JUDGES

OF THE

SUPREME COURT OF BRITISH GUIANA

DURING 1957.

SIR FRANK WILFRED HOLDER, C.M.G., Q.C.	— Chief Justice (on vacation leave 8th June—29th November).
KENNETH SIEVEWRIGHT STOBY	— Puisne Judge (acted Chief Justice 8th June—29th November).
ROLAND RICKETTS PHILLIPS	— Puisne Judge (on vacation leave 1st January—5th May).
NEVILLE ADOLPH ST. LOUIS CLARE	— Puisne Judge (on vacation leave 4th June to end of year).
JOSEPH ALEXANDER LUCKHOO	— Puisne Judge (on vacation leave 16th March — 14th October).
WILLIAM ADRIAN DATE	— Puisne Judge
ROBERT SYDNEY MILLER	— Acted Additional Judge 1st January—30th April. Acting Puisne Judge 1st May to end of year.
HAROLD BRODIE SMITH BOLLERS	— Acted Additional Judg from 1st January to 3rd June and from 29th November to end of year. Acted Puisne Judge from 4th June to 28th November.
PAUL RONALD JAILAL	— Acted Puisne Judge from 17th June to 13th October, 1957. Acted Additional Judge from 14th October—31st October.

LIST OF CASES REPORTED

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CASES

DETERMINED IN THE

Supreme Court of British Guiana.

WAJID ALLY v. CROFT

(In the Full Court, on appeal from a Magistrate's Court for the Georgetown Judicial District (Holder, C.J., and Luckhoo, J., (ag.) May 25, 1956, January 11, 1957.).

Summary Jurisdiction Offence—Procedure—Plea of defendant—Defendant present in Court—Plea to be made by defendant himself—Summary Jurisdiction Procedure Ordinance, Cap. 15 s.s. 12(2), 27.

Where both the complainant and the defendant appear at the hearing of a complaint for a summary conviction offence and the Court proceeds to hear the complaint, the Court is required under the provisions of section 27 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, to ask the defendant whether he is guilty or not and the defendant himself is required to plead to the complaint. If his counsel purports to plead for him to the complaint such plea is a nullity as are all proceedings thereafter.

Appeal allowed. Case remitted to magistrate to be reheard and determined.

C. L. Luckhoo for the appellant.

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

Judgment of **the Court:** The question for determination is whether a defendant may, through his counsel, plead guilty to a criminal charge laid under the provisions of the Summary Jurisdiction (Offences) Ordinance, Chapter 15. The facts of this case in regard to this question are that the defendant (appellant) was charged with the commission of a summary conviction offence under the provisions of the Motor Vehicles and Road Traffic Ordinance, Chapter 280, and to this charge he pleaded not guilty. Later, counsel for the defendant consulted with his client and as a result came to the conclusion that his client wished to change his plea to one of guilty. Counsel intimated this to the Magistrate who, without enquiry from the defendant whether this was in fact so, entered a plea of guilty in place of the former plea by the defendant of not guilty.

The Magistrate thereupon convicted the defendant and imposed a sentence upon him. From this conviction and sentence the defendant has appealed.

Before this Court the appellant is represented by counsel other than the one who appeared on his behalf in the Magistrate's Court.

Counsel for the appellant has informed this Court that the appellant is averring that his Counsel before the Magistrate misunderstood his instructions and incorrectly intimated to the Magistrate that the appellant desired to change his plea to one of guilty.

It has not, however, been contended on behalf of the appellant that he sought before the Magistrate to correct this allegedly erroneous impression of his counsel.

Counsel for the appellant has submitted several grounds of appeal but after hearing argument by counsel for the appellant and by the Solicitor General on the question referred to above, the Court reserved its decision thereon before proceeding to hear counsel for the appellant on the other grounds of appeal filed on behalf of the appellant.

Counsel for the appellant has submitted that it is not competent for the Magistrate to accept a plea of guilty from counsel and that the defendant himself is required by the provisions of section 27(1) of the Summary Jurisdiction (Procedure) Ordinance, Chapter 15, to plead to the charge as laid. In support of this submission counsel has referred us to the provisions of sections 22, 26 and 27 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 15, to the provisions of section 144 of the Criminal Law (Procedure) Ordinance, Chapter 11, and to Archbold's Criminal Pleading (33rd Edition) at page 144, paragraph 258.

The Solicitor General in reply submitted that the arguments of counsel for the appellant would properly relate to pleading in the Supreme Court in its criminal jurisdiction but not to pleading in criminal proceedings in the magistrates' courts.

The Solicitor General contended that a plea may be made on a defendant's behalf by counsel if the defendant authorises such a plea to be made on his behalf.

In support of his contention the Solicitor General referred us to the provisions of subsection (2) of section 12 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 15. That subsection provides that a magistrate may, if he thinks fit, permit a defendant to **appear** by counsel (which term includes a solicitor), and may at any time withdraw the permission after it has been given.

The Solicitor General cited the case of **R. v. Aves** (1871) 35 **J.P.** 68 in support of his submission. In the course of the judgment delivered in that case it was stated that a solicitor who appears for an infant who is not present cannot without his distinct personal authority plead guilty to a criminal charge **even assuming that an infant may plead by attorney when not personally present.** It would appear, therefore, that the point in issue in the present case was left open in Aves' case.

Section 12(1) of the Ordinance provides for an **ex parte** hearing of a summons in certain circumstances.

Under the provisions of section 22 of the Summary Jurisdiction (Procedure) Ordinance, Chapter 15, a defendant is entitled to conduct his case in person or by counsel, while under the provisions of section

12(2) of that Ordinance the Magistrate has a discretion to permit a defendant to **appear** by counsel. Such permission may be withdrawn by the magistrate at any time after it has been given.

There may be said to exist some doubt as to the construction to be placed upon the provisions of subsection (2) of section 12. Are these provisions limited to cases where a defendant does not appear at the hearing nor do they extend to cases where a defendant fails to appear?

As was stated by this Court in **de France v. Rai** (1944) L.R. B.G. 108, it is now a well-established rule of construction that a heading which precedes a provision in a statute is to be read as part of the statute and that much the same weight is to be attached thereto as to the preamble of an Act of Parliament. Where, therefore, any doubt exists as to the construction to be placed upon any provision in a section falling within the scope of the heading, the words of the heading may be looked at in order to determine the effect of the provisions.

It is to be observed that the Ordinance is divided into parts and that each part is further divided by headings. To Part 1 is assigned the general heading "Initiation of Proceedings". This part is further subdivided by specific headings "Making of Complaint", "Search Warrant" and "Enforcing appearance of Defendant". Sections 10 to 13 (inclusive) fall under the last of these specific headings and are placed immediately before Part II to which the general heading "WITNESSES" is assigned.

It is to be observed, also, that the provisions of sub-section (1) of section 12 of the Ordinance relate to the hearing **ex parte** and to the issue of a warrant for apprehension, on the non-appearance of a defendant. In our view, whatever meaning is to be given to the word "appear" in subsection (2) of that section, the provisions of subsection (2) of section 12 are applicable only to cases where a defendant is absent during a part or the whole of the hearing. In the present case it is not suggested that the defendant was absent during any part of the hearing before the magistrate.

It is provided by section 24(1) of the Ordinance that if, when a cause is called, the defendant does not appear, the Court may, if it comes within the provisions of section 12, proceed as therein directed.

Section 23 makes provision for the procedure to be adopted where a complainant does not appear but the defendant appears when the cause is called, and section 25 makes provision for the procedure to be adopted where neither the complainant nor the defendant appears.

Where both the complainant and the defendant appear the Court is required by provisions of section 26 of the Ordinance to hear and determine the complaint and the procedure to be adopted at the hearing is regulated by the provisions of section 27.

Section 27 provides as follows:—

"(1) At the commencement of the hearing, the court shall state to the defendant the substance of the complaint and ask him whether he is guilty or not guilty.

"(2) If the defendant says that he is guilty and shows no cause, or no sufficient cause, why an order should not be made against

him, the court shall make such order against him as the justice of the case requires.

"(3) If the defendant says that he is not guilty, the witnesses on both sides shall, unless the court in any instance otherwise expressly orders, be called and placed out of court and out of hearing, under the charge of the proper officer of the court or of some other person appointed by the court, for that purpose.

"(4) The court shall then proceed to hear the complainant and any witnesses he examines, and any other evidence he adduces in sups' port of his complaint, and also to hear the defendant and any witnesses he examines, and any other evidence he adduces in his defence, and also, if the court thinks fit, to hear any witnesses the complainant examines in reply, if the defendant has examined any witnesses or given any evidence.

"(5) The magistrate shall, in every case, take notes in writing of the evidence, or of so much thereof as is material, in a book to be kept for that purpose, and the book shall be signed by the magistrate at the conclusion of each day's proceedings :

Provided that, if the magistrate is from any cause unable to take the notes, they may be taken by the clerk under his direction."

We are of opinion that where both the complainant and the defendant appear and the Court proceeds to hear the complaint, the Court is required by the provisions of the above-mentioned sections to ask the defendant whether he is guilty or not guilty and the defendant himself is required to plead to the complaint.

In our view the appellant's original plea of not guilty to the complaint was never effectively altered by the purported change of plea by his counsel before the magistrate, and the proceedings thereafter amounted to a nullity. The conviction and sentence imposed by the magistrate cannot stand and must be quashed.

The case will be remitted to a magistrate of the Georgetown Judicial District to be re-heard and determined.

In the particular circumstances of the case each party will bear his own costs.

JHAMAN v. ANROOP

(In the Supreme Court, Civil Jurisdiction (Stoby, J.) March 20, June 15, 1957).

Practice and Procedure—Writ of summons—Issue of—By a barrister—Claim for declaration of ownership of land with claim for $500 for damages for trespass—Dispute concerning land—No allegation in writ of summons or in statement of claim that the value of the land does not exceed $500—Claim for declaration not consequential upon or ancillary to claim for damages—Value of land in fact exceeds $500—Issue of writ a nullity—Legal Practitioners' Ordinance Cap. 30, s. 42 (1) B (c).

The plaintiff's writ of summons which was not specially indorsed was issued by a barrister at law acting as a solicitor and was indorsed with claims for (a) a declaration of ownership to a parcel of land; (b) a declaration of undisturbed possession for over 60 years; (c) an injunction in the usual terms and a mandatory injunction; (d) a claim for the sum of $500 as damages for trespass and (e) costs. The value of the parcel of land was not stated in either the writ of summons or the statement of claim but counsel for the plaintiff stated that it exceeded $500.

Section 42 (1) B (c) of the Legal Practitioners' Ordinance, Cap. 30, provides that a barrister may act alone in any cause or matter where the writ is not specially indorsed in which the sum of money claimed or the value of the land or thing in dispute as alleged in the statement of claim does not exceed the sum of $500. It is also provided by that enactment that a claim for any additional relief in any such cause or matter by way of a declaration, an injunction, the appointment of a receiver, the taking of an account, or other consequential or ancillary remedy shall not affect the right of audience. Under s. 42 (1) B (d) of the Ordinance is provided that in any proceeding for a declaration of title to land under the Civil Law of British Guiana Ordinance, Cap. 7, a barrister may act alone irrespective of the value of the land.

It was submitted *in limine* on behalf of the defendant that the writ of summons signed by counsel was improperly issued on the ground that the claim for damages together with the value of the land in dispute exceeded $500.

For the plaintiff it was contended that the claim for a declaration was ancillary to the claim for damages and also that a barrister could act alone where such a declaration is sought.

Held: (i) The claim for the declaration was not ancillary in the particular circumstances of the case as it was not possible to adjudicate in respect of the claim for damages for trespass without resolving the dispute concerning the land.

(ii) That the declaration sought was not in proceedings for a declaration of title under the Civil Law of British Guiana Ordinance and s. 42 (1) B (d) of the Legal Practitioners' Ordinance had no application to the case.

(iii) As the value of the land in dispute exceeded $500 the issue of the writ was irregular and must with all other proceedings be struck out.

Semble: Where the value of land in dispute does not exceed $500 it is not irregular for a barrister to issue a writ claiming both remedies provided each claim is limited to $500.

Writ and subsequent proceedings struck out.

J. Carter for plaintiff.

A. S. Manraj for defendant.

Cur. adv. vult.

Stoby, J.: In this action the writ was issued by a Barrister-at-law, acting as a Solicitor and is indorsed as follows:—

(a) A declaration of the Court that he is the sole, legal and beneficial owner of —

"a piece or parcel of land situate at Soesdyke on the right bank of the Demerara River being 44 rods in facade and 750 (seven hundred and fifty rods) in depth bounded on the west by the Demerara River on the east by Crown Lands on the north by lands the property of the heirs of W. Porter and on the south of the lands the property of Andrew Jhaman and heirs as shown and described on a plan by S. S. M. Insanally, Sworn Land Surveyor, dated 31st December, 1945, and deposited in the Lands and Mines on the 24th January, 1946, in the county of Demerara and colony of British Guiana."

(b) A declaration of the Court that the plaintiff and his predecessors in title have been in continuous possession of the aforesaid property for a period of over 60 years *nec vi nec clam nec precario;*

(c) an injunction restraining the defendant, his servants, agents and/or workmen or any one claiming through him from further entering remaining and/or working the said land, and a mandatory injunction compelling the defendant his servants, agents and/or workmen to remove the building or buildings erected or may hereafter be erected on the said land;

(d) the sum of $500 (five hundred dollars) as damages for trespass;

(e) Costs.

In this Colony a barrister-at-law is entitled to issue writs and to act alone in certain cases. His authority so to do is regulated by the Legal Practitioners Ordinance Chapter 30. For the purpose of the submission hereunder discussed section 42 (1) is the relevant section. The material part is as follows:—

42 (1) "in any other cause or matter where the writ is not specially endorsed in which the sum of money claimed or the value of the land or thing in dispute as alleged in the statement of claim does not exceed the sum of five hundred dollars."

Section 44 of the Ordinance authorises a barrister to practise as a solicitor in respect of all proceedings including the issuing of writs of summons or other processes in any of the matters specified in section 42.

Mr. A. S. Manraj for the defendant, has taken the point that the writ of summons in the present case was improperly issued by a barrister and ought to be struck out. His submission is that there is a dispute as to land and although the value of the land is not stated in the writ, it must be assumed that land has some value and since there is a claim for five hundred dollars damages in addition to the issue concerning the land, the provisions of the section are infringed.

Mr. John Carter for the plaintiff referred me to the proviso to section 42 (1) B (c) and also to sub paragraph (d) of the same section. The proviso is:—

> "A claim for any additional relief in any such cause or matter by way of a declaration, an injunction, the appointment of a receiver, the taking of an account, or other consequential or ancillary remedy shall not affect the right of audience;"

and sub paragraph (d) is:—

> "in any proceeding for a declaration of title to land irrespective of the value thereof under the Civil Law of British Guiana Ordinance;"

Mr. Carter's submission is that the relief claimed in paragraphs (a) and (b) of the writ, that is, a declaration that the plaintiff is the sole, legal and beneficial owner of the land, and that he and his predecessors in title have been in continuous possession of the property for a period of over 60 years *nec vi nec clam nec precario* is a consequential or ancillary remedy and not a dispute as to land. The main issue, he contends, is one of trespass and as the amount of damages claimed is within the permitted sum, the writ was properly issued. He also argued that sub paragraph (d) enables a barrister to sign a petition for declaration of title irrespective of the value of the land involved and consequently a writ claiming prescriptive title with an additional claim for damages of or under $500:—does not infringe the Ordinance.

The submission by counsel for the plaintiff that the plaintiff's action is for damages for trespass to land and that there is no dispute as to land necessitating any inquiry about the value of the land is an ingenious attempt to overcome an insurmountable defect.

The plaintiff's case as set out in his statement of claim is that he is the legal and beneficial owner and occupier of a piece of land at Soesdyke on the right bank of the Demerara river. If he has a legal title as he says, then it would be enough for the plaintiff to succeed for him to establish his title and to prove that the defendant is attempting to interrupt his lawful possession by wrongfully entering upon his land. In such a case there is no necessity to claim a declaration of ownership; it is only when a person without legal title brings an action for trespass that a declaratory

judgment is necessary, for such a person has to prove an existing legal possession and a declaration that he is and has been in possession as against the defendant who is unable to show a superior title, is essential for the success of his case.

The manner in which the plaintiff's writ and statement of claim are framed, especially the claim that he has been in possession *nec vi nec clam nec precario* for 60 years, implies that the plaintiff's claim to the land is founded on possession. Before he can be awarded damages for trespass whether because he has a legal title or because he is in possession, his title, legal or possessory, has to be examined and a finding of fact made on that issue. The dispute which exists between the plaintiff and the defendant is a dispute concerning either ownership of the land or actual physical possession of the land and if the value of the land is over five hundred dollars, a barrister has no jurisdiction to issue the writ whether a claim for damages is added or not.

I interpolate here to say that after decision was reserved in this matter, 1 observed that the plaintiff had not stated in the writ what was the value of the land. I invited counsel for the plaintiff and for the defendant to attend in Chambers in order to place on the record a statement as to the value of the land. Although counsel for the plaintiff intimated that the land was of a value above five hundred dollars, he has not up to now submitted anything in writing but in order to avoid delay, I am proceeding on the assumption that the value of the land is over five hundred dollars.

Mr. Manraj's submission is that even assuming the land to be of a value under five hundred dollars, the writ was irregularly issued. As I am assuming a value over five hundred dollars, it is not necessary for me to decide that point but as it was argued I will express my opinion on it. Quite clearly, if the claim for damages is in the alternative the issue of the writ by a barrister could not be irregular as the section permits him to act where the value of the land in dispute does not exceed five hundred dollars or the amount claimed does not exceed five hundred dollars, nor is it in my view irregular for him to issue a writ claiming both remedies providing each claim is limited to five hundred dollars. The obvious reason for the enactment was to restrict a barrister's right to act as a solicitor to matters under five hundred dollars. The cumulative effect of doing two things that he is entitled to do cannot result in right becoming wrong. Had the land been of a value under five hundred dollars I would have held the writ to be properly issued although there is a claim for damages as well.

I have now to consider the submission on the assumption that the value of the land exceeds five hundred dollars. The claim for a declaration is not ancillary in the particular circumstances of this case. The expression "ancillary" was well illustrated in *Smith* v. *Smith* (1925) 94 L.J. K.B. 813, where the plaintiff brought an action in the County Court to recover the sum of £40 being two months arrears of pension and a declaration that the defendant was liable to pay the plaintiff during his lifetime pension at the rate of £20 per month.

At that time the County Court's jurisdiction was governed by section 89 of the Judicature Act 1873 which was:—

> "Every inferior Court which now has or which may after the passing of this Act have jurisdiction in equity, or at law and in equity and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being, have power to grant, and shall grant in any proceeding before such Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional....in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice."

and section 56 of the County Courts Act 1888 which was

> "All personal actions, where the debt, demand, or damage claimed is not more than one hundred pounds, whether on balance of account or otherwise, may be commenced in the Court. . ."

The County Court judge held that he had jurisdiction and gave judgment for the sum of £40 claimed and made the declaration asked for on the ground that it was ancillary relief.

The judgment as regards the declaration was set aside on appeal. Bankes, L.J. said:—

> "With regard to the other case cited, Rex v. Cheshire County Court Judge……It is necessary to refer to the facts of that case to account for the introduction of the expression 'ancillary.' The action was brought for a declaration merely, without any other claim. What the Court had to decide was whether the County Court had jurisdiction to deal with any such claim. In discussing that matter, the Master of the Rolls says more than once that the right which the County Court has under section 89 of the Judicature Act is ancillary, that is to say, supplemental. It is an additional remedy, the making more effective remedy for the one cause of action
>
> Applying those principles and those decisions to this case, it seems to me perfectly manifest that there are in this claim two causes of action. The one is a cause of action to recover two months arrears of pension due on May 31, 1924. In regard to that it was only necessary to prove an agreement which would cover that period. But the plaintiff goes on to say, 'I also want a declaration that not only are you liable in respect of that period, but you are also liable to pay this amount monthly for the whole of my life.' It seems difficult to follow the suggestion that that is not a separate and different cause of action. It is not an additional relief or remedy, or making more effective the plaintiff's remedy in respect of the cause of action of a liability covering the two months up to May 31, 1924. It is asking for something essentially different, and in respect of which the cause of action is quite different. It may be that the same agreement will prove both, but that does not present the two claims from being separate causes of action."

In the instant case it is not possible to adjudicate in respect of the claim for damages for trespass without resolving the dispute concerning the land. The consequence of the investigation which must necessarily

take place will result in my making a finding of fact that either the plaintiff or the defendant is entitled as against each other to the possession or ownership of the land. As soon as I make that finding I have made a decision concerning land the value of which exceeds five hundred dollars.

Mr. Carter's submission that a barrister is entitled to appear without the aid of a solicitor in any proceeding for a declaration of title to land under the Civil Law of British Guiana Ordinance is correct but I am unable to discover how that provision assists him in this case as this is not a proceeding under the Civil Law of British Guiana Ordinance.

The submission being well founded must succeed and the writ and all subsequent proceedings struck out.

On the question of costs I allow costs to the defendant up to and including the entry of appearance. It was the duty of the defendant's solicitor to apply to have this writ struck out instead of filing a defence and taking the point at the trial. Costs of appearance in Court will be permitted.

The action is struck out with costs limited as above.

Solicitors:

J. E. Too-Chung for plaintiff.

L. L. Doobay for defendant.

COMMISSIONER OF INCOME TAX v. BARCELLOS

(In the Supreme Court (Stoby, J.) March 23, June 15, 1957).

Insolvency—Rejection by assignee of Income tax Assessment made subsequent to receiving order—Assessment not challengeable in insolvency proceedings—Tax liability an obligation incurred before receiving order.

Application was made by the Commissioner of Income Tax under paragraph 24 of the Second Schedule to the Insolvency Ordinance (Cap. 43) to reverse the decision of the assignee in insolvency rejecting proof for arrears of income tax. Tax assessments were made subsequent to the making of a receiving order on the basis of statements of the debtor during public examination.

Held: (1) The Court will not re-open income tax assessment in proceedings of this kind, since it does not assume possibility of fraud between the Crown and its subjects.

Re Calvert (1899) 2 Q.B. 145, applied.

Re Kay and Lovell (1941) 2 All E.R. 67, *Re Lennox,*

Ex parte Lennox, (1885) 34 W.R. 51, *C.A. and Re Van Laun,*

Ex parte Chatterton, (1907) 2 K.B. 23, referred to.

(2) As soon as income is derived in the Colony over and above a certain sum, the obligation to pay income tax arises. The taxpayer's liability does not depend on the arithmetical calculations of a Government Official; it is the extent of his liability which is dependent on the ascertainment of his chargeable income.

Re Pitchford (1924) 2 Ch. 260, distinguished.

(3) Notice of the assessment was properly served on the debtor and not on the assignee.

S.S. Ramphal, Acting Solicitor General, for applicant.

J.H.S. Elliott, for respondent.

Cur. adv. vult.

Stoby, J.: The Commissioner of Income Tax has moved the Court that the decision of Anthony Stanislaus Marques Barcellos, Assignee of the estate of Mohamed Osman Bacchus, a debtor, in rejecting a certain claim made by the Commissioner of Income Tax against the estate of the debtor, be reversed or varied.

The facts which have given rise to this action are not in dispute and may be briefly stated.

On the 27th October, 1952, a Receiving Order was made against Mohamed Osman Bacchus hereinafter called the debtor, on his own petition.

Before the debtor's public examination was concluded, he lodged with the Official Receiver a proposal for a Scheme of Arrangement of his affairs as is permissible under section 19 (1) of the Insolvency Ordinance, Chapter 43. Thereafter the procedure set out in section 19 was followed. The public examination was concluded on 2nd March, 1953, and the Scheme of Arrangement approved by the Court on the 21st March, 1953. The result of the Court's approval of the Scheme was that Anthony Marques Stanislaus Barcellos was appointed Assignee and Trustee of the debtor's estate in place of the Official Receiver, this being one of the debtor's proposals.

On the 19th August, 1953, the Assignee applied by way of a summons to a Judge in Chambers for directions on certain matters which had arisen during the course of his administration of the estate.

The only question which is relevant to these proceedings is the following:—

Q. 7: What steps the applicant should take as regards the claim of the Commissioner of Income Tax for the sum of $11,834.28 in respect of Income Tax for the years of assessment 1949, 1950 and 1951.

It appears that the claim by the Commissioner of Income Tax arose in this way: During the public examination of the debtor he said:—

> "... .On 15th November, 1950, I resigned my position at Sankar Bros. Ltd., and having about $60,000.00 I started on the building of the Hollywood Cinema which was opened on 22nd December, 1951, and which I ran until sometime in June, 1952.
>
> This $60,000.00 was accumulated from rents from my property at 220 Lamaha Street, Kitty, which I owned since 1944, the revenue from the lorry and profits from sales of property and buildings (bungalows) erected by me.

Among the properties and buildings bought and sold by me were:—

'One in William Street, sold to Dr. Maraj. One in David Street, sold to Mr. Sydney Kennard. Four in 4th and 5th Avenues, Subryanville, sold to Messrs. Brandeo Singh, Low-A-Chee, Drepaul and Mrs. Camacho, as well as four bungalows built on leased land at 4th and 5th Avenues, Subryanville, sold to Messrs. Bostock, Moore, Wharton and Mrs. St. Pierre on each of which I made not less than $3,000.00 profit. All the $60,000.00 was invested in the Cinema.' "

Prior to giving this evidence, the debtor had filed a return of his taxable income for the years 1951 and 1952 for the years of assessment 1950 and 1951. On the basis of his returns his Income Tax Assessment was for rather modest sums.

After the debtor gave the evidence above referred to, the Commissioner of Income Tax came to the conclusion that the debtor's previous returns were untrue and incorrect and acting under section 50 of Chapter 299 he assessed the debtor on what he considered to be the debtor's true income for the years of assessment 1949, 1950, and 1951. This additional assessment was made on the 30th June, 1953 and amounted to a total of $11,834.28.

Before the assessment of the 30th June, 1953, had been made, the assignee wrote the Commissioner of Income Tax as follows:—

10th June, 1953,

"The Commissioners of Income Tax,
Income Tax Office,
Georgetown.
Gentlemen,

As Assignee of the Estate of Mohamed Osman Bacchus, Debtor, which appointment is by Order of the Supreme Court made on the 21st day of March, 1953, and entered on the 9th April, 1953 (insolvency No. 2 of 1952), I would be very thankful if you would be good enough to let me know early as early as possible whether the above-named debtor is indebted to your office for any income Tax Assessments,

Yours faithfully,
A. M. S. Barcellos,
ASSIGNEE: Estate of M. O. Bacchus,
Debtor."

The Commissioner of Income Tax replied on the 30th June, 1953, as follows:—

"Sir,

In reply to your letter dated 10th June, 1953, asking as Assignee of the Estate of Mohamed Osman Bacchus, Debtor, what Income Tax is payable by Mr. Bacchus I have to notify you that Mr. Bacchus has been assessed to tax as follows:—

Year of Assessment	1949	$2,994.78
„ „ „	1950	4,588.80
„ „ „	1951	4,250.70"

On the 10th July, 1953, the assignee replied to the Commissioner of Income Tax as follows: —

"Gentlemen,

I have the honour to acknowledge with thanks the receipt of your letter of the 30th ultimo Ref. No. c/1858/82-21ES, and in reply beg to inform you that as the Debtor has not included his liability to the Commissioners of Income Tax in his statement of affairs filed in his Insolvency proceedings on his own petition on the 27th October, 1952, (on which a Receiving Order was made on the same date), which statement was filed under Statutory Declaration dated 12th November, 1952, it is necessary that I have the following information:—

1. The dates on which the Returns were submitted to your office by the Debtor for the Years of Assessment 1949, 1950 and 1951, respectively.
2. The dates on which Assessments were made for the years 1949, 1950 and 1951 respectively.
3. The amount assessed on each return for the years 1949, 1950 and 1951 respectively."

to which he got no reply.

That was the position when the assignee approached a Judge in Chambers for directions.

The Commissioner of Income Tax was not represented in Chambers and the Judge's ruling on the question posed was that the Commissioner of Income Tax should prove his debt and that if the assignee rejected his claim, proceedings in accordance with Rules 23 and 24 of the Insolvency Rules could then be taken.

Accordingly, the Commissioner of Income Tax submitted his claim and the assignee rejected it. His reasons may be summarised as:—

(a) that the assessments were made against Mohamed Osman Bacchus and not against the assignee and the assignee was refused all information in respect of the assessments and was deprived in consequence thereof of the benefits of the provisions of the Income Tax Ordinance and was thereby deprived from disputing the assessments above-mentioned or any of them;

(b) that the assessments and penalties above-mentioned and in respect of which the claim which is rejected is based are **ultra vires** and the Commissioner of Income Tax had no power to make the assessments or impose the penalties as he has done;

(c) that none of the said assessments or the said penalties was a debt or liability to which the said Mohamed Osman Bacchus was subject at the date of the Receiving Order

or could become subject thereto before his discharge by reason of any obligation incurred by him prior to the date of the Receiving Order, and is therefore not within section 35 of the Insolvency Ordinance, Chapter 180.

(d) that the said Mohamed Osman Bacchus was not in receipt of any increased income in the year of income 1948, or in the year of income 1950 upon which it would have been competent for assessments under section 41 of the Income Tax Ordinance Chapter 38 to be made or at all;

(e) that the said Mohamed Osman Bacchus was not in the year 1948 in receipt of an increase of income of $9,927 or of any other sum being profit in trade business or otherwise chargeable to tax;

(f) that the said Mohamed Osman Bacchus was not in the year 1950 in receipt of an increase of income of $12,495 or of any other sum being profit from any trade business or otherwise chargeable to tax;

(g) that it was not competent for the Commissioner of Income Tax to make any of the assessments or to impose any of the penalties set out in his affidavit of proof dated the 11th day of June, 1954;

(h) that the said Mohamed Osman Bacchus was not prior to or at the date of the Receiving Order indebted in respect of any of the assessments set out in the Commissioner's affidavit of proof dated the 11th day of June, 1954;

(i) that there was no evidence upon which the Commissioner of Income Tax could find that the said Mohamed Osman Bacchus was in receipt of any of the increases in any of the years preceding the respective years of assessment in which he has been assessed.

The Commissioner of Income Tax hereafter called the appellant, now moves the Court that the decision of the assignee hereafter called the respondent, should be varied.

It was submitted by counsel for the appellant that the respondent could not properly reject the appellant's claim on the ground that the debtor was not in receipt of the taxable income which the appellant held him to be in receipt of. To do so, said counsel, would be in effect to go into the merits of the appellant's claim which could not be permitted.

Counsel for the respondent contended that in a bankruptcy matter it is competent for the Court to investigate the genuineness of the assessment on the merits.

With respect to bankruptcy, the jurisdiction of the Court is indeed very extensive, and even when a judgment has been obtained against a debtor prior to his bankruptcy, it is competent for the Court to investigate the facts on which the judgment was founded. Not only can the Court investigate the consideration for a judgment debt but the trustee or assignee in bankruptcy under rule 23 of the second Schedule to Chapter 43 is entitled to "examine every proof and the grounds of the debt".

These words mean that if the assignee is not convinced about the genuineness of a judgment debt he can reject it.

The grounds for the rule were stated by Cotton L.J. in *re Lennox ex parte Lennox* (1885) 34 W.R. at p. 53 as follows: —

> "It has been long established that as regards proof a trustee can, on behalf of the creditors, go behind a judgment and show that, though prima facie evidence, it does not establish the debt; and that is based on this principle, that no collusion of the debtor or anything else ought to prejudice the other creditors' rights, the assets in the bankruptcy having to be distributed amongst the bona fide creditors; thereby, as James, L.J., said, preventing sham debts from being proved."

In *Van Laun in re Chatterton ex parte* (1907) 2 K.B. 23 Cozens-Hardy M.R. in the Court of Appeal referred to the following passage in the judgment of Bigham, J. in affirming that Judge's decision:

> "The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him."

It was held, however, in *re Kay and Lovell, Trustee, v. Moore and Quaife* (1941) 2 All E.R. 67 that the jurisdiction in bankruptcy to reopen transactions did not extend to reconsidering receiver's accounts which were duly brought into Chambers and were certified as proper accounts by the master. The ratio decidendi in this case would seem to be that by Rules of Court provision is made that the master’s certificate is binding on all parties unless discharged or varied upon an, application made within a limited time. As the procedure provided by the rules was not followed, the Court held it had no jurisdiction to go behind the certificate.

The case of *Calvert: in re Calvert ex parte* (1899) 2 Q.B. 761 cited by counsel for the appellant, deals specifically with the peculiar position of Income Tax debts. It was there held that —

> "Where a debtor has been assessed to income tax in respect of profits which he alleges he has not earned, but has not appealed against such assessment, it is not competent to the Court at his instance in his subsequent bankruptcy to go behind the assessment as in the case of a judgment, but the Court will treat the assessment as conclusive."

In my view the Court ought not to re-open an Income Tax assessment in proceedings of this kind. The tax payer who inflates his income in order to become liable to pay a higher tax than he ought to pay benefits the Crown and no one else. The Courts will not assume that as between the Crown and its subjects there is the possibility of fraud and collusion. On the other hand, in respect of individuals, the Courts will assume and do assume that a fraudulent preference is a very real possibility and as a consequence permits the trustee in bankruptcy to examine such debts.

Counsel for the appellant conceded that it was competent for the assignee to contend, as he has contended, that it was not permissible for the Commissioner of Income Tax to make an assessment after the receiving order was made or as Counsel for the respondent stated the proposition— the debt is not a provable debt. He submitted, however, that section 35 (3) of Chapter 43 was sufficiently wide in its terms to justify the Commissioner of Income Tax making the assessment at the time he made it.

Section 35(1) and (3) is as follows:—

"(1) Demands in the nature of unliquidated damages arising from tort, or otherwise than by reason of a contract, promise, or breach of duty or breach of trust, shall not be provable in insolvency."

"(3) Except as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he becomes subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in insolvency."

There is no contest that the failure to pay income tax would be a breach of duty and consequently an income tax assessment is a provable debt in insolvency. Counsel for the respondent's submission is that it was not an obligation incurred before the date of the receiving order.

To decide the point, it becomes necessary to advert to the Income Tax Ordinance Chapter 299.

Sections 5 and 8 of the Income Tax Ordinance Chapter 299 provide respectively for the imposition of Income Tax and the basis of assessment of the tax. As soon as income is derived in the Colony over and above a certain sum the obligation to pay income tax arises. The tax payer's liability does not depend on the arithmetical calculations of a Government Official; it is the extent of his liability which is dependent on the ascertainment of his chargeable income. A clear distinction must be drawn between the liability to pay on the one hand and the amount required to be paid as a result of the liability on the other hand.

The case of *Pitchford* (1924) 2 Ch. D. 260 on which counsel for the respondent relied is distinguishable from the one under review. In Pitchford's case, it was held that untaxed costs of an action which had been stayed was not a provable debt. In the judgment of Astbury, J. reference was made to what Cave, J. said *In re Bluck* (1887) 57 L.T. 419 and 420 —

"If a man brings an action he does place on himself an obligation to pay the costs; that obligation arises when judgment is given against him".

He then concludes his judgment as follows:—

"The present case is far stronger than that. Here there was no order of any sort or kind dealing either with the claim or with the costs of the action, and the creditor having chosen, as the respondent in the present case has chosen, to obtain an order

> staying his action relying on proof in the bankruptcy, it seems to me perfectly hopeless to contend that he is now at liberty to go to the county court, which had no jurisdiction of any sort or kind, to make an order for the costs of the King's Bench action, and ask that he should be allowed to prove for a sum of costs in respect of which he has obtained no judgment and in respect of which there, consequently, can be no taxation".

The distinction I draw between Pitchford's case and the present one is that in Pitchford's case the obligation to pay costs could not arise until judgment and as there was no judgment, there was no liability; while in the present case the obligation to pay tax arose as soon as the income was earned.

The last point considered was whether the assignee was correct in rejecting the proof on the ground that the notice of assessment was served on the **debtor** and not on the assignee.

It appears that the appellant took the view that section 4 (1) (2) of the Income Tax Ordinance Chapter 299 precluded him from disclosing the information.

It is not necessary to decide whether this view is correct or not because there is no room for argument that anyone other than the **debtor** could have been assessed. The appellant exhibited the caution associated with civil servants when he directed attention to section 4, although it may well be that as the information about the debtor's income was obtained from the newspapers, any penalty imposed for disclosing this secret information would not have been too heavy. The assignee, however, could have protected himself by applying under section 27 of the Insolvency Ordinance, Chapter 43 for an order that all the debtor's letters should be re-directed to him, or by questioning the debtor as he is entitled to do. He could have obtained the information from the debtor under section 25 (2) of Chapter 43.

Apart from section 32 of Chapter 299 which authorises the Commissioner of Income Tax to charge tax against a receiver, trustee, guardian, curator or committee having the direction, control or management of any property or concern of an incapacitated person, there is nothing in the Income Tax Ordinance which permits the Commissioner to tax anyone other than the wage earner.

For the reasons stated above the assignee was not justified in rejecting the proof.

During the hearing of the appeal, counsel for the appellant stated that there would be no objection to granting the assignee an extension of time to appeal against the assessment should such extension be applied for.

As the respondent may wish to consider making such an application, I have refrained from expressing my view regarding the merits of the assessment and grant a stay of execution for six weeks.

The appeal is allowed with costs.

C. R. JACOB & SONS, LTD. v. COMPTROLLER OF CUSTOMS & EXCISE.

(In the Full Court, on appeal from a magistrate's court for the Georgetown Judicial District (Stoby and Clare, JJ.), December 18, 1956, January 21, 1957).

Customs duty—Import entry relating to shipment of goods ordered submitted to Comptroller and duly passed and duly paid—Subsequent increase in

C. R. JACOB & SONS, LTD. v. COMPTROLLER OF CUSTOMS & EXCISE.

rate of import duty—Arrival of the shipment of goods after increase in rate of import duty—Whether increased rate leviable in respect of that shipment—Customs Ordinance, Cap. 309 s. 15.

On the 15th December, 1954, the appellant company submitted to the Comp-troller of Customs and Excise an import entry for 999 cartons of malt. The entry relating to this shipment was duly passed and duty under the tariff contained in the then Customs (Consolidation) Ordinance 1952 amounting to $2,430.36 was paid on the 16th December, 1954. On the 17th December, a Bill dated 17th December, 1954, was published in the Extraordinary Gazette under the Provisional Collection of Taxes Ordinance, then Cap. 41, whereby the duty on malt was increased. The goods arrived in this Colony by ship on the 23rd December, 1954. The ship had been expected to arrive on the 16th December, 1954. The Comptroller claimed from the appellant company the difference in duty on the goods under section 251 of the 1952 Ordinance and the new provisions contained in the Bill.

It was contended for the appellant on appeal against the decision of the Magistrate who upheld the Comptroller's claim that when the duty was paid on the 16th December, 1954, in pursuance of the entry submitted on the previous day, the goods had been imported and on the 16th December, 1954, were entered for use within the Colony within the meaning of that expression in section 15 of the Customs Ordinance, Cap. 309, and were therefore liable to the payment of such duties as may be due and payable under the customs laws in force at the time when the goods were entered.

Held: Under section 15 of the Ordinance goods are not imported until they are in the Colony. As the goods the subject matter of the claim were not in the Colony when the duty was paid, the appellant was liable to pay duty at the rate existing at the time the goods arrived in the Colony and not the duty in force at the time when they were on a ship bound for the Colony.

Appeal dismissed.

F. R. Jacob for the appellant.

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

Judgment of the Court: This appeal raises the question what is the correct interpretation of section 15 of the Customs Ordinance, Chapter 309, hereinafter referred to as the Ordinance.

The facts which are not in dispute are as follows:—

"1. The appellant Company submitted to the Comptroller of Customs an import entry on the 15th December, 1954, for 999 cartons of malt, representing 1534.32 gallons.

2. The entry relating to this shipment was duly passed and duty amounting to $2,430.36 was paid on the 16th December, 1954.

3. The assessment of customs duty was made on 1534.32 gallons at $1.60 per gallon and this was at the preferential tariff rate under item 112-03.1 of the then Customs (Consolidation) Ordinance 1952 (No. 69).

4. On Friday 17th December, 1954, a Bill was published in an Extraordinary Gazette under the Provisional Collection of Taxes Ordinance, then Chapter 41, and the duty on malt was increased thereby from $1.60 to $2.00 per gallon.

5. This Bill was dated the 17th December, 1954.

6. The M.V. Corona arrived in this Colony on the 23rd December, 1954, and the 1534.32 gallons of the malt upon which duty was paid as aforesaid was part of the cargo of the said ship.

7. The S.S. Corona was expected to arrive on 16th December, 1954".

On those agreed facts the Comptroller claimed difference in duty under section 251 of the Customs (Consolidation) Ordinance, 1952 (No. 69) now section 251 of Cap. 309. The claim was amended at the hearing to give an allowance for breakage. The amended claim was for $607.90.

Section 15 of the Customs Ordinance Cap. 309 is the one which provides for the payment of duty. It states —

> "All goods deposited in any warehouse without payment of duty on the first importation thereof, or which may be imported or exported and shall not have been entered for use within the colony or for exportation as the case may be, shall, upon being entered for use within the Colony or for exportation as the case may be, be subject to such duties as may be due and payable on the like sort of goods under the customs laws in force at the time when the same are entered, save in cases where special provision shall be made to the contrary:
>
> Provided that for the purposes of this section, in the case of passengers' baggage or of goods imported into the Colony by post, for which entry is not required, the time of entry shall be taken to be the time of delivery of such baggage or goods to the passenger or addressee, as the case may be, and in the case of goods exported from the Colony by post, the time of entry of such goods shall be taken to be the time of posting."

Mr. F. R. Jacob counsel for the appellant submitted that when the import entry relating to the shipment of goods was lodged at the Customs on the 15th December, 1954, and duty paid on the 16th December, 1954, there was compliance with section 15 in that the goods were entered for use in the Colony. He contended that in relation to goods imported, the meaning of "entered" is defined in section 2 and that it means —

> ". . . the acceptance and signature by the proper officer of an entry, specification or shipping bill, and declaration signed by the importer or exporter on the prescribed form in the prescribed manner, together with the payment to the proper officer by the importer or exporter of all rents and charges due to the Government in respect of the goods . ."

Since, he said, the appellant Company had paid their duty, it followed that the goods were entered. The time for payment of duty had passed and any subsequent increase of duty was ineffective with regard to those goods.

Crown Counsel, Mr. Gillette, drew the Court's attention to the whole of section 15 and relied on the words "which may be imported". He stressed that importation of the goods should precede the entering of the documents and as the goods were not in the Colony when the duty was paid they were liable to the higher rate of duty on arrival.

In our view, there is no difficulty in construing section 15. It commences by making provision for goods which have come into the Colony and were deposited in a warehouse.

It is clear that if goods are deposited in a warehouse and duty has not been paid, the rate of duty payable is the rate existing when the goods are "entered" as defined in section 2.

The section having dealt with one type of dutiable goods then goes on to deal with another class of dutiable goods. It states (all goods) which may be imported……..and shall not have been entered for use within the Colony shall upon being entered for use within the Colony……be subject to such duties as may be due and payable……when the same are entered. The important words which require to be construed are the words "which may be imported". In section 2 of the Ordinance "import" means to bring or cause to be brought within the colony. As a result of this definition the words "may be imported" must mean "may be brought or may be caused to be brought within the Colony".

The submission that the section refers to importable goods does not commend itself to us. Section 42 of the Ordinance provides that certain goods set out in the Second Schedule of the Ordinance are prohibited or restricted from being imported. By section 216 it is an offence punishable by the offender being required to pay treble the value of the goods or a fine of $500 for importing prohibited goods. If it is an offence to import prohibited goods, the payment of duty on such goods can never arise and the purpose of section 15 is to deal with goods upon which duty is payable.

It remains to be considered whether the words "all goods which may be imported" are referable to goods which are being brought into the Colony or whether they refer to goods which have arrived in the Colony. If to the former the appeal succeeds; if to the latter the appeal fails.

In the well known case of *Broom* v. *Batchelor* (1856) 1 H & N 255 Pollock C.B. delivering the majority judgment of the Court said:

> "But as far as I can bring my knowledge of the English language to bear upon the subject, 'may be' is much oftner used with reference to the future than the past or the present."

In a dissenting judgment Bramwell, B. said:—

> "...'may be' is the present tense and *prima facie* means 'now may be'.

We have not been able to find any other case where the words 'may be' have been the subject of judicial interpretation and as the document

which had to be construed in *Broom* v. *Batchelor* (*supra*) was a private document concerning which extrinsic evidence was given to aid the interpretation we feel that *Broom v. Batchelor* (*supra*) is of no assistance to us in this case.

In our view the words "may be" can refer to the future or the present depending on the verb they precede. For example in section 51 of the Ordinance —

> "Any money which shall have been overpaid as duties of customs may be refunded at any time within two years after such payment, on the proper document for such overpayment being certified by the Comptroller".

Clearly there, "may be" refer to the future as a refund can be made only when an event occurs which causes the parties to decide that there has been an overpayment. But in section 17 "may be" must necessarily refer to the present, for goods can only be said to be imported when they are in the Colony. To import, does not mean to place an order for the purchase of goods with a manufacturer outside of the Colony but it means to bring goods into the Colony or to cause them to be brought into the Colony. So far as section 15 of the Customs Ordinance is concerned, goods are not imported until they are in the Colony. Goods on a ship which is in territorial waters will of course be deemed to be in the Colony as provided by section 2 of the Ordinance.

As the goods, the subject matter of this claim were not in the Colony (as defined in section 2) when the duty was paid, the appellant was liable to pay duty at the rate existing at the time the goods arrived in the Colony and not the duty in force at the time when they were on a ship bound for the Colony.

In the result the appeal is dismissed with costs to the respondent fixed at $25:—

KRAMAT *and anor* v. M. V. ROANDA.

(In the Supreme Court, Civil Jurisdiction (Stoby, C.J. (ag.), June 13, 14, 17, 1957).

Practice and Procedure—Admiralty Court—Unconditional appearance to action—Whether submission to jurisdiction of Court—Admiralty Rules.

Practice and Procedure—Admiralty Court—Possession suits in respect of foreign vessels—Matter for the discretion of the Court.

Motion at instance of plaintiffs praying that their evidence in an action against the motor vessel "Roanda" be taken in the United States of America.

On the 5th February, 1957, the "Roanda" was arrested at the instance of the plaintiffs who claimed that a debt of $6,243 was due to them and was secured by a mortgage on the vessel. On the 7th February, 1957, an unconditional appearance to the action was entered by solicitor for the defendant. The mortgagor and mortgagees were citizens of the United States of America and the vessel "Roanda" was a foreign ship.

On the motion coming on for hearing it was submitted on behalf of the defendant that the Court had no jurisdiction to hear and determine the action on the ground that where there is a foreign ship and there are foreign parties, the Court will decline jurisdiction unless the consular jurisdiction of the foreign state accedes to the Court exercising jurisdiction on behalf of his government or unless the parties submit to the jurisdiction of the Court.

On behalf of the plaintiffs it was submitted (a) that there had been a submission to the jurisdiction of the Court in that a conditional entry had been entered to the action; (b) that the Court will itself decide whether it will exercise its jurisdiction in favour of the plaintiffs; and (c) that in any event the Judicature Act, 1925, has made it clear that the Admiralty Court has jurisdiction in a matter of this kind.

Held: (i) The rules applicable to an action of this kind are the local Admiralty Rules and not the Rules of the Supreme Court, 1955 or the English Admiralty Rules and under the local Admiralty Rules where the jurisdiction is going to be questioned a conditional appearance is required to be entered.

(ii) There is no established rule that the Admiralty Court will not entertain possession suits in respect of a foreign ship where the parties are foreigners without the consent of the parties or without a request from the representative of the foreign state of which either of the parties are nationals and the matter is always one for the discretion of the Court.

In the Jupiter (No. 2) (1925) P. 67 applied.

(iii) The Court has no jurisdiction in a mortgage action relating to a ship other than the jurisdiction given in England by the Admiralty Court Act, 1840 and the Admiralty Court Act, 1861 and applied to this Colony by the Colonial Courts of Admiralty Act, 1890.

(v) The object of section 3 of the Admiralty Court Act, 1840, is to give the Court jurisdiction if the ship is under arrest. In this action the ship was under arrest and the arrest was wrongful. But the wrongful arrest had never been challenged and because the defendant had submitted to the arrest the Court could entertain the action as the ship was then in the territorial waters of the Colony.

Motion granted.

J. H. S. Elliott for the plaintiffs.

L. F. S. Burnham for the defendant.

Stoby, C. J. (ag): As I indicated on Friday last, I have not had an opportunity of putting this decision in writing, and as the matter appears

to be one of some urgency and as I have come to a conclusion I will not delay the decision in order to have it put in writing.

This is a motion at the instance of Harry Kramat and Isodor Sweet praying that their evidence in an action against motor vessel "Roanda" be taken in the United States of America. The record discloses that on the 5th February, 1957, the motor vessel "Roanda" was arrested at the instance of the plaintiffs who claimed that a debt of some $6,243 was due to them and was secured by a mortgage on the vessel. The record also discloses that on the 7th February, 1957, an unconditional appearance to the action was entered by Mr. Carlos Gomes, Solicitor.

The hearing of the motion was delayed for several weeks on the application of one A. H. Ballard, who claims to be the master or owner of the motor vessel "Roanda", and on one occasion the reason given was that a settlement of this action and another action, which the master himself was bringing, was contemplated. This settlement not having materialized, Mr. Burnham for the owner of the ship submits that this Court has no jurisdiction to hear and determine the action. He argues that the mortgagees and the mortgagor are citizens of the United States of America and that the ship is a foreign ship and that the law is that, where there is a foreign vessel and where there are foreign parties the Court will decline jurisdiction unless the consular jurisdiction of the foreign state accedes to the Court exercising jurisdiction on behalf of his government or unless the parties submit to the jurisdiction of the Court.

In support of that proposition he has referred me to Dicey's "Conflict of Laws", 4th Ed. p. 867, and the case of the *Evangelistria* reported at (1876) 2 Probate 241. I will deal more fully with those authorities later in this judgment.

In reply to this submission Mr. Elliot, for the mortgagees, relies on three points:—Firstly he has submitted that there has been a submission to the jurisdiction in that an unconditional appearance has been entered. Secondly, he submits that the law stated in Dicey is out of date, and that the authority for that statement is the case of the *Annette* (1919) Probate 105 at p. 113 and the *Jupiter No. 2* (1925) Probate 69. He submits that the test is not whether the parties submit to the jurisdiction; the test is whether the Court itself will exercise its jurisdiction in favour of the plaintiff; and, thirdly, that in any event the matter is concluded by statute because the Judicature Act has now made it clear beyond reasonable doubt that the Admiralty Court has jurisdiction in a matter of this kind.

Let me deal with Mr. Elliot's first point first. In the "Annual Practice" 1957, p. 128, the note to Order 12 Rule 1, there is the statement that where the defendant has appeared without any protest or condition reserving his right to object to the regularity to the writ or service or the jurisdiction of the Court, he is debarred from raising such objection afterwards. His unconditional appearance is a waiver of irregularity, if any, as well as a submission to the jurisdiction.

Mr. Burnham however contends that, however correct that statement might be with regard to the law for England, it is not a correct statement of the law of this Colony, and he relies on Order 10 Rule 20 (1) which states that:—

> "An entry of appearance shall not constitute a submission to the jurisdiction of the Court and it shall not be necessary to enter a conditional appearance or an appearance under protest".

But, of course, the answer to Mr. Burnham's submission is that Order 10 Rule 20 (1) is an Order of the Rules of the Supreme Court, 1955, and here we are dealing with the Admiralty Rules—not the English Admiralty Rules, but the local Admiralty Rules. I think it would be well, perhaps, if I drew attention to the fact that in England the Admiralty Rules are a part of the Supreme Court Rules. In this Colony the Admiralty Rules are separate and apart from the Supreme Court Rules and in the local Admiralty Rules there is no equivalent of the Supreme Court 0.10 r. 20(1).

Perhaps I should explain why the local Supreme Court Rule with regard to entry of appearance differs from the English one. Up to 1955 the local Supreme Court Rules, i.e. the 1900 Rules, with regard to the entry of appearance, if you were questioning the jurisdiction, were the same as in England, that is to say entry of appearance had to be conditional entry, but experience showed that the requirement of entering an appearance under protest was really unnecessary. If the appearance is entered under protest and no action is taken within a certain time to strike out the writ, the conditional appearance becomes an unconditional appearance. So the rule makers, the authorities of this country, brought in a more practical procedure to allow an unconditional appearance in all cases and then leave it to the defendants to move to strike out the proceedings. But that procedure does not as I say have any application to Admiralty jurisdiction. Therefore in the Admiralty jurisdiction, having regard to the nature of the Admiralty Rules and the authorities, it is necessary, where the jurisdiction is going to be questioned, to enter a conditional appearance.

Since Mr. Burnham has conceded that if the defendant has submitted to the jurisdiction the Court has jurisdiction, it follows on that ground alone I ought to entertain the proceedings. But in my view that is not a correct statement of the law, and in order to decide whether I have jurisdiction or not, some other aspect must be considered.

In order to submit to jurisdiction, the Court must have jurisdiction to hear the case. In a matrimonial case, for example, the unconditional entry of appearance of a respondent does not give the Court jurisdiction to hear the case if the parties are not domiciled in the country. As Lord Justice Asquith put it in *Wilkinson* v. *Barking Corporation* (1948) 1 K.B. 721:—

> "The Supreme Court may by statute lack jurisdiction to deal with a particular matter.....It has, however, jurisdiction to decide whether or not it has jurisdiction to deal with such matters, and by entering an unconditional appearance a litigant submits to the former jurisdiction (which exists) but not to the latter (which does not)."

So that if the Court has no jurisdiction to hear an action of this nature, an unconditional entry of appearance cannot give jurisdiction except in certain circumstances which I shall dead with later on. If the Court has jurisdiction and the writ is irregularly or improperly intituled or some

such thing, then an unconditional appearance gives the Court jurisdiction. 1 will show later how the defendant's unconditional appearance gives this Court jurisdiction, although in my opinion the Court has no jurisdiction in respect of a mortgage debt unless the ship has been arrested.

This brings me to Mr. Elliot's third submission. Mr. Elliot has submitted that section 22 of the Supreme Court of Judicature (Consolidation) Act, 1925, concludes this matter. He argued that section 3 of Chapter 3 of the Law of Merchant Shipping Ordinance makes the Judicature Act 1925 applicable to this Colony. In that I think he is in error. Section 3 states:—

> "From and after the commencement of this Ordinance, all questions arising within the Colony relating to the following matters, namely, ships, and the property therein and owners thereof; the behaviour of the master and mariners and their respective rights, duties, and liabilities as regards the carriage of passengers and goods by ships; stoppage *in transitu;* freight, demurrage, insurance; salvage; average; collision between ships; bills of lading; and all rights, liabilities, claims, contracts, and matters arising in respect of a ship, or any such question as aforesaid, shall be adjudged, determined, construed and enforced according to the law of England applicable to that or the like case."

Let us see how this Colony got its Admiralty jurisdiction. By section 10 of the Vice Admiralty Courts Act 1863, the matters in respect of which Vice Admiralty Courts were given jurisdiction were stated. The Colonial Courts were given jurisdiction over the same matters as English Courts had, and then in 1890 by the Colonial Courts of Admiralty Acts, the Act of 1863 was repealed and section 2(1) of that Act made provision for the existing Courts in British possessions to be Courts of Admiralty. Section 2 (2) made provision for the jurisdiction of the Courts in the following words:

> "The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and the Colonial Court of Admiralty may exercise such jurisdiction in like manner and to as full an extent as the High Court in England, and shall have the same regard as that Court to international law and the comity of nations."

Section 16 states that this Act was, save as otherwise in the Act provided, to come into force in every British possession on the 1st July, 1891; and that the only possessions exempted were New South Wales, Victoria, Saint Helena and British Honduras. So that it was this Colonial Courts of Admiralty Act 1890 that this Court has its Admiralty jurisdiction.

In the case of the *Yuri Maru* reported at (1927) Appeal Cases 906, the Privy Council held that the effect of section 2 of sub-section 2 of the Colonial Courts of Admiralty Act 1890 is to limit the jurisdiction of Colonial Courts established under the Act to the Admiralty juris-

diction of the High Court of England, as it existed at the passing of the Act, and consequently the Exchequer Court of Canada which was established by the Admiralty Act as a Colonial Court of Admiralty had not, under section 22 of the Judicature (Consolidation) Act, 1925, jurisdiction to try an action for damages for breach of a charter-party. The reason for that is not difficult to discover. English Courts did not have jurisdiction in respect of charter-parties until the passing of the Administration of Justice Act 1920. The Judicature Act of 1925 being a consolidating Act naturally included all the matters over which the Court hitherto had jurisdiction. It therefore provided in section 22 for jurisdiction in respect of charter-parties which came into force in 1920 and did not exist at the time of the passing of the 1890 Act. In Canada the trial judge in the Yuri Maru case took the view that since the Canadian Court was a Court of Admiralty it had the same jurisdiction as the United Kingdom Court of Admiralty, and therefore had the power to determine a case involving the issue of damages for breach of charter-party. The Privy Council held that it did not unless there was a specific statute extending jurisdiction as the Act of 1890 did not give the Canadian Court such jurisdiction.

That of course does not answer Mr. Elliot's submission, because Mr. Elliot's submission is that section 3 of Chapter 3 does of course give this Court the same jurisdiction as in England as the proper interpretation to be placed on section 3 is that whatever jurisdiction the U.K. Admiralty Courts have then this Court has a similar jurisdiction, but it would seem to me strange that an Act passed in 1865 which had for the purpose of making the jurisdiction of this Court the same as in England, would not have been sufficient to give this Court jurisdiction without the 1890 Act. In other words, the 1890 Act was passed 35 years after section 3 of Chapter 3; and if in 1865 this Court already had jurisdiction, there would have been no necessity in 1890 to pass an Act giving the Colonial Courts jurisdiction. In my view, all that Chapter 3 did was to make the law then applicable in England applicable in this Colony, and the reason I think why this point has never been raised before here is because the Judicature Act of 1925, as we all know, is only a Consolidating Act and did not greatly extend the jurisdiction from what it was in 1890.

Another point to which consideration must be given in dealing with the submission that section 3 of Chapter 3 has the effect of making statute law in England relating to Admiralty matters passed subsequent to 1865 the law of this Colony without a specific enactment is the meaning and effect of section 5 of the same Ordinance. Section 5 enacts that:

> "Nothing in this Ordinance shall in any way affect the jurisdiction or practice of the Supreme Court as a Colonial Court of Admiralty".

The jurisdiction of the Vice Admiralty Court of a British Colony was clearly defined by section 10 of the Act of 1863. Now when it is borne in mind that the law of this Colony was Roman Dutch in 1863 it may well be that what section 3 of Chapter 3 was intended to do was to enact that with reference to Admiralty law the law of the Colony was to be the law applicable in England. It did not enlarge the jurisdiction of the Admiralty Court but provided that in interpreting the

law within the limits of the jurisdiction prescribed it was to be determined according to English law and not Roman Dutch.

Had it been intended to legislate for future English statutes to be applicable to British Guiana words similar to those which appear in Order 1 Rule 3 of the Rules of the Supreme Court would have been used. Order 1 Rule 3 states:

> "Wherever touching any matter of practice or procedure these Rules are silent, the Rules of the Supreme Court for the time being in force, made in England under and by virtue of the Supreme Court of Judicature (Consolidation) Act, 1925, or any statute amending the same shall apply *mutatis mutandis".*

The effect of the words "for the time being in force" is to introduce into the local rules any rule in England not provided for in the Colony even though the English rule was not in existence at the time when the British Guiana Supreme Court rules came into force.

This means then that I must now consider what was the jurisdiction in England in 1890 in respect of Admiralty matters. In Dicey's "Conflict of Laws", 4th Ed. p. 279 it is said that the Court has jurisdiction to entertain an action against any ship or **res** connected with a ship if— (1) the action is an admiralty action; and (2) the ship is in any port: or river of England or within three miles of the Court of England.

That this ship was in the Colony there can be no doubt, and this brings us back to the point —Is a mortgage an admiralty action? Dicey says at p. 281 that:

> "An admiralty action may be described in general terms as an action which, immediately before the coming into force of the Judicature Act, 1873, could be brought in the Court of Admiralty, or, in other words, was based on a cause of action or claim which was within the jurisdiction of the Court of admiralty…….To give a definition covering all, and no more than all, the claims in respect of which the Court of Admiralty had jurisdiction is hardly possible……..that an admiralty action is an action in respect of a claim or matter over which the Court of Admiralty had jurisdiction until that jurisdiction was transferred by the Judicature Act, 1873, to the High Court, that such a claim was always of a more or less maritime character."

Now, it can hardly be said that a mortgage on a ship is something of a maritime character, and in my view, apart from statute, a mortgage on a ship is not an admiralty matter.

In the case of the *Annette* (1919) P. 105, Hill J. said at p. 115:

> "This Court (of Admiralty) itself is frequently bound to consider questions of foreign law, in wages, bottomry, or mortgage actions."

But the kind of mortgage action to which Hill J. was referring was a mortgage action provided for by statute. In Roscoe's Admiralty Practice 5th Ed. at p. 51 the following passage appears:

> "The Admiralty Court, which possessed no original jurisdiction over mortgages of ships, has now by statute jurisdiction

> in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1894, whether or not the ship or proceeds are under the arrest of the Court, and such jurisdiction may be exercised by an action *in rem* or *in personam."*

A similar statement will be found in Dicey's at p. 866:—

> "The Court of Admiralty had no original jurisdiction *in rem* over mortgages. It acquired, however, by statute, jurisdiction (which has passed to the High Court) in two cases: (a) where the mortgage is unregistered, but the ship mortgaged is under the arrest of the Court, or the proceeds thereof have been brought into the registry; (b) in respect of mortgages duly registered under the Merchant Shipping Acts, 1894 to 1923.
>
> The arrest, it should be noted, must be not only an actual arrest, but a rightful arrest, that is, it must be an arrest in a suit which the Court has jurisdiction to entertain."

The passage in Roscoe's continues:

> "But if any ship, such as a foreign one the mortgage of which is unregistered, is under the arrest of the Court, or the proceeds have been brought into the registry, then a jurisdiction is founded, irrespective of the Merchant Shipping Act, for this statute affects the priority but not the validity of a mortgage."

This passage does not mean that Admiralty Courts always had jurisdiction in respect of mortgages. The jurisdiction was first given by section 3 of the Admiralty Court Act, 1840, which provides:

> "Whenever any ship or vessel shall be under arrest by process issuing from the said High Court of Admiralty, or the proceeds of any ship or vessel having been so arrested shall have been brought into and be in the registry of the said court, in either such case the said court shall have full jurisdiction to take cognisance of all claims and causes of action of any person in respect of any mortgage of such ship or vessel and to decide any suit instituted by any such person in respect of any such claims or causes of action respectively."

This was followed by section 11 of the Admiralty Court Act, 1861, which is:

> "The High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act 1854 whether the ship or the proceeds thereof be under arrest of the said court or not."

This means that in 1861 the law was that the Admiralty Courts had jurisdiction over mortgages if the ship was under arrest when proceedings were taken or, if not under arrest, if the mortgage was registered.

In the *Byzantion* 1922 L.T. 756 Hill J. had to decide whether the Court had jurisdiction in respect of a mortgage of a foreign ship by a foreign mortgagee and in deciding that the Court had jurisdiction he

relied on section 3 of the Admiralty Court Act 1840 and section 11 of the Admiralty Court Act 1861. Hill J. pointed out, however, that he had jurisdiction because the ship was arrested in connection with another matter. The ship had gone to England; certain persons had made a claim against the ship and caused it to be arrested and after the ship had been arrested in that other matter the mortgagees sought to enforce their claim. That confirms the view of Dicey that when section 3 of the Act of 1840 refers to the Court having jurisdiction if the ship is arrested it means a rightful arrest not a wrongful arrest. In other words, if the Court has no jurisdiction over a mortgage jurisdiction is not given by arresting the ship. If someone else rightfully arrests the ship then that gives the mortgagee a right to claim.

From what I have said it follows that this court has no jurisdiction in a mortgage action other than the jurisdiction given in England by the Acts of 1840 and 1861 and applied to this Colony by the Act of 1890—In the present case the ship was arrested by the mortgagees and as far as I know the mortgage is not registered, so, but for the reasons hereunder, I would have had to hold that I have no jurisdiction.

The reason why in this case I am prepared to hold I have jurisdiction is that when the ship was arrested the owner entered an unconditional appearance. He did not enter a conditional appearance and move to strike out the writ. Now, the object of section 3 of the Act of 1840 is to give the court jurisdiction if the ship is under arrest. This ship is under arrest; here the arrest was wrongful but that wrongful arrest has never been challenged. The defendant not having protested but submitted it seems to me that because of his submission I can entertain the action as the ship is in the territorial waters of the Colony.

I have not yet referred to Mr. Elliot's second submission that the Court can exercise jurisdiction over foreign parties and over a foreign ship irrespective of whether the parties or their consular representative agree or not.

Mr. Burnham's submission based on the case of the *Evangelistria* (*supra*) and a passage in Dicey's at p. 866 is that the Court will not adjudicate in a suit where foreigners alone are concerned unless the parties agree or the consular representative consents.

Mr. Elliot submits that the statement in Dicey's is out of date and he has referred me to the *Annette* (*supra*).

In the *Annette* (*supra*) when the question of jurisdiction was raised Hill J. said:

> "I cannot help thinking that the cases to which I have referred are somewhat out of date. They proceed upon the principle that this Court cannot properly consider questions of the principal law of foreign countries, and that the possession and ownership of a vessel must depend upon the municipal law of the flag. In more modern times it is quite a common thing for other Courts to have to determine questions involving a consideration of the municipal law of foreign countries, which are tried on evidence as to what that law is…….The matter seems to me to be one of discretion, and the reasons for exercising the discretion by refusing to entertain a suit seem to me much less strong in modern days than they were in the days of

> Lord Stowell and less strong than they were even in the days of Sir Robert Phillimore."

In the **Jupiter (No. 2)** 1925 P. 67 where an Italian company moved to set aside the writ on the ground that the action was between foreigners and had been instituted without the consent of the parties or any request from representatives of the foreign state of which either of the parties were nationals, the Court of Appeal (Burke, Atkin and Lawrence L.J.J.) held that there is no established rule that the Admiralty Court will not entertain possession suits in respect of foreign vessels and that the matter is always one for the discretion of the Court.

I indicated at the hearing that if I came to the conclusion that I had jurisdiction I proposed to exercise my discretion in favour of the plaintiffs. It was agreed that if I came to the conclusion that this Court had jurisdiction, that the Order for taking the evidence of the two plaintiffs in America would be made, and under these circumstances, subject to the details to be worked out in a moment, in view of the fact that the ship has been in the Colony for several months and has been more or less immobilized I am also prepared to consider an application for bail providing the master or owner of the ship can find reasonable bail.

My ruling therefore is that the Court has jurisdiction to entertain this matter.

Solicitors: *H. C. B. Humphrys* for the plaintiff;

L. L. Perry for the respondent.

BETTENCOURT v. D'ANJOU.

(In the Full Court of the Supreme Court, on appeal from a magistrate's court of the Georgetown Judicial District (Stoby, C. J. (ag), and Date, J.) July 9, 11, 26, 1957).

Evidence—Police trap—Agent provocateur—Corroboration not required in law or by any rule of practice.

Evidence given by an *agent provocateur* on a criminal charge following upon a police trap is not either in law or by any rule of practice required to be corroborated.

Appeal dismissed.

B.O. Adams for the appellant.

G.L.B. Persaud, Senior Crown Counsel, for the respondent.

Cur. adv. vult.

Judgment of the Court: This is an appeal against the decision of a Magistrate of the Georgetown Judicial District convicting the appellant, a school girl, of selling rum contrary to section 44 (1) of the Intoxicating Liquor Licensing Ordinance, Chapter 316, and ordering her to pay a fine of $75 or to suffer imprisonment for two months.

The charge was the result of a police trap in which one Joseph Stuart, an electrician, was employed as *agent provocateur*. The case for the prosecution was that some time after 4.30 p.m. on 10th July, 1956, the appellant sold a bottle of Russian Bear Black Label rum at her home at the corner of Albert and First Streets where she lives with her parents, Mr. and Mrs. Caesar Bettencourt. The building in question is a two-storey building; the Bettencourts live in the upper storey and a liquor store, licensed in the name of Mrs. Bettencourt, is carried on downstairs. There is no internal means of communication between the one storey and the other.

The only witness for the prosecution as to the actual sale was Stuart, but evidence was given by Corporal Coppin and P.C. Thomas to the effect that they searched Stuart at the Alberttown Police Station, gave him a $2 note, the serial number of which was taken, and followed a little distance behind him as he walked from the Police Station to the Bettencourt premises. Thomas further stated that Stuart was never out of his view.

The policemen met Stuart at the gate of the premises when he was leaving with the bottle of rum and took him back upstairs. There they saw Mr. and Mrs. Bettencourt, the appellant, the appellant's elder sister, and one Mr. Annamanthadoo. Mr. Bettencourt, Mr. Annamanthadoo and the premises were searched; later, at the Police Station, the appellant also was searched; but the $2 note alleged to have been paid the appellant by Stuart was not found, nor was any other rum found upstairs. The appellant's mother and sister and Stuart were not searched.

The defence was a complete denial of any conversation or dealing with Stuart prior to his arrival upstairs with the Police.

In his reasons for decision the learned trial Magistrate stated that despite the slight discrepancies in the evidence of the witnesses for the prosecution he was satisfied beyond any doubt on the whole of the evidence and from the demeanour of the prosecution witnesses, who answered readily without hesitancy, that those witnesses were telling the truth but he did not say that he regarded the evidence of the *agent provocateur,* Stuart, with caution.

The main point raised on this appeal is whether, at the present time, *agents provocateurs* should be treated as accomplices and subjected to the rule of practice regarding the corroboration of accomplices. The older authorities, English as well as local, show plainly that that was not the case up to a few years ago; see for example *R. v. Mullings* (1848) 3 Cox 526; *R. v. Bickley,* (1909) 73 J.P. 239, C.C.A.; *Ferroze* v. *James,* (1942) B.G.L.R. 72; and *Tiam Fook v. Slater,* (1942) B.G.L.R. 415. But counsel for the appellant argued that a different view should now be taken, and in order to support his contention cited first of all *Brannan v. Peek,* (1947) 2 A.E.R. 572, in which Lord Goddard, C.J., is recorded as having said this:—

> "It cannot be too strongly emphasized that, unless an Act of Parliament provides for such course of conduct—and I do not think any Act of Parliament does so provide—it is wholly wrong for a Police officer or any other person to be sent to commit an offence in order that an offence by another person

> may be brought to light. . . If Police officers do commit such offences they ought to be convicted and punished and the orders of their superior officers would afford no defence."

The next case on which Counsel relies is *Sayce v. Coupe,* (1952) 2 T.L.R. 664, in which it was held that where a statute forbids the sale of an article without making it an offence to buy, a person who buys the article aids and abets the sale and is guilty as a principal in the second degree.

Finally, Counsel referred to the case of *Davies* v. *D P.P.* (1954) 1 A.E.R. 507, where the House of Lords in defining "accomplices" included persons who are *participes criminis* in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring, aiding or abetting (in the case of misdemeanours).

It is to be observed, however, that Lord Goddard's remarks in *Brannan* v. *Peek* were *obiter* and that none of the three cases cited by Counsel, deals with the specific question with which we are here concerned.

From a careful perusal of the authorities and of the general principles underlying the rules requiring corroboration we are satisfied that the application of the rule rested and still rests not so much upon whether a witness falls within the strict technical definition of "accomplice" but rather upon the true nature of the part played by him in connection with the offence committed. In the case of an *agent provocateur* there is not in the eyes of the law that "wicked complicity in the breaking of the law so as to make the party thereto guilty of such moral turpitude that it is unsafe to accept his sworn testimony without corroboration" (*Tiam Fook v. Slater, supra,* at p. 418); nor is there the motive or purchasing immunity from punishment by giving information *R. v. Mullins, supra.* Phipson on Evidence (Ninth Edition) p. 501, it is interesting to note, refers to *agents provocateur* as accomplices but adds that the rule requiring corroboration does not apply to that class of accomplices.

We do not think that counsel for the appellant's submission on this aspect of the case can be upheld, nor do we find substance in his next ground of appeal that the decision of the learned Magistrate was unreasonable and could not be supported having regard to the evidence; it is true that there was a conflict of testimony and that there were certain factors in the case that could be regarded as favourable to the appellant, but the decision was essentially one depending on the Magistrate's assessment of the credibility of the witnesses; in such circumstances an appellate tribunal ought not, save in the clearest cases, to set aside the decision of the trial Magistrate. *Flower v. Ebbw Vale Steel, Iron and Coal Co., Ltd., (*1936) A.C 206.

The last ground of appeal urged was that the sentence passed was based on a wrong principle because the appellant who was a young person within the definition of the Juvenile Offenders Ordinance, Chapter 41, should not have been ordered to pay the fine personally. Clearly there is no merit in this ground of appeal. Section 11(1) of the Ordinance reads as follows:

> "11. (1) Where a child or young person is charged before any court with any offence for the commission of which a fine, damages or costs may be imposed, and the court is of the opinion that the case would be best met by the imposition of a fine, damages, or costs, whether with or without any other punishment, the court may in any case, and shall if the offender is a child, order that the fine, damages, or costs awarded be paid by the parent or guardian of the child or young person, unless the court is satisfied that the parent or guardian cannot be found or that he has not conduced to the commission of the offence by neglecting to exercise due care of the child or young person".

Section 2 of the Ordinance defines "child" as a person under the age of fourteen years and "young person" as a person who is fourteen years of age or upwards and under the age of sixteen years. It is obvious, therefore, that the Magistrate had a discretion in the matter, and he must have taken into account the fact that the appellant attained her sixteenth year the day after the commission of the offence.

The appeal is dismissed and the conviction and sentence affirmed.

In the matter of an application for leave to apply for an order of mandamus.

RAI v. BROWNE and SYDNEY KING.

(In the Full Court of the Supreme Court (Stoby, C.J. (ag.), Phillips and Date, JJ.) August 7, 8, 1957).

Legislative Council Elections—Statutory declaration of candidate sworn on day before nomination day—Whether null and void—Representation of the People Ordinance, 1957 (*No. 3*) *s. 18* (*1*).

Practice—Application for mandamus in vacation—Discretion exercised by judge in directing hearing before Full Court.

Section 18 of the Representation of the People Ordinance, 1957 (No. 3 of 1957) requires every candidate nominated for a seat as a member of the Legislative Council of British Guiana to deliver or cause to be delivered before the hour of 11 a.m. of the day on which nominations are received to the returning officer either personally or to his clerk at his office a statutory declaration made and subscribed by such candidate, or in his absence from the Colony on nomination day by his duly authorised agent, of his qualification made before a Commissioner of Oaths, a Justice of the Peace or the returning officer in the prescribed form set out in the first schedule to the Ordinance. By subsection (3) of that section if such statutory declaration is not delivered as aforesaid, the nomination of such candidate shall be null and void.

A writ of election issued under the Ordinance appointed the 18th July, 1957, as the day when the returning officer would attend for the purpose of receiving nominations for the seat as a member of the Legislative Council for Electoral District No. 6. On that day the applicant R. was properly nominated and so was one McK. between the hours of 9 and 11 a.m. The respondent King was duly proposed and seconded and delivered to the returning officer his statutory declaration sworn to on the 17th July, 1957. The applicant R. applied ex parte for leave to apply for an order of mandamus compelling the returning officer B. to prepare a proper list of the names of the several candidates who had been

duly nominated for election as members of the Legislative Council to Electoral District No. 6. Leave was granted by a judge in Chambers who ordered that a motion should be filed returnable before the Full Court. At the hearing of the motion before the Full Court it was contended on behalf of the applicant that the statutory declaration filed by King was null and void in that section 18 (1) of the Ordinance required it to be sworn to on nomination day the 18th July, 1957, between the hours of 9 and 11 a.m. and at no other time.

Held: The statutory declaration sworn by King on the day prior to nomination day was valid as it was made in time reasonably contemporaneous with the nomination day.

Application dismissed.

The judge in Chambers before whom the *ex parte* application for leave to apply for an order of mandamus was heard directed that the motion should be filed returnable before the Full Court because although it is permissible for a judge in Chambers to grant an order of mandamus in vacation, an appeal from his decision would lie to the Full Court and the election would have taken place before the appeal could be heard.

Judgment of the Court: This is an application for an order of Mandamus compelling Cyril Rutherford Browne, Returning Officer for Electoral District No. 6 Central Demerara, for the General Election, 1957, to be held on the 12th August, 1957, to prepare a proper list of the names of the several candidates who have been duly nominated for election as members of the Legislative Council of British Guiana to the said Electoral District.

The application is brought by Mr. Balram Singh Rai who was nominated as a candidate for the said Electoral District. On the 31st of July, 1957, the applicant *ex parte* in Chambers for leave to apply for an order of Mandamus. The hearing came on before the Acting Chief Justice on the 1st of August, 1957, who granted leave but ordered that a Motion should be filed returnable before the Full Court. As it is permissible for a Judge in Chambers to grant an order of Mandamus in vacation we think it right to state the reasons which caused the direction to be given that the subsequent proceedings should continue before the Full Court.

By section 89 of the Supreme Court Ordinance, Chapter 7, an appeal would lie from the decision of a Judge in Chambers to the Full Court. In the event of the applicant or respondent being dissatisfied with the Judge's decision and desiring to appeal the election would have taken place before the appeal could be heard. In view of that fact it was thought desirable in the interests of all parties to this application to follow the practice prevailing in the United Kingdom which is that except in vacation an application for a Mandamus is made to the Divisional Court.

The facts of the case are not in dispute. A writ of election issued under the Representation of the People Ordinance, No. 3 of 1957, appointed the 18th day of July, 1957, as the day and the St. James-the-Less schoolroom as the place where the Returning Officer would attend for the purpose of receiving nominations of candidates for the seat as a member of the Legislative Council of British Guiana for Electoral District No. 6.

On the said day the applicant Mr. Balram Singh Rai was so far as we have been informed properly nominated and so was one Charles Alexander McKenzie between the hours of 9 and 11 a.m. The

respondent Sydney Evanson King was duly proposed and seconded and, purporting to act in accordance with section 18 (1) of the said Ordinance, he delivered to the Returning Officer his statutory declaration. The said declaration was made on 17th July, 1957, and it is the submission of Counsel for the applicant that it is null and void in that section 18 (1) requires it to be sworn to on the 18th between the hours of 9 and 11 and at no other time.

Subsections (1), (2) and (3) of section 18 of the Ordinance read as follows:—

"18 (1) Every candidate nominated at an election shall, before hour of eleven in the forenoon of the day on which the nominations are received, deliver or cause to be delivered to the returning officer either personally or to his clerk at his office a statutory declaration made and subscribed by such candidate of his qualification made before a Commissioner of Oaths, a Justice of the Peace or the returning officer in the form set out as Form No. 10 in the first schedule.

(2) If any candidate is absent from the Colony on the day on which nominations are received, a statutory declaration of the qualifications of such candidate made and subscribed by his duly authorised agent in the form set out as Form No. 10A shall be delivered to the Returning Officer or his clerk by the agent in the manner prescribed in subsection (1) of this section.

(3) If such statutory declaration is not delivered as aforesaid, the nomination of the candidate shall be null and void."

Counsel submitted that it is clear that a nomination in this case could not be received before the hour of 9 and after the hour of 11, and that as the statutory declaration is required by section 18 (1) to be made and subscribed by "such candidate" it follows that "such" relates back to a nominated candidate and consequently the candidate must have been nominated before making and subscribing to his statutory declaration. That is the narrow but important point of construction which we are called upon to decide. Most of the arguments and nearly all the authorities cited by Counsel on all sides related to whether we could properly order a Mandamus in any event. No authority was cited nor have we been able to find any which would indicate how this or a similar section has been construed in this or in any other Country. The reason, we think, is not hard to find. Although the Representation of the People Ordinance, 1957, No. 3 of 1957 is modelled on the British Honduras Representation of the People Ordinance, 1953, the Jamaica Representation of the People Law (Cap. 342,) the Trinidad Legislative Council (Elections) Ordinance, (Cap. 2 No. 2), the U.K. Act — the Representation of the People Act, 1949, and the U.K. Rules — the Parliamentary Rules (Second Schedule to U.K. Act), section 18 is a modification of the Representation of the People Ordinance Cap. 66, which in turn has as its source the Legislative Council (Elections) Ordinance, 1945. It must be conceded, however, that if counsel's interpretation is correct the respondent King's nomination is null and void.

Before we proceed to construe the section of the Ordinance under discussion it will be convenient to state certain principles which from early times have guided Courts in the construction of statutes.

> "The office of a good expositor of an Act of Parliament is to make construction on all parts together, and not of one part only by itself..... It is the most natural and genuine exposition of a statute to construe one part of a statute by another part of the same statute, for that best expresseth the meaning of the makers."……(*Coke in the Lincoln College Case*) (*1595*) *3 Co. Rep. 59 b.*).

But this rule of construction is never allowed to alter the meaning of what is of itself clear and explicit.

> "No rule of construction can require that when the words of one part of a statute convey a clear meaning it shall be necessary to introduce another part of a statute for the purpose of controlling or diminishing the efficacy of the first part." (*Warburton* v. *Loveland* (*1831*) *2D. & C1. 489*).
>
> "The key to the opening of every law is the reason and spirit of the law." (*Brett v. Brett* (*1826*) *2 Addams 210*). In *A.G. v. H.R.H. Prince Augustus* (*1957*), 1 All E.R. 49.

Lord Somervell of Harrow said in his speech at page 61 —

> "It seems now clear that the "intent of the Parliament which passed the Act" is not to be gathered from the Parliamentary history of the statute. The mischief against which the Act is directed and, perhaps, though to an undefined extent, the surrounding circumstances can be considered. Other statutes in *pari materia* and the state of the law at the time are admissible.
>
> > '". . . . subsequent legislation, if it proceed upon an erroneous construction of previous legislation, cannot alter that previous legislation; but if there be any ambiguity in the earlier legislation then the subsequent legislation may fix the proper interpretation which is to be put upon the earlier.'
>
> "These are properly called rules. They apply in all cases to determine what can, and cannot, be referred to and relied on. The above list is not intended to be either exhaustive or precise, but to mark the distinction between rules as to admissibility and the solution of the problems which arise when one turns to the actual words of the Act.
>
> "A question of construction arises when one side submits that a particular provision of an Act covers the facts of the case and the other side submits that it does not. Or it may be agreed it applies, but the difference arises as to its application. It is unreal to proceed as if the court looked first at the provision in dispute without knowing whether it was contained in a Finance Act or a Public Health Act. The title and the general scope of the Act constitute the background of the contest. When a court comes to the Act itself, bearing

> in mind any relevant extraneous matters, there is, in my opinion, one compelling rule. The whole, or any part, "of the Act may be referred to and relied on....."

With these principles in mind we now turn to the Ordinance we have to consider.

What was the state of the law in this Colony and in the United Kingdom when the Ordinance was enacted? Section 18 of Chapter 66 stated that —

> "18. (1) Every candidate nominated at any election of a Member of the House of Assembly shall, at the time of nomination, or within forty-eight hours after the hour of eleven in the forenoon of the day on which the nominations were received, deliver or cause to be delivered, to the returning officer either personally or to his clerk at his office, a statutory declaration made and subscribed by such candidate of his qualification made before a Commissioner of Oaths or a justice of the peace in the form set out as Form 6 m the first schedule to this Ordinance.
>
> (2) If such statutory declaration is not delivered as aforesaid, the nomination of the candidate shall be null and void."

The marginal note reads as follows:—

> "Delivery by candidate of declaration of his qualification."

There is, as we have said, no equivalent of this section in the United Kingdom, but Rule 9 of the Second Schedule to the Representation of the People Act, 1949, reads as follows:—

> " 9. A person shall not be validly nominated unless his consent to nomination, given in writing on or within one month before the day fixed as the last day for the delivery of nomination papers and attested by one witness, is delivered at the place and within the time for the delivery of nomination papers:....."

By Rule 7 of the United Kingdom Local Election Rules,

> " 7. (1) A person shall not be validly nominated unless his consent to nomination, given in writing on or within one month before the last day for the delivery of nomination papers and attested by one witness, is delivered at the place and within the time appointed for the delivery of nomination papers;
>
> " (2) A candidate's consent given under this rule shall contain a statement that he is qualified as required by law to be elected to and hold the office in question, and the statement shall give particulars of his qualification."

The particulars of qualification under the Local Government Act, 1933, section 57, are —

> "A person shall, unless disqualified by virtue of this Act or any other enactment, be qualified to be elected and to be a

member of a local authority if he is of full age and a British subject, and —

(c) he has during the whole of the twelve months preceding the day of election resided in the area of the local authority; or

(d) in the case of a member of a parish council, he has either during the whole of the twelve months preceding the day of election or since the twenty-fifth day of March in the year preceding the year of election resided either in the parish or within three miles thereof."

From these provisions it will be seen that there is nothing unusual as counsel for the second respondent said in a candidate performing certain acts before nomination. In this Colony it was quite regular until 1957 for the candidate to deliver his statutory declaration up to 48 hours after nomination.

What is the object of the statutory, declaration? It is to ensure that the candidate warrants he possesses the necessary qualifications. Paragraph 32 of The British Guiana (Constitution) (Temporary Provisions) Order-in-Council, 1953, provides that —

"Subject to the provisions of section 33B of this Order, any person who is a British subject of the age of twenty-one years or upwards shall be qualified to be appointed a Nominated Member of the Legislative Council, and no other person shall be qualified to be so appointed or, having been so appointed shall sit or vote in the Council."

Paragraph 33A as inserted by paragraph 14 of the British Guiana (Constitution) (Temporary Provisions) (Amendment) Order-in-Council, 1956, provides that —

"Subject to the provisions of section 338 of this Order, any person who —

(a) is a British subject of the age of 21 years or upwards; and

(b) has resided in the Colony for a period of at least two years immediately before the date of his nomination for election or is domiciled in the Colony and is resident therein at the date aforesaid;

shall be qualified to be elected as an Elected Member of the Legislative Council, and no other person shall be qualified to be so elected."

When Section 18(1) enacts that the declaration must be in the form in the schedule it is dependent on the schedule complying with paragraph 33A of The British Guiana (Constitution) (Temporary Provisions) (Amendment) Order-in-Council, 1956. The form in the schedule has to be considered but it is not conclusive. The Court has to construe the language of the section to which the schedule is appended. Whereas that section expressly provides that the delivery of the statutory declaration should be made before the hour of eleven on the day on which nominations are received it does not specifically state that the statutory

declaration should be sworn to or executed on that day; and such an intention on a matter of vital importance cannot be eked out by reference to a paragraph in a form contained in a schedule. The argument that the schedule states that the declarant must say that he was resident overlooks the fact that the Order-in-Council requires him to swear to the present and not to the past, i.e., that he is qualified to be elected since he is domiciled and is resident in the Colony. The true meaning of "residence" must be borne in mind. A person's place of residence is the place where he lives with is family and sleeps at night, and not his place of business, or one of his several places of business (*R. v. Hammond, 17 Q.B. 772*).

Paragraph 2 in the schedule which states that a candidate must have resided in the Colony for a period of at least two years immediately before the date of his nomination covers the case of a non-Guianese not domiciled in the Colony. An Englishman or a West Indian who wishes to contest a seat must have resided for two years, but the Guianese who is domiciled here but lives abroad, or the non-Guianese who has acquired a domicile of choice but lives abroad may contest a seat if he is resident in the Colony, and as we have shown "resident" in this sense does not mean living in the Colony on the day of nomination but that he has acquired a legal residence before nomination.

We have come to the conclusion that the schedule cannot be interpreted as controlling or diminishing the efficacy of the statutory enactment. The statutory declaration was delivered within the time at the place specified in the Ordinance. The candidate was in fact duly nominated and the statutory declaration delivered to the Returning Officer personally by the candidate after his nomination. We can see no merit in the contention that the statutory declaration was made the day before the Nominations Day when it is apparent and self-evident that the candidate was resident in the Colony at the date of his nomination for election. , Not having suffered a demise the fact that he was resident in the Colony on the 17th he must have been also resident in the Colony on the 18th when he delivered his nomination papers. The words "at the date of my nomination for election" on the Form, paragraph (3), are not to be construed as being of any greater significance than the words in the preceding paragraph (2) "immediately prior to the date of my nomination for election", and at least not of such significance as to control the meaning of the Ordinance itself. We conclude that this section is satisfied if the statutory declaration is made in time reasonably contemporaneous with the Nominations Day.

In view of the conclusions we have arrived at in respect to this aspect of the matter it is unnecessary to give any decision as to whether or not and order of Mandamus would be issuable in these proceedings. The application is accordingly refused, the applicant to pay the costs of the second respondent certified fit for Counsel.

Solicitors:

N. C. Janki, for the applicant, Balram Singh Rai.

P. M. Burch-Smith, Crown Solicitor, (Acting), for the first respondent, Cyril Rutherford Browne.

L. M. B. Martin, for the second respondent, Sydney Evanson King.

THE ENMORE ESTATES LTD. v THE VILLAGE COUNCIL OF THE BUXTON AND FRIENDSHIP VILLAGE DISTRICT.

(In the Supreme Court, Civil Jurisdiction (Phillips, J.) August 22, 26, 27, 28, 29, September 2, 3, October 3, 1957).

Irrevocable licence—Contract to grant—Whether ultra vires local authority—Specific performance—Injunction—No necessity for service of notice upon local authority under s. 206 of the Local Government Ordinance, 1945 (*now s. 206 of the Local Government Ordinance, Chapter 150*) *prior to institution of proceedings—Power of local authority to charge tolls in addition to the consideration agreed upon for the grant of the licence.*

The plaintiff company alleged that by a parol agreement with the defendant council, a duly constituted local authority, they acquired a right of way along the canal and dams on the Kryenhoff Empolder between Plns. Lusignan and Enmore on the East Coast of Demerara for such time as Pln. Lusignan continued in cultivation. The company alleged that as consideration for the licence they agreed to undertake at their own expense certain repairs to and maintenance of the canal and dams and also to pay to the defendant council the sum of $500 per annum and that in pursuance of this agreement they spent $25,000 on repairs and maintenance and had been paying $500 per annum to the council since 1944. The defendant council denied the making of such agreement and argued that even if made it was *ultra vires* the council since the consideration was not a toll. The council attempted to terminate the company's right of passage with effect from the 17th September 1952, and the company on the 16th September 1952 instituted an action to obtain an order for specific performance of the contract and an injunction restraining the interruption of the right of passage. On that day it obtained an interim injunction which was continued on the 25th September, 1952.

At the hearing Counsel for the defendant council took a preliminary objection that notice of the action had not been served on the council under the provisions of section 206 of the Local Government Ordinance, 1945 (now Chapter 150).

Held: dismissing the preliminary objection, service of notice under section 206 was not necessary. On the evidence the council had from the 1st January, 1944 agreed to grant the plaintiff company an irrevocable licence to pass along the canal and dams of the empolder for such time as Pln. Lusignan continued in cultivation upon payment by the company to the council of $500 per annum. Such a contract was not *ultra vires* and specific performance would be decreed and an injunction granted.

Obiter: the evidence of the agreement between the company and the council did not preclude the council from charging tolls against the company under section 90 (now section 94 of Chapter 150) since the council did not by the agreement deprive itself of that power.

Stafford, Q.C. (*Elliott with him*), for the plaintiffs.

Burnham, (*Chase with him*), for the defendants.

Cur. adv. vult.

Phillips, J.: The Plaintiffs are a Company incorporated in this Colony under the Companies (Consolidation) Ordinance, Chapter 178, and are the owners of the sugar estates known as Plantation Enmore and Plantation Lusignan (including Plantation Annandale) on the East Coast of the County of Demerara.

The Defendant Council is a Local Authority constituted under the Local Government Ordinance, 1945, (now Chapter 150).

The Plaintiffs claimed:

1. "A declaration that the parol agreement made on or about the 29th day of December, 1943, between the plaintiffs

and the defendants whereby the defendants in consideration of the plaintiffs undertaking a number of works and paying a yearly rent or sum of $500:— granted to the plaintiffs from the 1st day of January, 1944, a right of way over and along the canal and dams on the tract of land situate lying and being on the East Sea Coast of Demerara known as Kryenhoff Empolder in the rear of the Village of Buxton and Friendship, and performed on their part by the plaintiffs, is a valid grant and binding upon the defendants";

2. "A declaration that the plaintiffs are entitled to a grant of and/or to enjoy the said right of way so long as Plantation Lusignan continues in cultivation; alternatively, for a period of 99 years from the 1st day of January, 1944";

and prayed:

3. "An order for specific performance by the defendants of the said agreement";

4 "A declaration that the defendants are not entitled to determine the said right of way nor to prevent the plaintiffs from using the said Canal and/or dams nor to levy a toll on the plaintiffs' punts passing along the said Canal;"

5. "An injunction to restrain the defendants, their servants and agents from preventing the plaintiffs, their servants and agents from having free access along the said Canal and/or dams and enjoying the said right of way and user and/or from demanding from the plaintiffs tolls on the plaintiffs' punts passing along the said Canal".

The Defendant Council specifically denied that any such contract was entered into as was alleged—that the same cannot be entered into in the manner stated and alternatively that if any such contract was made between the parties, as alleged, it is not binding on the Defendants as it was entered into without their consent or approval and that the contract is *ultra vires.*

The Plaintiffs alleged the Defendant Council, in consideration of the Plaintiff Company undertaking a number of works to the Kryenhoff Empolder and paying a yearly rent of the sum of $500, granted to the Plaintiffs from the 1st January, 1944, a right of way over and along the Canal and dams on the Kryenhoff Empolder *so long as Plantation Lusignan continues in cultivation* —that the contract was contained in a number of letters (which were tendered in evidence) — that the contract was duly approved by the Local Government Board and that the Plaintiff Company has duly performed its part of the said contract and has used without interruption or without threat of interruption the said right of way up to the time of action brought—and consequently are entitled to an injunction restraining the Defendants from interfering with their right of passage on this waterway.

On the 10th September, 1952, the Defendant Council wrote to the Plaintiff Company as follows:—

> "On instructions from the Buxton-Friendship Local Authority, I hereby notify you that as from midnight on Wednesday, 17th September, 1952, you will no longer be allowed to pass the punts of the Enmore Estates Ltd., as was your wont, along the trench known as the Right of Way."

On the 15th September, 1952, the Plaintiff Company replied that the Company will have no other alternative but to take proceedings for the protection of its rights and that that letter would be produced in evidence.

On the 16th September, 1952, this action was issued; on this day an interim injunction was granted at the instance of the Plaintiff Company against the defendants restraining them from preventing the plaintiffs from having free access along the Canal and dams in question. On the 25th September, 1952 a continuation of the interim injunction was granted.

The action came up for hearing before me on the 22nd day of August, 1957, when a preliminary objection was taken by counsel for the defence that:

> The defendants contend that the plaintiffs are not entitled to sue without serving on the defendants a Notice as prescribed by Section 206 of the Local Government Ordinance, 1945 (now Chapter 150).

The Court overruled the preliminary objection and stated that it would put its reasons in writing and which is dealt with later in this judgment.

The trial therefore proceeded.

The Defendant Council is a corporation that can hold land for all the purposes for which it is constituted. (Section 43 of Chapter 84). Section 34 enacts:

> "In every village there shall be established a village council which shall be entrusted with the management of the administrative and financial business of the village and with its government generally."

The Kryenhoff Empolder owned by the Defendant Council by Absolute Grant No. 4592 dated 22/2/09, is situate at the back of the Village of Buxton and Friendship and lies between the two Sugar Estates owned by the Plaintiffs viz: Enmore Estate on the East and Lusignan on the West.

Both Estates were formerly "grinding" Estates but in the year 1943 it was decided for one reason or the other to close down the Lusignan Estate as a "grinding" factory and to transport the Lusignan canes to the Enmore Factory to be ground. It became necessary therefore to apply to the Defendant Council for a right of way through the Kryenhoff Empolder for this purpose.

The Plaintiff Company communicated with the Local Government Department, the governing body, and the Defendant Council, and cer-

tain arrangements were made with the Defendant Council and the Local Government Board, which arrangements terminated, as the plaintiffs allege, in a binding contract with the Defendant Council, (denied of course by the Defendant Council), the existence and validity of which forms the subject matter of this action.

The relevant statutory enactments affecting this issue are: —

> *The Local Government Ordinance*, Chapter 84, (now Chapter 150).
>
> *The District Government Ordinance, Chapter 56.*
>
> *Chapter 56, Section 5(1):*— The Governor may from time to time appoint some fit and proper person to be a District Commissioner in charge of the district, who shall reside at the place in the district from time to time directed by the Governor. (2) Subject to the control and direction of the Governor, the District Commissioner shall be charged with the general administration of the affairs of the district.

The defendants denied that the District Commissioner is an agent of the Defendant Council and contended that he had no authority to act on their behalf.

Mr. Laurence Thompson, the District Commissioner for East Demerara District gave evidence for the plaintiffs and said the District Commissioner supervises the working of the Local Authorities and that in particular all revenues collected by the Local Authority (such as the Defendant Council) are paid to the District Commissioner who banks the amounts to the credit of the Local Authority and issues cheques against the account on vouchers submitted by the Local Authority. The moneys collected by the Local Authority are in the first place paid to an Overseer appointed by the Local Authority with the approval of the Local Government Board.

The District Commissioner is a Civil Servant attached to the Local Government Department of Government. The Commissioner of Local Government is more often than not The Chairman of the Local Government Board, while the Local Government Board acts by its Secretary. The Commissioner of Local Government acts through the District Commissioner, who is also the *via media* between the Department of Government, the Local Government Board and the Local Authorities.

All correspondence as well as all accounts go from the Local Authority to the Local Government Board through the District Commissioner. The District Commissioner is the laison officer or conduit between the Defendant Council and the Local Government Board and without whose intervention the Local Government Board's approval in practice is unobtainable.

The District Commissioner attends the meetings of the Local Authority in an advisory capacity, though he is not entitled to vote thereat

After reading the relevant statutes in my view it is unrealistic in this case to suggest that the District Commissioner does not act as the agent

of the Defendants' Council. He so acted in my opinion, by reason of his statutory and public duties.

It is admitted that a sum totalling $7000 was paid in by the plaintiffs to the District Commissioner through the accounts of the Defendant Council for the relevant period as shown on list Ex. "K" in evidence.

It was also admitted on both sides that there was no formal written contract (other than by the letters in evidence) or Deed of Lease or Grant as to this right of passage over the water course or canal in question.

Attempts were made from time to time to have a Lease executed for a definite term of ninety-nine years or twenty-one years, but this was never done.

On the 20th August, 1943, the Plaintiffs wrote the Commissioner of Local Government as follows: — (Ex. C1)

> "The Directors of the Enmore Estates Ltd., have decided to make preparations for the grinding of all canes from Lusignan at the Enmore Factory as from 1st January, 1944.
>
> My Directors regret having to come to this decision but, owing to *labour difficulties and the consequent curtailment of Crop,* have no other alternative.
>
> I am to ask that permission be obtained from the villages of Buxton and Friendship for a right of way for the passage of cane punts, and to state that the cost of all works necessary to permit of this being done will be borne by the estate."

On the 23rd September, 1943, the District Commissioner wrote the Plaintiffs as follows: —(Ex. C3).

> "Following the inspection of the site of the proposed right-of-way through Buxton and Friendship, by the Village Council, I shall be grateful if you will define, in detail, for the consideration of the Village Council at a duly constituted meeting, the Estate Authorities' proposals regarding construction, maintenance and control of the right-of-way and also what financial consideration is offered to the Village Council in this connection."

On the 7th October, 1943 the plaintiffs wrote to District Commissioner as hereunder: —(Ex. C4).

> "With reference to your letter No. 59/43 dated 23rd September 1943, addressed to the Manager of Pln. Lusignan, in connection with the proposed right-of-way through Buxton and Friendship, I am instructed to forward you for the consideration of the Village Council, the Estate's Authorities' proposals detailed as below:—
>
> Estate to undertake the following works —

1. To erect a check sluice at Annandale for the purpose of controlling water levels.
2. To put down an aqueduct in Friendship East side lines in place of the existing one, which is in very bad order.
3. To widen and deepen Friendship East Cross canal-
4. To repair paal-offs and bridges where necessary and maintain same.
5. To make up dams where necessary.
6. To compensate cane farmers for any canes which may be lost in consequence of the widening of the dam. This compensation not to exceed $50.00 (Fifty dollars).
7. As regards financial consideration, the Estate's Authorities are prepared to offer the sum of $240.00 (Two Hundred and Forty dollars) per annum for the free and unrestricted use of this right-of-way.

With respect to this I am directed to draw your attention to the fact that the works proposed will also be of benefit to the Cane Farmers of these two Villages as their canes will have to be ground at Enmore Factory.

It must be understood that this arrangement will only remain in force as long as Pln. Lusignan continues in cultivation."

The amount of $500 per annum was eventually decided on and paid by the Plaintiffs.

It is not denied that the plaintiffs completed the works that they engaged to do and executed all such works as the Defendant Council from time to time requested.

Pursuant to the said agreement the plaintiffs expended (to the year 1957) in all a sum totalling approximately $25,000 according to the evidence of the Administrative Manager of the Plaintiffs' Company.

The proposals submitted by letter Ex. C4 above were unanimously agreed on by the Defendant Council at a meeting held on the 20th October, 1943, and confirmed at a meeting held on the 7th December, 1943.

It will be necessary to discuss in detail the proceedings of that meeting of the Defendant Council.

The minutes in part read thus:—

"The business of the meeting having thus commenced the Chairman asked the Council of it agrees to grant the "Right of Way" Pass.

In consequence of this a letter from the Enmore Estate Ltd. was read and each paragraph dealt with Councillor I. Harvey, in expressing his views said: Such proposal

should not be against the Council providing that the terms can compensate for what is required: adding that he agrees for the pass.

Councillor J. D. Young rising in support of what Councillor Harvey said, expressed that he was pleased for the pass be granted except for the compensation of $240 offered and that he objected to the term "Right of Way".

The District Commissioner here remarked that it was only a term used for a simple pass.

Councillor J. Fiffee asked if materials used for the proposed work will be sent back to the Local Authority in case of any dismantling. The Council's reply was in the affirmative, and after a deliberation on the matter this Council unanimously agreed to grant the "Right of Way" subject to the approval of the Local Government Board."

Thereafter the matter was submitted to the Local Government Board for its approval which was given on the 6th December, 1943.

The Extract of the Minutes of the Local Government Board, Exhibit "E" in evidence, is as follows:—

"The Chairman reported that the Enmore Estates Limited had asked for a right of way across the district in order to transport canes from Lusignan to Enmore from 1st January, 1944. The Chairman said that the Enmore Estates Limited would do all works necessary to effect the transport and had offered to pay $240 per annum to the Village Council for the facility but that the Village Council had asked that the annual payment should be $500 and this had been recommended to the Estates Authorities. The Board approved of the project and authorised the Chairman to conclude the arrangements."

It is to be noted that no duration of the proposed arrangement was stated. The only stipulation as to time so far made was by the plaintiffs in Exhibit C4 —

"this arrangement will only remain in force as long as Plantation Lusignan continues in cultivation."

On the 1st July, 1944, the plaintiffs wrote the District Commissioner as follows: (Exhibit Cll)

"I have to thank you for your letter of the 29th ultimo and to inform you that I have communicated with the Company's Solicitors requesting them to draw up the agreement to which you refer"

Suffice it to say that no such agreement was ever drawn up.

In the year 1945 the agreement still remained unexecuted in any formal document.

In 1947 in a letter from the Commissioner of Local Government it would appear that the delay was being laid to the Deeds Registry.

On the 28th March, 1947, the Plaintiff Company stated in a letter to the Commissioner of Local Government that Messrs. Cameron and Shepherd, their Solicitors had discussed the registration of the agreement with Mr. Murray of the Deeds Registry.

By letter dated 27th March, 1951, Ex. C17, the Chairman of the Defendant Council writing the plaintiffs in another matter about the transportation of some greenheart materials said:—

> "I shall be grateful if you can give instructions that the punt be sent to the *Right-of-Way Canal at Annandale* where I shall make the necessary arrangements to receive same."

It would seem to me that by this date the Right of Way had become an established fact.

However on the 10th September, 1952, the Chairman of the Defendant Council wrote to the Plaintiffs what has been described as an ultimatum as follows:—

> "On instructions from the Buxton-Friendship Local Authority, I hereby notify you that as from midnight on Wednesday, 17th September, 1952, you will no longer be allowed to pass the punts of the Enmore Estates Ltd., as was your wont, along the trench known as the Right of Way:"

On the 15th the plaintiffs replied that they in those circumstances would have no alternative but to take proceedings and duly filed their writ on the 16th September, 1952.

The Defence called one witness at the trial, Mr. George Arlington Young, the then (1952) Chairman of the Council. He said that he was present at the Meeting of the Council in October, 1943 when the District Commissioner made the proposals on behalf of the plaintiffs to the Defendant Council with respect to the right of way in question, and agreed that each paragraph of that letter was considered by the Council. Mr. Young while admitting that the Council unanimously agreed to the arrangement and admitting that the same was duly approved by the Board nevertheless maintained that this arrangement was a mere concession during the war and was a temporary measure.

It will be observed that Councillor D. J. Younge at the meeting, whilst supporting the plaintiffs' proposals, is reported as saying that,

> "He was pleased for the *pass* to be granted except for the compensation of $240.00, and that he objected to the term 'Right of Way'."

To which observations the District Commissioner remarked that "it was only a term for a '*simple pass*' "

The District Commissioner also expressed the view that years ago the price of sugar was high but today there is a big drop adding that the Estate Authorities would relieve the Village Council of certain works, and that the Local Authority might ask the Estate either to re-consider

the amount offered for compensation or to increase the amount if the price of sugar rises.

It would therefore appear to me that what the Defendant Council was agreeing to was compensation for the privilege to pass (a simple pass) along the water course in the light of the proposed works that the plaintiffs were undertaking to do.

Councillor Harvey, it would appear, introduced at this point the question of farmers' canes. He said that speaking on the point of "toll" in punts with farmers' canes, the Council should ask for more compensation from the plaintiffs considering the number of punts which pass with canes to the Estate every year and the amounts collected. (There would obviously be considerable more traffic over the water way).

In my view Councillor Harvey was there seeking to reduce the amount of the 'toll' then charged on the farmers' canes. The Chairman did not seem to agree with this reduction because the plaintiffs' company would be making improvements to the water works and that because of this the compensation offered might be reasonable and acceptable. Councillor Younge apparently was in agreement with the reduction of the cane farmers *'toll'* as the cane farmers would not be pleased to have to continue paying *'toll'*, as they might be led to believe that a larger sum had been received for the right of way pass, to which the Chairman remarked that it would be left to the Council to discontinue the *'toll'* to cane farmers or reduce it for the coming year.

In my view it is obvious that the Council was considering the question of *'tolls'* to be paid by the cane farmers in relation to the compensation (not a toll) that was to be exacted from the Plaintiff Company for the right to pass in conjunction with the expenditure and improvements the company was undertaking to make.

When the District Commissioner emphasised that canes could not be planted again without flood fallowing and that the help of the Estate was needed for this and that the relationship between the Council and the Estate in that regard should be considered, Councillor D. J. Younge advised caution in the matter and stated that the matter should not be rushed.

The Council, however, unanimously agreed to grant the Right-of-Way in those circumstances subject to the approval of the Local Government Board, which was subsequently sought and obtained. The compensation however was eventually agreed upon at $500.00 per annum.

If my interpretation of the deliberations at the meeting and the decision arrived at is correct it would seem apparent that the Council decided to take compensation and not a *'toll'*. It becomes necessary now to look at the proposals in writing, submitted by the other party to the contract. Paragraph 7 (Ex. C4) of the plaintiffs' proposals in my opinion supports this view. It reads thus:—

> "As regards financial consideration, the Estate's Authorities are prepared to offer the sum of $240.00 (Two hun-

dred and Forty dollars) per annum for the free and unrestricted use of this right-of-way"

The words *"the free and unrestricted use"* cannot be regarded otherwise than as being identical with what the District Commissioner described to the Defendant Council as a *'simple pass'*. This was a matter of great consequence to the plaintiffs as without this Right of Way to convey their canes from Lusignan to their Enmore Factory, the loss to them would be considerable indeed.

The Plaintiff Company, having therefore been granted a pass, were put in the same position with respect to their punts as the cane farmers' punts, and if it is conceded that tolls could be exacted from the cane farmers on the passing of their punts pursuant to the provisions of section 90 (now 94 of Chapter 150), then I can see no legitimate reason why notwithstanding this private contract, the same cannot be exacted, should it be deemed advisable, from the plaintiffs subject however to the approval of the Local Government Board.

I have reached the conclusion therefore that this was a private contract made by the Defendant Council with the Plaintiff Company and it was within their statutory powers so to do. Section 90 of Chapter 84 reads as follows:—

> 90. — (1) The local authority of any district may charge tolls, according to a tariff to be posted up at the village office or some other conspicuous place within the district, for bateaux, punts, or other craft, passing through any of the trenches, aqueducts, or kokers within the boundaries of the district, but no toll shall be charged until the tariff has been approved by the Board.
>
> (2) The local authority may also make by-laws for the prevention of fishing, or the mooring of bateaux, punts, or other craft, in any of the trenches or aqueducts aforesaid.

Mr. Burnham for the Defence however submitted that the contract was *ultra vires* and relied among others on the case of *York Corporation, v. Henry Leetham & Sons, Ltd. 1924 I Chancery, page 557.*

In this case the Ouse agreement and the Foss agreement were declared *ultra vires* because during their currency which depended on the wishes of the defendants, the plaintiff corporation no matter what emergency may arise, had disabled itself from exercising its statutory powers to increase the toll so far as might be necessary, and that being *ultra vires* at the date of their execution the agreement did not become *intra vires* by reason of estoppel, lapse of time, ratification, acquiescence or delay.

The facts in the York Corporation case may be differentiated from in facts in this case. In regard to the Ouse agreement, for example the Act of Parliament (13 Geo. 1, c. xxxiii.) was passed.

> "First as regards the Ouse: An act of parliament (13 Geo. 1, c. xxxiii.) was passed in 1726 entitled "An Act for improving the navigation of the River Ouse in the County of

> York." It was passed "To the intent that the said river as well for the good of the public in general and of the inhabitants of the said city (York) as also of such as shall trade and pass thither and from thence with merchandises may be effectually repaired, amended, maintained and improved". By this Act trustees were appointed for making navigable the River Ouse, and were entrusted with powers for that purpose. Commissioners also were appointed for the purpose of settling differences which might arise and for other purposes. The commissioners and trustees were empowered to lay tolls on all wares, merchandise, or other commodities, with certain exceptions, carried on the river above Wharfmouth not exceeding the various rates for the various goods there specified, and it was to be lawful for the trustees, their successors, assigns, and nominees "and no others" from time to time and at all times to recover and take "such reasonable tolls or rates as shall be so laid as aforesaid and *no other*.

Russell, J. at page 569 says:—

> "As I have already indicated, the plaintiffs are invested with statutory powers of charging such tolls, within limits, as they may deem necessary for the purpose of carrying on these two undertakings in which the public are interested. The effect of these two agreements is that they bind themselves for a period, the duration of which depends upon the volition of the defendants, not to exercise those powers as against them. No matter what emergency may arise during the currency of the agreements the Corporation have deprived themselves of the power to charge the defendants such increased tolls as might enable them to cope with the emergency. They have for so long a time as the defendants desire to that extent wiped out or fettered their statutory power. If that be, as I think it is the effect of these agreements, they are, in my opinion, agreements which are *ultra vires* the Corporation."

For my own part I do not see in the instant agreement that the Defendant Council have deprived themselves of the power to charge the plaintiff Company such tolls as might enable them to cope with any emergency under the powers contained in section 90 (now section 94 of Chapter 154).

In my view the facts in the present case are more in keeping with the facts in the *Birkdale District Supply Company, Limited v. Corporation of Southport* (1926 Appeal Cases, page 355). In that case the head-note reads:—

> "By a provisional Order of 1898 the Birkdale Urban Council were constituted electricity undertakers in Birkdale with power to charge up to a certain maximum price, but with authority to make special agreements with particular consumers as to price.
>
> By a deed of transfer of December 31, 1901, approved by the Board of Trade, the Birkdale Council transferred the

undertaking to an electric supply company with a provision for re-transfer if the Company made default in their obligations as undertakers. By a supplemental deed of the same date, made without the approval of the Board of Trade, the company agreed with the Birkdale Council not to charge higher prices than those charged in the adjoining borough of South-port. In 1911 the Birkdale District and the contractual rights and obligations of the Birkdale Council were transferred to the Southport Corporation, but the company still remained electricity undertakers in Birkdale.

The Company having recently begun to charge higher prices than the Corporation, the Corporation brought an action to restrain the Company's breach of agreement. The company contended that the supplemental agreement was *ultra vires* both under the Electric Lighting Act, 1882, s 11, which prevented them divesting themselves of their statutory powers without the consent of the Board of Trade, and under the general law applicable to statutory undertakings:—

It was held, that the agreement did not offend against the Electric Lighting Acts of 1882 and 1909, and that it was not void at common law as being incompatible with the due discharge of the company's duties."

In this case Russell J's judgment in the York Case was criticized in certain respects.

The Earl of Birkenhead referring to the provisions of the agreement in that case (dated 31st December, 1901) says—

"My Lords, as I have already pointed out, these provisions suggest rather an enforcement of the company's powers than a denudation of them. It is the company who *proprio vigore* are putting pressure on their consumers to accept the flat rate in order to escape the demand based on the maximum system. It is the company who are to reduce the flat rate to the borough of Southport. It is the company who are to deliver to every one of their customers the notice that he will be charged the maximum demand unless he elects to be charged on the flat rate system. This arrangement may be terminated in four months. The price charged by the borough of Southport to its customers is, no doubt, the price which this company desires to force its customers to pay. That may have been arranged with the Corporation of Southport. There may have been a good commercial reason for the plan, for instance, it may have prevented competition between those two sets of undertakers. What, in fact, the company does is this they say to their consumers—you must pay us the maximum prices which we are entitled to demand and be paid, but if you so elect you will only be charged a flat rate within our limit which we are also entitled to be paid. I am quite unable to see how the fact that the flat rate so offered for acceptance is the same as that demanded and taken in the borough of Southport amounts, on

> the part of the company, either to an abandonment of their powers, or, to *the commission of an act incompatible with the just and proper exercise of those powers. No evidence has been given that the proposed flat rate is oppressive, or that its' exaction interfered with or checked the industrial success of the company.* Even if one assumed that the Corporation and the company agreed between themselves to set up this flat rate system, I cannot see how that fact entitles the appellants to the relief they claim."

In the instant case there is no evidence to show that the Defendant Council acted oppressively. At page 364 he proceeds as follows:—

> "The appellants have relied strongly on a well established principle of law, that if a person or public body is entrusted by the Legislature with certain powers and duties expressly or impliedly for public purposes, those persons or bodies cannot divest themselves of these powers and duties. They cannot enter into any contract or take any action incompatible with the due exercise of their powers or the discharge of their duties. Many authorities were referred to in support, or rather in illustration of this principle, from *Mulliner v. Midland Ry. Co.* (1) and *Ayr Harbour Trustees v. Oswald* (2) down to *York Corporation v. Henry Leetham & Sons.* (3), A good example of the length to which the principles is carried is afforded by the case of *Paterson* v. *Provost of St. Andrews.* (4)".

At page 366 he says—

> "In none of the authorities cited in the Court of Appeal, or, indeed, before Astbury J., was the principle I have mentioned questioned. The problem was throughout, on the, facts proved, to bring the case within the principle. The York case (1) was somewhat severely criticized in the Court of Appeal. The facts of it are peculiar, and having regard to this peculiarity and to the acute criticism of Sargant L.J. (2) (which I adopt), I regard that case as distinguishable."

In the Court of Appeal Sargant L.J.'s remarks as follows were approved by the House of Lords: —

> "The York case (1) is a case very much nearer the present and differs altogether, like the present case, from the cases to which I have already referred, and so far as the judgment of Russell J. is founded upon an analogy drawn between those cases and the York case (1)I think that is subject to the same criticisms as the case with which we are now dealing, *and that to that extent it can hardly stand with the judgment of the Court in the present case.* But the case itself was a very peculiar one. It was one in which the principal navigation, that had to be dealt with was the Ouse navigation, which had originally been placed in the hands of trustees for public purposes and with regard to which there undoubtedly was a specific liability to apply the receipts towards the upkeep of the navigation. And although that was not the case with regard to the less important

> Foss navigation still there had been a transfer of the obligation and of the undertaking to the York Corporation, who themselves were or might be considered to be in the position of trustees for the public. I do not say they were so exactly. I will refer to the passage in the judgment of Russell J., where he deals with the general question. He says (1): "As I have already indicated, the plaintiffs are invested with statutory powers of charging such tolls, within limits, as they may deem necessary for the purpose of carrying on these two undertakings in which the public are interested." I think that he was there consciously or unconsciously dealing with the matter upon the basis that there was something which imposed a direct statutory obligation on the corporation with regard to the application of those funds, and that if that were so, it would differentiate the case altogether from the present case. There was this further point in the case, that whereas the corporation were bound to charge tolls for the use of the navigation *they made an agreement under which beyond a certain point no tolls at all were to be charged, but that the services were to be rendered free to Henry Leetham & Sons, Ltd.,* or rather to their predecessors in title, which appears in itself to be a direct breach of the provisions of the statutory obligation. And, therefore, although a considerable part of the reasoning of Russell J. in the case may be incompatible with the judgment that is now being given, it by no means follows that there are not grounds on which the actual decision in that case may be supported."

At page 824 he concludes as follows :—(1925 (1) Ch. p. 824).

> "However that may be, if a loss were incurred that would be the result of a miscalculation by the commercial advisers of the company, and the company would be in no worse position than if they had made an improvident bargain with regard to the price at which they might buy their coal or with regard to any other contract of real importance."

In the present case it was admitted that on both sides that the annual payment of $500.00 was not a toll. The plaintiffs urged that it was payment for a licence granted to pass over this waterway; in arriving at this figure the fact that the plaintiffs had expended considerable amounts of money in making improvements and constructions in order to make the said waterway suitable for use by the plaintiffs' punts, had been taken into account. What the defendants granted to the plaintiffs was an irrevocable licence to use the defendants' waterway for such time as the plaintiffs' plantation "Lusignan" continued in cultivation for the annual payment of $500.00 (Five hundred dollars).

Council for the defendants contended that this was a lump sum payment and not a toll and that the defendants had power only to charge a toll and nothing else. In my view, (upon consideration of the whole statute herein) the provisions of section 90 (now section 94 of Chapter 150) in any case is permissive and not mandatory, though whether this is so or not is beside the point on the facts in this case.

The villagers' punts already had this right to pass which right the plaintiffs were now seeking also to acquire. So that in the year 1944 the agreement was made that not only the villagers' punts would use the Kryenhoff Empolder in this way but also the plaintiffs. From the year 1920, it would appear that a toll of 8c. per punt, had been charged the Village farmers when transporting their canes through the Empolder to Plantation Lusignan. Now their canes would be transported to the Enmore Factory for grinding as the Lusignan Factory was closing down. The grinding of the Village farmers' canes at Enmore Estate was not at all a matter of small significance—(the original figure mentioned was $240 per annum). It is not for this Court to conjecture the many reasons which may have operated in fixing this figure. The factory at Lusignan was closing down and it may not have been ascertained for how long that Estate would continue in cultivation or at least with any degree of certainty. However, I can see no reason why the Village Council, cannot, in pursuance of section 90 (now section 94 of Chapter 150) charge tolls notwithstanding the existence of this present agreement with the plaintiffs, subject, however, to the approval by the Board and in compliance with the other requirements of the section.

In my judgment it would be an extraordinary extension of this doctrine of *ultra vires* or *repugnancy* to say that in such a case as this a local authority was deprived of its ordinary discretion as to fixing the price at which the services rendered or privilege granted should be rendered or fixed.

The defendants next contended that the provisions of section 87 of Chapter 84 had not been complied with and any agreement entered into was not only unenforceable but had no force or effect whatever, as the same had not been signed by the Chairman of the Local Authority.

Section 87 of Chapter 84, page 1470 reads thus:—

> "No lease or agreement to let any portion of any undivided lands or portion of lands, or any new empolder or portion thereof, in any village or country district shall have any force or effect whatever, unless it is signed by the chairman of the local authority thereof with the consent and approval of the Board."

Mr. Burnham referred to the case of *Warr & Co. Ltd. v. London County Council, 1904 W.L.R.,* but this case merely decided that to have the free and exclusive rights at a theatre for sale of refreshments was an ordinary Licence and not an interest in Land. But it was suggested that the case was an authority for the proposition that it is not unusual to use the words "to let" when referring to a grant of a licence—an ordinary licence or to an irrevocable licence. Mr. Stafford argued that the agreement in this case was a mere licence and as such could not be brought within the words of the section, *viz* :—

> "No lease or agreement to let any portion of undivided lands or portion of lands or any new empolder or portion thereof."

Consequently the agreement would not be null and void merely because it did not bear the signature of the Chairman of the Local Authority and refers specifically to the combined effect of sections 82

and 343 of Chapter 84, and that the Kryenhoff Empolder herein was the private property of the Defendant Council (acquired by absolute grant) and that the Defendant Council had the power to enter into a private contract with respect thereto and to grant a licence and that the section was inapplicable as the same referred to Leases.

I have come to the conclusion that the contention of the plaintiffs is the correct one. Having arrived at the conclusion that a valid contract subsists between the parties it remains to be decided what relief if any may be granted to the plaintiffs.

The contract was based on the proposal of the 7th October, 1943 (Ex. "C"4). The plaintiffs have performed their part of the contract, have paid a total sum of $7,000:—from 1944, and have expended a sum of about $25,000 (to the year 1957) on this waterway. I find as a fact that the time agreed on was that "the arrangement was only to remain in force as long as Plantation Lusignan remains in cultivation." I see no reason why the Defendant Council should not carry out the contract that they had entered into with the approval of the Local Government Board. I order therefore that the same be specifically enforced.

I intimated that I would give my reasons for overruling the preliminary objection taken by counsel for the defence. Section 206 of Chapter 150 (Section 326 of Chapter 84 reads as follows:—

> "(1) No process shall be issued against or served on any local authority, or any member thereof, or any officer of a local authority or person acting in his aid, for *anything done, or intended to be done, or omitted to be done, under the provisions of this Ordinance* until the expiration of one month after notice in writing has been served on that local authority, member, officer, or person clearly stating the cause of action, and the name and place of abode of the intended plaintiff and of his attorney or agent in the cause.
>
> (2) On the trial of the action, the plaintiff shall not be permitted to go into evidence of any cause of action which is not stated in the notice so served; and, unless the notice is proved, the defendant shall have judgement in his favour.
>
> (3) The action shall be commenced within six months next after the cause of action accrues, and not afterwards."

It is admitted that no notice was served in this case. It was submitted *in limine* therefore that the action is unsustainable and should be dismissed. Mr. Burnham relied upon the case of *Bhagchand Dagdusa Gujrathi and others* v. *Secretary of State for India in Council (1927) 43 T.L.R., page 617.* Section 80 of the Indian Code of Civil Procedure which fell to be interpreted is worded as follows:—

> "No suit shall be instituted against the Secretary of State for India in Council, or against a public officer *in respect of* any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, delivered."

First of all, in my view upon reading the plaintiffs' affidavits it was clear that if the plaintiffs at that stage were prevented from using the waterway in accordance with the agreement they would suffer irreparable loss or damage. For one thing it would appear that there was no other practicable means of conveying the plaintiffs' canes from Plantation Lusignan to the grinding factory at Enmore Estate.

Viscount Sumner in his judgment reviewed the earlier authorities which had decided similar points which turned on the construction of similar Sections in the (1) Metropolis Management Act, Amendment Act 1862; (2) The Public Health Act of 1875. The Public Authorities Protection Act of 1893 has repealed the relevant clauses in those acts. Viscount Sumner was of the opinion that the words *"in respect of"* in Section 80 of the Indian Code was a form going beyond *"for anything done or intended to be done"* and show it to be wider than the statutes on which the English Authorities were decided.

The official act complained of in the Bhagchand case, was a notification published in the Bombay Government Gazette in relation to certain approved proposals for the collection of taxes and the method employed by the District Magistrate and Collector in the collection thereof and as such was an act purporting to be done by a Public officer in his official capacity. The suit was in respect of such act and further the evidence in that case did not prove risk of irremediable damage to anybody and was not directed to doing so. The amounts payable were in any case very small, and were throughout far from being oppressive; sums paid under the collectors demand would be returnable if that demand was proved to have been bad and not one of the plaintiffs was shown to have been unable to make the first payment, the only one falling due within the two months.

The older authorities were mentioned and discussed in the local case of *H. M. Wight v. The Town Clerk of Georgetown 1939 B.G.L.R. page 144. In Flower v. Local Board of Low Leyton* (*1877*) *L.R. 5 Ch. D. 347 Jessel,* Master of Rolls in the Court of Appeal:—

> "I think it is impossible to hold that 264th section of the Public Health Act applied to a Bill in the Court of Chancery for an injunction to restrain a serious or irreparable injury requiring the intervention of the Court. The section was intended to apply to an action at law for damages and its object was to give an opportunity for a local authority to make payment or tender compensation for the damage sustained."

Sharpington v. Fulham Guardians 1904, Vol. 2, Ch. D, page 449 was decided after the passing of the Public Authorities Protection Act of 1893. The act is set out in the report. In that case the defendants took a preliminary objection that the claim was for neglect or default in

the execution of the defendants' public duty and proceedings had not been commenced within six months as prescribed by the Public Authorities Protection Act of 1893. The facts in that case were that the guardians of Fulham entered into a contract with the plaintiff, a builder for certain works required by them for the purpose of carrying out their public duties. The works were completed and paid for. The plaintiff then claimed an additional sum by way of damages for loss alleged to have been caused by negligence and frequent changes of plans on the part of the defendants. It was held that the plaintiff's claim was in respect of a private duty arising out of a contract, not for any negligence in performing a statutory or public duty and the Public Authorities Protection Act did not apply.

Upjohn, K. C. in that case argued and upheld by Farwell, J. and with whom I agree that in all the cases in which the act has been held to apply there has been a duty to the public binding the public body to do the act contracted for; and that that is clearly distinguishable from the duty to the plaintiff upon which he relied in that case; it was a duty to him privately arising out of the contract. In the present case under review it was a duty owed by the Defendant Council to the plaintiff's company privately arising out of the contract, viz: — having granted a licence, which they were at liberty to do thereafter in pursuance of the licence, to allow the plaintiffs' punts to pass unmolested.

Farwell J. said as follows:—

> "The public duty which is here cast upon the guardians is to supply a receiving house for poor children; a breach or negligent performance of that duty would be an injury to the children, or possibly to the public, who might be injured by finding the children on the highway. In order to carry out this duty they have power to build a house or alter a house, and they accordingly entered into a private contract. It is a breach of this private contract that is complained of in this action. It is not a complaint by a number of children or by a member of the public in respect of the public duty. It is a complaint by a private individual in respect of a private injury done to him. The only way in which the public duty comes in at all, is as I have pointed out, that if it were not for the public duty any such contract would be *ultra vires.* But that would apply to every contract. I cannot find any ground for saying that this particular contract comes within the Act. I think it is clear that what is complained of is a breach of a private duty of the guardians to a private individual."

The position is the same in this case. For these reasons I came to the conclusion that the statutory notice required by section 206 of Chapter 150 was not necessary and the objection taken *in limine* failed.

The defendants must therefore perform the contract into which they entered with the plaintiffs: viz:—that so long as Plantation Lusignan continues in cultivation to allow the plaintiffs' punts free and unrestricted use of the waterway in question upon the payment by the plaintiffs of the annual sum of $500 (five hundred dollars).

The defendants will be restrained upon payment by the plaintiffs annually of the said sum of $500 from preventing the plaintiffs from having free and restricted use of the waterway in question so long as Plantation Lusignan continues in cultivation.

Declaration accordingly. Judgment entered for the plaintiffs with costs fit for two counsel.

BACCHUS v. NEW INDIA ASSURANCE CO., LTD.

(In the Supreme Court, Civil Jurisdiction (Phillips, J.) October 7, 8, 9, 10, 31, 1957).

Marine Insurance—Variation between slip and policy—Slip the complete and final contract—Actual total loss—Constructive total loss—Notice of abandonment.

The plaintiff Bacchus claimed the sum of $4,000 for loss of 50 greenheart logs under a marine insurance policy issued by the defendant company dated 28th December, 1953. The logs were to be transported from Bartica to Georgetown on the punt *Allerton.* The punt left Bartica with the logs loaded in slings and on the 21st December, 1953, while the punt was on its way to Georgetown the logs worked loose from the slings owing to continuous heavy weather and sank and were lost. The insurance slip issued by the defendant company on the 18th December, 1953, insured the logs against "total loss only". The policy which was issued on the 28th December, 1953 after Bacchus had reported the loss of the logs, stated that the logs had been insured against "actual total loss". A search for the logs at the instance of the defendant company was made on the 28th December, 1953, but the logs were not located and on the following day Bacchus regarding the logs as lost informed the defendant company accordingly and demanded payment. The defendant company claimed that they later recovered 39 logs expending $2,534.80 in their recovery. They sold the logs recovered and retained the proceeds of sale.

On behalf of the defendant company it was contended that the policy only covered actual total loss and not constructive total loss and that even if Bacchus was insured against constructive loss there was no constructive loss within the provisions of the Marine Insurance Act, 1906 which applies to the Colony by virtue of the Law of Merchant Shipping Ordinance, Cap. 3. The defendant company also contended that the expenses of recovering the 39 logs should be borne by Bacchus either under the Sue and Labour Clause in the policy or as salvage. Bacchus asked for rectification of the policy to accord with the terms contained in the slip.

Held (1) As the parties intended that the policy would be issued in accordance with the slip viz. for total loss only, the policy will be rectified accordingly.

(2) Bacchus was entitled when he discovered that the logs could not be located on the 28th December, 1953, to treat the loss as a constructive total loss, to give notice of abandonment and to claim from the insurers, the defendant company, the amount insured in the policy $4,000.

(3) Where there is a Suing and Labouring Clause in a policy of marine insurance the underwriter cannot recover expenses which he has incurred in saving or protecting the property insured.

(4) The defendant company could not divest themselves of their power of underwriters and claim as salvors.

Judgment for plaintiff.

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

H. A. Fraser and *J. A. King* for the defendants.

Cur. adv. vult.

Phillips, J.: The plaintiff in this action is a timber merchant carrying on business between Bartica and Georgetown in British Guiana. The defendants are an Insurance Company incorporated in India and registered under the Indian Consolidation Acts 1912, with its Registered Office at Bombay, India, and operating in British Guiana by their attorney Messrs. Eric S. Stoby and Co. Ltd. of 25 Water Street, Georgetown, British Guiana.

The plaintiff's claim is for $4,000 for loss of 50 greenheart logs under a Marine Insurance Policy issued by the defendant company and dated 28th December, 1953.

The Policy No. 3191 admitted in evidence and marked Exhibit A3 was on the usual printed form.

The plaintiff claimed:—

"1. that the plaintiff was at all material times fully interested in a policy of Marine Insurance Number B.G. 3191 underwritten by the defendant, whereby the defendant insured 50 (fifty) Green Heart Logs valued at $4,000, the property of the plaintiff in the punt "Allerton" from Bartica, Essequibo, British Guiana until the said punt should be grounded at the Landing at Georgetown, Demerara, British Guiana, against, **inter alia,** the risks of water carriage, perils of the sea, and of all other perils, losses and misfortunes that should come to the hurt, detriment or damage of the said logs.

2. that the said Green Heart Logs were duly shipped in the said punt "Allerton" at Bartica, Essequibo, on the 18th day of December, 1953, for carriage to Georgetown, but during the currency of the policy and while so insured as aforesaid the said 50 Green Heart Logs and all of them became a total loss or alternatively, a constructive total loss, by one or more of the aforesaid perils insured against.

3. (a) that on the 21st December, 1953, the punt "Allerton" on the voyage aforesaid, was picked up by the tug "Davie" off Ruby on the West Coast at or near the mouth of the Essequibo River, to be towed to Georgetown, Demerara, with the aforesaid 50 Green Heart Logs slung alongside the said punt.

(b) that due to heavy seas and winds and to the flooding tide, which was against them, the tug and tow were unable to make any progress after reaching a position opposite Windsor Forest, West Coast, Demerara, and the said punt "Allerton" therefore, with its load was brought to anchor opposite Windsor Forest on the West Coast, Demerara, and about four miles out to sea, to await more favourable tide and weather conditions.

(c) that due to the continuous heavy weather the said 50 Green Heart Logs ran out or were worked out of their slings by the seas and sank and were lost.

4. that on or about the 29 day of December 1953, and again on the 8th January, 1954, the plaintiff gave notice of abandonment to the defendant.

5. that the plaintiff, therefore claimed from the defendant the sum of $4,000.00 for the total loss, alternatively for the constructive total loss, of the said 50 Green Heart Logs under the said policy of marine insurance; and costs".

The Defence to the action was:

"1. that the plaintiff is required to prove his interest in the policy of marine insurance referred to in the Statement of Claim.

2. that the defendants admit that they underwrote the said policy.

3. that the defendants contend that the terms of the Policy expressly provide that the greenheart logs the subject matter of the insurance were insured against "actual total loss" and were only covered "as a whole against the risks of water carriage" . . . "from the loading of the said goods or merchandise on board the said ship or vessel" and will contend that the said greenheart logs were not insured against a constructive total loss.

4. that the defendants deny that the said greenheart logs were duly shipped on the punt "Allerton" as alleged in paragraph 3 of the Statement of Claim or at all and say that the said greenheart logs were never loaded on board the said punt but were slung on each side thereof.

5. that the defendants deny that the logs became a total loss, or alternatively a constructive total loss by one or more of the perils insured against, as alleged in paragraph 3 of the Statement of Claim or at all.

6. that the said greenheart logs were lost as a result of being slung alongside the said punt or as the result of the negligent slinging of the said logs.

7. that there was not an actual total loss of the said greenheart logs within the' meaning of the said policy, the major portion of the said logs having been salved by the defendants.

8. that even if the plaintiff was insured against a constructive total loss which is denied, there was not a constructive total loss of the said greenheart logs.

9. that the defendants did not admit notice of abandonment. (This however at the trial was conceded by counsel for the defendants).

10. that the defendants contended that the insurance effected by the said policy never commenced."

The defendants' counterclaim was as follows:—

"11. that between the 15th day of January, 1954 and the 12th day of April, 1954 the defendants rendered salvage services or other services off Leonora, West Coast, Demerara and elsewhere to the plaintiff or to the cargo of the punt "Allerton" consisting of greenheart logs which have been claimed herein as the property of the plaintiff, in the circumstances hereinafter appearing.

12. that on or about the 21st day of December, 1953 a number of greenheart logs slung on each side of the punt "Allerton" whilst off the west coast of British Guiana ran out or were worked out of their slings and sank during heavy seas and winds.

13. that the defendants employed a diver, one Philip Gouveia, to locate, buoy and recover the said greenheart logs from their position in the shallow water off Leonora. The logs were rescued from a position of considerable risk of being totally lost, as had they not been located and buoyed, a high wind and rough seas would have so dispersed them as to make them impossible to recover.

14. that the defendants recovered 39 greenheart logs, 4 of which were either stolen or removed by tidal action as they lay at the Kingston Mud Flat.

15. that the defendants incurred the following expenditure in salving the said greenheart logs :—

Cost of locating logs in the sea—	$ 325.00
Cost of salving 39 logs from the sea—	2,000.00
Cost of transporting logs to Fisheries Mud Flat and measuring —	209.80
Cost of transporting and storing 2 logs under Mr. Low's wharf—	20.00
	$2,554.80

16. that the defendants gave due notice to the plaintiff of the salving of the said greenheart logs and subsequently of their intention to sell the same, but were informed by the plaintiff's solicitor that the plaintiff had no interest whatever in the logs.

17. that the defendants later sold 33 of the said greenheart logs and realised the sum of $3,125.28 which has been deposited with their solicitors and is the salved value of the said 33 logs.

18. that the salved value of the two greenheart logs lying under Mr. Low's Wharf is $217.60.

19. that the defendants counterclaim for :—

(i) the said sum of $2,554.80, and a declaration that they are entitled to deduct the same from the proceeds of sale of the said logs;

(ii) Salvage;
(iii) Such further or other relief;
(iv) Costs.

The plaintiff himself gave evidence and called one witness, Mr. Victor Grant, the captain of the punt "Allerton". The defendants called two witnesses Mr. Arthur Hale, the Manager of the Insurance Branch of the Defendant Company and Mr. Phillip Gouveia, who described himself as a diver.

The plaintiff said that during the year 1953 he had six other Marine Insurance Policies with the defendants, but never had occasion to make any claim on nor to scrutinize those Policies and that on each of those other occasions as well as on the occasion in question the logs had been transported by the Punt "Allerton".

On the 18th December, 1953, 50 greenheart logs were loaded onto the punt "Allerton" hired from Mr. Victor Grant at Bartica. The royalties on those logs were duly paid to the Lands and Mines Department. The certificate therefor was handed to the Captain of the punt the said Victor Grant for delivery to the officer of the Lands and Mines Department on arrival at their destination—Georgetown. The logs were carried outside on each side of the punt on slings and fastened by wire rope and towed by a tug or launch.

The plaintiff said the defendants had been notified of the carriage of the logs in that way and apparently no exception had been taken thereto on the previous occasions when his logs had been conveyed successfully to their destination.

Before the logs left Bartica the plaintiff said that he had given instructions as usual for Insurance to be effected with the defendants. On Insurance Slip or Certificate was duly issued and the premium of $20.48 duly paid on the 18th December, 1953. The Policy was not actually issued until the 28th December, 1953 after the loss of the logs had been reported by the plaintiff to the Defendant Company.

The Insurance Certificate Ex. A2 in evidence is worded as follows:—

"MARINE DEPARTMENT

Policy No. B G 3191
British Guiana Agency

No. 621

M M. J. Bacchus Dr.

18th December, 1953.

To

THE NEW INDIA ASSURANCE CO. LTD.,
(Incorporated in India)
Head Office: Bombay.

For Marine Insurance Premium as under:—

Per S.S. Punt Allerton towed by Launch Voyager (18/12/53)

		PREMIUM
From Bartica		
To Georgetown		$ c.
On 50 logs greenheart		20 00
Marks (if any) M.J.B.		
Amount . . . @ Ex . . $4,000		
Terms :— **Total loss only**		
Payable at Georgetown		----------
Policy Stamp		$20 00
		48
Total		$20 48

Stamp 2 cents cancelled

E. & O. E.

for the New India Assurance Co. Ltd.
Eric S. Stoby & Co. Ltd.,
Agents".

On the 22nd or 23rd December, 1953 the plaintiff received a telegram that the Punt "Allerton" had lost the timbers. He at once went to Georgetown and attended at the defendants' office—(that was, he says before Christmas day) and notified the Company of what had happened.

Two or three days later Mr. Gouveia (the diver) engaged by the defendants, in a party accompanied by the plaintiff and the Captain of the punt went out to sea to a point indicated by the Captain where the logs were supposed to have been lost. After a search lasting five to six hours the logs could not be located.

According to the plaintiff, Gouveia told him that he could not go back to search the next day for the logs, but Gouveia said in evidence he actually returned the very next day when the logs were located at the bottom of the sea.

The plaintiff said that the logs not having been located he then regarded the logs (as lost and that he returned to the Company's Office and reported to Mr. Stoby, the attorney's Managing Director, that the logs could not be found and that Mr. Stoby told him to return in another day or two—that he waited for payment from Mr. Stoby and not having heard from Mr. Stoby as he had promised he went to his lawyer, Mr. A. G. King.

The defendants in the meanwhile were investigating the plaintiff's claim before making payment.

The 50 logs the plaintiff said were valued $4,337.28 by actual measurement.

Rectification.

The plaintiff sought rectification of the Policy. The evidence of the defendants' manager and the evidence of the plaintiff on this issue were as follows:

Mr. Hale the defendants' manager said:

> "In January 1953 plaintiff came to my office to make arrangement for insuring his timber from Bartica onwards. He discussed with me the types of insurance we were giving him. I told him I would give him insurance on the actual total loss of the logs . . .
>
> On the slip Ex. A2 is written the words "Total loss only". That is a correct description of the cover we were giving the plaintiff.
>
> I told the plaintiff the only insurance I could give him was insurance for **actual total loss.** I meant that the entire cargo had to be irrevocably lost before he could recover. I explained that to Bacchus. There is a constructive total loss—that means if the cost of recovering the article deemed to be lost is less than the value of the article then it is not a constructive total loss. I did not explain that to the plaintiff."

The plaintiff on the other hand swore that:

> "The first time I applied for insurance with the defendant company might be 21st January, 1953. After that date I had several policies—about 7, and also with other companies after that and before 1953. I don't read the Policies hardly. I don't know if the other Policies cover me for **Actual Total Loss;** I never apply for Policy for partial loss. I just apply for insurance. I just go and take out insurance on the logs. I had Marine Insurance on the logs—different amounts, depending on the value of the logs. I don't know if the type of the insurance was the same type. It may be the same type. I **never read the Policies.** The Policies I applied for in 1953 from the Defendant Company might be the same. I know it was Marine Insurance. I take it as a Policy. I think my loss will be covered.... What I applied for was Marine Insurance to cover my logs. I applied for the same Marine Insurance that I had been taking out before—Marine Insurance. I wanted Marine Insurance to cover my logs. I never mentioned that I wanted to cover similar to the others before. I hadn't suffered any loss before."

The defendants' Managing Director by letter dated 11th January, 1954, Exhibit B5, wrote to the plaintiff's solicitor as hereunder:—

> "Your two letters dated 8th January, 1954, together with the statement of the same date by Victor Grant and a copy of Royalty Certificate was received by us this morning.
>
> Your attention is again drawn to our letter to you of the 7th January, 1954, and we must point out that the correspondence you sent us makes us very little wiser than we were before.
>
> In our opinion, it is insufficient to produce a Royalty Certificate as complete evidence that 50 logs were on the

punt at the time of the accident and we cannot understand your client's refusal to produce to us the log book and other records of the shipment. We note that Victor Grant in his statement states that 50 logs were on the punt but we still require the evidence asked for.

Again, we are at a loss to understand the apparent reluctance of your client to produce before us the Captains of the Tug and Punt so that we can obtain from them the information we require. The statement you sent us from the Captain of the Punt (Victor Grant) is silent on the point as to how the logs were sunk. All he says about the sinking, and we quote "and when the punt was 41/2 miles out to sea the punt was knocked about by the heavy seas and the current and winds with the result that all the logs sank on the 21st December, 1953".

To give you a complete picture of the available information we have on hand we confirm Mr. Bacchus' verbal statement to us which is attached hereto.

Mr. Bacchus is not entitled to claim for loss for a peril not insured against, and it is his duty to satisfy us or give us the opportunity of satisfying ourselves that such loss comes within the scope of the Policy. He is not entitled to prejudice our position by just informing us of the loss and doing nothing to protect his and our interest in the property insured.

Apart from all other considerations however, the Policy issued to Mr. Bacchus is for TOTAL LOSS ONLY and we are yet to be satisfied that the loss is TOTAL within the meaning of the Policy."

All the previous Insurance slips had the words "Total loss" or "Total loss only."

This Policy is worded thus: —

"Fifty greenheart logs valued at $4,000.00 (B.W.I.) Currency).

Insured against the *actual total loss* of the logs. This Policy covers the logs as a whole against the risks of water-carriage from the time the punt leaves its moorings at Bartica to the time the punt is grounded at the landing at Georgetown."

I accepted the plaintiff's evidence on this issue. The plaintiff had said that he usually telephoned or telegraphed his Clerk in Georgetown as occasion arose to take out the necessary Marine Insurance on the logs to be shipped, that at times he himself would do so if in Georgetown but that he did not recall writing the defendant Company asking for similar insurances. When however his letters were shown to him he recalled having done so. Counsel for the defendants stressed this fact but to my mind that does not take the matter any further because the Insurance slips have all been for Total loss or Total loss only. The Policies had all been for Actual total loss so when the plaintiff said "similar policies" he

may well have intended not having read the Policies, what was stated on the Insurance Slips.

The defendants on the other hand must have intended the risk for Total loss only for that is what they wrote on the Insurance slip.

It is true indeed that it is the Policy that is the evidence of the contract and the document sued on, and in Marine Insurance is obviously the document that matters.

The defendants urged that the plaintiff could not claim for a constructive Total loss and that the plaintiff was precluded from so doing in view of the stipulation in the Policy for *actual total loss.*

The plaintiff in these circumstances pleaded that there was fraud in the issue of the Policy. However at the trial this was not pursued with vigour, which is not surprising, but *"common mistake"* was rather relied on, which latter view the Court on the evidence accepted.

Fraud has not been established.

In *Spalding v. Crocker,* 1897 13 T.L.R., page 396, it was held that there is power to rectify a Policy of Insurance but there must be clear evidence of a common mistake before it can be rectified.

Section 21 of The Marine Insurance Act 1906 declares that:

> "A contract of Marine Insurance is deemed to be concluded when the proposal of the assured is accepted by the insured whether the Policy be then issued or not."

The Act further provides that:

> " where there is a duly stamped Policy reference may be made as heretofore to the slip or covering note in any legal proceeding."

and it seems that notwithstanding the provisions of the Stamp Act 1891 in England the Court has power to rectify a duly stamped Policy so as to make it correspond with the terms on the slip or covering note.

> *Halsburys Volume 18 Hailsham Edition. P. 262. Symington & Co. v. Union Insurance Company of Canton Ltd.* 1928 (34) Com. Cases 23, 233 C.A.
>
> "The *Insurance Slip* is in practice and according to the understanding of those engaged in Marine Insurance, the complete and final contract fixing the terms of the insurance and the premium and neither party can without the consent of the other deviate from the terms agreed on without a breach of faith. In accordance with this practice it is provided that the contract of Marine Insurance is deemed to be concluded when the proposal of the assured is accepted by the insured, whether the Policy be then issued or not. By issuing the slip the insurer impliedly agrees to issue a Policy in accordance with the slip. (Halsburys Volume 18 page 195)".

Not infrequently (as in this case) the Policy is not issued until after (a loss has occurred. I find as a fact that the parties herein intended that the Policy would be issued in accordance with the slip: viz for *Total loss only* as stated in the slip and the Policy will be rectified accordingly. **Constructive Total Loss**

It therefore remains to be considered whether in this case there was a constructive total loss and whether there was a notice of abandonment.

Counsel for the defendants conceded that there was a Notice of Abandonment. In fact the conduct of the plaintiff could not be considered in any other light.

Section 57 (2) of the Marine Insurance Act 1908 was evidently intended to reproduce substantially the statement in Lord Abinger's judgment in *Roux v. Salvador* (1836) 3 Bing. M.C. 266 Exch., that:

> "there is an absolute total loss where the thing insured is wholly destroyed or annihilated by the perils insured against or is by the same perils wholly and irretrievably lost to the assured so that it is totally out of his power or that of the underwriter to procure its arrival."

However in the case of insurance of goods under a Voyage Policy this includes the venture and not merely the goods. Consequently if the venture is frustrated by an insured peril the assured may abandon it and recover for a constructive total loss on the ground that the actual total loss of the subject matter insured appears to be unavoidable even though the goods themselves are uninjured and in his control.

> *British and Foreign Marine In. Co. Ltd. v. Sanday & Co. (1916) 1 A.C. 650*

Where the subject matter is destroyed or so damaged as to cease to be a thing of the kind insured or where the assured is irretrievably deprived thereof *there is an actual total loss.*

There is a *Constructive Total loss* where the subject matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable or because it could not be preserved from actual total loss without an expenditure which would exceed its value when that expenditure had been incurred.

In my view therefore the plaintiff, when he heard on the 28th December, 1953 that the logs could not be located at the bottom of the sea, was justified in then treating the loss as a Constructive Total loss land in giving to the defendant Company his notice of abandonment, which he did.

The relevant facts on this issue may be culled from the evidence of Victor Grant, Captain of the Punt and Philip Gouveia, the diver-Captain Grant's evidence is as follows:—

> " The Allerton is built for carrying timber. The Allerton is a Sea Punt.
>
> On the 18th I left Bartica. Mr. Bacchus' launch Voyager towed me as far as Tuschen just past Ruby on the 19th. At

that point the "Davy" an ocean going Tug took charge. It started towing the Allerton towards Georgetown on the 21st December, 1953. On reaching 3 to 4 miles out at sea off Windsor Forest we had terrible seas when the tide turned.

The tug anchored the "Allerton" 31/2 miles out at sea and went away to get fuel and return. While there, the seas pulled up the timbers, one side forced the other side off. Commenced "jacking" them. The seas were breaking all over the vessel. We tried to pull the logs back with the winch but could not. The vessel was twisted over and the sling on which the timbers were slipped out owing to the heavy seas. The timbers fell out in the seas on account of the seas pulling the "Allerton" almost capsizing it. The Punt righted itself after the timbers were gone. Mr. Bacchus had two men on board to assist me. They had to bail her as the "Allerton" had taken water. The "Davy" came back in the evening by that time the timbers had gone. The "Davy" brought the "Allerton" safely in-

On cross-examination he says that the Punt "Allerton" is useless without a launch or tug towing her. It is built to be towed by a Tug. It has no sails.

Mr. Gouveia in his evidence says:

"I had to wait for January neap tide before I could start operations. It is impossible to work in spring tide, the current then is stronger and seas rougher. The first amount of logs I brought in were 6 logs a shore. .

I came to the conclusion in July that it would no longer be a paying proposition to go salvaging for the other 11 logs. The balance of the logs were there but deep in the mud and to recover them was of great difficulty. I would not have accepted the job to go to recover those other 11 because it would be impossible to get them out from the mud as they were then too deep down in the mud."

I found as a fact also that the total cost of recovery of the whole cargo of logs was prohibitive (as in fact it turned out to be) and on this score also the plaintiff was justified in abandoning to the underwriters who were then quite within their rights in attempting to reduce their losses on the Policy by embarking on an enterprise in the hope of doing so. The defendants now seek to recover the cost of these operations from the plaintiff in one way or another: if not under the "Sue and Labour" Clause in the Policy then as Salvors. The plaintiff is entitled to recover as for a Constructive Total loss on this Policy.

Sue and Labour Clause

This action was brought on the 6th February, 1954. Sometime after action brought some of the logs were recovered. The diver said in his evidence that he did not report to the defendants that some of the logs had actually been recovered and had been deposited on the Mud Flat until April, 1954. It is clear therefore that the logs were not recovered to the knowledge of the defendants until after the action was brought, and I so find—

In *Pollurriam SS Co. Ltd. v. Young* (1915) 1 K.B. 922, the Court of Appeal laid it down as indisputable that according to the Laws of England in deciding upon the validity of clauses of this nature between the assured and the insured the matters must be considered as they stood on the date of the commencement of the action-

The decisive moment will therefore very often be that of "the notional issue of the writ" that is "the date at which the underwriters agreed to treat the matter as if it had been an issue. *Marstrand Fishing*

Co. Ltd. v. *Beer* (1936) 56 L.R. p. 173.

Ruys v. *Royal Exchange Ass. Corpn.* (1892) 2 Q.B. 135.

At page 1142 Arnould on Marine Insurance, the 14th Edition, the learned author states:

> "It was settled law before the passing of the Marine Insurance Act of 1906—and, as will appear shortly, still remains so— that an insurance on goods is a contract to indemnify the assured for any loss he may sustain by his goods being prevented, by the perils of the sea, from arriving in safety at their port of destination. If, therefore, the assured has given notice of abandonment at a time when the loss was total by the forcible dispossession of all control over his goods, he will not be precluded from afterwards recovering as for a total loss, by their being restored to him, before action brought, under circumstances which make it utterly hopeless for him ever, or within any assignable period, to procure their arrival at their destined part."

Section 60 of the Act declares: (Par. 1138) Arnould.

> "As we have seen, the Marine Insurance Act, 1906, declares that there is a constructive total loss of goods when the assured is deprived of the possession of them by a peril insured against, and either (a) it is unlikely that he can recover them, or (b) the cost of recovering them would exceed their value when recovered.

Parry v. Aberdein (1829) 9 B & Cr. 411 was a case where the goods were restored before action brought. After desertion of the ship by the crew and notice of abandonment duly given, the goods were many months after the loss delivered to the agents of the assured before action brought. This was held not to be such a restoration of the goods -as to prevent the assured from insisting on his abandonment and recovery for a total loss.

Lord Tenterden said:

> "Can any person say that the goods, although remaining in specie were not as effectually lost to the assured, when the ship was deserted as if they had then gone to the bottom of the sea or that the subsequent events produced a restoration of them to the owners?"

The subject of the Insurance must be in

> "existence under such circumstances that the assured may, if they please, have possession and may reasonably be expected to take possession of it", per Bayley, J. in

Holdsworth v. Wise (1828) 7 B & C 798.

But that case deals with a recapture of a ship and not where goods are at the bottom of the sea.

To quote Lord Abinger in *Roux v. Salvador:*

> "If the goods though imperishable they are in the hands of strangers not under the control of the assured or if by any circumstances over which he has no control they can never or will within no assignable period be brought to their original destination, in any of these cases the circumstances of their existing in specie at that forced termination of the risk is of no importance."

It took over five months to recover the 39 logs which were placed on the Mud Flat at the Molasses Wharf, Georgetown, as they were recovered from time to time—5 or 6 at a time. Mr. Gouveia however said that it would be impossible to recover the other eleven logs remaining as they were imbedded too deep in the mud and that no amount of money, not even another $2,000 (having already received $2,000) would he accept to attempt the recovery of those logs. In his opinion it would be impossible to recover them.

This clearly shows that the plaintiff was not unjustified, (as a *prudent uninsured* would have done) in treating the matter as a Constructive Total loss and abandon as the expense would be excessive.

In my judgment therefore the plaintiff was entitled when he discovered that the logs could not be located at the bottom of the sea on the 28th December, to treat the loss as a Constructive Total Loss, to give a notice of abandonment and to claim from the Insurers the amount insured in the Policy viz: $4,000.

Sue and Labour Clause

The defendant claimed that they expended $2,534.80 in recovering 39 logs which should be deducted from the sale price. Of the 39 logs redeemed, 33 were sold by the defendants for $3,125.28. This sum had not been paid to the plaintiff but has been deposited with the defendants' solicitors.

Those expenses the defendants contend the plaintiff should bear either

(a) Under the Sue and Labour Clause or

(b) as Salvage.

The defendants' counsel argued that the plaintiff were so liable because of the provisions of section 78 of the Marine Insurance Act 1906 and the Sue and Labour Clause of the Policy—that the plaintiff did nothing to satisfy the Sue and Labour Clause, and that when the defendants employed the diver (Gouveia) they were merely investigating the merits of the plaintiff's claim which turned out to be merely a *Partial loss* not insured against and that the defendants were at all times rejecting the notice of abandonment.

This Policy contains a "Sue and Labour Clause" in these terms:

> "AND in case of any Loss or misfortune it shall be lawful to the Insured their factors Servants and Assigns to sue labour and travel for in and about the Defence Safeguard and Re-

> covery of the aforesaid subject matter of the Insurance or any part thereof without prejudice to this Insurance the charges whereof the said Company will bear in proportion to the sum hereby insured."

Where there is a Suing and Labouring Clause in the Policy it seems clear that the Underwriter cannot recover expenses which he has incurred in saving or protecting the property. See *Crouan* v. *Startler* (1904) 1 K.B. 87.

Salvage:

The defendants therefore in the alternative claimed re-imbursement of those expenses as salvage. It is alleged, quite correctly, that although the provision in the Suing and Labouring Clause is of a permissive character it is nevertheless the duty of the assured and his agents, in all cases to take measures as may be reasonable for the purpose of averting or minimizing the loss.

The plaintiff incurred no such expenses in this case; the defendants after notice of abandonment acted in the protection of their own interests under the Policy.

Mr. Stafford argued that the defendants as underwriters could not divest themselves of their capacity of underwriters and claim as salvors (*Crouan* v. *Stanier).*

The defendants contended that they had always rejected the abandonment (though the defendants later disputed the claim they did not, as I find, reject the plaintiff's notice of abandonment), nevertheless they urge that having so rejected the abandonment and the plaintiff having himself abandoned, the goods then became *Res Nullius* and that consequently the defendants could, in those circumstances in relation to those abandoned goods, assume the role of salvors and claim as such.

When the location of the logs was discovered the defendants hoped to show that a Partial Loss only had occurred and defeat the plaintiff's claim. When the plaintiff's attitude continued to be belligerent, and the plaintiff would give no information or assistance and would do nothing in the matter, the defendants accepted the notice of abandonment and proceeded to demonstrate that it was (as it turned out to be) a partial and not a total loss and to refute the claim. That is the position as I find it on the facts.

If the policy is one against total loss only, and there is danger, not of a total loss, but only of a partial loss the expenses incurred to prevent such partial loss are not recoverable. Under this Clause. *(Great India Peninsular Railway Company v. Saunders* (1862) 2 B & S 266 Ex. Ch.)

> "Where there is a valid abandonment the Insurer is entitled to take over the interest of the assured in whatever may remain of the subject matter insured and all proprietary rights incidental thereto. This right of the underwriters is retrospective, operating from the moment of the casualty that gave the right to abandon, from which time they become, or are entitled to

be, complete owners of the abandoned property so far as it is covered by the insurance." (Arnould — Para. 1203)

This right the defendants purported then to pursue.

It is settled that the underwriters who have adjusted and paid for a total loss is by virtue thereof entitled to the benefit of any salvage that may eventually come to hand or the proceeds of any sale of the property that may have been made by the assured (or the master as his agent).

The defendant-underwriters however having sold the logs retained the proceeds and now claim the expenses which if they had been incurred in the first place by the plaintiff they (the defendant underwriters) would have had to bear.

The net amount of the sale becomes money now had and received to the use of the underwriters but only upon payment by them of the total loss. The defendants have not yet paid to the plaintiff on this Policy for a total loss.

The underwriters on payment for a total loss are entitled to the goods if they afterwards turn up as salvage. So the defendants herein are entitled to the proceeds of sale herein but only after payment of the sum insured on the Policy. The defendants counsel quite rightly perhaps argued that if the insurer does not accept the abandonment the property remains in the assurer (Arnould, para. 1213), and further that abandonment is not necessarily abandoned *to all the world*—that as notice of abandonment gives the underwriter opportunity of accepting it or not as he pleases and in the former case the property becomes indeed the underwriter's and brings all the privileges and liabilities but in the latter case the property becomes *Res Nullius*—So that therefore, so the argument is developed, these logs were *Res Nullius* and consequently the underwriter could in a sense divest themselves of their power of underwriters and claim as salvors.

I cannot accept this proposition. The defendants are, not unnaturally but none the less unsuccessfully, attempting to make the best of *two worlds.*

The defendants claim on this issue also fails.

Seaworthiness

Finally, the defendants contended that notwithstanding the admission of sea worthiness in the Policy and not withstanding the fact the *Punt "Allerton"* had, on the voyages in relation to the six other Marine Insurance Policies herein, been the punt used and towed by a launch — that the same was unseaworthy and outside the risk insured against, by reason of the fact that:

(a) The logs were loaded alongside and not inside the Punt.

(b) The Punt was not equipped as a *Sea Punt.*

— and —

(c) that the Punt had been separated from the launch which towed it leaving the Punt to the mercy of the raging seas,

and that therefore the plaintiff was in breach of the contract and the Marine Insurance affected herein was vitiated.

Upon consideration of the evidence as a whole I am satisfied the Punt Allerton, equipped, loaded and towed as she had been, was a Sea Punt within the contemplation of the parties and within the terms of the contract.

I find that the loading of the punt in the manner described in the evidence did not on that occasion render the punt unseaworthy and that the separation of the launch from the punt for the purpose of re-fuelling was due to the continued and exhaustive operation to save the logs as a result of the seas—and was due to the perils of the sea and within the risk insured against. *Parfitt v. Thompson et al* (1944) 14 L.J.R. p. 73.

For these reasons I have come to the conclusion that the plaintiff must succeed in this action on the Policy herein and judgment will be entered accordingly for the plaintiff against the defendants for the sum of $4,000 with costs. The counterclaims by the defendants are dismissed with costs.

Solicitors: *A. G. King* for the plaintiff; *J. Edward de Freitas* for the defendant company.

LUCK v. SHARPLES

(In the West Indian Court of Appeal, on appeal from the Supreme Court (Mathieu-Perez, Jackson and Chenery, C.J.J.) January 24, 25, 31, 1957).

Justices Protection Ordinance—Order made by magistrate without jurisdiction—Order quashed on certiorari—Order not a final adjudication—Order therefore not a decision within the contemplation of the Summary Jurisdiction (*Appeals*) *Ordinance—Claim for damages for false imprisonment—Justices Protection Ordinance, Cap. 254, s. 3* (*Major Edition of the Laws*).

The appellant Luck, a practising barrister at law was on the 15th April, 1954, convicted by the respondent Sharpies, a magistrate of the Georgetown Judicial District on a complaint by L'Cpl. of Police Strunkey made on the 8th April, 1954, for disorderly behaviour, contrary to section 139 (a) of the Summary Jurisdiction (Offences) Ordinance, Cap. 13 (Major Edition of the Laws). The respondent thereupon invoked the provisions of section 42 (b) of the Summary Jurisdiction (Procedure) Ordinance, Cap. 14, and ordered the appellant

to be discharged conditionally on his giving security in the sum of $100 with one surety in a like sum to the satisfaction of the respondent to appear for sentence when called upon within six months. The appellant then intimated to the respondent that he would not sign any bond. The appellant later left the Court.

On the 27th April, 1954, the respondent caused to be served on the appellant a document purporting to be an order made by the respondent on the 15th April, 1954. By this purported order the appellant was required to enter into a recognizance within 10 days of the date of the order and upon failure to obey the order it was adjudged that the appellant for his disobedience be imprisoned for 2 months unless and until he had remedied his default by obedience to the said order.

On the 3rd May, 1954, the appellant not having complied with the terms of the Order was taken in custody under a commitment warrant issued by the respondent and was conveyed to the Georgetown Prison. There the appellant was detained from the 3rd May, to the 29th May, 1954, on which latter date he was by order of the Acting Chief Justice, released from custody upon his signing a recognizance to appear before him on the 31st May, 1954. On the 3rd June, 1954, the Acting Chief Justice discharged the appellant and quashed the warrant of commitment.

On the 19th June, 1954, on the return of a writ of certiorari granted on the 12th June, 1954, it was ordered that the respondent's order of the 15th April, 1954, be quashed. Thereafter, on the 24th April, 1954, the appellant gave notice to the respondent of his intention 'to bring an action against him claiming $50,000 damages for false imprisonment. On action brought, Clare J., dismissed the appellant's claim.

The trial judge held that the magistrate had no jurisdiction to make the order but that as the appellant did not appeal against the order, the appellant could not by virtue of section 3 of the Justices Protection Ordinance Cap. 254 (Major Edition of the Laws) bring an action against the respondent in respect of the period of imprisonment undergone by him and flowing from the order as that order had not been quashed on appeal.

Under section 3 of Chapter 254 —

"No action shall be brought for anything done —

(a) under the conviction or order until after it has been quashed."

On appeal against the trial judge's decision —

Held: (i) The respondent had no jurisdiction to make the order.

(ii) The order made by the magistrate on the 15th April, 1954, was in no sense a final adjudication in a cause or matter and was therefore not a decision as contemplated by section 3 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 16 (Major Edition). The order could not therefore be quashed on appeal.

(iii) The order was the source from which the appellant's imprisonment flowed and the appellant had taken the proper legal steps, an appeal *not* being open to him to have it quashed by *certiorari*

Appeal allowed.

L. F. S. Burnham for the appellant.

G. M. Farnum, Acting Attorney General, (*F.W.H. Ramsahoye* with him) for the respondent.

Judgment of the Court: This appeal comes before the Court in circumstances which may be briefly related. The appellant, Joseph Rudolph Spencer Luck, who is a practising barrister-at-law, appeared on 15th April, 1954, before the respondent, Richard Gui Sharples, who was then a Magistrate of the Georgetown Judicial District in this Colony on the complaint of one Leslie Strunkey, Lance-Corporal of Police, made on 8th April, 1954, for disorderly behaviour contrary to section 139(a) of the Summary Jurisdiction (Offences) Ordinance, Chapter 13.

The respondent in his capacity as Magistrate heard and determined the complaint and adjudged the appellant guilty. The respondent thereupon invoked section 42(b) of the Summary Jurisdiction (Procedure) Ordinance. Chapter 14, which states that —

> "If, on the hearing of any complaint, it appears to the court that, although the complaint is proved, the offence was, in the particular circumstances of the case, of so trifling a nature that it is inexpedient to inflict any punishment, or any other than a nominal punishment. —
>
> (a) .....
>
> (b) the court may, upon convicting the defendant, discharge him conditionally on his giving security, with or without a surety or sureties, to appear for sentence when called upon or to be of good behaviour, and either without payment of damages and costs, or subject to the payment of damages and costs, or either of them, the court thinks reasonable,"

The respondent then ordered that the appellant be discharged after conviction conditionally on his giving security in the sum of $100 with one surety in a like sum to the satisfaction of the respondent to appear for sentence when called upon within six months. The appellant thereupon intimated to the respondent that he would not sign any bond but remained in Court until the adjournment when he left; no further step in respect of the case had then been taken by the respondent.

On 27th April, 1954, the respondent caused to be served on the appellant a document—to use the language which perhaps best describes it—purporting to be an Order made by the respondent on 15th April, 1954. The operative part of the document reads as follows:—

> "that the defendant do enter into a recognizance for this purpose within ten (10) days from the date hereof; AND if upon a copy of a minute of this Order being served upon the defendant, either personally or by leaving same for him at his last or most usual place of abode, he shall refuse or neglect to obey the same within four (4) days from the service thereof upon him, in that case IT IS ADJUDGED that the defendant, for that his disobedience, be imprisoned in the Georgetown Prison and there kept to hard labour for the term of two (2) months, unless and until he has remedied his default by obedience to the said order."

It was submitted by Mr. Burnham, counsel for the appellant, that in this "document" the words from "within 10 days" to the words "the

said order" at the end of the "document" represent an addition to the oral Order of the respondent made on 15th April, 1954, at the Georgetown Magistrate's Court. This was an issue before the Trial Judge who found that the Order as served was in terms of the oral Order pronounced. It was urged that the only evidence on this point was to the contrary, that adduced by the appellant himself. It is indeed true that the Order was in evidence but it was only put in to show the source that gave rise to the warrant of commitment. Before us counsel for the respondent did not contest this issue and the balance of probability inclines to support the appellant's contention. We find in favour of the view contended for by the appellant and are of opinion that that part of the Order was made in the appellant's absence and after the adjournment when the appellant had already left the Court.

On 3rd May the respondent issued a warrant of commitment commanding Frederick Cannon, Superintendent of Police, to take and convey the appellant to the Georgetown Prison and the Keeper of the Prison to receive the appellant and keep him to hard labour for a term of two months. On the said 3rd May, 1954, Superintendent Cannon in consequence arrested the appellant and delivered him to the Keeper of the Prison where the appellant was detained and kept from 3rd May to 29th May, 1954. On the latter date, the appellant was by Order of the Acting Chief Justice released from custody upon his signing a recognizance to appear before him, the said Acting Chief Justice on Monday, 31st May. On 3rd June, 1954, the Acting Chief Justice discharged the appellant and quashed the warrant of commitment. On 19th June, 1954, on the return to a writ of certiorari granted on 12th June, 1954, it was ordered that the Order of 15th April, 1954, be quashed. Thereafter on 24th July, 1954, the appellant gave notice to the respondent of his intention to bring an action against him, the said Magistrates/respondent, claiming $50,000 damages for false imprisonment. That action was heard by Clare, J., who gave judgment for the respondent/defendant with costs. From that decision the appellant has appealed.

After judgment and before the appeal came before us the respondent died and by virtue of an Order made on the 4th day of January, 1957, under the provisions of the Law Reform (Miscellaneous Provisions) Ordinance, his widow, Mary Winifred Sharpies, was substituted as respondent in her capacity as the executrix of the estate of Richard Gui Sharples, deceased.

In the course of his judgment the learned Judge stated that —

> "Upon the defendant refusing to give security the statute authorises the Court to do nothing more than to sentence him for the offence for which he has been convicted, namely, disorderly conduct. However, the Magistrate may still postpone sentence for eight days by remanding him in custody. In my opinion section 58 of Chapter 14 does not apply to this type of offence. It is only applicable to offences of a continuing nature. The defendant having refused to give security the Magistrate had no power to discharge him. He should not have been allowed to leave the Court in the manner described in the evidence. I am therefore of the opinion that the Magis-

> trate had no authority to order the imprisonment of the defendant Luck for two months for refusing to give security to come up for sentence. By so doing the Magistrate acted in excess of his jurisdiction and cannot claim protection under section 2" of the Justices Protection Ordinance, Chapter 254.

As respects section 58 referred to above, counsel for the respondent took the view that the Magistrate had by that section jurisdiction to enforce certain orders in manner prescribed in that section but as a result of a mistaken interpretation of the section he erroneously exercised jurisdiction as a result of which the appellant was committed to prison. The Order which was quashed was an Order under section 58 of Chapter 14 seeking to enforce the condition of the "discharge", that the appellant should sign a bond. In fact, he purported to issue the Order under section 58 which he could not properly do.

We are of opinion that the Magistrate had no jurisdiction to make this Order. It might have been thought that the Judge having so clearly disposed of the main question in issue would have proceeded to find for the appellant and award him such damages as he thought fit and proper. The Judge, however, took the view that inasmuch as the appellant did not appeal, and holding quite correctly that the writs of Habeas Corpus and certiorari did not take the place of an appeal, he reached the conclusion that as the proviso to section 3 of Chapter 254 states —

> "No action shall be brought for anything done
>
> (a) under the conviction or order until after it has been quashed".

that the action was "for something done under the conviction which was still in full force and effect not having been quashed on appeal", and he continued "this case differs from *Roach v.. Luckhoo* (*1945*) *B.G.L.R.* 99 in that there is a conviction and order from which to appeal".

Respondent's counsel stressed that the conviction against the appellant was still outstanding and that as long as it remained unassailed, just so long the appellant could not succeed for section 3 of the Justices Protection Ordinance, Chapter 254, made it imperative that the conviction should first be quashed. This contention though attractive is not sound. Now the right to appeal, as is well known, is entirely the creature of statute and is in the present instance governed by section 3 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 16, which reads as follows:—

> "Unless the contrary is in any case expressly provided by Ordinance, any person dissatisfied with a decision of a magistrate may appeal therefrom to the court in the manner and subject to the conditions hereinafter mentioned."

"Decision" is defined in section 2 of the same Ordinance as meaning—"any final adjudication of a magistrate in a cause or matter before him and includes any non-suit, dismissal, judgment, conviction, order or other determination of the cause or matter,"

Now the "Order" of which the appellant complains and which purported to be made on 15th April, 1954, was in no sense a "final adjudication" in a cause or matter before the Magistrate or any adjudication at all, it was simply an attempt by the Magistrate in excess of his jurisdiction to punish the appellant for his "disobedience" in not entering into a recognizance—that being the condition on fulfilment of which his discharge was to ensue—by imposing a term of imprisonment. The Order therefore does not fall within the definition of decision given in the Summary Jurisdiction (Appeals) Ordinance and does not provide an occasion for appeal. The Order was the source from which the appellant's imprisonment flowed and the appellant took the proper legal steps, an appeal not being open to him, to have it quashed by certiorari. When the Order of 15th April, 1954, had been quashed the appellant had effectively satisfied the requirements of the proviso to section 3 of Chapter 254. We are satisfied that in acting as he did the Magistrate committed an act in excess of his jurisdiction and the appellant is therefore entitled to damages.

Mr. Burnham on behalf of the appellant has submitted that the appellant is entitled to substantial damages. In assessing such damages the Court must look at the conduct of the appellant as it appears from his own evidence and from such other materials as are before the Court. It is clear that the appellant challenged the Magistrate to impose on him the highest penalty which the law allowed short of imprisonment. It also emerges from the appellant's evidence that even at the time he left the Court he was advised that the Magistrate could not legally act under "that section of the Ordinance." The appellant is also emphatic that up to the time of his arrest he did not think that the Magistrate would have executed the warrant. No doubt he reached the conclusion because, to use the appellant's language, "I had no doubt that the Magistrate knew that we felt that the Order was wrong." A reasonable inference, therefore, is that while the appellant was at that time by no means averse to assuming the martyr's mantle by going to prison he was still convinced that the Magistrate would not give him the opportunity of which he was anxious to avail himself. On 3rd May the appellant was arrested and taken to the Georgetown Prison where he was detained until 29th May. He suffered various humiliations while in prison and was forced to associate with criminals of a type that must have been repugnant to any man of culture and intelligence. He was also prevented for a period of, 27 days from pursuing his professional duties. On his release from prison he, as was perhaps inevitable, found himself shunned by people who hitherto had been fairly well disposed to him and with whom he had previously been friendly; he also lost his position as Honorary Secretary of the Chinese Sports Club.

The appellant has been described by the learned Judge as not being a witness of truth. This Court does not readily differ from the findings of a Judge of first instance who had the advantage of observing the manner and demeanour of a witness—an opportunity denied us. We make no comment on this finding but we wish to observe that there is nothing otherwise alleged against the character of the appellant. It is also clear that' if the Magistrate was convinced that the conduct of the appellant on 15th April was contemptuous of the Court, it was within his powers to deal with the appellant as the occasion warranted; but the Magistrate having failed to take such a step, it is not for this Court in

assessing damages to give undue weight to the behaviour of the appellant on 15th April in considering the events after his imprisonment on 3rd May.

The appellant has had his liberty restricted; as a result his reputation has suffered; he is entitled to damages which should be adequate compensation for this, for the injury to his dignity and for the discomfort he endured. The damage ensues until the determination of this case and it may be mentioned that at no time did the Magistrate have, even on the original charge, any power to order peremptory imprisonment. We are not unmindful of the conduct of the appellant before the Magistrate but however unfavourable a view we may take of such conduct that would not disentitle him to damages. In all the circumstances we think that an award of $500.00 would be adequate.

The appeal is allowed with costs and the judgment and order of the Court below reversed. There shall be entered judgment for the appellant/plaintiff on the claim for the sum of $500.00 with costs.

Appeal allowed.

Solicitors: L. L. B. Martin for the appellant.

Crown Solicitor for the respondent.

SUTTON v. FOWLER.

(In the Full Court of Appeal, on appeal from a magistrate's court for the Georgetown Judicial District, (Luckhoo, J., and Jailal, J. (ag.)) November 1, 1957).

Bastardy—Alleged putative father under fourteen years of age at date of last act of intercourse preceding conception—Whether he can be adjudged the putative father.

The appellant S. was adjudged the putative father of a child born to F. on the 8th October, 1955. The evidence was to the effect that the last act of intercourse with S. took place in January, 1955. At that time S. had not yet attained the age of 14 years.

On appeal, it was contended on behalf of S. that in law a male person could not be adjudged the putative father of a child where the last act of sexual intercourse prior to conception of the child is stated to have taken place before the male person has attained the age of 14 years.

Held: It is an irrebuttable presumption of law that a male person who has not attained the age of fourteen years at the time of the last act of sexual intercourse taking place before the conception of a bastard child cannot be the father of the child. Consequently he cannot be adjudged the putative father of the child.

Appeal allowed.

Cur. adv. vult.

J. O. F. Haynes for the appellant.

C. Wong for the respondent.

Judgment of the Court: The appellant against an order of a magistrate of the Georgetown Judicial District adjudging him to be the putative father of a bastard child born to the respondent on the 8th October, 1955.

The respondent's evidence was to the effect that the appellant first had intercourse with her in December, 1954, and that intercourse thereafter took place between them once a week until January, 1955. In February, 1955, she suspected herself to be pregnant and on this being confirmed by physical examination in April, 1955, she informed the appellant who for one year from August, 1955, gave her certain weekly sums of money.

The corroborative evidence was provided by the respondent's mother who said that the appellant when told that the respondent had said she was getting a child for him admitted to her that he had had intercourse with the respondent. The respondent's mother also confirmed the respondent's testimony of the payments alleged to be made to her by the appellant. The Magistrate accepted the evidence given by the respondent and her mother and rejected the appellant's denial that he had ever had intercourse with the respondent or had made money payments to her. The evidence disclosed that the appellant was born on the 5th March, 1941. In January, 1955, therefore, he had not yet attained the age of 14 years.

Counsel for the appellant, Mr. Haynes, submitted that the appellant being proved to be under the age of 14 years in January, 1955, as a matter of law the appellant must be presumed to be impotent and therefore incapable of being the "father" of the respondent's child even though it might be considered possible for him physically to have had intercourse with the respondent under that age.

Mr. Haynes stated that while he had not been able to discover any decided case on the point certain opinions have been expressed by judges in criminal cases and by legal text book writers which lend support to his submission. Those opinions are summarised below.

At page 629 of Hale's Pleas of the Crown it is stated that —

> "an infant under the age of fourteen years is presumed by law unable to commit rape, and therefore it seems cannot be guilty of it, and though in other felonies *malitia supplet aetatem* in some cases as has been shown, yet it seems as to this fact the law presumes him impotent as well as wanting in discretion.
>
> But he may be a principal in the second degree, as aiding and assisting, though under fourteen years, if it appears by sufficient circumstances, that he had a mischievous discretion, as well as in other felonies."

At page 212 of Blackstone's Commentaries, on the Laws of England (4th Book) there appears the following passage:—

> "A male infant, under the age of fourteen years, is presumed by law incapable to commit rape, and therefore it seems cannot be found guilty of it. For though in other felonies *malitia supplet aetatem*, as has in some cases been shown, yet, as to

> this particular species of felony, the law supposes an imbecility of body as well as mind."

Reference to Hale's statement is made at page 862 of Russell on Crime, 10th Edition, under the heading "Capacity" where the following appears —

> "The law presumes absolutely that a boy under the age of fourteen years is unable to commit the crime of rape, and, therefore he cannot be guilty of it, nor of assault with intent to commit rape; and if he be under fourteen no evidence is admissible to show that he was in fact physically capable of sexual intercourse. *This presumption, however, proceeds upon the grounds of impotency* rather than the want of discretion....."

At note (q) on page 113 of the Laws of England (Simonds Edition) under the heading "Bastardy" there appears the following:—

> "It would seem on principle that since a boy under fourteen is not in law capable of sexual intercourse he cannot have an order made against him as a putative father (*R.* v. *Waite* (1892) 29 B. 600)."

Mr. Haynes referred to the following statement appearing in the text of Rayden on Divorce (6th Edition) at page 263: —

> "The age at which a boy may be made a co-respondent has not been decided, but evidence cannot be given that a boy under fourteen years of age can be guilty of rape."

Mr. Haynes also referred to the case of *Barnett v. Barnett, Brown Intervening* (1957) 2 W.L.R. 272 where Mr. Commissioner Temple Morris held that a female child of 12 years is incapable of consent to sexual intercourse so as to render her guilty of adultery.

In *R. v. Phillips* (1839) 8 C. & P. 736, it was held that a boy cannot, in point of law, be guilty of the offence of assault with intent to commit a rape, if he is at the time of the offence, under the age of fourteen years, and that no evidence is admissible to show that, in point of fact he could commit the offence of rape.

In *R. v. Waite* (1892) 17 Cox C.C. 554, a boy under the age of fourteen was convicted for unlawfully and carnally knowing a girl under the age of thirteen, contrary to section 4 of the Criminal Law Amendment Act, 1885. On a case stated on the question of law which arose at the trial whether a male less than 14 years of age can be guilty of an offence against the above-mentioned enactment Lord Coleridge, C.J., in his judgment in which the other judges concurred, said —

> "Unless there is some very clear reason why we should think otherwise, we should hold that the Criminal Law Amendment Act, 1885, left the common law standing with reference to the point in question. As laid down by Lord Hale, 'an infant under the age of fourteen years and above the age of twelve years is not *prima facie* presumed to be *doli capax*, and therefore regularly for a capital offence committed under fourteen years, he is not to be convicted as a felon, but may be found

> not guilty: (Hale's P.C. Vol. I, page 25)'. In the authorities which have been cited it is a physical and not a mental incapacity as to which the judges would not admit evidence, it is a presumption of law that you cannot alter. Therefore, unless the Criminal Law Amendment Act has altered the common law, the prisoner cannot be found guilty of the full offence. With regard to the question of the attempt to commit the offence, he has not been found guilty of that, and therefore he cannot be convicted. The only case which in any way supports the conviction is that of *Reg. v. Brimilow* (2 Moo, C.C.) which seems to show that a person may be convicted of attempting to do that which he cannot be found guilty of doing. That question, however, does not arise here, and will have to be dealt with when it does arise. In my opinion this conviction was wrong, and must be quashed."

In *R.* v. *Williams* (1893) 1 Q.B.D. 320, on a case reserved, Lord Coleridge, C.J., in the course of his judgment said:

> "In the case the prisoner was properly indicted for a rape under section 4 of the Criminal Law Amendment Act, 1885. He was proved at the trial to be under the age of fourteen years, and therefore could not by law be convicted of rape, nor could he, in my opinion, be convicted of attempting to do that which the law says he was *physically* incapable of doing."

Hawkins, J., however, stated that he did not assent to the notion that a boy cannot be convicted of an attempt to do that which the law says he cannot do. The other judges of the Court of Crown Cases Reserved, Cave, J., Day, J. and Collins, J., concurred in Hawkins', J., opinion on that point.

Mr. Haynes further submitted that the scheme of the Bastardy Ordinance when viewed in the light of the provisions of the Infancy Ordinance, the Marriage Ordinance, the Juvenile Offenders Ordinance and the Education Ordinance, shows that the provisions of the Bastardy Ordinance were not intended to apply to a boy under the age of 14 years.

Under the provisions of section 8(c) of the Marriage Ordinance, Chapter 164, the marriage of a boy under the age of 14 years is null and void. Under the common law a male person could not lawfully contract a marriage under the age of 14 years. Under section 7 of the Infancy Ordinance, Cap. 39, a male person under the age of 14 years cannot make a valid will. Under section 17 of the Education Ordinance, Cap. 91, no person under the age of 14 years can lawfully be employed.

Mr. Haynes contended that no order for the payment of any sum of money can be made under the Bastardy Ordinance (the object of which is the provision of maintenance for a bastard child) against a person who by law is prohibited from being employed. Mr. Haynes further contended that if an affiliation order is made against a person under the age of 14 years and he fails to make any payment required thereunder he cannot be imprisoned as the provisions of Section 12(1) of the Juvenile Offenders Ordinance, Cap. 41, prohibits the imprisonment of any person under the age of 14 years.

Mr. Haynes' argument on this aspect is attractive but we prefer not to speculate as to the reason why the draftsmen of the respective Ordinance selected the age of 14 years.

Mr. Wong for the respondent submitted that the common law rule that a male person under the age of 14 years is incapable of committing rape is applicable only to the Criminal Law. He further submitted that on the authority of —

(a) *Berkeley v. Thompson* (1854) 10 A.C 45;
(b) *R.* v. *Sunderland Co.* (1945) 109 J.P. 201, and
(c) *Barnsley* v. *March* (1947) 1 A.E.R. 874,

it is clear that Bastardy proceedings are governed by practice and procedure of its own and unrelated to the practice and procedure under the Criminal and indeed the Civil Law.

In our view this latter submission by Mr. Wong does not assist his argument for the question in issue is not whether the practice and procedure applicable to the Criminal Law are also applicable to the Bastardy law but whether the *principle* of the common law referred to above is applicable to the Bastardy law. To decide that question we are of the view that it is necessary to discover the reason for the common law rule. The reason is, in our view, to be found in the statement by Hale that the law presumes a male under the age of 14 years to be impotent. Black-stone in the passage cited earlier in this judgment states the reason in slightly different language —"imbecility of body"—; Lord Coleridge, C.J., in his judgments in *R. v. Waite* and *R.* v. *Williams* cited above has put the foundation for the rule on "physical incapacity".

We are unable to see why the rule should be restricted in its application to the provisions of the Criminal Law and are of the opinion that it is applicable to proceedings under the Bastardy Ordinance. The presumption being an irrebuttable one it is clear that no evidence can be admitted in an endeavour to show that the appellant was in fact not impotent and, indeed, capable of procreation.

In view of our findings on this point it is unnecessary to consider the other grounds of appeal argued by Mr. Haynes. In the result the appeal is allowed and the order of the Magistrate set aside.

Having regard to the fact that the respondent is only sixteen years of age there will be no order as to costs.

Appeal allowed.

ASRAF ALLI v. MOSES.

(In the Full Court, on appeal from the Magistrate's Court of the East Demerara Judicial District (Stoby C.J. (Acting), Date, J. Bollers, J. (Acting) July 26, November 9, 1957).

ASRAF ALLI v. MOSES.

Evidence—Charge of indecent assault—Questions in cross examination of one witness to elicit details of conversation with another witness in absence of defendant—Object of questions to invalidate or confirm testimony of the two witnesses — Questions permissible—Answers to questions admissible and not hearsay.

On a charge of indecent assault, counsel for the defendant sought to ask certain questions of a prosecution witness, daughter of the virtual complainant who also gave evidence for the prosecution, for the purpose of eliciting what conversation, if any, relative to the matter took place between herself and the virtual complainant in the absence of the defendant in order to invalidate or confirm the testimony of the two witnesses. Similar questions for a like purpose were sought to be asked the virtual complainant by counsel for the defendant. The magistrate declined to permit counsel to ask such questions as he was of the opinion that any answers thereto would be hearsay and not admissible.

Held: The answers to such questions were not hearsay since they were directed solely to credibility. The magistrate, therefore, should have permitted counsel to ask the two witnesses those questions.

William Thomson v. The Queen (1912) A.C. 276. *Stanuel and Alexander v. The Queen* Nos. 21 and 22 of 1954, Court of Criminal Appeal British Guiana and *R. v. O'Neill,* 34 Cr. App. R. 108. referred to.

Appeal allowed.

E. V. Luckhoo for appellant. *G. L. B. Persaud,* Senior Crown Counsel, for respondent.

Cur. adv. vult.

Judgment of the Court: This is an appeal from a decision of the Magistrate of the East Demerara Judicial District who convicted the appellant on a charge of indecent assault, contrary to section 47 (a) of the Criminal Law (offences) Ordinance, Chapter 17, as amended by Ordinance No. 21 of 1932, now section 45A of Cap. 10, and ordered him to pay a fine $125 and costs $16. in default three months' imprisonment with hard labour.

Before the trial commenced, the prosecution made application for a summary trial on the ground of adequacy of punishment, whereupon the appellant was informed by the magistrate of his right to be tried by a jury, but he consented to be tried summarily. The appellant pleaded not guilty. The appellant was convicted and fined, as stated, and it is from this conviction that he now appeals.

The evidence discloses that on the 17th October, 1955, one Khirool Nesha, a woman married according to Muslim rights, was at her home at Plantation Enmore, East Coast, Demerara, when at two o'clock in the afternoon the appellant, who was an agent of the Singer Sewing Machine Company, went to her house to collect an instalment of money owing to this Company on a machine which he had sold to Nesha.

At that time there was a rumour in the village that Khirool Nesha was living with the appellant, and indeed on the 6th September, 1955, Nesha had instructed her legal adviser to write on her behalf a letter to one Moon claiming damages for slander, in which it was, alleged that

Moon stated that a man who was living with Nesha was paying for her husband's machine. It was not disputed that at the time of the appellant's visit to the house the husband of Nesha was not at home, and that she alone was upstairs in the house, and that her two children one of whom Nazmoon gave evidence, were downstairs in the yard.

Nesha gave evidence (which the magistrate believed) that the appellant, on being told that her husband was not at home, grabbed her by the hand, threw her down on the floor and tried to pull off her under garments. She shouted for her daughter Nazmoon. Nazmoon arrived, entered the house, and after seeing what was taking place she ran to her grandmother for help.

Nazmoon, aged 13 years, gave evidence on oath in which she said that she heard a scrambling, and she heard her mother shout, as a result of which she ran upstairs and saw the appellant on her mother. Subsequently the appellant left the house. All of this evidence the magistrate believed.

The defence was that Khirool Nesha had consented to the acts complained of, and had closed the door of the bedroom in which she and the appellant were when they were interrupted by Nazmoon knocking on the door. During the evidence of Khirool Nesha and Nazmoon counsel for the appellant sought to cross-examine them to elicit what conversation, if any, took place between mother and daughter immediately after the appellant left the house in order to invalidate or confirm the testimony of the two witnesses. He referred the Court to Archbold 33rd Edition at page 392. This permission was refused by the magistrate, and in his memorandum of reasons for decision the Magistrate has stated that he did not allow any questions to be put by counsel for the defence to Nazmoon in respect of any alleged conversation between them in the absence of the appellant, there being no evidence that Khirool Nesha had made any complaint to her daughter Nazmoon. Apparently he was of opinion that such evidence was hearsay evidence.

Counsel for the appellant at the hearing of the appeal abandoned four or five grounds of appeal and argued only ground 1(c) of his grounds of appeal, viz:, that the decision was erroneous in point of law because—

> 1(c) evidence was wrongly rejected by the Magistrate when he refused to allow questions to be put by Counsel for the defence in cross-examination of Nazmoon and Khirool Nesha, witnesses for the prosecution, in respect of an alleged conversation between the said Nazmoon and Khirool Nesha, in the absence of the defendant, immediately after the defendant left their home, which would have gone to the credit of the said Nazmoon and Khirool Nesha.

Nowhere on the record is it stated what were the questions that counsel desired to ask the witness Nazmoon, but counsel in this Court stated that he desired by his cross-examination to find out whether Khirool Nesha had told her daughter to say what she did in fact say in evidence. Counsel urges on this Court that had he been allowed to cross-examine both witnesses as to their conversation, if any, that took place immediately after the appellant left the home, he might have been able

to show that the mother had used her influence on the daughter in order to fabricate a story about something which had never taken place, or to throw so much doubt on the evidence of one or other of the witnesses that the Magistrate would have been unable to be sure of what did in fact take place. It is to be noted that the Magistrate did permit counsel to cross-examine Nazmoon as to whether her mother told her not to tell her father anything.

It was conceded by counsel for the Crown that a witness may be asked if he or she did not make a previous contradictory statement, and that particulars should be given as to the making of this statement and witnesses may be called to rebut his or her answers.

In the case of *William Thomson v. The Queen* (1912) 7 C.A.R. at page 276, the head note reads as follows: —

> "Hearsay evidence cannot be admitted merely on the ground that it is tendered in favour of the defendant."

In this case the appellant had been convicted by a jury at the Central Criminal Court of the offence of using an instrument upon a woman with intent to procure an abortion, and he appealed on the ground that evidence of statements made by the deceased woman was wrongly excluded. Counsel for the appellant submitted that he ought to have been allowed to have asked a certain witness for the prosecution questions in cross-examination which would have elicited—(1) that early in February, 1912, the deceased woman said she was pregnant, that she knew about procuring abortions, and had access to the instruments and intended to do it herself if she could get no one else to do it; and (2) that on 29th March, 1912, she told this witness that she had procured the miscarriage herself.

These statements, counsel submitted, were a necessary part of the defence, and ought on that ground to have been admitted. Counsel for the Crown, in his reply, submitted that the statements made by the deceased woman were rightly excluded as hearsay, and there is no principle of law on which they could be admitted. If the argument that any defence may be set up irrespective of the rules of hearsay evidence were right, then the same kind of evidence must be admitted for the prosecution. He urged that it would be dangerous to admit statements such as those made by the deceased in this case, because in every case of death from abortion an accomplice might come to swear that the deceased had said that she had done it herself. He went on to point out that exclusion was in favour of the prisoner, for in most cases the exclusion was against the prisoner. The Court of Criminal Appeal held that these statements were inadmissible. The Lord Chief Justice Lord Alverston, in his judgement stated:—

> "Secondly, it is said that a statement by the deceased woman early in February that she intended to procure a miscarriage was wrongly excluded. There can be no doubt that this statement was inadmissible. But it is further said that five days before her death she said to Grace Murray that she had procured a miscarriage and had done it herself—which statement was repeated by Grace Murray to the appellant. There is no

principle upon which this statement is more admissible than any other hearsay. No doubt the rejection of such evidence is on the whole greatly in favour of accused persons. If this hearsay could be admitted there would be no necessity for special rules as to dying declarations and declarations against pecuniary or proprietary interest. There is no rule that a defendant is entitled to prove anything by way of defence, even if it involves the admission of hearsay evidence."

The Lord Chief Justice went on to say —

"In this case there was no reason for straining any existing rule in order to admit evidence in favour of the defendant, for the defendant was allowed to say in the hearing of the jury what Grace Murray had repeated to him as statements of the deceased. In our opinion the ruling of Phillimore J. rejecting the evidence of Grace Murray on this subject, was right, and it may be that the evidence given by the appellant of the statements made to him by Grace Murray would not have been admitted, if objected to by the prosecution. "

It will be readily seen that in Thompson's case the witness was being asked questions as to what a dead person had told her, and consequently the jury would be deprived of the opportunity of the witness's evidence being tested by effective cross-examination. As the statement alleged to be made by the deceased was not a dying declaration the evidence was a clear infringement of the hearsay rule.

In the case of *Albert Stanuel and Joseph Alexander* v. *The Queen* Nos. 21 and 22 of 1954, the Court of Criminal Appeal held that statements made by other accused persons who had been charged jointly with the appellants for murder, and against whom the Attorney General had entered a *nolle prosequi* in their favour after their committal, were rightly excluded by the trial judge when counsel for the appellants had sought to get those statements admitted when cross-examining the Police witnesses who took those statements. The Court of Criminal Appeal considered the case of *Thomson v. The Queen* referred to above, and held that it is now well established that statements made in the absence of the accused persons are not admissible against them or for them. An application for leave to appeal to the Privy Council was refused. The distinction between the case of Stanuel and Alexander and the present one is that in the former the persons who made the statements were available as witnesses and it was sought to obtain evidence of statements made by them without giving the Crown the right to cross-examine them while in this case the cross-examiner was not endeavouring to obtain hearsay evidence but seeking to obtain evidence of inconsistent statements.

In Phipson on Evidence at page 498 the following passage appears:

"The Court has condemned a course of cross-examination in which counsel makes charges against a witness for the prosecution and does not call evidence to substantiate them. This, however, cannot be an objection to cross-examination as to credit on matters which cannot be contradicted by calling evidence (*R. v. O'Neill,* 34 C.A.R. 108.)

> "On the other hand, an incautious cross-examination may let in matter which would be inadmissible in chief, e.g., the independent portions of a document used to refresh the witness's memory (*ante*, 491; *post* 500). So, questions as to the contents of a document, put to a witness called merely to prove handwriting, let in the whole against the cross-examiner (id.); and if a plaintiff's witness be asked in cross-examination, "Didn't you meet A, and didn't he tell you so-and-so?" the plaintiff in re-examination may ask what A really did say, Although he could not do so in chief because the defendant was not present. If it is imputed in cross-examination that the witness has recently fabricated his story, this will, in rebuttal, let in proof that he told the same story at an earlier date (*Flanagan v. Fahy*, [1918] 2 Ir. R. 361, 374, 388, C.A.; *post* 512)."

In O'Neill's case (*supra*), it was held that "It is improper for counsel to make a charge against the police or any other witness by way of defence, as distinct from cross-examining the witness as to credit, if he does not intend to call his client to give evidence to support the charge."

The Lord Chief Justice Lord Goddard stated in his judgment:—

> "It is one thing to cross-examine a witness about credit, in which case one is bound by the answer of the witness. It is quite wrong and improper conduct on the part of counsel to make a charge against the police or against any other witness by way of defence—because, of course, it would have been a defence if the statements which were the principal evidence against the applicants had been extracted from them by improper means—if he does not intend to call his client to give evidence to support the charge.
>
> "In this case, a violent attack was made on the police. It was suggested that they had done improper things, and indeed, Ackers repeats that suggestion in his notice of appeal. The applicants had the opportunity of going into the box at the trial and explaining and supporting what they had instructed their counsel to say. They did not dare to go into the box, and, therefore, counsel, who knew that they were not going into the box, ought not to have made these suggestions against the police. *It is one thing to cross-examine properly and temperately with regard to credit*, though it is very dangerous to do so unless you have material on which to cross-examine, and with which you can confront the witness."

Generally speaking, a witness in the witness-box is not allowed to repeat what he heard another person say. Thus the rule arises that hearsay is no evidence, save and except for well-defined exceptions to the rule. Phipson observed that hearsay was sometimes used in a wider sense and confined his rule to "Oral and or written statements" made by persons *not* called as witnesses to prove the truth of the matters stated. If Phipson's definition of the hearsay rule is adopted it would be seen that statements made by one witness to another witness in the absence of the accused person, as in this particular case would not be an exception

to the rule, but would clearly be outside of the rule. The more recent definition by Baker (The Hearsay Rule 1950) states "Hearsay consists of out-of-court assertions of persons who are not called as witnesses offered as proof of the truth of the matters contained therein." In this case, however, the out-of-court assertions which counsel for the appellant sought to bring out in cross-examination were by persons called as witnesses.

Nokes on his "Introduction to Evidence", 1952 Edition at page 216, states that both Phipson and Baker exclude any statement by A in the witness-box of what C, another witness at the same trial, said out of Court, from the meaning of hearsay; probably because C's previous statement would usually be proved by A, for the purpose of discrediting C and not for the purpose of proving the truth of the statement.

Sir Roland Burrows, the learned Editor of Phipson on evidence, 1942, at page 205 has confined hearsay to "statements made by persons who are not parties and are not called as witnesses."

In Wills on the Law of Evidence, at page 149 the following passage appears: —

> "The rule against hearsay applies in strictness to the proof of the relevant facts in the course of cross-examination just as much as to their proof by examination in chief. That is to say, a party is not entitled to prove his case merely by eliciting from his opponent's witness in cross-examination not his own knowledge on the subject, but what he has heard others say about it, but has not verified it for himself. The application of the rule is however obscured by the fact that a party is entitled to test the credibility of his opponent's witness, and for that purpose to question him, inter alia, as to statements made to him by other persons, and his own conduct thereon, so that the party by whom the witness was called is not entitled to exclude the question, only to comment to the jury on the effect and value of the witness's answer (c). Similar considerations apply with even greater force to the witness's admissions in cross-examination of his own previous statements about the relevant facts. Although not strictly admissible as evidence on the issue (unless he is a party in which case they would be admissions) they are excellent means of testing the credibility of his evidence."

In Powell's Law of Evidence, 10th Edition, the authors state—

> "Great latitude is permitted in cross-examination, and a cross-examiner will not be stopped by the court unless the question is manifestly irrelevant and calculated neither to weaken the examination in chief nor to impeach the credit of the witness. Questions clearly irrelevant in examination in chief may be relevant and of "the highest importance when asked in cross-examination. In cross-examination, then, a witness (s) may be asked any question, however irrelevant the matter in issue, the answer to which may tend to affect his credit; but he will not always be obliged to answer such question, and if he does answer he cannot as a rule be contradicted."

In Roscoe's Criminal Evidence it is put this way at page 151:

> "A witness may be questioned not only on the subject of inquiry, but on any other subject, however remote, for the purpose of testing his credibility, his memory, his means of knowledge, or his accuracy. Whether or not the question put will have that effect will depend on the circumstances of the case, and frequently also on information which is in possession of the cross-examiner only; judges, therefore, are in the habit of granting considerable licence to counsel in this matter, from the implicit confidence which is placed in them that they will not turn the power, which is put in their hands for the purposes of justice, into an instrument of oppression. The moment it appears that a question is in course of putting which does not either bear on the issue, or enable the jury to judge of the value of the testimony, it is the duty of the court to interfere, as well to protect the witness from what then becomes an injustice or an insult as to prevent time from being wasted."

Expression to this passage is given by the Evidence Ordinance, Chapter 25, Section 77 of the Laws of the Colony which reads as follows:—

> "When a witness is cross-examined, he may in addition to the questions hereinbefore referred to, be asked any questions which tend —
>
> (a) to test his accuracy, veracity, impartiality or credibility, or
>
> (b) to shake his credit, by injuring his character;
>
> but the judge has the right to exercise a discretion in those cases, and to refuse to compel any of those questions to be answered, when proof of matter suggested would not in the opinion of the judge, affect the accuracy, veracity, impartiality, credibility, or credit of the witness in respect of the matter as to which he is required to testify."

The following section makes it clear that the witness's answer must be taken as final, and no evidence can be given to contradict him except in certain cases:—

> "78. When a witness under cross-examination has been asked and has answered any question referred to in the preceding section, no evidence can be given to contradict him, except in the following cases: —
>
> (a) if a witness is asked whether he has been previously convicted of any felony or misdemeanour, and denies or does not admit it; or refuses to answer, evidence may be given of the previous conviction; and,
>
> (b) if a witness is asked any question tending to show that he is not impartial and answers it by denying the facts suggested, he may, by permission of the judge, be contradicted by evidence of those facts."

It follows, therefore, that in the instant case, counsel for the appellant was not in a position to lead evidence in rebuttal if an incautious cross-examination of the witnesses Nazmoon and Khirool Nesha had led to damaging answers as, the appellant being absent and there being no other witness present, counsel would have no information as to the substance of the conversation that took place between Nazmoon and her mother. Nevertheless, he might have obtained answers favourable to the appellant Which would have thrown doubt on the version of the incident given by the two witnesses. Those answers, as we have shown, could not be treated as hearsay since the questions were directed solely to credibility-

In our view, therefore, the learned Magistrate erred when he excluded evidence under cross-examination as to the conversation that took place. We are unable to say that he would have reached the same conclusion had this evidence been admitted and as a result the appeal must be allowed and the conviction and sentence set aside. Costs to the appellant in the sum of $25: (Twenty Five) Dollars.

DE FREITAS v. COMMISSIONER OF INCOME TAX.

(In the Supreme Court, In Chambers (Luckhoo, J.) October 19, 23. November 9, 1957).

Income tax—Additional assessment—Request for particulars of all properties, investments and other assets—Whether request can validly be made in the events which have happened—Whether purposes for which particulars required must be disclosed to taxpayer—Income Tax Ordinance, Cap. 299, ss. 40 and 50.

On the 31st October, 1955, the plaintiff F. was assessed for income tax in respect of income for the year of assessment 1954, and on the 13th December, 1955, he paid the tax assessed in full. On the 9th October, 1956, F. received a request from the defendant the Commissioner of Income Tax to furnish him with particulars of all properties, investments and other assets owned by him and his wife on the 31st December, 1954. On the 4th February, 1957, F.'s solicitors wrote the respondent asking the purpose of his enquiry. On the 11th February, 1956, the respondent replied that the particulars he requested were for the purpose of the Income Tax Ordinance, Cap. 299 and directed F.'s attention to the provisions of section 50 of the Ordinance (which relate to additional assessments) but did not state for which purposes of the Ordinance he required it. F. took out an originating summons for the determination of the construction to be put upon the provisions of section 40 (2) of the Ordinance and of the question whether in the events which have happened it was incumbent upon him to supply the particulars requested at all or without the respondent stating for which purposes of the Ordinance he required the particulars.

Held: In the events which have happened the defendant could require F. to furnish him with the particulars he requested but not without stating for which purposes of the Ordinance he required the particulars.

J. H. S. Elliott for the plaintiff.

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

Cur. adv. vult.

Luckhoo, J.: The plaintiff applied by way of originating summons for the determination of the following question of law:—

"whether upon the true construction of subsection (2) of section 40 of the Income Tax Ordinance, and in the events which have happened, the Defendant may by notice in writing require the Plaintiff to furnish him with the particulars requested by the Defendant in his letter to the Plaintiff dated the 9th October, 1956, relating to properties, investments and other assets owned or held by the Plaintiff or his wife on the 31st December, 1954, at all or without stating for which purposes of the said Ordinance the Defendant requires the said particulars, when the Plaintiff was assessed for the year of income 1954 on the 31st October, 1955 and paid the tax assessed thereon on the 13th December, 1955".

On the 31st October, 1955, the plaintiff was assessed for income tax in respect of income for the year of assessment, 1954, and on the 13th December, 1955, he paid the tax as assessed in full.

On the 9th October, 1956, the plaintiff received a request from the Commissioner of Income Tax to furnish him with certain particulars in the following terms:—

"Will you please let me have a complete and detailed statement of all properties, investments and other assets and their respective costs, including **each at bank** and **in hand,** owned by you or your wife personally or jointly with others and whether in your or your wife's own name or in the name of a nominee on the 31st December, 1954.

2. In the case of cash at bank, please state whether at General Post Office Savings or other local bank. You should state whether the account is in your or your wife's name and give in respect of each account, the balance at the 31st December, 1954.

3. In the case of properties, please give in respect of each:—

(a) date of purchase;
(b) from whom purchased;
(c) purchase price;
(d) name of agent through whom purchased.

4. In case of any assets held in the name of a nominee, kindly give full name and address of nominee.

5. In case you sold any properties in 1954 kindly state:—

(a) sale price;
(b) date of sale;
(c) name of purchaser; and
(d) name of selling agent, and amount of commission paid.

6. If you hold or held any properties, investments and other assets as the nominee of any other person who holds the beneficial interest therein, kindly give full particulars thereof, with respective values and the name and address of the person on whose behalf you hold or held them.

7. If you had any liabilities at the 31st December, 1954 kindly furnish me with a detailed list of creditors and the amounts owed to them on that date".

On the 4th February, 1957, the plaintiff's solicitors, Messrs. Cameron and Shepherd wrote to the Commissioner asking the purpose of his enquiry.

On the 11th February, 1957, the Commissioner replied to that letter as follows:—

"I have for acknowledgment your letter dated 4th February, 1957.

2. I would direct your attention to sub-section (2) of Section 40, which provides that I may require any person to furnish me within a specified time any particulars I require for the purposes of this Ordinance with respect to the…..assets and liabilities of such person and of his wife. So far as I am aware the Courts of this country have not interpreted this section to be applicable only where no assessment has been raised by the Commissioner. In view of this I am unaware of any authority supporting the advice which you state has been given to Mr. deFreitas.

3. I would point out that a person is not normally required in the Return which he is required to submit under subsection (1) of section 40 to give particulars of his assets and liabilities, so in my view the requirement of sub-section (2) is to be considered as quite separate and distinct from that of sub-section (1).

4. I am to point out further that Section 50 provides that additional assessments can be raised within a specified period.

5. Please be informed that in accordance with subsection (2) of Section 40, the information requested is for the purpose of the Income Tax Ordinance. I would remind you that under the provisions of Section 4 of that Ordinance I am prohibited from using any information submitted to me for any other purpose.

6. I shall be pleased to consider any request to be allowed a reasonable time within which to furnish the information."

To that letter plaintiff's solicitors replied **inter alia** in the following terms:—

"We asked you in our letter of the 4th ulto., for what purpose of the Income Tax Ordinance you required the information set out in your letter of the 9th October, 1956, but in your reply you beg the question by stating that the information requested is for the purposes of the Ordinance.

The purposes of the Ordinance are surely the assessment of tax and its collection, and you can hardly require the information

for either of these purposes as our client has already been assessed and paid tax for the year in question.

We note your reference to section 50 but your powers under that section are limited and our client is advised that the Ordinance does not authorise you to issue "fishing" interrogations."

Except as later in this judgment referred to, it is unnecessary for the purposes of this application to set out the further correspondence passing between the plaintiff's solicitors and the defendant.

Mr. Elliot, counsel for the plaintiff contended that the provisions of sub-section (2) of section 40 of the Income Tax Ordinance Cap. 299 must be construed in relation to those of sub-section (1) of that section and are applicable only to cases (a) where no return has been submitted to the Commissioner, and (b) where a return has been submitted, but the Commissioner is not satisfied that such return is true and correct and has not proceeded to make an assessment.

The Solicitor General contended that the provisions of sub-section (2) of section 40 are general in application and can be invoked not only in the cases mentioned by counsel for the plaintiff but also even where an assessment has been made and the tax assessed paid or at any time within 5 years after expiration of the year of assessment, and are not limited by the provisions of sub-section (1) of section 40.

What is the correct approach to be taken in construing the provisions of sub-section (2) of section 40? It was held by Lord Davey in **Canada Sugar Refining Co. -v- R (1898) A.C. 741** that "every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as, so far as possible, to make a consistent enactment of the whole statute or series of statutes relating to the subject matter." In **Butcher -v- Poole Corporation** (1942) 2 A.E.R. 572, du Pareq LJ. held that "it is, of course, impossible to construe particular words in a statute without reference to their context and to the whole tenor of the Act."

As has been stated, and in my view correctly stated, in the letter of the plaintiff's solicitors dated 19th March, 1957, the purposes of the Ordinance are the assessment of tax and its collection. This would, of course, include any additional assessment of tax and its collection.

Under the provisions of section 50 of the Ordinance, the Commissioner is empowered to make additional assessments within the year of assessment or within five years after the expiration thereof. Such a power is not exercisable **in vacuo**. The Commissioner must have some material upon which it can appear to him that a person liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged.

Having regard to the provisions of the Ordinance as a whole it seems to me that the provisions of sub-section (2) of section 40 are not limited in their application as contended for by counsel for the plaintiff, but are of such general application as contended for by the Solicitor General.

It may be of interest to note the provisions of section 42 of the Ordinance. Those provisions were enacted in 1951 and are very wide in their terms in that the Commissioner is empowered to require any person to give him information for the purpose of enabling the Commissioner to make an assessment or to collect tax, (vide decision of Stoby, J. in **Barclay's Bank D.C.O. and Royal Bank of Canada -v- The Commissioner of Income Tax** No. 4 of 1954 delivered on the 25th May 1954.

Mr. Elliot further contended that even if section 40 (2) of the Ordinance is of general application, it is incumbent upon the Commissioner to inform the plaintiff of the specific purpose for which he requires the information requested, and that the Commissioner cannot simply state that he requires the information for the purposes of the Ordinance. It is stated at page 122 of Maxwell. Interpretation of Statutes (10th edition) that "enactments which confer powers are to be so construed as to meet all attempts to abuse them, either by exercising them in cases not intended by the statute, or by refusing to exercise them when the occasion for their exercise has arisen." This is in my view a correct statement of the law on the point and Mr. Elliot's contention is in my opinion sound.

The Solicitor General, however, contended that the Commissioner at paragraph 4 of his letter in reply to that of the plaintiff's solicitors dated 4th February, 1957, has in effect stated that he requires the information requested for the purposes of section 50 of the Ordinance—that is for the raising of an additional assessment in respect of the year of assessment 1954. The relevant paragraph is as follows:—

> "I am to point out further that Section 50 provides that additional assessments can be raised within a specified period".

However, in the letter received by the plaintiff's solicitors on or about 27th March, 1957, from the Commissioner it is stated **inter alia:**—

> "2. I am indeed surprised to learn that my confirmation to you that the information required from your client is for the purposes of the Income Tax Ordinance are insufficient to satisfy your client's advisers of his obligation under the provisions of the Income Tax Ordinance to furnish the information."

Reading the correspondence passing between the parties as a whole I am of the view that the Commissioner has not in fact informed the plaintiff of the specific purpose for which he requires the information requested.

The answer to the first part of the question for determination is in the affirmative and to the second part in the negative.

No order as to costs.

Solicitors: **H. C. B. Humphrys** for the plaintiff;

P. M. Burch-Smith, Crown Solicitor (ag.), for the defendant.

CODDETT v. THOMAS

(In the West Indian Court of Appeal, on appeal from the Supreme Court of British Guiana, (Mathieu-Perez and Gomes C.JJ. and Stoby, C.J. (ag.)) November 25, 29, 1957).

Title to immovable property—Transport—Indefeasibility—Impeachable in certain circumstances—When earlier title indefeasible qua a later title—Deeds Registry Ordinance, Cap. 32, s. 23.

A portion of land already included in the transport of the respondent T. and belonging to T. was transported to the appellant C. This was due to the deliberate act of the Sub-Registrar in changing the boundaries set out in an advertisement submitted to him relative to a transport to be executed in favour of C. of land adjacent to that owned by T. Neither T. who was resident out of the Colony nor her attorney had any notice of the transport to C. T. later brought an action against C. for a declaration claiming that she was entitled to possession of that portion and damages for trespass. At the hearing of the action the Sub-Registrar who testified, admitted that he was in error in making the change of boundaries. Judgment was given in T.'s favour and C. appealed.

It was contended on C.'s behalf that by virtue of section 23 of the Deeds Registry Ordinance, Cap. 32, he was the owner by transport of the disputed portion of land and that he therefore obtained an indefeasible title and, further, that his transport being later in point of time must prevail.

Held; (i) The element of indefeasibility which a purchaser obtains when he receives his title is derived or flows from adherence to the statutory procedure prescribed which includes the requirement that an owner of property who wishes to transport it must lodge his title with the Registrar, together with the affidavits of seller and purchaser. As T. lodged no title or affidavits the statutory procedure prescribed was not followed when the portion of land in dispute was conveyed to C.

(ii) A later title to land is not indefeasible *qua* a prior one which was also indefeasible unless the statutory procedure prescribed is followed.

Appeal dismissed.

J. H. S. Elliott and *J. A. King* for the appellant.

S. D. S. Hardyal for the respondent.

Cur. adv. vult.

Judgment of the Court: The facts of the case are plain and do not admit of dispute. It is apparent that a portion of land already included in the transport of the respondent and belonging to the respondent was transported to the appellant. This was due to the deliberate act of the Sub-Registrar for the County of Berbice in changing the boundaries set out in an advertisement submitted to him relative to a transport to be executed in favour of the appellant of land adjacent to that owned by the respondent. In his evidence at the trial the Sub-Registrar stated:

> "I have since learnt from my own investigation of the title that the alteration should not have been made"; and "having seen the title of the plaintiff I was more than satisfied that the alteration should not have been made." "From my own investigation I am saying that the title of Coddett contains more land than the title held by his predecessor Hunter. Any research would show at a glance that Coddett got more land than he is entitled to."

This alteration was done without the knowledge and consent of the respondent who had no notice thereof, the result being that the piece of land in dispute is now included in the transports of both the respondent and the appellant. The respondent filed an action claiming a declaration that she is entitled to possession of that portion and damages for trespass. Judgment was given in her favour and the appellant has appealed.

It was contended on behalf of the appellant that, by virtue of section 23 of the Deeds Registry Ordinance, Chapter 32, he was the owner by transport of this disputed portion of land and that therefore he has obtained an indefeasible title and further, as his transport is later in point of time, that transport must prevail. No authority has been submitted for the latter proposition.

The respondent is a resident of the United States of America and it is manifest that neither she nor her attorney had any notice of this transport. In *Abdool Rohoman Khan v. Boodhan Maraj et al.* 1930 B.G.L.R. 9 and other local cases, it was held that the advertisement of a transport is not equivalent to actual notice. We agree with that view.

It is submitted that a transport confers on the transportee an indefeasible title. In our view that quality of indefeasibility does not render the transport unimpeachable in every circumstance; for example, possession for the statutory period may defeat it even against an innocent purchaser and if there be an error or omission in the transport it can be rectified. The situation here, however, is not merely a case of error or omission but a case of a deliberate and an unwarranted act on the part of an officer in the purported execution of his duty. The question is — Can the appellant's transport be impeached on that ground?

The Rules made under the provisions of the Ordinance require an owner of property who wishes to transport it to lodge his title with the Registrar. The element of indefeasibility which a purchaser obtains when he receives his title is derived or flows from adherence to the statutory procedure prescribed, including the voluntary act of the seller in surrendering his own title, together with affidavits of purchaser and seller. Here the respondent lodged no title or affidavits and yet a portion of his property has been conveyed.

The conveyancing system of this Colony does not require a register of titles to be kept; in other systems the law ordains that a register must be kept, thus enabling persons to see at a glance without further enquiry the title to land of those with whom they are dealing. In those systems once a proprietor is on the register his title, (subject to certain statutory exceptions, is indefeasible; one of those exceptions is a "prior grant". Here there is no statutory register: deeds are registered but there is no statutory provision appropriate to this case which states that a later transport should take priority over an earlier one, and we can see no reason, and none was advanced, why a later title to a particular piece of land should be indefeasible *qua* a prior one which was also indefeasible, unless the statutory procedure indicated above is followed. It is quite apparent the proper procedure was not followed in this case and in the absence of express statutory provision to the contrary it would be against

the dictates of justice to allow the respondent to be victimised by the unauthorised and illegal act of the officer in question.

The appeal is dismissed with costs.

Solicitors:
H. C. B. Humphrys for Appellant.
J. E. Too-Chung for Respondent.

ALLEYNE and *anor* v. WREFORD and *anor*.

(In the West Indian Court of Appeal, on appeal from the Supreme Court of British Guiana (Mathieu-Perez, Holder and Gomes C. JJ.) December 6, 9, 12, 1957).

Libel—Defamatory matter published in letter—Mistaken belief on part of writer of letter as to certain facts on which defamatory matter based—Defence of qualified privilege not available—Occasion not privileged.

In all cases of libel in which the defendant relies on a plea of qualified privilege the question whether the occasion was or was not privileged does not depend on the defendant's belief that he was discharging a duty or that he had a legitimate interest in making the communication, but on whether he was right or mistaken in that belief. Where the defendant forms mistaken belief and as a result thereof creates in his own mind an occasion to give vent to them and then does so, the occasion is not privileged.

Appeal allowed.

P. A. Cummings and *L. F. Collins* for the appellants.

J. H. S. Elliott and *J. A. King* for the respondents.

Cur. adv. vult.

Judgment of the Court: This appeal arises out of an action for libel brought by the appellants against the respondent's in respect of a letter dated 17th March, 1953, written by the respondents to Messrs. Peter Lunt & Co. Ltd. of England.

The letter complained of is as follows:—

"Messrs. Peter Lunt & Co. Ltd.,
Aintree, Liverpool 10,
England.

17th March, 1953.

Dear Sirs,

We are very sorry that' we were forced to cancel order No. 5126 for "Little Peter White Floating" Soap ordered through our London Agents Messrs. Adam Pearson & Co. Ltd. The Controller of Supplies has taken a very strong action and has cancelled Import Licence U.K. 5-0030/53 along with all licences for this type of soap at that time. This licence was

taken out for us by your agents the Global Agency, Georgetown, and they advised that this soap was purely a toilet soap. This cannot be the case as the packets, are clearly marked laundry soap.

The unfortunate thing about the issuing of these licences is that the issuing clerk of the Control Authorities is very closely related to the manager or owner of the Global Agency. To make things a little more unfortunate our Mr. S. G. Wreford is a member of the Central Advisory Committee to the Control Authorities, and he is therefore forced to agree that these licences which were obtained under very suspicious circumstances should be cancelled at once, hence our cable to Adam Pearson on the 12th March instructing them to cancel order at once.

We enclose letter received today from the Global Agency. We think it is very unfortunate that they will not accept the loss of this business in good graces and consider it is unfortunate that a firm of your standard should be brought in to this very suspicious transaction.

Thanking you,

Yours faithfully,
S. WREFORD & CO. Ltd
S. G. Wreford,
Director."

The issuing clerk and the manager or owner of the Global Agency referred to in the letter is the male appellant and female appellant respectively-

The appellants complain that the respondents published the said letter falsely and maliciously of and concerning them as private individuals and in the way of their occupations and callings and by the said letter and words, the respondents meant and were understood by those to whom they were published to mean:—

(i) that the appellants had conspired together to obtain import licences for the soap by wilful false pretences and that they had obtained such licences fraudulently by false pretences;

(ii) that by such acts they had violated the law governing the issue of such licences;

(iii) that the male appellant being a clerk entrusted by the Government of British Guiana or by the Commodities Control Authority, with power to issue such licences in proper cases, had wilfully betrayed that trust and abused his position by wilfully and corruptly issuing such a licence improperly to his wife and other licences to her or other persons:

(iv) that the female appellant had wilfully and barefacedly misrepresented to both respondents and to the Controller

of Supplies that the soap was purely a toilet soap, whereas it was not;

(v) that the female appellant knowingly took part in such frauds and criminal illegalities;

(vi) that the conduct of the appellants in this matter was so monstrous and dishonest that no decent firm in England or British Guiana or the respondents could possibly associate themselves with it or them in any way without being besmirched and damaged;

(vii) that the female appellant was thoroughly unfit to be or remain the agent of the exporter or of any other decent and honourable merchants;

(viii) that the male appellant was also thoroughly unfit to be employed by the Government of British Guiana or by the Commodities Control Authority.

In their defence the respondents admitted publication but said that they—

(i) prepared and issued the said letter in the belief that every statement therein contained was true and without malice towards the applicants and with the honest desire to protect the interests of the respondents and the interests of Peter Lunt & Co. Ltd., who had a corresponding interest with the respondents in the matters therein referred to, and was reasonably necessary and proper for the protection of the said interests and that the occasion of the alleged publications is therefore privileged;

(ii) insofar as the words complained of consist of allegations of fact, they are true in substance and in fact and insofar as they consist of expressions of opinion, they are fair comment made in good faith and without malice upon the facts which were matters of public interest and that the words complained of are true in substance and in fact.

The learned trial judge found, **inter alia,** that —

(i) the words published in the letter complained of are capable of a defamatory meaning and are in fact defamatory of the appellants;

(ii) the licence of the respondents was not cancelled; the Global Agency had not advised the respondents that the soap was purely a toilet soap and that the issuing clerk was not John Alleyne, the male appellant.

He concluded that having regard to the inaccuracies contained in the letter written by the respondents, the plea of justification failed and although they were written without malice the words contained a misstatement of fact and are not protected by the plea of fair comment.

The trial judge held that the defence of qualified privilege was established on the following grounds:—

"1. That the respondent Sylvanus Wreford had an interest as consignee of the goods and as a member of the Advisory Committee, which he had to protect.

2. There was a community of interest between the consignee Wreford & Company Ltd. and the consignors Peter Lunt & Co. Ltd.

3. Sylvanus Wreford showed no malice and he had good and valid reasons to be suspicious. The statements were honestly made.

4. The untrue statements in the letter do not show a reckless state of mind and there is no evidence of malice".

He accordingly gave judgment for the respondents against the appellants jointly and severally. Against this judgment the appellants have appealed.

The notice of appeal contains several grounds but before us the arguments of both counsels were confined to the question of qualified privilege.

Counsel for the appellants contended that the occasion was not a privileged occasion, and, even if it were, that the privilege was destroyed by malice. He submitted that the occasion was not privileged because it was created by the respondent and was based on his misconception of the situation. In support thereof he maintained that the letter contained false and inaccurate statements, for example —

(a) that the Commodities Control Authority had cancelled import licence U.K. 5-0030/53 along with all licences for this type of soap at that time.

This is incorrect as no licences were in fact cancelled.

(b) that the Global Agency had advised that this soap was purely a toilet soap.

This also is incorrect and in point of fact Wreford himself stated—

"The Global Agency did not actually tell me that the soap was purely a toilet soap. I had no conversation with them";

and

(c) that the licences were issued by the male appellant.

This also is incorrect. The judge found as a fact that the above three statements were inaccurate.

Counsel in the course of his argument emphasised, that having regard to the relationship existing between the male and the female appellants, their respective occupations at that time were of such a nature as may have excited suspicion **vis-a-vis** the issue of licences, yet the fact is that the male appellant had nothing to do directly with their issue and they were in fact issued by another clerk. With this we agree.

Counsel for the respondents submitted that both the occasion and the communication were privileged and in any event there was no malice. He urged —

> "that the occasion was privileged because of the contract subsisting between Wreford's and Lunt & Co. Ltd., from which sprang a common interest in the delivery of the goods and the payment of the purchase price even to the extent of by-passing the agent";

and further, in regard to the communication, he submitted that

> "even if the cancellation of the order was unjustified to Wreford's knowledge a communication made relating to the cancellation of the order would be a communication made upon a privileged occasion and that any communication from Wreford to Lunt Ltd. was a privileged one".

In support of their contentions counsel referred to several authorities as to the meaning and application of the law relating to qualified privilege but we consider that the principles are fully and correctly stated in the following passages from Clerk & Lindsell on Torts and Gatley on Libel and Slander :—

> "In general an action lies for the malicious publication of statements which are false in fact and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice which the law draws from unauthorised communications, and affords a qualified defence depending upon the absence of actual malice. If fairly warranted by any reasonable occasion or exigency and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits". A more recent definition, possibly to be preferred as it refers to a duty or interest to make the communication rather than to an interest in its subject-matter, is to be found in the speech of Lord Atkinson in Adam v. Ward: "A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the 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".

There are three elements necessary to establish the defence of qualified privilege: the occasion must be fit, the matter must have reference to the occasion, and it must be published from right and honest motives. (Clerk & Lindsell on Torts 11th Edition page 771): and —

> "In all cases in which the defendant relies on a plea of qualified privilege, whether on the ground of duty or of interest, such duty or interest must exist in fact. It is not sufficient that the defendant honestly and reasonably believed that he was discharging a duty or that he had a legitimate interest in making the communication. "That the defendant acted under a sense

> of duty, though important on the question of malice, is not, I think, relevant to the question whether the occasion was or was not privileged. The question does not depend on the defendant's belief, but on whether he was right or mistaken in that belief" "An occasion which in point of fact is not privileged cannot become privileged because the defendant in good faith and on grounds which commended themselves to him, considered it privileged. Good faith, however strong its foundation cannot convert a non-privileged occasion into a privileged occasion, although it may afford excellent evidence of the absence of malice." "The mental attitude of a defendant can never make an occasion privileged which in point of fact is not so." (**Vide** Gatley on Libel & Slander 4th Edition, page 245).

We now examine the facts and circumstances leading up to the writing and publication of the letter complained of. The appellant John Alleyne was at all material times an employee of the Commodities Control Authority, an organisation of Government, with power to control prices and the importation of commodities into the colony; the appellant, Maisie Alleyne is the wife of the male appellant and carried on for reward an agency known as the Global Agency which was the local agent for Messrs. Peter Lunt & Co., Ltd., of the United Kingdom. At all material times the respondent Sylvanus Wreford was a director and manager of Messrs. S. Wreford & Co., Ltd., hereinafter referred to as respondent company, which carried on business as merchants; he was also a member of the advisory committee of the aforesaid Commodities Control Authority.

Shortly before October, 1952, an employee of the Global Agency approached the Controller of Commodities and discussed with him the importation by his customers of a soap to be called "Little Peter White Floating" soap and he wanted to know under what category, if any, permission would be granted. He showed the Controller two cartons of Little Peter White laundry soap but on each carton a label was pasted bearing the words "Floating Soap". The Controller told him that, as under the Import Order, Floating Soap could be classified as toilet soap; he could prepare the necessary application for the two licences and send them to him. This was done and their issue was approved by the Controller, who stated that he authorised the issue of the licences to two firms only as an introductory shipment as he wanted to satisfy himself that it was not a laundry soap. He also stated — to use his actual words —

> "Only two licences were authorised by me and Chan-a-Sue was told that no more to be issued. The other sub-controllers were not informed as they had nothing to do with the Soaps Department."

Despite these instructions other licences were issued and signed by Chan-a-Sue on behalf of the Controller but without the Controller's knowledge.

As a result of the original two licences being granted the Global Agency on 11th October, 1952, wrote a letter to the respondent company informing them that —

> "licences are granted for the importation of White Floating Soap, and our Principals Messrs. Peter Lunt & Co. Ltd. Of

> Aintree, Liverpool are now offering the finest household soap known as "Little Peter Floating Soap",

and enclosed an application for a licence and indent for the approval of the respondent company together with a sample of the soap. On 16th October the respondent company wrote to the Global Agency returning the documents signed and placing an order for five cases. On 25th October the Global Agency wrote again to the respondent company acknowledging the receipt of their order for five cases and informing them that they had taken the liberty of taking out the licence for fifteen cases in order to avoid making out another licence for their next order. On 8th January, 1953, the respondent company placed a further order for ten cases of the same soap and on 9th January the Global Agency wrote informing them that they had booked the order for ten cases and had taken the liberty of lodging a new application for one hundred cases. This application was approved on behalf of the Controller on 12th January, 1953, and seven days later the Global Agency wrote to the respondent company enclosing the Import Licence for the said hundred cases, and stating that they were awaiting further advice.

On 4th February, 1953, a meeting of the Central Import Advisory Committee of which Wreford was a member was held at the office of the Controller. Wreford was not present. At this meeting one member questioned the propriety of the importation of this soap on the ground that it was circumventing the prohibition of imports of laundry soap from outside the area and also drew attention to the fact that an officer of the organisation was said to be connected with the agency through which the order had been placed. The committee urged that the services of all members of the organisation with any commercial interests which clashed with their official duties should be terminated without delay. The male appellant was, at that time, an employee of the organisation but according to the Controller, not concerned with the department dealing with the importation of soap.

Wreford saw the Minutes of that meeting but stated that he "did nothing after seeing them." There is no indication when he saw them.

On 4th February, the same date as that of the meeting, the Global Agency wrote the respondent company informing them.

> "that as a result of strong representations by local soap manufacturers the Controller of Supplies has refused further licences for the importation of "Little Peter" White Floating Soap,"

and suggesting that they might like to take advantage of the licence they then held for the hundred cases, enclosing an order for this amount for their consideration. There was no reply to that letter but on 10th February the Global Agency wrote again to the respondent company referring to the letter of 4th instant and enquiring whether they would be willing to transfer fifty cases to two of their customers if they were not interested in taking up the hundred cases, and enclosing a transfer. On 12th February the respondent company wrote enclosing, as requested, the transfer for fifty cases. On 16th February, the Global Agency wrote again to them thanking them for transferring the cases and returning their Import Licence for the hundred cases.

On 11th March, 1953, another meeting of the Central Import Advisory Committee was held at which Wreford was present. The

committee was informed that a notice had been issued to the effect that "Little Peter White Floating" Soap was not classified as a toilet soap and imports of laundry soap from outside the area were prohibited. The following notice bearing the said date was published for general information:—

NOTICE

"LITTLE PETER" WHITE FLOATING SOAP

It is hereby notified for general information that "Little Peter" White Floating Soap has not been classified as a toilet soap in terms of the Schedule of Exceptions of the Open General Import Licences — Notice No. 42/1952 dated 29th March, 1952, and therefore comes within the classification of common laundry soap.

It is also notified for general information that the importation of common laundry soap is prohibited from outside the Caribbean Area in terms of the Oils and Fats Agreement.

G. F. MESSERVY,
Controller of Supplies and Prices.

11th March, 1953."

After that meeting Wreford cabled London cancelling his order for the soap because, as he stated in evidence, ' "Little Peter" soap was no longer a toilet soap.

On 17th March, the respondent company wrote to the Global Agency as follows:—

"Dear Sirs,

We thank you for your letter of the 13th March and are very sorry we were forced to cancel outstanding order for "Little Peter" Laundry Soap

We have written London explaining the circumstances how Import Licence came into our possession and in the circumstances we think they will fully understand that our Controller has been wrongly advised that Little Peter soap is only a toilet soap. There can be no doubt it is a laundry soap as it is plainly stated on the carton.

The Controller has taken a very strong stand and he will be getting the full support in this matter, of the Central Advisory Committee of which I am a member. We only hope your principals understand the position fully and have taken back this shipment.

Yours faithfully,
S. WREFORD & CO., LTD
S. G. Wreford.
Director."

It is to be observed that the letter complained of was written to Messrs. Lunt & Co., Ltd. on the same date and the contrast of language is of some interest.

It was in these circumstances that the offending letter was written and it is pertinent to enquire into the reasons why it was written. The reasons given in evidence by the writer, who ought to be in the best position to say why he wrote it, are:

> "When I wrote to Peter Lunt I had already cancelled my order. I wrote to give the company the history of how I came to order the soap because I had by then re-instated the order.
>
> It was not necessary for me to give them the history. I was forced to take the goods. It certainly was not necessary for my business that I should give them the history."
>
> "I wrote that letter because I did not think that I should be ordered by any person outside of B.G.
>
> I was angry about being dictated to by Peter Lunt. It had nothing to do with the Global Agency."

His counsel did not deal with these reasons but advanced as the real reason for the writing of the letter the receipt by Wreford of a letter of 13th March from the Global Agency. That letter informed Wreford that Lunt & Co., Ltd., had cabled that notwithstanding his cable of advice to London his order could not be cancelled as the goods had already been delivered for shipment. In the same letter he was also informed by the Global Agency that the goods were covered by a valid Import Licence and he should therefore re-instate the order. Presumably it was the action of Lunt & Co., Ltd., as stated in the letter that Wreford had in mind when he said he was being dictated to and ordered about by a person outside the colony.

It is difficult to understand several parts of Wreford's evidence and in particular his statement that at the time he wrote the letter to the company he had already re-instated his order; for the fact is that he had not then done so, as he himself in another part of his evidence said that he re-instated the order after the revocation of the notice of the 11th March, (set out above) prohibiting the importation of soap. That revocation was effected by notice dated 21st March, that is, four days after he had written the offending letter.

If the reasons that he gave for writing the letter are the real reasons that impelled him to write it, then it would be clear that it was his anger that caused him to do so and it is equally clear that his anger arose because of his self-induced and mistaken idea that he was being dictated to. We say so because we fail to see how it can be maintained that he was being dictated to merely because he was informed of the reasons why it was too late to cancel his order. This showed a confused state of mind, a confusion which led him to believe that a state of affairs had arisen which made it necessary for him to write to Lunt & Co., Ltd. His counsel pointed out that the reasons Wreford gave in evidence were statements made long after the date on which the letter was written. That is so and that fact may account for some of them being unintelli-

gible but we have considered the circumstances and relevant contemporaneous documents and have been unable to discover what actuated Wreford's mind in writing the letter, apart from the reasons given by him and we certainly cannot substitute any other.

His counsel also urged that an account of the business relationship subsisting, Wreford could at any time have written anything pertaining to the contract between them. We agree that that is so and Wreford might well have written the company setting out the true facts which he ought to have known or was in a position to ascertain. A presentation of the true facts might also have made it appear that his licence was obtained irregularly or under suspicious circumstances which may or may not have been matter for a plea of justification and fair comment but that are not the case here. The case here is that Wreford formed certain mistaken beliefs and as a result thereof created in his own mind an occasion to give vent to them and then did so. As stated by Hilbery, J. in **Davidson v Barclays Bank (1940)** 1 A.E.R. 322, "You cannot by making a mistake create the occasion for making the communication." Further, as stated in the passage from Gatley quoted above, the question whether an occasion was or was not privileged does not depend on the defendant's belief, but on whether he was right or mistaken in that belief.

We are of opinion that the occasion was not privileged as it was created by Wreford himself and his belief as mentioned above is not relevant: the defence of qualified privilege therefore fails. The question of malice does not arise as the occasion was not privileged. We agree with the finding of the trial judge that the letter is defamatory in meaning and was in fact defamatory of the appellants.

The only question that remains is the quantum of damages. The whole dispute arose by reason of the fact that the female appellant was carrying on a business which necessitated the obtaining of licences for the importation of controlled goods from the organisation in which the appellant, her husband, was employed in a responsible position. The appellants do not appear to have suffered any material damage. They have not lost the agency of Lunt & Co., Ltd., and their reputations do not appear to have suffered. It seems to us to be a case where an apology would have been adequate but no doubt it was not tendered because the request for one was coupled with a demand for the payment of a substantial sum of money. Nevertheless, the appellant's are entitled to damages.

The appeal is allowed. The judgment and order in the Court below is reversed and we direct that judgment be entered for each appellant for the sum of $100 damages against each defendant jointly and severally. The respondents will bear the costs in the Court below and the costs of this appeal. A certificate for Counsel, if necessary.

BISSOON v. BHAGWANTI

(In the Full Court of the Supreme Court, on appeal from the Magistrate's Court for the Berbice Judicial District (Phillips, J., and Bollers, J. (ag.)) December 13, 31, 1957).

Division of property—Immigrant—Meaning of—The Indian Labour Ordinance, Cap. 104, s. 147 (1)—Whether provisions applicable to persons living in adultery.

The respondent Bhagwanti was formerly married to one G. in 1926 but permanently separated from him two years later. One year after her separation from G. she started living and cohabiting with the appellant Bissoon and continued to do so until 1949 when she separated from Bissoon. By consent of both parties she took with her certain household articles. Three months later they became reconciled and lived and cohabited together until August, 1956, when they finally separated. The household articles which Bhagwanti had taken away on her first separation from Bissoon had been taken back by her when she had resumed cohabitation with him. When they finally separated those articles were left in Bissoon's possession. Bhagwanti instituted proceedings against Bissoon for a division of property under the provisions of section 147 (1) of the Immigration Ordinance, Cap. 208 (now the Indian Labour Ordinance, Cap. 104 (Kingdon Edition of the Laws) and claimed the return to her of the household articles retained by Bissoon. It was necessary before the provisions of that section could be invoked for proof to be given that the parties were immigrants within the meaning of that term in Part X of the Ordinance (which relates to Marriage and Divorce). Bhagwanti stated in evidence that Bissoon's parents came from India and Bissoon in his evidence also stated that his parents came from India but no evidence was given to the effect that Bissoon's parents had come to this Colony wholly or in part at the expense of the Immigration or any other fund. The magistrate held that Bissoon was an immigrant within the contemplation of the provisions of section 147 (1) of the Ordinance.

On appeal it was contended that there was no proof that the parties were immigrants within the contemplation of the relevant provisions and also that those provisions did not apply to persons living in adultery.

Held: There was no proof that Bissoon was an immigrant.

Obiter: The provisions of section 147 (1) of the Ordinance apply to immigrants even if they are living together in adultery.

Appeal allowed.

B. O. Adams for the appellant

M. Poonai for the respondent.

Cur. adv. vult.

Phillips, J.: In this matter the respondent made application to the Magistrate pursuant to the provision of section 147 (1) of the Immigration Ordinance, Chapter 208 now section 147 (1) of the Indian Labour Ordinance, Chapter 104, for a division of property.

It was established by a marriage certificate produced to the magistrate that the respondent was a female immigrant, but, on the other hand whilst it was shown that the appellant was an Indian born in this colony and that his parents came from India there was no proof he was an immigrant within the meaning of the Ordinance as defined by section 131 as follows:—

> **"Part X Marriage and Divorce**
>
> In this part unless the context otherwise requires, **"immigrant"** means any person introduced or coming into the Colony from Asia, whether directly or indirectly and whether wholly or in part at the expense of the Immigration Fund or otherwise and includes any descendant of that person.'

In **Sumaria v. Ramnarain** (1920) B.G.L.R. p. 195, the parties were proved to have been immigrants so that case can be of little assistance here.

In these proceedings there must be proof that the parties are immigrants or descendants of immigrants.

On this short point, therefore, it is clear that the order made by the magistrate herein cannot be allowed to stand and must be set aside.

It was, nevertheless, further argued by counsel for the appellant (although it is not now necessary to decide the point, I give my opinion on it) that upon a proper construction of this section 147 the words **"or who have cohabited together"** are only intended to refer to male and female immigrants who are **single and unmarried.**

The section reads thus:

> "Where a male immigrant and a female immigrant who are married to each other, or who have cohabited together, cease to cohabit and either of them desires that the property to which they or either of them are or is entitled should be divided, the magistrate of the district where those immigrants reside, or either of them resides, on application made to him by or on behalf of either of them, may summon them before him and any witnesses they desire, or either of them desires, to be examined, and make any just order for the division of the property."

With that contention I, however, cannot agree. I can see no reason why such a limited construction should be given to these words of the section and have come to the conclusion that the true interpretation to be placed on them is that they mean and were intended to mean "immigrants who have cohabited together whether married or single" I am unconvinced by the argument that considerations of public policy would exclude such a construction as tending to encourage adultery (if not discouraging immorality).

One has to look at the Ordinance as a whole to ascertain what, in this context, is the intention of the legislation.

I can see no reason, as I have stated, to give it the restricted meaning here contended.

I have had the opportunity of reading the judgment about to be delivered by my brother Bollers. With his conclusions I agree.

The appeal is allowed with costs given at $25.

Bollers, J.: This appeal in effect concerns an application by the appellant against the respondent for a division of property under section 147 (1) of the Indian Labour Ordinance, Cap. 104. In her plaint in the Magistrate's court the respondent, however, purported to base her application on the Immigration Ordinance which was formerly Chapter 208

The respondent alleged both in her pleadings and evidence that she was formerly married to one Gokul on 31st August, 1926, and that she had separated from Gokul two years after marriage; that about one

year after her separation with Gokul, she started living with the appellant, and about the year 1949 she separated from the appellant and by consent of both parties she was given certain household articles by a manager, presumably a manager of a plantation, Three months after separation, there was a reconciliation and she returned to the appellant's house with all the articles that she had been given. They lived and cohabited again together, and finally separated in August, 1956, whereupon the articles remained in the possession of the appellant. She now claims that these articles being her property should be returned to her.

The Magistrate accepted the evidence of the respondent, and then proceeded to enter judgment in her favour for the return of the articles or their value, but made no order as to a division of property.

The Magistrate made a specific finding as to the parties being immigrants within the meaning of the Ordinance, and stated that relying on the case of **Sumaria v. Ramnarain** 1920 B.G.L.R he entered judgment in favour of the respondent.

At the hearing of the application counsel for the appellant made several submissions both **in limine** and at the close of the case for the respondent. The submissions now form the basis of the grounds of this appeal, and may be summarized in three points:—

1. The plaint could not be brought under the Immigration Ordinance, Chapter 208 (Major Edition) which has since been repealed.

2. This Ordinance was not intended to apply to persons living in adultery.

3. That it must be strictly proved that the parties to the application are immigrants, more especially when this is an issue raised by the defence.

With respect to the first point, section 7A (1) of the Law Revision Ordinance (Kingdon Edition) No. 26 of 1949 gave power to the Commissioner to make minor amendments to the laws of the Colony which were set out in the third schedule to the Ordinance, which amended laws were then deemed to come into force on 1st April, 1953. The words "Indian Labour" were then substituted for the word "Immigration" in the Title of the said Ordinance. The Ordinance, Chapter 208 (Major Edition) remained then substantially the same save and except for this amendment to the title and another minor amendment to section 192(7). Under sections 13(2) and 20(1) of the Law Revision Ordinance, the revised Edition of the "Laws of British Guiana" came into force on the 15th January, 1956, under Order of the Governor made by Proclamation and published in the Official Gazette on 14th January, 1956.

With the revision, the Indian Labour Ordinance, Chap. 208 (Major Edition) then came into force on the aforesaid date under the title "Indian Labour Ordinance, Chapter 104."

The former Ordinance (Immigration) was therefore never repealed either expressly or by implication, but was replaced with minor amendments by the Indian Labour Ordinance, Chapter 104, of the Revised Laws. In this case the cause of action was therefore based on substan-

tially the same ordinance as existed formerly. Further, it must be observed that section 16 of the Law Revision Ordinance states:—

> "16. Where, in any enactment or in any document of whatever kind, reference is made to any enactment repealed or otherwise affected by or under the operation of this Ordinance, such reference shall, where necessary and practicable, be deemed to extend and apply to the corresponding enactment in the Revised Edition."

In **Keiler v. Braithwaite** (1949) B.G.L.R. 105. where a civil plaint founded in detinue was filed in the Magistrate's Court and the evidence disclosed that no demand was made, and the Magistrate accepted the evidence of the plaintiff, found trespass and awarded damages without amending the plaint, this Court held that under section 59 of the Summary Jurisdiction Petty Debt Ordinance, the Magistrate had a discretion to amend in the particular circumstances and ought to have amended without application in order to found the claim in trespass, and since under section 28(a) of the Summary Jurisdiction Appeals Ordinance, the appellate Court had power to make any Order which the magistrate ought to have made, the appeal was dismissed, the appellant not being prejudiced in respect of the necessary amendment.

In the instant case I take the view that the amendment which was required was of a very minor nature, and the Magistrate having proceeded to judgment in favour of the plaintiff (respondent) ought to have made the amendment which would not in any way have prejudiced the case of the defendant (appellant). The magistrate having failed to amend under the Summary Jurisdiction (Appeals) Ordinance, Chapter 17, this Court considers it just to do so now.

Counsel for the appellant submitted that under section 151 of the Ordinance, Chapter 104, it is an offence for any one to cohabit with the wife of an immigrant, and that as the appellant was cohabiting with the respondent who was already married, he was committing a criminal offence which she was aiding and abetting, and as a result she could not make this application, which would have the effect of bringing into disrepute the institution of civil marriage, which would be contrary to public policy. He further submitted that under the proviso to section 151, to escape conviction the onus would be on the man to establish that the wife was deserted by her husband, or that the husband compelled her to leave his house, or that the cohabitation was with the knowledge and consent of the husband. Consequently, in this application under section 147 it was on the respondent to lead **prima facie** evidence that she came within the conditions of the proviso to section 151 in order to place herself within the category of persons set out in section 147 privileged to make the application.

Counsel for the appellant further argued that the words "or who have cohabited together" in section 147(1), when properly construed refer only to single persons and **not** to cohabitation where one or other of the parties is at present married. This argument, though attractive, I do not consider sound as the whole scheme of the Ordinance indicates that it was the intention of the Legislature to protect people of a certain group or class with certain customs who have emigrated into the colony

and placed under the care and supervision of the Agent General with responsibility to the Governor.

It is clear that it was the intention of the Ordinance to protect women immigrants who had either married or cohabited, or married and then cohabited with male immigrants according to their own customs, and considered themselves married although not married according to the civil law of the colony.

As Douglas J. pointed out in **Sumaria v. Ramnarain** (1920) B.G.L.R. 195, it is always nearly the woman who has to bring the action, whereupon the man makes out himself to be a pauper. In the result I arrive at the conclusion that the section is to be interpreted as meaning that any male or female immigrant, married or single, who is cohabiting with an immigrant married or single, may make the application.

On point number three, the only evidence led in the proceedings on the question as to whether the parties were immigrants within the meaning of the Ordinance appears in the evidence of the plaintiff (respondent) who stated that her mother was born in the country and that her father was born in India, that her grandmother came from India, and that the defendant (appellant) was living in this colony, and that the defendant's father and mother came from India.

Under cross-examination, the defendant admitted that his mother and father came from India, and that both of the plaintiffs' parents came from India. Objection to this evidence on the ground of hearsay was immediately raised. It is clear from the Ordinance that any person who comes from India is not necessarily an immigrant. Section 147 is included in Part X of the Ordinance, and a section 131 of the Ordinance it states,

> "In this part unless the context otherwise requires "immigrant" means any person introduced or coming into the colony from Asia whether directly or indirectly, and whether wholly or in part at the expense of the Immigration fund or otherwise and includes any descendant of that person."

Counsel for the appellant has submitted that the words "or otherwise" as appearing in the section must be construed **eiusdem generis** with the preceding words in the section, and would therefore mean, or "other fund". There was no positive evidence in the whole of the case which showed that the appellant and the respondent were persons who were introduced into this colony from Asia, either wholly or partly at the expense of the Immigration fund, or indeed any other fund. Furthermore, there was no evidence that the parties to this application were descendants of these persons in the above-mentioned category.

Counsel went on to point out that magistrates in the past have always required strict proof that the parties were immigrants; otherwise it would be an encouragement to persons who were not immigrants to take advantage of the Ordinance. Counsel submitted that for the plaintiff merely to state that her father and mother came from India, and that the respondent's father and mother came from India, or even that they were immigrants, would be a clear infringement of the hearsay rule, as she could only say so if she had been informed or had perused the

records, and this fact must be proved by production of copies from the Register kept at the office of the Agent General under the Ordinance.

With these submissions I am in entire agreement. Whether a person is an immigrant or not is a question of status. One must therefore show that he possesses that status, and satisfy the Court as to his identity.

The Register at the office of the Agent General, under sections 7, 132, 133 and 134 of the Ordinance, would be a public document, and as such would have the characteristic of being kept in some special custody, and would be provable by means of a copy without the production of the original. "Wills on Evidence" 3rd Edition, states:—

> "The ordinary mode of proof of a public document is by means of an examined copy, that is, a copy taken on behalf of the party, generally by some clerk or other private person who produces it in the witness-box, and proves that he has copied it accurately from or examined it with the original and that it is correct."

This statement of the general law finds expression in Statute Law in section 44(2) of the Evidence Ordinance, Chapter 25, which reads as follows:—

> "Whenever any book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom is admissible in proof of its contents, provided the copy or extracts purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted"

and also section 47:—

> "Any copy of or extract from any writing, document, or record in the custody of any public officer, required by any law or regulation to be written or made and delivered to that officer or to be recorded, is, if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, admissible as proof of the contents of the writing, document, or record, and as **prima facie** evidence of the matter or transaction therein mentioned."

The best evidence rule, that is the most credible evidence that the nature of the case would permit, was not followed in this case.

The attempt of the respondent therefore to prove that the parties to the application were immigrants within the meaning of the Ordinance thus fails, and as a result the appeal must be allowed and the judgment and order of the magistrate set aside with costs fixed at $25 to the appellant.

Appeal allowed.

GUIANA GRAPHIC LTD., v. ARMSTRONG

(In the West Indian Court of Appeal, on appeal from the Supreme Court (Stoby J.), January 15, 16, February 4, 1957).

Master and servant—Wrongful dismissal—Length of notice—Custom or usage—Reasonable notice—Measure of damages.

The onus of establishing custom or usage in relation to length of notice lies on the party relying on its existence. The recognised method of proving this is by the oral testimony of persons who are aware of its existence by reason of their particular occupation or trade as it relates to the occupation or trade under review and by citing instances of its existence. This evidence must not be ambiguous, but clear and convincing. It is a question of fact whether the evidence establishes usage.

Moult v, *Halliday* (1898) 1 Q.B., 128 applied.

What length of notice is reasonable where a contract of employment is terminable upon reasonable notice is a question of fact to be determined upon a consideration of the nature of the employment.

A servant wrongfully dismissed is entitled to such damages as will compensate him for the wrong sustained. Those damages are to be assessed by reference to the amount earned in the service wrongfully terminated and the time which might reasonably elapse before the servant obtains another post for which he is fitted. The fact that the salary is payable monthly is not conclusive that the employment is a monthly one terminable by a month's notice; it is merely a circumstance to be taken into consideration in coming to a conclusion as to what period of time is reasonable notice.

Appeal dismissed.

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

J. Carter for the respondent.

Judgment of the Court: This is an appeal from a judgment of Stoby J., wherein he awarded the respondent $400 for wrongful dismissal less $200 already paid by the appellants.

The respondent was employed by the appellants in 1947 as Woman's page Editor at a salary of $50 per month; the next year she received $55 per month; later she became a senior reporter and about two years before her dismissal she was appointed Country News Editor and Confidential Accounts Clerk at a salary of $100, which position she occupied and which salary she drew until she was dismissed on 9th June, 1954. On her dismissal the respondent was on 11th June paid $150, being $50 salary from 1st to 15th June, 1954, and $100, one month's salary in lieu of notice; later on 17th June she was paid another $50, aggregating $200. This amount represented salary to the end of June, the month in which she was dismissed, and a month's salary in lieu of notice. The respondent thereafter filed a writ on 25th June against the appellants claiming damages for wrongful dismissal.

The contract of employment was oral and contained no stipulation as to notice of termination and the respondent alleges that she was entitled to reasonable notice. The appellants contend that one month's notice is reasonable and the question for consideration is what length of notice may be deemed reasonable having regard to the nature of her employment. Mr. Stafford for the appellants submitted that "where there is no express term for notice to be given, the length of the notice must be determined firstly by custom or usage and if no custom or usage exists or is proved then and only then can one fall back on what is a reasonable time for notice and what amount of damages should be reasonable".

It cannot be doubted that the onus of establishing custom or usage lies on the party relying on its existence and it is therefore appropriate at this stage to consider whether the appellants at the trial established the existence of such custom or usage. The recognised method of proving this, and more particularly in this class of case, is to prove it by the oral testimony of persons who are aware of its existence by reason of their particular occupation or trade as it relates to the occupation or trade under review, and to cite instances of its application; this evidence must not be ambiguous but must be clear and convincing. A careful examination of the evidence adduced must be made in order to ascertain whether it satisfies the standard of proof required or whether it falls short of it.

Two witnesses were called for the defence — Mr. Thorne and Mr. Garbutt. Mr. Garbutt's evidence related purely to what obtained outside of this area, in Fleet Street, London, and is therefore of little, if any, assistance. Mr. Thome's evidence on this point is as follows:—

> "I have worked on all the local newspapers. I was acting asst. editor at Argosy and then appointed editor of Graphic. I was acting asst. editor of Argosy for about 6 months and then resigned to go to Graphic. I gave them one month's notice but the management of Argosy told me if I was going I must go at once and gave me a month's salary and salary for the month in which I gave them notice.

> "My custom at the Graphic is to pay an employee a month's salary in lieu of notice and salary for month in which employee is dismissed.
>
> "At one time a sub-editor was dismissed. He was paid for month that he was dismissed and a month in lieu of notice".

Counsel for the appellants conceded that this evidence standing by itself does not satisfy the requirements to establish the usage for which he contended, but strongly urged that it is ample corroborative evidence of the plaintiff's testimony which in counsel's view was an admission that the custom or usage in the respondent's particular branch of employment was for the employer to terminate employment by giving one month's notice or by paying one month's wages in lieu of notice. The evidence on which he founds this admission was given by the respondent during cross-examination; it is as follows:—

> "I was a monthly servant. At the time of dismissal I was a monthly servant. I knew that it was the usual custom to give a monthly servant a month's notice".

The question which elicited the last answer appears to us to have been one applicable to monthly servants generally as there is no indication that a direct question was put to the respondent in relation to persons in her particular type of employment, an employment which the evidence reveals was a skilled one. She was promoted from the post of a senior reporter, a post characterised by Mr. Thorne as skilled, to a higher post. We are not convinced that this last answer is free from ambiguity and the finding of the learned Judge shows that he did not regard it as an admission. We were informed by Counsel and the evidence discloses that there were three daily newspapers issued by separate companies in the Colony at the material time; no evidence was offered of what obtained in that sphere of employment in the companies other than that of the Graphic. This omission is vital and cannot be overlooked. It cannot be assumed that the custom at the Graphic is the custom at the other newspaper companies in the locality. We are not unmindful that the late appellants' counsel is of the view that Mr. Thorne's custom at the Graphic was strong supporting testimony, but in view of the opinion we expressed of the probable value of the plaintiff's statement, this prop must fall. Mr. Thorne's own personal instance at the Argosy is certainly not in point for the notice moved from him, and the celerity with which it was accepted and the promptitude with which he was permitted to leave would lend no support to the appellants' case. Moreover, it is always a question of fact for a Court exercising the functions of a jury to determine whether the evidence establishes usage. In *Moult* v. *Halliday* (1898) 1 Q.B. at page 128, Hawkins, J., said —

> "The question which came before the county court judge for decision was whether or not the alleged custom had been proved, and that is a question of fact, and not a question of law. There is nothing here to shew that this alleged custom has been recognised, so as to dispense with the necessity for proving its existence . . . . "

The time has not arrived when the usage, as we understand it, is of such common and certain knowledge that a judge no longer requires it to be proved and may take judicial notice of it.

In the present case the learned judge found that a custom or usage was not proved. It was open to him from a proper assessment of the evidence to satisfy himself as a jury whether such a usage on which the appellants relied was proved. In our opinion he kept in view the correct principles to be applied and did not violate them; his finding cannot therefore be disturbed.

It now falls to be decided what should be a reasonable award of damages. What length of notice is reasonable where a contract of employment is terminable upon reasonable notice is a question of fact to be determined upon a consideration of the nature of the employment. The learned judge found that the respondent had been wrongfully dismissed and awarded her the damages hereinbefore mentioned.

A servant who has been wrongfully dismissed is entitled to such damages as will compensate him for the wrong he has sustained. Those damages are to be assessed by the reference to the amount earned in the service wrongfully terminated and the time which might reasonably elapse before the servant obtains another post for which he is fitted. The fact that the salary is payable monthly is not conclusive that the employment is a monthly one terminable by a month's notice; it is merely a circumstance to be taken into consideration in coming to a conclusion as to what period of time is reasonable notice. The respondent occupied an important position. One of the factors to be taken into consideration is that of the difficulty of obtaining other employment. There is evidence that the newspaper field in this Colony is limited. In his cross-examination Mr. Thorne stated that —

> "The newspaper field is limited. Avenues for employment limited. Dozens of people applying for employment. There is a waiting list. At the Argosy I was replaced by some one on the staff. Many suitable persons who seek employment with local newspapers fail to find employment.
>
> "**To Court:** It is not easy to fill the post of woman's news editor. It is easier to fill post of country news editor. There are three daily newspapers in the Colony. The post of woman's news editor or country news editor cannot be easily obtained."

The respondent's evidence discloses that she tried to obtain employment at various places but failed to do so and that her efforts were not confined to the newspaper field; in fact, the only employment she obtained since her dismissal was in 1955 when she did free lance reporting for the Daily Argosy during the discussion in the Legislative Council on Federation. The Trial Judge awarded $400—$100 for salary for the month of June in which the plaintiff worked and $300, the equivalent of three months' notice. Again, here the question of what amount of damages is reasonable is one of fact and we cannot conclude that there was not evidence from which the Judge could have assessed

the damages at the amount he did having regard to the circumstances of this particular case, nor can we say the amount is excessive. The question of damages is therefore not at large for us.

Appeal dismissed.

ROSE v. HANOMAN.

(In the West Indian Court of Appeal, on appeal from the Supreme Court (Mathieu-Perez, Jackson and Holder. C.JJ.) January 17, 18, 21; February 6, 1957).

Immovable property—Praedial servitude—Not annotated on transport of dominant tenement but annotated on transport of servient tenement—Roman Dutch Law—Sufficient proximity for one to receive the benefit from the subjection of the other necessary for the existence of a servitude—Extinguishment of servitude by sale at execution—Requirement of notice of existence of servitude in favour of dominant tenement where not annotated on transport of servient tenement.

The plaintiff Rose became the owner by transport in 1888 of the west half of the western half of Susannah and also since 1924 of a piece of land part of the east half of the western half of Susannah. The defendant Hanoman became the beneficial owner and occupier and was at all material times in possession as such owner and occupier of the eastern half of Susannah having bought the said premises from the former proprietors Bookers Demerara Sugar Estates Ltd., on the 25th June, 1947, though transport at all material times had not yet been passed by Bookers in favour of the defendant.

On the 3rd June, 1862, the then owner of Susannah one Britton transported the eastern half of it to one Burns. On Burns' transport was annotated the words "subject to the condition that 'each of the proprietors of the eastern and western halves of the said plantation shall have the right of grazing cattle over the whole of the plantation." This annotation appears on every transport for the eastern half including that of Bookers. The piece Of land part of the east half of the western half transported to the plaintiff is 3 rods wide and is bounded on the east by the property of one Seecharan and on the west by the property of the plaintiff and is contiguous to the west half of the west half. There is no reservation and/ or condition of any servitude on this transport.

There are a number of other pieces of land portions of the east half of the western half of Susannah which were transported to various persons and in five of these transports there is no mention of a reservation of servitude.

In the 1888 transport for the west half of the western half of Susannah the plaintiff was given a right to depasture cattle over the east half of the western half.

Between August and November, 1947, the defendant seized and impounded certain cattle the property of the plaintiff found grazing on the eastern half of Susannah. The plaintiff claimed that he was entitled both by prescription and under his title by transport to a servitude to graze his cattle over the whole of the eastern half of Susannah.

The plaintiff's claim was dismissed. He appealed to the West Indian Court of Appeal against the findings of the trial judge.

Held: (i) It is essential for the creation of a servitude that there must be a dominant and a servient tenement and no servitude can exist unless the dominant

and servient tenements are sufficiently near to allow the one to receive a benefit from the subjection of the other.

(ii) In three of the five transports for lands in the east half of the western half of Susannah in which there was no reservation of servitude mentioned, the sales were at execution by which the Marshal transported to each transportee who thereupon took the title free from all encumbrances and of all servitudes if any had existed before.

(iii) Where the servitude is mentioned in the transport of the dominant tenement and is absent from the transport of the servient tenement the servitude is valid provided that the owner of the servient tenement has notice of the existence of the servitude in favour of the dominant tenement. In the Case of the two others of the five above-mentioned transports (where there were no reservations of any servitude) there was no suggestion that any of the owners of the lands described there in had any notice of the servitude engrossed on the plaintiff's transport or of any existence of such servitude.

(iv) These five parcels of lands are situated at different points between (he dominant tenement the west half of the western half of Susannah and the servient tenement the eastern half of Susannah. They are separate parcels of land having a total facade of 20 to 25 roods out of 371/2 or 40 roods separating the dominant and servient tenements and are not sufficiently near for the one to receive a benefit from the subjection of the other. In such circumstances no servitude can exist in favour of the west half of the western half over the eastern half of Susannah.

(v) No notice of the plaintiff's claim for a declaration of prescriptive right to depasture his cattle on the eastern half or any part or portion of land at Susannah was given to the owners of the several portions of lands in the east half of the western half of Susannah nor has it been shown that they were aware of these proceedings or that they have had the opportunity to resist the plaintiff's claim. In such circumstances the declaration asked for by the plaintiff cannot be made.

Appeal dismissed.

B. O. Adams for the appellant.

H. C. Humphrys, Q.C., S. L. Van B. Stafford, Q.C., and *J. H. S. Elliott* for the respondent.

Judgment of the Court: This appeal comes again before this Court as a result of an order of Her Majesty in Council dated the 14th December, 1954, and in compliance therewith the "note of appeal" was served on Bookers Demerara Sugar Estates Limited, hereinafter referred to as Bookers, on the 24th day of November, 1956. At the hearing of the appeal Mr. Humphry's Q.C., informed the Court that Bookers had been served with the "note of appeal" but that they did not propose to appear or take any part in the proceedings and that they would be bound by any order or decree made by the Court.

The plaintiff became the owner by transport of the west half of the west half of Plantation Susannah otherwise known as Lot No. 15, and also the owner by transport of a piece of land part of the east half of the west half of the said Plantation Susannah, situate on the east sea coast of the County of Berbice. The defendant is and was at all material times the beneficial owner and occupier and in possession as such owner and occupier of the eastern half of the said plantation Susannah having bought the said premises from the former proprietors, Bookers, on the 25th June, 1947. Transport of the said east half of Plantation Susannah has not yet been passed by Bookers in favour of the defendant.

Between August and November, 1947, the defendant by himself and/or his agents and/or servants seized and impounded certain cattle the property of the plaintiff found grazing on defendant's lands as a result of which the plaintiff filed an action against the defendant claiming an injunction restraining the defendant from impounding any cattle, the property of the plaintiff, while grazing on any part or portion of Plantation Susannah. The plaintiff claims that he is entitled both by prescription and under his title by transport to a servitude to graze his cattle over the whole of the eastern half of Plantation Susannah occupied by the defendant; he also claims damages.

The defendant denies the plaintiff's claim and by way of counterclaim asks for a declaration that the transports to the plaintiff did not and do not in law or otherwise confer on the plaintiff any right to such servitude; for an injunction to restrain the plaintiff his agents and servants from continuing or repeating any of the acts complained of and for damages for the trespass occasioned.

In order that the true position may be appreciated it is necessary to show the various dealings with Plantation Susannah and in the course thereof to set out the title of the plaintiff and of the defendant to their respective portions.

In June, 1862, one Britton became the owner of the entire plantation and on the same day he transported to one Burns the eastern half of the said plantation, retaining for himself the western half. In the transport the following words appear: "subject to the condition that each of the proprietors of the eastern and western halves of the said plantation shall have the right of grazing cattle over the whole of the plantation."

In 1876 Britton transferred to one Thomas Howard the east half of the west half, retaining for himself the west half of the west half, and appearing in that transport are the words "right of free pasturage to Thomas Howard over the whole of the said plantation and subject to a right of pasturage over the said east half of the west half of the said plantation to the said Parris Britton, his heirs, executors, administrators and assigns". Britton died in 1878 and in pursuance of a sale at execution in 1886 Letters of Decree in favour of Charles Hooten were passed and Hooten became the owner of the western half of the western half with right of free pasturage to Thomas Howard over the whole of the said plantation and subject to the right of pasturage over the said western half of the western half of the said plantation to Britton, his heirs, executors, administrators and assigns. Prior to 1st January, 1917, title was on a sale at execution passed by Letters of Decree but after that date by Transport.

In 1888 Thomas Dalgliesh as assignee of the creditors of Charles Edward Hooten transferred the western half of the western half to Archibald Rose, the plaintiff, and in the transport are the words "with right of free pasturage to Thomas Howard over the whole of the said plantation and subject to the right of pasturage over the eastern half of the western half of the said plantation to Parris Britton, his heirs, executors, administrators and assigns." Thus at this stage Rose became the owner of the whole of the west half of the western half; and it is to be noted that the servitude in Howard's favour is a personal one.

As regards the eastern half of the whole plantation Burns became the proprietor of that portion in 1862 and on his transport appear the words "subject to the condition that each of the proprietors of the eastern and western halves of the said plantation shall have the right of grazing cattle over the whole plantation."

In 1883 one Cunha and Mendonca were the proprietors and they transferred it to one James Mavor "subject to the conditions that each of the proprietors of the eastern and western halves of the said plantation shall have the right of grazing cattle over the whole plantation"; in 1884 Welchman who was then the proprietor transferred it to one Douglas again "subject to the condition that each of the proprietors of the eastern and western halves of the said plantation shall have the right of grazing cattle over the whole plantation."

In 1895 Douglas transferred the said eastern half to one Ribeiro "subject to the condition that each of the proprietors of the eastern and western halves of the said plantation shall have the right of grazing cattle over the whole of the plantation".

In 1902 Ribeiro transported to Mary Anna da Silva the whole of the eastern portion subject to the same conditions and in 1936 the Marshal transported the whole to Mary Agnes Soares, Valerie L. da Silva and Simeon T. da Silva "with the right of grazing cattle over the whole of the said Plantation Susannah to each of the proprietors of the east and west halves of said plantation."

In 1936 Hygino V. da Silva, Mary Agnes Soares, Valerie L. da Silva and Simeon T. da Silva transferred to one Francis Sam the whole of the said eastern half "with the right of grazing cattle over the whole of the said Plantation Susannah to each of the proprietors of the east and west halves of the said plantation"; and in 1937 Francis Sam transferred it to Bookers" with the right of grazing cattle over the whole of the said Plantation Susannah to each of the proprietors of the east and west halves of said plantation."

The western half of the whole plantation was as hereinbefore stated subdivided and Britton in 1876 transferred to Thomas Howard the eastern half of the western half "with right of free pasturage to Thomas Howard over the whole of the said plantation and subject to a right of pasturage over the said eastern half of the said western half of the said plantation to the said Parris Britton, his heirs, executors, administrators and assigns."

We now deal with the east half of the west half which we refer to as the multiple proprietors' portion. This portion has been subdivided into many small divisions each of which is held by different persons. In 1895 William Alfred Douglas transported to one Assebud a piece of the eastern half of the western half measuring 6 roods in facade commencing at a point 15 roods from the western boundary of the eastern half of the western half "with right of pasturage over the whole of the said eastern half of the western half of said plantation and subject to the right of pasturage over the said piece of land to Paris Britton and Thomas

Howard, their heirs, executors, administrators and assigns". This piece is not contiguous to the western half of the eastern half.

In 1924 the Marshall transported to Rose a piece of land part of the eastern half of the west half; there is no reservation and/or condition of any servitude on this transport. This piece of land is three rods wide, bounded on the east by the property of Seecharan, on the west by the property of Archibald Rose and is contiguous to the west half of the west half.

In 1939 the Marshal transported to Hygino Vasco da Silva a piece of land forming part of the west half of plantation Susannah, the said piece having a facade of 61/2 rods commencing from the western extremity of the eastern half of Plantation Susannah and extending thence in a westerly direction north and south of the public road. There is no reservation of any servitude in this transport. Again in 1939 the Marshal transported to S. T. daSilva a piece of land part of the west half of Plantation Susannah having a facade of 6 rods commencing at a point 221/2 rods from the western extremity of the eastern half of Plantation Susannah. Again there is no reservation of any servitude.

In 1939 one Goberdhan Singh transported to Bhupsingh one undivided half part or share of and in a piece or parcel of land part of the west half of Plantation Susannah having a facade of 10 roods situate on the south side of the Public Road and commencing at a point 61/2 rods from the western extremity of the east half of said Plantation Susannah, having a depth from the south side of the public road running to the Grand Canal. Appearing in this transport are the words "with the right of grazing cattle on the east half of the west half of the said plantation Susannah."

In 1945 Goberdhan Singh transported to Robert Seecharan one undivided third part or share of and in the western half of a piece of land part of the eastern half of the western half of Plantation Susannah, the said piece of land measuring 6 roods in facade commencing at a point 15 roods from the western boundary of the eastern half of the western half of the said plantation by the entire depth of the said plantation with right of pasturage over the whole of the said eastern half of the western half of the said plantation and subject to the right of pasturage over the said western half of the said piece of land to and in favour of Parris Britton and Thomas Howard, their heirs, executors, administrators and assigns.

In 1947, Goberdhan Singh transported to Robert Seecharan four undivided fifth parts or shares of and in one undivided half part or share, that is to say, two undivided fifth parts or shares of and in a piece or parcel of land part of the west half of plantation Susannah, the said piece of land having a facade of 10 roods situate on the south side of the public road and commencing at a point 61/2 roods from the western extremity of the east half of said Plantation Susannah "with the right of grazing cattle on the east half of west half of said Plantation Susannah."

In 1943 Jacob Lancelot Hanoman transported to Bhupsingh a piece of land measuring 3 roods in facade being the eastern half of a piece of

land part of the western half of Plantation Susannah measuring 6 roods in facade by the full depth of the said plantation. There is no reservation.

In 1948 after the commencement of this action the plaintiff Rose transported to his son David Rose a piece of land part of the east half of the west half of Plantation Susannah, the said piece being 3 roods wide by the whole depth of the said estate and bounded on the east by the property of Seecharan and on the west by the property of the plaintiff. There is no reservation.

Thus it will be seen that from an early date Plantation Susannah was divided into an eastern half and a western half. The whole of the eastern half was from time to time transported without any sub-division and is still so held at present by the defendant.

The law relating to immovable property is Roman Dutch. A real or praedial servitude is immovable property and must be transported before the court in the same manner as the full and free property in land except where the right has been acquired by prescription when declaration of title must first be sought. It is essential for the creation of a servitude that there must be a dominant and a servient tenement and no servitude can exist unless the dominant and servient tenements are sufficiently near to allow the one to receive a benefit from the subjection of the other. *Voet in his Pandects Bk. 8, Tit. 4, par. 19* says:

> "There is, lastly, this common characteristic, that in every praedial servitude the dominant and servient tenement ought to adjoin one another; which proximity, however, ought to be judged rather from the advantage which is afforded and the capability of a servitude being imposed, than from the fact that the two properties touch one another……..a tenement not bordering on the dominant tenement can be subject to a servitude to it, if only the intermediate tenement owes the same servitude."

Before us, Counsel for the appellant in applying this doctrine to the case submitted that "so long as the appellant has a real servitude or a personal servitude or a licence or a prescriptive right over the intervening lands that would be enough to satisfy any requirements as regards proximity of tenements." With this proposition we agree. In this case appellant claims a right to a servitude to graze cattle over respondent's lands both by prescription and by transport. In the light of the proposition we now examine these claims.

As to prescription, it is admitted that the period of user must be a third of a century (33 1/3 years) before 1917 when the Civil Law of British Guiana Ordinance was introduced in the colony. All existing rights in respect of movable or immovable property were by this Ordinance preserved if they were acquired prior to 1st January, 1917. It is claimed for the appellant that on 1st January, 1917, he had already acquired by prescription a right to graze his cattle over the east half of Plantation Susannah. Appellant bases that claim on his user from 1888 when he acquired by transport the west half of west half of Susan-

nah from Thomas Dalgliesh, the assignee of the creditors of C. E. Hooten, and the user of his predecessors in title from 1862. Prior to 27th April, 1886, however, the title to the land owned by the appellant was by virtue of transport held by Britton, the original owner of the whole of Plantation Susannah. It is settled law that where a person enjoys a servitude over the land of another by reason of title by transport he cannot utilise the period of such enjoyment for the purpose of acquiring a title by prescription. It follows that if up to 27th April, 1886, any servitude existed over the servient tenement it existed purely by virtue of transport. The earliest date then from which the period of prescription could run for the purpose of creating a servitude in favour of the appellant was from 1886 and that falls short of the period of 33 1/3 years required for the establishment of the right. But in point of fact the period from which any prescriptive right could begin to accrue in favour of the appellant is from 1888 when he purchased his holding, the west half of the west half. There was therefore no acquisition by prescription of any right to the alleged servitude on the 1st January, 1917. The course the arguments in favour of or against prescription took before us and in the Court below was whether the right to graze cattle had accrued before 1st January, 1917. That notwithstanding, it cannot be doubted however, that the period of prescription, 30 years, required by section 4 (1) of the Civil Law of British Guiana Ordinance can accrue, and if accruing would insure for the benefit of the appellant.

Section 4(1) of the Ordinance is as follows:—

> "Title to immovable property including immovable property of the Crown or Colony or to any easement, profit a prendre, servitude or other right connected therewith may be acquired by sole and undisturbed possession for thirty years of which not less than three years shall be after the date hereof, provided that such sole and undisturbed possession shall be established to the satisfaction of the Supreme Court of British Guiana, and that the said Court may issue declaration of title in regard to the said property or right upon petition, motion or summons in such manner as may be prescribed by any Ordinance or Rules of Court."

Rules of Court for this purpose were made and intituled "Rules of the Supreme Court (Declaration of Title) 1923." These provided inter alia that an application for a declaration of title under section 4(1) of the Ordinance should be made by petition, that a notice of the application should be published simultaneously in the Gazette and in a daily newspaper on three consecutive Saturdays, that the petitioner should serve a copy of the petition and of any supporting affidavit on each owner and occupier of land adjacent to that mentioned in the petition, that the Registrar upon production to him of an office copy of any declaratory judgment or order made by the Court under the Ordinance shall convey to the person whose title has been so declared and at his expense the property mentioned in the order.

Again by section 4 of the "Title to Land (Prescription and Limitation) Ordinance, 1952, which was assented to on 27th December, 1952, after this case was already heard, it is enacted —

"The Court may make a declaration of title in regard to the land or interest in —

(a) any action brought by or against the owner thereof or any person claiming through him or in which all the parties interested therein are before the Court;

(b) .. ..

(c) .. ..

(d) any application under the rules of Court."

By section 24 of this Ordinance section 4 of the Civil Law of British Guiana Ordinance was repealed and the law now in force is provided by section 3 of the "Title to Land (Prescription and Limitation) Ordinance, 1952." It is as follows:—

> "Title to land (including land of the Crown or of the Colony) or to any undivided or other interest therein may be acquired by sole and undisturbed possession, user or enjoyment for thirty years, if such possession, user or enjoyment is established to the satisfaction of the Court and was not taken or enjoyed by fraud or by some consent or agreement expressly made or given for that purpose:
>
> Provided that except in the case of land of the Crown or of the Colony, such title may be acquired by sole and undisturbed possession, user or enjoyment for not less than twelve years, if the Court is satisfied that the right of every other person to recover the land or interest has expired or been barred and the title of every such person thereto has been extinguished."

The appellant as plaintiff has asked for a declaration that he has acquired a prescriptive right to depasture his cattle on the eastern half or any part or portion of land at Plantation Susannah; this is in substance and effect a request for a declaration of title by prescription to a servitude. There are several parcels of land on the east half of the west half independently owned by those whom we described as the multiple proprietors, situate between appellant's land west half of west half and that of the respondent's east half of Susannah. No notice has been given to them of this claim and it has not been shown that they have any awareness of these proceedings or that they have had the opportunity to resist the claim made by the appellant; moreover some of them are purchasers at a sale at execution; in these circumstances we cannot make the declaration that the appellant acquired by prescription the right sought. This does not mean that the appellant is shorn of any right to resist any claim of user set up against him. We endorse the pronouncement of the learned trial Judge which is as follows:

> "A person who has had user as of right for the prescriptive period but has failed to get his title thereto established in keeping with the Ordinance is not debarred by the Civil Law of British Guiana, Ch. 7, from setting up his prescriptive right in defence to a claim because he has not had his title declared in the manner provided by Rules of Court. (*Lalbahadur-*

singh v. *Daniel McPherson* (1939) B.G.L.R. 80). But though thus unrestricted in his defence to a claim, he cannot himself put forward a claim founded on a title to prescription which has not been the subject of a decree by the Court in pursuance of a petition presented to the Court vide judgment by Worley C.J in *Adams and Christmas v. Raghubir*—No. 441 of 1946 Demerara—delivered on April 16, 1951 (1951 B.G.L.R. 90). The position is analogous with the bar to action provided by the Statute of Limitation. A defendant is able to resist a claim to possession of land although he may be barred by the statute from getting an order for possession."

There remains to be examined the question whether there exists in the dominant tenement a servitude, real or personal by transport over the lands of the multiple proprietors.

A reference to the transports earlier described discloses that there are 5 parcels of these lands in which no reservation of servitude is mentioned. They are —

(i) Transport No. 271 of 1939 by the Marshal (sale at execution) to Hygino Vasco daSilva (61/2 roods facade).

(ii) Transport No. 272 of 1939 by the Marshal (sale at execution) to Simeon Theobald daSilva (6 roods facade).

(iii) Transport No. 122 of 1924 by the Marshal to Archibald Rose (sale at execution) (3 roods facade).

(iv) Transport No. 291 of 1943 by Jacob L. Hanoman to Bhupsingh (3 roods facade).

(v) Transport by Archibald Rose No. 312 of 1948 to David Rose (3 roods facade).

With regard to (i), (ii), (iii), the sales at execution by which the Marshal transported to Hygino Vasco da Silva, Simeon Theobald da Silva and Archibald Rose respectively, each transportee took the title free of all encumbrances and of all servitudes if any had existed before. A sale at execution gives the purchaser an indefeasible title free of all encumbrances save and except those that may be indorsed on the transport. If there existed any servitude over the lands referred to above and sold at execution such servitude was extinguished at the sale. It is interesting to observe that when the Marshal transported the east half of Plantation Susannah (Transport 366 of 1936) to Mary Agnes Soares **et al** there was the reservation of a servitude "with the right of grazing cattle over the whole of said Plantation Susannah to each of the proprietors of the east and west halves of said plantation."

In (iv), (v) there are no reservations of any servitude. Counsel for the appellant submitted quite rightly "that where the servitude is mentioned on the transport of the dominant tenement and is absent from the transport of the servient tenement the servitude is valid provided that the owner of the servient tenement has notice of the existence of the servitude in favour of the dominant tenement." There has been no attempt in this case to show nor is there the slightest suggestion that any of the owners of the lands set out in the transports (iv) and (v) above had

any notice of the servitude engrossed on the appellant's transport or of any existence of such servitude. It is thus shown that all the parcels referred to in (i) to (v) above were not by transport affected by the servitude claimed for the appellant. These parcels of land are situate at different points between the dominant tenement, west half of the west half of Susannah and the servient tenement, east half of Susannah. They are separate parcels of land having a total facade of 20 to 25 roods out of the 371/2 or 40 roods separating the dominant and servient tenements; these are clearly shown to be not sufficiently near for the one to receive a benefit from the subjection of the other. This is fatal to the struggle for the establishment of the servitude between the two tenements for most of the intermediate lands do not owe any servitude at all.

One of the main points argued in this appeal was whether a servitude annotated on the transport of the servient tenement but not on the transport of the dominant tenement was a valid servitude enforceable in the courts in the absence of any agreement between the owners of the two tenements. Our finding that there was not sufficient proximity to enable a servitude to be sustained renders it unnecessary for this or other questions raised to be determined as their materiality no longer exists.

As to the claim for trespass the Judge found as a fact that the cattle impounded came from Plantation Bohemia and not from Susannah. In this Court, however, appellant's Counsel expressed the view that if indeed the cattle did come from Bohemia appellant would have no right to depasture such cattle at Susannah but he submitted that the finding of fact could not be supported. We do not share this opinion of the finding for we hold that there was sufficient evidence before him to justify the conclusion at which the Judge arrived.

For the reason already stated we affirm the judgment and order of the Court below. The appeal is accordingly dismissed with costs. Fit for two Counsels.

Solicitors:

For appellant: W. D. Dinally.

For respondent: J. E. de Freitas.

LOCHAN v. THE QUEEN

(In the Court of Criminal Appeal, (Holder C.J., Stoby and Luckhoo, J.J.) December 15, 16, 1956; February 18, 19, 26, 1957).

Criminal Law—Appeal—Reference by Governor—Consideration of fresh evidence—Criminal Appeal Ordinance, Cap. 8, s. 22 (*a*).

In August, 1956 the appellant was convicted of the murder of one R. He appealed against conviction and his appeal was dismissed in October, 1956. Under section 22 (a) of the Criminal Appeal Ordinance (Cap. 8) the Governor referred to the Court of Criminal Appeal a petition by the appellant, dated 27th November, 1956, alleging that he had been wrongly convicted. The evidence at the trial was that R died from a fracture of the seventh cervical vertebra which could have been caused by blows on the neck inflicted by the appellant. No evidence

was given at the trial of an X-ray examination of the suspected fracture and on appeal the Court of Criminal Appeal expressed concern that the deceased was not X-rayed before being allowed to leave hospital. Following on these comments investigation revealed that X-ray pictures had been taken which did not reveal a fracture and the Crown made this evidence available to the appellant. After hearing fresh evidence relating to the X-ray examination, the Court admitted it on the ground that it was not in any true sense available at the appellant's trial, following *R. v. Sparks,* 40 C. App. R. 83.

R was admitted to hospital on 26th December, 1955, and treated for suspected cervical fracture. On 28th December, 1955, the radiologist and the senior surgeon examined the X-ray pictures which did not reveal a cervical fracture. R left hospital against medical advice on 30th December, 1955, and died on 5th January, 1956, Post mortem examination revealed the cause of death to be a fracture of seventh cervical vertebra. The senior surgeon expressed the opinion that there was no possibility of a cervical fracture existing and no sign of it appearing on X-ray pictures properly taken. He could definitely say that a fracture did not exist. The radiologist agreed that it was possible but highly improbable that a cervical fracture could have existed and not been shown on X-ray pictures. The pathologist stated that he would not be surprised if told that fracture of cervical vertebra which he had seen on post mortem examination was not revealed on X-ray pictures.

Held: An opinion is tenable where it is based upon grounds which, even though they are not conclusive, are sufficient and reasonable but might be rejected by a jury, and the Court is not concerned with the correctness of an opinion expressed so long as the grounds on which it is founded are tenable. Had the evidence of the surgeon and the radiologist, together with X-ray pictures been before the jury, they might in all probability have come to a different conclusion from the one to which they had come. As a reasonable jury hearing that evidence and seeing the X-ray pictures and being properly directed might very likely have come to a different verdict the Court would not grant a retrial.

Attorney General v. Kelly (1937) I.R. 315 considered.

E. V. Luckhoo with *J. O. F. Haynes* for appellant.

S. S. Ramphal, Acting Solicitor General, for respondent.

Appeal allowed. Conviction quashed

cur. adv. vult.

Judgment of the Court: This matter comes before the Court upon a reference by the Governor under section 22 (a) of the Criminal Appeal Ordinance, Chapter 8, which provides that upon such a reference the case shall then be heard and determined by the Court as in the case of an appeal by a person convicted. Section 22 (a) is similar to section 19 (a) of the Court of Criminal Appeal Act, 1907.

On the 3rd day of **August, 1956,** the appellant was convicted at the Demerara Criminal Sessions on an indictment charging him with the Murder on 5th January, 1956, of one Ramcharitar, and was sentenced to death. He appealed to the Court of Criminal Appeal.

The appeal which was heard on 5th and 9th October, 1956, was on 27th October, 1956, dismissed. In the course of the judgment the Court made the following observations:—

> " We desire, however, to say that this Court views with concern the fact that an injured man who was admitted to the Public Hospital suspected of having a fractured cervical vertebra and whose condition was regarded by the Doctor who admitted him as being dangerous to life and necessitating an

> X-ray examination, was not X-rayed as required even though he remained in the Hospital as a patient for four days and eventually allowed to leave in that condition and without this being done. However recalcitrant the patient might have been or insistent his relatives, we conceive that it was the duty of the Medical Officer to ensure that the examination and treatment which he thought necessary should have been carried out before the patient left the Hospital."

This comment which was published in the Press came to the attention of Mr. Grewal, Senior Surgeon of the Public Hospital, who investigated the matter and submitted a report to the Director of Medical Services. In the meantime on 27th November, 1956, a petition on behalf of the appellant was forwarded to the Governor setting out, **inter alia,** certain circumstances relating to an X-ray examination of the deceased and praying that the convicted man be granted a pardon and that his release be ordered forthwith.

The reference to the Court was accompanied by the appellant's petition, the prayer of which sought to obtain a pardon and the immediate release of the appellant. While under the Royal Instructions the Governor is empowered to exercise the prerogative of mercy and may act as he thinks fit, yet where the question of fresh evidence arises it is suggested that this becomes a matter for consideration by the Court of Criminal Appeal, and accordingly the reference to this Court under section 22 (a) of the Criminal Appeal Ordinance is pertinent, and is the proper and correct course. This procedure provides a full opportunity for the examination and determination of this matter in open Court on established legal principles rather than by consideration and decision without an investigation before the Court.

At the commencement of the hearing of this appeal the Court indicated that it would hear the evidence which counsel for the appellant suggested was fresh evidence and would determine at a later stage whether it was admissible or not. A similar course was taken in *Sparkes' case 40 CAR. p. 83* where the Court of Criminal Appeal allowed the evidence to be given before deciding on its admissibility.

Having heard the evidence of Mr. Grewal and Dr. Low and seen the X-ray pictures which had not been in evidence before, and having heard the reasons why that evidence was not given at the trial the Court considered it necessary to call Dr. Alli Shaw and Dr. Nehaul who had given evidence at the trial. After all the evidence had been given counsel for the appellant contended that the evidence of Mr. Grewal and Dr. Low, together with the X-ray pictures, was fresh evidence which was not in any true sense available at the time of the trial of the appellant. The Acting Solicitor General agreed with this contention.

We are of the view that in the particular circumstances of this case and on the authorities the evidence submitted to this Court was not in a true sense available at the appellant's trial. Nor in fact was this evidence available at the time of the hearing of the appeal which was dismissed by the Court on 27th October, 1956. We desire to emphasize that the fresh evidence is admitted because of its nature and the circumstances under which it was not forthcoming at the trial, but it is to be

understood that fresh evidence is rarely admitted as it would open the door to evidence being brought forward after a trial when a jury had given their verdict. In this respect the views of the Court of Criminal Appeal as stated by Lord Goddard in *Collins' case* (*1950*) *34 C.A.R. p. 148* are pertinent:

> 'The danger of allowing further evidence to be called after conviction, and the reason why the Court does not allow it save in exceptional circumstances, is clear enough. It is very easy after a person has been convicted to find witnesses who are willing to come forward and say this, that or the other thing. If further evidence were allowed in such circumstances, it could always be said:' "If this evidence had been given at the trial, it does not follow that the jury would have convicted, or they might not have convicted." That is especially true in cases where the defence is an *alibi.* Two or three witnesses perhaps are called to establish an *alibi,* which the jury rejects. It is very often not difficult after conviction to find another witness or perhaps two more witnesses who would be willing to come and support the *alibi,* and it can always be said: "If only the prisoner had had the evidence of A or B which is now tendered, the jury might have come to a different decision, and the prisoner should have the benefit of that possibility." That is one of the reasons why this Court is necessarily reluctant to allow further evidence to be called after conviction'.

Mr. Grewal in his evidence stated that he treated one Samaroo who had been admitted into the Hospital on 26th December, 1955, and who on his directions was X-rayed. We are satisfied that the deceased Ramcharitar and Samaroo were one and the same person and that the X-ray pictures marked Samaroo related to Ramcharitar upon whom Dr. Nehaul performed the post-mortem examination.

Mr. Grewal also said that he examined this patient named Samaroo who had complained of pain in the neck and all over the body and that there was contusion of the upper lip. An earlier examination had been conducted by Dr. Annamunthodo which disclosed that all the limbs were mobile; the patient reflexes were present, movement of the neck was full except flexion which was limited, and that there was a slight weakness of the right hand which the patient attributed to an accident about three months before. The provisional diagnosis of Dr. Gillette and of Dr. Alli Shaw of a fractured spine was queried by *Mr. Grewal whose opinion was that there was no fracture;* and by way of confirmation he ordered an X-ray examination on 26th December, the result of which was that in the opinion of *Dr. Low there was "no bony injury".* Mr. Grewal saw the X-ray pictures for the first time on 28th December, and examined them; on the same day he also saw the report by the Government Radiologist, with which he agreed. Mr. Grewal said that the patient Samaroo left the ward on 30th December, up to which time he was not suffering from a fracture of the cervical spine nor from a fracture of the seventh cervical vertebra. The patient had been examined by him on 26th December and again on 28th December after the X-ray pictures had been taken. *His findings were based on his own examination and on the X-ray.*

Under cross-examination Mr. Grewal said that he agreed with the treatment which the patient had received when he was in the ward until he left it, and that he was treated for suspected cervical fracture. The treatment was that his head and neck were immobilized between sandbags with a pillow under the shoulders. After the X-ray examination it was disclosed that there was no fracture and the treatment previously given was discontinued on his instructions, but it was not recorded. In view of the fact that the patient had been admitted with a history of being beaten up and also with limitation of the flexion of the neck the stiffness of the neck could have been a symptom of the cervical fracture. He continued the treatment on the basis of the suspected fracture but discontinued it after the X-ray examination, after which the stiffness of the neck continued. Mr. Grewal stated that what put an end to any suspicion of fracture was the X-ray, together with his own examination. He had found no evidence of a lesion, but it *was possible for the cervical vertebra to be fractured without any injury resulting to the spinal cord.* On his examination he looked for lesions and having found none came to the conclusion that there was no fracture of the cervical vertebra affecting the spinal cord. *The absence of injury to the spinal cord was not in all cases conclusive as to injury to the cervical vertebra, and pain in the neck and limitation of flexion would not be a neurological sign of a fracture of the cervical vertebra* but a local sign. He had ordered an X-ray as was recorded by Dr. Alli Shaw. He admitted that there are certain factors which can affect the diagnostic value of an X-ray picture, and those factors, if present, might affect or throw suspicion on the diagnostic value of the picture. The quality of the picture was one of those factors as was also the angle. He stated that when a Surgeon ordered an X-ray to be taken he gives directions as to the area to be X-rayed. In the present case that area was the cervical spine. Within the area of the spine which was ordered to be X-rayed the fracture might lie at any angle; the front to back and the side were the two views taken. No directions were given as to the views to be taken but in the absence of any directions these were the A.P. and lateral views. *Mr. Grewal explained that there was hardly any possibility of a fracture of the cervical vertebra that would not be revealed in an A.P. and lateral X-ray. There would be no possibility of a fracture existing and no sign of it appearing on an A.P. or lateral view properly taken.* It was his opinion that there has never been a case where in these two views a fracture of the cervical vertebra has not been disclosed. He had examined the two pictures and considered the A.P. film and the lateral both of reasonable quality. *From the pictures he could definitely say that a fracture did not exist.* The quality satisfied the purpose, and if the pictures had not been good enough for him to pass an opinion he would have sent them back and have them re-taken. He had advised against Samaroo's discharge on 30th December for the following reasons:—

(i) the patient was still having pains in the neck which could have been due to strained muscle for which he intended giving him treatment; and

(ii) the patient was found to be suffering from a chest condition which was in the process of investigation.

Dr. Low stated in his evidence that the X-ray pictures were taken for a suspected fracture of the cervical spine to verify whether the sus-

picion in connection with the fracture was well founded or not. The request for the X-ray was signed by Dr. Alli Shaw. After examination of the two pictures taken he had made a report on 28th December, 1955, of "no bony injury" which appeared at the bottom of the request form sent by Dr. Alli Shaw, relating to Samaroo. Under cross-examination by the Acting Solicitor General, Dr. Low stated that the report was to the effect that the pictures he had examined revealed no evidence of bony injury which embraces any injury to bone including the cervical vertebrae. He agreed that it was true that an X-ray taken from an oblique angle sometimes revealed a fracture which A.P. and lateral views failed to reveal. The two X-ray pictures had been taken from the A.P. and lateral sides. He agreed that fractures were of varying intensity; at one end of the scale there was the fissure which might be a very slight crack and at the other end a gross displacement of the bone. *The very slight crack was less easily recognizable than the gross displacement and might not show up on an A.P. and lateral view but might do so on a view taken on the oblique angle. It was possible but highly improbable in the present case that there was a fracture of the cervical spine which was not shown in the X-ray picture taken on the A.P. and lateral view.* It was possible that a longitudinal crack taken from A.P. and lateral views might not appear on the picture. Dr. Low explained to the Court that the pictures were reasonably good pictures from which a diagnosis could have been made, and that it was possible to have a longitudinal crack in the present case, but not probable; only in rare cases would this be the case *but he would not rule out the possibility of there being a longitudinal fracture in the present case though it were rare.*

Dr. Nehaul who was called by the Court stated that he gave evidence in the Supreme Court at the Demerara Assizes on the 2nd or 3rd August, 1956, in connection with the death of Ramcharitar on whom he had performed a postmortem examination. He had also given evidence of the same nature before the Magistrate at Sisters Court on the West Bank, Demerara. He expressed the opinion both in the evidence at the Magistrate's Court and at the trial in the Supreme Court that the cause of death was a fracture of the seventh cervical vertebra. On his postmortem examination he saw a fracture of the seventh cervical vertebra; with local injury in the region of the fracture. Dr. Nehaul stated that he was not in a position to say accurately how long before death the fracture of the seventh cervical had taken place but in his opinion it could have been within three to ten days before death. As far as he remembered the fracture was transverse.

Dr. Nehaul indicated the difficulties which might arise in the interpretation of X-ray pictures of the spine as this depended upon the accuracy of the focusing and on structures in the path of the X-rays. From his knowledge the lower part of the neck is one of those regions which it is difficult to X-ray. The position of the seventh cervical vertebra is such that the collar bone and the surrounding soft structure may prevent the fracture to that vertebra from being shown on the X-ray picture and unless such a fracture is taken from a particular angle it will not be revealed in the picture. *If he had been told that the injury to the seventh cervical which he had seen on the post-mortem examination had not been revealed in an X-ray picture he would not have been surprised because*

he knew it is very difficult to detect some of those injuries to the spine by X-ray examination.

In the light of this evidence it was submitted by Counsel for the appellant that had the fresh evidence been placed before the jury at the trial it would probably have affected their verdict resulting in the acquittal of the appellant. In support of this contention he referred to the cases of *Harding 25 C.A.R. p. 190* and *Jordan* (*1956*) *Cr. App. R.p. 152.*

On the other hand it was submitted by the Acting Solicitor General that before this evidence could be considered as likely to affect the verdict of the jury the question of its tenability must be determined. He proceeded to argue that the basis for the opinion of Mr. Grewal, the Surgeon, that the deceased Ramcharitar up to the time when he left the Hospital on 31st December, 1955, was not suffering from a fracture of the seventh cervical vertebra or of any part of the region of the spine was ,the fact that the neurological signs for which he had been looking in order to support the existence of a fracture were absent and that he had seen nothing in his clinical observation which would have led him to conclude that there was such a fracture; and further, that the X-ray pictures revealed no sign of bony injury which supported Mr. Grewal's clinical examination.

Mr. Ramphal submitted that these conclusions, either separately or together, did not support Mr. Grewal's opinion as he had admitted that neurological signs may be absent but that there might still be a fracture of the cervical spine; he had also admitted that a fracture of the nature suggested might possibly not appear on an X-ray picture having regard to its location and the necessity for taking such pictures at various angles, which had not been done in this particular case.

We feel, however, that as pointed out by Counsel for the appellant, consideration must be given to Mr. Grewal's experience and the views which he had held when Ramcharitar was still in the Hospital. An opinion is tenable where it is based upon grounds which, even though they are not conclusive, are sufficient and reasonable but might be rejected by a jury. But this Court which cannot usurp the functions of a jury is not concerned with the correctness of the opinion expressed so long as the grounds upon which it is founded are tenable.

In the circumstances of this case Mr. Grewal based his opinion upon his clinical observation and the absence of the neurological symptoms and the result of the X-ray examination, and it cannot be said that an opinion so based is not capable of being maintained. It must be remembered that Dr. Low stated that while it was possible that a longitudinal crack in the cervical spine may not be revealed on X-ray pictures taken in the A.P. or lateral positions, it was highly improbable that a fracture of the cervical spine would not be shown on pictures taken in those positions. Further, Dr. Nehaul had said that as far as he remembered the fracture he had seen on the post-mortem examination was a transverse fracture. It follows that if the fracture existed at the time it was reasonable to conclude that as it was a transverse fracture it would have been seen on the X-ray pictures. Mr. Ramphal conceded that if Mr. Grewal's opinion could be held to be tenable then the fresh evidence could be held to be such that it might probably have affected the verdict of the jury.

We are of the opinion that had Mr. Grewal's and Dr. Low's evidence together with the X-ray pictures been before the jury they might in all probability have come to a conclusion different from the one to which they did come. We wish to make it clear, however, that we are not expressing an opinion that Mr. Grewal's opinion was, in fact, the correct one.

Mr. Ramphal further submitted that in the event of this Court allowing the appeal consideration should be given to the question whether the conviction should be quashed simpliciter or whether the interests of justice required that a new trial should under the provisions of section 6 (2) of the Criminal Appeal Ordinance, Chapter 8, be ordered. As was stated by him the Criminal Appeal Act, 1907, contains no similar provision empowering the Court of Criminal Appeal in England to order a new trial and no assistance on this aspect of the matter can therefore be obtained from English authorities.

In Eire, however, the power to re-hear exists and the principles on which the Court determines the course which it will take when additional evidence inconsistent with previous guilt has been received were stated in *Attorney General* v. *Kelly (1937) I.R. 315.* This report is not available to us but the passage we cite hereunder is taken from the J. P. and Local Government Review of 3rd November, 1951. Sullivan, C.J., there said —

> "When this court has read the proof of the evidence which the witnesses are prepared to give or when this court hears the witnesses—as it did in this case—it may take one of three courses. It may (1) refuse to reverse the conviction; (2) reverse the conviction and direct that the prisoner be discharged; (3) reverse the conviction and direct a re-trial. It would be undesirable for this court to lay down any rules that might fetter the discretion of this court in determining which of these courses it should adopt in any particular case.
>
> "In one case the evidence may be such as to satisfy the court that no reasonable jury that heard it should convict the accused and that obviously would be a case—but not necessarily the only case—in which the court would reverse the conviction and direct the discharge of the accused. In another case, the evidence may be such that, in the opinion of the court, it should not influence any reasonable jury in arriving at their verdict, and in that case the court would refuse to reverse the conviction. Apart from such cases, there may be cases in which the court, in the exercise of its discretion, is of opinion that in the interests of justice the value and weight of the evidence should be determined by a jury and not by the court. In such cases the court would reverse the conviction and direct a re-trial."

Mr. Haynes for the appellant contended that in the particular circumstances of this case it would serve no useful purpose for a new trial to be ordered as on a new trial the prosecution would be expected to call Mr. Grewal and Dr. Low as witnesses and to produce the X-ray pictures and the same conflict of medical opinion would ensue.

In the instant case if we ordered a retrial it would be the duty of the Crown to produce the X-ray photographs and to call as witnesses Mr. Grewal and Dr. Low. It seems to us that a reasonable jury hearing that evidence and seeing the X-rays and properly directed might very likely come to a different verdict and in the circumstances we decline to grant a re-trial. It is satisfactory to note that as soon as the Law Officers became aware of the existence of the fresh evidence including the X-ray pictures, they placed it at the disposal of counsel for the appellant and so acted in accordance with the duties and responsibilities of counsel for the Crown.

We feel that we must refer once again to the unfortunate circumstances which gave rise to this case being referred to us by the Governor. It is a matter of deep concern that arrangements at the Hospital were such that it was possible for evidence of vital importance in a trial involving the most serious crime to have remained unknown and not produced at the trial. Neither the Police nor the Crown nor the defence was aware of its existence. In consequence it was not available at the trial and has brought about a very undesirable state of affairs. It is difficult to escape the conclusion that the arrangements for producing medical testimony before the Courts are highly unsatisfactory. There should be no possibility of vital evidence remaining unknown to the Police or the Law Officers of the Crown until months after the accused has been convicted. We wish to state that it is unfair to the Judge whose summing up was adequate on the evidence before him, unfair to the Law Officers of the Crown, to the Police, to the public and unfair to the accused.

We trust that the comments which we now make will result in the present system being examined and an efficient arrangement devised which will prevent a repetition of any similar occurrence.

We are of the opinion that in the particular circumstances of this case the conviction should be quashed and the sentence set aside.

NERVILLE v. JONES

(In the Full Court, on appeal from a magistrate's court for the Georgetown Judicial District (Stoby and Luckhoo, JJ.) December 14, 1956, January 19, 1957).

Bastardy—Applicant single at date of application for summons—Applicant married and living with her husband at date of hearing of summons and at date when order made against putative father—Material date that when woman applies to magistrate for a summons by making complaint on oath—Bastardy Ordinance, Cap. 40, ss. 3, 4 and 9.

The respondent, who was an unmarried woman, gave birth to a child on the 26th May, 1948, and to another child on the 10th April, 1951. On the 20th

March, 1956, she swore to an information before a magistrate alleging that the appellant was the father of her children. As a result of her sworn information, summonses were issued against the appellant returnable for the 9th April, 1956, when the appellant appeared and denied paternity. The case was then adjourned to the 3rd April and then to 23rd May, 1956 and then postponed to the 18th June, 1956. The respondent married on the 26th May, 1956, and was a married woman living with her husband at the date of the hearing of the summons and on the date when the appellant was adjudged the putative father of the children.

It was contended for the appellant on appeal against the order of the magistrate that the respondent's marriage was fatal to the respondent's application as she must not only be single at the time of her application but single in the sense in which the word is used in the Bastardy Ordinance, Cap. 40) at the time of the adjudication.

Held: The material date is the date when the single woman applies to the magistrate for a summons by making a complaint on oath and that reference in section 4 of the Bastardy Ordinance Cap. 40, to the magistrate hearing "the evidence of the woman" is to the woman who was single when she made her application in accordance with section 3 of the Ordinance.

Appeal dismissed

B. S. Rai for the appellant.
J. O. F. Haynes for respondent.

Judgment of the Court: The appellant was adjudged by a Magistrate of the Georgetown Judicial District, the putative father of an illegitimate child and ordered to pay a weekly sum to the child's mother for its maintenance and education.

His only ground of appeal is that the decision was erroneous in point of law, in that the learned Magistrate held that the complainant need not be a single woman at the time when the affiliation order was made provided she was single at the date of her application for a summons.

The facts so far as they are material for the purposes of this appeal are that the respondent who was then an unmarried woman gave birth to a child on the 26th May, 1948, and to another child on the 10th April, 1951.

On the 20th March, 1956, she swore to an information before the Magistrate for the Georgetown Judicial District alleging that the appellant was the father of her children.

As a result of her sworn information, summonses were issued against the appellant commanding him to appear before a Magistrate to answer the allegations made against him. The summonses were returnable for the 9th April, 1956, on which day the appellant appeared and denied paternity. The record shows that the cases were adjourned to the 3rd April and then to the 23rd May, 1956. On the latter date, the appellant appeared and the hearing of the cases was postponed to the 18th June, 1956. The respondent married on the 26th May, 1956, so that although she was unmarried when she gave birth to her children and when she applied for the issue of summonses against the applicant, she was a married woman living with her husband at the date of the

hearing of the summonses and on the date when the appellant was adjudged the putative father of the children.

Mr. Rai for the appellant, submitted that the respondent's marriage was fatal to the application as she must not only be single at the time of her application but single (in the sense in which the word is used in the Bastardy Ordinance) at the time of the adjudication.

He relied on the dicta of Mellor, J. and Loch, J. in **Stacey v. Lintell** (1879) 43 J.P. 510; (1878) 4 Q.B.D. 291 and also submitted that the intention of the Bastardy Ordinance, Chapter 40 should not be overlooked, such intention being, he said, to provide for a child who has no father. His argument was that the Maintenance Ordinance, Chapter 168 makes a man who marries a woman with illegitimate children liable to support those children, there could be no dual liability and consequently a married woman living with her husband could never obtain an order against the putative father of her illegitimate children.

We will first discuss the argument relating to dual liability. Section 9 of the Bastardy Ordinance, Chapter 40 reads —

> "When a bastard child becomes chargeable to the poor law commissioners, the commissioners or a district commissioner may apply to the Magistrate of the district in which the child resides, and thereupon the Magistrate shall issue a summons to the man alleged to be the father of the child to appear before the Magistrate, at a time and place to be mentioned in the summons, to show cause why an order should not be made upon him to contribute towards the relief of the child".

Section 2 of the Maintenance Ordinance, Chapter 168 is —

> "Every man is hereby required to maintain —
>
> (a) his own children; and also
>
> (b) every child whether born in wedlock or not, which his wife has living at the time of her marriage with him; and also
>
> (c) if he cohabits with any woman, every child which that woman has living at the time of the commencement of the cohabitation; and also
>
> (d) the legitimate children of any child that his wife has by him during his marriage, or of any child of which he has been duly adjudged to be the father under any Ordinance for the time being in force for the maintenance of illegitimate children, in the event of the parents of those children failing to maintain them, until they attain the age of fourteen years, or longer if they are, by reason of bodily or mental infirmity, unable to maintain themselves".

It is clear from the latter Ordinance that in the present case the husband of the respondent is liable to maintain her illegitimate children.

The case of *Stacey* v. *Lintell* (supra) decided that a woman who married after the birth of her child ought not to be allowed to proceed against the putative father as her husband was liable to support the child and it could not have been the intention of the legislature to establish a double liability for its maintenance.

In *Peatfield v. Childs* (1889) 63 J.P. 117 an order made by justices against the putative father where the mother of the child had been turned out of doors by her husband on hearing of the existence of her illegitimate child was quashed. Laurence, J. said:—

> "If the rule was to stand, there would be two people liable to maintain this child."

Before the decision in *Peatfield v. Childs* (supra) the case of *Stacey v. Lintell* had been distinguished in *Sotheron v. Scott* (1881) 6 Q.B.D. 518 and *Hardy v. Atherton* (1881) 45 J.P. 683 neither of which was cited in *Peatfield v. Scott* (supra). In both these cases the question to be decided was whether the mother of an illegitimate child who while single had obtained an order against the putative father could enforce the order after her marriage. In both cases it was argued that to permit her to enforce it would mean that there was dual liability and *Stacey* v. *Lintell* was relied on. In both cases the argument was rejected. Hawkins, J. said in *Hardy* v. *Atherton* (supra) —

> "I am glad that it is so, for common sense and common humanity tell me that the putative father ought not to be relieved from liability to contribute his share of the maintenance of his own offspring at the expense of the man who has married the woman who had the misfortune to bear it, who possibly may have a hard struggle to support the family of which he is legitimately the head, and to whom the contribution towards the one foreign member of it maybe of much importance."

In *Jones v. Evans* (1944) 108 J.P. 170; (1945) 1 All. E.R. 19 a married woman whose husband was serving overseas, gave birth to a child of which her husband could not possibly be the father. In proceedings by the married woman against the putative father the Divisional Court overruling, the Justices held that for the purpose of the Bastardy Act the married woman was a single woman since there was a separation from her husband and she had committed a matrimonial offence which was not condoned.

The importance of this case from the point of view of dual responsibility is that the husband was still liable to maintain the illegitimate child under the Poor Law Acts.

The question of dual responsibility was specifically argued and decided in *Guardians of Plymouth* v. *Gibbs* (1903) 67 J.P. 61 where a woman who had given birth to an illegitimate child married a man able to maintain it. The mother having parted with her husband, went with her child into the workhouse and was maintained by the Guardians of the parish. Subsequently she resumed cohabitation with her husband but he refused to take the bastard child out of the workhouse. In proceedings by the Guardians against the putative father, it was held that the jus-

tices had jurisdiction to order the putative father to contribute towards the maintenance of the child.

Counsel for the putative father in that case contended as Counsel did in the present case that "there cannot be two persons both liable to maintain one child". Lord Alverstone, C.J. said —

> "Dual liability has been discussed in several cases, and where an order has been obtained it can be enforced notwithstanding means or marriage, and in such a case as that there would be a dual liability just as in the present one. I do not say that the case of Lang v. Spicer (Supra), was not rightly decided as the law then stood. The statute of 18 Eliz. c. 3, was not directly repealed, but was practically repealed by a subsequent enactment of 49 Geo. 3, c. 68, which was inconsistent with it. Although the legislature knew of Lang v. Spicer, and of the liability of the husband to maintain the illegitimate children of his wife under the Act of 1834, it enacted in 1872, and again in 1873, that where a bastard child became chargeable to a union or parish, the justices, on the application of the guardians, might make an order against the putative father".

True there are *obiter* in *N.A.B. v. Mitchell* (1955) 3 All. E.R. 291 indicating that the National Association Board the successors of the Poor Law Commissioners would have to prove that a mother is a single woman within the meaning of the Bastardy Acts before an order can be made against the putative father. But the respondent did not appear in that case and was not represented and the Plymouth case was not considered by the Court. As the sole point was whether the National Association Board could bring proceedings against a putative father who had not contributed to the maintenance of his child more than 12 months after the birth of the child, the obiter about the status of the mother may have to be reconsidered at some future time.

The conclusion we draw from the decided cases is that dual responsibility is not to be regarded as the test in construing the Bastardy Ordinance.

Section 9 of the Bastardy Ordinance, Chapter 40 which entities Poor Law Commissioners to take proceedings against a man alleged to be the father of a child who has become chargeable is the equivalent of section 5 of the Bastardy Laws Amendment Act 1873 (36 Vict C 9). Under this section the criterion is not the status of the mother but that of the child. Once the child becomes chargeable to the poor law commissioners, an order can be made against the putative father although the child's mother is married, living with her husband at the time of the application and the husband legally liable to maintain her child.

Under section 3 of the Bastardy Ordinance the criterion is the status of the mother; once she is single within the meaning of the Ordinance she is entitled to an order irrespective of whether more than one man is liable for the child's maintenance or not.

Section 2 of the Maintenance Ordinance which is the equivalent of section 57 of the Poor Law Amendment Act 1834 (4 & 5 Will. 4 C 76) makes a man liable to maintain his wife's illegitimate child or children; but it is only when the child becomes a charge on the poor law

commissioners that proceedings can be taken against him. In effect, what the legislature did in enacting the relevant provisions of the Maintenance Ordinance was to preclude an illegitimate child being maintained at the expense of the tax payers. Where a putative father is for some reason not maintaining his child and relief is given to the child or its mother and the child has a step-father, the Ordinance permits the commissioners to obtain an order against the step-father.

Having decided that the Bastardy Ordinance should be construed without any consideration of dual responsibility being involved we must pose the question—Is the respondent a single woman within the meaning of section 3 of the Ordinance? Section 3 states —

> "Any single woman who is delivered of a bastardy child may....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".

Now at the time when the respondent made her complaint on oath she was a single woman and at the time when the Magistrate issued his summons she was a single woman.

Mr. Rai contended, however, that section 4 (1) of the Ordinance cannot be ignored as it shows that the woman must remain single throughout the proceedings.

Section 4 (1) states —

> "On the appearance of the person so summoned, or on proof that the summons was duly served on him, or left at his last place of abode seven days at least before the hearing, the Magistrate shall hear the evidence of the woman, and any other evidence she produces, and shall also hear any evidence tendered by or on behalf of the person alleged to be the father; and, subject to the provisions of subsection (2) of section 61 of the Evidence Ordinance, the Magistrate may adjudge the person summoned to be the putative father of the bastard child; and the Magistrate may also, if he sees fit having regard to all the circumstances of the case, proceed to make an order on the putative father for the payment to the mother of that child, or to anyone appointed to have its custody under the provisions of this Ordinance, of a sum of money weekly, not exceeding three dollars a week, for its maintenance and education".

Mr. Haynes submitted that once the woman was single at the date of her application for a summons she did not lose her single woman status if she married before the order was made. He cited —

Ex parte Fielding (1861) 25 J.P. 757 and *Healey v. Wright* (1912) 3 K.B.D. 256 in support of his argument.

We propose to examine the following authorities in chronological order —

Ex parte Fielding (1861) 25 J.P. 759

Stacey v. *Lintell* (1879) 43 J.P. 510

Tozer v. *Lake* (1897) 43 J.P. 656.

Healey v. *Wright* (1912) 3 K.B.D. 256.

Marshall v. Malcolm (1918) 87 L.J. K.B. 491, 493;

Ex parte Fielding (1861) 25 J.P. 759 was a case where the information was laid by the mother on October 23, 1860 and a summons issued. The summons was not served and on July 5, 1861 another summons was issued. It was objected at the hearing on behalf of the defendant that there was no application to the justice who had issued the second summons. The objection was overruled and an affiliation order made. The defendant moved for a rule **nisi** for a **certiorari** to bring up the order. The rule was refused. Wightman, J. said—

"The best evidence of the application was the issuing of the summons."

In Stacey v. *Lintell* (supra) the mother applied for an affiliation order after she was married. Mr. Justice Mellor said —

"I think that the intention is that the woman throughout should be a single woman".

In *Tozer* v. *Lake* (1879) 43 J.P. 656 the mother of an illegitimate child obtained a summons for an affiliation order which was not served as the putative father had absconded for about 15 months during which period the mother married. She applied for and obtained a second summons against the putative father. It was held that the justices had no jurisdiction to make the order. Mr. Justice Lindley said —

"The order was not made upon a summons applied for and issued when the respondent was a single woman."

In *Healey v. Wright* (1912) 3 K.B.D. 256 the mother of an illegitimate child swore to an information alleging that a certain man was the father of her child. The summons was issued but could not be served. She married and while married and living with her husband obtained an amendment to the first summons by changing the date of hearing. It was held that the amended summons was tantamount to a fresh summons and that she could not obtain an order because she was married when the amended summons was issued.

It should be noted that in this case, Counsel for the appellant argued that the woman must be single at the time the order is made and cited *Stacey* v. *Lintell* and *Tozer v. Lake.* Although the court did not expressly decide the point, Lord Alverstone C.J. said —

"If we had to deal with the simple question whether respondent's marriage operated as a bar to the order the application being made by her and the summons having been issued while she was a single woman I think we should have to answer that particular question in favour of the respondent. If an application is made by a single woman, the authorities show that an order may be made even though

> the woman marries after the issue of the summons. If therefore the only question were whether an order could be made if the woman married before the date of the order the answer would be in favour of the respondent."

In *Marshall v. Malcolm* (1918) 87 L.J. K.B. 491 a married woman living with her husband made an application on 11th July, 1917, for an affiliation order against a man alleging that he was the father of her child. The child was born in March, 1916, and the applicant's husband could not possibly be the father. Her husband forgave her and resumed cohabitation. Mr. Justice Darling in deciding whether she was entitled to an order said—

> "In deciding whether she was to be deemed a single woman within the meaning of the Act the material date is the date of the application for the affiliation order. The question to be decided therefore is whether the respondent was to be deemed a single woman on 11th July, 1917."

In a recent article in the Justice of the Peace and Local Government Review, September 15, 1956, a contributor states:—

> "....no woman may apply for an affiliation order unless she is a single woman, as that expression has been interpreted. The material time is the time of her application (Marshall v. Malcolm (1917) 82 J.P. 77), and if she marries between the issue of the summons and the return date her single woman status is not affected (R. v. Lancashire Justices (1874) 38 J.P. 215)".

Although the cases cited do not justify the contributor's statement, nevertheless, from the article we have referred to, and the authorities cited it would seem that there is preponderance of opinion to the effect that if a woman is single when she makes her application for an affiliation order and a summons is thereupon issued then her subsequent marriage does not preclude the making of an order.

We have come to the conclusion that the material date is the date when the single woman applies to the Magistrate for a summons by making a complaint on oath and that the reference in section 4 of the Ordinance to the Magistrate hearing "the evidence of the woman" is to the woman who was single when she made her application in accordance with section 3.

The appeal is dismissed with costs fixed at $20.

Mc DONALD v. CHARLESTOWN SAWMILLS LTD.

(In the Full Court, on appeal from the magistrate's court of the Essequibo Judicial District (Holder, C.J., and Luckhoo, J.) February 22, 27, March 8, 1957).

Workmen's Compensation—Meaning of "workman"—Remuneration—Prima facie evidence that applicant a workman—Burden on employer to show employee is within exception—Method of determining remuneration—Workmen's Compensation Ordinance, Cap. 111, s. 2.

Where *prima facie* evidence is given that an employee is a "workman" as defined by section 2 of the Workmen's Compensation Ordinance, Cap. 111, the onus is upon the employer to show that the employee comes within the exceptions contained in the definition of that term.

In contracts where an employee's remuneration is determined by work done and it is not possible to determine with certainty or at all what his remuneration would be in the period of 12 months immediately preceding his death, if it is sought to show that he was earning such a sum as would bring him within one

of the exceptions to the definition of the term "workman" there must be evidence that over a reasonable period of years immediately prior to his death his remuneration was such that there was real ground for expecting that the average remuneration he earned over the period of 12 months immediately preceding his death would continue.

Appeal allowed.

J. O. F. Haynes (F. L. Brotherson with him) for the appellant.

C. L. Luckhoo for the respondent.

cur. adv. vult.

Judgment of the Court: This is an appeal against the decision of a Magistrate of the Essequibo Judicial District dismissing an application brought by the appellant against the respondents for compensation under the Workmen's Compensation Ordinance Chapter III in respect of the death of her reputed husband Dudley Small.

At the hearing before the Magistrate, it was not disputed that the deceased was employed by the respondents as captain of their punts conveying timber from the respondents' timber-grant on the Essequibo River to Georgetown and that on the 27th August, 1955, while so employed, he received the injuries which later resulted in his death.

The evidence disclosed that the deceased had been employed by the respondents in the capacity of a punt-captain from the year 1942 to the time of his death under an oral agreement. By the terms of this agreement the deceased's remuneration was paid by the number of trips made and on the basis of the number of cubic feet of timber per ton he transported by his punt from the respondents' grant in Essequibo to Georgetown. From this amount he had to pay his crew of three members. In the year immediately preceding his death his crew was paid a total sum of $62 per trip, the balance remaining therefrom being retained by him.

According to Sinclair Tull, who was the mate of the punt captained by the deceased, a trip took between 8 to 11 days and on the average the deceased made two complete trips per month and sometimes three. This average as can be seen from an examination of Ex. "B" which *inter alia* contains a list and dates of the trips made during the year immediately preceding the date of the deceased's death, was maintained during that year.

According to the evidence of Julio Gomes, an employee of the respondents Company but called by the applicant, the deceased earned much more than $120 per month on the average.

A list was tendered in evidence Ex. "B" containing the dates of the trips made by the deceased during the period 30th August, 1954, to 25th August, 1955, the dates of the payments made to the deceased in respect of those trips, the number of cubic feet of timber transported by him on those trips, the rate per cubic foot and the amounts paid to him.

The learned Magistrate held that the only reliable evidence as regards payment to the deceased was contained in Ex. "B" and found that as the actual nett receipts of the deceased from the 30th August, 1954, to 25th August, 1955, amounted to $2,276.87 the deceased was in re-

ceipt of remuneration in excess of $1,800 a year and was therefore not a "workman" within the meaning of that term in section 2 of the Ordinance. The relevant portion of that definition is as follows:—

> "'workman', subject to the exceptions hereinafter mentioned means any person who has entered into or works under a contract of service or apprenticeship with an employer, whether by way of manual labour, clerical work or otherwise, and whether the contract is expressed or implied, is oral or in writing and whether the remuneration is calculated by time or by work done":

Counsel for the appellant contended that the Magistrate applied the wrong test in determining whether the deceased was a workman within the contemplation of the Ordinance.

Mr. Haynes submitted that the correct test to be applied in determination of that question is that a person comes within the exception contained in paragraph (a) of the definition of "workman" if under his contract of service the terms thereof are such that the contract will last a year (provided he is not dismissed nor dies) and will produce an income of more than $1,800 a year.

Mr. Haynes further submitted that if a contract is such that if the employee works through the year, he might or might not receive an income exceeding $1,800 then in such circumstances he does not come within the exception.

Counsel argued that the test is not what the employee has actually received during a particular year but what is contemplated by the contract that he would earn during a year and that must be capable of estimation at the time he embarks upon his contract of service.

Counsel also submitted that as there was no dispute that the deceased was a person who had entered into a contract of service with an employer he is *prima facie* a workman as defined by the Ordinance and the onus is upon the respondents to show that he came within the exceptions contained in the definition of that term. Counsel for the respondents on this point, submitted that the onus was upon the appellant to prove that the deceased was outside of the exceptions.

We are of the opinion that following the ordinary rule that he who asserts must prove the onus of proving that the deceased was within the exception in question is upon the respondents. The question which now arises is—have the respondents discharged the onus upon them proving that the appellant's remuneration exceeded $1,800 a year?

Mr. Haynes submitted that having regard to the evidence led, the respondents have failed to do so and that this will be appreciated if the correct test is applied.

In support of his submissions, Mr. Haynes cited to us a number of authorities.

In *Williams v. S. S. Maritime* (Owners) (1915) 2 K.B. 137 C.A. it was held that in assessing the remuneration regard must be had only to the existing contract of service and to what happened under it.

In *Griffith v. S. S. Penrhyn Castle* (1917) 1 K.B. 474 C.A. the question was whether the County Court Judge had applied the right principle in arriving at his conclusion that the deceased was not a workman as his remuneration exceeded £.250 a year. In that case the deceased had been receiving a monthly wage of £24.10s. at the time of his death. The County Court Judge thought that all that had to be done was to multiply that amount by 12, and that as that sum exceeded £250 a year he was therefore not a workman.

The Court of Appeal unanimously rejected that method of assessing the deceased's remuneration and in the course of his judgment Scrutton L.J. said —

> "Parliament has spoken of 'remuneration', not earnings, and has not incorporated in this case either the three years' or one year's conventional rule it has applied to get the amount of compensation from the workman's previous earnings. It speaks of persons 'employed' at a 'remuneration', and I think this language must be confined to the employment in which the accident happens and the remuneration is earned, and that we cannot make up a year's income out of several employments at various remunerations. The man is not a workman if the remuneration of his employment exceeds 250 1. a year. I think this must be limited to remuneration under contract, and not extended to possible earnings in the future. In my view, to satisfy the words of the Act it must be shown that there is a contract of employment which, unless determined by notice or by some extraneous fact such as death or the destruction of the subject-matter of the contract, will last a year and produce a remuneration of over 250 1.; and it is not enough to show a contract for less than a year at a remuneration of less than 250 1., as a six months' contract for 150 1. This construction appears to me to give effect to the words used, 'employment at a remuneration exceeding 250 1. a year', and not to require any words, such as 'at the rate of to be written in, or to involve any difficulties as to what year, whether past or future, is referred to. It also avoids the difficulties as to seasonal employment where a man may make in the year less than 250 1., but during part of the year may be engaged at a rate which if multiplied for the year would exceed 250 1., while in fact he is making much less".

That test was again applied by the Court of Appeal in *Reid v. British & Irish Steam Packet Co.* (1921) 14 B.W.C.C. 20.

In *Thomson & Co. v. Mackay* (1921) 14 B.W.C.C. 143 H.L. the pilots at Barry Docks who were not serving under any engagement but were earning dues by working as pilots, had an association and all the takings were pooled and periodically divided among the members of the association. The applicant for the month or two for which he worked earned £6 a week, but there was no engagement at £6 per week. There was no continuous employment and no evidence to show that there was in any way a customary sum or that he had any real ground for expecting that the £6 a week would continue.

It was held that on these facts the evidence was wholly insufficient to exclude from the Judge's consideration the possibility that the employment might become irregular, and that the rate of payment might fall. There was evidence in which he could so hold and his award could not be interfered with.

Mr. Haynes further submitted that from the facts proved in the present case, the proper inference to be drawn is that the deceased's annual income under the terms of his contract was uncertain. Mr. Haynes contended that there was no evidence that the deceased's earnings in any contractual year exceeded $1800: — and in fact there is no evidence on the record to indicate when the deceased's contract of service had commenced.

Mr. Lloyd Luckhoo for the respondents, submitted that where there is evidence that an employee under a contract has been employed over a considerable period, in a regular manner continuously and has been receiving regular payments, those are circumstances which a Court is entitled to take into consideration in coming to a finding whether or not the deceased was a workman in the contemplation of the provisions of the Ordinance.

Counsel contended that if a Court were not entitled to consider past earnings, the manner of his earnings, the regularity of his employment in the past then in contracts under which an employee is remunerated by way of work done, it would not be possible to determine with certainty or at all what would have been the earnings of an employee in this type of occupation if he had not died.

Mr. Luckhoo further contended that there is no suggestion that the period of one year ending with the death of the deceased was in any way an abnormal one and that the use of that period even though not conclusive is a sound basis in normal circumstances for computing the normal earning capacity and remuneration of an employee as contemplated by the definition of "workman" in the Ordinance.

Mr. Luckhoo argued that the *Thomson* case was distinguishable from the present case in that in the former there had been no continuous employment and no evidence to show that there was any real ground for expecting the £6a week to continue while in the present case the deceased's employment had been continuous over a period of 13 years and there was real ground for expecting the average income to be in excess of $1,800 as evidenced by an average being taken over any reasonable period during the year immediately preceding his death.

In the present case it has been proved that the deceased was continuously employed by the respondents but no evidence has been led to show that over a reasonable period of years immediately before his death the remuneration was such that there was real ground for expecting that the average remuneration he earned over the period of 12 months immediately preceding his death would continue.

The respondents have sought to show that the deceased was within one of the exceptions set out in the definition of the term "workman" under the Ordinance.

It was stated by Scrutton L. J. in *Wood v. Wood* (*1923*) 16 B.W.C.C. 208 at p. 216:—

> "I am rather disposed to think, though I do not know of any express authority for it, that, when you have an Act which is intended to lay down a general principle, you construe the exceptions rather against those who put them forward."

In our view the burden is upon the respondents to show by clear evidence that the deceased comes within the exception and not for the appellant to show that he does not. The material necessary for doing this, if it does exist, would certainly be in the hands of the respondents—employers of the deceased—who would no doubt have records of the remuneration paid to him during his employment.

We are of the opinion that there is sufficient *prima facie* evidence that the appellant is a workman within the meaning of that term in the Ordinance and that there is no clear evidence that the deceased came within any of the exceptions set out in section 2 of the Ordinance.

The appeal is therefore allowed and the matter remitted to the Magistrate for assessment of the compensation payable to the deceased's dependants and for determination of its distribution.

Costs to appellant fixed at $25:—

SAWH v. LOWE

(In the Full Court, on appeal from a magistrate's court for the Georgetown Judicial District (Holder, C.J., and Luckhoo, J.) February 15, March 8, 1957).

Motor Vehicles and Road Traffic—Charge under Motor Vehicles Insurance (*Third Party Risks*) *Ordinance, Cap. 281—Disqualification from holding or obtaining driving licence on conviction—Appeal against conviction—Appeal dismissed—Whether order for disqualification suspended pending appeal—Motor Vehicles and Road Traffic Ordinance. Cap. 280; ss. 31* (*2*)*, 35* (*2*)*,—Motor Vehicles Insurance* (*Third Party Risks*) *Ordinance, Cap. 281, s. 3* (*1*)*—Summary Jurisdiction* (*Appeals*) *Ordinance, Cap. 17, s. 12.*

An order made under the provisions of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 281 for disqualification from holding or obtaining a driving licence is by virtue of section 12 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, suspended pending the hearing and determination of an appeal against the decision of the magistrate under which that order was made.

The provisions of section 31 (2) of the Motor Vehicles and Road Traffic Ordinance, Cap. 280 (which relate to the power of a court to suspend the operation of an order made under that Ordinance, for disqualification from holding or obtaining a licence pending an appeal against the order) do not relate to an order for disqualification from holding or obtaining a licence made under the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 281.

Appeal allowed.

M. Poonai for the appellant.

F. H. W. Ramsahoye, Crown Counsel (ag.) for the respondent.

Judgment of the Court: The appellant was on the 11 th August, 1956, convicted by the magistrate of the Courantyne Judicial District of the offences of driving while disqualified, contrary to section 32 (5) of the Motor Vehicles and Road Traffic Ordinance, Chapter 280, and of using an uninsured motor vehicle, contrary to section 3(1) of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Chapter 281.

From both these convictions he has appealed.

The evidence disclosed that the appellant drove a motor car, No. 8256, along the Public Road at Crabwood Creek, Courantyne, Berbice, on Saturday the 19th May, 1956. On the 15th June, 1955, the appellant had been convicted of using a motor vehicle on a road without there being in force in relation to the user of that vehicle such a policy of insurance as complied with the requirements of the Motor Vehicles Insurance (Third Party Risks) Ordinance, contrary to section 3 (1) of that Ordinance. On the latter charge the appellant was disqualified from holding or obtaining a licence under the Motor Vehicles and Road Traffic Ordinance, Chapter 280 for six months.

The appellant appealed to the Full Court against this conviction and the appeal was, on the 20th of April, 1956, dismissed, the conviction and sentence being affirmed.

It was submitted on behalf of the appellant that on the 19th May, 1956, the date of the alleged offences, the appellant was not a disqualified driver because the period of disqualification which had been imposed on him on the 15th June, 1955, had by virtue of the provisions of section 31(2) of Chapter 280 come to an end on the 15th December. 1955.

Section 31 (2) of Chapter 280 provides as follows:—

> "A person who by virtue of an order of a court under this Ordinance is disqualified from holding or obtaining a licence may appeal against the order in the same manner as against a conviction, and the court may, if it thinks fit, pending the appeal, suspend the operation of the order."

Mr. Poonai contended that as the magistrate had not suspended the operation of his order for disqualification pending the appeal, the disqualification commenced to run as from the date of conviction and sentence, i.e. 15th June, 1955.

Mr. Ramsahoye for the respondent submitted that the provisions of section 31 (2) of Chapter 280 are not applicable to a disqualification imposed on conviction on a charge brought under section 3(1) of Chapter 281.

He contended that the provisions of section 31 (2) of Chapter 280 apply only to orders for disqualification made under that Ordinance, Chapter 280; that as there was no similar provision to be found in Chapter 281, the provisions of section 12 of the Summary Jurisdiction (Appeals) Ordinance, Chapter 17, would apply to suspension of execution of the decision of the Magistrate against which the appeal was brought; and that consequently the period of disqualification which had been imposed on the appellant began to run only from the 20th April,

1956, the date of the dismissal of his appeal, and was therefore still in force on the 19th May, 1956, when he drove motor car No. 8256.

It was held by the Divisional Court in *Kidner v. Daniels* (1910) 22 Cox *C.C.* 276 that an order for disqualification under section 4 (1) of the Motor Car Act, 1903 (which was replaced by section 6 (1) of the 1930 Act) is not suspended by notice of appeal alone. The reason for that conclusion was given in the course of his judgment in that case by Lord Alverstone C.J. at page 279 when he said—

> "Now subsection 4 of Section 4 of the Motor Car Act, 1903, says that a person who is by virtue of an order of the court under the section disqualified for obtaining a licence may appeal against the order, "and the Court may, if they think fit, pending the appeal, defer the operation of the order,." If there is nothing in the Summary Jurisdiction Act—and I believe there is nothing and Counsel agree that there is nothing —which, automatically so to speak, suspends the operation of the order pending the appeal, it would seem there must be an act of the justices to defer the operation of the order.".

Appeals from the decision of Courts of Summary Jurisdiction are in this Colony regulated by the provisions of the Summary Jurisdiction (Appeals) Ordinance, Chapter 17. Section 3 of this Ordinance provides that —

> "unless the contrary is in any case expressly provided by Ordinance, anyone dissatisfied with a decision of a Magistrate may appeal therefrom to the Court in the manner and subject to the conditions mentioned."

Under the provisions of section 2 of Chapter 17 the term "decision" means any final adjudication of a Magistrate in a cause or matter before him and includes any non-suit, dismissal, judgement, conviction, **order,** or other determination of the cause or matter.

It has not been expressly provided in Chapter 280 or in Chapter 281 that anyone dissatisfied with an order for disqualification imposed by a Magistrate shall not have any right of appeal to the Full Court or that such right of appeal shall not be exercised in the manner and subject to the conditions specified in Chapter 17.

It appears to us, therefore, that the provisions of Chapter 17 apply to and govern an appeal from the decision of a Magistrate on a charge instituted under Chapter 280 or Chapter 281.

Under the provisions of section 12 of Chapter 17 where the provisions of that Ordinance relating to the notice of appeal and security required to be furnished have been complied with, the decision of the Magistrate under appeal shall be suspended until the appeal is determined by the Full Court of Appeal.

In our opinion, the order for disqualification imposed on the appellant on the 15th June, 1955, was suspended by virtue of the appeal instituted by the appellant against the Magistrate's decision in the matter and only commenced to run from the 20th April, 1956, when this

Court dismissed the appeal and affirmed the conviction and sentence imposed upon the appellant.

The order of disqualification imposed on the appellant by the Magistrate on the 15th June, was therefore in force on the 19th May, 1956, when the appellant drove motor car No. 8256.

Mr. Poonai further submitted that as the appellant had been disqualified on a charge brought under the provisions of section 3(1) of Chapter 281, even if it were held that such disqualification was still in force on the 19th May, 1956, he would not be liable to conviction under section 32 (5) of Chapter 280 as that subsection contemplated that the defendant should have been disqualified consequent upon a conviction under the provisions of Chapter 280.

Section 32 (5) of Chapter 280 provides as follows:—

> "(5) If any person who under the provisions of this Ordinance is disqualified from holding or obtaining a licence applies for or obtains a licence while he is so disqualified or if any such person while he is so disqualified drives a motor vehicle or.....that person shall be liable, on summary conviction....."

Mr. Ramsahoye submitted that while section 32 (5) of Chapter 280 taken literally might indicate that the appellant was not disqualified under the provisions of Chapter 280, yet having regard to the provisions of section 3 (2) of Chapter 281 it is clear that the conviction, fine and disqualification imposed on the appellant must have been made under the provisions of Chapter 280.

Section 3 (2) of Chapter 281 provides as follows:—

> "(2) If a person acts in contravention of this section he shall be liable to a fine not exceeding two hundred and fifty dollars or to imprisonment for a term not exceeding three months or to both such fine and imprisonment, and a person convicted of an offence under this section shall (unless the Court thinks fit to order otherwise and without prejudice to the power of the Court to order a longer period of disqualification) be disqualified from holding or obtaining a driver's licence under the Motor Vehicles and Road Traffic Ordinance, for a period of twelve months from the date of the conviction."

It is to be observed that the provisions of section 31 (1) and (2) of Chapter 280 are in *pari materia* with those of section 6(1) and (2) of the English Road Traffic Act, 1930, and section 32 (1) to (6) of Chapter 280 with those of section 7 (1) to (7) of the 1930 Act. The only difference in wording is that wherever in Chapter 280 the words "this Ordinance" appear, in the 1930 Act the words "this Part of this Act" appears. Sections 6 and 7 of the 1930 Act appear in Part 1 of the Act.

Subsections (1) and (3) of section 3 of Chapter 281 are in *pari materia* with subsections (1) and (3) of section 35 of the 1930 Act. Section 35 of the 1930 Act appears in Part 2 of the Act. In subsection (2) of section 35 of the 1930 Act the words "under Part 1 of this Act"

appear where the words "under the Motor Vehicles and Road Traffic Ordinance" appear in subsection (2) of section 3 of Chapter 281.

While, however, the provisions of sub-section (2) of section 3 of Chapter 281 are in *pari materia* with those of subsection (2) of section 35 of the 1930 Act, the latter subsection contains a provision which is absent from the former—

> "A person disqualified by virtue of a conviction under this section or of an order made thereunder for holding or obtaining a licence shall for the purposes of Part 1 of this Act, be deemed to be disqualified by virtue of a conviction under the provisions of that Part."

In England, therefore, on a conviction under section 35 (1) of the 1930 Act with a consequent order for disqualification under section 35 (2) an appeal brought against the decision of the Court, by virtue of section 6 (2), would not cause the execution of the decision to be suspended; and the disqualification, unless the Court otherwise orders, runs from the date of the Order. Further, an order for disqualification made by virtue of a conviction under section 35 in Part 11 of the Act would be deemed to be made by virtue of a conviction under Part 1 of the Act and such a disqualification would be within the contemplation of the provisions of section 7 (4) of the Act (the local counterpart of which is section 32 (5) of Chapter 280).

The question which arises is—does the omission from section 3 (2) of Chapter 281 of such a provision as that contained in section 35 (2) of the Act have the effect as contended for by counsel for the appellant in the present matter?

We are of the opinion that the provisions of section 32 (5) of Chapter 280 are not referable to those of section 3 (2) of Chapter 281 in the absence of the provision referred to above contained in section 35 (2) of the 1930 Act and omitted from section 3 (2) of Chapter 281.

A breach of an order for disqualification imposed under section 3 (2) of Chapter 281 is punishable under the provisions of section 24 of that Ordinance and not under section 32 (5) of Chapter 280 under which the charge against the appellant was instituted.

The appeal against the appellant's conviction on that charge must therefore be allowed, the conviction quashed and sentence set aside.

With respect to the appeal by the appellant against his conviction under section 3 (1) of Chapter 281 for using an uninsured motor vehicle, the onus of proving that there was in force a valid certificate of insurance was upon the appellant *Williams v. Russell* (1933) 97 J.P. 128. There was no evidence that such a certificate was in force and therefore the appellant failed to discharge the onus placed on him.

This appeal must therefore be dismissed and the conviction and sentence affirmed.

The appellant having succeeded in one appeal and failed in the" other there shall be no order as to costs of the appeals.

HENDRICKS v. THE VILLAGE COUNCIL OF KITTY AND ALEXANDERVILLE

(In the Full Court, on appeal from a magistrate's court of the Georgetown Judicial District (Holder. C.J., and Luckhoo, J.) January 11, March 8, 1957).

Evidence—Proof of decision taken by a local authority at a meeting of the authority—May be proved by extract of minutes of meeting at which the decision was made certified by Chairman of the local authority—May also be proved by oral testimony of the Chairman or some person present when the decision was made.

A decision taken by a local authority may be proved in the manner provided by section 200 of the Local Government Ordinance, Cap. 150, that is to say, by an extract minute of the proceedings of the local authority purporting to be a certified true extract by the Chairman of the local authority* It may also be proved by the oral testimony of the Chairman or some person present when the decision was made.

Appeal dismissed.

L. F. S. Burnham for the appellant.

J. A. King for the respondents.

Cur. adv. vult.

Judgment of the Court: This is an appeal from the decision of a Magistrate of the Georgetown Judicial District ordering the appellant to deliver up possession of business premises situate under the Kitty Market to the respondents.

At the hearing before the Magistrate, the evidence disclosed that the premises consisted of a stall under the shed of the north-eastern part of the Kitty Market let by the respondents to the appellant at a rental of $1.20 per week. The respondents are the local authority of the Village District of Kitty and Alexanderville, and function under statutory authority as provided for by the Local Government Ordinance, Chapter 150.

The Chairman of the Village Council gave evidence in support of the case for the respondents to the effect that the appellant's tenancy was duly determined by a notice to quit given in consequence of a decision of the Council made at one of the meetings of the Council, the use of the space occupied by the premises being required by the Council to provide a cycle park for the use of shoppers at the market.

A copy of the notice to quit stated by this witness to have been served on the appellant was tendered in evidence without objection on the part of the defence.

The clerk in charge of the market, Claude Maloney, testified that prior to August, 1955, the appellant's stall was closed for almost a year and was only re-opened by some person other than the appellant about two weeks before the notice to quit was served on the appellant.

The case for the appellant was that he depended on the profits from the business carried on at the stall to supplement his income for the support of a wife and nine children; that he had built up a goodwill at those premises; that he was unable to find alternative accommodation of a

similar kind; and that the respondents' application was not genuine. In the course of his evidence the appellant stated that the notice came as a complete surprise to him. This is of importance in view of Counsel's submission on behalf of the appellant that there was no proof that the tenancy was duly determined by a notice to quit.

It was first submitted by counsel for the appellant that the Magistrate erred in point of law when he found that the appellant's tenancy had been duly determined.

Counsel contended that there was no proper evidence that the respondents, who are a corporation, sent a notice to quit or instructed that such a notice be sent to the appellant.

In support of this contention, Counsel referred to the provisions of section 85 of the Local Government Ordinance, Chapter 150 requiring the clerk of the local authority to take the minutes of proceedings and to section 200 of the Ordinance which provides that an extract minute of the proceedings of a local authority purporting to be certified as a true extract by the Chairman of the local authority shall be received, without further proof, in all courts of justice and for other purposes as *prima facie* evidence of such extract minute of every matter or thing contained therein.

Counsel submitted that the oral evidence of the Chairman of the Council that the Council had made a decision that a notice to quit should be sent to the appellant was not enough, but that it was necessary for the respondents to prove that such a decision was made by production of the relevant minutes duly read and approved or of a certified extract thereof.

Counsel for the respondents, on the other hand, submitted that the oral evidence given by the Chairman was sufficient, and that it was not obligatory for a certified extract of the minutes of the meeting at which the decision was made to be tendered in evidence. Counsel contended that the minutes of a meeting of the Council would not ordinarily be admissible evidence without statutory provision therefor; that in any event such evidence was only *prima facie* evidence of the facts stated therein and if challenged it would be necessary to call the direct evidence of a person or persons present at the meeting at which the decision was made; and that the provisions of section 200 of the Ordinance do not exclude the common law method of proof of the decision.

Neither Counsel cited any case law on the point, but the Law Journal of the 16th November, 1956, volume CVI (N.S.) there appears at page 722 under the caption OBITER DICTA the following:—

> *"A Company's Mind" again.*
>
> In the first *Austin Reed's* case, reported on another point in (1956) 2 All E.R. 509, Danckwerts, J., refused an application for a new tenancy, made under Part II of the Landlord and Tenant Act 1954, because he was satisfied that the Landlord company had, at the material date, formed an intention to demolish the premises in question on the termination of the tenancy. As we remarked briefly in these columns at

p. 546, *ante*, the decision was upheld in the Court of Appeal on July 18 last; and we added that at least two members of that Court said that, while a contemporary record of a formal resolution in the minutes was the best evidence of a company's intention, evidence might be adduced in other ways. The Court of Appeal's decision has not been reported, so, for the convenience of our readers, we now reproduce the *ipsissima verba* of the learned Lord Justices, taken from the transcript of the judgment. Lord Justice Jenkins said this: "It is no doubt most desirable in cases of this kind that the intention should be formally recorded in a clearly expressed minute so that no doubt about the matter can remain. Nevertheless I think it would be going too far to say that for the purposes of the Act the only way a company can evidence its intention is by a formal minute of a resolution of the board. It seems to me that it is clearly established that the board met together and arrived at a decision in fact to demolish or reconstruct the premises that is enough, although the decision was not recorded in a formal minute." And Hodson, L.J., said: "It is not necessary however for a company to pass a formal resolution provided that its intention is clearly expressed." It remains to be added that in *H. L. Bolton* (*Engineering*) *Co. Ltd. v. T. J. Graham & Sons, Ltd.* noted at p. 728, *post*, it was held that in certain circumstances the intention of the company can be derived, in the absence of a decision by the board, from the expressed intention of the company's directors or managers.

At page 728 of Starkie on the Law of Evidence (4th Edition) it is stated—

> "With certain exceptions already adverted to, (which are not relevant to the present case) the general rule," as above stated, seems to be, that oral evidence may be used indifferently as original and independent evidence of a fact, either concurrently with or in opposition to written testimony; and that written evidence, however superior it may be, and frequently is in effect, to mere oral evidence, does not in any case, of its own authority, unaided by an express rule of law, exclude such evidence."

In our view, a decision taken by the Council at a meeting of the Council may be proved by the oral testimony of the Chairman or some person present when the decision was made.

In the present case the Chairman, Azeem Khan, testified that the decision was taken at a meeting of the Council. It was not suggested in cross-examination by Solicitor for the defendant (appellant) that the witness was not present when the decision was made.

It was next submitted by Counsel for the appellant for similar reasons to those advanced in his first submission that there was no legal proof that the respondents required the premises of which the appellant was a tenant.

This ground of appeal fails for the reasons we have already given in respect of Counsel's first submission.

It was also submitted on behalf of the appellant that there was no evidence that the notice to quit, of which Ex. "B" purports to be a copy, was ever delivered to the appellant by the witness Baldeo.

We have carefully examined the evidence in this respect including the terms of Ex. "C", a letter dated the 12th September, 1955, written by the defendant (appellant) to the respondents and are of the view that there is sufficient evidence from which it can reasonably be inferred that the notice was in. fact served on the appellant by way of delivery to his wife at the appellant's place of abode.

It was next submitted that the respondent's application for possession was not a reasonable one. Counsel contended that as the evidence disclosed that the business carried on by the respondents in respect of the market was the rental of stalls to tenants, the provision of parking space for shoppers did not come within the term "business" in section 16 (1) (e) (iii) of the Rent Restriction Ordinance, Chapter 186.

Counsel further contended that it could not successfully be urged on behalf of the respondents that the premises were required for a public purpose as contemplated by section 16(1) (i) of the Ordinance, Chapter 186.

Counsel for the respondents contended that the provisions of both section 16 (1) (e) (iii) and section 16 (1) (i) applied in the present case as provision of a cycle park on the premises would improve the amenities of the market and would also be for the convenience of the tenants and the public who have business at the market.

We are of the opinion that the provision of a cycle park for shoppers at the Market is a purpose which can fairly be considered to be a public purpose. There is no evidence that the market is exclusively used or intended for use by one section of the community or not open for use by all sections of the community or by the inhabitants of the colony as a whole even though it may primarily be intended to supply the needs of the inhabitants of the area in which it is situate.

Finally, it was submitted on behalf of the appellant that it was unreasonable in all of the circumstances for the order for possession to be made.

Counsel contended that the Magistrate erred when in coming to a decision on this aspect of the matter he held that there was much vacant space in the market to which the appellant's stall might be removed, and that the loss of sales due to removal would only be temporary.

Counsel submitted that there was no evidence on which such a conclusion could properly be founded and that as a result, the Magistrate erred when he held that it was reasonable in all of the circumstances to make the order for possession.

While we are of the opinion that the Magistrate's conclusion that the appellant would be allotted space in the market on removal is not

founded on the evidence, we ourselves have applied our minds to all relevant considerations and are of the view that it is reasonable in all of the circumstances to make the order for possession.

The appeal is therefore dismissed. The order of the Magistrate requiring the appellant to give up possession of the premises to the respondents is affirmed.

The appellant will deliver up possession to the respondents on or before Monday 1st May, 1957.

Cost to the respondent $20:—

TAMESHWAR and *anor* v. THE QUEEN.

(In the Judicial Committee of the Privy Council, on appeal from the Supreme Court of British Guiana, before Earl Jowitt, Lord Tucker and Lord Denning).

Trial—View of locus in quo with witnesses—Absence of trial judge from view—Trial vitiated.

Reasons for report of the Lords of the Judicial Committee of the Privy Council, delivered the 1st May, 1957 by Lord Denning.

If witnesses give demonstrations or answer questions at a view, that is undoubtedly part of the trial and must be had before the trial judge and jury. Where such a view takes place in the absence of the trial judge it is a defect which would vitiate the trial.

This does not apply to a simple view without witnesses by a jury of an object or scene.

Appeal allowed.

This was an appeal by special leave from a judgment of the Court of Criminal Appeal in British Guiana dismissing the appeal of the two appellants against their conviction for robbery with aggravation after a trial before Miller, J. and a jury. At the close of the argument their Lordships announced that they would humbly advise Her Majesty to allow the appeal and quash the convictions; and they now give their reasons for the advice which they tendered.

The point on which special leave to appeal was granted was the fact that the jury had a view with witnesses *in the absence of the Judge.* The question is whether that vitiates the trial. The Judges in the Court of Criminal Appeal were divided in opinion. Holder, C.J. and Phillips, J. thought that it would not warrant their holding that the trial was irregular, Stoby, J. held that the Judge's absence was fatal.

The material facts are these: At about 7:15 in the morning of 25th February, 1954, a postal apprentice named Sherry Browne, aged 19, was entrusted with a bag containing $13,129.68 to carry to the Nigg Post Office. He was cycling towards the Post Office when two men

stopped him at a bridge and pulled him off his cycle. One had a gun and the other a cutlass. They took the bag of dollars and ran away with it. It has never been recovered.

Two men named Tameshwar and Seokumar were arrested and charged with the offence. At the trial Tameshwar was called accused "No. 1" and Seokumar accused "No. 2", and it is convenient here to do the same. Sherry Browne gave evidence of the robbery and identified accused Nos. 1 and 2 as his assailants. A boy scout, aged 12, gave evidence that he saw two men running away and identified them as accused No. 1 and 2. A barber said he saw two men running away and identified accused No. 2 as one of them. A young married woman said that she saw accused No. 1 running with a bag over his shoulder. So did a carpenter. A police sergeant named Adams gave evidence of statements made by the two accused after they were arrested. Both, in their first statements, said they were not at the place at all; but accused No. 2 afterwards made a second statement in which he said they were both there but he himself took no part in the actual robbery. He said: "Me get frighten and me run pon Nigg dam behind Tameshwar . . . Ah run behind Tameshwar and meself and them been ah shouting 'Hold he, hold he' ". Later accused No. 2 withdrew this second statement and said it was obtained from him by threats. The defence of each of them was an alibi. Accused No. 1 said he was in a boat going to the rice field. Accused No. 2 said he was in his hammock in his living quarters.

At the end of the evidence taken in Court, the jury made a request to visit the scene of the robbery and asked that the postal apprentice, the boy scout, the barber, the young married woman and the carpenter should attend. They also wished to see the living quarters of the accused.

On Tuesday, 15th February, 1955, the view took place. Before the jury left for the view, they were checked in the presence of the Judge to see all were there. The two accused men were there. So were the Superintendent of Police and Counsel for the Prosecution. The Judge warned the jury not to have any communication or engage in any discussion or argument. The jury then left with the Registrar, the Marshal, and Counsel for the Prosecution and Counsel for No. 2 accused, and the police officers. The two accused were present throughout. They went to the scene of the robbery. The postal apprentice indicated the spot where he said he was robbed, then the bridge where he said he saw the two accused standing. Police Sergeant Adams pointed out the Nigg Post Office and two dams which had been mentioned in evidence. The boy Scout pointed out the spot where he said he was standing when he saw two men running south. The barber pointed out the spot where he saw accused No. 2. The young married woman pointed out the house in which she lived at the time and the place where she was standing when she saw accused No. 1 going south. The carpenter showed the bridge on which he was standing when he saw accused No. 1.

It appears that three other witnesses were present at the view. A witness for the defence, Hector Apadoo (who had given evidence in support of No. 2's alibi that he was in his hammock), showed where

Nos. 1 and 2 accused were living, and where he himself was living, and the communal latrine. A witness for the prosecution (who was an engine driver who lived on the same estate as the two accused), showed where he was living. A witness for the defence (who had given evidence in support of No. l's alibi that he was in the boat) indicated the koker south of the estate. Sergeant Adams indicated the house where a witness for the prosecution, named Bacchus, lived.

On the next day after the view the trial was resumed before the Judge in Court. Sergeant Adams gave evidence of what happened ft the view. Sherry Browne, the postal apprentice, was re-called so as to be offered for cross-examination by the accused. They declined the offer. The other witnesses were available also for cross-examination but Counsel for the accused did not take advantage of it. Counsel made their speeches. The Judge summed up. The jury found the prisoners guilty by a majority of 11 to 1. Each was sentenced to 10 years penal servitude and 6 strokes by flogging.

It is important to notice that there is no suggestion of impropriety on the part of the jury or witnesses or anybody else at the view or any irregularity apart from the absence of the Judge. No complaint was made at the trial about the absence of the Judge, for the simple reason that in British Guiana for many years it has not been regarded as necessary for the Judge to attend a view. It appears that in British Guiana many Judges in the past have not accompanied the jury, and in a case decided in 1954 (*Hassan Mahamed* v. *The Queen*) the Court of Criminal Appeal in British Guiana had held that the absence of a judge on a visit to the place was not an irregularity.

The question for our consideration is whether the absence of the Judge at the view is a fatal defect in the trial.

In England it is a rare thing for a jury in a criminal trial to view the place where the crime is said to have taken place. At one time it was never done at the Assizes except with the consent of the prosecution. But in a case in 1847 on a trial for rape, the defence wished the jury to have a view, in order to support the contention that it was so public a place that it was unlikely for the offence to have taken place there. The prosecution did not consent, but nevertheless the Judge allowed a view. It was regarded as a thing of such moment that the jury was accompanied by the Under Sheriff, the Chief Constable, 20 policemen and 12 javelin men; but the Judge apparently did not go with them. Nor did the prisoner. It is to be noticed that there were no witnesses. (See *R.* v. *Whalley* (1847) 2 Car. and K. 376.) Such a view is on a par with the common case where a thing is too large or cumbrous to bring into Court but is left in the yard outside. It is everyday practice for the jury in such a case to be taken to see the thing. The Judge sometimes goes with them. Sometimes he goes by himself. But there are no witnesses and no demonstration. Their Lordships see nothing wrong in a simple view of that kind, even though a judge is not present. In a case of motor manslaughter, any member of the jury could go in the evening and look at the place by himself if he wished, without being guilty of any irregularity.

It is very different when a witness demonstrates to the jury at the scene of a crime. By giving a demonstration he gives evidence just as much as when in the witness box he describes the place in words or refers to it on a plan. Such a demonstration on the spot is more effective than words can ever be, because it is more readily understood. It is more vivid as the witness points to the very place where he stood. It is more dramatic as he re-enacts the scene. He will not, as a rule, go stolidly to the spot without saying a word. To make it intelligible he will say at least "I stood here" or "I did this", and, unless held in check, he will start to give his evidence all over again as he remembers with advantages what things he did that day. But however much or however little the witness repeats his evidence or improves upon it, the fact remains that every demonstration by a witness is itself evidence in the case. A simple pointing out of a spot is a demonstration and part of the evidence. Whilst giving it the witness would still be bound by the oath which he had already taken to tell the truth. If he wilfully made a demonstration, material to the proceedings, which he knew to be false, he would be guilty of perjury.

In England the Court of Appeal has clearly held in civil cases that a view, coupled with a demonstration, is part of the evidence. So much so that if it takes place in the absence of one party without his consent, the trial is bad—*See Goold v. Evans & Co.* [1951] 2 T.L.R. 1189. Or again, it may of itself outweigh all the other evidence in the case, so that the Judge can found his decision upon it without more—*See Buckingham v. Daily News Ltd.* [1956] 3 W.L.R. 375. Their Lordships have held likewise, in a criminal case in an appeal from British Guiana, that a view, at which witnesses give demonstrations, is part of the evidence—*See Karamat v. The Queen* [1956] A.C. 256.

Now if a view of this kind is part of the evidence—as their Lordships are clear that it is—it would seem to follow that it must be held in the presence of the Judge. It is the very essence of a criminal trial that it must be decided on the evidence before the Court and not on any outside information; and that the Judge and jury must be present throughout the giving of the evidence and every part of it, so as to be able to appreciate it and assess its worth: and throughout the speeches of counsel too. The summing-up of the evidence by an impartial judge with a trained mind is an essential part of every criminal trial: but it can only properly be done by a judge who has heard all the evidence and seen all the demonstrations by witnesses. The Judge, for instance, may notice something at a demonstration which may be of vital import but passes unnoticed by everyone else until he draws attention to it. His presence ensures not only that the proceedings are properly conducted but also that no relevant point on either side is overlooked.

Thus much has been said because there was a case in England many years ago which at first sight suggests the contrary. It is *Reg. v. Martin and Webb* (1872) L.R.I.C.Cas.R. 378 where two men were charged with indecency in a urinal. Two policemen gave evidence of what they had seen through the bars in a wall. After the Judge had summed up, the jury asked to view the place so as to see whether the policemen could have seen what they asserted. No objection was made on behalf of the prisoners. The jury had a view. The Judge did not attend.

Nor did the prisoners. On the return of the jury to the Court, without any further direction from the Judge, they found the prisoners guilty. Afterwards the Court was informed that the two police witnesses had gone to the view and pointed out where they had stood at the time of the alleged offence and the position in which the prisoners were standing: and that the jury had then placed themselves in the same spot and looked through the bars. A case was thereupon stated for the opinion of the Court on the ground that there had been a mistrial in that (*inter alia*) the jury had at the view put questions to the witnesses and thus received evidence in the absence of the Judge and the prisoners. The Court for Crown Cases Reserved refused to determine this point because there had been no examination in the Court below into the facts of what took place at the view. The alleged reception of evidence out of Court might be a mere rumour without any foundation. The conviction was therefore affirmed. Their Lordships cannot regard that case as any warrant for a view to take place with witnesses in the absence of the Judge. A reference to the report in 26 L.T. 778 shows that, during the argument, all the Judges thought it was undesirable and some thought it was wrong; but they did not determine the point because the facts were not properly before them. Now that the point has arisen for decision, their Lordships have no hesitation in saying that it is not only undesirable but that it is wrong for a view to be had with witnesses in the absence of the Judge.

Counsel for the Crown sought however to justify the practice in British Guiana by reference to the Criminal Law (Procedure) Ordinance of 1953 which re-enacts a provision to the like effect dating back to 1893. It says in section 45 (i) and (ii) —

> "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 the Judge seeming proper.
>
> 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 these directions shall affect the validity of the proceedings unless the Court otherwise orders."

Their Lordships think that the view primarily contemplated by that section is a simple view by a jury when no witnesses are present, such as a view of a van in the yard of the Court, or of the cross-roads where a motor accident took place. But the section undoubtedly extends to cover a view when witnesses are present and demonstrate where they stood. Their Lordships so held in the recent case of *Karamat v. The Queen (supra).* That case formed the basis for much of Mr. Le Quesne's argument. He said that the section applied alike to a view with witnesses as to a view without witnesses: and hence that if a Judge need not be present at the one, he need not be present at the other. Their Lordships do not accept this contention. Section 45 enables the Court or a Judge to determine the terms and conditions on which a view

may be held; but this power must be exercised in accordance with the fundamental principles of a fair trial: and one of these principles is that every piece of evidence given by a witness must be given in the presence of the tribunal which tries the case: and the tribunal is not the jury alone, but the Judge and jury. Section 90 of the Ordinance says that "the trial shall be had by and before a Judge of the Court and a jury". If witnesses give demonstrations or answer questions at a view, that is undoubtedly part of the trial and must be had before the Judge and jury.

These observations do not apply to a simple view without witnesses. It often happens that a jury has a simple view of a vehicle in the Courtyard by themselves without the Judge being present. It is rather like their examination of an exhibit or a plan in the jury room without the Judge being present. But the Judge usually sees it himself too.

There remains the question whether the absence of the Judge at this view vitiates the trial. Their Lordships are mindful of the principles on which they advise Her Majesty in criminal cases. Slow as their Lordships are to interfere, yet if it is shown that something has taken place which tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future, then their Lordships may well think it necessary to advise Her Majesty to allow an appeal—See *The Attorney-General of New South Wales v. Bertrand* (1867) L.R.1.P.C.520 at p. 530, *Ibrahim* v. *Rex* [1914] A.C. 599 at p. 615 per Lord Sumner. Their Lordships think it plain that if a Judge retired to his private room whilst a witness was giving evidence, saying that the trial was to continue in his absence, it would be a fatal flaw. In such a case, the flaw might not have affected the verdict of the jury. They might have come to the same decision in any case. But no one could be sure that they would. If the Judge had been present, he might have asked questions and elicited information on matters which counsel had left obscure; and this additional information might have affected the verdict. So here, if the Judge had attended the view and seen the demonstration by the witnesses, he might have noticed things which everyone else had overlooked: and his summing-up might be affected by it. Their Lordships feel that his absence during part of the trial was such a departure from the essential principles of justice, as they understand them, that the trial cannot be allowed to stand. Mr. Le Quesne argued that the conviction should not be set aside unless the absence of the Judge was shown to have affected the result of the trial: but their Lordships do not think it should stand in any case. It is too disturbing a precedent to be allowed to pass.

SINGH v. KHAN.

(In the Full Court, on appeal from the Magistrate's Court for the East Demerara Judicial District (Holder, C. J., and Clare, J.) March 7, June 3, 1957).

Maintenance of child—Illegitimate child—Mother dead—Claim for maintenance of illegitimate child instituted by maternal grandparent against putative father—Claim for maintenance only competent in respect of legitimate children—Maintenance Ordinance, Cap. 168, s. 2 (a).

The provisions of section 2 (a) of the Maintenance Ordinance, Cap. 168 whereby every man is required to maintain his own children apply only to his legitimate children and do not include his illegitimate children.

Appeal allowed.

B. S. Rai for the appellant.

Miss S. Edun for the respondent.

Cur. adv. vult.

Judgement of the Court: This is an appeal by the appellant from the decision of the Magistrate of the East Demerara Judicial District upon an application by the respondent, the grandmother and guardian of an illegitimate child named Joy Beverley Sherriot for an order under section 2(a) and sections 5 and 6 of the Maintenance Ordinance, Chapter 168. The facts may be briefly stated.

Joy Beverley Sherriot, born on the 24th day of July, 1951, is the illegitimate daughter of one Safiran Khan, deceased, and, on his own admission, of the appellant. The respondent, Budhia Khan, was the mother of the deceased Safiran Khan, and is the grandmother of the little child, Joy Beverley. The appellant says that his name was registered as the father of this child in the Register of Births of division number 10, Georgetown District, at the instance of her mother, Safiran Khan. On the 8th day of January, 1955, the appellant admitted on oath the paternity of this child and also admitted that he had maintained her since her birth until her mother's death on the 15th day of October, 1954, at the St. Joseph's Mercy Hospital. The appellant also stated that he had paid the hospital and funeral expenses of the deceased.

Following upon the death of Safiran Khan, the question of the custody of her child Joy Beverley was brought before the Court on an ex parte application made by its grandmother, Budhia Khan. An Order was made giving the child into her custody and care. Against this order the appellant appealed in the first instance to a Judge in Chambers who confirmed the Order, and then to the Full Court of Appeal. That Court also confirmed the Order and dismissed the appeal concluding its judgment as follows:—

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

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

It appears from the evidence in this appeal that the appellant has never accepted or acted upon the advice given by that Court in the conclusion of its judgment, and in consequence it became necessary for the respondent Budhia Khan to apply to the Court for maintenance of the child Joy Beverley. At the conclusion of the respondent's evidence, it was submitted on behalf of the appellant that the proceedings were not maintainable and that the Court had no jurisdiction under Chapter 168 section 2, and that the complaint should have been brought under the Bastardy Ordinance since the word "child" in section 2 of Chapter 168 means legitimate children.

Counsel for the appellant referred to section 2(b) of the same Ordinance and pointed out that the appellant was adjudged the father under this section and the Magistrate had ordered the appellant to pay the sum of $1.75 per week for maintenance and education of the child until it attained the age of 14 years.

Counsel informed the Court that he was unable to find any direct authority bearing on the point either one way or the other. Neither had he been able to find any corresponding legislation in the United Kingdom, and that the nearest approach to the legislation, the Maintenance Order, Chapter 168, is the Children's Act 1908-1948. He submitted that the complaint was brought under section 2(a) and sections 5 and 6 of the Maintenance Order, Chapter 168; and that the term "children" used in section 2(a) means lawful children except where specifically illegitimate children are referred to, or where the context compels an extension of the meaning of children to include illegitimate children.

The child in question, being an illegitimate child, has in law no father, it is *nullius filius*, and therefore *prima facie* section 2(a) does not apply to this child, and the context of the section does not permit an extension to include illegitimate children. Section 3 requires every widow and unmarried mother to maintain her own children, legitimate or illegitimate, but there illegitimate children are specifically mentioned. Section 5 relates to a person who is under an obligation to maintain another person "under this Ordinance" which is not applicable to this child having regard to the provisions of section 2(a).

The Bastardy Ordinance makes provision for illegitimate children, and is intended and designed to take care of children born out of wedlock and to provide for their maintenance by their putative fathers. The Bastardy Ordinance sought to take care of illegitimate children as they do not primarily fall within the provisions of the Maintenance Ordinance.

Counsel for the respondent submitted that the whole intention of the Bastardy Ordinance was not to benefit the child through the mother

or the state. Where there is a guardian, the guardian cannot institute proceedings. If the mother dies before proceedings are instituted, the guardian cannot apply to the Court for an Order.

In the Summary Jurisdiction Ordinance, Cap. 12, section 42, which relates to the protection and maintenance of married women, "children" means legitimate children. In the Maintenance Ordinance, Chapter 168, section 2, paragraphs (b) and (c) do not deal with the children of the father; section 2(c) places responsibility on the man for maintenance of every child which a woman with whom he cohabits could have living with her at the time of commencement of the cohabitation; and section 2(d) makes a similar provision in respect of any child of whom he had been adjudged to be the father. Consequently, if he is liable for the lawful child of his illegitimate child, why is he not made liable for the illegitimate child herself? The Court is asked to put a wide interpretation on the word "children" used in section 2(a) which must be comprehensive and embraces children, legitimate or illegitimate.

In the Maintenance Ordinance, the term "children" is capable of a wide interpretation enabling it to be construed as embracing illegitimate children.

We have considered the interesting argument addressed to us, and in our view, if the law had been intended to be so comprehensive and embracing as to include illegitimate children in section 2(a) where the expression "children" is used, then it would have so stated as it does in several instances. In the Bastardy Ordinance specific provision is made for and in respect of illegitimate children, and indeed an examination of the Maintenance Ordinance shows that in certain provisions illegitimate children are specifically referred to. In our view the maxim *"expressio unius est exclusic alterius" applies.* In legal instruments "child" is always construed to mean legitimate as opposed to an illegitimate child.

In the circumstances we are of opinion that the Magistrate was not empowered to make the Order Under the provisions of section 2(a) and sections 5 and 6 of the Maintenance Order, Chapter 168, and that the application could only have been made under the Bastardy Ordinance. But the mother being dead it was not possible for such an application to be made, and accordingly it appears that recourse was had to the provisions of the Maintenance Ordinance for the purposes of bringing this application.

The Court appreciates the circumstances leading to this application, but to seek to find a method of making provision for this child by bringing the application under the Maintenance Ordinance is in our view misconceived, and however sympathetic we might be to the question of the maintenance of this child, yet we cannot give an interpretation of section 2(a) of the Maintenance Order which is totally inapplicable. We would, however, wish to remind the appellant of his obligations to this unfortunate child admitted by him to be his, and for whom he professed and maybe still professes to have the greatest affection, and whose interest he considers to be his constant concern whereas in actual practice he has failed to provide any proper means or in fact any means for its maintenance. We would have thought his affection would have found tang-

ible expression in positive acts of kindness and in an endeavour to maintain the child at a standard befitting his own status and within his income.

The appeal is however allowed. There will be no order for costs, and we hope that our observations will not go unheeded. At the opening of his argument Counsel for the appellant sought to make it clear to this Court that personal and legal issues should be kept separate and distinct. We agree; this is a Court of law. But we would point out that "in all the transactions of human affairs the law has a finger", and we would emphasize that where human life and welfare are concerned personal issues must have a bearing; they will have a bearing on the future of this little child.

The appeal is allowed and the order of the magistrate is set aside.

DELPH v. SEERATTAN

(In the Full Court of the Supreme Court, on appeal from a magistrate's court of the Georgetown Judicial District (Holder, CJ., and Bollers, J. (ag.)) July 6, 9, 1956, June 5, 1957).

Sale of Foods and Drugs—Nature, substance and quality demanded—Adulterated ground coffee—Certificate of Analyst that coffee contained foreign organic matter—Onus on seller to prove any exception or provision contained in the Sale of Foods and Drugs Ordinance Cap. 144 on which he relies.

The appellant D. brought a complaint against the respondent S. for selling to the prejudice of the purchaser D. ground coffee not being of the nature, substance and quality demanded by the purchaser contrary to section 6 (1) of the Sale of Foods and Drugs Ordinance, Cap. 144. D. had purchased 3/4 lb. of ground coffee from S. for 99 cents at the same time informing S. that it was required for the purpose of analysis. After the coffee had been divided into three parts, one part was sent to the Government Analyst for analysis. A certificate was issued by the Government Analyst to the effect that the coffee was adulterated in that it contained foreign organic matter to the extent of 26.7% and a copy of the certificate was served on S. in accordance with section 22 of the Sale of Foods and Drugs Ordinance, Cap. 144. Later, another certificate given by the Government Analyst was tendered in evidence to show that the coffee was roasted coffee but the magistrate held that this latter certificate was inadmissible on the ground that it had not been issued with the summons which was served on S. The magistrate dismissed the charge against S. holding that the first certificate contained no particulars indicating whether the substance examined fell within the standard of purity prescribed by the Ordinance and that consequently there was no evidence that the substance sold as coffee was below the standard of purity prescribed. D. appealed against the dismissal of the charge by the magistrate.

Held: (i) The evidence adduced established that the ground coffee was sold in a mixed state, the first certificate of the Analyst certifying that the coffee contained foreign organic matter.

(ii) The proviso to section 6 (1) of the Sale of Foods and Drugs Ordinance, Cap. 144, provides that an offence shall not be deemed to be committed under section 6 of the Ordinance where the standard of purity does not fall below that of the cases set forth in the first Schedule to the Ordinance. It is, however, provided by section 23 (4) of the Ordinance that where an article of food or drug having been sold in the mixed state is proved, if the defendant desires to rely upon any

exception or provision contained in the Ordinance, it shall he incumbent upon him to prove it. The evidence having established that the coffee was sold in a mixed state the onus fell upon S. to show that the standard of purity did not fall below that prescribed. This S. failed to do.

Obiter: The second certificate of the Analyst was supplemental to the first certificate and was admissible in evidence.

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

H. E. Phillips for the respondent.

cur. adv. vult.

Judgment of the Court: This is an appeal against the decision of a Magistrate of the Georgetown Judicial District, who dismissed a complaint brought by the appellant against the respondent for selling adulterated ground coffee contrary to section 6(1) of the Sale of Food and Drugs Ordinance, Chapter 144, in that he, the respondent sold to the appellant on Monday, the 28th day of November, 1955, at Leopold Street, in the Georgetown Judicial District, a certain article of food, to wit, 3/4lb. of ground coffee, valued 99c. not being the quality, substance or nature demanded by the purchaser, the appellant.

The Magistrate dismissed the complaint and the appellant appealed against this decision. Before us the appeal was argued upon two grounds, namely —

(1) The decision of the Magistrate was erroneous in point of law in that —

(i) the complainant having led evidence to prove that the coffee which was the subject matter of the complaint was sold in a mixed state, was under no duty to prove that the coffee was within the standard of purity prescribed by the Sale of Food and Drugs Ordinance since proof of this is by law incumbent upon the defendant;

(ii) the certificate of the Analyst which was admitted in evidence should have been treated by the learned Magistrate as sufficient for the purposes of proof that the article sold was not of the nature, quality and substance demanded by the purchaser;

(2) The decision could not be supported having regard to the evidence.

The facts of the case are that on 28th November, 1955, the appellant, who is a Corporal of Police went into the respondent's shop in Leopold Street and purchased 3/4lb. of ground coffee for 99 cents, at the same time informing the respondent that the coffee was being purchased for purposes of analysis by the Government Analyst under the Sale of Food and Drugs Ordinance. The coffee was divided into three parts, of which one was retained by the appellant, another given to the respondent, and the third deposited with the Government Analyst for analysis. A certificate was given by the Analyst (dated 14th December, 1955) under the Sale of Food and Drugs Ordinance, to the effect that the coffee sold by the respondent was adulterated in that it contained foreign organic

matter to the extent of 26.7%, and a copy of the certificate served on the defendant in accordance with section 22 of the Ordinance. On 7th March, 1956, another certificate was given by the Analyst under the Sale of Food and Drugs Ordinance, but this was rejected in evidence by the Magistrate on an objection raised by Counsel for respondent as to its admissibility on the ground that it was not issued with the summons which was served on the respondent.

The Magistrate, in his reasons for decision, stated that the first certificate issued by the Analyst was not relied upon by the appellant as it contained no particulars indicating whether the substance examined fell within the limits of the standard of purity prescribed by the Ordinance; and having held the second certificate to be inadmissible, considered that there was no evidence that the substance sold as coffee was below the standard of purity prescribed, and accordingly dismissed the case.

Before this Court it was contended by the Solicitor General for the appellant that the evidence adduced established that the ground coffee was sold in a mixed state, as certified by the certificate of the Analyst —Exhibit "B"—that is, that the coffee contained foreign organic matter. Consequently, as provided in subsection (4) of section 23 of Chapter, 144, the onus fell upon the defendant to be discharged, and his failure to do so renders him liable to conviction.

With respect to the Magistrate's memorandum of reasons, the Solicitor General contended that the Magistrate failed to direct his mind to the provisions of subsection (4) of section 23 of Chapter 144, and that this was apparent when he stated that "the Certificate Exhibit 'B' was not relied upon by the complainant as it contained no particulars indicating whether the substance examined was within the limits of the standard of purity prescribed by the Ordinance".

On the second ground of appeal, the Solicitor General submitted that the second certificate ruled by the Magistrate to be inadmissible was in fact supplemental to the first and was issued for the purpose of satisfying a point of detail, **i.e.** that the coffee was roasted coffee; that the first certificate having given enough evidence of adulteration, the onus had shifted to the defendant to satisfy the Court that this was not the case as required by subsection (4) of section 23; that the appellant failed to satisfy the Court in this respect and should be convicted.

The Solicitor General also contended that the second certificate was admissible, but assuming that it was not, yet at the close of the prosecution's case there was sufficient evidence upon which the Court could call upon the defendant for an answer to the **prima facie** evidence that the food was sold in a mixed state, and it was by law incumbent upon the defendant to discharge that onus and to establish the standard of purity of the coffee, and that having been served with the first certificate, the second certificate was only supplemental.

We agree with the arguments addressed to us by the, Solicitor General and find that, having regard to the provisions of section 23, subsection (4) of the Food and Drugs Ordinance, the Analyst's certificate having once been given and accepted in evidence, which shows that the coffee was sold in a mixed state, then the onus shifted to the defend-

ant-respondent and was required to be discharged by him. This, in our view, he failed to do, and accordingly there was **prima facie** evidence before the Court upon which the conclusion could be reached. The second certificate was in our opinion merely supplementary to the first certificate which was given. In our view, therefore, the Magistrate erred in regard to the onus of proof in the particular circumstances of this case and the application of the provisions of the relevant section of the Ordinance. The appeal is therefore allowed and the respondent is fined $26 and costs $15 or in default two months imprisonment; the fine to be paid in three equal monthly instalments commencing 15th June, 1957.

Appeal allowed.

SHIVCHARRAN v. HEERALALL

(In the Supreme Court (Bollers, J. (ag.) January 23, 24, 25, 29; June 15, 1957).

Practice and Procedure—Writ of summons—Issue of—By a barrister—Claim for declaration of ownership and $500:—damages for trespass—Statement in writ that value of subject matter of action does not exceed $500:—No such allegation in the statement of claim—Such omission an irregularity and not a nullity—Does not affect validity of the writ and subsequent proceedings—Legal Practitioners' Ordinance Cap. 30, s. 42 (1) B (c).

Immovable Property—Sale of land at [execution sale for failure to pay rates—Incorrectly described in the notice and advertisement—Description in transport following upon execution sale same as that of another existing transport—Former transport ordered to be rectified—Owner by earlier transport estopped from setting up his transport in action for trespass in view of conduct of the predecessors in title of both owners in occupying 'each a portion of the land.

The plaintiff's writ of summons which was not specially indorsed was issued by a barrister at law acting as a solicitor and was indorsed with claims for (a) a declaration of ownership to a parcel of land; (b) an injunction in the usual terms; (c) a claim for the sum of $500:—damages for trespass (d) costs. The writ contained a statement that the value of the land the subject matter of the action did not exceed $500:—but no statement to that effect appeared in the statement of claim. It was contended that the writ of summons was improperly issued.

Section 42 (1) B (c) of the Legal Practitioners' Ordinance, Cap. 30, provides that a barrister may act alone in any cause or matter where the writ is not specially indorsed in which the sum of money claimed or the value of the land or thing in dispute as alleged in the statement of claim does not exceed the sum of $500. It is also provided by that enactment that a claim for any additional relief in any such cause or matter by way of a declaration, an injunction, the appointment of a receiver, the taking of an account, or other consequential or ancillary remedy shall not affect the right of audience.

Held: The omission to state in the statement of claim that the subject matter in dispute did not exceed the sum of $500 is an irregularity and not a nullity and does not affect the validity of the writ of summons or the subsequent proceedings.

In 1940 one Shivbarath, the plaintiff's immediate predecessor in title obtained a judicial sale transport for lot 13 B Cotton Tree pursuant to a sale at execution for non-payment of rates to a local authority. In Shivbarath's transport that lot is described as shown on a plan by F. Fowler dated 1892 following upon the

same description contained in the notice of the non-payment of the rates due and the advertisement of the execution sale. In that plan there are no subdivisions of lot 13. There should have been instead reference to Seymour's plan dated 1908.

In 1946, Shivbarath passed transport of the said land to the plaintiff. The description of the property both in the instructions to advertise and in the affidavits of purchase and sale followed that in Shivbarath's transport of 1940 but was subsequently altered to refer to lot 13 B as shown on Fowler's plan of 1895. Fowler had carried out another survey in 1895 in which he had subdivided the lots. However, lot 13 B on Fowler's 1895 plan is a different portion of land from that of the same number on Seymour's plan of 1908.

Transport was passed to the plaintiff of property described as lot 13 B by reference to Fowler's plan of 1895.

In 1946, there was already in existence a transport for "Lot letter B part of lot number 13 being a portion of Plantation Cotton Tree as defined on a plan by F. Fowler dated 1895. ..." in favour of one Ali Hoosein which was passed to him in 1933. In 1956, Ali Hoosein passed transport of this sublot to Sheik Mohamed.

As a result there was in existence at the time of the hearing of this action two transports bearing the same description "sublot B of lot 13, Cotton Tree, as shown on a plan by F. Fowler dated 1895. The trial judge found that the plaintiff was in occupation and in sole and undisturbed possession *nec vi, nec clam, nec precario,* of lot letter B, part of lot number 13, being a portion of Cotton Tree, as shown on a plan by J. T. Seymour dated 23rd December, 1908.

Prior to 1908, the defendant's predecessors in title were in occupation and possession of the north half of lot 13 E according to Fowler's plan of 1895 under transport for an undivided half part or share of and in lot 13 E. The plaintiffs predecessors in title were in occupation and possession of the south half of lot 13 E (Fowler's plan of 1895) under transport for an undivided half part or share in lot 13 E. These are lot 13 C and lot 13 B on Seymour's plan of 1908.

Lot 13 B on Fowler's plan of 1895 is lot 13 F on Seymour's plan of 1908 so that Ali Hoosein's transport of 1933 referred to a different sublot of land from the plaintiff's transport No. 285 of 1946.

The defendant stated in evidence that he is the owner by transport of lot 13 C (Fowler's plan of 1895) but the trial judge found that the defendant's property should have borne reference to sublot 13 C on Seymour's plan of 1908. By an arrangement between the plaintiff and the defendant, the defendant allowed the plaintiff to occupy certain portions of his (defendant's) rice lands on lot 13. The defendant later entered upon those lands and disturbed the plaintiff's enjoyment of them. The plaintiff thereupon brought this action against the defendant claiming a declaration that he is the owner of the southern half of lot 13 E (Fowler's plan of 1895).

Held: (i) In view of the conduct of both the plaintiff's and the defendant's predecessors in title in occupying each a portion of lot 13 E (Fowler's plan of 1895), prior to 1908 when transport was passed to them, the defendant is estopped from setting up his transport No. 72 of 1935 as owner of the undivided half part or share of lot 13 E in defence to the claim for trespass.

(ii) The plaintiff's transport is to be rectified to refer to lot 13 B (Seymour's plan).

W. R. Persram, for the plaintiff.

H. Matadial, for the defendant.

cur. adv. vult

Bollers, J: The plaintiff in this action in his statement of claim, before amendment was granted by the Court, claims:—

(a) An Order of the Court declaring that the plaintiff is the owner of one undivided half part or share in and to the hereinafter described land, namely —

"Lot letter E, part of lot number 13 (thirteen) being a portion of Plantation Cotton Tree, situate on the west coast of the County of Berbice, agreeably with a diagram thereof, dated 16th January, 1895, made by Frank Fowler, Sworn Land Surveyor, and deposited in the Registrar's Office of British Guiana at New Amsterdam, on the 24th March, 1895".

(b) An injunction restraining the defendant, his servants and/or agents from ousting or otherwise disturbing the plaintiff from his lawful possession and beneficial occupation of the aforesaid land.

(c) The sum of $500 (five hundred dollars) as damages and pecuniary compensation for the defendant's wrongful and unlawful dispossession of the plaintiff of his occupation and ownership of the aforesaid land between the months of May and June, 1954.

(d) Any other order as the Court may deem fit.

(e) The costs of these proceedings.

At the hearing and before evidence was led, Counsel for the plaintiff sought and obtained an amendment to the statement of claim that the words "one undivided half part or share" appearing in paragraph 1 and also paragraph 4 (a) of the statement be deleted and the words "south half of" be inserted.

The plaintiff, in his statement of claim, alleges that in or about the month of May, 1946, he purchased from Shivbarath, male B.R. No. 256 of 1894, of Cotton Tree, West Coast, Berbice, the said property as described in paragraph (1) of the statement of claim and the said Shivbarath at the time of the sale of the said land, delivered possession to the plaintiff of the said land.

At paragraph (2) plaintiff alleges that from the time of the purchase of the said land he paid the necessary rates and encumbrances therefor up to the year 1953, and was in sole, continuous and undisturbed possession thereof.

At paragraph (3) plaintiff alleges that while he was in lawful occupation and possession of the land, the defendant, his servants and/or agents wrongfully and unlawfully during the month of February, 1954, entered on the land and cut a portion of the smouse thereon belonging to the plaintiff, causing water to run out of his ricelands as a result of which the plaintiff was detained from growing his rice for the crop year 1954.

The plaintiff further alleges in paragraph 3 that, between the months of May and June, 1954, the defendant destroyed a cattle-pen

on the said land, his property, and the defendant ousted him from the land and otherwise disturbed his peaceful possession and lawful occupation of the said land.

The defendant in his defence at paragraph (3) pleads that his father was and he is now the owner of the said land, and that he and his father were the owners and persons in possession of the property, which is claimed by the plaintiff, for a period of over 40 years, and have been in possession for that period *nec vi, nec clam, nec precario,* and have exercised full acts of control, possession and ownership over the said property.

At paragraph 5 the defendant pleads that on the 10th May, 1954, the plaintiff wrongfully and unlawfully trespassed on a portion of the defendant's land, mainly the said piece of land which is now the subject matter of this action, and did damage to the defendant's rice cultivation by dragging a dragger on the defendant's rice plants and growing rice.

And at paragraph 7(a) the defendant counterclaims for the sum of $45.00 damages for this trespass alleged to have been committed by the plaintiff.

The evidence led by the plaintiff in support of his claim discloses that in May, 1946, he purchased from Shivbarath a piece of land at Cotton Tree, being part of lot 13, Plantation Cotton Tree. The description on his transport or title—Exhibit "A" No. 285/46—reads:—

> "Sublot B of lot number 13, Cotton Tree as shown on a plain by John Fowler, Sworn Land Surveyor, deposited in the office of the Registrar and dated 1895."

The plaintiff alleged that from the time he entered on the land he commenced to plant the land with rice and picked coconuts from the trees. He also cleaned up the house lot portion. The plaintiff also commenced to pay rates and taxes on the property as evidenced by the receipt Exhibit "B".

At this time the defendant was in occupation and possession of one rood of land north of the plaintiff's property and five roods of land to the south of the plaintiff's property. As there were only six ricefields in all seven roods of land, by an arrangement between the plaintiff and defendant, it was agreed that the defendant should have five portions of ricefields, and the plaintiff should have one portion of ricefield. Each of them would then occupy a certain portion of the other's land. In pursuance of this agreement, the plaintiff entered into possession of the sixth ricefield which was the most easterly ricefield and which consisted of both his own land (one rood) and part of the defendant's land (four roods). The defendant then occupied part of his own land (five roods) and part of plaintiff's land (one rood).

For several years the plaintiff continued to plant his rice in this manner until 1953 when the defendant intervened and took over all of his own (defendant's) land (four roods') in the sixth ricefield that the plaintiff was planting and of which he was in occupation, and then left the plaintiff with only his own (plaintiff's) portion of the land (one rood) the sixth ricefield.

Under the arrangement the plaintiff was entitled to one rood throughout the entire depth of the estate, but the defendant only left him one rood in the sixth ricefield (which was his own land) and then proceeded to occupy the plaintiff's one rood in the other five portions of rice-fields. The plaintiff nevertheless prepared the land in the one rood left to him for planting and made a smouse or mere to prevent water from escaping from the land.

In February, 1954, the defendant destroyed the smouse or mere in the presence of the plaintiff.

The defendant drained the one rood of land of all the water and proceeded to plant the land. After the defendant cut the smouse the plaintiff erected a calf-pen about 6 ft. square on the land, and the defendant broke it down and destroyed it. The plaintiff was then from this date unable to occupy the house lot portion of the land which was one rood in facade and six roods in depth, the whole of the property being one rood in facade and 1,000 roods in depth.

The defendant then proceeded to plough the house lot portion of the plaintiff's lot of land and in fact took possession of the whole of the plaintiff's land which the plaintiff had purchased from Shivbarath and of which transport had been passed in his favour in 1946. In this connection the plaintiff was supported in his evidence by the evidence of Shivbarath, Abdool Karim, and his own father, Seenanan and James Lowtan.

Shivbarath said that when he was in possession of the land 25 or 30 years ago, he ploughed and cultivated the land and picked coconuts on the land. There was also a similar arrangement between himself and the defendant with respect to sharing each other's land for the purpose of planting the rice lands, which arrangement the plaintiff carried on with the defendant when the land was sold to the plaintiff. Shivbarath states that he took the plaintiff to the land and pointed out the land to him in the presence of the defendant.

The witness, Abdool Karim, stated that he knew the portion of land in question, and that Shivbarath was at one time in possession of the land; that Shivbarath and the defendant, under an arrangement affecting each other's land, planted up this particular piece of land. The witness continued to state that he knew that about eight or ten years ago the plaintiff purchased from Shivbarath this portion of land, and he later saw the plaintiff planting his rice on the "big piece of land."

Seenanan, the father of the plaintiff, states that he is now 70 years of age and was a lad of 16 or 17 years when he first went to Cotton Tree. He was the person who made the arrangement for Shivbarath to sell the one rood of land to his son the plaintiff. He knows the land, and after his son purchased the land he saw him planting the ricefields on the land. He also knew of the arrangement his son had with the defendant over planting the six ricefields.

In 1953 the defendant told him that he did not want the "partner business" any more and he would plant his own land. Defendant then proceeded to plough the five roods that he had handed over to the plaintiff in the sixth ricefield for the purpose of planting rice, and left

the plaintiff with one rood. Later the defendant came and rolled the plaintiff's one rood and planted it. The witness swears that he heard defendant say that he had cut the smouse on this one rood of land.

The defendant, in his evidence, claimed the portion of land, subject matter of this action, as his property and denied that the plaintiff had ever been in possession of the land and that he had ever cultivated it. He also denied that Shivbarath had even owned and occupied this lot of land at lot 13, Cotton Tree. The only connection that the plaintiff ever had with the land, according to the defendant, was to break it up for him under an agreement whereby the plaintiff would break up the land and then occupy and plant it for a period of two years. The defendant states that, after the plaintiff had occupied the land for the period of two years under this agreement, he the defendant sent him a Notice to quit the land. The defendant then proceeded to deny that he had cut a smouse on the same land.

The defendant under cross-examination then changed his evidence to state that this agreement was made with Seenanan and not with his son, the plaintiff, and Seenanan had broken up the land. The defendant led the evidence of four witnesses—Shamsudeen, Mansingh, Bhagrit and Robbie Hoosein—none of whom impressed me as being a witness of truth, and appeared not to appreciate the nature of their evidence.

Shamsudeen swore that the defendant was occupying this lot of land for the past 15 years, and Shivbarath had never been on the land but had planted rice elsewhere at Cotton Tree. Mansingh did not seem to be aware of the fact that Shivbarath had obtained judicial sale transport for the same sublot of land and must have been in possession of it at some time or the other. He did not know Rhi, the aunt of Shivbarath, whose name is mentioned in Seymour's plan of 1908 as being on that sublot of land at the time of the survey. Bhagrit, on the other hand, admitted not knowing Lot 13 on which this particular portion of land is situated; and Robbie Hoosein appeared to me to be a witness of convenience.

On this aspect of the case, therefore, I did not accept the evidence of the defendant and his witnesses, and came to the conclusion that they were all withholding the truth in an effort to assist the defendant. On the other hand, I accepted the evidence of the plaintiff and his witnesses and found as a fact that from 1946, after transport was passed by Shivbarath to the plaintiff, the plaintiff had entered into occupation and possession of the sublot of land, subject matter of the action, and that the defendant in the month of February, 1954, and between the months of May and June, 1954, had gone on to the land and done the acts complained of in paragraph 3 of the plaintiff's statement of claim. I found also that, from the year 1901, Shivbarath and his predecessors in title, that is to say, his aunt Rhi and her reputed husband Dhouray, had been in the sole and undisturbed possession of this sublot of land *nec vi, nec clam, nec precario.*

The important question now arising for determination is whether the defendant had committed trespass on the land when he did the acts complained of. If he were the owner of the land, as he claimed in paragraph 3 of the defence, then quite clearly there could be no act of trespass on his part.

On the evidence of the Sub-Registry Officer, Mr. Hassan Bacchus, which I accepted, it appears that at the time Shivbarath obtained judicial sale transport of Lot number 13 B, Cotton Tree, as shown on a plan by F. Fowler dated 1892" number 633/40—Exhibit "G"—a mistake had been made by the Overseer who put up the respective sublot at execution sale. In a plan by F. Fowler of 1892, there were no subdivisions of lot 13, and there was certainly no sublot B lot number 13. On the conditions of sale referable to the particular sale, number 431/40—Exhibit "H"—in the Account and Notice of sum due for rates and property of lot 13B, Cotton Tree, the names of the Surveyors, J. T. Seymour, F. Fowler and S. S. M. Insanally and the dates of their plans appear. Seymour's name and Insanally's name were struck out and the name that remained was F. Fowler and the date 26th September, 1892. Transport was then advertised on that basis. Therein the mistake was made. The name that ought to have remained was J. T. Seymour as the transport that was being then obtained was "Sublot B lot number 13, Cotton Tree, as shown on a plan by J. T. Seymour of 1908."

The survey of Plantation Cotton Tree and Zeezight had been carried out by J. T. Seymour, Sworn Land Surveyor, at the request of the proprietors on the 23rd December, 1908, and the plan had been deposited in the Lands and Mines Department but not at the Deeds Registry.

After Cotton Tree had come under the control of the Local Government Board in 1935 the plan of J. T. Seymour had been used for the purpose of assessing rates on the various lots and sublots of Plantation Cotton Tree. In 1946 when Shivbarath passed transport of the said land to the plaintiff based on his title number 633/40—Exhibit "G"—the description of the property both in the instructions to advertise and the affidavits of purchase and sale which followed along the same lines of the transport of 1940, was subsequently altered to read—"Sublot B of lot number 13, Cotton Tree, as shown on a plan by F. Fowler dated 16th January, 1895."

F. Fowler had carried out another survey of Plantation Cotton Tree in 1895 in which he had subdivided the lots and the Registrar was under the erroneous impression that the 1892 plan of F. Fowler referred to in the transport of 1940—Exhibit "G"—was wrong as there had been up to that time no sub-divisions of the lot number 13. The plan did not contain lot 13 B. The mistake in the description of Shivbarat's title number 633/40—Exhibit "G"—was therefore perpetuated and the land transported which should have been described in relation to J. T. Seymour's plan of 1908, was erroneously described in relation to F. Fowler's plan of 1895.

In 1946 there was already in existence a transport of "Lot letter B, part of lot number 13, being a portion of Plantation Cotton Tree as defined on a plan by F. Fowler dated 1895 and deposited in the Registry of British Guiana" in favour of one Ali Hoosein, and which had been passed to him in 1933, number 189/1933—Exhibit "J".

In 1956 Ali Hoosein passed transport of this sublot of land to Sheik Mohamed, number 959/56—Exhibit "I", the description therein following the description in the transport number 189/1933—Exhibit "J". Mr.

Bacchus, in his evidence, states that he agrees that if the Registrar had knowledge of the title 189/1933—Exhibit "J" —he would not have changed the date of the plan in Shivcharran's transport number 285/1946—Exhibit "A".

As a result there is now in existence two transports bearing the same description of property—"Sublot B of lot 13, Cotton Tree, as shown on a plan by F. Fowler dated 1895". I have, however, found the plaintiff to be in occupation and in sole and undisturbed possession *nec vi, nec clam, nec precario* of lot letter B, part of lot number 13, being a portion of Plantation Cotton Tree, as shown on a plan by J. T. Seymour dated 23rd December, 1908.

The Sworn Land Surveyor, Norman Ford, who gave evidence for the plaintiff after an examination of J. T. Seymour's plan of 1908, stated that Seymour divided lot 13 into eight sublots—sublot A to sublot H—going from a general south to a general north and that the northernmost sublot was "H" and the southernmost sublot was "A", the whole lot 13, Cotton Tree consisting of 14 roods.

On examination of Fowler's plan of 1895 this witness found that Fowler had divided lot 13 Cotton Tree into six sublots—Sublot A to sublot F—going from a general north to a general south, and the northernmost sublot was A and the southernmost sublot was F, the whole of lot 13 Cotton Tree on this plan was 14 roods, the width of the sublot in Fowler's plan being on the same scale as Seymour's plan. The witness stated that with certainty. He could look at the sublots of lot 13 on Fowler's plan of 1895 and say what is the equivalent of those sublots on Seymour's plan of 1908. Starting from the same point on both plans, which is the southern boundary of lot 12, the sublot A on Fowler's plan is the equivalent of sublots H and G on Seymour's plan; sublot E on Fowler's plan would be therefore the equivalent of sublots C & B on Seymour's plan, sublot E on Fowler's plan being two roods in width and sublots C and B. on Seymour's plan being each one rood in width.

Sublot C is north of sublot B, and would therefore be the equivalent of the north half of sublot E on Fowler's plan, whereas sublot B would be the equivalent of the S1/2 of lot E on Fowler's plan.

The witness puts it this way, "Sublot E on Fowler's plan is two roods in width. If I were to divide sublot E on this plan into two halves, I would call them south half and north half of sublot E lot 13. The result of this is that sublot B of lot 13 on Fowler's plan (1895) is not the same as sublot B of lot 13 on Seymour's plan of 1908. Sublot B of lot 13 on Fowler's plan is sublot F on Seymour's plan. It is clear therefore that Ali Hoosein's transport No. 189 of 1933—Exhibit "J"—refers to a sublot of land different to and from the plaintiff's transport No. 285 of 1946 —Exhibit "A".

The witness went on to say the names of the persons mentioned on the various sublots of Seymour's plan indicated that those persons were in occupation of the particular sublots and were the probable owners. On that evidence, and on the other evidence of the case, I find as a fact that prior to and from the year 1908 the defendant's predecessors in title, his father Nusib and Gungadeen, were in occupation and possession of sublot C of lot number 13 on Seymour's plan which is the north half of

lot E, part of lot number 13 on Fowler's plan of 1895. Plaintiff's predecessors in title, Dhouray, Rhi and Shivbarath, were in possession of sublot B of No. 13 on Seymour's plan which is the south half of sublot E of lot number 13 on Fowler's plan of 1895.

The assessment books—Exhibits "L", "M", "N" and the evidence of James Lowtan indicate that rates on the sublots were assessed on Seymour's plan of 1908. Exhibit "M" shows that the plaintiff was paying rates for lot 13B Cotton Tree based on Seymour's plan. The defendant produced a receipt for rates showing that he had paid rates in September, 1955, in respect of sublot E, lot 13, Exhibit "S". This receipt however did not refer to Fowler's plan of 1895, but was based on Seymour's plan of 1908. Seymour's plan of' 1908, shows clearly that the defendant's father, Nusib, was also the probable owner of sublot E on this plan, and it is this sublot to which the receipt, Exhibit "S", refers. Sublot E on Seymour's plan would be sublot C on Fowler's plan. The defendant in his evidence admitted that he was the owner by transport of lot letter C, part of lot 13, Cotton Tree, as defined on a plan by F. Fowler (1895) No. 68 of 1935—Exhibit "Q"—which shows this transport was passed to him by his father Nusib. His evidence that he had lost his other receipts for rates in respect of this property in a bus accident was false, because it would indicate, not sublot C on Fowler's plan, but sublot E on Seymour's plan, as the assessments were based on Seymour's plan.

The defendant produced a transport No. 72 of 1937—Exhibit "R" which showed that his father Nusib in 1935 passed transport to him for one undivided half part or share of and in lot E, part of lot 13, Plantation Cotton Tree. When this title is traced, it shows that in 1904 the transport of this property was passed by Gungadeen to Nusib, No. 34 of 1904—Exhibit "T". In 1901 Gunraj passed transport in respect of the whole of this property (Lot letter E) part of lot 13, Cotton Tree, to Gungadeen and Dhouray who was Shivbarath's uncle No. 635 of 1901—Exhibit "V". In 1895 Ramgoolam had passed transport in respect of the whole of lot letter E, lot No. 13, Cotton Tree, to Gunraj, No. 118 of 1895—Exhibit "U".

The position in 1904 was that when Nusib received transport of the undivided half part or share of lot letter E of lot 13 on Fowler's plan of 1895, the title to the other undivided half part or share was still in Dhouray. Dhouray never transported his one undivided half part or share to any person. From the evidence in this case, and more particularly from Seymour's plan of 1908, it shows that Dhouray and his reputed wife Rhi were in occupation of sublot B of lot 13 on Seymour's plan which I have already found is the south half of lot E on Fowler's plan, and Nusib the defendant's father occupied sublot C on Seymour's plan which is the north half of lot E on Fowler's plan.

It is clear that, in spite of the fact that both Nusib and Dhouray had transports for one undivided half part or share in the particular sublot of lot 13, it was their intention that they should occupy each a particular half of the sublot. In 1940 when Shivbarath obtained Judicial sale Transport—Exhibit "G" 633 of 1940—for non-payments of rates, it was

in respect of sublot B of lot 13 on Seymour's plan, which was in effect the south half of sublot E of lot 13, Fowler's plan. There was no opposition to this Judicial sale Transport by the defendant, and that was so because of the conduct of his predecessors in title in recognising the title of Shivbarath and his predecessors in title to this sublot of land.

The question now arises whether the plaintiff's title and/or the defendant's title can now be rectified. Counsel for the defendant has submitted that the plaintiff ought to have approached the Court for a rectification of his title under Section 24 of the Deeds Registry Ordinance, Chapter 32. The section reads as follows: —

> "Whenever, in consequence of an error or omission in any grant, transport, mortgage bond, or other deed, whether in the name or names of a person or persons therein mentioned or in the description of the property thereby granted, transported, or bound, it is found necessary to amend that grant, transport, bond or deed, the Court may, upon consent in writing of the persons interested, amend the error: Provided that —
>
> (a) where the error or omission is common to two or more interdependent documents one document shall not be amended without the other or others; and
>
> (b) if any interested person refuses to consent to the amendment, no alteration shall be made before that person has had an opportunity of being heard."

It is quite clear that, before the final part of that section commences to operate, there must be consent of all the interested parties to the amendment. In the present case, there is no consent to the amendment.

In the present case the alteration of the description of the property could hardly be described as simple resulting in the passing of a transport of property in respect of which there is already a transport in existence and in respect of which there is transport held by the defendant for the undivided half part or share of the whole of the sublot. There is in effect a defect in title in relation to the plaintiff's transport. For these reasons and in view of the authorities that I have found on the matter, I cannot agree with the submission of Counsel for the defendant. Again, in the case of *ex parte* Thompson (1928) B.G.L.R. Dalton J. in his judgment stated:

> “But the normal and correct procedure for the rectification of transfer deeds or as we call them 'transports' is by action.”I have not met," says de Villiers, C.J. in Saayman v. La Grange (1879 Buch. 10), "with this peculiar form of action to rectify an error in a title deed in any of the Roman or Roman-Dutch authorities, but it is constantly occurring in this colony. The action to rectify transfer is purely a matter of equity……I think this court should in a case of this nature be guided by the decisions of the Courts of Equity in England."

Thus in *White v. White* 1872 L.R. 15 Equity at page 247 it was decided that the right to claim rectification is an equitable right, and a

conveyance, by a mistake which covered only half of the estate intended to be conveyed, could be rectified by the Court, so as to make it include the other half, and to render unnecessary a second conveyance.

In view of the conduct of both plaintiff's and the defendant's predecessors in title in occupying each a portion of the said sublot, prior to the year 1908, and presumably from the year 1901, when transport was passed to them, I hold that the defendant is now estopped from setting up his transport No. 72 of 1935.—Exhibit "R"—as owner of the undivided half part or share of sublot E of lot number 13, Cotton Tree, as shown on Fowler's plan of 1895 in defence to this action for trespass.

Under the claim for any other relief as the Court may deem fit in the exercise of the equitable jurisdiction of the Court I therefore make an Order for the rectification of the plaintiff's transport to read "sublot B of lot number 13 Cotton Tree in the Cotton Tree and Zeezight Country District in the west coast of the County of Berbice as shown on a plan by Jas. T. Seymour, Sworn Land Surveyor, dated 23rd December, 1908, and deposited in the Lands and Mines Department and recorded on 4th February, 1909, no building thereon."

This description would therefore correspond with south half of lot letter E, part of lot number 13, being a portion of Plantation Cotton Tree on the west coast of the County of Berbice, as shown on a plan by F. Fowler, Sworn Land Surveyor, dated 16th January, 1895, and deposited in the office of the Registrar at New Amsterdam on 26th March, 1895, no building thereon.

Having found the plaintiff is the owner of the sublot, subject matter of this action, and that he and his predecessors were in sole and undisturbed possession from the year 1908 and prior thereto, it follows that when the defendant in 1954 dispossessed the plaintiff from the land, and did the acts complained of, he committed acts of trespass. Trespass is an injury to possession and as was decided in the case of *Bridglall et anor v. Jay Jay et ors* (1948) B.G.L.R., trespass is actionable only at the suit of him who is in possession of the land. This form of injury is essentially a violation of the right of possession not of the right of property. Again the mere *de facto* and wrongful possession of land is a valid title of right against all persons who cannot show a better title in themselves and is therefore sufficient to support an action of trespass against such person."

Having held that the defendant is estopped from setting up his title to the undivided half part or share in the lot which includes the sublot, the plaintiff is entitled to damages. The plaintiff maintains that he was unable to plant his crop for the year 1954 and I assess the damages in the sum of $150. There will also be an injunction under (b) of the statement of claim, and the plaintiff will be entitled to his costs to be taxed. The counterclaim of the defendant therefore stands dismissed and there will be judgment for the plaintiff in both the claim and counterclaim.

In considering the question of costs, I find nothing wrong in plaintiff's conduct, and on the contrary I find that the defendant, under the subterfuge of an arrangement with the plaintiff whereby they shared each other's land for the purpose of planting rice, deliberately put the plaintiff

off the land when he became aware of the error in the plaintiff's transport. I can find nothing therefore which would interfere with the rule that costs follow the event.

Counsel for the defendant in his address to the Court submitted that the plaintiff was claiming a declaration of ownership of "S1/2 Lot E, part of lot number 13, Cotton Tree, in the west Coast, Berbice, as shown on a plan by F. Fowler dated 16th January, 1895", which he valued at $140, and was also claiming damages for trespass in the sum of $500, making a total of $640, and as a result the writ was improperly issued by a barrister purporting to act as a solicitor and should have been issued by a Solicitor.

Counsel for the defendant cited *Sanichari* v. *Etwaria and Dool* (1945) B.G.LR. 77, in support of his contention. In this case the plaintiff by his writ, which was not specially indorsed, claimed (a) possession of certain lands described therein; (b) $250 as damages for trespass and illegal occupation. The indorsement on the claim of the writ was signed by a barrister acting as solicitor for the plaintiff, and the writ purported to be issued by King's Counsel. There was no allegation in the statement of claim as to the value of the land, nor was it stated that the value of the land did not exceed $500 possession of which was claimed by the plaintiff, but the defendants in their defence pleaded that they had purchased the premises for $280. Upon the action coming on for hearing, Counsel for the defendants submitted that the action should be struck out on the ground that the writ and the statement of claim did not disclose the grounds upon which the barrister was entitled to act as a solicitor in the action.

Verity C.J. held that the claim for possession of the land was a separate and distinct cause of action, in addition to, and not consequential upon or ancillary to the claim for damages for trespass to the land, and therefore the barrister by whom the writ was issued and who had purported to act as a solicitor was not entitled so to act within the Legal Practitioners' Ordinance, 1931, and that the issue of the writ amounted to a nullity.

In this case it is readily seen that the plaintiff was out of possession and was never in possession and was seeking to gain or recover possession. In the present case, the plaintiff was in possession of the land at the time of the alleged entry by the defendant and claims to be the owner of the land. He does not seek to recover possession of the land, he seeks a declaration of ownership of the land which would have the effect of declaring him to be still in the lawful possession of the land and entitled to the quiet and peaceful enjoyment of the said land.

Counsel for the plaintiff submits that, having established his title to and his right to possession of the land, the claim for damages for trespass is merely consequential upon and ancillary to the declaration sought in the relief. In the case of *Bennie Jhaman* v. *Anroop* Number 621 of 1954 where the declarations sought were similar and decision was given on the basis that the value of the land exceeded the sum of $500:—, Stoby J. held that the writ was improperly issued but observed:—

> "The plaintiff's case as set out in his statement of claim is that he is the legal and beneficial owner and occupier of a

> piece of land at Soesdyke on the right bank of the Demerara River. If he has a legal title as he says, then it would be enough for the plaintiff to succeed for him to establish his title and to prove that the defendant is attempting to interrupt his lawful possession by wrongfully entering upon his land. In such a case there is no necessity to claim a declaration of ownership; it is only when a person without legal title brings an action for trespass that a declaratory judgment is necessary, for such a person has to prove an existing legal possession and a declaration that he is and has been in possession as against the defendant who is unable to show a superior title, is essential for the success of his case."

In the present case the plaintiff has a legal title which merely contained a defect; and again

> "Quite clearly, if the claim for damages is in the alternative the issue of the writ by a barrister could not be irregular as the section permits him to act where the value of the land in dispute does not exceed $500:— or the amount claimed does not exceed $500:— nor is it in my view irregular for him to issue a writ claiming both remedies providing each claim is limited to $500. The obvious reason for the enactment was ' to restrict a barrister's right to act as a solicitor to matters under $500. The cumulative effect of doing two things that he is entitled to do cannot result in right becoming wrong. **Had the land been of a value under $500:— I would have held the writ to be properly issued although there is a claim for damages as well."**

In *T. E. N. Smith v. L, Charles* 1941, the B.G.L.R. 165 West Indian Court of Appeal held,

> "Trespass to land is a possessory action, founded merely on possession, and it is not at all necessary that the right to the land should come in question. It only incidentally decides the question of ownership sometimes by granting a remedy, damages and an injunction, the result of which is to preclude further acts by the defendant of the same kind as those complained of."

In the present case, although the value of the land is not set out in the statement of claim, and it was not specifically stated that the value did not exceed $500 Counsel for the defendant did not take the point *in limine.* The matter, having proceeded to trial, it has been established in evidence that the value of the land is merely $140 in which case the point, if indeed it did contain merit, was certainly cured. Verity C.J. in the case of *Sanichari* v. *Etwaria and Dool* did not agree that it could be cured as the barristers right to act depended entirely upon the existence of the statutory conditions on which the right is conferred, and in the absence of an essential condition, namely the allegation in the statement of claim that the value of the land or thing in dispute does not exceed $500:— the right to practise as a solicitor cannot be conferred.

With this statement of the law I do not agree as it would mean that, where the actual value of the land is $1,000 or more, counsel in order to act as a solicitor would merely have to allege in his statement of claim that the value of the land did not exceed $500. I hold therefore that in the present case the writ was properly issued.

BAKSH and another v. THE QUEEN

(In the Court of Criminal Appeal (Holder, C.J., Stoby and Date, J.J) May 13, 14, 15, 16, 17, 20, 21, June 7, 1957).

Criminal Law—Appeal—Leave to call fresh evidence not available at trial—Power to direct a new trial—Criminal Appeal Ordinance, Cap. 8, s. 12 (*b*) *and s. 6*(*2*).

The appellants Fiaz Baksh and Nabi Baksh were convicted of the murder of one S by shooting. At the trial, three witnesses testified that they had seen both appellants near the scene of the shooting and two of them said they shouted out the names of the appellants immediately after hearing the explosion of the gun. In their statements to the police, one of these witnesses said he saw the first appellant running away from the scene of the crime, another said he shone his torchlight and saw the first appellant and another man whom he did not know by name, and the third witness said neither he nor the other witness shouted out the names of the accused. The case for the prosecution depended on identification and the defence of each appellant was an alibi. The discrepancies between the statements and the evidence were unknown to the defence and to counsel for the Crown at the trial.

Held: (1) Where a discrepancy between a witness' statement to the police and his evidence is so startling that it strikes at the very roots of the prosecution's case justice demands that a disclosure should be made and a prosecutor who fails to do so is acting contrary to the established and salutary practice in the administration of justice. Changes in time, date, place and description do not necessarily mean that a witness is not speaking the truth and once there is no vital discrepancy there is no obligation on the prosecution to disclose it to the defence. In the present case the fresh evidence is admissible.

(2) Had the jury known the content of the statements to the police it cannot be said that inevitably they would have arrived at the same conclusion with respect to the second appellant, and a new trial is directed in accordance with section 6 (2) of the Criminal Appeal Ordinance (Cap. 8). As regards the first appellant, however, the jury's verdict ought not to be disturbed as nothing favourable to him can be found in the statements.

Appeal of Fiaz Baksh dismissed.

Appeal of Nabi Baksh allowed; Re-trial ordered.

(*The decision with respect to Fiaz Baksh* has since been reversed on appeal to the Privy Council.)

E. V. Luckhoo for the appellant, Fiaz Baksh.

C. *L. Luckhoo* for the appellant Nabi Baksh.

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

cur. adv. vult.

Judgment of the Court: The appellants were charged with the murder of one Mohamed Saffie on the 12th June, 1956.

After a trial before a jury at the Session in the Supreme Court, Georgetown, they were convicted and sentenced to death.

Their appeals against conviction contained twenty-eight (28) grounds and at the hearing leave was granted to implement the first ground and the appellants were required to furnish particulars of certain grounds which direction was complied with.

Before the argument commenced Counsel for the appellant Nabi Baksh applied under section 12 of the Criminal Appeal Ordinance, Chapter 8, for leave to call fresh evidence. As we were unable to decide in the absence of any indication as to the nature of the fresh evidence and the reason why it was not adduced at the trial, whether leave should be granted or refused, we gave leave to Counsel to file an affidavit containing the relevant information.

In accordance with our direction the affidavit was filed arid after argument we decided to hear the submissions with respect to the grounds of appeal.

On the 20th May we gave leave to admit the fresh evidence and this was accordingly done on the 21st May.

We now give our reasons for admitting the fresh evidence and our decision resulting from its admission.

Section 12 (b) of the Criminal Appeal Ordinance Chapter 8 states that the Court of Criminal Appeal may

> "if they think fit order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of court before any judge of the Court or before any officer of the Court, or before any magistrate or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court;"

This provision, which is the equivalent of section 9 of the Criminal Appeal Act, 1907, has in a series of cases been interpreted to mean that the Court will only hear additional evidence if it was not available at the trial.

Where, however, there has been a reference to the Court by the Home Secretary, different considerations apply and the Court may hear additional evidence even though it were available. *R. v. McGrath* (1949) 2 All E.R. 498.

In *R. v. Sparkes* 40 Cr. App. R. 83, it was pointed out that no general rule was to be deduced from the previous cases and that the Court would not treat itself as bound by the rule of practice regarding the admission of fresh evidence if to do so might lead to injustice or the appearance of injustice.

It is not unlikely that the reason for the distinction in England is that there is no power in the Court of Criminal Appeal to order a new trial and as a consequence the reception of fresh evidence may necessi-

tate the quashing of a conviction although after hearing such evidence, a jury might have convicted.

In this Colony the power to order a new trial exists and consequently in a suitable case it may be necessary to decide whether there should be any different approach to the reception of fresh evidence when the application is made on appeal or where made on a reference by the Governor.

It is unnecessary to decide this point now as in this case the fresh evidence was not made available to the defence at the trial and in accordance with R. v. Wattam (1952) 36 Cr. App. R. 72, we decided to hear the evidence as the affidavit filed by our directions disclosed *prima facie* that justice might be stultified if we did not hear it.

We think it imperative to observe, however, that applications of this nature will always be carefully scrutinised as we recognise the obvious danger in a Court of Criminal Appeal listening to witnesses whom the jury have not heard.

A summary of the evidence admitted shows the following discrepancies:

Bebe Mariam, in a statement to the police, said:

that at about 2.30 a.m. on 12th June, 1956, she awoke and heard dogs barking and by the light of her husband's flashlight she saw Mohamed Faiz Baksh running away in the ricefield south of her home;

At the trial she said:

that she saw Nabi Baksh on the rice bed 48 feet away from her house; that she told Haniff and Nazir at 3.00 a.m. what she had seen at 2.30 a.m.—that, she had seen Mohamed Faiz Baksh and Nabi Baksh;

Mohamed Haniff, in a statement to the police, said:

that on the 12th June, 1956, after he heard the explosion of a gun, he looked out of the window, shone his torchlight and saw Mohamed Faiz Baksh and another man whom he did not know by name on the parapet of the trench which divides the yard and the ricefield; that he went out on the platform and then ran on the bridge and was all the time shouting "all right Faiz, all you run, me see all you two";

At the trial he said:

that he identified both men by appearance as well as by name; that he shouted "alright Faiz and Jacoob you need not run I see you all".

Mohamed Nazir, in a statement to the police, said:

that on the 12th June, 1956, neither he nor Mohamed Haniff shouted at the men who were escaping after the gun had been fired because they were afraid of being shot;

At the trial he said:

> that Haniff said "alright Faiz and Jacoob don't run ah see you"; that he admitted having said in the Magistrate's Court that Haniff shouted: "alright alyou no run, me see ah you";

The appellant Nabi Baksh is also called Jacoob.

It is regrettable that the police officer who prosecuted in the Magistrate's Court did not disclose to the defence the material variations which had taken place.

We recognise that variations must occur between a witness' statement to the police and his evidence. Changes in time, date, place and description do not necessarily mean that a witness is not speaking the truth and once there is no substantial or vital discrepancy there is no obligation for a prosecutor to disclose it to the defence. Where, however, the discrepancy is so startling that it strikes at the very root of the prosecution's case, justice demands that a disclosure should be made and a prosecutor who fails to do so is acting contrary to an established and salutary practice in the administration of justice.

We make no observations about the non-disclosure of the evidence in the Supreme Court as we are aware that Crown Counsel examines the witnesses from the depositions and may not have seen the original statements.

From an examination of the additional evidence, it will be seen that Bebe Mariam made no mention of seeing Nabi Baksh on the morning of the 12th June shortly before the shooting; Mohamed Haniff did not know the name of the man he saw with Faiz Baksh and therefore could not have called it out. Had the jury known these facts, we are unable to say that inevitably they would have arrived at the same conclusion. They may have done so because they may have accepted Mohamed Nazir's evidence that he saw the two appellants, or the two witnesses already mentioned may have been able to explain or amplify their original statements. In *Lochan* v. *The Queen*, (1957) Feb. 26, we referred to the case of *Attorney General v. Kelly*, (1937) 1 R. 315, where the possible courses open to a Court after listening to the testimony of witnesses was discussed.

In our view in respect of the appellant Nabi Baksh in the interests of justice, the value and weight of the evidence should be determined by a jury and not by this Court.

Entirely different considerations apply with regard to the appellant Mohamed Faiz Baksh. Counsel for him has contended that if the witnesses were untruthful in their evidence concerning Nabi Baksh, then undoubtedly the jury might have taken the view that they were untruthful regarding Mohamed Faiz Baksh.

In Kelly's case supra, it was said —

> "In another case, the evidence may be such that, in the opinion of the court, it should not influence any reasonable jury in arriving at their verdict, and in that case the court would refuse to reverse the conviction."

We do not wish to embark on a detailed examination of the evidence of the three material witnesses having regard to our decision with respect to Nabi Baksh but a brief reference seems inevitable.

According to the statements admitted Ex. C.C.A. 1, 2 and 3 each witness positively identified Mohamed Faiz Baksh and each one said so in his or her statement to the police. Had they been cross-examined on their original statements, damaging evidence against Mohamed Faiz Baksh could and certainly would have been elicited; for example, Bebe Mariam never gave the reason which prevented the deceased accompanying her to the bus. In her statement the evidence would seem to be hearsay but there was nothing to prevent her saying that after seeing Mohamed Faiz Baksh she spoke to her husband and as a result he did not leave the house with her. Naturally, we are conscious that the contents of the statements cannot be treated as evidence and we do not overlook the fact that in order to decide whether the jury's verdict would have been the same had they heard the additional evidence, we must not consider evidence which was not given; but we are entitled to consider, having seen the statements, whether anything favourable to this appellant could have been obtained which was not obtained at the trial. There is a great deal that is unfavourable which we will not take into account but we can find nothing favourable. At the time when the statements were made to the police, one of the witnesses had identified both of the appellants; the three witnesses lived in the same house and two of them had some hours together before making their statements and yet their statements did not correspond in certain respects. This would necessarily have a profound effect on the jury when assessing the value of the evidence even if the jury knew the facts as we now know them.

We are of opinion that the jury's verdict with respect to Mohamed Faiz Baksh ought not to be disturbed on this ground.

It now becomes necessary to consider the substantive grounds of appeal; it is not proposed to set out all of them in detail as many were abandoned, some are without merit, and some can be summarised. We shall first consider Ground 3 which is:—

> The learned trial Judge misdirected the jury concerning the statements of the accused from the dock, to the effect that they were entitled to draw inferences which could tell of their guilt and which might be unfavourable to the accused if the accused did not give a reasonable explanation for facts which were proved.

The direction at page 135 which is impugned is as follows:—

> "I mentioned to you that the accused persons have in their wisdom elected to make a statement from the dock and they are entitled so to do. However, you are also entitled to draw inferences that may be unfavourable to the prisoners where they are not called to establish an innocent explanation of facts that you might find proved by the prosecution and which, without such explanation, tell of their guilt."

It is said by counsel that the judge's direction is a correct statement of the law but was unwarranted having regard to the fact that the prisoners had given evidence from the dock and had answered the *prima facie* case of the prosecution.

The passage referred to in the summing-up appears in Archbold's 33rd edition page 488. The authority cited in support of it is *R. v. Come* (1904) 68 J.P. 294; *R. v. Bernard* 1 Cr. App. R. 218.

In both of the above-mentioned cases the trial Judge had commented on the absence of the accused from the witness box and told the jury to draw their own conclusions from the absence of an explanation. Since the two accused both gave unsworn evidence about their movements at the material time, it would not be correct to say that there was no explanation. A judge is entitled, however, to comment on the absence of an accused person from the witness box. When the sentence preceding the one which is criticised is borne in mind, no reasonable jury could have thought anything else than that the judge was commenting on the absence of the accused from the witness box. The words "when they are not called" mean when they are not called as witnesses.

Ground 4 is as follows:—

> The learned trial Judge misdirected the jury on "the burden of proof" and "reasonable doubt."

The objection to the manner in which the Judge dealt with the burden of proof can be dismissed in a few words. In explaining the meaning of proof beyond reasonable doubt, the Judge took a passage from Denning L.J.'s judgment in *Miller v. Minister of Pensions* (1948) L.T.R. 117 at p. 203. Nor did he confine himself to the language of Denning L.J.; he elaborated and gave his own explanations, in a concise and thorough manner.

Ground 6 is as follows:—

> The learned trial Judge misdirected the jury as to the manner in which the establishment of motive by the Crown would strengthen the case for the prosecution.

Counsel submitted that the trial Judge's direction at page 139 "If there is strong motive for an act it strengthens the prosecution's case" was a misdirection in that the jury might have thought that if they were doubtful about the identity but certain of motive, their doubts could be resolved having regard to motive. The argument was also put thus: If there was strong motive, the witnesses by faulty reasoning, might consider that the only person who could have shot Saffie was someone who had a grudge against him and therefore it must have been Mohamed Faiz Baksh who shot him. This aspect, counsel said, was not adequately dealt with in the summing-up.

We do not understand the submission to be that evidence of motive is not admissible.

Previous enmity, motive, preparation, have long been accepted as admissible as relevant factors in deciding whether an act was done by an accused person or not. None can deny that motive strengthens a case

just as absence of motive weakens a case. Whether witness persuades himself that he has seen someone he has not seen simply because he is convinced that no one but a known enemy could have desired the death of the person concerned, is a possibility which is present in every case where identity is in issue and previous enmity exists. Trial by jury would be impossible and a summing-up an intolerable burden if a Judge was required to remind the jury of all the weaknesses of human nature. A reasonable jury must be credited with some knowledge of the way people behave and it must not be assumed that when they considered the evidence they were unmindful of the possibilities counsel stressed. Ground 8 is as follows:

> The learned trial Judge misdirected the jury as to the law relating to an accessory before the fact."

Counsel contended that the direction regarding an accessory before the fact was a misdirection for the reason that while he stated the law correctly he left it open to the jury to find that one or other of the accused was an accessory before the fact and could be convicted as such when there was no evidence to warrant any such finding.

The first point to be noticed is that no complaint is made regarding the direction in law. We entirely agree that the legal direction was impeccable. That being so, the short answer to the submission is that it cannot be assumed that the jury acted contrary to the direction. They were told that in order to convict of being an accessory before the fact, there must be evidence of aiding, abetting, etc. If there was no such evidence, it would be wrong for us to assume that the jury discovered evidence which did not exist.

Another answer suggests itself. Neither Mohamed Haniff nor Mohamed Nazir saw who fired the shot which killed Saffie. Since Bebe Mariam had seen the appellant Mohamed Faiz Baksh near the house two or more hours before the shooting and if the evidence was to be believed that he was seen leaving the vicinity from which the shot had come, there was some evidence on which the jury could find that if he did not fire the shot he was either a principal in the second degree or was an accessory before the fact. The Judge is entitled to put any theory to the jury once the facts justify it. *Ramlochan v. The Queen* (1956) A.C. 475. The main issue in this case was identity and unless the jury had accepted the evidence of the witnesses as to identity, they could not on the summing-up have found the appellants guilty.

Grounds 12 and 13, which were argued together, are as follows:—

12. The learned trial Judge misdirected the jury as to the law relating to the defence of an alibi.

13. The learned trial Judge misdirected the jury to the effect that the onus of proving an alibi is on the accused.

Under these heads the appellants complained of two portions of the summing-up appearing respectively at page 150 and page 151 of the record:

(1) "The onus of proving an alibi is on the accused but the onus on the prosecution of proving the identity of the person or persons that did the act still remains."

(2) "When an accused person is required to prove a fact he is not required to prove it beyond reasonable doubt as in the prosecution's case. He is only required to prove that on a balance of probabilities and if on such balance of probabilities you come to the view that they are not the persons who discharged the shots that killed the deceased then they are not guilty."

Counsel for the appellants submitted, in our view not unreasonably, that the jury must have understood the second passage as being referable to the first, that is to say, as a further direction with regard to the onus of proving an alibi. He laid special emphasis on the use of the word "required", and contended that the combined effect of the two statements might well have been to mislead or confuse the jury.

It is very important that a jury should be directed properly with regard to the onus of proof but in our view there is no misdirection in the passages complained of although they are not happily worded.

It is the fact that if an accused person states a fact completely inconsistent with the prosecution's case, that fact can only be accepted by the jury if on the balance of probabilities the jury believes it to be proved. Proof of it results in an acquittal; failure to prove it does not result in a conviction. In attempting to prove some fact, the prosecution's case may be so shaken that the burden of proof has not been discharged.

Once the jury understand the position, the form of direction is immaterial and we have no doubt in this case that the correct method of approach was understood. In considering whether the jury have been properly directed with regard to the onus of proof, it is necessary in each case to look at the whole of the summing-up and not just at one or two passages which, standing by themselves, may be regarded as infelicitous or open to even stronger criticism. It is the effect of the summing-up as a whole that matters.

Learned counsel for the respondent has directed attention to these other passages in the summing-up:—

(a) Pages 134 and 135 of the record:

"The prosecution have brought them (the accused) here and they are to prove the case. It is not the accused person that has to prove his innocence—or their innocence in this case."

(b) Page 136 of the record:

"You are entitled to draw reasonable conclusions from the facts that you find proved to your satisfaction, but you must always give the benefit of the doubt—of any reasonable doubt—to the prisoners."

(c) Pages 137 and 138 of the record:

"In this case, as in all criminal cases, the burden of proof is on the prosecution and proof is the establishment of a fact to your satisfaction beyond reasonable doubt. It

is the law that every accused person is presumed to be innocent until he is proved to be guilty and the burden of proving him guilty rests upon the prosecution all the way during the whole of the case; and while the prosecution must prove the guilt of the prisoner there is no such corresponding burden laid on the prisoner to prove his innocence—or the prisoners: when I use the singular as far as this case is concerned it refers to both of them. It is sufficient for him to raise a doubt as to his or their guilt. He is not bound to satisfy you of his innocence."

(d) Page 139 of the record:

"You may convict on the strength of the Crown's case but not on the weakness of the defence."

(e) Pages 150 and 151 of the record:

"It is my duty to tell you that if you consider that the alibi has failed you must now turn to the facts of the case and consider them on their own merits. If in your opinion the defence of an alibi has failed the prosecution does not necessarily succeed. You still have to consider the facts of the case and see if the prosecution has proved the case beyond reasonable doubt.....It does not prevent you, gentlemen, from finding that notwithstanding that the alibi is not proved the explanation given by the accused persons throws so much doubt on the evidence of the prosecution as to lead you to say 'we have a doubt about the guilt of the prisoners' and you will therefore acquit them."

(f) Pages 217 and 218 of the record:

"If you accept their statement and the evidence of their witnesses then they are not guilty. If it leaves you in any doubt, then they must be acquitted. If you do not accept it, before you can convict the accused you still have to consider the evidence and the case of the prosecution. So that, before you convict, you have to consider the evidence of the prosecution to see that the identity of the persons has been established—that it has been proved and all other ingredients of which you have been informed by me."

(g) Page 219 of the record:

"If you are in doubt as to whether you should convict at all, your duty would be to acquit. If you accept the account of each of the accused you must acquit. Short of accepting that explanation if it left you in any doubt you must acquit."

The very clear and unimpeachable directions at (f) and (g) came almost at the end of the learned Judge's charge to the jury, and it is inconceivable that they were overlooked; they must, we think, have removed from the minds of the jury any misunderstanding or confusion that could have been caused by the earlier statements complained of.

We are satisfied that the effect of the summing-up, taken as a whole, was to convey to the jury what was their duty, namely, that they must acquit if they believed the alibi or if they were left in doubt about it and that, even if they disbelieved it, they would still have to consider the case for the prosecution and could not convict unless they were satisfied that the prosecution had proved its case beyond reasonable doubt.

Grounds 18 to 28 may be summarised under the main head that the learned trial Judge did not adequately put the case for the defence to the jury. Ground 1(a), (b), (c) and (d) can also be included under this head.

We indicated at the hearing that we were not impressed with any of the arguments addressed to us under these grounds. Counsel gave us the benefit of a very reasoned and detailed examination of the evidence and dealt at length on certain features which he thought should have been put to the jury. The following are some of the omissions about which complaint is made:—

(a) As the defence was that after Saffie was shot the witnesses did not noise it abroad that they had seen the assailants, as would be expected if they did so, this fact should have been mentioned to the jury;

(b) Saffie must have been shot at about 5.30 am. which would make it virtually impossible for one of the appellants to join the train at 6 a.m.;

(c) the appellants' movements were disclosed at a very early time. The information they gave must have been checked and found correct and sufficient prominence was not made of this fact;

The record shows that counsel for both appellants were counsel in the Court below. We observe, too, that their addresses to the jury lasted nearly two days. Although there were only fourteen witnesses called by the Crown the trial lasted 13 days.

In this Colony there is no obligation for the Official Shorthand Writer to record any part of Counsel's speeches so we have not had before us any note of what they said. We are certain that counsel, with their wide experience, did not overlook any of the matters which have been drawn to our attention. The Judge in putting the defence to the jury read their evidence and commented on certain aspects of the defence. There were other comments. We are satisfied that the defence was adequately put and the jury was not unaware of the salient features of the case.

Grounds 5, 7, 9, 11, 15, 16, 17 and 22 were abandoned. Accordingly, the appeal of the appellant Mohamed Faiz Baksh is dismissed and the conviction and sentence affirmed.

For the reasons hereinbefore stated, the conviction of Nabi Baksh is reversed and we direct a new trial in accordance with the provisions of section 6 (2) of the Criminal Appeal Ordinance, Chapter 8.

(In the Full Court of the Supreme Court, on appeal from the Magistrate's Court for the East Demerara Judicial District (Holder, C.J., and Stoby, J.) May 18, June 7, 1957).

Local Government—Power of local authority of village or country district to let lands—No power to let dams—Local Government Ordinance, Cap. 150, ss. 89 and 90.

Section 89 of the Local Government Ordinance, Cap. 150, which provides that all undivided lands or portions of land…….dams……of every village or country district shall be under the control and management of the local authority, does not place ownership of undivided lands in a local authority and the power to control and manage undivided property does not extend to selling, letting or parting with possession of such property.

Section 90 of that Ordinance which empowers the local authority of a village or country district to let to any person by monthly or yearly tenancy or for a term of years at any such rent as may be fixed by the local authority, any undivided lands, undivided empolders, pasture lands, woods or any portion thereof for the time being under the control and management of the local authority does not empower the local authority to let dams.

Appeal allowed.

B. S. Rai for appellant.

S. Misir for respondent.

Cur. adv. vult.

Judgment of the Court: An important point concerning the powers of Village Councils arises in this appeal.

The Village Council of Beterverwagting and Triumph District purporting to act under section 90 of the Local Government Ordinance, Chapter 150, let to a number of persons portions of the Triumph west side line dam for the purpose of cultivation. In consideration of their being allowed to cultivate the land rented to them, the tenants were required to keep a 10 foot drain clean.

The respondent who is one of the persons to whom the Village Council had let a portion of the dam and acting with their consent, planted a variety of root vegetables on the dam.

On the 12th December, 1955, cattle belonging to the appellant, a proprietor of land in the Village District of Beterverwagting and Triumph strayed on to the dam mentioned aforesaid and destroyed the respondent's cultivation.

The respondent brought an action against the appellant claiming damages for the trespass by appellant's cattle and for damage to his crops caused thereby.

The Magistrate awarded the respondent $30 damages and costs against the appellant.

On this appeal two points fail for consideration, namely:—

(a) did the Village Council have authority to let the dam or any portion of it? And

(b) if not, is the appellant in the circumstances thereby relieved of liability for damage done by his cattle?

Section 89 of the Local Government Ordinance, Chapter 150 places the management of undivided property in Village and Country Districts in the Local Authority. The section provides that—

> "All undivided lands or portions of land, undivided empolders, pasture lands, woods, dams, kokers, sluices, watercourses, navigation and draining trenches, roads, streets and bridges (not being public roads, streets and bridges under the Roads Ordinance) of every village or country district shall be under the control and management of the local authority."

It is clear that section 89 does not place *ownership* of undivided, lands in a local authority and it is equally clear that power to control and manage undivided property does not extend to selling, letting or parting with possession of such property.

The right to let undivided property is given by section 90 which states:—

> "The local authority of a village or country district may let to any person by monthly or yearly tenancy or for a term of years, and at such rent as may be fixed by the local authority with the approval of the Board, any undivided lands, undivided empolders, pasture lands, woods, or any portion thereof, for the time being under the control and management of the local authority."

It will at once be noticed that there are some significant omissions in section 90 when compared with section 89. Dams, kokers, sluices, draining trenches, roads and streets, for example, are not referred to in section 90. The reason is not difficult to discover. No local authority would wish to let to a private individual the streets or kokers of its Village District and the same view must have been taken by the legislature about the letting of dams.

We unhesitatingly find that the Local Authority of Beterverwagting and Triumph Village District had no power to let any portion of a dam in the district to the respondent and acted *ultra vires* in so doing. We wish to say, however, as the Authority was not represented before us and not being a party to the appeal could not be represented, that we realise that their action in letting the dam was done in the interests of the Village and no doubt with a view to reducing the rates.

Having decided that the letting was *ultra vires* we must now refer to the appellant's position.

The evidence discloses that the appellant is a rate-payer of the District. There is no evidence concerning the respondent's status although it was stated at the Bar that he too is a rate-payer.

The importance of being a rate-payer, according to the argument addressed to us, is that the dams are the property of the rate-payers. This argument was based on the evidence of Paul Slowe, the Chairman of the Beterverwagting and Triumph Village District who said with reference to the land on which the appellant's animals allegedly trespassed—

> "The dam belongs to all the rate-payers. It is common land. The Village District maintains the dam."

We thought it unusual that ownership of property should be proved in so perfunctory a manner and considered the advisability of sending the case back to the Magistrate for further evidence to be taken on the issue of ownership of the dam.

We refrain from doing so as we are able to decide the question raised in the appeal without deciding in whom the ownership of the dam lies.

On the assumption that appellant and respondent are rate-payers and undivided owners with other rate-payers of the dam, trenches, sluices and so on in the District, the respondent could not maintain an action for cattle trespass against the appellant.

The owner of cattle is liable without proof of negligence if his animals trespass on his neighbour's land and cause damage; a similar liability attaches where he has demised or sub-let his own land but no such liability can arise in trespass between co-owners who are both in possession. In *De Aguiar* v. *Obermuller* (1948) L.R.B.G. 68 at p. 72 Worley, C.J. agreed with the following passage of Dalton, J. *In re Downer* (1919) L.R.B.G.

> "Joint owners of land are entitled to make a reasonable use of all the land so held proportionate to the share of each therein. Each owner is entitled to access to the whole of the land and to an interest in every square inch of it, proportionate to his share and to everything upon it."

One co-owner cannot use the common property in such a way that he confers on himself an exclusive benefit.

We are not unmindful of the fact that an action for damages may lie where one co-owner wilfully damages another co-owner's cultivation but we are dealing here with a case of cattle trespass and we have confined ourselves to the facts proved in this case.

Although we have proceeded on the assumption that the appellant and respondent have undivided ownership with other rate-payers on the dam, we thought it proper, so that no misunderstanding could arise from our decision, to examine the titles in the Deeds Registry. Without expressing any considered opinion regarding ownership we do not think it correct to say that ownership of the dam follows ownership of property in the village.

It would seem that by Transport No. 687 of the 14th June, 1926, the dams, streets, kokers, sluices and so on were sold by the Colony of British Guiana to the Local Authority but with two restrictions attached. One restriction is that the reserves which would include dams were to be used for ingress and egress only or for construction of roads or other commercial purposes.

In a suitable case and on proper evidence we may have to consider this question and rule on it.

The appeal is allowed with costs $20.00.

LUCKIE v. STEPHEN.

(In the Full Court of the Supreme Court, on appeal from the Magistrate's Court for the Georgetown Judicial District (Holder, C.J., and Bollers, J. (ag.)) July 6, 1956, June 17, 1957).

Landlord and tenant—Claim that landlord's alleged wrongful act caused electric current to be cut off from demised premises—Claim in tort for loss of convenience—No enforceable claim disclosed.

Landlord and tenant—Claim in tort for loss of convenience—No breach of implied term that the demised premises are reasonably fit for human habitation—Landlord and Tenant Ordinance, Cap. 185, s. 44 (*3*).

The respondent tenant Stephen claimed from the appellant landlord Luckie damages for the wrongful act of the appellant in causing the electric current to be cut off from premises occupied by the respondent and rented by him from the appellant. It was alleged by the respondent in his plaint that in consequence of the said wrongful act by the appellant the respondent suffered loss and convenience of electric current and light in the demised premises. The magistrate found that the electric wire carrying the current became defective through no fault of the respondent and that the respondent had only brought the defective state of the wire to the appellant's notice. The magistrate awarded the respondent damages holding that the appellant had committed a breach of the implied condition in section 44 (3) of the Landlord and Tenant Ordinance, Cap. 185. that is to say, the premises were not kept in all respect reasonably fit for human habitation, that as a result the health of the respondent's wife was injuriously affected and that the appellant had committed a breach of his agreement of tenancy with the respondent.

Held: (i) The claim being one in tort for loss of convenience it was not competent for the magistrate to award damages on a finding of breach of contract and the claim therefore was not enforceable.

(ii) The provisions of section 44 (3) of the Landlord and Tenant Ordinance, Cap. 185, entitle an inmate of the demised premises to an award of damages only where the property or the person or the health of the inmate is injuriously affected by reason of a breach by the landlord of the condition or undertaking implied by the subsection and as no such injury was proved no damages could be awarded. Further, that subsection contemplates an award of damages to the inmate and not to the tenant for injury to an inmate.

Appeal allowed.

H. Mitchell for the appellant.

C. Llewellyn John for the respondent.

Cur. adv. vult.

Judgment of the Court: This is an appeal from the decision of a Magistrate of the Georgetown Judicial District who gave judgment for the respondent for the sum of $100 and costs $6.24 in respect of an action in which the respondent claimed from the appellant the sum of $250 damages for the wrongful act of the defendant in causing the electric current to be cut off from the premises during May, 1955, up to the date of the filing of the claim and keeping the electric wires on the premises in a defective condition. The premises were occupied by the respondent who rented them from the appellant at a rental of $19.69 per month. It was alleged in the plaintiff's claim that in consequence of the said wrongful act by and on behalf of the defendant, the plaintiff suffered loss and convenience of electric current and light in the said premises.

The Magistrate in his memorandum of reasons for decision stated—

> " The Court was satisfied, having regard to all the evidence, that the wire became defective through no fault of the plaintiff. The Court was further satisfied that the plaintiff did bring the contents of "Exhibit "A" to the defendant's notice."

The learned Magistrate accepted the evidence of the plaintiff and his witnesses and found that there was—

(a) a breach of agreement;

(b) breach of the implied condition under section 44 of the Landlord and Tenant Ordinance, Chapter 185,

and then proceeded to award the sum of $100 damages and costs on that basis.

The appellant now appeals from the Magistrate's decision to this Court on the following grounds:—

1. that the decision was erroneous in point of law for the following reasons:—

(1) that the statement of claim of the respondent discloses no cause of action;

(2) that sub-section (3) of section 44 of the Landlord and Tenant Ordinance, Chapter 185, under which presumably the learned Magistrate decided the action before the Court, (if there was an action), (he himself has referred to section 44) applied only to the property or the person or the health of an inmate of any house according to the maxim *"Expressio unius personam vel rei est exclusio alterius",* and accordingly, in so far as the respondent has adduced no evidence that his property, person or health has been injuriously affected, rather only evidence that he has been uncomfortable, the decision of the learned Magistrate is untenable within the meaning of the Ordinance under which it was made;

(3) that the learned Magistrate misdirected himself as to the meaning of and the law in relation to the term "fit for human habitation" under the provisions of section 44 of the Landlord and Tenant Ordinance, Chapter 185, and as defined in *WHITEHEAD vs. HIVE (1952) B.G.L.R. 6,* to which the Magistrate himself referred;

(4) that even if it is ultimately decided that there is evidence upon which the Court could rely that the health of the respondent was injuriously affected (and it is contended on behalf of the appellant that there is no evidence upon which the Court could rely that the health of the respondent was affected by the use of the light from a kerosene lamp instead of the use of electric light), it is urged on behalf of the appellant that the action of the respondent in purchasing and in using a kerosene lamp after the discontinuance of his supply of electricity was a *novus actus interveniens,* the flow of damages from which deliberate

use by the respondent is not attributable to the appellant and is too remote.

2. The decision of the learned Magistrate could not be supported having regard to the evidence.

At the hearing of the appeal we informed Counsel for the appellant that we were impressed by his first three grounds and we would not consider ground 1(4).

With reference to ground(l), Counsel for the appellant urged that no enforceable action was disclosed in the plaint. There is no mention of any agreement and of any breach of agreement. The action is founded in tort and not in contract. The words "wrongful act" are used. The injury of which the plaintiff complained was a loss of electric current and light on the said premises. He urged that the Magistrate gave judgment and awarded damages on the basis of contract which on the face of the claim did not exist. In so far as the claim was based on tort for the loss of convenience, he urged the Court to find that the plaint as so worded could not stand and was unenforceable. *(PEREIRA v. VANDEYAR W.L.R. 1953).* There was no separate tort for loss of convenience. Damages claimed in tort for loss of convenience could not be enforced. To succeed the respondent should have framed his claim on one of the recognised torts, such as trespass, nuisance and negligence. Counsel further contended that the evidence which followed tended to support the claim as drawn. The respondent repeated in evidence that he had been inconvenienced and uncomfortable. This clearly indicated the intention of the respondent that the claim should be for loss of convenience and nothing else. Although there was a relationship of landlord and tenant which of itself implied an agreement, yet his claim was founded upon tort and not contract. The Magistrate may have advised the respondent at any stage during the hearing to amend the claim but he did not do so himself, and the respondent did not apply for leave to amend his claim. Consequently, he must stand by his claim. The Magistrate's reasons for judgment were based on contract, whereas the claim was brought under the head of "TORT". The action as framed, therefore, was not actionable.

Solicitor for the respondent in reply to ground (1) submitted that an objection that the claim disclosed no cause of action was an objection which could have been taken at the hearing of the proceedings *in limine.* In this case this was not done. This would also go to the jurisdiction which the Magistrate had in the matter. Solicitor for the respondent also referred the Court to section 9 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, and submitted that this point could not be taken in the Court of Appeal. The submission made at the close of the case for the respondent that there was no case to answer was substantially different from the submission that the plaint disclosed no cause of action. He referred the Court to Rule 1(1) (d) under PART V of the Magistrates Rules, 1939. He also urged on the Court that in paragraph 1 of the claim there was an agreement alleged and that was a contract. Paragraph 1, he submitted, alleged that the premises were wired for the supply of electric current on the said premises. He referred to page 3 of the Magistrate's reasons, as follows: —

> "Apart from the question of agreement simpliciter, there is implied under the provisions of Section 44 of the Landlord and Tenant Ordinance, a condition that any premises let, shall be, at the commencement and during the tenancy, in all respects reasonably fit for human habitation"

Here there was a general breach of the agreement that the landlord had provided the wire at the commencement and had accordingly held out that this wire was in a fit and proper state for the purpose of providing electric current. Electric current was part of the tenancy. The tenant could look for the continuance of that wire being in a fit and proper state, provided he paid his rent. Counsel finally submitted that the Magistrate considered that the premises were wired for electricity. He also cited PEREIRA v. VANDEYAR, the facts of which are as follows: —

> "The plaintiff was the tenant of a flat within the protection of the Rent Restriction Acts of which the defendant was the landlord. The plaintiff lived in the flat with his wife, and child aged two. On October 8, 1952, the defendant, without going into the flat, cut off the supply of gas and electricity to it and left the plaintiff without any alternative means of heating or lighting. The plaintiff, after two days' discomfort, went with his wife and family to stay with friends for five days, returning when the gas and electricity supply was restored on October 14. In this action the plaintiff claimed damages for breach of the terms of his tenancy agreement. At the end of the hearing and at the instance of the county court judge the particulars of claim were amended and a claim was added for damages for eviction. The judge awarded to the plaintiff £3. 10s. special damages together with £25 general damages for the inconvenience caused to him. He further held that the plaintiff was entitled to punitive damages and awarded to him an additional sum of £25 on the basis that the defendant's conduct constituted a deliberate and malicious tort entitling the plaintiff to punitive damages. The defendant appealed on the ground that the damages awarded were excessive:—HELD, that the plaintiff had not proved any separate tort since although so far as the plaintiff had been evicted the defendant's conduct was *prima facie* a breach of contract, the cutting off of the gas and electricity did not amount to a tort—it did not constitute an interference with any part of the demised premises and could not be regarded as a trespass; and that, the plaintiff not having brought himself within the head of tort, the award of the additional sum of £25 punitive damages could not stand. LAVENDER v. BETTS /1942/2 All E.R. 72) considered and distinguished. SEMBLE, there is no separate tort of eviction. So far as eviction is wrongly achieved by a landlord it is *prima facie* a breach of contract."

In this case it will be seen that where the landlord deliberately cut off the supply of electricity as a result of which the tenant suffered dis-

comfort, the matter was treated as one of breach of contract. The learned authors of Clarke and Lindsell on TORT, state: —

> "One who commits a wrongful act is responsible for the ordinary consequences which are likely to result therefrom, but generally speaking, he is not liable for damage which is not the natural or ordinary consequences of such an act, unless it be shown that he knows, or has reasonable means of knowing, of the consequences not usually resulting from the act are, by reason of some existing cause, likely to intervene so as to occasion damage to a third person."

We agree with the submissions made by counsel for the appellant that the words "wrongful act" appearing in the claim indicated that the action was framed in tort and not in contract. Paragraph (1) of the claim merely sets out the status and relationship of the two parties, but does not allege a specific or an implied agreement between the plaintiff and the defendant and certainly not a breach of any agreement. Section 9, Chapter 17, cited to us by counsel for the respondent, does not apply as the action so framed as it was disclosed, a cause of action, but one in tort and not in contract. In our view the action ought to have been brought under the head of "CONTRACT" for breach of an express or implied term of the tenancy of the said premises.

Under section 28(a) of Chapter 17 this Court may amend either in whole or in part any order made by the Magistrate with reference to the cause, or may make any order which the Magistrate ought to have made. Under PART XIII of the Summary Jurisdiction (Civil Procedure) Rules, 1939, Chapter 12, of the Subsidiary Legislation, the powers of amendment given to the Magistrate are clearly laid down. The position is not covered by the Magistrate's powers of amendment. It follows, therefore, that this Court cannot properly amend the plaintiff's claim if it is wrongly framed. Rule 1(1) (d) under PART V to which Solicitor for the respondent has drawn our attention in our opinion does not apply, and does not permit of an action being framed in tort and judgment for damages being awarded on the basis of contract. We are, therefore, in agreement with the submissions made by counsel for the appellant.

On ground (2) of the appellant's grounds of appeal, counsel for the appellant submitted that under sub-section 3 of section 44, Chapter 185, on which the Magistrate purported to base his award of damages, gave rise to damages only where the property or the person or the health of an inmate of any house to which this section applies, was "by reason of a breach by landlord of the condition or the undertaking injuriously affected." In this case there was no evidence that the property or the person or the health of the tenant was injuriously affected. There was no evidence that the health or person of the tenant/respondent was at all affected; that the respondent's wife suffered from colds could hardly be traced to the lack of electric lights, or to the use of kerosene oil lamps; that the respondent was unable to use his radio was not an injury to the health or person of the tenant. Counsel for the appellant contended that the learned Magistrate misdirected himself as to the meaning

of the term "fit for human habitation", and cited the test laid down in *Hill & Redman—Law of Landlord and Tenant*—11th Edition, page 1103:

> "In determining for the purpose of this Act whether a house is fit for human habitation, regard shall be had to the extent, if any, to which by reason of disrepair or sanitary defects the house falls, and the provisions of any by-laws in operation in the district, or of any enactment in any local Act in operation in the district dealing with the construction and drainage of new buildings and the laying out and construction of new streets."

And again in the case of *Whitehead v. Hive* [1952] B.G.L.R. 6, at p. 9, the Full Court of Appeal, in their judgment stated: —

> "'Reasonably fit for human habitation' means that the premises are not in a condition which might tend to endanger the health and well-being of its inmates. In our view the landlord's statutory obligation to repair is restricted to his maintaining the house fit for human habitation……..Nor would the avoidance of mere inconvenience of the inmates which is not likely to result in the impairment of their health be deemed under the Ordinance to be warranted by the landlord as a term implied under the tenancy agreement."

Sub-section 3 of section 44 of the Ordinance reads —

> "When the property or the person, or the health of an inmate of any house to which this section applies, is by reason of a breach by the landlord of the condition or the undertaking in this section mentioned injuriously affected such inmate shall be entitled to recover damages from the landlord of the house in respect of such injurious affection."

In a claim for injury to property under this sub-section the respondent must show that the injury of such property arose as a direct result of the house being not reasonably fit for human habitation in the sense given above. Section 44 of Chapter 185 is taken from section 2 of the Housing Act, 1936, (26 Geo. 5 & 1 Edw. 8, c. 51), which in turn follows section 1 of the Housing Act, 1925, (15 Geo. 5, c 14) which has replaced section 15 of the Housing Town Planning Act, 1909, and which followed the Act of 1885. It will be noted that a section similar to subsection 3 of section 44 of Chapter 185 does *not* appear in the English Acts. As a result it has been held in England that the landlord cannot be sued by anyone, save the tenant (*Ryall v. Kidwell* [1914] 3 K.B. 135) Strangers to the contract cannot sue on the implied undertaking. For example, tenant's wife or children (*Cavalier v. Pope* [1906] A.C. 428), (*Bromley v. Mercer* [1922] 2 KB.).

It is apparent that this would not be the legal position in this Colony where by sub-section 3 of section 44 of Chapter 185 the Legislature specifically gives the right to an inmate of any house to which the section applies, to recover damages from the landlord of the house when his property or his person or his health is by reason of the breach of the

statutory condition injuriously affected. In this case, therefore, the Magistrate was wrong when he awarded damages to the plaintiff based on the ground that the health of the plaintiff's wife was injuriously affected.

We are in agreement with the submissions made by counsel for the appellant on the second ground of appeal, and for these reasons the appeal must be allowed and the judgment of the Magistrate set aside. We award to the appellant the costs of this appeal fixed at $25.00 and of the proceedings in the Magistrate's Court also fixed at $25.00.

The appeal is accordingly allowed

REPORTS OF DECISIONS

IN

THE SUPREME COURT

OF

BRITISH GUIANA

DURING THE YEAR

1957

AND IN

THE WEST INDIAN COURT OF APPEAL

1957

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