced to prove that he did possess a cycle and therefore could not say that the witnesses who saw him riding were untruthful as he was unable to ride.

With respect to the second ground of appeal Counsel argued that the learned trial Judge failed to direct the jury that the case of each accused must be considered separately; that the nearest the Judge came to direct the jury on this point is when he told them that the statements of either accused was not evidence against the other accused; that with that exception the Judge did not direct the jury that each accused must be considered separately and that the jury may convict one accused and acquit the other if they so thought fit. This non-direction or omission to direct, Counsel urged, was not a matter of mere academic interest but was of great practical importance in this case as the defences were different in so far as the places where the accused were alleged to have been at the time of the robbery and the trial Judge put the cases of the accused together for all purposes in his summing-up to the jury.

At pages 89-90 with respect to the first-named appellant the trial Judge said:

> "The defence of the accused is an alibi. That means that they were somewhere else at the time when the crime was committed. If you

believe the first-named accused, the story that he told you from the dock, and if you believe the testimony of this witness who has been called in support of his story, that at that time of the morning he was in this boat going away, he certainly could not have been on the Nigg road and he certainly could not have taken part in the perpetration of this crime. The defence is an alibi. The accused says: "I was not there". He told you where he was and he called a witness to support him. You will consider his story as given from the dock and you will consider the story of the supporting witness and say whether you believe them or not. If you believe them, the No. 1 accused is not guilty of this crime".

The trial Judge then proceeded (page 90) to deal with the case of the second-named appellant and concluded thus:

"So, gentlemen, you have Seokumar's story and then you have this witness of his. If you believe his story and if you believe his supporting witness there again, like the No. 1 accused, his alibi is established and he could not have been on that Nigg public road to have committed this crime. You are the judges of the facts and you have to consider whether you accept them as witnesses of the truth.

Well, gentlemen, that is the story, as I see it, with respect to both accused. I have dealt with each one separately and independently".

It is only a misreading and a misconception of the summing-up which could result in such an argument.

With regard to Ground 3 Counsel contended that the Judge ought to put the main aspects of the defence and argued that the defence of alibi was not adequately put; that he would not say that everything in the defendant's case must be put to the jury minutely, that the Judge must deal with the defence exhaustively, but the Judge slurred over those parts of the cross-examination which were helpful or favourable to the accused and then Counsel proceeded to give illustrations of this proposition.

For instance in the case of the witness Etwaria who swore that she had seen the first-named appellant running away from the scene with a gun but in cross-examination had denied that she had spoken falsely (as was suggested) and denied that her reason for giving the testimony she gave was because she had wished to marry the first-named appellant but that he had refused to consent and enter into matrimony with her because of her bad character.

This Counsel alleged was not recalled to the attention of the jury.

In our view that is not a matter of any great significance. The jury had seen the demeanour of the witness, had heard her testimony and had every opportunity of assessing her credibility.

He contended that another important aspect of the case was whether there was a robbery at all i.e. whether Sherry Browne was an accomplice. While the Judge did mention that aspect without going into detail he brushed it aside and did not put to the jury the circumstances whereby he could be regarded as an accomplice.

In our view the trial Judge could not have been more explicit on this aspect of the case. This is what the trial Judge said at p. 72 of the record:

"If....you can find it possible on the evidence to take the view that Sherry Browne is not an innocent person as he asks you to

believe, that he is in this link-up and that he is part and parcel of it, having knowledge and information that he was carrying this money, and that he gave assistance to the robbers to take the money, and if you can find it possible on the evidence to take the view that he is an accomplice, that would be an end of the case for the Crown because there would be no robbery. If he gave his aid and if he was in this link-up and was there giving his assistance that would be an end of the case for the Crown, if you regard Sherry Browne as an accomplice. That is my direction to you. There would be no robbery, as the parting with this money would not be a parting against his will".

Counsel for the defence then referred to the second statement taken by the Police from the second accused and submitted that this statement was not dealt with by the trial Judge. He referred to p. 94 where the trial Judge dealt with this statement as if it amounted to a confession, but it is to the contrary a denial of guilt; that the second accused was exculpating himself at the expense of the first accused; that the Judge had put emphasis on the wrong place and this was a misdirection; that it is not easy to realise that this statement is not a confession of guilt but an exculpation.

The trial Judge did not tell the jury that the statement amounted to a confession but that the second-named appellant by his statement had put himself on the "spot" i.e., had put himself on the scene.

In general terms Counsel's argument was that the defence was not put in the same adequate manner as was done in respect of the prosecution's case; that it is a well known proposition of law that the defence must be as clearly put as the case for the prosecution; that in putting the case for the defence there were certain aspects with regard to the question of identification which had been elicited in cross-examination and which were not put to the jury; that while the question of identification was a matter of fact for the jury, yet in determining this question those points which emerged in cross-examination should have been put clearly to the jury.

The Lord Chief Justice in the case of *Ronald Ernest Meredith and others* (1943) 29 CD. App. R. 40, said at p. 45;

"we are satisfied on the whole.....…that the "jury were not given an opportunity of saying whether they accepted the statements of the defendants and that this vitiated the summing-up, can any criticism fairly be made. It is true that the summing-up as a whole leans, if that is the right expression, against the appellants. But a direction in a criminal Court cannot always maintain the precise balance which I suppose in theory people sometimes think a direction to a jury should preserve. It is within the experience of all of us that a learned Judge finds it necessary, because the facts compel him, to direct the jury in such a way as to indicate to them his opinion, having told them that they are judges of fact. It is impossible to quash a conviction because a summing-up is adverse to a particular defendant. The only question is whether the case for the defence was fairly put before the jury."

with this statement we are in entire agreement. In our view the defence in this case was fairly and adequately put to the jury.

Counsel for the appellants next submitted that there was a view of the *locus in quo* by the jury directed by the Judge in pursuance of section

45 of the Criminal Law (Procedure) Ordinance, Chapter 11, but that the trial judge did not himself attend this view. He contended that the absence of the Judge from the view was in itself an irregularity which vitiated the trial. He further submitted that even though there was no irregularity at the view other than the fact that the view was conducted by the Clerk of the Court in the absence of the Judge that this was a circumstance which together with the fact that the Judge was absent during a part of the trial (and the view is part of the trial) rendered the proceedings abortive and a nullity. No agreed statement of the facts in connection with the view of the locus was filed nor was any in the circumstances requested by the Court. Counsel for the appellants accepted the record as accurate. The Judge's notes relating to the view are:

"Request that witnesses Mohamed Islam Khan. Sherry Browne, Etwaria, Junor Armogan, Bassalat to see living quarters of the accused.

Tuesday, 15th February, 1955.

Jury checked. Accused present. Supt. Moss and Mr. A. M. Edun, Crown Counsel being also present. Warning given jury not to have any communication or engage in any discussion or argument. Directions that accused are also taken to locus. Both counsels inform the Court that they will also be visiting the locus. Jury leave with Registrar, Marshal. Counsel and Police Officers.

Wednesday 16th February, 1955.

Crown Counsel asks to recall certain witnesses who pointed out spots to jury.

DAVID ADAMS:

I was present yesterday throughout the time when the jury visited the locus. The accused were present throughout along with Counsel for the second accused. I was present when Sherry Browne indicated the spot he said he was robbed, then the bridge he said he saw the two accused standing. I pointed out Nigg Post Office, the Nigg dam and the Belvedere Dam. I was present when Mohamed Khan pointed out the spot he said he was standing when he said he saw two men running south. I was present when Bassalat pointed spot he said he saw No. 2 accused. When Etwaria pointed out house she said she lived at the time. The route she took to the back of the house, then where she was standing when she said she saw No. 1 accused going south. I was present when Junor Armogan showed bridge he was standing when he saw No. 1 accused. I was present too when Hector Apadoo showed where Nos. 1 and 2 accused were living, and where he was living the communal latrine that Apadoo had used. Junor Madray showed where he was living. Naikan indicated the koker south of the estate. I indicated house Jaghar Bacchus lived.

Cross-examined by Mr. B. O. Adams: Declined.

Cross-examined by Mr. E. W. Adams:

I indicated nothing to the Jury at Albion station yesterday during the luncheon adjournment. I did not indicate the lavatory and water tank to the Jury. No one did.

SHERRY BROWNE:

Offered for cross-examination by accused.

Declined.

Counsel for both accused say they do not wish any other witness to be recalled."

In support of his contention Counsel referred to several passages in the judgment of Lord Goddard, C.J., in the appeal of *Karamat v. The Queen* (1956) 2 W.L.R. p. 412 and urged that as a view is part of the evidence and as the demonstrations to the jury were given in the absence of the Judge, evidence was thereby received outside of a properly constituted court and was therefore an irregularity and accordingly the conviction should be quashed. He further submitted that the question of a *venire de novo* was not a proper method of dealing with the appeal if it was accepted that there were irregularities.

The Acting Solicitor General argued that the distinction drawn by Counsel between the jury merely "viewing" on the one hand and on the other obtaining demonstrations in addition to "viewing" was not tenable in law: he pointed out that the attention of the Privy Council was directed to a view of the *locus* in the absence of the Judge; that the Privy Council contemplated a situation where there was a view in the absence of the Judge and all that they have said in Karamat's case in that regard was obiter as in fact the Judge was present and that if the Judge is present and no irregularity occurs then the conviction would stand. He further argued that the Privy Council have said that it is eminently desirable that the Judge should be present but they have stopped at the point of deciding that Martin's case is wrong; that nowhere does the Privy Council say that the absence of the Judge vitiates the trial where there have been demonstrations without anything more or indications properly made to the jury for the purpose of the view. Finally he submitted that in Karamat's case the Judge was present but the Privy Council does not say that if the Judge were absent and demonstrations were given to the jury that would have been ground for holding that an irregularity had taken place which would justify quashing the conviction.

We agree that it is eminently desirable that a Judge should attend a view as stated in Karamat's case; this ensures the proper conduct of the view and avoids irregularities or removes the possibility of irregularities occurring.

It does not however follow that in the absence of a Judge irregularities are bound to occur.

The purpose of a view is to enable the jury to get a clear picture of points and spots and landmarks and the general topography of the area of which they may sometimes obtain a hazy and inaccurate picture merely through the medium of plans and photographs. Distances given by witnesses may be approximate; descriptions of places may be inaccurate and fail to convey to the jury the correct relationship of objects referred to in the evidence and so a view of the *locus in quo* may often dispel from the minds of the jury misconceptions arising from evidence given. The absence of a Judge from a view which he has directed to be had is not by itself a ground for nullifying the trial; provided that there are adequate safeguards to prevent members of the jury being spoken to or receiving communications or being subjected to the exercise of influence. The law jealously guards the office and functions of the jury and seeks to ensure that nothing improper occurs which may be prejudicial to the accused.

The important point is to ensure that no irregularity takes place which clearly would detract from the due and proper administration of the law and strike at the root of a fair trial.

We have seen nothing on the record nor heard any submission which would lead us to infer that in this regard the appellants did not have a fair and proper trial.

On the facts of this case there has been no suggestion of impropriety on the part of the jury or witnesses or anybody else or any irregularity apart from the absence of the Judge at the view and the Assistant Sworn Clerk's conducting the view in the Judge's absence at his direction.

The Judge's Clerk is an officer of the Court and is usually a Sworn Clerk or an Assistant Sworn Clerk whose duties under the provisions of the Supreme Court Ordinance, Chapter 7, section 17, are to perform those duties in connection with the Court and with judicial business which the Registrar, subject to the approval of the Court, assigns to him. The Sworn Clerk authorised by the Court has power to administer oaths and take affidavits and to take solemn affirmations or declarations in lieu of oaths.

The Marshal of the Court is also an officer of the Court whose duties among others is to be in attendance on the Court and to take the jury in charge when sworn.

The Sworn Clerk and Marshal in the absence of the Judge have charge of the jury by virtue of their office and under the directions of the Judge. These officers are experienced officers of the Court. It was never suggested that they performed their duties improperly. Ample opportunity was given if such were the case for such an allegation to have been made and an investigation carried out at the trial.

In *R. v. Furlong,* 34 C.A.R. p. 79, the Lord Chief Justice said at p. 82:

> "We are quite satisfied that the Judge's Clerk did not enter the jury room. Even if he had, we do not think that that would have been in itself an irregularity, because the Court always has power to allow somebody to make a communication to the jury, *if it is a communication proper to be made,* and if it is made by the direction of the Court. Everyone knows that the oath that is given to a jury bailiff is that he "shall suffer no person to speak to them nor speak to them (himself) unless it be to ask whether they are agreed upon a verdict, without leave of the Court". That has been the jury bailiff's" oath, I should think, for at least 100 years or perhaps longer, though it was altered at one time because the jury bailiff used to be sworn to keep the jury without light, food or water."

He further said at p. 84:

> "It is impossible to say that every irregularity is a ground for quashing a conviction. It may. and not infrequently does, happen that something is done in the course of a trial which is not strictly in accordance with recognised procedure. If that is so, the Court must consider whether or not it is an irregularity which goes to the root of the case."

When the Court resumed David Adams a Sergeant of Police who was a witness at the trial and who was present at the view was recalled and gave evidence as to what occurred there and opportunity was given to Counsel for the appellants to cross-examine him. This was declined by Counsel for one of the accused while the other Counsel availed himself of the opportunity, as is seen from the record to cross-examine him. Sherry Browne the chief witness for the Crown was also recalled and presented for cross-examination. Other witnesses for the Crown were available for cross-examination but both Counsel for the accused intimated to the Court that they did not wish any other witness to be recalled. Had the witnesses not been recalled and offered for cross-examination in this case the result might have been otherwise.

We conclude that had there been any irregularity Counsel for the accused or for the Crown would have brought this to the attention of the Judge

We have accordingly come to the conclusion that the absence of the Judge who has directed a view is by itself not necessarily fatal. Where however there is such absence and irregularities are established or there appear to be circumstances and incidents from which it may be inferred that irregularities occurred or were likely to occur of a nature prejudicial to the fair trial of the accused, the trial would have been irregular and the conviction could not be allowed to stand. In our view no such irregularities occurred in this case such as would warrant our holding that this trial was irregular. We are of the opinion that the mere conduct of the view by the Assistant Sworn Clerk, an Officer of the Court, acting under the direction of the Judge, is not an irregularity of a nature that goes to the root of a fair and proper trial. In the circumstances we feel that the appellants received a fair and impartial trial and we cannot say that justice was not seen to be done.

This ground of appeal fails.

The appeals are dismissed and the convictions and sentences affirmed. In view of the delay which has taken place sentences will run from the date of convictions and not from the date when the appeals are dismissed.

DISSENTING JUDGMENT BY STOBY, J.

Section 3(6) of the Criminal Appeal Ordinance, Chapter 8, states that—

> "Unless the Court directs to the contrary in cases where, in the opinion of the Court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the Court, the judgment of the Court shall be pronounced by the President of the Court, or such other member of the Court hearing the case as the President of the Court directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the Court."

In this appeal a question of law of some importance has been argued and as the conclusion to which I have come differs from that of the majority of the Court I sought and obtained the consent of My Lord the President of the Court to deliver a separate judgment in respect of the ground of appeal where the divergence of views occurs.

It is common ground that at the trial of the appellants before a Judge and jury at the Berbice Criminal Assizes, the jury requested a view of the *locus in quo.* The Judge acceded to the jury's request and directed a view. The note he made is as follows:

> "Request by jury to visit locus. Arranged for 9 a.m. on 15th February, 1955.
>
> Request that witnesses Mohamed Islam Khan. Sherry Browne,Etwaria, Junor Armogan, Bassalat to see living quarters of the accused."

It is not in dispute that the Judge did not go to the locality, but accompanying the jury were Counsel for the prosecution and for the defence, the Clerk of Court, the Marshal and the five witnesses required by the jury.

On return to the Court David Adams was recalled as a witness and gave evidence of what took place at the *locus in quo*. He was cross-examined by Counsel for one of the accused. Another witness Sherry Browne who had given important evidence was recalled for cross-examination. He was not cross-examined. Each Counsel for each of the accused then intimated that it was unnecessary to recall the other witnesses with the result that no other witness who had attended the view was recalled.

Counsel for the appellants relying on *Karamat v. The Queen* (1956) 2 W.L.R. 412 submitted that where anything was said or done by a witness at the view the Judge's presence was essential and the absence of the Judge was an irregularity which must result in the conviction being quashed.

The Acting Solicitor General's submission was that Karamat's case decided that the presence of the Judge was desirable but not necessary and as two witnesses were recalled and the others were not required by the defence it was clear that no irregularity was being complained of. He stressed that the case of *Reg. v. Martin and Webb* (1872) L.R. 1 C.C.R. 378 in which the jury and two witnesses visited the *locus* after the summing-up without the Judge was mentioned in Karamat's case and not overruled.

As the case of Karamat is the latest authority with regard to a view by the jury and as Counsel for the appellants as well as Counsel for the respondent relied on it in support of their respective propositions an analysis of the case is necessary.

In Karamat's case the point which was taken was that whatever may have been the common law practice the authority for a view by the jury was to be found in the Criminal Law (Procedure) Ordinance. Chapter 11, section 45 (1) and (2) which is:

> "45. (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, person, 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 affect the validity of the proceedings, unless the Court otherwise orders."

It was contended that the section did not permit demonstrations by witnesses but that they had to content themselves by pointing out fixed objects.

The Judicial Committee of the Privy Council did not place such a limited interpretation on the section and held that it was unobjectionable if witnesses attended the view and indicated where they or others had been at the material time. That being the decision of the Privy Council then whatever doubts may hitherto have existed concerning the propriety of making demonstrations at the *locus* such doubts have been resolved and it is now finally settled that on a visit to the *locus* witnesses need not confine themselves to pointing out fixed objects but may indicate where they were standing and make such demonstrations as may be requested of them.

After deciding that issue the Privy Council went on to examine what took place at the view in order to determine whether despite the legal authority for demonstrations by witnesses there nevertheless were in the circumstances of that case irregularities which vitiated the trial. In the result it was held that no irregularities took place.

The Solicitor General relied on the following passage in the speech of Lord Goddard as supporting the argument that the Judge need not attend the view:

> "In *Reg. 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."

In *Reg. v. Martin* & *Webb (supra)* where the jury had a view in the absence of the Judge two questions were reserved for the Court of Crown Cases Reserved —

1. Whether there was a mistrial by reason of the view having been permitted after the summing-up. and

2. Whether there was a mistrial by reason of the jury having at such view put some questions to the witnesses which were not heard by the judge or the prisoners.

> Bovell. C.J., delivering the judgment of the Court said: "The first objection made to the conviction in this case is that the jury was permitted to view the urinal, in which the offence was alleged to have been committed, after the summing up of the learned judge. We are unanimously of opinion that there was no irregularity in allowing such a view. It is always entirely in the discretion of the Court to allow a view or not; though such precautions, as may seem to the Court necessary, ought to be taken to secure that the jury shall not improperly receive evidence out of court.
>
> As to the second point, the alleged reception of evidence by the jury in the absence of the judge and of the prisoners, it does not appear that any examination into the facts was made in the court below. And in the absence of such examination, it is impossible for this Court to reverse the conviction on the ground of a mere statement of what the learned judge was informed, which may be a mere rumour without any foundation.
>
> If such an examination into the facts had been made in the court below, and it had been found that the irregularity alleged had taken place, a very serious question would then have arisen."

Having regard to the decision in Martin's case it seems to me that Lord Goddard was citing Martin's case as authority for the decision to which the Board had come which was that what took place at the view in Karamat's case did not prejudice him in any way and that the question of whether an accused person is prejudiced by what takes place at a view may be a deciding factor.

From Martin and Karamat the law may be stated thus:

1. The jury can be permitted to have a view in the absence of the Judge provided no questions are asked and they communicate with no one.

2. The jury can ask questions and witnesses may place themselves in positions they were at the material time provided the judge is present.

This second aspect which I have stated emerges from the judgment in Karamat's case. Lord Goddard there said: "That a view is part of the evidence is……. clear." And later: "The holding of a view is an incident in and therefore part of the trial."

Once it is conceded that what takes place at the view is part of the trial, a clerk of Court cannot question the jury or if he does the answers must be recorded. Nor is it necessary to recall the witnesses who have demonstrated at the view as the demonstration is evidence and in substitution of a photograph or plan. But a photograph or plan cannot be tendered in the absence of the Judge and if it is material the judge should look at it so as to deal with it if necessary in his summing-up.

That Counsel for the prisoners did not wish to cross-examine Sherry Browne or to have three of the five witnesses recalled certainly shows that they were not complaining of any irregularity. The state of the law in British Guiana at the time of that trial must not be overlooked. In *Hassan Mohamed v. The Queen* (C.C.A. No. 17 of 1954) the Court of Criminal Appeal (Boland, C.J. (acting), Stoby and Phillips, JJ.) had held that the absence of the Judge on a visit to the *locus* was not an irregularity. Delivering the judgment of the Court I said:

> "No case has been cited to us and we know of none, whereby it is essential for the Judge to accompany the jury to the *locus in quo."*
>
> "What took place was that the jury visited the locus in order to appreciate what the witnesses had said and the Judge, in his summing-up reminded the jury that, having visited the scene, it would assist them in appreciating the evidence which had been given by the witnesses. We can see nothing wrong in that procedure."

It was my opinion at the time that a view was not part of the trial and consequently once the jury was not allowed to communicate with anyone except to ask questions of the witnesses through the Clerk, the Judge's absence did not matter as whatever was said at the *locus* had to be repeated in Court. Counsel could, at the time, not have founded any objection on the Judge's absence as that decision of the Court of Criminal Appeal was against him. For many years the practice existed. Many Judges in the past did not accompany the jury and no complaint was ever made no doubt because it was never regarded as part of the trial.

Since Karamat's case the view that a visit to the locus is not part of the trial is found to be erroneous and the contention that evidence cannot be received in the Judge's absence is in my opinion sound. I would quash the convictions.

RAMNARAIN *v.* BASSOO

(In the Supreme Court, Civil Jurisdiction (Luckhoo J. Ag.) January 11, 12, 17; February, 2, 1956).

Immovable property—Continuous possession for period of years—Levy thereon for non-payment of village rates—Sale at execution—Possessory rights extinguished.

The defendant was in continuous and undisturbed occupation of a parcel of land for a period of 22 years from 1930.

In 1946, a levy on lands which included that parcel of land was made at the instance of a village authority for non-payment of village rates assessed on the lands. Following upon the levy the lands were sold at execution sale and purchased by the plaintiff but the defendant continued in occupation of the aforesaid parcel of land.

In 1952, for the first time the plaintiff laid claim to the parcel of land.

Held: The levy made in 1946 for non-payment of village rates was a levy *in rem.* Even if defendant had actual notice of the levy and of the sale at execution he could not successfully have opposed the sale at execution on the ground that he had acquired negative possessory rights to a portion of the lands. At the sale at execution any possessory right acquired in the lands or any portion thereof were extinguished and the transport for the lands passed to the purchaser on such sale gave him a title free from any possessory rights in any person.

Judgment for plaintiff.

Sugrim Singh for plaintiff.

R. M. Morris for defendant.

Luckhoo J: In this case the plaintiff seeks to recover damages for alleged trespass to land and claims also an injunction restraining the defendants his servants and/or agents from entering upon the said land or from in any way interfering with the plaintiff's right to the use or enjoyment of the same.

The case for the plaintiff is that he is the owner by transport of the land in question which is about 1400 square feet more or less in area and which forms part of the east half of lot 3, Section B, Nabaclis, on the east coast of the county of Demerara. This land lies immediately east of the west half of lot 3 which is owned and occupied by the defendant.

The defendant on the other hand alleges that he purchased the west half of lot 3 at execution sale in the year 1930 and accepted transport thereof on the 5th January, 1931. He entered into occupation of that property during the year 1930 and has been in possession thereof ever since. On entering into possession of the west half of lot 3, he erected a wire fence as his eastern boundary enclosing the land now in dispute and has continued in possession of that land **nec vi nec clam nec precario** ever since.

The plaintiff, however, alleges that the east half of lot 3 was first occupied by his father, Naipaul, some thirty-one years ago, that is, in 1925. He admits, however, that the wire fence was erected some time before 1939 by the defendant approximately in the position in which a wallaba fence which has replaced it now stands.

The plaintiff further alleges that during Naipaul's lifetime both he and Naipaul had on several occasions pointed out to the defendant the fact that part of the land he occupied was the property of Naipaul and that the defendant on each of those occasions admitted the same and promised to withdraw his eastern wire fence to its correct position when Naipaul required the land.

On the death of Naipaul, the plaintiff went into occupation of the east half of lot 3, other than the portion fenced off by the defendant, in consequence of a devise of the half lot to him by Naipaul's will.

In the year 1946, after Naipaul's death the east half of lot 3 was sold at execution for non-payment of village rates and was purchased by the plaintiff who accepted transport thereof on the 6th February. 1947. The description of the property transported to the plaintiff reads as follows:

> "East half of lot number 3 (three) section B, Nabaclis, in the Golden Grove and Nabaclis Village District, situate on the east sea coast of the county of Demerara and colony of British Guiana, the said

lot being laid down and defined on a diagram of Plantation Nabaclis by T. G. Wight, Sworn Land Surveyor, dated January, 1871 and deposited in the Office of the Registrar at Georgetown on the 22nd September, 1877, without the buildings thereon."

According to the plaintiff, within one week after obtaining this transport he informed the defendant that he would require the land now in dispute and the defendant told him he could occupy the land when he was ready for it. Then about two or three weeks later he observed that the wire fence was being replaced by a wallaba fence. He alleges that he protested to the defendant whereupon the defendant for the first time claimed the land as his property.

The plaintiff further alleges that at his request Thomas Benn the then chairman of the Golden Grove and Nabaclis Village Council, went upon the land and that in the presence of the plaintiff, the defendant, Thomas Benn and others, certain measurements were taken by one Sancho in order to ascertain the boundary between the east half and the west half of lot 3.

I do not believe the evidence of the plaintiff either that he or his father ever spoke to the defendant prior to the year 1952 about the land in dispute or that the defendant ever admitted that the land belonged to Naipaul or to the plaintiff. I do not believe the evidence given by Thomas Benn that he interceded on behalf of the plaintiff in respect of the alleged dispute over the land in 1949. His demeanor while he was giving evidence was most unsatisfactory and his answers evasive. For the same reasons I do not accept the evidence of the witness Harry that he spoke to the defendant about the land.

In my view the evidence led on behalf of the plaintiff to the effect that the defendant acknowledged Naipaul's ownership and later plaintiff's ownership in the land has been fabricated to lend colour to the plaintiff's contention that the land was occupied by the defendant with Naipaul's permission and later with that of the plaintiff himself.

I accept the defendant's evidence that the first intimation he ever had of plaintiff's claim to the land was when he received the notice of intended survey sent him on 31st December, 1952, by Mr. Phang, Sworn Land Surveyor, who was engaged by the plaintiff to carry out a survey of the land. Mr. Phang's evidence that the plaintiff told him that he had an idea that his neighbour (the defendant) was encroaching on his land is not without significance.

I find therefore that the defendant was in continuous and undisturbed occupation of the land for a period of 22 years from 1930, his possession thereof being first challenged in December, 1952, by the plaintiff.

There remains the question — what effect did the sale at execution in 1946 of the east half of lot 3 have on the possessory rights acquired by the defendant between 1930 and 1946?

Counsel for the plaintiff has submitted that any possessory rights thereto which might have been obtained by the defendant were swept away by the sale at execution of the east half of lot 3. In support of this submission he cited the case of the *Trustees of the Diocese of Guiana v. I. E. McLean (1939) L.R.B.G. 182.* In that case Langley, J., expressed the view that where there is parate or summary execution *in rem,* the sale at execution of the land levied upon extinguishes any negative rights which

any person, by force of possession, may have acquired in the land or to any part thereof. Counsel contended that a sale of land at execution for non-payment of village rates is effected by way of parate or summary execution *in rem* in the manner described by Langley, J., at page 171 of the report of the Trustees' case. With this contention Counsel for the defendant agreed that he sought to distinguished the Trustees' case from the instant case on the ground that in the former case the Trustees were seeking to obtain prescriptive title over the land in question while in the latter the defendant was not; that while the defendant could not succeed in a claim to title to the land the plaintiff could not now seek to enforce an action for interference to possession of the land as his right thereto was extinguished at the end of twelve years after the defendant had first entered into occupation of the land.

In this connection Counsel cited the cases of *Lalbahadursingh v. D. McPherson* (*1939*) *L.R.B.G. 80* and *Abdool Rohoman Khan v. Boodhan-Maraj et al* (1930) L.R.B.G. 9. In the former case Camacho. C.J., held that the effect of section 14 of the Limitation Ordinance, Chapter 184 (which declares that entry shall not be made or action brought to recover any immovable property but within 12 years after the time at which the right to recover or to bring the action accrued) is to put an end to all questions and discussions whether the possession of the lands be adverse or not; and if one party has been in the actual possession whether adversely or not the claimant whose original right of entry accrued above 12 years before bringing the ejectment is barred by this provision of the law.

In the latter case Savary, J., held that the advertisement of an intended transport or mortgage is not equivalent to actual notice as regards a person in possession for the statutory period and that a person in possession of land for the statutory period does not lose his rights if he does not oppose an intended sale or mortgage of which he has not had actual notice.

Counsel contended that there was no evidence that the defendant had actual notice of the sale at execution of the land in 1946 and therefore his negative rights were not lost on such sale.

Counsel also referred to the case of **Gonchi v. Hurrill** (1931-37) L.R.B.G. 509. In that case the passing of transport without opposition by a person who acquired negative possessory rights in the land transported was a matter **in personam.**

From the finding of facts to which I have already referred it is clear that immediately prior to the sale at execution of the east half of lot 3 in 1946 the plaintiff was debarred from bringing ejectment in respect of the land in dispute.

When the levy on the east half of lot 3 was made in 1946 for nonpayment of village rates it was not levy **in personam,** but was one made on the land assessed and charged with the payment of rates, that is the east half of lot 3 (which includes the land in dispute). It was a levy **in rem.** Even if the defendant did have actual notice of the levy and of the sale at execution of the east half of lot 3, I am of the view that he could not successfully oppose the sale at execution on the ground that he had acquired negative possessory rights to a portion of that land. The fact is that the rates due on the land had not been paid and the prescribed process of the law had been invoked for failure to pay same. It was not as if the plaintiff had sought to transport or to mortgage the whole of the east

half of lot 3. The plaintiff could then only alienate such interest as he had in the property. See **Archer v. Rodrigues,** L.J. 28th February, 1912. Nor is it akin to the position where a levy is made **in personam** on the property; for example, if the plaintiff had failed to satisfy a judgment given against him for non-payment of a debt, a levy made on the land to recover the amount due under the judgment would have been a levy **in personam** and the defendant could have opposed the sale at execution of the whole half lot on the ground that he had acquired negative possessory rights to the part thereof. In other words the levy on and the sale of land at execution for non-payment of village rates are made irrespective of the identity of the owner or owners of the land levied on and sold or of the interest therein of such owner or owners.

For those reasons I am of the view that on a sale of land at execution for non-payment of village rates any possessory rights acquired in the land or any portion thereof are extinguished and transport of the land taken by a purchaser on such sale gives him a clear title free from any possessory rights in any person. See also **Bowen** v **Jones** (1948) L.R.B.G. 55. I hold therefore that on accepting transport in 1946, the plaintiff acquired title to the whole of the east half of lot 3 frees from any possessory rights in the defendant. The defendant has, however, remained in possession of the land in dispute and at the time of the filing of the writ in this action on the 22nd June, 1953, was in possession thereof for a period some six and one-half years from the date of the sale at execution referred to above.

The right of entry of the plaintiff to the land is therefore not barred by the provisions of section 14 of the Limitation Ordinance, Chapter 184.

It is to be observed that the provisions of section 13 of the Land (Prescription and Limitation) Ordinance, 1952 (No. 62 of 1952) (which relate to the extinction of title of a person after the expiration of the prescribed period for that person to bring action to recover land) did not come into force until the 31st December, 1952, some years after the land in dispute was sold at execution. Until then in such circumstances only the remedy was barred and not the right to the land. Since that date, however, the right also is barred and the title to the land extinguished but this does not operate to pass the title therefor to the adverse possessor.

The plaintiff is entitled to judgment on his claim. I assess the damages at $100 and judgment will be entered for the plaintiff in that amount. There will also be an order that the defendant do forthwith remove the fence now standing on the land in dispute as well as the house thereon and an injunction restraining him from erecting any other structure on the said land. The plaintiff will get only one half of his taxed costs of this action.

BOOKER BROS. *et anor* v. HUTT

(In the Supreme Court, In Chambers (Luckhoo, J. acting), March 3; April 5, 1956).

Practice—Application to strike out opposition and writ of summons—No liquidated sum due—Proceedings alleged to he vexatious and an abuse of the process of Court—Delay in making application to strike out.

Application was made by defendant three years after the hearing of the action had already commenced for an order that the opposition entered by the plaintiffs to the passing of a conveyance by way of transport and the writ of summons based thereon be struck out on the grounds that the plaintiffs were not entitled to enter the opposition nor to issue against the defendant the writ of summons based thereon as at the date of the opposition there was no liquidated amount due by the defendant to the plaintiffs and on the further ground that the proceedings in the action are vexatious and an abuse of the process of the Court.

Held: A summons to strike out any opposition or pleading should be made promptly but may be made even after the pleadings are closed. It was too late to make such an application nearly three years after the hearing of the action had commenced.

Tucker v. Collinson (1886) 34 W.R. 354, and *Crosse v. Earl Howe* (1895) 62 L.J. Ch. 342 applied.

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

H. A. Fraser for defendant.

Luckhoo, J: This is an application by the defendant for an order that the opposition entered by the plaintiffs on the 11th day of November, 1950, and the writ of summons based thereon and filed in Action No. 772 of 1950, Demerara, be struck out or set aside on these grounds —

(a) that the plaintiffs were not entitled to oppose the passing of the passing of the conveyance by way of transport advertised for the third time in the Official Gazette of the 11th day of November, 1950, and numbered 19 therein for the Counties of Demerara and Essequibo between the defendant and Magan also known as Magan Hardeen, or to issue a writ of summons against the defendant based on the said opposition, as at the date of the filing of the said opposition, there was no liquidated amount due by the defendant to the plaintiffs;

(b) that the proceedings in action 772 of 1950, Demerara, are vexatious and an abuse of the process of the Court.

Mr. Stafford, counsel for the plaintiffs, has taken a preliminary objection to the hearing of this application on the ground that the hearing of the above-mentioned action has already commenced. He submitted that where the trial of an action is proceeding it is not competent for either party to file a summons for the purpose of disposing of that trial.

In support of his submission he cited the cases of *In re Moynihan* (1930) 2 Ch. D. 356 and *de Freitas v. Demerara Leather and Boot Factory Ltd.* (1946) L.R.B.G. 212 at p. 223.

Mr. Fraser, counsel for the defendant, in reply contended that the cases cited by Mr. Stafford are not in point in this matter. He conceded that the trial of an action commences when the case of the party upon whom the burden of proof lies is opened. Mr. Fraser submitted, however, that in the instant action even if some evidence had been led the defendant is nevertheless entitled to make this application.

He further submitted that the defendant is entitled to make this application not only by virtue of Order 17; rule 30 of the Rules of the Supreme Court 1900 (Now Order 17; rule 32 of the Rules of the Supreme Court, 1955) but also under the inherent jurisdiction of the Court.

The Writ of summons in the above-mentioned action was filed on the 20th November, 1950 following upon a notice of opposition dated 11th November, 1950, caused by the plaintiffs to be entered in the Deeds Registry at Georgetown.

Entry of appearance on behalf of the defendant to that writ was filed on the 22nd November, 1950, and the plaintiffs' statement of claim was filed on the 16th December, 1950.

The statement of defence was filed on the 7th July, 1951, and on the 21st July, 1951, hearing of the action was requested by the plaintiffs.

The matter was fixed for hearing on the 25th March, 1952, when it was called before Mr. Justice Boland and taken off the list to be refixed for hearing.

On the 26th April, 1952, an *exparte* application was made by the defendant for the *de bene esse* examination of a witness. A similar application was made by the defendant on the 19th July, 1952. Both of those applications were granted and evidence taken from the persons named therein. The matter was fixed for hearing on the 15th September, 1952, and on the 29th September, 1952, this action along with action No. 306/1950 were put down for hearing to commence on the 29th September, 1952.

With the consent of both counsels I have referred to the notes taken by Mr. Justice Boland, before whom this action came on for hearing on the 29th and 30th September, 1952. From those notes it would appear that it was agreed that the onus was upon the defence to begin. Mr. Cummings who appeared for the defendant then asked leave of the Court to file an amended statement of defence. Leave was granted to the defendant to do so and/to plaintiffs to file a reply within two days after service of amended statement of defence.

Mr. Cummings then opened the case for the defence. After his opening address had been in progress for some considerable time, the Court pointed out to Mr. Cummings that the issues raised by the defence were the same as those then before the Privy Council on appeal from the West Indian Court of Appeal No. 4 of 1950. *Hutt v. Booker Bros McConnell and Company Ltd.*

The Court thereupon stayed the hearing of the action pending the determination of the appeal then before the Privy Council.

A similar order was made in respect of Action No. 306 of 1950.

On the 30th September, 1952, the defendant filed an amended statement of Defence and on 23rd May, 1955, this action was fixed for hearing before Mr. Justice Phillips on the 24th June, 1955.

On the 14th June, 1955, this application was filed.

A summons to strike out any opposition or pleading should be made promptly but may be made even after the pleadings are closed (se *Tucker v. Collinson* (1886) 34 W.R. 354)—although I have found no reported case where it has been held that such a summons cannot be successfully brought after the hearing of an action has commenced, there is good reason why a Court or Judge should decline to entertain such an application. In *Crosse v. Earl Howe* (1893) 62 L.J. Ch. 342 an application was made to strike out a statement as frivolous and vexatious after the action had been set down for trial and was only forty out of the list. It was held that although the application would otherwise have been acceded to, it must be refused on the ground of delay.

In the instant case from the notes of Boland J. it is clear that the hearing of the action had commenced on the 29th September, 1952. In my view it is too late in the day, nearly three years after the hearing of the action had commenced to, make this application.

The preliminary objection of counsel for the plaintiffs is upheld.

Costs of this application to the Plaintiffs certified fit for counsel.

Solicitors

J. Edward de Freitas for Applicants.

I. G. Zitman for Defendant.

HANCOCK v. WALKER

(In the Supreme Court, on appeal from the Rent Assessor's Court, Georgetown, (Luckhoo, J. (ag) March 3, April 5, 1956).

Rent Restriction—Standard rent—Landlord of building land on which tenant's house situate wholly responsible for payment of rates and taxes—Transfer of burden by law to tenant—Payment of rates and taxes on house—Subsequent agreement for lesser sum as rent under lease—Whether standard rent that lesser sum.

In 1939 the owner of a house on leased building land paid to the landlord an annual sum of $42.80 as rent. At that time the rates and taxes levied by the Mayor and Town Council of Georgetown were levied on the whole lot of land owned by the landlord without reference to any portion or portions thereof leased to tenants and the landlord was wholly responsible for the payment of the rates and taxes levied.

In 1944 legislation was enacted whereby the Mayor and Town Council of Georgetown proceeded to levy rates and taxes separately upon the house of the tenant. The then landlord and tenant came to an arrangement and the terms of the oral lease between them were varied by mutual consent and a new agreement was come by whereby the landlord agreed to accept the sum of $10:— per year as rent reserved under the agreement of lease as the tenant would from then onward be bound to pay the rates levied on the house. That position has continued ever since although the tenant sold the house to the appellant and the land was purchased by the respondent.

On behalf of the appellant it was contended that as the tenant of the house was legally liable to pay the rates on the building as from 1944, the letting under the modified agreement of lease should be treated as a new letting of the premises and that the sum of $10:— per annum should be regarded as the first rental under the new letting and therefore the standard rent of the portion of land.

Held: The new arrangement entered into by the then landlord and tenant in 1944 was not a new letting of the premises and did not have the effect of altering the standard rent of the portion of land which remained at $42.80 per annum.

Appeal dismissed.

J. Carter for appellant.

Carlos Gomes for respondent.

Luckhoo J: This is an appeal by the tenant from the decision of the Rent Assessor in which on the application of the landlord the standard rent of a certain portion of building land was ascertained and certified at forty-two dollars and eighty cents per annum.

The portion of land in question forms a part of the west half of lot 37, Ketley Street, Georgetown, which was purchased by the respondent in February, 1952. At that date the appellant was residing in a house situate thereon:

The evidence disclosed that the portion of land in question was let by a previous owner to one Sookie Azeez in the year 1939 and that she then had a house thereon, which is now the property of the appellant. In 1939 Sookie Azeez as tenant of the said land paid as rent to her landlord the Superior of the Convent of Mercy the sum of forty-two dollars and eighty cents per annum. At that time the rates and taxes levied by the Mayor and Town Council of Georgetown were levied on the whole lot of land owned by the landlord without reference to any portion or portions thereof leased to tenants, and the landlord was wholly responsible for the payment of the rates and taxes levied.

As stated by the Rent Assessor in his Reasons for Decision in the year 1944 legislation was enacted whereby the Mayor and Town Council of Georgetown proceeded to levy rates and taxes separately upon the house of the tenant. The then landlord and tenant came to an arrangement and the terms of the oral lease between them were varied by mutual consent and a new arrangement was come to whereby the landlord agreed to accept the sum of $10 per year as rent reserved under the agreement of lease as the tenant would from then onwards be bound to pay the rates levied on the house. That position has obtained ever since even though Sookie Azeez sold the house to the appellant and the land was purchased by the respondent.

Counsel for the appellant has contended that as the tenant of the house was legally liable to pay the rates on the building as from the year 1944, the letting under the modified agreement of lease should be treated as a new letting of the premises and that the sum of $10 per annum should be regarded as the first rental under the new letting for the purposes of the application.

> The term "Standard rent" is defined by section 2 of the Rent Restriction Ordinance Cap. 186 as meaning "the rent at which a dwelling-house, public or commercial building or building land was let on the 3rd September, 1939, or where the dwelling-house, public or commercial building or building land was not then let, the rent at which it was let before that date, or in the case of a dwelling-house, public or commercial building or building land first let after that date, subject to the provisions of subsection (2) of section 7, the rent at which it was first let;"

A similar provision is made by the English Rent Restriction legislation except that for the 3rd September, 1939, the date shown in the English legislation is 1st September, 1939, in the case of new control and the 3rd August, 1914, in the case of old control.

In the case of *The Westminster and General Properties and Investment Co., Ltd., and another v. Simmons* (1919) 19 W.N. 241, the question was what the standard rent at which a flat was let on the 3rd August, 1914. In 1912 the flat had been let by the plaintiff company at a yearly rent of £80 including rates and taxes. It was then sublet to the defendant in May 1916 at a rent of £85 a year inclusive of rates and taxes.

The rateable value of the premises on 3rd August, 1914, was £49 and the borough rates for the then current half-year were 3s. l0d. in the £1; i.e. £18. 5s. 8d. for the year.

It was contended for the defendant that the true standard rent was £80 minus £18. 5s. 8d. the rates and taxes payable by the landlord.

It was held by Bray J. that the fact that the lessor undertook the burden of paying the rates did not give any right to the tenant to a deduc-

tion from the rent in order to ascertain the standard rent. The standard rent was therefore the rent set out in the lease £80.

In *Isaacs v. Titlebaun* (1920) 20. W.N. 29, the plaintiff had let premises to the defendant in January, 1914, on a weekly tenancy at a rent of £1. 9s. a week, the plaintiff paying the rates.

On 27th October, 1919, the plaintiff gave the defendant notice to quit on 4th November, 1919 and on 8th November, he issued a writ specially endorsed with a claim for possession. The defendant contended that the annual rent £75. 8s. was really composed of £20. 8s. rates and ESS rent property so called and that, the yearly rent being really £55, and the rateable value of the premises being below £70, the case came within section 4 of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1919. He was ready and willing to pay the sum of £1. 9s. a week, and contended that by section 1 (3) of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, as amended by section 4 of the Act of 1919, no order for the recovery of possession of the tenement could be made against him. The defendant's contention was rejected by Bailhache J. and on appeal the Divisional Court held that the terms of the Acts, and particularly S. 1 (4) and (6) (b) of the Act of 1915, showed that by the word "rent" the Legislature intended the whole sum which the tenant agreed to pay as rent, and not the balance thereof after deducting so much as was payable in respect of rates. The Court approved the judgment of Bray J. in *Westminster and General Properties and Investment Co. v. Simmons* (1919) W.N. 241.

As pointed out by counsel for the respondent the definition of the term "standard rent" in the Act of 1915 is to all intents and purposes the same as the definition of that term in the local law.

In *Mackworth v. Hellard* (1921) 2 K.B. 253, the plaintiff on 12th July, 1916, let to the defendant a dwelling house on a monthly tenancy at a rent of £2. 10s. per month or £30 per year. The plaintiff verbally agreed to pay rates and taxes. In 1919 the rates and taxes amounted to £31. 18s. a year. The rateable value of the premises on 3rd August, 1914. was £.40.

In June, 1920, the plaintiff gave the defendant one month's notice to terminate the tenancy on 12th July, 1920. The defendant refused to vacate and the plaintiff brought an action to recover possession.

The defendant contended that he was entitled to remain in possession as statutory tenant under the provisions of the Increase of Rent etc (Restrictions) Act, 1920. Section 12 (7) of that Act provides:

"Where the rent payable in respect of any tenancy of any dwelling house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy."

The plaintiff contended that the word "rent" in that subsection did not mean the rent actually reserved by the instrument of tenancy, but the real or net rent after deducting the rates and taxes, so that the rent which the tenant paid in this case was less than two-thirds of the rateable value of the premises and the Act did not apply.

It was held by Lush J., that the word "rent" meant rent in the ordinary meaning of the word.

On appeal to the Court of Appeal it was held that the words "rent payable" meant the rent which the tenant had to pay, and not the net amount which the landlord got after paying the rates and taxes.

In *Hornsby v. Maynard* (1925) 94 L.J. K.B. 380, the plaintiff was the owner of a house which was let by her at £46. 16s. per annum, she paying the rates and taxes.

In 1920, the plaintiff served a notice increasing the rent to £46. 16s. a year.

On appeal, Shearman, J., in the course of his judgment said:

> "Here the landlord was the owner of a house, of which the standard rent was £46. 16s. The lease that fixed the standard rent left the payment of the rates with the landlord. The letting, which forms the subject of this dispute, was at £36 per annum, and by it the obligation of the payment of rates was transferred to the tenant. The agreed rent was, therefore, £10. 16s. less than the standard rent."

The case of *Rousou v. Photi* (1940) 2 K.B. 379 which was cited by Counsel for the appellant does not support his argument. In that case it was held that the word "rent" in section 2 (1) of the Housing Act, 1936, means the actual rent contracted to be paid by the tenant to the landlord for the use of the house in question without any deductions therefrom of any sums in respect of rates and taxes or anything else.

In *Sidney Trading Co. Ltd. v. Finsbury Corporation* (1952) 1 T.L.R. 512, it was held by the Divisional Court on appeal that where a tenant agrees to pay a sum of money in consideration for a tenancy, then, whether it includes a sum for rates or for services or for the use of furniture or anything else, it is, for the purposes of the Rent Restriction Acts, a rent.

From the above cases it seems clear that the contention put forward by counsel for the appellant is not sound and that the learned Rent Assessor was right in ascertaining and certifying the standard rent of the land at $42.86 per annum and in assessing the maximum rent thereof at that figure.

The appeal is accordingly dismissed with costs to the respondent fixed, by consent, at $15.

Solicitor: Carlos Gomes for respondent.

LILBOY v. THOMAS

(In the Full Court, on appeal from the Magistrate's Court for the Corentyne Judicial District (Holder C.J., and Phillips, J.) March 31, April 9, 1956).

Negligence—Defective bridge leading to business premises—Injury to customer—Business premises closed—Whether invitee or trespasser.

The appellant carried on a dry goods business and a parlour and the respondent was a customer of both businesses. There was one bridge leading to both businesses which was provided by the appellant for his customers to gain entrance to both businesses. The bridge was badly in need of repairs and the respondent knew of this. As a result of the condition of the bridge the plaintiff fell through it and injured his left leg. On a claim brought by the respondent against the appellant for damages for injuries sustained by the respondent on the ground of negligence of the appellant, the magistrate on proof of the above-mentioned facts considered that the respondent was an invitee and as such the appellant owed him a duty of care which the appellant failed to fulfil.

On appeal, it was submitted on behalf of the appellant that if the shop of which the appellant is proprietor was temporarily closed the respondent is a trespasser.

Held: There was evidence upon which the magistrate could find that the shop was open at the time the respondent received his injury and therefore the appellant was an invitee.

Held further: Even if the shop were temporarily closed the respondent did not (in the absence on the particular occasion of consent to enter) become a trespasser. The respondent being a regular customer of the shop, there must be in such circumstances a common interest expressed or implied even though such regular customer may also be described in a sense as a "potential" customer on the particular occasion.

Indermaur v. *Dames* (1866) *L.R.I.C.P.* 274 and *Pearson v. Lambeth Borough Council* (1950) 1 A.E.R. p. 688 applied.

Appeal dismissed.

S. D. S. Hardyal for appellant.

F. R. Jacob for respondent.

Judgment of the Court: This is an appeal from the judgment of the Magistrate of the Courantyne Judicial District who awarded the sum of $100 as damages in an action brought by the respondent against the appellant claiming the sum of $213.72 as damages for injuries sustained by the respondent through the negligence of the appellant on the 31st March, 1955, at the appellant's shop at No. 55 Village, Courantyne.

The appellant's defence was that

(a) the respondent was under the influence of liquor;
(b) appellant's shop was closed;
(c) respondent was a trespasser;
(d) respondent was grossly negligent.

In his memorandum of reasons for decision the Magistrate stated that he found the following facts *inter alia:*

"(a) the defendant carries on a dry goods business and a parlour and the plaintiff is a customer of both businesses;
(b) there is one bridge leading to both businesses and that the bridge was provided by the defendant for his customers to gain entrance to both businesses;
(c) the bridge was badly in need of repairs, and the defendant knew of this;
(d) as a result of the poor state of disrepair of the said bridge the plaintiff fell through the bridge and injured his left leg:
(e) the plaintiff was not drunk or negligent." The Magistrate continued:

"Having found the following facts I considered the plaintiff an invitee and the defendant an invitor, and as such the defendant owed the plaintiff a duty of care which the defendant failed to fulfil."

and entered judgment in favour/of the plaintiff (respondent) for $100 with costs.

Before us it was argued for the appellant that if the shop of which the appellant is proprietor was closed the defendant is a trespasser, if opened then the defendant is an invitee having gone to the shop on business.

Counsel contended that certain essential facts were to be found and the most essential of them is whether the shop was opened and the Court cannot read into the words *"inter alia"* in the Magistrate's stated findings such an essential fact as the Magistrate may never have directed his mind to that particular fact.

Mr. Jacob for the respondent urged that there was evidence that the cake shop was open and further stressed that there was evidence that cake shops open between 7 a.m. to 11 p.m. and that the accident occurred about

3 p.m.; that the Magistrate need not have found that the cake shop was open though that is implicit in his finding that the plaintiff is an invitee; that the Magistrate is not required to state in his reasons every specific finding of fact if that can be reasonably inferred; that if all the Magistrate's findings are read then the fact of the cake shop being open not being specifically found does not and cannot affect the decision. (Clerk and Lindsell 10th Ed. p. 646). He also submitted that it is implied in the Magistrate's findings that the plaintiff did not know (even though his wife might have known of it) of the danger and that the plaintiff was not drunk or negligent; that even if the shop door was closed temporarily the duty remained to ensure that the premises are in good order and free of any defects and that during business hours the duty to customers so to keep the premises in order and reasonably safe continues.

The question which falls to be determined is whether in the circumstances of this case the respondent using reasonable care for himself was an invitee and as such entitled to expect that the appellant occupier of the premises should use reasonable care to prevent him from receiving damage or injury from unusual danger.

In *Indermaur v. Dames* (1866) L.R.1C.P. 274, the Court had to deal with the general question of law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation express or implied. The common case is that of a customer in a shop; but it is obvious that this is only one of a class. The Court stated that

> "The class to which a customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons, whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.
>
> And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.
>
> "It is important to observe the careful terms in which the law was here laid down by a very strong Court. On the one hand a customer (to use the word as a name of the whole class defined by the Court) is not entitled to find a state of positive safety, but only to warning of unusual danger incident to the nature and uses of the place. On the other hand the occupier is not entitled to create or maintain a state of things so dangerous as to make the place practically inaccessible or impassable, even if he gives warning.
>
> It is hardly needful to add that a customer, or other person entitled to the like measure of care, is protected not only while he is actually doing his business, but while he is entering and leaving."

Indermaur v. Dames decides that the occupier is liable if as a result of some unusual danger on the premises the customer is injured while entering on business or when leaving. In considering what is a matter of *common interest* we can see no distinction in this regard between

leaving a shop premises without purchasing, having entered for that purpose, and entering the shop premises for the purpose of purchasing.

In Pearson *v. Lambeth Borough Council* (1950) 1 A.E.R. p. 688, Asquith, L.J., said:

"It is more exact to say that an invitee is a person who comes on the occupier's premises with his consent on business in which the occupier and he have a *common interest."*

In *Dunster v. Abbott* (1953) 2 A.E.R. p. 1572 a canvasser being shewn his way out was held to be a licensee as he had no common interest with the occupier having come on the premises uninvited and on his own business and it is there stated that

"The Rule as to licensees is that they must take the premises as they find them apart from concealed sources of danger; where dangers are obvious they run the risk of them."

In this case before us however it cannot be said that as a regular customer the business on which the plaintiff called was not a business in which he and the defendant had a common interest. In our view with respect to the present state of the authorities we cannot say that the mere fact that the shop herein may have been temporarily closed (if it was so in fact) when the plaintiff, a regular customer of the shop, called to do business with the defendant but by mischance finds it closed — is not an invitee of the defendant. There must be in such circumstances a common interest expressed or implied even though such regular customer may also be described in a sense as a "potential" customer on the particular occasion.

We cannot agree with the contention that the fact that the shop in this case was temporarily closed turns the plaintiff into (in the absence on the particular occasion of consent to enter) a trespasser. Per Denning. L.J., in *Dunster v. Abbott* (*supra*).

However there is evidence upon which the Magistrate could find that the shop was open at the time and therefore the plaintiff was an invitee. Even though the Magistrate made no such specific finding there is ample evidence upon which he could so find; consequently upon either view the plaintiff is entitled to succeed. The appeal therefore fails.

The appeal is dismissed with costs fixed at $20.

JAGNARINE v. BOOKERS SUGAR ESTATES LTD.

(In the Full Court, on appeal from the Magistrate's Court for the Courantyne Judicial District (Holder, C.J., and Luckhoo, J. (Acting)) April 20, May 19, 1956).

Workmen's Compensation—Workman suffering from hernia—Pre-existing condition—Workman unaware of such condition—Accident to workman—Injury arising out of and in course of employment aggravating pre-existing condition—Compensation payable—Workmen's Compensation Ordinance, 1934.

The appellant, a workman employed by the respondents, was prior to the 14th August, 1952, suffering from hernia of which he stated he was not aware. On the 14th August, 1952, he suffered an injury arising out of and in the course of his employment which aggravated his pre-existing condition.

It was contended on behalf of the respondents that the appellant by reason of his pre-existing condition was not entitled to payment of compensation under the provisions of the Workmen's Compensation Ordinance in respect of the injury on 14th August, 1952.

Held: The appellant was entitled under that Ordinance to an award of compensation for the disability he suffered from the injury he received on 14th August, 1952, although that injury was by way of aggravation of a pre-existing condition.

Appeal allowed.

Jones v. Rexham and Acton Collieries Limited (1917) 10 B.W.C. 607 considered and *Oliver Clayton* v. *Hughes* (1910) A.C. 242 applied.

D. Dyal for appellant.

H. C. Humphrys, Q.C., for respondents.

Judgment of the Court: This is an appeal against an order of the Magistrate of the Courantyne Judicial District, made under the Workmen's Compensation Ordinance, 1934 (No. 7 of 1934), dismissing a claim for compensation brought by the appellant, a workman employed by the respondents, for injuries sustained by accident arising out of and in the course of his employment.

The evidence before the Magistrate disclosed that the appellant was on the 14th August, 1952, employed by the respondents as an engineer at their factory at Plantation Albion, Courantyne, Berbice. On that day while engaged in repairing a mechanical carrier, one of his duties as an engineer, his left foot slipped. About three-quarters of an hour later he felt a pain and stopped work and was taken to hospital.

A medical examination by Dr. L. R. Sharples on the 13th September, 1952, disclosed that the appellant was suffering from a hernia which was well defined and of several months standing. In Dr. Sharpies' opinion, the hernia was in existence prior to the 14th August, 1952, and could have been aggravated by a sudden jerk.

Dr. Sharples advised the appellant to have an immediate surgical operation for the hernia. The respondents then arranged for the appellant to go to the Public Hospital, Georgetown, for an operation for hernia and although accommodation at that hospital was available a fortnight later, the appellant did not consent to go there until the 19th November, 1952. On the 28th November, 1952, he was operated on by Mr. Fung-Kee-Fung, surgeon specialist at that hospital. Two further operations were performed on the appellant on the 9th January, 1953. and on the 11th February, 1953.

The appellant has stated that on the 14th August, 1952, he was not aware of the fact that he was suffering from a hernia.

The learned Magistrate believed and accepted the evidence of Dr. Sharples. It would therefore appear that the Magistrate accepted the doctor's opinion that the appellant was suffering from a hernia prior to the accident on the 14th August, 1952.

The Magistrate has made no finding of fact as to whether the hernia was in fact aggravated by the jerk which the appellant stated he had suffered on the 14th August, 1952. However, the respondents by their insurance clerk Surujlall Chedda, acting on a medical certificate issued to the respondents by Dr. Sharples after he had examined the appellant agreed to pay the appellant compensation and accepted the injury as one which arose out of and in the course of his employment. They have paid to the appellant the sum of $494.46 purporting to be compensation in full for the injury suffered by the appellant.

There is, in our opinion, ample evidence that the hernia from which the appellant suffered was aggravated by a jerk sustained as described by the appellant in his evidence.

The short point in this appeal is whether a workman, who suffers from a pre-existing condition, whether or not he is aware of such condition, and who suffers an injury arising out of and in the course of his employment which aggravates that condition is precluded by such a pre-existing condition from being awarded compensation in accordance with the provisions of the Workmen's Compensation Ordinance, 1934.

Counsel for the appellant has referred us to the case of *Jones v. Rex-ham and Acton Collieries Limited* (1917) 10 B.W.C. 607. In that case as stated in the head-note, a workman had suffered for some years from hernia but with the use of a truss he had been able to work well for seven years until 28th February, 1917, when in straining to lift a truck on to some rails, the rupture again broke down. He complained of being in great pain and was taken home. The next day, under an anaesthetic, the bowel was put in its place. Two days later, while still in bed, it came down again and strangulation occurred. He was taken to the infirmary where he was operated upon but died from exhaustion following the operation.

The employers disputed a claim by the widow on the ground that the first operation had completely reduced the hernia and put the man into the same condition as he had been in for the past seven years, and that in that condition at any time a bowel might come down and strangulation be set up either from constipation or other cause, and that there was nothing that connected the strangulation with the strain.

The County Court Judge found against the employers' contention, and made his award in favour of the widow on the ground that death resulted from the injury by strain. On appeal it was held by the Court of Appeal that there was evidence to support the County Court Judge's finding.

The decision in Jones' case followed upon that in the case of *Clover Clayton & Co. v. Hughes* (1910) A.C. 242. In that case the workman who was suffering from an advanced aneurism of the aorta was doing work in the ordinary way by tightening a nut with a spanner. While doing so, the aneurism ruptured, resulting in death. The aneurism was' in such an advanced condition that it might have burst while the man was asleep, and very slight exertion or strain would have been sufficient to bring about a rupture.

The arbitrator found that the strain put upon the man in tightening the nut was not more than ordinary in such work, but that it was sufficient to bring about the rupture of the aneurism, having regard to the man's condition at the time, and he found as a fact that the rupture was so brought about and awarded compensation.

The arbitrator's decision was on appeal upheld both by the Court of Appeal and by the House of Lords.

In the course of his judgment in the House of Lords, Lord Macnaghten after pointing out that the words "injury by accident" meant nothing more than "accidental injury" or "accident" as the word is popularly used and that the rupture of the aneurism was an accident in the popular sense of the word added:

> 'The fact that the man's condition predisposed him to such an accident seems to me to be immaterial. The work was ordinary work; but it was too heavy for him."

Having regard to the decision in Clover Clayton's case, we are of the opinion that under the provisions of the Workmen's Compensation Ordinance, 1934, the appellant is entitled to an award of compensation for the

disability he has suffered from the injury he received which arose out of and in the course of his employment although that injury was by way of aggravation of a pre-existing condition.

Mr. Humphrys at the conclusion of the arguments conceded that this was a correct statement of the law and agreed that the appellant was entitled to payment of compensation for the injury he had sustained.

The further question to be determined is the amount of compensation to which the appellant is entitled.

In this respect the Court heard the testimony of Mr. Fung-Kee-Fung, the surgeon who performed the operations on the appellant after the latter's disability arose and the testimony of Mr. H. C. Hugh, a surgeon who gave evidence at the hearing before the magistrate.

After a consideration of their evidence we are of the opinion that the appellant is still suffering from a temporary partial incapacity the result of the injury in question.

The appellant has stated in his evidence before the Magistrate that he earned on the average $60 to $80 per month. In the assessment of the compensation payable to the appellant we have taken the average monthly earnings of the appellant as $70.

On that basis the appellant will be entitled under the provisions of section 5(1) (d) (ii) of the Workmen's Compensation Ordinance, 1934, as substituted by section 4 of the Workmen's Compensation (Amendment) Ordinance, 1947 (No. 14 of 1947) to a half monthly payment of $26.25 payable on the sixteenth day from the 14th August, 1952, (the date of the injury) and thereafter half monthly during the incapacity or during a period of five years (whichever is shorter).

From the 30th August, 1952, to the 16th May, 1956, a period of 401/2 months, the amount of compensation payable amounts to $2,126.25. The appellant has, however, already received the sum of $494.46 from the respondents in respect of compensation for the injury. The appellant should therefore receive $1,631.79 as compensation due up to 16th May, 1956, and the sum of $26.25 each half month thereafter until the 30th August, 1957, or for the duration of the incapacity whichever is the shorter period.

Costs of this appeal to the appellant fixed at $25. Costs of proceedings in the Magistrate's Court to the appellant to be taxed.

Solicitor: F. I. Dias for respondents.

RAMSARRAN v. HEYLIGER

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Holder, C.J., and Luckhoo, J. (acting) April 13, May 19, 1956).

Appeal—Summary conviction offence—Conviction on defective charge—Powers of amendment on appeal to the Full Court.

R. was convicted by a magistrate on a charge of having in his possession without lawful authority or excuse, a document which appears to be intended as evidence of membership of the Pioneer Youth League, an organisation declared unlawful by the Governor, contrary to section 51 (3) of the Emergency Order dated 10th October, 1953, made under section 5 of the British Guiana (Emergency) Order in Council 1953.

On appeal it was contended that the evidence disclosed the commission by the appellant of another offence under the same subsection of the Emergency

Order under which the appellant was convicted—of possession of a document which appears to be evidence of membership of the prescribed organisation, and that the conviction should therefore be set aside.

For the respondent it was contended that the conviction order should be amended by the Court by the deletion of the words "intended as" appearing therein so that the description of the offence in the Order would be in conformity with the evidence.

Held: the magistrate was empowered under the provisions of section 94 (2) and (3) of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, to amend the complaint to conform with the evidence and having regard to the provisions of section 25 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, it was competent, for the Full Court, on appeal, to amend the complaint and conviction order likewise.

Appeal dismissed. Complaint and conviction order amended.

Clarke v. Clarke (1931—1937) L.R.B.G. 195 followed.

B. S. Rai for appellant.

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

Judgment of the Court: The appellant E. K. Ramsarran was charged with the offence of having in his possession without lawful authority or excuse, a document, to wit, a letter which appears to be intended as evidence of membership of the Pioneer Youth League, an organisation declared unlawful by the Governor on the 14th December, 1953, contrary to section 51 (3) of the Emergency Order dated 10th October, 1953, made under section 5 of the British Guiana (Emergency) Order in Council. 1953.

On that charge he was on the 23rd December, 1955, convicted by a Magistrate of the Georgetown Judicial District and fined the sum of $50 in default 2 months imprisonment with hard labour. From that decision he now appeals.

It was proved in evidence and Counsel for the appellant so conceded at the hearing of this appeal, that the document in question was found in the possession of the appellant. It was also proved that the appellant was a member of the Pioneer Youth League, an organisation declared unlawful by the Governor on the 14th December, 1953; under the provisions of section 51(1) of the Emergency Order dated 10th October, 1953, made under the provisions of section 5 of the British Guiana (Emergency) Order in Council, 1953.

Counsel for the appellant, Mr. Rai, has submitted that the decision of the Magistrate was

(a) erroneous in point of law because the evidence did not support the charge;

(b) unreasonable or could not be supported having regard to the evidence.

Counsel contended that the document was not one which appeared to be intended as evidence of membership of the Pioneer Youth League.

In order to appreciate this submission it is necessary to set out *in extenso* the contents of the document, which are as follows: —

"PIONEER YOUTH LEAGUE of B.G.
Atomic Hall.
Howes Street,
Charlestown.

Dear Comrade,

You are requested to attend a meeting of the Festival Committee on SATURDAY, June, 13th 1953, at 5 p.m. sharp at the Atomic Hall Howes Street, Charlestown.

AGENDA

1. League's participation in Youth Festival.
2. Anniversary Celebrations (leagues in Sept.). PLEASE MAKE IT YOUR DUTY TO ATTEND.

Yours faithfully,
B. H. Benn,
Secretary.

Monday Lectures. Thursday Games.
(2) 2nd week in Sept. Mon. to Sat. with public meeting. Social Games Tournament, Athletic, Choir, Lectures
(Sect. Report)
Athletic on Sat. 5th Sept. Friday Social. Wed. Cantata."

Counsel for the appellant agreed that the document was an invitation by the Secretary of the Organisation addressed to the appellant, a member of the Organisation, inviting him to attend a meeting of the Organisation on Saturday, 13th June, 1953, and informing him of certain forthcoming activities of the organisation. Counsel contended that *intention* is the gist of the offence charged; that while the document does show an association with the prescribed Organisation and does afford some evidence of membership of that Organisation, it does not appear to be a document which is intended to be evidence of membership.

He further contended that a careful distinction must be drawn between documents or articles which provide some evidence of membership of an organisation and those which are issued with the intention that they should provide evidence of membership. Examples of the latter class are buttons, badges, tickets and membership cards distinctive of an organisation. Such documents or articles are intended to be used as a means of identification but from the document in question it cannot be inferred that it was intended to be used as a means of identification. Had the document contained any indication that it had to be presented or used for the purpose of gaining admission to the meeting or other activities mentioned therein, or to show that the person in possession thereof or named therein was a member, then it would clearly appear that the document was intended to be used as evidence of membership.

The Solicitor General in reply submitted that in the absence of an explanation from the appellant as to the reason why he had kept the document since June, 1953, it was competent for the Magistrate to draw the inference that the appellant had retained the document as evidence of membership of the prescribed organisation.

With this submission we do not agree. We are of the opinion that such an inference would not be a reasonable one. There are several reasons why a person might retain a document. It may and frequently does happen that a document after use on a certain occasion is put by and its existence forgotten without the slightest intention on the part of the possessor of retaining it for further use or for any purpose whatever. There is, in our view, no burden cast upon the appellant to prove the reason for its retention.

The Solicitor General further contended that the offence described under the provisions of section 51(3) of the Emergency Order consists in the possession of a prohibited document; that categories of prohibited documents are set out in that subsection, and that each category is merely a description of a document.

The offence, he submitted, consists in the possession of a document to which any of those descriptions apply. That even if Counsel's contention is correct (which is not admitted) there is only a variance in the description of the document which is not fatal.

The Solicitor General submitted that there was clear proof that the document is evidence of membership of the organisation; that the possession without lawful authority or lawful excuse of a document which is evidence of membership of a prescribed organisation is an offence under section 51(3) of the Emergency Order and that it was therefore competent for the Magistrate to convict the appellant on the charge as laid and to draw up the form of conviction so that it would be in accord with the evidence.

The Solicitor General further submitted that although this was not in fact done by the Magistrate it is competent for this Court to amend the form of conviction accordingly. He cited in support of these submissions the case of *Martin v. Pridgeon* (1859) 28 L.J.M.C. 179.

In that case the defendant was charged with being drunk in a street and guilty of riotous conduct therein, contrary to the 29th section of the Towns Police Clauses Act, 1947, incorporated with the Public Health Act. The drunkenness in a street was proved, but the riotous conduct was not proved. The defendant was convicted of drunkenness, contrary to the 21st Jac. 1 C. 7.

On appeal it was contended for the appellant that the justices had no power on a charge for one offence to convict of another under a different Act of Parliament. For the respondent it was contended that the case came within the proviso of the 11 & 12 Vict. C. 43 s. 1 which is as follows: —

> "No objection shall be taken or allowed to any information, complaint. or summons for any alleged defect therein in substance or in form, or for any variance between such information, complaint, or summons, and the evidence adduced on the part of the informant or complainant at the hearing of such information or complaint as hereinafter mentioned; but if any such variance shall appear to the justice or justices present and acting at such hearing, to be such that the party so summoned and appearing has been thereby deceived or misled, it shall be lawful for such justice or justices, upon such terms as he or they shall think fit, to adjourn the hearing of the case to some future day.

It is to be observed that the provisions of subsections (2) and (3) of section 94 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 15, are substantially the same as those of the proviso above-mentioned.

It was held by the Court that the conviction was bad and that the proviso as to variance of the 11 & 12 Vict. C. 43, s. 1, had no application the appellant being charged with one offence and convicted of another under a different act of Parliament. In his judgment Crompton, J., held that the variance meant by the proviso is a difference between the mode of stating and the mode of proving the same thing in substance; that variance points to some distinction between the allegation of time or place and the proof of it.

We are of the opinion that the decision in the case of *Martin v.* Pridgeon has no application to the instant case. It is only an authority for what it actually did decide.

The Solicitor General also referred us to the provisions of section 25 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 17, which are as follows:—

"On an appeal no objection shall be taken or allowed to any proceeding in a magistrate's court for any defect or error which might have been amended by that court, or to any complaint, summons, warrant, or other process to or of that court, for any alleged defect therein in substance or in form, or for any variance between any complaint or summons and the evidence adduced in support thereof in that court:

Provided that if any error, defect, or variance mentioned in this section appears to the Court at the hearing of an appeal to be such that the appellant has been thereby deceived or misled, the Court may either refer the cause back to the magistrate with directions to rehear and determine it, or reverse the decision under appeal, or may make any other order for disposal of the cause which justice requires." The evidence in this case shows that the appellant has committed an offence under the provisions of section 51(3) of the Emergency Order.

This is admitted by Counsel for the appellant.

In *Rodgers v. Richards* (1892) 1 Q.B. 555, Wills, J., said —

"The scheme of the Summary Jurisdiction Act, 1848, is plain. When a person has once been brought before the justices, the case against him is not to be got rid of on account of any defect in substance or in form in the information. If the evidence discloses a variance between the charge and the actual offence proved, the justices have power to adjourn the case in order that the defendant may be prepared to meet the offences disclosed by the evidence."

This extract of Wills, J.'s judgment was cited by this Court with approval in the case of *Clarke v. Clarke* (1931—1937) L.R.B.G. 195 at page 198. In that case a wife had applied for an order for maintenance against her husband. The ground of her complaint was that the husband had wilfully neglected to provide reasonable maintenance for her and her infant children and by such neglect had caused her to leave him and live separately apart from him.

Before the magistrate the husband contended that the matrimonial offence was not proved, that the evidence proved that he had deserted his wife, that the complaint was not for desertion and that the magistrate should dismiss the complaint. The magistrate found that the husband had deserted his wife, and made an order against her husband for the maintenance of herself and her infant children.

On appeal, it was held that the complaint should be amended by adding an alternative claim for desertion, that there was no necessity for an adjournment as the very defence set up was that it was a case of desertion and that the appeal should be dismissed.

We are of the view that in the instant case the magistrate was empowered under the provisions of section 94(2) and (3) of the Summary Jurisdiction (Procedure) Ordinance, Chapter 17, to amend the complaint by deleting therefrom the words "intended as". There was no necessity for an adjournment for, as Counsel for the appellant has agreed, there was no question that on the appellant's own evidence an offence under the provisions of the subsection was committed.

The complaint and the conviction order are hereby amended by the deletion therefrom of the words "intended as".

The appeal is dismissed with costs $20 to the respondent.

SPENCE v. HOPPIE

(In the Full Court, on appeal from the Magistrate's Court for the Essequibo Judicial District (Holder, C.J., and Luckhoo, J. (acting) December, 16, 23, 29, 1955; January, 7; June 8, 1956).

Appeal—Notice of—Signed by widow of deceased defendant—Signed prior to grant of letters of administration—Authority—Notice a nullity. Practice and Procedure—Magistrate's Court—Death of party—Abatement of proceedings—Notice of death not brought to attention of magistrate—judgment delivered by magistrate—Judgment defective.

H. brought a claim for rent due against W.S. in the magistrate's court. Before decision was delivered by the magistrate W.S. died but the magistrate was not informed of his death and no change of parties on death had been effected when the decision was delivered. K.S. the widow of W.S. then filed a notice of appeal against the magistrate's decision. Letters of Administration of the estate of W.S. were not granted to K.S. until some days after the hearing of the appeal had commenced.

It was submitted *in limine* at the hearing of the appeal that the notice of appeal filed was invalid and that the cause of action did not survive on the death of W.S.

Held: the cause of action survived on the death of W.S. by virtue of the provisions of section 12 of the Law Reform (Miscellaneous Provisions) Ordinance. Cap. 4.

Held further : where a sole plaintiff or sole defendant dies, the action becomes abated or defective until steps are taken to continue the proceedings under the rules in Part XV of the Magistrates' Courts Rules, 1939 (now Cap. 12 of the Subsidiary Legislation to the Laws of the Colony (Kingdon Edition).

No steps having been taken under the appropriate rules to continue the proceedings the judgment of the magistrate was defective and must be recalled.

Swindell v. Bulkeley 18 Q.B.D. 250 referred to.

M. M. Ali for appellant.

F. L. Brotherson for respondent.

Judgment: This is an appeal from the decision of the Magistrate of the Essequibo Judicial District in which he gave judgment for the plaintiff (respondent) in a claim by her for rent due.

When this appeal came on for hearing Counsel for the respondent took an objection *in limine* to the hearing of the appeal on the ground that the appellant had failed to comply with the provisions of rules 2, 3 and 5 of Part 15 of the Magistrates' Courts Rules, 1939, (now Cap. 12 of the Subsidiary Legislation to the Laws of this Colony (Kingdon Edition) as exemplified by Forms 35, 36 and 37 to those Rules (which relate to the change of parties on death of a defendant) and consequently that the notice of appeal filed in these proceedings is invalid.

Counsel stated that William Spence the defendant in the proceedings before the Magistrate died on the 16th February, 1954, some weeks before the decision appealed from was given by the Magistrate on the 6th April, 1954 and that the notice of appeal was filed by the deceased's widow Khirul Spence, the appellant, on the 1st May, 1954, even before she had been granted letters of administration of the estate of the deceased William Spence.

These facts were admitted by Counsel for the appellant who stated that the appellant was granted letters of administration of the deceased's estate on the 21st December, 1955, some days after the hearing of this appeal had commenced.

Counsel for the respondent further submitted that the maxim *actio personalis moritur cum persona* applied to this case. This submission is, however, not sound having regard to the provisions of section 12 of the

Law Reform (Miscellaneous Provisions) Ordinance, Chapter 4. In our view the cause of action in this case—a claim for rent alleged to be due—survived and continued even after the death of the defendant William Spence.

Rule 1 of the Summary Jurisdiction (Magistrates) Rules, Chapter 12, provides that an action or matter shall not become abated by reason *inter alia* of the death of any of the parties, if the cause of action survives or continues, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite;* and that whether the cause of action survives or not, there shall be no abatement by reason of death of either party between the finding of the issues of fact and the judgment, but judgment may in such case be entered, notwithstanding the death.

This rule is *in pari materia* with Order 17, rule 1 of the English Rules of the Supreme Court, 1955, and of Order 15 rule 1 of the local Rules of the Supreme Court, 1955.

While there is no abatement or defect the cause of action survives or continues in some person who is before the Court. Where a sole plaintiff or a sole defendant dies, the action becomes abated or defective until steps are taken to continue the proceedings under the subsequent rules of Part XV or the respective Orders as the case may be.

It was held in *Swindell v. Bulkeley,* 18 Q.B.D., 250 that this rule does not take away the right of a plaintiff on death of a defendant before judgment to commence a new action against his representatives within a reasonable time, although the period of limitation may then have expired, and in the case of the death of a defendant the plaintiff might commence a new action within a reasonable time after probate of the will or grant of administration. In the present case after evidence was given on behalf of both parties the Magistrate, on the 22nd December, 1953, reserved decision. On the 17th February, 1954, the defendant died and on the 6th April, 1954, the Magistrate delivered judgment apparently without being informed of the death of the defendant and without any application being made as provided by the Magistrates' Courts Rules for the substitution of the present appellant or anyone else for the deceased defendant.

In such circumstances, in our opinion, the finding of the issues of fact having been made subsequent to the death of the defendant, it was necessary for action to be taken as required by the rules, non-compliance with which precluded the Magistrate from proceeding to the determination of the matter, the action having become abated on the defendant's death. No steps have been taken under the appropriate rules to continue the proceedings. The judgment of the Magistrate is therefore defective and must" be recalled.

As the appellant had not been granted letters of administration when the hearing of this appeal commenced, she had no *locus standi* in the appeal and consequently we feel that in the circumstances of this case each party should be left to bear her own costs.

ALEXANDER v. CHALMERS

(In the Full Court, on appeal from a Magistrate's Court for the Georgetown Judicial District (Holder, C.J., Luckhoo, J. (ag.) December, 13, 14, 1955; June 8, 1956).

Immigration Ordinance—Proof of appointment as Immigration Officer—Acting in a public capacity prima facie evidence of title thereto.

Act prohibited except with consent—Burden of proof—When evidential burden of proof of consent cast on defendant.

At the hearing on the 2nd August, 1955 of an application made by the respondent under the provisions of section 26 (1) of the Immigration Ordinance, 1947 (No. 42) for an order for removal from the Colony of the appellant, it was proved that the appellant was a St. Lucian and had entered the Colony on the 14th June, 1953, by the schooner "Everdene" and was still in the Colony at the date of the application to the magistrate. The respondent gave oral evidence that the appellant's passport bore no permit by the immigration authorities for the appellant to land in the Colony and to come ashore. The appellant's passport was at the time of the hearing of the application in the possession of the respondent and was not tendered in evidence. The appellant did not give the respondent notice to produce the passport.

The magistrate granted the respondent's application and made an order for the removal from the Colony of the appellant who appealed against the order. Section 6 (3) of the Immigration Ordinance (now Cap. 98 Kingdon Edition of the Laws of the Colony) provides as follows:—

> "No person arriving in the Colony by sea or air shall disembark without the consent of an immigration officer."

Under section 6 (5) of the Ordinance, any person who contravenes or fails to comply with the provisions of section 6 (3) of the Ordinance shall be deemed to be a prohibited immigrant and under section 26 (1) of the Ordinance a magistrate is empowered on the application of an immigration officer to order a prohibited immigrant to be removed from the Colony.

It was contended on behalf of the appellant that there was no proof that the respondent was authorised to bring the proceedings in as much as there was no evidence that the respondent was authorised in writing by the Deputy Chief Immigration Officer to be an Immigration Officer nor that D. J. G. Rose who purported to act as the Deputy Chief Immigration Officer was duly appointed as such, his appointment not having been proved by its publication in the Official Gazette.

Held: (1) Acting in a public capacity is *prima facie* evidence of title thereto. Failure to prove publication of Rose's appointment by production of the Gazette was immaterial so long as there was evidence that he and the respondent acted in the capacities of Deputy Chief Immigration Officer and Immigration Officer respectively.

(2) Where a statute prohibits an act but provides exceptions, proof of the doing of the prohibited act impliedly supplies *prima facie* evidence that the act was done without lawful authority or excuse and the evidential burden of proof in respect of lawful authority or excuse is then cast on a defendant. *Per curium:* where an act is lawful unless it is done in a particular manner without lawful authority or excuse, proof by the prosecution that the act was done in that manner is not sufficient *prima facie* evidence to sustain a conviction for doing the act in that manner without lawful excuse. Some *prima facie* evidence must be given by the prosecution from which it can be inferred that the defendant did not "have lawful authority or excuse for doing the act in the particular manner.

(3)The act of disembarking from a ship or aircraft on arrival in the Colony is an act which is prohibited by the Ordinance except with the consent of a Immigration Officer. On proof by the prosecution that the appellant had arrived on a ship and disembarked therefrom the evidential burden of proof in respect of an immigration officer's consent to the disembarkation was cast upon the appellant. This burden the appellant failed to discharge.

Appeal dismissed.

L. F. S. Burnham for appellant.

G. M. Farnum, Solicitor General for respondent.

JUDGMENT:

On the 2nd August, 1955, a Magistrate of the Georgetown Judicial District granted an application made by the respondent under the provisions of section 26(1) of the Immigration Ordinance, 1947 (No. 42 of 1947), for an order for the removal from the Colony of the appellant. From this order of the Magistrate the appellant appeals.

The only evidence before the Magistrate was that of the respondent who stated: —

"I am Lance Corporal of Police No. 4825 stationed at the Immigration Service, Brickdam Police Station. I am also an Immigration Officer. I was authorised in writing by the Deputy Chief Immigration Officer, Mr. D. Rose, under subsection 2 of section 4 of the Immigration Ordinance, No. 42 of 1947, to exercise and perform all the powers and functions and duties of an Immigration Officer, in specified parts of the Colony, on 1st July, 1955. This is my authority in writing signed by Mr. D. Rose, Deputy Chief Immigration Officer (tendered, admitted and marked Exhibit "A"). That authority is also published in the Official Gazette (Extraordinary) dated 6th July, 1955 (tendered, admitted and marked Exhibit "B").

On Friday, 17th June, 1955, I was on immigration duty in Ketley Street, Georgetown, where I met the defendant. I asked defendant his name and he told me his name was James Alexander. I asked defendant where he was from and how he entered the Colony. Defendant said he was from St. Lucia and he entered the colony on the schooner "Everdene" which arrived in the Colony on 14th June, 1953. Defendant later showed me his passport, which I examined and found that there was no permit by the Immigration Authorities for defendant to land in the Colony and come ashore.

I took defendant to Immigration Officer, Brickdam, where the records of the schooner "Everdene" were checked and defendant's name did not appear on the list of the crew of that schooner. That schooner brought no passengers to the Colony. Defendant was then deemed a prohibited immigrant by me.

On 20th June, 1955, defendant was placed before Mr. Akbar Khan, Magistrate, and defendant was defended by Counsel, and finally on 9th July, 1955, the case was dismissed on a submission by Counsel that at the time defendant was arrested I was not an Immigration Officer and the defendant was not properly before the Court.

"I did not become an Immigration Officer until 1st July, 1955, when I was so authorised.

After defendant was discharged by the Magistrate, I re-arrested him and deemed him a prohibited immigrant and charged him again and placed him before the Magistrate.

I now apply to the Court for an order that defendant be removed from the Colony and in the meantime be kept in custody.

The previous case before His Worship Mr. Akbar Khan was dismissed.

St. Lucia is a British Possession in the Caribbean. He showed me a St. Lucian passport. He told me he had arrived on the schooner "Everdene" as a passenger on 14th June, 1953.

The last case was dismissed on 9th July, 1955, and I re-arrested defendant on 9th July, 1955. I received Exhibit "A" personally from

Mr. D. J. G. Rose, and this document is the only document I have received from Mr. Rose in relation to my appointment as Immigration Officer."

Counsel for the appellant submitted that the decision was erroneous in point of law because the Magistrate held that the respondent was an Immigration Officer within the meaning of the Immigration Ordinance.

Counsel contended that under the provisions of section 14(l)(b) of the Ordinance the person who applies for an order for the removal of a prohibited immigrant must be an immigration officer and that there was no proof that the respondent was an immigration officer within the meaning of the Ordinance.

Under the provisions of subsection (4) of section 4 of the Ordinance "the Chief Immigration Officer may, by writing under his hand, authorise any member of the police force, subject to such directions as he may give to him from time to time, to exercise and perform in a specified part of the Colony, and any such authorised person shall have and may exercise and perform subject to such directions, all the powers, functions and duties of an immigration officer; and the Chief Immigration Officer may at any time, by writing under his hand, cancel any such authorisation."

Under the provisions of subsection (2) of section 4 of the Ordinance "the Governor may from time to time appoint a Deputy Chief Immigration Officer, and such Officer shall have and may exercise all the powers, functions and duties of the Chief Immigration Officer under this Ordinance."

Every appointment and authorisation under section 4 is required by subsection (5) of that section to be published in the Gazette.

In this case the appointment of the respondent was made by one D. J. G. Rose, Superintendent of Police and Deputy Chief Immigration Officer.

Counsel contended that there was no proof in this case of the appointment of D. J. G. Rose as Deputy Chief Immigration Officer or of publication of such appointment in the Gazette, and failure to give such proof in evidence vitiated the purported appointment by D. J. G. Rose of the respondent.

Counsel further contended that even if there was proof of the appointment of D. J. G. Rose as Deputy Chief Immigration Officer, the purported appointment of the respondent would be invalid because Exhibit "A" which respondent produced in evidence as proof of his authority is not an authority but merely a notification of an authority given him sometime in the past. In this connection Counsel referred us to the evidence of the respondent that he has received no written authority to act as an immigration officer other than Exhibit "A".

Counsel also contended that failure to publish notice of the appointment of either D. J. G. Rose as Deputy Chief Immigration Officer or of the respondent as an Immigration Officer is fatal because provision for such publication under the provisions of subsection (5) of section 4 is mandatory.

The Solicitor General while agreeing that there was no document tendered in evidence of the appointment of or publication of such appointment of either D. J. G. Rose as Deputy Chief Immigration Officer or the respondent as an Immigration Officer, contended that acting in a public capacity is *prima facie* evidence of title thereto.

We agree with this contention. The principle as stated in Phipson on Evidence (9th Edition) at p. 120 is that "the admission of such evidence rests partly on the principle that the law presumes in favour of the regularity of acts and against misconduct and bad faith; and partly on the consideration that the invalidity of an act or appointment is more liable to detention when of a public, than when of private nature. It is inherently improbable that a person would assume to act unless in fact he held the office or appointment." That being the principle for the admission of such evidence we are of the opinion that failure to prove publication of such appointment in the Gazette would be immaterial so long as there is evidence of D. J. G. Rose and of the respondent acting in the capacities of Deputy Chief Immigration Officer and Immigration Officer respectively.

With respect to the further contention of Counsel for the appellant that Exhibit "A" is merely a notification of some prior appointment of the respondent as an immigration officer, while that document could have been better drafted we are of the opinion that it is an authority given to the respondent by D. J. G. Rose, Deputy Chief Immigration Officer, to act as an immigration officer.

We are of the opinion that the respondent was properly authorised to act as an immigration officer and therefore to bring these proceedings before the Magistrate.

Counsel for the appellant also submitted that inadmissible evidence was wrongly admitted by the Magistrate when he admitted—

(a) evidence of the contents of a passport not produced in Court;

(b) evidence of the contents of the records of the schooner *Everdene,* and

that there was not sufficient evidence otherwise to sustain the decision of the Magistrate.

Counsel contended that the only evidence that the appellant entered the Colony in contravention of the provisions of section 6 (3) of the Ordinance is the contents of his passport which it was common ground was in the possession of the immigration authorities during the hearing of the matter before the Magistrate but not tendered in evidence and the contents of the records of the schooner *Everdene* which are required to be furnished by the master of the vessel to the immigration authorities under the provisions of section 7 of the Ordinance, and also not tendered in evidence.

In respect of the evidence given by the respondent of the contents of the records of the schooner Everdene the Solicitor General conceded that such evidence was inadmissible. He also agreed with the submission of Counsel for the appellant that the provisions of section 33 of the Ordinance (which places the burden of proof on a person charged under the Ordinance) do not apply to the instant case.

Apart from the oral evidence of the respondent that the appellant's passport bore no permit by the immigration authorities for appellant to land in the Colony and to come ashore the only other evidence on the record as to appellant is that he admitted to the respondent that he was a St. Lucian and that he had entered the Colony on the 14th June, 1953, by the schooner Everdene and was still in the Colony at the date of the application to the Magistrate.

In answer to the contention of Counsel for the appellant the Solicitor General submitted that where the act complained of is unlawful unless the person doing the act has permission to do it, that is, one of absolute pro-

hibition, it is a general rule of law that the burden of proving permission is upon that person. In support of that proposition the Solicitor General cited to us the case of *R. v. Putland and Sorrell* (1946) 1 A.E.R. 85, and he further submitted that there must be some evidence led by the prosecution of the unlawful act after which the onus is shifted to the defence to prove the necessary permission. The Solicitor General sought to distinguish such a case from one where the act complained of was not *prima facie* unlawful but became unlawful if something was done or omitted to be done. The Solicitor General also referred to a passage in the judgment of Humphreys, J., in Putland's case where the learned judge expressed the opinion that the case of *R. v. Oliver* (1943) 2 A.E.R. 800 was one of an absolute prohibition.

The Solicitor General further contended that the instant case was by virtue of the provisions of section 6 (3) of the Ordinance one of absolute prohibition and therefore it was incumbent upon the defence to lead or elicit evidence that he did have an entry permit.

In reply Counsel for the respondent submitted that the statement of Humphreys, J., referred to above as to what Oliver's case decided is incorrect; that the real question is whether the fact that the appellant was given an entry permit is a fact peculiarly within the knowledge of the appellant. If answered in the affirmative that fact is required to be proved by the appellant.

Counsel further submitted that in any event the required proof could have been given by the prosecution from and by production of the records of the schooner *Everdene* in their custody, or by production of the appellant's passport in evidence.

Counsel also submitted that section 6 (3) of the Ordinance does not place an absolute prohibition on entry into the Colony; that where the Legislature decided that the onus of proving a fact should be on a defendant it has so provided in the Ordinance an example of which is section 33 of the Ordinance; and that the *maxim omnia praesumuntur rite esse acta* would apply in this case.

It is stated at Article 96 of Stephen's Digest of the Law of Evidence (11th Edition) that

> "The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the burden of proving the fact shall lie on any particular person; but the burden may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof the Court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.

In *R. v. Turner* (1816) 5 M. & S. 206, a carrier was prosecuted for possessing pheasants without being qualified by law so to do. There were ten different qualifications recognised by the Game Laws. In holding that the burden of proof of qualification was on the defendant, Bayley, J., said:

> "I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies and who asserts the affirmative is to prove it and not he who avers the negative".

It was held in *Apothecaries Co. v. Bentley* (1824) 1 C. & P. 538 in an action for penalties for practising as an apothecary without a certificate

that the onus was on the defendant to show that he had one and in *R. v Scott* (1921) 86 J.P. 69 it was held that the onus of proving the fact of the possession of a licence or authority from the Secretary of State to sell dangerous drugs was on the defendant. In *Huggins v. Ward* (1873) L.R. 8 Q.B. 521 on information for having diseased cattle in his possession and neglecting to give notice to a police constable, it was held that the burden of proving that he gave such notice was upon the defendant

However, in *Abrath v. North Eastern Railway Co.* (1883) 11 Q.B.D. 440 which was an action for malicious prosecution, it was held that the burden of proving that the defendant prosecuted the plaintiff without reasonable and probable cause rested upon the plaintiff. In the course of his judgment in that case Bowen, L.J., said:

> "If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff. It has been said that an exception exists in those cases where the facts lie peculiarly within the knowledge of the opposite party. Counsel for the plaintiff has not gone the length of contending that in all those cases the onus shifts. I think a proposition of that kind cannot be maintained, and that the exceptions supposed to be found amongst cases relating to the game laws may be explained on special grounds."

In *Williams v. Russell* (1933) 149 L.T. 190 where the defendant was convicted of the offence of using a vehicle without being in possession of a policy of insurance, Talbot, J., said:

> "On the principle laid down in *R. v. Turner* (ubi sup.) and numerous other cases, where it is an offence to do an act without lawful authority, the person who sets up lawful authority must prove it, and the prosecution need not prove the absence of lawful authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute."

In *R. v. Oliver* (1943) 2 A.E.R. 800 the appellant had been convicted on a charge of having sold sugar as a wholesaler without the necessary licence, contrary to the provisions of Article 2 of the Sugar (Control) Order, 1940. At the trial the only evidence given was that called by the prosecution and was to the effect that the appellant had sold and delivered sugar to a number of persons and received payments for the quantities so delivered. The prosecution led no evidence to show that the appellant had no licence. In his summing up to the jury the deputy chairman of the Middlesex sessions told the jury that the onus of proving that the appellant had a licence was on the appellant and that they must accept his direction that the appellant had no licence in view of the appellant's silence. The appellant was convicted and on appeal Counsel submitted that the prosecution had not discharged the onus of proof, which rested on the prosecution to show that the appellant had no licence to supply sugar.

In the judgment of the Court of Criminal Appeal delivered by Viscount Caldecote, L.C.J., it was held that that submission was wholly without merit inasmuch as no one knew better than the appellant whether he had a licence or not. After examination of several authorities including the cases of *R. v. Scott*, *R. v. Turner*, and *Williams v. Russell* (ubi sup.) the Court held that in the circumstances of the case, the prosecution was under no necessity of giving *prima facie* evidence of the non-existence of a licence.

R. v. Oliver (ubi sup.) was cited with approval by the Court of Criminal Appeal in its judgment in the case of *R. v. Putland and Sorrell*

(1946) 1 A.E.R. 85. In that case, the appellants were convicted of the offence of having conspired to acquire, and having acquired rationed goods without surrendering the appropriate number of coupons in contravention of the Consumer Rationing (Consolidation) Order, 1944. In his summing up, the trial Judge directed the jury that, in a case of this kind, a defendant alone might know whether coupons had been surrendered or not and. therefore, if the prosecution had proved the whole case to the satisfaction of the jury, it was not necessary to prove that no coupons had been given in order to establish a case requiring an answer from a defendant. The appellants were convicted. On appeal, it was contended that the Order in question did not put the onus of proof on a defendant and the Judge had therefore, misdirected the jury in law in regard to the onus of proof. The prosecution contended that the onus of proving that he had surrendered the appropriate coupons was on the defendant because that was, very often, a fact peculiarly within his knowledge. Humphreys, J., in delivering the judgment of the Court of Criminal Appeal said:

> "We were referred in regard to that matter to R. v. Oliver which is binding upon us so far as it is relevant to the present case. The Order which was being considered in that case was the Sugar (Control) Order, 1940, which made it an offence for any wholesaler by way of trade to supply any sugar; it is an absolute prohibition, subject to this, that he may do so "in accordance with the terms of a licence, permit or other authority granted by……the Minister." So that no person may do the act—no person may deal in sugar at all—unless he has a licence. The court held, upon the terms of that Order, that the onus was on the defendant to prove that he had a licence that being a fact peculiarly within his own knowledge, and the prosecution was therefore under no necessity of giving *prima facie* evidence of the non-existence of a licence. There is, in our opinion, a very broad distinction which must be observed between that case and the present. In that case the prohibition against doing the thing was absolute, and it was for the defendant, if he wanted to show that he might do it lawfully, to provide some excuse such as a licence or other authority from the Minister.
>
> In this case, the offence (I am now dealing more particularly with the first two counts of this indictment) which is created is not in dealing in rationed goods, either by way of supply or by way of acquiring; that remains lawful. There is no reason why anybody should not deal in rationed goods if they like, but what is provided is that, if a person does deal in rationed goods in a particular way, he must do something else, *i.e.* he must surrender the appropriate number of coupons. That seems to us to be a slightly different matter. The view we take of the onus of proof in such a case is this: we are not prepared to hold that the prosecution is bound to prove by evidence that in fact there was no surrender of coupons, because in many cases that would be quite impossible. But we do think that the prosecution, in making a charge against persons of having contravened this Order, must give some *prima facie* evidence to the jury upon which the jury would be entitled as reasonable people to find as a fact that there was no surrender of coupons. When the prosecution has done that, there is, in our opinion, not a change in the onus of proof, but there is a case against the defendants upon which the jury may convict them, unless they can upset the *prima facie* case which has been made against them. We are very far from saying that that means that the defendant must prove in the first instance anything at all."

The distinction sought to be drawn in Putland's case put in another way appears to us to be that where an act is absolutely prohibited, proof by the prosecution that the act was done by the defendant raises the *prima facie* presumption of fact that it was done by the defendant without lawful authority or excuse. That presumption may be rebutted by the defendant giving evidence that he had such authority or excuse. Where, however, the act is one which is lawful unless it is done in a particular manner without lawful authority or excuse, proof by the prosecution that the act was done in that manner is not sufficient *prima facie* evidence to sustain a conviction for doing the act in that manner without lawful authority or excuse. Some *prima facie* evidence must be given by the prosecution from which it might be inferred that the defendant did not have lawful authority or excuse for doing the act in the particular manner.

In *Humphreys v. John* (1955) 1 W.L.R. 325 a Divisional Court held that where an act complained of is unlawful unless the person doing the act has permission to do it, it lies upon that person to prove that he has permission to do it if that fact is one peculiarly within his knowledge and it is not necessary for the prosecution to give *prima facie* evidence of the grant of permission.

The view expressed by the learned author of Archbold (33rd Edition at page 367 paragraph 604) is that the present rule upon the subject of negative averments appears to be, that in cases where the subject of the averment relates to the prisoner personally, or is peculiarly within his knowledge, the negative is not to be proved by the prosecutor, but, on the contrary, the affirmative must be proved by the prisoner, as a matter of defence; on the other hand, if the subject of the averment does not relate personally to the prisoner, or is not peculiarly within his knowledge, but either relates personally to the prosecutor, or is peculiarly within his knowledge at least is as much within his knowledge as within the knowledge of the prisoner, the prosecutor must prove the negative.

At pages 714 and 715 of Glanville Williams on Criminal Law (the General Part) after discussing the judgments in the cases referred to above, the learned author states:

> "The position is that where a statute prohibits an act but provides exceptions, and the question whether he comes within the exceptions is peculiarly within the knowledge of the accused, the prosecution satisfies the evidential burden by giving evidence of the commission of the act, and the evidential burden of qualification or excuse is then on the accused. Outside this rule, the prosecution must generally give some evidence of the commission of the crime, even in respect of elements that lie peculiarly within the knowledge of the accused, before the case will be left to the jury; but where the matter is peculiarly within the knowledge of the accused comparatively slight evidence on the part of the prosecution will be accepted."

After a careful consideration of the above-mentioned authorities, we are of the opinion that where a statute prohibits an act but provides exceptions, proof of the doing of the prohibited act impliedly supplies *prima facie* evidence that the act was done without lawful authority or excuse and the evidential burden of proof in respect of it is then cast on the defendant.

In the present case the relevant provisions are to be found at section 6 (3) of the Immigration Ordinance, 1947 (now Chapter 98 Kingdon Edition) and are as follows:—

"No person arriving in the Colony by sea or air shall disembark without the consent of an immigration officer."

We are of the opinion that the act of disembarking from a ship or aircraft on arrival in the Colony is an act which is prohibited by the Ordinance except with the consent of Immigration Officer and it was necessary for the prosecution in this case to lead evidence to the effect that the appellant had arrived on a ship in the Colony and disembarked therefrom. That evidence was, in our opinion, sufficient to cast the evidential burden of proof in respect of the consent of an Immigration Officer upon the appellant. This burden the appellant failed to discharge.

In coming to this conclusion we have not overlooked the fact that the respondent at the time of the trial had in his possession the appellant's passport. There was nothing however, to prevent the appellant from giving notice to the respondent to produce the same at the trial but from the record of appeal before us it is apparent that such a step was not taken by the appellant.

We are of the opinion that on the admissible evidence in this case the learned Magistrate could have come to no other conclusion but the one to which he did come.

For these reasons the appeal fails. The order of the Magistrate is accordingly confirmed. Costs to respondent fixed at $20:—

ROACH v. REID.

(In the Full Court, on appeal from a Magistrate's Court for the Georgetown Judicial District, (Holder, C.J., Luckhoo, J. (ag.), May 26; June 16, 1956).

Unlawful Wounding—Mens rea—Maliciously—Reasonable foresight of consequences of voluntary act.

In a room 8' x 4' the appellant Roach rushed at the injured man Johnson and pushed him against a dinner wagon on which were some glasses. As a result of the impact some of the glasses fell to the floor and were broken. The appellant thereupon cuffed Johnson then knocked him against a chair and down to the floor, jumped upon him and kicked and trampled him with his bare feet. The appellant throughout the affray was the aggressor. Johnson was found to have a wound one inch long in the right loin which in the opinion of the examining doctor could have been produced by a sharp instrument.

The case for the prosecution was that the wound was sustained by Johnson coming into contact with a piece of broken glass lying on the floor of the room while the appellant was assaulting him and that a reasonable man must in the circumstances have foreseen that such an injury might result. The appellant was convicted by the magistrate.

On appeal it was contended on behalf of the appellant —

(a) There was no evidence that the appellant did any act amounting to the wounding of Johnson; and

(b) The evidence disclosed that the wound was as a result of an accident.

Held: approving the opinion of the learned author of Kenny's Outlines of Criminal Law (Turner's Edition, 1952) at page 35, that the prosecution must establish:—

(a) that the defendant's conduct contributed either directly or indirectly to the *actus reus;*

(b) that this conduct on his part was voluntary;

(c) that he foresaw at the time that his acts or omissions might produce or help to produce certain consequences; the nature of those consequences being fixed by law for each specific crime.

and that having regard to the circumstances of the case the prosecution had discharged the onus placed on it.

Appeal dismissed.

L. F. S. Burnham for appellant

G. S. Gillette, Acting Assistant to the Attorney General, for respondent.

Judgment of the Court:

The appellant was convicted on the 21st November, 1955, by a Magistrate of the Georgetown Judicial District on a charge of unlawfully wounding Maurice Johnson, contrary to section 52 of the Criminal Law (Offences) Ordinance, Chapter 17, (now section 50 of Chapter 10, King-don Edition of the Laws of British Guiana) and was fined the sum of $150:—and ordered to pay costs $4.46 in default three months' imprisonment with hard labour.

The appellant by his Counsel within the time prescribed by the Summary Jurisdiction (Appeals) Ordinance gave notice of appeal against the decision of the Magistrate and lodged with the clerk of court a notice of the grounds of appeal and served a copy thereof on the respondent. He later lodged three additional copies of the record with the Registrar as required by the provisions of section 13 (2) of the Summary Jurisdiction (Appeals) Ordinance, but omitted to pay the prescribed fee of $4.00 for lodging those copies. The copies of the record were accepted by the Registrar without the payment of the prescribed fee.

On the 11th April, 1956, the appellant applied to this Court under the provisions of section 14 of the Summary Jurisdiction (Appeals) Ordinance Chapter 16 (now Chapter 17 of the Kingdon Edition) as amended by section 2 of the Summary Jurisdiction (Appeals) (Amendment) Ordinance, 1955, (No. 29 of 1955) for leave to lodge three additional copies of the record and to pay the prescribed fee for lodging same.

At the hearing of that application we were satisfied that the appellant had omitted to pay the prescribed fee through an oversight on his part and that the appeal sought to be brought had merit.

In the exercise of our discretion we granted the application and proceeded to hear the appeal.

The appellant who was charged indictably had consented to be tried summarily. The evidence given before the Magistrate disclosed that on the 1st November, 1955, the virtual complainant Maurice Johnson together with his wife Muriel Johnson resided at premises rented by him from Olinda Teixeira, the defendant's reputed wife.

The defendant also resided at the above premises with his reputed wife.

A gallery forms part of the premises and was fitted with one light.

At about 11.30 p.m. that night, Maurice Johnson returned home and turned on the light in the gallery whereupon the defendant came into the gallery with a towel around his waist and told Johnson that he wanted him to turn off the light as he did not pay for its use. Johnson declined to do so and said that he did pay for the use of the light.

The defendant went into his room and shortly after returned to the gallery wearing a pair of short pants. He then rushed at Johnson and

pushed him against a dinner wagon on which were glasses. Some of the glasses thereon fell upon the floor as a result of the impact and were broken. The defendant thereupon cuffed Johnson then knocked him against a chair and down to the floor, jumped upon him and kicked and trampled him with his bare feet.

The defendant's reputed wife then dragged the defendant away from Johnson and asked him if he wanted to kill Johnson.

Blood was then observed running down Johnson's leg. Johnson was later taken to the Public Hospital, Georgetown, where on examination by Dr. Haniff he was found to be suffering from a wound on the right loin. A certificate issued by that doctor after he had examined Johnson reads as follows:—

> "Wound right loin—external opening about one inch long. Wound about three inches from lumber, spine and right iliac crest. Could have been produced by sharp object. I hereby certify that the injuries may be dangerous to life. Patient admitted for exploration (of depth) of wound and treatment."

Under cross-examination by Counsel for the appellant the injured man stated that he fell away from the glass on the floor and was not cut by it. His wife stated that she could not say if her husband fell on the glass; that he was beaten some distance away from where the glass fell.

During the course of the argument, Counsel for the appellant in answer to the Court and after consultation with the appellant stated that the room in which the affray took place is about 8 feet in length by 4 feet in width.

The appellant at the hearing before the Magistrate declined to lead evidence and relied on the submissions of his Counsel that —

(a) there was no evidence to show that the defendant (appellant) did the act amounting to wounding; and

(b) the evidence shows that the wound was as a result of an accident.

Counsel for the appellant agreed that there was evidence on which the Magistrate could find, as he did, that Johnson received the injury in the course of the affray. He contended, however, that while it might not be unreasonable to conclude that the injury did result from the injured man coming into contact with a piece of broken glass lying on the floor during the affray, there was no evidence that he received the injury as a result of any unlawful act on the part of the appellant.

Counsel submitted that the onus was on the prosecution to prove that Johnson received the injury as a direct result of a deliberate act of the appellant.

Counsel further contended that it was possible that the injured man might have received the injury from some other object on the floor which was not within the contemplation of the appellant or indeed of either party.

The acting Assistant to the Attorney General submitted that the prosecution was not required to show by what instrument the injury was inflicted so long as it was proved that it was inflicted during the affray.

He further submitted that assuming that the injury resulted from the injured man coming into contact with broken glass lying on the floor, the defendant would in law be liable therefor because a reasonable man must have foreseen that such an injury would result if after glasses had fallen on to the floor and been broken he struck down another man to the floor.

The appellant was convicted for unlawfully and maliciously wounding Johnson. There is no dispute that the appellant throughout the affray was the aggressor.

As stated at Article 1694 on page 874 of Volume 10 of the Simonds Edition of Halsbury's Laws of England,

> "A man is said to act "maliciously" when he intended to do the very unlawful act with which he is charged, or, if the act is the necessary consequence of some other criminal act in which he was engaged, or where the act charged was the probable result of the act contemplated, who either foresaw or ought to have foreseen the consequence and yet persisted in the unlawful act in which he was engaged."

The onus which lies on the prosecution in cases of this kind is in our opinion correctly stated by the learned author of Kenny's Outlines of Criminal Law (Turner's Edition, 1952) at page 35. There it is stated that the prosecution must establish —

(a) that the defendant's conduct contributed either directly or indirectly to the *actus reus;*
(b) that this conduct on his part was voluntary;
(c) that he foresaw at the time that his acts or omissions might produce or help to produce certain consequences. The nature of these consequences is fixed by law for each specific crime.

In this case the evidence discloses that the appellant persisted in his attack on the injured man and struck him to the floor and trampled him even after the glasses had fallen on to the floor and had as a result been broken. The size of the room in which the affray took place was as stated by Counsel for the appellant 8 feet in length by 4 feet in width.

In our view the appellant must in such circumstances have foreseen at the time he knocked down the injured man that such an act might help to cause injury to be inflicted on the injured man by splinters of broken glass lying about the small floor area.

There can be no question that the appellant's conduct was voluntary. The further point, however, remains—was the appellant in fact cut by the glass on the floor?

As already stated it was conceded by Counsel for the appellant that there was evidence upon which the Magistrate could find that the injury was sustained during the course of the affray. There is no evidence that the injury could have been produced in any way other than by a piece of glass lying on the floor or by the appellant kicking the injured man. If the former, then the appellant's conduct contributed indirectly to the *actus reus;* if the latter it contributed directly thereto.

We are of the opinion that in the circumstances of this case the prosecution has discharged the onus placed on it and that the appellant was properly convicted for the offence for which he was charged.

The appeal is therefore dismissed with costs $20 to the respondent.

LEE-HONG-GAT *et anor* v. HARDEEN

(In the Supreme Court (Phillips J.) July 14, 26, 1956).

Jurisdiction—Rent Restriction—Claim for excess rent brought in Supreme Court—Claim to be instituted only in Magistrate's Court.

Section 26 (1) of the Rent Restriction Ordinance, Cap. 186, provides that "any claim or other proceedings arising out of this Ordinance shall be made in the Magistrate's Court."

Plaintiffs sued the defendant their landlord of rent controlled premises for the sum of $718.77 as excess rent paid by them in respect of those premises. The claim was instituted in the Supreme Court. Counsel for the defendant submitted *in limine* that having regard to the provisions of section 26 (1) of the Rent Restriction Ordinance the Supreme Court had no jurisdiction in the matter.

Held: The provisions of section 26 (1) of the Ordinance are mandatory and irrespective of the amount involved in a claim any claim or other proceedings arising out of the Ordinance shall be made or instituted in the Magistrate's Court. The Supreme Court had no jurisdiction in the matter.

Judgment for defendant.

A. T. Singh for plaintiff.

C. R. Wong for defendant.

Phillips, J: In this action the plaintiffs who are tenants of the defendant-landlord with respect to a building situate at 9 and 10 Holmes Street, Georgetown, Demerara, to which the Rent Restriction Ordinance applies, claim from the defendant the sum of $718.77 pursuant to the provisions of section 14(2) of the Rent Restriction Ordinance, Chapter 186, being an amount of excess rent paid by the plaintiffs to the defendant.

When this action came on before me for hearing an agreed statement of facts was filed.

On the 14th July, 1956, the matter was argued before me.

An objection with respect to jurisdiction was taken *in limine* by Mr. Wong, Counsel for the defendant. It was submitted that by virtue of sections 26 and 27 of the Rent Restriction Ordinance, Chapter 186 the Supreme Court had no jurisdiction to hear the action and that the same should have been brought in a Magistrate's Court. The relevant parts of the sections referred to read as follows: —

Section 26(1) and (2)

" (1) Subject to the provisions of subsection (3) of section 3 of the Summary Jurisdiction (Petty Debt) Ordinance, any claim or other proceedings (not being proceedings under the Summary Jurisdiction Ordinances or proceedings before the Rent Assessor as such) arising out of this Ordinance shall be made or instituted in a magistrate's court.

(2) A magistrate shall have full powers to re-hear any application and to revise any decision in any case in which, in his opinion, altered circumstances make it just that he should exercise such powers."

Section 27 (1) and (2)

" (1) An appeal shall lie to the Full Court of the Supreme Court of British Guiana from the decision of a magistrate on any claim or proceedings (not being proceedings before the Rent Assessor as such) in respect of any premises to which this Ordinance applies, and the judgment or order of the Full Court shall be final.

" (2) The provisions of the Summary Jurisdiction (Appeals) Ordinance shall regulate appeals under this section."

It was argued that the words *"shall be made or instituted in a Magistrate's Court"* are mandatory. The plaintiffs' Counsel on the other hand contended that the Supreme Court would have concurrent jurisdiction and that by virtue of section 3 of Chapter 16 the Summary Jurisdiction (Petty Debt) Ordinance, the Magistrate's jurisdiction was limited to an amount not more than $250 and that consequently the venue of the trial of the action was in the Supreme Court.

Section 17(2) of the English Rent Restriction Act of 1920 is differently worded from the local Ordinance. The section reads:

> "A county court shall have jurisdiction to deal with any claim or other proceedings arising out of this Act or any of the provisions thereof, notwithstanding that by reason of the amount of claim or otherwise the case would not but for this provision be within the jurisdiction of a county court, and, if a person takes proceedings under this Act in the High Court which he could have taken in the county court, he shall not be entitled to recover any costs."

Further by the specific reference to sub-section 3 of section 3 of the Summary Jurisdiction (Petty Debt) Ordinance, Chapter 16, without any reference to subsection 1 of that section, it clearly indicates that the intention of the Legislature was to extend, for the purposes of the Rent Restriction Ordinance, the Magistrate's jurisdiction as to amount.

> "The saying has been attributed to Lord Mansfield that nothing but express words can take away the jurisdiction of the superior courts but it seems that it may in certain circumstances be taken away by implication."

(Maxwell on Interpretation of Statutes, 10th Ed. p. 131).

> "It is, undoubtedly, good law that, where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to this remedy or this tribunal and not to others. As the House of Lords ruled in *Pasmore v. O. Urban Council*, per Earl of Halsbury, L.C. (1898) A.C. 394:
>
> > "The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the "

(*Wilkinson v. Barking Corporation* (1948) 1 A.E.R. p. 567).

The rule of law is that where a statute creates an obligation and points out a mode of enforcing it that mode is the only one to be adopted.

In *Doe d. the Bishop Of Rochester v. Bridges* 1 B. & Ad. 847; s.c. 9 Law J. Rep. K.B. 113, Lord Tenterden says:

> "Where an act creates an obligation, and enforces the performance in a specific manner, we take it to be a general rule that performance cannot me enforced in any other manner."

A somewhat similar point was raised in a matter under the Nuisances Removal Act, 11 and 12 Vict. C. 123 as to whether the County Court had jurisdiction to try the case. Alderson, B., in *The Guardians of the Poor of Hertford Union v. Kimpton & anor.* (1856) 25 L.J. (N.S.) 41, said

> "The act of parliament has prescribed the tribunal in which cases of this kind were meant to be tried. It was evidently the intention of the framers of the act of parliament that the country court and two Justices should have exclusive jurisdiction."

By virtue of section 14(2) of Chapter 186, excess rent paid in respect of any period subsequent to the material date may be recovered. The section reads thus:—

> "Where, in respect of any period subsequent to the material date, any tenant has paid, whether before or after the aforesaid date, rent on premises to which this Ordinance applies, or any sum on account of such rent, which exceeded the standard rent by more than the amount permitted under this Ordinance the amount of such excess shall, notwithstanding any agreement to the contrary, be recoverable from the land-lord who received the payment, or from his legal personal representative, by the tenant by whom it was paid and the tenant may without prejudice to any other method of recovery, deduct such excess from any rent payable by him to the land-lord."

Under section 26(1) of Chapter 186 it is enacted that "any claim or other proceedings.....*arising out of this Ordinance* shall be made or instituted in a magistrate's court."

In my view the recovery of excess rent specified in section 14(2) comes within the purview of "any claim or other proceedings arising out of this Ordinance".

The Rent Restriction Ordinance prescribes by section 27(1) that an appeal shall lie to the Full Court of the Supreme Court from the decision of a Magistrate. The scheme of the Ordinance was designed to have a speedy hearing and determination of matters coming within the ambit of the Ordinance. I have come to the conclusion therefore that the provisions of section 26(1) are mandatory and that irrespective of the amount involved in a claim any claim or other proceedings arising out of the Ordinance shall be made or instituted in a Magistrate's Court and nowhere else.

In view of my opinion that the Supreme Court has no jurisdiction it is unnecessary for me to express any opinion on the other submissions made.

I have been referred to no cases in the Supreme Court nor have I been able to trace any case in which this point of jurisdiction has been directly raised or argued. In at least two cases mentioned hereunder actions for excess rent under the Rent Restriction Ordinance have been brought in the Supreme Court but it does not appear from the Judgments that this point of jurisdiction was take

(1) In *Sampson v. Roberts* (1951) L.R.B.G. 191, before Boland, C.J. (acting), a claim for $395.81 was brought for excessive rent. Judgment was entered for $176.78. The final paragraph of the judgment reads:

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

In the case before me I also award costs on the higher scale (but to the defendant) even though, as I find, the action should have been brought in the Magistrate's Court.

(2) In *Nathoo v. Sabga* (1952) L.R.B.G. p. 120 heard before Stoby, J., again the question of jurisdiction was not raised. The plaintiff claimed the sum of $427.50 for excessive rent under the Rent Restriction Ordinance and judgment was entered for that amount.

This case decides that "if the Rent Assessor has not reduced the standard rent then excess rent is recoverable from the material date as defined in the Ordinance even though there is an effective date in the certificate."

The plaintiff's action fails. Judgment will be for the defendant with costs. Certified fit for Counsel.

SERTIMA *v.* EDINBORO

(In the Full Court, on appeal from the magistrate's court for the East Demerara Judicial District. Holder, C.J., Stoby. J.) July 6, 1955; February 10, 1956).

Criminal Law—Wilfully preventing a person from passing while in charge of a vehicle—Ingredients of the offence—Evidence—Section 156 (*xx*) *of the Summary Jurisdiction* (*Offences*) *Ordinance, Cap. 13:*

The appellant was convicted by a Magistrate of wilfully preventing Carmen Alleyne from passing him while being in charge of a bicycle, contrary to section 156 (xx) of the Summary Jurisdiction (Offences) Ordinance, Cap. 13.

The evidence adduced at the hearing was that Alleyne was wheeling her bicycle on the public road and as she was about to mount it preparatory to riding, the appellant who was standing *behind* her held the carrier attached to the bicycle and prevented her from getting on.

Held, on appeal, that the prosecution would have to prove—

(a) obstruction to the public way; and

(b) that by such obstruction a person or vehicle was wilfully prevented from passing.

The evidence did not justify a finding that the appellant had wilfully prevented Alleyne from passing him as the appellant was behind Alleyne and therefore she must have passed him.

Appeal allowed—Conviction quashed and sentence set aside.

L. F. S. Burnham for appellant.

G. L. B. Persaud, Legal Draftsman (ag.), for respondent.

Judgment of the Court: The appellant was convicted by a Magistrate of the East Demerara Judicial District of wilfully preventing Carmen Alleyne from passing him while being in charge of a vehicle, to wit, a bicycle, on the 24th day of July, 1954, contrary to Section 156 (xx) of the Summary Jurisdiction (Offences) Ordinance, Chapter 13.

The effect of Section 156 (xx) is that every person is liable to a penalty of not less than twenty five dollars who "by obstructing any public way, wilfully prevents any person, cart, carriage, or other vehicle, or any horse or other animal, from passing him or any cart, carriage, or other vehicle, or horse or other animal, under his care."

The evidence led in support of the charge was that Carmen Alleyne was wheeling her bicycle on the public road and as she was about to mount it preparatory to riding, the appellant who was standing behind her held the carrier attached to the bicycle and prevented her from getting on. The appellant did not give evidence but relied on a submission made on his behalf by Counsel that while the evidence might support a charge of assault it did not warrant a conviction under the section charged.

The Magistrate took the view that the appellant obstructed the public way when he held the bicycle.

In interpreting this section no assistance can be gained from English authorities as the provisions of the local Ordinance are different from those of the English enactment. Section 72 of the Highway Act, 1835, creates a number of offences one of which is "wilfully obstructing the free passage of any highway".

In **Eaton v. Cobb** (1950) 114 J.P. 271 the driver of a motor car who opened the off-side door while the car was stationary and struck a passing cyclist was convicted of wilfully obstructing the free passage of a highway by opening the off-side door of a motor car thereby impeding the progress of a pedal cycle. His conviction was quashed on the ground that there was no evidence that the driver of the car wilfully obstructed the free passage of the highway.

It would seem from this decision that if there was evidence that the obstruction was intentional the conviction would have been upheld.

This case was preceded by **Watson v. Lowe** (1950) 1 All E.R. 100, where on exactly similar facts the Justices had dismissed a complaint under Section 78 of the Highway Act, 1835, for negligently interrupting the free passage of a person on the highway. The Divisional Court held

on an appeal against the acquittal that the Justices should be convicted on the ground that the driver of the car was negligent not in driving because the car was stationary but in opening the door as he did.

It will be noted that both under Section 75 and Section 78 the main ingredient of the offence is obstructing the free passage of the highway. But in this Colony the person causing the obstruction on the public way must wilfully prevent another person from passing him; the prosecution will have to prove two ingredients namely (a) obstruction to the public way and (b) that by such obstruction a person or vehicle was wilfully prevented from passing.

There may be cases where by interfering with a person or a vehicle on the public way obstruction is caused to the public way, but in view of the decision which we have reached it is not necessary to decide that point.

The form of conviction in this case is some indication of the difficulty experienced by the Magistrate in drawing up a conviction which would truly reflect the offence for which the appellant was convicted. He has been convicted for wilfully preventing Alleyne from passing him. The evidence does not justify such a finding as the appellant went behind Alleyne and therefore she must have passed him.

In the result therefore we have come to the conclusion that the offence charged was net proved and this appeal is allowed with costs fixed at $20.

FRASER v. POLLARD

(In the Full Court, on appeal from the Magistrate's Court for the Berbice Judicial District (Holder, C.J., Luckhoo, J. (Ag.) April 14, July 26, 1956).

Tenancy at Will—Agreement by landlord to transfer his rights in property to third party—Tenant still in possession—Subsequent notice to quit—No attornment to third party by tenant—Tenant estopped from asserting title in overlord until attornment.

The appellant was for some years lessee from the Transport and Harbours Department of a railway tavern. In 1945 she became ill and at her request the respondent carried on the business therein. The tavern licence under the Intoxicating Liquor Licensing Ordinance was issued to and continued to stand in the name of the appellant who since 1945 paid all licence fees and rents in respect of the tavern. The appellant did not demand nor receive any profits from the working of the business.

In October or November 1954, she sold to one Chandra all her rights in and to the tavern, and agreed to give Chandra vacant possession of the tavern. The respondent, however, continued in possession of the tavern and on the 19th January, 1955, the appellant purported to determine the respondent's tenancy by a notice to quit but the respondent refused to give possession of the tavern to the appellant who thereafter instituted proceedings for possession.

The Magistrate struck out the appellant's application for possession on the ground that at the time the application was made the appellant was no longer the respondent's landlord as she had in November, 1954, transferred all her rights and interests to Chandra.

On appeal it was contended for the appellant that the respondent was estopped from challenging the appellant's title.

Held: The evidence disclosed that Chandra was never put into nor had he entered into possession of the premises and the respondent had not attorned tenant to Chandra. Until he has so attorned tenant he is estopped from asserting the title to be in the overlord.

Appeal allowed.

E. A. Romao for appellant.

S. D. S. Hardyal for respondent.

Judgment of the Court:

This is an appeal from an order of the Magistrate of the Berbice Judicial District made on the 21st July, 1955, striking out the claim brought by the appellant against the respondent for the possession of railway tavern premises situate at Rosignol, West Coast, Berbice.

The evidence disclosed that the appellant was for some years the lessee from the Transport and Harbours Department of the railway tavern at Rosignol. In 1945 she became ill and at her request the respondent carried on the business therein. The tavern licence under the Intoxicating Liquor Licensing Ordinance was issued to and still stands in the name of

the appellant, but the respondent has since 1945 paid all licence fees and rents in respect of the tavern. The appellant has neither demanded nor received any profits from the working of the business.

According to the appellant she requested the respondent to "work the place" until she was ready for it. The respondent was a tenant at will of the premises.

In October, 1954, she offered to sell to the respondent her interests in the tavern for the sum of $3,500 but the respondent said he had no money and that she could sell the place. She thereupon entered into an agreement of sale with one Chandra in November, 1954. It is not clear whether this agreement of sale was written or oral.

On the 19th January, 1955, the appellant determined the respondent's tenancy by a notice to quit but the respondent still remained in possession of the premises.

Under cross-examination by Counsel for the respondent, the appellant stated—

> "I sold the licence to one Chandra for $3,800. I received the full sum. I also gave Chandra possession as from November, 1954. In November, 1954, I transferred all my rights whatsoever to him."

Re-examined by her Counsel she stated:

> "I agreed to give Chandra vacant possession."

It was submitted by Counsel for the defendant (respondent) before the magistrate that on her evidence the plaintiff (appellant) had admitted that she was not the landlord; that in November, 1954, she had transferred all her rights and interests to Chandra as from November, 1954, and that the claim was filed in March, 1955.

Counsel for the plaintiff in reply submitted that the defendant was estopped from challenging the plaintiff's title.

The learned magistrate agreed with the submission made by Counsel for the defendant and he accordingly struck out the plaintiff's claim.

On appeal, Counsel for the appellant submitted that the main ground of appeal was that the respondent was estopped from challenging the title of his landlord, unless he could show that the title of his landlord had expired.

In support of this submission he cited the cases of *Balls v. Westwood* (1809) 170 E.R. 1064 and *Mountjoy v. Collier* (1853) 118 E.R. 573. He further submitted that there must be some evidence of privity of contract between the overlord and the tenant. In support of this submission Counsel cited the cases of *England v. Slade* (1792) 100 E.R. 1243 and *Serjeant v. Nash* (1903) 2 K.B. 304. Counsel referred to the fact that the respondent did *not* claim that he was in possession of the premises as tenant of Chandra though by the cross-examination of the appellant by Counsel for the respondent it was clear that the respondent was challenging the title of the appellant.

Counsel for the respondent while agreeing that the broad principle was that a tenant is estopped from denying his landlord's title, submitted that the tenant is not precluded from so doing where the landlord's title had expired. Counsel also submitted that the appellant's title had expired as she had in November, 1954, sold her rights including her right to possess or occupy the tavern; that the sale of the right to occupy the tavern is

complete in itself and is independent of the licence issued under the provisions of the Intoxicating Liquor Licensing Ordinance; and that the appellant held the licence in trust for Chandra.

It is stated at paragraph 572 of Halsbury's Laws of England (2nd Edition at page 506)—

> "A tenant is not estopped either before or after the expiration of the term from showing that his lessor's title has determined. But if the tenant came into possession under the lessor, the better opinion would seem to be that he must surrender possession before he disputes the lessor's title; it has, however, been held that it is not necessary that he should actually go out of possession unless he claims to be entitled to the premises in his own right, and that it is sufficient that he should come to a new arrangement with the person who really has the title to hold under him, or that he should be evicted by a person having title paramount."

From a consideration of the evidence it is clear that Chandra has never been put nor has he entered into possession of the premises. It is also clear that the respondent has not attorned tenant to Chandra. As was stated by Holroyd, J., in *Cornish v. Searall* (1828) 8 B. and C. 471 at page 476 "The attornment is the act of tenant putting one person in the place of another as his landlord."

Until he has done so a tenant is estopped from asserting the title to be in the overlord.

We are of the opinion, therefore, that at the time of the institution of the claim before the Magistrate the respondent was still the tenant of the appellant in respect of the premises and that an order should have been made by the Magistrate for possession of the premises to be given by the respondent to the appellant.

We accordingly order that possession of the premises be given by the respondent to the appellant on 1st October, 1956.

Costs to appellant fixed at $20: —

ATHERLEY v. DAS.

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Holder, C.J., and Luckhoo J. (acting) July 9, 1956).

Bastardy—Complaint by mother before one magistrate—Hearing before another magistrate—Jurisdiction—No objection thereto taken at hearing—Order made against person adjudged to be putative father of bastard child—Order cannot be challenged on appeal for lack of jurisdiction.

The respondent, mother of a bastard child, made a complaint on oath under section 3 of the Bastardy Ordinance, Cap. 40, before a magistrate alleging that the appellant to be the father of child. Another magistrate issued the summons in respect of the respondent's complaint.

At the hearing of the summons no objection was taken to the jurisdiction of the court on the ground that under the provisions of section 3 of the Bastardy Ordinance, Cap. 40, the summons must be issued, heard and determined by the magistrate before whom the respondent made her complaint. The appellant was on the hearing of the summons adjudged the putative father of the respondent's child.

On appeal, it was contended on behalf of the appellant that the summons not having been issued by the magistrate before whom the appellant had made her complaint was *prima facie* evidence that the magistrate who heard and deter-

mined the matter was not the magistrate before whom the respondent had made her complaint and that consequently the magistrate who heard the summons had no jurisdiction to do so and the order he made was therefore not valid.

Held: The appellant having appeared and taken no objection to the issue of the summons the magistrate hearing the summons had jurisdiction to make the order.

R. v. *Fletcher* (1884) 32 W.R. 828 applied.

It is not competent for the Full Court to entertain an appeal on the ground that the Magistrate's Court had no jurisdiction in the matter unless objection to the jurisdiction of the Magistrate's Court is taken at some time during the progress of the case and before decision is announced.

Appeal dismissed.

A. S. Manraj for appellant.

H. E. Phillips for respondent.

Judgment of the Court:—

This is an appeal against the decision of a Magistrate of the George town Judicial District who adjudged the appellant to be the putative father of a bastard child and ordered him to pay to the Collecting Officer the sum of $1.20 per week for its maintenance and education until it attains the age of 14 years or should die, whichever is earlier, consequent upon an application by the respondent for the issue of a summons upon the appellant.

The grounds of appeal filed on behalf of the appellant were—

1. the decision was unreasonable or could not be supported having regard to the evidence;
2. the decision was erroneous in point of law;
3. the judgment or sentence passed was based on a wrong principle or was such that a Magistrate viewing the circumstances reasonably could not properly have so decided.

Counsel informed the Court that he did not propose to submit any argument to the Court on the first and third grounds above-mentioned which relate to the findings of fact made by the Magistrate on the issue of paternity but would confine his argument to the second ground only, that is, that the decision of the Magistrate was erroneous in point of law. Counsel stated that the appeal was based solely on the question of the competency of the Magistrate to make the order. In this respect he referred to the provisions of section 3 of the Bastardy Ordinance, Chapter 40 which are as follows : —

"Any single woman who is delivered of a bastard child may—

(a) at any time within twelve months from the birth of the child: or.

(b) at any time thereafter, upon proof that the man alleged to be the father of the child has, within twelve months next after its birth, paid money for its maintenance or contributed to its support: or

(c) at any time within twelve months next after the return to the Colony of the man alleged to be the father of the child, upon proof that he ceased to reside in the Colony within twelve months next after its birth,

make a complaint on oath before the magistrate of the district in which she resides alleging some man to be the father of the child; and the magistrate shall thereupon issue his summons to the person alleged to be the father of the child to appear before him at a time and place to be mentioned in the summons."

Counsel submitted that the summons to the alleged putative father must be issued by the same Magistrate before whom the complaint on oath was made; that the Magistrate who heard and determined the case the subject matter of this appeal was not competent to do so in law as he was not the Magistrate before whom the complaint had been made. Counsel contended that the mere fact that the magistrate who heard the summons was not the same magistrate before whom the complaint was made was in itself *prima facie* evidence in support of his contention.

In the course of Counsel's submission it was pointed out by the Court that from the record there appeared to have been no objection taken before the magistrate by or on behalf of the appellant to the hearing of the matter on the ground of the abovementioned irregularity and that having regard to the provisions of section 9 (a) of the Summary Jurisdiction (Appeals) Ordinance, Chapter 17, it did not appear that this Court could entertain the appeal on the ground advanced by Counsel. Counsel contended, however, that the question of the competency of the Magistrate to hear and determine the case was different from that of the Magistrate's Court jurisdiction and that therefore the provisions of section 9 (a) of the Summary Jurisdiction (Appeals) Ordinance, Chapter 17, did not apply.

In support of his submission, Counsel cited to us the case of *R. v. Pickford* (1861) 121 E.R. 643; 1 B. & S. 77.

In that case the mother of a bastard child, applied to a justice within twelve months after the child's birth, for a summons against the defendant, the person alleged to be the father of the child. The summons was issued by the justice but could not be served the defendant having absented himself. On his return, which was more than twelve months after the child's birth, and before which time the justice who had issued the first summons had died, the mother obtained from another justice a second summons against the defendant. Upon that summons the justices in petty session made in order adjudging the defendant to be the putative father. On appeal, it was held that the order was bad as the jurisdiction to make the order is limited to the justice before whom the first application was made; and that the second summons not being issued by the same justice could not be considered as part of the original process upon the first application.

It is to be observed that in Pickford's case the defendant did not appear at the hearing before the justices in petty session.

Counsel for the appellant did not refer the Court to the case of *R. v. Fletcher* (1884) 32 W.R. 828. In that case the mother of a bastard child gave information to a justice and obtained a summons against the alleged father of the child. Owing to the failure of service within the required time, another summons was granted by another justice against the alleged father. The hearing of the case then took place before that justice and another justice when an affiliation order was made against the defendant who was at the hearing represented by Counsel. No objection was made on the defendant's behalf as to a defect in the issue of the summons, which did not appear on the face of it, and which only became known on the issue of a second and substituted order by the justices, stating that the information had been heard by one justice and the summons on which the hearing took place had been granted by another.

The defendant thereupon appealed to the Divisional Court and obtained a rule *nisi* calling on the justices and the applicant to show cause why the order of the justices should not be quashed on the ground of illegality, as the summons had not been issued by the same justice who

heard the information as required by 35 and 36 Vict. C. 65 ss. 3, 4 (The Bastardy Laws Amendment Act, 1872). Section 3 of that Act as well as section 3 of the Bastardy Ordinance, Chapter 40, require that the Justice by whom the order is made shall be the same justice who issued the summons and he must also have been the justice before whom the mother's application was made. Pickford's case was cited to the Divisional Court in support of the rule by Counsel for the defendant. The Divisional Court held that the rule must be discharged as the defendant had failed to show there was any irregularity in the order as entitled him to the judgment of the Court.

> In the course of his judgment at p. 829 Mathew, J. stated: — "The learned counsel has not dealt with the cases quoted on behalf of the justices, although the case of *The Queen v. Hughes* is entirely analogous to the present one. In that case a man had been arrested and brought up under circumstances which, in themselves, would have entitled him to maintain an action for false imprisonment, but having appeared and been dealt with on the merits, it was held that the irregularity was not such as went to the jurisdiction. In the present case it is perfectly plain the magistrates had jurisdiction under section 4 on the appearance of the defendant before them. Up to that point the disobedience to the direction of the Act, as to the issue of the summons, was a matter of substance. If the defendant had asked for strict proof as to the issue of the summons, and had taken his stand on an objection to its defect, the magistrates would have been bound not to proceed with the investigation. But the moment he appeared and discussed the matter with his opponent on the merits, he came within the terms of section 4, and the magistrates had jurisdiction. It appears to me, therefore that the order corrects any irregularity disclosed on the face of it, and that the magistrates acted with the defendant's consent. The order, therefore, is right, and the rule must be discharged with costs."

Counsel for the appellant has admitted at the hearing of this appeal that no objection was taken on behalf of the appellant at the hearing before the magistrate as to a defect in the issue of the summons.

We are of the opinion that it is clear for the reasons given by Mathew, J., in Fletcher's case that the submission of Counsel for the appellant must fail.

That submission also fails for the further reason that under the provisions of section 9(a) of the Summary Jurisdiction (Appeals) Ordinance, Chapter 17, it is not competent for this Court to entertain an appeal on the ground that the Magistrate's Court had no jurisdiction in the matter unless objection to the jurisdiction of the Magistrate's Court was formally taken at some time during the progress of the case and before the decision was pronounced.

In our opinion those provisions are applicable to the question raised in this appeal.

Yet another reason why this appeal must fail is that by the combined effect of the provisions of section 11(2) of the Bastardy Ordinance. Chapter 40, and of section 93 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 15, it is not competent for any person to impeach in any proceeding or in any other manner whatever, any order made by the Court on the hearing of a complaint on the ground that the Court had no jurisdiction to make the order, unless that objection was taken on the hearing of the complaint or at the time of the making of the order.

The appeal is dismissed with costs $20.00.

DEVEAUX v. THE COMMISSIONERS OF INCOME TAX

(In Chambers (Luckhoo, J.) August 21, 1956).

Income Tax—Application to state case—Domicile of choice—Question of fact.

Deveaux appealed to a Judge in Chambers against an assessment to income tax on the ground that he was at all material times not domiciled in this Colony. The appeal was dismissed, the Judge finding that Deveaux was at all material times domiciled in this Colony.

Deveaux applied for a case to be stated for the consideration of the Full Court of the Supreme Court on the finding by the Judge that he was at all material times domiciled in the Colony.

Under section 57 (10) of the Income Tax Ordinance, Cap. 299, the decision of the judge hearing an appeal from the findings of the Commissioners of Income Tax shall be final, but the judge shall on the application of the appellant state a case on a question of law for the consideration of the Full Court of the Supreme Court.

On behalf of the appellant it was contended that the question of domicile of the appellant is one of law.

Held: "Domicile is a question of fact and the effective acquisition of a domicile of choice with its correlative effective abandonment of domicile of origin or previous domicile of choice is also a question of fact."

The appellant's domicile at the material times was a question of fact and not one of law.

Earl of Iveagh v. Revenue Commissioners (I.F.S.) (1930) Ir. R. 386 and 431 (cited in Income Tax Case Law by Farnsworth) followed.

Application to state case refused.

J. E. deFreitas for the applicant.

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

Luckhoo, J: This is an application made by the appellant under the provisions of section 57 (10) of the Income Tax Ordinance, Cap. 299, for a case to be stated for the consideration of the Full Court of the Supreme Court.

On the 18th June, 1956, sitting as a Judge in Chambers, I dismissed the appeals (2) brought by the appellant against the decisions of the Commissioners dismissing objections by the appellant in respect of assessments made by the Commissioners relating to the foreign income from all sources of the appellant for the years of assessment 1948 to 1953 inclusive.

The grounds argued on behalf of the appellant in those appeals (and decided in favour of the respondents) were —

(a) that the appellant was at all material times not domiciled in the Colony and is not now so domiciled; and

(b) that the appellant was not and is not ordinarily resident in the Colony.

Under the provisions of section 57 (10) of the Income Tax Ordinance, Cap. 299, the decision of the Judge hearing an appeal from the findings of the Commissioners shall be final, but the Judge shall on the application of the appellant state a case on a question of law for the consideration of the Full Court of the Supreme Court.

Counsel for the appellant has applied for a case to be stated for the consideration of the Full Court of the Supreme Court on the finding by the Judge in Chambers that the appellant was at all material times domiciled in this Colony.

He has submitted that the question of the domicile of the appellant is one of law; that although the facts found by the Judge cannot be questioned, the inference to be drawn from those facts is a question of law and can therefore be questioned.

In support of his submission, Counsel cited the case of *Bowie* (*or Ramsay*) *v. Liverpool Royal Infirmary & ors.* (1930) 143 L.T.R. 388, and referred to certain passages appearing in the judgments of Lord Thankerton and Lord Macmillan in that case. At page 391 it is stated in the judgment of Lord Macmillan —

> "The acquisition of a domicile of choice is a legal inference which is drawn from the concurrence of evidence of the physical fact of residence with evidence of the mental fact of intention that such residence shall be permanent."

It is to be observed for reasons which will appear later in this decision that the House of Lords in Bowie's case had to consider the question of domicile in a probate matter and not in an income tax matter.

The Solicitor General has submitted that the domicile of a person (other than the domicile of origin) is determined by the fact of residence in a particular country and the fact of an intention on the part of that person to settle in that country; and that the question of domicile is therefore one of fact.

In support of his submission, the Solicitor General referred to a passage in the judgment of Lord Loughborough C in *Bempde v. Johnstone* (1796) 30 E.R. 967; 3 Ves 198 where it is stated that the question of domicile *prima facie* is much more a question of fact than of law.

The Solicitor General also referred to the case of *Anderson v. Laneuville* (1854) 14 E.R. at page 323.

The Solicitor General further submitted that even if it were held that the question of domicile is one of mixed fact and law, no appeal would lie to the Full Court, having regard to the provisions of section 57 (10) of the Ordinance.

It is unnecessary to refer to the findings of fact made on the appeals except to state that they included the following —

(a) that the appellant's domicile of origin was this Colony;
(b) that he acquired a domicile of choice in Panama in 1928;
(c) that in the relevant years he was domiciled in this Colony, his domicile of choice having been lost and his domicile of origin revived; and
(d) that he has not re-acquired a domicile of choice in Panama.

It is well settled that in order to acquire a domicile of choice there must exist both the fact of physical presence or residence in the new country and also an intention to remain there indefinitely. Residence is a question of fact and so is intention.

As was stated by Greer L.J. in *Inland Revenue Commissioners v. Wahl* (1932) 17 T.C. at p. 576 —

> "When you have to go into a man's mind for his actions and to put an interpretation on his actions, it is a difficult problem to decide and it is not a question of law; it is a question of fact."

It is also well settled that a domicile of choice is abandoned when the country is actually left with the intention of abandoning it for ever.

As stated at paragraph 553 of Volume 1 of Simon's Income Tax (2nd Edition), it is a question of fact whether the necessities of residence and of an intention to settle, requisite to establish a domicile of choice, are indeed present.

By parity of reasoning, it is also a question of fact whether the necessities of absence and of an intention to abandon requisite to establish the abandonment of a domicile of choice are present.

It is to be observed that at the hearing of this application it was not urged nor suggested on behalf of the appellant that there was no evidence upon which it was possible for a Judge to come to those findings. It was rather submitted that upon the evidence those findings were against the weight of the evidence.

In the case of *Usher's Wiltshire Brewery, Ltd. v. Bruce* (1915) A.C. 433, the House of Lords rejected for cases stated under the Income Tax Acts the right claimed by the Courts upon appeal from findings of the County Court Judge, to determine the issue as one of law where all of the facts are admitted or not in dispute. It was held that the findings of the Commissioners must be accepted and the Courts are precluded from questioning them except so far as it is necessary to see whether there is relevant evidence.

Usher's case has made it clear that the Courts have no power to review inferences of fact arising in cases under the Income Tax Acts.

The decision of the House of Lords in *Inland Revenue Commissioners v. Lysaght* (1928) A.C. 234 determined that if the issue before the Courts could be described as a question of degree, then it was a question of fact. By question of degree is meant how one estimates and appreciates the various elements of fact combining to make up the ultimate fact.

Lysaght's case has therefore rejected the view expressed by Lord *Parker in Farmer v. Trustees of the late William Cotton* (1915) A.C. 929 that where all material facts are fully found and the only question is whether the facts are such as to bring the case within the provisions of some statutory enactment, the question is one of law. Such a view would indeed make every finding of fact appealable on the ground that it was a question of law whether the Commissioners had rightly construed the Act which used the word employed to describe the "fact".

In Lysaght's case the House of Lords has excepted from the sphere of income tax law the doctrine that it must always be a question of law whether, once the facts are found, the case falls within the meaning of the statute.

In the *Earl of Iveagh v. Revenue Commissioners* (I.F.S.) (1930) Ir. R. 386 and 431 (there is no copy of this report in the Law Library and the facts of the case herein stated are taken from Income Tax Case Law by Farnsworth) the Special Commissioners had found that the appellant, whose domicile of origin was in Ireland, had acquired *animo et facto* a "permanent home" in England some forty years earlier; considering themselves bound, however, by a supposed rule of law that the retention of a residence in the domicile of origin was prohibitive of its abandonment, the Commissioners had held that a domicile of choice had not been acquired in England.

In the High Court, it was argued for the respondents that the Court had no jurisdiction to hear the case since no "point of law" was involved, the acquisition of a domicile of choice being one of "pure fact". This plea was overruled in the High Court which adjudicated in its own alleged right on the question of domicile.

On appeal in the Supreme Court it was held that the acquisition of a domicile of choice was a pure question of fact and the weight to be given to conflicting evidence on one side or the other was not a matter of law. The view of the Supreme Court is as stated by Kennedy, C.J. —

"Domicile is a question of fact and the effective acquisition of a domicile of choice with its correlative effective abandonment of domicile of origin or previous domicile of choice is also a question of fact."

In the result, I have come to the conclusion on the authorities cited above that the question of the applicant's domicile at the material times was a question of fact and not one of law and that it is not competent for me to state of a case on that question for the consideration of the Full Court.

The application is therefore refused

GRIMMOND v. WONG

(In the Full Court, on appeal from the Magistrate's Court of the East Demerara Judicial District (Holder. C.J. and Phillips J.) July 12, August 30, 1956).

Criminal Law—Embezzlement—Money received for or in the name of or on behalf of employer—Whether receipt of money by person in pursuance of his relations/lip as a servant to his master—Receipt unrelated to substantive duties— Whether offence of embezzlement committed—Summary Jurisdiction (*Offences*) *Ordinance, Cap.* 13, *s.* 95 (*Major Edition of the Laws*).

The respondent was employed as a boat-hand engineer by the Forestry Department and was specifically directed not to receive moneys as royalty. He, however, voluntarily assisted the ranger in the performance of his duties including the collection of royalty. He received the sum of $2.00 from a grant holder to be paid over to the ranger as royalty but omitted to do so.

A charge of embezzlement was instituted against the respondent the allegation of the prosecution being that the respondent, being employed as a servant, as an engineer in the Forestry Department, fraudulently embezzled the sum of $2.00 received by him for or in the name of or on behalf of the said Forestry Department, his employer, contrary to section 95 of the Summary Jurisdiction (Offences) Ordinance, Cap. 13.

The Magistrate dismissed the complaint.

On appeal, it was contended for the appellant that the offence of embezzlement is committed by *any* servant of an employer who receives money totally outside of the scope of his employment and who fails to pay it over to his employer.

Held: The respondent was not employed to receive moneys nor was he engaged in any cognate employment and having been specifically directed not to receive moneys acted outside the scope of his authority and did not receive the money in pursuance of his relationship as a servant to his master as the money was altogether unrelated to his substantive duties as a boat-hand. Accordingly the respondent could not be convicted of the offence of embezzlement.

R. v. Coley (1887) 16 *Cox C.C.* 266, *C.C.R.* considered.

Appeal dismissed.

G. M. Farnum, Solicitor General for appellant.

L. F. S. Burnham for respondent.

Judgment of the Court: This is an appeal by the Complainant. Detective-Corporal David Grimmond, from a decision of the Magistrate of the East Demerara Judicial District dismissing a charge of embezzlement against the respondent.

The charge against the respondent was that he between the 14th and the 31st day of December, 1954, at Mahaicony, in the East Demerara Judicial District, being employed as a servant, as an engineer in the Forestry Department of the Government of British Guiana, fraudulently embezzled the sum of $2.00 current money of the Colony of British Guiana, received by him for or in the name of or on behalf of the said Fores-

try Department, his employer, contrary to section 95 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13.

The facts and the only point for determination are conveniently set out in the Magistrate's Memorandum of Reasons for decision as follows: —

> "According to the evidence of James Ferdinand, a Forest Inspector employed at the Forestry Department, the defendant was employed simply as a boat hand engineer and was not permitted to receive royalty.
>
> It is true that the defendant assisted the ranger in the performance of his various duties which included the collection of royalty, but the services rendered by the defendant in that connection were purely voluntary and were not included in his duties which he was employed to perform as a boat hand engineer. In short, the appointment of the defendant was for a specific duty and that duty did not require or authorise the defendant to collect or receive royalty on behalf of the Forestry Department. I was satisfied from the evidence adduced that at no time the relation of master and clerk or servant (the term "servant" includes the term "clerk") ever existed between the defendant and the Forestry Department. As the defendant received the sum of $2.00 merely as a volunteer and not as a clerk or servant within the meaning of section 95 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13, he was not liable to be prosecuted for the offence of embezzlement vide R. vs. Coley (1887) 16 Cox C.C. 226, C.C.R., 3 T.L.R. 703."

The Solicitor General for the appellant pointed out that the words *by virtue of his employment* omitted in the English Larceny Act, 1861, 24 & 25 Vict. C. 96, Sec. 81, are also omitted from the local Ordinance (now section 91 of the Summary Jurisdiction (Offences) Ordinance, Chapter 14). He submitted that the circumstances of this case the respondent was under a duty to pay over the moneys received by him and further that the case of *R. v. Coley* (1877) 16 Cox 226 on which the Magistrate relied in coming to his decision does not now represent the law and indeed that this case of *R. v. Coley* is not included in the leading modern Text Books on Criminal Law on this subject and ought not to be followed.

The duties of the respondent were those of a boatman employed by a Department of Government. He was specifically directed not to, and it was no part of his duties as a boatman to receive moneys or give receipts therefor. However, on occasions he would assist the Forest Ranger one Mr. Cook in calculating the cubic measurements of lumber. It was the duty of Mr. Cook to collect moneys paid for royalties by the grant holders at Banniah, Mahaicony Creek. The respondent would also on occasions, contrary to express instructions, if asked by persons to whom wood cutting permissions or licences had been granted, receive from such persons the royalties and hand the same over to Mr. Cook who would issue the necessary receipts.

It was accepted by the Magistrate that the grant holder Mr. Prince Lemmon on the 16th December, 1954, handed to the respondent the sum of $2 to be paid over to Mr. Cook as royalty.

The question for determination is was the respondent in those circumstances a Clerk or servant within the meaning of the Ordinance.

It was conceded that on the findings of fact by the Magistrate a conviction for fraudulent conversion could be supported if the respondent had been charged with that offence but it was argued for the respondent that a conviction for embezzlement could not have been sustained.

In view of the present state of the authorities on the law relating to the statutory offence of embezzlement four questions have to be specifically answered:

(1) was the respondent in this case under a duty to account ?

(2) was this sum of money the property of the master or the property of the grant holder, Prince Lemmon ?

(3) is the offence of *embezzlement* committed by *any* servant of Government (of whatever station) who receives money totally outside the scope of his employment and who fails to pay the same over to the Government ?

(4) is the offence of embezzlement committed by a servant who is not employed to receive moneys or in any cognate employment and who is in addition specifically directed not to receive moneys but who nevertheless receives it but fails to pay the same over to his master (especially when the master is the somewhat intangible *persona*—the Government of the Colony)?

The Solicitor General cited the following cases in support of his argument:

R. v. Hall, 1 M.C.C. p. 1474.
R. v. Foulkes, (1875) 2 C.C.R. 150
R. v. Thomas Smartt, 1 R. & R. p. 516.
R. v. Nettleton, (1830) 1 M.C.C. p. 259.
R. v. Mayle, 11 Cox 150.

Those cases in our view do not entirely cover the point in issue in this case and do not go as far as to support the proposition that if *any* servant in any type of employment who receives money who by the very nature of his engagement so to do is acting outside the scope of his employment and who is directly forbidden by his master to receive moneys but who nevertheless in disobedience of orders does so, can be convicted of the offence of *embezzlement.*

Question (1): The respondent was on the facts of this case under no duty to receive or deliver moneys to his master but if he failed to deliver the same as requested would hold the moneys in trust as a bailee for the person from whom he received it, namely, the grant holder Prince Lemmon.

The respondent might have been a bailee of the money but not a servant within the meaning of the Ordinance. See *R. v. Gibbs* (1855) Dears. Crown Cases p. 445.

In *R. v. Hoare* 1 F. & F. 648 the prisoner was charged on counts of embezzlement (and fraudulent conversion under the Act 20 & 21 Vict. C. 54, S. 4). The employer had closed down his farm at which the prisoner was employed as a farm bailiff: subsequently the prisoner was asked by his former master then about to depart for America to collect for him certain outstanding debts but it did not appear that the prisoner was to be paid anything for doing so. It was held that a person who received money on behalf of another did not thereby become a bailee within the meaning of 20 & 21 Vict. C. 54, S, 4, of the money, not being bound to hand over the particular sum (or coins) he has received. In the present case the servant was not bound to receive the money at all.

Question (2): The money was the property of Prince Lemmon and not that of the respondent's master. The fact that the respondent happened to be a paid servant of the Government was merely incidental.

By the acceptance of the money in disobedience of the master's instructions it cannot be said that the moneys were received *"on account"* of his master. See *Reg. v. Harris* (1854) Dears, C.C.R. p. 244. In that case —

> Harris was tried and convicted at the sessions for the county of W. on an indictment charging him with embezzling certain moneys as servant to the inhabitants of that county. It appeared that H. was the miller of a mill in the gaol of the county, that the offence, if any, took place entirely within the gaol, which is situate within the county of the city of W., more than 500 yards from the county of W., and that the county of the city of W., has a separate jurisdiction and its own Recorder and Quarter Sessions. It was the duty of H. to direct persons bringing grain to be ground at the mill to obtain at the porter's lodge a ticket, specifying the quantity of grain brought. The ticket was his order for receiving the grain, and it was his duty to receive the grain with the ticket, to grind it, to receive the money for the grinding, and to account for the money to the governor of the gaol, who accounted to the county treasurer. H. had no right to grind any grain at the mill for his private benefit, nor without a ticket as above mentioned. H. was appointed to his situation by the magistrates of the county at a weekly salary, which was paid to him out of the county rates by the governor of the gaol, who received the money from the county treasurer. H. received and ground grain without a ticket, and without directing the persons bringing the grain to obtain one. He received the money for the grinding and did not account for it to the governor of the gaol, but applied it to his own use. It was held that Harris could not be convicted of embezzlement, as the conclusion to be drawn from the facts was, that he had made an improper use of the mill by grinding the corn for his own benefit, and consequently that he did not receive the money for or on account of his masters.

Questions (3) *and* (4): At page 607 of an Edition of Archbold the following appears:

> "The statute is not confined to the clerks and servants of persons in trade, but extends to the clerks and servants of all persons whomsoever, if they be employed to receive money." The respondent in this case was not employed to receive moneys nor was he engaged in any cognate employment and having been specifically directed not to receive moneys acted outside the scope of his authority and must be deemed, on the facts of this case, to have accepted the money as a gratuitous bailee of Prince Lemmon his bailor in whom the property continued to vest until it was eventually delivered to Mr. Cook the person appointed or authorised to receive it for his master. In our view the respondent did not receive the money in pursuance of his relationship as a servant to his master as the receipt of the money was altogether unrelated to his substantive duties as a boat-hand and accordingly the respondent could not have been convicted on those facts of the offence of embezzlement.

We have, however, come to the conclusion that Coley's case has not been directly overruled and that the Magistrate was right in acquitting the defendant-respondent of the offence of embezzlement with which he was charged.

The appeal is accordingly dismissed with $20 costs.

JANALI v. DUNCAN *et al*

(In the Supreme Court (Luckhoo, J. (Ag.) April 26, 27; May 28, 29; June 26, 29; August 31, 1956).

Trespass—Possession—Land not capable of use and enjoyment—No discontinuance of possession by absence of use and enjoyment—Owner out of possession for less than statutory period—Intruder abandoning possession—Owner in same position as if no intrusion took place.

There can be no discontinuance of possession of land by the owner by absence of use and enjoyment where the land is not capable of use and enjoyment. Mere non-user is not abandonment.

Leigh v. Jack (1879) 49 L.J. Q.B. 220 applied.

Where one person goes out of possession and is followed by another in possession there is a discontinuance of possession by the person who goes out of possession.

Rains v. *Buxton* (1880) 14 Ch.D. 537 applied.

"If an intruder without title holds possession for less than the statutory' period and then abandons possession and no other person immediately takes possession of the land, as there is no person against whom the rightful owner can bring ah action the rightful owner is in the same position as if no intrusion had taken place, and although he is out of possession for the statutory period and another intruder subsequently takes possession but does not hold for the statutory period the title of the rightful owner is unaffected by the statute."

Decision of the Judicial Committee in *Trustees, Executors and Agency Com-pany* (*Limited*) *and anor* v. *Shortt* (1888) 13 *App : Cases* 793—Passage in Halsbury's Laws of England (as stated in Halsbury's Laws of England (2nd Edition) Volume 20, page 745 at paragraph 1015) applied.

C. Lloyd Luckhoo for plaintiff.

A. S. Manraj for defendants.

Luckhoo, J.: The plaintiff's claim is for an order that the defendants jointly and severally trespassed on certain lands situate at Plantation Good Hope, East Bank, Essequibo; for an injunction in the usual terms and for $5,000:— damages for trespass to the aforesaid lands.

The defendants admit entering and cultivating rice on the lands in dispute but in effect say that the lands do not form part of Plantation Good Hope under the plaintiff's transport No. 1034 dated the 11th September, 1939; that they and persons through whom they claim have been in possession of specific portions of the lands *nec vi, nec clam, nec precario* for 12 years and over and that they are therefore protected by the provisions of section 5 of the Title to Land (Prescription and Limitation) Ordinance, 1952, (No. 62 of 1952) now section 5 of the Title to Land (Prescription and Limitation) Ordinance, Chapter 184 of the Kingdon Edition of the Laws.

By consent of all parties to this action the affidavit filed by the plaintiff in support of his application for an interim injunction against the defendants and the affidavits in reply by each of the defendants filed in respect of the plaintiff's application for an interlocutory injunction were treated as pleadings in the action.

In his affidavit the plaintiff claimed ownership of the lands in dispute which are situate between what is referred to in the evidence as the new sea dam and high water mark. The lands are situate on the right bank of the Essequibo River and are to the north of the Public Road which runs approximately parallel to its facade.

The plaintiff is the owner by transport No. 1034 dated 11th September, 1939, from one Henry de Lisle Wight of the property described therein and which may conveniently be referred to as Plantation Good Hope. It

may be well to set out the description of the property transported to the plaintiff which is as follows:

> "Plantation Good Hope situate on the east bank of the Essequibo river, in the county of Essequibo between Plantation Greenwich Park and Plantation Ruby with the cultivation on the said property save and except both the portions upon which the Good Hope Chapel school is situate and that portion used as a Burial Ground, the said portions being laid down and defined on two plans of portions of the said Plantation Good Hope made by W. M. A. Roberts, Sworn Land Surveyor, dated 13 th July, 1910, and deposited in the office of the Registrar of British Guiana on the 22nd July 1910, save and except such portions of the said lands as have been sold and transported or sold but not yet transported without the buildings and erections thereon and also save and except a strip of land forming part of Plantation Good Hope the said strip of land being 100 (one hundred) feet in width running across the said plantation from east to west lengthways and together with all such portions of the Company Path side lines and original side lines in or adjacent to the said strip of land as the proprietors of the said plantation were capable of transporting under the Company's Clauses Completion of Titles Ordinance, 1898, as laid down and defined on a diagram by A. Mac Dougal, Sworn Land Surveyor, dated 27th April, 1914, and deposited in the office of the Registrar of British Guiana on the 11th May, 1914, and as transported to the Demerara Railway Company on the 13th June, 1914, No. 515."

Plantation Ruby lies to the west and Plantation Greenwich Park to the east of Plantation Good Hope.

The Good Hope Chapel School grounds, the Burial Ground and the strip of land transported to the Demerara Railway Company on the 13th June, 1914, referred to in the above-mentioned description as being excepted from the property transported to the plaintiff are all situate south of the Public Road.

There was tendered and admitted in evidence a plan, Ex. "B". The legend on this plan states that it is a diagram of thirty-one 1/2 acre lots of land in Good Hope formerly a sugar estate situate on the east bank of the Essequibo River surveyed and paals placed at the boundaries October, 1840, by A. Buchanan, Sworn Land Surveyor. These lots are shown on Ex. "B" as being situated south of the Public Road.

There was also tendered and admitted in evidence a plan Ex. "F". The legend on that plan states that it is a diagram of land of three double lots of land on the west side of Plantation Greenwich Park and ten double lots in front of Good Hope. Although the plan is certified as a true copy it is not stated thereon by whom the plan was made and on what date it was made except for certain pencilled information appearing thereon.

It is, however, common ground between the parties to this action that Ex. "F" is a certified copy of a plan made by A. Buchanan, Sworn Land Surveyor, on the 27th September, 1842, and is the diagram referred to in the Act of Deposit executed by Colin Simson as attorney of Sir Edward Cust on the 26th day of January, 1852.

The lots demarcated and delineated on the plan Ex. "F" are all situate north of the public road and south of the Essequibo River.

There is in evidence as Ex "M" a transport passed on the 17th July, 1852, by Colin Simson as attorney of the Honourable Sir Edward Cust in favour of one "Brag Rae his heirs and assigns of part of the front lands of

Plantation Good Hope situate on the east coast of the county of Essequibo and designated on a chart thereof by the Sworn Land Surveyor A. Buchanan dated twenty-seventh September, 1842, deposited in the Registrar's Office of the Counties of Demerara and Essequibo on the twenty-sixth of January, 1852, as Lot La K.

Transported on the ninth of March, 1835."

Having regard to the description contained in the transport Ex. "M". I have no doubt whatever, despite Mr. Manraj's submission to the contrary, that the lands shown on Ex. "F" lettered a to k and also the portion of land marked 1 thereon form part of Plantation Good Hope.

I have no doubt also, despite Mr. Manraj's contention to the contrary, that Plantation Good Hope extends on its northern side to at least as far as the high water mark.

A search of the records in the Deeds Registry has, except with respect to lettered lots i and k, failed to bring to light any evidence of the alienation of any of the lettered lots at Good Hope north of the Public Road, otherwise than to the successive owners of the plantation by reason of their titles to the plantation.

It was suggested by Mr. Manraj that the purpose of laying out the lots north of the public road at Good Hope was to enable the proprietor Sir Edward Cust to pass transport therefor to his former slaves. That suggestion, however, is unsupported by any evidence on the record and it would be idle to speculate as to whether Sir Edward Cust did sell or give or transport or in any other way divest himself of the ownership of all or any of the lettered lots at Good Hope except lot lettered k.

It is clear, however, that at some time prior to 1922, lettered lot i had been alienated, but at what date and by whom it does not appear from the evidence given at the hearing of this action.

Mr. Manraj has submitted that the burden is upon the plaintiff to establish that the lands in dispute are not included in that part of the description contained in the plaintiff's transport in the following words —

> "save and except such portions of the said lands as have been sold and transported or sold but not yet transported".

In support of his submission Mr. Manraj has cited the case of *Meertins et al v. Jordan* (1915) L.R.B.G. 179. The report of that case, however, discloses that the decision of the trial judge, Major, C.J., laid down no general proposition. In my view, that decision must be read in the light of the facts of that particular case.

The plaintiff, however, has in my opinion given enough *prima facie* evidence of the ownership of the disputed lands other than lots i and k as shown on Ex. "F".

The evidence disclosed that in 1927, one Rahiman was the owner by transport of the property now owned by the plaintiff. That property was managed by her son-in-law Elahi Bacchus until 1937 and in 1938 the property was sold to Henry Wight from whom it was purchased by the plaintiff in 1939.

In 1927 and until 1931 or 1932 rice was cultivated by tenants of Rahiman on land north of the public road at a position north of an old sea dam or sand reef. I do not accept the plaintiff's or Bacchus' evidence that rice was cultivated south of the sand reef. Crissy Cole's evidence

that in 1927 rice was planted north of the public road at Good Hope out by the seaside supports this view.

In 1931 or 1932 because of the sea water coming into the rice lands the cultivation of rice came to an end. By about 1934 or 1935 almost all of the persons residing on or occupying or cultivating the lands north of the public road had ceased doing so because of sea water coming upon the lands.

In 1938 the plaintiff became the manager of the plantation in place of Bacchus. In 1939 the plaintiff purchased the plantation from Henry Wight and from that year until 1946 grazed his cattle on the disputed lands north of the position where the new sea dam now stands. That sea dam was erected in 1946 by Government and extends from about 6 rods from the public road at its western end to about 10 rods at its eastern end. It is about 60 rods from high water mark at its western end and about 30 rods at its eastern end.

After the erection of the new sea dam the plaintiff rented out the whole area of the lands between the public road and the new sea dam to various persons at the rate of 8 cents per month for 12 rod sections. Crissy Cole and Sugar Austin were among those tenants who planted provisions for about three years. The plaintiff also after erection of the new sea dam put down a koker on the land north of the public road but south of the new dam for drainage purposes without any protest on the part of any of the defendants.

In 1952 and 1953 Crissy Cole rented from the plaintiff the western half of those lands for cattle grazing.

Except for the plaintiff and persons with his permission grazing their cattle on the lands north of the new sea dam between 1939 and 1946, no one used or occupied any portion thereof until 1953 when the defendant Duncan and others went upon those lands for the purpose of measuring out certain areas for rice cultivation.

Apparently between 1946 and 1953 the sea had receded sufficiently for the land to recover and to be in a fit state for cultivation.

The plaintiff had, however, decided not to cultivate this area of land or to depasture his cattle thereon in order to preserve the big bushes which were growing thereon and the new sea dam as an effective defence against the inroads of the sea.

During 1955 the defendants and others without the plaintiff's permission carried on rice cultivation on those lands—the undisputed lands.

It is of no little significance that no attempt has been made by any of the defendants or for that matter by any person to occupy or use the land between the public road and the new sea dam to the exclusion of the plaintiff. The explanations offered by the various defendants for their failure to occupy any part of this area are all unconvincing.

At the time of the alleged trespass the defendant Duncan was in occupation of an area of land 3 rods wide by 6 rods in depth situate north of the public road and commencing about 2 rods from the boundary between Good Hope and Ruby—the western boundary of Good Hope.

Duncan in evidence claimed ownership of an area of land 5 rods wide by 60 rods in depth north of the public road commencing from the western boundary of Good Hope.

In his affidavit Ex. "L " Duncan claimed ownership of this land by way of untransported gift in the year 1908 from one Rebecca Blackman whom he described as his godmother.

At the hearing of this action he abandoned that claim and put forward a claim to the land by virtue of possession thereof from 1917 to the present time.

The evidence disclosed that one Rebecca Blackman had been in occupation of that portion of land for some years prior to her death in 1910. At that time Duncan lived with his mother south of the public road at Good Hope.

After Blackman's death, Duncan's mother used to go upon the land to pick mangoes. She died in 1915.

Duncan resided in Georgetown where he worked from about 1910 to 1915.

In 1915 Duncan returned to live at Good Hope and would go onto the land formerly occupied by Blackman to cut wood. I believe Nash Griffith's evidence in this respect.

I also believe that from 1917 he did enter into exclusive occupation of that portion of land, cultivated it and reaped the produce and fruits from that land until 1935 when the inroads of the sea water on the land caused him to abandon any further effort to cultivate the land. Thereafter he carried on his cultivation on land south of the public road.

I do not accept Duncan's evidence that he made oral representations for the erection of a sea dam on the lands north of the public road in 1941.

When in 1946, the new sea dam was erected, the lands at any rate between the public road and the new sea dam became capable of use for cultivation and was so used in 1947 and for some years thereafter by the plaintiff who for 3 years rented that area of land to tenants for cultivation of provisions without protest by Duncan.

Duncan has agreed that Crissy Cole used the western half of that portion of land (which would include part of the land Duncan is now claiming) for grazing cattle and that he (Duncan) did not protest against this occupation. He also admitted that he knew that Cole was paying rent therefor to the plaintiff. He gave as his reason for making no protest "I did not know anything would come of the land. It was only a small bit of land."

I believe the plaintiff's evidence that when he purchased Good Hope in 1939 all the lands north of the public road were "abandoned" lands. Apart from Austin who lived there no one occupied or cultivated them.

No attempt was made by Duncan to reclaim or to use in any way any portion of the land he now claims. It was not; until the beginning of 1953 that Duncan and others took any action to recommence cultivation of any of the lands north of the public road. Then on 1st January, 1953, Duncan in his capacity as Chairman of the Farm Local Authority by letter addressed to the District Commissioner, West Demerara, made enquiries as to the possibility of the lands north of the new sea dam being put to use in the cultivation of rice.

To this letter Duncan received a favourable reply and it was only thereafter that Duncan and others measured and marked out certain areas of the lands north of the new sea dam for rice cultivation.

Duncan allotted to himself and has in 19SS cultivated an area of 3 rods by 6 rods commencing 2 rods from the western boundary of Good Hope.

That area of land is as Duncan has stated situate within that portion of land marked "1" on Buchanan's plan of 1842 Ex. "F". It would appear from that plan that that portion of land did not form any part of the 10 double lots laid out by Buchanan. Those lots are clearly lots a to k (there is no lot marked j) and the prolongation thereof northwards as delimited on that plan.

Mr. Manraj had in the course of his opening of the defendants' case submitted that Buchanan's plan of 1842 was prepared for the purpose of the passing of transport for the 10 double lots shown thereon to former slaves of the then owner of Plantation Good Hope, Sir Edward Cust, if that is so it would appear that the owner did not intend to part with that portion of land marked "1" and indeed no transport therefor by or on behalf of Sir Edward Cust can be traced in the Deeds Registry. There is no evidence that the portion of land marked "1" on Buchanan's plan Ex. "F" was ever sold or transported to any person other than to the successive owners of Plantation Good Hope or that title therefor has by operation of law or otherwise passed to any other person.

I have no hesitation on a consideration of the evidence given in this case in coming to the conclusion that Duncan did not until 1953 return to the land after he left it in 1935. I do not believe that at any time during that period Duncan cleared the land of weeds or bush or did any other act thereon in connection therewith. There can be no discontinuance of possession by absence of use and enjoyment where the land is not capable of use and enjoyment. *Leigh v. Jack* (1879) 49 L.J.Q.B. 220. Mere non user is not abandonment. But where one person goes out of possession and is followed by another in possession there is a discontinuance of possession by the person who goes out of possession. *Rains v. Buxton* (1880) 14 Ch.D. 537.

Between 1935 and 1945 the land was from the evidence not capable of use and enjoyment for cultivation of ground provisions or fruit trees; but became so during 1946 when the plaintiff entered into possession of the whole area between the public road and the new sea dam. Prior to this he had since 1939 and until 1946 grazed his cattle on the land north of the position where the new sea dam has since been erected.

It is stated at Halsbury's Laws of England (2nd Edition) Volume 20, page 745, at paragraph 1015:

> "If an intruder without title holds possession for less than the statutory period and then abandons possession and no other person immediately takes possession of the land, as there is no person against whom the rightful owner can bring an action the rightful owner is in the same position as if no intrusion had taken place, and although he is out of possession for the statutory period and another intruder subsequently takes possession but does not hold for the statutory period the title of the rightful owner is unaffected by the statute.

The passage cited above correctly states the decision of the Board of the Judicial Committee of the Privy Council in the case of the *Trustees, Executors and Agency Company (Limited) and anor. v. Shortt* (1888) 13 App. Cases 793.

In England by virtue of the provisions of section 27 of the Real Property Limitation Act, 1833, where possession is held for the statutory period

the title of the owner is extinguished; in this Colony until the provisions of the Title to Land (Prescription and Limitation) Ordinance. 1952 (No. 62 of 1952) were enacted a similar result did not follow. The result as stated in the passage cited above would be the same in this Colony where the intruder without title held possession for a period of less than 12 years and then abandoned it. But where the intruder without title held possession for over 12 years continuously, although the title of the owner was not extinguished, the latter could not by virtue of the provisions of section 4(2) of the Civil Law of British Guiana Ordinance. Chapter 7 (1930 Edition) bring an action or suit to recover the land after twelve years had elapsed from the time the right to bring or recover the same had accrued to him or to some person through whom he claimed.

If the intruder in such circumstances abandoned possession then in my opinion it would be necessary for the owner actually to re-enter into possession when he would be in the same position as if no intrusion had taken place. In this case the lawful owner, the plaintiff, actually entered into possession of the land after Duncan had abandoned possession of it. He was thereby deemed to be in possession of the portion of land on Buchanan's plan Ex. "F" designated as "1" when Duncan went upon it in 1953 to mark out and measure the lands and in 1955 when Duncan cultivated the portion he did.

In the result the plaintiff is entitled to succeed in his claim for damages for trespass against Duncan and to an injunction restraining Duncan from committing further acts of trespass on the area of land in question.

There will be judgment for the plaintiff against the defendant Duncan for the sum of $50:— for trespass and an injunction in the terms stated above with costs.

The defendant Wilson claims ownership of the land he was cultivating at the time of the alleged trespass by purchase from Arthur Joel Lynch.

In his affidavit Ex. "L2" Wilson has claimed that this area of land forms portion of the eastern half of lot "1" which was purchased in 1902 by Henry Lynch, since deceased, from Thomas Otto.

At the hearing, however, there was evidence led in an endeavour to establish that Thomas Otto was the owner of lot "1"—lot "k" on Buchanan's plan Ex. "F". But it was not proved that Henry Lynch purchased the land he occupied on the eastern half of lot "1" from Otto.

Indeed it was proved that the land Henry Lynch occupied was situate in that portion of land marked "1" on Buchanan's plan Ex. "F" for which no transport from any owner of Plantation Good Hope can be traced. There is no evidence that any part of that land was ever sold to anyone by any of the successive owners of Plantation Good Hope.

In 1927, Henry Lynch together with his wife and his son Arthur Joel Lynch left Good Hope and resided at Vergenoegen but Lynch's wife from time to time returned to the land to reap the fruit from trees growing thereon until 1941 when all of the fruit trees had died.

From 1941 until 1953 neither Henry Lynch's wife nor Arthur Joel Lynch ever returned to the land in order to see whether it could be of further use or to keep it clean. I do not believe the evidence in support of those allegations.

In 1953, A.J. Lynch purported to rent a portion of that land to Wilson and in 1955 purported to sell to Wilson a portion of that land.

Wilson, however, at the time of the alleged trespass occupied an area of land 3 rods in width by 40 rods in depth commencing 14 rods from the western boundary of Good Hope. This would place it within the lot k on Buchanan's plan Ex. "F". From the transport Ex. "M" dated 17th July, 1852, by Colin Simson Attorney of the Honourable Sir Edward Cust in favour of Brag Rae, it is clear that lot k after that date no longer formed part of Good Hope in the ownership of Sir Edward Cust.

While it seems clear that Henry Lynch did not continue in occupation of the land as it was impossible to do so by reason of the inroads of the sea water, it was possible for Arthur Joel Lynch or for Henry Lynch's wife to resume and continue occupation of that land from 1946, because the land had at that date again become capable of use and enjoyment. These both of them failed to do.

The plaintiff, however, as stated above in 1946 entered into possession of the lands north of the public road and extending up to the new sea dam. He had previously occupied the land north of where the new sea dam now stands prior to the erection of the new sea dam. The plaintiff's occupation in respect of the land Wilson occupied at the time of the alleged trespass was not referable to his title for Good Hope. That occupation did not continue after 1946.

Wilson therefore is not a trespasser in respect of the area of land he cultivated.

The plaintiff's claim against Wilson fails and must be dismissed. Wilson would have, in the ordinary course, been entitled to costs. In view of the fact that it has been sought to bolster his case by evidence of his solicitor which I regret I am unable to accept in respect of the contents of his (Wilson's) affidavit Ex. "L2", I have in the exercise of my discretion, declined to award him any costs.

The defendant McKenzie claimed ownership by possession of lots 11 and 12. He alleged in his affidavit Ex. "L3" that his paternal grandmother Miriam Crown had prior to her death intestate in 1902 occupied and cultivated those lots and had lived in a house she erected on the land; that from the time of Miriam Crown's death until his mother's death in 1922 his mother Margaret Barnwell had lived in Crown's house and had occupied and cultivated the lots; that from 1922 until 1942, he himself had exercised certain acts of ownership over the lots when because of the inroads of the sea he was unable to continue in occupation thereof. Thereafter until 1953 he would periodically inspect the lots and clear them of weed and bush.

From Duncan's evidence of the position of the various rice cultivations in 1955 which I accept, it appears that McKenzie was in that year cultivating rice on an area of land measuring 3 rods in width by 40 rods in depth commencing 20 rods from the western boundary of Good Hope. That would place this area within lot i on Ex. "F". Or if it falls within lot 6 as was suggested by Counsel for the plaintiff that would bring it either within lot i or lot k on Ex. "F". In either case that area falls with-in a lettered lot proved by the evidence to have at some time prior to 1955 been transported out of the ownership of the proprietor of Plantation Good Hope.

From the findings of fact I have already made the plaintiff was not in possession of the area in question for twelve years or over and was not in possession thereof at the time McKenzie entered thereon. As was stated by Counsel for the plaintiff the plaintiff's case rests on ownership by virtue of his transport for Plantation Good Hope.

In the result the claim against the defendant McKenzie fails and is dismissed with costs to the defendant.

The defendant Frank Little claims ownership of lot 14 by continuous and undisturbed possession in himself, his grandfather Frank Little and his father Charles Little commencing from some years prior to 1915.

Duncan's evidence, however, discloses that this defendant in 1955 occupied and cultivated an area measuring 6 rods in width by 25 rods in depth commencing 26 rods from the western boundary of Good Hope. This would place that area in lot i on Ex. "F".

For the reasons given for the dismissal of the plaintiff's claim against the defendant McKenzie, the claim against the defendant Frank Little fails and is dismissed with costs to the defendant.

The defendant George Simms defends the claim made against him by the plaintiff on the ground that permission to occupy the area of- land in question was given him by his wife Gladys Simms. Her claim to the land — referred to in the evidence as lot 18 — is based on continuous and undisturbed occupation by herself, her mother Elizabeth Lancaster who is still alive and by the latter's uncle one Philip Jackson from some years prior to 1915.

The evidence discloses that during 1955 the defendant Simms occupied and cultivated an area of land 3 rods in width by 15 rods in depth commencing 32 rods from the western boundary of Good Hope. That area of land would therefore according to the scale on Buchanan's plan be lot h. There is no evidence that lot h has ever been sold or transported by any of the proprietors of Plantation Good Hope or title therefor has ever by operation of law or otherwise passed to any other person.

The credible evidence discloses that Elizabeth Lancaster did occupy that lot for some nineteen years before the inroads of the sea caused her to relinquish possession of the lot in or about 1935. Thereafter neither she nor anyone else on her behalf ever sought to cultivate or occupy the lot until 1953. I do not believe that between 1935, when Elizabeth Lancaster, the defendant Simms and his wife went to live at Vergenoegen, and 1953, either the defendant Simms or his wife or Elizabeth Lancaster or anyone on their behalf ever returned to the land to pick coconuts or any other type of fruit or to clear the lot of weed or bushes or to clear the drainage trench. I do not believe the evidence of any of the witnesses in this respect. I find that Elizabeth Simms abandoned possession of that lot in or about 1935.

For the reasons I have given above in dealing with Duncan's case, the lot formerly occupied by Elizabeth Lancaster was after its abandonment by her and subsequent entry into possession by the plaintiff deemed to have returned to the possession of the plaintiff by virtue of his ownership by transport as if no intrusion had ever taken place.

When the defendant Simms entered upon the land in 1953 and cultivated it in 1955 he was therefore a trespasser.

There will be judgment for the plaintiff for $50 against the defendant Simms with an injunction in the usual terms restraining further acts of trespass with costs to the plaintiff.

Certified fit for Counsel in respect of costs awarded to both plaintiff and defendants.

Solicitors: A. G. King for plaintiff.
O. M. Valz for defendants.

KOWLA PERSAUD, *et al.* v. THE QUEEN.

(In the Court of Criminal Appeal, on appeal from the Supreme Court (Stoby and Phillips JJ., and Miller, J. (acting); September 30; October 6, 7, 1955; February 11, 1956.)

Criminal Law—Murder—Evidence of witness for prosecution—Differing from depositions—Tendering of Depositions—Effect of discrepancies—Inadmissible portions of depositions not read to jury—Prejudicial effect—Judge's duty to exclude.

Dying declaration—Principles governing admission.

Murder—withdrawal of verdict of manslaughter from jury—No evidence of provocation, self-defence or accident—malice—Several accused acting with a common design.

At the trial of the four appellants for the murder of one Chetty one of the prosecution witnesses R gave evidence of his seeing the deceased on the ground and of seeing the four appellants running in a northernly direction. On being cross-examined by counsel for the appellant Dilmohamed the witness said that he did not hear the deceased say anything at the time and that he did not call the deceased's name when he got to him. The deposition of that witness records him as saying to the magistrate "I went up to Chetty. I called his name. Chetty said "Me go dead now. He told me Gutter dem lick am". On the application of counsel for Dilmohamed that the entire deposition of the witness be read to the jury the trial judge permitted the deposition to be read to the jury with the statement "me go dead now. He told Gutter dem lick am" omitted. The trial judge did not think the statement alleged to be made was made in circumstances which rendered it admissible as a dying declaration.

The judge directed the jury that other than acquittal of each of the accused, the only other possible verdict was that of murder. The appellants were convicted of murder.

On appeal it was contended (a) that the trial judge erred in not admitting the statement as a dying declaration and in causing it to be omitted from the deposition of the witness read to the jury; (b) the trial judge erred in withdrawing the verdict of manslaughter from the jury.

Held: (1) The trial judge applied the correct principles in deciding whether the statement was admissible as a dying declaration and on the evidence it cannot be said that his conclusion that it was inadmissible as such was wrong.

(2) If the only purpose for producing the deposition was to contradict the witness the inclusion or omission of the words "Gutter dem lick me'' was immaterial for the crux of the matter was that in the magistrate's court he had sworn that the deceased spoke to him and at the trial he was denying that; the existence of a discrepancy was brought prominently before the jury and their minds fully directed to the change of evidence.

(3) Where a deposition contains words which are inadmissible it is the duty of the trial judge to exclude them from admission in evidence before the jury. Further, the judge was justified in preventing the jury from hearing something which was prejudicial to one accused and not in favour of the other accused.

(4) Had the statement been admissible the fact that it was pre judicial to one accused would be no ground for rejecting it.

(5) On the evidence the judge was right in withdrawing a verdict of manslaughter from the jury.

Convictions affirmed.

Per Curiam : "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." Reg.—v—Wilkinson (1955) Cr. Law Review 575 referred to and applied.

J.O.F. Haynes for appellant Kowla Persaud.
E.V. Luckhoo for appellant Dil Mohamed.
F.Ramprashad for appellant Dyal Singh.
L. A. Luckhoo, Q.C., for appellant Pooran.
G.L. B. Persaud, Solicitor General (acting) for respondent.

Judgment of the Court: The four appellants Kowla, Persaud, Dilmohamed, Dyal Singh and Pooran after a trial lasting ten days were convicted of murder by a jury on the 25th March, 1955.

The deceased was a watchman named Muthu Chetty employed at Plantation Lusignan a sugar estate on the East Coast of Demerara.

On Thursday the 5th August, 1954, in company with another watchman named Kadir they proceeded to a specified part of the estate. Their mission was to prevent anyone destroying the estate's irrigation system and to ensure that cattle did not enter the cultivation and cause damage. The watchmen having made a survey of the area they were to watch were sitting and smoking. The time, which is but a rough estimate, was about 5 to 9 p.m. The four accused, according to Kadir, approached them each carrying a stick or iron rod. The appellant Kowla Persaud asked Kadir whether he was watching the area and on receiving a reply in the affirmative, he and the appellant Pooran began to beat Kadir while Dilmohamed and Dyal Singh attacked and beat the deceased.

In an effort to escape from the fury of the onslaught, Kadir ran towards the back of the estate pursued by his original assailants leaving the others assaulting the deceased. After running for about 25 rods he fell and had the presence of mind to lie still and pretend that life was extinct. While in that position the appellant Pooran said "you rass stand there dead noh carry no tales". Kowla Persaud and Pooran then ran back in the direction of the deceased.

In the meanwhile three other watchmen attracted by the shouts of Kadir arrived on the scene. It is the evidence of two of these watchmen Hossein and Rambajan which has given rise to several of the grounds of appeal argued before us and therefore it will be convenient now to consider the submission made with regard to Hossein's evidence.

At the trial Hossein said that he heard Kadir shouting and ran in direction from which the shouts were coming. He found Kadir bleeding. Kadir spoke to him and then he (Hossein) ran in a northerly direction and saw the four appellants beating the deceased.

His deposition was tendered and he is recorded as saying before the Magistrate "Rambajan and I ran towards where Muthu Chetty was. I saw all four accused running from where Muthu Chetty was towards the train line."

The witness Rambajan on this phase of the case said at the trial "I heard a shout and ran north and saw Kadir running towards me: we met and he told me something and I "made a noise". I went further north. Hossein was behind me. I saw deceased lying down; I saw the four accused running. Hossein ran past me and went further north."

His deposition was tendered and it appears that in the Magistrate's Court he said "Hossein and I ran towards where Muthu Chetty (deceased) was, about 2 5 rods away. As we got there I saw the four accused running away from where Muthu Chetty was".

Mr. Haynes for Kowla Persaud submits that in view of what Hossein told the jury as contrasted with what he told the Magistrate at the preliminary inquiry the Judge should have directed the jury that Hossein's evidence where he said he saw the four accused beating the deceased should be disregarded and then he should have left it to them to decide without that portion of Hossein's evidence whether there was a common purpose. The case of *R. v. Harris* (1927) 20 C.A.R. 144 was cited in support of this submission. The head-note to Harris' case reads:

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

The facts in that case were that a witness for the prosecution had given a statement to the police in which certain allegations were made. At the trial she denied the allegations and the Judge deemed her a hostile witness and allowed her to be cross-examined on the police statement. In summing up he told the jury that the result of her varying statements was to make her a negligible witness.

On the facts of that case, it was essential for the Judge to so direct the jury as in her statement to the police she had asserted that the accused had committed an offence against her whereas in the witness box she was swearing that he had not harmed her. To prevent the jury thinking that her unsworn statement was evidence, the Judge told them to treat her as a negligible witness and decide the case on the testimony of the other witnesses who had given evidence against the accused.

In the present case the witness Hossein had given evidence at the preliminary inquiry that he saw the four accused running from the direction of where the deceased lay. His evidence at the trial that he saw them beating the deceased could either be untrue or be true but not mentioned

before due to faulty recollection. Assuming it was untrue, it did not make him a negligible witness nor could the whole evidence be discarded. It was essentially a question of fact for the jury who could have treated that portion of his evidence as false and accepted the remainder or who were entitled to accept the whole of his evidence if satisfied with the reason he gave for not saying it in the Magistrate's Court or who might have rejected the whole of his evidence because of the discrepancy. Certainly, it is not the law and Harris' case did not so decide that once discrepancies are established, the Judge should tell the jury to discard the witness' evidence.

The Judge, we find, correctly directed the jury when he said —

> "I must say a word, too, about contradictions either in the evidence of a particular witness or contradictions between what one witness has said and what one or more other witnesses have said — and those have figured quite prominently in the course of this case. It is for you, gentlemen, to make up your minds as to what is in fact the effect of a contradiction where you find that a contradiction does in fact exist. You will have to ask yourselves 'does the fact that this contradiction exists show that one or other of the witnesses, or a particular witness, is saying what is untrue ?' If you find that that is so, well, then you will of course disregard the evidence of that particular witness in the respect in which you find he is not speaking the truth".

As all the other grounds of appeal or for leave to appeal were abandoned, this appellant's conviction and sentence are affirmed.

With regard to the remaining appellants, the grounds of appeal can be summarised under two heads which were exhaustively argued on behalf of all of them. We think it unnecessary to refer in this judgment to the other grounds as we indicated during the argument that in our opinion they were without merit. The first of these two grounds is that the

> "Judge erred in ruling against the admissibility of certain words in the deposition of the witness Rambajan (Page 89 of Record) namely: "Gutter dem lick me" which words were excluded from the deposition of the said Rambajan when they were relevant to and had an important bearing on several issues before the Jury, and by reason of the said exclusion the Jury were deprived of considering a portion of the evidence of the said Rambajan given at the Preliminary Enquiry which might well have influenced them to come to a verdict different from the one they found."

It was conceded that whether evidence ought to be admitted as a dying declaration is a question for the Judge whose discretion will not be interfered with if exercised Judicially. In this case, however, the submission was that the Judge took extraneous matter into consideration which must result in his decision being open to review.

It is necessary to examine the record in order to see what the Judge's ruling was and how it came about that he was required to rule.

It appears from the record, pages 40 to 44, that the witness Rambajan gave evidence of hearing Kadir the watchman shout, of running in his direction, of seeing the deceased on the ground and of seeing the four appellants running in a northerly direction. After he was cross-examined by Counsel for Kowla Persaud, Mr. Collymore, Counsel for Dilmohamed cross-examined him and the witness said:

> "I did not hear deceased say anything at the time. I did not call deceased's name when I got to him."

After receiving those answers Mr. Collymore requested the Judge to direct the jury to withdraw as he wished to make a submission regarding the admissibility of what the deceased is alleged to have said to Rambajan in the absence of the accused. On referring to the deposition, the Magistrate has Rambajan as saying:

> "The accused all ran towards the train line. I went up to Chetty. I called his name. Chetty said me go dead now. He told me Gutter dem lick am".

Those were the words which Mr. Collymore wished to put to the witness Rambajan when he asked for the jury's withdrawal. The Judge permitted the jury to withdraw and Mr. Collymore submitted that the evidence was admissible as (a) a dying declaration and (b) part of the *res gestae.* After the Judge had heard the other Counsel in the case including Counsel for the Crown he ruled that the evidence was inadmissible and the deposition was read to the jury with the words "Me go dead now.'" "Gutter dem lick am", omitted.

As the omission of those words was in the interest of the appellant Kowla Persaud, we invited Mr. Haynes to address us on the objection taken to their exclusion. Mr. Haynes submitted that the trial Judge was misled into going into the question of whether the words were a dying declaration or not as the whole purpose of tendering the deposition was to contradict the witness Rambajan and not to obtain evidence of what the deceased said.

In reply to this argument. Mr. E. V. Luckhoo contested the statement that Rambajan's deposition was being tendered merely to contradict him and asserted that the purpose of the cross-examination was to get the witness Rambajan to admit that the deceased had used those words and thereby obtain evidence favourable to his client.

From the course the arguments took, both in this Court and at the trial we are convinced that the request to tender the depositions was for the purpose of contradicting Rambajan. We will, however, consider the point on the assumption that either statement may be correct.

Sections 79 and 80 of the Evidence Ordinance Chapter 25 contain the procedure to be adopted when Counsel wishes to cross-examine a witness on a statement made at the trial inconsistent with a previous statement in writing. These provisions are taken from the Criminal Procedure Act 1865. Sections 5 and 6 which were enacted to prevent the cross-examining party being compelled to prove the written document before he could cross-examine on it. At Common Law unless the witness admitted the previous statement his answers had to be taken and no cross-examination was permitted on the statement unless it was proved in evidence. This procedure affected the order of speeches and could deprive Counsel for the defence of the final speech. The Criminal Procedure Act 1865 allowed cross-examination on the previous statement such as a deposition, without showing it to the witness, though, if it is intended to contradict him, then it must be shown to him and be tendered. *R. v. Riley* 4 F and F 964.

We might mention here that by reason of section 145, Chapter 18 the Criminal Law (Procedure) Ordinance, in British Guiana. Counsel for the

Crown has the right to reply in every case and consequently it is immaterial whether the defence leads evidence or not as the order of speeches is unaffected.

The provisions referred to above, show that depositions can be tendered (and could have been tendered at common law) to contradict a witness and to that extent and subject to what we say hereunder the depositions are evidence. When therefore Mr. Collymore cross-examined Rambajan and asked him whether he had heard the deceased say anything and the witness replied that the deceased had not said anything, Mr. Collymore must have wished to contradict the witness by producing the deposition to prove that the witness had said in the Magistrate's Court that the deceased had spoken to him. This is borne out by the first paragraph of the Judge's ruling in which he said:

> "At the preliminary inquiry this particular witness is recorded in the depositions as having said, first of all. that he called the name of the deceased. In this court he denies doing so. He is further recorded in the depositions as saying that the deceased said to him "me go dead now" and then, that the deceased went on and told him, calling the name of one accused and adding so and so accused "them lick me" and then he stopped talking. In this court he has denied that the deceased said anything to him."

If then the only purpose for producing the deposition was to contradict Rambajan the inclusion or omission of the words "Gutter dem lick am are immaterial, for the crux of the matter was that in the Magistrate's Court he had sworn that the deceased spoke to him and in the Supreme Court he was denying that. The existence of a discrepancy was brought prominently before the jury and their minds fully directed to the change of evidence.

It was said, however, that the Judge had no discretion to exclude those words even if they were not admissible and the case of *R. v. Riley (supra)* was the authority in which reliance was placed. In Riley's case evidence given by the witness at the trial was not in the deposition and Counsel wished to comment on that fact without tendering the deposition. The Judge ruled that the deposition should be put in so that the whole of it may be read. He added "Then it will appear how far the suggested contradiction exists, and the absence of a particular statement may be explained by the context". Put in another way, it is not for Counsel to allege a contradiction without giving the jury an opportunity of reading the evidence on which the allegation is made. The jury may not agree with the inference drawn by Counsel and can only decide facts if they are apprised of the facts. Riley's case then is no authority for the proposition that if inadmissible evidence is in the depositions the jury must nevertheless hear it. On the other hand, it is a well established principle that even when evidence is admissible the Judge can exclude it if its weight is slight and its prejudicial effect great.

We have no doubt that if the words were inadmissible the Judge was right and indeed it was his duty to exclude them. If the words were admissible different considerations apply and we turn now to decide this question of their admissibility and whether if admissible, the deposition could have been used as proving what the deceased said.

Counsel for each appellant agreed that the Judge in deciding whether the words alleged to be used by the deceased was a dying declaration or

not stated the correct principle of law but misapplied the principle in relation to the facts proved. Especially, criticism was directed to the Judge's statement that the words "Me go dead now" are a very common expression and one frequently used in Court and that the words cannot always be interpreted as meaning that the person using the words in fact believes he is at the point of death.

In *Rex v. Perry* (1909) 2 K.B. 697 where the Judge at the trial admitted a statement as a dying declaration as he had no doubt that it was such a declaration, he certified the case as fit for an appeal in order to give the Court of Criminal Appeal, then recently established, an opportunity of laying down the principle upon which the admissibility of evidence of such statements ought to be considered.

In the course of its decision, the Court said at page 703 —

> "It is for the judge at a trial to admit as evidence a statement made by a deceased person for whose murder the prisoner is being tried if he thinks the statement was a declaration made in circumstances which render it admissible."

And again —

> "We are of opinion that the right view is that in determining whether a declaration is admissible in evidence the judge at the trial ought to consider whether the death of the deceased was imminent at the time the declaration was made and to determine from the language used by the deceased whether the statement was made at a time when the deceased had "a settled hopeless expectation of death".

In this case the Judge applying the correct principles did not think the statement alleged to be made was made in circumstances which rendered it admissible and we are not disposed to differ from the view he expressed.

Although, in deference to the arguments addressed to us we have applied our minds as to whether the words were a dying declaration or not an important circumstance must not be overlooked. The witness Rambajan never said or wished to say that the deceased told him anything if the Judge had held the evidence admissible as a dying declaration and permitted the depositions to go in undiluted, he would have had to explain to the jury that there was no evidence that the deceased used the words attributed to him. The case of *Rex v. White*, 17 Cr. App. Rep. 60 decided that the previous statement while useful in contradicting a witness, could not be used as evidence of the truth of the statements therein contained. Were Mr. Luckhoo's arguments to prevail the result would be that when prosecution witnesses retracted what they told the police, as they often do, then if the Judge deems them adverse then the previous statements could be put to them and the jury invited to choose between sworn evidence and unsworn evidence. Such is not the law and consequently Rambajan's deposition containing the words alleged to be used by the deceased, could not be treated by the jury as evidence that the deceased had said something which no one at he trial said he had uttered.

This being so, the Judge was justified in preventing the jury from hearing something which was prejudicial to one accused and not evidence in favour of the other accused.

We said earlier that different considerations would apply if the evidence omitted was admissible. By that we mean that had Rambajan

desired to give evidence of what the deceased said to him, then if those words were admissible the fact that they were prejudicial to one accused would be no ground for rejecting them.

That we have shown was not the position here, for Rambajan never said that the deceased spoke to him and never wished to say that he spoke to him.

The other ground was that the possible verdict on the evidence of manslaughter was withdrawn from the jury.

The judge directed the jury that other than acquittal of each of the accused, the only other possible verdict was that of murder.

At pages 149—150 the trial Judge in his summing up when dealing with the subject of malice in relation to murder, told the jury: —

> "Malice being an abstract matter, something which is not capable of positive proof in most cases, except where you have express malice, it must be implied and it is for the jury to say whether from the circumstances they may reasonably imply the existence of malice on the part of a person charged. I should tell you that it is the law that the jury may imply malice from a deliberate cruel act committed by one person on another. If you feel that it is a deliberate act and it is a cruel act then the law says you may imply that malice existed in the mind of the person who did that act.
>
> That is closely allied to another principle that a man is presumed in law to intend the natural and probable consequences of his act. If you do find that one of the accused persons did in fact administer to the deceased a blow which fractured his rib and brought about the rupture of his spleen well, the law would say that you can say that person who did that must have intended to bring about an injury of such a nature because a blow, in order to cause that injury, must be delivered with some degree of force and you may feel that the person delivering that blow must have intended to cause either grievous bodily harm or death to the person;—in other words, that he must have intended that were the reasonable and probable consequences of that particular act of administering that blow. *But you must be satisfied of the existence of malice before a verdict of guilty may be returned."*

And at page 152 the Judge continuing said:

> "If, however, you find that one of the accused only used violence—
> I will use that expression as it is a convenient one—on Muthu Chetty and that from the nature of the act itself you may imply malice then, because there is no question of provocation, or self-defence, or accident, if you find that one accused would be guilty—if you find that you may imply malice—and the guilt of any of the other accused would depend on whether you find that there was a common design; a pre-concerted plan; a joint enterprise between the one accused using the violence and any of the other accused persons."

It is settled law that if several persons act together in pursuance of a common intent every act done in pursuance of that intent by each of them is in law done by all—as where a body of men beat a constable, some with sticks, some with fists, some by throwing stones and he died from the aggregate violence. *R. v. Macklin* (1838) 2 Lewin 225: 168 E.R. 1136

The question therefore was in this case what was the common design. There were no express words so the common design must be inferred from the circumstances. What therefore were the circumstances? These can be gleaned from the evidence of Kadir, the other watchman who was also attacked and beaten and from the evidence of the witness Hossein, who apparently was the first to arrive on the scene. Their evidence appears at pages 20 and 33 of the record as follows: —

> "After getting the lashes I got up and ran towards the Estate (back dam). While I was running I was shouting. After I had run about 25 rods, I fell. Accused No. 1 and Accused No. 4 were behind me and beating me as I ran. The distance I ran before I fell is about from witness stand to far end of court green (on east). After I fell I 'play dead'. Accused No. 4 took the iron rod and 'canted' me three times. Accused No. 4 then said 'You rass dead you stand there, dead nah carry no tales'. Accused No. 1 started to run back in the direction where deceased was and Accused No. 4 followed Accused No. 1. When I saw that Accused No. 1 and Accused No. 4 had gone a good way I got up and ran and made a lot of noise. My bags and raincoat and hat were left where deceased and I had been sitting.
>
> While running (after Accused No. 1 and Accused No. 4 had gone away) I met Mohamed Hossein (Yassin) and Rambajan on the west side line dam — they were running coming towards me: they are both watchmen. Hossein is the 'driver'. They ran up to me and I spoke to them; they then left me and ran in the direction of deceased.
>
> Have known Accused No. 1 since I was a small boy living at Mahaicony Creek. Accused No. 2 was adopted into our family since he was a small boy (we are not related). Accused No. 3, I have seen him working about the estate for about 4 years. Known Accused No. 4 since he was a small boy; he grew up on the estate. The 'morest' work the four Accused do is fishing *i.e.* their main occupation is fishing.
>
> I know Accused No. 4 has cattle on the Estate.
>
> None of the accused held on to each other.
>
> I lost my senses when I reached the 'Nigger Yard' and when I 'catch myself I was at P.H.G. I was in Hospital for about 8 days. When I came out of Hospital I went to Vigilance Police Station where the Police showed me Ex. "B" (raincoat)—it was given to me by Overseer Irwin.
>
> When deceased and I were sitting down that night deceased had khaki drill trousers, shirt, hat and a 'woolly, woolly jacket' also a sugar bag, a lantern (Ex. D identified) and an old towel (Ex. F). Deceased also had a stick. Ex. H. ("part of stick) does not resemble a part of the stick that deceased had."

Hossein said —

> "I was then about 25 feet from deceased (indicates distance)—the accused were actually lashing deceased with sticks and iron rods when I hollered to them. They ran north."

If their evidence is accepted, the following facts emerge —

(1) The two watchmen who were sitting down on the dam were attacked simultaneously by the four appellants who had sticks

or iron rods. No. 1 and No. 4 beating Kadir who ran. No. 2 and No. 3 beating deceased who did not and. from the nature and extent of the attack, could not run.

(2) That Kadir "played dead" and No. 4 "canted" him three times and said *you rass dead you stand there, dead nah carry no tales.* Whatever interpretation may have been placed on those words, the interpretation could reasonably be that he had been beaten to a state of senselessness if not taken to be dead by No. 1 and No. 4.

(3) That No. 1 and No. 4 thinking Kadir speechless and senseless or possibly dead, returned (some 25 rods) to assist in beating the deceased—in that state of mind.

(4) If Hossein's evidence is accepted on this important aspect that he Hossein leaving Kadir on the ground bleeding and running further on the dam saw each of the four appellants beating the deceased (including No. 1 and No. 4).

(5) Then it is not an unreasonable inference to draw that during the time that No. 1 and No. 4 had chased Kadir 25 rods and retraced their steps to the spot where the two appellants (No. 2 and No. 3) who had been simultaneously beating the deceased *had continued to do so* if Hossein when he arrived saw all the four of the appellants beating the deceased.

(6) From the injuries the doctor stated the deceased received no doubt while on the ground (for that was the position in which he was seen when first attacked and that was the position in which he was last seen) it could hardly be conceived that the obvious intent in the minds of Nos. 1 and 4 accused was any different from that in the minds of Nos. 2 and 3 accused while that continuous assault on the deceased took place—*i.e.* to do grievous bodily harm. One may be presumed to intend the natural consequences of one's acts.

There was therefore no room, on the evidence, for any finding of fact by the jury that these appellants had an intent to do violence of any less degree than what they manifested. Consequently it was not incumbent on the Judge and immaterial if he did or did not direct the jury as to a possible verdict of manslaughter by violence occurring while in the commission of an unlawful act—that of a mere assault and death resulting *in the absence of malice,* when the evidence could not be whittled down merely to support such a finding.

> "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."

Reg. v. Wilkinson (1955) Cr. L.R. 575.

Thus it was immaterial to consider whether the jury was properly directed on this question.

The appeals are accordingly dismissed and the convictions affirmed.

Appeals dismissed.

Solicitor:

Miss E. A. Luckhoo for appellant Pooran.

COLLYMORE v. THE ARGOSY CO., LTD. *et anor*

(In the Supreme Court (Bollers, J. (ag.)) September 18, 19, 20; October 1, 1956).

Libel—Judicial proceedings—Statement made by prisoner from dock during trial—Publication—Not fair nor accurate—Malice implied.

The defendants published of and concerning the plaintiff the following:

TRACTOR OPERATOR ACCUSED OF KILLING PARAMOUR"

"Objects to Way Case Being Handled by Junior Counsel"

" Gerard King, a 24-year old tractor operator, who is accused of murdering his former sweetheart, Marie Alleyne, at Mackenzie on April 1 last, objected as to the manner in which junior counsel was conducting the case on his behalf yesterday morning before Mr. Justice Clare, at the Demerara Assizes.

The accused intimated to the Court that he had retained Mr. J. O. F. Haynes to defend him at the trial but Mr. C. H. Collymore has been appearing. He wanted Mr. Haynes to do his case as he was not satisfied with the manner in which junior counsel was carrying out his duties."

The plaintiff alleged that the words were defamatory and that the defendants meant and were understood to mean that the accused was dissatisfied with the conduct of his case by the plaintiff and that the plaintiff did not conduct the case properly. The plaintiff claimed that in consequence he had been seriously injured in his credit and reputation and in the way of his profession as a Barrister-at-law and had been brought into public scandal, odium and contempt.

The defendants raised two defences:—

(a) that the words of the publication are not capable of bearing a defamatory meaning and were not understood to bear any of the meanings claimed by the plaintiff :

(b) that the publication was not published falsely nor maliciously and was a fair, accurate and contemporaneous report of a judicial proceeding.

Held: (1) the statement was defamatory of the plaintiff and was understood to bear the meanings claimed by the plaintiff.

(2) a statement made by a prisoner from the dock in the course of his trial is a statement made in a judicial proceeding.

(3) The onus was on the defendants to prove that the report was a fair and accurate report of proceedings in open court and if the defendants failed to prove this the plaintiff was entitled to succeed no matter how honestly it may have been published. In such circumstances malice would be inferred and need not specifically be proved by the plaintiff. The defendants having failed to prove that the report was fair and accurate the plaintiff was entitled to judgment.

Judgment for the plaintiff.

John Carter for plaintiff.

C. V. Wight with *B. O. Adams* for defendant.

Bollers J.: In this case the plaintiff seeks to recover damages for an alleged libel contained in the "Daily Argosy" newspaper of which the first-named defendant company is the proprietors; the second-named defendant is the Editor.

The plaintiff is a Barrister-at-law and in January, 1956, had appeared for the defence associated with Mr. J. O. F. Haynes, Barrister-at-Law, in the case of The Queen v. Gerard King indicted for murder and tried by a jury at the Demerara Assizes held at the Victoria Law Courts, Georgetown, presided over by His Lordship Mr. Justice Clare. The plaintiff had come into the matter through the instrumentality of Mr. Haynes who had retained him as junior Counsel in the case.

At the commencement of the trial, Mr. J. O. F. Haynes associated with the plaintiff entered appearance on behalf of the accused and had

been present in Court for a few minutes, after which he left the Court in order to conduct the defence in another trial for murder presided over by Mr. Justice Miller. The plaintiff was left alone to conduct the defence in the case of The Queen v. Gerard King and continued to do so up to Friday, 27th January, after the trial had been in progress for three days. Up to this time Mr. Haynes had made only one appearance at the trial for a period of one hour when he actually took part in the conduct of the defence.

On the morning of the 27th January, 1956, as soon as the Court had assembled for the commencement of the proceedings on that day and after the Judge had taken his seat and the jury checked, the accused who had remained standing in the dock addressed the learned Judge and made a statement from the dock which is now the subject matter of dispute in this action.

As a result of what the accused stated to the Judge the Judge sent for Mr. Haynes. On Mr. Haynes' arrival the learned Judge addressed Mr. Haynes in open Court and asked Mr. Haynes what was his position with regard to the accused. Mr. Haynes replied to the Judge and further exchanges then took place between the learned Judge and Mr. Haynes. As a result, the Court was then adjourned to 1 p.m.

At the resumption the last witness for the prosecution. Dr. Nehaul, gave evidence and was then cross-examined by Mr. Haynes. After the accused made an unsworn statement from the dock in his defence, Mr. Haynes then addressed the jury.

On the following day, 28th January, 1956, in an issue of the "Daily Argosy" there appeared the following publication under the caption—

"TRACTOR OPERATOR ACCUSED OF KILLING PARAMOUR"
"Objects To Way Case Being Handled By Junior Counsel"

"Gerard King, a 24-year-old tractor operator, who is accused of murdering his former sweetheart, Marie Alleyne, at Mackenzie on April 1 last, objected as to the manner in which junior counsel was conducting the case on his behalf yesterday morning before Mr. Justice Clare, at the Demerara Assizes.

The accused intimated to the Court that he had retained Mr. J. O. F. Haynes to defend him at the trial but Mr. C. H. Collymore has been appearing. He wanted Mr. Haynes to do his case as he was not satisfied with the manner in which junior counsel was carrying out his duties."

This publication purports to be a report of events that took place before His Lordship Mr. Justice Clare in his Court on the previous day.

The plaintiff on reading the publication at the commencement of the proceedings of the court on 30th January, 1956, made a complaint in open court to His Lordship Mr. Justice Clare. The plaintiff in paragraph 3 of his statement of claim alleges—

"On page 4 (four) in columns 7 and 8 of the issue of the said newspaper dated Saturday, January 28, 1956, under the heading "Tractor Operator Accused of Killing Paramour" "Objects to way case being handled by Junior Counsel", the defendants falsely and maliciously printed and published or caused to be printed and published of the plaintiff and of him in the way of his profession and in relation to his conduct therein the following words:—"Gerard King,

a 24-year-old tractor operator, who is accused of murdering his former sweetheart, Marie Alleyne, at Mackenzie on April 1 last, objected as to the manner in which junior counsel was conducting the case on his behalf yesterday morning before Mr. Justice Clare, at the Demerara Assizes." And in paragraph 4 further alleges:

> "By the said words the defendants meant and were understood to mean that the accused was dissatisfied with the conduct of his case by the plaintiff and that the plaintiff did not conduct the case properly."

Paragraph 5 of the statement of claim states:

> "The plaintiff has in consequence been seriously injured in his credit and reputation and in the way of his said profession and has been brought into public scandal odium and contempt."

The defendants in their defence after admitting that the first-named defendants are the proprietors and publishers of the "Daily Argosy" and that the second-named defendant is the editor of the said newspaper and that they published the article, both in their pleadings and at the trial raised two defences—

> (1) that the words of the publication are not capable of bearing a defamatory meaning and were not understood to bear any of the meanings alleged in paragraph 4 of the statement of claim or any other meaning defamatory of the plaintiff ;
>
> (2) that the publication was not published falsely and maliciously and is a fair, accurate and contemporaneous report of a judicial proceeding.

The actual words used in paragraph 5 of the defence which raise the first defence are—

> "5. The defendants deny that the said words set out in paragraph 3 of the Statement of Claim bore, or were understood to bear or are capable of bearing any of the meanings alleged in paragraph 4 of the Statement of Claim or any other meaning defamatory of the plaintiff."

There have been many definitions both Judicial and Text Book of a defamatory statement. In the case of *Scott v. Sampson* (1882) 8 Q.B.D. Cave, J., defined a defamatory statement as "A false statement about a man to his discredit." The learned author of Fraser on Libel and Slander, 6th Ed. puts it this way—

> "A defamatory statement is a statement concerning any person which exposes him to hatred, ridicule or contempt or which causes him to be shunned or avoided or which has a tendency to injure him in his office or trade."
>
> Halsbury's Laws of England, 2nd Ed. Vol. 20 at para. 403 states—"A statement which being published of another in the way of his lawful trade, business, profession or office conveys a reflection on him calculated to disparage or injure him therein is a defamatory statement, even though it be not calculated to hold him up to hatred, contempt or ridicule."
>
> This definition is not satisfied
>
> (1) unless there is a reflection on the plaintiff himself, and
>
> (2) unless the statement is published of the plaintiff in the way of his trade, business, profession, calling or office.

Again at paragraph 495—

"A statement reflects on another in the way of his trade, business, profession, calling or office if it imputes to him the want of some general requisite therefor, as honesty, capacity, fidelity or the like or connects the imputation with the plaintiff's trade, business, profession, calling or office."

Thus in *Botterill v. Whytehead* (1879) 41 L.T. 588, it was held to be a libel on an architect actually employed to do certain work to write that he has no experience in the work in which he was so employed. In *Sim v. Stretch* 52 T.L.R. p. 669, the test applied was whether the words complained of would tend to lower the plaintiff in the estimation of right thinking members of society generally.

The question whether a particular publication can be construed as a libel is a question of law for the judge.

"It has been stated over and over again and it is not in dispute, that the question for the judge is whether the writing or publication complained of is capable of a libellous meaning. It is for the jury if the judge so rules to say whether it has that meaning"—Per Viscount Dunedin in *Tolley v. Fry* (1931) A.C. 333.

In this Colony where there is no jury Camacho, C.J., in *Woolford v. O. W. Bishop* (1940) L.R. B.G. stated—

"On this aspect of the case the single duty which devolves on this court in its dual role is to determine whether the words are capable of a defamatory meaning and, given such capability, whether the words are in fact libellous of the plaintiff. If the court decides the first question in favour of the plaintiff, the court must then determine whether an ordinary, intelligent and unbiassed person reading the words would understand them as terms of disparagement, and an allegation of dishonest or dishonourable conduct. The court will not be astute to find subtle interpretations for plain words of obvious and invidious import."

Lord Selbourne in the case of *Capital and Counties Bank v. Henty* (1882) 7 A.C. p. 741, laid down the law as follows:

"The test according to the authorities is whether under the circumstances in which the libel was published, reasonable men to whom the publication was made would be likely to understand it in a libellous sense."

Lord Blackburn in the same case in the course of his judgment states: "The question is not whether the defendant intended to convey that imputation, for if he without just cause or excuse did what he knew or ought to have known was calculated to injure the plaintiff he must at least civilly be responsible for the consequences."

The defendant has a right to have the whole of the publication read from which extracts are set forth in the statement of claim.

When I read the whole of the publication and I apply the principles of law as set out above the Court holds without hesitation that the words in their plain and ordinary meaning are capable of bearing a defamatory meaning, and do in fact bear a defamatory meaning and considers them an imputation on the plaintiff's competency and capacity to conduct the defence in the case of The Queen v. Gerard King. To state in the subhead-line—

"Objects to way case being handled by junior Counsel" and in the subsequent paragraph of the publication—

> "Accused objected as to the manner in which junior counsel was conducting the case on his behalf."

and also—

> "He wanted Mr. Haynes to do his case as he was not satisfied with the manner in which junior counsel was carrying out his duties,"

means, must be taken to mean, and does in fact mean that in the article the defendants were publishing that the accused was saying that he was not satisfied with the manner in which the plaintiff was conducting the case and carrying out his duties. He wanted Mr. Haynes to do his case as the plaintiff was not competent to do so and he was not satisfied with the manner in which junior counsel was carrying out his duties.

An innuendo is necessary only when the words in their natural and ordinary meaning are meaningless or innocent and become defamatory only by reason of special circumstances. When however I apply the above principles of law to the innuendo in this case which is sufficiently narrow I find that the words are capable of bearing and do in fact bear the meaning ascribed to them in the innuendo in the plaintiff's statement of claim. To allege that the accused objected to the way his case was being handled by junior Counsel and to assert that the accused wanted Mr. Haynes to do his case as he was not satisfied with the manner in which junior Counsel was carrying out his duties, can and does mean that the accused was dissatisfied with the conduct of his case by the plaintiff and that the plaintiff did not conduct the case properly.

Counsel for the defence cited a passage from Lord Blackburn's judgment in *Capital and Counties Bank v. Henty* where he repeats the dictum of Brett, L.J., in the same case in the Court of Appeal—

> "It is unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document."

Counsel argues that the words can mean that the accused could have been dissatisfied with the manner in which the plaintiff was carrying out his duties for a variety of reasons, for instance, that the plaintiff did not cross-examine a witness sufficiently or to the satisfaction of the accused. In my view if this is so, the publication should go on to say so. When I apply the principle as laid down by Brett, L.J., I can find no good interpretation to be placed on the words.

The plaintiff actually led the evidence of two witnesses who were asked the question by Counsel what they understood the words complained of to mean. They replied that they understood the words to mean that the plaintiff was not a competent and good lawyer. This evidence was not objected to by Counsel for the defence.

> "The proper course for Counsel who proposes to get rid of the plain and obvious meaning of the words imputed to the defendant as spoken of the plaintiff is to ask the witness, *not* 'what did you understand by these words?' but 'was there anything to prevent these words from conveying the meaning which obviously they would convey?', because if there was, evidence of that may be given and then the question may be put."—See *Daines v. Hartley*

(1915) 31 T.L.R. 480. Their evidence on this issue was plainly inadmissible, and in considering the application of the principles of law set out to the facts as I have found them. I rejected the evidence of these two witnesses on this issue and have not taken it into consideration.

I turn now to the second defence of the defendants which in the pleadings was inelegantly drawn and during the course of the proceedings was amended to read as follows: Paragraph 4 of the defence states:

> "As for paragraph 3 of the Statement of Claim, the defendants admit that they published the said article but they deny that they did so falsely and/or maliciously and they say that the said report was fair, accurate and contemporaneous and is a report of Judicial Proceedings publicly heard in the Supreme Court of British Guiana."

Where there are judicial proceedings before a properly constituted judicial tribunal exercising its jurisdiction in open Court, the publication, without malice, of a fair and accurate report of what takes place before that tribunal is privileged.

Fair and accurate reports whether in a newspaper or elsewhere of the public proceedings of any Court of justice are conditionally privileged by the Common Law.

It appears to me that the first question to be considered is whether the report in this case is a report of judicial proceedings. This is a report of words alleged to have been used by the accused to the Judge from the dock and not on oath at the commencement of the proceedings on the 27th January, 1956, after the third day of the trial.

> "It is an established principle, upon which the privilege of publishing a report of judicial proceedings is admitted to rest, that such report must be strictly confined to the actual proceedings in court and must contain no defamatory observations or comments from any quarter whatever in addition to what forms strictly and properly the legal proceedings."—

Gatley on Libel and Slander, 4th Ed. p. 306.

In *Delegal v. Highley* (1837) 3 Bing M.C. 950 it was held that an interruption by the chief clerk is not reportable as the observation was not made in the course of any judicial proceeding by anyone whose duty called upon him to make it.

In *Ryall v. Leander* (1866) L.R. 1 Exch. 296 it was laid down that the test is what occurred in court.

In *Lynam v. Gowring* (1880) L.R. Ir. 259 it was held that an irrelevant interruption by a bystander was not reportable.

In *Hope v. Leng* (1907) 23 T.L.R. 243. it was held that a remark made by a litigant in court though not in the witness box was reportable. Collins, M.R. in his judgment stated:—

> "I am not prepared to hold that an observation made by a litigant in a case when he was not actually in the witness box could not be reported without risk of liability on the part of the reporter, if it was in fact made in court in the course of legal proceedings. It may be that a more liberal view of the immunity of reporters is taken than in former times. The law has accommodated itself to prevailing conditions and common sense is allowed a larger share in determining the right of parties to litigation of this sort. It was a comment made by

him when he was still under the obligation of the oath. It would be too nice to exclude from the privilege accorded to fair reports a report of an observation made under these circumstances."

In the more recent case of *Farmer v. Hyde* (1937) A.E.R. p. 773, this passage from the judgment of Collins, M.R., was quoted with approval by Slesser, L.J., and where a report of legal proceedings containing an application made to the judge by a stranger to the action who had been criticised in the opening and in the evidence it was held by the Court of Appeal to be a "Fair and accurate report of a proceeding publicly heard before a court exercising judicial authority", within the meaning of section 3 of the Law of Libel (Amendment) Act, 1888, which supplemented the Common Law and gave to newspapers what is felt to be absolute privilege of a fair, accurate and contemporaneous report of judicial proceedings.

Slesser, L.J., in the course of his judgment states:

"Now I ask myself, this admittedly being a fair and accurate report was it a report of proceedings publicly heard before any court? With regard to that a number of cases was cited to us, the effect of which appears to me to be this, that whenever something is done in the course of proceedings which is in any way related to the proceedings as such, and can be done in the proceedings that may properly be said to be "proceedings publicly heard" and a report of it may be said to be protected."

I find that what the accused said on the morning of the 27th January, 1956, in the case of The Queen v. Gerard King formed part of the proceedings in Court and on the authority of the recent decisions I hold that a report by a newspaper or other publication of what was said by the accused under these circumstances would be a report of judicial proceedings publicly heard.

I now come to consider whether the report was fair, accurate and contemporaneous. As to the latter there can be no doubt, the former presents more difficulty. The learned author of Gatley on Libel and Slander at pages 300 and 315 states:

"In order to be privileged the report must be a fair and accurate account of what took place in court. It is not necessary that it should be verbatim ……..The real question for the jury is not whether every word in the report is accurate but whether taken as a whole it is a substantially fair and accurate report of what took place in court."

"In the case of a newspaper report the jury ought to take into consideration the fact that the report does not come from the hands of a trained lawyer, but from a person whose function it is to make the report in order that the public may read it the next day."

Again at page 312 the learned author states:

"The onus is then on the defendant to prove that the report is a fair and accurate report of proceedings in open court; but it is sufficient if this clearly appears from the plaintiff's own evidence. If the defendant fails to prove that the report is fair and accurate, the plaintiff is entitled to succeed, however honestly it may have been published. If the defendant succeeds in proving that the report is fair and accurate, it is *prima facie* privileged and the plaintiff will only succeed if he can prove that the defendant is actuated by malice."

It is necessary therefore for me at this stage to examine the evidence in order to see whether the defence has discharged the burden of proof placed upon them to show that the report is fair and accurate or whether by the plaintiff's own evidence it can be said that the report is a fair and accurate one.

The defence led the evidence of four witnesses, three of whom were jurors in the case of The Queen v. Gerard King and one who was the prison officer in charge of the accused. None of these witnesses I consider gave satisfactory evidence.

Reginald Paul de Corum admitted under cross-examination that he had been asked to give evidence for the defence on the 13th September. 1956, and that when he sat as a juror he did his best to put the facts of the case out of his mind as soon as the case was finished. It was patently obvious that when the witness gave evidence he was trying to recall what happened in court more than seven months ago and in doing so failed hopelessly. At the relevant point he states in examination in chief —

> 'After that the judge came in at about 9.05 to 9.10 a.m. After reading his notes I heard the judge say if my memory is right 'I understand someone wants to exhaust my patience.' The accused asked the court if he could be assisted to get back his money which he paid Mr. Haynes, as he was seeing Mr. Collymore representing him and he is not satisfied with the way he is conducting his case. The accused spoke some more which was indistinct. The judge then repeated what the accused said to him. The judge told the accused 'You mean you are not satisfied how Mr. Collymore is conducting your case.' Accused replied 'No I am not satisfied.' The judge then spoke to Mr. Collymore and also to the Crown Counsel Mr. Miller."

Under cross-examination the witness went on to say —

> "I was hazy when I stated what the judge said after the accused complained but when I said what the accused said I was not hazy. When the complaint was made by the accused the accused did not speak in a clear voice. I gathered what the accused said. The judge spoke in a clear voice. I could hear him clearly but I only have a hazy recollection of what the judge said. I remember what was mumbled by the accused. I did not hear the accused complain as to the absence of Mr. Haynes. At no time did I hear that, that morning."

In the next breath the witness states —

> "I did hear the judge tell Mr. Haynes that the accused had complained about his absence. The substance of the complaint of accused was that he had retained Mr. Haynes and had paid him and he was continually absent."

It is clear to me that on that evidence the witness did not appreciate and could not remember the events of that morning and to adopt his own words he "gathered what the accused said."

George Brummel appeared to find the proceedings amusing. His examination in chief of what the accused is alleged to have said is but a mere paraphrase in reported speech.

> "He objected to Mr. Collymore handling the case really. Accused said that he had hired Mr. Haynes and that he wanted Mr. Haynes to appear for him because Mr. Collymore was not handling the case

properly and he did not want Mr. Collymore to appear for him. Accused was mad, excited and vexed when he made this complaint against Mr. Collymore.

Under cross-examination the witness goes on:

"It was after Mr. Collymore failed to ask this witness questions that accused became annoyed. I can't remember what time this was the Judge did tell Mr. Haynes that the accused King had objected to Mr. Collymore appearing for him. Accused stood up and spoke. He said he did not want Mr. Collymore to appear for him. Accused said 'I don't know what this man is doing here. I did not pay him to appear for me. I want Mr. Haynes, and I paid Mr. Haynes to appear for me. This man is not doing anything for me. He is no good."

When the statement of this witness in examination in chief is compared with his statement under cross-examination it will be seen that the substance of the complaint by the accused was that he had paid Mr. Haynes and wanted Mr. Haynes to appear for him, and not that he was dissatisfied with the manner in which the plaintiff was performing his duties.

The third juror to give his evidence was Leopold D'Anjou, whose occupation was omitted in his examination in chief. It is the normal procedure that this evidence is led in examination in chief. But it was only in cross-examination that it came out that he was an employee of the defendant company for the past 25 years. This fact, although not enough to cause his evidence to be discarded entirely, was sufficient to excite the suspicion of the Court, and to cast some measure of doubt on his evidence after the fact had been suppressed.

In the relevant portion of his evidence he states —

"I heard the prisoner say as the court rose at 9.10 a.m. in a passion-able way 'I don't like the way this man here is conducting my case. This man is no good; I want back my money from Mr. Haynes.' His Lordship then enquired as to what the accused was saying and the judge then asked him to repeat the words and the accused did so. The accused then said "This man is no good. I gave Mr. Haynes my money and I want back my money."

According to this witness, the accused repeated the offending words on two occasions. This fact is missing from the evidence of the other witnesses for the defence. Under cross-examination the witness stated that as Mr. Collymore was about to cross-examine the witness in the box he could not remember if Mr. Collymore asked any questions. He then changed his evidence and stated that Mr. Collymore asked the witness two questions. Under further cross-examination the witness states that the accused said "This man is not conducting my case properly," which words are quite different from the words which the witness alleged in his examination in chief that the accused had used. One is left in a state of doubt as to what the accused did in fact say. The witness goes on to say under cross-examination:

"I can't remember hearing the judge tell Mr. Haynes that the accused had said that he did not like the way in which Mr. Collymore was conducting the case. I can't remember hearing the judge say to Mr. Haynes that the accused had complained about his absence. I can't remember anything that the judge said to Mr. Haynes."

It appears to me strange that the witness cannot remember the exchanges that took place between Mr. Haynes and the Judge and yet he purports to remember the first part of the incident so clearly. I formed the impression that this witness had carefully rehearsed what evidence he was going to give in this case.

Eric Facey, the prison officer, was the remaining witness for the defence and on the relevant point his evidence is as follows:

> "The accused Gerard King was standing in the dock. As soon as the judge took his seat, Gerard King then rose to his feet and said 'My Lord, I don't like how this man is conducting my case. He is not even cross-examining the witnesses and I have retained Mr. Haynes.' He spoke in a vexatious manner."

The witness did not answer the question put to him by Counsel for the defence "What about the defence?" Under cross-examination the witness stated that he was first asked to give evidence in this case two weeks ago and that it was true that the accused complained about Mr. Haynes being absent. The witness stated that the accused spoke to the Judge as soon as the Judge sat down and Mr. Collymore did not speak before the accused spoke.

> "The judge should have heard what the accused said as he spoke clear enough for the judge to hear. Accused stood up and addressed standing from the dock as far as the defence was concerned. The accused said this man is not good he is only holding a pencil in his hand. In answer to the court the witness stated that he never heard anyone say 'is someone going to exhaust my patience now?" I can't remember quite clearly what the Judge told Mr. Haynes."

Here again this witness could not remember the exchanges that took place between Mr. Haynes and the learned Judge, yet he purports to explain what took place earlier in the order of events. The manner and demeanour of the witnesses for the defence was not convincing and I could not and did not accept their evidence. Counsel for the defence asked the question, "Why should these witnesses give perjured evidence?" It appeared to me that these witnesses were all present in Court at the relevant time, and completely misconceived what did in fact take place and with faulty memory were trying to reconstruct the incident. After the accused stated that he had retained Mr. Haynes and had paid him, and wanted him to conduct the defence, and had complained about his continued absence at the trial, the witnesses formed the conclusion that because of this dissatisfaction by the accused over the absence of Mr. Haynes the accused was not satisfied with the manner in which the plaintiff was conducting the defence and carrying out his duties. Counsel for the defence himself asked the Court to draw what he termed the only reasonable inference from the facts that because the accused was dissatisfied with Mr. Haynes over his continued absence it necessarily followed that he was not satisfied with the manner in which the plaintiff was carrying out his duties. In my view, it follows neither as a matter of law, nor as a process of logic and sound reasoning that because the accused was dissatisfied with Mr. Haynes over his continued absence he was necessarily not satisfied with the manner in which the plaintiff was performing his duties.

On examination of the plaintiff's evidence I have searched in vain to find any portion of evidence on which I could find that he is not a witness

of truth. The plaintiff gave his evidence in a most straightforward, honest and convincing manner and at times was rather restrained.

The plaintiff in his evidence states:

> "Accused told the judge that he had retained Mr. Haynes and Mr. Haynes had promised to assist me in the conduct of the defence and Mr. Haynes had not been doing so."

The plaintiff states categorically —

> "The accused said nothing at all about me, he did not mention my name. The accused did not object to my conduct of the case."

In keeping with his consistency of conduct after reading the publication on 28th January, 1956, the plaintiff made a complaint to the Judge on 30th January, 1956, and drew the publication to the attention of the learned Judge. Under cross-examination the plaintiff with a touch of modesty states:

> "In my opinion it was a bad case. It was the type of case that needed an experienced counsel……Accused said 'I have retained Mr. Haynes and he promised to help with the defence and he has not been coming'."

The evidence of the clerk of court Mr. Michael Akai corroborates the plaintiff's evidence that the substance of the complaint of the accused to the learned Judge was that he had paid Mr. Haynes and retained Mr. Haynes for the defence and he was not satisfied that Mr. Haynes had been continually absent at his trial. This is the note that the witness made in the crown book.

Mr. Akai states:

> "When Mr. Haynes came I do not think that the accused said that he was dissatisfied over the way Mr. Collymore was conducting the case. I cannot remember the Judge telling Mr. Haynes that the accused had complained that he was dissatisfied with the manner in which the plaintiff (Mr. Collymore) was conducting the case. This did not happen as far as my recollection goes."

Under cross-examination this witness stated that he thought the Judge did say that Mr. Collymore who had been conducting the defence had been placed in an unenviable position.

> "I can't remember particularly the judge saying that the accused had expressed dissatisfaction with the manner in which his interests had been represented. As far as I remember when I asked the accused why he wanted to speak to the judge he told me that he had retained Mr. Haynes and not Mr. Collymore and Mr. Haynes had been more absent than present. He said that he wanted Mr. Haynes and not Mr. Collymore and Mr. Haynes had promised to be present and was not there and his case was finishing."

It is clear from the evidence of this witness that the complaint of the accused was that he had retained Mr. Haynes and wanted him to conduct his defence and not Mr. Collymore. From this, it does not follow that he was dissatisfied with the manner in which the plaintiff was performing his duties, nor did he express such dissatisfaction. Counsel for the defence suggested that Mr. Akai took the briefest notes and as an act of discretion he might have refrained from making any note of a complaint by the accused as to the manner in which the plaintiff was performing his

duties. If this is so, then the moment the incident was recalled to the mind of the witness I would have expected him as an officer of the court and a witness of truth to have remembered it.

Although it was urged on this Court that the weight of evidence on this issue was in favour of the defence, I find that this is only so as far as the number of witnesses are concerned and not as to the quality of the evidence. The nature of the quality of the evidence was such that it could not be accepted.

A significant feature of the evidence presented by the defence on this issue is the failure by them to produce as a witness the reporter who is alleged to have taken down and recorded the proceedings in Court. He is conspicuous by his absence. One would have expected that he would have been called as a witness to say that he had witnessed the events in Court on the 27th January, 1956, and had heard what the accused said:to the judge and had recorded it, and the report in the newspaper on the 28th January, 1956, was a fair and accurate report. He would then have been made available for interrogation by the plaintiff's Counsel in order to find out the sources of his information, and whether this report was obtained by first hand or second hand knowledge.

I find that the defence has failed to discharge the burden of proof placed upon them in showing that the report in the Daily Argosy of the 28th day of January, 1956, was a fair and accurate report of judicial proceedings publicly heard. On examination of the plaintiff's evidence. I do not find that this clearly appears from his evidence and on the contrary I make the specific finding that the report is unfair, inaccurate and untrue. At paragraph 570 of Halsbury it is set out that —

> "If the defendant does not satisfy the judge that the occasion was privileged the plaintiff is not called upon to prove actual malice because in such a case the law implies malice from the falsity of the statement."

It follows therefore that it can be inferred and I do in fact infer from the falsity of the statement that the publication by the defendants was actuated by malice.

Malice in this connection means not only spite or ill will but any improper wrong or indirect motive other than a sense of duty which induces the defendant to defame the plaintiff. The learned author of Clarke and Lindsell on Torts, 11th Ed. p. 816 quotes the dictum of Lord Esher, M.R., in the *Royal Aquarium Society vs. Parkinson* (1892) 1 Q.B. 431 —

> "The question is whether the defendant is using the occasion honestly or abusing it. If a person on such an occasion states what he knows to be untrue no one ever doubted that he would be abusing the occasion ..... "

I consider now the question of damages which the plaintiff is entitled to have assessed in his favour in this action. The plaintiff in an action of libel need not allege or prove that he has suffered damage if he has been libelled without lawful justification or excuse. He is entitled to such general damages as the jury can properly find, though he neither alleges nor proves special damage, and in any case to at least nominal damages for the injury to his right of reputation. The plaintiff has neither alleged nor proved special damages. Counsel for the plaintiff has invited me to find that greater injury has been and will be done by the publication of this

libel to the reputation of the plaintiff, as a young practitioner, than if he were an older and more experienced practitioner of many years standing. Happily for us, in these modern times, publications of this nature are easily and soon forgotten. Counsel has submitted that the defendants by their conduct in cross-examining the plaintiff as to his experience at the Bar both in the United Kingdom and in this Colony have aggravated the damages in an attempt to justify and substantiate the libel. I do not accept this submission and take the view that this line of cross-examination was directed at the plaintiff in keeping with the defence that the report was fair, accurate and contemporaneous. Counsel relies on the dictum of Lord Esher in *Praed v. Graham* (1889) 24 Q.B.D. 53, which states:

> "It is a rule of law in actions of libel that the jury in assessing the damages is entitled to look at the whole conduct of the defendant from the time that the libel was published down to the very moment of their verdict."

and points out that the defendants have neither published a correction of the false and erroneous and defamatory statement nor have they offered an apology. I accept this latter submission by the plaintiff's Counsel and taking all the circumstances into consideration 1 award the sum of $480,00 as damages jointly and severally against the defendants and direct that they should pay the plaintiff's taxed costs. I certify fit Counsel.

Solicitors :

H. V. Gunning for plaintiff.

A. G. King for defendants.

PETITION OF WASON FOR DECLARATION OF TITLE

(In the Supreme Court (Luckhoo, J.), September 28, October 31, 1956).

Prescriptive title—Adverse possession—Marriage in community of goods—Survivor not trustee for heirs of deceased spouse.

The facts are as set out in the judgment.

Held: Where persons are married in community of property, the community comes to an end on death of one of the spouses and the right to the inheritance of the spouse who has died vests in the heirs. The surviving spouse is not one of the heirs and if he remains in possession of the inheritance he does so as a stranger and not as a co-proprietor nor trustee either express or implied.

Gravesande v. *Burrowes et al* (1921) *L.R.B.G. p.* 95 *applied.*

The question whether possession is adverse depends on what is the character of the defendant's possession as a matter of right.

Muthunayagan v. *Brito* (1918) *A.C.* 895, and

Littledale v. Liverpool College (1900) 1 Ch. 19 C.A. *applied.*

John Carter for petitioner.

Sugrim Singh for opposers.

LUCKHOO, J.: The petitioner is the surviving spouse of Julia Wason, born Deamon, to whom he was married in 1911. Julia Deamon was the daughter of Rebecca King with one Deamon and was born prior to Rebecca King's marriage to Domingo King. Rebecca King died in or about the year 1900.

Subsequent to Rebecca King's death Domingo King married Margaret King who survived him. Domingo King died on 20th March, 1907, testate and by his last will and testament dated 6th June, 1905, and deposited

with proof of due execution on the 16th March, 1908, in the Registrar's office (now Supreme Court Registry) he devised to his son Napleton Alexander King, the west half of lot No. 63, Kitty, the subject matter of this petition together with the four rooms in three buildings situate on the land referred to in the will as houses No. 1, 2, 3 and 6. To his wife Margaret who has since died, Domingo King bequeathed his furniture and a life interest in house No. 2; to Julia Deamon he bequeathed house No. 4 and to Amanda Adella King house No. 5.

At the time of his death there were four buildings situate on the land. One building contained houses Nos. 1 and 2 and another houses Nos. 5 and 6. Houses Nos. 3 and 4 were separate buildings. After Domingo King's death Julia Deamon resided in house No. 4 which Napleton King permitted her to retain on the land. House No. 3 was sold in 1909 by Napleton King and shortly thereafter removed by the purchaser. The building containing houses Nos. 1 and 2 was in 1911 demolished by Napleton King while the building containing houses Nos. 5 and 6 was also demolished, the materials therefrom being utilised by Amanda King in constructing a house in Sandy Babb Street, Kitty. The petitioner has stated that this building was demolished in 1910 or 1911 but it would appear from the fact that Amanda King was one of the persons who in 1916 entered opposition to the levy by George Norton on the land and the buildings thereon that house was not demolished until after April 1916. In 1911 Julia Deamon married the petitioner and with him continued to live in her house (which was later rebuilt) until her death in 1942. Since her death the petitioner has continued to live in that house up to the present time.

Napleton King at the time of his father's death resided on the land and continued to do so until 1910 when he went to Brazil. On his return from Brazil in 1912 he worked for some time in the interior of this Colony. Occasionally during that period he would return to Kitty and whenever he did so he resided with Julia Wason and the petitioner in the former's house on the land. At that time one Albertha Marshal Napleton King's paramour lived in Wason's house. Later on Napleton King worked at the Department of Public Works in Georgetown and resided with Julia Wason and the petitioner until 1921 except for some period in 1917 when he resided at Nog Eens, East Coast, Demerara.

In 1921, the petitioner permitted Napleton King to reside rent free in his house situate at lot 42 Kitty.

In 1924, Napleton King commenced to live with Margareta Weather-head, then a spinster, as man and wife and in 1932 he married her. After marriage they continued to reside in petitioner's house at lot 42, Kitty until 1939 when because of the bad condition of the house they went to reside in a house owned by Mrs. Emily Clarke. It appears from the evidence that Napleton King had not the means wherewith he could erect a house on the land in dispute.

Napleton King died in 1940, intestate. Julia Wason died on 21st August, 1942, intestate and without issue. Letters of Administration of her estate dated 17th October, 1952, were granted to the petitioner. The deceased's estate was valued at the date of her death at $400.

The petitioner has sought a declaration of title to the land on the ground that he and his wife have been in continuous, peaceful and undisturbed possession of the land for a period of over 42 years.

Napleton's wife, Margareta, bore him six children, all of whom are alive. In 1946 she married Joseph Weatherhead. She has opposed this petition on the following grounds —

(a) that the petitioner's occupation of the land has not been undisturbed ;
(b) that the petitioner's wife undertook to pay the rates levied on the land from time to time and to keep the land clean and in consideration of that undertaking Napleton King permitted her to remain on the land rent free, and that the petitioner himself after his wife's death occupied the land on those terms;
(c) that the opposer is legally entitled to the land as the widow of Napleton King.

It does not appear from the evidence who paid the rates levied upon the land by the local authority, the Kitty and Alexanderville Country District, during the years 1908 to 1910. The land was, prior to the death of Domingo King in 1907, assessed in his name as owner in the books of the local authority and has continued to be so assessed up to the present time.

From 1911 and until 1950, the rates levied on the land have been paid either by Julia Wason or on her behalf by the petitioner. In 1951 and thereafter the opposer has paid either the whole or part of the rates.

The reason why Julia Wason paid the rates during the lifetime of Napleton King appears to be as stated in evidence by the petitioner —

> "I and Julia Wason and Napleton King lived very well together. It is through his sister Julia that Napleton allowed us to remain on the land. As Napleton King did not appear to bother about the land, Julia Wason his sister and I decided that we would pay the rates in order to save the place from being sold at execution."

In this connection it must be borne in mind that Napleton King resided with Julia Wason on the land until 1921 and thereafter until 1939 he resided in the petitioner's house at lot 42, Kitty.

In the light of such evidence it is difficult to see how it could successfully be claimed that Julia Wason's possession of the land became adverse to Napleton King by virtue of her payment of the rates.

It has also been suggested by the petitioner that Julia Wason claimed to be entitled to remain on the land after Domingo King's death by virtue of her ownership of a part or share thereof as one of the heirs of her mother Rebecca King, Domingo King's first wife.

The argument of Counsel for the petitioner is, as I understand it, as follows. There is no evidence that Rebecca King and Domingo King were married by ante-nuptial contract so it is to be presumed that they were married in community of goods. On Rebecca's death, Domingo was entitled to one half part or share of the land and buildings thereon and Rebecca's heirs who included Julia were entitled to the remaining one half share.

> As was stated by the learned Burge in his Commentaries on Colonial and Foreign Law, Volume 3, page 425 —
>
> "Though at the death of either of the spouses the community came to an end, one estate was left to which the survivor, together with the next of kin of the predeceased, was entitled. If there were children of the marriage and the marriage property had been held in joint

ownership by the spouses, it remained joint property between the survivor and the children. If there had existed between the spouses community of property in the sense of holding in common, the children, or other next of kin of the predeceased spouse inherited half the common property and remained owners in common with the surviving spouse until division."

It has been pointed out in *Natal Bank v. Reed* (1910) A.C. 570 that in the absence of custom or enactment, the continuation of this community could not be allowed by the general law of Holland, because it was at variance with the common law of partnership.

In *Gravesande v. Burrowes et al* (1921) L.R. B.G. at p. 95 it is stated that in this Colony neither by the common law nor by statute law has the principle of a "real continuing communion" of property between a surviving spouse and the heirs (whatever their degree) of the predeceased ever prevailed. Where the community comes to an end on death of one spouse, the right to the inheritance of the spouse who has died, namely her one-half share of the common property, vested upon her death in the heirs. The husband is not one of those heirs. If therefore he remained in possession of the inheritance he did so as a stranger not in any sense as a co-proprietor. He was not an express trustee for the heirs or an implied trustee.

However, in the present case it would appear that both Domingo King and Julia Wason were in occupation of the land until the former's death in 1907 when the latter continued in occupation along with Napleton King. If Julia Wason were in fact entitled to a part or share in the land as an heir of her mother then with Domingo King and thereafter with Napleton , King she would be a co-parcener. Now possession by one co-parcener is presumed to be for the joint benefit of other co-parceners. *Phillips v. Dublin* (L.J. April 27, 1912) following *Corea v. Appuhamy* (1912) A.C. 230 unless ouster is shown (See *D'Aguiar v. Obermuller* (1948) L.R.B.G. 68).

Possession is never considered adverse if it can be referred to a lawful title. This rule or referring possession to a lawful title was applied by the Privy Council in *Corea v. Appuhamy* (1912) A.C. 230. In that case a brother entered into possession of lands of which he and his brothers were co-owners by inheritance *ab intestato.* It was held that his title was that of a co-parcener and his possession, therefore, that of his co-owners and J that there had been no ouster or anything equivalent to ouster which in the circumstances of the case could not be presumed. In that case it was stated that "the principle recognised by Wood, V.C., in *Thomas v. Thomas* (1855) 2 K. & J. 79, holds good; possession is never considered adverse if it can be referred to a lawful title."

In *Milner v. Brightwen* (1809) 10 East 583 a party who had taken possession of copy holds on the death of his wife, by an adverse title, lived more than twenty years afterwards, and it was then found that there was an old custom of the manor by which he had a right to courtesy. It was held that his possession was therefore referred to that title which was consistent with the title of the other party.

The rule of referring possession to a lawful title was again applied by the Privy Council in *Muthunayagan v. Brito* (1918) A.C. 895 where it was held that the question whether possession is adverse depends on what was the character of the defendant's possession as a matter of right.

In determining the sufficiency of a possession it must be considered with reference to the peculiar circumstances. The suitable and natural mode of using the property which might reasonably be expected to follow must be taken into account. *Kirby v. Cowderoy* (1912) 81 L.J.P.C. 222. In every case the possession which will cause time to run against the owner involves an *animus possidendi* that is an occupation with an intention of excluding the owner as well as other persons; and such a possession must be shown unequivocally by the petitioner. (See *Littledale v. Liverpool* College (1900) 1 Ch. 19 C.A.).

Is there in the present case any evidence of ouster on the part of Julia Wason? In other words, was there a change in the character of Julia's possession? As was held by Romer, J., in *Tinker v. Rodwell* (1893) 9 T.L.R. 657, the onus of proving a change lies on the person asserting that such a change has been made. An examination of the circumstances does not enable me to fix a date for any such change.

Further, if it is true that Julia Wason was by operation of law entitled as one of the heirs of her mother to a part or share in the land then it is not competent for this Court to make a declaration of title on the ground of adverse possession in respect of the whole of the land for Julia and consequently the petitioner would be entitled under an existing legal title to a share in the land.

At paragraph 2 of this petition it is stated that Domingo King was the owner by transport dated 7th March, 1863, of the west half of lot 63 east of Queen Street—the land now in dispute. It is also to be observed that there is no evidence as to whether there are any surviving heirs of the other children of Rebecca King. In the absence of such evidence the quantum passing to the petitioner under any existing legal title cannot be accurately determined.

Mr. Carter for the petitioner urged that the payment of the rates by Julia Wason or by the petitioner on her behalf was evidence or such ouster even though payment was made in the name of Domingo King (deceased). I do not agree. Nowhere in the evidence given by the petitioner or in the circumstances of the case as a whole can that inference of ouster be drawn.

On this point I have not overlooked the evidence given by the opposer that in 1924 after some difference arose between them Napleton King told the petitioner to remove his house off the land and that the petitioner did not do so.

I was not impressed with this evidence and indeed the petitioner has not alleged that there was any such difference between himself and Napleton King.

Reference should be made to the levy made on the land and all the buildings and erections thereon in 1916 by George Norton in respect of a debt alleged to be owed him by Napleton King. That levy was opposed by Julia Wason and Amanda Adella King. They subsequently followed the levy by a writ against Norton. The levy was by Order of the Court dated 5th January, 1917, declared bad and the opposition entered to be just, legal and well-founded.

There was tendered in evidence Conditions of Sale No. 48/1917 dated the 2nd April, 1917, in which it was stated that pursuant to a writ of execution granted by the Chief Justice on the 17th February, 1916, on the petition of George Norton in behalf of himself versus Napleton King, the Reg-

istrar will expose for sale to the highest bidder firstly, an undivided forty-one ninety-sixth (41/96) part or share in the land and an undivided forty-one ninety-sixth (41/96) part or share in and to the buildings and erections thereon; secondly, one one-storey building (unfinished) on wooden blocks on the said land, the sole property of the defendant. It is stated that Antonio de Freitas purchased the property for the sum of $105.00.

The petitioner has stated that with the knowledge and consent of Napleton King he had arranged with Antonio de Freitas that de Freitas-should buy that portion of the property for him for $100; that he had paid de Freitas $90 on account of that sum; that title therefor had never been passed to de Freitas because he had died soon after the sale and that consequently title had never been vested in him (the petitioner).

Mr. Carter and Mr. Sugrim Singh expressed the view that this levy and sale does not in any way affect the question now sought to be determined and I am inclined to agree with that view in the circumstances of this case. The petitioner has been unable to explain how a levy came to be made on an undivided 41/96th part or share in the land and buildings. A. possible explanation is that Napleton King considered that he owned 41/96th part or share in the land and buildings thereon and it was by such token that a levy was made by Norton on that portion only. In that event, after the sale there would be no right, title or interest in or to the land existing in Napleton King. De Freitas would have been entitled to receive letters of decree for the portion he had purchased at execution sale holding the same as trustee for the petitioner who would be in effect the beneficial owner of that portion and therefore entitled to possession. Possession thereafter by him could not be adverse to Napleton King nor to anyone else.

However, whatever the true position was, the petitioner appeared to regard Napleton King as the legal owner of the land even after 1917, hence his claim to a declaration on the ground of adverse possession. The opposer considered that Napleton King remained the legal owner to the date of his death.

I was not impressed with all of the evidence given by the opposer. I. however, accept her evidence corroborated by that of Mrs. Emily Clarke that Napleton King shortly before his death reaped fruits from trees growing on the land and cleaned the yard and dug drains therein. I also accept the opposer's evidence that in 1942, after Julia's death, she asked the petitioner to remove his house from the land and that he agreed to do so as soon as his financial position had improved. It was in 1949 for the first time that the petitioner told the opposer that he had purchased the land and had sold it to one Sam.

In 1950, it would appear that the opposer became apprehensive that the land would be put up for sale at execution for non-payment of rates. She thereupon paid the rates due for that year as well as the whole or part of the rates for succeeding years.

From the foregoing it is clear that the petitioner has failed to show *adverse* possession of the land in his wife and in himself for an aggregate period of 30 years or over or for that matter for 12 years or over.

One further point which in my opinion puts the petitioner out of Court is his payment in the name of Domingo King, deceased, for his wife and after her death on his own account of the rates levied by the local authority on the land. Each payment of the rates 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 the heirs of Domingo King — Napleton King and after his death to his wife and their children (assuming that they retained any interest in the land after the execution sale to de Freitas)—because the petitioner's wife and the petitioner preserved the property by annual payments of rates thereby placing themselves in the same position as if they were paying an annual rent. (See Petition of Albertha Cadogan, (1955) L.R.B.G. 4.

For the several reasons given above the petition must be dismissed with costs fixed at $50:—

Solicitor: H. B. Fraser for petitioner.

SERRAO v. WIDDUP

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Holder, C.J., and Luckhoo, J. (ag.) May 7, 18, 25 and November 23, 1956).

Rent restriction—Landlord and tenant—Contractual rent—Assessment of premises—Maximum rent fixed—Contractual tenancy not determined—Notice of increase not given—Whether maximum rent can be demanded.

W. the tenant of premises of which S. was the landlord paid a contractual rent of $75:—per month. On application of S. the maximum rent was fixed by the Rent Assessor at $88.17. After the assessment W. continued paying rental of $75:—per month. No notice to quit nor notice of increase of rent payable was given by S. to W. S. filed a claim for $118.53 being the difference between the maximum rent and the contractual rent for 9 months. The Magistrate dismissed the claim.

S. appealed to the Full Court against the decision of the Magistrate.

Held: (i) The object of the provisions of section 7 (24) (b) of the Rent Restriction Ordinance, for the sending by the Rent Assessor of certificates of the standard rent, or the maximum rent, as the case may be, to the landlord and to every tenant who is a party to the application for the ascertainment of those rents is to notify those persons of the amounts which may lawfully be claimed by the landlord;

(ii) if after the Rent Assessor has ascertained the standard rent or has fixed the maximum rent the landlord wishes to demand and to receive a rent greater than the contractual rent but not exceeding the maximum assessed rent he is entitled to do so but must first bring the contractual tenancy to an end ;

(iii) the contractual tenancy in such a case is brought to an end by the landlord giving to the tenant a valid notice to quit and a notice of increase above the contractual rent;

(iv) the increase required can be claimed from the effective date of the Rent Assessor's certificate but does not become payable until the expiry of the relevant period referred to in the first proviso to section 15 of the Ordinance.

Appeal dismissed.

H. A. Fraser for appellant.

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

Judgment of the Court:

This is an appeal from the decision of a Magistrate of the Georgetown Judicial District dismissing a claim by the appellant from the respondent for the sum of $118.53 being arrears of rent due owing and payable by the respondent to the appellant for premises situate at lot 7, Third Avenue, Subryanville, East Coast, Demerara, under a contract of tenancy

The question to be determined in this appeal is whether a landlord of premises controlled by the Rent Restriction Ordinance is entitled, without further notice to his tenant, to claim payment of the maximum rent at which the premises were assessed by the Rent Assessor in proceedings between the landlord and the tenant, the maximum rent assessed being at a higher figure than that payable by the tenant under his existing contract of tenancy.

The facts of this case are not in dispute. The respondent was a monthly tenant of the appellant as from 1st August, 1951, of a bungalow at lot 7, Third Avenue, Subryanville, East Coast, Demerara, at a rental of $75 per month.

On the 9th November, 1951, the appellant (landlord) applied to the Rent Assessor under the provisions of section 4A of the Rent Restriction Ordinance, 1941 (No. 23 of 1941) as inserted by section 5 of the Rent Restriction (Amendment) Ordinance, 1947 (No. 13 of 1947) now section 7 of the Rent Restriction Ordinance, Chapter 186 (Kingdon Edition of the" Laws) to have the standard rent of the premises ascertained and certified and the maximum rent assessed, fixed and certified.

The Rent Assessor fixed the standard rent of the premises at $72 and gave the permitted increase of $7.53 for rates and taxes by virtue of the provisions of section 6(1) (b) of the 1941 Ordinance and an increase of $8.64, that is, 12% of the standard rent by virtue of the provisions of section 6(1) (c) of that Ordinance. The Rent Assessor issued his certificate to that effect on the 8th April, 1952.

It was specified in the certificate that the certificate was to take effect from the 1st April, 1952.

The maximum monthly rent fixed by the Rent Assessor was therefore $88.17 effective from the 1st April, 1952.

On appeal by the respondent (tenant) to a Judge in Chambers, the assessment of the Rent Assessor was on 28th July, 1952, varied, the standard rent being increased to $75:—and the amount under the provisions of section 6(1) (c) of the 1941 Ordinance—12% of the standard rent—increased to $9.00. The amount of $7.53 under the provisions of section 6(1) (b) of the Ordinance was not varied. The Judge in Chambers therefore fixed the maximum monthly rent at $91.53.

The respondent continued in occupation as a tenant after the determination of the appeal by the Judge in Chambers and made payments at the rate of $75.00 per month which he claimed were in accordance with the terms of his contract of tenancy. The appellant, however, on the 28th August, 1952, and each month thereafter sent to the respondent an account claiming a monthly rental of $88.17 the maximum rent as fixed by the Rent Assessor and giving the respondent credit for the payment of $75:—on account of $88.17.

The respondent refused to pay any sum above the monthly contractual rent of $75.

On the 13th May, 1954, the appellant filed a plaint claiming from the respondent the sum of $118.53 for rent due from 1st April, 1952, to 31st December, 1952. The particulars stated therein disclose that the appellant claims the payment of a monthly rental of $88.17 under the Rent Assessor's certificate for the above-mentioned period less the sum of $675 paid at the rate of $75 per month during the same period.

Counsel for the appellant has stated to this Court that at the time the claim was instituted before the Magistrate, the appellant was not aware that the standard and maximum rents fixed by the Rent Assessor had been increased by the Judge in Chambers and that no certificate to that effect appears to have been issued. It is to be observed that under the provisions of sub-sections (8) and (10) of section 11 of the Rent Restriction Ordinance, Chapter 186, it is required that the decision of the Judge shall be endorsed on the back of the certificates transmitted to the Registrar by the Rent Assessor under the provisions of sub-section (3) of that section, and shall be authenticated by the signature of the Registrar. The Registrar is required to transmit one copy of those certificates to the Rent Assessor.

There is no provision in the Ordinance for certificates bearing the Judge's decision to be issued to the parties.

Before the Magistrate, it was admitted by the appellant that no notice to quit was given to terminate the contractual tenancy of $75 per month and that apart from the monthly accounts rendered by the appellant to the respondent no notice of intention to increase the monthly contractual rental to $88.17 was given to the respondent.

The Magistrate held that it is a condition precedent to the enforcing of any claim for a permitted increase of rent that a notice to quit with a notice of intention to increase the rent should be given by the landlord to his tenant. The Magistrate therefore dismissed the appellant's claim.

Counsel for the appellant has submitted that the appellant's case is based on the following propositions —

(a) that he, as landlord, is not required to serve a notice of intention to increase the rent;

(b) that if a notice of intention to increase the rent is required, the certificate of the Rent Assessor is sufficient notice;

(c) that if the landlord is the person required to serve such a notice, the accounts sent by him (appellant) to the respondent on the 28th August, 19S2, (one month after the dismissal of the appeal to the judge in chambers) was a sufficient notice;

(d) that, in any event, the requirement to serve a notice of intention to increase the rent related only to the permitted increases under section 6(1) (c) of the 1941 Ordinance (now section 15(1) (c) of the Rent Restriction Ordinance, Chapter 186).

It is instructive to examine the position as it existed under the common law and under the Rent and Mortgage Interest Restrictions Act, 1920, and certain other related Acts of the United Kingdom.

It is to be observed that under the provisions of section 4 of the landlord and Tenant Ordinance, Chapter 185, the common law of England applies, subject to the provisions of that Ordinance, to a monthly contractual tenancy.

At common law, if a landlord desired to increase the rent he had first to serve the tenant with a legal notice to quit thereby terminating the existing tenancy. An increase of rent could be agreed on verbally provided the consideration on the part of the landlord, such as the execution of improvements, was to be performed within a year. *Donellan v. Read* (1832) 3 B & Ad. 899, but it could only be recovered on the agreement

and did not pass with the reversion unless the agreement could be construed as a surrender of the old and the creation of a new tenancy at the increased rent (*Lambert v. Norris* (1837) 2 M & W 333).

As in the case of a reduction of rent, the mere change of rent did not operate as a new demise (*Geeckie v. Monk. Doe D. Monk. v. Geeckie.* (1844) 1 Car. & Kir. 307).

Apart from the provisions of the Rent Restriction Ordinance, a landlord could not during an existing tenancy increase the rent by simply giving notice to his tenant that the rent was increased. If the tenant did not agree to pay a higher rent he would not be liable, and if he did not assent to the increase the landlord's raising of the rent would be legally quite ineffective.

Under the provisions of the Rent and Mortgage Interest Restrictions' Act, 1920, a landlord was empowered to add certain permitted increases to the standard rent. If the tenant was dissatisfied as to the amounts of such increase he could apply to the County Court to determine the matter.

Section 3(1) of the Rent and Mortgage Interest Restrictions Act. 1920, provided as follows:—

> "Nothing in this Act shall be taken to authorise any increase of rent except in respect of a period during which but for this Act the landlord would be entitled to possession."

This provision thereby gave statutory recognition to the common law rule.

It was held by the House of Lords in the case of *Kerr v. Bryde* (1923) A.C. 16 that this provision prevented any increase in the rent of tenants under a continuing tenancy unless the tenancy was first determined by due notice to quit pursuant to the "basic principle" that a landlord could not increase rent merely by giving notice of increase; he must first determine the existing tenancy. The House also held that the statutory notice of increase of rent was not in itself notice to quit.

The Rent Restrictions (Notice of Increase) Act, 1923, was thereafter enacted. That Act while retaining the "basic principle" of the decision in *Kerr v. Bryde* (*supra*) that no increase of rent is authorised during an existing tenancy, evades that doctrine, as to tenancies which can be determined by notice to quit, by making the statutory notice of increase in itself equivalent to notice to quit.

Section *3*(2) of the 1920 Act provides that notwithstanding any agreement to the contrary, where the rent of any dwelling house to which the Act applies is increased, no such increase shall be due or recoverable until a specified period after a notice of increase has been given.

It was held by the Court of Appeal in *Phillips v. Copping* (1935) 1 K.B. 15, that the notice need not be served if the landlord is merely raising the rent up to the standard rent. In other words there is no "increase" within the meaning of the Act.

It was held in *Mills v. Bryce* (1951) 1 A.E.R. 111 C.A. that an addition to the rent corresponding with an increase in rates which did not carry the rent above the standard rent did not require a notice of increase under section 3(2) of the 1920 Act.

There is no provision in the Rent Restriction Ordinance, Chapter 186, similar to that of section 3(1) of the 1920 Act nor indeed to that of section

3(2) except in respect of the first proviso to section 15(1) (c) of the Ordinance.

The Rent Restriction Ordinance, 1941 (No. 23 of 1941) made irrecoverable any rent which exceeded the amount of the "standard rent" of premises except that the landlord was permitted to obtain the following three increases on the standard rent:—

(a) an amount not exceeding 8% of the amount expended by him on improvement or structural alterations;

(b) an amount representing an increase in rates and taxes since the date on which the rent was deemed to be the "standard rent";

(c) "in addition to any such amounts as aforesaid an amount not exceeding 10% of the standard rent.

Provided, however, that where under any contract of tenancy a fixed or minimum period of notice is required to be given of an intention to increase the rent, such notice shall be given before any increase of rent is made under this paragraph and in all other cases not less than one month's notice shall be given before any increase of rent is made under this paragraph."

The landlord who desired to increase the rent within those prescribed limits was still at common law under an obligation to terminate by legal notice the existing contractual tenancy. Before he could claim the increased rental, there must have been a new tenancy arising by way of express agreement or by implied agreement.

The absence from the 1941 Ordinance of provisions similar to those contained in section 3(2) of the 1920 Act means that the landlord is entitled to claim payment of the increases referred to in paragraphs (a) and (b) above as from the date of the notice.

Under the Defence (Georgetown Rent Control) Regulations, 1944 (No. 6 of 1944) made under the Emergency Powers (Defence) Acts, 1939 and 1940, as applied to the Colony, a tenant of premises situate in the city of Georgetown and its environs who was of the opinion that his landlord was requiring him to pay rent in excess of the maximum rent chargeable in respect of the premises occupied by him, was empowered to apply to the Rent Assessor appointed under the provisions of regulation 4 of those Regulations to fix the maximum rent of such premises.

The certificate of the Assessor took effect from the date entered therein (reg. 12).

Any increase of rent due to improvement or structural alteration of the premises was dependent upon the issue of a new certificate (reg. 26)

Under regulation 27, paragraph (a) of sub-section (1) of section 6 of the 1941 Ordinance had effect in the area to which the Regulations applied as if the following proviso were added thereto —

"And provided further that where any certificate has been issued by the Rent Assessor under the Defence (Georgetown Rent Control) Regulations. 1944. to any landlord in respect of any dwelling house the increase permitted under this paragraph shall not have effect until a new certificate has been issued by the said Assessor."

Under the Rent Restriction (Amendment) Ordinance, 1947, (No. 13 of 1947), which revoked the Defence (Georgetown Rent Control) Regula-

tions, 1944, which applied not only to the city of Georgetown and its environs but to those areas to which the 1941 Ordinance applied, no landlord was empowered any longer to make the permitted increases himself.

The 1947 Ordinance made provision for the appointment of a Rent Assessor. The power of ascertaining and fixing the permitted increases was vested solely in the Rent Assessor in proceedings instituted by application to him either by the landlord or the tenant. The Assessor was empowered to make permitted increases on the standard rent for any or all of the same three reasons and to the same extent as had been permitted to the landlord under the 1941 Ordinance save that the percentage of increase on the standard rent was raised from a maximum of 10% to a maximum of 12%, and in special cases to a maximum of 25%. Further, where for certain reasons the Assessor believed that the standard rent would be too low, he was empowered to refer the matter to an Advisory Committee for their recommendation by which he could be guided.

On determination of an application, the Assessor is required to issue a certificate showing the standard rent ascertained by him together with any increases under the three heads which he has permitted and the maximum rent of the premises.

He is also empowered to make this assessment operate retrospectively—vide section 7(25) of the Ordinance (Cap. 186).

Counsel for the appellant has contended that since the amending Ordinance of 1947 came into operation, there is no longer any need for the landlord to give to the tenant notice of increase of the contractual rent to the maximum rent fixed by the Assessor; further, it is not a condition precedent to the landlord's claim for payment of the maximum rent that the contract of tenancy should be determined.

Counsel further contends that the notice of the increase has in effect been given by the Rent Assessor issuing his certificates by causing them, under the provisions of section 7(24) (d) of the Ordinance (Cap. 186), to be sent to the landlord and to each tenant who was a party to the application.

Counsel for the respondent, on the other hand, has submitted that neither a landlord nor a tenant can take advantage of the statute (that is the provisions of the Ordinance relating to the increases) without in effect bringing the contractual tenancy to an end.

It appears to us that the object of the provisions of section 7(24) (b) of the Ordinance for the sending by the Rent Assessor of certificates of the standard rent, or the maximum rent, as the case may be, to the landlord and to every tenant who is a party to the application for the ascertainment of those rents is to notify these persons of the amounts which may lawfully be claimed by the landlord. We do not agree as contended for by the appellant that the object of the provisions is to give notice to the tenant of the amount that he is required to pay to the landlord. It is quite possible that the landlord may wish to demand and to receive a lesser amount than that to which he is under the provisions of the Ordinance entitled.

If after the Rent Assessor has ascertained the standard rent or has assessed or fixed the maximum rent the landlord wishes to demand and to receive a lesser rent than that fixed by the Rent Assessor but greater than the contractual rent he is perfectly entitled to do so but in that event

the contractual tenancy must be brought to an end. That is done by the landlord giving to the tenant a valid notice to quit and a notice of increase above the contractual rent in accordance with the provisions of the first proviso to section 15. The increase required can be claimed from the effective date of the Rent Assessor's certificate under section 7(25) of the Ordinance but does not become payable until the expiry of the relevant period referred to in the first proviso to section 15 of the Ordinance.

The appellant in the present case has, however, failed to bring the contractual tenancy to an end by serving on the respondent notice to quit before claiming the increased rent. His claim, therefore, must fail and the decision of the learned Magistrate dismissing the appellant's claim is, in our view, correct.

The appeal therefore fails and must be dismissed with costs fixed at $25: —

MUNIAN v. KOO

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Holder, C.J., Clare, J., and Luckhoo, J. August 11, November 23, 1956).

Shops Ordinance—Exposing goods for sale during prohibited hours in a place other than a shop—Stall in market—Construction—Meaning of "public building" in paragraph (b) of proviso to First Schedule of the Shops Ordinance—Whether Sundays included.

K. the holder of a stall in a market in Georgetown had her stall opened at 7.15 a.m. on Sunday 4th March, 1956, and exposed for sale amongst other goods, flour, sugar, rice and fish. She was charged for exposing goods for sale during prohibited hours, contrary to s. 15 of the Shops Ordinance, Cap. 118, in that she did expose for sale in a place other than a shop in the city of Georgetown goods of a description which a shop in that area was forbidden to be opened for sale thereof.

The Magistrate held that the expression "public holiday" used in proviso (b) to Part I of the First Schedule of the Ordinance (which sets out the days and hours when a shop may be opened or kept open) included Sundays and that the expression "week-days other than public holidays and half holidays" in Part I of the same Schedule included Sundays. He therefore dismissed the complaint brought against K.
On appeal, it was held:—

(i) The expression "public holiday" in proviso (b) to Part I of the First Schedule of the Shops Ordinance does not include Sundays;

(ii) the expression "weekdays other than public holidays and half-holidays" in the same Schedule does not include Sundays;

(iii) provisos are clauses of exception or qualification in an enactment, excepting something out of, or qualifying something in the enactment which but for the proviso would be within it. Unless of necessity, a proviso is never construed as enlarging the scope of the enacting words and it must be construed with reference to the preceding parts of the provision to which it is appended.

Ex p. Partingdon (1844) 8 Q.B. 619 followed.

Appeal allowed

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

F. Ramprashad for respondent.

Judgment of the Court: This is an appeal from the decision of a Magistrate of the Georgetown Judicial District; the facts are very simple and not in dispute. The respondent was charged for exposing goods for

sale during prohibited hours contrary to section 15(1) of the Shops Ordinance, Chapter 118, in that she on Sunday, 4th March, 1956, at Bourda Market, in the Georgetown Judicial District, did expose for sale in a place other than a shop, to wit, a stall at the Bourda Market in the area of the City of Georgetown, goods of description which a shop in that area was forbidden to be opened for sale thereof.

In brief, the facts are that the respondent, the holder of a stall in the Bourda Market, a municipal market in the City of Georgetown, had her stall opened at 7.15 a.m. on Sunday, the 4th of March, 1956, and exposed for sale, amongst other goods, flour, sugar, rice and fish and that the articles were actually being purchased from the respondent at the time.

The Magistrate found the respondent not guilty of the offence charged under Section 15(1) of Chapter 118, as he considered that the Shops Ordinance, Chapter 118, did not forbid the opening for sale in a shop of the articles mentioned in the urban area at the hour alleged on Sunday. The Magistrate held that the expression "public holiday" used in proviso (b) to Part I of the First Schedule of Chapter 118, included Sundays for the following reasons:

Section 3 of the Public Holidays Ordinance, Chapter 61, clearly declares Sunday to be a public holiday, but neither the Shops Ordinance, Chapter 118, nor the Interpretation Ordinance, Chapter 5, define the expression "public holiday". In the absence of such a definition the Magistrate held that the Public Holidays Ordinance, Chapter 61, the only Ordinance which provides for public holidays applied to Chapter 118 in interpreting the term which he found included Sundays.

The Magistrate further held that the expression "weekdays other than public holidays and half-holidays" appearing in Part I of the First Schedule of Chapter 118 included Sundays and construed the term in the proviso to mean weekdays other than public holidays and half-holidays falling on weekdays and to be wide enough to include holidays on weekdays and holidays which were Sundays. He accordingly rejected Counsel's contention that the term excluded Sundays.

Against the Magistrate's decision the appellant has appealed on the ground that the decision was erroneous in point of law in that the learned Magistrate erred in holding that Sunday was a public holiday within the meaning of the Shops Ordinance.

Section 190 of the Summary Jurisdiction (Offences) Ordinance, Chapter 14, prohibits the opening or the keeping open on a Sunday of any store, shop, house, room, shed or booth for the purpose of selling or bartering therein or of trading therein in respect of any goods, wares or merchandise or any other thing whatsoever.

Under the provisions of section 191(1) of that Ordinance the sale or delivery of certain articles are permitted on a Sunday.

Section 3(1) of the Shops Ordinance, Chapter 118, provides that except for the sale of certain articles which are specified in section 16 of the Ordinance, (and which include all of the articles specified in section 191(1) of the Summary Jurisdiction (Offences) Ordinance, Chapter 14) no person shall open, or keep open or permit to be open, any shop for any purpose whatsoever except on the days and between the hours respectively set out in the first schedule to the Ordinance.

The relevant portion of the First Schedule to Chapter 118 which falls for consideration is that which relates to Urban Areas and is as follows:—

"The days on which and the hours between which shops (other than restaurants and parlours) in urban areas may be opened and kept open shall be as follows: —

Weekdays, other than public holidays and half-holidays.....	...	7.30 a.m. to 4 p.m.
Half-holidays ...	...	7.30 a.m. to 12 noon
The day following Good Friday	..	7.30 a.m. to 12 noon

Provided that —

(a) during Christmas period the hours shall be —

(i) for the first seven working days of this period (other than the weekly half-holiday)……...7.30 a.m. to 5 p.m.

(ii) for the second seven working days of this period……7.30 a.m. to 6 p.m.

(iii) On Christmas Eve and on the Saturday preceding Christmas Eve when the latter day falls on a Sunday ……7.30 a.m. to 8 p.m.

(b) on public holidays (other than the day following Good Friday) provision shops and groceries paying a licence duty of or under $70 per annum may open and keep open between the hours of 6.30 a.m. and 9 a.m.

(c) Where a public holiday falls on a Monday, provision shops and groceries paying a licence duty of or under $70 per annum may remain open for an additional hour on the Saturday immediately preceding the Monday, except where the Saturday is the day following Good Friday."

The question for determination is what is the meaning to be given to the expression "public holidays" occurring in paragraph (b) of the proviso thereto. Does that expression include Sundays ?

Counsel for the appellant has submitted that the above portion of the schedule must be considered as a whole and that paragraph (b) of the proviso cannot be considered without reference to the remainder of that portion of the schedule. In support of this contention Counsel cited to us the case of *Jennings v. Kelly* (1940) A.C. 206.

With that contention we are in entire agreement.

Counsel further submitted that the words "public holidays" contained in the expression "Weekdays, other than public holidays and half-holidays" refer to such public holidays as fall on weekdays and that weekdays do not include Sundays.

We agree with this submission.

In the course of his judgment in *London County Council v. Gainsborough* (1923) 2 K.B.D. 301 at p. 306, Lord Hewart, L.C.J., said:

"I cannot doubt that "every day other than Saturday" includes Sunday, and that "weekdays other than Saturday", excludes Sunday; and no dissertation, however edifying, on the statutory piety of the latter seventeenth century, and no analysis, however exhaustive, of the enactments of the last thirty years seems to me to affect, or even to obscure, that simple point."

It appears to us that the above-mentioned observations of the Lord Chief Justice are directly in point in the present case.

We are in agreement with the contention of Counsel for the respondent that in the absence of a definition of the expression "public holiday" in the Shops Ordinance and in the Interpretation Ordinance it is permissible to refer to the meaning of that expression in the Public Holidays Ordinance, Chapter 61. Under the last mentioned enactment "public holiday" includes Sunday.

However, we are also in agreement with the further contention of Counsel for the appellant that the words "public holidays" in paragraph (b) of the proviso are referable only to public holidays which fall on weekdays.

Provisos are clauses of exception or qualification in an enactment, excepting something out of, or qualifying something in the enactment which but for the proviso would be within it. Unless of necessity a proviso is never construed as enlarging the scope of the enacting words and it must be construed with reference to the preceding parts of the provision to which it is appended. *Ex p. Partingdon* (1844) 6 Q.B. 649.

We are also of the opinion that the provisions of sections 190 and 191 of the Summary Jurisdiction (Offences) Ordinance, Chapter 14, to which we have already made reference are of full force and effect and were not overlooked by the draftsman of the Shops Ordinance, Chapter 118, in as much as reference to section 191 is contained in section 4 of the latter Ordinance.

It therefore follows that the Magistrate erred in coming to the conclusion that the respondent was not guilty of the offence charged.

The order of the Magistrate is quashed and the respondent is hereby convicted of the offence charged and fined the sum of $60 and in default of payment to undergo two months imprisonment. The respondent will pay $20 costs in this Court and the costs in the Magistrate's Court.

The respondent is given two months to pay the fine imposed.

PERSAUD v. NEDD

(In the Full Court, on appeal from the Magistrate's Court for the East Demerara Judicial District (Holder, C.J., and Luckhoo, J. June 8, 9, 16; November 23, 1956).

Appeal—Motion for leave to file grounds of appeal and copy of record of appeal out of time—Principle on which leave granted—Sentence manifestly excessive.

On an application by appellant by way of motion under the provisions of section 14 (1) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, as repealed and re-enacted by section 2 of the Summary Jurisdiction (Appeals) (Amendment) Ordinance, 1955, (No. 29 of 1955), for leave to file the notice of his grounds of appeal and a copy of the record of appeal out of the prescribed time leave to do so was granted as the sentence imposed by the magistrate was on the face of it manifestly excessive.

J. Carter for appellant

G.S. Gillette, Acting Assistant to the Attorney General, for respondent.

Judgment of the Court: This is an application by the applicant by way of motion under the provisions of section 14 (1) of the Sum-

mary Jurisdiction (Appeals) Ordinance, Chapter 17, as repealed and re-enacted by section 2 of the Summary Jurisdiction (Appeals) (Amendment) Ordinance, 1955, (No. 29 of 1955) for leave to file the notice of his grounds of appeal and a copy of the record of appeal out of the time prescribed under sections 8(3) and 13(1) of the Principal Ordinance.

The applicant had, on the 11th August, 1955, at Vigilance Magistrate's Court, been convicted by the Magistrate of the East Demerara Judicial District of the offence of praedial larceny, contrary to the provisions of section 76 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13 (now section 72 of the Summary Jurisdiction (Offences) Ordinance, Chapter 14, Kingdon Edition) and was sentenced to a term of six months imprisonment with hard labour.

Counsel who appeared for the applicant in the magistrate's court duly gave notice of appeal and the prescribed sum was lodged with the Clerk of Court as security for due prosecution of the appeal.

On the 22nd September, 1955, the applicant received from the Clerk of Court a notification under the provisions of section 8(2) of the Summary Jurisdiction (Appeals) Ordinance, Chapter 17, that the record of proceedings was ready. A copy of that record was subsequently obtained by the applicant but the applicant neglected to take the steps required under the provisions of sections 8(3) and 13(1) of the Ordinance to file the notice of his grounds of appeal and a copy of the record of appeal.

On the 14th December, 1955, the applicant made this application as stated above.

In his affidavit in support of this motion the applicant has stated that he was ignorant of the fact that the grounds of appeal had to be prepared and filed within a limited time and that he assumed that by depositing the sum of $25 as security for due prosecution of the appeal there was nothing further to be done by or on his behalf until the matter came on for hearing.

As we have on several occasions stated, ignorance of the relevant provisions of the Ordinance on the part of an appellant or a person entitled to appeal is not by itself a ground on which this Court will in the exercise of its discretion grant an application made under the provisions of section 14(1) of the Ordinance.

However, as on the face of it the sentence imposed by the magistrate appears to us to be manifestly excessive, we are of the opinion that we may in the exercise of our discretion grant this application. It is therefore ordered that the notice of grounds of appeal and three copies of the record of proceedings be filed forthwith subject to the payment of the necessary fees and that a copy of the grounds of appeal be also served forthwith on the respondent.

HARDAI v. WARRICK

(In the Supreme Court, (Bollers J. (ag.)) December 11, 12, 13, 31, 1956).

Libel—Justification—Qualified privilege—Malice—Onus of proof—Estate manager and worker.

The plaintiff, a sugar estate worker, claimed damages from the defendant, the administrative manager of the estate on which the plaintiff resided and worked for libel alleged to be contained in a letter addressed by the defendant in his

capacity as manager to one Yassim a worker on that estate. In that letter the defendant after stating that it had been alleged that Yassim was living with the plaintiff, wife of one Ramnarine, and that the plaintiff admitted this, warned Yassim that if that conduct continued he (defendant) would have no option but to refuse him work on the estate and would probably be compelled to give him notice to quit the estate.

The plaintiff claimed that the words "It has been alleged that you are living with (Finey) wife of Ramnarine; this woman admits this," were defamatory and were understood to mean that the plaintiff was a woman of loose and immoral character.

For the defence the pleas of justification and qualified privilege were raised.

Held: (1) the words were defamatory of the plaintiff;

(2) the plea of justification failed on the evidence;

(3) on a plea of qualified privilege the burden is upon the defendant to establish that the occasion was privileged and when this is established the burden is upon the plaintiff to prove actual malice on the part of the defendant

Hebditch v. M'llwaine (1894) 2 Q.B. 54 applied.

(4) it is a question of law for the judge to decide whether the facts proved constitute a privileged occasion;

Hebditch v. *M'llwaine* (*ubi supra*) applied;

(5) there was a duty cast upon the defendant as manager of the estate to address the communication in question to Yassim a worker on the estate who had an interest to receive it;

(6) there was no evidence of actual malice although the words "this woman admits this" while relevant to the main statement were excessive. The plea of qualified privilege therefore succeeded.

Judgment for the defendant.

A. S. Manraj for plaintiff.

J. A. King for defendant.

BOLLERS J.: In this case the plaintiff has brought an action against the defendant for damages for libel alleged to be contained in a letter to one Yassim dated the 10th of January, l956. The letter which is set out hereunder reads as follows:—

"ENMORE ESTATES LIMITED,
East Coast, Demerara.
20th January, 1956.

"PD13/56
Mr. Yassim,
Rural Constable,
Lusignan.
Dear Sir,

WARNING NOTICE

This letter is to confirm my conversation with you of the 17th January, 1956, and to warn you of your conduct on the estate.

It has been alleged that you are living with (Finey) wife of Ramnarine; this woman admits this.

Your own wife Aziman also complains of your conduct and your behaviour.

You are now being a nuisance to both management and residents on the estate and this sort of conduct for a man in your position cannot be tolerated.

We therefore warn you that if this conduct continues we will have no option but to refuse you any work on this estate and probably be compelled to give you notice to quit the estate.

Yours Faithfully,
(SGD.)E.WARRICK.
Adm. Manager.

C. C. Mr. G. Burr, Lusignan."

Objection was taken by the plaintiff to the words appearing in paragraph 2 of the above letter — "It has been alleged that you are living with (Finey) wife of Ramnarine; this woman admits this."

The innuendo pleaded at paragraph 4 of the statement of claim is that by the said words the defendant meant and was understood to mean that the plaintiff was a woman of loose and immoral character and was in the habit of having illicit sexual intercourse with the said Yassim who is a married man living with his wife, Aziman.

The defence shortly put is as follows: —

(1) The words complained of did not bear and were not capable of bearing the meanings alleged in the innuendo nor did they bear any defamatory meaning as alleged or at all.

(2) Justification, that is to say, the words complained of in their true and natural and ordinary signification were and are true in substance and in fact.

(3) (a) Qualified privilege, that is to say, the defendant had a moral and social duty to prevent scandal and breaches of the peace arising from among the workers.

(b) The words complained of were published to persons having a common interest with the defendant in the matters complained of and were published by the defendant in the course of and in pursuance of a duty, and were without malice towards the plaintiff, and were published in the honest belief that the said words were true.

The plaintiff is the reputed wife of one Ramnarine who was, up to a few days before the writing of this letter, a worker on the sugar estate of Plantation Lusignan, East Coast, Demerara, of which the defendant is the Administrative Manager. The plaintiff and Ramnarine had been living together as man and wife for 15 years when, in 1953, Ramnarine was convicted of an offence involving counterfeit coins and was sentenced to a term of imprisonment.

In July, 1955, after coming out of prison, Ramnarine returned to his home at Annandale, which is a part of Plantation Lusignan at which estate he was employed, and resumed cohabitation with his reputed wife, the plaintiff Finey.

In January, 1956, differences arose between the plaintiff and Ramnarine as a result of which Ramnarine decided to sell his share of the house to Finey and leave the estate. The house had been built from a loan from the Sugar Industry Loan Welfare Fund, taken in the joint names of Ramnarine and Finey, and both Ramnarine and the plaintiff had been contributing to the repayment of the loan, as evidenced by the receipt — exhibit "F" — tendered by the plaintiff.

On the 10th January, 1956, after both parties had had an interview with Mr. G. Arnold, the Personnel Manager of the estate, Ramnarine sold his share of the house to the plaintiff for the sum of $400 and then proceeded to leave the estate. In 1954, during the period that Ramnarine was in prison, the defendant started to receive anonymous letters signed "Workers Pln. Lusignan", in which the writers complained that Yassim, a worker on the estate, was living with Finey, the wife of Ramnarine. These anonymous letters were destroyed by the defendant shortly after receiving them.

In 1955, the defendant was away on leave and returned to the estate on the 11th November, 1955. During his period of absence from the estate, Mr. Finlay, Field Manager, acted as Administrative Manager for the defendant, and in October, 1955, Mr. Finlay interviewed Yassim and spoke to him about allegations that were being made against him that he was living with another man's wife. In this same month Mr. Arnold, the Personnel Manager, also received a complaint from Aziman, the reputed wife of Yassim, as a result of which he had an interview with Aziman and Yassim, the subject of which is now in dispute.

On the defendant's resumption of duty in November. 1955, Mr. Finlay made a verbal report to him. The defendant then caused the Personel Manager, Mr. Arnold, to make enquiries into this matter, and on a subsequent date Mr. Arnold submitted a written report to the defendant.

On the 17th January, 1956, the defendant had an interview with Yassim at the office at Lusignan, and in the presence of Mr. Finlay. Field Manager, the defendant told Yassim that the allegation was being made of him living with Ramnarine's wife, and that Mr. Finlay had reported to him (the defendant) that he had occasion in 1955 to warn him (Yassim) of the same allegation.

Yassim denied that he had been warned, and also denied the allegation, whereupon the defendant informed Yassim that as he was denying that Mr. Finlay had spoken to him, he would give him a warning in writing to ensure that in future he (Yassim) could not say that he had not been warned.

On the 20th January, 1956, Mr. Finlay, the Field Manager summoned Yassim to the office at Plantation Lusignan and had an interview with him in the presence of Bambhola, the Sanitary Assistant. After his interview Mr. Finlay made a report to the defendant that same day, as a result of which Yassim was dismissed.

On the 20th January, the defendant, as a result of the cumulative effect of the anonymous letters, Mr. Finlay's verbal report, and Mr. Arnold's written report addressed the letter exhibit "A" to the man Yassim, which is now the subject matter of the alleged libel.

At the trial Counsel for the defence, although not admitting that the words were defamatory, did not pursue and argue the contention that the words complained of were not capable of bearing and did not in fact bear a defamatory meaning.

It could hardly be contended that the statement in the words complained of in the offending paragraph of the letter was not a statement concerning the plaintiff which exposed her to hatred, contempt and ridicule and which caused her to be shunned and avoided. To make the allegation that Yassim is living with (Finey) wife of Ramnarine and then to assert

positively "this woman admits it" could only mean, must be understood to mean, and does in fact mean that the plaintiff has admitted that she is living with Yassim, the person to whom the letter was addressed.

I have no difficulty, therefore, in holding, without hesitation that the words in their plain and ordinary meaning are capable of bearing and do in fact bear a defamatory meaning, and I consider them an imputation on the moral character of the plaintiff as alleged in the innuendo at paragraph 4 of the statement of claim.

As far as the plea of justification is concerned, Counsel for the defendant submits that two factors are required to be proved—(a) that the plaintiff (Finey) the wife of Ramnarine had been living with Yassim; (b) that the plaintiff (Finey) had admitted this fact. He submits that the evidence of (a) is based partly on the evidence of alleged admissions by the plaintiff Finey and Yassim that it is true that they were in fact living together, and also partly on the evidence of witnesses who had first-hand knowledge of these factors, that is to say Ramnarine and Morrison, and their evidence ought to be believed.

Counsel went on to submit that if the Court finds that the parties were living together, then the plea of justification has been established. The words, "This woman admits this" would become immaterial and would not give rise to an action for libel. The character of a person is not besmirched by saying that they don't admit what you allege if you can prove to be true what you do in fact allege.

With this latter submission I am not in agreement. It appears to me that two persons can live together and still not admit the fact of living together. The two statements in this connection to my mind are distinct and separable from each other: the facts stated and the admission of the facts stated, the second statement being positive and stronger than the first.

When the plea of justification is raised, the substance of the charge must be justified, and the libel must be carefully examined to see what the substance really is. "As much must be justified as meets the sting of the charge and if anything may contain a libel which does not add to the sting of it that does not need to be justified." (per Burroughes, J., *Edwards v. Bell* 1824 Bing 403 at 409.

The first part of the offending statement is a mere allegation. The second part deals with the positive statement "this woman admits this." Surely the sting of the libel in this case is the positive statement of fact — "this woman admits this".

"There can be no doubt that a defendant may justify part only of a libel containing several distinct charges,…..But if he omits to justify a part which contains libellous matter, he is liable in damages for that which he has omitted to justify". Per Tindal C.J. 664 *Clarke v. Taylor* 1836 2 Bing N.C. 654.

In this case by his pleadings the defendant has sought to justify the whole of the libel alleged and has not restricted his plea to a part only.

The burden of proof is therefore cast on the defence to show, firstly that the allegation contained in the first sentence is true, and that the positive statement of fact contained in the second part of the statement is also true.

I turn now to consider the evidence in order to see whether the plea of justification has been established, and whether the defence has discharged the burden of proof placed upon it.

The defendant himself is not helpful on this issue as he has stated that he did not even know the plaintiff and never met her. At the interview of the 17th January, 1956, at the Lusignan Office, he states that Yassim denied the allegation that he was living with Ramnarine's wife, and he, the defendant, was willing to accept that denial.

The Personnel Manager, Mr. G. Arnold, in his account of the matter states that at the interview in October, 1955, he asked Yassim if he was friendly with Finey, and he said "yes". The word "friendly" cannot be taken to mean "living with" and cannot have the same connotation. When this portion of Mr. Arnold's evidence is contrasted with Yassim's own evidence that he used to go to the plaintiff Finey's house in order to assist her during the period of time her husband was in jail, Mr. Arnold's evidence on this point becomes even of less value.

At the interview of the 10th of January, 1956, between Mr. Arnold, Finey and Ramnarine, Mr. Arnold cannot even remember whether Finey was present. In his conversation with Ramnarine he states that Ramnarine told him that his wife was playing around with another man, and that his name was Yassim. It may well be that Ramnarine did use these words to the Personnel Manager, but Ramnarine by those words could not have been taken to mean that his wife was living with Yassim, and, in any event, at that time Ramnarine and his reputed wife, Finey, were estranged from each other and Ramnarine was at that time preparing to leave the estate, in which case his allegation would be of little value.

The plaintiff's evidence on this point is that at the interview she was making allegations against Ramnarine that he was continuing with his counterfeit activities, and that is why he wanted to sell his share of the house and leave the estate. The plaintiff asserts that there was no complaint by Ramnarine against her on the ground of misconduct. Mr. Arnold's evidence as to the events that took place at this interview on the 10th of January, 1956, was hazy and unreliable and I could not rely on it.

The result of the interview was that Ramnarine sold his share of the house to Finey and quit the estate which, in my view, was more consistent with the conduct of a man who is not dissatisfied with the allegations made against his wife and is content to leave her, than with a man who feels his wife to be unfaithful. If the latter were the case it would be more likely that he would be calling on his wife to leave the house rather than taking the lead and leaving the house himself.

The evidence of Bambhola, the Sanitary Assistant, requires careful scrutiny as it would appear on the evidence that he and Yassim were not getting on well together. Bambhola in his evidence made allegations against Yassim, and Yassim made counter allegations as to Bambhola interfering with his work. Bambhola was present at the meeting of October. 1955, between Mr. Arnold, Yassim and Finey, and his account of the interview varies materially from the evidence given by the Personnel Manager.

This witness states, "Aziman also complained that Yassim had an outside girl by the name of Finey. Yassim admitted it. Yassim said that he did not want Aziman any more as a wife. This was the admission." This evidence, in my view, is flimsy and unreliable and based on a miscon-

struction of words. Merely stating that he did not want his wife any more could never be interpreted to mean that Yassim was admitting living with Finey.

As to the interview on the 10th of January, 1956, which took place between Mr. Arnold, Finey and Ramnarine, this witness gives an account which again varies materially from the evidence of Mr. Arnold. On the relevant point, this witness states, "Ramnarine applied to the Manager to permit his house to be transferred to Finey because he did not want any further trouble. The Manager then asked Ramnarine what was the trouble. Ramnarine then said "Manager, I no longer want her because she has another man by the name of Yassim."The Personnel Manager then asked Finey known as Roney, "Is it true what your husband is saying?" She admitted yes, that she was living with Yassim. 'Yes, I am living with Yassim.' "

It is strange that Mr. Arnold does not remember this positive language which this witness alleged that Finey used.

This witness goes on to state that later, on the 16th January, 1956, Mr. Arnold sent him to Yassim to find out the name of Yassim's reputed wife. One wonders how this can be true when at the interview in October, 1955, both Mr. Arnold and the witness were aware of the existence of and the name of Yassim's reputed wife Aziman.

It appears to me more likely that the information that Mr. Arnold was seeking was the name of the woman with whom Yassim was alleged to be living, and not his recognised reputed wife Aziman, which would go to show that at the interview of October, 1955, Yassim had not admitted that he was living with Finey, and at the interview of 10th January, 1956, Finey had not in fact admitted that, she was living with Yassim.

As to the interview of the 20th January, 1956, between Mr. Finlay and Yassim, this witness was also present and states that when Mr. Finlay asked Yassim why he was behaving like that Yassim said, "Manager, I don't know what they want the name of my wife for, and I have already told the Personnel Manager that I have no wife."

This evidence fortifies my view that Bambhola was seeking the information as to Yassim's reputed wife, meaning the woman with whom he was alleged to be living and not his recognised reputed wife Aziman, as Yassim would never have used this language and could not be taken to mean Aziman when both he and Aziman and the witness Bambhola had been before Mr. G. Arnold, the Personnel Manager, in the month of October, 1955. When Yassim used these words on the 20th January, 1956, he was merely repeating his denial that he was living with another man's wife.

I do not accept the evidence of Bambhola who did not impress me as a witness of truth. Mr. Finlay, the Field Manager, in his examination in chief commenced by stating that at the interview of the 20th January,1956, Yassim complained against Bambhola interfering with his business, and as a result he, Finlay, reminded Yassim of the warning he had given him in October, 1955. He then continued to tell Yassim about the allegations being made against him living with another man's wife.

It was then at this stage that the witness states that Yassim said that he had lived with the woman for the past 15 years, and that was his business.

Under cross-examination the witness changes his evidence and states that Yassim resented being investigated and addressed his remarks to Bambhola, "You have been interfering with my business for a long time and I have been living with this girl for the past fifteen years."

Having given these two versions of the matters, this witness concludes by saying that this interview was as a result of Yassim threatening to crack Bambhola's neck because Bambhola was seeking information from him which information the witness is unable to remember.

This clearly indicates that, although this matter was considered serious by the Management, yet investigations were not carried out as meticulously and thoroughly as they might have been, creating a position which now causes them some embarrassment. This might have been avoided if investigations had been carried out with some proper method.

Ramnarine's evidence is that of a man who has been deposed from, his home, and is not worth the paper on which it was written. His manner and demeanour in the witness-box was most unconvincing, and I could not accept his evidence. His evidence as to the events which are alleged to have taken place on the night of the 20th November, 1952, was flimsy and unreliable, and did no more than aggravate the injury to the plaintiff.

I do not believe in the evidence that the plaintiff (Finey) had ever been caught in an uncompromising situation with Yassim. Had this occurred, a man of his type would never have continued to live with his wife up to the time of going to prison in 1953, and would never have rejoined her on coming out of prison in 1955.

Ramnarine's account of the interview of the 10th January, 1956, does nothing to support Mr. Arnold's evidence. It may well be that Ramnarine is anxious to get his own back on Yassim and the plaintiff, Finey, as a result of Yassim charging him for disorderly behaviour in August, 1953, when he threatened his wife Finey. If, as he states, he knew that the parties were living with each other at this time, he would certainly have brought it to the attention of the Magistrate.

The evidence of Morrison was nebulous and unreasonably inferential and I considered that he jumped to conclusions without proper enquiry. It would be nothing strange for him to see Yassim at the plaintiff's house as Yassim admitted that he went there to assist Finey in looking after the cows.

It is true that the plaintiff in her evidence foolishly denied that Yassim visited her house during the period of her husband's imprisonment, and she may have done this in the belief that it would strengthen her case, but when I contrast the plaintiff's evidence and the evidence of Yassim on the one hand, with the evidence of the defence on the other hand in this issue, I find that the evidence for the defence is not convincing, and I cannot and do not accept it.

I find that the defence has failed to discharge the burden of proof placed upon it to prove the truth of the alleged libel. The defence has failed not only to prove that the parties in fact lived together, but that the plaintiff admitted the fact. The essence of the imputation has not been proved. At its highest level the defence has merely shown that allegations were made by anonymous persons that the parties were living together. The plea of justification therefore fails.

Counsel for the defendant relied on the defence of qualified privilege as his main ground of defence and submitted that the offending passage in the letter was addressed by the defendant, the administrative manager of the estate, to Yassim a worker on the estate, and that there was a social and moral duty cast on the defendant as manager, to send this communication to Yassim, a worker on the estate, who had an interest in receiving it, and, therefore, the occasion, of a publication of this libel was privileged and can only be defeated by malice, the proof of which lies on the plaintiff. Counsel pointed out that both the plaintiff and Yassim admitted in their evidence that it was the duty of the manager to look after the welfare of the workers on the estates and furthermore, the manager himself in his evidence which has not been rebutted on this point, states that it is a recognised thing for managers of estates to try and settle differences and quarrels between workers who are resident on the estate, and keep the peace among the workers; and the manager at the time of writing the letter, felt that some incident might have taken place on the estate between Yassim and Ramnarine and other people.

The learned author of Salmond on the Law of Torts, 8th. Ed. at page 426 states:

> "A statement is said to possess a qualified privilege when, although false and defamatory, it is not actionable without proof of malice. Malice means the presence of an improper motive."

The presence of malice, therefore, defeats the privilege.

Whether the occasion upon which a statement is made is privileged is a question of law for the judge to decide.

> "If the judge rightly holds the occasion to be privileged though a libel has been proved in the absence of anything further the defence is perfect," — per Esher M.R. in

Nevill against The Fine Arts, (1875) 2 Q.B. 156 at p. 169.

> "The occasion is privileged, the communication is protected".—per Lord Shaw in *Adam against Ward,* 1917 A.C. 309 at p. 348.
>
> "The question whether the occasion is privileged if the facts are not in dispute is a question of law only for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends they must be left to the jury; but where the jury have found the facts it is for the judge to say whether they constitute a privileged occasion".— *Hebditch v. M'llwaine* (1894) 2 Q.B. 54.

In this case the facts are not in dispute on this question.

The burden of proving that the occasion is privileged lies upon the defendant who is making the allegation.

> "It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burden of proving actual malice is cast upon the plaintiff; but unless the defendant does so, the plaintiff is not called upon to prove actual malice."—

Hebditch v. M'llwaine (1894) 2 Q.B. 54.

Halsbury at para. 573, 2nd Ed. repeats the definition laid down by Lord Atkinson in *Adam v. Ward* —

> "An occasion is privileged where the person who makes a communication has an interest or a 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.

Again, Halsbury in para. 574, 2nd Ed. states —

"It has been said that the reason for holding any occasion privileged is the common convenience or the welfare of society, and that no definite line can be so drawn as to mark off with precision those occasions which are privileged and separate them from those which are not".

The circumstances that constitute a privileged occasion can never be catalogued and rendered exact, per Lord Buckmaster in L.A.P.T.M. Greenlands 1916 A.C. 15.

Willes J. in *Henwood v. Harrison* (1872) L.R. 7 C.P. in para. 606 at p. 622, puts it this way —

"The principle upon which these cases are founded is a universal one, that the public convenience is to be preferred to private interests, and that communications which the interests of society require to be unfettered may freely be made by persons acting honestly without malice, notwithstanding that they involve comments defamatory of individuals."

In *Stuart v. Bell* (1891) 2 Q.B. 341 at p. 350 Lindley L.J. laid down the test which the judge must use in deciding whether this privilege exists or not, —

"The question of moral or social duty being for the judge to decide, each judge must decide it as best as he can for himself. I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principles but at the same time, a duty not enforceable by legal proceedings whether civil or criminal."

The true mode of judging is to try and put oneself as much as possible in the position of the defendant — per Kay L.J.

When I apply the above principles of law to the facts in this case, I ask myself the question — was it necessary in the interest of or for the common convenience of the welfare of society on the estate at Plantation Lusignan for the manager to have addressed this communication to a worker on the estate in respect of allegations which had been made that he had been living with the wife of another worker? These allegations had reached the ear of the manager. The manager had taken steps to investigate the matter and feared that its continuance, if it did exist, would lead to an incident of a breach of the peace. The plaintiff's husband, it is true, had already left the estate, but he was always free to return. The answer to the question clearly and positively is in the affirmative. The policy of the management is to preserve peace amongst workers on the estate. Surely under these circumstances there was a duty cast on the manager of the estate to address this communication to a worker who would have an interest in receiving it, which duty would be recognised by "English people of ordinary intelligence and moral principles."

The offending paragraph in the letter is written in two parts, Firstly. "It has been alleged that you are living with (Finey) wife of Ramnarine." Secondly, "This woman admits this." It is not easy to see why the manager included the second part of this statement when he could easily have dealt with the whole matter in the first part of the statement, and this is

especially so in view of his evidence that at the interview on the 17th January, 1956, he was willing to accept the denial of Yassim as to his living with Ramnarine's wife. It may be that the manager wished to strengthen the allegations that had been made by adding the second part of the statement. The question, therefore, arises whether the occasion will be privileged in respect of the second part of the statement in the communication.—"This woman admits this."

The learned author of Gatley on Libel and Slander, 4th. Ed. at p. 278 states—

> "The scope of the defamatory matter must not exceed the exigency of the occasion. If a person goes into matters wholly unconnected with, and irrelevant to, the duty or interest that gave rise to the privilege, no privilege will attach to his statement in so far as it refers to such matters. 'The fact that an occasion is privileged,' said Lord Loreburn in Adam v. Ward, 'does not necessarily protect all that is said or written on that occasion. Anything that is not relevant and pertinent to the discharge of the duty or exercise of the right or the safeguarding of the interest which creates the privilege (or, in the words of Lord Atkinson, 'foreign and irrelevant subjects not pertinent to the discharge of the duty, or the protection of the interest which forms the basis of the privilege') will not be protected. The judge has to consider the nature of the duty or right or interest and to rule whether or not the defendant has published something beyond what was germane and reasonably appropriate to the occasion."

Lord Finlay in the same case states —

> "Occasion with its privilege does not reach a communication upon this foreign and totally unconnected matter."

The learned author of Gatley continues —

> "But where the matter impugned as irrelevant, though not strictly necessary to the discharge of the duty or exercise of the right which is the foundation of the privilege, is in any way reasonably germane to the subject matter, it is material only as evidence of malice to take the case out of the privilege.

In the case of *I. Persaud v. C. H. Parsley* (1948), Jackson J. considered the question — "How irrelevant or excessive material relates to a privileged occasion has received judicial attention," and quotes passages from the judgments of Lord Atkinson and Lord Dunedin in the case of *Adam v. Ward,* the latter repeating and relying on the dictum of Esher M.R. in *Nevill v. The Fine Arts.* Lord Atkinson at p. 340 in his judgment states —

> "What would be the effect of embodying separable foreign and irrelevant defamatory matter in a libel? Would it make the occasion of the publication of the libel no longer privileged to any extent, or would those portions of the libel which would have been within the protection of the privileged occasion, if they had stood alone and constituted the entire libel, still continue to be protected, the irrelevant matter not being privileged at all and furnishing possible evidence that the relevant portion was published with actual malice. In the absence of all guiding authority the latter would, in my opinion, be more consistent with justice and legal principle, and I think it is in law, the true result."

Lord Dunedin adopting the language used by Esher M.R. —

> "But when there is only an excessive statement having reference to the privileged occasion, and which, therefore, comes within it, then the only way in which the excess is material is as being evidence of malice. In none of the cases on the subject, so far as I know, has it been held that the privilege is taken away when there has been such an excessive statement, unless the jury has found that there was malice. I protest against the notion that a judge has a right to say that, if the jury find that the statement is excessive, though they decline to find actual malice, the law infers it. If the law did so, it would often be inferring what is not true. A man may use excessive language and yet have no malice in his mind."

Lord Dunedin continued —

> "If the defamatory statement is quite unconnected with and irrelevant to the main statement which is ex hypothesi privileged, then I think it is more accurate to say that the privilege does not extend thereto than to say, though the result may be the same, that the defamatory statement is evidence of malice. But when the defamatory statement — though not really necessary to the fulfilment of the particular duty or right which is the foundation of the privilege — is, so to speak, part and parcel of the privileged statement and relevant to it. then I think that the only way in which the statement is material is as evidence of express malice."

The question that arises for my determination, therefore, is whether the statement "This woman admits this" on the one hand is unconnected with and irrelevant to the main statement which I have held to be privileged or, on the other hand, whether this second part of the statement is part and parcel and relevant and referable to the main statement.

The learned author of Gatley at p. 280 quoting the dictum of Lord Esher M.R. in *Nevill v. The Fine Arts*, states —

> "The question whether a privileged occasion protects a statement involving the character of one who is only indirectly concerned in the charge made depends on its relevancy to the privileged part of the statement and the circumstances in which it was made. 'Where a defendant on an occasion which is privileged as between himself and some other person, makes some defamatory statement affecting a third person which has nothing to do with the privileged occasion that third person would have a right of action against the defendant, and, as between him and the defendant, there would be no privileged occasion.' "

It is true that the defendant could have dealt with this matter of discipline without making the second part of the statement, but he was bound to introduce the name of plaintiff in the first part of the statement in order to give the worker particulars of his misconduct. The second part of the statement, therefore, need not have appeared. Can it be said, however, that the second part of the statement is irrelevant, foreign, not germane to and not referable to the first part of the statement, and has nothing to do with it? I think not. The words may be unnecessarily strong and excessive but certainly not irrelevant and unconnected with the first part of the statement. It may be that the words used in the second part of the statement were irrelevant in the sense that the manager could have fully dealt with the matter of the allegations and need not have stated "This

woman admits this", but they were not "irrelevant" in the sense that they were not relevant to the main statement and also certainly not "unconnected with", "foreign" or "had nothing to do with" the first part of the statement. In the result, I find that the words "This woman admits this" used by the defendant in his letter to Yassim were excessive having reference to the privileged occasion. This excess is only evidence of malice. I hold, therefore, that the occasion is privileged in respect of the whole statement appearing in paragraph 2 of the letter and the entire communication is protected.

The defendant, having discharged the burden of proof placed upon him in showing that the occasion was privileged, it is now on the plaintiff to show the existence of actual or express malice in the mind of the defendant at the time of the publication.

In *Clerk v. Molyneaux* (1877) 3 Q.B.D. 237 at 247, Brett L.J. lays it down—

> "I apprehend the moment the Judge rules that the occasion is privileged, the burden of proving that the defendant did not act in respect of the reason of the privilege but from some other and indirect motive, is thereupon thrown upon the plaintiff."

In the same case Cotton L.J. states—

> "It is clear that it is not for the defendant to prove that he was acting from a sense of duty, but for the plaintiff to satisfy the jury that the defendant was acting from some other motive than a sense of duty."

In this case there is no extrinsic evidence at all from which I could properly infer malice in the mind of the defendant. The plaintiff, being unknown to the defendant, the defendant could not have borne feelings of spite or ill-will towards her nor could he have had the intention to injure her. The question arises whether there is intrinsic evidence of malice, that is to say, evidence of malice which arises from the terms of the statement itself.

The defendant has stated that he wrote and published the letter on information received from Mr. Finlay and Mr. Arnold, and that he honestly believed that what was contained therein was true and correct. There is nothing to rebut the defendant's evidence on this issue.

What better source of information could he have had than the report of his Field Manager and the written report of his Personnel Manager, the latter by whose very designation we must assume was employed for that purpose.

Cockburn C.J. in *Spill v. Maule* (1869) L.R. 4 Ex. 232 at 236 laid it down,—

> "All we have to examine is whether the defendant stated no more than he believed and what he might reasonably believe; if he stated no more than this he is not liable, and unless proof to the contrary is produced, we must take it that he did state no more."

In *Laughten v. Bishop of Sodor and Man* (1872) L.R. 4 P.C. 495 at 504, Sir Robert Collier stated in his judgment, —

> "To submit the language of privileged communications to a direct scrutiny, and to hold to all excess beyond the absolute exigency of the occasion to be evidence of malice would in fact greatly limit, if not altogether defeat that protection which the law throws over privileged communications,"

Nearly 50 years later, Lord Atkinson in *Adam v. Ward* approved of the *dicta* of these two learned judges and summarised the point in this way —

> "These authorities, in my view, clearly establish that a person making a communication on a privileged occasion is not restricted to the use of such language merely as is reasonably necessary to protect the interest or discharge the duty which is the foundation of his privilege, but that, on the contrary, he will be protected, even though his language should be violently or excessively strong, if having regard to all the circumstances of the case, he might have honestly and on reasonable grounds believe that what he wrote or said was true and necessary for the purpose of his vindication, although in fact it was not so."

The plaintiff has failed to show that the defendant did not act honestly and reasonably and that he was actuated by some indirect motive other than a sense of duty, and on the contrary I accept the defendant's evidence on this issue and find that in publishing the letter of 20th January, 1956. he was not actuated by spite or ill-will or any improper motive towards the plaintiff, and that he was prompted only by a sense of duty in his capacity as Manager to a subordinate employee of the estate.

I find that at the time of the publication the defendant honestly believed the plaintiff's conduct to be such as he was informed by his Field Manager and Personnel Manager, and honestly felt that such information warranted the publication of the letter. I cannot and do not find that at the time of the publication of the letter the defendant displayed such recklessness from which it could be inferred that he had no regard for the effect of the publication. Nor can I find that he was actuated by any motive other than an honest one to cause him to use the excessive language.

Plaintiff has failed to establish that the defendant was actuated by malice and has therefore not discharged the onus cast upon her. The claim is therefore dismissed and there will be judgment for the defendant with costs on the lower scale.

Solicitors:
S. M. A. Nasir for plaintiff.
H. C. B. Humphry's for defendant.

SIMPSON v. THE QUEEN

(In the Supreme Court, Court of Criminal Appeal (Holder. C.J., Stoby. J., Luckhoo, J. ag.) February 3, 11, 1956).

Criminal Law—Throwing corrosive fluid with intent—Wrongful exclusion of evidence—Refusal by trial judge to allow deposition of a witness to be tendered to contradict that witness—Refusal wrong—Effect of wrongful refusal—Application of proviso to section 6 (1) of the Criminal Appeal Ordinance, Cap. 8.

The appellant was convicted on a charge of unlawfully and maliciously throwing a corrosive fluid upon Violet Luke with intent to maim, disfigure or disable her or to cause her grievous bodily harm contrary to section 57 (1) of the Criminal Law (Offences) Ordinance, Cap. 17.

At the trial a witness for the Crown on oath made a statement which was inconsistent with her evidence in her deposition before the magistrate at the preliminary enquiry into the charge against the appellant. This inconsistency she sought to explain by saying that the magistrate misunderstood her evidence. The witness therefore did not distinctly admit that she had made that statement attributed to her in her deposition.

Counsel for the appellant thereupon sought to contradict the witness by her deposition but the trial judge declined to allow him to do so.

Held: Under the provisions of section 79 (1) of the Evidence Ordinance. Cap. 25, "a witness under cross examination may be asked whether he has made any former statement relative to the subject matter of the cause or matter and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and, if he does not distinctly admit that he has made that statement, proof may be given that he did in fact make it." The trial judge was therefore in error in refusing to allow the deposition to be tendered.

Counsel for the appellant further submitted that the wrongful exclusion of that deposition should result in the conviction being quashed.

Held: The surrounding circumstances of the case pointed so conclusively to the appellant's guilt that there was no doubt that had the deposition been admitted the jury would inevitably have come to the same conclusion. Consequently the proviso to section 6(1) of the Criminal Appeal Ordinance, Cap. 8 would be applied, no substantial miscarriage of justice having resulted from the exclusion of the evidence.

Appeal dismissed. Conviction and sentence affirmed.

B. S. Rai, for appellant.

S. S. Ramphal, Solicitor General (ag.) for respondent.

Judgment of the Court: On the 7th December, 1955, the appellant was convicted on a charge of unlawfully and maliciously throwing a corrosive fluid upon Violet Luke with intent to maim, disfigure or disable her or to cause her grievous bodily harm, contrary to Section 57 (c) of the Criminal Law (Offences) Ordinance, Chapter 17. Against this conviction he has appealed.

The grounds of the appeal are—

1. that the learned trial Judge wrongly excluded the deposition of JANE HALL, a witness for the prosecution, when it was sought to contradict her thereby;

2. that the learned trial Judge misdirected the jury on the burden of proof.

At the hearing of this appeal Counsel for appellant abandoned the second ground and confined his argument to the first. In support of this ground he contended that the evidence given by the witness Jane Hall at the trial was inconsistent with that given before the Magistrate and recorded in the depositions. He gave instances of the variance between her story told in the Magistrate's Court and that told at the trial and urged

that it was for the purpose of showing those inconsistencies that he sought to put the deposition of Hall in evidence which the Judge refused to permit to be done. He further contended that the learned trial Judge in his summing up to the jury said that the allegation of the Crown was that the appellant before he left the house had told Hall to say that it was Campbell who had thrown the acid on her daughter; that Hall had in her evidence at the trial said that it was not Campbell who had thrown the acid and that the reason why she told the Police that it was Campbell was because the accused had threatened her and that she had to remove from the house in which she and the appellant lived. No mention was made in the summing up about her love for him as the true and only motivating factor, whereas in the Magistrate's Court Hall only referred to love as the motive which causes her to put the blame on Campbell.

Counsel emphasized that the clearest example of the inconsistent story of the witness Hall was where she said that she had never made a report at the Police Station implicating Campbell.

Counsel submitted that where there are discrepancies between the evidence of a witness at the trial and his evidence before the Magistrate at the preliminary inquiry the deposition of that witness may be put in evidence with the object of discrediting the witness and that this is not a matter within the discretion of the trial Judge. Counsel contended that by the exclusion of this evidence the appellant was prejudiced at the trial. Hall being the principal witness for the prosecution and in fact the only witness who claimed that she saw the appellant near the scene of the crime when it was committed. That no one could say what would have been the impact on the jury if the deposition of the witness Hall had been admitted in evidence.

On the other hand it was contended for the Crown that the deposition would be admissible if it carried the matter any further but that implicit in Hall's statement is a denial that she made a report at the police station mentioning Godfrey Campbell's name; that there is also her positive statement denying that she mentioned Campbell's name at the police station. She was thereby admitting the apparent difference referred to by Counsel for the appellant although she was saying that it was wrongly recorded. The admission of the deposition as evidence is not therefore required; that from reading the record it is clear that the purpose of putting in the deposition was to contradict her statement that she did not make the report implicating Campbell at the Police Station. Had the deposition been read it would not have assisted the jury to any considerable extent and the jury would have come to the same conclusion in the case. The appellant had spoken to Hall shortly after the incident and told her not to say that he was the person who had thrown the acid but that it was Godfrey Campbell who had done so. It was therefore unnecessary for the deposition to be put in for Counsel to attack her credibility.

Counsel further contended that Hall had admitted that she had made a false report and that she had done so because she loved the appellant. In the circumstances it is not necessary to put her deposition in evidence and accordingly deposition was not wrongly excluded.

Further, Counsel argued, there was no inconsistency in the alleged contradictions as to which of the two emotions motivated the witness Hall to make a statement to the Police involving Godfrey Campbell.

Counsel for the Crown agreed that the better course at the trial might have been to admit the deposition in evidence but submitted that failure to do so was not prejudicial to the accused at the trial; it did not deprive the jury of evidence which might have led them to a different conclusion or to a conclusion favourable to the accused. The material aspects of Hall's testimony were not challenged. There was no suggestion in the cross-examination that in respect of the material portions of her evidence there was any inconsistency. The suggestion of the appellant must be that the whole story is false; that is the purpose of attempting to discredit her. But in view of the several substantial parts of her evidence already mentioned which were uncontradicted the whole story is not false.

Mr. Rai in reply referred to the 33rd Edition of Archbold. p. 344 paragraph 570 (3) (which relates to the wrongful exclusion of evidence) and submitted that a distinction must be drawn between misdirection of law and fact which may not result in a miscarriage of justice and the case where credit or credibility is concerned. In the former case the matter would be a comparatively simple one for this Court to say whether that misdirection would have affected the jury. But the question of credit or credibility is a matter for the jury. If the deposition had been admitted the jury would have had additional material which might have led them to discard the whole of Hall's evidence.

The procedure to be followed when a witness makes a statement inconsistent with a previous statement in writing is set out in section 79 of the Evidence Ordinance, Chapter 25 (KINGDON Edition) which is:

> "79. (1) A witness under cross-examination may be asked whether he has made any former statement relative to the subject matter of the cause or matter and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and, if he does not distinctly admit that he has made that statement, proof may be given that he did in fact make it.
>
> (2) The same course may be taken with a witness upon his examination in chief, if the judge is of opinion that he is adverse to the party by whom he was called, or that his memory is in good faith at fault, and permits the question."

From this section it is evident that once a discrepancy is established it is the Judge's duty to admit the deposition so that the jury can compare the sworn testimony of the witness with her previous statement. Of course, it will be appreciated that in taking evidence difficulties often arise with regard to recording precisely what a witness says and more so when the answers are given in cross-examination. The speed with which questions are asked and answered may account for seeming discrepancies and it frequently occurs that what appear to be contradictions are capable of explanation. The Judge may if he thinks fit demolish the effect of apparent contradictions in his summing up by explaining to the jury how discrepancies may arise and he may thereby minimise the value of the depositions but the right of an accused person to avail himself of evidence which is admissible and which he considers useful cannot be impeached.

Whether the Judge was right or wrong in declining to admit the deposition as evidence depends then on whether the witness Jane Hall made a contradictory statement and did not expressly admit so doing.

At the trial of the appellant Jane Hall said:

"I told the Police that it was Godfrey Campbell burnt me at my home after I returned from the doctor.

1/2 hour after the incident I went to the Police Station I was rushed to the Doctor. I did not then say it was Godfrey Campbell at the Police Station before going to the doctor, but afterwards at home.

.....I made the report to Police that Godfrey Campbell burnt me on the 19th at my home.

It is at my home I made the report about Godfrey Campbell. In my deposition a mistake is made “they” take “police” for “police station”.”

At the preliminary inquiry she is recorded as saying:

"I made a report at the station that Godfrey Campbell had burnt my child and me.

.....Apart from the report I made at the Station, I gave a statement in writing to the Police about 10.00 a.m. on the 19th February, 1955. In that statement I said it was GODFREY CAMPBELL who burnt us."

This is an inconsistent statement which she explained at the trial by saying that the Magistrate misunderstood her evidence. By asserting that she was wrongly recorded is clearly not an admission that she had made the statement attributed to her. On the contrary it is a denial that she had been correctly recorded. This being so we are of opinion that the Judge was in error in refusing to allow the deposition to be tendered.

Mr. Rai submitted that if we reached the conclusion that the deposition was wrongly excluded then the conviction ought to be quashed as the jury having the additional evidence might not have accepted Jane Hall's evidence and unless her evidence was accepted the appellant could not be convicted.

The principle on which a Court of Criminal Appeal acts where evidence has been wrongly excluded is that the exclusion of admissible evidence is not fatal if the Court of Criminal Appeal is satisfied that the jury would have arrived at the same verdict if that evidence had been admitted.

In this case the following facts may be noted:

Jane Hall admitted at the trial that she had told a false story to the police at her house on the 20th September, and gave as a reason that she was threatened by the appellant. Had the deposition been tendered the jury would have heard that she told the Magistrate in her evidence before him as recorded that she had made a statement at the police station on the 19th September alleging that someone other than the appellant had thrown acid on her daughter. There was no evidence that she did mention Campbell's name at the police station on the 19th so the jury would have had to be directed to consider whether the

difference in her evidence before the Magistrate and at the Supreme Court was so vital that they ought to disregard her evidence having regard to her explanation of the discrepancy. But the jury knew that she had first mentioned Campbell as the man who had thrown the acid on her daughter. With this knowledge and the other evidence before them they came to a conclusion adverse to the appellant. We fail to see how the mere fact that the deposition recorded the witness Hall as mentioning Campbell's name on the 19th September and not on the 20th should have been such an important and compelling circumstance as to cause them to discredit her evidence completely and to reach a different conclusion. It is significant that the appellant was not in the house when Violet Luke was attacked nor did he arrive until 5 or 10 minutes later; the lamp from his room was missing and it was found in a trench 11/2 rods away. The surrounding circumstances pointed so conclusively to appellant's guilt that we have no doubt that had the deposition been admitted the jury would inevitably have come to the same conclusion and consequently we apply the proviso to section 6 (1) of the Criminal Appeal Ordinance, Chapter 8, and hold that although evidence was wrongly excluded no substantial miscarriage of justice has occurred and the appeal is accordingly dismissed.

SHARMA v. SANKAR

(In the Full Court, on appeal from the magistrate's court for the Essequibo Judicial District. (Holder. C.J., Stoby, J.) July 12, 1955: February 16, 1956).

Rice Farmers' Security of Tenure Ordinance, 1945 No. 10 of 1945—Removal of padi without payment of rent—Breach of section 7 of the Ordinance—Claim for possession because of breach.

The appellant sought after one month's notice to quit an order for possession of rice land rented by him to the respondent on the ground that the respondent had removed padi grown on the land without payment of the rent and had thereby committed a breach of the Rice Farmers (Security of Tenure) Ordinance, 1945.

The respondent admitted that he had removed the padi prior to the 31st December, 1953, without paying rent but contended that this did not constitute a breach of the Ordinance. The Magistrate held that no breach was committed as the rent was payable in money and was payable not later than the 31st December. 1953, whereas the padi was removed on the 24th October, 1953.

On appeal it was contended for the appellant that the magistrate's interpretation of section 7 of the Ordinance was wrong as paragraph (b) of that section specifically provides that if the tenant has not previously paid his rent he cannot remove his padi from the land let to him. Counsel for the respondent did not seek to support the Magistrate's interpretation of the Ordinance and agreed that a breach of the Ordinance had taken place. He submitted, however, that the magistrate was empowered to exercise his discretion as to whether he would order possession or not.

Held: that the magistrate erred in holding that no breach of the Ordinance had been committed by the respondent.

Held further: that the magistrate was not empowered to exercise a discretion as to whether he should order possession or not on such breach.

Appeal allowed. Order of Magistrate set aside.

L. A. Luckhoo, Q.C., for appellant.

F. Ramprashad, for respondent.

Judgment of the Court: The appellant (plaintiff) filed a complaint in the Magistrate's Court at Leguan in which he alleged **inter alia** that:

(a) The respondent (defendant) was his tenant of 3 acres of rice land at a yearly rental of S30;

(b) the tenancy was determined by notice to quit: and

(c) the defendant was not entitled to the protection afforded by the Rice Farmers (Security of Tenure) Ordinance, No. 10 of 1945, hereinafter called the Ordinance, as padi grown on the land was removed without payment of the rent and thereby a breach of the Ordinance was committed.

The respondent's defence was that he had not committed a breach of the Ordinance. He admitted that he had removed the padi prior to 31st December. 1953, without paying rent but contended that this did not constitute a breach of the Ordinance.

The issues then which the Magistrate had to decide were whether or not the respondent had committed a breach of the Ordinance and if he had done so whether the tenancy was properly determined.

The Magistrate held that no breach was committed as the rent was payable in money and was payable not later than the 31st December whereas the padi was removed on 24th October, 1953. The Magistrate's interpretation of the relevant section of the Ordinance is challenged in this appeal and it is therefore necessary to examine the salient provisions of the Ordinance.

Section 7 of the Ordinance is as follows:

"7. A landlord shall be entitled to give his tenant not less than one month's notice to quit his rice land in any of the following cases, that is to say —

(a) if, where the rent is payable in money, the tenant fails to pay the same by the thirty-first day of December in any year; or

(b) if the tenant, not having previously paid his rent removes his padi from the land let to him, without the permission of his landlord; or

(c) if, where padi is reserved as rent, the tenant fails to pay the same within twenty-one days after it has been reaped; or

(d) if the tenant, without any reasonable excuse, fails to plant or cultivate any padi or reap a crop in any year; or

(e) if the tenant commits a breach of a specified condition; or

(f) if, where a landlord has constructed or maintained any

dam, trench, drain or koker run, the tenant by any wilful or negligent act or omission causes damage to any such work; or

(g) if the tenant is convicted of any offence involving fraud or dishonesty in respect of any agricultural produce or livestock or if the tenant is convicted of having caused malicious damage to the property of the landlord or of other tenants of the landlord:

Provided that if at the time of such conviction the tenant has a crop growing on the land the landlord shall not require the tenant to quit until the crop has been reaped."

If it is borne in mind that section 5(1) of the Interpretation Ordinance, Chapter 5, requires "or" in any Ordinance to be construed disjunctively and not as expressing similarity then it will be seen that the Magistrate's interpretation of the section was manifestly wrong. True, section 7(a)

prescribes that where the rent is payable in money no breach is committed unless it is not paid by the 31st December but this does not mean that a tenant can remove his padi before he pays his rent as section 7(b) specifically provides that if the tenant has not previously paid his rent he cannot remove his padi from the land let to him. Under section 7(c) for example, a tenant has twenty-one days within which to pay his rent if the rent is payable in padi: if the Magistrate's interpretation is correct then no breach is committed if the padi were removed before twenty-one days. If this were so the Ordinance affords no protection to landlords at all as a tenant would be able to remove his padi and thereby deprive his landlord of the security on which he relies. The true purport of the Ordinance is to give to the tenant a reasonable time to pay: he may not wish to pay immediately and is not obliged to do so but where the right to delay payment up to 31st December is being exercised the padi must remain on the landlord's property until payment is made.

Counsel for the respondent did not seek to support the Magistrate's interpretation of the Ordinance. He agreed that a breach had taken place but submitted that the Magistrate could exercise his discretion whether he would order possession or not.

If such a discretion exists the basis for it must be found in the Ordinance either expressly or by necessary implication. It cannot be too strongly stressed that the Ordinance restricts and was designed to restrict the common law right of a landlord to dispossess his tenant after the giving of an appropriate notice. Before the coming into operation of the Ordinance, the Rent and Premises Recovery Ordinance. Chapter 92, section 15, regulated the procedure to be adopted in respect of tenements not exceeding S240 a year. Chapter 92 was repealed by the Landlord and Tenant Ordinance, 1947, No. 26. The provisions of section 15 of Chapter 92 were substantially re-enacted by section 46 of Ordinance No. 26 of 1947 which provides that where a tenancy under $240 a year has been determined by a legal notice to quit and possession has not been delivered up, the landlord may file proceedings in the Magistrate's Court for possession, and if the tenant appears and does not show to the satisfaction of the Magistrate reasonable cause why possession should not be delivered up. the Magistrate may order possession.

Section 1 of the Small Tenements Recovery Act, 1838. is the English equivalent of section 46 of Ordinance No. 26 of 1947 and in **Shelly v. London County Council** (1949) A.C. 56 it was held that the words "must show to the satisfaction of the Magistrate reasonable cause why possession should not be given up" did not give the Magistrate an arbitrary discretion but means some cause whereby the tenant has a right in law to remain and that no discretion based on hardship to the tenant was exercisable.

Now if there was no discretion at common law and no discretion other than a legal one under Ordinance No. 26 of 1947 which regulates the relationship between landlords and tenants in this Colony then the Magistrate would be compelled to order the delivery up of possession unless the Rice Farmers (Security of Tenure) Ordinance, 1945, endowed him with special powers. We have found no provision nor has Counsel indicated any which empowers a Magistrate to exercise a discretion in the tenant's favour where a breach has been committed. A

breach having been committed by the tenant and the landlord having complied with the requirement as to notice there was no alternative but to decide in the landlord's favour.

The appeal is allowed and the respondent is ordered to deliver up possession of the lands held by him on or before the 30th day of April. 1956. The respondent will pay the appellant's costs to be taxed.

Solicitor:
H. B. Fraser for appellant.

LLOYD v. ROSS

(In the Full Court, on appeal from the magistrate's court for the East Demerara Judicial District) (Holder, C.J., and Stoby, J.) July 6, 1955; February 17, 1956).

Bastardy—Order against putative father—Mother later confined in Mental Hospital—Custody of illegitimate child—Variation of order for maintenance—No jurisdiction in Magistrate.

R. was adjudged the putative father of a child in affiliation proceedings brought by the mother of an illegitimate child and ordered to pay its mother a weekly sum for its maintenance and education. Subsequently the mother was confined in a Mental Hospital and the custody of the child was transferred to L. and the weekly sums made payable to her.

On application by R. for custody of the child the magistrate found that it would be in the child's interest to remove him from L's custody and he revoked the existing order and awarded custody to R.

On appeal from the magistrate's decision it was contended that the Magistrate had no power in law to cancel the maintenance order and was wrong when he purported to revoke an order of custody alleged to have been made in favour of L.

Held: The magistrate had no power to cancel an order for maintenance of an illegitimate child once made. He can vary the amount to be paid under the order or he can appoint someone other than the mother to have custody of the child but the order remains in existence. His jurisdiction to vary the order in respect of the custody of the child is founded on the continuance of the order and if he cancelled the order he could not appoint R. to be the custodian of the child.

Appeal allowed

J. O. F. Haynes, for appellant.

B. S. Rai, for respondent.

Judgment of the Court:

This is an appeal from the decision of the Magistrate for the East Demerara Judicial District who in proceedings brought by the respondent under section 6(3) of the Bastardy Ordinance, Chapter 147, awarded custody of an illegitimate child to the respondent.

The evidence disclosed that on the 6th March, 1947, the respondent in affiliation proceedings brought by the mother of an illegitimate child was adjudged the putative father of the child and ordered to pay its mother a weekly sum for its maintenance and education. Subsequently the mother was confined in a Mental Hospital and the custody of the child was transferred to the appellant and the weekly sum made payable to her.

The respondent the putative father is an Agricultural Instructor and his evidence that the appellant was permitting the child to associate with another child who was convicted on seven occasions for dishonesty was accepted by the Magistrate. The Magistrate found that it would be in the child's interest to remove him from the custody of the appellant and he revoked the existing order and awarded custody to the respondent.

No legal argument was addressed to the Magistrate but in this Court Mr. Haynes for the appellant submitted that

(1) the Magistrate had no power in law to cancel the maintenance order;

(2) even if he had power to cancel the maintenance order the mother of the child in whose favour the order had been made should have been made a party to the proceedings either personally or, if she were of unsound mind, by some person authorized to represent her;

(3) the Magistrate was wrong when he purported to revoke an order of custody alleged to have been made in favour of the appellant.

With regard to the first submission his argument was that a careful analysis of section 6 of Chapter 147 made it apparent that there was no power given to the Magistrate to cancel an order and since he could not cancel the order he could not appoint the putative father as custodian.

We agree with this submission. By section 2 of the Bastardy Ordinance "affiliation order"" means "'an order adjudging a man to be the putative father of a bastard child and ordering him to pay a sum of money weekly or otherwise". Section 5 provides that an affiliation order is of no validity after the child has attained the age of fourteen years except for the purpose of recovering arrears due under it. In certain circumstances the order may remain in force until the child is sixteen years. Section 6(1) provides for payments under the order to be made to the mother so long as she is alive, not of unsound mind, not in prison or not unfit. Section 6 (3) is as follows:

"After the death of the mother of the child, or whilst she is of unsound mind or confined in a prison, or is proved to be a person unfit to have the custody of her child, the magistrate may, if he sees fit, by order under his hand, from time to time, appoint someone, with the consent of that person, to have the custody of the bastard child."

The sections referred to show that the whole scheme of the Ordinance is to ensure that after a man has been adjudged father of an illegitimate child the maintenance payable by him must continue for not less than fourteen years even though the mother of the child might die.

The Magistrate has no jurisdiction to cancel an order once made. He can vary the amount to be paid under the order or he can appoint someone other than the mother to have the custody of the child but the order remains in existence. His jurisdiction to vary the order in respect of the custody of the child is founded on the continuance of the order; if the Magistrate cancelled the order he could not appoint the respondent to be the custodian of the child.

Section 6 subsection (4) of the Ordinance supports this view. Under it anyone appointed to have the custody of a bastard child is

empowered to make application for the recovery of all payments becoming due under it. This must mean that a change in custody envisages the continuance of the order and not cancellation of it. Section 13 (1), too, enables a magistrate to order that all payments under an affiliation order should be paid to a collecting officer and by section 13 (5) the payments made by a putative father to the collecting officer are to be paid to the mother or person having the custody of the child.

The Magistrate must have appreciated the futility of appointing the respondent to have custody of the child and yet keeping the order alive and for that reason he adopted the course of cancelling it.

In coming to the conclusion that the Magistrate had no jurisdiction to appoint the father guardian of the child under the Bastardy Ordinance we are not deciding that if an application is made to a Judge of the Supreme Court such an order cannot be made and as that course may be adopted we refrain from expressing any opinion on the merits of the application.

In the result this appeal is allowed with costs fixed at $25 inclusive.

BOOKERS *et anor* v. HUTT

(In the Supreme Court. Civil Jurisdiction (Phillips J.) June 29, 30; September 6, 7; October 3, 4; December 2, 14, 15, 22, 23; 1955; February 25, 1956).

Agreement of sale—Subsequent agreement of sale following upon previous agreements of sale—Whether subsequent agreement represented true intention of parties—Whether condition to be implied in subsequent agreement that its fulfilment depended upon performance of a previous agreement.

Schuler held 3,400 and Hutt 2,600 of the 6,350 shares issued in the Bel Air Hotel Company Ltd. Hutt desirous of acquiring the Bel Air Hotel as a going concern agreed with Schuler to purchase his shares from him for $17,000 and to undertake the liabilities of the Company which included $19,000 a debt due to Bookers etc. Co. Ltd., to which Schuler was also indebted. Hutt was the owner of the Eldorado Hotel. By an agreement dated 3rd January, 1949, Hutt agreed to sell and Sue-A-Quan agreed to buy the Eldorado Hotel for $120,000. The purchase was to take effect from the 3rd January, 1949, and possession was to be given to Sue-A-Quan who was empowered to collect the rents on Hutt's behalf. A deposit of $6,000 was made by Sue-A-Quan and provision made for a further deposit of $5,000. Transport of the property was to be completed within six months or as soon as possible. It was provided that if Sue-A-Quan failed to complete the purchase within six months from the date of the agreement his deposit would be forfeited to the vendor Hutt and the agreement would become null and void.

A supplemental agreement between the same parties was made on the 12th February, 1949. It made provision for the transfer of the hotel and other licences to Sue-A-Quan before payment of the further deposit of $5,000. It was also provided by that agreement that the vendor having assigned the benefit of the agreement of the 3rd January, 1949 to Bookers shall be at liberty to advertise and pass a fifth mortgage to Bookers for $17,000. It was further provided under that agreement that Sue-A-Quan should pay to the Demerara Mutual Life Assurance Society Ltd. the sum of $45,000 in respect of the First, Second, Third and Fourth Mortgages on the property sold, and to Bookers the balance of the purchase price — $64,000.

A third agreement also dated 12th February, 1949, and made between the Bel Air Hotel Ltd., and Hutt, Schuler and Bookers in the first recital stated that the Bel Air Hotel Co. Ltd. was indebted to Bookers in the sum of approximately $19,000 under a First Mortgage and in the sum of approximately $8,500 in respect of supplies and was indebted to Schuler in the sum of $17,000. It also recited that Schuler who had the controlling interest in the Hotel Company had

agreed to sell his shares in that Company to Hutt for $17,000. In a third recital was stated that Hutt had agreed to sell the Eldorado Hotel for $120,000 and had delivered possession for the same to Sue-A-Quan under an agreement dated 3rd January, 1949. It also stated that $11,000 had been already or will shortly be received by Hutt and $45,000 is to be paid to the Demerara Mutual Life Assurance Society Ltd. in satisfaction of the first, second, third and fourth mortgages on the property leaving a balance of $64,000 to be paid to Hutt on the passing of Transport. The fourth recital stated that Schuler has assigned to Bookers $17,000 owing to him by the Bel Air Hotel and the sum of $17,000 owing to him by Hutt in respect of the sale of the said shares.

The fifth recital stated that the Hotel Company has agreed to pass a first and second mortgage on its property to Bookers as security for the payment of the said sum of $17,000 with interest at the rate of 5% per annum from the date of the agreement within six months from the 3rd January, 1949, or the passing of the mortgage and that Hutt has agreed to pass a fifth mortgage on the said property to Bookers as security for the payment of the said sum of $17,000 with interest at the rate of *5%* per annum from the date of the agreement within six months from the 3rd January, 1949, or the passing of the mortgage as the case may be.

The operative portion of the agreement is as follows—"the Purchaser" being Hutt, "the Creditor Company" Bookers "the Debtor Company", Bel Air Hotel Co. Ltd. and the "Vendor" Schuler —:

"Now it is hereby agreed as follows: —

1. The Purchaser shall forthwith deposit with the Creditor Company the Grosse Transport No. 523 of 23rd April, 1946, for the said property and hereby assigns to the Creditor Company the said balance of $64,000 payable to him under the said Agreement dated 3rd January, 1949, and the full benefit and advantage thereof.
2. The Debtor Company and the Purchaser shall forthwith advertise the aforesaid mortgages to the Creditor Company, and shall pass the same whenever requested by the Creditor Company.
3. On payment of the said sums of $17,000 with interest as aforesaid or on the passing of the said mortgages, whichever shall first happen, the transfer of the said shares which has been signed by the Vendor shall be handed to the Purchaser.
4. On receipt of the said balance payable under the said Agreement dated 3rd January, 1949, the Creditor Company shall apply the same to the payment of —
   (a) the capital and interest of the said First Mortgage of $19,000;
   (b) the said sum of $8,500 in respect of supplies: and.
   (c) the said sum of $17,000 with interest as aforesaid.
5. All costs and expenses of and incidental to this Agreement shall be paid by the Debtor Company.

As witness the hands of the parties the day and year first above written in the presence of the subscribing witness."

Bookers and Schuler brought this action to recover the purchase price of the 3,400 shares and interest. Hutt alleged that the agreement of the 12th February, 1949, did not represent the true intentions of the parties and on his behalf it was contended that there was an implied condition in the agreement that the fulfilment of the agreement depended upon the performance of the terms and undertakings in the Sue-A-Quan agreement.

The trial judge rejected Hutt's allegation that the agreement did not represent the true intentions of the parties.

Held: there was an implied condition in the third agreement that its fulfilment depended upon the performance of the Sue-A-Quan agreement and that it was not the intention of the parties to carry out the agreement if the Sue-A-Quan agreement fell through.

Judgment for defendant. (Editor's note—An appeal against this judgment was allowed by the Federal Court).

H. C. Humphrys, Q.C., for first-named plaintiff.

S. L. Van B. Stafford, Q.C., for second-named plaintiff.

P. A. Cummings with *H. A. Fraser* and *L. F. S. Burnham* for defendant.

Phillips, J. : This case arises out of an action brought by the plaintiffs against the defendant by way of a Specially Indorsed Writ of Summons to recover the sum of $17,000 being the purchase price of 3,400 fully-paid shares of S5 each in Bel Air Hotel Ltd. on or about the 12th February, 1949, sold to the defendant by the plaintiff Leon Schuler and which sum of $17,000 by an agreement dated 12th February, 1949, it is alleged, was duly assigned by Mr. Leon Schuler to the first-named plaintiff.

The case first came before the acting Chief Justice who refused the defendant's application for leave to defend on the ground that his affidavit in reply disclosed no triable issue and gave judgment on the 22nd May, 1950, in favour of the plaintiffs for the sum claimed. This judgment was affirmed by the West Indian Court of Appeal on the 26th February, 1951. Leave to appeal therefrom to His Majesty in Council was granted. The appeal was allowed by the Privy Council, the judgments aforesaid were set aside and it was directed that the defendant be given leave to defend the action.

The case came before me for trial on the 29th day of June, 1955, and on several other days when evidence was taken, arguments heard and concluded on the 23rd December, 1955 when judgment was reserved. I now set out hereunder my reasons for decision.

The proceedings before the Privy Council in booklet form were by consent tendered in evidence and marked Ex. 1 and are attached hereto.

The agreement of the 12th February, 1949, made between the plaintiffs and defendant herein and Bel Air Hotel Ltd. on which the action is based may be found printed at pages 9 and 10 of the proceedings before the Privy Council, Ex. 1 in evidence. The original is marked as Ex. 3 and will be referred to herein as 'The Agreement".

First of all the question whether the shares in question in the Bel Air Hotel Ltd., a company incorporated in this Colony are "goods" may be at once disposed of.

By section 22 (1) of the Companies (Consolidation) Ordinance. Chapter 178,

> "The shares or other interest of any member in a company shall be movable property transferable in manner provided by the Articles of the Company and shall not be of the nature of immovable property".

Goods are movable property as also are chattels.

Section 2 (1) of the Sale of Goods Ordinance, Chapter 65, enacts that

“Goods’ includes all movables except money, etc . . .” Shares in a company are treated as choses in action and have been held to come within the meaning of the word “chattels”.

Robinson v. Jenkins (1890) 24 Q.B.D. p. 275. "Chattels" Coke tells us is a French word and signifies goods which by a word of art we call "Catalla". In my view shares in a company in this Colony are goods within the meaning of section 2 (1) of the Sale of Goods Ordinance, Chapter 65.

During the course of this judgment for convenience the first-named plaintiff, Booker Brothers McConnell and Company Limited, will be referred to as "Bookers" and the second-named plaintiff, Leon Schuler, and the defendant, Johan Francois Hutt, will be referred to respectively, but with no discourtesy as "Schuler" and "Hutt".

Bookers is a firm doing business in British Guiana whose Managing Director during the relevant period was Mr. William Stanley Jones who has retired from Bookers but now carries on the business of a Broker in the city.

Schuler and also **Hutt** had previously been employees of Bookers and had held responsible positions in that firm. They are both keen businessmen, had both bought and sold Hotels and indeed had been previously instrumental in the formation of companies for the purpose of operating Hotels. Hutt during the course of his span of 81, no doubt, interesting years, had had occasion to make fleeting excursions in, and apparently was not a stranger to, the Bankruptcy Courts.

Mr. J. Edward De Freitas, herein after referred to as the Solicitor, is a partner of the firm of Cameron & Shepherd, a firm of Solicitors with their office in Georgetown. Mr. De Freitas in the matter of this agreement (Ex. 3) in question had acted, on this occasion as well as on previous occasions, as the Solicitor for all the parties — for Bookers, for Schuler, for Hutt and for Bel Air Hotel Ltd.

One other actor must be mentioned who enters at a later stage — of him I will later speak — one **Mr. James Alexander Sue-A-Quan.** So much for the **dramatis personae.**

The facts in this long outstanding case have now been fully canvassed. A comparatively simple issue of an agreement to sell shares in a company and their subsequent assignment has been the subject of considerable legal controversy, the cause of which is not hard to find.

This matter is easily understood, in my opinion, if it is fully appreciated that, though not a contracting party, the central figure in this entire transaction was Mr. J. Edward De Freitas, the Solicitor acting professionally for all the parties to this action and in whom all the parties had placed their complete confidence and reliance. The parties believed that this Solicitor could from his brain create one short and concise document which would contain all their business ramifications—what is called in commercial parlance comprehensively, if perhaps loosely, "a deal"—all the collateral arrangements and agreements, they had made.

The solicitor quite frankly told the plaintiff Schuler and the defendant Hutt that to do all that was legally required was not possible within the time at his disposal—between the 8th and 12th February. The upshot was that this composite agreement herein (Ex.3) came into being which purported to be a short cut to Eldorado but in effect and in truth was a document prepared by him with the avowed intention, not unnaturally from the solicitor's own point of view, to protect and better to serve the first-named plaintiffs, Bookers, a company in a big way of business and his influential and important clients. To such an extent was this uppermost in the solicitor's mind that by this agreement he attempted from all the available material to make assurance for Bookers doubly sure and security more secure. If this was the intention of the solicitor

it was his duty clearly and unmistakably advise the other parties especially Hutt of the desirability of having separate legal advice. It may not have been thought necessary, however, in the circumstances by the parties themselves but nevertheless the advice should have been given.

Mr. Cummings, Counsel for the defendant Hutt, great stress on this aspect of the case.

The Solicitor had acted previously for the defendant Hutt in a similar transaction of the sale of a Hotel, had also previously acted as solicitor for Schuler; his firm were the retained Solicitors of Bookers and he was the Solicitor for the Bel Air Hotel Ltd. The books of that Company and its meetings were frequently kept and held at his office and he was a shareholder, albeit a small' shareholder in the Bel Air Hotel Ltd.

The Solicitor in his evidence says:—

> "At some stage someone asked me to make one complete agreement of the whole of the transaction about the sale of shares—the taking over of Bel Air Hotel Ltd.—the assignment of debts and the security to be given to Bookers in relation to the whole of this transaction. I said I could not do that within the time but would do so as far as the security to Bookers was concerned."

For this agreement to be properly understood therefore it must be necessary to ascertain what were the other collateral agreements, of which there had been two. one verbal (the agreement Ex. 3 it was submitted was a mere note or memorandum of it sufficient to satisfy the Sale of Goods Ordinance (sec. 6 of Ch. 65) and the other, written—the Sue-A-Quan agreement.

Firstly, the agreement — Schuler with Hutt for the sale of shares and Hutt's purported agreement to buy out Bel Air Hotel Ltd. As a going concern, and

Secondly, the Sue-A-Quan agreement of the 3rd January, 1949 and the supplemental agreement thereto of the 12th February, 1949.

I will deal with these two agreements separately, but in so doing I fear some over-lapping may occur but for clarity this is the shortest way.

Firstly:

The Schuler-Hutt verbal agreement for shares.

The day after the signing of the agreement, having brought off what they considered a profitable deal to themselves Schuler and Hutt left the Colony together for Trinidad on holiday apparently in high spirits—the one **en route** to Jamaica, the other to the United States of America.

Hutt and Schuler had been friends and business associates. Schuler who had the controlling interests in the Bel Air Hotel Ltd. and was its chairman, had previously on the 15th day of July, 1948, sold to Hutt $13,000 in value of shares in the Bel Air Hotel Ltd. from which time onwards Hutt became the Managing Director.

However in January, 1949, Hutt who was the owner of another Hotel (the Eldorado Hotel) had agreed to sell the same to Sue-A-Quan for 120,000 of which sum there had been a payment of $6,000. Hutt disclosed to Schuler that he desired to acquire the whole Hotel (Bel Air Hotel Ltd.) all the shares and assets and all the liabilities for the sum of

$70,000. I find as a fact that this sum of $70,000 an issue in the case was mentioned. Schuler like the Solicitor cannot recall this sum of $70,000 ever being mentioned by Hutt when instructions were being given for the preparation of the agreement.

Schuler and Hutt then interviewed Mr. Jones, the Managing Director of Bookers and the scheme was outlined to him. Mr. Jones was informed that Hutt had agreed to sell out his Eldorado Hotel and had actually received an advance of $6,000 and it was left to Cameron and Shepherd as to how the whole matter including the payment of Bookers" debts should be carried out.

Apart from the debt of $19,000 owed to Bookers by the Bel Air Hotel Ltd. the Hotel owed Bookers other sundry debts for groceries, etc.: but what was more important was the fact that Bookers had a hen or had in their possession Schuler's shares, that he had agreed to sell to Hutt, for an advance or loan of $10,000 which Bookers had previously made to Schuler. In order to release these shares for delivery to Hutt. Schuler apparently agreed to assign the purchase price of his shares, agreed to be paid by Hutt, to Bookers. Schuler was indebted to Bookers and had certain other financial dealings with them with which we are not concerned.

The Hotel was also indebted to Schuler for the sum of $17,000 (called Schuler's Vendor's Debt) which was one of the liabilities of the Hotel which Hutt, if he were to obtain complete control and to be responsible for all the liabilities, would have had also to discharge. It was no doubt to Schuler's advantage to have this debt of $17,000 assigned to Bookers. This debt formed the subject matter of another pending action arising out of the said agreement in question. It does not form part of the present action and no further mention will be made of it unless where absolutely necessary.

On Hutt's return to the Colony at a meeting of the Bel Air Hotel Ltd., held on the 1st May, 1949, at which Schuler was Chairman, the Board of Directors ratified the agreement in question of the 12th February, 1949.

The minutes of the meeting read as follows:

> "The Board ratified the four-party agreement entered into by the Company with Messrs. L. Schuler, J. J. Hutt, and Booker Bros. Mc-Connell & Co., Ltd., and the affixing of the Company's Seal thereto under date 12th February, 1949, *affecting the transfer of the Hotel and the mortgage thereon.*
>
> The meeting adjourned to take the stocks inventory and this completed, was terminated."

It was admitted that the blank transfer of shares was never actually delivered to Hutt; that no mortgages as mentioned in the agreement were ever passed and that Sue-A-Quan failed to fulfil his contract with Hutt, and never paid the $64,000 as he agreed to do, to Bookers.

Hutt contended that Schuler agreed that for $70,000 Hutt would get full and complete control of the Hotel and that this was never done.

The plaintiffs on the other hand maintain that by the simple agreement to sell Schuler's shares or his controlling interest that automatically conferred on Hutt what he had agreed to buy *i.e.*, the Bel Air Hotel Ltd. as a going concern. With this latter contention I cannot agree. It would appear fairly obvious that without the controlling interest in the Hotel (of Schuler's shares) Hutt could not on behalf of Bel Air Hotel Ltd. Pass

the second mortgage stipulated for in the agreement and Schuler, while still holding the controlling interest, would not do so unless the $64,000 were paid. Hutt could not get possession of Schuler's shares unless Bookers received from Sue-A-Quan the $64,000 also stipulated for in the agreement (Ex. 3). Moreover. Bookers had control of Schuler's shares for their advance thereon of $10,000.

Sue-A-Quan made default, the whole super-structure fell in and nothing can now be reconstructed from the debris. This state of affairs must nave been in the contemplation of the parties, as I find. Hutt was buying out Bel Air Hotel Ltd. and paying over to Bookers $64,000 in order to do so and would not be able to acquire the Hotel unless the $64,000 were paid.

Mr. Jones the Managing Director of Bookers in his evidence at the trial said:

> "I was expecting to be paid from the moneys Hutt was getting from Sue-A-Quan but I was not interested and did not know what Hutt was getting from the moneys that he was paying except that I was aware that Hutt was trying to acquire the Bel Air Hotel Ltd. *If the moneys from Sue-A-Quan were not forthcoming I suppose my company would still look to Schuler and the Bel Air Hotel Ltd. for the payment of their debts."*

Schuler in his evidence said:

> "I supposed the Blank Transfers would be delivered to Hutt *when the money was passed and the whole deal was completed."*

Meaning thereby, I am convinced, that when Sue-A-Quan paid over the $64,000 to Bookers. Hutt would be put in complete control of the Bel Air Hotel Ltd. and be delivered the snares and then the whole deal would be completed.

Hutt in cross-examination by Mr. Stafford (Counsel for Schuler) said:

> "I had at no time taken charge of the Bel Air Hotel Ltd. I did not regard myself as being in possession of the assets of the Hotel. I did not regard the other shareholders as nonentities."

I accept this.

An examination of the Minutes of the Meeting of the Bel Air Hotel Ltd., if those can (as they ought to) be relied upon, bears out that Hutt was not regarded as having acquired Bel Air Hotel Ltd. and for the very good reason that the Sue-A-Quan moneys had never been paid to Bookers. The following appears in the Minutes of the Meeting of the Hotel of the 30th May, 1949 (at which Meeting Schuler was the Chairman).

"MINUTES OF A MEETING OF THE BOARD OF DIRECTORS OF BEL AIR HOTEL LIMITED HELD ON MONDAY, 30TH DAY OF MAY AT 5.30 P.M. IMMEDIATELY FOLLOWING THE ANNUAL GENERAL MEETING.

Present — Messrs. Leon Schuler, Chairman
J. J. Hutt,
J. A. Adamson.
Jocelyn Bostock, Secretary.

The Directors agreed to waive notice of the Meeting which immediately followed the Annual General Meeting.

Mr. Hutt informed Mr. Schuler and Mr. Adamson, Directors, that the arrangement made for taking over the assets of the Bel Air Hotel, Limited for $70,000 was contained in an agreement a copy of which he produced but it appeared that the agreement seemed to be ambiguous as two amounts of $17,000.00 were mentioned in the agreement instead of one amount of $17,000.00 for shares to Mr. Schuler.

Mr. Adamson after reading it, said that at the end of the agreement he construed it to mean only one amount of $17,000.00. Mr. Schuler could not read it as he had not his glasses; he simply glanced at it and it was agreed to see Mr. de Freitas of Cameron & Shepherd about it.

Approved
J. A. Adamson
Chairman. 8. 7. 49."

Those in attendance at the Meeting of the 17th August, 1949, were "Messrs. J. A. Adamson (Chairman) Edward De Freitas. H. C. B. Humphreys (Shareholders) with Messrs. L. Schuler, J. J. Hutt (Directors) and Mr. J. Hill by invitation with Mr. H. W. Low (Secretary). The Minutes of the Meeting were as follows:

" …….. …….. ……..

Mr. Hutt stated that no reply having been received from Messrs Booker Bros, or Mr. Schuler re the agreement of purchase of the assets of Bel Air Hotel Ltd. but Mr. Hutt having received a reply from Messrs. Cameron & Shepherd today, from Mr. L. M. F. Cabral. he will therefore call off the meeting.

Mr. Hutt having said certain shares were issued and not paid for, Mr. Edward De Freitas then stated that he would like to know something about the call on shares issued and not paid for. He produced certain certificates re shares held by Mr. Schuler. Mr. Hutt pointed out that from the Share Certificate Book, more shares were issued to Mr. Schuler than stated by Mr. De Freitas. After going into the matter of transferred shares by Mr. Schuler and transferred shares to Mr. Schuler, they came to agreement of the total shares now held by Mr. Schuler and other Shareholders, viz: —

L. Schuler	3,400	Shares
J. A. Adamson	600	"
H. C. Humphreys	50	"
J. Edward DeFreitas	50	"
C. B. Adamson	50	"
J. J. Hutt	2,600	"
	6,750	

Mr. Hutt stated that although shares were transferred by Mr. Schuler and shares transferred to Mr. Schuler, the original Shares Certificates of those shares transferred were not returned and cancelled or replaced in the Share Capital Book or entered in the Register of Members and Share Ledger as having been paid for. There is also no Minutes of the Directors confirming the said "transfers. Mr. Edward De Freitas

remarked that the shares issued to Mr. Schuler were paid for as Vendor of the Company as per agreement of sale to be paid for in cash or shares. At this stage, Mr. Adamson informed the meeting that he has paid for 200 shares, but the other 400 shares which had been issued to him, he has not paid for and that he had told Mr. Schuler that he was not calling them up long ago and had returned the Share Certificate to the best of his memory."

It is true that Mr. Cabral's letter of the 18th July, 1949, on which Counsel for the plaintiff places so much reliance to establish the agreement to buy the shares in the second paragraph states (at page 17 of Ex. 1): —

"I am told by Mr. Hutt that he or Bel Air Hotel Ltd., did not intend to agree and did not agree to bear any alleged liability of $17,000.00 to Mr. Leon Schuler *apart from the price of Mr. Schuler's shares"*

But this paragraph read alone does not give the true picture of what was the whole agreement. In the very next paragraph the letter states as follows:—

"Mr. Hutt says that he told Mr. J. Edward de Freitas who prepared the Agreement that he had agreed to buy the assets of Bel Air Hotel, Ltd. for $70,000.00 which sum was arrived at by adding all the liabilities which Mr. Hutt was to take over, to the price he was to pay for the shares to be transferred to him, as set out in his letter of the *8th February, 1949*, by Mr. Hutt to Booker Bros. McConnell & Co., Ltd."

Neither Mr. Jones, the Managing Director of Bookers, nor Mr. J. Edward De Freitas recall ever receiving or even seeing this letter of the 8th February, 1949 (and indeed it was never produced at the trial). Mr. Hutt however, strenuously maintained it was received by Bookers as there was a discussion on it. Neither Mr. Jones nor Mr. De Freitas could recall the sum of $70,000 ever being mentioned.

I find that it was in fact mentioned; but if the lack of memory of Mr. Jones in this matter may be excused as he is no longer with Bookers and years have passed by, nevertheless I must say that no one has suggested that Mr. J. Edward De Freitas suffers also from lapses of memory. His memory appears fresh on other incidental aspects of this matter and he had documents from which to refresh his memory.

Apart from the agreement of the 12th February, 1949, as between Schuler and Hutt there is no other contract in writing with respect to the agreement to sell these shares of which, however, it is alleged, the above agreement, Ex. 3, is only a note or memorandum of it. From the evidence as a whole I find that Hutt never agreed to buy these shares simply as one single and indivisible transaction but as part of his arrangement with Schuler to acquire Bel Air Hotel Ltd. as a going concern and this agreement to buy the shares is inseparable from the whole entire deal involving the payment of all the liabilities including the debts due to Bookers. If my view of the facts is correct then the action must fail on this ground also as that arrangement also was never fulfilled—and for the same reason, namely, the default of Sue-A-Quan in not paying to Bookers the $64,000.

Hutt's letter of the 30th July, 1949, to Mr. Jones though an *"ex post facto"* communication is not devoid of significance in this regard. His letter reads:—

57, Chalmers Place.
Georgetown. Demerara..
30th July, 1949.

Dear Mr. Jones,

I regret having to write you on business while on your well-earned holiday, but as the matter is of such great importance to me and also to Bookers. I decided to write to you.

You will no doubt remember that two days prior to your departure I phoned asking you for an interview, (as I had received a copy of the Agreement between Bookers. Schuler and myself), which you could not grant as you were very busy but told me I could call on the 27th May, which was the morning of your departure. You went with me to Mr. Durey (*re* drainage for the piece of land at Bel Air Hotel) and told me that Mr. Durey would look after that: with reference to the Agreement between Bookers. Schuler and myself, when I asked you who gave Cameron & Shepherd the instructions *re* the Agreement, as two sums of $17,000 were mentioned instead of one sum of $17,000 shares for Schuler, you told me to see Mr. Follett-Smith. I saw him and showed him the letter with the amounts I agreed to take over. It was a definite arrangement that I should take over the assets of the Bel Air Hotel, Ltd. as a going concern for the total sum of $70,000. *i.e.*, taking over the following debts:—

Bookers Mortgage Debt	$19,000
Bookers Current A/c	8,500
Bookers Loan to Schuler on his $17,000 shares	10,000
Schuler — Balance of his shares	7,000
R.B. of Canada — Overdraft	5,000
Other shareholders	2,000
Hutt's shares	13,000
Hutt — Cash advance	3,500
Sundry Creditors	2,000
	$70,000

which as I told you is much more than the worth of the assets of Bel Air Hotel, Ltd., but having the hope of putting the land in good condition, I may be able to recover the amount and not lose the money invested and advanced. Bel Air Hotel at present is insolvent, from the Balance Sheet as at 30th June, 1949, as the assets of the Hotel cannot fetch at a maximum more than $45,000 and the creditors are as under:—

Bookers Mortgage A/c	$19,000
Bookers Store A/c	8,902
Cameron & Shepherd	176
J. J. Hutt — cash advance A/c	4,708
Bookers Interest A/c	234
Royal Bank of Canada	5,000
Sundry creditors	3,000
Schuler's shares	17,000
Schuler — Vendor's A/c	19,991
Hutt's shares	13,000
Other shareholders	2,000
	$93,011

It therefore follows that to put it in the hands of the Official Receiver, after deducting their Commission and charges, the Creditors will not get 30%.

I told Mr. Edward de Freitas that I will still carry out my original agreement for $70,000 as stated, but not with the addition of the other $17,000 as vendor's debt. They have up to date not decided.

I am still in possession of the Hotel, trying to nurse the lame horse, but I cannot continue as when the horse is restored to health I will not have it to ride as everybody will then want to ride it too.

I am very sorry to have taken up so much of your time. I sincerely hope that you are enjoying your holiday and that you will return feeling fit and strong.

Yours faithfully.
Joh. J. Hutt."

The Sue-A-Quan Agreement.

I shall now attempt to deal with the Sue-A-Quan Agreement.

It is necessary to examine the evidence given on oath at the trial by Leon Schuler, the second-named plaintiff.

He said that in the year 1945 he had purchased the Bel Air Hotel and the year after he formed a company—the Bel Air Hotel Ltd. He sold to the company he had formed for $63,000 on the 1st February, 1946, and thereafter until the year 1950 was Chairman of that company until he resigned as a Director on 26th May, 1950.

On the 15th July, 1948, the defendant Hutt acquired $13,000 face value of his shares in Bel Air Hotel Ltd. by an exchange with Hutt for $10,000 value of shares Hutt then held in the Hotel Tower Ltd. and that from that time Hutt became the Managing Director in the Company. Schuler said he (Schuler) had bought $17,000 worth of shares in the Bel Air Hotel Ltd.

It is clear that both Schuler and Hutt were and are no strangers to the "Hotel" business or in the formation of companies. Hutt himself had concerned himself in the formation of a similar Hotel company known as the Hotel Tower Ltd. and in which transaction Mr. J. Edward De Freitas had acted as his Solicitor.

Schuler further said that in January, 1949, (the Sue-A-Quan agreement is dated 3rd January, 1949) Hutt intimated to him that he desired to acquire the whole Hotel (Bel Air Hotel Ltd.)—all the shares and all the liabilities. Schuler and Hutt then together went to interview Mr. Jones, the Managing Director of Bookers, the largest creditor of the Company—that Hutt told Mr. Jones that he Hutt had agreed to sell his Eldorado Hotel and had already received an advance of $6,000 from Mr. Sue-A-Quan, the purchaser, that Mr. Jones then told them that they should go to Cameron & Shepherd, their Solicitors, and see Mr. J. Edward De Freitas who would prepare the necessary documents; *that it was to be left to Cameron & Shepherd as to how the matter should be done.* Schuler explained how thereafter they both left Mr. Jones, went to Mr. De Freitas and explained to him what they wanted done. They informed Mr. De Freitas that they intended leaving the Colony in a few days time, whereupon it appears that Mr. De Freitas informed them it would be impossible to do all that they required in that short space of time. However, he took down certain instructions from them. Mr. De Freitas, it would appear, had by that time

received instructions from Mr. Jones through Mr. Carlos Ignatius Fernandes who was then in charge of Bookers Credit Control Department: that was on the 8th February, 1949. On the 10th February, 1949, the agreement was drafted and on the 12th February, 1949, the parties appeared at Mr. De Freitas' Office to sign the agreement in dispute. Hutt was instructed by Mr. De Freitas to bring the Sue-A-Quan agreement which he did.

Schuler said Mr. De Freitas was acting then as Solicitor for all the parties, including the Bel Air Hotel Ltd.

Schuler said the document was read by himself and Hutt as I imagine as businessmen they would do and find as a fact that they did do. But Schuler said:

> "I signed what my Solicitor told me to sign. I signed the agreement on the 12th February. 1949, relying on and in the confidence I placed in Mr. De Freitas. I did not question him. I relied "on" him completely. I signed it for myself and the Company."

It is worthwhile here to note that Mr. Hutt said the same thing that he also signed in complete reliance on his Solicitor, but Mr. Hutt went a little further and quite untruthfully, as I find, said he never read the agreement, that parts of it were read out by the Solicitor and that other parts were omitted by the Solicitor and not read out at all and that it was the Solicitor who inserted in the agreement without his knowledge the fifth mortgage on Eldorado Hotel.

From what I gathered from Mr. Jones he too went to the office of the Solicitor when summoned there and affixed his signature to the document: I assume in full confidence also (though not misplaced confidence) in his Solicitor, Mr. De Freitas.

Thereafter said Mr. Schuler he took little part in the affairs of the company but that on the occasions that he attended the Meetings of the Bel Air Hotel Ltd. he was accompanied by his Solicitor. Mr. J. Edward De Freitas. He said from that time onward Hutt gave all the orders and instructions and was *in complete control of the Hotel* and had at least 99% proprietorship — a fact, I must reiterate, not borne out by the Minutes of the Meetings of the Hotel as I have previously attempted to show; though indeed it would appear that one Mrs. Kaise (whom Hutt later married and has been divorced from) was soon after appointed Manageress of the Snack Bar of the Hotel and one Mr. J. C. Hill, a relative of Mr. Hutt, appears to have attended meetings by invitation and on the 2nd June, 1950, as a Director.

Schuler further said that he understood by the agreement that Hutt was undertaking all the liabilities of Bel Air Hotel Ltd. and taking over all the assets of the Company and that he (Hutt) was going to run it as his personal property but not for the sum of $70,000 as Hutt alleges — that figure he said was never mentioned. Schuler said that by all the assets he meant the controlling interest that he Schuler had and which by the agreement Hutt was acquiring. Hutt on the other hand maintained that the arrangement with Schuler as disclosed to Bookers was that he would for a total sum of $70,000 be getting all the assets including the other outstanding shareholders' shares and he was undertaking to pay off and be responsible for all the liabilities of the Company acquiring Bel Air Hotel Ltd. as a going concern.

I accepted Hutt's evidence on this point.

Schuler said that he considered that the agreement in question of 12th February, 1949. contained all the arrangements between Hutt and himself and did not agree nor would he accept the statement contained in paragraph 2 of his Reply in this action dated 28th June, 1955, namely, that the agreement in question:

> "was not intended to set out all the terms and conditions of the several agreements made between Schuler and the defendant in relation to the purchase by the defendant of 3,400 shares in Bel Air Hotel Ltd. owned by the plaintiff and the acquisition by the defendant of the controlling interest of the Company."

And finally, Mr. Schuler, a man versed in the formation of companies and dealing with shares said — (and I do believe what he here said to be true) — namely: —

> "I did not know what Mr. De Freitas was to do with the Blank Transfer Shares."

but that (to use his own words again)

> "*I supposed the blank transfers would be delivered to Mr. Hutt when the money was passed and the whole deal was completed."*

Paragraph 3 of the agreement reads:

> "On payment of the said sums of $17,000 with interest as aforesaid or the passing of the said mortgages whichever shall first happen the transfer of the said shares which has been signed by the Vendor, shall be handed to the Purchaser."

The payment of the said sums of $17,000 was to be made from the Sue-A-Quan $64,000. This was not forthcoming. Schuler had assigned his debts to Bookers; Bookers had in their possession or held a lien on Schiller's shares for $10,000 and they could not be expected to release or deliver them up unless the $64,000 were paid from which their debts were to be paid. Schuler with the controlling interest still in Bel Air Hotel would not on their behalf pass the second mortgage to Bookers because Hutt would not or could not pay for Schuler's shares (or Schuler's Vendor's debt) because Sue-A-Quan had not paid the $64,000. Hutt would not pass the fifth mortgage on the Eldorado Hotel because he had not acquired, pursuant to this agreement, the Bel Air Hotel Ltd. Schuler would not allow Hutt to acquire Bel Air Hotel Ltd. because the $64,000 had not been paid. So because of the default by Sue-A-Quan the whole deal collapsed and became abortive.

Mr. De Freitas in his evidence said :

> "When I read the agreement between Hutt and Sue-A-Quan there were 2 or 3 things to be dealt with. I told Mr. Hutt that it was advisable in his own interest to get a Power of Attorney from Sue-A-Quan to pass back the licence if the sale to Sue-A-Quan fell through and that it also seemed necessary if Hutt was going to pass a second mortgage on Eldorado Hotel to Bookers that the purchaser (Sue-A-Quan) should actually know of it and give his consent to it and that he, Sue-A-Quan, would have to know that he would have to pay Bookers the balance of the purchase money; that that was how the supplemental agreement (Ex. 9) came into being and the reason for the insertion of clause 5 of the Hutt-Sue-A-Quan agreement, Ex. 10. Both Hutt and Sue-A-Quan agreed and they had signed that document"

Mr. Sue-A-Quan, whose evidence I did not accept, on the other hand said that he did sign this supplemental agreement. Ex. 9. on the 12th February, 1949, at the office of Cameron & Shepherd, but that he did not realise he was giving permission to Mr. Hutt to pass a mortgage on Eldorado Hotel. Hutt also swore that he also did not realise this and was attempting in the witness box, to the dismay no doubt of his own Counsel, to induce the Court to believe that Mr. De Freitas had wilfully deceived him for the purpose of giving additional security to Bookers. Suffice it to say I did not believe this part of Mr. Hutt's evidence.

Mr. Sue-A-Quan was asked if the document of the 3rd January, 1949, represented as between Hutt and himself a sale and purchase of the Eldorado Hotel for $120,000. His reply was that it was not a genuine purchase and that he had had no intention of paying over to Bookers $64,000 as mentioned in paragraph 6 of this agreement, Ex. 9.

With regard to the Cancellation Agreement of the 19th July, 1949, Ex. 13, Mr. Sue-A-Quan tried to make out that Mr. Hutt got Mr. Cabral to draw up that agreement as there was some extrinsic or collateral "personal" arrangement between Hutt and himself; that Hutt (having agreed to assign the $64,000 to Bookers) should take back the property after six months.

Of course Hutt denied any such collusive arrangement. I accept Hutt's evidence on this point and totally discard the evidence of Sue-A-Quan—a person, in my estimation, whose word is not worthy of much credence. Mr. Sue-A-Quan however gave the Court to understand that in July, 1949, he might have been able to purchase the Eldorado Hotel and also take his wife to the United States of America for he could get financial assistance elsewhere and that it was not through his wife's illness that he found it difficult to carry through the "Eldorado Sale."

I do not agree with Counsel for the defendant Hutt that there was no *consensus ad idem* as to the *contents* of the agreement in question but I do believe and am convinced of it that the agreement did not contain all the arrangements the parties had made as to the proposed sale of the Bel Air Hotel Ltd. to Hutt which was the *causa causans* of the whole agreement. Ex. 3. The parties doubtless believed that the agreement they had signed would do to all intents and purposes should Sue-A-Quan live up to their expectations. Schuler and Hutt indeed were celebrating the "coup". Sue-A-Quan's default alas was a genuine disappointment to all the parties concerned! That is my confirmed opinion.

I do not accept that part of Hutt's evidence where he swore he never read the agreement in question and that only parts of it were read out by Mr. J. Edward De Freitas. I find that he did read the agreement and did sign and agree to what appears written in the agreement. It may well be that he discovered later (on his own or on advice) on his return to the Colony that the other sum of $17,000 described as Schuler's Vendor's debt was a secret profit (undisclosed to the shareholders) made by Schuler as Promoter on the formation of the Company and then sought to repudiate it. However in this action I am merely concerned with the sale of shares —not Schuler's debt by the Hotel for $17,000.

In conclusion it must be observed that the Privy Council decision herein referred to was delivered on the 9th November, 1954, and recorded in British Guiana on the 4th January, 1955,

The Statement of Claim as endorsed in the Specially Endorsed Writ was amended on the 11th February, 1955, in pursuance of Order XXVI rule 2 in the manner following

Paragraphs 3, 4 and 5 were deleted: a new paragraph 3 inserted as follows:

"3. The plaintiffs have delivered or alternatively at all times have been and still are ready and willing to deliver the said shares to the defendant and to complete the said agreement, and the plaintiff Schuler has executed and delivered to the defendant a blank transfer of the said shares together with the certificates thereof."

A new paragraph 7 inserted as follows:

"7. The plaintiff's further claim in the alternative: —

(1) Specific performance of the said contract for the sale of the said shares;

(2) Damages for breach of contract;

(3) Further or other relief;

(4) Costs."

Paragraph 1 amended by the insertion of the words "the recitals to" in the 7th line.

Paragraph 4 amended by the deletion of certain words in the 1st. 2nd, 3rd and 4th lines. The original paragraph read as follows: —

"The defendant failed to advertise and pass the said mortgage as provided in the said agreement and has refused to do so or to pay for the said shares *although he has been given control of the "Bel Air Hotel Limited. Furthermore, the said sale to J. A. Sue-A-Quan has fallen through."*

The amended paragraph now reads:

"The defendant has refused and still persistently refuses to pay for the said shares although he has been given control of the Bel Air Hotel Limited."

The effect of all these amendments is to delete and exercise all reference to Mr. Sue-A-Quan and his agreement and to relegate to the Recitals the "*Bargain and Sale"* of the shares, the terms of the same having been formerly conceived to have been included and contained in the written agreement. Ex. 3.

To my mind this is a matter of considerable significance when the facts are carefully examined and a comparison is made with paragraph 2 and 3 of the plaintiffs' reply herein dated the 28th June, 1955, as follows:

" 2. The Agreement referred to in paragraph 1 of the Defence (hereinafter referred to as "the security agreement") was not intended to set out all the terms and conditions of the several agreements made between the plaintiff Schuler and the defendant in relation to the purchase by the defendant of the 3,400 shares in Bel Air Hotel Limited owned by the plaintiff Schuler and the acquisition by the defendant of the controlling interest in the said Company, but was intended to and did in fact set out, the terms on which security was to be given to the plaintiff company for the facilities which it was providing to enable the various deals made between the plaintiff Schuler and the defendant to be carried through.

3. The plaintiffs are not seeking to enforce the security agreement but the contract of sale made between the plaintiff Schuler and the defendant for the sale of the said shares to the defendant as recorded in and evidenced by the "security agreement".

Whereas the defendant from the outset (5 years earlier) in his affidavit of defence sworn to on the *13th May,* 1950, alleged, and indeed I do find to be established, that the fulfilment of the Sue-A-Quan agreement was a basic condition of the agreement of the 12th February, 1949, in question (see paragraphs 12 to 15 inclusive of the Defence). I am convinced that there would have been no agreement if Hutt did not express his desire to acquire the Bel Air Hotel Ltd. and had not unequivocally evinced to all concerned how he was going to pay for it—namely, from the moneys derived from the sale of his Eldorado Hotel. I have come to the conclusion that there was an implied condition in the agreement in question that the fulfilment of the agreement depended upon the performance of the "Sue-A-Quan agreement" as alleged in paragraph 14 of the Defence, and it was not the intention of the parties to carry out the agreement if the Sue-A-Quan agreement fell through; and further that the defendant is not estopped in any way from so alleging as claimed by the plaintiffs.

For these reasons I have come to the conclusion that the plaintiffs' action fails.

If it had become necessary to assess the damages for breach of the agreement to sell the shares in question I would have assessed the damages at $17,000.

With respect to the defendant's counterclaim for the detention of the sum of $18,735.17 by the plaintiffs, being the sum deposited with the Registrar of the Supreme Court as security to the plaintiffs in the appeal to the Privy Council, which sum without an order of the Court to do so had been uplifted by Mr. J. Edward De Freitas, the Solicitor, and (it was alleged) paid over to the plaintiffs, no order will be made as the same subject matter has already been disposed of (see judgment dated 21st July, 1955). An application had been made by way of Summons for an order for the return to the Registrar of the Supreme Court of this sum which was uplifted by the Solicitor without an order of the Court, which application was duly granted and I am informed has been duly complied with. As to this claim therefore no evidence was led nor argument heard and the matter is deemed to have been abandoned.

The agreement to sell the shares in question is set aside and judgment will be entered for the defendant against each plaintiff with costs, I certify for two Counsels.

Solicitors:

J. Edward De Freitas for plaintiffs.

H. B. Fraser for defendant.

BHIMSINGH v. RAMKISSOON MAHARAJ

(In the West Indian Court of Appeal, on appeal from the Supreme Court of Trinidad and Tobago (Collymore, Jackson, Holder, C.JJ.) February 20, 21, 22, March 5, 1956.)

Interpretation—Compensation for Injuries Ordinance—Action for recovery of compensation—Injury causing death—Notice in writing of injury not given—Whether action maintainable.

The respondent as administrator of the estate of his son Ramnarine Ramkissoon, deceased, claimed damages against the appellant under the Compensation for Injuries Ordinance, Chapter 5 No. 5 for the benefit of himself as father and of his wife as mother of the deceased. The deceased had died as a result of injuries received in a collision between a car driven by him and a truck the property of the appellant.

The trial Judge found that the death was due solely to the negligence of the appellant's servant. Against this finding there was no appeal. He awarded the sum of $1,600 as damages under the Compensation for Injuries Ordinance for the benefit of the respondent and his wife.

Against this award the appellant appealed on the ground that section 6 of the Ordinance did not apply to actions by or on behalf of dependants of a deceased person for damages for the death of that deceased person.

Sections 3 and 4 of the Compensation for Injuries Ordinance make provision for the payment of damages in the case of death due to some wrongful act, neglect or default and for workmen's compensation in respect of injuries to workmen.

Sections 3 and 4 are included under the heading "Action for Compensation".

Section 6 of that Ordinance provides—

> "6. An action for the recovery of compensation under this Ordinance shall not be maintainable unless notice in writing that injury has been sustained is given within six weeks, and the action is commenced within six months, from the occurrence of the accident causing the injury, or, in case of death, within twelve months of the time of death;
>
> Provided that in case of death, the want of such notice shall be no bar to the maintenance of such action if the Court or Judge is of opinion, at the trial, that there was reasonable excuse for such want of notice."

The respondent reported the accident to his insurers within six weeks there-of. His insurers were also the insurers of the appellant.

For the respondent it was contended that section 6 is applicable only in cases of injury to workmen and is not applicable in cases where claims are made on behalf of dependants of deceased persons accidentally killed.

Held: Section 6 of the Compensation for Injuries Ordinance applies with its requirement as to notice alike to actions for damages and to actions for compensation in cases of injuries to workmen.

Held further: The notification by the respondent to his insurers was solely in compliance with the contractual obligation existing between them under his policy of insurance and the insurers cannot be deemed to have acted as agents for the appellant in respect of the receipt of notice by the respondent.

Appeal allowed.

H. O. B. Wooding, Q.C. with *W. H. Agimudie* for appellant.

M. Butt, Q.C. with *Lessey, Q.C.* and *M. H. Shah* for respondent.

Judgment of the Court:

This is an appeal from the judgment of Ward J. in an action brought by the respondent as administrator of the estate of his son Ramnarine Ramkissoon deceased, who died on the 23rd July 1950 as the result of a collision which took place on 21st July between a

truck TA 9112, the property of the appellant and the respondent's motor car PB 1733. The car at the time of the collision was being driven by the deceased on the Siparia Erin Road at Dumfries in the Ward of Naparima. In the action the respondent claimed damages under the Judicature Ordinance Chapter 3 No. 1 and also damages under the Compensation for Injuries Ordinance Chap. 5 No. 5 for the benefit of himself as father and of his wife Tilkooree as mother of the deceased. The learned trial judge found that the death of Ramnarine Ramkissoon was due solely to the negligence of the appellant's servant and awarded the sum of $800 under the Judicature Ordinance. Against this finding and this award there is no appeal. The judge in addition awarded under the Compensation for Injuries Ordinance damages which he assessed at $1600 for the benefit of the respondent and his wife and it is against this that the appeal is concerned.

In the record three grounds of appeal are set out namely:

(i) The learned trial judge erred in law in holding that section 6 of the Compensation for Injuries Ordinance did not apply to actions by or on behalf of dependants of a deceased person for damages for the death of that deceased person.

(ii) The learned trial judge erred in law in holding that the plaintiff or his wife Tilkooree was dependants of their deceased son.

(iii) The finding of the learned trial judge that the plaintiff or his wife Tilkooree was a dependant of their deceased son was unreasonable and/or against the weight of evidence and/or cannot be supported having regard to the evidence.

Before us Counsel for the appellant abandoned the second and third grounds and confined his argument to the first.

Section 6 of the Compensation for Injuries Ordinance provides:

"6. An action for the recovery of compensation under this Ordinance shall not be maintainable unless notice in writing that injury has been sustained is given within six weeks, and the action is commenced within six months, from the occurrence of the accident causing the injury, or, in case of death, within twelve months from the time of death; Provided that in case of death, the want of such notice shall be no bar to the maintenance of such action if the court or Judge is of opinion, at the trial, that there was reasonable excuse for such want of notice".

The sole question is whether in the circumstances of this case notice in writing is required to be given within six weeks of the injury causing the death as a prerequisite to the maintenance of this action. The answer is to be found in a true and correct interpretation of section 6 and the determination as to whether it is applicable or not in this case. The issues involved present certain difficulties.

The Compensation for Injuries Ordinance is a statute upon which embodies provisions of the Fatal Accidents Act, 1846 as amended by the Fatal Accidents Act, 1864, and provisions of the Employers' Liability Act 1880. It is clear that the Ordinance was intended to comprehend two separate and distinct remedies, the one being an extension of the common law right to recover damages for injuries occasioned by the tortious act or default of a defendant or his servants to certain

classes of dependants of a deceased person, the other being a special statutory remedy given to certain classes of workmen to recover compensation.

The question for determination as put by Counsel may be stated thus: — For the respondent it is contended that section 6 is applicable only in cases of injury to workmen and is wholly inapplicable in cases where claims are made on behalf of dependants of deceased persons accidentally killed; whereas for the appellant it is argued that section 6 is of universal application in all cases brought under the Ordinance. Counsel for the respondent agreed that the long title of the Ordinance, the headings it contains and its general purport are to be considered but argued that as the Ordinance embodies provisions of two separate and distinct English statutes and as certain sections can only be related to distinct forms of actions and remedies, section 6 should be construed as applicable only in respect of Employers' Liability to Workmen for injuries or death. He supported this contention by calling attention to the position Section 6 occupies and stressed the use of the word "Compensation" which he urged was wholly inapt in cases of the kind under review. He further invited us to read the section with the insertion of a full stop placed after the word "injury" in the fifth line of the section, and suggested that with this punctuation it becomes clear that here notice was not required to be given. We cannot agree that this last suggestion is appropriate in the interpretation of the section.

It is well established that the long title forms an integral part of a statute and that in its interpretation due regard must be paid to the headings therein set out.

The long title of the Compensation for Injuries Ordinance, Chapter 5 No. 5 is as follows —

> An Ordinance to provide for Compensation in cases of accidental deaths in general and in cases of injuries to workmen.

Under the first heading, 'Action for Compensation', appear section: 3 to 5. Section 3 provides:

> "3. Whenever the death of any person shall be caused by some wrongful act, neglect, or default, and the act, neglect, or default is such as would before the commencement of this Ordinance (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been under such circumstances as amount in law to felony."

Section 4 provides for Workmen's Compensation; thus under the heading 'Action for Compensation' there is without distinction the provision for the extension of the common law right to damages in case of death due to some wrongful act, neglect or default as well as the right to recover in respect of injuries to workmen. Under 'Action for Compensation' therefore, are provisions in respect of both kinds of action. The next heading is 'Notices' and it is under this heading that section 6 appears. In view of what is set out under the previous heading it is difficult to see why section 6 should be restricted in its scope and intent solely to matters arising under the Employers' Liability pro-

visions. It is significant that in the English Fatal Accidents Act of 1864, the word "compensation" is mentioned and not damages. Section 2 of that Act in which the word "compensation" appears is incorporated in the local Ordinance as the second proviso to section 10. The next headings of the Ordinance are 'Procedure' and 'Supplemental' Sections 10 and 11 fall under the heading 'Procedure'; the first proviso to section 10 speaks of "compensation under section 4 of this Ordinance" while the expression used in section 11 is "recovery of compensation under this Ordinance". Accordingly a clear distinction under this heading is drawn between action to be taken under a particular section and action to be taken under the Ordinance generally. Again, under the heading 'Supplemental', reference is made in section 12 to "an action brought under this Ordinance."

Giving section 6 the plain and ordinary meaning of the language used and bearing in mind that the section refers to actions brought under this Ordinance, while in other parts of the Ordinance actions brought under a particular section are specifically referred to, we have no hesitation in holding that section 6 applies with its requirement as to notice alike to actions for damages and to actions for compensation in cases of injuries to workmen.

A further question arises as to whether notice within six weeks after the accident had been complied with. It is not disputed that the respondent well within the six weeks after this accident reported the matter to his insurers and that his insurers happened to be also insurers of the appellant. It is suggested that notification of the accident by the respondent to his insurers was notice to the appellant through the agency of his insurers. We are satisfied that this notification by the respondent to his insurers was solely in compliance with the contractual obligation existing between them under his policy of insurance and that the insurers cannot be deemed to have acted as agents for the appellant in respect of the receipt of notice by the respondent. Non-compliance with the giving of the notice may be excused under the proviso to section 6 if this excuse is reasonable and accepted as such by the Court. No acceptable excuse has been offered. It was mooted that the practice in this Colony has been not to give notice in cases of a similar nature but it was pointed out that since 1949 the pleadings in several cases reveal objections for lack of notice.

For the reasons given above, the appeal is allowed with costs and the appellant will have his costs in the Court below in respect of this issue only.

THOMAS v. BAPTISTE

(In the West Indian Court of Appeal, on appeal from the Supreme Court of Trinidad and Tobago (Collymore, Jackson, Holder C.JJ.) February 23, 24, 27, March 5, 1956.)

Will—Testamentary instructions in writing given to Solicitor by deceased—Signed by deceased in presence of Solicitor and his clerk—Solicitor and clerk both sign the writing in presence of each other and of deceased—Written instructions given with view to having will made—Indicated to deceased by Solicitor that if she died the signed instructions would serve and have same effect as a will—Deceased dies without formal will being made—Whether signed instructions to be regarded as valid will.

The facts are fully set out at the beginning of the judgment.

Held: The character of the document, (the testamentary instructions in writing), the circumstances under which it was prepared, the manner in and purpose for which it was executed stamp it as a perfect and testamentary disposition and it contains the fixed and final expression of the deceased's wishes at the time of execution. As such it was not deliberative in the sense that there was something more to be done to it or added to it even though it was contemplated that a formal document in the same terms should be drawn up within a reasonable time.

Probate of the document granted as the last will and testament of the deceased, in solemn form. *In the Goods of T. Fisher* (*deceased*) (1869) *L.T.* (*N.S.*) P. 684 *applied.*

Dingle v. *Dingle* (1833) 162 *E.R.* 1488 considered.

Appeal allowed.

M. Butt, Q.C. with *Scipio Pollard* for appellant.

H. O. B. Wooding, Q.C. with *Hutson* for respondent.

Judgment of the Court: On the 19th June 1952 Frances Moraldo, the natural mother and only next of kin of one Louisa St Laurent applied for a grant of letters of administration of the estate of the said Louisa St. Laurent who died on the 8th November, 1951. Before the grant was obtained Frances Moraldo died on the 15th August 1952 and probate of her will was granted by the Supreme Court of Trinidad and Tobago on the 6th March 1953 to Elijah Baptiste, plaintiff in the action under review. Cyril Bernard Thomas, the defendant, claims to be the sole executor of a will which he alleges to have been made on the 2nd June 1948 by the said Louisa St. Laurent. Prior to the execution of this document St. Laurent consulted Mr. Pollonais, a Solicitor of the Supreme Court, with a view to having her will made. The Solicitor was extremely busy with other matters and could not immediately draw up a will; as she expressed anxiety to have the will made he suggested to her that he would take her instructions in writing, have them signed by her and witnessed, and he indicated to her that if anything happened to her suddenly the signed instructions would serve as a will and would have the same effect. She then agreed. The Solicitor wrote out the instructions in his "Instructions Book;" the instructions were duly signed by her in the presence of the solicitor and his clerk, both of whom then signed as witnesses in her presence and in the presence of each other. Pollonais in cross-examination said "In my contemplation formal will would be drawn up in a short time and that is what I put to St. Laurent."

St. Laurent died on the 8th November 1951 without having executed any other testamentary document. The Solicitor over-looked the preparation of a formal will although he saw his client several times on other business. His explanation is that soon after the taking of the instructions, the "Instructions Book" was filled up and a new one started.

The Plaintiff claimed **inter alia** —

(a) "That the Court will pronounce against the validity of the said alleged Will of the said deceased.

(b) A declaration that the plaintiff is entitled to a grant of Letters of Administration to the estate of Louisa St. Laurent deceased."

The defendant by way of counterclaim prayed the Court to decree probate of the said alleged Will in solemn form of Law.

The question before the trial Judge was whether or not the signed instructions ought to be regarded as her last will and probate granted in respect thereof or whether she died intestate; or, in the words of Mr. Clarke for the defendant, the party propounding the will, "Did instructions constitute at the time of execution a will and maintain character and nature up to her death?" The learned trial Judge after a careful review of the authorities held on the evidence that the instructions were not a formal will and pronounced against them but did not grant letters of administration to Baptiste. Against this decision the defendant Thomas has appealed.

The Judge found that Pollonais "was confident that the general impression he conveyed to Mrs. St. Laurent was that the instructions were to be a temporary measure until he could find time to prepare a formal instrument to be executed by her; that although he gave her no indication as to when it was likely that he would be ready with such a document he expected that he would have been able to give it his attention within a short time and that the instructions were signed and witnessed on that basis." The Judge seems to have paid little regard to the testimony of this witness as to the information he first imparted to the deceased to which we have already alluded, namely, that the instructions would serve as a will.

We think it appropriate to set out the instrument in full:—

2nd June '48: Instructions for Will of Louisa St. Laurent, formerly Louisa Gonsalves of 46 Calcutta Street, St. James, Port-of-Spain. Widow.

(a) Owner of (No. 86 Nelson Street)
(No. 92 " ")
Given back as 99 years.

(b) 46 Calcutta Street, St. James, Rented lands.

(c) 19 a 2R 17 at Charuma C/G CCI fo 77.

(d) Cemetery allotment 3rd Street Centre Lapeyrouse.

Appoint as Executor Cyril Bernard Thomas of 20 St. Francois Valley Road, Belmont, Cleaner and Dyer.

(a) 92 Nelson Street devise to Albert Camps of 64 Gallus Street absolutely.

(b) 86 Nelson Street devise to Cyril Bernard Thomas and Muriel Gonsalves as tenants in common share and share alike.

(c) Bequeaths 46 Calcutta Street to Daniel Gonsalves brother for lifetime and after his death to be sold and proceeds divided between Cyril Thomas and Muriel Gonsalves in equal shares.

(d) 19a 2r 17p to be sold and proceeds to be divided equally between the three members of the Gonsalves family alive at my death or such of them as are alive.

(Wilfred Gonsalves
(Joseph Gonsalves
(Keny Gonsalves

All other property including case in Bank etc. to Muriel Gonzales and Cyril Thomas they paying all duties etc. out of such cash and residue.

Allotment to Cyril Thomas. Dated
the 2nd June, 1948.

(Sgd) Louisa St. Laurent.

Witnesses:

R. J. Pollonais
Wilfred Roberts

Counsel for the appellant in opening the appeal submitted that the instrument contains all the characteristics of a valid will inasmuch as it is a complete dispository document, for it appoints an executor, disposes of property, deals with the residue, and it was executed, signed and duly witnessed in accordance with the Wills Ordinance. He further submitted that but for the words "Instructions for Will" no question could in the circumstances have been raised as to validity for St. Laurent knew and approved of its contents and that the only significance of the words "Instructions for Will" is that they raise ambiguity as to the intentions of the deceased; and it would therefore be necessary for the Court to be satisfied by parol or other evidence that the instrument was executed animo testandi. He submitted that Pollonais' testimony shows that St. Laurent signed the instrument and did so, intending it to be her last will. In his concluding address Counsel put his case on the footing that the document itself was a perfectly dispository instrument and alternatively if it were held not to be such, any ambiguity arising was completely dispelled by the evidence of Pollonais.

For the respondent it was urged that in order that an instrument may be or constitute a will, it must be complete in the sense that it expresses the fixed intentions of the deceased at the time of execution and it must not be imperfect in the sense that it discloses the intention or contemplation that there will be some more formal dispositive instrument; that however complete the instrument may be if it is imperfect in the sense mentioned then a presumption of abandonment arises if there has been a lapse of time more than is reasonably necessary for the preparation and execution of the further formal document; that the presumption of abandonment may be rebutted by evidence showing that the intentions of the deceased as expressed in the imperfect instrument remained his fixed intentions up to the date of his death, the onus being on the person propounding the instrument as a will. Further, it was submitted that the evidence of Pollonais establishes that at its highest the instrument was provisional only as a will in the case of sudden death and the presumption of abandonment, which follows from the lapse of three and a half years between the execution of the instrument and St. Laurent's death, was not rebutted by the applicant.

Many cases were cited and the court is indebted to both counsel for the lucid and able arguments advanced for its assistance. Each case must however depend on its own set of facts; and care must be taken that only principles of law should be extracted from them for proper application in any particular case. One important principle accepted as settled is stated in Jarman on Wills Vol. 1, 8th Edition at page 32 thus —

> "The law has not made it requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is

sufficient that the instrument, however irregular or inartificial in expression, discloses the intentions of the maker respecting the posthumous destination of his property; and if this appear to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded."

The instrument under examination, although dispositive in character with its execution in conformity with the Wills Ordinance is headed "Instructions for Will." It is settled law that this expression or form of title does not necessarily render the instrument inoperative as a will; it may create an ambiguity only as to the intentions of the deceased at the time of the execution, and extrinsic evidence may be admitted to show whether the instrument was a fixed and final expression of the testator's wishes, and not a mere deliberative and temporary document compiled for consideration and not for stating final intention.' As Pollonais' evidence was neither disputed nor impugned this court is in as good a position as the Trial Judge to interpret its effect in the circumstances on the mind of the deceased St. Laurent. In her interview with Pollonais she unequivocally informed him that she wanted him to make a will; he took down the particulars, namely, the person to be appointed as executor, the way she wished her property to be disposed of, who should receive the residue, and in the circumstances already narrated, the document was signed by the deceased, and duly witnessed with all the formalities required by the Wills Ordinance. It seems to us that the document contained the fixed and final expression of her wishes at the time of execution; as such it was not deliberative in the sense that there was something more to be done to it or added to it, even though it was contemplated that a more formal document in the same terms should be drawn up within a reasonable time.

Much reliance was placed by counsel for the respondent on the case of *Dingle v. Dingle* (1833) 162 *E.R.* 1488. In that case one feature of the judgement is the importance of distinguishing the facts and circumstances of a particular case from those in any other. While it is true that there are certain similarities in the case of *Dingle v. Dingle* and the present case the paper writing in the former was authenticated as instructions and nothing else; whereas in this case although the document was headed instructions, it was not authenticated as instructions, but on the contrary signed and attested as a testamentary disposition. In *Dingle and Dingle* therefore testimony was required to establish continuing intention, and that the dispositions in it had not been abandoned. The Court held that the testimony adduced did not negative the presumption raised.

Reference to the case of *In the Goods of T. Fisher* (deceased), 1869 *L.T. (N.S.) P.* 684, in of great significance and in our view entirely in point. There Fisher died leaving a testamentary paper dated May, 6, 1867, which was in the form of instructions for a will. This document was signed by the deceased and, duly attested by two witnesses in conformity with the provision of the Wills Act. Lord Penzance said: "I will consider how probate ought to go. I am satisfied that when a man has executed a paper of instructions like this, it must be presumed that he intends it should take effect, though he may intend at some future period to execute it in a more regular form." He intimated that probate would go to the paper.

Respondent's counsel observed that there was no indication here as to what time elapsed between the making of the paper and the death of the testator. Holding the view which we take of the facts and circumstances of the present case, lapse of time between the execution of the document and the death of St. Laurent is immaterial, as indeed it was in Fisher's case, the document being perfect and complete on its execution. We are satisfied that in this case the character of the document, the circumstances under which it was prepared, the manner in and purpose for which it was executed stamp it as a perfect and complete testamentary disposition; as such it cannot be defeated by anything less than cancellation or revocation in writing.

The appeal is therefore allowed; the judgement of the Trial Judge reversed and probate granted of the document dated 2nd June 1948 as the last will and testament of Lousia St. Laurent, deceased, in solemn form. Appellant's costs and expenses of and incidental to this action and appeal, and respondent's costs here and in the court below as between solicitor and client to be taxed and paid out of the estate.

Dated this 5th day of March, 1959.

REOPNARAIN v. HEYLIGER

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Boland and Stoby J.J.). January 14, 15, 21, 1955; March 8, 1956).

Criminal law—Attempt to export gold out of Colony concealed on person in manner calculated to deceive officers of Customs—Customs (*Consolidation*) *Ordinance,* 1952 (*No.* 69) *S.* 217*—Prohibition of export without a licence of gold produced or manufactured in the Colony—Imports—Exports* (*Control*) *Order,* 1942, *No.* 12*—No import or export licence required for gold intransit—Customs* (*Consolidation*) *Ordinance* 1952, S. 44*—Whether gold intransit.*

Criminal Procedure—Summary Jurisdiction (*Procedure*) *Ordinance—Legal submissions by counsel for one party—Counsel for other party may even if he has no right of reply make reply thereto at Magistrate's invitation—Magistrate entitled to receive full assistance from Bar when legal submissions are under discussion.*

Customs (*Consolidation*) *Ordinance—Penalty for breach—Election by Comptroller of Customs—Time for election—Whether before or after conviction.*

The appellant Reopnarain, an intending passenger for Trinidad, prior to boarding a plane for that destination in reply to a Customs Officer declared that he had only personal effects. He had recently entered the colony from Dutch Guiana.

After boarding the plane and just prior to its departure the Customs Officer went to the appellant and told him that he had received information to the effect that he had gold on his person, and that it was contrary to the verbal declaration that he had made. The appellant in reply to a police officer stated that he had nothing on his person. On being searched two pieces of gold were found in a pocket in his underpants. Appellant said "Me know me do wrong," On being further searched some more pieces of gold were found in his shoes.

The appellant was later charged with the offence of attempting to export gold concealed on his person in a manner calculated to deceive the Officer of the Customs, contrary to section 217 of the Customs (Consolidation) Ordinance, 1952 (No. 69). At the close of the prosecution's case no evidence was led by the defence and counsel for the appellant contended before the magistrate as he did on appeal that—

(a) the appellant was an intransit passenger and was not exporting the gold;

(b) there was no proof that there was an intention to deceive the Customs Authorities;

(c) a specific illegality affecting the merits of the case was committed in the course of the proceedings when counsel for the complainant addressed the magistrate by letter, contrary to section 30 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 14.

The Comptroller of Customs, after conviction made the election under Section 217 of the Customs (Consolidation) Ordinance, 1952, that the punishment should be treble the value of the gold seized.

It was contended on behalf of the appellant that such election could only be made before conviction.

The appellant was convicted on the charge laid.

Held, on appeal, that the Imports—Exports (Control) Order, 1942 (No. 12) prohibits the export without a licence of gold produced or manufactured in the Colony; that by virtue of the provisions of section 44 of the Customs (Consolidation) Ordinance, 1952, import or export licence is required for gold intransit but that on the evidence the excuse that the gold was intransit was not proved by the appellant. The prosecution had established that the appellant attempted to export gold out of the Colony and had concealed it with intent to deceive Officers of Customs. He was therefore rightly convicted.

Held further: that no illegality was committed by complainant's Counsel in sending a letter to the magistrate drawing the magistrate's attention to the Imports and Exports (Control) Order 1942, and the Interpretation Ordinance. It would have been quite proper for the magistrate to invite counsel for the complainant to reply to the legal submissions of appellant's counsel even though the former had no right of reply as the court is entitled to receive full assistance from the Bar when legal submissions are made.

Held further that the Comptroller of Customs was entitled after conviction to make the election he is empowered to make under Section 217 of the Customs (Consolidation) Ordinance, 1952, that the punishment should be treble the value of the gold seized.

Appeal dismissed. Conviction and sentence affirmed.

S. L. Van B. Stafford, Q.C., F. R. Jacob, with him for appellant.

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

Judgment of the Court: The appellant was convicted by a Magistrate of the Georgetown Judicial District for attempting to export 152 ounces 6 pennyweights and 12 grains of gold concealed on his person in a manner calculated to deceive the Officer of Customs contrary to section 217 of the Customs (Consolidation) Ordinance, 1952 (No. 69).

The evidence given in support of the charge was that the appellant, an intending passenger for Trinidad, arrived at the airport office at Atkinson Field on the 3rd April, 1954. He handed his passport to an Immigration Officer who stamped it with an exit stamp. He then went to the Customs examining counter where a Customs Officer asked him whether he had in his baggage or on his person anything apart from his personal effects. The appellant who had recently entered the Colony from Dutch Guiana replied "only personal effects". The Customs Officer requested the appellant to open an overnight bag and suitcase he was carrying and he did so. Only personal effects were found. Shortly after, the B.W.I.A. aircraft arrived and when it was announced that the plane was ready to

depart for Trinidad the appellant entered the plane. Some moments afterwards and before the aircraft moved to start its journey the Immigration Officer and the Customs Officer went to the appellant in the aircraft and there the Customs Officer told the appellant that he had received information to the effect that he had gold on his person and that it was contrary to the verbal declaration he had made. The appellant was made to get out of the aircraft and in reply to a question by Sub-Inspector Heyliger of the Criminal Investigation Department in the presence of the Customs Officer as to whether he had anything on his person appellant replied "No". He was searched at the Customs office at the airport and two pieces of gold wrapped in paper were found in a pocket of his underpants. Appellant said "Me know me do wrong". He was told that he was attempting to take gold out of the Colony. He was then taken to Georgetown and searched again when some more pieces of gold were found in his shoes; two pieces in his right shoe and two large pieces in his left shoe.

At the close of the prosecution's case Counsel for the appellant who was also his Counsel at the hearing before the Magistrate declined to lead evidence and relied on certain legal submissions which with slight modifications are the same as have been argued in this Court.

It was submitted that the appeal should be allowed on three grounds:

(a) the appellant was an intransit passenger and was not exporting the gold;

(b) there was no proof that there was an intention to deceive the Customs Authorities;

(c) that a specific illegality affecting the merits of the case was committed in the course of the proceedings when Counsel for the complainant addressed the Magistrate by letter contrary to section 30 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 14.

It is clear that before the appellant could have been convicted of the offence for which he was charged it was incumbent on the prosecution to prove beyond a reasonable doubt that

(a) he attempted to export gold out of the Colony;

(b) that the gold was concealed and

(c) that the concealment was in a manner calculated to deceive officers of Customs.

The unchallenged evidence was that the appellant was sitting as a passenger in an aircraft which was about to depart for Trinidad and he was then in possession of a quantity of gold. By section 2 of the Ordinance "export" is interpreted as meaning "to take or cause to be taken out of the Colony"; hence, unless the gold was intransit—as we have explained in this judgment—or could be deemed part of his personal effects, there can be no question but that the appellant was attempting to take gold out of the Colony and that accordingly the gold was being exported within the meaning of the charge.

As to proof of concealment there can be no question that the gold was being carried by the appellant in a manner which would not normally have attracted the notice of the Customs Officer. Appellant's Counsel asks the Court to accept that appellant's motive for the concealment was not with intent to deceive the Customs authorities but to have it secure from possible theft.

Although the appellant did not give any evidence and so left unexplained his intention for the concealment it was urged before us on the appellant's behalf that the words of the section "calculated to deceive" are synonymous with intention to deceive and that it was for the protection to prove affirmatively not only that there was concealment but that the appellant's intention was to deceive the Customs authorities. Counsel contended that the absence of any fraudulent intent was established by the facts. Whether or not the words "calculated to deceive" would include a manner of transportation **likely** to deceive the Customs without any intention of such deception by the exporter need not be determined because we are satisfied that in this case the appellant's intention was established as fraudulent by the surrounding circumstances.

Prima facie the appellant's answer to Sub-Inspector Heyliger in the presence of the Customs Officer—"Me know me do wrong"—indicated that his intention of concealment of the gold was not an innocent one. We would mention that one aspect of the case to which our attention was directed by Counsel for the appellant was with reference to the question put to the appellant at the airport at the time when his baggage was submitted for examination. It was pointed out that the Customs Office did not in express terms ask the appellant whether he had gold but had asked him whether he had anything in his baggage or on his person other than personal effects. Gold, it is contended, is a "personal effect" and as the free exportation of a passenger's **bona fide** baggage is permissible, there was nothing untruthful, Counsel says, in appellant's reply to the Customs Officer.

This argument is relevant only in so far as the incident can be said to afford some evidence as showing what was the appellant's state of mind. We entertain no doubt whatsoever that the gold found on appellant was not part of the appellant's "personal effects". We may concede that although gold in such a large quantity and not made into articles of jewellery would not be a "personal effect", yet if the appellant did genuinely believe it to be the nature of "personal effects" then his omission to declare it in answer to the Customs Officer's question would not have been knowingly false, and he could not in such circumstances be said to have had the intention wilfully to deceive the Customs authorities even though carrying it in concealment in his underpants and shoes.

But as we have already indicated the evidence led by the prosecution was not limited to the question put by the Customs Officer to the appellant before he entered the plane. After the appellant was removed from the plane he was asked if he had anything on his person. Even then his reply was "No". He could then have had no illusions as to his obligation to declare the gold he had on him. The question was put to him by a police officer in the presence of the very same Customs Officer to whom he had made the declaration. Moreover when the gold was found on him appellant said "Me know me do wrong".

In determining the appellant's state of mind the Magistrate was entitled to take into account everything that transpired at the airport and later at the Station. On the above evidence we are of opinion that he correctly found that the concealment of the gold was because of an intention to deceive the Customs authorities.

We agree with Counsel for the appellant that in determining whether the appellant's concealment of the gold was with the intention to deceive the Customs authorities a consideration of the law relating to the export of gold from the Colony is not unimportant. If there be some restriction in law against the export of gold from the Colony the inference would be strong that the appellant's real object in concealing the gold in this manner was to circumvent such restrictions; while on the other hand if gold can be freely exported from the Colony there could have been no reason for his wish to prevent the Customs authorities from having the opportunity of seeing that gold was being exported. Accordingly we would direct attention to the relevant law relating to the export of gold from this Colony.

It is enacted by section 3 (1) of the Import Export and Customs Powers (Defence) Ordinance, 1939, that

> "The Governor may by order make such provisions as he may think expedient for prohibiting or regulating, in all cases or any specified class of cases, and subject to such exceptions, if any, as may be made by or under the order, the importation into, or exportation from the Colony or any specified part thereof, or the carriage coastwise or the shipment as ships' stores, of all goods or goods of any specified description."

On the 17th March, 1942, the Governor by the Imports and Exports (Control) Order, 1942 (No. 12) made provision for prohibiting and regulating the import and export of goods as he was empowered to do under the Ordinance above-mentioned. Clause 3 of Order 12 of 1942 provides:

> "No goods or articles of any description shall be imported into the Colony unless such importation is authorised by a licence (hereinafter referred to as an import licence)."

Clause 4 states:

> "No goods or articles of any description shall be exported or reexported from the Colony, or transhipped in the Colony, for the purpose of being taken from the Colony, unless such exportation, re-exportation or transhipment (as the case may be) is authorised by licence hereinafter referred to as an export licence."

The effect of this order was to control the movement of goods in and out of the Colony by making it an offence for anyone to import, export, re-export or tranship goods in or out of the Colony without a licence issued by the Controller of Commodities subsequently re-named the Controller of Supplies.

This order with amendments which do not affect this issue is still in force and various notices not relevant to this case have been published by the Controller of Supplies from time to time. By a Public Notice on the 24th November, 1951, no doubt due to the improvement in world supply of consumer goods the Controller of Supplies modified the requirements of the Imports and Exports (Control) Order, 1942, by informing the public that certain goods could be imported without a specific licence and on the 12th January, 1952, by another Public Notice he declared that certain goods could be exported without a specific licence. These Notices have been amended from time to time, the existing one with reference to imports being the notice published in the

Official Gazette of the 22nd August, 1953, and to exports being the notice of the 16th August, 1952. The former notice prohibits the importation of gold without a licence while the latter notice permits the free exportation of

(i) Passengers' **bona fide** baggage, stores and household effects:

(ii) **Bona fide** unsolicited gifts, other than Arms and Ammunition,Dangerous Drugs, Plumage and Rice and Butter in excess of 2 lbs. each; provided —

(a) the local f.o.b. value does not exceed twenty-five dollars local currency;

(b) if despatched by parcel post, the package is clearly marked "gift" and the gross weight does not exceed 22 lbs:

(iii) Patterns and samples of no commercial value;

(iv) Goods produced or manufactured in British Guiana with the exception of those enumerated in the First Schedule hereto:

(v) Goods produced or manufactured in the sterling area with the exception of those enumerated in the Second Schedule hereto.

As gold is one of the articles enumerated in the First Schedule it is an offence to export gold produced or manufactured in British Guiana without a licence. The combined effect of the two Notices is that since gold of any origin cannot be imported without a licence, any gold exported must be of British Guiana production unless it was improperly brought into the Colony.

A point greatly stressed by Counsel for the appellant was that appellant was an intransit passenger who brought the gold into the Colony and is exempted from the provisions of the Imports and Exports (Control) Order, 1942, by section 44 of the Customs (Consolidation) Ordinance, 1952, No. 69.

The provisions of section 44 are:

"Goods imported in transit or in transhipment, or as the bona fide stores of any aircraft or ship, shall not be deemed to be goods prohibited or restricted to be imported or exported unless such goods are expressly prohibited or restricted to be imported in transit or in transhipment, or as aircraft's or ships' stores, in any order made under the Customs laws or in any ordinance prohibiting or restricting the importation or exportation of goods:

Provided that any goods imported as aforesaid shall be duly re-exported within such time as the Comptroller shall allow."

Prior to this enactment it was an offence, as we have shown, to bring goods into the Colony without a licence except those goods permitted under the open general licence of the 22nd August, 1953. Gold is still on the list of articles the importation of which requires an import licence. But section 44 of the Ordinance expressly provides that in-transit goods shall not be deemed prohibited or restricted goods unless expressly prohibited to be imported in transit. Since the Notice of the 22nd August, 1953, does not expressly prohibit the importation in transit of gold it would seem that gold imported in transit does not require an import licence.

We must now decide whether the gold found on the appellant was, as submitted by his Counsel **in transit.** It was urged that as the appellant arrived at Springlands, Corentyne, Berbice, from Nickerie and was bound for Trinidad he was an in transit passenger. But does it necessarily follow that **the gold** was in transit? An in transit passenger who while in transit purchases in the Colony articles which cannot be exported without licence is in no better position when leaving the Colony than resident. Such articles purchased by him are subject to the same restrictions as to exportation as would apply to a resident seeking to export them. Section 44 of the Ordinance is designed to protect importers who declare at the time of entry that prohibited goods are in their possession or who lodge such goods in a warehouse. The goods would then be in transit. Section 189 of the Ordinance, for instance, provides that

> "The provisions of the customs laws with reference to the importation, prohibition, entry, examination, landing, warehousing and the exportation and clearance of goods so far as they are applicable, and subject to any regulations made under this Ordinance regarding goods **in transit,** shall be deemed to apply to **goods declared in transit to a destination beyond the Colony."**

This section means that when goods are declared to be in transit a Customs Officer may, if he thinks fit, order the goods to be warehoused until the time of re-exportation.

We take the view that while the onus was on the prosecution to prove that the appellant was attempting to export gold this onus was discharged by proof of his departing with it. The claim that the gold was in transit is the kind of excuse contemplated by section 9 of Chapter 14 which must be proved by a defendant. It is remarkable that this defendant who now through his Counsel says that the gold was in transit never at any time said either on oath or not on oath that he brought the gold into the Colony. On the contrary when the discovery was made he said "Me know me do wrong".

We cannot accept the submission that the gold was in transit.

The ground of appeal that a specific illegality took place is founded on what occurred after the Magistrate reserved his decision.

At the close of the case for the prosecution Mr. Stafford drew the Magistrate's attention to section 30, Chapter 14 (section 29 of Chapter 15, KINGDON Edition) the Summary Jurisdiction (Procedure) Ordinance, which states:

> "The complainant shall be entitled to address the court at the commencement of his case; the defendant shall be entitle to address the court at the commencement or the conclusion of his case, as he thinks fit; and if the defendant has examined any witness or given any evidence, the magistrate may allow the complainant to reply on the conclusion of the cause."

As the defendant did not give evidence or lead any witnesses Mr. Stafford addressed the Magistrate on the facts and on the law; Crown Counsel was not permitted or invited to reply and the Magistrate reserved his decision.

Before the Magistrate delivered decision Crown Counsel wrote a letter to the Magistrate a copy of which he sent to Mr. Stafford draw-

ing the Magistrate's attention to the Imports and Exports (Control) Order, 1942, and to the Interpretation Ordinance. He made no comment on the facts or submitted any argument. Obviously the letter was written because Mr. Stafford had argued that the export of gold was permissible.

The Magistrate on receipt of the letter re-fixed the case for further argument and permitted Mr. Stafford to address him again. Again Crown Counsel did not address.

We are unable to regard what took place as an illegality. The Summary Jurisdiction (Procedure) Ordinance regulates the course of a trial for a summary conviction offence. The entire trial must take place before a Magistrate and the procedure should be as is therein indicated. So far as submissions of law were concerned it would have been quite proper for the Magistrate to invite Crown Counsel to reply to Mr. Stafford's legal submissions. True Crown Counsel had no right of reply but the Court is always entitled to receive and expects to receive full assistance from the Bar when legal submissions are under discussion.

The course the Magistrate took did not prejudice the appellant in any way. His counsel was appraised of the letter and was expressly given the opportunity of addressing a second time. It was a much more reasonable course for Crown Counsel to adopt than to permit the Magistrate to be misled, and to be content to lodge an appeal against a possible order of dismissal because of what was conceived by him to be a wrong submission on the law. If authority is needed to justify the course the Magistrate took it will be found in the case of *Warne v. Martin* reported in the Criminal Law Review, 1954, at page 936 where the Divisional Court held that where a judge or magistrates gave a decision and before it was drawn up found that they had gone wrong, they could alter it. In that the case the attention of the Magistrates was drawn to a point of law not appreciated by them when they acquitted a defendant before the order was drawn up. If there is power to draw the attention of Magistrates to a point after conviction or acquittal all the more can that be done before the Magistrate has given his decision.

Finally we shall deal with the question of punishment with respect to which there is the ground of appeal that the sentence was unduly severe. The learned Magistrate imposed a fine of $27,457.50 being treble the value of the gold as assessed in his evidence by Mr. David Westmass, the Mining Claims Officer of the Government Lands & Mines Department. On the defendant being found guilty the Magistrate in order to fix the punishment allowed the Comptroller of Customs to testify that he was electing as empowered by section 217 of the Customs (Consolidation) Ordinance, 1952, that the punishment should be treble the value of the gold seized. We do not subscribe to the contention submitted by Counsel for appellant that this election by the Comptroller should have been before the conviction. Nor do we see any reason in the circumstances of this case why an order for the forfeiture of the gold should not have been made.

Accordingly we confirm both the conviction and sentence and dismiss the appeal. There will be costs to the respondent.

Solicitor

H.A. Bruton for appellant.

SEAL COON v. B.G. LITHOGRAPHIC CO., LTD., *et al*

(In the Supreme Court, in Chambers, (Luckhoo J. (ag.)) January 25, March 17, 1956).

Practice—Discovery—Interrogatories—Defamation—Libel—Newspaper—Allegation of express malice—Defendant's source of information.

The plaintiff brought an action to recover damages for libel published in a newspaper of which the defendants were publishers. The defendants in their statement of defence admitted the publication and pleaded that the writings complained of were inserted in the newspaper without actual malice and without gross negligence, that before the action was commenced they had published a full apology and that they had paid into Court a sum of money sufficient to satisfy the plaintiff's claim.

The writings complained of were publications in certain issues of the defendant's newspaper of letters written by a correspondent of that newspaper under the assumed name "Joe Blunt". The plaintiff sought leave by way of interlocutory application to administer interrogatories as to the name and identity of the writer "Joe Blunt". On behalf of the defendants it was contended that the judge in chambers in the exercise of his discretion ought not to permit the interrogatories as to the name or identity of the writer "Joe Blunt".

Several authorities were cited as to the manner in which the discretion of the judge in chambers should be exercised.

On a review of the pleadings and of the affidavits filed and of the authorities cited the judge in chambers in the exercise of his discretion refused to allow the interrogatories.

L. A. Luckhoo, Q.C., for plaintiff.

H. C. B. Humphrys, for defendants.

Luckhoo J: This is an application by the plaintiff by way of summons filed on the 4th January, 1956, for

(a) an Order that the third-named defendant individually and in his capacity as an officer of the second-named defendant company, namely, editor of the Guiana Graphic and Guiana Sunday Graphic newspapers published by the said second-named defendant company, do disclose to the plaintiff the name and Identity of the writer 'Joe Blunt' referred to in paragraphs 3, 4, 5, 6 and 9 of the Defence filed by the said defendants;

(b) alternatively, an order that the defendants do produce and give inspection of the original letters copies of which were printed and published as stated in paragraphs 4, 5, and 6 of the Defence filed by the defendants, to the plaintiff and his solicitor, and permit them to inspect and peruse the same and to take copies thereof at such time and place as may be ordered;

(c) in the further alternative, an Order that the plaintiff may be at liberty to deliver to the third-named defendant individually and as an officer of the second-named defendant company interrogatories in writing a copy of which is filed herewith and that the said defendant do within such time as the Court may direct answer the said interrogatories by affidavit to be filed within 10 days after the service of the Order to be made hereon and of the said interrogatories;

(d) in the yet further alternative, an Order that the defendants do furnish to the plaintiff within such time as the Court may order particulars of the true name and identity of the writer 'Joe Blunt' referred to in paragraph 3 of their defence.

The interrogatories which the plaintiff seeks to administer are —

1. Is not the true name and identity of the writer 'Joe Blunt' referred to in your defence known to you?
2. What is the true name and identity of the said writer?
3. Is not X (person named in the list of interrogatories filed by the plaintiff) the person who wrote the letters published by you and referred to in the plaintiff's statement of claim under the name of 'Joe Blunt'?

The writ in this action was filed on the 20th September, 1955, by the plaintiff for damages for libel contained in letters headed "Matters of Public Interest" published on the 13th March, 1955, in issues of the Guiana Sunday Graphic, and on the 24th March, 1955, and on the 24th May, 1955, in issues of the Guiana Graphic.

The statement of claim was filed on the 17th November, 1955, and it is therein alleged by the plaintiff that he is a journalist and was at the times material hereto the Editor of the Daily Argosy, a daily newspaper printed and circulated in this Colony; that the above-mentioned letters were written by a correspondent of those newspapers under the assumed name of "Joe Blunt" and that the defendants have failed to disclose the true name or identity of the said correspondent although they have been formally requested to do so by the plaintiff. The plaintiff further alleged that the said correspondent was actuated by improper motives and was malicious in his aforesaid writings.

The defence (of the three defendants) was filed on the 1st December 1955. By their defence the defendants admit that they printed and published the words set out in paragraph 3 of the statement of claim (contained in a letter signed "Joe Blunt" and published in the Guiana Sunday Graphic in issues of the 13th March, 1955) but deny that they printed the same falsely and maliciously. They allege that they were not at the time of publication aware that the writer "Joe Blunt" was referring to the plaintiff.

The defendants admit that they printed and published a cartoon entitled "Joe Blunt vs. Bill Sharp" in the issues of the Guiana Sunday Graphic dated the 13th March, 1955, but they deny that the said cartoon was libellous of the plaintiff. They also admit that they published the letter referred to above in the issues of the Guiana Graphic dated the 24th March, 1955, but deny that the letter was in any way libellous of the plaintiff.

They further admit that they printed and published the letter signed "Joe Blunt" appearing in the issues of the Guiana Graphic dated the 24th May, 1955,but say that they were not at the time of publication aware that the said letter referred to the plaintiff. They also admit that those writings were intended to and did in fact refer to the plaintiff and were capable of being so understood by those reading the same and that certain of the statements therein contained were defamatory in their ordinary and natural sense.

The defendants at paragraph 9 of their defence admit that they were requested by the plaintiff to disclose the true name and identity of the correspondent "Joe Blunt" and refused to do so. They contend that they are under no legal or moral obligation to make such disclosure to the plaintiff or to any other person and that it is the practice of newspapers the world over to protect the identity of their correspondents.

At paragraph 13 of their defence, the defendants aver that the writings of which the plaintiff complains were inserted in the respective newspapers without actual malice and without gross negligence.

The defendants allege that on Saturday the 1st October, 1955, the defendants inserted in the Guiana Graphic and on Sunday, the 2nd October, 1955, in the Guiana Sunday Graphic a full apology for the libel in the terms set out in paragraph 15 of the defence and that pursuant to section 5 (2) of the Slander and Libel Ordinance they have brought into Court the sum of $360 by way of amends for the injuries suffered by the plaintiff by and through the publication of the libel.

By his affidavit in support of the summons the plaintiff states that he is advised by Counsel and verily believes that it is necessary for the proper prosecution of his action that one of the orders applied for be made and that the true name and identity of "Joe Blunt" is relevant to the matters in question in the action, that is to say, whether the defendants printed and published the said letters maliciously or not. The plaintiff has also stated in his affidavit that he intends to ask leave of the Court to join the writer of the said letters as a further defendant in this action upon ascertaining his true name and identity.

In his affidavit filed on the 7th January, 1956, in reply to the plaintiff's affidavit, the third-named defendant on his own behalf and on behalf of the other defendants has stated that he has made a diligent search for the original letters referred to in the plaintiff's affidavit but without success. To the best of his knowledge information and belief the said letters have been destroyed. He admits that he and certain other employees of the second-named defendant are aware of the true name and identity of the writer "Joe Blunt". He objects to answering the second interrogatory the plaintiff desires to administer to him on the grounds that the interrogatory is irrelevant, not **bona fide** for the purpose of the cause or matter; that it is the practice of newspapers to keep secret the names of their anonymous correspondents and that the letters were published by him and by the other defendants on his authority in good faith, without malice and without knowledge that the said letters referred to the plaintiff. Further that if there was malice on the part of "Joe Blunt" (which he does not admit) the defendants had no knowledge of any such malice.

In his counter-affidavit filed on the 19th January, 1956, in reply to the affidavit of the third-named defendant, the plaintiff has alleged that the publication of the letters in question were actuated by express malice on the part of the defendants and that it is therefore material and relevant in dealing with the questions of malice and damages to know and ascertain the identity of "Joe Blunt".

At paragraph 6 of his counter affidavit the plaintiff states that he has been confidentially informed and verily believes that the pseudonym "Joe Blunt" refers to X (person named and described at paragraph 6) and at paragraphs 7 and 8 of that affidavit he sets out his reasons for believing that X is the writer of the letters in question.

During the course of his submissions in support of the plaintiff's application, Counsel stated that the plaintiff's informant as to the identity of "Joe Blunt" if called as a witness at the trial may plead privilege in refusing to answer any question that may be asked him in respect of any identity.

On the 23rd January, 1956, the plaintiff obtained leave of the Court to amend the list of interrogatories he desired to be submitted for

answer by the third-named defendant by adding thereto the third interrogatory.

On the 27th January, 1956, the third-named defendant in his affidavit in reply to the plaintiffs counter-affidavit objected to answering the third interrogatory on the grounds that it is irrelevant, not **bona fide** for the purpose of the cause and matter, and also on the grounds set out in his affidavit of the 17th January, 1956, in respect of his objection to answering the second interrogatory.

Counsel for the plaintiff has submitted that the granting or refusal of the orders asked for by the plaintiff is a matter within the discretion of the Judge in Chambers and that such discretion must be judicially exercised. This is a well established rule in cases of libel and I do not think there can be any doubt as to its applicability in the instant case.

Counsel has contended that a distinction is to be drawn between cases where the discovery of the identity of the writer of a letter published in a newspaper is sought and where the discovery of the identity of an individual who has supplied information to a newspaper is sought. He also referred to the fact that in this case the defence filed is not one of fair comment on a matter of public interest nor is it based on privilege and submitted that in such a case rule 2 of Order 27 of the Rules of the Supreme Court, 1955, would not apply. That rule provides that in an action for libel or slander where the defendant pleads that the words or matters complained of are fair comment and on a matter of public interest or were published on a privileged occasion, no interrogatories as to the defendants' sources of information or grounds of belief shall be allowed.

It is common ground that the defence in this case is not one of fair comment on a matter of public interest nor is it based on privilege.

Counsel has also submitted that in view of the nature of the defence and of the allegations by the plaintiff of express malice on the part of the defendants the plaintiff's application should be granted as with the disclosure of the name of the writer of the letter the Court will be able to see more clearly the malice alleged by the plaintiff. Further, that with respect to damages, the disclosure of the identity of the writer will enable the plaintiff to show how he has suffered materially as a result of the alleged libel.

Counsel further contended that the onus was on the defendants to show that the application should not be granted.

In support of these submissions, Counsel cited the case in **Adam** v **Fisher** (1914) 110 L.J. 538 per Lord Justice Buckley at page 539:—

> "The real question is whether in this action the plaintiff is entitled to have discovery of the persons to whom the respondent had addressed inquiries upon the charges made against the appellant, and from whom he received answers to such inquiries. There is no doubt that such an interrogatory is one which the Judge in his discretion might allow. The object of the interrogatory is to furnish the plaintiff with evidence of malice, so as to rebut the allegation of good faith, and the information of the name of the informant may be relevant because the plaintiff may be in a position to show that the person mentioned was a person of no importance, a person to whom credence could not be given, or a person with a grudge "against plaintiff. In fact its relevancy is not disputed; there have been cases in which judges always guarding themselves from acting otherwise in

the exercise of their discretion in the matter have allowed interrogatories of that kind—**viz.,** as to what information the defendant had and what steps he had taken to ascertain the truth".

Counsel contended that the plaintiff having alleged in his statement of claim and in his affidavits that the writer of the letter had a grudge against him; it would be competent for a Judge in Chambers to exercise his discretion and allow the second or third interrogatories. In this connection it is to be observed that Lord Justice Buckley in the course of his judgment in the above-mentioned case stated at p. 539 —

"On the other hand, it has been decided, in what might be called the newspaper cases, such as *Plymouth Mutual Society Limited v. Traders' Publishing Association Limited* and the cases which preceded it, that disclosure of the source of information ought not to be allowed".

Counsel also referred to the case of *South Suburban Co-operative Society Limited v. Orum* (1937) 53 T.L.R. In that case it was held that the rule of practice whereby the owners and publishers of newspapers should not be required to disclose the name of their informants does not extend to an individual **defendant** who has written a signed letter to a newspaper. In the course of his judgement in that case Lord Justice Scott at p. 805 referred to a passage in the judgment of Sir Richard Henn Collins M.R. in his judgment in the case of *White & Co. v. Credit Reform Association and Credit Index Limited* (1905) 21 T.L.R. 337 :

"If there is to be an investigation into the motives of the person publishing the libel, it is essential to know all of the facts; and it is obvious that, if the information upon which he acted was procured from a person or persons who could not possibly know anything about the matters in question and he nevertheless published the statements complained of as if they were based on sufficient information, that might be cogent evidence of malice".

Scott L. J. was of the opinion that there could be no question that in that case there was a definite decision of that Court that the identity of the defendant's information was for purposes of discovery relevant in such an action as Orum's case. He also referred to the fact that the special newspaper immunity did not rest on any independent principle of law, but was in truth an exception, the grounds of which had not been very completely defined, carved out of the general field of relevance. He concluded that there was no sufficient ground of principle for extending the rule of practice "so as to bring the writer of a libellous letter in a newspaper within the umbrella of a newspaper so as to give him the special and exceptional immunity conferred by the rule on the newspaper.

In the case of *Caryll v. The Daily Mail Publishing Company* (1904) 90 L.T. 307 also cited by Counsel for the plaintiff leave to deliver certain interrogatories was refused by the master and a judge at chambers and the Court of Appeal having come to the conclusion that both the master and the judge had properly exercised their discretion in the matter and dismissed the appeal brought by the applicant. It was also held that the interrogatories could not be said to be so relevant to the question of malice that they ought to be allowed.

Counsel referred to the cases of *White and Company v. Credit Reform, Association and Credit Index Limited* (1905) K. B. D. 653 and

Marriott v. Chamberlain (1886) 17 Q.B.D. 154. Reference has already been made to the former case in respect of the issue of malice and inquiry made into the truth of the statements published. In the latter case it was held that if the party interrogating is in other respects entitled to certain information, he will not be debarred from it merely because supplying it will necessarily disclose the names of persons whom the party interrogated may hereafter wish to call as his witness, or otherwise give some clue to his evidence.

Counsel further submitted that having regard to the judgment of Swinfen Eady L. J. in the case of *Spiers and Pond Limited v. John Bull Limited and Odhams Limited* (1916) 114 L.J. 641. even if the second interrogatory is not allowed the third interrogatory should be. I have given careful consideration to that judgment but cannot find anything therein in support of Counsel's contention.

Finally, Counsel submitted that the letters signed "Joe Blunt" publication of which is admitted by the defendants, the prominence given to them in the newspaper together with the cartoon referred to above and the other circumstances referred to by him strongly indicate the existence of express malice on the part of the defendants and disclosure of the identity of the writer "Joe Blunt" and the subsequent joinder of him as a defendant would materially affect the question of the apportionment of any damages awarded to the plaintiff.

Solicitor for the defendants in reply contended that it is the duty of newspaper editors, publishers, and proprietors to protect from disclosure the names of their correspondents. He cited in support of the contention the case at *nisi prius* of *Harle v. Catherall et al* (1866) 14 L.T. 802 where Martin B. in the course of his summing up expressed the view that no blame would attach to an editor who refused to give the name of an anonymous correspondent when requested to do so and that an editor would almost be mad to do so.

He referred to Gatley on Libel and Slander, 4th Edition at page 528 where it is stated that in an action against proprietor of a newspaper, if publication is admitted, interrogatories will not be allowed as to the name of the person who wrote the libel or supplied the information on which it was founded or as to the possession or contents of the original manuscript in which it was contained.

He also referred to the case of *Hennessy v. Wright* (No. 2) (1888) 24 Q.B.D. 445. In that case it was held that if the proprietor of a newspaper accepts liability for a libel which has appeared in his paper he cannot be interrogated as to the name of the writer of the libel, or of the person who sent it to him for publication, unless the identity of such person is a fact material to some issue raised in the action.

In the case of *Hope v. Brash and another* (1897) 76 L.T. 823 the plaintiff brought an action to recover damages for libel published in a newspaper of which the defendants are proprietors. The defendants in their statement of defence admitted the publication, and pleaded that the libel was inserted in the newspaper without actual malice and without gross negligence, that before the action was commenced they had published a full apology, and that they paid into Court a sum of money as sufficient to satisfy the plaintiff's claim. The defendants admitted that the matter published was defamatory. The plaintiff obtained an order for production of the manuscript written by a contributor to the

newspaper, the contents of which were published in the newspaper and constituted the libel. The defendants objected to its production on the ground that it was the original contribution and was that which was published by them and for which they admitted responsibility. The defendants by their affidavit admitted the relevancy of the document.

Lord Esher M.R. in the course of his judgment in which the other member of the Court concurred after referring to a passage in the judgment of L. J. Lindley in *Hennessy v. Wright* (*ubi supra*) said:

> "The Court of Appeal, therefore, in that case recognised the rule that this information ought not to be given to a plaintiff suing in respect of a libel. The rule is, not that the court will never order that information ought not to be given, but that as a general rule the court, as a matter of discretion, will not do so. This is the very point taken by the defendants in their affidavit of documents when they say that they "object to produce it on the ground that the manuscript referred to is the original contribution to us, and is that which was published by us, as admitted in the first paragraph of the statement of defence, and as to which we admit responsibility". That objection seems to be founded upon the case of *Hennessy v. Wright* (*ubi sup.*). I think, therefore, that the learned judge at chambers ought, in the exercise of his discretion, to have followed the general rule laid down by the Court of Appeal in *Hennessy v. Wright* (*ubi sup*.) and to have refused to order production of this document."
>
> In his judgment at page 824 Smith L.J., stated:
>
> "According to the settled rule of practice, referred to in *Hennessy v. Wright* (*ubi sup.*) the plaintiff is not entitled to be informed as to the writer of the libel. That is the "almost invariable practice, and there must be something very special in a case to make any exception to that general rule."

It is to be observed that the case above cited is in several respects not unlike the instant case.

The only other case to which I would like to refer is that of *Lawson and another v. Odhams Press, Limited and others* (1948) 44 T.L.R. 532, In that case as stated in the headnote a libel action was brought against the proprietors and publishers of a newspaper, against the writer of a signed article in the newspaper and against the acting editor. The alleged libel appeared in the article. The writer of the article was a member of the regular staff of the newspaper and he had procured the material which formed the basis of the alleged libel in the normal course of his duties. An interlocutory application was made for leave to administer an interrogatory to him as the source from which he obtained his information. It was contended on his behalf that he was protected from the necessity of answering the interrogatory by the special rule of practice which excused the proprietor or publisher of a newspaper from revealing the source of the information which he published. It was held (without deciding whether the rule applied in the case of a person in the position of the defendant) that the judge in his discretion could rightly disallow the interrogatory.

By their defence all three defendants in that case admitted that they had printed or caused to be printed and published the words complained of. They denied that the words were capable of bearing the meanings

alleged or any defamatory meaning and, in the alternative they pleaded that the words were fair comment on a matter of public interest made in good faith and without malice towards the plaintiff. A reply was delivered alleging that the defendants and each of them was actuated by malice in writing and publishing the words complained of.

It is to be observed that the provisions of R.S.C. Order 31. r. 1A (our R.S.C. 1955 Order 27, rule 2) had not yet been made when the application in Lawson's case was decided.

After careful consideration of the arguments adduced by Counsel and by Solicitor and of the authorities referred to by them at the hearing of this application I have come to the conclusion, in the exercise of my discretion, that the application should be refused.

Application refused.

Costs of this application to defendants.

(In the Full Court, on appeal from the Magistrate's Court for the West Demerara Judicial District (Holder, C.J., and Stoby J.,) August 16, 1955; March 19, 1956).

Spirits Ordinance—Having on business premises—spirituous liquor—Whether business premises includes kitchen of shopkeeper.

No inflexible rule can be laid down regulating when a room or place must be considered as being used for storing goods and therefore a business premises within the meaning of section 2 of the Intoxicating Liquor Licensing Ordinance, Cap. 316. Each case must depend on its own facts and one of the important factors will always be the quantity and nature of the goods.

Appeal dismissed.

L. F. S. Burnham, for appellant.

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

Judgment of the Court: The appellant was convicted by the Magistrate of the West Demerara Judicial District of being in the unlawful possession of *33* fluid ounces of rum contrary to section 93 (1) of the Spirits Ordinance, Chapter 110, now section 89 (1) of Chapter 319 (KINGDON Edition) and of having on his business premises 273 fluid ounces or thereabouts of Spirituous liquor contrary to section 80 (1) of Chapter 107 now section 85 (1) of Chapter 316 (KINGDON Edition).

The appellant carries on a grocery shop at Windsor Forest, West Coast Demerara but is not licensed to sell spirituous liquor. On the 23rd July, 1954, the police searched the premises of the appellant and found in his kitchen ten (10) bottles of rum and 1 bottle of high wine. Beer, milk and potatoes were also found in the kitchen.

With regard to the conviction for having spirituous liquor on business premises the sole point arising in this appeal is whether the appellant's kitchen comes within the definition of business premises.

Section 2 of Chapter 316, the Intoxicating Liquor Licensing Ordinance, provides that business premises includes any room or place used for storing goods whether or not adjoining or adjacent to a store or shop.

At the time of the search by the police on the 23rd July, 1954, the entire amount of goods found in the kitchen was 2 cartons of beer, 1 crate of potatoes and 2 cases of milk.

Mr. Burnham submitted that although "business premises includes a room or place used for storing goods", there ought to be read into the definition the words "for the business" as a shopkeeper is entitled to store goods in his kitchen for his own use. He invited the Court to take the view that the goods found in the kitchen were of such a quantity and of such a nature that they could have been there for the shopkeeper's personal use and not for sale in his shop.

We agree that if a shopkeeper sells condensed milk in his shop and a tin of it is found in his kitchen it cannot be said that his kitchen is a place used for storing goods within the meaning of the Ordinance. No inflexible rule can be laid down regulating when a room or place must be considered as being used for storing goods. Each case must depend on its own facts and one of the important factors will always be the quantity and nature of the goods. In the present case there was ample evidence on which the Magistrate could have arrived at his conclusion of fact that the kitchen was a storeroom for at the trial the appellant suggested that no goods were in the room at all and never advanced an answer to the *prima facie* case of the respondent that the goods were for his own use. Once the Magistrate accepted the evidence that the goods were found in the kitchen and that they were the kind of goods being sold by the appellant in his shop there was evidence to justify his conclusion and we see no ground for disturbing this conviction.

There remains the appeal against the conviction of being in the unlawful possession of 33 fluid ounces of rum.

Section 89 (1) of the Spirits Ordinance. Chapter 319 enacts that

> "Every person who is in unlawful possession of spirits shall be liable to a penalty not exceeding one thousand dollars or to imprisonment with or without hard labour for any term not exceeding six months and the spirits shall be forfeited."

By section 89 (2) everyone possessing spirits exceeding in quantity a pint shall be deemed for the purposes of this section to be in unlawful possession unless he brings himself within the exceptions referred to in the section.

The respondent's case was that the appellant was found in possession of 10 bottles of rum and 2 bottles of high wine. The total quantity in those bottles was 273 fluid ounces or nearly 14 pints.

The appellant proved at the trial that he purchased 10 bottles of rum from a licensed spirit shop in Georgetown and that he was in possession of a permit. Section 89 (2) provides that a person in possession of more than a pint of rum is not to be regarded as being in unlawful possession if the spirits were in his possession under permit for removal. The Magistrate accepted the appellant's explanation as to the 10 bottles and held he was not in unlawful possession of 240 fluid ounces of rum. This meant that the appellant had to explain his possession of 33 fluid ounces or about 11/2 pints. The appellant sought to do this by explaining that he had purchased this quantity at the same time as the other rum he had accounted for and that he was in possession under a permit. The Analyst's certificate showed that the high wine was 41.2% over proof while the rum that the appellant held under a permit was 24% under proof.

As a result the Magistrate held that the appellant had not brought himself within one of the exceptions to section 89 (2) and he convicted him.

It was not drawn to the Magistrate's attention and he does not appear to have considered the other evidence which was given and the other exceptions to section 89 (2).

The clerk employed at the spirit shop which had supplied 11 bottles of rum to the appellant identified the permit he had given authorising the removal of 11 bottles. The respondent who is an officer of Customs and Excise checked the permit and stated it was genuine so there was no doubt that appellant had purchased 11 bottles of rum and lawfully had possession of 11 bottles; at the time of the search one of these had been consumed. The clerk also said that after purchasing the 11 bottles and receiving the permit the appellant purchased a bottle of high wine but he did not issue a permit for that. That bottle of high wine contained 24 fluid ounces or 1 1/5 pints.

Under section 62 (1) of the Intoxicating Liquor Licensing Ordinance the holder of a spirit shop licence is permitted to sell up to 2 quarts of rum to any one person at any one time without issuing a permit. Where a person is in possession of more than a pint of rum it is a good defence if the quantity does not exceed two quarts to prove that it was purchased from a licensed spirit dealer. See *Ackla* v. *Peters* (1909) Applte. J. 8th July, 1909.

The Magistrate did not express disbelief of the clerk's evidence but convicted the appellant; it seems clear that had he addressed his mind to this aspect of the case he would have come to a different conclusion.

As the quantity of rum in excess of a pint was exceedingly small and as the clerk's evidence was found to be reliable we are of the opinion that the appellant ought not to have been convicted on this charge and this appeal is allowed.

As the appellant has succeeded in one appeal and failed in the other, each party will bear his own costs.

KAILAN v. BOWLIN

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District Holder, C.J., and Stoby, J.) July 20, 1955; March 19, 1956).

K. claimed from B payment of $50: due on an overdue promissory note made by B in favour of A or order and indorsed by A to K. The evidence of K was to the effect that he demanded payment from B after he became the holder for value. B's defence was that she had paid A. This was accepted by the Magistrate who dismissed the claim.

On appeal, it was contended on behalf of the appellant that assuming B had paid A, K being a holder in due course was entitled to recover the amount claimed.

Held : If K did not take the promissory note when it was overdue and if he took it for value his claim could only be defeated if B established that he took the note with notice that the maker had paid it.

Appeal allowed.

A.T. Singh, for appellant.

Judgment of the Court: The appellant claimed from the respondent payment of the sum of $50 being an amount due on an overdue promissory note dated the 23rd October, 1952, made by the respondent in favour of one Anderson or her order and indorsed by Anderson to the appellant.

In the Magistrate's Court the appellant's evidence was that the promissory note dated the 23rd October, 1952, was endorsed to him for value; the date of the indorsement is recorded on the note as the 29th September. 1954. He said that he demanded payment of the amount from the respondent after he became the holder of the note and in reply to his demand the respondent wrote him as follows:

"Mr. W. H. Kailan Dear Sir,

I had some dealings with Mrs. Mahala Anderson, but I paid her the interest on the note several times and capital also and from the balance $25.00 (twenty-five dollars) I paid Mr. T. A. Morris her Lawyer $10.00 (ten dollars). Her interest was harsh and I am willing to pay balance of $15.00 (fifteen dollars) now, as I dont want any further transaction.

Yours truly,
Florence Bowlin"

The appellant after receiving that reply spoke to Anderson and as a result of what she said instituted proceedings for the whole amount. The evidence before the Magistrate was very meagre. The appellant after giving his evidence was only asked two questions in cross-examination neither of which was relevant to the issue and then his case was closed. The respondent thereupon gave evidence; her defence was that she had paid Anderson; this was accepted by the Magistrate who dismissed the claim.

It is submitted in this appeal that the Magistrate's decision was erroneous in point of law as assuming that the respondent had paid the maker of the note, the appellant being a holder in due course was entitled to recover the amount claimed.

The legal position with regard to holders in due course of Bills of Exchange is clearly set out in the Bills of Exchange Ordinance, Chapter 338. Section 30 (1) provides:

"A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely —

(a) that he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if that was the fact; and

(b) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it."

The Magistrate in his reasons for decision has said that the promissory note was overdue. Although he does not expressly say so this finding of fact must have caused him to conclude that if the promissory note was overdue when it was negotiated then the payee could only negotiate it subject to any defect of title affecting it at maturity, and if the payee had received payment then he could not give a better title than he had.

The Magistrate's reasoning would have been sound if the action was on a Bill of Exchange for section 37 (2) and (3) provides:

"(2) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that of the person from whom he took it.

(3) A bill payable on demand is deemed to be overdue, within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time, and what is an unreasonable length of time for this purpose in a question of fact."

These provisions however do not apply to promissory notes for section 88 (3) states:

"(3) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, because it appears that a reasonable time for presenting it for payment has elapsed since its issue."

This subsection negatives the application of section 37 (3) to promissory notes payable on demand. The reason for the difference is that a bill on demand or a cheque are intended to be presented and paid immediately while a promissory note on demand is very often intended from its inception to be a continuing security. In *Brooks v. Mitchell* (1841) 9 M. & W. 15 at p. 18 Baron Parke said:

"If a promissory note payable on demand is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note payable on demand is intended to be a continuing security. It is quite unlike the case of a cheque, which is intended to be presented speedily."

In *Glasscock v. Balls* 59 L.J. Q.B. 51; 24 Q.B.D. 13, the head-note reads:

"The defendant being indebted to W. gave him as security a promissory note payable on demand to W.'s order, and afterwards as additional security a mortgage of certain property. By a transfer, to which the defendant was not a party, W. transferred the mortgage to H. for a sum in excess of the debt secured by the note. The note remained in W.'s hands, who indorsed it to the plaintiff for value, the plaintiff took the note in good faith without notice of the circumstances."

It was held that

"In an action by the plaintiff as indorsee against the defendant as maker of the note, that the note had not been re-issued, or even paid, and that the plaintiff was entitled to recover."

Lord Esher, M.R., said at p. 52:

"If a note, although it has been paid, nevertheless remains current, there is nothing to prevent an indorsee from recovering upon it."

It follows from what we have said that the Magistrate was not justified in assuming that the appellant had notice of the defect in title of the promissory note from the mere fact that it was in existence for two years before it was indorsed.

If then the appellant did not take the promissory note when it was overdue and if, as he said, he took it for value, his claim to be a holder in due course could only be defeated if the respondent established either by cross-examination or by the evidence of herself or witnesses that he took the note with notice that the maker had paid it.

The respondent made no attempt to show that the appellant had not given value for the note or that he had notice of any defect in the title. Her defence that she had paid would have been a good one against the payee but it was not a good defence to the appellant's claim in the circumstances we have explained above.

The appeal must be allowed with costs fixed at $15 inclusive.

In view of the finding of the Magistrate on the question of payment by the respondent we think that an opportunity should be given respondent to take such action as she may be advised regarding the sums alleged to have been paid. Accordingly a stay of execution for 2 months is granted to enable respondent to take such action as may be required against the payee Anderson.

Solicitor :

O. M. Valz for respondent.

MADRAY *v.* CAMERON

(In the West Indian Court of Appeal, on appeal from the Supreme Court of British Guiana, (Mathieu Perez, Jackson, Holder. C.J.J.). January 12, 25, 1956).

Immovable property—Opposition—Trust—Construction of document—Whether imperfect gift or trust—No consideration necessary for creation of trust.

Ramchurreah, the mother of Tulashiama and grandmother of Cyril Madray was, previous to 1944, the owner in possession of certain land. On 29th August, 1944, she made a will in which among the provisions she devised to her daughter Tulashiama 14 of 16 roods at Good Faith, and to Cyril Madray 2 roods. On the 21st November, 1945. Ramchurreah swore to the requisite affidavit of title in connection with the whole 16 roods at Good Faith to Tulashiama. Transport therefore became ripe for passing on the 29th December, 1945, but was not passed until the 11th March, 1946.

On 2nd February, 1946, before the passing of the transport, Ramchurreah and Tulashiama went to the home of one Lashley and there Tulashiama at the instance of Ramchurreah wrote two documents, in one stating that she had given to her nephew Cyril Madray 2 roods out of the 16 roods, and in the other a life interest to Ramchurreah in 14 roods. Tulashiama acquiesced in those documents and willingly carried out the terms of the documents, Madray being put in possession of the 2 roods from the 6th February, 1946. There was evidence which was not rebutted that Ramchurreah was under the impression that a transport would not be passed for so small a parcel of land as 2 roods.

Cameron, the administrator of the Estate of Tulashiama (deceased) later caused to be advertised transport of the whole 16 roods to Dabi Prasad Singh, Mad ray entered opposition to this transport and as a result brought an action against Cameron claiming *inter alia* a declaration that he (plaintiff) is the beneficial owner of the 2 roods, and that Cameron is holding the same in trust for him.

The trial judge held that a trust was created in favour of Ramchurreah by Tulashiama of a life interest in 14 roods but that no trust was created in favour of Madray of the 2 roods.

On appeal, it was contended on behalf of the respondent Cameron that the document dated the 6th February, 1946, referring to the interest of the appellant Madray constituted an imperfect gift from Tulashiama to Madray without any consideration and that equity would not perfect such an imperfect gift.

Held: This was not a gift from Tulashiama for at the date of the execution of the document Tulashiama was neither seised nor possessed of the land in question. Tulashiama had accepted and held the 2 roods in trust for Madray and for the creation of a trust no consideration is necessary.

Declaration accordingly.

Appeal allowed.

S. L. Van. B. Stafford, Q.C., with J. A. King for appellant.

H. A. Fraser for respondent.

Judgment of the Court:

On three successive Saturdays ending 6th day of March, 1954, Thomas Dorman Cameron in his capacity as the administrator of the estate of Millicent Cameron, his wife, also known as Tulashiama, deceased, letters of administration having been granted to him on 16th July, 1953, caused to be advertised a conveyance by way of transport of a certain piece or parcel of land being part of Plantation Good Faith situate between the Mahaicony and Abary creeks on the East Coast of the County of Demerara, to and in favour of one Dabi Prasad Singh. On the 6th March, 1954, in accordance with the Rules of the Supreme Court (Deeds Registry), Cyril Madray entered an opposition to the passing of the said transport stating his grounds therefor. As a result of this opposition the said Cyril Madray brought an action against Thomas Dorman Cameron claiming among other things:

(1) A declaration that the opposition entered by the plaintiff on the 6th day of March, 1954, to the passing of a certain conveyance by way of Transport advertised in the Official Gazette of the 6th day of March, 1954, and numbered 4 therein for the Counties of Demerara and Essequibo is just, legal and wellfounded.

(2) An injunction restraining the defendant from passing the transport now opposed or from passing any other transport of the property sought to be transported without excluding therefrom two roods of land the property of the plaintiff.

(3) A declaration that the plaintiff is the beneficial owner of two roods of land at Good Faith, Mahaicony, East Coast Demerara, being part of the property sought to be transported and that the defendant is holding the same in trust for the plaintiff.

(4) An order directing the defendant to transport to the plaintiff the said two roods of land the value of which does not exceed $500 and in the event of the defendant failing to do so the Registrar of Deeds be empowered to pass such transport.

(5) An injunction restraining the defendant, his servants or agents from interfering with the plaintiff's possession of the said two roods of land.

The defendant, Cameron, counter-claimed and sought a declaration that the estate of Millicent Cameron, deceased, was by transport No. 349 of the 11th March, 1946, the sole and absolute owner of the property advertised; possession of two roods part of the said property occupied by the plaintiff, Cyril Madray; damages in the sum of $1,000.

On the action coming on for hearing the trial Judge found for the defendant both on the claim and on the counterclaim. Against this the plaintiff has appealed.

The material facts in the case are not in dispute and indeed no evidence was called for the defence. Ramchurreah also called Rampiary, the mother of Tulashiama, and grandmother of Cyril Madray was previous to 1944 seised and possessed of the land advertised. On the 29th August, 1944, she made a will and testament in which among the provisions she. devised to her daughter Tulashiama 14 of 16 roods at Good Faith, and to Cyril Madray 2 roods; on the 21st November, 1945, Ramchurreah swore to the requisite affidavit of title in connexion with a transport of the whole 16 roods at Good Faith to her daughter Tulashiama; this transport became ripe for passing on the 29th December, 1945, but was not passed until the 11th March, 1946 (Transport No. 349). On the 2nd February, 1946, that is, before the passing of the transport, Ramchurreah and Tulashiama went to the house of one Alfred Lashley and there Tulashiama wrote and signed two documents. The evidence of Lashley is as follows:

"I live at 186 Almond Street, Queenstown. I knew Millicent Cameron. In 1946 Mrs. Cameron and her mother came to my home and the mother told me she had come to let the daughter write a document. Mother told daughter what to write. Daughter wrote. This is the document Ex. A I signed it. This document was also written at the same time tendered Ex. F. No objection. No one else present."

Lashley was not cross-examined. It is manifest from the evidence of Lashley that the documents were written at the instance of Ramchurreah and indeed events show that Tulashiama acquiesced therein and willingly accepted the obligations imposed thereby for she carried out the terms of the documents; in the one case, Ramchurreah enjoyed the fruits of 14 roods until her death which occurred after that of Tulashima and in the other, Cyril Madray was put in possession of the two roods from 6th February, 1946, and is still in possession paying the rates and taxes. On the said 6th February, 1946, Tulashiama gave appellant the document referring to his interest.

The documents referred to in Lashley's evidence as Exhibits “A” and "F" are herein set out.

"A" 6.2.46

I Tulseeamah Born (Madray) of 188 Almond St. Queenstown has with my full sense & understanding Given to my nephew Cyril Madray two roods of land out of sixteen roods of land at Pln. Good Faith given to me by my mother Rampiary & 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".

"F" 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 & to maintain her until her death & I further agree to carry out her funeral arrangements between myself, my nephews Jack & George & my niece Walterine Jeebode all residing at Pln. Good Faith at the time of her death.

Tulseeamah

Witnesses

Alfred William Norman Lashley".

Ponapareddy Madray, a son of Ramchurreah and a brother of Tulashiama gave evidence and stated:

"I knew that she (Ramchurreah) made a will in 1944. After she made her will she transported some of her property to Millicent Cameron. She also transported the land stated in will to persons mentioned in will except that Cyril Madray 2 roods were not transported and Joseph Nargen's share was transported to his children. She told me that the reason Cyril 2 roods were not transported was because it was a small amount and his aunt (Tulashiama) intended to give him more and she would make one transport. She said that Mrs. Cameron had given Cyril a paper for two roods".

He was not cross-examined.

The question that falls to be decided is whether a trust has been created in favour of the appellant thus entitling him to the beneficial

interest in the two roods of land having regard to the existing documents and the conduct of the parties. The trial Judge found that no such trust was created but that one had been created in favour of Ramchurreah.

He stated that:

"the donor (Ramchurreah) 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 (Tulashiama) would not have got the 16 roods unless she agreed to hold 2 roods in trust for the plaintiff".

He further stated:

"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 impell me to that one conclusion. I am left in doubt and my doubt is not due to any failure to weigh carefully Ponapareddy 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".

An examination of the two documents reveals no material difference in the wording and their intended purport appears to us to be the same. In each Tulashiama states that "she has with her full sense and understanding given" in one, to her nephew Cyril Madray 2 roods out of 16 roods, and in the other a life interest to Ramchurreah in fourteen roods. It is difficult to appreciate how one could be led to constitute a trust and not the other in the light of the circumstances and the fact that the documents were in accord with the express wishes of Ramchurreah. Moreover by this disposition immediate effect was given to the devises made by Ramchurreah in respect of these 16 roods in the will of 1944 to which reference has already been made. The learned Judge summed up the position thus:

"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?"

From the above it would appear that some confusion existed in the mind of the Judge in respect of the essentials of an enforceable contractual relationship which requires consideration and those for the creation of a trust where no such consideration is necessary. In our view that is not the correct approach.

It is contended on behalf of the respondent that the document dated 6th February, 1946, referring to the interest of the appellant constituted an imperfect gift from Tulashiama to the appellant without any consider-

ation and that equity would not perfect such an imperfect gift. The latter proposition of law is not applicable to the facts of this case; this was not a gift from Tulashiama with or without consideration for at the date of the execution of the document by her Tulashiama was neither seised nor possessed of the land in question; this was merely a method adopted by Ramchurreah to ensure that the appellant would at once receive the two roods as she was under the impression that a transport could not be passed for so small a parcel of land; and it was after Tulashiama signed the relevant document that the transport of the whole 16 roods was, on the 11th March, 1946, passed.

We are therefore, on a review of all the circumstances, satisfied that Tulashiama accepted and held the two roods in trust for the appellant. The appeal is allowed and the judgment and order of the learned Judge set aside.

We declare

(i) that the opposition entered by the appellant on the 6th March, 1954, to be just, legal and well-founded;

(ii) that the appellant is the beneficial owner of the two roods of land and that the respondent is a trustee of the said two roods of land for the appellant.

We grant an injunction restraining the respondent, his servants or agents from interfering with the appellant's possession of the said two roods of land, and we order that transport be advertised by the respondent to the appellant of the said two roods of land, part of sixteen roods at Plantation Good Faith, Mahaicony, East Coast Demerara, within six weeks of the entry of this order and be passed as soon as possible after the transport is ripe for passing. And we further order that if the said transport be not advertised or if advertised be not passed to the appellant within the time stated above then the Registrar be and is hereby authorised to advertise and pass the said transport and that this appeal be allowed and that the respondent do pay the costs of this appeal here and in the Court below.

Fit for 2 Counsels.

Solicitors:

H. C. B. Humphrys for appellant.

N. C. Janki for respondent.

SUMENDRANAUTH v. VAN GRONIGEN

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District, (Holder, C.J. and Stoby, J.) July 19, 1955; March 23, 1956).

Criminal law—Contradictory statements on oath—Test as to materiality to an issue.

Judicial proceeding—Proof of charge—The written charge or a certified copy of it.

On a charge of wilfully making on oath two contradictory statements of alleged fact material to a trial, contrary to section 328 of the Criminal Law Offences) Ordinance, Cap. 10, Kingdon Edition of the Laws), the true test as to whether the evidence is material to an issue or not is to ask whether the evidence is of any legal importance or not.

Where the inconsistent statement is alleged to have taken place in judicial proceedings it is essential to prove what the charge was at the hearing at which the inconsistent statement was made. Without knowing the nature of the charge it is not possible to say whether the evidence is material to the issue or not and it is not possible to know the nature of it unless the best evidence of it is given. The charge being in writing the best evidence is the writing or, as permitted by statute, a certified copy of it.

Appeal allowed.

R. H. Luckhoo, for appellant.

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

Judgment of the Court: The appellant was charged before a Magistrate of the Georgetown Judicial District of wilfully making on oath two contradictory statements of alleged fact material to the trial of one Harry Narine at the June Criminal Session for the County of Demerara contrary to section 329 A of the Criminal Law (Offences) Ordinance, Chapter 17, as inserted by section 3 of the Criminal Law (Amendment) Ordinance, 1949, now section 328 of the Criminal Law (Offences) Ordinance, Chapter 10.

It appears from the evidence that Harry Narine was charged indictably with wounding one Odal on the 3rd March, 1954, at Victoria, East Coast Demerara, with intent to cause him grievous bodily harm.

At the preliminary inquiry the appellant was called as a witness for the Crown and in his examination in chief he said:

> "I live at Victoria, E.C.D. On 3/3/54, one Wednesday, about 5.30 p.m., I was at home, and I heard Odal shouting "Harry bore my eye." *I left my home and came out, and I saw a crowd on the gallery of my father's Rum Shop.* I did not see Odal. I saw the accused on the road. At 6 p.m. on the same day, I saw Odal on the road with a policeman."

In cross-examination he said:

"I was upstairs in my house when I heard the shout. I know Odal well. He comes in the Spirit Shop often. At the time 1 heard the shout, 1 do not know where the accused was."

Harry Narine was committed for trial by the Magistrate, and an indictment containing two counts one for wounding with intent and the other for malicious wounding having been preferred against him, he duly appeared to stand trial at the June Session of the Supreme Court for the County of Demerara in its Criminal Jurisdiction. On being called in the Supreme Court as a witness for the Crown the appellant admitted hearing Odal shout but *denied coming out of his home or seeing a crowd on the gallery of his father's shop.* Eventually in answer to the trial Judge he admitted that he came out and saw a crowd. He explained to the Judge that the reason for his untruthfulness when examined by the Crown Counsel was his fear that if he admitted that persons were on the gallery of his father's shop at the time of the incident, his father, might be prosecuted for selling liquor after the permitted hour.

The appellant did not give any evidence or call any witness. He relied on two submissions made by Counsel on his behalf. They were:

"1. What appeared to have been a contradiction on oath was in fact no contradiction at all. Accused corrected himself on oath.

2. Even assuming that the statement was contradictory, it was on a point that was not material."

The Magistrate held that the statements made by the appellant at the trial in the Supreme Court were inconsistent with his statement at the preliminary inquiry and as the statements were material to the issue he convicted the appellant and fined him.

The first argument addressed to us in this appeal was that assuming the two statements were contradictory they were not material to the issue. The issue in the case, it was submitted, was whether Harry Narine had wounded Odal and it was irrelevant whether there was a crowd or not in the gallery of the shop.

Counsel drew our attention to the cross-examination by the Crown Counsel of a witness for the respondent who said "there was no dispute between the prosecution and the defence that people were drinking in the yard. The defence suggested that Odal might have been wounded by falling on a fence in a drunken state".

It seems to us that the true test of whether evidence is material to an issue or not is to ask whether the evidence is of any legal importance or not. A more simple way of putting it is to say that evidence which is substantial or important to the issue is material. Now the issue in the case was whether Harry Narine had wounded Odal. It can be gathered from the depositions in the Magistrate's Court that Odal was the only person who could give direct evidence against Harry Narine as no one else saw Narine inflict the injury. The other evidence for the Crown consisted of the statements of persons who heard Odal accuse Narine of cutting him. There was no issue about the presence of other persons. Indeed the defence suggested as part of their case that there were a number of persons present. The witnesses for the prosecution other than the appellant admitted that there were a number of people and their admissions were consistent with what the defence said took place. Nor was there any doubt that Odal had

accused Harry Narine of injuring him. That being so the appellant's evidence was of no legal importance and was not material to the issue.

The other ground of appeal was that there was no evidence of the substance and effect of the indictment and trial of Harry Narine.

Mr. Luckhoo urged that in a trial for perjury the judicial proceeding at which the perjury was committed has to be proved by the production of a certificate containing the substance and effect of the indictment and trial signed by the Registrar. Since a charge for making contradictory statements is akin to perjury, he said, and as no certificate was produced there was no proper evidence of Harry Narine's trial.

There is much to be said in favour of the argument. At common law the previous trial of an indictable offence was proved by the production of the record or an examined copy of it. *R.* v. *Smith* 8 B & C 341. This was simply the logical effect of the rule that in a criminal trial the best evidence must be produced. As the indictment at the trial of an indictable offence is in writing and as all the records of the trial were in writing the best evidence was the record and it had to be produced. This hardship was mitigated by the Evidence Act of 1851, Section 13, which permitted previous indictable offences to be proved by a certificate of the clerk or other officer of the Court having the custody of the records. In perjury cases the proof was further simplified by the Perjury Act, 1911, section 14, which permits a former trial to be proved by a similar certificate without proof of the signature of the clerk signing the certificate.

Section 13 of the Evidence Act 1861 is embodied in Section 43 of the Evidence Ordinance, Chapter 25 (Major Edition) now section 42 of Chapter 25 (Kingdon Edition). The provisions of the Perjury Act 1911 relating to proof of previous proceedings will be found in section 141 of Chapter 11 (Kingdon Edition).

The question which now arises is whether the methods of proof above mentioned are the only ones open to the prosecution.

Counsel for the respondent submitted that the provisions of Section 43 of the Evidence Ordinance and Section 141 of the Criminal Law (Procedure) Ordinance, Chapter 11, are permissive and do not prelude the proceedings from being proved in a simpler way.

This argument, although attractive, over simplifies the issue and overlooks the true reason for the common law rule regarding proof of the judicial proceedings.

Where the inconsistent statement is alleged to have taken place in judicial proceedings it is essential to prove what the charge was at the hearing of which the inconsistent statement was made. Without knowing the nature of the charge it is not possible to say whether the evidence was material to the issue or not and it is not possible to know the nature of it unless the best evidence of it is given; and the charge being in writing the best evidence is the writing or, as permitted by statute, a certified copy of it. See *R. v. Willan,* 14 Cox 4.

After proper proof of the judicial proceeding has been given a witness can say what the accused said at the trial as the Judge's notes are not the best evidence—*R. v. Child,* 5 Cox 197.

As the previous proceedings were not properly proved and as the existence of a crowd or not was not relevant to the issue the appeal must be allowed with costs fixed at $30 inclusive. Accordingly the conviction is quashed and the sentence set aside.

WORRELL v. SEALEY

(In the Full Court, on appeal from the Magistrate's Court for the Georgetown Judicial District, Holder, C.J. and Stoby, J.) July 5, 1955, March 23, 1956).

Under the Summary Jurisdiction (Offences) Ordinance, Cap. 14 (Kingdon Edition) on a charge of larceny a defendant cannot be convicted of the offence of fraudulent conversion.

Appeal allowed.

J. O. F. Haynes, for appellant.

G. L. B. Persaud, Legal Draftsman (ag.), for respondent.

Judgment of the Court: On the 2nd September, 1953, the appellant was convicted by a Magistrate of the Georgetown Judicial District of stealing thirty dollars the property of a person unknown contrary to section 70 of the Summary Jurisdiction (Offences) Ordinance, Chapter 13, now section 66 of Chapter 14 (KINGDON Edition).

His appeal from his conviction was heard by the Full Court (Bell. C.J., and Boland, J.) on the 10th December, 1953, and the following order was made :

"UPON READING the grounds of appeal dated the 24th day of September, 1953 from the conviction of a Magistrate of the Georgetown Judicial District dated the 2nd day of September, 1953 and the Court having on this day allowed the appellant to file additional grounds of appeal AND UPON HEARING Mr. J. O. F. Haynes of Counsel for the appellant and the Solicitor General of Counsel for the respondent:

(i) IT IS ORDERED that this appeal be allowed as to the conviction for larceny and that the sentence of the Magistrate be set aside but IT IS ADJUDGED that the evidence before the Magistrate disclosed a prima facie case of fraudulent conversion

and (ii) IT IS ACCORDINGLY FURTHER ORDERED that the case be remitted forthwith for retrial before the said Magistrate and that the defendant (appellant) be called upon to answer the said prima facie case of fraudulent conversion of the sum of $30.00 (thirty dollars) received by him on behalf of the Commissioner of Police contrary to section 94 A (1) (b) of the Summary Jurisdiction (Offences) Ordinance, Chapter 13 as amended by section 2 of the Summary Conviction (Offences) Ordinance, 1930 (No. 24 of 1930) and thereafter dispose of the case according to Law AND IT IS ALSO ORDERED THAT no costs in this appeal be awarded to either party."

As a result of the direction of the Full Court the case came on for hearing on the 27th March, 1954, before the same Magistrate who had convicted the appellant of larceny.

At the commencement of the hearing the Magistrate informed the appellant of his right to have all or any of the witnesses who gave evidence against him at the first trial recalled for further cross-examination.

Mr. Haynes for the appellant did not wish any witness recalled but he objected to the appellant being called upon to answer a *prima facie* case of fraudulent conversion based on the evidence led on the former charge of larceny. He contended that the Full Court having acquitted the appellant on the charge of larceny such acquittal was in law an acquittal on a charge of fraudulent conversion.

The Magistrate overruled the submission. The appellant gave evidence in answer to the charge of fraudulent conversion, but his evidence did not create any reasonable doubt in the mind of the Magistrate and he was convicted of fraudulent conversion contrary to section 94 A (1) (b) of the Summary Jurisdiction (Offences) Ordinance. Chapter 13, now section 92 (1) (b) of Chapter 14.

Two grounds of appeal were argued on behalf of the appellant against this second conviction but in view of the decision to which we have come we propose to refer to one only.

It was submitted by Mr. Haynes that assuming the order of the Full Court was valid (a fact he disputes) nevertheless the Magistrate had no power in law to convict for fraudulent conversion on a charge of larceny.

The acting Legal Draftsman in reply referred to section 41 (2) of the Summary Jurisdiction (Procedure) Ordinance. Chapter 14, now section 41 (2) of Chapter 15. He submitted that the subsection specifically enabled a person charged with larceny to be convicted of fraudulent conversion.

> Section 41 (1) reads : "Where embezzlement, or the fraudulent application or disposition of anything, is charged and the evidence establishes the commission of larceny of any kind, the defendant shall not be entitled to have the complaint dismissed, but he may be convicted of the larceny and punished accordingly."
>
> Section 41 (2) reads : "Where larceny of any kind is charged, and the evidence establishes the commission of embezzlement, or the fraudulent application or disposition of anything, the defendant shall not be entitled to have the complaint dismissed, but he may be convicted of the embezzlement or fraudulent application or disposition and punished accordingly."

This section is the local adaptation of section 44 (2) of the Larceny Act 1916 which states:

> "If on the trial of any indictment for any offence against section seventeen of this Act (relating to embezzlement) it is proved that the defendant stole the property in question, the jury may find him guilty of stealing, and thereupon he shall be liable to be punished accordingly; and on the trial of any indictment for stealing the jury may in like manner find the defendant guilty of embezzlement or of fraudulent application or disposition, as the case may be, and thereupon he shall be liable to be punished accordingly."

It was decided in *R. v. Stevens* 24 Cr. App. R. 85 that a person charged with simple larceny under section 20 of the Larceny Act. 1916, could not be convicted of fraudulent conversion despite the existence of section 44 (2) referred to above.

Counsel for the appellant conceded that he was unable to reconcile the decision in *R. v. Stevens (supra)* with the precise language of the local enactment and the United Kingdom enactment referring as they do to fraudulent application or disposition". A careful examination of section 44 of the Larceny Act, 1916, and other sections of the Larceny Act discloses, however, that the words "fraudulent application or disposition" when used in section 44 (2) have no reference to fraudulent conversion.

Section 44 (2) of the Larceny Act, 1916, commences by stating: "If on the trial of any indictment for any offence against section 17 of this Act". Section 17 of the Larceny Act relates to embezzlement. Section 17 creates the offence of a clerk or servant stealing any chattel or money belonging to or in the possession of his master or employer. Section 17 (3) is as follows:

> "Every person who being appointed to any office or service by or under a local marine board
>
> (a) fraudulently applies or disposes of any chattel, money or valuable security received by him (whilst employed in such office or service) for or on account of any local marine board or for or on account of any other public board or department, for his own use or any use or purpose other than that for which the same was paid, entrusted to, or received by him; or
>
> "(b) fraudulently withholds, retains, or keeps back the same, or any part thereof, contrary to any lawful directions or instructions which he is required to obey in relation to his office or service aforesaid;
>
> shall be guilty of felony and on conviction thereof liable to penal servitude for any term not exceeding fourteen years."

From this it will be seen that the object of section 44 (2) of the Larceny Act was to enable the Court to call upon an accused person to answer a charge of larceny if he were charged with embezzlement and the evidence established larceny and *vice versa* if he were charged with simple larceny for him to be called upon to answer a charge of embezzlement under section 17 (a) or to answer a charge under section 17 (c) of fraudulent application or disposition of money or a chattel.

The principal reason, we think, why Parliament limited section 44 (2) of the Larceny Act 1916 to larceny and embezzlement and did not include fraudulent conversion was because of the legal distinction whereby in fraudulent conversion the ownership of the property is transferred to the accused whereas in larceny and embezzlement ownership remains in the true owner and is never in the accused.

Larceny and embezzlement are in the nature of kindred offences except that in larceny possession is in the thief and in embezzlement possession as well as ownership remains in the master. This difference was too trivial to permit guilty persons to escape punishment. On the other hand fraudulent conversion was an offence of a different nature and it must have been thought that there could be no difficulty in differentiating between larceny and fraudulent conversion.

When we turn to the local provisions contained in section 41 (1) and (2) of the Summary Jurisdiction (Procedure) Ordinance, Chapter 15, it will be seen that the section was enacted for exactly the same reason as was done in the United Kingdom and that it does not permit a person charged with larceny to be convicted of fraudulent conversion.

We recognise that in coming to this conclusion we are to a certain extent differing from a previous ruling of the Full Court. The order of the Full Court which resulted in the Magistrate calling on the appellant to answer a case of fraudulent conversion implied that on a charge of larceny it was proper so to do. The Full Court did not expressly so decide as the

point was not before it for decision but the order made certainly implies that in the opinion of that Court it could be done. Such an order, we think, was made *per incuriam* and as it was decided in *R. v. Taylor* (1950) 2 All R. 170 that where the liberty of the subject is involved a Court of Criminal Appeal should not hesitate to differ from a previous Court, we have no option in this case but to hold that the previous order was one which could not be made.

In so deciding we are not expressing agreement with the ground argued by Mr. Haynes that in no circumstances can the Full Court quash a conviction and yet direct a Magistrate to call for a defence for an offence for which the Magistrate could have convicted an accused person. While we invite attention to the very wide language of section 28 (a) and (b) of the Summary Jurisdiction (Appeals) Ordinance, Chapter 15, we refrain from expressing any opinion on the point as it is not necessary for us to do so for the purposes of this judgment.

We conclude by observing that on the facts of this case the appellant's defence was entirely without merit and his conduct of such a nature that he cannot be regarded as a trustworthy policeman. Had the correct charge been brought or had the correct procedure been followed this Court would not have disturbed the conviction on the facts.

It is a matter for the executive to consider whether some change in the law is not desirable so as to permit, as exists in some Colonies, a complaint in the Magistrate's Court to contain any number of counts not exceeding three and thereby minimize the possibility of charges being dismissed on purely technical grounds.

The appeal is allowed with costs fixed at $30 inclusive. Accordingly the conviction is quashed and the sentence set aside.

CENTRAL TRADING COMPANY LTD. v. THE COMMISSIONER OF INCOME TAX.

(In the Supreme Court, (Stoby J. in Chambers) August 11, 1955; March 26, 1956).

Income Tax—Company incorporated in British Guiana—Objects of company —Purchase of property—Resale at a profit—Transaction not in the nature of trade—Isolated transaction—Profit not taxable—Sale of capital assets—Capital appreciation—not taxable.

The appellant company was incorporated on 11th August, 1947, to carry on business in the Colony. Among its objects are the purchase of the immovable property the subject matter of this appeal and the hotel licence attached thereto, to carry on business as hotel, boarding, lodging house and restaurant keepers, etc., and to purchase, accept transport for, take on lease or otherwise acquire for the purposes of the Company any estates, lands, buildings or other interest, immovable property and to sell transport or otherwise dispose of……any immovable property belonging to the Company.

Before the incorporation of the Company S purchased the property in question for $52,500 and arranged to sell it to one W. After the formation of the Company, S, the principal shareholder and a director, transported the property to the Company on the 29th September, 1947, and on the same day the Company transported the property to W for $62,250 thereby making a profit of $10,741.81. The appellant submitted their income tax returns in respect of the year of assessment ending on the 31st December, 1947, and disclosed as their income rents $445.71. The Commissioner of Income Tax assessed the appellants additionally for the year of assessment 1948 in respect of the profit on the sale of

the property and the appellants objected to the additional assessment. Their objection was considered by the Commissioners who confirmed the additional assessment. On appeal to a Judge in Chambers from the additional assessment:

Held: that the sale to W was not by nature of trade or an adventure in the nature of trade was an isolated transaction and as such the profits were not taxable.

Held further: that the transaction involved a capital asset and that where there is an appreciation of a capital asset such appreciation is tax free as no profits or gains are involved.

Leeming vs. Jones, 15 T.C. 333 followed.

Cases referred to: —

(1) *Pearn vs. Miller* (1927) 11 T.C. 610.
(2) *Tebrau* (*Johore*) *Rubber Syndicate Ltd. v. Farmer* (1910) 5 T.C. 568.
(3) *Leeming v. Jones* 15 T.C. 333.
(4) *Edwards.* (*Inspector of Taxes*) *v. Bairstow* (1955) 32 W.L.R. 410.
(5) *California Copper Syndicate (Ltd. and Reduced) v. Harris* 5 T.C. 165.
(6) *C.I.T. v. Toll Property Co. Ltd.* (*In Liquidation*) *34* T.C. 13.
(7) *McLellan, Rawson & Co. Ltd. v. Newall* (*Inspector of Taxes*) (1955) 36 T.C. 117.

Editor's Note

On appeal to the Full Court the decision of the Judge in Chambers was reversed.

J. E. deFreitas, for appellants.

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

Stoby J: The appellant company was incorporated on the 11th August, 1947, with an authorised capital of $15,000. Among its objects are:—

(a) to purchase or otherwise acquire the immovable property known as Lot 9 (nine) Regent and High Streets, Robbstown, in the City of Georgetown, and the Hotel licence attached thereto, and accordingly to enter into and carry into effect any agreement for the purchase thereof;

(b) to carry on business as hotel, boarding, lodging house and restaurant keepers and proprietors, licensed victuallers, wine and spirit merchants, etc.;

(c) to purchase, accept transport for, take on lease or otherwise acquire for the purposes of the company, any estates, lands, buildings……..or other interests in immovable property, and to sell, transport……or otherwise dispose of……any immovable property belonging to the company.

On the 23 rd June, 1947, Ahmad Sankar purchased Lot 9 (nine) Regent and High Streets (hereinafter called the property) for $52,500 and arranged to sell it to one Mr. Woo Ming before the incorporation of the company.

After the formation of the company, Ahmad Sankar the principal shareholder and a director transported the property to the company on the 29th September, 1947, and on the same day the company transported it to Woo Ming for $62,250, the profit of the transaction being $10,741.81.

The appellants submitted on the 7th March, 1949, their Income Tax Return for the Year of Assessment 1948, in respect of their income for the year ending on the date immediately preceding the Year of Assessment, *i.e.,* for the year ended 31st December, 1947, as follows :

Rents - $445.71.

With their aforesaid return, a Receipt and Payment account for the period ended 31st December, 1947, an Income and" Expenditure Account for the period 23rd June, 1947 to 29th September, 1947, and a Balance Sheet as at 31st December, 1947 were also submitted. On 16th May, 1949, the Commissioner assessed the Appellants on the basis of their return to tax in the sum of $178.28. On the 4th of December, 1951, the Commissioner assessed the appellants additionally for the Year of assessment 1948 in respect of the profit on the sale of the property that is to say, $10,741.81, to tax in the sum of $4,296.72. The appellants objected to the additional assessment. Their objection was considered by the Commissioner on the 6th May, 1952, and the Commissioners confirmed the assessment.

This appeal is against the additional assessment.

Mr. Edward de Freitas for the appellants submitted that the profit was from an isolated transaction and consequently not liable to tax. He also submitted that it was a capital profit and on that ground too it was not liable to income tax.

The respondent contended that the transaction was not an isolated one and referred me to the statement of agreed facts which was placed on the file with the consent of both parties. From this agreed statement it appears that subsequent to the sale of the property the appellants bought immovable property in D'Urban Street on the 19th July, 1949, and resold it on the 2 7th August, bought immovable property on the 12th September, 1949 and subdivided it into four sub-lots and sold each sub-lot during 1950 and 1951 and bought immovable property in Regent Street which they still own.

The respondent's argument was that even if the transaction was an isolated one the appellants were liable to tax as the profit was from revenue and not a capital profit but the subsequent transactions were useful as showing that the main object for which the company was formed, that is to say, to carry on the business of hotel keepers was never carried out while the other objects, that is to say, to acquire and sell immovable property, were carried out.

The appellants referred me to section 41 of the Income Tax Ordinance, Chapter 38, as amended by section 6 of Ordinance No. 6 of 1947, now section 50 of Chapter 299 (Kingdon Edition), which reads:

> "Where it appears to the Commissioner that anyone liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the Commissioner may, within the year of assessment (commencing with the year of assessment nineteen hundred and forty-two) or within five years after the expiration thereof, assess the person at such amount or additional amount as according to his judgement ought to have been charged....."

The point made by Mr. de Freitas was that it was not open to the Commissioner to say that the Company was trading during the year of assessment if only evidence of trading was subsequent to the year of assessment.

In my view the section is not one which is difficult to construe. Obviously the object of the section is to enable the Commissioner to make a corrective assessment and collect tax which he had overlooked or where

the income had not been declared, but I agree that the new assessment must be on the basis of the events which have taken place in the year of the assessment. A house agent who sells a house in 1956 at a profit has not necessarily made a profit in 1955 and because he trades in 1956 does not mean he was trading in 1955. The subsequent actions of an individual are sometimes a useful guide in determining the motive of a previous act but even so great care has to be exercised in drawing the correct inference, So too in a business transaction by a company the nature of its business in the years succeeding the year of assessment may sometimes serve to explain an earlier transaction. Here, however, the sale by the appellant company of properties in 1949, 1950 and 1951 ought not to be used as establishing that in 1947, the year of assessment, the company was trading in properties. The reasons which caused the sale of the property in 1947 are not unimportant factors. The absence of any purchase or sale in 1948 and the fact that a decision to trade in 1949 might have been entirely divorced from the transaction of 1947 are circumstances which would make it too dangerous and too speculative to conclude that the acts of 1949—1951 were the result of a formed design in 1947. The company may have genuinely intended to be hotel keepers but due to unforeseen events were forced to alter their plans. In deciding whether the additional assessment is correct or not I propose to ignore the transactions of 1949—1951 and set out in paragraph 17 of the agreed statement of facts.

I turn now to deal with the main contention of the appellant company that is, that the transaction was an isolated one and as such is tax free. In order to decide whether this contention is correct or not an examination of section 5 of the Income Tax Ordinance is necessary. Section 5 reads:

> "5. Income tax, subject to the provisions of this Ordinance, shall be payable at the rate or rates herein specified for each year of assessment upon the income of any person accruing in or derived from the colony or elsewhere and whether received in the colony or not in respect of
>
> (a) gains or profits from any trade, business, profession or vocation, for whatever period of time the trade, business, profession, or vocation, may have been carried on or exercised."

The first question which has to be answered is, can an isolated transaction ever be regarded as the carrying on of a trade?

Before deciding this question I propose to some of the cases although as often happens in Income Tax cases the authorities are not easy to reconcile.

Pearn v. Miller (1927) 11 Tax Cases 610 was a case in which a taxpayer was builder's foreman and subsequently a director of a company carrying on the business of a builder and contractor. During the years 1920 to 1924 he bought on his own account some seven properties, of which he sold four during the period; he still owned the remainder in 1926. The General Commissioners assessed the appellant under Schedule D and the Special Commissioners decided on appeal that the difference between the purchase price (including expenses) and the sale price was a profit taxable under Case VI of Schedule D.

In the course of his judgement Rowlatt, J., said:

> "If it is desired to tax the difference between what a man has bought goods for, or property for, and sold them for, you can

only tax it, in my judgement, if you can say that what he did was a trade or adventure or concern in the nature of trade."

In Tebrau (*Johore*) *Rubber Syndicate, Ltd. v. Farmer* (1910) 5 Tax Cases 658, the distinction between a profit arising as a result of an appreciation of capital and a profit arising from trade was drawn. The company was formed primarily to acquire and develop certain estates and any other estates suitable for the cultivation of rubber; and to carry on the business of developing and cultivating the said estates. The original capital being insufficient to develop the estates they were sold to a second company at a profit. The Surveyor of Taxes maintained that as the company was formed for the purpose *inter alia* of acquiring and reselling rubber estates, any profits made on the resale of such estates were liable to income tax. On appeal Lord Salvesen in his judgment said:

"The mere fact that a person or company has invested funds in the purchase of an estate which has subsequently appreciated and so has realised a profit on his purchase does not make that profit liable to assessment."

And again:

"In the case before us it is no doubt true that the Syndicate only existed a little more than a year; but that does not in the least affect the question whether the profits were made by way of annual income or resulted from appreciation of capital. Suppose the Company had been in existence for ten years before it sold its whole property at a profit, how could it be said that the profit so made was income of the last year in which it existed?"

Finally I must refer to *Leaning v. Jones* 15 Tax Cases, 333. The head-note to that case is as follows:

"The appellant was a member of a syndicate of four persons formed to acquire an option over a rubber estate with a view to resale at a profit. The option was secured but the estate was considered too small for re-sale to a company for public flotation. An option over another adjoining estate was accordingly secured and it was decided to resell the two estates to a public company to be formed for the purpose. Another member of the syndicate undertook to arrange for the promotion of this company.

The vendors of the second estate gave an abatement of 5 per cent on the purchase price of that estate, this sum (£1,750) being stated in the form of a commission for introducing a purchaser but being claimed by the Appellant to be in reality a deduction from the purchase price. The syndicate's rights were transferred to a company for £1,250. This company promoted a further company to which the properties were sold.

The syndicate's total receipts thus amounted to £3,000, and the balance remaining after deduction of certain expenses was divided between the members.

The Appellant was assessed to Income Tax, Schedule D, in respect of his share. The General Commissioners, on appeal, were of opinion that he acquired the property or interest in the property in question with the sole object of turning it over again at a profit, and that he at no time had any intention of holding it as an investment. They confirmed the assessment.

The case was remitted to the General Commissioners, after its first hearing in the King's Bench Division, for a finding as to whether there was or was not a concern in the nature of trade. The Commissioners found that the transaction in question was not a concern in the nature of trade."

It was held that there was no liability to assessment.

The course which that case took was that the General Commissioners were of opinion that the appellant acquired the property or interest in the property with the sole object of turning it over again at a profit and that at no time had he the intention of holding the property as an investment. They held he was liable to tax. The taxpayer having appealed the case came before Rowlatt, J., in the King's Bench Division. The relevant portions of his judgment are as follows:

"This case is one of these in which the question is whether the difference between the price for which an article is sold and the price at which it was bought, it being an isolated transaction, can be regarded as an annual profit and gain taxable to Income Tax.

It is said that an isolated pair of transactions by purchasing and selling, if they show a profit, does not show a profit in the nature of income liable to tax—it is an accretion of capital value. If you repeat it habitually it may become a trade that would be liable to tax. But even with regard to isolated transactions there are several cases in the books where they have been held to afford an income which is taxable. Where an important and large asset is bought and it is subdivided and so made more marketable and the subdivision is advertised, and so on, as in the linen case (*Martin v. Lowry,* 11 T.C. 297). that is one thing; where you get a thing altered and treated and dealt with in an expert way and also subdivided, such as the Cape Brandy *Syndicate* case, 12 T.C. 358, that is another; and where you get a thing, although it is not altered or subdivided, yet it is in this sense. that it is thoroughly repaired and converted into a new and better article, like the steam drifter case (*The Commissioners of Inland Revenue v. Livingston,* 11 T.C. 538), that is another case."

The General Commissioners found that the transaction was not a concern in the nature of trade and as a result Rowlatt, J., allowed the appeal.

An appeal to the Court of Appeal was dismissed. Lawrence. L. J. said at p. 354:

"It seems to me that in the case of an isolated transaction of purchase and resale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and resale of property. If in such transaction as we have here the idea of an adventure in the nature of trade is negatived, I find it difficult to visualise any source of income, or to appreciate bow such a transaction can properly be said to have been entered into for the purpose of producing income or revenue.

The Crown appealed against this decision, but the appeal was dismissed by the House of Lords. Viscount Dunedin said at p. 360 :

"The fact that a man does not mean to hold an investment may be an item of evidence tending to show whether he is carrying on a trade or concern in the nature of trade in respect of his investments but *per se* it leads to no conclusion whatever."

A consideration of these cases makes the following propositions clear: (a) where an individual or a company makes a profit out of one transaction then whether such profit is taxable or not depends on whether the individual or company has been carrying on a trade or (subject to what I say hereunder) a concern or adventure in the nature of trade. An isolated transaction may or may not be taxable;

(b) where an isolated transaction does not amount to the carrying on of a trade or (subject to what I say hereunder) a concern or adventure in the nature of trade but involves the sale of capital assets it is not taxable;

(c) whether the transaction involves the carrying on of a trade or not is a question of fact.

In so far as the question of fact is concerned the position in this colony differs from the position in the United Kingdom where an appellate court does not disturb a finding of fact by the Commissioners. In this Colony the Judge is empowered to hear evidence and arrive at his own findings of fact and is not bound by a finding of the Commissioner. Be that as it may the necessity for taking evidence and arriving at a finding of fact was obviated by the parties adopting the course of filing an agreed statement of facts. The inference to be drawn from the agreed statement of facts is my responsibility and consequently I have to decide whether the Commissioner was correct in drawing the inference that the company was trading. In my view the evidence does not justify such an inference and my reasons for coming to that conclusion are as follows :—In this Colony in deciding whether a company or an individual is carrying on a trade or not it is essential to recognise an important difference between United Kingdom legislation and local legislation. The relevant provision of the Income Tax Act, 1918. is Schedule D section 1 which reads :

"1. Tax under this Schedule shall be charged in respect of

(a) The annual profits or gains arising or accruing—

(i) to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere; and

(ii) to any person residing in the United Kingdom from any trade, profession, *employment*, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere; and

(iii) to any person, whether a British subject or not, although not resident in the United Kingdom, from any property whatever in the United Kingdom, or from any trade, profession, employment, or vocation exercised within the United Kingdom; and

(b) All interest of money, annuities, and other annual profits or gains not charged under Schedule A. B. C or E, and not specially exempted from tax;

in each case for every twenty shillings of the annual amount of the profits or gains."

Section 2 reads:

"Tax under this Schedule shall be charged under the following cases respectively; that is to say, —

Case I. — Tax in respect of any trade not contained in any other Schedule."
Rule applicable to Case I —

> "The tax shall extend to every trade carried on in the United Kingdom or elsewhere, (*other than a trade relating to lands, tenements, hereditaments, or heritages directed to be charged under Schedule A*), and shall be computed on the full amount of the balance of the profits or gains upon a fair and just average of three years ending on that day of the year immediately preceding the year of assessment on which the accounts of the said trade have been usually made up, or on the fifth day of April preceding the year of assessment."

In section 237 of the Act "Trade" is defined as including every trade, manufacture, adventure or concern in the nature of trade.

When however one turns to the local legislation "trade" is not defined. That a person may have an adventure in the nature of trade without carrying on a trade is illustrated in several of the cases already cited but it is only necessary to refer specifically to the recent case of *Edwards* (*Inspector of Taxes*) *v. Bairstow* (1955) 32 W.L.R. 410. In that case two taxpayers purchased a complete spinning plant, agreeing among themselves not to hold it but to make a quick resale. After a period of two years the whole plant was eventually sold in lots at a profit of over £6.000. The General Commissioners found that the transaction was an isolated one and not taxable. The matter was taken to appeal and a Judge of the High Court remitted it to the General Commissioners with the intimation that they were to consider the question whether the transaction being an isolated transaction there was nevertheless "an adventure in the nature of trade". It should be noted that the Judge did not remit the case for the Commissioners to consider whether the taxpayers were trading. The specific direction was for them to state whether the transaction was an adventure in the nature of trade. The General Commissioners drew the inference from the evidence that the transaction was not an adventure in the nature of the trade. Where the case reached the House of Lords it was held that the transaction was an adventure in the nature of the trade and the profits from it liable to income tax.

Although no distinction between a trade and an adventure in the nature of trade was specifically drawn the following passage in the speech of Lord Radcliffe supports the view I take that there is such a distinction. At page 424 he said:

> "There remains the fact which was avowedly the original ground of the commissioners' decision—"this was an isolated case." But, as we know, that circumstance does not prevent a transaction which bears the badges of trade from being in truth an adventure in the nature of trade. The true question in such cases is whether the operations constitute an adventure of that kind, not whether they by themselves or they in conjunction with other operations, constitute the operator a person who carries on a trade. Dealing is, I think, essentially a trading adventure, and the respondents' operations were nothing but a deal or deals in plant and machinery."

As I have already shown section 5 (a) of the Income Tax Ordinance embraces gains or profits from any trade for whatever period of time the trade may have been carried on or exercised. A pre-requisite of this section

unlike the United Kingdom Act is that the person must carry on a trade. In this Colony the true question is not whether the operation constitutes an adventure in the nature of trade but whether the operation amounted to the carrying on of a trade by the company. No doubt it was this consideration which led Mr. de Freitas to contend that an isolated transaction is never taxable but in so doing he was stating the proposition too widely. A person who announces that he is opening a shop for selling shoes and buys 1,000 pairs is trading the moment he sells one pair of shoes even though he closes the next day, but a lawyer who imports one pair of shoes and sells it at a profit is not making a profit from his trade although the transaction is an adventure in the nature of trade.

Having regard to the principles enunciated above I return to the facts of this transaction in order to examine them in the light of what I have said. A summary of the facts agreed on is as follows:—

1. The appellant company was incorporated on the 11th August, 1947.

2. The objects of the company are as stated at the commencement of this judgment.

3. Ahmad Sankar the principal shareholder and director of the company purchased the property together with the fittings and conveniences and Licence of the Hotel carried on in the said property for the sum of $52,500:—(of which $2,500:—was paid as a deposit) from Marie Eugene, subject to the granting of a Lease to her for two years with the right of renewal for one year, of the Licence and the two upper flats in which the hotel was being carried on, at a monthly rental of $350:—and the Vendor guaranteed that the rents of the ground floor were $181:—per month. Transport was to be passed on 31st March, 1947.

4. Marie Eugene did not pass transport and attempted to repudiate the sale.

5. On the 23rd June, 1947, Marie Eugene after being threatened with legal proceedings passed transport to Ahmad Sankar.

6. After Marie Eugene passed transport she again gave trouble about the terms of the lease, and the aforementioned Ahmad Sankar continued with the formation of the aforementioned Company and provided for the carrying on of the hotel. Whilst these negotiations in respect of the lease were going on, one Michael Andrew Woo Ming offered to buy the aforementioned property for $66,250:—and Ahmad Sankar decided that the best thing to do was to sell out.

7. On the 30th July, 1947, the aforementioned Ahmad Sankar entered into an agreement with the aforementioned Michael Andrew Woo Ming to sell the aforementioned property for $66,250:—subject to the mortgage for $45,000:—as part of the purchase price, and to accept a second mortgage for $14,000.—In the Agreement it was provided that transport was to be passed on the 1st September, 1947, subject to the Lease to Marie Eugene; that the Vendor was not to be called upon by the Purchaser to add to or in any way lessen the terms of the agreement of sale with Marie Eugene dated 24th December, 1946; and that title was to be passed by way of a Company unless it was impossible to do so.

8. Application was made to the Demerara Mutual Life Assurance Society Limited for permission to transport the aforementioned property subject to the aforementioned mortgage of $45,000:—The Society agreed

provided the capital of the Mortgage was reduced by $10.000:—The aforementioned Woo Ming said that he would not be able to find an additional $10,000.00 and the sale was considered cancelled.

9. On the formation of the appellant company on the 11th August, 1947, the aforementioned property was taken over as from that date, and on the 28th August. 1947, the Appellant Company agreed to sell the aforementioned property on the same terms as had been agreed on between the aforementioned Sankar and Woo Ming except that the first mortgage, which was being taken over as part of the purchase price, was to be reduced to $35,000:— to the aforementioned Woo Ming and one Keturah Sam who was contributing the aforementioned sum $10,000.00 to the purchase.

10. On the 30th August, 1947, the aforementioned Sankar executed the Lease in favour of the aforementioned Marie Eugene and on the 13th September, 1947, advertised transport for the first time to the Appellant Company. On the 13th September, 1947, the Appellant company advertised transport to the aforementioned Woo Ming and Keturah Sam and the second mortgage for $14,000:— to Ahmad Sankar instead of the appellant company.

11. On the 29th of September, 1947, transport of the aforementioned Lot 9 (nine) Regent and High Streets, Robbstown, Georgetown, was passed from the aforementioned Ahmad Sankar to the appellant company subject to a mortgage of $45,000:—the consideration being stated as $52,500.00. On the same day the appellant company transported the aforementioned property to the aforementioned Woo Ming and Keturah Sam subject to a first mortgage of $35,000:—the consideration being $66,250:—and the aforementioned Woo Ming and Sam passed the aforementioned second mortgage to the aforementioned Sankar for the balance of the purchase price.

12. The aforementioned second mortgage of $14,000:—although passed to the aforementioned Ahmad Sankar was in reality the property of the appellant company and was included in its assets on the 31st December, 1947. The said Mortgage was paid off as follows: $1,500 in the year 1948, $5,500:—in the year 1949, and $7,000:—in the year 1951. Immediately after the payment of the said sum of $5,500:—Ahmad Sankar took over the said mortgage.

13. The company purchased and sold immovable property in 1949, 1950 and 1951.

14. The company never at any time carried on the business of a hotel in the property.

The first point to be noted is that one of the objects of the company is to carry on business as hotel proprietors. That is the primary purpose for which the company was formed. If the company had kept the property and began business as boarding house and restaurant proprietors then the first drink sold or the first meal consumed on the premises would be enough for them to be regarded as carrying on business. Instead they sold the property. As I have already indicated they did not trade by so doing. Not only was the transaction an isolated one but it was not the type of venture associated with the hotel business. I have not overlooked object (9) of the Memorandum of Association which empowered the company to purchase immovable property for the purposes of the company and

to sell property belonging to the company. Although one of the objects of the company was to buy and sell immovable property the agreed facts are, that after Sankar purchased the property he continued with the formation of the company and *provided for the carrying on of the hotel.* It was the difficulty experienced with Marie Eugene the original owner which caused a decision to be taken that it would be better to sell than to negotiate with her. That being so (and it is not my finding of fact but the agreed facts) the transaction was simply one of purchase and sale resulting in a profit and not taxable.

The above finding is enough to dispose of the appeal in favour of the appellants, although I am not in entire agreement with Mr. de Freitas' submission that an isolated transaction is always tax free.

As I have taken a slightly different view from Mr. de Freitas on his main contention I propose to discuss his second submission should my judgment on the first ground be in error.

The second submission is that the transaction in issue involved a capital asset and that where there is an appreciation of a capital asset such appreciation is tax free as no profits or gains are involved. Put that way the submission is unanswerable but it is the contention of the Solicitor General that the sale of the company's property did not result in capital appreciation but was a trading transaction.

The point is really an elaboration of the first proposition.

The principle of law with regard to capital appreciation has been stated in several cases. In *Californian Copper Syndicate* (*Limited and Reduced*) *v. Harris*, 5 Tax Cases 165, Lord Justice Clerk said:

> "It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of Schedule D of the Income Tax Act of 1842 assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.
>
> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being —Is the sum of gain that has been made a mere enhancement of value by realising a security, or is at a gain made in an operation of business in carrying our a scheme for profit-making?"

The distinction between capital appreciation and an adventure in the nature of trade was again drawn in *Commissioners of Inland Revenue v. Toll Property Co., Ltd.* (*In Liquidation*), 34 Tax Cases 13. That case

had some features very much like this and some of the arguments for the Company in that case were repeated in this. The Toll Property Co. Ltd. purchased one property consisting of shops and tenements shortly after its formation. Part of its property was sold four years after its formation and seven years after its formation the remainder was sold at a profit. The company was assessed for income tax on the profit so made but a majority of the Commissioners considered the 1949 profit an appreciation of a capital asset and not a transaction in the nature of trade. Before the Commissioners it was contended for the company *inter alia.*

(a) that the Company was liable to tax only if it had been trading in the purchase and sale of heritable property;

(b) that the fact that the Company had power to acquire other heritable property was irrelevant and the test for liability was not what business the Company might be said to profess to carry on but whether, in fact, it carried on a trading business at all:

(c) that as the Company was therefore not trading it was not liable to tax and the appeals should be allowed.

For the Crown it was contended *inter alia*

(1) that the memorandum showed that one of the main objects of the company was to buy and sell heritable property: —

(2) that the liquidation of the Company following the sale of the property indicated that this was not an investment company as its purpose was evidently achieved when it sold the property at a profit.

The majority of the Commissioners were of the opinion that as the Company was a distinct legal *persona* and had derived an income from this isolated property transaction for a number of years, it was an investment in the hands of the Company. The profit arising was therefore an appreciation of a capital asset and not assessable. The dissenting Commissioner was of the opinion that the property was purchased with the intention of resale at a profit when a suitable opportunity arose and that therefore the purchase and sale of the property constituted an adventure in the nature of trade, the profit on which was assessable. The Commissioners therefore by a majority decided that the purchase and sale of the property were not in the nature of trade and they accordingly discharged the assessments.

The Commissioners stated a case for the opinion of Court of Session as the Court of Exchequer in Scotland.

The question of law stated was whether the majority of the Commissioners were entitled, on the facts above stated, to find that the purchase and sale of the property were not in the nature of trade, and that the profit arising from the transaction in question was an appreciation of a capital asset and not assessable to Income Tax and Profits Tax.

Lord Carmont said:

"Accepting the Respondent Company in this case as a distinct legal *persona,* and taking it that, in point of fact, for some years they did obtain a monetary return from the occupation of the property which they acquired, I think that having regard to the facts that are stated in regard to the formation of the Company, and taking the evidence of Mr. Allison as stated in the Case in the eighth finding, the majority of the Commissioners misdirected themselves in law in accepting it as a possible conclusion that the property was purchased as an invest-

ment. On the facts stated the only reasonable conclusion was that the purchase was made with the intention of a resale at a profit when a suitable opportunity arose. Notwithstanding that it was only a single transaction, having regard to the purpose of the formation of the Company as stated by Mr. Allison, I think it was the inevitable conclusion that the transaction was an adventure in the nature of trade, and I agree with the result reached by your Lordship in the Chair."

The point was recently discussed in *McLellan, Rawson & Co., Ltd. v. Newall* (*Inspector of Taxes*), (1955) 36 Tax Cases 117, the head-note of which reads:

"The appellant Company, which carried on business as timber merchants, became interested in 1948 in the purchase of three lots of woodland on an estate as a source of supply of timber. Following the sale of the whole estate by private treaty the Company entered into negotiations with the purchaser for the purchase of these lots. In the course of the negotiations it became apparent to the Company that the price it would have to pay would be much higher than that originally contemplated, and it would have been uneconomical to lock up so much capital for the five years or so it would have taken to clear the timber. The Company therefore, while the negotiations were proceeding, arranged to sell the woodlands to two other timber merchants. The carrying out of these transactions was delayed owing to the making of a Tree Preservation Order, but arrangements were eventually made enabling the timber to be felled. The Company completed the purchase of the three lots in May, 1949, and later that year resold them to the other timber merchants at a net profit of £4,846. The transaction was the only one of its kind undertaken by the Company and a separate account of it was kept in the Company's books.

The Company was assessed to Income Tax under Case I of Schedule D for the year 1951-52 on the basis that the profit on the transaction was part of its trading profits. On appeal to the General Commissioners the Company contended that the transaction was an isolated one and that there was no evidence that it formed part of the Company's trade of timber merchants. The Commissioners found that the purchase and sale of the woodlands was part of the general trade of the Company and that the profits were assessable under Case I, of Schedule D accordingly. The Company demanded a case."

It was held that there was no evidence upon which the Commissioners could properly reach their decision.

The cases cited serve to emphasize how important it is in deciding whether a profit is due to capital appreciation or the result of trade to avoid drawing an incorrect inference from the facts. In paragraph 4 of the agreed statement of facts (paragraph 3 of the summary of facts in this judgment) the property was purchased with the intention that one Marie Eugene would rent it. In paragraph 8 (paragraph 6 of the summary of facts in this judgment) it is explained how Marie Eugene gave trouble and the company abandoned their previous intention to keep the property and decided to sell. If the company was not trading by so doing and if a transaction in the nature of trade is not taxable in this Colony then it

follows that the sale of the property was a capital appreciation. There is no evidence that in the year 1947 the Company's intention was to buy and sell property at a profit. That is why subsequent events are often useless in assessing one's previous conduct. There is nothing to connect the Company's purchase and sale of properties in 1949, 19S0 and 1951, with the transaction of 1947. No evidence was given on oath, and I did not have the opportunity of forming any opinion on the demeanour of the principal shareholder of the company. It may be that had he given evidence and been cross-examined evidence of a different nature may have emerged. But I take the view that I ought not to assume facts against him which the Commissioner himself did not assume. In the agreed facts there is no agreed finding of fact that in 1947 the intention of the company was to buy properties for resale and that they had no intention of entering into the hotel business. Without such a finding of fact this case must come within the *Leeming v. Jones* principle and not within the principle of cases where the transaction has been held to be in the nature of circulatory or trading capital.

In the result this appeal is allowed with costs fixed at $240.

REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1956

AND IN

THE WEST INDIAN COURT OF APPEAL

[1956].

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:

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INDEX

WORKMEN'S COMPENSATION —

Workman suffering from hernia—Pre-existing condition—Workman unaware of such condition—Accident to workman—Injury arising out of and in course of employment aggravating preexisting condition—Compensation payable—Workmen's Compensation Ordinance. 1934.