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**THE LAW REPORTS OF
BRITISH GUIANA**

1962

The Privy Council

The Federal Supreme Court

The British Caribbean Court of Appeal

and

The Supreme Court of British Guiana

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FEDERAL SUPREME COURT

(up to 31st May, 1962, and thereafter)

BRITISH CARIBBEAN COURT OF APPEAL

1. THE HON. SIR STANLEY GOMES — Chief Justice.
2. THE HON. SIR CLYDE V. H. ARCHER — Judge.
3. THE HON. MR. JUSTICE A. M. LEWIS — Judge.
4. THE HON. MR. JUSTICE C. WYLIE — Judge.
5. THE HON. MR. JUSTICE J. F. MARNAN — Judge.
6. THE HON. SIR DONALD JACKSON — Judge.

SUPREME COURT OF BRITISH GUIANA

1. THE HON. MR. JUSTICE JOSEPH ALEXANDER LUCKHOO — Chief Justice.
2. THE HON. MR. JUSTICE WILLIAM ADRIAN Date — Puisne Judge.
3. THE HON. MR. JUSTICE KEITH LYNDELL Gordon — Puisne Judge; retired on 7th July, 1962.
4. THE HON. MR. JUSTICE ROBERT SYDNEY MILLER — Puisne Judge.
5. THE HON. MR. JUSTICE HAROLD BRODIE SMITH BOLLERS — Puisne Judge.
6. THE HON. MR. JUSTICE HENRY AUBREY FRASER — Puisne Judge; transferred to Trinidad as Puisne Judge from 1st October, 1962.
7. THE HON. MR. JUSTICE GUYA LILADHAR BHOWANI PERSAUD — Puisne Judge.
8. THE HON. MR. JUSTICE AKBAR KHAN — Acting Puisne Judge; appointed substantively as Puisne Judge on 21st September, 1962, with effect from 8th July, 1962.
9. THE HON. MR. JUSTICE BERTRAND OSWALD ADAMS — Acting Puisne Judge until 30th June, 1962.
10. THE HON. MR. JUSTICE ARTHUR CHUNG — Acting Puisne Judge with effect from 28th April, 1962.

CITATION

These reports may be cited as 1962 L.R.B.G.

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NIEWENKERK v. MELVILLE AND ANOTHER

[Supreme Court (Miller, J.,) January 5, 1962.]

Election petition—Application to strike out particulars—Whether foreign nationals may be appointed as presiding officers—Representation of the People Ordinance, 1957, s. 7 (1) and (3).

At the trial of an election petition the respondents applied to strike out certain particulars supplied by the petitioner in pursuance of certain orders of court, including an allegation that foreign nationals acted as presiding officers. Section 7 (1) of the Representation of the People Ordinance, 1957, provides that “the returning officer . . . shall . . . appoint a presiding officer . . . for each polling place in his district.” Subsection 3 requires each presiding officer to take an oath to act faithfully according to law, without partiality, fear, favour or affection, and to keep secret the names of the candidates for whom any of the electors in the polling place may mark his ballot paper in his presence at the election.

Held: (i) at the trial of an election petition an enquiry should not be allowed to be stifled as not being in the particulars; but at the same time the court could not allow the respondent to be taken by surprise without having fair warning;

(ii) there was no requirement for a presiding officer to be a British subject, and the particulars given in this respect would be struck out.

Order accordingly.

J. T. Clarke, H. D. Hoyte with him, for the petitioner.

J. H. S. Elliott, Q.C., G. M. Farnum and *F. R. Wills* with him, for the first-named respondent.

G. A. S. Van Sertima, Senior Legal Adviser (ag.), with *Doodnauth Singh*, Crown Counsel (ag.), for the second-named respondent.

MILLER, J.: This is a representation petition presented by Charles Niewenkerk a person who voted and had a right to vote, at the election for the Electoral District of Rupununi No. 35, held on the 21st day of August, 1961. It is brought against Edward Eyre Melville, the candidate who was successful at the election, and was duly returned, and Neville Leyton Franker, the Returning Officer. Several allegations have been made; and, those against the first-named respondent, are not only several, but grave and serious.

On the matter coming on for trial on the appointed day, 3rd January, 1962, Mr. Elliott, counsel for the first-named respondent, raised several objections with respect to the particulars filed, and

asks that those particulars to which his objections relate, be struck out.

Mr. Van Sertima, for the second-named respondent, urged that the allegation that foreign nationals acted as presiding officers should be struck out.

Many of the criticisms made by counsel for the first-named respondent are, in my opinion, justified. It seems to me there has been a want of care in the preparation of the particulars. The last four Saturdays were occupied in chambers in dealing with various aspects of the particulars supplied as the result of orders made by the Chief Justice and myself; and haste, or possibly, confusion, has resulted in there not being, in quite a few instances, a strict compliance with the orders made. I, at one time, felt I might not have survived to hear the petition. A merciful Providence, has, however, made that possible. Counsel for the first-named respondent was, by no means wrong when he said there is such a mass of particulars and so many documents that it is very difficult to find one's way through the pleadings before the court.

We come, however, to the main point of the case at this stage, and make inquiry as to the real purpose and object of particulars. It is long settled and established that "such particulars are given as may be necessary to prevent surprise and unnecessary expense, and to ensure a fair and effectual trial." In *Wigan* (1881), 4 O'M. & M. 2, an order was made for particulars, and it was stated in the order that the petitioners were precluded at the trial from going into any case of which particulars had not been delivered. The court allowed evidence of persons not named in the particulars to be adduced in order to prove the intention of treating, as well as of general treating. BOWEN, J., said:

"I think it is within the competency of the court to admit it. The object of these particulars is simply to prevent surprise and unnecessary expense Particulars, therefore, are ordered before trial . . . to be given to the extent to which they can be given. What they are bound to do, is to tell the most they can at the time these particulars are given. But it is said that the order for particulars has been drawn by the court in a form that the petitioners could be *precluded* at the trial from going into any case of which the aforesaid particulars have not been delivered. That is an order that can be modified at any time, and I confess I should not hesitate myself at any moment to disregard that prohibition, and to amend the order by stating that further cases might be gone into, if the justice of the case required it, and if there was no chance or danger of surprise upon the sitting member."

This statement was approved in *East Cork* (1911), 6 O'M. & H. 320.

In the *Staleybridge* case (1869), 1 O'M. & H. 72, it was held that an inquiry is not to be stifled through insufficient particulars, but the

NIEWENKERK v. MELVILLE

respondent must not be taken by surprise. BLACKBURN, J., said all through these cases he had gone upon the principle, namely, that he should not allow any inquiry to be stifled as not being in the particulars; but at the same time he could not allow any respondent to be taken by surprise without having fair warning.

The inclination of my mind, therefore, is to allow the trial to proceed, allowing evidence only with respect to recognizable offences; and, at the end, deciding, as I must, whether there is any evidence before the court to support the allegations made.

I can find nothing in the Ordinance, which requires, or even suggests, that a presiding officer should be a British subject. I could only deal with the law as I find it. Section 7 (1) of the Ordinance reads:—

“The Returning Officer of every Electoral District shall, on the occasion of any contested election, and with the approval of the Commissioner of Elections, appoint a presiding officer and an assistant presiding officer for each polling place in his district.

Subsection 3 says:

“Forthwith upon his appointment each presiding officer and each assistant presiding officer shall take and subscribe an oath in the form set out as Form No. 3 and Form No. 4 respectively in the first schedule and shall transmit such oath to the Returning Officer.”

The forms require the officers so appointed to act faithfully according to law, without partiality, fear, favour or affection, and to keep secret the names of the candidates for whom any of the electors in the polling place marks his ballot paper in his presence at the election.

In PARKER’S ELECTION AGENT AND RETURNING OFFICER, (6th Edition) at p. 34, the qualification of a presiding officer is given thus:—

“Any competent person is eligible as presiding officer, but he must not be a minor, nor must he, his partner or clerk, be any candidate’s agent at the election at which he acts as presiding officer, nor must he be, or have been employed by or on behalf of a candidate in or about the election.”

In 14 HALSBURY’S LAWS (3rd edn.) it is stated that a person who has been employed by, or on behalf of, a candidate in or about the election must not be appointed a presiding officer, nor a minor be so appointed.

That being my opinion, I order the particulars given with respect to presiding officers being foreign nationals, and with respect to the allegation in the petition that the election was not conducted in accordance with the principles laid down in the Representation of the People Ordinance, 1957, be struck out.

Order accordingly.

GREENE v. MATTAI

[In the Full Court, on appeal from the magistrate's court for the Georgetown Judicial District (Persaud, J., and Adams, J., (ag.)) February 9, March 16, 1962.]

Criminal law—Obtaining money by false pretences—Owner of money not stated in charge—Whether charge defective—Summary Jurisdiction (Offences) Ordinance, Cap. 14, s. 99 (b)—Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s. 7.

Section 99 of the Summary Jurisdiction (Offences) Ordinance, Cap. 14. provides that “everyone who, by any false pretence, obtains from another any . . . money . . . with intent to defraud . . . shall,” on conviction thereof be liable to certain penalties. Section 7 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, provides that “the description of any offence, in the words of the statute creating the offence, or any similar words . . . shall be sufficient in law.”

In an appeal from a conviction for an offence under s. 99 of Cap. 14 it was argued for the appellant that the charge was defective because it did not state who was the owner of the property.

Held: the wording of the summons followed that of s. 99 of Cap. 14 (in which there is no reference to ownership) and was therefore in keeping with the form and requisites of a complaint as stipulated in s. 7 of Cap. 15.

Appeal dismissed.

A. W. E. Roberts for the appellant.

W. R. Persram, Senior Legal Adviser, for the respondent.

Judgment of the Court: The appellant was charged with obtaining money by false pretences, contrary to s. 99 (b) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14. The particulars of offence were that the appellant, Charles Greene, between Monday 24th and Tuesday 25th April, 1961, at Georgetown, in the Georgetown Judicial District, with intent to defraud, obtained from Amos Glenn the sum of \$5.85 current money of the Colony of British Guiana, by falsely pretending to the said Amos Glenn that he the said Charles Greene was a clerk employed with Roopnarine Maraj, Barrister-at-Law, and was capable of preparing and filing two summonses against Lennox October for common assault and threatening behaviour committed on the said Amos Glenn.

After the case for the prosecution had been closed, counsel for the appellant relied on certain submissions that he had made and

closed his case without leading a defence. The magistrate found the appellant guilty and fined him \$50 and costs \$10 or in default of payment two months' imprisonment.

On the evidence the appellant was not employed in any capacity by Mr. R. Maraj, Barrister-at-Law, but he made pretences as to existing facts to Amos Glenn when he said that he was a clerk in Mr. Maraj's office and was in a position to make out summonses for Glenn. The pretences were false to his knowledge.

It was also clear on the uncontroverted evidence of Glenn that the sum of \$5.85 was obtained by the false pretences. Glenn said: "when defendant told me he was a clerk employed by lawyer Maraj, I believed him and that is why I gave the money."

There was abundant evidence from which the magistrate could properly infer that the appellant obtained the money with intent to defraud. When Glenn asked the appellant for the return of his money, the appellant denied knowing him. He also told the respondent that he did not know Glenn.

Counsel for the appellant, however, submitted that the summons was defective as it did not state who was the owner of the property in question. Counsel referred to the cases of *R. v. Martin* (1838), 8 Ad. & E. 481, and *R. v. Norton* (1839), 8 C. & P. 196. These early nineteenth century cases appeared at first glance to support this proposition and might have reflected the state of law in England during that period.

The wording of the summons, however, followed that of s. 99 of Cap. 14, under which the appellant was charged, and was therefore in keeping with the form and requisites of a complaint as stipulated in s. 7 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15. According to sub-s. (4) of this section:

"The description of any offence in the words of the statute creating the offence, or in similar words, with a specification so far as practicable of the time and place when and where the offence was committed, shall be sufficient in law."

The description of the offence was similar to form 12 of the Appendix to Rules (Forms of Indictment) to the Criminal Law (Procedure) Ordinance, Cap. 11, LAWS OF BRITISH GUIANA, and also to the statement and particulars of offence to be found at paragraph 1935 of the 34th edition of ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE. Even in an indictment for larceny it is not essential in England to name any person as the owner of the goods. (Vide the decision of HUMPHREYS, J., in *Hibbert v. McKiernan* (1948), 112 J.P. 287, at p. 290). The appellant in the case under review was on a summary charge but it is hardly to be expected that the drafting of a summary complaint is stricter than the framing of the count of an indictment. The appellant's conviction may be pleaded in bar

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to a subsequent prosecution for larceny under the provisions of s. 99 of Chapter 14.

Moreover, the evidence adduced at the trials as accepted by the magistrate, was that the money fraudulently obtained by the appellant was the property of Amos Glenn, so that even if there had been a defect in the summons, it had been cured by the evidence before any objection was taken by counsel for the appellant to its form. If counsel had faith in his submission, he should have advanced it before the plea was taken.

Bearing in mind also a magistrate's power of amendment and the fact that by s. 94 (2) of Cap. 15:

“No objection shall be taken, or allowed in any proceeding in the court, to any complaint, summons, warrant, or other process for any alleged defect therein in substance or in form,”

the court scrutinised the appellant's position in the proceedings and concluded that he was not deceived or misled by the omission of a description of the ownership of the property in the complaint.

For these reasons the appeal was dismissed and the conviction and sentence affirmed with costs fixed in the sum of \$25.00 to the respondent.

Appeal dismissed.

PRESCOD AND ANOTHER v. JAMES

[Federal Supreme Court (Lewis, Marnan and Jackson, JJ.,) March 13, 14, 15, 16, 1962.]

Will—Testamentary capacity—Testator suffering from diabetes—Burden of proof as to testamentary capacity.

Appeal—Whether appeal on costs alone competent—Federal Supreme Court (Appeals) Ordinance, 1958, s. 9(2) (a) (iii).

The appellants appealed from a judgment given by GORDON, J., in favour of the respondent in an action in which the appellants challenged the validity of a will sought to be propounded by the respondent. There was a remarkable disparity between the benefits provided under the will for the respondent and other children of the testator against whom no unfilial conduct was suggested. The testator suffered from diabetes but the evidence showed that his mental powers were not impaired. On appeal it was argued for the appellants that the trial judge failed to appreciate the weight of the burden of proof which lies on the plaintiff in a probate case when the testator is proved to have been suffering from a debilitating disease.

GORDON, J., had ordered all the costs in the action to be paid out of the estate. The respondent cross-appealed against the order, contending that the appellants should have been left to pay their own costs. For the appellants it was argued that a respondent has no right to raise such a question by cross notice in case where the notice of appeal does not challenge the order as to costs.

Held: (i) the most strict proof of testamentary capacity is required when it can be shown by evidence that a testator's mental powers had become impaired prior to or at the time of the execution of a will. The test is not what is the type of disease from which a testator may have suffered or whether it can be described as debilitating, but whether the malady, whatever its nature, had in fact debilitated the testator's mental powers;

(ii) by virtue of s. 9 (2) (a) (iii) of the Federal Supreme Court (Appeals) Ordinance, 1958, there is no right of appeal on a question of costs alone; but the provisions of s. 10 of the Ordinance empower the court to deal with an order for costs made in any case the subject of an appeal which can be otherwise entertained, whether or not either party has raised the question of that order by notice of appeal or cross-notice;

(iii) in making the order for costs the trial judge might competently have taken account of the disparity of benefits under the will, and the exercise of his discretion would not be interfered with.

Appeal and cross-appeal dismissed.

P. A. Cummings, with C. A. F. Hughes, for the appellants.

J. H. S. Elliott, Q.C., Mrs. A. Ali-Khan with him, for the respondent.

MARNAN, J.: This is an appeal from a judgment of GORDON, J., in a probate case. The appellants are two of the children of the testator, who are evidently disappointed by the provisions made for them in the will sought, at trial, to be propounded by the respondent, who is their sister and the sole executrix. Their attack on the will was supported, at trial, by one of their sisters and by their mother, but neither of those parties to the suit have appealed. On the hearing of the appeal much preliminary argument was directed to the question whether the appellants were entitled, or should be permitted, to rely on points pleaded in the action, not by them but by the other parties ranged in the opposition to the will. One of the appellants' practical difficulties in that respect was that the case against the will, as developed in evidence, bore little relation to any of the defences particularly that of the appellants, and counsel for the appellants did not venture to formulate any amendments of his clients' defence, although he referred to the possibility that some such amendment might be necessary. He expressed a desire to adopt the defence of the first defendant, but such an ambition is not, and could not, be an amendment of his own pleading. In the upshot, this court ruled that he might argue his case upon the basis of his notice of appeal and on the evidence, reserving a decision on his tentative, and still unformulated, application for leave to amend his defence.

I refer to those matters briefly and for two reasons. The brevity is due to my opinion that they do not affect the fate of this appeal. The reasons for referring to them are, firstly, to record that counsel for the appellants was not restricted in the scope of his arguments for any technical reason; and, secondly, to emphasize that the latitude allowed to him in this case, for reasons based on the particular facts of this case, must not be taken to afford a precedent affecting the exercise of the judicial discretion of an appellate or any other court when asked to permit a party to argue matters not raised by his pleadings.

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I now turn to the substantive appeal. If this were a case which involved the decision of any legal principle it would doubtless be convenient to set out first the precise facts giving rise to the question of principle, and then to consider the relevant authorities. But counsel for the appellants presented their case in a manner which made it quite clear (as he himself agreed at an early stage, in answer to a question from the Bench) that their true case was that the judge's findings were against the weight of the evidence. His only point of law was that the judge had failed to appreciate the particularly heavy burden of proof placed on the plaintiff in a case where the testator was suffering from a debilitating disease, whatever that may mean. In those circumstances the relevant facts can be positively stated only so far as undisputed, and where disputed must be related, so far as necessary, to counsel's arguments attacking the findings of the learned judge, from whose decision this appeal lies.

The testator, who lived in Mahaicony, was a rich man, with an apparently devoted wife, ten or eleven children, and numerous grandchildren. There was some evidence, and I am prepared to assume, that he made a will leaving all his property to his wife for life, and thereafter to his children in equal shares. Some years before the 30th August, 1958, the date of the disputed will, he revoked that earlier will, and it is conceded that he did so *animo revocandi*. He was a man of strong character, and his relationship with his children varied from time to time, according possibly to their behaviour, or to his disposition. He suffered from diabetes, and was accustomed to injecting himself with insulin, as is the normal practice with diabetics who do not require the constant attendance of their doctor.

In July, 1958, he desired to make a new will, and visited Mr. Wong, a member of the Bar, in Georgetown, seeking legal advice. Mr. Wong referred the testator to a Mr. Fraser who had drawn up the testator's earlier will. Mr. Fraser had been a solicitor's clerk upon that earlier occasion, but was, in 1958, employed in another capacity. Nevertheless, it appears that Fraser was assumed not to have forgotten his legal technique, because the testator gave instructions to Fraser; Fraser drafted the disputed will and took it to Mr. Wong; Wong made certain corrections in the draft, and the will propounded in this case was the outcome of their joint efforts. It was duly executed by the testator.

After the execution of the will the testator went home, and continued to take an active part in his business affairs. There was no evidence that he ever had second thoughts about his will or that he came to think that it did not truly express his intentions. He died of cancer, with diabetes as a contributory cause, in December, 1958. There was no evidence from anyone with whom he had a medical or business relationship that the testator's mental capacity appeared to be impaired at any time. On the contrary, there was an abundance of evidence, which was not impugned on appeal, that upon occasions both before and after the 30th August, 1958, and in that same year, the testator was mentally alert and effectively in control of his personal and business affairs.

Counsel for the appellants submitted that the evidence just referred to was irrelevant to his case—a submission which tends sharply to define what the appellants' case on appeal was. It was that, however mentally normal the testator may usually have been during the latter half of 1958, the trial judge was wrong in finding that he was similarly normal on the occasion when he executed the disputed will. Counsel submitted that the proper inference from the evidence as a whole was that the testator was deprived of testamentary capacity on that particular occasion owing to an attack of hypoglycemia. "This," he said, "is the case of a man, not insane, but suffering from a temporary loss of judgment." When reminded that instructions for the will were given about a month before the date of execution, counsel was constrained to admit that his case involved the proposition that the testator must have been suffering from a similar attack on that occasion also. It is true that Fraser had most unfortunately and improperly destroyed the notes he took of the testator's original instructions, but counsel did not suggest that the will as drawn departed in any material respect from those instructions. Indeed, had it done so, whether by accident or design, and the testator had been in some form of temporary diabetic coma on either occasion, it seems inevitable that a man of his businesslike character would have taken steps to rectify the matter as soon as he recovered.

In support of his submissions that the trial judge erred in his findings, counsel first submitted that the judge had failed to appreciate the weight of the burden of proof which lies on the plaintiff in a probate case when the testator is proved to have been suffering from a debilitating disease. He cited the cases of *Harwood v. Baker*, 3 Moore's P.C. 282, and *Amirchan v. Batan Singh*, [1948] 1 All E.R. 152. If, which I doubt, any principle of law germane to this case can be derived from either of those decisions, it is to my mind only to the effect that the most strict proof of testamentary capacity is required when it can be shown by evidence that a testator's mental powers had become impaired prior to or at the time of the execution of a will. The test is not what was the type of disease from which a testator may have suffered, or whether it can be described as debilitating, but whether the malady, whatever its nature, had in fact debilitated the testator's mental powers. Both of the cases referred to, where the testators were in a state of mental feebleness and at death's door, are clearly distinguishable on the facts, from the present case. I do not think that they are relevant, nor do I think that the present case raises the question of any mistake in law on the part of the learned judge.

The rest of Mr. Cummings's arguments, though presented with much complexity, can be summarised under two headings: direct evidence as to the testator's condition on the 30th August, 1958, and evidence of so-called suspicious circumstances. Mr. Cummings conceded that there was no evidence as to the testator's physical or mental condition on the occasion in July when he gave his instructions for the will, but as to the 30th August he pointed to the evidence of

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the male appellant, of the testator's wife and grand-daughter, and of Mr. Wong, which indicated that the testator was in a bad physical condition on that day. As to the testator's mental condition, however, he could only rely on the evidence of Dr. Williams, who had never seen the testator, to the effect that the circumstances described to him by counsel suggested that the testator might well have been suffering from an attack of hypoglycemia on the occasion in question. Having regard to the direct evidence of Mr. Fraser and Mr. Wong to the effect that the testator was in a clear and normal state of mind when the will was read and explained to him, and he signed it, it is my opinion impossible to say that the trial judge was wrong in coming to a corresponding conclusion.

I have not forgotten that Mr. Cummings submitted that the judge, before coming to that conclusion, should have taken into account the evidence of suspicious circumstances, and I would agree with that submission could I find any cause for genuine suspicion in this case. But I have been unable to do so, nor could I gather from the argument what evil or mischief it is that the judge or this court should have suspected. Mr. Cummings first referred to the previous will making equitable distribution of his property. The admitted fact that that will was destroyed by the testator, *animo revocandi*, a long time before the execution of the disputed will, seems to me to indicate that the testator had made up his mind to make quite different dispositions. Mr. Fraser's destruction of his notes and draft will be highly suspicious if it were suggested that he had deliberately drawn up a will conflicting with the testator's instructions, but that is not suggested; counsel eventually did not persist in his submission that Fraser's indebtedness to the testator was a suspicious circumstance, and he was unable to advance any reason why the testator's semi-illiteracy should be regarded in that light. He argued that the apparent conflict of evidence as to the times and sequence of the testator's visits to Fraser and Wong was suspicious, but at most that seems to me to reflect only on the reliability of memory of one or the other witness. I can see nothing suggestive of malpractice in the fact that the will was executed in a motor car, nor in the suggestion that neither the testator nor Fraser appreciated the value of the residuary bequest. The only matter which, to my mind, can be properly described as suspicious in this case is the disparity of the provisions made for the various children which, *prima facie*, might give cause to suspect that the will was at variance with the testator's natural desires and responsibilities and therefore with his true and lucidly formal intentions. But when one comes to examine the will, with all its detailed provisions and distinctions, and to take into account the evidence as to the testator's attitude towards the various members of his family, it seems plain that he intended to dispose of his property as he did.

I find it quite impossible to hold that the learned judge's findings were against the weight of the evidence in this case. On the contrary, I think that they were entirely justified.

There remains the question of his order as to costs which is raised by the respondent's cross-notice. Mr. Cummings submitted that since, by virtue of s. 9 (2) (a) (iii) of the Federal Supreme Court (Appeals) Ordinance, 1958, there is no right of appeal on a question of costs, a respondent has no right to raise such a question by cross-notice in a case where the notice of appeal does not challenge the order as to costs. It appears that there is no reported decision of this court on the point, and although I am unable to accept Mr. Cummings's submission, I consider it fortunate that he should have afforded the court an opportunity of dealing with it. In my opinion the provisions of s. 10 of the Ordinance empower this court to deal with an order for costs made in any case, the subject of an appeal which can otherwise be entertained, whether or not either party has raised the question of that order by notice of appeal or cross-notice. Section 10, so far as is relevant, reads as follows:—

“10. (1) On the hearing of an appeal from any order of the Supreme Court in any civil cause or matter, the Federal Supreme Court shall have power to—

(a) confirm, vary, amend, or set aside the order or make any such order as the court from whose order the appeal is brought might have made, or to make any order which ought to have been made, and to make such further or other order as the case may require;

* * * *

(2) The powers of the Federal Supreme Court under the foregoing provisions of this section may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the court from whose order the appeal is brought or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the Federal Supreme Court may make any order, on such terms as the court thinks just, to ensure the determination on the merits of the real question in controversy between the parties.”

Those wide powers, in my view, give the court the jurisdiction challenged by Mr. Cummings in this case. The provisions of Order 11, r. 5, of the Federal Supreme Court (Appeals from British Guiana) Rules, 1959, as amended, are entirely consistent with, and indeed support that view.

I need not refer in detail to Mr. Elliott's arguments in support of his contention since those arguments are admirably summarised in the cross-notice itself. He is undoubtedly right in his submission that the appellants' case, as it belatedly developed at trial, was totally different from the case pleaded in their defence. In those circumstances he contends that the appellant-defendants should have been

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left to pay their own costs, whereas the trial judge ordered all the costs in question to be paid out of the estate. Nevertheless, in exercising his discretion as to costs, the trial judge was entitled to take all the facts of the case into account. One such fact may well have been the remarkable disparity between the benefits provided for the plaintiff and other children of the testator against whom no unfilial conduct was suggested. I therefore do not think that this court has sufficient grounds for interfering with the exercise of the judge's discretion as to costs in the circumstances of this case.

I would therefore make no other order than that this appeal be dismissed with costs; no order as to the costs of the cross-appeal.

LEWIS, J.: I agree. I merely wish to add that I confirm the view that I expressed during the course of the argument with respect to the court's jurisdiction to deal with the question of costs and which agrees entirely with the view which MARNAN, J., has just expressed.

JACKSON, J.: I agree with the judgment which has been delivered and which has been acquiesced in by the learned President.

Mr. Cummings submitted that the appellant should have the costs of the cross-notice.

LEWIS, J.: The court orders that the costs of the appeal be paid by the appellants, and that there be no order as to the costs of the cross-notice.

Appeal dismissed.

YOUNG v. YOUNG

[Supreme Court (Persaud, J.) March 13, 14, 17, 1962.]

Infancy—Custody—Parents separated—Father in custody of children with mother's consent—No misconduct proved against father—Father more suitable to have custody and providing better amenities—Whether father's custody should be disturbed—Infancy Ordinance, Cap. 39, ss. 15 and 21.

The parties were husband and wife, but living apart, the mother having the custody of the children and being in receipt of maintenance from the father for them. In this situation the father, at the mother's request, took the children to live with him. On the evidence the father was more suitable to have custody of them and he provided better amenities than the mother. The mother later applied for custody of the children alleging, but failing to prove, that the father had misconducted himself with his housekeeper.

Held: (i) at common law the general rule was that a mother had no right to the custody of an infant while the father was alive, but statute had made inroads on the rule, and under s. 15 of the Infancy Ordinance, Cap. 39, the court would in a proper case give a mother the custody of her infant children notwithstanding that she might have been guilty of a matrimonial misconduct;

(ii) here, however, the father's common law jurisdiction was being exercised with the mother's consent and was not diminished by any misconduct on his part or by any statute. He was the more suitable to have custody and provided better amenities than the mother. In such circumstances his common law right to custody would not be disturbed.

Application dismissed.

C. V. *Wight* for the plaintiff.

A. S. *Manraj* for the defendant.

PERSAUD, J.: The plaintiff and the defendant are wife and husband, and the children mentioned in the application are the lawful children of the marriage, they having been legitimated by the marriage of the parents.

This is an application by the mother under ss. 15 and 21 of the Infancy Ordinance, Cap. 39. Section 15, which is in similar terms to s. 5 of the Guardianship of Infants Act, 1886 (49 & 50, Vict. c. 27), provides as follows:—

“The Court, upon the application of the mother of an infant. may make any order it thinks fit regarding the custody of the infant and the right of access to the infant of either parent, having regard to the welfare of the infant and the conduct of the parents, and to the wishes as well of the mother as of the father, and may alter, vary, or discharge the order on the application of either parent or, after the death of either parent, any guardian under this Ordinance, and in every case may make any order respecting the costs of the mother and the liability of the father therefor, or otherwise as to costs, it thinks just.”

At common law the general rule was that the mother had no right to the custody of an infant while the father was alive, but the Custody of Infants Act, 1873 (36 & 37 Vict. c. 12) recognised a separation agreement by which a father gave up the custody or control of his children to their mother. The Guardianship of Infants Act, 1886 (s. 5) made further inroads into the rule of common law by enabling a mother to apply to a court for the custody of any infant whereupon the court may make an order if it thinks fit having regard to the welfare of the infant and the conduct of the parents, and to the wishes as well of the mother as of the father. There can be no doubt that the court has full jurisdiction to override entirely the common law rights of a father. In *Re A and B (Infants)* (1897), 66 L.J. Ch. (N.S.) 592, it was held that the court has a wide discretion under the section which must be exercised subject to the requirements of the section; and that the court can deprive a father of the custody of his children, although he may not have acted in such a way as would have forfeited his rights under the old law.

In this case the father had filed a petition for divorce on the ground of the mother's adultery. The petition was dismissed on the

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13th January, 1961. Before the petition was heard the children lived with the mother, but on the 25th December, 1960, they went to their father and spent some time with him. On the 14th January, 1961, he returned them to the mother, as he was leaving town on duty. He is employed with the Telecommunications Department, and is now stationed and living at Anna Regina, Essequibo. The children are now living with the father. I accept the father's version as to how the children came to go to Anna Regina. The mother admits that prior to the 23rd September, 1961, she had taken the children to Anna Regina on about four occasions, but she denies asking the father to keep the children. She says that she had been led to believe that the father was willing to have them all back, and for that reason she took the children to Essequibo. She admits, however, that on one of her visits, she told the father that he had the custody of the children, whereupon the father said he did not have accommodation and that she must keep them. This is precisely the husband's case. The mother further admits that she had written the husband telling him to collect the children even though she was still receiving maintenance for them. She gives as her reason for so doing the fact that the place where she was then living was not convenient, as she and the six children occupied one room only, and slept on bags spread on the floor. It was as a result of that letter that the father came to Georgetown in September, 1961. On the 23rd September, 1961, he took the children away with the mother's consent. I find it strange that the mother allowed the children to leave without herself raising the question of her going also to Anna Regina, if in truth and in fact she had previously understood that she also was to go with the children. I also find it hard to accept that the petition, which was grounded on adultery, having been dismissed in January, the husband would have had a complete *volte-face* in September, and would have agreed to have his wife return home.

I am not concerned whether the father has deserted the mother. I am concerned with custody and custody alone, and I am only to give legal effect to the provisions of s. 15 of Chapter 39. I am well aware of the fact in *Re A and B (Infants)* (*supra*) the court also held that it will in a proper case give a mother the custody of her infant children notwithstanding that the mother may have been guilty of a matrimonial misconduct. How much more will the court give custody to an unoffending mother. In this application before me, the father is not resisting the order on the ground of the mother's adultery; he is alleging that over a period of time, including the time when he was away, the mother was cruel to the children and careless of their welfare, whereas now he is in a position to offer them suitable accommodation, to look after their education, and that all in all they are very happy at Anna Regina. If I am to accept the evidence of the two children called, then they do appear to prefer to live with their father.

Learned counsel for the defendant has referred me to *In re J. M. Carroll (an infant)*, [1931] 1 K.B. 317, in support of his submission

that the court ought not to place any weight on the wishes of children too young to have views of their own. In that case, the child was illegitimate and under two years old; in the case before me the children who gave evidence were twelve and ten years respectively. The court in *Carroll's* case was considering the provisions of s. 4 of the Custody of Children Act, 1891 (54, Vict. c. 3) a portion of which provides—

“Nothing in this Act contained shall interfere with or affect the power of the Court to consult the wishes of the child in considering what order ought to be made, or diminish the right which any child now possesses to the exercise of its own free choice.”

In any event, my mind is not swayed one way or the other by the wishes expressed by the two children. Instead, I am bearing in mind the dictum of the Master of the Rolls in *Re Gyngall* (1893), 62 L.J. Q.B. 559, at p. 562—

“But there was another absolutely different and wholly distinguishable jurisdiction which had been exercised from time immemorial by the Court of Chancery It was a paternal jurisdiction. The Court of Chancery was put in a position to act, on behalf of the Queen, as the guardian of all infants, in the place of the parent. That jurisdiction was to be exercised by the Court as if it were the parent of the child and as superseding the natural parentage which existed.”

And again at p. 263—

“I think the Court is, by reason of the prerogative of the Crown, put in the position of being the supreme parent of the child, and has to act in the way a wise, affectionate, and careful parent would act for the welfare of the child The natural parent in a particular case may be affectionate, and intending to do what is best for the welfare of the child, but may not be acting as a wise, affectionate, and careful parent should act; and then the Court would say that, although it would find no misconduct on the part of the parent, yet, under the circumstances, it would not allow that to be done which was not for the welfare of the child. The Court, however, must be very careful to see what the circumstances are under which it will interfere with a parent's rights.”

The application before me is based on the alleged misconduct of the father with his house-keeper. He admits having employed a house-keeper who looks after his house and the children. The allegation is that the husband admitted in the presence of a policeman that he was friendly with his housekeeper. One would have thought that the policeman concerned would have been called to support the allegations; this has not been done. I cannot find from the evidence before me that the allegation has been proved. Allegations of this nature must be proved beyond reasonable doubt.

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In this case the father has exercised his common law right with the consent of the mother. And according to GREER, M.R., in *Re Gyngall (supra)* at p. 562—

“ . . . where the common-law jurisdiction was being exercised, unless the right of the parent was diminished by reason of misconduct on the part of such a parent or by some statute affecting such rights, then it seems to me that the right of the parent to the custody of the child was absolute, and the Court would have given the child over to the parent.”

In the circumstances, having regard to my findings on the facts, I must refuse the order.

I may add, that I have paid particular attention to the general demeanour of the parties, as it was necessary so to do in my view in a matter of this sort. I have formed the opinion that the father is the more suitable to have custody of the children. I have also taken into account the existing amenities which the children enjoy at their father's house, as against the absence of any such amenities at the mother's residence.

According to the provisions of s. 15 of Chapter 39, an order of court may, if the court thinks fit, include an order for access of either parent. I feel that the mother should have access to the children at least once per month during such time as they reside with their father.

The application is dismissed, but each party must bear his own costs.

Application dismissed.

DA SILVA v. BRITISH GUIANA CREDIT CORPORATION

[Supreme Court (Fraser, J.) February 28, March 1, 2, 6, 8, 12, 19, 1962.]

Contract—Offer of appointment made on certain conditions—Offer accepted but conditions varied—Intended appointee however willing to serve on original conditions—Whether counter offer—intended appointee is serving public officer—Whether possible non-release from public service relevant to question whether contract has been concluded.

Corporation—Execution of agreement—Statutory requirement for seal or signature of person specially or generally authorised by resolution to sign—Validity of service agreement not so executed—British Guiana Credit Corporation Ordinance, 1954, ss. 7 and 13.

Corporation—Appointment of general manager—Power of corporation to fix remuneration with prior approval of Governor-in-Council—Appointment made on salary fixed without such approval—Validity of appointment—British Guiana Credit Corporation Ordinance, 1954, s. 6 (1) and (2).

The plaintiff was Deputy Financial Secretary of British Guiana and a member of the board of the defendant corporation. In response to an advertisement he applied for the vacant post of general manager of the corporation. At a meeting of the board called for the purpose of considering all applications received, the plaintiff was chosen for appointment and it was decided that he be notified accordingly. The secretary to the corporation in consequence wrote to the plaintiff saying “. . . . you were selected for the appointment on the terms and conditions as advertised; and I shall be glad to be informed, as early as possible, how soon you would be able to take up the appointment.” The plaintiff replied accepting the appointment but enclosing a draft agreement of service which included certain fresh terms and varied some of the advertised conditions. He however swore that he was prepared to take up the appointment on the terms as advertised. His letter and the enclosure were read out to a meeting of the board which, however, without considering the form of his acceptance, proceeded to appoint another person to the post. The plaintiff thereupon sued for a declaration that he was the general manager, alternatively for damages for breach of contract and related reliefs.

Section 7 (1) of the British Guiana Credit Corporation Ordinance, 1954, provides that “the seal of the corporation . . . may be affixed to instruments pursuant to a resolution of the corporation . . .” Section 13 provides that “any transport . . . agreement or other document requiring to be executed by the corporation . . . shall be deemed to be duly executed if signed by a person or persons specially or generally authorised by resolution of the corporation so to sign.” The letter notifying the plaintiff of his appointment was not under seal and there was nothing to indicate that the secretary who signed it was ever alone specially authorised to sign for the corporation.

Section 6 (1) of the Ordinance provides that “the corporation shall appoint and employ at such remuneration . . . as they think fit a general manager . . . provided that no salary in excess of the rate of \$4,800 *per annum* shall be assigned to any post under this subsection without the prior approval of the Governor-in-Council.” Subsection 2 makes provision for the payment of gratuities. In respect of the previous holder of the post of general manager the salary duly fixed was \$10,560 and the approved gratuity \$7120 *per annum*, making a total of \$11,280 *per annum*. The appointment offered to the plaintiff purported to be at a salary of \$11,280 *per annum* but the court found that the prior approval of the Governor-in-Council had not been obtained for the payment of salary in this amount.

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Held: (i) the plaintiff's reply was not a counter offer;

(ii) whether or not the plaintiff would have been free to take up the appointment was not material to the question whether a concluded agreement came into being;

(iii) in order to bind the corporation the letter notifying the plaintiff of the appointment should bear the common seal in manner provided by s. 7 or should be signed by some person or persons specially or generally authorised by a resolution of the corporation as provided by s. 13. The letter was not executed by the corporation in the manner required by s. 7 or s. 13 of the Ordinance and did not bind the corporation;

(iv) a clear distinction must be drawn between remuneration, salary, gratuity and emoluments. The fact that the new salary equalled the old salary and gratuity was therefore irrelevant. The failure of the corporation to obtain the prior approval of the Governor-in-Council for a salary at the new figure constituted a breach of a condition precedent to the exercise of its power to fix remuneration and appoint. The contract, if it was made, was therefore *ultra vires*;

(v) in any event the declaration claimed was intended to achieve the purpose of a decree of specific performance of a contract for personal services and would not be granted as such a contract is not so enforceable.

Judgment for the defendants.

[**Editorial Note:** Reversed on appeal. See (1963), 5 W.I.R. 475, B.C.C.A., and (1965), 7 W.I.R. 530, P.C.]

L. A. Luckhoo, Q.C., with *C. Lloyd Luckhoo, Q.C.*, *E. V. Luckhoo, John Carter* and *M. S. Rahaman* for the plaintiff.

Dr. F. W. H. Ramsahoye for the defendants.

FRASER, J.: "The law of contract," CHITTY said, "is concerned with those undertakings between man and man which the law will, if necessary, enforce in case either of the parties fails to carry out his bargain in order that the legitimate expectation of the other in the realization of his object may not be defeated." That precise statement of the law accurately describes both the ancient and the modern concept of the right of each individual to be his own legislator; but the growth of society and the development of commerce have created an artificial juristic person in the form of a corporation which, although inanimate, has perpetual succession and is invested with the capacity of acting in several respects as an individual according to the powers conferred upon it by the instrument of its creation. The principles of law upon which the liability of a corporation is to be decided, as far as it is necessary for the decision of this case, are very clear and well settled, although, perhaps, in practice, not always steadily kept in view.

The defendant is a statutory corporation established by the British Guiana Credit Corporation Ordinance, 1954,—No. 13 of 1954. The plaintiff, at the time the writ was filed, was an official member of the defendant corporation. He then held the office of Deputy Financial Secretary in the public service of this country and continued to

hold that office until 21st January, 1962, when he retired after 28 years' service. He now receives a pension and is not employed. He is 51 years old.

The plaintiff seeks a declaration that he is the General Manager of the defendant corporation by virtue of his appointment to that post by the Board of the corporation. Alternatively, the plaintiff claims from the defendant corporation the sum of \$100,000 as damages for breach of a contract to employ him as its General Manager. There is no claim for specific performance because an ordinary contract for personal services is not so enforceable; but it seems that the claim for a declaration in the terms sought by the plaintiff is intended to achieve the purpose of a decree of specific performance and I should say at once that the court will not make a declaratory order in those circumstances.

When the hearing commenced on 28th February, Dr. Ramsahoye submitted that the interrogatories answered by Mr. J. McB. Moore, a former chairman of the defendant corporation, should be removed from the record on two grounds. Firstly, he submitted, the order directing the interrogatories made by BOLLERS, J., was bad for want of form and was therefore a nullity; and, secondly, Mr. Moore had ceased to be a member of the defendant corporation for several months before he actually answered the interrogatories. I do not agree with the submission. Mr. Moore had resigned from the Board on 18th March, 1961. The interrogatories were answered on 26th October, 1961. Assuming without deciding, that the order made by BOLLERS, J., was defective in form, objection could have been taken on summons at any time under the provisions of O. 26, r. 11, of the Rules of the Supreme Court, 1955. With regard to the second limb of the submission the position is that the court has jurisdiction to make the order if the person ordered is an officer of the corporation at the time of the making of the order—see *The Madrid Bank v. Bayley*, (1866) 2 Q.B. 37. Once that order is made it must be complied with unless varied and I have seen no authority that allows the exemption of an officer who retires before compliance. Quite apart from this, however, the solicitor for the defendant corporation, subsequently to Mr. Moore's retirement, made two applications on the ground of illness for an extension of time for Mr. Moore to answer the interrogatories. Both applications were granted. Decision on this submission was reserved and there being no merit I make no order; but it is not without interest to recall that no reference whatsoever was made to the interrogatories by either counsel throughout the trial.

I now turn to the case. The issues are not involved. They fit narrowly into two propositions and I cannot but comment on the length of time devoted to evidence in a situation that fully justified an agreement on the facts except proof of damage. The two propositions are these: (1) whether there was mutuality in the contract; and (2) whether the contract was *ultra vires* the defendant corporation.

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On the question of mutuality it was submitted that the plaintiff's acceptance was not final in that he made a counter offer to the defendant corporation and that in any event there was no intention between the parties to create legal relations by the correspondence exchanged. On this issue the facts are as follows: Pursuant to an advertisement appearing in the Daily Chronicle on 6th August, 1960, the plaintiff obtained from the secretary of the defendant-corporation particulars of the vacancy of the post of General Manager. In the statement of particulars the salary and allowances as well as the conditions and duration of service were set out. By letter dated 24th August, 1960, the plaintiff applied for the post. In all there were 26 applicants for the post. At a properly constituted meeting of the Board held on 22nd September, 1960, the plaintiff who was not in attendance was selected for appointment. It is important to reproduce the record of what occurred. The minutes read:—

“(iii) *Appointment of a General Manager, vice Mr. W. G. Carmichael:* As the secretary was one of the applicants for the position, he withdrew from the meeting while this item was being considered.

All applications which had been received as a result of the advertisement published locally and in the West Indies were then carefully considered, and Mr. Clement H. Da Silva, now Deputy Financial Secretary and Official Member of the Board, was chosen for the appointment. It was decided that Mr. Da Silva be notified and Government be advised of the appointment; all the unsuccessful applicants be notified that the position had been filled.”

On 26th September, 1960, Mr. L. E. Kranenburg, the secretary of the corporation, handed the plaintiff personally a letter in these terms:

“26th September, 1960.

Mr. C. H. Da Silva etc.

Dear Sir,

With reference to your letter of 24th August, 1960, applying for the vacant post of General Manager of this Corporation, I am pleased to inform you that a meeting of the Corporation held on Thursday, 22nd September, 1960, you were selected for the appointment on the terms and conditions as advertised; and I shall be glad to be informed as early as possible, how soon you would be able to take up the appointment.

Yours faithfully,

L. E. Kranenburg

Secretary.”

On 3rd October, 1960, the plaintiff replied in these terms:

“3rd October, 1960

Dear Sir,

Appointment as General Manager

I thank you for your letter of 26th September informing me of my selection for appointment as General Manager. I enclose a draft agreement of service which I shall enter in with the Corporation. I accept the appointment.

I am reporting the position to the Government with a view to release as early as possible. Meanwhile I would ask that no official announcement be made by the Corporation.

Yours sincerely

C. H. Da Silva”

Attached to this letter there was a draft agreement of service which included some terms which had not appeared in the statement of particulars of the vacancy supplied to the plaintiff by the secretary, and others which varied some of the terms in the statement. The plaintiff explained the circumstances of his sending the draft agreement. I believe him; but those circumstances have no relevance to the legal effect of the documents sent by the plaintiff on 3rd October.

Dr. Ramsahoye cited two oases which are precisely on the point and *prima facie* might appear to resolve the issue. In the case of *Jones v. Daniel* (1894), 70 L.T. (N.S.) 588, the letter of acceptance by the vendor’s solicitor stated that the vendor had accepted the offer and that a contract was enclosed for signature by the purchaser. The contract carried terms which were not in the offer made. In an action for specific performance it was held that there was no contract between the parties. Similarly in the case of *Crossley v. Maycock* (1874), L.R. 18 Eq. C. 180, the vendors wrote to the intending purchasers as follows:

“ . . . which offer we accept and now hand you two copies of conditions of sale and therewith enclosed a formal agreement with conditions of a special character.”

It was held that the acceptance was conditional and therefore there was no contract.

In considering this aspect of the matter I wish to say that in my view a contract between parties is substantially a matter of intention and behaviour and while judicial authority prescribes the principles to be applied it is unsafe to adopt and apply a conclusion drawn from a set of facts in one case to those of another case even though apparently similar. In this case there is a feature which I consider relevant and which in my mind creates a difference. The plaintiff’s letter of 3rd October was read at a meeting of the Board on 27th October, 1960. According to Mr. Kranenburg the draft agreement

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was attached to it at the time but it does not appear from the minutes that the terms of the draft were considered. The reason for this was, it seems, that immediately after the plaintiff's letter was read the Chairman read another letter dated 18th October, 1960, from the Financial Secretary to the Chairman of the Corporation. That letter was as follows:

“18th October, 1960.

Sir,

With reference to the Secretary's letter of 26th September and our subsequent conversations on the subject of filling the vacant post of General Manager of the Corporation, I am directed to inform you that the matter was considered by the Governor-in-Council.

2. I am to ask the Board of the Corporation to re-examine the recommendation made as the Government is anxious that the best person available be obtained for the post. If the Board wishes to have the qualifications of any of the candidates residing in the West Indies further investigated, the Chief Secretary would be glad to enlist the aid of the Government of the territory in which the candidate is residing. If the Board is not satisfied that any of the persons who have so far applied is suitable, the vacancy should be re-advertised over a wide field.

3. I should be grateful if you would put the matter to your Board accordingly.

I have etc.

W. A. D'Andrade

Financial Secretary.”

After the two letters were read it was decided to consider the matter at a special meeting to be held on 4th November. It is not clear whether the matter was considered at that meeting but in the minutes of a meeting held on 11th November it is recorded as follows:

“10. *Appointment of a General Manager:*

The matter was considered in terms of the Financial Secretary's letter No. F.S.G. 283/55^{II} dated 18th October 1960, (see paragraph 8 of the minutes of Members' Meeting, 27th October 1960).

The qualifications, training and experience of all the candidates were reviewed exhaustively by the Board who unanimously agreed that Mr. G. E. Luck, Permanent Secretary, Ministry of Natural Resources, British Guiana, was suitable for the post and should be appointed.

It was decided, however, not to offer Mr. Luck the appointment until the Governor in Council had been informed of the decision and had approved the selection.”

It seems clear that the plaintiff's letter of 3rd October had made no impact on the Board either as an acceptance of an offer or as a conditional acceptance. By 27th October, except for the Chairman and a single member, a new crew had manned the decks of the Board, a sight was taken on a new tangent and the ship had altered its course. The plaintiff's appointment was not a matter of moment at the meeting of 27th October and I am satisfied that the form of his acceptance was not considered by the Board then or at any time afterwards. The plaintiff said that the revised terms included in the draft were not intended as a counter-offer. He conceded however that he wished that the hopes he expressed in that form might be fulfilled. He said he was quite prepared to take the appointment on the terms set out in the statement of particulars. Mr. Da Silva had hoped to retire. He expected a gratuity of \$15,625 and an annual pension of \$3,750. In addition, his own house was let for \$325 and by virtue of his appointment as General Manager he was likely to obtain the facility of a free partly-furnished house of a rental value of \$225. Above all this he was to receive an annual salary \$11,280 as General Manager. In these circumstances can it be said that he was making a counteroffer? I think not. I believe his evidence on this point. The whole web of the defence on this aspect arose *ex post facto* and had no factual bearing on the behaviour and intentions of the Board on 27th October or subsequently.

Dr. Ramsahoye also urged that the plaintiff was in no position to accept the post of General Manager because he did not intend to resign and his secondment or retirement depended upon a number of factors over which he had no control. I do not think there is much weight in this submission. If there was a contract which the plaintiff could not perform he may have been liable for a breach but the probability or the inevitability of a breach of contract has no causal influence on an intention to create legal relations; if it did, it will be impossible to establish a breach of contract unless it can be shown that the party in breach was able to perform at the time the contract was made. The whole fabric of the law of contract would become weakened and a wide door would be left open for dishonourable dealing. In the absence of a stipulation as to time of performance a reasonable time must be presumed and the circumstances of each case must determine what is a reasonable time.

In paragraph 19 (b) of the defence it is pleaded that the secretary was not legally entitled to write the letter of 26th September, 1960. I construe this to mean that if the letter of 26th September is considered to be the defendant corporation's offer then the secretary had no authority to sign it or alternatively that the purported offer of the defendant corporation was not made in accordance with the Ordinance. If this is so, the defendant corporation would be entitled to contend that there was an absence of mutuality. A veiled suggestion of this was made in the cross-examination of Mr. L. E. Kranenburg and copies of two letters were tendered to show the manner in which documents are executed by the corporation on a special author-

ity. Dr. Ramsahoye did not address on this aspect of the defence but it must nonetheless be considered.

At common law a corporation could only bind itself by contract under the common seal except in some slight matters of service, *e.g.*, the employment of a cook or gardener. It is, however, not necessary to use the common seal if the incorporating statute specifically provides for an alternative method of signifying assent. As I understand the position the common seal can always be used on the proper authority being given but the absence of the seal will not affect the element of mutuality if the contract is executed strictly in accordance with the formalities prescribed in the Ordinance—see *R. v. The Justices of Cumberland*, (1847) 17 Q.B. 102, In the case of *Ernest v. Nicholls*, (1857) 6 H.L.C. 401, Lord WENSLEY-DALE said at p. 419:

“All persons, therefore, must take notice of the deed and the provisions of the Act. If they do not choose to acquaint themselves with the powers of the directors, it is their own fault, and if they give credit to any unauthorised persons they must be contented to look to them only, and not to the company at large. The stipulations of the deed, which restrict and regulate their authority, are obligatory on those who deal with the company; and the directors can make no contract so as to bind the whole body of shareholders for whose protection the rules are made, unless they are strictly complied with.”

In the case of *Fontaine v. Carmarthan Railway Co.*, (1868) 5 L.R. 316 Sir W. PAGE WOOD, V.C., said at pp. 321—332:

“ . . . where there is merely a power vested in directors to act for the company in certain special emergencies, the Court is obliged to consider all acts of directors by which it is sought to bind the company as being the acts of agents . . . and in the case of companies where directors are the special agents of the company, and do not possess the power of affixing the corporate seal except under certain prescribed rules, a person who deals with the directors is taken to have notice of the rules . . . and if there be anything to be done which can only be done by the directors under certain limited powers, the person who deals with the directors must see that those limited powers are not being exceeded.”

In CHITTY ON CONTRACTS (21st Edition) p. 35 it is stated:

“The last requisite to the agreement of the parties is that the assent should be mutual. This may mean one of at least two things; either (a) that the parties must be agreed on the same thing in the same sense; or (b) that there must be, in a simple contract at least, obligations on both sides and not on one side only. There must be reciprocity of obligation.”

And at p. 36:

“*Lack of Mutuality*: Whenever it appears that, if the contract were not binding on both parties at the time it was made, this

want of mutuality would leave one party without a valid and available consideration for his promise, then the contract will be void.”

It has long been settled that in order to bind a corporation the agreement must be under seal or executed in the prescribed manner.

Section 7 of the British Guiana Credit Corporation Ordinance reads as follows:

“7. (1) The seal of the Corporation shall be kept in the custody of the Chairman or the Deputy Chairman or the Secretary of the Corporation and may be affixed to instruments pursuant to a resolution of the Corporation in the presence of the Chairman or Deputy Chairman and the Secretary.

(2) The seal of the Corporation shall be authenticated by the signature of the Chairman, or Deputy Chairman and the Secretary.

(3) All documents, other than those required by law to be under seal made by, and all decisions of, the Corporation may be signified under the hand of the Chairman or Deputy Chairman or General Manager and the Secretary.”

Section 13 of the Ordinance as repealed and re-enacted by s. 2 of the British Guiana Credit Corporation (Amendment) Ordinance, 1955—No. 13 of 1955—provides as follows for the execution of documents:

“13. Any transport, mortgage, lease, assignment, transfer, agreement, or other document requiring to be executed by the Corporation, or any cheque, bill of exchange or order for the payment of money requiring to be executed by the Corporation shall be deemed to be duly executed if signed by a person or persons specially or generally authorised by resolution of the Corporation so to sign.”

Having considered those two sections the position seems to me to be this: In order to bind the defendant corporation the letter of 26th September should bear the common seal in manner provided by s. 7 or should be signed by some person or persons specially or generally authorised by a resolution of the corporation. There is nothing to indicate that Mr. L. E. Kranenburg as secretary was ever alone specially authorised to sign for the corporation. On the contrary, the copies of the two letters tendered by the defendant corporation show that the secretary and the chief accountant were given special authority. In the case of *A. R. Wright and Son Ltd. v. Romford Corporation*, [1956] 3 All E.R. 785, there was an agreement in writing but not under seal, signed by the borough engineer on behalf of the corporation and being made in accordance with the corporation's standing orders; it was contended that it was valid by virtue of s. 266 (2) of the Local Government Act, 1933, which required a contract to be so made, and because the corporation could appoint and

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had validly appointed the borough surveyor to execute the written contract on their behalf under s. 74 (2) of the Law of Property Act, 1925. In giving judgment Lord GODDARD said at p. 788:

“. . . but section 74 (2) of the Act of 1925 cannot, in my opinion, in any way validate an agreement which is not under seal and does not fall within the recognised exceptions, unless, indeed, it be made under some authority conferred by statute on the particular corporation. Although it may be distasteful to give effect to a technical defence of this description, it is a valid defence in law, and it accordingly follows that the action cannot be maintained.”

This principle was also considered in the case of *Cope v. The Thames Haven Dock and Railway Co.* (1849), 3 Ex. R. 841. The headnote reads as follows:

“A Railway Company was incorporated by an Act of Parliament, one section of which enacted, that the directors should have power to use the common seal on behalf of the Company, and that all contracts relating to the affairs of the Company, signed by three directors, in pursuance of a resolution of a court of directors, should be binding on the Company. The following section enacted, that the directors should have full power to employ all such managers, officers, agents, clerks, workmen, and servants as they should think proper.

By resolution of the board of directors, signed by their chairman, the plaintiff was appointed agent to negotiate with another railway for the lease of the line:—

Held, that the contract was not binding on the Company, it not having been sealed, or executed with the required formalities.”

For the reasons given I must find that there was a lack of mutuality between the parties on the sole ground that no enforceable offer or acceptance was made by the defendant corporation for the reason that the document dated 26th September, 1960, was not executed by the corporation in the manner required by s. 7 or s. 13 of the Ordinance.

I now turn to the second proposition and that is whether the contract was *ultra vires* the defendant corporation. I propose to deal with this matter on the assumption that my finding on the first proposition is wrong and that therefore the contract is in other respects validly enforceable. This proposition is pleaded in paragraph 19 (d) of the statement of defence.

Subsections 1 and 2 of s. 6 of the Ordinance read as follows:

“6. *Appointment of General Manager, Secretary, officers, and servants.*
(1) The Corporation shall appoint and employ at such remuneration and on such terms and conditions as they think fit a General Manager, a Secretary and such other officers

and such servants as they deem necessary for the proper carrying out of the provisions of this Ordinance:

Provided that no salary in excess of the rate of four thousand eight hundred dollars per annum shall be assigned to any post under this subsection without the prior approval of the Governor in Council.

(2) No provision shall be made for the payment of any pensions, gratuities or other like benefits to the General Manager, the Secretary, other officers, servants or to other persons by reference to their service without the prior approval of the Governor in Council.”

On behalf of the plaintiff it is contended that the defendant corporation has the power to appoint and that the stipulation regarding assignment of the salary does not affect the power to appoint. In the light of the authorities that contention is untenable. The appointing process necessarily involves the assignment of a salary. Subsection (1) does not permit an appointment to be made without remuneration and it has long been established that the powers of a corporation are only such as are conferred by the statute. It cannot therefore be contended that a corporation can do anything which is not specifically prohibited by the statute. It is true that by virtue of s. 6 the defendant corporation has unfettered power to contract for matters like a free furnished house, for travelling allowances and for leave; but how effectively can the corporation exercise that power if the power to fix the salary is fettered by a condition precedent? The power cannot be exercised unless the condition precedent is fulfilled. In the case of *Attorney General v. Lord Mayor of City of Sheffield* (1912), 106 L.T. 367, EVE, J., said at p. 370:

“One must look at the transaction as a whole, and the fact, if indeed it be a fact—that the defendants have power to do a part of the act will not legalise the act if its completion involves at any stage a step *ultra vires* of the corporation.”

I wish to adopt what was said in *Hattersley v. The Earl of Shelburne* (1862), 31 L.J.R. 873. Vice-Chancellor KINDERSLEY said at p. 878:

“But it is clear, that all the matters that are specifically agreed to be done by this agreement are all component parts of one design, and for the purpose of accomplishing one single end. They are different wheels and levers and springs of one complete machine, by which the object of that machine is to be worked; and if it were not for accomplishing that one object none of these details would have been agreed upon or made the subject of any stipulations.”

Before dealing with the facts in the case before me there are two other cases to which I wish to refer. The first is the case of *Davis v. Corporation of Leicester*, [1893] 2 Ch. D. 208. The facts as set out in the headnote were these:

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“In March, 1888, a municipal corporation offered for sale by auction, in lots, some of their corporate land, subject to special conditions restricting the right of each purchaser to build on his lot. At the auction none of the lots were sold. In June, 1888, the Plaintiff entered into a contract to purchase two of the lots, subject to the conditions. The proper steps were taken to obtain the approval of the Treasury, which is required by sects. 108, 109, of the Municipal Corporations Act, 1882, to enable a municipal corporation to sell their corporate land; and that approval was given in the ordinary way by two Lords of the Treasury joining in the conveyance to the Plaintiff. The conveyance contained a covenant by the Plaintiff in the terms of the restrictive conditions, but there was no reference to those conditions, or to the previous abortive sale. There was no covenant by the corporation binding them by the conditions as regarded the unsold lots, and the Treasury were not, before they gave their approval, informed that the corporation would be liable to any such restriction. The corporation afterwards contracted with the trustees of a church to sell to them two others of the lots, and authorised them to build on those lots in a manner inconsistent with the conditions:—

Held, by NORTH, J., and by the Court of Appeal, that, if the corporation had been ordinary individuals, they would have been bound by the original building scheme, and that they, and the trustees, who had purchased with notice of the scheme, must have been restrained from building or permitting building on the lots purchased by the trustees, in a manner inconsistent with the conditions:

But held, that the Treasury had only given their approval to what was to be found in the conveyance, and that they had not sanctioned the disposition by the corporation in favour of the Plaintiff of any right over other land than that which was conveyed to him, and consequently that neither the corporation nor the trustees could be restrained from violating the conditions.”

In delivering judgment KAY, L.J., said at p. 235:

“Therefore the case is reduced to this, that the Plaintiff is now seeking to bind the corporation and the other Defendants who have purchased other lands from the corporation by an implied agreement from the building scheme, which he says was a term and condition of the disposition of the land to him which he bought, which alleged implied agreement and which terms and conditions have never been submitted to the Treasury, and, of course, have not been approved by them. The answer is that such a thing would be *ultra vires* of the corporation, because, as I read sect. 109, such terms and conditions attached to the sale of the particular lands which the Plaintiff bought could not be made valid and binding upon the corporation without the approval of the Treasury.”

The other case is *Pacific Coast Coal Mines, Lim. v. Arbuthnot* (1917), 86 L.J.P.C. 172. In that case a company incorporated under the Companies Acts of British Columbia entered into an agreement which was admitted to be *ultra vires*, and obtained a private Act of the provincial Legislature to validate it. The Act "validated, ratified, and confirmed" the agreement, "subject to the same being adopted by a resolution passed by 75 per cent, of the shareholders of the Company present personally or by proxy, at any meeting of the shareholders of the said Company called for that purpose, and for the purpose of authorising the issue of the said debentures, after the 14th day of February 1911," which was the date of the petition for the passing of the private Act. The Privy Council held that the condition imposed by the statute was not one of internal management only, the non-observance of which could be cured by the acquiescence of the shareholders, but was a condition of the agreement becoming *intra vires*; and unless it was literally and in reality fulfilled the agreement remained *ultra vires* of the company, and incapable of being carried out. In delivering the judgment of the court Viscount HALDANE said at p. 176:—

"But the case stands quite otherwise when the act is one which has not, by the constitution of the corporation, been put within its power excepting on the fulfilment of a condition. In that event the persons dealing with the corporation are bound to ascertain whether the condition has been fulfilled. The question which alternatively applies is, of course, one of construction of the statute authorising the act. Their Lordships are compelled to dissent from the view taken by the Judges of the Court of Appeal on this point, and to hold, with Mr. Justice CLEMENT, who tried the action, that unless the condition prescribed by the words cited from the private Act was literally and in reality fulfilled the agreement remained, what it undoubtedly was apart from the Act, *ultra vires* of the appellant company."

I might perhaps also mention an Irish case the report of which I have not seen but it is referred to in *THE DOCTRINE OF ULTRA VIRES* by STREET. It is the case of *Holmes v. Trench*, (1898) 1 Ir. 319, in which an Asylum Board entered into a contract for the purchase of land without first obtaining an Order in Council. It was held that the whole transaction was a nullity and not capable of ratification.

The proviso to sub-s. 1 of s. 6 of the Ordinance states:

"Provided that no salary in excess of the rate of \$4,800 per annum shall be assigned to any person under this subsection without the prior approval of the Governor in Council."

I construe this provision as a condition precedent to the exercise of the power conferred by sub-s. (1) to fix remuneration and appoint. It is not permissive, it is imperative. It prohibits the assignment of a salary until approval is given by the Governor in Council and it indicates, in my judgment, that the Governor in Council was to have the means of satisfying himself as to the conduct of the Board, and, if he thought proper, of contesting the intended provision of salary.

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There is no doubt whatever that the Governor in Council never approved of the salary of \$11,280 which the defendant corporation assigned to the post of General Manager in the advertisement of 6th August, 1960, and in the statement of particulars. Mr. Luckhoo submitted that the salary of \$11,280 was an amalgamation of the approved salary of \$10,560 per annum and the approved gratuity of \$180 per completed quarter of resident service. Alternatively, he submitted that the court should presume that approval was given because the documents of the defendant corporation refer to the salary of the post as \$11,280 per annum. These submissions bear little relation to the meat of the plaintiff's case and it seemed to me that up to the time when his examination-in-chief was finished the plaintiff genuinely believed that specific approval had been given by the Governor in Council for a salary of \$11,280 (quite apart from gratuity) during Mr. Carmichael's tour of office. In examination-in-chief on the morning of 1st March the plaintiff said in reply to Mr. Luckhoo:

"I know as a member of the Board that the salary of the post of General Manager was \$11,280 *per annum* (fixed). On several occasions I saw the Executive Council decision and a letter sent by the Financial Secretariat to the General Manager informing him of the salary of \$11,280 for the post. I saw the letter for the original salary and I saw letters whenever the Governor in Council had varied the salary."

Early in his cross-examination on the following day 2nd March, the plaintiff said:

"I am aware of the emoluments of Mr. Carmichael. He received a salary of \$880 plus a gratuity of \$60 per month. This was \$940 per month or \$11,280 per year. His gratuity was settled by the Governor in Council when he was first employed. I do not know that Mr. Carmichael's original salary was fixed by the Governor in Council at \$800 per month. I know that the Governor in Council approved a salary of \$880 for the General Manager of the British Guiana Credit Corporation. This is a certificate from the Treasury dated 22nd May, 1957 showing the salary of the General Manager as £2,200 (\$10,560).

I am aware of the provision of section 6 of Ordinance 13 of 1954. I know that at the commencement of Carmichael's appointment he was granted a gratuity of £37.10s. (\$189) per quarter by the Governor in Council.

From 22nd May, 1957 to the 6th August, 1960 I know that the Governor in Council did not reconsider the salary of the post of General Manager. So far as I know there was no reconsideration up to the date of the writ on 13th December, 1960.

Towards the end of his cross-examination the plaintiff said:

"I was aware that gratuity and salary are treated differently in the Ordinance, No. 13 of 1954. I say section 6 (1) deals with

salary and 6 (2) deals with pensions and gratuities. The position was that separate approval had to be given for salary and for pension and gratuity. When the advertisement was prepared the salary and the gratuity were merged.”

In re-examination the plaintiff said:

“The salary \$11,280 was approved by the Governor in Council in two parts. The first part \$10,560 by letter Exhibit “O” dated 22nd May, 1957 and \$720 approved by the Governor in Council originally in 1954 as gratuity. It was the gratuity and salary which were combined.”

In answer to the court the plaintiff later said that he did not know if the Governor in Council had given approval for the amalgamation of the salary of £2,200 per annum: (\$10,560) and the gratuity of £37. 10s. per quarter (\$180). His evidence as to the absence of approval by the Governor in Council is supported by Jaisar Girdhan, the acting chief accountant of the defendant corporation. He said that no communication had been received by the defendant corporation from the Governor in Council on the question of salary since 22nd May, 1957. Mr. Kranenburg said that the defendant corporation did not consider the provision of s. 6 (1) in relation to the appointment of the plaintiff.

It is easy to understand what happened. The plaintiff mistakenly believed the salary of the post was \$11,280 and had been approved by the Governor in Council. At that meeting of 29th July, 1960, no one remembered the necessity to fulfill the condition precedent prescribed by the Ordinance. It was urged that the approval of a gratuity of £37. 10s. per completed quarter of service and the approval of a salary of £2,200 *per annum* as stated in the letter of 22nd May, 1957, should be treated as an approval to pay a salary of \$11,280 or at least emoluments of \$11,280. To accept this proposition is to do violence to the plain words of the Ordinance in which a salary is dealt with in a proviso to sub-s. (1) and a gratuity is dealt with in sub-s. (2). Moreover, both the plaintiff and Mr. Kranenburg agreed that even if the salary of \$11,280 had been approved the Governor in Council was at liberty to approve a gratuity in addition. I need only refer to what BRETT, L.J., said in *R. v. Postmaster General*, [1878] 3 Q.B.D. 428, at p. 431:

“That annual emolument is the value of his appointment . . . if he receives a salary and something additional by way of remuneration, the value of the appointment must be the salary and anything which he gains by the remuneration.”

A clear distinction must be drawn between remuneration, salary, gratuity, and emoluments. The emoluments are the gross value of the appointment and comprise salary, gratuity and remuneration. Salary is the reward monthly or annually for the service to be rendered, and includes reward during periods of leave. Gratuity is

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an acknowledgement of service and is the pensionable element of a salary which in this case can only accrue on completed quarterly periods of service. Remuneration includes free furnished quarters, travelling allowances and other benefits of a money value.

Mr. Luckhoo urged that the defendant corporation did not plead the failure to perform the condition precedent and therefore by virtue of r. 14 of O. 17 of the Rules of the Supreme Court, the performance of that condition must be implied. This proposition is without merit. There is a world of difference between a condition precedent to the existence of a cause of action and a condition precedent to the exercise of a right of action. The former is a matter of substantive law and the latter a matter of adjective law. The one a matter of substance in the formation of a personal right the other a matter of procedure in the vindication of the right in a court. This view is supported by the ANNUAL PRACTICE in a note on r. 14 of O. 19 which is the same in wording as r. 14 of O. 17. It is there stated:

“But an allegation which is of the essence of the cause of action is not a condition precedent within the meaning of this Rule, and must still be pleaded in the statement of claim.”

I must find that the contract, if it was made, is *ultra vires* the defendant corporation and is therefore void and wholly unenforceable for the reason that the prior approval of the Governor in Council was not obtained for the assignment of the salary of \$11,280 *per annum* to the post of General Manager as prescribed in the proviso to s. 6 (1) of the Ordinance. The condition precedent was not fulfilled.

On the question of costs I should have felt constrained to deprive the defendant corporation of its costs if the plaintiff was a person unconnected with the corporation. The facts disclose a miserable lack of courtesy on the part of the defendant corporation. They disclose a disregard for administrative propriety. No replies had been sent to the plaintiff's letter nor to the letter by the plaintiff's solicitor. Indeed, the last communication received by the plaintiff was the letter informing him of his selection for the post of General Manager. These circumstances are, however, not meet to be considered in awarding costs unless they can be said to have contributed to the plaintiff's position. The plaintiff was a member of the defendant corporation throughout the material period and was in part responsible for its omissions. It was his duty to ascertain whether the condition had been fulfilled—see *Pacific Coast Coal Mines v. Arbuthnot*, *supra*. To say that the plaintiff was entitled to assume that things were properly done is to misjudge the position. WRIGHT, J., said in *Liggett v. Barclay Bank*, [1928] 1 K.B. 48, at p. 56:

“Whatever may be the exact scope of the rule in *Turquand's* case I think it is quite clear on principle and on the authorities I have already referred to that it can never be relied upon by a person who is put on enquiry.”

Having regard however to the issues raised and to the presentation of those issues before the court I consider that justice would be served by disallowing a portion of the defendant's costs.

The action is therefore dismissed. The plaintiff is ordered to bear his own costs and to pay one half of the taxed costs of the defendant corporation certified fit for counsel.

Judgment for the defendants.

Solicitors: *Evelyn A. Luckhoo* (for the plaintiff); *Sase Naraine* (for the defendant).

FRASER v. TOWN CLERK OF NEW AMSTERDAM

[Supreme Court (Persaud, J.) October 3, 1961, January 15, 1962.]

Statutory undertakers—New Amsterdam Town Council—Statutory duty to supply electricity—Statutory authority to cut off supply for arrears—New Amsterdam Electric Lighting Order, 1900—Electric Lighting Ordinance, Cap. 237, ss. 20 and 45.

Justices protection—New Amsterdam Town Council—Statutory duty to supply electricity—Action for breach of duty—No notice of intended action—Whether notice necessary—Justices Protection Ordinance, Cap. 18, ss. 8, 9 and 14.

Section 21 of the New Amsterdam Electric Lighting Order, 1900, requires the Mayor and Town Council of New Amsterdam to supply electricity to the owner or occupier of premises in certain areas. Section 20 of the Electric Lighting Ordinance, Cap. 237, authorises the Town Council to cut off the supply of electricity where the consumer is in arrears of payment. The plaintiff's electricity supply having been cut off in exercise of this power, he sued for damages for breach of contract to supply electricity or alternatively for damages for breach of the Council's statutory duty to supply electricity. No notice of intended action had been served but it was argued for the plaintiff that the defendant, having entered appearance and having pleaded to the writ, was estopped from raising the point.

Held: (i) notice was necessary since the defendant was sued in his official capacity for an act done in execution of his office and was caught by the provisions of s. 14 of the Justices Protection Ordinance, Cap. 18;

(ii) s. 21 of the Order took the matter out of the pale of the general law of contract;

(iii) *quaere* whether the Town Clerk was the proper defendant.

Judgment for the defendant.

[**Editorial Note:** with respect to the third point see s. 5 (2) of the New Amsterdam Town Council Ordinance, Cap. 161.]

D. Dyal for the plaintiff.

H. D. Hoyte for the defendant.

PERSAUD, J.: The plaintiff claims from the defendant the sum of \$500.00 as damages for breach of a contract to supply electricity, or alternatively the sum of \$500.00 as damages for a breach of a statutory duty to supply electricity. He further seeks an order restraining the defendant from continuing and/or repeating the said breach of contract or breach of statutory duty as the case may be, and costs.

The Mayor and Town Council of New Amsterdam, who are the employers of the defendant, are the local authority authorised by the Electric Lighting Ordinance, 1890, as amended from time to time to supply the town of New Amsterdam and its environs with electricity. This authority was granted by the New Amsterdam Electric

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Lighting Order, 1900 (hereinafter referred to as the Order). The existing enabling section is now s. 45 of the Electric Lighting Ordinance, Cap. 237. The Order has been extended from time to time, the last effort being by the New Amsterdam Electric Lighting Order (Extension) Ordinance, 1961 (No. 4). So that when the writ in this matter was filed, the Order was operative, and still is.

It is admitted that the Mayor and Town Council supplied the plaintiff with electricity from 1956; it is also admitted that at the instance of the Council that supply was discontinued, and it is claimed that in so doing the Council was exercising its statutory right.

Several preliminary points were taken by counsel for the defendants, and I will now rule on those points.

Counsel submits that a notice under s. 8 of the Justices Protection Ordinance, Cap. 18, ought to have been served, and that no notice having been served, the plaintiff is precluded from bringing this action. Counsel for the plaintiff answers this submission by arguing that the defendants having entered appearance and having pleaded to the writ, they are now estopped from raising this point. Counsel accepts that no notice has been served. Section 9 of Cap. 18 renders the plaintiff's contention untenable. That section clearly contemplates pleadings by way of defence, and this is in my view in addition to the provision of s. 8. I hold that the submission can be raised notwithstanding that pleadings have been filed. I further hold that the defendant having been sued in his official capacity for an act done in the execution of his office, he is caught by the provisions of s. 14 of the Ordinance. I pause here to wonder whether the Town Clerk is the proper defendant to an action such as this, as not he but the Mayor and Town Council of New Amsterdam are the Undertakers under the Order. Be that as it may, the point would have been just as sound had that body been made the defendants.

I would therefore decide this first point in favour of the defendant and dismiss the action on that ground alone.

The plaintiff bases his claim on a breach of contract or alternatively on a breach of statutory duty. I am clearly of the view that there is no breach of contract disclosed in the pleadings. By s. 21 of the Order, the Undertakers are bound to supply electricity to the owner or occupier of premises situate within 50 yards from any distributing main in which they are for the time being required to maintain, or are maintaining a supply of energy for the purposes of general supply to private consumers under the Order. This section takes the matter out of the pale of the general law of contract, but places an obligation on the Undertakers to supply electricity. Correspondingly, certain rights—arbitrary though they may seem—must be given to the Undertakers so as to ensure the smooth operation of the Undertaking. Section 20 of the Electric Lighting Ordinance, Cap. 237, authorises the cutting off of supply of electricity

where there has been a neglect to pay any charge for electricity. The defendant swears that at the time of the disconnection the plaintiff was in arrears of payment to the extent of \$15.70.

I do not propose to deal here with the other points raised, except to indicate that in my view, the defendant would be entitled to succeed on all of them. However, I prefer to rest my judgment on the first point taken.

I am not by this judgment indicating that the plaintiff may not have a remedy in these circumstances, but not by means of proceedings such as these.

There will be judgment for the defendants. The plaintiff must pay the costs of this action to be taxed, fit for counsel.

Judgment for the defendants.

Solicitor: *M. E. Clarke* (for the defendant.)

D'AGUIAR v. D'ANDRADE

[Federal Supreme Court (Lewis, Marnan and Jackson, JJ.) March 20, 1962]

Mandamus—Currency Board—Six members—Not less than three members could act—Mandamus sought against one member to enforce duty of Board—Whether mandamus lies against that member—Currency Ordinance, 1959.

Mandamus—Currency Board—Headquarters in Trinidad—Branch in British Guiana—Demand made at branch—Whether demand properly made of the Board—Currency Ordinance, 1959.

The Currency Ordinance, 1958, gave statutory force to an agreement setting up a Currency Board for the Eastern Group of the British Caribbean Territories. The Board consisted of six members, and its relevant duties were to be discharged by not less than three of them. Only one member, the respondent, resided in British Guiana. The headquarters of the Board were in Trinidad but a branch office was established in Georgetown. The appellant presented to the officer at the branch office \$50,000 in B.W.I. currency notes and demanded that the Board should, in accordance with its statutory duties, pay over to him in London the equivalent in sterling. After consulting the respondent, the officer refused to effect the conversion on the ground that the appellant should first produce a permit thought to be required by the exchange control laws. The appellant, who denied that any permit was necessary, applied for a mandamus to compel the respondent to effect the conversion on behalf of the Board. LUCKHOO, C.J., granted an order *nisi*, but later discharged it on the ground that the duty to convert rested on the Board as a whole and not upon any particular member, and on the further ground that in law no sufficient demand had been made of the Board. (See p. 64 herein, and (1962), (4 W.I.R. 141). On appeal—

Held: (i) the demand at the branch office was a sufficient demand of the Board;

(ii) but the respondent acting alone had no power to effect the conversion and the writ of mandamus did not lie to him.

Appeal dismissed.

J. H. S. Elliott, Q.C., for the appellant.

Dr. F. H. W. Ramsahoye, Attorney-General, with *M. Shahabuddeen*, Crown Counsel, for the respondent.

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JACKSON, J.: On 16th January, 1962, the Chief Justice upon an application by Peter Stanislaus D'Aguiar, a company director, ordered the Commissioner of Currency for British Guiana, William Peter D'Andrade, to show cause on a named date why a writ of mandamus should not issue commanding him in his capacity as Commissioner of Currency to accept on behalf of the Board of Commissioners of Currency, British Caribbean Territories (Eastern Group), the sum of \$50,000 in British "West Indian currency notes and thereafter to cause the equivalent value of the said sum in sterling to be paid through the Crown Agents to him, D'Aguiar, in London.

An Ordinance to amend and consolidate the law relating to currency and to implement an agreement to provide a uniform currency in the Eastern Group of the British Caribbean territories, was in 1959 enacted by the Legislature of British Guiana and is cited as the Currency Ordinance, 1959. The agreement hereinbefore mentioned provided for the appointment of a Board of Commissioners of Currency, the Board to consist of five Commissioners, one on behalf of each of the five Governments named and in addition an Executive Commissioner who would also be a member of the Board. Subject to the provisions of the Ordinance the sole right, power and authority to provide, issue and re-issue currency notes in British Guiana was to reside in the Board.

Section 7 of the Ordinance is as follows—

- 7 (1) The Board shall issue on demand to any person desiring to receive currency notes in British Guiana, currency notes to the equivalent value (at the rate of one dollar for four shillings and two pence) of sums in sterling lodged with the Crown Agents in London by the said person, and shall pay on demand through the Crown Agents to any person desiring to receive sterling in London the equivalent value calculated as aforesaid of currency notes lodged with the Board in British Guiana by the said person:

Provided that—

- (a) no person shall be entitled to lodge with the Crown Agents or the Board as the case may be less than such minimum sum as may from time to time be prescribed for the purpose of obtaining currency notes or sterling as the case may be; and
 - (b) the Board shall be entitled to charge and levy from any person obtaining currency notes or sterling commission at such rate or rates as the Board may think fit not exceeding three-quarters *per centum* and in addition the cost of any telegrams sent by the Board or by the Crown Agents in connection with any transfer as above described.
- (2) The Board may, at its option, issue and receive coin in the same manner and subject to the same conditions as are prescribed in subsection (1) of this section for the issue and receipt of currency notes.

The headquarters of the Board are established in Trinidad but the Board has an office in British Guiana; one of its officers there is Mr. C. G. Small, Senior Currency Officer. William Peter D'Andrade, Secretary to the Treasury, British Guiana, is a member of the Board of Commissioners of Currency and he is the only such Commissioner who resides in British Guiana.

On 22nd December, 1961, Peter Stanislaus D'Aguiar, a company director and a citizen of British Guiana resident therein called at the Board's office in Georgetown; there he spoke to the Senior Currency Officer, tendered \$50,000 in B.W.I. currency notes and requested the equivalent in sterling to be paid by the Board to him in London, through the Crown Agents. After making the demand orally he handed the officer a previously prepared document containing the words of the demand. It was as follows:

"I am Peter Stanislaus D'Aguiar a resident of the Colony of British Guiana.

I have come to make demand of you the Board of Commissioners of Currency in this Colony to convert B.W.I. currency notes to the amount of 50,000 dollars, which I am now lodging with you here in British Guiana, into sterling the equivalent of which I desire to receive in London through the Crown Agents.

I make this demand under and by virtue of my rights under the provisions of section 7 (1) of the Currency Ordinance, No. 8 of 1959.

I am willing to comply with all the provisions of the whole of the said section and with any other relevant requirements of the Currency Ordinance, and call on you in turn to make due compliance with the said Ordinance and give effect to your obligations thereunder in respect of my aforesaid demand.

I will now give you a copy of what I have just said."

The Senior Currency Officer spoke to D'Andrade, Commissioner, who enquired whether D'Aguiar had a permit presumably thought to be required under the Exchange Control Ordinance, 1958, in consequence of an Order made by the Governor on 18th December, 1961. The answer was in the negative. D'Andrade in his affidavit swore, "I also advised the Senior Currency Officer after consultation with the Attorney General that the transfer of the money would be a violation of the Exchange Control Ordinance if the prosecutor had no permit. I did not instruct him not to accept the money for transfer." The Senior Currency Officer did not accept the notes but asked D'Aguiar to give him until 9.30 a.m. the next day.

On 23rd December, 1961, the applicant's solicitors Messrs. Cameron & Shepherd delivered to the Senior Currency Officer a letter addressed to the Board and to the Executive Commissioner with reference to what had transpired; the letter warned that if the demand was not satisfied their client would have no alternative but to apply for a writ of mandamus to issue compelling the Board or the Exec-

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utive Commissioner to perform their statutory duties. Later the same day the money was again tendered and refused.

On 15th January, 1962, D'Aguiar applied to the Supreme Court praying for the prerogative writ of mandamus to issue and on the next day an order *nisi* was made accordingly. D'Andrade filed an affidavit in which he set forth his reasons why he thought the order should be discharged and not be made absolute.

At the hearing counsel for the Commissioner of Currency (respondent) objected *in limine*, that

- (1) the respondent was never under any duty to the prosecutor (D'Aguiar) to effect conversion in favour of the prosecutor.
- (2) there was no sufficient demand and refusal.

These preliminary objections were upheld and the order *nisi* was discharged. From this decision the prosecutor D'Aguiar has appealed.

The main question which emerges is whether s. 7 of the Ordinance imposes a duty on a single Commissioner, and in the present case on the Commissioner of Currency for British Guiana to discharge the obligations of the Board as contained in the provisions of the section. If it does, (i) was there a sufficient demand? (ii) was there a sufficient refusal? It was submitted by counsel for the appellant that the duty is imposed on each and everyone of the six members of the Board, and urged that in law it was not necessary for the appellant to join in these proceedings more Commissioners than those required to perform the duty. He further submitted that the duty was imperative and immediate; moreover, hitherto the whole course of conduct by the respondent in respect of such conversion under the section was automatic. He referred to respondent's evidence—"Senior Currency Officer would advise me if person wishes to convert and lodges money with Senior Currency Officer. I will advise Crown Agents by cable accordingly If Senior Currency Officer advises me of person converting I would automatically cable Crown Agents, except if I felt something irregular with transaction. I would enquire in my capacity as Financial Secretary and not as a resident member of the Board."

The appellant spoke to the Senior Currency Officer who in turn communicated with the respondent by telephone. Having regard to the evidence of how conversion was in the past effected I think the conclusion that the Senior Currency Officer spoke to the respondent in his capacity as a member of the Board of Commissioners is ineluctable.

For the appellant it was also contended that if the duty was imposed on all the members of the Board severally it would not be necessary to initiate proceedings against all the Commissioners but only against the one who had refused. He observed that to serve all or any group of the Commissioners would entail a difficulty of effecting service on the others as only one was resident in the Colony and the others were out of the jurisdiction. This procedural difficulty I am unable to contemplate; still less am I able to appreciate it without full argument when I consider that the Board has a habitat within the jurisdiction.

The Board is a statutory body and not a corporation. There is no provision as to how a Board may sue or be sued. Paragraph 6 of article 1 of the Agreement in the First Schedule to the Ordinance states unequivocally that any duty devolving and any power conferred on the Board may be discharged or exercised by any three members. With respect to the submission by appellant's counsel that the words "may be" are only permissive and that they do not mean "must", I am of the view that it would have been just as easy for the parties to have employed the words "may be discharged or exercised by any one member" if they intended them to bear that meaning. The Ordinance is composed of fourteen sections six of which impose duties or give powers to the Board and three others empower the Governor to do certain things "after consultation with the Board." It seems clear that a reference to consultation with the Board cannot be construed to mean with one member of the Board. The only exception I find is in sub-s. 3 of s. 11 where there is a specific delegation of power—

"11 (3) A prosecution under this section shall not be instituted except by the Board or by an agent duly authorised by the Board in writing."

I do not think there is room for doubt that the appellant purported both orally and in writing to make the demand on the Board. This was done at the Board's office in Georgetown, British Guiana; and it is inconceivable that it could be seriously contended that the demand was not made at a proper place. The choice, however, as to whom a writ should be directed is that of the prosecutor, whether to the "Board", to the several members naming them or to three or one of them, and he exercises it at his peril. It does not fall to be decided whether the nomenclature "the Board of Commissioners of Currency in this Colony" is a correct designation for a demand, or how and to whom the writ should be directed, but it does concern this court whether the writ was properly directed to the respondent alone.

The appellant caused the writ to be directed to the respondent because of his view that the powers of the Board were exercisable by him as a commissioner on behalf of the Board, and that every Commissioner had the right to exercise those powers and that a duty devolved on each and everyone of them to do so. I do not share this view. The obligation is not a joint and several one. In the absence of any precise provision in the Ordinance, notwithstanding any domestic provisions for internal administration, the obligations under s. 7 of the Ordinance must be discharged by the six members of the Board or not less than three of them. I therefore hold that the Commissioner of Currency for British Guiana acting alone had no power to effect the conversion sought and the writ of mandamus did not lie to him.

For these reasons I would dismiss the appeal with costs.

LEWIS, J.: I agree.

MARNAN, J.: I agree.

Appeal dismissed.

BASIR v. GOOLCHARAN

[Federal Supreme Court (Lewis, Marnan and Jackson, JJ.) March 21, 1962.]

Practice and procedure—Amendment—Limitation—Whole Ordinance pleaded, but no particular section specified—Facts pleaded and evidence led suggested that a particular section was involved—Amendment granted To plead particular section after conclusion of addresses by both counsel—Whether amendment was properly granted.

Costs—Amendment granted after conclusion of addresses by both counsel—No new case raised by amendment—Principles on which costs to be apportioned.

In an action by the appellant for the recovery of possession of land, the respondent pleaded that since 1928 she was in sole occupation of the land. She also pleaded the Title to Land (Prescription and limitation) Ordinance, Cap. 184, though specifying no particular provision thereof. After the conclusion of the addresses by both counsel, at the suggestion of the trial judge counsel for the respondent applied for and was granted an amendment to plead specifically s. 5 of the Ordinance, which provides that “no action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him . . .” ADAMS, J. (ag.), dismissed the action but awarded costs to the appellant from the time the amendment was made to the end of the case, and to the respondent from the beginning of the case up to the time of the amendment. (See 1961 L.R.B.G.) On appeal,

Held: (i) the amendment was properly made;

(ii) where an entirely new defence is raised at a late stage in the trial, the normal order as to costs is that costs of the time previously thrown away should be paid by the party making the amendment, and the cost of the rest of the hearing depend upon the result of the issues raised by the new amendment. Here, however, the amendment did not raise a new case and the order as to costs was right;

(iii) *quaere* whether, the whole Ordinance having been pleaded, it was necessary to plead any particular provision of it.

Appeal dismissed.

M. M. Ali for the appellant.

C. V. Wight for the respondent.

JACKSON, J.: This is an appeal from the judgment of ADAMS, J., in which he dismissed a claim by the plaintiff against the defendant for the recovery of possession of a certain piece of land. The first ground of appeal is that the learned trial judge exceeded his jurisdiction in suggesting to counsel and in granting an amendment of his defence after the addresses by both counsel had been concluded. The ground states:

“That the learned trial judge exceeded his jurisdiction in suggesting to counsel for the respondent that he should amend his defence to plead section 5 of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184.”

Counsel in this court argued that there were no extenuating circumstances on which the judge could grant the amendment asked

for. He cited the case of *Loutfi v. C. Czarnikow, Ltd.*, [1952] 2 All E.R. 823, in support of his contention. In the course of his argument he said that counsel for the respondent had urged during the trial that it was not necessary to plead s. 5, as he had rested his case on 30 years' possession; that notwithstanding, the application for the amendment was made and granted. The case cited—*Loutfi v. C. Czarnikow, Ltd.*—in the headnote faithfully records the principle decided and which appellant's counsel stressed is applicable to this appeal. I am in agreement. The headnote reads:

“Such an amendment may be allowed . . . where the fact the subject of the amendment has been referred to by counsel in opening and evidence about it has been given, since there has been sufficient indication in the course of the trial and in the evidence, that it is a matter in controversy and the amendment will enable the court to arrive at the view, if it thinks fit, that what is pleaded is a correct interpretation of the facts.”

The case, according to the plaintiff, was that the defendant had pleaded the whole of the Statute of Limitation Ordinance, and that in her pleadings the defendant had said that from the year 1928 she had been, and still is, in sole occupation, possession and control of the land described in paragraph 1 of the plaintiff's statement of claim, *nec vi, nec clam, nec precario*, free and undisturbed and in view of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184, she is entitled to have the title of the said property registered in her name. The appellant has contended that since the defendant (respondent) has so pleaded, there is no specific plea of s. 5, and since the amendment in his submission was to plead something new it should not have been allowed.

Section 5 states:

“No action shall be brought by any person to recover any land after the expiration of 12 years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person.”

Counsel for appellant further urged that the subject of the amendment did not arise in the course of the proceedings and if it did that was not a circumstance which would justify the grant of the application to amend.

From my understanding of the ease of *Loutfi v. Czarnikow, Ltd.*, which was referred to by counsel for the appellant, this is precisely the type of case in which such an amendment could be allowed. I think the amendment was properly made. I wish to add that I have not been able to find in the Rules of Court anything that says that the particular section must be pleaded if the whole Ordinance is pleaded. I am not by that making any decision on the particular point, but if I may refer to it, O. 17, r. 15, states:

“15. The defendant or plaintiff, as the case may be, must raise by his pleading all matters which show the action or counter-

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claim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, limitation by statute, prescription, release, payment, performance, facts showing illegality, either by statute or common law, or any provision of the Statute of Frauds, which has been incorporated in the law of the Colony.”

In this particular case the Limitation Ordinance has been pleaded, and nowhere in the pleadings is it stated that it has been limited to 30 years’ prescriptive title or to 12 years’ prescriptive title. Of course, there is no proper application by the defendant (respondent) for registration of title for a period of 12 years, but, nevertheless, the 12 years is an effective bar to the ouster of possession by or at the instance of the appellant.

I have already said that I think the amendment was properly made. The only other ground of appeal argued was that there was no evidence, or sufficient evidence, to support the finding of the court that there was adverse possession of the land in dispute by the defendant, even though in contradiction to this the defendant admitted in evidence that she entered into possession of the said land in dispute. I think I can conclude this very shortly by saying this: that, in my opinion, there was sufficient evidence upon which the learned trial judge could have found in favour of the respondent. The appellant has before us conceded that there was evidence upon which the judge could so find, but he contended that the weight of evidence was against the judgment of the learned trial judge. I am quite content to say there was abundant evidence upon which he could so find, and I would not disturb his findings on that account.

As far as the question of costs is concerned, I am in entire agreement with the finding of the learned judge when he awarded costs, in this particular set of circumstances, to the appellant from the time the amendment was made to the end of the case, and to the respondent from the beginning of the case up to the time of the amendment. The issue or the point argued then related to possession, and I do not think it would have made much, if any, difference to the case in respect of length of time or difficulty in presentation up to the time the amendment was sought if s. 6 was originally pleaded in the defence.

For that reason I would not disturb the finding of the trial judge in respect of the costs, and I cannot say that he did not apply his discretion. I would dismiss this appeal with costs.

Lewis, J.: I agree.

MARNAN, J.: I also agree. I had some hesitation about the order for costs, because in many cases when an entirely new defence

is raised at a late stage in the trial the effect is to throw away all the work which has been previously done and start what may be classified as a new action. Under such circumstances the normal order as to costs is, that costs of the time previously thrown away should be paid by the party making the amendment, and the cost of the rest of the hearing depend upon the result of the issues raised by the new amendment. That, however, is not this case, and it is sufficient to say that the amendment which was in fact made at a late stage did not raise what can be classified as an entirely new case, or anything like that. It would not be useful to go into the circumstances of the case, which have already been dealt with by JACKSON, J. It is sufficient to say that I agree with his judgment.

Appeal dismissed.

DEMERARA MUTUAL LIFE ASSURANCE SOCIETY LTD. v. GOPAUL

[Federal Supreme Court (Lewis, Marnan, Jackson, JJ.) March 21 and 22, 1962.]

Appeal—Right of—Incidental remark by trial judge, not reflected in order—Whether appeal lies against such remark.

Appeal—Right of—Costs—Whether appeal lies on a question of costs only—Federal Supreme Court (Appeals) Ordinance, 1958, s. 9(2) (a) (iii).

The respondent claimed *inter alia* a declaration that a certain mortgage was entered into by the appellant society in excess of its statutory powers and was therefore null and void. ADAMS, J., in the course of his judgment stated that the mortgage was *ultra vires* the powers of the directors of the society but for various reasons he declined to declare it null and void. He dismissed the action absolutely but ordered the parties to bear their own costs. (See 1961 L.R.B.G.). The society appealed against the statement by ADAMS, J., that the mortgage was *ultra vires* the directors' powers and against the order for costs.

Held: (i) an appeal does not lie from an incidental statement or expression of opinion which may occur in the body of a judgment or reasons for judgment, as delivered, but only from a finding of fact or law to which the order of the court gives effect, whether, having regard to the issues, that effect be negative or positive;

(ii) the statement relating to the mortgage was not given effect to by, and did not form part of, the court's order, decision or judgment within meaning of ss. 2 and 9 of the Federal Supreme Court (Appeals) Ordinance, 1958. For this reason no appeal lies in respect of the statement complained of;

(iii) by virtue of s. 9 (2) (a) (iii) of the Federal Supreme Court (Appeals) Ordinance, 1958, no appeal lies on a question of costs alone.

Appeal dismissed.

J. H. S. Elliott, Q.C., J. A. King with him, for the appellants.

DEMERARA MUTUAL v. GOPAUL

Sir Eustace Woolford, Q.C., John Carter with him, for the respondent.

LEWIS, J.: I should like to begin my judgment by saying that the court is indebted to Mr. Elliott for his very full and able argument in this matter.

The judgment appealed from in this case is one dismissing the plaintiff's claim for certain declarations, including a declaration that a mortgage passed by Sir Frank McDavid in favour of the respondent Society on the 22nd February, 1960, to secure repayment of a sum of \$48,000, was null and void and *ultra vires* the powers of the defendant society under the terms and provisions of the Demerara Mutual Life Assurance Society Ordinance, Cap. 211.

In the course of his judgment the learned trial judge stated that this mortgage was *ultra vires* the powers of the directors of the respondent society, a matter which was not raised in the statement of claim, but he declined to declare it null and void for various reasons, amongst them the fact that Sir Frank McDavid was not a party to the proceedings. He dismissed the action absolutely but ordered the parties to bear their own costs.

In their notice of appeal the appellants state that the parts of the decision appealed from are:

- “(1) The mortgage on Sir Frank McDavid's property was *ultra vires* the directors' powers;
- (2) In view of the fact that the interest-free loan to Sir Frank McDavid by the board of directors was *ultra vires* its powers, and taking into consideration the directors' conduct in relation to Sir Frank McDavid's appointment, which caused the plaintiff to institute these proceedings, I order that the parties bear their own costs.”

And the relief sought is that the judgment be “set aside in so far as it declares the said mortgage to be *ultra vires* the powers of the directors, and that in lieu thereof judgment be entered for the defendants dismissing the action with costs to be taxed.”

In my opinion the statement made by the learned judge with reference to the mortgage, as set out above, does not form part of the judgment, order, or decision of the court below, and the appellant cannot properly appeal from it. An appeal can only be taken from the judge's order and this forms no part of his order. The order as drawn up and entered appears on p. 83 of the record, and, in my view correctly records the judge's order, as follows:

“That this action do stand dismissed and that the parties do bear their own costs.”

Counsel for the appellants referred the court to *Enmore Estates Ltd. v. Buxton Village Council* (1959), 1 W.I.R. 389, 1959 L.R.B.G.

185. In that case the appellants had brought an action claiming *inter alia*, an injunction restraining the defendant council from demanding tolls from them when their punts passed along the council's canal. The trial judge granted the injunction restraining the council from preventing the appellants from having the free and unrestricted use of the waterway, but he declined to grant an injunction to restrain the demand for tolls since he held that the council was entitled to exact tolls. The appellants complained of the portions of the judgment which held that the council was entitled to exact tolls, and this court granted the relief asked for in the notice of appeal by varying the judge's order so as to include an injunction restraining the demanding of tolls. That case is clearly distinguishable from the present case because in that case the judge had refused a claim made in the action and the appeal was against that refusal: in the present case the appellants sought nothing but the dismissal of the action, and the judge dismissed it. There is nothing in that order from which they can properly appeal.

It is conceded that in these circumstances the appeal resolves itself into an appeal against an order as to costs alone, which the court has no jurisdiction to entertain.

The appeal must therefore, in my view, be dismissed with costs.

MARNAN, J.: This is an appeal from an order of the Supreme Court of British Guiana in an action decided in favour of the defendants. The order, as drawn up and entered, was: "That the action do stand dismissed, and that the parties do bear their own costs." Nevertheless, it is the defendants who have appealed.

The notice of appeal purports to specify two parts of the decision sought to be appealed from. The first part is set out as follows: "The mortgage on Sir Frank McDavid's property was *ultra vires* the directors' powers." That is a statement which appears on the record of the trial judge's judgment, but which, however it may be regarded, was not a part of his order or decision. The persons referred to were not parties to the action. By virtue of s. 9 of the Federal Supreme Court (Appeals) Ordinance, 1958, an appeal to this Court lies only from an *order* of the court below. The distinction between a judgment and an order was pointed out by Lord ESHER in *Onslow v. Commissioners of Inland Revenue*, [1890] 25 Q.B.D. 435. I quote:

"A judgment is a decision obtained in an action and any other decision is an order."

By s. 2 of the Federal Supreme Court Ordinance, "order" is defined to include "decision" or "judgment". In my opinion an appeal does not lie from any incidental statement or expression of opinion which may occur in the body of a judgment, or reasons for judgment, as delivered, but only from a finding of fact or law to which the order of the court gives effect, whether, having regard to the issues, that effect be negative or positive.

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In this case the order of the court below gave no effect whatsoever to the statement relating to the mortgage referred to, and I hold that it does not form part of the court's order, decision, or judgment within the meaning of ss. 2 and 9 of the Ordinance. For this reason no appeal lies to this court in respect of the statement complained of.

The second part of the decision referred to in the notice of appeal is the judge's order as to costs. Since, however, there is no substantive appealable point raised and, by virtue of s. 9 (2) (at (iii)) of the Ordinance no appeal lies on a question of costs alone, no appeal can be entertained on this ground either. I therefore agree with the order proposed.

JACKSON, J.: I have had the advantage of knowing beforehand of the judgment and opinion of the learned President and my learned brother, MARNAN, J. The order asked for here is that judgment be entered for the defendant dismissing the action. That is precisely what is expressed in the order of the court below under date 6th September, 1961. The appellants also asked that the judgment be set aside in so far as it declares the said mortgage (referring to the mortgage to Sir Frank McDavid) to be *ultra vires* the powers of the directors. I cannot find there is any judgment to that effect, but merely an opinion which does not find expression in the order of the court. The distinction between the present case and that of the *Enmore Estates Ltd. v. Buxton Village Council*, (1959) 1 W.I.R. 389, 959 L.R.B.G. 185, has been sufficiently marked by the learned President.

I agree for the reasons already expressed that this appeal should be dismissed with costs.

Sir Eustace Woolford, Q.C., applies for costs fit for two counsel.

Mr. Elliott, objecting, says that the appellants did not behave unreasonably in the course which they adopted and should not be penalised to that extent.

LEWIS, J.: The court will certify costs fit for two counsel.

Appeal dismissed.

R. v. GRIFFITH

[Supreme Court—Demerara Assizes (Adams, J., (ag.)), January 15, 16, 17, 1962.]

Criminal law—Indictment—Motion to quash—Whether such motion may be made after plea—Criminal Law (Procedure) Ordinance Cap. 11, ss. 106 and 161.

Criminal Law—Indictment—Third indictment filed after end of session for which accused committed and during pendency of two previous indictments—Third indictment in respect of offence disclosed on depositions but not being the offence for which the accused was committed for trial—Validity of third indictment—Criminal Law (Procedure) Ordinance, Cap. 11. s. 113 Criminal Law (Procedure) (Amendment) Ordinance, 1961.

Section 113 (1) of the Criminal Law (Procedure) Ordinance, Cap. 11, provides that “the Attorney General, if he sees fit to do so, shall institute those criminal proceedings . . . which to him seem legal and proper.” Subsection 2 (which came into force on the 23rd June, 1991) enables an indictment to “include, either in substitution for or in addition to counts charging the offence for which (the accused) was committed, any counts founded on facts or evidence disclosed in any examination or deposition . . . being counts which may lawfully be joined in the same indictment.”

On 26th May, 1981, the accused was committed for trial on an information charging him with falsification of accounts. In pursuance of the committal two indictments were filed against him on the 23rd July, 1961. After the close of the assizes for which he was committed and while the other two indictments were still pending a third indictment was preferred on the 27th December, 1961, containing 11 counts of falsification of accounts which were based on the evidence disclosed on the depositions but were different, from the offence in respect of which the accused was committed for trial.

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After the accused had pleaded to the third indictment, counsel for the accused moved to quash it on certain grounds.

Held: (i) subject to the provisions of Cap. 11, a court has an inherent right at common law to quash an indictment that is not presented according to law even though the motion to quash the indictment does not fall within either s. 106 or s. 161 of Cap. 11;

(ii) if the Attorney General or his successor, the Director of Public Prosecutions, institutes criminal proceedings that are not legal and proper the court will be justified in quashing them;

(iii) before s. 113 (2) came into force the Attorney General had a right to add, but not to substitute, counts for offences disclosed on the depositions but different from the offence in respect of which an accused person was committed to stand trial;

(iv) it was not open for the Director of Public Prosecutions without a fresh preliminary enquiry having been held to present without the leave of the court a third indictment consisting wholly of offences other than the offences for which the accused was committed during the pendency of two previous indictments and especially as the third indictment was filed after the termination of the assizes at which the accused was committed for trial;

(v) an indictment may be filed after the commencement of the session for which the accused was committed, but *quære* whether it may be filed after the end of that session.

Indictment quashed.

J. Gonsalves-Sabola, Crown Counsel, for the Crown.

J. O. F. Haynes, Q.C., and *F. John* for the accused.

ADAMS, J.: The accused is being tried on an indictment containing eleven counts of falsification of accounts, contrary to s. 208 (b) of the Criminal Law (Offences) Ordinance, Cap. 10, of the LAWS OF BRITISH GUIANA. The particulars of each count of the indictment allege the making of a false entry in a cash book belonging to the Government of British Guiana, who is the employer of the accused. This indictment was signed on 27th December, 1961, and filed on 28th December, 1961.

Proceedings against the accused commenced by way of information upon oath, which was taken before a magistrate of the Georgetown Judicial District on 7th March, 1961. The information related to the offence of falsification of accounts, contrary to s. 208 (a) of the Criminal Law (Offences) Ordinance, Cap. 10, and the particulars alleged the wilful alteration of thirty-two officers' overtime records, belonging to the Government of British Guiana.

On 26th May, 1961, the accused was committed by a magistrate of the Georgetown Judicial District to stand trial at the next Demerara assizes commencing on 6th June, 1961. On 25th July, 1961, the Attorney General filed two indictments against the accused in pursuance of his committal and the cause was listed for trial as cause No. 4 in the Official Gazette of 23rd September, 1961. One indictment was presented for trial before GORDON, J., at the Demerara assizes for

October and the jury acquitted the accused on some counts and disagreed on others. Both indictments were therefore pending at the time when the Director of Public Prosecutions signed the third indictment on 27th December, 1961. They are still pending.

When the case for the Crown was closed yesterday, Mr. J. O. F. Haynes, Q.C., for the accused moved the court to quash the indictment on three grounds. First, he contended that under the Criminal Law (Procedure) Ordinance, Cap. 11, an indictment following a committal for trial at the next assizes must be filed before the day of the commencement of the said assizes, and, as the filing had not been done in time in this cause; the indictment was bad. Secondly, he contended in the alternative that there was no power given to the Director of Public Prosecutions to file a fresh indictment after two indictments had already been filed and the cause had been listed for trial. Thirdly, he submitted in the further alternative that no power had been conferred on the Director of Public Prosecutions to present against the accused an indictment consisting wholly of offences other than those for which the accused was committed in a case where the committal had taken place before the coming into operation of Ordinance No. 22 of 1961 on 23rd June, 1961.

Despite the fact that the motion was not made before the accused person had pleaded, I was satisfied that I could properly entertain it and such a course was conceded as proper by counsel for the Crown.

The objection was however taken by counsel for the Crown that ss. 106 and 161 of Cap. 11 were the only two sections that gave a right to the accused to move that the indictment be quashed and that therefore this motion could not be brought for the reason that it did not fall within either section. But I am convinced that, subject to the provisions of the Ordinance, common law provisions are still applicable and that a court has an inherent right at common law to quash an indictment that is not presented according to law.

I shall consider the third submission first. The power of the Attorney General to institute criminal proceedings is derived from s. 113 of Cap. 11, which now reads as follows:

“113 (1) On receipt of the documents relating to the preliminary inquiry, the Attorney General, if he sees fit to do so, shall institute those criminal proceedings in the Court against the accused person which to him seem legal and proper.

(2) The indictment against the accused person may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a magistrate in his presence, being counts which may lawfully be joined in the same indictment.”

As regards the first subsection, Crown Counsel submitted that the words “which to him seem legal and proper” are wider in scope

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than the words “which are legal and proper.” I however am of the opinion that the two clauses must be equated in meaning because if the Attorney General, or his successor in criminal proceedings who is the Director of Public Prosecutions, institutes proceedings that are not, legal and proper, the court will be justified in quashing them.

The second subsection was inserted for the first time by the Criminal Law (Procedure) (Amendment) Ordinance, No. 22 of 1961, on 23rd June, 1961. Counsel for the Crown was at pains to stress that it represented a statutory restatement of the existing law and that its purpose was to dispel doubts and remove ambiguities. If the view of counsel were erroneous, this subsection could not operate retrospectively so as to affect proceedings against the accused as it would alter not merely procedural but substantive rights.

In *R. v. Manning* (1959), 2 W.I.R. 111, 1959 L.R.B.G. 272, DATE, J., was of the view that the provisions of s. 113 of Cap. 11 empowered the Attorney General to include in the indictment, either in substitution for or in addition to a count charging the offence for which the accused was committed any counts for related offences founded on facts disclosed in the legally admissible evidence adduced at the preliminary enquiry.

In *R. v. Insanally* (1960), 2 W.I.R. 549, 1960 L.R.B.G. 222, FRASER, J. (ag.), held that the Attorney General had the right to add a count or counts to an indictment for offences other than the offence charged in the information in any case where such offences are disclosed on the depositions.

The Federal Supreme Court of the West Indies held in *Insanally v. R.* (1960), 2 W.I.R. 519, 1960 L.R.B.G. 277, that the Attorney General had a discretion to include in the indictment any offence disclosed by the depositions. Sir ERIC HALLINAN, C.J., who delivered the judgment of the Court, stressed the importance of s. 16 of Cap. 11, which provides:—

“Subject to the provisions of this Ordinance and of any other statute for the time being in force, the practice and procedure of the Court shall be, as nearly as possible, the same as the practice and procedure for the time being in force in criminal causes and matters in the High Court of Justice and the Courts of Assize created by commission of oyer and terminer and of gaol delivery in England.”

The Federal Supreme Court considered that the ruling of FRASER, J., in *Insanally's* case and the decision of DATE, J., in *Manning's* case were correct.

Unlike HUGHES, J., in *R. v. Karamat*, 1954 L.R.B.G. 121, and DATE, J., FRASER, J. did not expressly attribute to the Attorney General a right to substitute counts, but merely to add offences. The opinions of HUGHES, J., and DATE, J., on this point must be treated with respect but were unnecessary for the purpose of their decisions.

I do not think that the Attorney General had the right in England before the Administration of Justice (Miscellaneous Provisions) Act, 1933, to substitute counts, as distinct from adding counts for offences other than the offence charged in the information, and consequently I doubt that such was the position in British Guiana before 23rd June, 1961. Referring to the Criminal Law (Amendment) Act, 1867, which gave a right to join a count or counts with the rest of the bill of indictment, FRASER, J., expressed the view that the effect of this provision was merely to restore the position at common law respecting indictments relating to offences mentioned in the Vexatious Indictments Act, 1859.

In the instant case, all the eleven counts are founded on the legally admissible evidence disclosed at the preliminary inquiry but they are without exception different from the offence contained in the information. As proceedings commenced before 23rd June, 1961, the validity of such an indictment is open to question on this score.

It will be observed from CHITTY'S PRACTICAL TREATISE ON THE CRIMINAL LAW (2nd Ed.), which was published in 1826, that the learned author expresses the opinion at p. 248 that it is a legal and advantageous course to add, join or insert counts in the same indictment but makes no mention of a power to substitute entirely new counts.

It does not appear that the power to substitute offences in lieu of the offence alleged in the information was the subject matter of argument or consideration by the Federal Court in *Insanally v. R.* and when the Federal Court expressed the view, which I respectfully share, that the decision of DATE, J., in *R. v. Manning* was correct, the Federal Court must be taken to be referring to the actual decision in the circumstances relating to the particular indictment and not to be giving its approval to the *obiter dictum* on the right of the Attorney General to substitute offences without the leave of the court.

The better view is that Ordinance No. 22 of 1961 was not a mere statutory restatement of the existing law but effected a change in the law.

I shall now examine the first ground of the application. Section 71 of Cap. 11 empowers a magistrate who is conducting a preliminary inquiry to commit an accused person, where a sufficient case is made out, for trial to the next practicable sitting of the court for the county in which the inquiry is held. Section 90 (1) lays down that every person committed for trial shall be tried on an indictment in the court. Section 84 empowers the bailing of an accused person on committal for trial. One condition of his recognisance is that he shall personally appear before the court and there and then, or at anytime within twelve months from the date of the recognisance, answer any indictment that may be filed against him in the said Court. By s. 84 (2) of Cap. 11 he is therefore bound to appear in court for a period of twelve months unless the trial has taken place within a shorter period. Section 84 (2) does not mean that the

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indictment may be filed at any time within twelve months of the committal. Section 4 provides for the appointment of causes to be tried on each day of the sitting of the court. Section 5 permits the Attorney General to add any cause to the list after the transmission of the list to the Registrar. Section 6 directs the Attorney General to deliver to the court on the first day of every sitting of the court a list of causes for trial. It is clear, therefore, that there is no merit in the first submission that the indictment must be filed before the opening day of the session because to uphold it would be to deny the Attorney General, or since the coming into force of the British Guiana (Constitution) Order in Council, 1961, the Director of Public Prosecutions, the right to add a cause to the list.

It seems, however, from the scheme of the Ordinance that it was intended that the indictment should ordinarily be filed before the termination of the session to which the accused was committed by the magistrate for trial. It is true that a cause appointed for trial may be postponed to the next sitting of the court but the signing of the indictment is a condition precedent for the appointment of the cause for trial. As the first submission of counsel for the accused was not presented in this form, it would be unnecessary for me to decide whether the indictment should be quashed simply because it was not filed until after the termination of the sitting of the court at which the accused was committed for trial.

I now turn to the second ground on which the motion is based, namely, that there is no power given to the Director of Public Prosecutions to file a fresh indictment after two indictments have been filed and the cause has been listed for trial. There may be cases where a fresh indictment may be filed. For example, under s. 106, sub-s. 4, of Cap. 11.

“(4) If the indictment is quashed, the Court may direct the accused person to plead to another indictment, when called on at the same sitting of the Court.”

Again, under s. 114 (5) of Cap. 11,

“(5) Whenever the Court orders or allows another indictment to be prepared at the same sitting of the Court for the same offence or for a minor offence, the accused person shall not be entitled to have a copy served upon him for a longer period than twenty-four hours before his arraignment on the other indictment.”

Section 106, sub-s. 4, is concerned with the case of an indictment quashed at the same sitting of the court for not stating in substance an indictable offence or for stating an offence not triable by the court. Section 114, sub-s. 5, deals with the case of an indictment preferred for the same offence or for a minor offence and gives the procedure to be followed in cases falling under s. 106, sub-s. 4. In the instant trial, one indictment was tried without an agreement being reached by the jury on some of the counts at a previous sitting of the court and this and the other untried indictment are listed for trial. Neither section is therefore authority for bringing a third

indictment, after the completion of two criminal sessions, in consequence of the same committal and preliminary proceedings.

In the case of *Lewis Morgan* (1925), 18 Cr. App. R. 180, the appellant was convicted at the Cardiff assizes of obtaining money by false pretences. He was committed for trial at the assizes not on the charge on which he was convicted but on charges of conspiracy to defraud and obtaining goods by false pretences. The indictment containing the latter charges was not proceeded with but was ordered to remain on the file. A second indictment was without the leave of the court preferred before the Grand Jury for obtaining money by false pretences and the appellant was convicted on the second indictment. The Court of Criminal Appeal quashed the conviction and the Lord Chief Justice, who delivered the judgment, gave the following reasons:—

“The really substantial point of this appeal is under the Vexatious Indictments Act, 1869, and the Criminal Law Amendment Act, 1867. It was held in *Mosley* that counts for offences within the Act of 1859 may be added to an indictment without the leave of the Court of trial where they are founded on facts disclosed on the depositions. Here a fresh *indictment* was preferred on facts said to be contained in the depositions. No case has gone that length . . . There remains on the file another indictment for conspiracy to defraud and obtaining goods by false pretences. This appeal must be allowed. The prosecution may proceed on the other indictment, but we think that the proper order should be that the appellant is discharged.”

Counsel for the Crown submitted that the decision in *Lewis Morgan's* case turned on the provisions of the Vexatious Indictments Act, 1869, and the Criminal Law Amendment Act, 1867, but it must be remembered that, as FRASER, J., rightly said in *R. v. Insanally*, the effect of the latter Act “was merely to restore the position at common law respecting indictments relating to the offences mentioned” in the former Act.

Counsel for the Crown also urged the court to take the view that the third indictment was proper because it was observed in the case of *Carless and Stapley*, (1984), 25 Cr. App. R. 43, that it was undesirable to have an excessive number of counts in a single indictment and, further, where there are more counts than one in an indictment, each count may be treated as a separate indictment. The second argument was expressly advanced in the *Lewis Morgan* case by the Crown but did not find favour with the court.

In the result I hold that the proceedings instituted by the Director of Public Prosecutions on 27th December, 1961, by way of indictment without the holding of a fresh preliminary inquiry were not legal and proper for the reason that it was not open to him to present without the leave of the court a third indictment consisting wholly of offences other than the offence for which the accused was committed during the pendency of two previous indictments before the court, one of which was tried at a previous sitting, and especially as the third indictment was filed after the termination of the assizes at which the accused was committed for trial.

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I therefore propose to quash the indictment that is preferred before the court, to discharge the jury without requesting them to arrive at a verdict and to discharge the accused on this indictment. The Crown may notify the accused of the date of hearing of the other indictments and in the case of his non-appearance may apply to the court for the issue of a warrant.

Indictment quashed.

Solicitors: *P. M. Burch-Smith*, Crown Solicitor (for the Crown); *Miss H. Eleazar* (for the accused).

TAPPIN v. RAMPERSAUD

[Supreme Court (Bollers, J.) March, 2, 3, 23, 1962.]

Execution—Immovable property vested in administrator—Administrator beneficially entitled to greater part thereof, but has not vested title therefor in himself in his personal capacity—Whether judgment creditor of administrator in his personal capacity can levy on latter's beneficial interest in property.

The plaintiff was the administrator of the estate of his wife (who died intestate) and beneficially entitled to the greater part of the immovable property thereof. The defendant levied on the plaintiff's beneficial interest to satisfy a judgment obtained by the former against the latter in his personal capacity. The plaintiff in his capacity as administrator then opposed the sale at execution, his contention being that he had no right to the immovable property as such, but only to a share in the proceeds of the property when realised. The estate owed no debts but over a long period of time the plaintiff as administrator neglected or refused to vest title in the beneficiaries.

Held: (i) if the judgment debtor merely holds the *jus ad rem* to the property levied upon, which is a *jus incorporate*, and the legal title or right to the legal title is in another, it is not competent for the judgment creditor to levy upon his beneficial interest in the land;

(ii) a *jus ad rem* exists when a person has a right that some other right shall be transferred to him or otherwise vested in him; it is a right to a right and is a right *in personam*. No such position obtains here: the property by operation of s. 24 (1) of the Deceased Persons Estates' Administration Ordinance, Cap. 46, already vests in the plaintiff.

Judgment for the defendant.

L. F. S. Burnham, Q.C., for the plaintiff.

J. A. King for the defendant.

BOLLERS, J.: This is an opposition suit in which the plaintiff, in his capacity as the administrator of Sarah Elizabeth Tappin, deceased, claims a declaration that in his capacity as administrator he is the legal owner and is vested with the title of the deceased in respect of certain immovable property situate at Golden Fleece, in the Golden Fleece and Paradise Country District, an injunction restraining the defendant, his servants and/or agents from selling at execution the said immovable property or any portion thereof as a result of a judgment obtained by the defendant against him in his personal capacity, and finally a declaration that the opposition entered by him in his capacity as administrator to the sale at execution of a portion of the said property and advertised in the Official Gazette dated 2nd August, 1958, and numbered 204 for the County of Berbice at the instance of the defendant, against him in his personal capacity, is just, legal and well-founded.

The defendant claims that he obtained judgment against the plaintiff in his personal capacity in two actions in the year 1956, each for the sum of \$850 and costs to be taxed, and the plaintiff failed and neglected to satisfy these judgments. The defendant further avers that the plaintiff was the husband of Sarah Elizabeth Tappin who died intestate on the 11th September, 1955, the owner by transport of

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the whole of the said immovable property, and the plaintiff as widower was entitled to \$480 and to an undivided half of the balance of her estate upon her death. On these premises the defendant contends that he is competent to levy on the beneficial interest of the plaintiff in the said immovable property.

The circumstances which I find to have existed at the time of the levy are that at the time of her death in 1955, the deceased Sarah Elizabeth Tappin, the wife of the plaintiff, to whom she was married subsequent to August, 1904, held by transport the immovable property described therein as lot number 15 (fifteen), section A, lot number 15 (fifteen) section C, lot number 15 (fifteen) section E, Golden Fleece, in the Golden Fleece and Paradise Country District, formerly the Eldorado Block Country District, situate on the west coast of the County of Berbice in the Colony of British Guiana. On the 9th February, 1956, the plaintiff was granted letters of administration in respect of the estate of his deceased wife, and in the oath to lead to the grant he swore that from the inventory which he had declared, the gross value of the estate amounted to \$600 in value, and that the liabilities of the estate were nil. The sole asset of the estate he declared to be this immovable property held by transport valued at \$600.

On the 20th May, 1957, the defendant obtained two judgments against him each for the sum of \$850 and taxed costs, and as a result the property was seized in execution by the Marshal of the Supreme Court on the 14th July, 1958, at the instance of the defendant for sale at execution as advertised in the Official Gazette on 2nd August, 1958. On the 18th August, 1958, the plaintiff entered opposition to the levy in his capacity as administrator of the estate of Sarah Elizabeth Tappin, deceased, and at the time of the levy no debt was owed by the estate of the deceased to the defendant, the judgment-creditor of the plaintiff. In his grounds of opposition the plaintiff claimed that the estate was indebted to several persons in respect of the funeral expenses of the deceased, the cost of obtaining administration and administration expenses, and other debts amounting to a sum approximating the value of the sole asset of the estate, and that there were other next of kin of the deceased who were alive and by law entitled to a portion of the estate of the deceased.

During the period February 1958 to November 1959, the property was advertised and put up at execution sale for rates owed to the local authority on three occasions on the same summation, and on each occasion the defendant and the plaintiff and his second wife, Christina Tappin, attended the sale and bid for the property. On each occasion the defendant out-bid the plaintiff's wife, and as a result the sale was stopped by the overseer of the local authority and eventually the proceedings were withdrawn. It appears that the plaintiff, instead of vesting title in the property to the beneficiaries of the estate in his capacity as administrator, was seeking to obtain title of the property in the name of his wife—which property he admits is worth \$4,000—and thus defraud his creditors.

In this court the plaintiff has sought to make out, quite contrary to his declaration and inventory of the estate for the Registrar for the purpose of estate duty, that there are existing debts owed by the estate to certain creditors which remain unpaid. I am forced by the circumstance of his previous declaration, his evidence unsupported by any creditor of the estate, and the lapse of the period of limitation, to arrive at the conclusion that there are no debts owed by the estate, and that the only other beneficiary entitled under the estate is the mother of the deceased, Elizabeth Bell.

Under s. 5 (1) (g) of the Civil Law of British Guiana Ordinance, Cap. 2, the plaintiff will be entitled to take \$480 of the estate as a first charge and one undivided half of the residue. The mother of the deceased then becomes entitled to the remaining undivided half of the residue of the estate as her share. The sole asset of the estate is the immovable property situate at Golden Fleece.

Counsel for the plaintiff has submitted with confidence that it is not competent for the defendant, the judgment creditor of the plaintiff in his personal capacity, to levy on the beneficial interest *simpliciter* of the plaintiff in the estate. In his submission, the plaintiff's beneficial interests is neither ascertainable nor ascertained, and the plaintiff has not even a *jus ad rem* to the immovable property. He argues that, whether there are debts owing by the estate or not, the plaintiff has no right to the immovable property as such, he has merely a right to the first \$480 and half of the residue of the estate out of the proceeds of the estate. In other words, the assets of the estate must first of all be realised out of which the plaintiff would then be entitled to the first \$480 and then to half of the proceeds of the realisation. In support of the submission counsel cited *Lawrence v. Trustees, Court "Berbice Heart,"* 1896 L.R.B.G. 3; *Mangia v. Safayan*, 1917 L.R.B.G. 58, *Ori. v. Phuljaria*, 1917 L.R.B.G. 123.

Counsel for the defendant, on the other hand, submitted that where, as in this case, the legal estate and beneficial interest are in the same person, that is, the plaintiff, it was competent for a creditor of the plaintiff to levy on that interest. He argued that the beneficiary under the estate should not be allowed to say that a debt of the estate has not been paid so as to prevent his creditor from proceeding against his beneficial interest and certainly not at this stage after a lapse of six years from the grant of letters of administration when the debt would be statute barred, and he points out, and may I say that I agree with him on this observation, that under s. 46 (6) of the Deceased Persons Estates' Administration Ordinance, Cap. 46, anyone interested in the estate, such as a creditor, could have filed an objection to the administrator's account, or under s. 47, where the administrator has failed to file an account, the creditor could have filed an application to the court calling upon the administrator to show cause why an account has not been filed. In the instant case this was never done by any of the creditors. Counsel poses the question: "Is the creditor of the plaintiff in his

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personal capacity to be defrauded of the fruits of his judgment because he levied on a portion of the property that is said to be smaller than the eventual interest to the judgment-debtor when administered?" He cited *Mangru v. Kalla*, (1931-1937) L.R.B.G. 414.

In *Lawrence v. Trustees, Court "Berbice Heart"*, 1896 L.R.B.G. 3, there was an opposition action by the plaintiff to the sale at execution at the instance of the defendants in proceedings by the Trustees against one Lucienne. The sale was opposed on the ground that the plaintiff had purchased the property in question from Lucienne and was the true and beneficial owner thereof. Lucienne had himself purchased the property at execution sale and had not obtained letters of decree. He had not passed transport to Lawrence. It was held that the Trustees, the creditors of Lucienne, who had obtained a judgment against him, were entitled to levy on such property, even though title to the property was not vested in Lucienne. ATKINSON, J., in delivering decision, pointed out that the plaintiff had a right of action against Lucienne, the co-defendant, to compel him to pass transport of the property, but, meanwhile, the right to the legal title in the land was in the co-defendant, and any creditor who had obtained judgment against the co-defendant, *i.e.*, Lucienne, was entitled to levy upon his legal interest in the property. He went on to point out that the plaintiff was no more entitled to oppose the sale of the property itself than he would have been to oppose the sale of the co-defendant's interest in it. It will be seen from this case that, although the co-defendant did not have the legal title, he had the right to the legal title of the property, and his interest in it could therefore be levied upon by his judgment-creditor.

In *Mangia v. Safayan*, 1917 L.R.B.G. 58, there was a claim by the plaintiff for an order setting aside (a) a levy and sale at execution in respect of certain immovable property on behalf of one Jumra Ali, judgment creditor of one Osiran, and (b) the letters of decree for the same property issue to one Safayan, the defendant, the purchaser at the sale, on the ground that the property in question was never the property of Osiran but of the plaintiff Mangia. Jumra Ali set up the defence that if the plaintiff held title for the property in question, she held it in trust for Osiran as the property was paid for by the plaintiff with money supplied by Osiran, and Osiran had been put in possession thereof as owner. From the facts of the case it appears that the legal title to the property was in the plaintiff, having been conveyed to Mangia *coram lege loci* by the Official Receiver representing a bankrupt. Four years later Jumra Ali, as judgment-creditor of Osiran, the wife of the bankrupt, issued execution on his judgment after swearing in the usual affidavit that Osiran was, to his knowledge, the true owner of the property and had been in possession for a period of five years. Although the property then stood in the records of the Registry in the name of the plaintiff Mangia as owner by transport, nevertheless, a writ of *fiery facias* was issued in respect of the property, and it was sold

at execution sale and purchased by the defendant Safayan, who subsequently obtained letters of decree.

The learned Chief Justice, Sir CHARLES MAJOR, in his judgment held that the property was not the property of Osiran while she was alive, nor was it the property of Osiran's representatives when she died. When therefore, in order to lead to the writ of seizure and sale, the judgment-debtor, Jumra Ali, had sworn in an affidavit that Osiran was the owner of the land, and the sheriff proceeded "to seize and sell", Ali had sworn falsely as no property of Osiran was sold and a *jus ad rem* could not be taken in execution under a writ of *feri facias*. For this proposition, the learned Chief Justice cited the English case of *Maynard v. Gilmer's Trustees*, 3 Menzies 116, where the court held that a purchaser of a certain immovable property who had partly paid, but had no legal transfer for it, had but a *jus incorporate*, namely, the *jus ad rem* to demand and obtain transfer from the sellers which was all that vested in him, and that a *jus incorporale* could not be taken in execution by a writ to attach the immovable property in respect whereof the *jus* existed.

In his judgment the learned Chief Justice approached the matter on the footing that the property had been purchased by the plaintiff with Osiran's money and that Osiran's possession was referable to that fact, but arrived at the conclusion that Osiran had no estate in the land whatever, but may have had merely a right to call upon the plaintiff to transfer the property to her but that was a *jus ad rem* and nothing more. He went on to hold that the ownership or legal estate in the property was in the plaintiff and that the letters of decree to the defendant Safayan conveyed only the judgment-debtor's interest which was nothing, and then proceeded to make an order setting aside the sale of the property in execution of the judgment and the consequent letters of decree purporting to give effect to that sale. In the course of his judgment the Chief Justice made this classic statement which is observed up to this day by Judges of the Supreme Court:

"There is but one method of acquiring the ownership of real property in this colony, namely by conveyance, or 'transport', or the legal equivalent thereof. The person holding the conveyance of this property is the plaintiff and she and none other is today the owner of it. In that position she is, as against the defendants with whom she has no equities, resting on her conveyance."

In *Ori v. Phuljaria*, 1917 L.R.B.G. 123, it was held that where immovable property in respect of which the judgment-debtor had only a *jus ad rem* was levied upon and sold in execution of the judgment under an ordinary writ of execution, that the execution was illegal and, together with the subsequent sale, must be set aside. In this opposition suit a defendant Surjoo had obtained judgment against one Charitar and had proceeded to levy in execution upon certain land as the property of Charitar, transport for which was

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in the name of the plaintiff. Charitar had paid for six acres of land which the plaintiff had sold to him. The plaintiff had transport of 50 acres of land, the greater part of which he had sold to various persons including Charitar, intending to keep a certain portion for himself. When the time arrived for passing transport to these persons, the land had been surveyed and all the other co-purchasers had each obtained his own portion and it was then found that only five acres remained to be divided between Charitar and the plaintiff. Charitar then consented to take four acres instead of the original six, leaving the last remaining acre for the plaintiff. The plaintiff seemed to have approved of this suggestion, but later thought better of it and refused to pass transport to Charitar. Surjoo, who was related to Charitar, obtained a judgment against him and levied on the five acres which were sold at execution to Phuljaria who petitioned for letters of decree. The grant of letters of decree was opposed by the plaintiff who prayed for an order setting aside the levy and sale at execution. BERKELEY, J., had no hesitation in making an order setting aside the levy and sale on the ground that the title to the land was in the plaintiff by transport.

The principle to be extracted from these cases is that if the judgment-debtor merely holds the *jus ad rem* to the property levied upon, which is a *jus incorporeale*, and the legal title or the right to the legal title is in another, it is not competent for his judgment-creditor to levy upon this beneficial interest in the land.

In *Mangru v. Kalla*, (1931-1937) L.R.B.G. 414, on which counsel for the defendant strongly relied, the plaintiff Mangru was appointed executor under the last will of his mother, Sundar, who died in 1933. Probate of the will was granted to the plaintiff in June 1933. By the said will the testatrix devised and bequeathed all her property to her reputed husband Kalla, the defendant, and her son Mangru, the plaintiff, in equal shares. The inventory filed by the plaintiff for estate duty showed the property of the deceased to have consisted of certain immovable property. There was only one debt of the estate declared which was a small sum owing to the Mayor and Town Council as special rates which the judge considered was funded and could be paid in small yearly instalments as a charge on the land. There was subsequent litigation between the parties, and in an action where the present plaintiff was defendant and the present defendant was plaintiff, Kalla obtained judgment against Mangru and Mangru was ordered to pay the costs of the action personally.

In December 1934 the defendant Kalla, in order to satisfy the judgment held by him against the plaintiff for costs, levied execution on one undivided half part or share of and in the immovable property already mentioned, devised to the plaintiff Mangru under the will of his mother Sundar. The action was then brought by the plaintiff in which he claimed an order of the court declaring the execution levied at the instance of the defendant on the said property to be illegal, unjust and not well founded, and the usual consequential

injunction. DE FREITAS, J. (ag.), addressed his mind to the question whether the execution levied by the defendant on the undivided half of the property was illegal, and held that it was not. It was submitted before the learned judge that the levy was illegal because the property had been sold by the plaintiff as the executor to pay debts of the estate, and that from the date of that sale at auction the property was in equity no longer owned by the estate but by the purchaser, and, further, that the defendant was estopped from questioning the validity of that sale.

The learned judge rejected this submission, and stated that he would adhere to his opinion that in this colony no transfer of immovable property could take effect unless perfected by transport, and referred to the statement of the law made by Sir CHARLES MAJOR in *Mangia v. Safayan*. He also pointed out that even in England the statement that in equity the purchaser becomes the owner of the property, is only a general statement subject to qualification, and if, by reason of delay or other circumstances the court declines to grant specific performance, the purchaser is not treated as being in equity owner of the property.

It was also submitted in the course of argument that because the estate was still being administered by the executor it was not competent for the defendant "to levy on the equitable interest of the plaintiff personally in his hands as executor" while the debts of the estate were unpaid. The learned judge, in reply to this submission, stated:

"I am of the opinion that as the plaintiff holds both the legal title and the sole beneficial interest in one undivided half of the abovementioned properties, it was competent for the defendant to levy execution on that undivided half to enforce the judgment held by him against the plaintiff individually."

He then went on to point out that under the Rules of Court any judgment-creditor who desired to take in execution any immovable property to satisfy a judgment of the court had to file an affidavit of the facts and documents upon which he made claim to take the property in execution, and the Registrar, who is the examiner of titles in the colony, had first to be satisfied that the judgment-debtor is *prima facie* the owner of the property sought to be taken in execution. He concluded that, in the absence of evidence in rebuttal, it could be presumed that any property levied on had been proved to the satisfaction of the examiner of titles to be the property of the judgment-debtor.

In the instant case there can be no question that debts of the estate remained unpaid and the estate is being still administered, as there are no debts and the plaintiff in his quality of executor neglects and/or refuses to vest title in the beneficiaries. Under s. 24 (1) of the Deceased Persons Estates' Administration Ordinance, Cap. 46, title to the property is vested in the plaintiff in his capacity as administrator of the estate, and the position here is similar to that obtained in *Mangru v. Kalla*. The learned judge expressed his view on this position in these words:

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“He (plaintiff) and the defendant are the sole beneficiaries under the will; there are no other *cestuis que trust*; there are no creditors of the testator. He holds the legal estate and is the sole beneficial owner of one undivided half of the property left by his mother. By what process of reasoning are his own creditors to be prevented from levying execution on property which is his in every sense of the word? The case might be different if, for instance, a creditor of the plaintiff were to issue execution on the whole property, of one-half of which the defendant is the beneficial owner.”

In the instant case the plaintiff holds the legal estate in the land and is also the beneficial owner of one undivided half of the property under s. 5 (1) (g) of the Civil Law of British Guiana Ordinance, Cap. 2. Under this section, if the value of the estate exceeds \$480, as in this case, the surviving spouse shall be entitled to \$480 as a first charge and the residue is treated as if it were the whole estate. The first \$480 is not then considered as part of the estate (except for estate duty purposes) and, after deduction, the residue falls into the estate. It follows that the plaintiff is entitled as of right to \$480 out of the land or out of the proceeds of sale of the land levied upon, and then to one undivided half part or share in the land. In other words, the greater portion or share of the land is his, and the title thereto is in him.

I reject the argument of counsel that the plaintiff has less than a *jus ad rem* to the undivided half-part or share of and in the property. A *jus ad rem* exists when a person has a right that some other right shall be transferred to him or otherwise vested in him, it is a right to a right and is a right *in personam*. No such position obtains here; the property by operation of law already vests in the plaintiff. The property in the undivided half is his and his right to own it is absolute. The court could never countenance his neglect or refusal to vest title to the property in his personal capacity in order to defraud creditors who have obtained judgment against him personally, or to avoid the property, which is in every sense his, being seized in execution to satisfy a judgment against him in his personal capacity. In *Ray v. Ray*, 1 Cooper's Reports 264, it was held that after a lapse of six or seven years, equity will not restrain by injunction a creditor of an executor from taking in execution the goods of a testator for the executor's own debts where another creditor, who did not make a claim for that period, had induced the world to believe that it was the executor's own property. This is not such a case of inducement; this is the administrator's own property, and a creditor is entitled to levy upon it.

The action must therefore be dismissed and the opposition declared unjust, illegal and not well-founded. The defendant shall have his costs to be taxed certified fit for counsel. Stay of execution granted for six weeks.

Judgment for the defendant.

OLDS DISCOUNT COMPANY (T.C.C.) LIMITED v. MARAJ

[Supreme Court (Luckhoo, C.J.), March 16, 24, 1962.]

Hire purchase—Penalty—Motor car re-possessed and sold on failure to pay instalments—Provision that if car re-possessed before expiration of two-thirds of the term hirer to pay difference between sums paid and two-thirds of balance in schedule—Whether a penalty—Whether damages for breach of contract to be diminished by discount of interest on proceeds of sale.

Clause 7 of a hire purchase agreement relating to a motor car provided that if the hiring should before the expiration of two-thirds of the term be determined or the plaintiffs retake possession of the car, the hirer was to pay the plaintiffs by Way of compensation for depreciation, in addition to any other sum payable thereafter, such sums as with the total previously paid for rent would make up a sum equivalent to two-thirds of the balance set out in the schedule to the agreement. The hirer defaulted after paying four of thirty-five stipulated monthly rentals. The owner thereupon seized and sold the car and sued for a sum of \$1,778.34 under clause 7, alternatively for damages for breach of contract.

Held: (i) in the circumstances of this case the amount alleged due under clause 7 was not a genuine pre-estimate of damages, but a penalty, and the owner could not therefore rely on that clause;

(ii) in computing damages for breach of contract a discount should be given to the hirer on the accelerated receipt of the proceeds of the sale of the car to be calculated at the rate of interest charged by the owner on his capital outlay over the unexpired portion of the term.

Judgment for the plaintiffs.

J. H. S. Elliott, Q.C., for the plaintiffs.

W. R. Adams for the defendants.

LUCKHOO, C.J.: The point for determination in this action is what should be the measure of damages to be awarded an owner where a hirer has committed a breach of contract under an agreement of hire purchase and the owner has, under the terms of the agreement, re-taken possession of the motor car, the subject matter of the agreement, and has sold it for less than the price paid.

The facts are not in dispute, the defendant having, at the hearing, abandoned all grounds of his defence except on the issue of the quantum of damages to be awarded.

By an agreement dated 25th November, 1960, made between the plaintiffs, Olds Discount Company (T.C.C.) Ltd., a finance company, and the defendant, Balgobin Maraj, the plaintiffs let on hire-purchase to the defendant a motor car for a total hire purchase price of \$3,655. The initial deposit payable was \$800 and the remainder of the hire-purchase price was to be paid by way of 35 monthly rentals of \$79.30 commencing one month after the date of the agreement and a final month's rental of \$79.50. The hire-purchase charges amounted to \$580, being at the rate of 25½% over the three-year period. The capital outlay of the plaintiffs was therefore \$2,275.

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The agreement provided that if the hirer should make default in the punctual payment of any of the hire rentals, the plaintiffs should be entitled without any notice to determine the agreement and to re-take possession of the motor car without prejudice to their other rights thereunder. The defendant paid four monthly rentals amounting to \$317.20. On the 16th of June, 1961, when the defendant was in arrears for two monthly rentals amounting to \$158.60, the plaintiffs determined the agreement and re-took possession of the motor car which, on the 21st of August, 1961, they sold for the nett sum of \$1,047.40.

It is provided by clause 7 of the conditions of the agreement that if the hiring should before the expiration of two-thirds of the term be determined or the plaintiffs re-take possession of the motor car, the hirer shall pay the plaintiffs by way of compensation for depreciation, in addition to any other sum payable thereunder, such sums as with the total previously paid for rent shall make up a sum equivalent to two-thirds of the balance set out in the schedule to the agreement.

The plaintiffs issued the writ in this action claiming the sum of \$1,778.34 under that clause. When this action came on for hearing counsel for the plaintiffs referred the court to the recent case of *Bridge v. Campbell Discount Co. Ltd.*, [1962] 2 W.L.R. 439, a decision of the House of Lords, which related to a claim brought under a similarly worded clause (clause 9) contained in an agreement of hire-purchase in England. In that case it was held by the House of Lords, as is stated in the headnote to the report, that on the basis that the hirer did not exercise his option under clause 6 to terminate the agreement but was in breach of his obligations, the amount alleged due under clause 9 was not a genuine pre-estimate of damages, but a penalty and the owner could not therefore rely on clause 9. The case was remitted to the court of first instance to determine the amount of damages, if any, which the respondents had suffered. Differing views were expressed by the Lords of Appeal as to whether a hirer could obtain relief if he exercised his option under clause 6.

Mr. Elliott for the plaintiffs has conceded that in view of the decision in *Bridge v. Campbell Discount Co. Ltd.* the claim as originally framed cannot be sustained. He sought and obtained leave, Mr. W. R. Adams for the defendant not objecting, to amend the plaintiffs' statement of claim by adding an alternative claim for damages for breach of the agreement.

Mr. Elliott has referred me to the case of *Yeoman Credit Ltd. v. McLean*, [1962] 1 W.L.R. 131, reported as a note to *Overstone Ltd. v. Shipway*, [1961] 1 W.L.R. 117. In the former case Master JACOB assessed the damages in circumstances similar to the present case in the following way:—

“The plaintiffs claimed that their loss on this transaction amounted to £381. 14s. 9d., calculated on the following basis:

leaving aside the deposit of £75, the total sum which the plaintiffs would have received if the hire-purchase agreement had been fully performed would have been £803. 5s., and from this there was to be deducted the sum of £421. 10s. 3d., comprising the first instalment of £22. 6s. 3d., which had been paid, the arrears of hire rent of £89. 5s., for which judgment has been signed, and £310, the proceeds of sale of the motor-car. This calculation means that there would be included in the loss claimed by the plaintiffs the whole of their hire charges of £163. 5s. which the plaintiffs would only have received over the period of three years, without any allowance or discount being made for the accelerated receipt by the plaintiffs, within six months of the agreement, of nearly half of their capital outlay, *i.e.* £310 out of £640. Indeed, Mr. Lloyd-Eley, on behalf of the plaintiffs, contended that no such allowance or discount ought to be made, but on the contrary, in assessing the damages, the court ought to disregard entirely the recovery by the plaintiffs of part of their capital outlay long before the expiry of the period of the agreement.

In my view, this contention is wrong both in principle and on authority. It must be remembered that the hire charges of £163. 5s. represent the plaintiffs' profit on their capital outlay of £640, and both the capital and profit are repayable over the period of three years. These two factors, the capital outlay and the hire charges, are directly interconnected and related to each other—the one being a percentage of the other, and the two together making the aggregate of the hire-purchase price payable by instalments during the currency of the agreement. The accelerated receipt of £310, the proceeds of sale of the motor-car, reduces the amount of the capital laid out by the plaintiffs and this, in my view, has the necessary effect of increasing the amount of the plaintiffs' profit. It seems to me, therefore, that, in assessing the damages suffered by the plaintiffs as a result of the defendant's breach of the hire-purchase agreement, the court should make a reasonable allowance or discount for the accelerated receipt by the plaintiffs of part of their capital outlay, a sum which represents a reasonable percentage on the amount of the capital received in respect of the period between the date of its receipt and the date of the expiry of the agreement.

Moreover, the accelerated receipt of the proceeds of sale represents moneys in the hands of the plaintiffs which they would, in the ordinary course of their business as a finance company, put to use again to earn a further profit or interest; it is difficult to imagine or believe that the plaintiffs would allow these moneys in their hands, however small in amount, to remain idle.

If, therefore, in assessing the damages suffered by the plaintiffs, no reduction is to be made in the amount of their hire charges, the plaintiffs would, in effect, be receiving two amounts of profit or interest at the same time on the same sum of money. In my view, it would be wrong in principle to award damages

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which would produce this result, for the plaintiffs would be getting as damages more than the amount of the loss they have in fact suffered.”

And then—

“It seems to me, however, that the question which I have to decide is covered by authority. In *Interoffice Telephones Ltd. v. Robert Freeman & Co. Ltd.* the plaintiffs had let on hire to the defendants an office telephone installation for a period of 12 years. The defendants repudiated the contract after six years, and the plaintiffs claimed damages for breach of contract. In the Court of Appeal the counsel for the plaintiffs (Mr. Lloyd-Jones) conceded that in assessing the damages there should be a reasonable discount for receiving as a lump sum what would otherwise be receivable over six years. In his judgment, JENKINS, L.J., said: ‘Then off the net rental as ascertained some discount should be allowed by reason of the fact that the plaintiffs would be receiving in one sum an amount which, had the contract run its full length, they would have received only over a period of six years.’”

At p. 135, Master JACOB said —

“What discount should be made in the hire charges of the plaintiffs in this case? One approach, and it is by no means the only one, is to calculate the hire-charges on the amount received from the proceeds of sale from the date of its receipt until the expiry of the agreement at the percentage charged in the agreement. On this basis, in the present case, this approach would mean that one should calculate 8 to 9 per cent, per annum on £300 for a period of about 2½ years. But, in assessing damages, the function of the court is not to act as a mathematician but to endeavour to ascertain what is the amount of the loss suffered by the injured party, and so far as money can do it, to put the injured party in the same position as if the contract had been duly performed. Doing the best I can in all the circumstances, I think the hire charges in this case should be reduced by £65. Accordingly, I assess the damages in this case at £316. 14s. 9d.”

Master JACOB in fixing the discount calculated the hire charges on the amount received from the proceeds of sale from the date of its receipt until the date of the expiry of the agreement at the percentage charged in the agreement. In *Overstone's* case the Court of Appeal approved the method applied by Master JACOB in fixing the discount to be allowed. The Court of Appeal also endorsed Master JACOB'S approach that the function of the Court is not to act as mathematicians, but to endeavour to ascertain the amount of loss suffered by the injured party, and so far as money could do it to put the injured party in the same position as if the contract had been performed.

Mr. Elliott has submitted that the method employed by Master JACOB and approved by the Court of Appeal is unrealistic as no account is taken of the fact that the owners (the plaintiffs) cannot immedi-

ately turn over the money realised from the sale of the motor car. Mr. Elliott suggested that in fixing the discount, the hire charges should be calculated on the amount received from the proceeds of sale at the maximum percentage allowable by s. 12 (2) of the Civil Law Ordinance, Cap. 2, (which relates to the maximum rate of interest allowable in proceedings before the court where no rate of interest is specifically stated in the contract sued on), and by s. 13 (1) of the Law Reform (Miscellaneous Provisions) Ordinance, Cap. 4, (which relates to the power of the court to award interest on debts and damages). The maximum rate permitted by these provisions is 6 *per cent per annum*.

It seems to me that both Master JACOB and the Court of Appeal have recognised the fact that the money realised cannot immediately be turned over by their rejection of a purely mathematical approach to the fixing of the amount for discount. In both *Yeoman Credit Ltd. v. McLean* and *Overstone Ltd. v. Shipway* the amount fixed for discount is somewhat less than if a purely mathematical approach were taken. Where the owners are a finance company conducting hire-purchase transactions of this nature as their business or part of their business operations, I think that Master JACOB'S approach is the correct one. Where the owners do not conduct such transactions as part of their business operations I think that the figure of 6 per cent or the percentage stated in the agreement—whichever is the less—should be adopted.

The total sum the plaintiffs would have received if the agreement had been fully performed would have been \$2,855 (leaving aside the deposit of \$800 paid). Of this sum the plaintiffs have received four instalments paid totalling \$317.20 and the proceeds of the sale of the motor car, \$1,047.40. The hire charges, \$580, form a percentage of the capital outlay \$2,275, the two together forming the hire-purchase price of \$2,855 payable by instalments. Applying Master JACOB'S method of fixing the discount to be made because of the accelerated receipt of \$1,047.40, the assessment should be made in that sum at 8 to 9 per cent per annum for a period of about 2 years, the date of the receipt of the proceeds of sale being the 21st of August, 1961, and the date of the expiry of the agreement being the 27th of December, 1963. I think that the hire charges should be reduced by \$175.00. The damages should therefore be assessed as follows:—

| | |
|--|--------------------|
| Capital outlay | \$ 2,275.00 |
| Hire charges stated in the Agreement | <u>580.00</u> |
| | 2,855.00 |
| Less Instalments paid | <u>317.20</u> |
| | 2,537.80 |
| Less Proceeds of Sale..... | <u>1,047.40</u> |
| | 1,490.40 |
| Less Discount | <u>175.00</u> |
| | <u>\$ 1,315.40</u> |

OLDS DISCOUNT v. MARAJ

At the hearing reference was made to the case of *Yeoman Credit Ltd. v. Waragowski*, [1961] 1 W.L.R. 1124, where no discount was made in assessing damages. As was pointed out by Master JACOB in *Yeoman Credit Ltd. v. McLean* (at p. 134 of [1962] 1 W.L.R.), this point was not raised, argued nor dealt with by the Court of Appeal.

It is to be observed that in the instant case no question was raised by the hirer that the motor-car on delivery was in a defective state or not in good or proper working order and condition or not of merchantable quality. Where such a defence is raised consideration would have to be given to the judgment of Master JACOB in *Yeoman Credit Ltd. v. Coleman* (The Times, September 28, 1960) to which reference has been made in (1962) 25 M.L.R. 25 in an article by ALEC SAMUELS on "NEW ANGLES IN THE ETERNAL HIRE-PURCHASE TRIANGLE". In that article the question of mitigation of damages is discussed. That question has not been raised in the instant case. It has not been suggested that the plaintiffs could have mitigated their loss by re-hiring the motor car, therefore it is not necessary for me to consider whether *Bentworth Finance v. Jennings* (June 16, 1961) in the County Court [(1961) 6 C.L. June, 1961, para. 182] was correctly decided. In that case Judge LESLIE held that the finance company (the plaintiffs), though not a normal hiring concern, should mitigate their loss by re-hiring the car.

The sole issue in the present case is what discount should be given on the accelerated receipt of the proceeds of the sale of the motor car in the circumstances set out earlier in this judgment.

Judgment will be entered for the plaintiffs for \$1,315.40 with costs to be taxed.

Judgment for the plaintiffs.

Solicitor: *D. F. De Caires* (for the plaintiffs).

PHANG v. ATTORNEY GENERAL

[In the Full Court, on appeal from the decision of a judge in chambers (Bollers and Persaud, JJ., and Adams, J., (ag.)) November 17, 21, 1961, March 24, 1962.]

Tax—Pool betting business—Business carried on in British Guiana in respect of bets made here and abroad—Money received in respect of bets made abroad not remitted to British Guiana but taken into account in dividing winnings and fixing profits—Whether such monies received in British Guiana and taxable—Tax Ordinance, Cap. 298, s. 8A (4).

Section 8A (4) of the Tax Ordinance, Cap. 298, as amended by the Tax (Amendment) Ordinance, 1960, imposes a tax on “every receipt, in the course of any (pool betting) business, of money or money’s worth paid as a bet”. Subsection 2 provides that “a bet shall be deemed . . . to be made by way of pool betting if it is one of any number of bets made on the terms that the winnings of such of the persons making the bets as are winners . . . shall include an amount which is to be paid to . . . such of those persons as are winners (. . . whether the pool betting is promoted, or the bets or any of them made, in British Guiana or not) . . .”

Bets were made both in British Guiana and abroad in respect of a pool betting business ran by the appellants in the colony. Each pool was a single indivisible pool. A certain portion of the total bets collected in respect of each pool was paid to the winner or winners and the balance retained by the appellants for expenses and profits. In a construction summons brought by the respondent GORDON, J., held that the appellants were liable to the tax on monies collected abroad and taken into account by them for the purposes of their business even though not brought into the colony. (See 1961 L.R.B.G. 264). On appeal—

Held: (i) there is no *a priori* liability in any subject to pay any tax and, while the same canons of construction are applicable to all statutes, a taxing act must be approached with this caution in mind;

(ii) the word “receipt” in s. 8A (4) means nothing more than an actual receipt. Monies not brought into the colony were therefore not taxable;

(iii) there is no presumption that an ordinance has extra-territorial effect so as to make money or assets abroad taxable and there is nothing in the ordinance giving it such an effect.

Appeal allowed.

G. M. Farnum for the appellants.

M. Shahabuddeen, Crown Counsel, for the respondent.

Judgment of the Court: The appellants have moved this court to set aside the judgment of GORDON, J., dated 19th August, 1961, in which it has been ordered and directed that

- (a) the tax payable by virtue of s. 8 A (4) of the Tax Ordinance, Cap. 298, as amended by the Tax (Amendment) Ordinance, 1960, by the defendants in respect of their pool betting business is payable alike on bets made and collected by or on behalf of the defendants outside of the Colony of

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British Guiana as on bets made and collected by them within the Colony, irrespective of whether or not money or money's worth paid as bets outside of this Colony is actually remitted to and received by them within this Colony;

- (b) the money or money's worth collected by virtue of the said s. 8 A (4) as amended by the Tax (Amendment) Ordinance, 1960, by or on behalf of the defendants outside of this Colony as bets made outside of this Colony and taken into account by the defendants for the purpose of their said business and/or the purpose of determining the amount of the winnings in respect of the pool to which such bets relate, are received in the course of that business within the contemplation of the said provisions and are in consequence taxable thereunder, although not actually received by the defendants in this Colony.

Proceedings were commenced by the respondent who brought an originating summons under O. 42, r. 2, of the Rules of the Supreme Court for the determination of two questions arising under s. 8 A (4) of the Tax Ordinance, Cap. 298, as amended by the Tax (Amendment) Ordinance, 1960.

This originating summons was supported by an affidavit and the allegations made therein may be summarised as follows. The appellants are the proprietors of a pool betting business carried on in this colony under the name and style of the "Fabulous Four-Cast Pool". Before 4th May, 1960, the appellants paid tax under the provisions of s. 8 A (4) of the Tax Ordinance, Cap. 298, in respect of bets made both within and outside of the colony in the course of their business. Since that date the appellants collected bets outside of British Guiana in relation to their pools but paid no tax thereon. Each pool run by the "Fabulous Four-Cast Pool" is a single, indivisible pool. Such pools are based upon the forecasting of the first four places in given horseraces, a stated number of points is awarded for the correct forecast of each place and the winner or winners is or are the person or persons obtaining the highest number of points. A certain portion of the total bets collected in respect of each pool is paid to the winner or winners and the balance is retained by the appellants for expenses and profits.

The ground of appeal before this court is that the learned judge erred in law in holding that Cap. 298, as amended, renders the appellants liable to the tax levied by its provisions in respect of money or money's worth collected for the purposes of their business and taken into account by them for such purposes, but not received by them in the colony.

The crux of the problem is the meaning to be attached to the words "every receipt, in the course of any business, of money or money's worth paid as a bet" found in sub-s. (4) of s. 2 of the Tax (Amendment) Ordinance, 1960. This subsection enacts as follows:

“(4) There shall be raised, levied and collected on every receipt, in the course of any business, of money or money’s worth paid as a bet a tax equal to ten *per centum* of the gross amount of the receipt, and every person who is the proprietor of a business shall pay every Thursday to the district commissioner the tax on the gross amount of every such receipt in the course of the business during the week ending on the preceding Saturday:

Provided that where any Thursday is a public holiday, the proprietor shall make such payment to the district commissioner on the next following day not being itself a public holiday.”

To be intelligible, this subsection must be construed in conjunction with the previous subsections, which are reproduced thus:—

“8 A (1) In this section, unless the context otherwise requires—

“business” means any business the carrying on of which involves the receipt of money or money’s worth paid as bets;

“bet” means any bet by way of pool betting and includes any transaction which is, on the part of any person taking part therein, only not a bet by way of pool betting by reason of his not in fact making any stake;

“money or money’s worth paid as a bet” includes any payment of money or money’s worth—

- (a) as stake money;
- (b) in performance of any express or implied promise made by any person for the purpose of making a bet; or
- (c) for the purpose of entitling any person to make a bet,

whether such payment is made with a view to the same or any part thereof, or an amount equal thereto or to any part thereof, being sent or otherwise transferred out of British Guiana or not

(2) A bet shall be deemed, for the purposes of this section, to be made by way of pool betting if it is one of any number of bets made on terms that the winnings of such of the persons making the bets as are winners shall be, or be a share of, the stake money paid or agreed to be paid on the bets, or shall be or shall include an amount which is to be paid to, or is divisible in any proportions among, such of those persons as are winners (whether such amount is determined by reference to the stake money paid or agreed to be paid on the bets or not, and whether the pool betting is promoted, or the bets or any of them made, in British Guiana or not), where the bets are made by filling up and returning coupons or other printed or written forms or otherwise howsoever.

(3) Every person who occupies any set of premises, or part of a set of premises for the purposes of any business shall take

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out an annual licence for the set of premises, or part thereof, so occupied and shall pay for the licence the sum of two hundred and fifty dollars.”

Mr. Farnum, counsel for the appellants, has submitted that a local tax is imposed on local receipts unless the contrary is clearly shown. Mr. Shahabuddeen, counsel for the respondent, has contended that there is no presumption in law that taxation is confined to money received in the colony, alternatively, that as the appellants are in a position to pay winnings abroad from receipts obtained there and need not remit money from the colony for such a purpose, there is a constructive receipt by them here of bets placed with them abroad.

In *Cape Brandy Syndicate v. I.R.C.*, [1921] 1 K.B. 64, at p. 71, ROWLATT, J., laid down the following rule of strict construction in relation to statutes imposing pecuniary burdens:

“It simply means that in a Taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

There is no *a priori* liability in any subject to pay any tax and, while the same canons of construction are applicable to all statutes, a taxing act must be approached with this caution in mind.

Is a constructive receipt fairly and squarely hit by the Tax (Amendment) Ordinance, 1960? In *The Norwich Union Fire Insurance Company v. Magee* (1896), 73 L.T. 733, an English insurance company with branch offices in foreign countries sought to have exempted from assessment to income tax a sum of money representing part of the profits made abroad which, instead of being specifically remitted to England, were re-invested in American securities for the purpose of forming a reserve fund for the business of the company there. It was held that this sum of money was “in effect” received in England and liable to assessment.

Similarly in *Universal Life Assurance Society v. Bishop* (1899), 81 L.T. 422, interest and dividends received at the branches of a life assurance company in India and retained for use in India by the company in liquidating payments at those branches were held to have been constructively received by the company in the United Kingdom and assessable to income tax.

However, in *Gresham Life Assurance Society, Limited v. Bishop*, [1902] A.C. 287, the House of Lords held that interest arising from foreign securities and paid abroad was not “received in the United Kingdom,” within the meaning of the Income Tax Act, 1842, s. 100, Schedule D, Fourth Case, and was therefore not chargeable with income tax under that clause, unless it was remitted to the United Kingdom. The House of Lords was of the view that taking the

interest into account was not equivalent to a receipt in the United Kingdom.

Coming from so high an authority and being later than the two other cases already mentioned, this decision must be followed by this court. Lord BRAMPTON said at p. 294:

“If a ‘constructive’ receipt is the same thing as an actual receipt, I see no reason for the use of the word ‘constructive’ at all. If it means something differing from or short of an actual receipt, then it seems to me that a constructive receipt is not recognised by the statute, which, in using the word ‘received’ alone, must be taken to have used it having regard to its ordinary acceptance.”

Applying Lord BRAMPTON’S reasoning, this court construes the word “receipt” in sub-s. 4 of s. 8 A of the Tax Ordinance to mean nothing more than an actual receipt.

There is a further reason for rejecting the submission of counsel for the respondent on this point. There is a total absence of evidence to show that any part of the appellants’ receipts outside the colony has been transmitted to this colony or has been in any sense received here and then applied in payment of winnings or expenses. The appellants’ agents, who received bets abroad, still have the receipts there or have dealt with them without transferring them to the appellants here.

Counsel for the respondent cited the cases of *Liverpool & London & Globe Insurance Co. v. Bennett*, [1913] A.C. 610, and *Stoddart v. Hawke* (1902), 66 J.P. 67, but these were cases that were plainly covered by the dissimilar wording of the Income Tax Act, 1842, and the Betting Act, 1853, respectively.

The next and final question to be determined by this court is whether receipts outside of British Guiana and remaining abroad fall within the scope of the section? In the first place there is no express mention in the Ordinance that tax is collectible on receipts of money or money’s worth paid as bets outside the colony. While we agree with the submission of counsel for the respondent that the Income Tax Ordinance, Cap. 299, and the Estate Duty Ordinance, Cap. 301, are not *in pari materia* with the Tax Ordinance, there is no specific mention in the last named Ordinance as, for example, in s. 5 of Cap. 299, of such words as “whether received in the colony or not.”

In arriving at his decision the learned judge in chambers said:

“It is observed from sub-s. 2 that for purposes of the section the definition of ‘a bet’ is extremely wide, embracing in its scope not only stake money whether paid in British Guiana or not, but also where the effect of a bet is carried out by the filling up and returning of coupons or other written forms, or otherwise howsoever.”

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But has the definition of a bet such far-reaching consequences as the final conclusions of the judgment? The words “in British Guiana or not” appear in parenthesis in sub-s. 2 and merely refer to the division of the winnings, whether the bets are made here or not. If the learned judge’s reasoning is correct, then a foreign pool betting company with a branch office here, which receives for any particular week all its bets abroad without transmitting any part of the money to this country, will be liable to the ten *per centum* tax on its gross takings.

There is no presumption that an ordinance has extraterritorial effect so as to make money or assets abroad taxable. Chapter 298 is an ordinance imposing pecuniary burdens and what is not clearly and unambiguously taxed is excluded from its scope.

The definition of “money or money’s worth paid as a bet” is more in point. It specifically includes any payment of money or money’s worth, whether such payment is made with a view to the same or any part thereof, or an amount equal thereto or any part thereof, being sent or otherwise transferred out of British Guiana or not. It omits any reference to the case of money that is not only paid but retained abroad. This omission is significant.

Further, the tax is payable to the district commissioner, which fact tends to put a local or even district complexion on the tax.

A strict construction of sub-s. 4 does not favour the view of the judge in chambers. Even if the sub-s. is ambiguous, the construction more favourable to the appellants will be preferred, in accordance with the view expressed by Lord THANKERTON in *I.R.C. v. Ross & Coulter & others*, [1948] 1 All E.R. 616, at p. 625.

For these reasons this appeal is allowed, the order of the learned judge is set aside, the replies to the questions asked in the respondent’s amended summons are both in the negative and by consent the parties shall bear their own costs of the appeal.

Appeal allowed.

Solicitors: *A. G. King* (for the appellants); *S. M. A. Nasir* (for the respondent).

BUDHU v. ALLEN

[Federal Supreme Court (Lewis, Marnan and Jackson, JJ.), March 26, 1962]

Appeal—Full Court—Power to substitute different charge and conviction—Defendant had no opportunity to answer substituted charge—Validity of substituted charge and conviction—Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s. 94.

Criminal law—Sending or delivering an obscene letter—Distinct offences—Whether competent to substitute one charge for the other after limitation period—Summary Jurisdiction (Offences) Ordinances, Cap. 14, s. 141 (c)—Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s. 6.

Criminal law—Obscene matter—Tendency to deprave—Proof of actual depravement not necessary.

Section 141 (c) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14, makes it an offence to send or deliver any obscene writing. The appellant was charged with the offence of sending an obscene writing to another person. After she pleaded not guilty the magistrate, at the request of the prosecutor, amended the complaint by substituting the offence of delivering an obscene letter. The amendment was made more than six months after the commission of the alleged offence, but no objection was taken on this ground, and the trial proceeded without any further plea being taken. The evidence disclosed that the letter was in fact delivered by a postman, but the appellant was nevertheless convicted of the offence of delivering it. On appeal, the Full Court held that the evidence did not support the conviction for delivering an obscene writing and substituted a charge and a conviction for sending an obscene writing. (See p. 34 herein). On appeal from the Full Court—

Held: (i) if the writing is offensive to modesty or decency or expresses or suggests unchaste or lustful ideas, or is impure, indecent or lewd, it is not necessary for the prosecution to prove that the person who received it was in fact likely to be depraved by it;

(ii) section 141 (c) of Cap. 14 creates two distinct offences of sending or delivering an obscene writing;

(iii) *per* MARNAN, J., the amendment made by the magistrate had the effect of placing the appellant on a new charge outside of the limitation period, but as the appellant did not object at the trial to the jurisdiction of the magistrate to do so, the point was not open to her on appeal;

(iv) the fact that the appellant was not called upon to plead to the substituted charge in the magistrate's court was irrelevant since she agreed to go on to answer the new complaint and the case proceeded on the basis that her plea of not guilty applied to the new complaint;

(v) if a section creates two or more offences and one is charged in a complaint but the evidence discloses another, under s. 34 of Cap. 15 the magistrate may give leave to the prosecutor to amend his complaint by substituting the offence proved and may himself call upon the defendant to answer the charge which in his opinion the evidence discloses, but the section does not empower the magistrate to convict the defendant of the offence so substituted without first giving him an opportunity to answer the new charge except in cases where the law allows a conviction to be entered for a lesser offence proved by the evidence on a charge for an aggravated offence;

(vi) the order of the Full Court had the effect of convicting the appellant on a charge on which she had not been heard and was therefore bad.

Appeal allowed.

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H. D. Hoyte for the appellant.

J. C. Gonsalves-Sabola, Crown Counsel, for the respondent.

LEWIS, J.: The defendant-appellant was charged by complaint without oath with the offence of sending an obscene writing, contrary to s. 141 (c) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14, the particulars being that on 3rd December, 1960, at No. 40 Village, West Coast Berbice, in the Berbice Judicial District, she sent to Christina Mohan a letter containing an obscene writing. To this charge she pleaded not guilty on 23rd March, 1961, and the case was thereupon adjourned. When the case came up again for hearing on 22nd June, 1961, the prosecutor applied for an amendment of the complaint to substitute the offence of delivering an obscene letter on 2nd December, 1960, an offence created by the same section. Counsel for defendant objected to this amendment on the ground that it created a new charge and that the court must hear and determine the charge stated in the complaint. His objection was overruled and the amendment allowed. Counsel for defendant was offered an adjournment but declined it stating that the defendant was not prejudiced. No further plea was taken, and the case proceeded, witnesses for the prosecution being examined by the defence. At the close of the case for the prosecution counsel for defendant made a no case submission on the grounds, *inter alia*, that delivery had not been proved, and that the letter was not obscene within the test laid down in *R. v. Hicklin*, (1869) 11 Cox C.C. 19. The magistrate overruled this submission and called on the defendant for her defence. Counsel for defendant closed the case for the defendant and relied on his submissions. The defendant was convicted and fined \$35, or two months' imprisonment and costs. On appeal, the Full Court held that the evidence did not support the conviction for delivering an obscene writing, and substituted a conviction for sending an obscene writing.

Against this order the defendant appeals on three main grounds.

First, it is said that the conviction was bad because the defendant appellant was not called upon to plead after the complaint was amended. The answer to that is that the defendant agreed to go on and to answer the new complaint and the case proceeded on the basis that her plea of not guilty applied to the new complaint. The merits of the case were gone into and she cannot now complain of the irregularity in the procedure. See *Turner v. Postmaster General* (1864), 5 B. & S. 756.

Secondly, counsel for defendant submits that the letter is not obscene within the test laid down in *R. v. Hicklin* (*supra*) and approved in *R. v. Reiter*, [1954] 1 All E.R. 741, namely:—

“whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”

Christina Mohan, he says, to whom the letter was addressed, was not likely to be depraved or corrupted. The learned magistrate held that it

fulfilled this test. The Full Court was of opinion that this test “is applicable to the publishing, selling or exhibiting of obscene matter tending to corrupt public morals which is indictable and not to the summary offence of sending or delivering an obscene writing.” They considered that the meaning to be ascribed is the ordinary meaning, and, adopting the definition given in the SHORTER OXFORD ENGLISH DICTIONARY, held that “an obscene writing is one which is either offensive to decency or modesty and expresses or suggests lewd thoughts; or offensive to the sense or the mind and is disgusting or filthy in expression.” They had no difficulty in finding that the letter in question fell within this definition.

I am not convinced that there is any substantial difference between the test laid down in *R. v. Hicklin* and the first part of the definition adopted by the Full Court. I think that a writing which is offensive to decency or modesty and expresses or suggests lewd thoughts, tends to deprave and corrupt those whose minds are open to such immoral influences. I may observe that in *Hicklin*, COCKBURN, C.J., after stating the test referred to above, added:—

“Now with regard to this work it is quite certain that it would suggest to the minds of the young of either sex, or even to persons of more advanced years, thoughts of a most impure or libidinous character.”

In BURROW’S WORDS AND PHRASES JUDICIALLY DEFINED the learned author, after giving the definition of “obscene” as stated in *Hicklin*, cites the following passage from the judgment of MACLAREN, J.A., in *R. v. Beaver* (1905), 9 O.L.R. 418, at pp. 424, 425:

“The word ‘obscene’ . . . was originally used to describe anything disgusting, repulsive, filthy, or foul. This use of the word is now said to be somewhat archaic or poetic; and it is ordinarily restricted to something offensive to modesty or decency, or expressing or suggesting unchaste or lustful ideas, or being impure, indecent, or lewd.”

In my opinion the test is an objective one; if the writing is of the character described above it is not necessary for the prosecution to prove that Christina Mohan was in fact a person likely to be depraved by it.

I do not think that the distinction drawn by the Full Court between an indictable and a summary offence in laying down the test of obscenity is a valid one. It may be that the second element in the test laid down in *Hicklin*, “and into whose hands a publication of this sort may fall” is more properly applicable to publications—and *Hicklin’s* case dealt with the offence of publishing an obscene book—but there may be cases under the local Ordinance in which it may be pertinent to consider this element. Thus, I cannot think that a doctor who sent a confidential report on the medical aspect of a patient’s condition to a colleague for an opinion could be held liable under s. 141 (c) even though the report might contain matter which if it

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were published generally might on a strict view be considered obscene. But no such consideration arises in the present case. There is no mutuality of interest of a scientific nature between the sender and the receiver of the letter. The court has read the letter, as it must do for the purpose of deciding whether the magistrate could reasonably come to the conclusion that it was obscene, and there is no doubt that it satisfies the test of obscenity, whether that test be as laid down in *Hicklin* or as laid down by the Full Court, in that it would suggest lewd thoughts even to a person of advanced age whose mind is open to such immoral influences. In my opinion, therefore, this ground of appeal fails.

The third ground of appeal is that the Full Court erred in substituting a conviction for "sending" for that for "delivering" an obscene writing entered by the magistrate. The Full Court held that the evidence did not support "delivering" and disclosed the offence of "sending"; that under s. 94 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, (which relates to variance between the complaint and the evidence adduced), the magistrate had power to amend the complaint to allege the offence of sending, having regard to the fact that both offences are created by the same section, and that he ought to have done so; and that under s. 28 (a) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, which empowers the Full Court to make any order which the magistrate ought to have made, they were empowered to amend the complaint and substitute a conviction for "sending" an obscene writing.

It is true that if a section creates two or more offences and one is charged in a complaint but the evidence discloses another the magistrate may give leave to the prosecutor to amend his complaint by substituting the offence proved, or may himself call on the defendant to answer the charge which in his opinion the evidence discloses; but s. 94 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, does not empower him to convict a defendant of the offence so substituted without first giving him an opportunity to answer the new charge. I do not of course refer to cases where the law allows a conviction to be entered for a lesser offence proved by the evidence on a charge for an aggravated offence. Moreover, where the prosecution has expressly elected to rely upon one of the offences created by the section and has abandoned the other or others, and the evidence does not support the offence so relied upon, the defendant cannot properly be convicted of any of the other offences. To convict after such an election would be contrary to natural justice, for he has been put off his guard and has not had an opportunity to defend himself with respect to the other offences created by the section. The situation in such a case is similar to that where one of two or more counts in an indictment has been abandoned, as in *R. v. Day and Cox* (1870), 11 Cox C.C. 505. In that case the prisoners were charged under 9 Geo. 4, c. 69, s. 2, with having assaulted with a weapon and wounded a gamekeeper who was arresting them for an offence against the Game Laws, and on other counts with common assault. At the close of the case for the prosecution counsel for the prosecution abandoned the counts for common assault and elected to stand on the first count. The jury

returned a verdict of guilty of night poaching and common assault. It was held by the Court for the Consideration of Crown Cases Reserved that the counts for common assault having been withdrawn from the jury the prisoners ought to be acquitted.

In the instant case the prosecution having at first charged "sending" abandoned this offence and elected to rely on the offence of "delivering". The case was defended on this basis. Having regard to the fact that the section itself creates a distinction between "sending" and "delivering", I agree with the Full Court that the evidence did not support a conviction for "delivering." In these circumstances I am clearly of opinion that it would have been improper for the magistrate to have convicted the defendant of the offence of "sending" an obscene writing, and that the Full Court erred in substituting such a conviction.

For these reasons the appeal must be allowed, the conviction quashed, and the sentence set aside.

MARNAN, J.: The appellant was convicted of an offence under s. 141 (c) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14. That sub-section creates two offences which are distinct, namely, sending to any person any obscene writing, and delivering to any person any obscene writing. The appellant was charged with the former offence on the 23rd March, 1961, and pleaded not guilty. The case was then adjourned to the 22nd June, before any evidence was given. On the 22nd June the complaint was amended to allege the latter offence. The 22nd June was more than six months after the date of commission of the alleged offence, and insofar as a new offence was then preferred, the complaint was out of time by virtue of s. 6 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15. The amendment, however, was not objected to on that particular ground and counsel for the appellant waived his right to an adjournment. Indeed, the point as to time was not taken until the appeal reached this court. In my view the objection, if taken, would have gone to the jurisdiction of the magistrate and the point is no longer open to the appellant by virtue of s. 93 of Cap. 15 which provides:

"It shall not be competent for any person to impeach, in any proceeding or in any other manner whatever, any order made by the court on the hearing of a complaint on the ground that the court had no jurisdiction to make the order, unless that objection was taken on the hearing of the complaint or at the time of the making of the order."

The next question is what was the effect of amending the complaint. There was only one complaint, and by s. 7 (3) of Cap. 15 a complaint can be for one offence only. Had both offences been included in the complaint the prosecution should have been required to elect on which charge to proceed, and to amend by striking out the other charge (*Edwards v. Jones*, [1947] 1 K.B. 659). In my opinion the effect of the amendment in fact made was to strike out the charge of sending altogether.

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In the event, the appellant was convicted of delivering the letter, on a complaint which charged delivering, and that conviction was duly recorded. The next question is whether that conviction can be supported having regard to the evidence. The judges of the Full Court took the view that it could not, and I agree with them. No doubt there are cases, such as cases dealing with the sale of goods, where the concept of delivery may include both sending and delivering. But in s. 141 (c) of Cap. 14 the words “sends” and “delivers” are used in contradistinction, and the evidence in this case was that the appellant sent the letter by posting it, whereas it was delivered by a postman. This matter was considered in the old case of *R. v. Hammond*. (Leach 444, 163 E.R. 324) where it was held that evidence that the prisoner delivered a threatening letter would not support an indictment for sending it. In my view it follows that evidence of sending such a letter will not support the different charge of delivering the same letter, within the meaning of s. 141 (c).

The Full Court apparently considered that, having heard the evidence, the magistrate should have exercised his powers under s. 94 of Cap. 15 by re-amending the complaint to charge sending. But if I am right that the effect of the first amendment was to strike out the charge of sending, such a further amendment by the court would have been tantamount to preferring a new charge out of time, and in my opinion it could not properly have been made. The magistrate must be taken to be cognisant of s. 6 of Cap. 15 which is peremptory in its terms.

It is of course arguable that by virtue of s. 19 of Cap. 14 the appellant was in any event guilty of delivering, as having caused or procured delivery by the postman. But that was not the case the appellant was called upon to meet. She had admitted to the policeman posting the envelope, but denied that the envelope contained the obscene letter. Had the case been presented on the basis that she had procured delivery it would have been important for her counsel to challenge the evidence of the handwriting expert, which was directed to proving authorship of the letter. But, since she was charged with delivering, and the charge of sending had been struck out, her counsel not unnaturally took the view that that evidence was irrelevant, and rested that part of his defence on the evidence that it was the postman and not the appellant who had delivered the letter. It is therefore not open to the Crown to seek to rely on s. 19 at this stage. (Compare *Atterton v. Brown*, [1945] 1 K.B. 122).

This appeal is against the order of the Full Court that both the complaint and the conviction be amended by the deletion of the word “delivered” and the substitution therefor of the word “sent.” The effect of this order, if valid, would be that the appellant would stand convicted of an offence for which she had not been tried. In *Atterton v. Brown* HUMPHREYS, J., said in the course of his judgment

“Section 1 of the Summary Jurisdiction Act, 1848, which may be said to have created courts of summary jurisdiction as we know them, clearly indicates that technical objections to informations are not to prevail, even though they touch the substance of the

charge. There have been, however, many decisions under the section which show that the section does not operate to prevent an objection being effective where the error alleged is fundamental, such as for instance, where one offence is charged in the information and a different offence is found in the conviction recorded by the justices, even though the two matters may seem to be very much the same thing."

That is a statement of a principle so well known that, when applied to this case, seems to me to dispose of it. But there is a further point. In ordering that the complaint and conviction be amended, the Full Court purported to exercise its powers under s. 28 (a) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, which gives to the Full Court power to make any order which the magistrate ought to have made. If the suggestion is that the magistrate ought to have re-amended the complaint to fit the evidence, I hold that he had no power to do so, because of the time limit. But I do not think that the Word "order" in s. 28 (a) of Cap. 17 refers to procedural orders. Section 2 of the Ordinance, where the word "decision" is defined, lends support to the view that "order" in s. 28 (a) means the final adjudication. In this case the order of the Full Court purported to amend both the complaint and the conviction in the magistrate's court, and thereby to record a conviction against the appellant for an offence for which, as already observed, she had not been tried.

In *Meek v. Powell*, [1952] 1 K.B. 164, it was held that quarter sessions had power to amend an information only in cases where a court of summary jurisdiction had that power, and the latter court had no power to do so when once it had recorded a conviction. The powers of quarter sessions on appeal from a magistrate's court are limited by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933, which is in such similar terms to s. 28 of Cap. 17 that I think the same principles apply so far as this case is concerned. The Full Court accepted that it could not amend the appellant's conviction without also amending the complaint, and in my opinion, the conviction having been recorded, it had no power to do so. To hold otherwise would involve the proposition that an appellate court, having reviewed the evidence given in an inferior court, could substitute the charge and conviction which probably ought to have been made on the basis of such evidence for the charge in fact made and the conviction recorded.

I would therefore allow this appeal and order that the appellant's conviction be quashed. I regret that the effect of ss. 26 (1) and 34 of the Federal Supreme Court (Appeals) Ordinance, 1958, is to disable this court from making an order for costs.

JACKSON, J.: I have had the advantage of reading the judgments beforehand. I agree that the appeal should be allowed, the conviction quashed, and the sentence set aside.

Appeal allowed.

BROTHERSON v. BAKKER AND ANOTHER

[Supreme Court—In Chambers (Adams, J., (ag.)) February 27, March 13, 30, 1962.]

Garnishee proceedings—Money standing to credit of judgment debtor with clerk of court—Whether garnishee order can be made against clerk of court.

Pending the determination of certain interpleader proceedings between the judgment debtor and the judgment creditor, the former had deposited money with the clerk of court as security. The interpleader proceedings having terminated in favour of the judgment debtor, the judgment creditor instituted garnishee proceedings against the clerk of court to attach the deposit to answer a judgment recovered against the judgment debtor by the judgment creditor.

Held: there was no attachable debt and the clerk of court could not be subjected to garnishee proceedings.

Application dismissed.

Abraham Vanier for the judgment-creditor.

G. M. Farnum for the judgment-debtor.

The garnishee appeared in person.

ADAMS, J. (ag.): The judgment creditor instituted garnishee proceedings and obtained an order *nisi* before a judge in chambers to the effect that all debts owing or accruing due from C. E. Sukra, clerk of court, Georgetown Judicial District, to the judgment debtor in the sum of \$465.54 be attached to answer a judgment recovered against the said judgment debtor by the judgment creditor in the Supreme Court of British Guiana on the 4th day of May, 1960.

The judgment creditor applied to me to make the order absolute and relied on his affidavit in support of summons. According to this affidavit the garnishee was indebted to the judgment debtor in the sum of \$465.54, which was the amount of security deposited by the judgment debtor in the magistrate's court pending the determination of interpleader proceedings between the judgment debtor as plaintiff and the judgment creditor as defendant. These proceedings terminated in the judgment debtor's favour as a result of a judgment by a magistrate of the Georgetown Judicial District and the amount of his deposit became due, owing and repayable to him.

Mr. G. M. Farnum, counsel for the judgment debtor, submitted that money lodged in court was not a debt personally owed by the clerk of court to the judgment debtor, because the clerk of court was by ordinance under the control of the magistrate, the money had been put into the Georgetown Judicial District deposit account and the clerk of court was authorised merely to operate the account.

On behalf of the judgment creditor it was submitted that the sum of \$465.54 was a deposit for a specific purpose and that money which was deposited with a third party for a particular purpose that failed was attachable.

My attention was also drawn by the judgment creditor to the provisions of r. 14 (1) of the Summary Jurisdiction (Civil Procedure) Rules, Part 21. In my view this reference is irrelevant because the particular rule deals with garnishee proceedings in a court of summary jurisdiction and even before a magistrate the judgment creditor is under an obligation to establish the relationship of creditor and debtor between the judgment debtor and the garnishee.

My attention was also attracted on behalf of the judgment creditor to the case of *Brereton v. Edwards*, [1888] 21 Q.B.D. 488, in which it was held that the proper method of obtaining money standing in court to the credit of the judgment debtor was by a charging order. The application, however, before me was not for a charging order but for attachment of debts.

In the case of *Dolphin v. Layton* (1879), 4 C.P.D. 131, it was held on appeal that the proceeds of a judgment paid into the county court were not attachable by means of a garnishee summons at the suit of a third person as a “debt” due from the Registrar of the court to the judgment debtor. Lord COLERIDGE, C.J., in giving his judgment said:—

“I am clearly of opinion that money in the hands of the Registrar as an officer of the County Court is not subject to process of attachment.”

In the case of *Spence v. Coleman* (1901), 84 L.T.R. 703, COLLINS, L.J., said at page 705:—

“A number of cases have been cited which I need not go through in detail. The effect of them is that where some officer of the court is under a duty to the court to distribute money which is in his hands in a particular way, there is no relation of debtor and creditor established between him and the person entitled to all or some part of the money. He is an officer of the court and his duty is to the court and no debt is created which can be the subject matter of attachment by a garnishee order. That is the principle of those cases, and it has been applied to liquidators, trustees in bankruptcy and to Registrars of County Courts . . .”

STERLING, L.J., another member of the court stated:—

“I am of the same opinion; the point is a very short one—namely, that in order that Order 45, r. 1, may apply, it is necessary that the existence of the relation of debtor and creditor should be established as between the judgment debtor and the third person.”

In the circumstances of this case I upheld Mr. Farnum’s submissions that there was no attachable debt and that the clerk of court could not be subjected to garnishee proceedings. I therefore dismissed the application and discharged the order *nisi*. The judgment creditor was ordered to pay the judgment debtor costs in the agreed sum of \$45.00.

Application dismissed.

CENTRAL HOUSING AND PLANNING AUTHORITY v. GRIFFITH

[In the Full Court, on appeal from the magistrate's court for the Georgetown Judicial District (Luckhoo, C.J., and Miller, J.) April 6, 1962]

Landlord and tenant—Tenancy not subject to Rent Restriction laws—Tenancy duly determined by notice to quit—Whether magistrate has discretion to refuse possession—Landlord and Tenant Ordinance, Cap. 185, s. 46 (1).

The respondent rented a dwelling house from the appellants under s. 44 of the Housing Ordinance, Cap. 122. By virtue of s. 44 (7) of that Ordinance the Rent Restriction Ordinance, Cap. 186, did not apply to the tenancy. The tenancy agreement provided that the tenancy might be determined by either party at any time serving upon the other 14 days' notice in writing of intention to terminate the tenancy. The appellants duly determined the tenancy by notice under this provision, but on application for possession the magistrate refused to make an order on the ground that he had a discretion in the matter by virtue of s. 46 (1) of the Landlord and Tenant Ordinance, Cap. 185, which provides that "if the former tenant . . . does not show to the satisfaction of the magistrate reasonable cause why possession should not be delivered up . . . the magistrate, on proof of the holding and of the end or determination of the tenancy and the time and manner thereof . . . may order that possession . . . be delivered up . . ." On appeal,

Held: "reasonable cause" in s. 46 (1) of Cap. 185 means some cause which gives a right in law for the tenant to remain. Hardship is not such a right.

Appeal allowed.

M. Shahabuddeen, Crown Counsel, for the appellants.

T. Corrica, and *W. McE. Williams* for the respondent.

Reasons for Decision: On the 6th of April, 1962, we allowed this appeal. We now proceed to give our reasons therefor.

On the 1st of September, 1954, the appellants (hereinafter referred to as the "Housing Authority") let to the respondent, Alma Griffith, as a dwelling house the building and curtilage at 135 Laing Avenue, La Penitence, East Bank, Demerara, at a monthly rental of \$8.00.

The Housing Authority and the respondent on that day signed a written agreement of tenancy in the form contained in the Schedule to the Housing (Form of Letting Agreement) Regulations, 1948 (No. 15). One of the terms of the agreement is that the tenancy may be terminated by either party to the agreement at any time serving upon the other 14 days' notice in writing of intention to terminate the tenancy. By a notice to quit dated the 27th of July, 1961, the Housing Authority determined the tenancy with effect from 1st September, 1961. The respondent having failed to deliver up possession by that date the Housing Authority brought proceedings before a magistrate of the Georgetown Judicial District for an order for possession. The magistrate held that the provisions of s. 46 (1) of the Landlord and Tenant Ordinance, Cap. 185, gave him a discretion as to whether or not he should make an order for possession and he dismissed the Housing Authority's application.

It is from the magistrate's decision that this appeal was brought.

The premises in question form part of a housing estate built under the Housing Ordinance, Cap. 182, in order to make provision with respect to the housing of persons of the working class. Such premises are let to tenants under the provisions of s. 44 of the Housing Ordinance. By virtue of s. 44 (7) of the Housing Ordinance, the provisions of the Rent Restriction Ordinance, Cap. 186, and of any order made thereunder do not apply to any premises let under the Housing Ordinance.

It was conceded by counsel for the respondent that the provisions of the Rent Restriction Ordinance relating to the recovery of possession were not applicable to the premises rented to the respondent. Counsel contended, however, that the magistrate has a discretion as to whether an order for possession should be made, that discretion being either an inherent one or one given the magistrate by s. 46 (1) of the Landlord and Tenant Ordinance, Cap. 185. A magistrate in British Guiana is purely a creature of statute and derives his powers from statute. He has no inherent discretion of the kind contended for. Section 46 (1) of the Landlord and Tenant Ordinance provides that in proceedings for possession of premises after the termination or determination of the tenancy where the tenancy is at a rate not exceeding \$1,200 per year—

“if the former tenant or occupier does not appear in accordance with the summons, or appears but does not show to the satisfaction of the magistrate reasonable cause why possession should not be delivered up, and still refuses or neglects to deliver up the possession of the premises to the former landlord or his agent, the magistrate, on proof of the holding and of the end or determination of the tenancy and the time and manner thereof *may* order that possession of the land or buildings be delivered up by the former tenant or occupier as well as by all persons who were theretofore on the land or in the buildings through or under the former tenant;”

Counsel for the respondent contended that the magistrate is thereby empowered to make an order for possession only if the tenant fails to show reasonable cause why possession should not be given; where hardship on the tenant is shown by the tenant that is reasonable cause and the magistrate would refuse to make the order for possession. It was held by the House of Lords in *Shelley v. London County Council*, [1949] A.C. 56, that “reasonable cause” in a comparable provision (section 1) in the Small Tenements Recovery Act, 1848, means some cause which gives a right in law for the tenant to remain. Hardship to a tenant is not a right in law for the tenant to remain. Reference was also made by counsel to the inclusion of the words “under the provisions of this Act” after the words “show . . . reasonable cause why possession should not be given up” in the 1848 Act. In s. 46 (1) of the Ordinance the words “under the provisions of this Ordinance” do not appear after the words “show . . . reasonable cause why possession should not be delivered up.” But as

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Lord GREENE, M.R., pointed out (in the Court of Appeal in *Shelley's* case) the introduction of the words "under the provisions of the Act" refers not to the substance of a claim but to the procedure. Lord ATHWART in that case in the House of Lords said that having regard to the use of those words the only discretion given the justices under s. 1 of the Act is to decline jurisdiction under the Act when for good reason they are satisfied that the case ought not to be heard under the Act at all. The omission of comparable words from s. 46 (1) of the Ordinance does not have the effect of conferring on a magistrate a discretion to refuse to make the order for possession on the ground of hardship in the tenant.

In the present case the respondent did not make any attempt to show any legal right in himself to remain in possession of the premises. She, therefore, failed to give any evidence of reasonable cause why possession should not be delivered up. There was nothing upon which in the circumstances the magistrate could have exercised a discretion. He was therefore bound to make the order for possession.

The magistrate appeared to take the view that the use of the word "may" gives merely an enabling or discretionary power. It should be pointed out, however, that enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right.

One other matter remains to be dealt with. The Housing Authority's agent had before the commencement of the hearing stated in answer to the magistrate that the ground of the application for possession was that the respondent was a non-occupying tenant. It was not necessary for the Housing Authority to state any ground for the bringing of the proceedings and in fact the Housing Authority's agent did not attempt to lead any evidence in that regard. The reasons why no ground for possession need be stated or proved in such proceedings (brought under the Housing Ordinance, Cap. 182), are the same as those which relate to similar proceedings under the Housing Act, 1936, and are fully set out in the judgment of Lord GREENE, M.R., in *Shelley's* case and need not be repeated here.

For these reasons we allowed the appeal and made an order for possession against the respondent.

Appeal allowed.

SUKHU AND OTHERS v. DRAINAGE AND IRRIGATION BOARD

[Supreme Court (Luckhoo, C.J.) December 21, 1961, January 19, 20, February 5, 12, 13, April 11, 1962.]

Crown servant—Drainage and Irrigation Board—Whether a crown servant—Whether suable in tort—Drainage and Irrigation Ordinance, Cap. 192.

Statutory body—Drainage and Irrigation Board—Omission to provide adequate drainage facilities—Whether breach of statutory duty—Whether compensation payable—Drainage and Irrigation Ordinance, Cap. 192, s. 27(b).

By an order made by the Governor-in-Council under the Drainage and Irrigation Ordinance, Cap. 192, the defendant Board was directed to carry out certain drainage works in the vicinity of the plaintiffs' lands. In the course of executing the works the Board closed a cut in a dam through which the plaintiffs' lands used to drain, but without providing adequate alternative means of drainage. The plaintiffs sued for damages, alternatively for compensation, in respect of loss resulting to their cultivations. It was argued that the Board was a Crown servant and therefore not suable in tort, alternatively that the Board had a power but no duty to execute the works and was therefore not liable unless the plaintiffs could show that their position was worsened by the execution of the works, and that compensation was not payable in respect of acts of omission or non-feasance.

Held: (i) the Board was not a crown servant and was suable in tort; (ii) the Board was under a duty to carry out the works and was liable for any damages resulting from its failure to do so;

(iii) a claim for the payment of compensation under s. 27 (b) of Cap. 192 cannot be founded on an omission or non-feasance.

Judgment for the plaintiffs.

J. O. F. Haynes, Q.C., J. N. Singh with him, for the plaintiffs.

M. Shahabuddeen, Crown Counsel, for the defendants.

LUCKHOO, C.J.: The plaintiff, Sukhu, is the owner of a parcel of land situate at Tenez Ferme, Canal No. 1, West Bank, Demerara. He cultivates a provision farm thereon together with his wife Somaria, the third plaintiff. His son, the second-named plaintiff, Harry Persaud, also cultivates a provision farm thereon.

The plaintiffs claim damages against, alternatively, compensation from, the defendants, a statutory Board, in respect of loss they have suffered from damage done by the flooding of their cultivations in December, 1959. They allege that the flooding was due to the faulty construction of certain drainage works undertaken by the defendants at the direction of the Governor in Council under the provisions of the Drainage and Irrigation Ordinance, Cap. 192.

It was stated by the plaintiffs' counsel in his opening remarks that in 1950 Government embarked upon what became known as the Boerasirie Project and later as the Bonasika Project at a cost of some twelve and one-half million dollars in order to make available for

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cultivation about 140,000 acres of land in that area. The contractors to the Drainage and Irrigation Board, Sir Lindsay Parkinson Co., were employed to carry out the Project. The Project was completed during 1959. The actual works under consideration in this action were completed a few months before October, 1959.

Prior to the carrying out of those works Sukhu's land drained into a canal which ran parallel to the public road and was situate between the southern extremity of the land and the public road. At the northern extremity of the land was the "A" line canal—at that time an irrigation canal. As part of the Project a trench running east to west was dug across Sukhu's land dividing it into two parts. This trench, called the Centre Line trench, became Sukhu's irrigation trench. Also, as part of the Project were constructed a dam called the "A" line dam and a feeder or sucker trench running from east to west at the northern extremity of Sukhu's land. The dam divides the feeder trench on the south from the "A" line canal on the north. The feeder trench is immediately south of the dam. The dam, feeder trench and the "A" line canal run for some considerable distance to the east and west of Sukhu's land. The "A" line canal empties into the Demerara River through a sluice situate at the junction of Goed Fortuin and Longden Park.

After the construction of the Centre Line trench the "A" line canal became a drainage canal and Sukhu was instructed by the Board's agents to drain his lands by way of the "A" line canal. To effect drainage of his lands Sukhu caused cross drains to be dug on his land. The cross drains led to trenches at the eastern and western extremities of his land. Those trenches emptied into the feeder trench which was about 3' deep and its width varied along its 3½ to 4 miles length from about 3' at one end to about 7' at the other end. Box kokers were put connecting the "A" line canal with the feeder trench across the dam. In the vicinity of Sukhu's land there were two box kokers 3' x 3' each at a distance of about 400 rods. Through those box kokers an area of at least 400 rods x 450 rods had to be drained. While the work was proceeding in 1957 Sukhu sought and obtained the Board's permission to cut the dam at his own expense at a point opposite his land in order to effect the drainage of his land *via* the feeder trench into the "A" line canal. It was during the middle of 1959 that the Board caused box kokers to be put connecting the feeder trench and the "A" line canal. Waters from the lands south of the feeder trench had first to come into that trench and by way of box kokers flowed into the "A" line canal for eventual discharge through the Goed Fortuin sluice into the Demerara River. The "A" line canal was designed to drain some 6,000 acres of land. In order to keep out waters from his neighbours' lands Sukhu erected a dam immediately east and west of the trenches dug at the eastern and western extremities of his land. A few weeks before December, 1959, instructions were issued by the Board to have the cut closed in the dam opposite to Sukhu's farm. Sukhu protested to Vyfhuis, Superintendent of Works of the Drainage and Irrigation Department, that closing of the cut would result in flooding of his land. Vyfhuis informed Sukhu that the Board's resident engineer had said that if

the closing of the cut affected his drainage the cut would be re-opened. The cut was filled in, the plaintiff's land and lands to the east and west of his land being left with two box kokers at a distance of 400 rods for drainage of waters accumulating in the feeder trench into the "A" line canal.

On Thursday, 17th December, 1959, 2" 17 parts of rain fell in that area and that portion of Sukhu's land nearest the "A" line was flooded. On the 18th, 19th and 20th December, the rainfall was respectively 81 parts, 40 parts and 1" 51 parts. The plaintiffs' cultivations nearest the "A" line were under water and Sukhu made representations to Government as a result of which Vyfhuis, the Resident Engineer Webster and the Assistant Engineer Gonzaski, visited Sukhu's land on Monday, 21st December, 1959. The Resident Engineer gave instructions for the cut to be re-opened. This was done on the same day. Two days later the waters on Sukhu's land had completely drained off. Subsequently, the Board caused a box koker to be put in place of the cut and another box koker was added to those in the vicinity of Sukhu's lands. Further, the Board caused two stop-offs to be inserted in the sucker trench to prevent water from the lands of Sukhu's neighbours coming into that portion of the feeder trench opposite Sukhu's land. Since these steps have been taken no further flooding has occurred on Sukhu's land.

It is urged on behalf of the defendants that the flooding of Sukhu's land was caused by reason of abnormally heavy rainfall over a short period of time on land of low level. For the plaintiffs it is urged that the flooding was caused by the waters coming off the lands in that area being penned up in the feeder trench and backing up on to the land because of the closing of the cut without first providing a sufficient number of outlets from the feeder trench into the "A" line canal in that vicinity.

Evidence has been given on behalf of the defendants that on 17th December, 1959, there was but a difference of 2 inches in the levels in the feeder trench and the "A" line canal, and it was contended that such a small difference in levels indicated that if the cut had been open no appreciable relief could have been obtained in draining away the waters on Sukhu's land. For the plaintiffs evidence was given that the difference in levels amounted to about 2 feet. Deane, the Executive Engineer of the Drainage and Irrigation Department, has stated that the "A" line canal is designed to discharge 1.5" of run off per day and that as there was a rainfall of 2" 17 parts on the 17th of December, 1959, there would have been some degree of flooding on that day and that having regard to the rainfall on succeeding days and the nature of the soil flooding would have continued until 21st December, 1959. In coming to this conclusion Deane gave consideration to the water level readings taken at the discharging sluice on those dates and the levels taken by the Surveyor Harding on Sukhu's lands. The rainfall readings for the period 15th December to 23rd December taken in the vicinity (as shown on gauge readings taken by the witness Birbal) were as follows:—

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| | | | |
|---------------|-----|----------|----------|
| 15th December | | 0.Inches | 07 Parts |
| 16th | do. | 0. | 35 |
| 17th | do. | 2. | 17 |
| 18th | do. | 0. | 81 |
| 19th | do. | 0. | 40 |
| 20th | do. | 1. | 51 |
| 21st. | do. | 0. | 11 |
| 22nd | do. | 0. | 07 |
| 23rd | do. | 0. | 07 |

Sukhu has said that the waters were not drained off his land until 23rd December even though the cut was re-opened on the 21st of December.

On the basis of Deane's calculations Sukhu's land should have been relieved of almost all water by the latest some time before midnight on the 21st of December, 1959. His calculations are based upon the assumption that there should be 1.5" of run off each day in accordance with the plan on which the "A" line canal was designed. Whether the performance accords with the design is another matter. I think that the difference in levels in the feeder trench and the "A" line canal was not as little as 2" nor as much as 2'. It was somewhere between these two figures. The flooding of the plaintiffs' cultivations was caused by the backing up of waters in the feeder trench. In my view the extent to which flooding of the cultivations took place was in some measure due to an insufficiency in the number of conduits from the feeder trench into the "A" line canal. Had a sufficient number of conduits between the feeder trench and the "A" line canal been provided the extent of the flooding of the cultivations would have been somewhat less and for a shorter period of time and the resulting damage to the cultivations would also have been less.

I am not impressed with the contention that extra expenditure in putting in additional box kokers and the two stop-offs was incurred by the Board in order that the plaintiffs might be placated and not because the Board considered that the drainage facilities would be improved thereby. With the cut in the dam open the works executed on behalf of the Board provided adequate drainage facilities for the plaintiffs. The act of the Board in closing up the cut without first providing an outlet in that vicinity rendered the drainage facilities inadequate and occasioned much of the damage done to the plaintiffs' cultivations by the penned up waters. The amount of rainfall was not abnormal for the month of December though it was certainly heavy on the 17th of December, 1959.

The defendants have contended that the plaintiffs' claim cannot succeed because the defendants are a Government Department and are therefore not liable in tort. As counsel for the plaintiffs has observed this question presents some difficulty.

Counsel for the Board has traced the history of the authorities responsible at one time or another for the drainage and irrigation of lands in the Colony. He has pointed out that at one time the Director

of Public Works—a Crown servant—was the responsible authority. Under the existing Ordinance the powers of the Board are largely subject to control by the Governor in Council. There are not, as was the case in *Metropolitan Meat Industry Board v. Sheedy* (1927), 137 L.T. 782, wide powers which are given it to be exercised at its own discretion and without consultation of the direct representatives of the Crown. The composition of the Board is such that, apart from the *ex officio* members who are all Crown servants, the members were appointed by the Governor in Council at the material date. The amount of annual payments made by proprietors of estates in and local authorities having administrative control over any part of any drainage and irrigation area are required to be paid into the general revenue of the Colony.

On the other hand the Board is empowered to acquire and hold lands and to divest itself of lands though only to a limited extent. Reference has been made by counsel for the plaintiffs to a number of English cases, where it was held that the respective defendants were not Crown servants. Most of these cases relate to nationalised industries or to commercial undertakings carried on by Government departments. Counsel has also referred to the fact that drainage and irrigation of lands—more especially lands owned by individuals—affect only one sector of the community and is not in the same category as education or health which affect the public as a whole. The Board deals with private lands and not with Crown or public lands. Drainage and irrigation would normally be the care of the proprietors but Government through the Board assists them by undertaking these works and may charge them up to 7/8ths of the cost of the works.

Counsel for the plaintiffs observed that in 1927 when the Board was first created it had no powers of carrying out new works but could only upkeep or replace existing works and further, that the moneys therefor were raised from the proprietors by way of annual charges, no money being provided therefor by the Legislature. In such circumstances counsel argued that the Board could hardly be considered as carrying out a Crown activity. Counsel agreed that in 1940 the Board was re-constituted and its powers and duties enlarged and further, that the Governor in Council had certain control over the activities of the Board and that Crown funds were to be used in carrying out the works directed by the Governor in Council to be carried out.

Counsel for the plaintiffs has referred to *Bank Voor Handel v. Slatford*, [1952] 2 All E.R. 956, at p. 970, in discussing the criteria which should determine whether an activity is a Crown activity. At p. 970 DENNING, L.J., said—

“ These, (the authorities), I think, support the view that Crown immunity depends not only on whether the person has Crown status, but also on whether the activity in question is a Crown activity Not only must the activity be a Crown activity, but also, in accordance with the original rule

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which I have mentioned, the activity must be such that the Crown purposes would be prejudiced unless immunity were afforded to it. This appears from all the cases”

And at p. 971—

“ Crown status attaches to the Ministers of the Crown, to the government departments of which they are the heads, and to the servants of those departments. In this connection I would observe the test of being a servant does not rest nowadays on submission to others. It depends on whether the person is part and parcel of the organisation: see *Cassidy v. Ministry of Health* and *Stevenson Jordan & Harrison, Ltd. v. MacDonald & Evans* both decided in 1951. Outside the government departments Crown status also attaches to a number of persons in *consimilii casu*, as BLACKBURN, J., described them (11 H.L. Cas. 465) in *Mersey Docks v. Cameron*. These are persons who acquire Crown status by acting exclusively for Crown purposes, such as occupiers of assize courts and police stations, the territorial associations, and the Administrator of Enemy Property under a peace treaty. This category of persons is extremely vague because of the difficulty of deciding what are “Crown purposes”. If by “Crown purposes” is meant the purposes of the executive government, these have been vastly enlarged in the last century. In former days they were almost confined to justice, defence and foreign affairs. Nowadays they include transport, fuel, hospitals, forestry, new towns, and, indeed, almost every purpose beneficial to the public at large. I am quite sure that the great judges who spoke of “the province of government” in the nineteenth century did not mean to include in it the wide range of activities in which governments now embark, and we have recently in this court refused to extend immunity to these activities. The point was distinctly raised in *Tamlin v. Hannaford* when Mr. Redmond Barry, K.C., said that the real question was: “What at this date is the true province and sphere of central government? and we answered it by declining to give Crown immunity to the commercial activities of government . . .”

The question before the Court of Appeal was whether Crown status attaches to the Custodian of Enemy Property. In deciding that question DENNING, L.J., said (at pp. 971, 972)—

“ He is appointed by the Board of Trade, he is subject to a large measure of control by the Board of Trade, the fees he receives go into the Exchequer, and he is paid out of the Consolidated Fund. The present holder of the office, Mr. Slatford, is himself an official of the Board of Trade, he has his office in the Board of Trade, and he may, for aught I know, do work for the Board of Trade when he is not engaged in his work as Custodian. All this makes it look at first sight as if he had Crown status. But it does not touch the crucial question, which is: What are his activities? Are they Crown activities? Although the Board of Trade have a large measure of control over him, his activities as Custodian are his own activities. They are not

Board of Trade activities. Whilst doing them, he is not acting as a servant of the Board of Trade, but as Custodian. And, as Custodian, he is not implementing any of the Crown's prerogatives, as the Administrator was in the *Austrian Administrator* case. He is collecting debts due, not only to alien enemies, but also to alien friends resident in territory occupied by the enemy. The Crown has no prerogative to seize the property of British subjects or alien friends who are resident, against their will, in territory occupied by the enemy. When the Custodian has collected the money, he does not hold it on behalf of the Crown. He holds it pending arrangements to be made later. It is inconceivable that, under those arrangements, the property of alien friends would be confiscated. Even the property of alien enemies would probably be used to pay English creditors. At any rate, all the property is held in suspense. It is not Crown property and his activities are not Crown activities. He is a public officer carrying out public purposes, but they are not Crown purposes."

Adopting the approach of DENNING, L.J., leads me to the conclusion that the Board is a statutory body carrying out at the most public purposes but they are not Crown purposes. The Board is therefore suable in tort.

Counsel for the Board contends that even if the Board is suable in tort the plaintiffs can only succeed if the plaintiffs' position was worsened by the execution of the works by the Board. This contention is based on the submission that under the Ordinance the Board has the power as opposed to the duty to carry out the works. The Board was directed by Order of the Governor in Council to carry out the works. It was bound to do so just as much as if the provisions of the Ordinance contained that direction. The Board was required to maintain the works when carried out. A duty was cast on the Board to execute the works and to maintain them. The works were intended for the benefit of the proprietors. In any event although the portion of land near the "A" line was only cleared in August, 1959, it is significant that since December, 1959, no flooding has taken place there. It can hardly be argued that the filling in of the cut did not worsen the plaintiffs' position as it existed immediately before the cut was filled in. If the Board is not protected as a Crown servant then liability for negligence would follow for the act of the Board in closing the cut in the dam without providing adequate drainage facilities in its place occasioned much of the damage which was done to the plaintiffs' cultivations.

Before dealing with the quantum of damages to be awarded the plaintiffs a word must be said about the alternative claim for compensation. The complaint by the plaintiffs relates to the omission of the Board to provide adequate drainage facilities in the vicinity of Sukhu's lands. By s. 27 (b) where any person suffers actual loss or damage which is caused by the construction of any work he shall be entitled to receive compensation from the Board in respect of such loss. As was pointed out in *Coe v. Wise* (1865), 1 Q.B. 711, by ERLE, C.J., when construing a comparable provision contained in s. 217 of the

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Statute 7 & 8 Vict. c. 106, a claim under such a provision cannot be founded on an omission or non-feasance. As the plaintiffs' claim in this action is founded on an omission by the Board to provide adequate drainage facilities (box koker and stop-offs) rather than the negligent construction of such drainage facilities a claim for compensation would fail. It is therefore unnecessary for me to decide whether such a claim must, by virtue of the provisions of s. 30 of the Ordinance, be brought in the magistrate's court of the judicial district in which the land is situate.

There is a great divergence in the evidence on the plaintiffs' side and the evidence on the defendants' side as to the extent of the loss suffered by the plaintiffs. I was not impressed by the evidence on the plaintiffs' side in this respect and find that the plaintiffs and their assessor Young have greatly exaggerated the extent of the loss. Paying due regard to the criticisms of plaintiffs' counsel in respect of the non-production of the original notes of the defendants' witnesses I accept their evidence that the two sections of cultivation nearest the centre line trench showed no sign of damage by flood waters and that only the section nearest the "A" line canal was, in fact, damaged by flood waters. The evidence discloses that some damage would in any event have been done by the heavy rainfall on the 17th of December, 1959, the more so because of the spongy nature of the soil which does not readily drain downwards.

I accept Bovell's estimate of the loss as the one which is most trustworthy. No mathematical calculation can be made in respect of the inevitable loss which occurred apart from the negligence of the Board's servants. At best only an estimated figure can be put upon that loss. In this case I estimate that loss at about 20 *per centum* of the entire loss, and would allow about 80 *per centum* as the extent of loss occasioned by the negligence of the Board.

Bovell has assessed the loss to Sukhu and Somaria as \$196.04 and to Harry Persaud as \$629.02. Adding a re-establishment charge of 40%, Sukhu's and Somaria's loss would be \$274.45 and Harry Persaud's loss \$880.63.

Estimating the loss occasioned by the negligence of the servants of the Board I would enter judgment for the plaintiffs Sukhu and Somaria for \$250.00 and for the plaintiff Harry Persaud \$750.00, with costs to be taxed certified fit for two counsel.

Judgment for the plaintiffs.

Solicitors: *Sase Narain* (for the plaintiffs); *P. M. Burch-Smith*, Crown Solicitor (for the defendants).

HUSBANDS v. THE PRESBYTERY OF BRITISH GUIANA

[Supreme Court (Fraser, J.,) February 13, 14, 16, 19, 20, 21, 22, 27, March 5, 9, 16, 19, April 18, 1962.]

Statutory tribunal—Presbytery by law the supreme ecclesiastical court of Church—Not acting within jurisdiction—Whether declaratory action lies.

Contempt of court—Contumacy—Presbytery of Church of Scotland—Refusal of minister to accept transfer—Right of Presbytery to appeal to General Assembly of the Church—Right not exercised—Minister deposed for contumacy in refusing to accept transfer—Validity of deposition—Church of Scotland Government Ordinance, Cap. 213, ss. 9, 34 and 35.

The plaintiff, a minister of the Church of Scotland, was suspended by the Presbytery of the Church on the 5th January, 1961, for failing to return a motor car irregularly purchased by him from church funds. He also refused to comply with an order of the Presbytery transferring him to another parish. At a meeting of the Presbytery called for the purpose of considering a resolution requesting him to produce certain books, he refused to produce the books on the ground that he had been suspended from office and could not produce them. He displayed a threatening attitude and was required to appear before the Bar of the Presbytery. He at first refused but later complied with this requirement. Having appeared before the Bar he was asked to purge his contumacy by complying with the decision relating to his transfer. He refused to do so and the Presbytery thereupon ordered that he be deposed from his office as Minister for contumacy *instante*. The plaintiff brought an action challenging the validity of this decision.

By s. 9 (1) of the Church of Scotland Government Ordinance, Cap. 213, the Presbytery is declared to be the supreme ecclesiastical court of the Church. By s. 34 the proceedings of the Presbytery are governed by the laws, regulation, process and practice of the Church of Scotland. Under the regulations of the Church relating to admission, translation and de-position of ministers, where a minister declines a transfer, the Presbytery has a right of appeal to the General Assembly of the Church of Scotland. No such appeal had been made and the plaintiff was never charged with any censurable offence.

Held: (i) if the defendants acted within their jurisdiction the court would not interfere if the procedure was slightly irregular or the finding was against the weight of the evidence. If that is the position the plaintiff must appeal to the General Assembly of the Church of Scotland. If on the other hand the procedure was grossly irregular that would be a matter of substance affecting its jurisdiction for which a declaratory order can be made. Likewise an unauthorised assumption of jurisdiction can also be made the subject of a declaratory order;

(ii) contumacy is the ecclesiastical offence of contempt of court, stubbornness, but the purpose for which the meeting had been called did not make the Presbytery a judicial tribunal to enquire into any charge;

(iii) the defendants not having appealed to the General Assembly, they could not impose the transfer in the way they sought to do it;

(iv) transfer is not a censure, disobedience of which becomes a censurable offence and which may in certain circumstances constitute the offence of contumacy.

Judgment for the plaintiff.

J. O. F. Haynes, Q.C., for the plaintiff.

J. A. King for the defendants.

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FRASER, J.: At the commencement of the hearing of this action Mr. J. A. King submitted that this court had no jurisdiction to proceed with the trial in view of the provisions of ss. 9 and 34 of the Church of Scotland Government Ordinance, Cap. 213. The effect of his argument was that the Presbytery of British Guiana is the supreme ecclesiastical court of the Church from whose decisions an appeal would lie only to the General Assembly of the Church of Scotland; and further that article IV in the Schedule to the Church of Scotland Act, 1921, which is made applicable to British Guiana by s. 34 of Cap. 213, precludes civil courts from interfering with the judgments of the Church within its jurisdiction. Decision on this submission was reserved.

I do not intend to deal exhaustively with the authorities on this point. They have been reviewed in several cases; one of the most recent being *Sowatilall v. Fraser* (1961), 3 W.I.R. 70. In that case LEWIS, J., said at p. 76 (1960 L.R.B.G. 379, at p. 385):

“It has long been settled that the use of the words such as “final” or “final and conclusive” in respect of the decision of an inferior court are not sufficient to oust the jurisdiction of the courts to issue the prerogative writs and notwithstanding the use of such words certiorari would issue to quash a decision which was defective either for lack of jurisdiction or for error of law appearing on the face of the record.”

HALLINAN, C.J., said:

“Since the decisions in *Cooper v. Wilson* and *Bernard v. National Dock Labour Board*, it is now accepted that the decisions of statutory tribunals can be invalidated by a declaratory judgment as an alternative procedure to certiorari.”

When this submission was made the only relief sought in the statement of claim was \$5,000 damages for wrongful dismissal but, by order of court on 13th February, an amendment was granted to include various declaratory orders. In the present state of the pleadings therefore the submission cannot be upheld and in disallowing it I wish only to add on this aspect of the matter, the words of Lord DENNING in *Taylor v. National Assistance Board*, [1957] 1 All E.R. 183. He said:

“Parliament gives the impress of finality to the decisions of the Board only on condition that they are reached in accordance with the law; and the Queen’s Courts can issue a declaration to see that this condition is fulfilled.”

Even if no amendment was sought by the plaintiff this court is empowered to grant a declaration in a fitting case by virtue of the provisions of s. 33 of the Supreme Court Ordinance, Cap. 7, or in its inherent jurisdiction—see *Loudon v. Ryder* (No. 2). [1953] Ch. 423.

The plaintiff was a minister of the Church of Scotland and the Moderator of the Kirk Session in the parish of St. Mary’s, Mahaica.

He was deposed from his office of minister by the Presbytery on 23rd March, 1961, for the offence of contumacy. One of the remedies he seeks is a declaration that his deposition was invalid and a nullity in law. A great deal of evidence was led in this case. The unsavoury relationship of the plaintiff with the Presbytery has been fully canvassed and I cannot but express regret that this wholly distasteful business has had to be ventilated in public hearing. It is not necessary for the purposes of this decision to rehash the full history and I would wish to refer only to such matters as are relevant to what in my opinion is the sole point so that the ultimate solution to this problem is not made more difficult.

The sole point is whether the defendant acted in accordance with the law in deposing the plaintiff in the circumstances in which it was done on 23rd March, 1961. If the defendant acted within its jurisdiction this court will not interfere if the procedure was slightly irregular or the finding was against the weight of the evidence. If that is the position the plaintiff must appeal to the General Assembly of the Church of Scotland. If, on the other hand, the procedure was grossly irregular that would be a matter of substance affecting its jurisdiction for which a declaratory order can be made. Likewise, an unauthorised assumption of jurisdiction can also be made the subject of a declaratory order.

Briefly the relevant facts are these. On 13th March, 1961, Rev. W. A. Fraser, Clerk to the Presbytery, issued a notice convening an *in hunc effectum* meeting of the Presbytery for the purpose only of considering the following resolution:

“That this Presbytery request the Rev. Ivan Husbands to bring to the next meeting of Presbytery called for 1 p.m. on Thursday, 23rd March, 1961, in St. Andrew’s Kirk, all books in connection with St. Mary’s Parish, *i.e.*, baptismal registers, marriage registers, minute books, bank books and all funds.”

That was the sole purpose of the meeting notified to members of the Presbytery.

On 23rd March, when the meeting was duly convened the Moderator of Presbytery asked Rev. Husbands to deliver the books, etc. The plaintiff said that he had been suspended from his office as minister and therefore he could not bring the books of the parish. The moderator explained that, suspension notwithstanding, the plaintiff was still a minister of Presbytery enjoying the emoluments of his office and he should obey Presbytery and submit to its authority. The plaintiff then displayed a threatening attitude. Other members present told the plaintiff that his conduct was contumacious and, having regard to his vows at ordination and induction he should change his attitude. The plaintiff then shouted:

“I was never in charge of the books of St. Mary’s Parish or had I control of any of them since I was minister of the parish.”

The Moderator’s further questions to the plaintiff were left unanswered.

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At this stage it was moved that the Rev. Husbands appear before the Bar of Presbytery. He refused to do so unless he was summoned in writing. The Moderator then pointed out that everything was being done to assist him to co-operate with the Presbytery. The plaintiff remained unmoved. A motion was then passed deeming Rev. Husbands contumacious. As soon as this occurred three members of Presbytery interceded on Rev. Husbands' behalf and requested Presbytery to give him an opportunity to purge his contumacy and to reconsider the consequences of his refusal to obey the instructions of Presbytery (presumably to appear before the Bar) and to assume duty at St. Mark's Parish. This request was acceded to and a motion was accordingly passed. Rev. Husbands thereupon appeared before the Bar of Presbytery. He said:

"I am not aware that I am contumacious to the Presbytery and I can give no guarantee that I would obey the Presbytery's instructions or subject myself to Presbytery's authority."

The Moderator then pointed out that he had been given three opportunities to purge his contumacy and that he ought to do so, by declaring that he was prepared to recognise the authority of Presbytery and its considered judgments and give an undertaking that he would assume duty at St. Mark's Parish. Rev. Husbands then said "I cannot say if I will take up duties at St. Mark's Parish." After some exchange between the clerk and the plaintiff and after unsuccessful encouragement by several members of Presbytery, it was moved that the plaintiff be deposed from his office of Minister for contumacy *instante*. Other motions ancillary to the one mentioned were passed. The Rev. Husbands was deposed and was required to leave the manse at Mahaica by 15th April.

The question is—did the defendant act within its jurisdiction? Relying upon the minutes of the meeting of Presbytery it appears that the charge of contumacy first arose from Rev. Husbands' refusal to answer questions and his refusal to appear before the Bar *instante*. The fact is that Rev. Husbands had not been charged at that meeting for any censurable offence within the laws of the Church of Scotland nor was there any reason assigned for his being required to appear before the Bar.

The offence of contumacy is defined by Cox in the PRACTICE AND PROCEDURE IN THE CHURCH OF SCOTLAND, p. 781, as "the ecclesiastical offence of contempt of court, stubbornness." At p. 284 it is stated that a fault cannot be visited with judicial censure unless it has been confessed to the court or regularly proven, except that a contempt of court committed in presence of the court may be dealt with on the spot. In the provisions relating to discipline and the trial of charges there is a method of citation known as *apud acta* which is a citation by a court during its proceedings of a person in its presence. It is peremptory and disobedience thereto constitutes the offence of contumacy. The first question to be considered is whether the Presbytery was sitting as a court on 23rd March, 1961. It is clear from the

notice dated 13th March, that the Presbytery was not being convened as a judicial tribunal to enquire into any charge. It was called to consider a resolution regarding books and money. When asked about these Rev. Husbands said he did not have them because he was suspended. The fact is that he had been suspended since 5th January for failing to return a motor car irregularly, though not dishonestly, purchased from Church funds. Assuming however that Presbytery was properly constituted as a judicial tribunal it is clear that the plaintiff was not cited *apud acta* for any censurable offence. It is however unnecessary to develop this point because I hold that the enquiry about the books and money was not a judicial enquiry into any offence or charge against Rev. Husbands. If that is so then there could be no contempt in the face of the court to constitute the offence of contumacy because there was no court as such in session. In chapter 5 at p. 82 of the PRACTICE AND PROCEDURE OF THE CHURCH OF SCOTLAND, COX says

“Every court is entitled to protect itself from evident insolence and contumacy”.

I am satisfied that the offence can only be committed when Presbytery is meeting as an ecclesiastical court in the manner set out in s. 9 of Cap. 213.

A look at the background of this matter shows that the instructions of Presbytery which Rev. Husbands was alleged to have disobeyed were the instructions to accept a transfer to the parish of St. Mark's. This is borne out by the second motion passed on 23rd March to give him another chance “to purge himself of contumacy and to obey the instructions of Presbytery and assume duties in St. Mark's Parish.” Rev. Husbands appeared at the Bar and therefore to that extent he purged his contumacy if he had committed the offence. It was only after it became clear that he did not intend to assume duty at St. Mark's that he was finally deposed. It appears that his refusal to go to St. Mark's was considered to be contempt in the face of the court and he was therefore deposed for contumacy. I have already expressed the opinion that the Presbytery was not sitting as an ecclesiastical court. If however I am wrong in that respect, there is another reason for holding that the defendant had no jurisdiction to depose Rev. Husbands for contumacy founded on his refusal to be transferred to St. Mark's.

The Presbytery had resolved to transfer Rev. Husbands since 26th September, 1960. He appealed against that direction and the Colonial Committee held that the decision to transfer in the circumstances was irregular. It is true that the Colonial Committee advised the Presbytery that the decision to transfer Rev. Husbands may still be pursued and it will be readily conceded that the Presbytery could have done so. I think it is unquestionably the case that ss. 34 and 35 of Cap. 213 by reference have made all the laws, Regulations process and practice of the Church of Scotland applicable to British Guiana. That being the position it was, in my judgment, necessary for the Presbytery to pursue the transfer of Rev. Husbands in accordance

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with the provisions relating to the Admission, Translation and Demission of Ministers which are set out in Chap. XII of Cox's. St. Mark's Parish did not have an inducted minister and therefore the procedure for nominations by St. Mark's Parish must follow the Regulations. It is only after the congregation has failed to nominate a minister that an appointment *tanquam jure devoluto* may be made by the Presbytery. Having regard to the provisions of regs. 21 (7) and 23 (4) it seems that where a minister declined to be translated on an appointment *tanquam jure devoluto*, the Presbytery has a right of appeal to a higher court, in this case the General Assembly of the Church of Scotland. There is no provision whatsoever in the Regulations for a transfer or translation to be effected in the manner by which the Presbytery attempted to impose it. Moreover, a transfer is not a censure, disobedience of which becomes a censurable offence and which may in certain circumstances constitute the offence of contumacy. The principle is that in order to impose the censure of deposition the act disobeyed must be an act which the Presbytery could properly require the plaintiff to perform and in respect of which the plaintiff owed a duty to perform. I am grateful to Mr. Haynes for drawing my attention to the case of *Long v. The Bishop of Cape Town* (1863), 1 Moo. P.C.C. (N.S.) 411. This case is particularly apposite in many respects and deals fully with the principles. Lord KINGSDOWN in delivering the judgment said at p. 461:

“It may be further laid down that, where any religious or other lawful association has not only agreed on the terms of its union, but has also constituted a Tribunal to determine whether the rules of the association have been violated by any of its members or not, and what shall be the consequence of such violation; the decision of such Tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed, and, if not, has proceeded in a manner consonant with the principles of justice.”

And again at p. 465 he said:

“The oath of canonical obedience does not mean that the clergyman will obey all the commands of the Bishop against which there is no law, but that he will obey all such commands as the Bishop by law is authorised to impose.”

Applying that principle to this case the proposition is that the vows of obedience to the authority of the Presbytery taken by Rev. Husbands are to be honoured only in so far as the authority is exercised in accordance with the law. Finally at p. 466 Lord KINGSDOWN said:

“We think that even if Mr. Long might have appealed to the Archbishop, he was not bound to do so; that he was at liberty to resort to the Supreme Court.”

In that case it was held that sentences of suspension and deprivation pronounced by the Bishop of Cape Town against an incumbent within his diocese for refusing to give notice in his Church for the election of

lay delegates to a synod of the diocese, in conformity with the provisions of certain printed regulations purporting to be Acts and Constitutions passed at a previous synod, and transmitted to the incumbent in a letter from the bishop were irregularly pronounced for the reason that the refusal by the incumbent was not an offence for which by the laws of the Church of England his suspension and deprivation would have been warranted.

For the reasons given I declare with reluctance that the sentence of deposition or dismissal imposed by the defendant on the plaintiff on 23rd March, 1961, was invalid and a nullity in law. It follows from this that the plaintiff has not ceased to be a minister of the Presbytery. Having regard also to the circumstances of his suspension on 5th January, 1961, I must also declare that his suspension was also invalid for the reason that there was no finding of guilt on a charge properly brought for a censurable offence for which the Presbytery had authority to impose the censure of suspension. I make no declaration with regard to the Kirk Session of St. Mary's Parish. The Kirk Session is not a party to these proceedings. I make no other order.

I said that I make these declarations with reluctance because I am satisfied that the Moderator of the Presbytery, Rev. John Lord and Rev. E. A. Rule, Moderator of the Kirk of St. Andrew's, who gave evidence, had made much conscientious effort to encourage the plaintiff to be reasonable. The plaintiff gave his evidence unsatisfactorily and was in many instances less than frank with the court. He knew what were the financial regulations of the Presbytery and despite that he purposely engaged in a transaction which was constitutionally irregular. He retained moneys which he ought to have paid to the Treasurer and for months ignored Presbytery's direction to refund it. I believe his behaviour at Presbytery meetings was unpleasant and that he showed no charity in his attitude to his colleagues. He has substantially contributed to his own misfortune. Having regard therefore to all those circumstances I award only a part of his costs.

There will be judgment for the plaintiff for the declarations stated with one half of his costs to be taxed certified fit for counsel.

Judgment for the plaintiff.

SAUL AND ANOTHER v. SMALL

[Supreme Court (Fraser, J.) January 16, 23, 30, April 18, 1962.]

Rent restriction—Application by tenant for interlocutory injunction against landlord—Matter arising out of Rent Restriction Ordinance, Cap. 186—Whether Supreme Court has jurisdiction.

The plaintiffs were statutory tenants of the defendant and protected by the provisions of s. 21 of the Rent Restriction Ordinance, Cap. 186. They claimed damages for various acts committed by the defendant which substantially diminished and interfered with the enjoyment of their tenancy. On the hearing of a summons to continue an interim injunction granted to the plaintiffs, it was argued for the defendant that the jurisdiction of the Supreme Court was ousted by s. 26 (1) of the Ordinance which provides that “. . . any claim or other proceedings . . . arising out of this Ordinance shall be made or instituted in a magistrate’s court.”

Held: (i) the jurisdiction of a superior court is not to be ousted unless by express language in, or obvious inference from, some Act of Parliament. *Oram v. Brearey* (1877), 2 Ex. D. 346, at p. 348;

(ii) in s. 26 of Cap. 186 there is no expression to oust the jurisdiction of the Supreme Court, and no inference can be drawn that that was intended. *Lee-Hong-Gat v. Hardeen*, 1956 L.R.B.G. 156, and *Evelyne v. Latchmansingh* (1961), 3 W.I.R. 107, 1961 L.R.B.G. 12, distinguished.

Order accordingly.

[**Editorial Note:** See later proceedings in (1965), 8 W.I.R. 351, B.C.C.A.]

O. M. Valz for the plaintiff.

N. J. Bissember and *H. D. Hoyte* for the defendant.

FRASER, J.: The plaintiffs are tenants of the defendant of dwelling and business premises at “G” D’Urban Street, Lodge Village. The premises are subject to the provisions of the Rent Restriction Ordinance, Cap. 186. By a valid notice to quit dated 17th February, 1961, the defendant terminated the contract of tenancy. The plaintiffs have held over and are therefore statutory tenants protected by the provisions of s. 21 of the Ordinance.

On 6th January, 1962, the plaintiffs were granted an interim injunction upon an *ex parte* application made when this writ was filed. The plaintiffs alleged that the defendant made an unsuccessful demand on them for increased rent in May, 1961; and that in June, 1961, the defendant committed various acts which substantially diminished and interfered with the enjoyment of their tenancy. The plaintiffs also claimed damages in the sum of \$500. When the summons to continue the injunction came on for hearing the defendant took an objection to the jurisdiction of the Supreme Court on the ground that the plaintiffs’ claim based as it is on a statutory tenancy can be made only in a court of summary jurisdiction by virtue of the provisions of s. 26 (1) of the Ordinance which reads as follows:

“26. (1) Subject to the provisions of subsection (3) of section 3 of the Summary Jurisdiction (Petty Debt) Ordinance, any claim or other proceedings (not being proceedings

under the Summary Jurisdiction Ordinances or proceedings before the Rent Assessor as such) arising out of this Ordinance shall be made or instituted in a magistrate's court."

In support of this proposition Mr. Hoyte cited the cases of *Lee-Hong-Gat v. Hardeen*, 1956 L.R.B.G. 156; and *Evelyne v. Latchmansingh* (1961), 3 W.I.R. 107 (1961 L.R.B.G. 12).

In the case of *Lee-Hong-Gat v. Hardeen* (*supra*) the plaintiffs, as tenants, sued their landlord for \$718.77 as excess rent paid by them and made recoverable by s. 14 (2) of the Ordinance. The money was paid on a contract and would have been irrecoverable but for the provisions of the Ordinance. The jurisdiction in the magistrate's court extended to claims not exceeding \$250. PHILLIPS, J., held that the provisions of s. 26 (1) are mandatory and that irrespective of the amount involved in a claim the proceedings must be instituted in a magistrate's court "and nowhere else." He expressed the opinion that the Supreme Court had no jurisdiction to entertain the claim. In *Evelyne v. Latchmansingh* (*supra*) the plaintiff, who was a statutory tenant of the premises, sued the landlord for damages for breach of contract and also for trespass. LUCKHOO, C.J., said this at p. 109:

"It was held by PHILLIPS, J., in *Lee-Hong-Gat v. Hardeen* that the provisions of s. 26 (1) of the Rent Restriction Ordinance are mandatory and that irrespective of the amount involved in a claim any claim or other proceedings arising out of the Ordinance must be made or instituted in the magistrate's court and that the Supreme Court has no jurisdiction in such matters. I am in agreement with that decision."

The claims in both of those cases were money claims *simpliciter*, the former for overpayments of rent and the other for damages for breach of contract and trespass. In neither case was there a claim for an injunction. The objection on the ground of jurisdiction in this case is made in an application to grant an interlocutory injunction and, in my judgment, this factor makes the difference between this case and the two cases referred to. I do not think that anything more than appears should be read into the judgments in *Hardeen's* case and *Latchmansingh's* case. It is unnecessary for the purpose of the decision in this case to go over the ground covered by these judgments and, without expressing a considered view, it appears to me that they support the proposition that a claim for money, whether as damages or otherwise, arising as a consequence of the statutory provisions, is tenable only in the magistrate's court and the Supreme Court has no jurisdiction to entertain it.

In *Evelyne v. Latchmansingh* reference was made to the unreported case of *Clouett v. London and Provincial Stores Ltd.* in which there was a claim for an injunction as well as damages. In an article appearing in 161 L.T. 48 it is stated that the Court of Appeal held that the case came within s. 17 (2) of the Rent Act, 1920, the issue as to trespass, detinue, and the injunction being wholly dependent

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on the question whether or not the plaintiff was protected by the Act. The article suggests that at the trial it appeared that the whole matter in issue was whether or not the plaintiff was protected by the Rent Act. The *ratio decidendi* is not clear from the article but when it is realised that a county court in England has jurisdiction to grant an injunction, provided there is also a claim to money or other relief within its jurisdiction, the real position becomes clear. What s. 17 (2) of the Rent Act, 1920, provides is this:

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

This provision does not confer upon the county court an exclusive jurisdiction, although in the ordinary way proceedings under the Acts ought to be brought in that court. The question whether the High Court in England has jurisdiction is therefore not likely to come up for decision. There can be no doubt that the High Court has jurisdiction. The act itself concedes this by necessary implication and usually the issues in the English cases are alternatively whether the claim or proceedings arise out of the Act in order that the court may determine whether a litigant bringing an action in the High Court should be awarded costs—*Tideway Investment & Property Holdings Ltd. v. Wellwood* (1952), 2 T.L.R. 365; *Wolf v. Smith* (1923), 130 L.T. 154, and *Lee v. Roberts* (1925), 159 L.T. 531; *Gill v. Luck* (1923), 93 L.J.K.B. 60; or whether the action should be referred to the county court for trial as in *Russoff v. Lipovitch* (1925), 41 T.L.R. 278. Those cases are not helpful on the question of the ouster of the jurisdiction.

As I previously mentioned, a county court in England has a limited jurisdiction to grant injunctions—see ss. 71 and 72 of the County Courts Act, 1934. A magistrate’s court in British Guiana does not have jurisdiction to grant an injunction in any circumstances. The jurisdiction to grant injunction in this country is conferred on the Supreme Court by s. 31 of the Supreme Court Ordinance, Cap. 7. I do not think it will be disputed that but for the provisions of s. 26 (1) of the Rent Restriction Ordinance, Cap. 186, that a statutory tenant would have been entitled to bring a claim in the Supreme Court for money in excess of \$250 arising out of the Ordinance. That would have been the case whether or not a claim for an injunction or other relief was sought. It has been held by the Supreme Court that a money claim must be brought in the magistrate’s court but it has never been held that the Supreme Court has no jurisdiction to grant an injunction to a statutory tenant whose right of action arises by virtue of the provisions of the Rent Restriction Ordinance. It will be readily conceded, I think, that this claim for an injunction and

damages by the statutory tenants are proceedings arising out of the Ordinance but the question is: Does s. 26 deprive the Supreme Court of its jurisdiction? I am firmly of the view that it does not.

In *Jacobs v. Brett* (1875), L.R. 20 Eq. 1, Sir GEORGE JESSEL, M.R., said at p. 6:

“ . . . I think nothing is better settled than that an Act of Parliament which takes away the jurisdiction of a Superior Court of Law must be expressed in its terms. I do not mean to say that it may not be done by necessary implication as well as by express words, but at all events it must be done clearly. It is not to be assumed that the Legislature intends to destroy the jurisdiction of a Superior Court. You must find the intention not merely implied, but necessarily implied.”

POLLOCK, B., in *Oram v. Brearey* (1877), 2 Ex. D. 346, said at p. 348:

“No rule is better understood than that the jurisdiction of a Superior Court is not to be ousted unless by express language in, or obvious inference from, some Act of Parliament.”

In s. 26 of the Rent Restriction Ordinance there is no expression to oust the jurisdiction of the Supreme Court, and no inference can be drawn that that was intended.

Quite apart from authority, moreover, it would seem that the legislature could not intend to preclude statutory tenants from seeking an injunction unless it can be inferred that s. 26 by implication conferred on magistrates the right to grant an injunction. Such an inference, in my judgment, is far-fetched and offends the canons of construction. If, however, it is conceded that a magistrate's court has no jurisdiction to grant an injunction but it is urged that the Supreme Court has no jurisdiction by virtue of s. 26, the inevitable result will be that the right of the tenant to be protected from an attempt at forcible eviction can find protection in the remedy of damages only. The tenant will be denied the remedy of an injunction which, in certain circumstances, may be the most appropriate relief and may, conceivably, be the only remedy. I prefer to follow the principle—where there is a right there is a remedy—and hold that the remedy must be measured to the nature and extent of the right impugned.

It is ordered that the interim order of injunction made on 6th January, 1962, be continued until the final determination of this action, the costs of this summons to be costs in the cause.

Order accordingly.

PILGRIM v. BRITISH GUIANA CREDIT CORPORATION

[Supreme Court—In Chambers (Khan, J. (ag.)) August 28, September 12, 19, 1961, January 27, 1962.]

Practice and procedure—Action—Plaintiff ordered to supply particulars within 21 days—Action stayed until delivery of particulars—Particulars delivered over two years later—No other steps taken in the meanwhile—Whether action altogether abandoned and incapable of being revived—Order 32 rr. 3(2) and 9(1) (a).

After the statement of claim and a defence and counterclaim were filed and served, the court ordered the plaintiff to deliver certain particulars to the defendants within 21 days, and that the action should be stayed until the delivery. The particulars were not delivered until over two years later, and no action had in the meanwhile been taken by either party except for certain visits made by the plaintiff to the defendants' office to inspect the relevant books in the defendants' possession in order to obtain information to supply the particulars. After the particulars were delivered the defendants applied by summons for an order deeming the action altogether abandoned and incapable of being revived.

Order 32, r. 9 (1) (a), provides as follows—

“9. (1) A cause or matter shall be deemed altogether abandoned and incapable of being revived if prior to the filing of a request for hearing or consent to judgment or the obtaining of judgment—

- (a) any party has failed to take any proceeding or file any document therein for one year from the date of the last proceeding had or the filing of the last document therein;”

Order 32, r. 3 (2), provides that—

“If there are any interlocutory proceedings pending, a cause or matter shall not become ripe for hearing until the determination of such proceedings unless the Court or a Judge otherwise orders”.

Held: (i) The effect of the order of court was to stay the action for 21 days to enable the plaintiff to file the particulars ordered, and not to stay the action indefinitely until the particulars were filed;

(ii) negotiations or correspondence between parties or their solicitors or a visit to the other party for information does not constitute a step in the action, but an application by summons or motion or the delivery of a pleading does. The plaintiff's visits to the defendants' office were accordingly not steps in the proceedings within the meaning of O. 32, r. 9 (1) (a);

(iii) under O. 32, r. 9 (1) (a), the “failure to take any proceeding or file any documentfor one year from the date of the last proceeding had or the filing of the last document” is not a mere irregularity, and therefore any document filed thereafter is a nullity and of no effect;

(iv) accordingly the defendants' acceptance of the particulars did not estop them from invoking the operation of O. 32, r. 9 (1) (a), *Krakauer v. Katz*, [1954] 1 W.L.R. 278, distinguished.

Order accordingly.

F. R. Allen for the plaintiff.

J. A. King for the defendants.

KHAN, J. (ag.): The defendants by their solicitor Herman William De Freitas on 16th August, 1961, took out a summons asking

that the action which was commenced by the plaintiff William Henry Pilgrim by writ issued on the 30th October, 1956, should be deemed abandoned and incapable of being revived, the plaintiff having failed to take any proceeding or file any document within one year of the 22nd day of July, 1958, alternatively, the plaintiff having failed to file an application for or consent to revivor within six months after the same had been deemed deserted.

On 30th October, 1956, the plaintiff issued a writ against the defendants for:—

- (1) an account in respect of moneys earned by and payable to the plaintiff for work done as secretary, etc.; and
- (2) the sum of \$1,000 for moneys earned by the plaintiff for work done from the year 1950 to 1954, and also from 1954 to 1956 as secretary, etc.

The writ was served on defendants who entered appearance on 6th November, 1956. On 3rd May, 1957, the plaintiff's solicitor delivered and filed the statement of claim and on that day he also issued a summons for an order for an account to be taken of what amounts were due to the plaintiff from the defendants. This summons was made returnable for 11th May, 1957, and on that date the matter was adjourned for a date to be fixed. The defendants on 17th May, 1957, filed and served a defence and counterclaim, and on the said day requested (by letter) the plaintiff's solicitor to supply further and better particulars of the statement of claim. The particulars requested were not supplied and on 4th December, 1957, the defendants' solicitor issued a summons for an order compelling the plaintiff to deliver the said particulars.

On the 22nd July, 1958, both summonses (the plaintiff's for an account and the defendants' for better particulars) were heard and determined by LUCKHOO, J., who made the following orders:

“BEFORE THE HONOURABLE MR. JUSTICE LUCKHOO. TUESDAY THE 22ND DAY OF JULY, 1958. ENTERED THE 12TH DAY OF AUGUST, 1958.

UPON THE APPLICATION of the plaintiff by summons filed herein on the 3rd day of May, 1957, AND UPON THE APPLICATION of the defendants filed herein on the 4th day of December, 1957. AND UPON READING the said applications and the affidavits in support of the said applications AND UPON HEARING counsel for the plaintiff and counsel for the defendants IT IS THIS DAY ORDERED that the plaintiff's application for accounts be dismissed, AND IT IS FURTHER ORDERED that the plaintiff do deliver to the defendants within twenty-one days from the date hereof the following and better particulars of the statement of claim:—

PILGRIM v. B.G. CREDIT CORPORATION

1. Under paragraph 2.....
2. Under paragraph 3.....
3. Under paragraph 4.....
4. Under paragraph 5.....
5. Under paragraph 14.....
6. Under paragraph 15.....
7. Under paragraph 16.....

AND IT IS FURTHER ORDERED that this action be stayed until the delivery of the said particulars AND IT IS FURTHER ORDERED that the plaintiff be at liberty to inspect the relevant books in the defendants' possession AND IT IS FURTHER ORDERED that the costs of these applications be costs in the cause.

BY THE COURT

H. BACCHUS

DEPUTY REGISTRAR (Acting).”

The plaintiff failed to take any further proceeding or file any document in the action until the 6th January, 1961, when the plaintiff's solicitor delivered particulars pursuant to the order of court made on the 22nd July, 1958. On 20th January, 1961, defendants' solicitor applied to the Registrar for a certificate of abandonment, but this was not issued. On 11th July, 1961, the plaintiff's solicitor filed a request for hearing and on the 16th August, 1961, the defendants' solicitor took out this summons for an order to deem the action abandoned and incapable of being revived.

Order 32, rule 9, of the Rules of the Supreme Court, 1955, provides as follows:—

“9. (1) A cause or matter shall be deemed altogether abandoned and incapable of being revived if prior to the filing of a request for hearing or consent to judgment or the obtaining of judgment:—

- (a) any party has failed to take any proceeding or file any document therein for one year from the date of the last proceeding had or the filing of the last document therein; or
- (b) no application for or consent to revivor has been filed within six months after the cause or matter has been deemed deserted; or
- (c) if the cause or matter has not, on the request of any party been entered on the Hearing List within six months from the date of any order of revivor.

(2) The instituting of a cause or matter which has been deemed altogether abandoned shall be of no effect in interrupting any period of limitation.”

It is observed that the date of the last proceeding had in this matter was the 22nd July, 1958, when LUCKHOO, J., dismissed the plaintiff's summons for accounts and made an order that the plaintiff do deliver certain particulars to the defendants within 21 days. Thereafter this action was allowed to sleep and no steps was taken by either party until the plaintiff filed the particulars on the 6th January, 1961. The action slept undisturbed from 22nd July, 1958, until 6th January, 1961 a period over 2 years and 5 months.

It has been submitted that in pursuance of the order of court the plaintiff made several visits to the defendants' office to inspect the relevant books in the defendants' possession in order to obtain information to supply the particulars; that each and every such visit was a *step* taken in the action and it was therefore quite wrong for defendants to say that no step was taken for over a year.

It has been also submitted that:

- (a) The delay in filing the particulars ordered was contributed by the defendants who did not produce all the books for plaintiff's inspection.
- (b) This application cannot apply to the ancillary summonses which were taken out to aid the determination of the matter in the writ of summons and this prevented the operation of paragraph (a) of rule 9 (1) of Order 32.
- (c) LUCKHOO, J., had stayed the proceedings until the particulars had been filed and delivered by the plaintiff. The nature of the ancillary proceeding prevented the action from going forward.
- (d) The defendants having accepted the particulars were estopped from saying that no document was filed within the last year.
- (e) Even if the plaintiff were guilty of undue delay the court has power under Order 54, rule (1), to grant relief on such terms as may be deemed just in all the circumstances because Order 54 is similar to Order 70 (1) of the English rules and in view of the equity of the case the court ought to exercise its discretion in favour of the plaintiff and dismiss this summons.

In support of his contention counsel cited *Krakauer v. Katz*, [1954] 1 W.L.R. 278. Mr. J. A. King, for the defendants, relied on the judgment of LUCKHOO, J., in *Cunningham v. Lee* decided on 13th April, 1960 (1960 L.R.B.G. 69).

On consideration of the points raised I find that visits to the defendants' office for the purpose of obtaining information in order to supply particulars are *not* steps in the proceedings. In *Ives and Barker v. Williams*, [1894] 2 Ch. 478, at p. 484, LINDLEY, L.J., said this:

“The authorities show that a step in the proceedings means something in the nature of an application to the court, and not

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mere talk between solicitors and solicitors' clerks nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings."

The distinction seems to be that negotiations or correspondence between parties or their solicitors or a visit to the other party for information does not constitute a *step* in the action, but an application by summons or motion or the delivery of a pleading does. It seems to me that the plaintiff's visits to the, defendants' office were for preparation in order that a step may be taken. This step, however, was not taken until 2 years and 5 months had elapsed.

By the order of court made on the 22nd July, 1958, the plaintiff was given 21 days to file the particulars. If the plaintiff encountered difficulty in obtaining the necessary information and/or could not supply the particulars ordered within the allotted time, several courses were open to him, *viz.*:—he could have filed those particulars which he was in a position to give, or applied to the court for extension of time or applied for any other relief as the circumstances warranted. He did nothing.

The interlocutory proceedings (described by Mr. Allen as ancillary) did not prevent the operation of paragraph (a) of rule 9 of Order 32. In *Cunningham v. Lee LUCKHOO, J.*, (as he then was) in a considered judgment stated thus:

"The provisions of Order 32, rule 3 (2), do not prohibit pleadings in an action from being filed by the parties while interlocutory proceedings are still pending. It is therefore possible for pleadings and documents to be filed in an action even though interlocutory proceedings are pending. If this is done then there would be no failure to file any further pleading or document and the procedure of rule 9 (1) (a) of Order 32 would be inoperative."

In the present case, however, the interlocutory proceedings were not pending but were determined on the 22nd July, 1958, when LUCKHOO, J., delivered judgment in both summonses:

"A judgment is a judicial determination; the decision of a court on one of the questions if there are several" (*vide* DICTIONARY OF ENGLISH LAW BY JOWITT).

The action was stayed by order of the court for 21 days to enable the plaintiff to file the particulars ordered. The contention of plaintiff's counsel that the action was stayed until the particulars were filed—be that 2 years after—is unreasonable, unrealistic, and untenable.

It is my view that the acceptance by the defendants of the particulars filed on the 6th January, 1961, did not estop the defendants

from invoking the operation of paragraph (a) of rule 9 (1) of Order 32, because the "failure to take any proceeding or file any document therein for one year from the date of the last proceeding had or the filing of the last document therein" is not a mere irregularity. Any document filed thereafter is a nullity and of no effect. In *Daily Chronicle Ltd. v. Munroe*, 1960 L.R.B.G. 267, FRASER, J., stated thus:

"It is my view that abandonment arises in any one of three ways under rule 9 and that an action deemed abandoned under one sub-rule cannot be saved by an unreasoning application of another sub-rule When an action is deemed altogether abandoned and incapable of being revived, no consensual action by the parties can alter the status of the action as contemplated by the rules. In this respect a dead action is no different from any other dead object. Once the life has been spent there is no means of revivor. The cause of action nevertheless survives and may be made the subject matter of a fresh action if not barred by limitation."

Finally, it was submitted that even if the plaintiff were guilty of undue delay the court has powers under Order 54 to grant relief on such terms as the equity of the case may deem just. I have considered the judgment in *Krakauer v. Katz* cited in support of this submission. I find no provision in the English Rules for *abandonment* as is provided by rule 9 of Order 32 of the Rules of the Supreme Court, 1955. I find therefore that Order 54 must of necessity be read with rule 9 of Order 32. Order 54, which is analogous to Order 70 (1) of the English Rules, is applicable to proceedings which are merely irregular in the sense that they involve noncompliance with any of the rules of the Supreme Court or with any rule of practice.

The object of the powers vested in the court in respect to cases falling under Order 54 is to give the court a discretion to extend time with a view to the avoidance of injustice to the parties. Excessive delay, however, may induce a court in its discretion to refuse to extend the time. In this case the delay is not one year but over 2 years and 5 months. Had the case fallen under Order 54 the court would have been justified in refusing to extend time, because of the indolence and excessive delay in the conduct of the action. However, it is clear to me that Order 54 is inapplicable in the light of Order 32, rule 9 (1) (a). There is no equity to revive a dead action.

In *Krakauer v. Katz* the defendant took out a summons for an order to dismiss the action for want of prosecution. The last step taken in that action was over 12 years. By Order 70 (1) of the English Rules the court (unhindered by any rule of abandonment) was vested with a discretion to further extend time in all the circumstances as may be deemed just. The delay was regarded as excessive and the action was dismissed for want of prosecution. It is observed that the procedure adopted in the above case is peculiar to the English practice because of the absence of any English rule of abandonment analogous to our Order 32, rule 9. The facts in

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Krakauer v. Katz could not be *in this colony* the subject matter of a summons to “dismiss for want of prosecution”, because such a procedure is only applicable in a ‘pending action’, which means an action in which some proceeding may still be taken. When an action by virtue of rule 9 of Order 32 of the Rules of the Supreme Court, 1955, is deemed altogether abandoned and incapable of being revived, no proceeding may be taken therein, and the action is no longer a pending action. In other words, no action can be dismissed for want of prosecution unless that action is pending at the date of the application to dismiss (*vide Beaton v. Quintin*, 1943 L.R.B.G. 71). *Krakauer v. Katz* can therefore be distinguished from the present case in that there was a *pending action* at the date of the application to dismiss for want of prosecution; whereas in the present case there is no *pending action* because it has been deemed abandoned by virtue of rule 9 (1) (a) of Order 32, at the very latest one year and 21 days after the 22nd July, 1958—that was on the 13th August 1959.

I am therefore of the opinion that this action must be deemed altogether abandoned and incapable of being revived by virtue of the provisions of paragraph (a) of rule 9 (1) of Order 32 of the Rules of the Supreme Court, 1955. And I so order. The plaintiff shall pay the defendants their taxed costs.

Order accordingly.

Solicitors: O. M. Valz (for the plaintiff); *Cameron and Shepherd* (for the defendants).

GURRICK v. JOHN

[Supreme Court (Fraser, J.) May 4, December 29, 1961, January 17, 18, February 23, March 5, 7, April 26, 1962.]

Local Government—Statutory prohibition against sub-dividing a lot into portion of less than one fifteenth of an acre—Transport passed for distinct but contiguous portions of lot—Together, but not separately, the portions exceeded the prescribed minimum area—Validity of transport—Local Government Ordinance, Cap. 150, s. 122(2) and (3).

Section 122 (2) of the Local Government Ordinance, Cap. 150, provides that “no lot in a village or country district shall be sub-divided into portions of less than one fifteenth of an acre”. Subsection 2 provides that “any subdivision which is made contrary to the provisions of (that) section shall be null and void”.

The defendant owned a piece of land the total area of which exceeded one fifteenth of an acre. He obtained the approval of the Local Government Board to subdivide it into portions each of which exceeded the prescribed minimum area of .33 of a square foot. The plaintiff bought the land and took transport for it, the subdivided portions being separately described therein, but was later refused a building permission by the Central Board of Health on the ground that the subdivision was illegal. In an action by the plaintiff for rescission of the sale,

Held: (i) the courts have declared null and void any transports passed for a subdivision which contravenes s. 122 of Cap. 150 and it does not matter whether several such void subdivisions are passed as distinct, albeit contiguous, portions of property in the same transport with a total area exceeding one fifteenth of an acre;

(ii) a statutory prohibition must be strictly construed and the excess of .33 of a square foot did not fall within the principle of *de minimum*;

(iii) there was a total failure of consideration and the plaintiff was entitled to a rescission of the contract of sale.

Judgment for the plaintiff.

[**Editorial Note:** Reversed on appeal (See (1964), 6 W.I.R. 508, B.C.C.A.)]

J. O. F. Haynes, Q.C., for the plaintiff.

L. F. S. Burnham, Q.C., for the defendant.

FRASER, J.: The plaintiff claims rescission of a written contract made on 7th January, 1958, for the sale and lease of land; and for ancillary relief by declarations. There is no counterclaim. The point in this case is not free from difficulty and should perhaps be determined by an appellate court. The point is this: Is it lawful to pass a transport for two distinct but contiguous portions of divided property where it is unlawful to pass a transport for either one or the other of the portions by reason of the provisions of s. 122 of the Local Government Ordinance, Cap. 150, which *inter alia*, prohibits the subdivisions of a lot in a village or country district into portions of less than one-fifteenth of an acre.

The facts are simple and to a large extent undisputed. On 7th January, 1958, the defendant agreed to sell to the plaintiff two divided portions of land in the Lodge Village District for \$12,000 and in addition to grant the plaintiff a lease for 999 years on another portion. Prior to the sale the defendant had applied for and obtained the permission of the Local Government Board to subdivide the land as provided by s. 122 of the Local Government Ordinance, Cap. 150. The approval was as follows:

- (a) $S\frac{1}{2}$ of $S\frac{1}{2}$ of Lot A, South Section Lodge, divided into:
 - (i) $N\frac{1}{2}$ of $S\frac{1}{2}$ of $S\frac{1}{2}$ of Lot A (ii) $S\frac{1}{2}$ of $S\frac{1}{2}$ of $S\frac{1}{2}$ of Lot A
- (b) $S\frac{1}{2}$ of $S\frac{1}{2}$ of Lot B, South Section Lodge, divided into:
 - (i) $N\frac{1}{2}$ of $S\frac{1}{2}$ of $S\frac{1}{2}$ of Lot B (ii) $S\frac{1}{2}$ of $S\frac{1}{2}$ of $S\frac{1}{2}$ of Lot B

At the time of the sale the plaintiff was informed of this approval and the agreement was that transport papers were to be prepared forthwith. There is no doubt that the parties intended that the transfer of the property was to be done by transport for the portions (a) (ii) and (b) (ii) above and by lease for a parcel of land equivalent to $\frac{1}{3}$ of (b) (i) above. The transport and lease were passed by the defendant and accepted by the plaintiff on 24th March, 1958. By that date the plaintiff had paid \$6,000 on account of the purchase price. He passed a mortgage in favour of the defendant for the unpaid balance of \$6,000.

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The plaintiff's case is that the contract is indivisible in the sense that he agreed to purchase a specific area of land for \$12,000 to be conveyed by transport and lease and that if the agreement and transport for the divided portions are void therefore the whole agreement is void. I should say at once that if it is held that the portions of land previously described as (a) (ii) and (b) (ii) are not transportable, then in my opinion, apart from the contract being void for illegality there would be an almost total failure of the consideration and it would, I think, be wrong to make the plaintiff hold a 999 years lease for an area of land 1/7th the size of the land he intended to purchase and upon which he cannot carry out the building scheme he planned.

The dimensions of the land sold are not stated in the transport but the transport was prepared in accordance with r. 22 (3) of the Deeds Registry Rules which provides:

- “(3) Where two or more distinct properties are to be conveyed by the same deed, each property must be described in a separate paragraph which shall set forth the particulars herein mentioned.”

The particulars are mentioned in r. 22 (1). The transport in respect of this sale describes the two distinct properties in terms of the subdivision approved by the Local Government Board.

It has long been established that a transport for a portion of land in a village or country district which is less than the minimum required for a sub-division, *i.e.*, one-fifteenth of an acre, is void for the reason that the subdivision of less than one-fifteenth of an acre is null and void. See *Austin v. Allen*, O.G. 7.9.04 at p. 599; and *Mohamed Din v. Tetry*, 1943 L.R.B.G. 145. There was at first some doubt in my mind about the precise area of the separate portions. I am however satisfied from the copy of the plan by Sugrim A. Nehaul dated 12th April, 1956, and from the evidence of Mr. D. N. Persaud, Sworn Land Surveyor, that each of the subdivided portions contains 2903.67 square feet. The required minimum of one-fifteenth of an acre is equivalent to 2904 square feet. The difference is .33 of a square foot. I do not think that this small difference falls within the principle of *de minimum*. A statutory prohibition must be strictly construed and it is not for the courts to avoid its application by holding that partial compliance, although substantial, escapes the absolute prohibition. As SCRUTTON, L.J., said in *Re Mahmoud and Ispahani*, [1921] 2 K.B. 716—

“ . . . if an act is prohibited by statute for the public benefit, the Court must enforce the prohibition ”

There was also tendered in evidence a sketch plan showing the subdivisions prepared on behalf of the defendant for giving assistance to the Conveyancing Officer. This sketch was given to the plaintiff by the defendant. In that sketch the dimensions of (a) (ii) are shown as 73.455 feet by 39.53 feet and similar figures are given as the

dimensions of (b) (ii). The area of each as shown on the sketch is 2903.67 square feet. This sketch originated from the defendant and he ought not to be allowed to urge that there is no evidence of the dimensions or area of the subdivided portions.

It was however contended for the defendant that assuming the area of each of the sub-divisions is less than one-fifteenth of an acre nevertheless the transport is in respect of a total area which is greater than one-fifteenth of an acre and therefore it is valid and should not be set aside. On the face of it this proposition is attractive but it offends a well established principle "that the court will not lend its aid in order to enforce a contract entered into with a view of carrying into effect anything which is prohibited by law"—*Longstone v. Hughes* (1813), 1 M. & S. 593.

The position as I understand it is that there is no statutory prohibition against passing a transport for an area of land less than one-fifteenth of an acre. If that were so, it could, I think, be urged that a transport for any area greater than one-fifteenth of an acre would, in any circumstance be valid. What is prohibited by statute is the subdivision of lots in a village or country district into portions less than one-fifteenth of an acre. The Public Health Ordinance, Cap. 145, also prohibits in s. 135 (5) the sub-division of lots within the control of a local authority into less portions than quarter lots, those quarter lots to be not less than twenty square roods. No reference has hitherto been made to that Ordinance, although it arose in counsel's argument, because in my opinion it is not relevant to this case, except to this extent, that the defendant should have made an application to the Central Board of Health under s. 135 and submitted a plan as described. The prohibition in the Local Government Ordinance, Cap. 150, is against subdividing into portions less than 1/15th of an acre or 2904 square feet. The Ordinance declares null and void any sub-division which is made contrary to the provisions of the section. The courts have declared null and void any transports passed for a sub-division which contravenes the section and in my judgment, it does not matter whether several such void subdivisions are passed as distinct, albeit contiguous, portions of property in the same transport with a total area exceeding one-fifteenth of an acre. It was possible for the whole area comprising the south halves of the south halves of Lots A and B to be subdivided in the manner carried out by Sugrim Nehaul, Sworn Land Surveyor, on the request of Mrs. Joyce James. Had that been done the two divided portions would have been merged into one with a different description. The defendant however chose the shorter course and negligently, although not intentionally, warranted by implication that the two subdivisions conformed with the requirements of the Ordinance. They do not conform and the transport relating to them must therefore be declared void. I also hold that it was a condition of the contract that the transfer be effected by transport and lease. A contract to transport a portion of land which is subdivided in contravention to s. 122 of the Local Government Ordinance, Cap. 150, is void and I therefore give judgment for the plaintiff with the following orders:—

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- (i) rescission of the contract dated 7th January, 1958, on the ground of illegality;
- (ii) a declaration that transport No. 1282 dated 24th March, 1958, with mortgage in favour of the defendant is null and void;
- (iii) cancellation of the lease No. 73 of 1958 dated 24th March, 1958;
- (iv) the defendant to repay to the plaintiff the sum of \$6,000 with interest at the rate of 6% per annum from 24th March, 1958, until final payment;
- (v) the defendant to pay the taxed costs of the plaintiff certified fit for counsel.

Judgment for the plaintiff.

DEMERARA ELECTRIC COMPANY LTD. v. INLAND REVENUE
COMMISSIONER.

[Supreme Court—In Chambers (Fraser, J.,) January 11, 12, April 26, 1962.]

Income Tax—Claim for deduction—Legal and travelling expenses incurred in connection with sale of company's assets and enactment of legislation to improve its franchise—Whether expenses are capital or revenue—Income Tax Ordinance, Cap. 299, s. 12(1).

In the year of income 1958 the appellants incurred legal and travelling expenses in the sum of \$14,576 in connection with arrangements for the sale of the company's assets and the enactment of legislation for the improvement of the statutory franchise under which they generated and supplied electricity. Section 12 (1) of the Income Tax Ordinance, Cap. 299, provides that "for the purpose of ascertaining the chargeable income of any person there shall be deducted all out-goings and expenses wholly and exclusively incurred during the year immediately preceding the year of assessment by that person in the production of the income"

Held: (i) the Words "in the production of the income" appearing in s. 12 (1) of the Ordinance mean "in the production of the assessable income", and the test to be applied in determining whether a disbursement or expense is an allowable deduction under the Ordinance is that it must have been incurred for the direct purpose of producing profits;

(ii) payments which are made for a dual purpose, one of which is a revenue purpose, are nevertheless not deductible unless the payments can be divided into allowable and non-allowable parts, because unless the division is made the gross payment is not "wholly and exclusively laid out or expended for the purpose of acquiring the income" as required by s. 14 (b) of the Ordinance;

(iii) the expenses incurred in connection with the sale of the company's assets were a capital expenditure and were therefore not deductible. So also were the expenses incurred in connection with the proposed revision of the company's franchise, for the latter was a capital asset and any expenditure in an attempt to vary it was expenditure of a capital nature.

Appeal dismissed.

J. H. S. Elliott, Q.C., for the appellants.

R. M. F. Delph, Solicitor General (ag.), for the respondent.

FRASER, J.: This appeal is against an additional assessment of tax made by the Commissioner on 31st December, 1960, on the appellant company's income for the year 1958. The additional tax is \$6,559.20 on a chargeable income of \$14,576. Briefly, the facts are these. In the absence of a return the appellant company was assessed in May, 1959, on an estimated chargeable income of \$1,189,000. In July an income tax return in respect of income for 1958 was submitted by the appellant company. The chargeable income was declared at \$1,190,402.23. Among the documents submitted with the return was a schedule of general expenses incurred in 1958. Particulars were requested for the items of supervision and legal expenses which were shown at \$105,374.55 and \$8,061.09 respectively. After correspondence between the Commissioner and the accountants of the appellant company the Commissioner disallowed the sum of \$14,576.14 upon which the additional assessment is based. This sum comprised the following:—

| | |
|----------------------|--------------------|
| Legal Expenses | \$ 5,616.01 |
| Travelling Expenses: | |
| P. W. Raymer | 2,105.05 |
| A. A. Putnam..... | 1,943.48 |
| H. L. Talbot..... | <u>4,911.60</u> |
| | <u>\$14,576.14</u> |

In letters written in October, 1960, the accountants to the appellant company furnished explanations for the expenditure. With regard to legal expenses it was stated that \$523.26 was referable to the sale of the company's assets and \$5,092.75 was incurred on the arrangements for the revision of the company's franchise. With regard to the travelling expenses of Messrs. Raymer and Putnam, it was explained that they visited British Guiana to discuss the company's "rate of return" with Government officials in connection with the company's proposals to extend the Georgetown electric system by spending \$12,000,000 for two new 12.500 k.w. steam turbines and wide expansion and improvements to the distribution system. It was said that agreement with Government was sought in order to enable the company to finance the heavy programme. It should be mentioned at this point that the "rate of return" upon which agreement with Government was being sought in the discussions by Messrs. Raymer and Putnam was to be the amount (not less than 8½%) computed "after all operating expenses and taxes of all kinds (including taxes on income) and proper allowance for depreciation which the company is entitled to earn annually on the fair value of its property assets and undertakings used or useful in supplying electricity, in order to attract investment capital within or without the Colony." With regard to the travelling of Mr. H. L. Talbot for the periods other than when he substituted as General Manager while

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Mr. McIntyre was on vacation leave, it was explained by a letter dated 12th December, 1960, that the travelling expenses were incurred for the purpose of ascertaining whether the Government intended to repudiate its simple contract to purchase or whether the company was to continue in business.

On 23rd July, 1958, the appellant company had submitted to Government a memorandum setting out the basis on which it was prepared to continue in business and embodying the proposals to enable the company to operate satisfactorily and attract the necessary capital. Those proposals involved a revision of the company's franchise and the establishment of a rate of return described as the "fair return."

Having considered those explanations the Commissioner declined to treat the expenses incurred as deductible and made the additional assessment. The sole question is whether these expenses were wholly and exclusively incurred in the production of the company's income in 1958. In short, was it capital expenditure or revenue expenditure? The case of *Ralli Estates Ltd. v. Commissioner of Income Tax*, [1961] 1 W.L.R. 329, re-emphasized the principle that it is the purpose of the payments which must determine whether the expenditure is revenue or capital. For the payments to be treated as revenue expenditure they must be made for the direct purpose of producing profits—see *B.G. Lithographic Co. Ltd. v. I.R.C.*, (1959) 1 W.I.R. 241, 1959 L.R.B.G. 60. In that case Luckhoo, J. (as he then was) in a careful judgment reviewed the cases on this point and examined closely the comparable legislation in the Commonwealth including ss. 12 and 14 of the Income Tax Ordinance, Cap. 299. At p. 255 LUCKHOO, J., said this ((1959) 1 W.I.R.):—

"In my view the test to be applied in determining whether a disbursement or expense is an allowable deduction under the Ordinance is that it must have been incurred for the direct purpose of producing profits."

I am also of that opinion and I hold the words "in the production of the income" appearing in s. 12 (1) of the Ordinance to mean "in the production of the assessable income." In stating the test to be applied where, as in New Zealand, the words used in the statute were "in the production of the assessable income, Viscount CAVE in *Ward & Co. Ltd. v. Taxes Commissioner*, [1923] A.C. 145, said:

". . . . it must have been incurred for the direct purpose of producing profits."

In this case the appellant company has by necessary implication stated through its accountants that the expenditure was incurred for the following purposes:

Legal Expenses

| | | |
|------------|---|--------------------------------------|
| \$ 523.26 | — | for sale of company's assets |
| \$5,092.75 | — | for revision of company's franchise. |

Travelling Expenses

| | | | |
|--------------|---|------------|--|
| P. W. Raymer | — | \$2,105.05 | for discussing the feature of |
| A. A. Putnam | — | \$1,943.48 | “rate of return” in the revision of company’s franchise. |
| H. L. Talbot | — | \$4,911.60 | (a) for sale of company’s assets. |
| | | | (b) for revision of franchise as basis for company continuing in business. |

There emerges therefore two real purposes for which the expenses were incurred. The first purpose is the sale of the company’s assets and the second is the revision of the company’s franchise.

Mr. Elliott conceded that the sum of \$523.26 was not deductible as legal expenses incurred for arrangements for the sale of the company’s assets in view of my finding in Appeal No. 394 of 1961—*Demerara Electric Company v. I.R.C.* (at p. 4 herein). My opinion is that those payments are capital expenditure and are therefore not deductible. It is also established that payments which are made for a dual purpose, one of which is a revenue purpose, are nevertheless not deductible unless the payments can be divided into allowable and non-allowable parts because unless the division is made the gross payment is not “wholly and exclusively laid out or expended for the purpose of acquiring the income” as required by s. 14 (b) of the Income Tax Ordinance, Cap. 299—see *Copeland v. Flood (William) & Sons Ltd.*, [1941] 1 K.B. 202. By the application of that principle the whole sum of \$4,911.60 paid for the travelling of H. L. Talbot is at once assessable for the reason that the sale of the company’s assets is not a revenue purpose but a capital purpose and the travelling was incurred partly for that purpose and is not divided. There is, however, another ground which makes Mr. Talbot’s travelling not deductible. It is that the other purpose for which it was incurred involved the revision of the company’s franchise, which, in my judgment, is a capital purpose and not a revenue purpose.

Mr. Elliott submitted that the expenses for negotiations to revise the franchise were of the nature of revenue expenditure and cited the case of *No. 693 v. Minister of National Revenue*, 60 D.T.C. I think that the difference between that case and the present one is this: In *No. 693* the improvement of the capital position was to be done within the framework of the existing franchise whereas in this case the improvement of the capital position necessarily involved a statutory revision of the franchise. In *Pyrah v. Amis*, 37 T.C. 163, it was held that a carrier’s licence under the Road and Traffic Act, 1933, was a capital asset. VAISEY, J., said in that case at p. 169:

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“Now, here the purpose for which this sum of £1,272 was expended, as I have already mentioned, in an attempt to make the fleet of lorries owned by this Company more useful and more advantageous as income-winning assets, is not part of the carrying on of the business at all. It was an expenditure which was designed to improve the capital position of the Company, and I think that this unsuccessful attempt to better the capital position by obtaining the desired variation of the “A” licence was a matter which was properly attributable in the accounts to capital and not to income.”

Applying the same reasoning to this case I hold that the appellant company’s franchise is a capital asset and any expenditure in an attempt to vary it is expenditure of a capital nature.

It was proposed by the appellant company that its statutory franchise be amended by legislation. Following the principle in *Moore & Co. v. Hare* (1914), 6 T.C. 572, I must hold that expenditure incurred with a view to having legislation amended is capital expenditure. A great deal has been said about the need, at the time, to improve the financial position of the appellant company and to attract capital both locally and abroad. It was urged that the scheme contained in the company’s memorandum to Government was intended to make the company a more attractive financial proposition. On this aspect of the argument I think the words of Lord MACMILLAN are applicable. In the case of *Montreal Coke and Manufacturing Co. v. Minister of National Revenue* (1944), C.T.C. 94, Lord MACMILLAN said at p. 100:

“it is not the business of the appellants to engage in financial operations. The nature of its business is sufficiently indicated in its title. Of course, like other business people, it must have capital to enable it to conduct its enterprise, but its financial arrangements are quite distinct from the activities by which it earns its income.”

It seems to me that the scheme contemplates the expansion of the company’s operations in the context of a revised franchise. This is a capital purpose and not a revenue purpose. For the reasons given I dismiss this appeal with costs fixed in the sum of \$250 payable by the appellant company to the respondent.

Appeal dismissed.

IN THE MATTER OF THE DEEDS REGISTRY ORDINANCE,
Cap. 32, s. 37 (2)

[Supreme Court—In Chambers (Luckhoo, C.J.), March 10, 15, April, 1962]

Power of attorney—Executed abroad and recorded in the Deeds Registry—Attempt to enlarge power by undated notice—No proof of signatures of notice—Deeds Registry Rules, rr. 23 and 24—Evidence Ordinance, Cap. 25, s. 28.

By a power of attorney executed in New York and recorded in the Deeds Registry H authorised A to manage *inter alia* a certain property in British Guiana belonging to H, subject to the exception that H could not make, execute or deliver any deed or mortgage in respect of the said property. A sought to transport the property to the appellant, acting under the power of attorney supplemented by an undated notice purporting to be signed by H and addressed to the Registrar. No proof was tendered of the signatures on the notice. Section 28 of the Evidence Ordinance, Cap. 25, provides for the proof of the due execution of a special power of attorney to pass transport made outside of the colony. On refusal by the Registrar to certify the passing of the transport, the appellant appealed.

Held: the notice was inadmissible to enlarge the power of attorney, and under the latter A had no authority to pass the transport.

Appeal dismissed.

O. M. Valz for the appellant.

LUCKHOO, C.J.: This is an appeal brought by virtue of the provisions of s. 37 (2) of the Deeds Registry Ordinance, Cap. 32, against the refusal of the Registrar to certify for passing to the appellant a conveyance by way of transport of immovable property situate in this Colony.

The property is in the ownership of one Joseph Holder who presently resides in the United States of America.

On the 22nd of March, 1960, Holder executed in the City and State of New York, in the United States of America, a power of attorney in favour of William Nicholas Arno who resides in British Guiana. This power of attorney was duly recorded in the Deeds Registry on the 9th of June, 1960. Arno, purporting to act under the power of attorney supplemented by an undated notice purporting to be signed by Holder and addressed to the Registrar, has sought to convey the property to the appellant by way of transport.

The power of attorney executed on the 22nd of March, 1960, was given for the purpose of Arno managing Holder's properties and concerns in British Guiana "and in general in and about the premises to perform, transact and accomplish all and whatever shall or may be requisite or necessary and whatever further the ap-pearer may from time to time direct by letter or letters, cable or other written instructions (in proof whereof the affidavit or statutory declaration

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of the attorney may be accepted) as fully and effectually to all intents and purposes as the appearer could do if personally present.”

It is specifically stated in the power of attorney that the property in question is included within the authority conferred by the power of attorney except that Arno cannot make, execute or deliver any deed or mortgage in respect of the said property.

No power to sell or transport the property is contained in the power of attorney.

For the appellant it was urged that the general words mentioned above are sufficiently wide to include a power to sell or transport the property. I do not agree. As was stated by the Lord Chancellor (Lord CAMPBELL) in *Perry v. Holl* (1860), 2 de Gex, F. & J. 38 at p. 48, “if there is a power of attorney to do a particular act followed by general words, these general words are not to be extended beyond what is necessary for doing the particular act for which the power of attorney is given.”

Solicitor for the appellant has also referred to the case of *Reckitt v. Barnet, Pembroke and Slater, Ltd.* (1928), 45 T.L.R. 36, where a power of attorney was given by the appellant to enable one Lord Terrington to manage the appellant’s affairs while he was in France. Lord Terrington lodged the power of attorney with the appellant’s bank in order to draw cheques upon the appellant’s accounts. The bank informed Lord Terrington that in their view the power of attorney did not authorise the drawing of such cheques. The bank suggested that the appellant should write to them stating that he wished the power to cover the drawing of cheques upon them by Lord Terrington “without restriction”. Lord Terrington then obtained for the bank a letter addressed to the bank and signed by the appellant to the effect that he wished the power to cover the drawing of cheques upon the bank by Lord Terrington without restriction. Lord Terrington, in fraud of the appellant, drew a cheque on the appellant’s account in favour of the respondents, in part payment of a motor car which he had obtained from them for his own purposes on the hire purchase system. The respondents were aware that the cheque was drawn by Lord Terrington as agent for the appellant. The appellant brought an action against the respondents to recover the proceeds of the cheque. The House of Lords held that as the respondents knew that Lord Terrington was paying his own debt to them with the appellant’s money and had not authority to do so, the appellant was entitled to recover the proceeds of the cheque.

For the appellant in the present case reliance is placed upon the opinion expressed by Lord DUNEDIN in *Reckitt’s* case in support of solicitor’s contention that the notice addressed to the Registrar made the position the same as if the power of attorney had itself contained a clause permitting Arno to pass transport of the property. At p. 38 (45 T.L.R.) Lord DUNEDIN said —

“ . . . The power of attorney was silent as to the question of drawing cheques and the bank wanted to be certiorated on this

point. The letter refers to the power of attorney 'which you have inspected' and then says 'I wish the power to cover the drawing of cheques upon you by Mr. Woodhouse (*i.e.*, Terrington) without restriction.' That seems to me to be exactly the same as if the original power of attorney had had a clause at the end, 'and for the purposes aforesaid I wish that Terrington be allowed to draw cheques without restriction'."

The authority to draw cheques though not contained in the power of attorney given to Terrington was in furtherance of the purpose of managing Reckitt's affairs. It was not a new power to do an act not contemplated by the power of attorney. The power sought to be given by Holder to Arno by way of the notice to the Registrar is a new power to do an act not contemplated by the power of attorney.

So far the matter has been dealt with on general lines. Rule 23 of the Deeds Registry Rules (contained in the Second Schedule to the Deeds Registry Ordinance, Cap. 32), requires any person seeking to pass a transport on behalf of another person to lodge with the Registrar the power of attorney under which he claims to act except where the power is already deposited or recorded. By Rule 24 a special power of attorney which provides only for the passing of a transport may be lodged with the Registrar though the Rule does not state how it must be executed if executed without the Colony. However, the Registrar must be satisfied of the due execution of the power. Section 28 of the Evidence Ordinance, Cap. 25, provides how due execution of such a power (made without the Colony) may be proved. No such proof has been given the Registrar.

All that the Registrar had before him was a typewritten notice bearing a signature purporting to be that of "J. I. HOLDER" and the signature of another person as a witness. No proof of the signatures has been given.

In these circumstances I am of the opinion that the Registrar was not in error in refusing to certify the conveyance.

Appeal dismissed.

PRAIM AND OTHERS v. SAM

[In the Full Court, on appeal from the magistrate's court for the Essequibo Judicial District (Luckhoo, C.J., and Khan, J.,) January 11, 12, 26, 1962.]

Magistrate's court—Joint trial of summary conviction offence and indictable offence triable summarily—Whether competent—Summary Jurisdiction (Procedure) Ordinance, Cap. 15, ss. 2, 28 and 63.

Section 28 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, provides that "where two or more complaints appear to arise out of the same circumstances the court may . . . hear and determine the complaints at one and the same time." Section 2 provides that "'complaint' includes any information or charge relating to a summary conviction offence." Section 63 provides that ". . . so soon as the court assumes the power to deal with (an indictable) offence summarily, the procedure shall be the same, from and after that period, as if the offence were a summary conviction offence and not an indictable offence . . ."

Arising out of the same circumstances the appellants were charged with a summary conviction offence and with an indictable offence triable summarily. The magistrate duly decided to hear the indictable matter summarily and, with the consent of the appellants, to take both matters together. The appellants having been convicted on both charges appealed, their contention being that the provisions of s. 28 relate only to trial of matters which are brought by way of information or charge relating to summary conviction offences.

Held: (i) the information or charge relating to an indictable offence triable summarily is, once the magistrate's court decides to deal with it summarily, a complaint within the meaning of that term in s. 28 of the Ordinance;

(ii) section 28 permits a magistrate to hear or determine two or more charges which appear to arise out of the same circumstances, one or more of the charges being for an indictable offence triable summarily.

Appeal dismissed.

C. Lloyd Luckhoo, Q.C., for the appellants.

W. R. Persram, Crown Counsel, for the respondent.

Judgment of the Court: The sole point for determination in this appeal is whether by virtue of the combined effect of the provisions of ss. 28 and 63 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, it is competent for a magistrate to hear and determine two or more charges which appear to arise out of the same circumstances, one or more of the charges being for an indictable offence triable summarily. All of the other grounds of appeal filed have been abandoned at the hearing of this appeal.

The appellants were charged indictably with inflicting grievous bodily harm upon one Jaisingh on the 6th of February, 1961, contrary to s. 50 of the Criminal Law (Offences) Ordinance, Cap. 10. The prosecutor applied for the matter to be tried summarily and the magistrate, acting in accordance with the provisions of s. 60 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, decided to deal with the matter summarily.

Arising out of the same circumstances the appellants were also charged with maliciously wounding one Ramcharran Singh, contrary to s. 30 (b) of the Summary Jurisdiction (Offences) Ordinance. Cap. 14.

The appellants agreed that both charges should be heard and determined at one and the same time. This fact is not stated on the case jacket or in the notes of evidence but is stated in the magistrate's memorandum of reasons for decision and was confirmed before us by Mr. Sahoy who had appeared for the appellants before the magistrate. This course was adopted and the appellants were found guilty on both charges and were sentenced to four months' imprisonment on both charges.

It is not disputed that the provisions of s. 60 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15 (which relate to the steps required to be taken before an indictable offence is dealt with summarily) were complied with and that the magistrate could properly have dealt with that charge summarily. Section 63 of the Ordinance provides as follows:—

“63. Where an indictable offence is, in the circumstances mentioned in this Ordinance, authorised to be dealt with summarily,—

(a) the procedure shall, until the court assumes the power to deal with the offence summarily, be the same in all respects as if the offence were to be dealt with throughout as an indictable offence, but when and so soon as the court assumes the power to deal with the offence summarily, the procedure shall be the same, from and after that period, as if the offence were a summary conviction offence and not an indictable offence, and the provisions of this Ordinance shall apply accordingly:

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Provided that nothing herein contained shall be construed to prevent the court from dealing thereafter with the offence as an indictable offence, if it thinks fit to do so;

(b) the evidence of any witness taken before the court assumed the power to deal with the offence summarily need not be taken again, but the witness shall, if the defendant so requires, be recalled for the purpose of cross-examination;

(c) the conviction for the offence shall be of the same effect as a conviction on a trial on indictment therefor;

(d) where the court has assumed the power to deal with the offence summarily, and dismisses the complaint on the merits, it shall, if required, deliver to the person charged a copy, certified under the hand of the magistrate, of the order of dismissal, and the dismissal shall be of the same effect as an acquittal on a trial on indictment for the offence; and

(e) the conviction shall contain a statement either as to the plea of guilty of the person charged or his consent to the offence being dealt with summarily by the court.”

The magistrate assumed the power to deal with the indictable charge summarily at the very outset so that the procedure from the very outset had to be the same as if the offence were a summary conviction offence and not an indictable offence and the provisions of the Ordinance, (Cap. 15), applied accordingly. By s. 2 of the Ordinance a summary conviction offence means any offence punishable on summary conviction before the magistrate’s court acting in the exercise of its jurisdiction in respect of summary conviction offences.

That procedure is set out at Part III of the Ordinance under the heading “Hearing and Order” which includes s. 28. Section 28 provides as follows:—

“Where two or more complaints appear to arise out of the same circumstances the court may, if it thinks fit, and if all the parties consent, hear and determine the complaints at one and the same time.”

Counsel for the appellants has submitted that the provisions of s. 28 relate only to the trial of matters which are brought by way of information or charge relating to summary conviction offences. In support of this submission counsel has referred us to the definitions of “complaint,” “summary conviction offence” and “indictable offence” in s. 2 of the Ordinance—

“In this Ordinance unless the context otherwise requires,—

‘complaint’ includes any information or charge relating to a summary conviction offence;

‘summary conviction offence’ means any offence punishable on summary conviction before the court:

‘indictable offence’ means any offence punishable on indictment.”

By those definitions a "complaint" includes any information or charge relating to any offence punishable on summary conviction before the magistrate's court acting in the exercise of its jurisdiction in respect of such offences.

Counsel for the appellant referred to the case of *Harry v. Beramsingh*, 1941 L.R.B.G. 41. In that case the appellant was charged indictably with the larceny of a heifer and the matter was by consent of the parties dealt with summarily. It was contended that the magistrate had no jurisdiction and further that the trial summarily was limited to within six months under s. 7 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 14, (now s. 6 of Cap. 15). The Full Court (FRETZ and STUART, JJ.) held on appeal that s. 7 of Cap. 14 did not apply where an indictable offence was being tried summarily and that the offence remained an indictable offence.

That case is distinguishable from the instant case. The provision of the Ordinance relating to the limitation of a complaint did not relate to any matter of procedure from or after the time the magistrate had decided to deal with the matter summarily. In *Harry v. Beramsingh* the Full Court's opinion that the indictable offence remained an indictable offence by consent tried by summary procedure must be read along with the provisions of s. 64 (a) of Cap. 14, (now s. 63 (a) of Cap. 15), that when and so soon as the court assumes the power to deal with the offence summarily the procedure shall be the same from and after that period as if the offence were a summary conviction offence and not an indictable offence.

In *Simpson v. Butts* (1952) (unreported), to which counsel for the respondent referred us, the Full Court allowed an appeal where two indictable charges were taken together by consent of the parties. We have consulted the bound volume of Full Court matters for July, 1952, and have read the appeal record. No written judgment was handed down. It would appear that the magistrate had begun to enquire into the matters indictably and at the close of the evidence for the prosecution he decided to deal with the matters summarily with the consent of the parties. The parties declined to lead a defence and closed their oases. They were convicted. On appeal it was, in effect, submitted on behalf of the appellants that despite their consent to the trial of both matters summarily the trial was a nullity. It is clear that the proceedings before the magistrate were a nullity because the magistrate could not lawfully enquire into the two indictable charges at one and the same time. Thereafter every step taken in the proceedings was a nullity including the purported summary trial. That case is to be contrasted with the unreported case of *Collins v. Ramjattan* (Appeal No. 652/1957) to which counsel for the respondent referred us. In that matter two indictable charges against the appellant were tried summarily together by a magistrate. The parties had consented to summary trial as well as trial of the charges at one and, the same time. The appellant was convicted and he appealed to the Full Court on the ground that it was not competent for the magistrate to try together two indictable

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charges taken summarily. In that appeal the cases of *Harry v. Beramsingh (ubi supra)* and *Simpson v. Butts (ubi supra)* were referred to as well as ss. 28 and 63 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15. The Full Court (STOBY, Ag. C.J., and DATE, J.) dismissed the appeal. No written judgment was delivered. In that case the magistrate had decided from the outset to try both matters summarily.

We have consulted the minute book of DATE, J., and it appears that no reference to the definitions contained in s. 2 of the Ordinance was made by counsel during the course of the argument. However, we do not think that it would have made any difference to the view taken by the Full Court in *Collins v. Ramjattan* if the Full Court's attention had specifically been drawn to those definitions.

In the instant case although the offence charged by s. 50 of Cap. 10 is punishable on indictment if tried by jury it is also punishable on summary conviction before the magistrate's court. When dealt with in the latter way under the provisions of the Ordinance, although it remains an indictable offence, yet for the purposes of procedure it is treated as a summary conviction offence. The information or charge relating to the offence is, once the magistrate's court decides to deal with it summarily, a complaint within the meaning of that term in s. 28 of the Ordinance. It is our opinion, therefore, that s. 28 of the Ordinance permits a magistrate to hear and determine two or more charges which appear to arise out of the same circumstances, one or more of the charges being for an indictable offence triable summarily.

The appeals are dismissed with costs \$25.00 to the respondent. The convictions and sentences are affirmed.

Appeals dismissed.

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[Supreme Court (Fraser, J.,) April 18, 25, 28, 1962.]

Election petition—Corrupt practice by agent—Report by judge to Speaker—Incapacities in consequence suffered by agent—Agent acquitted in subsequent criminal proceedings—Application for removal of incapacities—Discretion of court—Criteria for removal of incapacities—Legislature (Appointment, Election and Membership Controversies) Ordinance, 1961, s. 37(1).

The respondent's election was declared void on the ground that at the instance of his agent A.C. one S. had personated another voter. In accordance with s. 35 of the Legislature (Appointment, Election and Membership Controversies) Ordinance, 1961, A.C.'s conduct was reported by the court to the Speaker and thereupon A.C. became subject to certain legal incapacities. A.C. was subsequently tried on indictment for the offence of personation but was acquitted thereof. He then moved for the removal of the incapacities under s. 37 (1) of the Ordinance, which provides that "where any person is subject to any incapacity by virtue of the report of the court under s. 35 of this Ordinance and he . . . is on a prosecution acquitted of any of the matters in respect of which the incapacity was imposed, the acquittal shall thereafter . . . be reported to the court which may, if it thinks fit, order that the incapacity shall henceforth cease so far as it is imposed in respect of those matters".

Held: (i) the power given in s. 37 is a discretionary power intended to be exercised by a court after consideration of all relevant circumstances;

(ii) the factors to be considered are (a) whether there was a proper trial on the merits before the jury; (b) whether the material witnesses in the trial of the election petition testified on the trial of the indictment; and (c) whether on the face of the record of the trial of the indictment the verdict of the jury can be said to be a perverse verdict.

Application granted.

S. L. Van B. Stafford, Q.C., and J. O. F. Haynes, Q.C., for the applicant.

J. R. G. Hope for the petitioner.

G. A. S. Van Sertima, Senior Legal Adviser (ag.), for the second respondent.

G. S. S. Gillette, Director of Public Prosecutions.

FRASER, J.: This is a motion by counsel on behalf of Ashton Chase to remove the incapacity to which he became subject by a report of this court to the Speaker made on 30th November, 1961, in accordance with s. 35 of the Legislature (Appointment, Election and Membership Controversies) Ordinance, 1961—No. 34 of 1961. The application prays for the exercise of the court's power as prescribed in s. 37 (1) of that Ordinance which reads as follows:—

37. (1) Where any person is subject to any incapacity by virtue of the report of the Court under section 35 of this Ordinance and he or some other person in respect of whose act the incapacity was imposed, is on a prosecution acquitted of any of the matters in respect of which the incapacity was imposed, the acquittal shall, thereafter or, if an appeal may be made,

after the expiration of the ordinary period allowed for making an appeal or, if an appeal is made and the acquittal is affirmed, after the appeal is finally disposed of or, if an appeal is made and is abandoned or fails by reasons of non-prosecution thereof, after the appeal is abandoned or so fails, be reported to the court which may, if it thinks fit, order that the incapacity shall henceforth cease so far as it is imposed in respect of those matters.

The applicant was tried on indictment before a judge and jury for the offence of personation and was acquitted on a unanimous verdict of the jury on 8th March, 1962.

The two questions which arise in this application are (a) whether the power given in s. 37 is mandatory and must be exercised as of course upon an acquittal; or (b) whether it is discretionary and, if so, in what circumstances will the court exercise its discretion upon an acquittal. Mr. Haynes referred to s. 111 of the Representation of the People Ordinance, 1957, No. 3 of 1957, which reads as follows:—

111. Where a person becomes subject to any incapacity under this Ordinance by reason of any conviction, or of a report of any election court, and any witness who gave evidence against such incapacitated person upon the proceeding for such conviction or report is subsequently convicted of perjury in respect of that evidence, the incapacitated person may apply to the Supreme Court, and the Court, if satisfied that the conviction or report regarding such person was based upon perjury may order that such incapacity shall thenceforth cease, and the same shall cease accordingly.

It was submitted that the word “may” in s. 111 of Ordinance 3 of 1957 should be construed as “shall” thereby making it a mandatory duty of the court to order the incapacity to cease if satisfied that the report was based upon perjury. While conceding that the words “may, if it thinks fit” appearing in s. 37 of Ordinance 34 of 1961 were not generally the same in meaning as “may” in s. 111 of Ordinance 3 of 1957, Mr. Haynes urged that in an application for relief under s. 37, as in the present application, the court should construe the words as meaning “shall” and treat the power as mandatory. There is some merit in the argument that “may” in s. 111 of Ordinance 3 of 1957 should be construed as “shall”. I should consider a person entitled to relief without question if a report to the Speaker was based on perjury and the appropriate application for relief is made to the court. I cannot agree however that “may, if it thinks fit” can be construed as meaning “shall”. In my opinion the addition of the words “if it thinks fit” after the word “may” necessarily implies a discretion and removes the power from the category in which it could possibly in certain circumstances be a mandatory power. In my opinion the power given in s. 37 is a discretionary power intended to be exercised by a court after consideration of all relevant circumstances.

The difficulty which arises in this application is to settle the criteria upon which relevancy is to be determined and thereafter to

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select what circumstances are relevant in terms of the criteria adopted. This aspect of the law is an uncharted way in which no help is provided in decided cases. The provisions of s. 37 of Ordinance 34 of 1961 are to some extent similar to those in s. 152 of the Representation of the People Act, 1949, which replaced ss. 46 and 56 (1) of the Corrupt and Illegal Practices Prevention Act, 1883. I have found no case dealing with this provision and the researches of both senior and junior counsel engaged in this application have been equally unsuccessful. There can be no doubt that the Legislature anticipated the precise eventuality that has occurred in this case and has made provision to meet it. It is equally clear that the provision is intended to provide relief in cases other than those in which the report was based upon perjury. This is manifestly so by virtue of subs. (2) of s. 37 which by reference allows the court the additional power to grant relief to a person subject to any incapacity by reason of a report based upon perjury.

After giving careful consideration to the very able argument of Mr. Haynes, and to the submissions of other counsel, and having regard to the scope of the legislation I am of the opinion that the factors which are to be considered are:

- (1) whether there was a proper trial on the merits before the jury;
- (2) whether the material witnesses in the trial of the petition testified on the trial of the indictment; and
- (3) whether on the face of the record of the trial of the indictment the verdict of the jury can be said to be a perverse verdict.

I propose to deal now with the circumstances which I consider relevant to each of the above factors.

It appears from the record of the proceedings attached to the applicant's affidavit that there was a full trial of the indictment before the jury. Submissions of no case to answer were made on behalf of the accused. They were overruled by the trial judge who left the issues of fact for the determination of the jury. The jury returned a unanimous verdict of not guilty.

With regard to the question of the material witnesses I think that it is unnecessary to deal with the witnesses who gave evidence about the personation by Sookhoo; suffice it to say, that all of those witnesses gave evidence at the trial of the petition and at the trial of the indictment. It is only necessary for the purposes of this application to consider those witnesses whose testimony is specifically referable to the allegation of aiding and abetting made against the applicant. In the trial of the petition evidence considered by the court was given by Ashton Andries, Cpl. John Corlette, Ashton Chase and Sookhoo. All these witnesses gave evidence on oath. In the trial of the indictment evidence on oath was given on behalf of the prosecution by Ashton Andries, Cpl. John Corlette, and Alfred Davis. On behalf of the applicant evidence on oath was given by Tanzil Razac, Henry

Mangroo, Claude Vibart Wight and Fenton Ramsahoye. The jury did not hear sworn testimony by the applicant. He made an unsworn statement from the dock. Sookhoo was not called as a witness.

The evidence of the applicant in the trial of the petition was important and in the judgment of the court reference was made to the significance of it in relation to the evidence of Ashton Andries and Cpl. Corlette. It is however to be borne in mind that upon a trial of an indictment an accused person is not bound to give sworn testimony and while in this case the applicant could have done so, he nevertheless had a right to adopt the course he did. Therefore, for the purposes of this application it is not a relevant consideration because the burden of proof was on the prosecution. The evidence of Sookhoo also had significance in the trial of the petition in which the court called him as a witness under the provisions of s. 15 of Ordinance 34 of 1961. It should perhaps be mentioned that he was a person liable to be reported under that Ordinance and the court for that reason considered it fitting to hear his evidence. But the conduct of the indictment did not make him a necessary witness and here again his omission to do so is not a relevant consideration for the reason that, in my opinion, in an application of this nature the court cannot enquire into what the jury may have done if the evidence of Ashton Chase and Sookhoo was a part of the testimony to be considered by the jury. The court has only to consider what the jury did in relation to evidence led in the trial of the indictment.

Ashton Andries, Cpl. John Corlette and Alfred Davis were material witnesses. Davis' evidence and that which was led in rebuttal of it at the hearing of the petition was considered inadmissible. The other material witnesses at the trial of the indictment were Tanzil Razac and Henry Mangroo, neither of whom gave evidence in the petition but testified on behalf of the applicant at his trial. It was submitted that this court ought to consider the possible effect which the evidence of Razac and Mangroo may have had if it was available at the trial of the petition and in doing so to consider also that the applicant was not a party to the petition and therefore did not have control of the conduct of the respondent's case. So far as the evidence of Razac and Mangroo is concerned I think that it will not be possible for this court to say whether or not that evidence was likely to affect the findings of the court on the trial of the petition, but it would be appropriate to deal with this part of the submission when consideration is being given to the third factor.

The other part of the submission with regard to the applicant's control of the defence in the petition has to be looked at in relation to the notice requiring him to show cause. At that stage of the proceedings without saying whether it may have been possible for him to call witnesses he could, I think, have requested the court to postpone the submission of a report on the ground that criminal proceedings were taken or were likely to be taken against him. The case of *R. v. Mansel Jones*, [1889] 23 Q.B.D. 29, is helpful on this point. At p. 34 POLLOCK, B., said this:

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“The person charged is not a party to any issue before the Court, and whether or not he has committed corrupt practices must be determined upon the evidence of other persons who must have been closely connected with this conduct. It must first be established by the evidence of others that he is a person against whom the charge is made. Then there comes a moment of time at which the commissioner has to determine whether or not to make a report against him. He is summoned before the Court; and, if he appears, the Court must give him an opportunity of being heard “by himself.” Those words may be struck out entirely if the view is adopted that he may be heard by counsel or solicitor. I think they mean “by himself” and nothing else. No great danger results from the construction. He is only in the position of a man against whom a bill has been found by a grand jury. He is entitled to insist that other proceedings shall be taken against him before he is made liable to the consequences which may follow if he is found to have been guilty of corrupt practices.”

While this passage does not establish a principle it does indicate what steps may be taken by a person required to show cause.

What would then have been the position if that course had been adopted by the applicant and the court had postponed the submission of a report? If the applicant was convicted a report would have been unnecessary because upon conviction the applicant would suffer the same incapacities as result from the submission of a report. If the applicant was acquitted then, in my judgment, the court should only consider the circumstances of the acquittal because a verdict of not guilty by a jury after a trial on the merits is recognised by English law as a badge to freedom. The circumstances which in that case should be considered are whether there was any element of perjury; or whether the verdict was against the weight of the evidence; or whether the verdict was a perverse verdict, and finally whether the evidence was the same or substantially the same as that considered in the trial of the petition. It seems to me, therefore, that notwithstanding a report having been made, in order to decide whether the discretionary power is to be exercised in this case, this court has a duty to examine the circumstances of the acquittal. This brings me therefore to the third factor.

I have read the record of the trial on the indictment and I wish to say at once that in my view the jury came to a proper verdict on the evidence which was available for their consideration. The element of perjury does not arise but there are many disturbing features about the evidence of Ashton Andries and Cpl. John Corlette. It appears also that certain suggestions put to the witness Corlette by the defence appear to conflict with the sworn testimony which the applicant gave in the trial of the petition. For example, it was suggested to Corlette that Sookhoo was not at the police station when the applicant first visited, whereas the applicant in his sworn testimony in the trial of the petition said that Sookhoo was at the station when he first visited but he did not speak to him. Corlette denied

this but in cross-examination he gave evidence about the applicant's conversations with Sookhoo which differed materially from the evidence he gave in the trial of the petition. It is difficult to reconcile those answers with his evidence in chief and to a reasonable jury his credibility must clearly have been in doubt. The witness Andries also gave evidence under cross-examination which differed from his evidence in the trial of the petition. The differences did not relate to his identification of the applicant or of Sookhoo but they touched upon his conduct during the afternoon of 21st August. It is not necessary to deal exhaustively with the many instances of difference; it is enough to say that his credit before the jury must have been severely shaken. The differences related to matters which in my opinion cannot be excused on the basis of imperfect memory. It is not for me to find reasons for this curious behaviour of the principal witnesses for the prosecution. I was satisfied with their evidence in the trial of the petition but that has no relevance in considering whether the acquittal of the applicant was justified on the evidence before the jury. Having regard therefore to this aspect of the matter I must find that on the face of the record the verdict of the jury cannot be said to be perverse and in all the circumstances I consider it right to exercise my discretion in favour of the applicant and order that the incapacity suffered by the applicant by virtue of my report made to the Speaker under s. 35 of the Ordinance shall henceforth cease.

I wish to make it clear lest there be any misunderstanding that this order is not intended to affect nor can it legally affect anything I said in the determination of the election petition from which these proceedings arose. I desire finally to express the court's appreciation for the helpful and thorough arguments addressed by Mr. Haynes.

I shall forthwith certify the determination of this court to the Governor and to the Speaker.

Application granted.

Solicitors: *Sase Narain* (for the applicant); *C. M. L. John* and *V. Lampkin* (for the petitioner); *P. M. Burch-Smith*, Crown Solicitor (for second respondent).

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[Supreme Court—In Chambers (Date, J.,) April 4, 6, 9, 30, 1962]

Practice and procedure—Judgments and orders—Settlement reported to court—Direction that draft order be submitted by parties for approval of court—Rival drafts submitted to Registrar who preferred and entered one—Order entered in substantial agreement with settlement as reported—validity of order entered.

Execution—Arrears of maintenance—Application for writ of fieri facias—Whether such writ is the appropriate remedy—Mode of application—Order 36, r.8 (1) and (17).

In recording the terms of settlement reported in an application for permanent maintenance, the court directed that a draft order be submitted for approval. Rival draft orders were thereafter submitted to the Registrar, the draft submitted for the wife being however substantially in agreement with the terms of settlement as reported to the court except for one variation inserted at the instance of the husband. The Registrar, without submitting the drafts for the approval of the court, entered the order in the terms of the draft submitted on behalf of the wife. Subsequently the wife filed an *ex parte* application by way of affidavit for leave to issue a writ of *fieri facias* against the husband's property for recovery of arrears due under the order. Pursuant to leave granted by the court the application was served on the husband who later argued that the application could not properly be brought *ex parte*, that the correct remedy was a writ of sequestration, and not a writ *fieri facias* and that the order under which the wife purported to act was bad having been wrongly entered unilaterally and not by consent.

Order 36, r. 8 (1), provides that “a judgment or order for the recovery by or payment to any person of money may be enforced by (a) a writ of sale of property, movable and immovable; . . .” Order 36, r. 17, provides that “any party desiring to issue a writ of execution shall file with the Registrar a request in writing for that purpose signed by such party or his solicitor . . .”

Held: (i) the wife was entitled to a writ of *fieri facias*. *Van Sluytman v. Van Sluytman*, 1960 L.R.B.G. 3, followed;

(ii) a summons was unnecessary and all that the wife need have done to obtain a writ of *fieri facias* was to file with the Registrar a request in writing in accordance with the provisions of order 36, r. 17;

(iii) the court would now approve of the order as entered.

Order accordingly.

J. A. King for the respondent.

The petitioner appeared in person.

DATE, J.: These two divorce cases were consolidated and tried together. On January 23, 1960, I granted to each of the parties a decree *nisi* on the ground of cruelty, the question of the custody of the children of the marriage being adjourned into chambers. The decree *nisi* was made absolute on March 12, 1960.

There are five children of the marriage. The eldest is Michael John, born on February 21, 1945. The other four children are girls, born respectively on January 11, 1947, April 29, 1948, September 23, 1954, and October 1, 1956. At the time of the pronouncement of the decree *nisi* Michael John was in the custody of Mr. Allen, who is a

barrister-at-law practising in this Colony, and the four girls were in the custody of Mrs. Allen, who is an uncertificated primary school teacher.

On April 7, 1960, Mrs. Allen filed a petition for permanent maintenance of herself and the children of the marriage. Thereafter, with the leave of the court, various affidavits were from time to time filed, and on December 17, 1960, both the question of the custody of the children and the application for permanent maintenance came on for hearing before me in chambers. Mr. J. A. King appeared for Mrs. Allen. Mr. Allen appeared in person. Mr. Allen said that though his application was for the custody of the four girls of the marriage he would be satisfied to have the custody of Helen and Frances, or of Frances alone (if the court so thought) "to end the dispute". He also stated that he had no objection to Frances spending her school vacations with Mrs. Allen. Other aspects of the matter were mentioned in chambers and the hearing was then adjourned to January 7, 1961, "pending discussions by the parties and their legal advisers."

When the matter came up for hearing on January 7, 1961, Mr. Allen again appeared in person and Mr. J. A. King again appeared for Mrs. Allen. Mr. Allen produced a copy of a letter dated January 4, 1961, from his solicitor, Mr. O. M. Valz, to Mrs. Allen's solicitors, Messrs. Cameron and Shepherd. In that letter, a copy of which was by consent put in as Exhibit A, Mr. Valz stated:

"My client will agree to the following terms of settlement which were more or less suggested by His Lordship the Judge.

1. The four girls to remain in the custody of the respondent, Mrs. D. U. Allen, but they are to spend three week-ends per month in the custody of the petitioner, my client. Such days with the petitioner to commence on Fridays on or around 6 p.m. and to conclude on Monday mornings on or around 7.30 a.m. to enable the children to go to school. It must be appreciated that my client wishes to review the children's school work and as on week-ends they could only work on one or two nights such an arrangement is necessary.

2. Helen, Frances and Barbara Ann to attend the school of my client's choice at his expense. Frances and Ann to attend, as the Court suggested, Baird's High School, whereas Helen to seek entry to St. Joseph's High School now in course of erection or some similar school.

3. My client to pay \$60.00 per month permanent alimony."

Having regard to some of the questions now raised, I will here set out my complete note of the proceedings before me in chambers on January 7, 1961:

"Mr. Allen produces copy of letter dated 4.1.61 from his solicitor, Mr. Valz, to Messrs. Cameron and Shepherd. (By consent letter put in as Exhibit A).

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Mr. King states: As regards para. 1 of Exhibit A, Mrs. Allen would prefer children to come back on Sunday night so as to avoid confusion in getting them to school on Monday morning. Mr. Allen says he will not make an issue of that.

It is agreed that the children should return to Mrs. Allen by 8.15 p.m. on Sundays.

It is also agreed that Michael should spend with Mrs. Allen the week-ends when the girls will be with her.

Mr. King says Mrs. Allen agrees to para. 2 of Exhibit A with the further condition that on Frances and Ann respectively attaining the age of 12 years, Mr. Allen will have the right to make a reasonable selection of the school to which they should go, Mrs. Allen to be at liberty to apply if in her opinion the selection is unreasonable.

Mr. O. M. Valz now appears for Mr. Allen.

Mr. Allen undertakes to look after the transportation of the children to and from school. Mrs. Allen to be at liberty to apply if Mr. Allen fails to honour this undertaking which is not to be made a term of the formal order.

As regards paragraph 3 of Exhibit A: It is agreed that the rate of permanent alimony be \$80 a month with effect from 1.1.61 on condition that sum of \$100 be paid in respect of arrears—in instalments to be agreed upon.

Order accordingly.

Draft order to be submitted for approval.”

No draft order was ever submitted to me, nor was it ever brought to my knowledge by anyone that any dispute or difficulty had arisen in connexion with the settling of the order.

The record shows that a draft order which had been presented to the Registry by Mrs. Allen’s solicitor was initialled and signed respectively by the Judicial Officer and the Deputy Registrar and was entered on August 18, 1961. The operative part of the order reads thus:

“IT IS ORDERED as follows:

That Carol Athene, Helen Louise, Frances Rosamond and Barbara Ann the children of the marriage be permitted to spend the first three weekends in each month with the Petitioner commencing each Friday at 6.15 p.m. on condition that they be returned by 8.15 p.m. on Sundays and that Michael John be permitted to spend the remaining weekend or weekends with the Respondent on similar terms. That Helen, Frances and Barbara Ann do attend the school of the Petitioner’s choice at his expenses and that Frances and Barbara Ann do attend Baird’s High School as suggested by the Court whereas Helen do seek entry to St.

Joseph's High School now in course of erection on condition that on Frances and Barbara Ann attaining the age of 12 years the Petitioner shall have the right to make a reasonable selection of the school to which they should go, with liberty to the Respondent to apply if in her opinion the selection is unreasonable.

THAT the Petitioner will pay to the Respondent permanent alimony at and after the rate of \$80.00 per month for herself and the children of the marriage namely, Carol Athene, Helen Louise. Frances Rosamond and Barbara Ann with effect from the 1st January, 1961, and until they shall attain the ages of 16 years, on condition that the sum of \$100.00 be paid by the Petitioner to the Respondent in satisfaction of arrears due, in instalments to be agreed upon."

On February 3, 1962, Mrs. Allen filed an *ex parte* application by way of affidavit for leave to issue a writ of *fieri facias* against the property of Mr. Allen for recovery of the sum of \$680 representing arrears due under the order made on January 7, 1961. The affidavit stated, *inter alia*, that on January 5, 1962, Mr. Allen was in arrears in the sum of \$720 commencing from April 1 to December 31, 1961; that a sealed and certified copy of the order bearing penal notice was served on him on January 5, 1962; and that on January 13, 1962, he paid the sum of \$120 towards the arrears but had failed to pay the balance and was at the time of the filing of the application in arrears in the sum of \$680 for the period May 1, 1961, to January 31, 1962.

The *ex parte* application came before KHAN, Ag. J., in Chambers on February 6, 1962. Mr. Allen, who had somehow got to hear about the application, was present in that judge's chambers when the application came on for hearing. Leave to serve Mr. Allen was granted, and on February 20, 1962, the date to which the hearing of the application had been adjourned, Mr. Allen filed an affidavit in reply. That same day the matter came before ADAMS, Ag. J., in chambers. On the affidavit in reply filed by Mr. Allen appears this note by the judge's cleric:

"Received on 20.2.62 in chambers."

The record further shows that ADAMS, J., adjourned the matter to March 20, 1962, to enable Mr. Allen "to pay the arrears of alimony and to bring application for variation of the order of DATE, J." On March 20, 1962, a further adjournment was granted, this time at the request of Mrs. Allen's solicitors.

On April 4, 1962, Mrs. Allen's application for a writ of *fieri facias* and Mr. Allen's affidavit in reply came on for hearing before me. Mr. King appeared for Mrs. Allen. Mr. Allen appeared in person. Mr. King stated, and Mr. Allen confirmed, that the whole of the amount of \$680 mentioned in Mrs. Allen's application had been paid on March 22, 1962. Mr. King then asked for leave to withdraw Mrs. Allen's application for the writ of *fieri facias* and for an order for costs against Mr. Allen since the arrears of alimony were paid long

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after the application had been made and served on Mr. Allen pursuant to the order by KHAN, J. Mr. Allen opposed Mr. King's application and contended that the application for the writ of *feri facias* should be dismissed with costs in his favour. He did not pursue paras. 3, 4 and 5 of his affidavit in reply, which relate to the custody of the children and are in the nature of an application for variation of the order for custody made by me on January 7, 1961. I understood him to say that he intended to take up that aspect of the matter separately.

The relevant paragraphs of Mr. Allen's affidavit in reply are therefore paragraphs 1 and 2, which are as follows:

"1. The learned trial judge on the 7th January, 1961, ordered that the terms of settlement regarding the custody of the children should be mutually settled by the parties, their solicitor and counsel and be embodied in an order by the consent. The terms of what purports to be the order were never so settled but were unilaterally entered by the respondent [Mrs. Allen] in spite of correspondence to the effect with the respondent's solicitors and the supply of a draft order. Consequently this order is bad as not expressing the true and agreed terms provided, should be expunged from the record and a new one provided.

2. An application by summons in chambers in regard to such subject matter is not properly made *ex parte* and should be dismissed with costs. The application is further bad in that a certificate of the judgment creditor's residence is not attached."

Before me Mr. Allen submitted:

(1) that an application for a writ of *feri facias* cannot properly be brought *ex parte*;

(2) that such an application is bad in law if it does not state the residence of the parties;

(3) that a writ of sequestration, and not a writ of *feri facias*, is the appropriate remedy for recovery of arrears of permanent alimony;

(4) that the order under which Mrs. Allen purported to act is bad having been wrongly entered unilaterally and not by consent.

Submission (2) was abandoned by Mr. Allen when his attention was attracted to the first paragraph of Mrs. Allen's affidavit in which her residence is stated.

For support for his third submission, that is, that a writ of *feri facias* does not lie to enforce payment of arrears of alimony, Mr. Allen referred to the cases of *Capron v. Capron* (1927), 96 L.J. (P.) 151, and *Findlay v. Findlay*, [1947] P. 122, C.A., and to the following passage in the note headed "Alimony" on p. 1001 of the ANNUAL PRACTICE, 1961:

“Orders for the payment of arrears of alimony and maintenance are not ‘judgments’ in the strict sense, and cannot be enforced as such, hut payment of arrears of alimony and maintenance may be enforced under section 5 of the Debtors Act, 1869.”

Section 5 of the Debtors Act, 1869 [U.K.], provides for the committal to prison for a term not exceeding six weeks, or until payment of the sum due, of any person who makes default in payment of any debt or instalment of any debt due from him in pursuance of any order or judgment of a competent court.

The note “ALIMONY” on p. 1001 of the ANNUAL PRACTICE, 1961, appears under O. 42, r. 3, which reads as follows:

“3. A judgment for the recovery by or payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any court whose jurisdiction was transferred by the Supreme Court of Judicature Act, 1873, might have been enforced at the time of the passing thereof.”

The corresponding local rule is O. 36, r. 8 (1), of the Rules of the Supreme Court, 1955, which reads:

“8. (1) A judgment or order for the recovery by or payment to any person of money may be enforced by—

- (a) a writ of sale of property, movable and immovable;
- (b) the attachment of debts due to the person directed by the judgment or order to pay the money; and
- (c) an order charging the interest of such last-mentioned person in the shares or scrip of any incorporated company.”

In *Van Sluytman v. Van Sluytman*, suit No. 1456 of 1959 Demerara (1959 L.R.B.G. 3), it was submitted that it was not competent for a writ of execution to be issued by a wife against her husband’s immovable property for his failure to pay any sum due under an order of the Supreme Court as alimony pending suit. In his judgment dated January 30, 1960, LUCKHOO, C.J., adverted to the relevant English and local rules and said this:

“Reference has been made to the position in England where it is desired to enforce such an order. There, it would appear, judgment summons proceedings are taken out, payment of arrears of alimony being enforced under s. 5 of the Debtors Act, 1869. See *Findlay v. Findlay*, [1947] P. 122, C.A. In England the relevant provision as to enforcing a judgment for payment of money is Order 42, r. 3 It has been pointed out at page 1001 of the ANNUAL PRACTICE, 1960, in a note to that rule under the heading ‘Alimony’ that orders for the payment of alimony and maintenance are not ‘judgments’ in the strict sense, and cannot

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be enforced as such. The corresponding local rule, however, refers both to judgments and orders and therein lies the difference in the mode of enforcing orders as to alimony and maintenance in this Colony as compared with England.”

The learned Chief Justice held that an order for the payment of alimony is an order for the payment to a wife of money and is within the provisions of r. 8 (1) of the Rules of the Supreme Court, 1955 [B.G.].

Mr. Allen’s contention that sequestration is the remedy for which application should have been made by Mrs. Allen appears to be based on nothing more substantial than certain dicta in *Capron v. Capron* (*supra*). In that case a wife was granted a decree of judicial separation, with costs. She also obtained an order for permanent alimony payable by monthly instalments. The husband failed to pay the taxed costs or to keep up the payments under the order for permanent alimony; instead, he proceeded to dispose of his property. A receiver of his assets was appointed by the court and a sum of £79 was collected by the receiver and paid into court. The wife then moved the court for a writ of sequestration in order that what little was left of the husband’s property might be obtained for her benefit. In granting the writ BATESON, J., said (at pp. 153, 154, (1927) 96 L.J. (P.)):

“There is a special rule in the Divorce Rules—Rule 97—which says: ‘In any matter of practice or procedure which is not governed by statute or dealt with by these rules the Rules of the Supreme Court in respect of like matters shall be deemed to apply.’ But when one comes to look at Divorce Rule 79 (a), it specially deals with the very matter which we are discussing, thus: ‘In default of payment of any sum of money at the time appointed by any order of the Court for the payment thereof, a writ of *feri facias*, sequestration, or elegit shall be sealed and issued as of course in the registry upon the affidavit of service of the order and of non-payment.’ So that here there is a special rule which seems to me exactly to cover this case. Further than that, if there was not such a special rule, I myself think that this is within R.S.C., Order XLIII, r. 6, because the order for payment of alimony by monthly payments is in my view an act to be done ‘in a limited time.’ Rule 6 says: ‘Where any person is by any judgment or order directed to pay money into Court or to do any other act in a limited time, and after due service of such judgment or order refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment or order shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person.’ I think that this is not a mere order to pay a sum per annum for maintenance by monthly instalments. It is something more than a mere order for the payment of money. It is an act which has to be done at regular times in accordance with the terms of the order, and, in my judgment, when the Court has ordered money to be paid monthly, it means that the monies

are to be paid within the month, which I think is a limited time; so that *on either view of the case in this regard the argument of counsel for the respondent fails.*”

The question in the instant case is not whether a writ of sequestration is a remedy available to Mrs. Allen but whether she is entitled to a writ of *feri facias*. It seems to me that *Capron v. Capron* is against Mr. Allen rather than in his favour. I agree with and adopt the views expressed by the Chief Justice in *Van Sluytman v. Van Sluytman*.

I turn now to Mr. Allen's first submission: that Mrs. Allen's application is bad in that it was made *ex parte*. Mr. Allen contended that the application should have been by summons which should have been served on him at least two clear days before the return thereof in accordance with the provisions of r. 60 of the Matrimonial Causes Rules (Subsidiary Legislation, vol. IX [B.G.]). He argued that there are only two ways by which an application can come before the court in matrimonial causes and that they are to be found in r. 53 of the Matrimonial Causes Rules [B.G.], which reads:

- “53. Applications to the Court shall be made—
- (a) if by motion, to a judge in Court;
 - (b) if on summons, to a judge in chambers.”

In my opinion this argument is unsound. Rule 53 of the Matrimonial Causes Rules applies only to such applications as are required to be brought by motion or on summons, and merely provides that the former shall be made in open court and the latter in chambers.

Section 2 (1) of the Matrimonial Causes Act, Cap. 166 [B.G.], provides that, subject to any Ordinance, the jurisdiction to be exercised by the Supreme Court in respect of divorces and other matrimonial causes and disputes “shall as far as possible be exercised in the same manner and in accordance with the same principles and rules as jurisdiction in those matters is exercised by the Probate, Divorce and Admiralty Division of the High Court of Justice in England, subject to any rules of court made under this Ordinance *or the Supreme Court Ordinance*, or any amending Ordinance, hereinafter in this Ordinance called ‘the rules’.”

The English practice, which is based on r. 62 of the Matrimonial Causes Rules, 1950 [U.K.], is stated in RAYDEN ON DIVORCE (6th Edn.), pp. 350 and 351, thus:

“In default of payment to any person of any sum of money, at the time appointed by order of the court, a writ of *feri facias*, or of *elegit*, may be issued, as of course, in the Registry, upon affidavit of service of the order and non-payment. The affidavit must show that the copy served bore the penal notice required by Divorce Rule 62 (2),”

Rule 17 of O. 36 of the Rules of the Supreme Court, 1955 [B.G.], made under the Supreme Court Ordinance, provides:

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“Any party desiring to issue a writ of execution shall file with the Registrar a request in writing for that purpose signed by such party or his solicitor. The request shall contain the title of the action, the reference to the record, the date of the judgment, and of the order, if any, directing the execution to be issued, the names of the parties against whom, or the firm against whose goods, the execution is to be issued. Forms Nos. 1 to 5 (inclusive) in Appendix Q to these Rules shall be used with such variations as circumstances may require.”

From the foregoing it seems that a summons was unnecessary and that all that Mrs. Allen need have done to obtain a writ of *feri facias* was to file with the Registrar a request in writing in accordance with the provisions of O. 36, r. 17 [B.G.]. I understand that this is indeed the practice in this Colony, though Mr. King in the course of his arguments said that in this particular case a Registry officer (not named) had declined to issue the writ on request. That, he said, was why Mrs. Allen’s solicitors adopted the procedure laid down for the issue of writs of sequestration in O. 36, r. 101 [B.G.]:

“101. No writ of sequestration shall be issued unless by leave of the Court or a Judge to be obtained on *ex parte* application.”

This brings me to the fourth and last submission made by Mr. Allen, that is, that the order under which the application was made is bad having been wrongly entered unilaterally and not by consent. During the arguments on this point it was admitted that in March, 1961, Mrs. Allen’s solicitors sent a draft order to Mr. Allen’s solicitor. By letter dated March 30, 1961, Mr. Allen’s solicitor replied in these terms:

“The Honourable Justice DATE decided on the 7th January, 1961, that the girls in the custody of the respondent should spend three consecutive week-ends with the petitioner, Mr. Frank Allen, the period being from 6.15 p.m. on Friday to 8.15 p.m. on Sunday.

The draft order which has been forwarded did not properly state this. Consequently it has been amended accordingly. In respect of Michael in the custody of the petitioner he should spend one week-end per month with the respondent for the same period. Nothing was said in court concerning the holidays and therefore it is sought to incorporate conditions for the spending of the holidays by consent. A draft copy of the order submitted to the court is appended for your information.

Please let me have your views on this.”

The draft order which accompanied this letter included the following passages:

(a) “It is ordered as follows that Carol Athene, Helen Louise, Frances Rosamond and Barbara Ann the children of the marriage be permitted to spend the three week-ends in each month with the Petitioner commencing on each Friday at 6.15 p.m. and

terminating on Sundays at 8.15 p.m. and that Michael John be permitted to spend one week-end per month with the Respondent on similar terms.

(b) "That the Petitioner will pay to the Respondent permanent alimony at and after the rate of \$80.00 per month for the maintenance of the children of the marriage, namely, Carol Athene, Helen Louise, Frances Rosamond and Barbara Ann with effect from the 1st January, 1961 until they shall attain the age of sixteen years on condition that the sum of \$100.00 be paid by the Petitioner to the Respondent in respect of arrears due, in instalments to be agreed upon.

That the said five children of the marriage should spend half of their school holidays with the Petitioner and the Respondent respectively."

Mr. Allen says that a copy of this draft order was also sent to the Registry.

By letter dated April 19, 1961, Mrs. Allen's solicitors acknowledged the receipt of the letter dated March 30, 1961, and stated that Mrs. Allen did not agree to the inclusion of the clause relating to school holidays. They added:

"We submit herewith a copy of the final draft which we are laying over with the Registrar and we are making arrangements to have this matter called up before Mr. Justice DATE as early as possible."

In that letter Mrs. Allen's solicitors went on to complain that Mr. Allen had paid only \$80 on account of the arrears and had made no payment in respect of alimony for the preceding three months. They also complained that almost every other day Frances and Barbara Ann were being taken by Mr. Allen to his house for lunch without any previous intimation to Mrs. Allen and that this was causing her a considerable amount of anxiety. They said that Mrs. Allen would be asking the court to make an order that the children should not go to Mr. Allen's home for lunch during the school period.

It would appear that the "final draft" referred to in this letter is the one that was eventually entered on August 18, 1961.

By letter to Mrs. Allen's solicitors dated April 26, 1961, Mr. Allen's solicitor admitted that Mr. Allen had paid only \$80 on account of the arrears and said that a further sum would reach her that day; he answered the complaints made by Mrs. Allen about the children being taken to Mr. Allen's home at lunch time, and said:

". . . my client insists on the following points being included in the draft order:

1. The permanent alimony of \$80 per month is for the children until they shall each attain the age of 16 years as is allowed by law.

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2. That the children of the marriage should spend their holidays half with the petitioner and half with the respondent.

In reply to the covering letter my client sees no reason why this matter should be brought before the court or why an order of court should not be arranged by consent. The terms he desires are legally permissible and equitable.”

To complete the background to the arguments before me on the last point raised by Mr. Allen, I think I should mention that Mr. Maraj, the Chief Justice’s clerk, has confirmed that while I was acting as Chief Justice last year (from April 8 to August 8) Mr. Allen handed him a copy of a draft order. The matter, Mr. Maraj said, appeared to him to be somewhat complicated and, as he knew nothing about it, he handed it over to Assistant Sworn Clerk Alli, who was my clerk when I made my order on January 7, 1961. Mr. Alli is and has for some time been on long leave.

It is common ground that the sum of \$100 mentioned in the order entered on August 18, 1961, as arrears payable by Mr. Allen to Mrs. Allen in instalments to be agreed upon, has in fact been paid.

It is also common ground that the question of the children of the marriage spending half of their school vacations with each of the parents was never raised during the discussions in chambers which resulted in the order made by me on January 7, 1961. Mr. Allen concedes that the order entered cannot be impeached in this respect and that it was up to him to come back to the court and ask that provision for that be included.

But Mr. Allen alleges that the \$80 per month permanent alimony was only for the four children and not for the children and Mrs. Allen. The record shows that Mrs. Allen’s petition dated April 7, 1960, was for “permanent maintenance of herself and the children of the marriage.” Mr. Allen’s solicitor’s letter dated January 4, 1961, which, as I have already pointed out, formed the basis of the discussions in chambers, contained this term:

“3. My client to pay \$60 per month permanent alimony.”

It was there, incidentally, that the expression “permanent alimony”, instead of “permanent maintenance” crept in. I do not think that that is important. The point is that in chambers Mr. Allen never sought to make any stipulation that the maintenance or alimony was to be in respect of the children only. The sum eventually agreed upon was \$80 per month and my note is: “It is agreed that the rate of permanent alimony be \$80 a month with effect from 1.1.61.” Nothing was said in chambers about the age to which the alimony would be paid in respect of the children. My understanding of the matter was that for the time being the parties were agreeing to a lump sum payment of \$80 per month as the maximum amount that Mr. Allen could afford to pay in respect of Mrs. Allen’s application for mainten-

ance for herself and the children and that in due course, as conditions changed and the children advanced in years, the amount to be paid would be reviewed. Mr. Allen concedes that the words "and until they shall attain the ages of 16 years" which appear in the last paragraph of the order entered on August 18, 1961, were inserted by Mrs. Allen's solicitors as a result of the suggestion to that effect contained in the draft order which accompanied his solicitor's letter to them dated March 30, 1961. As to the practical value of the insertion of that provision in the absence of any apportionment of the alimony payable, I am not clear.

Mr. Allen also alleges that the agreement in chambers was that Michael would spend one week-end a month with his mother and that the four girls would spend three week-ends a month with him. That is not so. The agreement, as will be seen from his solicitor's letter dated January 4, 1961 (Exhibit A), and my notes of the proceedings in chambers, was that the four girls were to spend three week-ends per month with Mr. Allen and that Michael was to "spend with Mrs. Allen the week-ends when the girls will be with her". It may well be that when this arrangement was made Mr. Allen overlooked the possibility of there being more than four week-ends in a month.

Mr. Allen's main argument on this last point appeared to be that before the order was entered the draft should have been submitted to the court for approval, and that had Mrs. Allen's solicitors informed his solicitor of their intention to have the order entered, his solicitor would have come back to the court. He said that it was incumbent on Mrs. Allen's solicitors, who knew of the existence of the other draft order submitted by his solicitor, to cause both drafts to be submitted for the judge's consideration. In reply, Mr. King drew attention to:

(a) the first paragraph of Mrs. Allen's solicitors' letter of April 19, 1961, in which it is stated, "we submit herewith a copy of the *final draft which we are laying over with the Registrar* and we are making arrangements to have this matter called up before Mr. Justice DATE as early as possible," and

(b) the fourth paragraph of Mr. Allen's solicitor's letter of April 26, 1961, in which it is stated, "my client sees no reason why this matter should be brought before the court or why an order of court should not be arranged by consent."

Mr. King further submitted that the draft order laid over by Mrs. Allen's solicitors correctly represented what was agreed upon in chambers and that after it was laid over with the Registrar the matter was out of the hands of her solicitors. He added that where a judge orders that a draft be submitted for approval it is for the Registrar to take it to the judge. He conceded that normally both solicitors initial the draft but said that on this occasion it was impossible to have that done as Mr. Allen's solicitor kept insisting on inserting terms that were not agreed upon.

Mr. Allen invited reference to O. 35, r. 2 (3), of the Rules of the Supreme Court, 1955 [B.G.], which provides:

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“(3) A draft of every judgment shall be left with the Registrar to be settled before the judgment or order is signed and sealed. If the Registrar deems it necessary he may summon the parties before he settles the draft.”

Mr. Allen contended that inasmuch as there were before the Registrar two drafts which contained material differences—one submitted on behalf of one party and the other on behalf of the other party—the Registrar should have summoned the parties before settling the draft.

It seems to me that in the circumstances which I have stated the drafts should have been submitted to me. Nevertheless, it is the fact that, except for the passage relating to the age limit of the children which was inserted at the instance of Mr. Allen, the draft order submitted by Mrs. Allen’s solicitors accurately represented the order made by me on February 7, 1961, whereas the one submitted by Mr. Allen’s solicitor did not. The Registry officers who dealt with the matter and had before them the entries on the file made by the Assistant Sworn Clerk who was present in the chambers at the material times must have been influenced by this fact. Had the two drafts been submitted to me I would undoubtedly have approved the one that was entered on August 18, 1961. I see no reason why I should not now approve it. I accordingly do so. If Mr. Allen wishes any changes in the terms agreed upon and ordered on January 7, 1961, the onus is on him to make an application in the proper way for variation of the order.

Mr. King’s application for leave to withdraw Mrs. Allen’s application for the issue of a writ of *feri facias* is granted; but having regard to my findings and the circumstances generally, I order that each party shall bear their own costs.

Order accordingly.

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[In the Full Court, on appeal from the magistrate's court for the Berbice Judicial District (Luckhoo, C.J., and Khan, J. (ag.)) April 6, May 5, 1962.]

Workmen's compensation—Limitation—Requirement for claim for compensation to be made within six months of accident—Whether requirement fulfilled where application was made but notice of claim not given within six months—Workmen's Compensation Ordinance, Cap. 111, s. 15 (1) (c).

Section 15 (1) of the Workmen's Compensation Ordinance, Cap. 111, provides that "proceedings for the recovery . . . of compensation for any injury shall not be maintainable unless . . . (c) the claim for compensation with respect to such action has been made within six months from the occurrence of the accident causing the injury". Section 33 provides that "if an employer on whom notice of the accident has been served . . . do not within four weeks after the receipt of the notice agree in writing with the workman

as to the amount of compensation to be paid, the workman may make such application as in this Ordinance is provided for enforcing his claim for compensation”.

In an application for compensation by the respondent against the appellant it was established that within the period of six months after the accident the appellant paid \$10 to the respondent's father and later sent for the respondent and his father and offered to pay \$100 by instalments of \$25. The magistrate having made an order in favour of the respondent, the appellant appealed on the ground that the respondent had failed to make a claim within six months as required by s. 15 (1) (c). For the respondent it was, however, argued that if the application to the magistrate is made within the prescribed period that is sufficient notice of claim for compensation.

Held: (i) the application to the magistrate's court is not a claim for compensation within the meaning of s. 15 (1) (c) of the Ordinance. The application is to enforce the claim for compensation which must be made within the prescribed period of six months from the date of the accident;

(ii) from the evidence relating to the offer made by the appellant it was reasonable to infer that a claim had in fact been made for the payment of compensation within the prescribed period.

Appeal dismissed.

D. Dyal for the appellant.

R. P. Rawana for the respondent.

Judgment of the Court: The main point for determination in this appeal is whether proceedings for the recovery of compensation under the Workmen's Compensation Ordinance, Cap. 111, are maintainable where the proceedings are brought within six months from the occurrence of the accident causing the injury to the workman but no notice of the claim for compensation has been given to the employer prior to the commencement of the proceedings.

Section 15 of the Ordinance contains the requirements as to the giving of notice of accident and the period within which the claim may be brought. Paragraph (c) of sub-s. (1) of that section provides as follows:—

“Proceedings for the recovery under this Ordinance of compensation for any injury shall not be maintainable unless—

* * * *

(c) the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury;”

The proviso to this sub-section specifies the circumstances under which failure to make a claim within the specified period shall not be a bar to the maintenance of such proceedings.

For the appellant employer it was submitted that the provisions of s. 15 (1) (c) of the Ordinance require that the workman must send

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his employer a *notice* of his claim for compensation within six months from the occurrence of the accident causing the injury and that those provisions do not relate to the workman making an application to a magistrate to enforce his claim.

In support of his submission counsel for the appellant referred to the case of *Powell v. The Maine Colliery Co. Ltd.*, [1900] A.C. 366, where a majority of the House of Lords held that the words “the claim for compensation” in a similarly worded provision contained in s. 2 (1) of the Workmen’s Compensation Act, 1897, meant, not the initiation of proceedings before the tribunal by which the compensation is to be assessed but a notice of a claim for compensation sent to the workman’s employer. In that case the injured workman had sent his employers within six months after the accident a notice of the accident and also a notice stating that he claimed a certain amount as compensation for the injury. However, he filed a request for arbitration in the county court more than six months after the accident. His employers contended that the request for arbitration was required by s. 2 (1) of the Act to be filed within six months from the date of the injury and that accordingly the proceedings before the arbitrator could not be maintained. The arbitrator overruled this contention and made an award. The Court of Appeal (A. L. SMITH and COLLINS, L.J.J., ROMER, L.J., dissenting) held that the proceedings were out of time under the Act and set aside the arbitrator’s award. In the House of Lords the Lord Chancellor (Earl of HALSBURY) said that the statute deliberately and designedly avoided anything like technology and that the word “proceedings” in the subsection was used in a sense different from that which would describe legal procedure ordinarily. The Lord Chancellor considered that the notice of claim for compensation was a “claim for compensation” within the contemplation of s. 2 (1) of the Act. Lord SHAND considered that the notice of claim was the first step in and a part of the “proceedings”. Lord BRAMPTON put the matter in this way—

“If you desire compensation, give notice of your injury as speedily as you can, and send in your claim within six months; try to agree with your employer, but if you fail to do so, you may then enforce your right to compensation by arbitration, but you will not be entitled to an arbitration or to insist upon compensation unless you have given notice and claim as the statute directs you to do.”

Lord ROBERTSON considered that the proceedings contemplated by the Act were not primarily judicial proceedings, that although arbitration may be required to decide differences arising in proceedings, it is only incidental to the proceedings and is not contemplated as a necessary part of them and that once this is realised it becomes clear that the proper initiation of the proceedings is not an appeal to arbitration but is exactly such a claim as that which was sent to the employers by Powell.

Lord DAVEY was content to adopt the reasons given in the dissenting judgment of ROMER, L.J., in the Court of Appeal. In effect,

ROMER, L.J., held ([1900] 2 Q.B. 145) that there can be no arbitration until there is a dispute and there can be no dispute until a claim for compensation has been made. In his dissenting judgment in the House of Lords Lord MORRIS took the view that the words "the claim for compensation" in s. 2 (1) of the Act could not refer to any document to be served on the employer, but must refer to some document appealing to a tribunal. Lord MORRIS stressed that the word "the" and not "a" is used before the word "claim" and said

"if these words are satisfied by the workman merely serving a notice on the employer that he claims a certain amount as compensation, and does not proceed to give seisin to any tribunal of his claim to be disposed of according to law, it follows that it remains open for any period of time—that the claim remains hanging over the employer with a right to the workman to take proceedings against him to the most remote period of time, not even limited by the Statute of Limitations.

That the employer may initiate proceedings against himself appears to me an unmeaning and futile contention."

In this connection the Lord Chancellor, Lord SHAND and Lord ROBERTSON saw no difficulty in an employer himself approaching the arbitrator for a determination of the question. A similar opinion was expressed by Viscount DUNEDIN in *M'Cafferty v. MacAndrews & Co.*, [1930] A.C. 599 at p. 614, when dealing with an appeal brought in respect of proceedings under the 1925 Act.

Lord MORRIS also referred to the fact that the Act contained provisions as to what the notice of accident is to contain and of the mode of service or delivery of it to the employer but that no reference whatever is made to what "the claim for compensation" is to contain, or as to the mode of service or delivery of it. He said that this appeared to be conclusive that "the claim for compensation" could not refer to any document served on the employer, but must refer to some document appealing to a tribunal.

Counsel for the respondent has urged that if the application to the magistrate is made within the period of six months after the date of the accident that is a sufficient notice of claim for compensation. Counsel has referred us to a passage appearing at pp. 429 and 430 of WILLIS' WORKMEN'S COMPENSATION (33rd Edn.) under the heading "*Proceedings . . . under this Act . . . shall not be maintainable unless*" etc., wherein it is stated—

"It is clear, therefore, that the section does not require the proceedings for arbitration to be brought within the six months. If the claim for compensation is first made by the initiation of proceedings, then those proceedings must be started within the six months; but if a claim for compensation has been made within that period there is no limit to the time within which the actual proceedings by way of application for arbitration are to be commenced. The employer is protected against undue delay by

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having power himself to apply for arbitration (See *M'Cafferty v. MacAndrews*, [1930] A.C. 599; B.W.C.C. 286; Digest Supp.).

In *M'Cafferty's* case one of the questions which arose was the construction to be put upon the expression—

“If, within the time hereinbefore limited for taking proceedings under this Act,”

in s. 29 (2) of the Workmen's Compensation Act, 1925. That expression related to the provisions of s. 14 (1) of the Act. Section 14 (1) provides—

“Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the accident has been given as soon as practicable after the happening thereof and unless the claim for compensation with respect to such accident has been made within six months from the occurrence of the accident causing the injury”

Section 29 (2) provides—

“If, within the time hereinbefore limited for taking proceedings under this Act, an action is brought to recover damages independently of this Act for injury caused by an accident, and it is determined in such action or on appeal that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the provisions of this Act, the action shall be dismissed; but the Court in which the action is tried, or, if the determination is the determination (on appeal by either party) by an appellate tribunal, that tribunal shall, if the plaintiff so chooses, proceed to assess compensation, but may deduct from such compensation all or part of the costs, which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. In any proceeding under this sub-section”

It was held by the House of Lords (Sc.) as is stated in the head-note to the report of that case in [1930] A.C. 599, that upon the construction of those provisions, the expression “within the time hereinbefore limited for taking proceedings under this Act” does not mean that the action must be brought within six months from the occurrence of the accident but means that the claim must be made within six months as a condition of taking proceedings for the recovery of compensation and that if the conditions of s. 14 (1) of the Act are complied with the Act imposes no limit of time within which the action must be brought.

In his opinion Lord WARRINGTON OF CLYFFE put the matter succinctly—(at pp. 623 and 624)—

“The learned judges of the Court of Session have thought themselves justified in reading ‘time limited for taking proceedings’ as if it had been ‘time limited for making the claim’. I

cannot think this view is justified. The purpose of the section is obviously to secure that the claim for compensation referred to therein is at the time when the action is commenced a live claim capable of being maintained and prosecuted.”

The statement contained in the passage of WILLIS’ (at p. 429)

“If the claim for compensation is first made by the initiation of compensation, then those proceedings must be started within six months;”

is incorrect and finds no support in the majority opinions in *Powell’s* case or in *M’Cafferty’s* case.

Also incorrect is the first portion of the statement at p. 427 of WILLIS’ (33rd Edn.) under the heading “Claim” that “the words ‘the claim for compensation’ are not confined to the initiation of the proceedings before the tribunal by which the compensation is to be assessed, but also include notice of a claim for compensation sent to the workman’s employer. The authority cited for that statement is *Powell’s* case. At p. 428 there appears the further statement—

“. . . . but an application for arbitration is a claim, and does not require to be preceded by any other form of claim.”

The authority cited for that statement is *Fraser v. Great North of Scotland Rail Co.* [(1901), 3 F. 908; 34 Digest 369, 2988 iv]. Unfortunately, that report is not in the Law Library and it is therefore not possible to ascertain whether or not *Powell’s* case was cited in that case. We can find nothing in the majority opinions in the House of Lords in *Powell’s* case or the opinions in *M’Cafferty’s* case to support such a proposition and indeed the opinions given therein are to the contrary.

We are of the view, following as we do the majority opinions in *Powell’s* case and the opinions in *M’Cafferty’s* case, that the application to the magistrate’s court is not a claim for compensation within s. 15 (1) (c) of the Ordinance.

Reference should be made to s. 33 of the Ordinance, (Cap. 111), which provides that if an employer on whom notice of the accident has been served does not within the four weeks after the receipt of the notice agree in writing with the workman as to the amount of compensation to be paid, “the workman may make such application as in this Ordinance is provided for enforcing his claim to compensation.” The application is to enforce the claim for compensation. This presupposes that prior to the application a claim for compensation has been made.

On the facts the magistrate believed the evidence that the appellant paid the respondent’s father the amount of \$10.00. The circumstances under which that amount was paid are given by the father Goberdhan in his evidence. It may be contended that this payment was made *ex gratia*. But the appellant later sent for the

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respondent and his father and offered to pay \$100.00 by instalments of \$25.00. That offer the respondent's father refused. Subsequently, these proceedings were brought. From the evidence it may reasonably be inferred that a claim had been made for the payment of compensation on behalf of the respondent in respect of which the sum of \$100.00 was offered by the appellant and refused by the respondent's father. This all took place within the period of six months after the accident.

We are of the opinion that the magistrate did not err in making the award to the respondent.

The appeal is dismissed—each party to bear his own costs.

Appeal dismissed.

OFFICIAL RECEIVER v. RAMNARINE SINGH AND OTHERS

[Supreme Court (Date, J.) April 26, May 7, 1962.]

Practice and procedure—Joinder of parties and of causes of action—Common question of law or fact—Discretion of court—Order 14, rr. 1, 4, and 5—Order 16, rr. 1, 7 and 8.

In an action brought by the Official Receiver as assignee in insolvency of the estate of MEHS, a debtor, the statement of claim alleged that immediately prior to 10th November, 1963, Plantation Walton Hall was owned jointly by the debtor, the first-named defendant, R.S., and the second-named defendant, A.P.S. On 10th November, 1953, the plantation was sold at execution at the instance of the third-named defendant, the Drainage and Irrigation Board, for arrears of drainage rates. In February, 1961, it was however discovered that no rates had been due. The debtor purchased the plantation at the execution sale and agreed to sell it for \$20,000 to the fifth-named defendant, the Devonshire Castle Cooperative Savings Society Limited. Specific performance of this agreement was ordered by the Supreme Court but before the order could be performed the debtor was adjudged insolvent. It was also alleged that the society without consulting the debtor wrongfully paid part of the purchase price into his account at the Royal Bank of Canada, the fourth-named defendant, where it was appropriated to meet his existing debt with the bank. The debtor therefore claimed declarations that the execution sale was illegal and void, that the order of specific performance was void and that the agreement of sale was of no effect because of the supervening insolvency before conveyance was passed. Claims were also made for an injunction, for accounts and for various orders and declarations.

At the trial a preliminary objection was raised on behalf of the third-named defendant to the effect that the relief claimed against the defendants was not jointly, severally or in the alternative in respect of the same cause or causes of action, that the joinder of the parties was otherwise improper and embarrassing and that the action should be dismissed.

Order 14, r. 1, authorises the joinder of “all persons . . . as plaintiffs . . . where if such persons brought separate actions any common question of law or fact would arise” “Order 14, r. 4, provides that “all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative”; and r. 5 provides that “it shall not be necessary that every defendant shall be inter-

ested as to all the relief prayed for, or as to every cause of action included in any proceedings against him . . ." Order 16, r. 1, enables a plaintiff to "unite in the same action several causes of action . . ."

Held: (i) the court has a wide discretion and will normally allow the joinder of plaintiffs or defendants, subject to its directions as to how the action should be tried, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the object being to avoid an unnecessary multiplicity of actions;

(ii) the validity of the sale at execution was at least one important question which was common to the first, second, third and fifth defendants and they were properly joined under O. 14, having regard to r. 5 thereof;

(iii) provided that the parties had been properly joined in accordance with the provisions of Order 14, the extent to which different causes of action may be joined by virtue of Order 16 is limited only by judicial discretion, regard being had to whether the several causes of action can be conveniently tried and disposed of together. A good test is whether the causes of action are such that if separate actions were brought in respect of them an order to consolidate would be made. The joinder in this case would be allowed.

Objection overruled.

Dr. F. H. W. Ramsahoye, C. A. F. Hughes with him, for the plaintiff.

J. O. F. Haynes, Q.C., for the first and second-named defendants.

G. M. Farnum for the third-named defendants.

L. F. S. Burnham, Q.C., H. D. Hoyte with him, for the fifth-named defendant.

DATE, J.: In this action the Official Receiver, the plaintiff, sues as assignee in insolvency of the estate of M. E. H. Salisbury (hereinafter referred to as the debtor) who was adjudged insolvent on April 13, 1959.

Paragraphs 2 and 3 of the statement of claim aver that the debtor is the owner of two undivided third parts or shares in and to various properties including Plantation Walton Hall, situate on the west sea coast in the county of Essequibo, which properties formed part of the residuary estate of Parikan Rai who died in 1943 leaving his residuary estate to the debtor, the debtor's father, and to the first defendant and Ramjattan Singh, two brothers of the debtor.

Paragraph 4 of the statement of claim alleges that there was a re-distribution of the residuary estate of Parikan Rai in accordance with a written agreement dated February 16, 1943, between the devisees, and that Plantation Walton Hall and certain other properties were conveyed to the debtor, the debtor's father and Ramjattan Singh upon payment by them of the sum of \$6,000 to the second defendant.

It is alleged in paragraph 11 of the statement of claim that the interest of Ramjattan Singh in these properties was purchased by the debtor in or around April, 1945, and that title was vested in the debtor in respect of that interest in January, 1949.

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In paragraphs 40 and 41 of the statement of claim it is stated that on November 10, 1953, Pln. Walton Hall was sold at execution at the instance of the third-named defendant, the Drainage and Irrigation Board, in pursuance of its statutory powers to satisfy drainage rates alleged to have been owing on Pln. Walton Hall in 1952, and that in February, 1961, upon the receipt of an undated account from the Board, the Official Receiver learnt that no rates were owing by the said plantation when the sale at execution took place.

Paragraphs 42 and 43 state that Pln. Walton Hall was purchased at the execution sale by the debtor; that the debtor agreed to sell it to the fifth defendant for \$20,000; that specific performance of the contract with the fifth defendant was ordered by the Supreme Court in action No. 28 of 1954; that the judgment of the Supreme Court was upheld in proceedings No. 3 of 1955 before the West Indian Court of Appeal; that before the order of specific performance could be performed the insolvency of the debtor supervened, and that the order has not been performed. The fifth defendant admits that an order for specific performance was made but says that the contract and order were in respect of Plantation Walton Hall save and except certain lots thereof.

Paragraphs 45—47 of the statement of claim complain that instead of paying the purchase price of Plantation Walton Hall to the debtor personally, the fifth defendant, without prior consultation with the debtor, deposited the sum of \$14,500 into the debtor's account at the Royal Bank of Canada, the fourth defendant, where it was appropriated to meet his existing debt with that Bank; that the debtor was thus deprived of the opportunity to pay the purchase price to the marshal of the Supreme Court pursuant to the sale at execution; and that of the remaining sum of \$5,500, paid to the debtor by the fifth defendant, the sum of \$500 was paid to the marshal on account of the sale at execution.

Paragraphs 48 and 49 of the statement of claim allege that the third defendant has refunded arrears of rates in respect of the plantations which formed part of the residuary estate of the late Parikan Rai in respect of which an interest is held by the debtor, but that he has not received any portion of such rates and the third defendant has not furnished him with accounts of refunds of rates to which he is entitled.

The debtor claims *inter alia*:

- (a) A declaration that the sale at execution of Pln. Walton Hall in which the debtor held an interest amounting to two undivided third parts or shares was illegal and void, no rates having been owing on the said plantation in respect of the years 1946—1952, inclusive, for which the levy and sale at execution were effected.
- (b) A declaration that in any event the order of specific performance made in action No. 28 of 1954 in favour of the fifth defendant is null and void and that the agreement in

writing dated July 13, 1953, made between the debtor and the fifth defendant upon which the order was based is of no effect because of the supervening insolvency of the debtor before conveyance passed.

- (c) Alternatively, an order directing the fifth defendant to pay to the debtor the sum of \$14,500 being balance of the agreed purchase price of Plantation Walton Hall under the agreement in writing dated July 13, 1953, made between the debtor and the fifth defendant for the sale of Walton Hall.
- (d) An account of all moneys owing by the debtor to the third defendant in respect of drainage rates during the period 1952 to the date of judgment and for a further account of all funded arrears of (maintenance) rates payable by the third defendant to the debtor.

The other parts of the statement of claim relate to claims by the plaintiff as assignee in insolvency of the estate of the debtor against defendants other than the third defendant. These claims are for an injunction, for accounts and for various orders and declarations including an order directing the sale of properties jointly owned. Most of them relate to the debtor's interests in the properties which formed part of the estate of Parikan Rai and are in respect of moneys alleged to be owing to the debtor as a result of the working of those properties including, of course, the working of Plantation Walton Hall. But the relief, if any, sought against the fourth defendant is obscure.

The preliminary objection upon which I am required to rule is raised by the third defendant only and is to the effect that the relief claimed against the defendants in this action is not jointly, severally or in the alternative in respect of the same cause or causes of action; that the claim against the third defendant is joined with several different claims (some for accounts) against different defendants and will embarrass the defendant and the fair trial of the several claims, and that the defendants will be put to expense by being required to attend proceedings in which they have no interest. The third defendant asks that the action be struck out or dismissed with costs to each defendant, or that the name of the third defendant be struck out.

The law on this subject is no longer in doubt. The difficulty lies in the application of the law to the circumstances of a case like this.

The relevant Rules of Court are contained in O. 14, rr 1, 4 and 5, and of O. 16, rr. 1, 7 and 8 of the Rules of the Supreme Court, 1955 [B.G.], which are identical with O. 16, rr. 1, 4 and 5, and O. 18, rr. 1, 8 and 9, respectively, of the English Rules, and read thus:

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“ORDER 14

PARTIES

“1. All persons may be joined in an action as plaintiffs in whom the right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any common question of law or fact would arise: provided that if upon the application of any defendant it shall appear that such joinder may embarrass or delay the trial of the action, the Court or a Judge may order separate trials, or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found entitled to relief for such relief as he or they may be entitled to without any amendment: but the defendant, though unsuccessful, shall be entitled to his costs occasioned by any person or persons being joined who shall not be found entitled to relief unless the Court or Judge shall otherwise order.

* * * *

“4. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities, without any amendment.

“5. It shall not be necessary that every defendant shall be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him; but the Court or a Judge may make such order as may appear just to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in which he may have no interest.”

* * * *

“ORDER 16

JOINDER OF CAUSES OF ACTION

“1. Subject to the following rules of this Order, the plaintiff may unite in the same action several causes of action; but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any such causes of action to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof.

* * * *

“7. Any defendant alleging that the plaintiff has united in the same action several causes of action which cannot be conveniently disposed of together, may at any time apply to the Court or a Judge for an order confining the action to such of the causes of action as may be conveniently disposed of.

“8. If, on the hearing of such application as in the last preceding rule mentioned, it shall appear to the Court or a Judge that the causes of action are such as cannot all be conveniently disposed of together, the Court or a Judge may order any of such causes of action to be excluded, and consequential amendments to be made, and may make such order as to costs as may be just.”

The English O. 16, r. 1 (our O. 14, r. 1) was amended on October 26, 1896. Previous to that amendment the rule did not contain the words “in respect of or arising out of the same transaction or series of transactions” or the passage “where if such persons brought separate actions any common question of law or fact would arise” down to “the Court or a Judge may order separate trials, or make such other order as may be expedient.” Before those words were inserted it had been held by the House of Lords in *Smurthwaite v. Hannay*, [1894] A.C. 494, that this Order related only to the joinder of parties in respect of the same cause of action. The scope of r. 1 was greatly extended by the 1896 amendment, and although r. 4 of the Order was not similarly amended, the amendment of r. 1 had an important effect upon the construction of r. 4 as may be seen from the cases decided since 1896. These cases shew that the court now has a wide discretion and that normally it will allow the joinder of plaintiffs or defendants, subject to its directions as to how the action should be tried, where claims by or against different parties involve or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time, the object being to avoid an unnecessary multiplicity of actions.

In *Compania Sansinena v. Houlder Brothers*, [1910] 2 K.B. 354. Houlder Brothers had contracted to carry meat for the plaintiffs from Bahia to England; they employed for this purpose a ship called the *Devon*. The meat was alleged to have been damaged owing to the unseaworthiness of the *Devon*. It was held by the King’s Bench Division that the plaintiffs were entitled to join in the one action as defendants both Houlder Brothers and the owners of the *Devon*. In the course of his judgment BUCKLEY, L.J., said this ([1910] 2 K.B. at pp. 369, 370):

“As regards one of [the defendants] the plaintiffs allege that that defendant had entered into a certain contract with the plaintiffs for the carriage of the meat, under which that defendant is liable; as against the other the plaintiffs allege that the ship in which the meat was carried was the ship of those defendants, and that they entered into a contract with the plaintiffs by the bill of lading; and the plaintiffs say that one or other of the defendant companies is liable to them in respect of the damage to the meat. It is the same cause of action as against both defendants, if by that is meant that all the material facts which go to shew injury to the plaintiffs’ goods, by reason of the unseaworthiness of the ship, are common to the case as against both the defendant companies. The difference as between the

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two defendant companies lies, as in *Frankenburg v. Great Horseless Carriage Co.*, in the fact that one of the defendant companies may be liable on one ground, and the other may be liable on another ground and therefore the respective liabilities of the two companies do not rest upon a common ground. Upon the authorities that does not seem to me to be a reason for saying that the two companies cannot be joined as defendants under the rules in respect of what is one cause of action as regards the investigation of the facts upon which the liability alleged against them respectively depends. It appears to me therefore that the defendants in this case were properly joined.”

Also in the King’s Bench Division, SCRUTTON, L.J., had this to say in *Bailey v. Curzon*, [1932] 2 K.B. 393, at pp. 397 and 398:

“Within the last twenty years a complete change has taken place in the attitude of the courts towards the joinder of parties and causes of action on the same writ. After a number of cases all pointing to the necessity for an amendment, Order XVI, r. 1, was amended The rule relating to defendants is Order XVI, r. 4 This rule, it will be noticed, omits the words ‘arising out of the same transaction or series of transactions,’ and the words ‘where any common question of law or fact would arise.’ The first step taken by the Court was to hold that r. 4 covered the same ground as r. 1. The next was to decide that, notwithstanding certain decisions limiting the power of joining matters and parties on one writ, those rules were to be construed liberally, with the result that many matters, formerly the subject matter of separate actions, could now be tried in one action.”

In *Green v. Berliner*, [1936] 2 K.B. 477, Du PARCQ, J., in dealing with the English Order 16, stated the law thus ([1936] 2 K.B. at p. 484)

“In comparatively recent times a change was made in the rules of that Order, and the tendency of the courts has been to give a very liberal interpretation to them as they exist at present. Having regard to r. 4, which deals with the joinder of defendants, and to such cases as *Thomas v. Moore* and *Payne v. British Time Recorder Co.*, I think it is plain that when a plaintiff is claiming relief arising out of the same set of circumstances against several persons he may join any number of them as defendants in the action, either jointly, or severally or in the alternative, the word ‘severally’ meaning that his claims against them are separate claims. If he sought to join several persons as defendants in an action when his claims against them were wholly unconnected and no common question of fact or law arose, the Court would certainly take steps, as it has power to do, to prevent him from proceeding with his action in that form.”

A case cited by counsel on both sides, and relied upon to a great extent by counsel for the plaintiff, is *Payne v. British Time Recorder*

Co., [1921] 2 K.B. 1, C.A. In that case the plaintiff had entered into a contract with the British Time Recorder Co., Ltd., to supply them with certain printed cards which should conform to certain specimens supplied. In order to carry out that contract the plaintiff entered into a contract with W. W. Curtis, Ltd., to supply him with the cards and paid for them. The cards were sent to the British Time Recorder Co. by W. W. Curtis by the direction of the plaintiff, but the British Time Recorder Co. refused to accept them on the ground that they did not conform to the specimens supplied by them to the plaintiff. The plaintiff brought an action against both companies claiming as against the British Time Recorder Co. the price of the goods sold and in the alternative as against W. W. Curtis damages for breach of contract in not supplying the cards in accordance with the specimens. The companies made separate applications to the master to have their respective names struck out as defendants. The applications were refused and the master's decision was affirmed by the judge. On appeal to the King's Bench Division, it was held that the court had a discretion as to allowing the joinder of the two defendants and that as there was a common question of fact to be tried, namely, whether the cards were in accordance with the specimens supplied, the court would in the exercise of that discretion allow the two defendants to be joined in one action. In his judgment SCRUTTON, L.J., said ([1921] 2 K.B. at p. 16):

“The result of the later decisions is that you must look at the language of the rules and construe them liberally, and that where there are common questions of law or fact involved in different causes of actions you should include all parties in one action, subject to the discretion of the court, if such inclusion is embarrassing to strike out one or more of the parties.”

“It is impossible to lay down any rule as to how the discretion of the Court ought to be exercised. Broadly speaking, where claims by or against different parties involved or may involve a common question of law or fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matters should be disposed of at the same time the Court will allow the joinder of plaintiffs or defendants, subject to its discretion as to how the action should be tried.”

At pp. 10, 11 and 12 of the same report Lord STERNDALE, M.R., is recorded as having said:

“The decisions of the court are certainly not consistent. Some part of the inconsistency is to be found in this that, after the alteration of the rule to its present form in consequence of the decision in *Smurthwaite v. Hannay*, the courts have not always taken notice of the alteration. I think what FLETCHER MOULTON, L.J., said with regard to those decisions in *Compania Sansinena de Carnes Congeladas v. Houlder Brothers & Co.* is correct. ‘A number of decisions of the Court of Appeal have also been cited to us. I confess that I find it difficult to reconcile all those decisions, and so I am driven back upon the plain mean-

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ing of the words of r. 4, which, as I have said, appear to me clearly to contemplate such a case as the present.' I agree that the cases made by the plaintiff against the two defendants are not the same. They are sued on different contracts, in the one case for the price of goods sold and in the other for damages, and the amounts claimed differ in each case. But the words of limitation sought to be read into the rule are not to be found there."

* * * *

"I agree that as regards the question of discretion this case is not the same as any of the decided cases. It is very near the line. Questions are raised between the plaintiff and one of the defendants which are not raised between him and the other defendants, but there is one very important question which is common to both defendants—namely, whether the cards were up to sample. If that is decided the rest of the case is mere fringe.

"But then there are other questions as for example the question of custom raised by one of the defendants as to which I will only say that it is difficult at first sight to see how it applies to the plaintiff. Then there is the question of the separate counterclaims and there is the question as between the plaintiff and one of the defendants as to whether the plaintiff did not admit that the clock cards were not up to sample and ask them to return them. But there is, as I say, one main question which is common, and the learned judge who tries the case will be able under Order XVI, r. 5, to avoid any injustice being occasioned to one of the defendants by reason of the fact that some of the questions do not concern them. That rule . . . seems to me quite sufficient to prevent any injustice being done to a defendant who is not interested in subsidiary questions which concern only another defendant.

"I had some doubt at first whether the statement of claim in this case was not embarrassing, but I have come to the conclusion that on the whole it is not so embarrassing that the court ought to strike out one of the defendants.

"Even if the court were to strike out one of these defendants the only result would be that another action would be brought by the plaintiff against them and the two actions would be tried by the same judge."

In the instant case it can, I think, be said that there is at least one important question which is common to the first, second, third and fifth defendants: that is, whether the sale at execution of Plantation Walton Hall at the instance of the third defendant was illegal and void. That Plantation, it will be remembered, is alleged to have been owned jointly by the first and second defendants and the debtor immediately prior to the sale at execution.

I think that the first, second, third and fifth defendants are properly joined under O. 14 of the Rules of the Supreme Court, 1955

[B.G.], r. 5 of which provides that it is not necessary that every defendant should be interested as to all the relief prayed for, or as to every cause of action included in any proceeding against him.

Holding as I do that this action is properly constituted as to parties under O. 14 (except perhaps as to the fourth defendant whose position was not canvassed in these proceedings), the question of what causes of action can be combined in the action falls to be considered under O. 16. In the recent case of *Harris v. Ashworth*, [1962] 1 W.L.R. 193, PLOWMAN, J., referred to the judgment of BOWEN, L.J., in the Queen's Bench Division, and the speech of Lord RUSSELL of KILLOWEN in the House of Lords in *Hannay v. Smurthwaite*, [1893] 2 Q.B. 412, and [1894] A.C. 494, respectively, and emphasized that O. 18 [our O. 16] deals only with what causes of action may be joined together in an action where the parties have been rightly joined under O. 16 [our O. 14]. Order 18 [our O. 16] assumes that the action has been properly constituted as to parties under the earlier order and comes into play only if that is the case; but provided that the parties have been properly joined in accordance with the provisions of O. 16 [our O. 14], the extent to which different causes of action may be joined by virtue of O. 18 [our O. 16] is limited only by judicial discretion, regard being had to whether the several causes of action can be conveniently tried and disposed of together.

In applying the provisions of O. 18 [our O. 16] a good test—and the one I adopt—is said to be to consider whether the causes of action are such that if separate actions were brought in respect of them an order to consolidate would be made: *Sandes v. Wildsmith* [1893] 1 Q.B. 774.

It seems to me that a good deal of the ground that will be covered in this action may again have to be trodden if there is to be a separate trial of the cause of action against the third defendant and that the circumstances taken as a whole do not justify such a course.

I think that this is a case in which the court has a discretion and that, subject to any directions that may hereafter be given on examination of the fourth defendant's position, the court should allow the joinder of the defendants and of the various causes of action and make such order or orders at the trial as may appear necessary to prevent any of the defendants from being put to unnecessary expense by being required to attend parts of the proceedings in which they have no interest.

For the reasons stated, the preliminary objection is disallowed. The question of costs of and in connection with the preliminary objection is reserved until the completion of the hearing of the action.

Objection overruled.

Solicitors: *S. Naraine* (for the plaintiff); *D. Dial* (for the first and second defendants); *C. Gomes* (for the third defendant); *A. G. King* (for the fourth defendant); *M. E. Clarke* (for the fifth defendant).

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WALDRON v. GANPATSINGH

[Supreme Court (Persaud, J.,) October 10, 11, 12, 13, 1961, May 10, 1962].

Local Government—Building laws—Requirement that every building to stand not less than 3 feet from boundary—Base of building 4 feet away, but roof directly over boundary—Whether requirement satisfied—New Amsterdam By-laws, By-law 13, Cap. 161.

G and W owned adjoining lots. By-law 13 of the New Amsterdam By-laws, Cap. 161, provides that “every new building shall be so erected that it shall stand not less than 3 feet within the side or back boundary line of the lot or portion of a divided lot on which it shall be situated” G erected a building the base of which was 4 feet from the boundary with W’s land, but the roof of which ended exactly over the boundary. In the result, the supply of air and light to W’s building was affected and W accordingly sought an order compelling G to dismantle and remove the offending portion of his building.

Held: (i) where a statute has authorised the doing of a particular act. or the user of land in a particular way, which act or user may involve a nuisance, all remedy for injuries resulting therefrom is taken away, provided every reasonable precaution consistent with the exercise of the statutory powers has been taken to prevent the injuries occurring;

(ii) the proper interpretation to be placed on by-law 13 is that no part of the building shall be less than 3 feet from the boundary. The projection of the roof contravened the by-law and G could not therefore plead compliance with the latter in defence to an action for nuisance.

Judgment for the defendant.

B. Prasad for Ganpatsingh.

S. D. S. Hardyal for Waldron.

PERSAUD, J.: These two actions were taken together by the consent of the parties, and for the sake of convenience, I shall refer in this judgment to Mr. E. R. Ganpatsingh (Mrs. Ganpatsingh not having given evidence or appeared in court) as the plaintiff, and Mrs. Waldron as the defendant.

The plaintiff and his wife own by transport No. 859 of 1958 a property in New Street, New Amsterdam, more accurately described as part of the southern back quarter of lot number 16 situate in that part of the town of New Amsterdam called Smyth Town. Before 1958 and as long ago as 1931, the plaintiff’s mother had owned this property with the buildings and erections thereon. The defendant’s husband (now deceased) by transport No. 162 of 1942 had owned a property carrying the same description as the plaintiff’s property, but from the evidence it has been disclosed that the two properties adjoin each other on the southern side of New Street, with the plaintiff’s property on the west.

These actions concern a triangular piece of land with its apex at the northern end of the common boundary and its base about 1.3' along the southern boundary at the western end of the defendant's southern boundary. The plaintiff's case is that this strip of land forms part of this lot, and he claims damages for trespass committed by the defendant to a fence which he had caused to be erected in October, 1958, in that she dismantled it. The defendant, on the other hand, claims the strip of land as belonging to her deceased husband, and seeks an order compelling the defendants to dismantle and remove part of a building which is on the defendant's land as it infringes the New Amsterdam By-Laws. Each party also seeks an injunction against the other.

The court laments the apparent lethargy in which the Mayor and Town Council of New Amsterdam seem to carry on their business in so far as the laying out of lots in the town is concerned. There appears to have been no comprehensive survey of the town of New Amsterdam, and therefore no such plan, and further, the various lots seem not to be describable in relation to measurements; but rather in relation to adjoining lots which are themselves in turn described in relation to other adjoining lots. A more confusing state of affairs can hardly be imagined.

As a result of a dispute which the defendant had with her eastern neighbour over their common boundary, she engaged a Mr. Joseph Phang, a sworn land surveyor of 45 years' experience, and an ex-Government surveyor for 35 years, to survey her land and to fix her boundaries. Mr. Phang fixed the defendant's eastern boundary: he then secured the agreement of the plaintiff and defendant as to the locality of the northern extremity of the defendant's western boundary. Using this point, Mr. Phang measured the northern facade of the defendant's land; this was 57.6 feet. Having done this, he caused 57.6 feet to be measured off westwards from the southern end of the defendant's eastern boundary, and at this point Phang placed a paal. He found that the position of his paal was 1.8 feet (*i.e.* 16") east of the intersection of the two palings, and was not in accordance with the defendant's occupation. Phang recorded this fact in his field notes. This survey was carried out in July, 1957. This witness has also said that at the time of his survey, there was not a whole fence along the common boundary between the plaintiff's and the defendant's properties. Mr. Carew, an ex-mayor and a councillor of the Town Council of New Amsterdam, visited the premises and has seen a fence, he says, which appeared to be in the same position as it was when his father owned the defendant's premises. But this was in July 1958,—after Phang's survey. When the elder Mr. Carew owned the property the separating fence was hard against the western building and there was no septic tank in the defendant's yard. The septic tank was built in 1946, and I accept the evidence of the builders that when it was built, no part of the fence stretched over any portion of that septic tank.

To get back to Phang's evidence. In February 1959, he revisited these premises for the purpose of carrying out another survey. He

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served notices on the plaintiff and the Town Council. On this occasion, Phang found a fence, part of which extended across the septic tank; and also that the line which he had laid down in 1957 would have crossed the septic tank. This seems to indicate that the fence (which I found was erected by the witness Shaw on the plaintiff's instructions) followed this line. Phang found that the defendant's post had been removed and placed in line with his first paal. Phang planted a second paal 1.3 feet west of his first paal. The plaintiff objected to the placing of this second paal. It is to be observed that there and then the defendant's son-in-law showed Phang a piece of lath similar to Exhibit "G" which he measured, and it was 1.3 feet. In court, Phang has measured Exhibit "G", and it is 1.3 feet. I have myself compared Exhibit "G" with the remainder of the runner which was also produced in court, and I am satisfied that they had both formed part of the same lath at one time. I also find that Exhibit "G" was cut off by the witness Chan when he erected the fence. It is clear from my physical examination that Exhibit "G" was nailed at one of its ends on to a post. This supports Phang's testimony that the defendant's original occupation included the extra bit of 1.3 feet.

It is difficult for the plaintiff to escape this finding of fact. He seeks to explain the defendant's occupation by saying that he had given permission to the defendant's husband to occupy a portion of his land for the purpose of constructing a septic tank. As I have said before, this particular septic tank, I find, was built in 1946, and in so doing, I rely on the evidence of Rampersaud Rambarran, the town's sanitary inspector, supported as it is by the evidence of the witnesses Thom and Peters. The defendant's husband died in January, 1958, and the plaintiff would have me believe that from 1949 (according to him) but from 1946 (as I have found) he permitted the husband to occupy this portion of land without entering into a lease, or without protecting his interest in some form or other. The plaintiff has impressed me as a good businessman, and as possessing an imposing personality. I find that it was not until 1958 that the plaintiff had a discussion about the payment of the sum of 25 cents. I find that the defendant did pay the plaintiff 25 cents and that the plaintiff demanded this sum as he was of the view, Phang having placed the first paal, and that survey having resulted in the septic tank falling within what he believed to be his land, that he must hasten to provide some evidence of the defendant's acknowledgment of that fact. I find it hard to believe that the plaintiff, had he in fact given the defendant's husband permission to occupy a portion of his land, would not have done something in the husband's lifetime to protect his interest. I find that he attempted to create a tenancy after and as a result of Phang's first survey. I need only observe that there is no principle in English law which enables a contract to be entered into unilaterally. I accept the defendant's version that she paid the money pending Phang's re-survey, and that there was no tenancy. I therefore find that the defendant is entitled to occupy the strip of land in dispute in accordance with the plan prepared by Phang.

The defendant admits that the plaintiff's fence was dismantled on her instructions; but having regard to my finding, I cannot hold that she committed trespass in so doing. On her instructions, the fence was placed on the plaintiff's land. She could have done no more. The action brought by the plaintiff will therefore fail, and is dismissed with costs.

I must now consider the defendant's seeking of an order compelling the plaintiff to remove his building or to dismantle it as it infringes the provisions of the By-Laws made by the Mayor and Town Council. She also seeks an injunction restraining the plaintiff from erecting any building within 4 feet of the common boundary. As I understand Shaw's evidence the base of the bottom flat of the plaintiff's two-storeyed building which he was employed to erect, is 4 feet from the fence, and the top flat is 3 feet away, but that the eaves of the building project 3 feet beyond the eastern wall of the top flat. This would mean that the eaves end exactly over the fence. The town superintendent has expressed the view that the plaintiff had complied with the relevant by-laws, and that in his experience, the position of the eaves of a building are not considered in relation to other buildings. Mr. Carew, who at the material time was the Mayor, has said that on the occasion of his visit to these premises in 1958, the proposed building would have been about 4 feet, from the fence. Obviously, Mr. Carew was referring to the base of the building as indicated on the plan Exhibit 'D', so that when it is claimed that the Mayor and Town Council visited the premises in 1958 and approved of the building, what is meant is that the Mayor and Town Council approved of the proposed works as indicated on the plan, and when it is borne in mind that although the eaves of the building are shown on the plan, but not in relation to the fence, one can readily understand why approval was not withheld.

Where a statute has authorised the doing of a particular act, or the user of land in a particular way, which act or user may involve a nuisance, all remedy for injuries resulting therefrom is taken away, provided every reasonable precaution consistent with the exercise of the statutory powers has been taken to prevent the injuries occurring. There is no suggestion here that the plaintiff did not take reasonable precaution in the erection of his building. I must therefore consider whether the plaintiff is authorised by statute to erect the building in the position he did, so that the eaves project over the fence. In my view, even if I found that the plaintiff was entitled to the strip of land, having regard to the entire depth of the land which is 59 feet, and the width of the base of the strip which is 1.3 feet, the proximity of the eaves to the fence would not be substantially affected.

By-law 13 of the relevant by-laws (Laws of B.G., Vol. IX, p. 1912), provides as follows:—

“Every new building shall be so erected that it shall stand not less than three feet within the side or back boundary line of

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the lot or portion of a divided lot on which it shall be situate, and not within fifteen feet from the centre of the drainage trenches of the street known as the Strand, or the public middle road known as High Street, or Savannah Road; provided always that where two or more contiguous lots are occupied by the same person, the Council may waive the enforcement of this provision with regard to the distance or distances from the boundary line or lines between such contiguous lots.”

In my view, the meaning of this by-law is plain. The fact that the word ‘stand’ is used does not, in my opinion, restrict the separating distance to the base of a building only. If this were so, then it would mean that provided there is space, one proprietor can so construct his building to have the base not less than three feet from the common boundary, but to have the top storey of that building project into his neighbour’s land, and then in an answer to an action for nuisance, plead that he was so empowered by this by-law. This interpretation would be to make nonsense of the by-law. When one bears in mind that this part of the by-laws is intended to deal with the erection, construction and ventilation of buildings, it is difficult to resist the conclusion that the proper interpretation to be placed on the first part of by-law 13 is that no part of a building shall be less than 3 feet away from the boundary. I therefore arrive at the conclusion that the plaintiff has contravened this by-law, so that compliance with the by-law would not be good defence to an action for nuisance.

The defendant claims that the proximity of the plaintiff’s eastern wall to her house affects both air and light. Mr. Carew accepts that it does interfere with the light somewhat, but not so with the air, while the town superintendent does not accept this. Indeed, this officer claims that her situation has improved. I do not accept this. The fact that it is the western side of the defendant’s house and not the eastern side makes no difference in my view. Even though the flow of air may not be substantially affected, I find that it is affected, and more so the light.

I will award very nominal damages of \$50.00, but I will make an order for the removal of the building or so much of it to be dismantled as to comply with the by-laws. It is clear that the plaintiff both by the defence filed and his evidence intends to continue the violation of the by-laws; indeed, he seems to feel that he has a right to have erected the building in the position it is. In these circumstances I must grant the prayer of the defendant.

The defendant must also have her taxed costs fit for counsel.

Judgment for the defendant.

SATTAUR v. RAMSAROOP

[In the Full Court, on appeal from the magistrate's court for the Georgetown Judicial District (Bollers and Persaud, JJ.,) November 3, December 8, 1961, February 11, 1962.]

Appeal from magistrate's court—Service of notice of appeal—Respondent testified at trial that he was living at an address cither than that indicated in the plaint—Notice of appeal sent by registered post to original address—Notice returned and eventually reached respondent out of time—Validity of service—Summary Jurisdiction (Appeals) Ordinance, Cap. 17, s. 4 (1) (b) and s. 38—Interpretation Ordinance, Cap. 5, s. 5.

At the trial of an action brought in the magistrate's court by the respondent against the appellant, the respondent testified that he was then living at an address other than that indicated in his plaint. Judgment having been entered in favour of the respondent, the appellant sought to appeal. His notice of appeal was however directed to the original address indicated in the plaint and was later returned. Subsequently it was sent to another address where it was received by a third party who eventually delivered it

out of time to the respondent. At the hearing of the appeal counsel for respondent objected that the notice was not served on the respondent within the prescribed time or at all as it was not left at his last known place of abode in accordance with s. 38 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, which provides as follows:—

“Any notice or other document required to be served or transmitted under this Ordinance, may be served or transmitted by registered post or may be served by delivering or leaving it at the last known place of abode of the party to be served.”

Held: (i) in s. 38 of Cap. 17 the words “last known place of abode” have no reference to the words “may be served or transmitted by registered post” and relate solely to the words “may be served by delivering or leaving it.” Under the section a document may be served either by sending it by registered post to the other party at the address given in the plaint whether it be his place of business or place of residence, or it may be served by delivering it or leaving it at his last known place of abode;

(ii) the notice was not served by registered post on the respondent either at his residence or place of business within the time laid down in s. 4 (1) (b) of Cap. 17.

Appeal dismissed.

C. L. Luckhoo, Q.C., for the appellant.

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

Judgment of the Court: In this appeal counsel for the respondent has taken the point that the appeal should be struck out and dismissed because of non-compliance with s. 4 (1) (b) of the summary Jurisdiction (Appeals) Ordinance, Cap. 17.

Section 4 (1) (b) of Cap. 17 states:—

“An appellant may—

* * * * * * * *

(b) within fourteen days after the pronouncing of the decision, lodge with the clerk a written notice of appeal in form 1, and serve a copy thereof upon the opposite party.”

Counsel urges on this court that the notice of appeal was sent to the respondent by registered post to an address in Albouystown, Georgetown, and was actually served on one Meena Khan through whose agency it was finally delivered to the respondent on the 9th February, 1961, after the expiration of the prescribed period of 14 days, and was in effect not served on the respondent within the time or at all as it was not left at his last known place of abode in accordance with s. 38 of Cap. 17, the last known place of abode being the residence of the respondent. (*R. v. Webb* [1896.] 1 Q.B.D. 487, and *R. v. Farmer*, 65 L.T. 736).

For the purpose of answering this submission counsel for the appellant sought and obtained the leave of this court to lead evidence as permitted by s. 27 of Cap. 17 in order to make clear to the court the true position as to the circumstances surrounding the serving of the notice of appeal. After hearing evidence this court arrived at the conclusion that the following facts had been established:

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On the 5th January, 1960, when the trial of this matter was proceeded with in the magistrate's court, Mr. H. A. Fraser, Barrister-at-Law, entered appearance on behalf of the appellant. The respondent then gave evidence in which he stated that he was no longer living at the address given in the plaint, that is to say, 187 Waterloo Street, Georgetown, but was now living at 122 Fourth Street, Alberttown, with his brother. The hearing of this matter was further adjourned on two occasions and on the 16th March on the resumption after two adjournments Mr. C. A. F. Hughes, Barrister-at-Law, entered appearance on behalf of the appellant as Mr. Fraser had withdrawn from the matter. Mr. Hughes did not hear the evidence given by the appellant and on the 24th January, 1961, decision was given by the magistrate.

On the 30th January, 1961, in accordance with s. 4 (1) (b) of Cap. 17, counsel for the appellant lodged a copy of the notice of appeal with the clerk of court and sent by pre-paid registered post a copy of the notice of appeal to the respondent at 187 Waterloo Street. In the month of February, 1961, before the expiration of the time limited for service, the envelope containing the notice of appeal with the notice inside was returned by the post office to counsel for the appellant with a note made by the post office officials—"Removed 30.1.61"—and a signature following. Counsel immediately sent the notice of appeal by messenger to the chambers of counsel for the respondent and it was returned to him. Counsel then sent the notice of appeal to solicitor for the respondent who refused to accept service. On the 7th February, 1961, he communicated with his client who supplied him with another address of the respondent. On the 8th February, 1961, counsel sent the notice of appeal by registered post to this address where it was finally served on Meena Khan who delivered it to the respondent. It should be observed that on both occasions, on the 30th January and 8th February, 1961, respectively, when the notice of appeal was sent by registered post to the two addresses the copies of proceedings were not available to counsel.

Counsel for the appellant has submitted that under s. 38 of Cap. 17 it is not incumbent upon the appellant to serve the notice of appeal on the respondent at his last known place of abode. It is sufficient if it is sent by registered post to his last known place of abode or to a business address which he may have given as an address in the rubric of his plaint. Counsel has pointed out that under Part V of the Summary Jurisdiction (Magistrates) (Civil Procedure) Rules, Cap. 12—Subsidiary Legislation, the appellant was entitled to give the address of his residence or place of business and it follows that if he was so entitled to give either address he could be served at the address given. Counsel presses on this court that under s. 9 of the Interpretation Ordinance, Cap. 5, where any Ordinance requires any document to be served by post whether the expression "serve," "give," or "send" or any other expression is used, that unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and unless the contrary is proved to have been effected at the time at which the

letter would be delivered in the ordinary course of post. The notice then having been sent by pre-paid registered post to the address given by the respondent in the plaint was properly served on him at the time at which the letter would be delivered in the ordinary course of post, which of course was within the time limit in this case.

In our opinion s. 38 of Cap. 17 is an enabling or permissive section which permits service in the method stated. It reads as follows:—

“ Any notice or other document required to be served or transmitted under this Ordinance may be served or transmitted by registered post or may be served by delivering or leaving it at the last known place of abode of the party to be served.”

In our view the document under the section may then be served either by sending it by registered post to the other party at the address given in the plaint whether it be his place of business or place of residence, which is of course substituted service, or it may be served by delivering it or leaving it at his last known place of abode, which is of course personal service. We are in agreement with the construction placed on this section by counsel for the appellant and we are firmly of the view that the words “last known place of abode” have no reference to the words “may be served or transmitted by registered post” and relates solely to the words “may be served by delivering or leaving it.” The position might well have been otherwise had the preposition “to” appeared after the words “may be served or transmitted by registered post.”

The point now to be decided is whether the notice of appeal was served by registered post on the respondent at his residence or place of business within the time limit laid down in s. 4 (1) (b) of Cap. 17. The answer is clearly No. The respondent had given a place of residence in his plaint but had withdrawn it in his evidence and given a new address and the notice was never sent to this address. In any case, even if it were to be considered that it was sent to the original place of residence given by him, it did not remain at this address and therefore it could not be said to have been served on him.

We consider the point taken to be sound and the appeal must be struck out and dismissed with costs to the respondent fixed at \$25.

Appeal dismissed.

NILES v. BARRATT AND OTHERS

[British Caribbean Court of Appeal (Gomes, P., Archer and Wylie, JJ.A) May 15, 16, 17, 1962]

Execution sale—Authority of marshal—Property Knocked down to bidder—Bidder then withdraws—Marshal withdraws and puts up property for sale again—Validity of withdrawal—Supreme Court Ordinance, Cap. 7, ss. 19, 20 and 25.—Rules of Court 1955, O. 36. rr. 51 and 37.

At an execution sale of certain immovable property, the subject of a foreclosure order, the property was knocked down to J.B. for \$7,500. J.B. then expressed a wish to withdraw and the marshal allowed him to do so. The property was put up for sale a second time and knocked down to C. for \$3,500. C, however, failed to pay the required deposit. The property was then put up for sale a third time and knocked down for \$25 GORDON, J., held that the marshal had authority to act as he did. (See 1961 L.R.B.G. 377). On appeal it was argued that the marshal's authority was that of an auctioneer, that it ended on the fall of the hammer, that he therefore had no authority to treat the sale to J.B. at an end and that that sale was binding.

Held: (i) so far as his general authorities and powers are concerned, the marshal is in a position analogous to that of a sheriff and his bailiff levying execution of goods under a writ of *fiery facias*;

(ii) the marshal's powers were not limited to those of an auctioneer and on refusal of the highest bidder to pay the deposit required by the conditions of sale he was entitled to repudiate the sale and to resell.

Appeal dismissed.

G. M. Farnum, with J. I. Ramphal, for the appellant.

J. O. F. Haynes, Q.C., for the respondent.

WYLIE, J.: The respondents in this appeal are the mortgagees under a mortgage to secure a loan of \$6,500.00 made by them to the appellant on the 24th September, 1958. The loan was secured by first mortgage on certain lots being portions of Plantation Soesdyke, and by second mortgage on half of lot 94, Agricola Village. On 15th June, 1961, the respondents commenced an action against the appellant to "foreclose" the mortgage and have the mortgaged property sold at execution, claiming that the appellant was in default under the mortgage and that at that date the sum of \$7,360.91 was owing thereunder. The appellant defended the action claiming that at an execution sale one James Barratt, father of the respondents, had, on behalf of the respondents purchased for the sum of \$7,680.00 the property over which there was a first mortgage and that therefore upon completion of that sale there would be merger of the mortgage in the legal estate and, in addition, the respondents would owe to the appellant by way of purchase money more than was sufficient to liquidate the whole of the mortgage debt.

The evidence disclosed that the property which was sold was also subject to a second mortgage and that the property had been put up for sale pursuant to an order for foreclosure obtained by the second mortgagee. The conditions of sale stated that the property was being sold

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subject to the first mortgage in favour of the respondents. The First Marshal conducted the sale by auction and the property was knocked down to James Barratt for the sum of \$7,500.00, according to the marshal's evidence. After the fall of the hammer, Barratt asked leave to withdraw saying that he did not realise "he" was covered. He explained to the marshal that the property was mortgaged to his children and he did not realise that whoever bought at the sale would still be responsible "to him", presumably, under the mortgage. The marshal asked him if he was withdrawing and not paying the money. He confirmed this, repeating what he had previously said. The marshal thereupon announced to the bidders that he would sell the property again, and he stated in evidence that he discharged Barratt of his obligation. The property was then knocked down to one Carthy for \$3,500.00, but this purchaser also failed to pay the deposit of 25 per cent required under the conditions of sale to be paid forthwith, stating that he had no money and could not get any until next day or the day after that. The marshal thereupon announced that the property would have to be put up again, and on this occasion the only bidder was the second mortgagee to whom the property was knocked down for \$25.00. This amount was paid forthwith and the purchaser signed the conditions of sale. The marshal states that he read out all the articles of the conditions of sale before each of the three auctions.

In the court below the judge found that the marshal acted within his authority in treating the sales to Barratt and Carthy as at an end upon the failure of the would-be purchasers to pay the deposit, and that he was justified in putting the property up for auction again on each occasion as he did. He therefore found that the sale to the second mortgagee was in order and that consequently the question as to whether Barratt was purchasing on behalf of the mortgagees did not arise. It followed that the amount claimed was still owing under the mortgage and he made an order for the sale of the property. From this decision the appellant has appealed on grounds which in effect raised again the question decided against him in the court below.

It was argued for the appellant that the marshal had no authority to release Barratt from his contract to purchase which, it was submitted, was complete on the fall of the hammer; that the purchase was really made as agent for the respondents, and that the fact that the purchaser had bought the property subject to the first mortgage meant that the total consideration for the sale was the amount of the bid, \$7,500.00, plus the amount owing under the first mortgage, and that in consequence, when transport was passed to the purchaser, there could be nothing due from the appellant to the respondents under the mortgage.

In the course of the hearing of the appeal the court intimated that in its opinion there was no evidence which would justify a finding that Barratt was purchasing as the agents of the respondents. It is true that his evidence suggests that, although the mortgagees named

in the mortgage are his children, the principal sum under the mortgage was probably advanced from Barratt's monies, but he states more than once in his evidence that he was bidding for this property in order to acquire it in his own name, and there is no evidence on the record to contradict this.

Nevertheless, in view of the strong suggestion in the evidence that this mortgage may have been given to secure an advance made by Barratt and that therefore in effect the respondents may be trustees for Barratt, it is still necessary to consider whether the sale to Barratt was properly rescinded or not. For this purpose it is necessary to consider the position of the marshal. This officer acted under a writ of sale of immovable property which was issued out of the Supreme Court pursuant to a "foreclosure" order made by the court and commanded the marshal "to seize and sell" the property in question to satisfy the amount due to the second mortgagee. The writ further commanded the marshal that, in the event of this property being not sufficient, the marshal was to "seize and sell" the movable property of the appellant, and if the movable property was not sufficient, to "seize and sell" sufficient of the other immovable property of the appellant.

The full powers and duties of a marshal do not appear to be enumerated in the statute law, but there are several references to his position in the Supreme Court Ordinance, Cap. 7. Section 19 provides that he shall be an executive officer of the Court and s. 20 that he shall be under the control of and be responsible to the Registrar and

"shall, in addition to the duties and liabilities imposed on him by any statute, perform the duties required of him by the Registrar, subject to the direction and approval of the Governor".

Section 25 provides that all officers of the court shall perform duties similar or analogous to those performed by them before the commencement of the present Ordinance in connection with any court whose jurisdiction is vested in the Supreme Court. Section 22 makes the marshal liable for all losses caused by any irregularity, omission, or neglect of duty by him. Order 36 of the Rules of the Supreme Court, 1955, sets out in some detail the functions of the marshal on the execution of a writ of sale of property. These Rules make it clear that the whole process of execution is, subject to the procedure and restrictions laid down in the Rules, to be carried out by the marshal. Rule 51 provides that the marshal shall sell immovable property by auction to the highest bidder. Rule 57, which is repeated in the conditions of sale, is to the following effect:

"57. (1) Whenever any immovable property (not being a plantation in cultivation) shall be sold at execution other than summary or parate execution for a sum exceeding one hundred dollars the purchaser shall, unless he pays the purchase money at the time of sale, forthwith deposit with the Marshal twenty-five per centum of the purchase money, and shall, if the purchase

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money do not exceed the sum of five hundred dollars, pay the balance by three equal instalments, with interest at the rate of six per centum per annum, at the expiration of one, two and three months respectively, and if the purchase money exceed the sum of five hundred dollars he shall pay such balance with such interest by three equal instalments at the expiration of two, four and six months respectively.

(2) In the event of the purchaser making default in payment of any of the instalments the amount of the deposit shall, unless the Court or a Judge on application filed within seven days of the default extend the time for payment, be forfeited and applied by the Marshal towards discharge of the execution costs and judgment debt or debts; and if there be any balance due on the said costs and debts the property may, after being re-advertised, again be put up for sale by auction and sold. If there be no balance due, the property shall be released to the judgment debtor.”

Subsection (1) of s. 28 of the Deeds Registry Ordinance, Cap. 32, provides (*inter alia*) that any immovable property sold in execution of a judgment or an order of a court shall be transported before the court before which transport must be passed “by the officer of the court carrying out the judgment or order”; and sub-s. (2) is to the following effect:

“(2) For the purpose of passing the transport, the officer of the Court shall produce and file in the registry a certified copy of the conditions of sale, of the statement of the documents or other facts constituting the title of the judgment debtor, of the affidavit in support thereof (if any), of the instructions to levy, and of the judgment or order (if any) whereby that immovable property was brought under execution”.

The argument for the appellant was to the effect that r. 51 appointed the marshal the auctioneer for the purpose of selling the property by auction, that in the absence of any special authority from the vendor, the authority of an auctioneer is ended on the fall of the hammer, when the sale is complete, and that, therefore, even if the highest bidder failed to pay the deposit required by the conditions of sale, and even though that might, having regard to the conditions of sale, justify a vendor in treating the contract as repudiated, the marshal himself had no authority to exercise the rights of the vendor in those circumstances and accept the repudiation, because, like any other auctioneer in ordinary circumstances, his authority ended on the conclusion of the auction. For the respondents, it was contended that the position of the marshal was not that of an auctioneer but that the legislation and the rules of court showed that he was carrying out the whole process of sale as a vendor would, and that, therefore, he was the proper authority to exercise the rights and powers which a vendor might exercise in the process of completing a sale of the property.

In my judgment, the foregoing provisions relating to the position and duties of the marshal place him, so far as his general authorities and powers are concerned, in a position analogous to that of a sheriff and his bailiff levying execution of goods under a writ of *feri facias*. The sheriff must also sell by auction if the execution exceeds a certain sum. A sheriff has wide powers of discretion as to how and when he sells, provided that he complies with the statutory provisions and acts reasonably. The authorities show that, subject to his selling by auction when so required by law, it is the sheriff who sells, whether by auction or by private treaty, and the sheriff who settles the terms of sale and transfers title to the purchaser, whether by delivery or by bill of sale or otherwise. A statutory provision that, in certain circumstances, the sale shall take place by auction cannot have the effect of cutting down the authority and the powers of a sheriff in regard to the contract of sale to those of an auctioneer. Similarly, in British Guiana, although the system of execution in force has a different source, *i.e.*, in Roman-Dutch law and not in the common law, it does not follow that a provision that execution sales must be by auction carries the implication that the powers of a marshal in regard to the contract of sale have thereby been limited to the powers of an auctioneer. If that were so, one would expect the statute to vest other powers in connection with the contract of sale in some other authority. The true explanation is that these powers flow from the nature and authority of a writ of execution and are vested in the officer charged with executing the writ, in the absence of any statutory provision to the contrary. It has to be remembered that the writ does not merely authorise the marshal to sell property. It authorises him to levy and complete execution, including all the different steps that may be necessary for that purpose, and requires him to make a return on the writ. To carry out all those steps, he may have to sell the property levied on as a vendor would, subject always to following the procedure, and complying with the restrictions, set out in the rules of court. Section 28 of the Deeds Registry Ordinance, Cap. 32, specifically imposes upon him the duty of taking the steps necessary for the passing of transport—steps that would normally be taken by a vendor selling his own property, whether by auction or otherwise. One of the restrictions imposed by the rules is that he must sell immovable property by auction, but, in view of all the provisions and the other powers to which I have referred, this is clearly not equivalent to the proposition that, for the purposes of executing a writ, he has merely the powers of an auctioneer. It also has to be remembered that execution sales do not always follow the issue of a writ. The marshal may be able to obtain satisfaction for the claim without this step. Accordingly, at a certain stage, there is even a certain amount of discretionary power in the marshal to decide whether or not there shall be a sale at all. These are further functions which show that his authority greatly exceeds that of an auctioneer, whose instructions are to sell and do not include such discretionary powers as putting off a sale while other avenues are being explored, unless he has been specifically instructed in this respect. As an officer of the court carrying out an order of the court, the marshal could, of course, apply to the court for directions if he found himself in difficul-

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ties, but that does not mean that he has to apply to the court for directions at every step he takes or even in respect of all matters not specifically referred to in the legislation and rules. Section 22 of the Supreme Court Ordinance makes it clear that, if he does not act reasonably, he will act at his peril. When therefore the highest bidder at an auction refuses point-blank to pay the deposit required by the conditions of sale, the marshal, who has to complete the execution by selling the property and making a return on the writ, has then to decide how next to proceed to carry out his duty to execute the writ, having regard to this repudiation by the highest bidder. In the normal case of a sale between vendor and purchaser where the conditions of sale provide for a deposit of twenty-five *per centum*, of the purchase price to be paid forthwith at the time of sale and the purchaser categorically refuses to pay any deposit, the vendor would be entitled to treat this conduct as a repudiation by the purchaser giving to the vendor the right to act on this repudiation and treat the contract as rescinded and at an end. There could be no question that, in the case of a sale in execution, this right must also exist, and the obvious person to exercise it is the marshal to whom the whole conduct of the sale of the property has been entrusted. It may not be without significance that r. 57 and the conditions of sale, while providing for what is to happen in the case of the purchaser failing to pay subsequent instalments of the purchase price, makes no similar provision with regard to the deposit. It may have been assumed by those responsible for the rules and the conditions of sale that the only commonsense course to adopt on the failure of the highest bidder to pay the deposit, would be for the marshal to repudiate the sale and re-sell. In my judgment, therefore, the marshal had the power to act as he did at this auction sale. Whether on any particular occasion he behaves reasonably in so doing is a matter giving rise to other questions which are not in issue in these proceedings. Nor must I be understood as suggesting that the marshal behaved other than reasonably on this occasion.

I have arrived at this conclusion of the legal position on a consideration of the functions of the marshal and without reference to any authority or to the practice in these matters. This court was, however, referred to both authorities and practice which confirm this conclusion. In *Cameron v. Hinds*, 1925 L.R.B.G. 115, the report shows that the marshal, upon the highest bidder asking for time to pay the deposit, put the property up for sale again and there is no suggestion that he exceeded his powers or acted improperly in so doing. In the report of *In re Primo*, Supreme Court Judgments, 10th April, 1907, the following passage appears in the judgment:

“ . . . it is clear from the language of rule 47 (at present rule 57) that the contract must be completed at the time of the sale and the 25% be paid ‘forthwith’ so as to avoid the serious risk of the sale proving abortive owing to other intending buyers leaving the place of sale and afterwards the 25% not being paid by the bidder who is declared the purchaser”.

The inference is clear that, if the deposit is not paid, the property may be offered there and then to other intending buyers. Counsel on

both sides agreed that the course adopted in the present case was commonly adopted at execution sales. Reference to transports shows that it is the marshal who, pursuant to s. 28 of the Deeds Registry Ordinance, takes the place of the vendor in the passing of transport. This practice confirms the conclusion that, unlike an auctioneer, the marshal's authority does not end on the fall of the hammer. Indeed, the final instruction in the writ is that, upon completion of execution or failure to execute, the marshal is to endorse the writ with his return. It is impossible to escape the conclusion that, up to the point of making the return, he has authority to do all that is necessary to complete execution, including the completion of a sale, if, as would normally be the case, that is required to be done before execution is complete.

Consequently, the agreement for sale to Barratt, which was concluded on the fall of the hammer, was properly rescinded by the marshal when Barratt showed quite clearly that he was repudiating his contract. Accordingly, the other questions which would have had to be considered if the sale to Barratt was held to be still binding, do not arise.

The appeal must therefore be dismissed with costs to the respondents.

GOMES, P.: I agree,

ARCHER, J.: I agree.

Appeal dismissed

BONDS v. JOSEPH

[In the Full Court, on appeal from the magistrate's court for the West Demerara Judicial District (Luckhoo, C.J., and Miller, J.,) March 2, 9, 23, 30, April 25, 27, May 18, 1962.]

Public Health—Authority to prosecute—Complaint brought in name of officer of local sanitary authority—Whether complaint should have been brought in the name of the authority—Public Health Ordinance, Cap. 145, s. 153.

The appellant was convicted of the offence of erecting a building without the previous authority in writing of his local sanitary authority, contrary to s. 136 (1) of the Public Health Ordinance. Cap. 145. The complaint was brought by and in the name of the respondent in his capacity as an officer of the authority. On appeal, it was argued for the appellant that the respondent had no authority to bring the proceedings in his own name. Section 153 of the Ordinance provides that “any proceedings by a local sanitary authority . . . may be taken by an officer of the authority . . . if duly authorised by the chairman thereof . . .”

Held: a duly authorised officer of a local sanitary authority may take the proceedings contemplated by s. 153 of the Ordinance in his capacity as an officer just as the Attorney General may prosecute claims by the Government against private persons in his capacity as Attorney General.

Appeal dismissed.

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L. F. S. Burnham, Q.C., for the appellant.

L. F. Collins, Crown Counsel, for the respondent.

Judgment of the Court: This is an appeal from the decision of a magistrate of the West Demerara Judicial District who convicted the appellant on a charge brought by the respondent of erecting a building, to wit, a business place, at Wismar Foreshore, Demerara River, in the West Demerara Rural District, without the previous authority in writing of the local sanitary authority, contrary to s. 136 (1) of the Public Health Ordinance, Cap. 145. The appellant was fined the sum of \$15.00, in default of payment one month's imprisonment, and was ordered to remove the building within 28 days of the date of the magistrate's order.

The first ground of appeal argued was that the decision was erroneous in point of law in that the learned magistrate wrongly accepted the respondent (complainant) as competent to take the proceedings. Counsel for the appellant submitted that the provisions of s. 153 of the Public Health Ordinance, Cap. 145, do not give the respondent authority to bring the proceedings in his own name. Section 153 of the Ordinance provides as follows:—

“Any proceedings by a local sanitary authority or by the Board for the enforcement of any of the provisions or the recovery of a penalty under this Ordinance or any of the regulations made thereunder may be taken by any officer of the authority or of the Board if duly authorised by the chairman thereof either generally or in respect of any particular provision or offence and an authorisation may be cancelled at any time by writing under the hand of the chairman.”

Counsel compared the wording of s. 136 with that of ss. 13 (1), 14, 25 and 88 and contended that the scheme of the Ordinance is such that, unless the Ordinance authorises otherwise, the local sanitary authority is the only competent body to bring proceedings on breach of the provisions of the Ordinance or the Regulations made thereunder. The gist of counsel's contention is that proceedings authorised by s. 153 of the Ordinance must be taken in the name of the local sanitary authority as complainant and not in the name of the officer of the local sanitary authority who is authorised to take the proceedings.

In this regard reference may be made to the provisions of s. 46 (1) of the Supreme Court Ordinance, Cap. 7. That subsection provides as follows:—

“Claims by the Government of the Colony against any private person shall be brought by the Attorney General or by any officer authorised by law to prosecute those claims on behalf of the Government.”

It has never been suggested that any such proceedings should be brought in the name of the Government of the Colony as plaintiff and not in the name of the Attorney General or an officer authorised by law to prosecute the proceedings on behalf of Government.

The comparable words in s. 153 of the Public Health Ordinance, Cap. 145, are—

“Any proceedings by a local sanitary authority may be taken by an officer of the authority if duly authorized by the Chairman thereof”

In our opinion a duly authorised officer of a local sanitary authority may take the proceedings contemplated by s. 153 of the Ordinance in his capacity as officer just as the Attorney General may prosecute claims by the Government against private persons in his capacity as Attorney General. In the present case the respondent F. A. Joseph has taken these proceedings in his capacity as “an officer of the Christianburg Local Sanitary Authority of the West Demerara Rural District.” We hold that the magistrate did not err when he accepted the respondent as competent to take these proceedings.

It was conceded by counsel for the appellant that the Central Board of Health is the local sanitary authority for the district in which the appellant’s premises are situate. Counsel therefore abandoned paragraph (b) of the grounds of appeal.

Finally, it was submitted that the sentence imposed by the learned magistrate was unduly severe in that the magistrate erred in the exercise of his discretion whether or not to order the removal of the appellant’s building. Counsel contended that there were no circumstances disclosed by the evidence upon which the magistrate could have exercised his discretion in the way he did, and further, that the magistrate erred when he called upon the appellant rather than the respondent to lead evidence in relation to the question whether or not an order for removal of the building should be made.

An examination of the record discloses the following circumstances (accepted by the magistrate as proved) upon which such a discretion could be exercised—

- (i) that when a notice was served upon her in November, 1960, to remove the building which had not yet been completed she promised to remove it in a few days’ time;
- (ii) that the building (a cakeshop and store) has no sanitary convenience;
- (iii) that the appellant stated in evidence that if she had known that the erection of the building without permission was contrary to law she would have broken it down;
- (iv) that the building is on the foreshore;

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- (v) that the building is a substantial structure and is well painted;
- (vi) that the stock in the building is valued at over \$5,000.

Prima facie there was evidence upon which the magistrate could have exercised his discretion in the way he did.

The magistrate gave a further opportunity to the appellant to adduce evidence in her favour in relation to this question but the appellant's counsel declined to lead any further evidence.

The exercise of such a discretion is one for the magistrate and an appellate tribunal will not interfere with the exercise of his discretion if, as is the case here, there was evidence upon which the discretion could be exercised and the magistrate did not act upon any wrong principle.

The appeal is dismissed and the conviction and sentence affirmed. The order for the removal of the building will be extended. The appellant will have until the 1st of August, 1962, to remove the building. Costs of the appeal to the respondent fixed at \$27.16.

Appeal dismissed.

BALLI v. MOHANLALL

[Federal Supreme Court—Civil Appellate Jurisdiction (Archer, Wylie and Jackson, JJ.), November 24, 27, 28, 1961, May 19, 1962.]

Sale of land—Proposal to sell less than quarter lot—Transport for less than quarter lot not permitted by law—Proposed sale dependent on mortgage being granted to purchaser by third party—Third party unwilling to grant mortgage unless sale is for quarter lot—Agreement of sale then executed for quarter lot—Building owned by vendor on adjoining quarter lot extends over land sold—No intention that any part of that building should be included in sale—No appropriate exemption however made in agreement of sale or subsequent transport—Allegation by vendor that no part of land on which building stood was intended to be sold—Claim for rectification of agreement and transport.

The appellant took transport from M. for a half lot of land subject to a first mortgage in favour of M. The appellant occupied a building situate on the southern part of the land but extending in part onto the northern half of the land. The appellant desired to sell the northern part to the respondent save for the portion of land occupied by the building. The arrangements for the sale depended on whether the respondent could obtain a loan from M. to be secured by a mortgage on the land to be sold. M. was, however, not prepared to advance any monies unless the land sold amounted to at least a quarter lot, since this was by law the minimum area which could be transported. A written agreement of sale was in consequence entered into for the entire northern half of the land, which amounted to a quarter lot.

Before executing the agreement the appellant had the advice on it of two house agents employed by him and of his own legal adviser. The agreement and transport passed in pursuance of it failed, however, to provide for any exemption in respect of the portion of the building which stood on the land sold, although there was no intention that any part of the building should be included in the sale. The respondent subsequently sold the land bought to R. and advertised transport to him for it. The appellant opposed the passing of the transport on the ground that there was no intention to sell any part of the land on which the building stood and claimed *inter alia* an appropriate rectification of the agreement of sale and of the transport, alternatively, cancellation of the transport and an order that the respondent execute a lease to him for the piece of land on which his building encroached.

Held (ARCHER, J., dissenting): whatever was the original intention, in view of the attitude of the mortgagee it was eventually agreed to sell a quarter lot.

Appeal dismissed.

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

J. H. S. Elliott, Q.C., for the respondent.

ARCHER, J.: Helena Mekdeci was the owner by transport of a half lot of land in Georgetown with a frontage on Cornhill Street. Prince Street runs along the southern boundary. She was also the owner of four buildings and erections standing on the land. Two of these buildings are in the northern sector of the land and the respondent was the tenant of one of them. This was a two-flat building, on the ground floor of which the respondent carried on the business of cake selling. She lived upstairs. The other building in the northern sector was also a two-flat building. The buildings in the southern sector were a three-storey building and a cottage. A part of each of these two buildings is astride the boundary line which divides the half lot latitudinally into two equal portions. The appellant was the tenant of the three-storey building in the southern sector and carried on the business of a hotel proprietor there.

Mekdeci employed two agents, Rebitt and Naraine, who were in partnership, to find a purchaser of the whole property. They approached the appellant and he agreed to buy the property. The purchase price was to be \$75,000, of which the appellant was to find a part. Mekdeci agreed to lend the balance on a first mortgage. A written agreement (exhibit E) was entered into on April 10, 1957, and it embodied the terms upon which they had agreed.

The appellant proposed to sell such portion of the property as he did not need, and on the same day (April 10, 1957) Rebitt and Naraine took him to Nehaul, a land surveyor. They then set about canvassing prospective purchasers on the appellant's behalf. Nehaul made a survey of the land on May 15, 1957. He was accompanied on the survey by Insanally, a surveyor's draftsman, who used to work with him. Among the persons whom Rebitt and Naraine canvassed as prospective purchasers was the respondent. They went to her on several occasions but the evidence does not show the dates of any of their visits. One or more of these visits may well have been before June 17, 1957, when the first plan of the land was made: it is extremely unlikely that these land agents would not have acted promptly. On

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one of these visits, Rebitt pointed out to the respondent, as the property he was offering to sell her, the building in which she did business with the land on which it stood, and the land between that building and the other building in the northern sector of the half lot. This is according to his evidence. According to her evidence, he offered her half of the appellant's land and showed her the boundary between the two halves of the half lot, namely, the partition to Young-Sam-You's grocery which she also described as the wall of the shop. It will be seen that what she says she was shown was not half the appellant's land.

Rebitt had no plan of the land when he negotiated with the respondent, or so he said, nor had he any knowledge of a plan or of any subdivision of the half lot at the time, according to his evidence. This must be so if he is speaking of some date before June 17, 1957. The respondent agreed to buy the property offered for \$23,000, and Rebitt and Naraine took her to Mekdeci from whom, it was hoped, she would obtain a loan of \$20,000 on mortgage.

Nehaul did not himself make a plan of his survey, but Insanally drew two plans, exhibits A and B. Both these plans purport to have been made on June 17, 1957, but exhibit B cannot have been made on that date. Exhibit A shows the half lot of land divided into three portions with facades of 50 feet, 16 feet and 34 feet respectively, the 50 feet facade relating to the southern sector of the land and the other two facades to the northern sector of the land. The area of the land with the 16 feet facade is marked A on the plan and the area with the 34 feet facade is marked B. For the sake of brevity, I shall hereafter refer to this latter area as the 34 feet portion. Wooden paals are shown on the plan at the two western ends of the strip marked A, a concrete paal is shown at the north-eastern corner and a spike nail driven into the concrete is shown in the south-eastern corner. No buildings are indicated on this plan. Exhibit B shows the same division into the three portions of land but, in addition, the buildings on the land are indicated on that plan. Both plans recite that the land has been surveyed and paaled off at the request of the appellant. Insanally's evidence was that he drew exhibit A and that it was lodged in the Lands and Mines Department. Subsequently, but he did not say when or at whose request or for what purpose, he was asked to make a copy of exhibit A and to indicate the portion of the eastway buildings on the land, using the same scale. That copy of exhibit A is exhibit B. It was alleged by the appellant, but not proved, that exhibit B was deposited in the Lands and Mines Department on July 4, 1957.

The appellant was handed Nehaul's plan (exhibit A) on July 22, 1957. He took it to Gonsalves, Mekdeci's solicitor, on the same day and the written agreement between the appellant and the respondent (exhibit F) was also made on that day. It was drawn up by Gonsalves and referred to the property to be transferred as the north half of the east half of the lot with the buildings and erections thereon. On July 1, 1957, Nehaul had applied to the Mayor and Town Council

of Georgetown, in pursuance of ss. 128 and 129 of the Georgetown Town Council Ordinance, Cap. 152, for permission to sub-divide the land. Attached to his letter of application was a plan of the land which is neither exhibit A nor exhibit B. In this plan the land is shown as divided into two portions, each with a facade of 50 feet. The plan shows no buildings. The whole area is described as East half, lot 14, but the northern portion is described as North half, lot 14, and the southern portion as South half, lot 14. A similar error occurs in the letter of application: in the first paragraph, application was made in respect of the North half of lot 14 and the South half of lot 14; it was, however, brought to the attention of the Council in the second paragraph that it was in respect of quarter lots that permission to transport was being sought. The minutes of the Council (exhibit C) show that the application was considered by officers of the municipality before it was placed before the Council. An annexure to exhibit C is a plan described as "Plan of 14 or South half of East half, Lot 11, Cornhill and Prince Streets." "Lot 14" was the description of the lot on the chart of William, Hillhouse, sworn land surveyor, but the lot was numbered 11 on the Town Clerk's books and referred to as Lot 6 in the agreement between the appellant and the respondent (exhibit F). This annexure to exhibit C shows five buildings on the half lot and was probably copied from a plan in the Assessment Office, so the assistant to the Town Clerk thought. The municipal engineers were concerned about the encroachment of two buildings on the boundary streets and advised that there was contravention of the Council's bye-laws. The application was, however, approved by the Central Housing and Planning Authority on August 6, 1957, and granted by the Mayor and Town Council on August 12, 1957. On August 14, 1957, the Town Clerk wrote to Nehaul informing him that the Council had granted permission in respect of the North half and the South half of the lot. In fact, the application had been dealt with by the Council as an application in respect of the two quarter lots. Nehaul's error was not discovered until the following year, and on October 21, 1958, the Town Clerk wrote to Nehaul correcting the error. The last paragraph of the Town Clerk's letter requested that the letter be produced when application was being made for the certificates.

On November 18, 1957, the appellant transported to the respondent the property described in exhibit F as a quarter lot with the buildings and erections thereon. The appellant, the respondent, Rebitt, Naraine and Mekdeci were all present at Gonsalves' office when exhibit F was executed. Gonsalves had Nehaul's plan (exhibit A) which the appellant had handed to him but it was not referred to at any stage of the discussion preceding the signing of the agreement.

The respondent, in addition to her evidence as to the area of land pointed out to her by Rebitt as the property for sale, also said that the appellant had carried her on the land right through—whatever she may have meant by that. The dispute has now arisen between the parties because the appellant maintains that he never intended to part with a quarter lot and the respondent contends that she understood that she was buying the northern quarter lot with

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the buildings and erections on it, save and except such part of the appellant's hotel building and cottage which crossed the southern boundary of the quarter lot. The matter is further complicated by reason of the fact that Mekdeci has advanced money on mortgage to both parties on the security of the two quarter lots respectively, and of the further fact that the respondent has agreed to sell the quarter lot for which she has transport to a third person, Rodrigues.

The judge came to the conclusion that Nehaul's letter of application to the Council indicates that, although the area of the land the appellant had originally intended to sell to the respondent was the 34 feet portion, he had eventually decided to sell her a quarter lot. There was evidence that the agreement (exhibit F) had been read aloud at the conference at Gonsalves' office and that the appellant had, before signing it, taken it away for the purpose of obtaining legal advice concerning it. The only discussion at Gonsalves' office about buildings turned on the removal of the staircase to the hotel building which encroached on the respondent's quarter lot, and the judge accepted the evidence that the appellant had undertaken to have it removed. He found that the appellant had sold to the respondent with a full knowledge of the facts.

The judge's finding that at first the appellant had intended disposing of the 34 feet portion only accurately reveals, I think, the appellant's state of mind when he engaged the services of Rebitt and Naraine and of Nehaul. He himself said that he had decided to sell the 34 feet portion and Rebitt said that that was what the appellant had instructed him to sell. That portion of land is specifically demarcated on exhibit A, but it is quite obvious that the appellant's instructions to Rebitt contained no reference to a plan. It is probable that he told Rebitt to find a purchaser for the land on which the cakeshop and the two flat buildings to the west of it were standing and for these two buildings.

I have said that the appellant engaged the services of Rebitt and Naraine and of Nehaul but that bald statement is not an accurate description of the manner in which these persons became his agents. It is, in my view, of some significance that Rebitt and Naraine were earning a commission on each transaction commencing with their agency on Mekdeci's behalf. They found a purchaser for Mekdeci. They also found a purchaser for the appellant. They introduced the appellant to Nehaul and were instrumental in arranging the mortgages for the appellant and the respondent. Rebitt was also instrumental in arranging the sale by the respondent to Rodrigues. It was inevitable that Rebitt and Naraine would be anxious to see these several transactions go through and it is, therefore, necessary to examine very carefully their conduct in order to determine how far they dealt fairly by the appellant. I have in mind the instructions they received and the advice they gave to the appellant.

In my view, the evidence does not support the suggestion that the appellant had full knowledge of everything that Rebitt and Nehaul

did. I see no inconsistency between the appellant's denial that he had instructed Nehaul to apply to the Council for permission to subdivide the land into quarter lots and Nehaul's statement in his letter of application to the Council that he was acting on the appellant's instructions. Nehaul (and Rebitt as well) must have known that the 34 feet portion could not legally be transported. In this connection, it seems almost pointless for exhibit A ever to have been prepared. That it was prepared does, however, indicate that the appellant wanted to, and thought that he could, dispose of the 34 feet portion. But the evidence also suggests the strong probability that, not only did the appellant not know that he could not transport the 34 feet portion, but that up to July 22, 1957, nobody had taken the trouble to tell him that less than a quarter lot could not be transported. Nehaul may have been acting in the best interests of the appellant but that is quite a different thing from saying that the appellant had knowledge of what was being done on his behalf and fully appreciated all the implications.

It has been submitted by counsel for the respondent that Nehaul and the appellant conspired together to deceive the Council by withholding exhibit B which showed the buildings on the land, but there is no evidence that the appellant knew of exhibit B. Exhibit A was the plan he handed to Gonsalves. He said that Insanally and he got it from the Town Clerk's office. There is no reason to suppose that he did not go to the Town Clerk's office with Insanally, but he is in error either as to the identity of the plan that Insanally obtained there or of the source from which exhibit A was obtained. Exhibit A is not the plan attached to Nehaul's letter to the Council. His error, however, whatever it may be, shows, I think, how little he knew about the several plans of his land. A further point that is of some significance is that when Gonsalves told the appellant that a certificate would have to be obtained from the Town Clerk's office, the appellant said that he would get it, and not that Nehaul had already applied for one or that he had authorised him to apply for one.

The respondent said that when Rebitt showed her the boundary between the land she was buying and the land the appellant was retaining, the staircase to the hotel building was in the way. If Rebitt did indicate that boundary to her, he was offering her considerably more land than the 34 feet portion, which he had no authority whatever to do. If, on the other hand, he showed her the 34 feet portion only, as he said he was instructed to do and did, but the respondent thought that her boundary extended further south, then even at this early stage there was no agreement as to subject-matter. The respondent did not say precisely what area she was shown by the appellant, but she denied that she had ever been shown a paal. The appellant, on the other hand, said that Rebitt and Naraine, in his presence, pointed out to her the 34 feet paal as her boundary. The portion only, as he said he was instructed to do and did, but they must have done so, for they met at Gonsalves' office on July 22, 1957, to put their oral agreement into writing. But the question as to what that oral agreement was is, I think, incapable of a satisfactory answer. The appellant pleaded an oral agreement made on July

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20, 1957, but no evidence was directed to this date. I find it impossible to say on the evidence if the appellant, when he and the respondent met at Gonsalves' office, still thought he was selling the 34 feet portion or if he had by then agreed to sell a portion of the 16 feet strip as well.

Rebitt's evidence as to what took place at Gonsalves' office on July 22, 1957, is unsatisfactory. In examination-in-chief he said that the appellant never altered the instructions he had given him. These instructions were to endeavour to sell the 34 feet portion. He also said that when he read the agreement (exhibit F) he appreciated that the land to be sold was a quarter lot but that he did not realise that this was more than he had been instructed to sell. In cross-examination he contradicted himself and said that when he read exhibit F it did strike him that whereas it referred to a quarter lot, the appellant had instructed him to sell only the 34 feet portion. It is not surprising that he followed this up by saying that if he had felt that the appellant did not know to what he was committing himself when he signed exhibit F he would have explained it to him. In examination-in-chief he did not know the measurement of the quarter lot referred to in exhibit F when he read it: in cross-examination he knew the dimensions of the half lot at the time of the agreement.

Gonsalves saw only one plan (exhibit A) and did not concern himself even with that plan. He was Mekdeci's solicitor and when Mekdeci refused to take a mortgage unless a quarter lot was being transported, he drew up exhibit F. He said that the appellant agreed to what Mekdeci wanted. This is easy enough to say but it begs the very question to be decided for it involves the assumption that the appellant understood that a quarter lot, no less, had to be transported and that the buildings he was retaining would be affected. Not even everything was said in his hearing: Rebitt's evidence is that at a certain stage Gonsalves and Mekdeci had a long talk which he did not overhear and he was at the time in the inner section of Gonsalves' office with the others. Gonsalves thought that the 16 feet strip shown on exhibit A was the land on which the appellant's staircase was encroaching and had no doubt that with the removal of the staircase an unencumbered quarter lot could be sold. I do not know why it should be thought that the appellant who can neither read nor write could not have been similarly misled. Nothing was said about the cottage at the back or about the hotel building and it seems to me that the discussion which was confined to the removal of the staircase is intelligible only on the assumption that it was in the mind of everybody that the southern boundary agreed upon intersected the staircase and nothing else. It is of extreme significance that no alteration in the purchase price was ever mentioned at Gonsalves' office and the judge's findings involve the curious result that the appellant agreed to transport a much larger area than the respondent and he had arranged for at the price that she had agreed to pay for a much smaller area, with the knowledge that he was selling land on which his buildings stood and without making any arrangements for

a lease of that land. I do not think that any such drastic conclusion can fairly be drawn from the evidence.

I have already drawn attention to some of the features of Rebitt's and Nehaul's conception of their duty to the appellant. It is not enough to say that they were his agents and that he had the benefit of their advice. Nor do I attach the same significance to the fact that he took exhibit F to his legal adviser before signing it, as the judge did. The appellant's legal adviser had no plan of the land and there was nothing on the face of exhibit F to alert him to the encroachment of the appellant's buildings on the land to be transported. It is not very helpful to say that the appellant agreed to what Mekdeci wanted and such a conclusion cannot safely be drawn. It does not follow that because a legal document which referred to a quarter lot was read out to him he must have known that he was agreeing to transport a quarter lot measured on the ground and whether any part of his buildings crossed the boundary line or not. The appellant stupidly denied in evidence that exhibit F had been read to him and that he had agreed to remove the staircase, but his stupidity cannot obscure the proper inferences that should be drawn from the evidence.

In my judgment, the real contract between the parties was for the purchase and sale of less than a quarter lot and their common mistake was in thinking that what they had agreed upon was a quarter lot. The area could not be legally transported and the agreement for a transport was unenforceable. It is true that exhibit F obliged the respondent to accept a long lease if the Council refused a certificate to transport, but this provision pre-supposed that a quarter lot was in fact the area agreed upon by the parties. While, therefore, the written contract ought now to be rectified so as to express the real intention of the parties, the respondent's transport cannot be similarly rectified: the land transported is the minimum that the law will permit. Mekdeci and Rodrigues were witnesses for the respondent in the court below. Rodrigues is the person who, as his wife's agent, purchased the respondent's quarter lot. Mekdeci is the appellant's and the respondent's mortgagee and the mortgages held by Mekdeci cover the entire half lot of land and the agreement for sale to Rodrigues' wife is subject to the mortgage given by the respondent. A long lease of that portion of the 16 feet strip of the land transported to the respondent, on which the hotel building and cottage encroach, by the respondent to the appellant would appear to me to be a way out of the difficulty, but neither Mekdeci nor Rodrigues' wife was a party to the action and I do not think that an order requiring the respondent to execute a lease in favour of the appellant can properly be made in their absence. They should be given the opportunity to make representation and any order made should fully protect their rights. I would have allowed the appeal and sent the case back to the Supreme Court in order that Mekdeci and Rodrigues should be joined as parties and heard. I have, however, had the opportunity of reading the judgments about to be delivered and as the other members of the court take a different view of the agreement which

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was finally made between the parties, it would serve no useful purpose for me to indicate the order I had in mind.

WYLIE, J.: I agree with the conclusion reached in the judgment about to be delivered that this appeal must be dismissed with costs to the respondent.

Up to a certain stage, the original proposal considered by the appellant and the respondent was for the sale of the northern strip of 34 feet and, if this had been erroneously described as a quarter lot, then that would have been merely a misdescription, which in appropriate circumstances would have been a proper matter for rectification. However, the original proposal was changed when Mrs. Mekdeci insisted on a title by transport, and an agreement was made to sell a quarter lot without reference to any boundary line. The evidence of the solicitor (Gonsalves) on this point is as follows:

“Question arose as to mortgage of \$20,000. Mrs. Mekdeci said that she would only give a mortgage if defendant was getting a transport for North half of East half of Lot 14. She said she was not lending unless it was on North half of East half of Lot 14.

I drew up agreement of sale, exhibit F. Balli agreed to what Mrs. Mekdeci wanted and I drew up the agreement of sale which my clerk Massey typed out. I then read out the agreement aloud to all present.”

And later:

“I had no doubt at all in my mind that the land that Balli agreed to sell to defendant was a quarter lot—the North half of East half of Lot 14.”

This was an agreement to sell by area or description and not by boundaries. The discussion concerning the removal of the staircase followed this agreement. This discussion shows that the parties were not aware of the precise boundary of a quarter lot and therefore certainly could not have been agreeing to a sale of land up to a specific line. All it makes clear is that they knew the line would be south of the 34 feet line (which did not involve the removal of the staircase) and that they thought it still ended north of the main hotel building, but not north of the staircase. Whatever the appellant may have thought as to where the boundary of a quarter lot would run, the major consideration between the parties had then become that the sale must be of a quarter lot, irrespective of the boundaries shown to the purchaser on inspection. This was the major consideration because both the appellant and the respondent had to be sure that Mrs. Mekdeci would accept a mortgage and her attitude made it essential that they agree to buy and sell a quarter lot, wherever the southern boundary might be. Consequently, the appellant could no longer be considered as representing that he was selling up to a certain line, but as unequivocally agreeing to sell a certain area (a quarter lot) wherever the boundary line fell. Whether

he thought the hotel wall would be the boundary, or whether he was merely reckless or ignorant as to where the boundary was, cannot be said, and he has made the position more obscure by his dishonest evidence as to what happened at the solicitor's office. But this cannot alter the position that, when the agreement was signed, both parties were holding themselves out as agreeing to the sale of a quarter lot to satisfy Mrs. Mekdeci's requirement, and were no longer agreeing to sell up to a certain line only. There can thus be no question of rectification so as to exclude any part of the quarter lot from the agreement.

JACKSON, J.: This is an appeal from a decision of the Chief Justice dismissing a claim by the appellant (plaintiff) against the respondent (defendant) in which the appellant sought rectification of an agreement of sale of land dated July 22, 1957, and rectification or cancellation of a transport (conveyance) No. 2146 of November 18, 1957, passed in favour of the respondent.

The appellant was, since the year 1947, tenant of a three-storeyed building situate at East half of Lot 6 or 14 Werk-en-Rust, in which he carried on the business of a hotel.

On April 10, 1957, the appellant entered into an agreement with Mrs. Mekdeci, the owner of the said East half of Lot 6 or 14 Werk-en-rust, with four buildings thereon, including the hotel premises, for the purchase of the entire property for the sum of \$75,000: \$55,000 of that sum was to be secured by a mortgage of the property by the appellant in favour of Mrs. Mekdeci. The appellant desired to sell a portion of the said property and engaged the services of two house agents, Rebitt and Naraine, for that purpose. On his instructions, a sworn land surveyor, Mr. Sugreem Nehaul, now deceased, on May 15, 1957, surveyed and paled off "the south half of the East half of Lot 6 or 14 and on whose plan dated June 17, 1957 (exhibit A), are indicated two strips marked 'A' and 'B'". The portion marked "A" formed part of the north half of the East half of Lot 6 or 14 and abuts the south half of the East half of Lot 6 or 14; that portion "A" has a facade of 16 feet; the remainder of the north half of the East half of Lot 6 or 14 is marked "B" and has a facade of 34 feet. The facade of the south half is 50 feet. There is, therefore, a total facade of 100 feet. The hotel building stands on the south half of the East half of Lot 6 or 14, as well as partly on the portion marked "A" on Nehaul's plan; further, a cottage to the west is across the common boundary between the south half of the East half of Lot 14 and the portion marked "A" in the north half.

The agents offered for sale to the respondent the north half of East half of Lot 6 or 14 with the buildings thereon, indicating the wall of the hotel building as the southern boundary; it was then quite clear that no portion of any of the buildings which rested on the part marked "A" was being offered for sale. The respondent wanted a mortgage on the part she was buying and the appellant, his agents and the respondent went to Mrs. Mekdeci in an endeavour to secure a

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mortgage on that portion for \$20,000. Mrs. Mekdeci refused to accept a mortgage as she doubted whether the respondent would receive a transport for that portion of land, and she was not prepared to lend any money on any less interest in land than that secured by transport.

Sections 129 and 130 of the Georgetown Town Council Ordinance, Cap. 152 provide, *inter alia*:

“129. Where transports or letters of decree are held at the commencement of this Ordinance for less portions of lots than half lots, the less portions may continue to be sold and transported:

Provided that, if any portion or any half lot, not having a frontage to a street is or becomes the property of the owner of a contiguous lot or portion of a divided lot having a frontage to a street, it shall not be dealt with again by way of sale, transport, or otherwise, except in accordance with this Ordinance.”

“130. (1) Except as otherwise provided in section 129 of this Ordinance, no portion of a lot less than a half lot, such portion being hereinafter in this section referred to as a ‘sub-lot’ shall be transported except with the consent of the Council first had and obtained.

* * * *

- (4) The consent of the Council shall not be given—
 (a) unless the sub-lot is not less than a quarter lot;”

It is thus clear that consent cannot be given for less than a quarter lot to be transported, except permitted by s. 129.

By letter dated July 1, 1957, Mr. Nehaul, on behalf of his client, Balli, the appellant, applied to the Council for certificates for the purpose of transport of two quarter lots of land—the North half of East half and South half of East half of Lot 14, Werk-en-Rust. The application was granted on August 12, 1957, and the certificates were given. The letter of application stated:

“I crave to bring to the Council’s attention *that these are quarter lots* having individual frontages to a street, and more so, the facade of each quarter lot is over 40 feet by a depth of over 100 feet.”

It is significant that the plan, C.1, accompanying this application, shows two quarter lots, each with a facade of 50 feet and shows no buildings; it is also dated June 17, 1957, as plan, exhibit A, which shows the divisions A and B without any buildings, and as plan, exhibit B, which shows the buildings.

On July 22, 1957, the appellant, the respondent, the agents and Mrs. Mekdeci met at the office of Mr. Joseph Gonsalves, solicitor, for the purpose of getting an agreement of sale and purchase made out

and executed. Mrs. Mekdeci made it quite clear that she would not accept a mortgage from the respondent if the latter would not have transport. Mrs. Mekdeci was assured that the respondent would have transport and that it would be for a quarter lot.

The appellant denied that: (i) Nehaul had any authority to apply to the Town Council for certificates to enable transport to be passed to the respondent or that he knew anything about the application; (ii) he knew it was a quarter lot he had agreed to sell to the respondent; (iii) he took the agreement away before signing it, even though he admitted that Mr. Gonsalves told him to get his own lawyer; (iv) the agreement was read over to him, although he admits that his two accredited agents read it in his presence; (v) he had any talk about removing or altering the staircase; (vi) he knew when Mr. Collymore, his own lawyer, took him to a Commissioner of Oaths to swear to an affidavit in respect of transport to the respondent that he swore he had sold North half of East half of Lot 14, a quarter lot.

Rebitt, the appellant's (plaintiff's) agent, said, in answer to the respondent's (defendant's) counsel:

"To get transport for lands, one must have not less than a quarter lot. When Mrs. Mekdeci said she would not give mortgage unless transport was given for the land, it did strike me that she was in effect saying that at least one quarter lot must be sold I do not remember if the agreement of sale and purchase, exhibit 'F', was read out in Mr. Gonsalves' office. I remember there was talk about staircase of Balli's building. He did not promise to remove the entire staircase. He promised to re-arrange the staircase to give ingress and egress to the back building on portion that defendant had agreed to buy."

He, however, admitted reading the agreement to himself in the office. Mr. Gonsalves, in his evidence, said Balli agreed to what Mrs. Mekdeci wanted, that is, "she would only give a mortgage if defendant was getting a transport for North half of East half of lot". She was not lending any money unless it was on that. Rebitt and Naraine were present. He, thereafter, drew up the agreement, had it typed and read it out to all present. One of the agents then read it aloud to the appellant who, thereafter, took the agreement away before it was signed; he returned with it less than half an hour later and it was then signed by the parties. Mr. Gonsalves further stated:

"Balli had brought me a plan (exhibit 'A') made by Nehaul. That plan showed me a strip which I gathered was strip on which the staircase was encroaching. After Balli agreed to transport the quarter lot and Mrs. Mekdeci agreed to give mortgage on the quarter lot, it was not necessary for me to use the plan I had no doubt at all in my mind that the land Balli agreed to sell to defendant was a quarter lot—the North half of East half of Lot 14."

The trial judge made some findings of fact which he expressed in these terms:

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"I am quite convinced by Mr. Gonsalves' testimony that he read out aloud to all present, including the plaintiff, the terms of the agreement, including the description of the property; that neither of the property agents demurred when the document which was read out showed that agreement had been reached that what was to be conveyed was the north half of the East half of Lot 14. There was no need for Mr. Gonsalves to consult Nehaul's plan which he had in his possession, for it had been agreed that North half of the East half of the lot was to be sold. It was appreciated by the plaintiff that the stairway of the hotel was encroaching on a portion of the land agreed to be conveyed to the defendant and the plaintiff, in Mr. Gonsalves' presence, agreed to have an internal staircase in its stead. Apparently, no thought was given to the cottage at the back of the hotel and nothing was said about it. However, it is apparent from the evidence that this building was not to form any part of the property agreed to be purchased by the defendant.

I also accept Mr. Gonsalves' testimony that the plaintiff left his office with the agreement of sale and purchase before it was signed. He returned with it about half an hour later. Presumably, he went to consult Mr. Collymore, Barrister-at-Law, for Mr. Gonsalves had asked him to take independent legal advice. After the plaintiff returned with the agreement, it was duly executed by him and by the defendant. The plaintiff's agents had also read the terms contained in the agreement Although the plaintiff cannot read or write he is a very intelligent man and this was apparent when he gave evidence on oath. Further, with his agents' services and Mr. Collymore's advice, he cannot be said to have been imposed on or misled. The defendant, on the other hand, is a very simple individual of modest intelligence."

I endorse the findings of fact as to what took place in the course of these transactions, and think it highly improbable that the appellant, in the circumstances that developed, was not acutely aware that he was selling the North half of South half of Lot 14 to the respondent, and nothing less. He had taken successive steps; his surveyor, on his behalf, sent a letter of application to the Town Council, even though he denied the authority; he took his agents with him to Mr. Gonsalves' office to discuss the terms of the agreement; he sought and received independent help and advice from his counsel, Mr. Collymore, who prepared his affidavit of sale to the respondent, to which he swore before a Commissioner of Oaths, and his papers for transport. including the instructions for advertisement were prepared by Mr. Collymore. The course of conduct of the appellant in trying to effect a sale of part of the property to the respondent revealed an anxious necessity on his part to ensure that a mortgage to Mrs. Mekdeci was secured; this latter was vital to his interests. Without that mortgage, it was evident that a binding contract between him and the respondent would not have been concluded. It was in that setting that he agreed to sell and transport the North half of South half of Lot 6 or 14.

As to the denial of the authority of Mr. Nehaul, I would say a sworn land surveyor would know what sections in the Georgetown Town Council Ordinance are applicable to transports and, indeed, Mr. Nehaul knew, for he quoted them; he ended his application in these terms:

“In the circumstances, I have to ask that the Council and the Town Planning Authority be so kind in the exercise of its discretion to grant the certificate sought and applied for on behalf of my client who would be most grateful.”

It would be unreasonable, I think, to hold that Mr. Nehaul was acting without authority or without the knowledge and acquiescence of the appellant.

On January 29, 1958, Hermina Rodrigues purchased from the respondent the North half of East half of Lot 6 or 14, that being the same property acquired by transport dated November 18, 1957, by the respondent from the appellant. The transport by the respondent to Rodrigues was advertised in the *Official Gazette* on May 10 and 17, 1958, and on May 22, 1958, the appellant filed an opposition to the transport, and it is from this opposition the action under review had its origin. In this sale Rebutt was the agent of the respondent, Hardhy Mohanlall; he said:

“I was instrumental in getting sale from defendant to Rodrigues. I showed Rodrigues where the half of East half of Lot 14 would be. I told Rodrigues that the North half of East half of Lot 14 was for sale and that is what he agreed to buy from defendant. I told Rodrigues that Balli was going to rearrange the staircase . . . I had shown defendant less than I had shown Rodrigues. I did so because defendant had shown me her transport No. 2146 of 1957.”

In the court below and in the grounds of appeal, the appellant prayed for rectification of the agreement between the appellant and the respondent bearing the date July 22, 1957, and of the transport No. 2146 of November 18, 1957, to the effect that the appellant did sell and transport to the respondent only the parcel of land in North half of East half of Lot 6 or 14, designated “B” on Nehaul’s plan of June 17, 1957, exhibit “A”, and showing a facade of 34 feet. This prayer was rejected by the trial judge who was satisfied that the appellant had agreed to sell to the respondent the North half of East half of Lot 6 or 14.

Attention in the judgment was also paid to the rights of the mortgagee where it was observed that Mrs. Mekdeci was induced by the representation of the appellant to accept a mortgage in favour of the respondent on the North half of East half of Lot 6 or 14, the appellant intending that she should act on such representation. As a result she acquired rights under the mortgage which the rectification sought would adversely affect.

It is common ground that the respondent did not agree to purchase from the appellant any portion of the buildings which are situate partly

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on the north half and partly on the south half of East half of lot 6 or 14; to that extent, the judge ordered the respondent's transport, No. 2146 of November 18, 1957, to be rectified. The appellant's counsel urged in this court that the transport should be similarly rectified in respect of the land on which parts of the buildings stand, more specifically to be indicated by a straight line drawn along the southern wall of the three-storeyed building from West to East. This cannot be sustained in view of the findings already stated.

For these reasons, I would affirm the judgment and order appealed from and dismiss the appeal with costs here and in the court below.

Appeal dismissed.

Solicitors: *H. A. Bruton* (for the appellant); *J. A. Jorge* (for the respondent).

SEEWAH PERSAUD AND A.-G. v. WILLEMS

[Federal Supreme Court (Archer, Wylie and Jackson, JJ.) December 1, 4, 5, 6, 7, 1961, and May 19, 1962].

Evidence—Lease—Proof of boundaries—Description in lease referred to no plan or map, but plan attached thereto—Whether plan admissible to prove boundaries.

Crown forest—Logs unlawfully cut by trespasser on Crown forest leased to another—Trespasser convicted of unlawfully cutting logs—Logs forfeited to Crown—Whether lessee has any right to logs forfeited—Forests Ordinance, Cap. 240, ss. 18 and 22.

W. claimed against S. a declaration that he had the exclusive right to possession of 918 logs cut by S. on a certain tract of crown forest held by W. under crown forest lease No. 71/76. S. admitted cutting the logs but denied that they came from the area held by W. The issue depended upon where a certain boundary of W's lease lay. The description in the lease referred to no plan or map, but a plan was attached thereto when the lease was issued to W. The lease described the boundary in question as running along the back boundary of an adjoining lease, Ess 32/54. The evidence showed that this lease could not be found. W. therefore sought to rely on the plan attached to his own lease in order to establish the boundary.

Held: (i) *per* JACKSON, and ARCHER, JJ., the plan, though attached, was admissible only if it was established by W. as forming part of his lease, and it was not so established;

(ii) *per* WYLIE, J., dissenting, in view of the fact that lease Ess 32/54 could not be found and of the fact that the plan was attached to W's lease at the time of issue, the plan was admissible as secondary evidence of the boundary in question.

S. had been charged with the offence of cutting the logs contrary to s. 18 (1) of the Forests Ordinance, Cap. 240. He pleaded guilty but it was not brought to the notice of the magistrate that the logs had been cut in an area subject to a lease. The magistrate ordered the logs to be forfeited under s. 22 (1) of the Ordinance and to be disposed of by the Conservator of Forests

under s. 22 (2). The second defendant, the Attorney General, contended that the logs were in consequence the property of the Crown and that W. had no right to possession of them.

Held: (i) *per* ARCHER, J., it would not be a proper exercise of a magistrate's discretion, in punishing an offender who unlawfully cut forest produce on a lessee's concession, to order forfeiture of the produce so cut. The order made was not the equivalent of a judgment *in rem* and, had W. proved that P. had trespassed on his concession, a declaration in his favour would have got rid of the order;

(ii) *per* JACKSON, J., the statement of claim and the orders sought therein were not such as to impel the Attorney General to intervene;

(iii) *per* WYLIE, J., dissenting, an order for forfeiture can be made even if there are rights given by contract over the forest produce concerned. The exercise of the magistrate's discretion could not be reviewed in these proceedings. The order of forfeiture was valid and the property was freely at the disposal of the Crown without any limitation.

Persaud's appeal allowed.

Attorney General's appeal dismissed.

J. H. S. Elliott, Q.C., for Persaud.

M. Shahabuddeen, Crown Counsel, for the Attorney General.

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

JACKSON, J.: Ewald Willems, plaintiff, brought an action against Sewah Persaud in which he alleged that the defendant (Sewah Persaud) his servants and agents, in or about the year 1956 and thereafter, wrongfully entered lands in which he was in possession by virtue of a lease granted by the Crown, and wrongfully cut down trees growing thereon and removed some 918 logs to the damage and loss of the plaintiff, and claimed—

- (a) an injunction restraining the defendant, his agents and servants, from trespassing on the said lands and from cutting and removing any timber therefrom;
- (b) a declaration that the plaintiff, subject to the terms of the lease, has the exclusive right to possession of those logs cut by the defendant on the said tract and still lying thereon;
- (c) \$30,000 damages for the said trespass and for the value of the timber cut and/or removed by the defendant and his servants or agents from the lands aforementioned.

The defendant, among other things, pleaded a general denial of each and every allegation in the statement of claim and specifically put the plaintiff to the proof of the extent of the boundaries of the area held under the said lease and that the logs were cut within that area. He admitted cutting logs but said they were cut as permitted by his own lease, No. 30/55, by virtue of permission given him by one McLennan Turner to cut and remove logs from his area held under certain wood-cutting leases.

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On the application of the Attorney General of British Guiana, a judge of the Supreme Court of British Guiana on 3rd September, 1960, ordered that "Her Majesty's Attorney General be joined as an added defendant" and that the added defendant be served with a certified copy of the statement of claim.

The Attorney General in his defence stated that—

- (a) The plaintiff's (Ewald Willems) lease was issued by the Conservator of Forests pursuant and subject to the provisions of the Forests Ordinance Cap. 240, and that such lease expired on 1st February, 1959, and that no title had been issued to the plaintiff by the Conservator of Forests or other competent authority in respect of the area on which logs referred to in the statement of claim were cut and are still lying.
- (b) During the year 1958, defendant, Sewah Persaud, unlawfully cut logs in crown forest on land falling within the plaintiff's said lease.
- (c) A Divisional Forest Officer, acting under s. 26 of the Forests Ordinance, Cap. 240, seized the logs so cut and summoned Sewah Persaud before a magistrate to answer charges for unlawfully cutting the said logs in May, June, July, August and September, 1958, to which charges the defendant, Sewah Persaud, pleaded guilty. The magistrate on convicting the defendant ordered by virtue of s. 22 (1) and (2) of the said Ordinance that the logs be forfeited to the Crown and be disposed of by the Conservator of Forests as he should think fit.

The Attorney General (added defendant) by way of counterclaim sought a declaration that the Crown has the exclusive right to possession of all logs unlawfully cut whether by the plaintiff or by others upon the area included in the said lease and in particular, that the Crown has the exclusive right to possession of the 918 logs aforementioned.

The plaintiff, in paragraph 7 of his reply, states:

"The plaintiff has made no claim against the Crown or the Conservator of Forests and will contend at the hearing that the added defendant's defence is irrelevant; and in his defence to the counterclaim stated that the plaintiff will contend that the added counterclaim is untenable against him".

The action was tried by LUCKHOO, C.J., who found in favour of the plaintiff as set out in the following terms:

"IT IS THIS DAY ADJUDGED AND DECLARED that the plaintiff is entitled to the possession and ownership of the 918 (nine hundred and eighteen) logs cut by the defendant, Sewah Persaud, on the land described in the schedule hereto and referred to in the statement of claim filed herein on the payment by the plaintiff to the

Government of British Guiana of the amount of royalty prescribed by law therefor AND IT IS ORDERED that the said logs be removed by the plaintiff from the land as aforesaid within a reasonable time from the date hereof.

AND FURTHER IT IS THIS DAY ADJUDGED that the plaintiff do recover against the defendant, Sewah Persaud, damages for trespass fixed in the sum of \$100 (one hundred dollars) with his costs of this action to be taxed certified fit for counsel.

AND FURTHER IT IS THIS DAY ADJUDGED that the plaintiff do recover against the added defendant, Her Majesty's Attorney General for British Guiana, his costs of the counter-claim herein to be taxed, certified fit for counsel."

From this judgment and order the defendants, Sewah Persaud and Her Majesty's Attorney General, hereinafter referred to as the first and the second named appellants, respectively, have appealed.

The main grounds of appeal argued on behalf of the first named appellant were that (a) the respondent failed to prove that the logs were cut on land in his possession at the material time; (b) there was no evidence that logs were cut on land in possession of respondent by virtue of lease, *Ess. 71/76*; (c) the learned trial judge erred in taking into consideration against the first named appellant, an admission by the second named appellant, when he said "Savoury's evidence confirms the admission made by the added defendant in his pleading that the logs were in fact cut on the plaintiff's area".

As respects the admission referred to in the pleadings of the second named appellant and in the judgment of the trial judge, it is useful to examine the ground on which the admission is founded and the efficacy of Savoury's evidence stated to be confirmatory of that admission, and whether the admission bears any relation to the case of the first named appellant.

The first named appellant appeared before a magistrate upon two complaints by a Divisional Forest Officer that he did. in the one case during the months of May, June and July, 1958, in Crown Forest between the Manaribisi Creek and the Tabuta Creek, unlawfully cut 828 logs of greenheart and other forest produce contrary to s. 18 (a) of the Forests Ordinance, Cap. 240; in the other, during the months of July, August and September, 1958, in the same area, unlawfully cut 90 logs of similar timber contrary to the same section of the Ordinance; he pleaded guilty, was reprimanded and discharged. The logs were "ordered to be forfeited and to be disposed of by the Conservator of Forests as he thinks fit".

Section 18 is as follows:

"18. Any person who in any crown forest, except in accordance with the terms of a contract or lease granted under the provisions of this Ordinance or of the Crown Lands Ordinance or of the Mining Ordinance—

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- (a) cuts, fells, lops, damages or removes forest produce;
 - (b) grazes or pastures cattle:
 - (c) cleans, cultivates, cuts, digs or turns the soil;
- shall be liable on summary conviction to a penalty not exceeding one hundred dollars”.

Nowhere in the charges before the magistrate was any reference to any lease by the respondent or to any lands said to be in the respondent's possession; the conviction, therefore, as it stands, cannot be regarded as having any connection with the respondent's possession of any lands.

The admission by the second named appellant is stated in his statement of defence as follows:

“During the year 1958, the abovenamed defendant, Sewah Persaud, unlawfully cut logs in crown forest between the Manarabisi Creek and the Tabuta Creek in the county of Essequibo on land falling within the plaintiff's said lease”.

This admission may possibly be of some value as between the second named appellant and the respondent, but is utterly valueless as between the first named appellant and the respondent unless it is founded on cogent and admissible evidence produced at the trial establishing possession of the lands at the material time in the latter. Savoury's evidence, which the trial judge is of opinion gives support to that admission, will be examined later.

The essential parts of the agreement styled a lease, No. Essequibo 71/56 dated 2nd February, 1956, between the Conservator of Forests and the respondent are set out:

“1. The lessor grants to the lessee the exclusive rights for a period of three (3) years from the date of this agreement to cut wood on all Crown forest land falling within the following boundaries:—

Situated on the left Bank Cuyuni River, commencing at the source of the Sipericurn Creek, thence by a cut line in a northeasterly direction to the Wiapi Creek, thence along the right bank of the Wiapi Creek to the source, thence by a cut line to the head of Labbacabra Creek, thence by a cut line west to the source of the Manarabisi Creek, thence by a cut line of the source of the eastern branch of the Tabutu Creek to the point where the boundary line of the lease Ess. 30/55 meets the said Creek, thence along this boundary line of lease Ess. 30/55 to the back boundary of lease Ess. 28/54, thence along this boundary to its Northeastern corner, thence by a cut line Eastwards for a distance of approx. 6 miles and at depth approx. 1½ miles from the Cuyuni River bank to the point of commencement.

* * * *

Comprising Forrest Compartments Nos. and having an estimated area of 8,500 acres save and except and any other lands lawfully occupied by any person.

2. In the event of any doubt or disagreement arising as to the exact position of any of the above boundaries, the decision of the lessor shall be final.

3. This agreement shall convey to the lessee the right to cut and remove wood from the above area on payment of the prescribed or agreed royalties and to such things as can reasonably be regarded as necessary for this purpose but shall convey no other right whatsoever.

* * * *

12. The lessee, if he shall desire to renew this agreement for a further term, shall make application to the lessor not less than three calendar months before the end of the current term. If no such application is made or if the lessor shall refuse to grant any renewal, this agreement shall expire on the agreed date, whereupon the lessor shall give notice to the lessee to remove within three months all buildings and erections failing which all buildings and erections and all improvements on the land shall become the property of the lessor.

* * * *

14. The lessee shall not transfer, sublet, mortgage or otherwise dispose of any interest arising under this agreement unless the written permission of the lessor is first obtained and any purported disposition made without such permission being first obtained shall be null and void. On application for such permission being made the lessor may either grant it, refuse it, or grant it conditionally”.

The question at issue is, what is the southern boundary of the area described in the respondent's agreement No. 71/76, as back boundary of lease Ess. 28/54, frequently referred to as Ferreira's lease and said to be lease Ess. 32/54. It has been agreed by all parties that Ferreira's lease 28/54 or 32/54 cannot be found and that there is not a true copy or record of it extant. There can be no doubt that the issue whether the logs were cut on lands included in the plaintiff's lease was one of fact and permitted of parol evidence being admitted. Recourse was, therefore, had at the trial to parol and other evidence in an endeavour to establish with reasonable certainty the limits of Ferreira's holdings under his lease with special reference to the position of his northern or back boundary which would be the same as the southern boundary of lease Ess. 71/76. The respondent gave evidence; he did not at any time go to locate where his boundaries lay; he sent his men "to see about that"; they were not called as witnesses; he relied on a plan which was originally attached to an affidavit in some interlocutory proceedings in this action and at the hearing marked "F" for identification. The respondent said:

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“My plan refers to lease of Ferreira’s. There is no reference to any plan or map in description of my lease, but a plan was attached to my lease”.

Indeed, lease No. 28/54 is shown on that plan. It is clear from the respondent’s evidence that he did not personally know where his southern boundary was, but had to rely on the description in his lease and on any other acceptable evidence in support of possession constructive or otherwise.

I now refer to Savoury’s evidence. Savoury, a sworn land surveyor attached to the Department of Lands, called for the respondent, said:

“I was detailed by the Commissioner of Lands and Mines to do a survey in connection with report of Willems in respect of cutting of timber on what was said to be Willems’ boundary.

* * * *

My plan was made for purposes of prosecution against Sewah Persaud. I was asked to see where the cut logs were in relation to Turner’s northern boundary. Before making survey, I consulted available plans in Lands and Mines Department and found most of the plans to be inconsistent with each other. I was concerned with the topographical information on the maps. The plans I saw conflicted with Turner’s northern boundary. None of the plans I saw was based upon a proper survey.

* * * *

I may have been told by Narain that Ferreira had more land than Turner and that their boundaries were not the same. Turner’s lease is 160/54. Ferreira’s lease number is shown on plan as 28/54 (really should be 32/54). From change in number of lease when Turner was granted lease I would deduce different lease was given to Turner.

* * * *

I based my plan on Turner’s boundary and not on Ferreira’s boundary.”

Satnarain, a Field Assistant, Geological Department, employed as a Forest Guard 1956-1959, called for the defence, said it was his duty to survey and inspect Crown Forest leases, measuring and assessing royalty on timber, and to perform other duties assigned to him by the Director of Forestry. He knew Willems, Ferreira and Lorrimer; that Persaud, Willems and Lorrimer were already operating in the area in 1956 and that Ferreira’s lease had already been turned over to McLennan Turner. Ferreira’s lease was worked by Turner for Ferreira. When Turner got his lease Turner showed him a line by which the area under Turner’s lease “covered only one half that was under Ferreira’s original lease”. He was to prepare a plan for Turner’s lease and so he did; that plan covered only a part of Ferreira’s area. He continued:

“Willems’ plan (A) ‘F’ shows northern boundary of Ferreira. It was prepared at random by Forest Guard Yhap and is not based on any proper survey. Northern boundary of Ferreira on Exhibit ‘F’ is not in its correct position. It should have been somewhere where eastern branch of Tabuta turns north to the Manaribisi in an easterly direction. (Exhibit ‘E’)—Ferreira’s northern boundary shown on a brown line—appears to be more in the correct position. I have never seen Ferreira’s lease but from Exhibit ‘E’ and from what Turner told me I know where Ferreira’s northern boundary should be. The land in Ferreira’s lease, but not in Turner’s lease, would be a reserve of Crown land for Turner. There was a reserve for Willems, Lorrimer and Persaud kept to the north of their holdings”.

He further stated that those cut logs north of Turner’s line were within Ferreira’s area.

The evidence of Turner which purported to give supporting testimony for the defence as to the true position of Ferreira’s back or northern boundary, the trial judge characterised as valueless and doubted the impartiality of Satnarain’s evidence. The evidence led in discharge of the plaintiff’s onus of proof viewed from any angle without Exhibit “F” is far from establishing with any degree of probability where the back boundary of Ferreira’s holdings is situate. Savoury’s evidence does not in any way help and, with great respect I am inclined to the view that no support can be found therein for the admission by the second named appellant as stated in the judgment of the trial judge.

Was the plan “F” admissible in evidence? It was in the first instance produced and marked for identification; it was looked at frequently during the trial and questions were asked about it. There is no indication that it was ever admitted in evidence. If it was admissible, how far, if at all, does it assist?

Counsel for the respondent submitted that “F” could be looked at and was *prima facie* evidence of the back boundary of Ferreira’s lease (28/54 or 32/54) for, he argued, it was attached to the lease. He cited (i) 15 HALSBURY’S LAWS, 3rd Edn., at p. 412, para. 736, where it is stated:

“Where a map is drawn on or annexed to a will or instrument, so as to form part thereof, it is to be looked at with the instrument”.

The governing words are “so as to form part thereof” and the obligation rests on the plaintiff to satisfy the court that the map or plan “F” was thus annexed to his lease; (ii) (a) 11 HALSBURY’S LAWS, 3rd Edn., at p. 427, para. 688, where it is stated:

“Frequently when property is conveyed it is described both by words and by reference to a plan, and this should be done when practicable so that the plan may be looked at for the purpose

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of explaining the language of the parcels; but it is imprudent to rely upon a plan alone as the sole description, since slight errors in the drawing may have serious consequences; moreover, a complete and unambiguous description in a deed will prevail over a plan”.

It is to be noticed that at note (1) to paragraph 688 referred to in (ii) (a) above, the following words appear: “A map may not be looked at, if the map, though attached is not referred to in the deed.” (*Wyse v. Leahy* (1875), I.R. 9 C.L. 384).

Counsel cited further in support of his submission the cases of:

1. *Lyle v. Richards* (1866), L.R. 1 H.L. 222;
2. *Brian v. Harris* (1855), 10 Ex. Ch. 908;
3. *Nicholson v. Rose* (1859), 4 De G. & J. 10.

In each of these cases the map was referred to in the instrument so as to connect it, save in the case of *Lyle v. Richards* where the connection was by an instrument previously executed and not the one on which the action was based. There, the plaintiff brought an action against John Richards and others for trespass. In 1835 a lease of a certain mine was executed in favour of one R. and to the description of the boundaries were added the words “and which said premises are particularly delineated by the map in the back of the sett” (lease). In 1852 the plaintiff (*Lyle*) who had become assignee of the 1835 lease and had surrendered the remainder of the term for the purpose of obtaining a new lease of the same premises, received same from the same lessor in identical terms, save that the words referring to the map were omitted. In those circumstances, the map was looked at. Here, there is no reference to the plan or map “F”, or to any plan whatsoever in the lease 71/76, and although the respondent said “This is my lease with accompanying chart issued to me,” that statement cannot supply the nexus which is lacking.

He further contended that in this case, the plan “F” agrees with the description in the deed, but if the court thought there was any lack of precision in the description then the court could look at the plan. The description is neither imprecise nor ambiguous; the suggestion that plan “F” is *prima facie* evidence is inappropriate to the circumstances of this case where the question of the correctness of the plan is implicit in the burden of which the respondent must discharge himself. Moreover, the evidence adduced by the respondent and on his behalf, inclines to the view that the demarcation of the back boundary of Ferreira’s lease on “F” is nothing more than guess work. The back boundary there is represented by a straight line said to be drawn by a clerk; and if it is intended to be understood that Ferreira, Turner and the respondent had a boundary common to them all, one has only to look at Satnaraine’s evidence to be satisfied that that is no true indication of the back boundary of lease 28/54 of 32/54. A striking feature is that the plan “F” is not authenticated by anyone.

I have reached the conclusion that the plan “F” cannot be looked at for the purpose of aiding the determination of the back boundary

of Ferreira's lease 28/54 or 32/54, and even if utilised, can be of no assistance, having regard to the reasons hereinbefore given.

The respondent's counsel referred to clause 2 of the agreement "A", which is to the effect that if there is any doubt or disagreement arising as to exact position of boundaries, the lessor's decision shall be final. It has not been communicated to the court that the lessor has made any decision in terms of that clause, nor has the court any knowledge that the lessor had been invited to remove any doubt or settle any disagreement.

The judge, in my opinion, came to a wrong conclusion; the judgment against the first named appellant should accordingly be reversed and the appeal allowed.

The second named appellant argued the following grounds of appeal—

- (1) The learned trial judge erred in holding that so long as the (plaintiff) respondent is prepared to pay the prescribed royalty the (plaintiff) respondent is entitled to take the logs whether they were cut with or without the (plaintiff's) respondent's permission. The said logs were and are the property of the Crown for the following reasons:
 - (a) On a true construction of the Forests Ordinance, Cap. 240, and of the lease issued under it to the (plaintiff) respondent the (plaintiff) respondent is entitled only to logs cut by himself and/or agents. The logs in question were not so cut.
 - (b) The said logs were unlawfully cut by the original defendant, Sewah Persaud, and upon his conviction for so doing, were ordered by the magistrate to be forfeited to the Conservator of Forests to be disposed of as the Conservator of Forests thinks fit. The said order of forfeiture dated the 15th day of July, 1959, has not been set aside.
- (2) The learned trial judge erred in not granting the declaration sought in the appellant's counterclaim that the Crown had an exclusive right to all the logs unlawfully cut upon the area included in the (plaintiff's) respondent's lease".

A significant feature of the trial is that by order a certified copy of the statement of claim against the (defendant) first named appellant only was served on the (added defendant) second named appellant and that nowhere in the statement of claim was there any reference to or any allegation made against the (added defendant) second-named appellant. It is assumed that the statement of defence and counterclaim was filed because the second named appellant thought the Crown's right might be infringed by the declaration sought if granted in terms of the plaintiff's statement of claim 4 (b), namely—

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“A declaration that the plaintiff, subject to the terms of the lease aforesaid, has the exclusive right to possession of those logs cut by the defendant on the said tract and still lying thereon”.

The respondent’s counsel submitted that the Conservator of Forests, a party to the agreement of lease, having had the property of the logs vested in him by order of the magistrate, was placed in the same position as he was in respect of the (lessee) respondent before the criminal proceedings were instituted; that the proceedings did not release the Conservator from his obligations under the agreement of lease; that the words “as he thinks fit” in the order meant and should only mean that he should hold those logs at the disposal of the (lessee) respondent to pay the royalty if the latter desired so to do.

Counsel for the second named appellant, on the other hand, contended that the logs were, by reason of the forfeiture, the property of the Crown.

There has been no appeal from the magistrate’s order of forfeiture to the Crown. The trial judge, however, refused the declaration asked for by the second named appellant that the Crown had the exclusive right to possession of the 918 logs said to be cut on lands leased by the respondent.

In my opinion, the necessity for an examination of this aspect of the case as put forward by the second named appellant no longer arises, if at all it did arise, in view of my determination that the respondent failed in his attempt to establish that the logs were cut on lands within the boundaries described in his agreement. Again, I am not convinced that the statement of claim and the orders sought therein were such as to impel the Attorney General to intervene. I would, therefore, dismiss the appeal of the second named appellant.

The question of costs attendant on each appeal, in compliance with the request of the respondent at the hearing of the appeals, is reserved for argument later.

ARCHER, J.: I am also of the opinion that the respondent has not proved that the logs were cut on his concession. The judgment does not refer to any of the plans produced at the trial but the judge, in placing the value on Savoury’s evidence that he did, has impliedly credited Exhibit F, the plan which Willems said he had received together with his lease, with an accuracy which all the evidence belies. At p. 113 of the record, the judge said:

“The plaintiff’s witness, Savoury, a sworn land surveyor, had prepared a plan showing the portion of the group of cut logs in relation to what Naraine had, very soon after the discovery of the logs, marked as Willems’ southern boundary. From the measurements he gave during the course of his evidence, it was clear that none of the logs did fall outside of the southern boundary of Willems’ lease”.

This finding invests Savoury's figures with a cloak of respectability which they do not deserve and arbitrarily attributes a bias to Naraine and Turner.

Naraine, a forest guard whose duty it was to survey and inspect crown forest concessions, said that in 1956 he was instructed to survey Turner's concession. He took with him plans that were not based on surveys. He based his survey on a line shewn him by Turner. That line, Turner said, was a prospecting line and not Ferreira's northern boundary line. Naraine never found Ferreira's northern boundary. He also said that he showed Savoury the northern boundary of Turner's area. He prepared a plan (Exhibit K) showing a common boundary between Willems and Turner but this was done on the instructions of a District Forest Officer. Turner's concession was only about a half of Ferreira's concession. Savoury's evidence is based on plans, most of which he found to be inconsistent with each other. They were in conflict on Turner's northern boundary and none had been based on a proper survey. On his plan (Exhibit G) he placed Turner's northern boundary where Naraine told him it should be. He deduced that Turner's area was 350 acres larger than Ferreira's. This is clearly wrong. On his larger plan (Exhibit J) he shows Willems' concession as 9300 acres. Willems' lease gives him 8500 acres. Savoury's measurements are all in relation to Turner's boundary and have not, in my view, the weight that the judge has attached to them. I cannot agree that from his evidence it is clear that none of the logs fall outside Willems' southern boundary. Nor does his evidence warrant the conclusion that it was mathematically probable that the logs were cut in Willems' concession.

Exhibit F was prepared by Yhap, a forest guard, and is not based on a proper survey. That was the evidence of Naraine and it is the only evidence as to the authorship of this plan. It was never formally put in evidence but it was treated as evidence at the trial and I think that it is now too late for the appellant, Persaud, to raise any question as to its admissibility. Its evidential value is, however, quite another matter. It is at variance with Savoury's measurements and falsifies Ferreira's northern boundary. I do not consider that either these measurements or Exhibit F, or a combination of both, constitutes *prima facie* proof of the location of Ferreira's northern boundary. It is true that the sources of Naraine's knowledge of the position of Ferreira's northern boundary were (1) the plan attached to Exhibit E (Persaud's lease, Ess. 30/55); and (2) what Turner told him, but it was not for Persaud to prove that the logs had not been cut in Willems' concession: it was for Willems to show that they had.

Section 12 (1) of the Forests Ordinance, Cap. 240, provides that forest produce from Crown forests remains the property of the Crown until royalty is paid. When royalty is paid by a lessee the Crown no longer has any property in the forest produce. But even if royalty is not paid by the lessee the Crown's right of disposal of the forest produce is, by sub-s. (3), limited to a sale of only so much as will realise the amount of the royalty. It is not, therefore, competent to

the Crown to refuse to accept royalty from a lessee and to dispose at will of forest produce cut on a lessee's concession. Nor would it be a proper exercise of a magistrate's discretion, in punishing an offender who unlawfully cut forest produce on a lessee's concession, to order forfeiture of the forest produce so cut. The Attorney General's claim to a declaration involves the assertion that the logs were cut on the respondent's concession. He has not proved that assertion but, even if it had not been proved the respondent, who has neither declined nor is unable to pay the prescribed royalty, and not the Crown, would have been entitled to the logs. The appellant, Persaud, pleaded guilty to the unlawful cutting of the logs before the magistrate and there was therefore no necessity to prove where the logs had been cut, but, if the magistrate had been told that they had been cut on the respondent's concession (which is what the Conservator of Forests was alleging) he could not sensibly have ordered them to be forfeited. No mention was, however, made of the respondent's entitlement and forfeiture was ordered. This order, nevertheless, is not the equivalent of a judgment *in rem* and had the respondent proved that Persaud had trespassed on his concession, a declaration in his favour could have got rid of it, for as DENNING, L.J., said in *Taylor v. National Assistance Board*, [1957] 1 All E.R. at p. 185:

“The remedy by declaration is available at the present day so as to ensure that a board or other authority set up by Parliament makes its determinations in accordance with the law; and this is so, no matter whether the determinations are judicial or disciplinary, or, as here, administrative determinations: See *R. v. London County Councils Education Committee, Staff Subcommittee, Ex parte Schonfeld*, and the recent decision of the House of Lords in *Vine v. National Dock Labour Board*. The remedy is not excluded by the fact that the determination of the Board is by statute made ‘final’. Parliament gives the impress of finality to the decisions of the board only on condition that they are reached in accordance with the law; and the Queen's Courts can issue a declaration to see that this condition is fulfilled”.

I think, therefore, that the Attorney General's claim to a declaration must also fail and I would dismiss his appeal and allow Persaud's appeal.

WYLIE, J.: The principal contention advanced for the appellant Persaud (referred to in this judgment as “the appellant”) was that the plan now referred to as exhibit “F” could not be looked at to determine the location of the southern boundary of the land included in the grant of timber-cutting rights made to the appellant. Without that plan, it was submitted, there was no reliable evidence from which it could be held that the trees that had been cut stood on the land included in that grant. It was submitted that this plan could not be looked at for this purpose because it was not referred to in the document itself constituting the grant. This document, described in the heading of the document itself as a woodcutting

lease, purports to grant the exclusive rights for a period of three years to cut wood on all crown forest land falling within certain boundaries which are set out in detail, but without reference to Exhibit "F", or any other plan. The appellant's submission was that, by analogy with the decisions concerning conveyances and leases of land, as this plan (even if annexed to the document) was not referred to in the description of the area, it could not be looked at for the purpose of determining the boundaries of the crown forest land over which the appellant's right extended.

Even if this principle does extend to a document of this nature, it will not operate in the circumstances of this case to prevent the court from looking at this plan for the purpose of assisting it to determine the northern boundary of the grant referred to as Ferreira's lease the correct number of which, it is common ground, was Essequibo 32/54. In the respondent's grant, part of his southern boundary is described as running along the "back boundary" (that is, northern boundary) of Ferreira's lease from the Tabuta Creek to the north eastern corner of Ferreira's lease. Such a description is obviously unintelligible without evidence as to the location of this boundary in Ferreira's lease and the best evidence of that boundary would be obtained by producing Ferreira's lease itself. The evidence showed that this lease could not be found. The respondent's evidence was that he secured his own lease, together with this plan, from the Conservator of Forests when it had been settled what area of land was to be included in respondent's concession. The only inference possible from this evidence is that this plan was drawn up by the department which was itself responsible for the boundaries in Ferreira's lease in the ordinary course of the business of that department. It is therefore admissible as secondary evidence of the northern boundary of Ferreira's lease which is shown on it. It was, of course, also admissible in evidence against the added defendant (the Attorney General) as an admission, but that would not make it admissible against the appellant.

It is true that the respondent did not put the plan forward as such secondary evidence and follow the procedure usually required before secondary evidence is produced, but no objection was made until the close of the respondent's case, when the same objection was raised as was argued on this appeal. This submission is not that the plan was inadmissible in evidence altogether, which of course would have been untenable in view of the evidence which, according to the record of the submissions of counsel for the appellant in the court below, apparently suggested that the plan was originally attached to the document creating the respondent's grant. Both documents were originally produced together as Exhibit "A". The submission was that the plan should not be looked at to determine the respondent's boundaries. However, the whole of the evidence has shown that Ferreira's lease could not be located, and so even if this objection was sound, the plan then also became admissible as secondary evidence and the proper procedure could have been followed if the objection had been taken at an earlier stage. Consequently, on this

issue, the remarks of the Master of the Rolls in *Bradshaw v. Widdington*, [1902] 2 Ch. 430 at p. 449, are in point.

Moreover, a considerable part of the evidence called on behalf of the defendant was in effect aimed at showing, in the absence of the actual grant, where the northern boundary of Ferreira's lease was and was therefore secondary evidence called on the same issue. Consequently, the principle applied in *Gilbert v. Endean*, [1878] 9 Ch. D. 260, also applied in this case. Both parties treated all this evidence as admissible, as indeed it was upon establishing that the actual grant could not be located.

The evidence called on behalf of the plaintiff to establish his southern boundary was, therefore, this secondary evidence of Ferreira's northern boundary, plus the evidence of one Savoury, a surveyor called to show where he found the logs. His evidence and his plan, made as a result of his own observations, showed that he found notice boards purporting to mark the respondent's southern boundary and his plan shows that those notice boards, and the boundary which he marked in consequence establish a line somewhere near that shown in Exhibit "F", although it cannot be established that the two lines coincide precisely. The evidence is certainly sufficient to establish beyond doubt that the logs were north of the line on Savoury's plan, and, on a balance of probabilities, that they were north of the corresponding line on exhibit "F". That was the position at the close of the respondent's case when, after counsel for the appellant had submitted the plaintiff's claim should be dismissed at that stage, the learned Chief Justice ruled that there was a case to answer and called on the defence.

The appellant thereupon called one Narain to give (*inter alia*) secondary evidence as to the northern boundary in Ferreira's lease. His evidence was to the effect that a certain line which he had cut was the northern boundary of a grant to one Turner, who had received a grant in respect of land included in Ferreira's lease after this lease had expired. Narain, who had been one of the staff of the Forestry Department but has since left that department, said that Turner's grant was smaller in area than Ferreira's. His evidence is to the effect that, in consequence, the latter's northern boundary was more to the north than Turner's and therefore the respondent's boundary and Turner's did not coincide. However, he stated in evidence that he had himself nailed all notice boards in that area. The line which he had cut and which he said was Turner's northern boundary, had on it boards showing it to be also the respondent's southern boundary. He admitted also that he had pointed out this line as being the common boundary between Turner and the respondent to the surveyor, Savoury, who had been directed by the same department to prepare a plan showing on whose concession these logs were. In addition, he admitted that exhibit "K", a plan marked "Surveyed by S. Narain 12th July, 1958", had been prepared by him. It shows the same common boundary between Turner and respondent. He stated that he had done this "on instructions" in the department. Whatever else

this may mean, it is clear that officials of the department which had attended to the granting of these concessions and determined their boundaries, treated the two concessions as having a common boundary. Savoury's evidence and his plan, dated 12th March, 1959, shows the same common boundary (pointed out by Narain) and, as already stated, his evidence and his plan shows that Savoury found on this line noticeboards showing it to be the boundary of both Turner's grant and respondent's grant. A comparison of the line shown on the plan (exhibit "F") attached to the respondent's grant as being the northern boundary of Ferreira's lease with the corresponding lines shown on Narain's and Savoury's plan shows that they are approximately in the same position, although the plans are clearly not accurate enough to draw any more precise inference from this comparison. Consequently, at the close of the defence, there was still more evidence to support the plaintiff's claim and, as the Chief Justice said, Narain had been shown to be an unsatisfactory witness. His actions while in the employ of the department clearly were at variance with his evidence in court that suggested that the respondent's boundary did not coincide with Turner's boundary. Turner, who was also called by the defence, could not give any direct evidence as to Ferreira's northern boundary. The evidence was ample in my judgment, to show that, on the balance of probabilities, the trees were in the area over which respondent held this grant.

For these reasons, I would dismiss the appeal of the appellant Persaud.

As for the appeal by the Attorney General, the position of the Attorney General in these proceedings requires some clarification. The Attorney General applied by way of summons for leave to intervene and, on this application, apparently heard *ex parte*, an order was made that the Attorney General be added as a defendant and that the words "Her Majesty's Attorney General defendant added by Order of Court dated 3rd day of September, 1960" be inserted in the statement of claim. This addition was made, but no claim was made against the added defendant in the statement of claim. Nevertheless, the Attorney General lodged a statement of defence in which he admitted that the logs had been cut on the area included in the respondent's grant, but set out that the appellant had been convicted before the magistrate of offences under s. 18 (a) of the Forests Ordinance, Cap. 240, in respect of these logs and that the magistrate had ordered the logs to be forfeited under s. 22 (1) of the Ordinance and to be disposed of by the Conservator of Forests under s. 22 (2). The Attorney General contended that, in consequence, the logs are the property of the Crown and that the respondent had no right whatsoever to possession of the logs. It would thus appear that the Attorney General desired to intervene because the respondent, in his statement of claim, had claimed as against the appellant a declaration that the respondent had an exclusive right to possession of the logs cut by the appellant, although it is to be observed that this claim was made against the appellant only in proceedings confined to the respondent and the appellant before this intervention.

The Attorney General further counterclaimed against the respondent for a declaration that the Crown has the exclusive right to possession of all logs unlawfully cut, whether by the respondent or others, upon the area included in the grant and in particular of the logs in question.

In his reply, the respondent set out that he had made no claim against the Crown or the Conservator of Forests and he contended that the Attorney General's defence was irrelevant. As to the counterclaim, he contended that he had never unlawfully cut logs and that the counterclaim was untenable against him.

No party seems to have taken any objection to the joinder of the Attorney General and to this procedure, which really amounted to a claim by the Crown against the respondent for a declaration in the terms set out in the counterclaim. The learned Chief Justice rejected this claim and granted the respondent a declaration that he was entitled to the possession and ownership of the logs in question. The Attorney General has appealed against the order granting this declaration on the grounds that, on a true construction of the Forests Ordinance and the respondent's grant, the latter was only entitled to logs cut by himself, his servants and agents; that, because of the order of forfeiture which had not been set aside, the declaration in favour of the respondent could not be made; and that as no royalty had been paid on the logs, they were the property of the Crown pursuant to s. 12 of the Ordinance.

These were the grounds upon which the counterclaim for a declaration was based and the learned Chief Justice rejects them in the following passage in his judgment:—

“The right to obtain forest produce given to the plaintiff was an exclusive right—exclusive even of the Crown so long as the terms and conditions of the lease were fulfilled. One of the terms of the lease, for example, prohibited the plaintiff from cutting trees less than a certain size and if the plaintiff or anyone else cut trees of a lesser size an offence would be committed against the Forest Ordinance, and the logs so cut could be forfeited. The unlawful cutting must be unlawful *vis-a-vis* the Crown before forfeiture could enure to the Crown. So long as the plaintiff is prepared to pay the prescribed royalty he is entitled to take the logs whether they were cut with or without his permission.”

I am not clear whether the Chief Justice is maintaining that the order of forfeiture was wrongly made and, for that reason, cannot be taken into consideration on this question, or that the contractual rights conferred upon the respondent by his grant entitles him to possession and ownership of all logs cut in the area of his grant, notwithstanding the existence of the order of forfeiture.

As to whether the order of forfeiture was wrongly made, the appellant Persaud pleaded guilty before the magistrate to two offences

of unlawfully cutting forest produce contrary to s. 18 (a) of the Forests Ordinance in respect of the logs in question. Whatever may be the elements of that offence, the appellant's plea of guilty was an admission that these elements existed, and it is not possible to review the facts in these proceedings to see whether they support a conviction.

Section 22 reads as follows:—

“22. (1) When any person is convicted of an offence under this Ordinance or any regulations made thereunder all forest produce in respect of which such offence has been committed, and all livestock, tools, boats, vehicles, machinery and other implements used in committing such offence shall be liable to be forfeited by order of the court. Such forfeiture shall be in addition to any other punishment that may be awarded.

(2) Any forest produce forfeited under subsection (1) of this section shall, unless otherwise ordered by the court, be sold or otherwise disposed of as the Conservator may, by general or special order, direct.

(3) When any person is convicted of an offence under this Ordinance, or any regulations made thereunder, the court may, in addition to any other punishment that it may award, order the convicted person to restore to the owner any forest produce that such person has obtained in contravention of this Ordinance or any regulations made thereunder or pay to the owner compensation for the loss he has sustained by such contravention.”

The conviction is in order, and the order for forfeiture is consequently properly founded and within the magistrate's jurisdiction. The exercise of his discretion cannot be reviewed in these proceedings. If the Chief Justice is to be understood as holding that an order for forfeiture cannot be made if there are rights given by contract over the forest produce concerned, there is nothing in s. 22, in my view, that could lead to the conclusion that the power to order forfeiture is so limited. Indeed, it would seem more logical for the Ordinance to give authority to exercise the power in these circumstances than in cases where nobody has any claim to the forest produce. For it might be pointless to order forfeiture of forest produce in the latter case. Consequently, the issues must be considered having regard to the fact that there is a valid order of forfeiture subsisting in regard to these logs.

An order for forfeiture made in criminal proceedings as part of the penalty for an offence normally means that the goods forfeited vest in the Crown free of any claim that others may have, whether arising under contract or otherwise. I see no reason for holding that the power of forfeiture provided for in sub-s. (1) of s. 22 has any different consequence. Indeed, sub-s. (2), authorising the Conserva-

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tor of Forests to direct the sale or disposal of forfeited forest produce, unless otherwise ordered by the court, confirms the view that, upon forfeiture without any other order by the court, the property is freely at the disposal of the Crown without any limitation. Subsection (3) also supports this view, for it gives power to the court to protect the interests of an owner of forest produce. If it had been intended to protect any lesser interests than ownership, this subsection would surely have so provided.

It follows that this order of forfeiture was validly made and that it operates to exclude the rights of any person other than the Crown. Consequently with this order of forfeiture in existence the respondent could not, in my judgment, obtain a declaration that he was entitled to the ownership and possession of these logs, whereas the Attorney General must be granted such a declaration in favour of the Crown.

It is not necessary, in order to settle the matters in dispute in this case, to go any further and consider the declaration sought by the Attorney General that the Crown is entitled to all logs unlawfully cut upon the area included in the respondent's lease and I therefore express no view on this claim. Nor do I wish to be understood as supporting the proposal of the Conservator to sell these logs to the appellant. Sufficient was said in the course of the hearing of this appeal concerning the view that ought to be taken of the conduct of the head of a government department which had, to all intents and purposes, disposed of these trees to the respondent and was receiving from him substantial royalties, including minimum payments, if, after having obtained an order of forfeiture of some of these logs without the grantee being heard, or the department's representative drawing his rights to the attention of the court, he proceeded to use the power under s. 22 (2), gained in such circumstances, to deprive the respondent of the logs and to dispose of them, not to him, but to the very offender himself.

I would allow the appeal of the Attorney General and vary the judgment of the court below by setting aside the declaration in favour of the respondent and substituting a declaration that the Crown is entitled to the ownership and possession of these logs.

As counsel for the respondent asked to be heard on the question of costs, if the judgment of the court below is varied, I express no view as to costs in this appeal at this stage.

First appeal allowed. Second appeal dismissed.

MOHAN PERSAUD v. FRASER

LILLOWATTIE PERSAUD v. FRASER

[Federal Supreme Court (Gomes, C.J., Lewis and Marnan, JJ.) February 12, 1962]

Sale of rum—Rum selected in licensed premises but ordered, delivered and paid for in unlicensed premises—Whether sale took place in licensed premises—Intoxicating Liquor Licensing Ordinance, Cap. 316, s. 44 (1).

The male appellant owned a parlour and, adjoining to it, a licensed spirit shop. His wife, the female appellant, attended to customers in both premises. A revenue officer approached her in the parlour and ordered a bottle of rum. She thereupon went over to the spirit shop and brought back a bottle of rum. She handed this over to the revenue officer in the parlour and received payment from him therein. The appellants were in consequence convicted before a magistrate for selling rum in unlicensed premises contrary to s. 14 (1) of the Intoxicating Liquor Licensing Ordinance, Cap. 316. They appealed unsuccessfully to the Full Court, before which it was argued on their behalf that the appropriation of the particular bottle of rum, and therefore the sale, should be presumed in law to have been made in the spirit shop and not in the parlour. (See 1961 L.R.B.G.)

On appeal from the Full Court—

Held: the appropriation of the rum took place in fact and in law in the parlour.

Appeals dismissed.

A. W. E. Roberts for the appellants.

M. Shahabuddeen, Crown Counsel, for the respondent.

Judgment of the Court delivered by the Chief Justice:

In this case the two appellants are husband and wife. The male appellant was the owner or occupier of certain premises the northern half of which was used to run the business of a parlour and the southern half as a rum or spirit shop. It appears that the female appellant used to conduct the business of the parlour and probably assisted during opening hours on the licensed premises. On the day in question a revenue officer accompanied by another person went into the parlour and there he saw the female appellant. He asked her for a bottle of rum and she asked him if he wanted “XM” and he said no, he wanted Russian Bear rum.

These two premises, the parlour and the spirit shop, adjoin each other and were separated by a partition but in that partition was a communicating door in order to permit access from the parlour to the spirit shop and *vice versa*. The moment that the prospective purchaser, that is to say, the revenue officer, said no, he wanted a bottle of Russian Bear rum, the female appellant went through the door in the partition which separated the two premises and came out with a bottle of rum which she handed to him. He produced a note and tendered it in payment. The note was accepted by the female appellant who took out the price of the rum and gave him the change.

On those facts they were convicted before the magistrate of selling twelve fluid ounces or thereabouts of rum to the revenue

officer, contrary to s. 44 (1) of the Intoxicating Liquor Licensing Ordinance, Cap. 316. Against that conviction both appellants appealed to the Full Court. The Full Court, after hearing considerable argument and considering many authorities by counsel for the appellants in support of their appeal, dismissed the appeal.

The appellants now appeal to this court and counsel for the appellants has put forward and has argued only one ground of appeal and it is, he says, the learned magistrate and also the Full Court were both wrong in concluding that the appropriation of the article in question, that is to say, the half bottle of rum, took place in the parlour and not in the licensed premises. That is the only point arising in this appeal.

Counsel has cited most of the cases that were cited before the Full Court and he has argued the appeal very fully. Most, if not all, of the cases that were cited by him do not relate to the circumstances of this case. This is a case where a seller and buyer confronted each other and a very simple transaction took place such as takes place whenever a customer goes into a shop and asks for an article.

Counsel for the appellants maintained that the appropriation took place the moment the female appellant went into the rum shop and took up the bottle of Russian Bear rum. He said that at that stage there was an executory agreement for sale. That matter has been fully argued and I do not propose to deal with the authorities because, as I say, most of the cases cited are cases where messengers were sent to certain licensed premises to obtain liquor, but here the facts are a simple transaction where a person goes into a parlour and calls for a bottle of rum; there was no rum in the parlour, which was not licensed premises, and a bottle was obtained elsewhere and presented to the customer. I don't think I need even go on and say "delivered to him" or even "paid for by him" because I think that in the circumstances of this case a complete authority and complete answer is to be found in part of the judgment of Lord GODDARD in the case of *Fusby v. Hoey*, [1947] 111 J.P. 167.

My brother on my right has read the whole of that passage. I will not repeat the whole passage but I shall just identify it by saying that it commences with the words "In our opinion, the sessions did not sufficiently distinguish between appropriation and delivery," and it concludes with the words "The customer has, by his conduct, impliedly assented to the appropriation."

The particular portions of that passage on which I rely for the purpose of my judgment are two. First of all, the second sentence which is as follows:—

"Property in unascertained goods passes to the buyer when there is an appropriation of goods to the contract—which need not be a pre-existing contract—by the buyer with the assent, express or implied, of the seller, or by the seller with the assent of the buyer."

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And then the second portion on which I rely is the portion which gives an illustration which, I think, absolutely fits the circumstances of this case, where Lord GODDARD said:—

“If he says, (that is, the potential purchaser) and the gin being under the counter, or elsewhere, ‘please let me have a bottle,’ and the shopman takes one out and hands it to him, and he accepts it, there is an appropriation from the seller’s stock with the buyer’s express consent.”

I think that illustration amply fits the circumstances of this case and so far as I am concerned that is sufficient authority for me to rule that in this case appropriation of the rum took place in fact and in law in the parlour. For those reasons I would dismiss this appeal.

LEWIS, J.: I agree.

MARNAN, J.: I agree.

Appeals dismissed.

MC GARRELL AND OTHERS v. DEMERARA COMPANY LIMITED

[Federal Supreme Court—Civil Appellate Jurisdiction (Archer, Wylie and Jackson, JJ.) November 23, 24, 1961, May 19, 1962.]

Practice—Parties—Action in the name of the plaintiffs and others together constituting a fluctuating body—Whether action maintainable.

Immovable property—Transport—Claim by villagers that owner granted land to villagers as a body in 1842—Land subject of several subsequent transports—Transports disclosed no exemption in favour of villagers—Transport for land never passed to villagers—Claim by villagers to be entitled to land by transport not maintainable.

Prescriptive title—Claim by villagers that villagers as a body entitled to land, by prescription—No evidence of adverse possession by villagers as a body—Claim not maintainable.

Trust—Claim that land allocated in 1842 by owner for use of villagers—Land not exempted in subsequent transports—Successors in title gave valuable consideration for land—No evidence of a declaration of trust—Claim to trust not maintainable.

J.S. purchased Plantation Vreed-en-Hoop at execution sale in 1839 and obtained letters of decree for it in 1842. He disposed of certain portions of the plantation and in 1878 his heirs transported the remainder to S.G. After being the subject of a succession of other transports, the plantation finally devolved to the respondents. In the 1878 letters of decree and in all subsequent decrees the property transported was described as Plantation Vreed-en-Hoop “save and except such parts . . . as have been heretofore transported to other parties, and also save and except such parts . . . as have heretofore been sold but not yet transported”. The appellants, three land owners of the village of Stewartville, as the plantation later came to be called, claimed title to a portion of the plantation on behalf of themselves and all other land owners of the village on the ground that in 1842 J.S. had granted it to the villagers of Stewartville to be used by them for farming, pastureland and cane fields. There was no evidence, however, that the villagers as a body ever exercised adverse possession over the disputed area, which was never transported to any of the villagers and was not exempted in any of the transports passed after 1842. In the alternative, the appellants claimed that the respondents should be considered as trustees for the land owners of Stewartville.

Held: (i) immovable property in British Guiana is governed by the English common law of chattels real;

(ii) there could be no question of the appellants being co-owners of the disputed area by transport since even if J.S. intended to vest ownership of the area in purchasers of lots at Stewartville, he could only have done so by passing transport for it;

(iii) the root of title commenced in 1842 and there was no evidence on which it could be presumed that the successors in title to J.S. held the disputed area in trust for the land owners of Stewartville; in the absence of any evidence that the villagers as a body had by prescription acquired the disputed area, there was no basis for a representative action;

(iv) *per* WYLIE, J., a claim on behalf of a fluctuating body, whether it be the villagers for the time being or the owners of village land for the time being, is obviously not enforceable in British Guiana today irrespective

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of the history of this plantation or of the changes from Roman-Dutch law to common law.

Appeal dismissed.

L. F. S. Burnham, Q.C., and H. D. Hoyte for the appellants.

S. L. Van B. Stafford, Q.C., and J. H. S. Elliott, Q.C., for the respondents.

ARCHER, J.: This is an appeal against a decision of the Supreme Court of British Guiana in an action brought by the three appellants against the respondent company for a declaration of ownership of land, an injunction, and damages. The action is in the name of the appellants on behalf of themselves and all the other villagers, and more particularly, the other landowners, except the respondent company, of Plantation Vreed-en-Hoop, now known as Stewartville, West Coast, Demerara. Plantation Vreed-en-Hoop was purchased by John Stewart at execution sale on October 3, 1839, and letters of decree were passed to him on September 17, 1842. He disposed of portions of these lands and in 1878 the remainder was transported to Stewart Gardner by his heirs. Stewart Gardner became insolvent, and in 1893, what remained of Plantation Vreed-en-Hoop was transported to Samuel Sandback and two other persons by the Administrator-General of British Guiana. Sandback and his two co-owners transported to Plantation Leonora, Ltd., and this company transported to Leonora, Ltd., another company, in 1911. In 1923, Leonora, Ltd., transported to the respondent company. In the 1878 letters of decree and in each subsequent decree, the property transported was Plantation Vreed-en-Hoop—

“save and except such parts, portions and lots of said Plantation as have been heretofore transported to other parties, and also save and except such parts, portions or lots of said Plantation as have heretofore been sold but not yet transported”.

In 1878 Plantation Vreed-en-Hoop was already known as Stewartville. The appellants were all born at Stewartville, the appellant McGarrell in 1888, and the appellants Small and Elcock in 1898. McGarrell left Stewartville when he was twenty-three years old but Small and Elcock continued to live there and still do so. The claim put forward by these three appellants was that the villagers, for the time being, of Stewartville are the owners of a portion of land, comprising certain lots represented on a plan prepared in 1842, as the successors in title to villagers of Stewartville to whom it was granted by John Stewart to be used by them for farming, pasture land and playing fields; and that the respondent company had, in 1954 and in 1955, trespassed upon it. At the trial, evidence of the user of the land by villagers for the purposes of cultivation, cattle grazing and games over a lengthy period of time was led at considerable length, and the appellants' case was upon the basis of a grant of the land, or alternatively, an acquisition of title to it by prescription, reliance being placed on the exercise of rights in proof of ownership. The judge held that the appellants' claim was in form a representative action and that the

appellants were incompetent to sue in a representative character. He further held that ownership of the land could not reside in a fluctuating body, such as the villagers of Stewartville, and found that, in any event, an intention by the villagers to hold the land as against the true owners had not been manifested. He gave judgment for the respondent company on the ground that the appellants had not, either in respect of the villagers of Stewartville or themselves, acquired by user such ownership of the land as would entitle them to any of the remedies they sought. At an early stage of the argument for the appellants, it appeared to us that the question whether or not the villagers of Stewartville could be owners of the disputed area, either by grant or by adverse possession, might be the crux of the case, and we heard submissions on this question but without prejudice to argument on the other grounds of appeal if this was found to be necessary.

Counsel for the appellants submitted that the action was maintainable in the form in which it had been brought because the interest claimed was ownership of the disputed area and it was the same for all the persons represented. He abandoned the claim in respect of the villagers of Stewartville as such and relied on a claim in respect of such villagers as are also landowners of Stewartville. He said that they are a body of persons who can be ascertained with certainty and that it was competent for this court to give judgment for such persons as landowners. He contended that a fluctuating body can own land and referred to the judgment of WORLEY, C.J., in *Adams and Christmas v. Raghbir*, 1951 L.R.B.G. 90. Alternatively, he urged that a lost grant should be presumed or that this court should find that the respondent company was a trustee for the landowners of Stewartville. He made no claim to an easement or *profit a prendre*. Counsel for the respondent company argued that the landowners of Stewartville are just as much a fluctuating body as the villagers of Stewartville, and that a fluctuating body cannot be the owner of land either by grant or by prescription.

The Civil Law of British Guiana Ordinance, Cap. 2, which came into operation on January 1, 1917, effected a drastic change in the law governing rights of property. Section 2 (1) defines movable property and immovable property, the latter to include both real property and chattels real as understood by the common law of England. Section 3 (C) provides that the English common law of real property shall not apply to immovable property and s. 3 (D) provides that there shall be, as formerly, one common law for both movable property and immovable property and that all questions relating to immovable property and to movable property subject to the law of the Colony shall be adjudged, determined, construed and enforced, as far as possible, according to the principles of the common law of England applicable to personal property. The combined effect of these two provisions of the Ordinance is that it is the English common law of chattels real which is to be applied to immovable property and in so far as the question of ownership of land by a fluctuating body of persons is concerned, it is to that law that we must look in order to determine the appellants' entitlement.

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The rights of the predecessors of the appellants and of those on whose behalf they have claimed must be ascertained and determined in accordance with the law that prevailed at the time of the acquisition of those rights. In 1842 and up to 1916, Roman-Dutch law controlled the transfer of immovable property. What the law on the point was is to be found in the decision of the Privy Council in *Steele v. Thompson* (1860), 13 Moo. P.C.C. 280. In that case, there had been an agreement between the vendor and the purchasers for the sale to the purchasers of certain lands described by metes and bounds, and a number of negroes. There was also a contemporaneous agreement that the purchasers and their successors should have for the benefit of the lands agreed to be sold a right to the use of a canal belonging to the vendor for certain purposes. The right to use the canal was a servitude and therefore immovable property and was transferable only by a proceeding in the presence of a judge. The question was whether the transport by which the vendor professed to sell, transport, and in full property make over to the purchasers the lands in question as described in the agreement and the negroes “agreeably to contract of sale and purchase recorded in the Secretary’s Office” was effective as a transfer of the servitude as well. The following paragraph occurs in the judgment (13 Moo. P.C.C. at p. 298):

“It is admitted that the servitude in question is of the character of immovable property, and like other immovable property can only be passed according to the Roman-Dutch Law which prevails in the Colony, by the proceeding in the presence of some Judge at the place in which the property is situated.”

At *ibid.*, p. 301, the judgment reads:

“Nobody reading the transport would infer from it that anything more was intended to be conveyed than is expressed.”

The agreement had provided for a first and second mortgage on the lands and negroes to secure the balance of the purchase money. The judgment continues (*ibid.*):

“It is clear that it never was intended that this transport should complete the agreement. Two other transports are to be executed by way of mortgage, and not only so but twenty-five additional negroes are to be put upon the property and included in such mortgages. It cannot be pretended that if the agreement had been for the purchase of two plantations, and only one had been conveyed, the words ‘agreeably to articles of agreement of such a date recorded in such a book’ would have been sufficient to include the other plantation, the properties being distinct. A conveyance of A, in pursuance of an agreement, could not amount to a conveyance of B also, although the agreement to convey included B. But it is said that here the properties were not distinct, that the one was an incident to the other, and that the conveyance is to be read as if it purported to convey the plantation to be held and enjoyed with the incident to it, specified in

the article. But this is not the language of the instrument, and what in this argument is termed an incident does not become an incident until it has been legally constituted. At the date of the transport it was a distinct interest in a real estate, which real estate was not included, and was not meant to be included in the conveyance. The plantation conveyed and the right over the canal were not inseparably connected. The right over the canal could not, it is true, be enjoyed, according to the agreement, except by the owner of the plantation. But the plantation might well be conveyed and enjoyed without the right over the canal, and the plantation being first conveyed, the right over the canal might be the subject of a separate conveyance. There seems, therefore, to their Lordships to be no sufficient reason for extending the words of the transport beyond their ordinary sense, *viz.*: that the conveyance thereby made, was made in consequence of the articles therein referred to If, however, it could be held that the intention of the parties to include in the transport everything which is included in the agreement is sufficiently apparent, the question would still remain whether effect could be given to such intention consistently with the rules of law prevailing in the Colony. The law provides that the transfer of immovable property shall only be made before some judicial authority. It is in fact a judicial act.”

Even if John Stewart in 1842 intended to vest ownership of the disputed area in purchasers of lots at Stewartville, he could only have done so by passing transport for that area as he must have done for the respective lots. There was never transport of the area to these original purchasers and there can, therefore, be no question of their having been co-owners of it by transport.

Counsel for the appellants invited the court to give legal validity to the rights of the present owners by inferring that the respondent company held the disputed area as trustees for the landowners of Stewartville if not satisfied that they had proved transport of the area to them. But there is no sufficient evidence on which any such presumption could be made. In *Goodman v. Saltash Corpn.* (1882), 7 App. Cas. 633, the decision which counsel asked us to apply to the circumstances of this case, the court, while holding that the inhabitants of a borough were not capable grantees of a *profit a prendre*, found a way out by postulating a trust of which the Mayor of Saltash, a corporation, was the trustee. This was feasible because it was possible to presume a grant dating from antiquity to an ascertained person. No such presumption can be made in this case. We are dealing with a root of title that commenced in 1842 when John Stewart parted with portions of Stewartville. The first dealing with Stewartville after 1842 of which there is any evidence by way of transport is the transfer to Stewart Gardner by the heirs of John Stewart. No transport of the portions of land sold before 1878 have been exhibited and there is no evidence of a declaration of trust at any time during these several transactions. The predecessor of the respondent company gave valuable consideration for the lands they purchased and so

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did the respondent company. On the face of the transport to the respondent company, the disputed area passed free from any trust and there is nothing to suggest that the respondent company is bound in any such way.

The alternative ground on which the appellants' claim was based was ownership of the disputed area by adverse possession. Counsel for the appellants contended that by 1923 when the respondent company acquired their lands, the landowners of Stewartville whom the appellants represented had already prescribed and that ownership of the disputed area had not passed to the company. He relied on *Adams and Christmas v. Raghbir*, 1951 L.R.B.G. 90, for the proposition that a fluctuating body of persons can acquire title to land by adverse possession. In *Adams and Christmas v. Raghbir*, the plaintiff, Adams, opposed transport of a parcel of land by the defendant who became the owner of Plantation Zeelandia after the death of his father who had acquired it in 1932. The dispute was similar to the dispute with which this appeal is concerned. The root of title, as in this case, commenced in 1842 when a portion of the plantation was laid out in lots, some of which were transported to purchasers while others were occupied by persons who held bills of sale or receipts. The whole constituted a village and the villagers for the most part lived in the first and second sections and used the third and fourth sections for cultivation. They had a rudimentary form of self-government presided over by a headman chosen by themselves, and the cleaning out of trenches and drains was done by communal labour. The office of headman had been held by the plaintiff's grandfather and father in turn and, at the time of his opposition to the defendant's transport, the plaintiff was the headman of the village.

The plaintiff, Adams, was born in 1860. In 1901, he purchased a lot of land in the village and, after the death of his father in or about 1911, he succeeded to whatever interest his father had had in the village lands. The judge found that there had been continuous and uninterrupted occupation since 1870 of the land in dispute, namely, the fourth section and a portion of the third section, by the villagers and held that the effect of this occupation was to transfer ownership of the land occupied to the plaintiff's grandfather, father and others who occupied in common. He further held that the plaintiff, as a co-owner, was entitled to assert or defend his right without having to join all the other co-owners or to show who they were and was entitled to a declaration that he and others were in possession of the lands sought to be transported, and that the defendant's predecessors in title had lost ownership of the land by adverse possession in the plaintiff and his predecessors and other persons.

The landowners of Stewartville have acquired their holdings at different times and in various ways. There was never any suggestion by way of evidence that as a community they occupied the disputed area. The contentions put forward were that each owner of a holding was entitled to the holding in the disputed area which he had appropriated for the purposes of cultivation, that grazing rights belonged

to the community, and that the community also had the right to use some portion of the disputed area for purposes of recreation. There was no pretence that occupation of a particular portion of the disputed area could be traced through predecessors in occupation, and, even assuming that WORLEY, C.J., correctly stated the effect of acquisitive prescription under Roman-Dutch law, and that Roman-Dutch law permitted ownership of land by a fluctuating body, there was no attempt to prove that the villagers as a body had by prescription acquired the disputed area as such. There was, accordingly, no basis for a representative action and I think that the judge came to a correct conclusion. I do not, therefore, consider it necessary to address my mind to the other grounds of appeal and I would dismiss the appeal with costs.

WYLIE, J.: I agree that this appeal must be dismissed without considering the other grounds of appeal. I only wish to add that a claim on behalf of a fluctuating body, whether it be the villagers for the time being, or the owners of village land for the time being, is obviously unenforceable in British Guiana today, irrespective of the history of this plantation, or of the changes from Roman-Dutch law to common law. One has only to examine the claims set out in the statement of claim for declarations of title to realise that this is so. This examination shows that there are no defined persons in whom the right of ownership or other rights claimed could be vested if a declaration was granted. Consequently, the Supreme Court cannot be asked to make a declaratory order which in the present state of the law in British Guiana would be ineffective because it purports to vest ownership, or the other rights claimed, in a fluctuating body of persons. More especially must this be the position when that fluctuating body clearly cannot be the same persons to whom these rights may have originally been granted and from whom, if ever properly granted, they have apparently subsequently never been transferred, or have never passed, in any manner recognised by law, to any defined body of persons in whom such rights could by law be vested.

JACKSON, J.: I agree.

Appeal dismissed.

Solicitors: *Vibert Lampkin* (for the appellant); *H. C. B. Humphrys* (for the respondents).

BISHUNDYAL v. ROSS AND OTHERS

[Federal Supreme Court—Civil Appellate Jurisdiction (Archer, Wylie and Jackson, JJ.) November 29, 30, December 1, 1961, May 19, 1962.]

Rice lands—Crown lands let by respondents to appellant for the cultivation of rice—Appellant subsequently pays rent to Commissioner of Lands and Mines and applies for crown lease over the lands—Appellant's conduct alleged by respondents to amount to a disclaimer of their title—Appellant dispossessed by respondents without order of the Rice Assessment Committee—Whether appellant protected by the Rice Farmers (Security of Tenure) Ordinance, 1956.

The respondents claimed to be entitled to cultivate certain crown lands in the fourth depth of No. 41 Village, West Coast Berbice, by virtue of their alleged ownership by transport of the front lands, but they also relied on permission to occupy granted by the Commissioner of Lands and Mines to certain named proprietors of the front lands of the village, including two of the respondents. At the material time the last permission so granted had expired. The permittees nevertheless continued to pay rent to the Commissioner of Lands and Mines, and applied for a new title and paid the appropriate fees. Part of the lands had been rented by the respondents to the appellant for the purpose of cultivating rice. He ploughed and cultivated his land and paid rent to the respondents but later, in the light of certain information and advice received from an officer of the Lands and Mines Department, he also paid rent to the Department and applied for a lease of the land. The respondents then re-entered the land and ploughed it. In answer to a claim by the appellant for damages for trespass and an injunction, the respondents contended *inter alia* that the appellant's conduct in relation to the Lands and Mines Department amounted to a disclaimer of their title and that thereupon the appellant became a trespasser.

Section 3 of the Rice Farmers (Security of Tenure) Ordinance, 1956, provides that no agreement of tenancy relating to rice lands "shall be terminated by the landlord or by the tenant except as in this Ordinance provided". Section 28 of the Ordinance provides for the determination by the Rice Assessment Committee of applications by landlords for the termination of tenancies, and sub-s. 2 thereof stipulates the grounds on which such applications may be made. The respondents had made no such application before re-entering.

Held: (i) the proposition that transport for lands carries with it transport for other lands is untenable. *Steele v. Thompson* (1860), 13 Moo. P.C 2.80, (1859-1865) 2 L.R.BG. (O.S.) 42, applied;

(ii) there are only two ways by which a tenant of rice lands whose contractual tenancy has come to an end can lose the protection of the Rice Farmers (Security of Tenure) Ordinance, 1966: one is by giving up his possession, the other is by having an order made against him by the Rice Assessment Committee;

(iii) even if, therefore, the appellant had disclaimed his landlord's title and thereby forfeited his contractual tenancy, he could not have become a trespasser by so doing. He still remained a person protected by the Ordinance and entitled to defend his possession by an action of trespass.

Appeal allowed.

J. H. S. Elliott, Q.C., for the appellant.

L. F. S. Burnham, Q.C., for the respondents.

ARCHER, J.: On November 20, 1946, a permission under reg. 85 of the Crown Lands Regulations, 1919, to occupy 327 acres of

Crown land in the fourth depth of lot 41, West Coast, Berbice, for cattle grazing purposes was granted to certain named proprietors of No. 41 village, including Willie Sampson and George Grandsoult, two of the respondents. This permission (exhibit A) referred to an earlier permission (No. 5981) under which the tract of land had formerly been held and was expressed to continue in force until December 31, 1950. It was renewed for five years on December 17, 1951.

In January, 1958, the appellant went into possession of a portion of the land under an oral agreement with certain persons. He alleged that those persons were the thirteen respondents and that the agreement was for a five-year tenancy of 120 acres. He ploughed and empoldered the land he occupied, built dams, fences and a watch-house, and planted rice. In September, 1958, he received certain information and advice from an officer of the Lands and Mines Department and, in consequence, he subsequently paid the Department two years' rent in respect of the land. He also applied for a lease of the land. On February 14, 1960, the respondents entered the land and ploughed it. The appellant applied for an interim injunction against the respondents on March 10, 1960, and obtained it on March 11, 1960. On that day he also issued a writ claiming a declaration (which he subsequently abandoned), an injunction and damages for trespass against the respondents. He relied on the Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956, and also on possession with the permission of the Commissioner of Lands and Mines. The respondent, Donald Mona, entered no appearance to the action. The other defendants pleaded that they held title by transport for the front lands of lot 41 and that title had been in their names or those of their predecessors for 50 years; that by virtue of their title they were entitled to use the second, third and fourth depths and had done so under the authority of permission issued by the Lands and Mines Department for that period of time; that exhibit A had been issued to them in respect of the fourth depth and was effective up to December 31, 1955; that thereafter the Commissioner of Lands and Mines continued to accept rental from them; that they made application to the Department for a new permission and paid the appropriate fees; that on April 1, 1959, they made an amended application for permission in respect of the 327 acres to cover use for agricultural purposes instead of cattle grazing; that they had continued in occupation up to March 14, 1960, when the interim injunction was served upon them; that on February 14, 1960, the appellant and others had entered the land and threatened to evict them forcibly. As to the appellant's tenancy, they pleaded that separate parcels of land had been rented to the appellant for one year by the first five respondents, the eleventh respondent and other persons individually; that in 1959, the appellant had informed them that he was no longer their tenant, and that his tenancy had come to an end when he set himself up as owner of the land. The contention was the basis for argument that the appellant had, by paying rent to the Department and applying for a lease, disclaimed his landlords' titles, that forfeiture automatically ensued and entitled the respondents to re-enter, which they had done. They counter.

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claimed for damages for loss suffered as a result of the grant of the interim injunction.

The judge found that the respondents Forshaw Ross and Willie Sampson had not made any agreement with the appellant but he was satisfied that the other eleven respondents had and that they had accepted the agreed rent from him. He also found that the agreement was for five years and that a tenancy from year to year was thereby created. He held that (a) as from December 31, 1955, the respondents were in occupation and holding over; (b) the Department accepted rent from them in 1956 on a yearly basis and a tenancy on a year to year basis on the same terms and conditions as were contained in exhibit A was implied; (c) that tenancy had never been terminated but the Department accepted fees and rent from both the appellant and the respondents who were in competition for a lease of the land; (d) the attempt by the eleven respondents to terminate the appellant's tenancy was abortive because they were estopped from denying his tenancy; (e) the appellant was, in any event, protected by the Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956; (f) the appellant on March 10, 1960, regarded himself as a tenant of the respondents and had not intentionally asserted a title adverse to them. Accordingly, he considered that the appellant's action in trespass was well-founded but he was of the opinion that the respondents had trespassed in genuine protection of their rights and he declined to award damages against them. He, however, granted the injunction against the respondents other than Forshaw Ross and Willie Sampson, in whose favour he gave judgment on the claim. On the counterclaim he gave judgment for Forshaw Ross and Willie Sampson for \$500 and judgment against the other respondents.

The appellant appealed against so much of the judgment as was in favour of the respondents Forshaw Ross and Willie Sampson, as well as against other parts of the judgment in which the judge made certain findings. These findings were that (a) the respondents held a tenancy on a year to year basis after December 31, 1955; (b) the permission to occupy granted to the appellant by the Lands and Mines Department was not in keeping with reg. 7 (1) of the Crown Lands Regulations. He also appealed against the judge's refusal to award damages against the respondents for trespass. He asked for a declaration that none of the respondents had any rights or interest in or to the land; alternatively, for a declaration that the respondents had granted a tenancy from year to year to the appellant; and, in either case, for judgment on both the claim and the counterclaim against all the respondents.

On the hearing of the appeal, counsel for the respondents applied for and was granted leave to argue (a) that judgment should be entered for all the respondents on the claim and counterclaim on the ground that the judge had erred in law when he found (1) that the appellant's possession was protected by the Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956; (2) that the appellant had not disclaimed his landlords' title; (3) that the respondents were not

entitled to re-enter the land and dispossess the appellant; and (b) that the finding of fact that there had been no disclaimer was against the weight of evidence.

Counsel for the appellant submitted that (1) the permission to occupy (exhibit A) had been granted to two only of the respondents, namely, Forshaw Ross and George Grandsoult, and was for cattle grazing purposes; (2) that permission came to an end in 1955; (3) a permission could only be transferred in accordance with reg. 12; (4) receipts had been given by the Lands and Mines Department in different names from time to time; (5) the appellant's evidence that Forshaw Ross had made a tenancy agreement with him was uncontradicted by Forshaw Ross and was corroborated by Willie Sampson's affidavit of March 22, 1960, in opposition to the interim injunction in which he swore that Forshaw Ross had in 1958 rented the appellant eight acres of land in the fourth depth of lot 41 for one year; (6) oral permission to occupy was a sufficient compliance with reg. 7 (1) of the Crown Lands Regulations; (7) the applicants for a lease for cattle grazing purposes had abandoned that application and made a new application for a lease for agricultural purposes and only some of the respondents were among the applicants; (8) permission to occupy for more than a year cannot be granted under reg. 9 of the Crown Lands Regulations and reg. 85 of the Crown Lands Regulations, 1919, under which exhibit A was issued is subject to reg. 9 of the Crown Lands Regulations; (9) the respondents had no interest in the land at the time when the appellant applied for a lease; (10) permission to the appellant to occupy the land had been ratified by the Crown; (11) damages should have been awarded on the finding of trespass; (12) the respondents Forshaw Ross and Willie Sampson were not entitled to damages on the counterclaim.

Counsel for the respondents argued on the appeal that the finding that Forshaw Ross and Willie Sampson had not rented to the appellant was justified because the appellant was present at a conference at the Ministry of Natural Resources on February 5, 1959, when it was agreed that neither Forshaw Ross nor Willie Sampson had rented land to him. As to the judge's refusal to award damages against the respondents for trespass, he conceded that, if the judgment was right, nominal damages at the least should have been awarded but he submitted that more than nominal damages could not, in any event, be awarded in the absence of an inquiry in this court or in the court below as to damages as no special damages had been proved. As to the damages awarded on the counter-claim, he said that the judge must have taken into account that the appellant had trespassed on Forshaw Ross's and Willie Sampson's sections prior to the date of the interim injunction.

On the cross-appeal, he argued that the appellant had said both that he considered himself to be a tenant of the Department and not of the respondents after paying fees to the Department, and that he considered himself to be a tenant of the respondents up to the time when he received a letter from the Department in 1960, and that the

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judge was wrong in accepting the latter as a frank statement. He contended that the payment of rent to the Department by the appellant, coupled with his pleadings in which he asked for a declaration that he was the tenant of the Commissioner of Lands and Mines, amounted to a disclaimer; that he was estopped from denying his landlords' title and as soon as he did there was forfeiture of his tenancy and that the landlords were entitled to re-enter and had done so. He maintained that the appellant had lost the protection of the Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956, by operation of law and had become a trespasser by his acts of disclaimer and that a statutory tenancy had not arisen. He further contended that permission under reg. 7 (1) of the Crown Lands Regulations had to be in writing but that, even if it could be oral, there was no evidence that oral permission had been given to the appellant, the Governor and the Commissioner of Lands and Mines being the only persons who could give permission.

Counsel for the appellant in reply pointed out that estoppel had not been pleaded nor dealt with. He said that the appellant was merely safeguarding his position when he paid rent to the Department and had not denied his landlords' title; that his pleadings came after the respondents' re-entry and could not, therefore, amount to a disclaimer; that, in any case, there was no evidence that the re-entry had been in consequence of a disclaimer; that there was no need for a permission under reg. 7 to be in writing, and that the Commissioner's permission could have been conveyed through an officer of the Department.

The Department undoubtedly deserved the strictures which the judge passed upon it but confusing as its lax dealing with applications, permissions and receipts has made the situation the appellant's status can readily be determined and it is unnecessary to consider the elaborate argument on many of the topics raised by counsel. The protection given to a tenant by the Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956, is similar to that given to tenants by the Rent Restriction Ordinance. Section 3 provides as follows:

“3. Anything in any law or in any agreement in respect of the letting of rice lands to the contrary notwithstanding every agreement of tenancy, whether written or oral, shall be deemed to be an agreement of tenancy from year to year and no such agreement, whether made before or after the commencement of this Ordinance, shall be terminated by the landlord or by the tenant, except as in this Ordinance provided.”

Section 5 deals with implied conditions in agreements of tenancy and the implied conditions mentioned in paragraphs (d) and (e) of sub-s. (1) are:

“(d) the landlord shall not evict a tenant or give him notice to quit or otherwise terminate the tenancy except as in this Ordinance provided;

(e) the tenant shall not terminate the tenancy except as in this Ordinance provided”.

Section 8 provides for the establishment of assessment committees one of whose functions is to hear and determine applications for the recovery of holdings to which the Ordinance applies (s. 11 (b)). Section 28 provides that a tenant may terminate his tenancy by giving not less than six months' notice in writing expiring on April 30 in any year and s. 29 provides for applications for termination of tenancies by landlords. Subsection (2) of s. 29 provides that no order or judgment for the recovery of possession of any holding to which the Ordinance applies, or for the ejection of a tenant therefrom, shall, in respect of a notice given by a landlord, be made or given unless one or other of certain conditions are fulfilled.

In *Brown v. Draper*, [1944] 1 All E.R. 246, GREENE, M.R., delivering the judgment of the court, pointed out that in the case of a rent-controlled property, there are only two ways by which a tenant whose contractual tenancy has come to an end can lose the protection of the Rent Restriction Acts; one is by giving up his possession, the other is by having an order made against him by the court. The Rice Farmers (Security of Tenure) Ordinance, 1956, affords to tenants of rice lands the like protection as is given to tenants of rent-controlled premises by the Rent Restriction Ordinance. The appellant in this case did not give up possession. Even if, therefore, he disclaimed his landlords' title and thereby forfeited his contractual tenancy, he could not have become a trespasser by so doing. He still remained a person protected by the Ordinance and entitled to defend his possession by an action of trespass. The question now is: who were his landlords?

Willie Sampson in his affidavit of March 22, 1960, swore that Forshaw Ross had rented the appellant eight acres of the land and that he had been authorised by Forshaw Ross to say so. In his evidence, he said that Forshaw Ross had never rented the appellant any land. This was but one respect in which he contradicted his affidavit: there were others. The minutes of the meeting of February 5, 1959, in the Ministry of Natural Resources recite that there was general agreement that certain proprietors of No. 41 village, but not those present, had rented land to the appellant (who was also present). At the trial the appellant gave evidence that Forshaw Ross had rented to him in January, 1958. Forshaw Ross did not give evidence but after the trial had progressed for some time counsel for the defendants asked leave to amend the defence *inter alia* by substituting “James” for “Forshaw” in paragraph 5 in which it had been pleaded that Forshaw Ross had rented eight acres to the appellant for one year. Counsel for the plaintiff objected to the application but subsequently withdrew his objection and the amendment was allowed.

There has been no explanation as to the reason for Forshaw Ross' original pleading in paragraph 5 of the defence. If it was on his own instructions, it cannot be ignored simply because an application for an amendment has been successful. If it was based on Willie Sampson's

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affidavit it had the authorisation of a person who discredited himself at the trial. The appellant's evidence was that when he offered Forshaw Ross the rent at the end of 1958, it was refused and Forshaw Ross said that he wanted the land to plant rice in the following year. By this time dispute had already arisen between the parties and the Minister of Natural Resources had intervened. Willie Sampson gave evidence concerning a meeting in 1958 with the Minister and other proprietors of No. 41 village which he attended. The minutes of the meeting of February 5, 1959, to which I have referred are in direct conflict with the appellant's evidence as to the tenancy agreement between himself and Forshaw Ross but I do not think that that is a sufficient reason for disregarding the evidence on the point of the appellant whom the judge found otherwise to have been a truthful witness. The evidence provided by the minutes is not even what it appears to be, for the minutes themselves were written up on February 18, 1959, and it was not until May 5, 1959, that the names of the proprietors present at the meeting were recorded in a minute written to the Minister by someone on behalf of the Commissioner of Lands and Mines who obtained the information from another officer in the Department. These names are Isaac Persaud, Ernest Ross, William Morris, F. Ross, and Willie Sampson. Having regard to the perfunctory manner in which some of the paper work is done in the Department, as the evidence in this case shows, I do not consider that reliance should be placed on a deduction from the minutes which is, moreover, based on hearsay evidence, in preference to the sworn testimony of a witness whose veracity has been accepted. Willie Sampson's evidence is suspect and I think that the balance of probability was definitely in favour of the appellant's contention.

The respondents had originally based their claim to cultivate the fourth depth on their alleged ownership by transport of the front lands, but they also relied on permission to occupy granted by the Commissioner of Lands and Mines. The proposition that transport for lands carried with it transport for other lands is untenable (see *Steele v. Thompson* (1860), 13 Moo. P.C. 280). Willie Sampson had no transport even for front lands. Such transport as there was is, according to his evidence, in his deceased mother's name. The transport is not in evidence nor is there any evidence that he is entitled to the land his mother owned. All that he has said is that the transport is in the name of his mother, Charlotte Peters (a different surname from his own), that he is her only son, and that he looked after and took over all her interests. He was apparently not even aware of the extent of her holding, for he said: "My interest in fourth depth amounts to nine acres. Plaintiff told me my interest is nine acres." He went to the United Kingdom early in 1958 and returned to British Guiana on September 22, 1958. On that day, he saw the appellant reaping his crop but beyond asking him on that occasion by whose permission he was planting the land and refusing to accept rent when it was tendered in December, 1958, he did nothing to question the appellant's occupancy. It is of some moment that the appellant had made application to the Department for a lease in November, 1958, or thereabouts. Sampson's wife issued receipts to the appellant for rent

of the land. I do not think that any value ought to be placed on his repudiation of her agency at a time when the dispute between the parties was ripe. He demonstrated that he is a person on whose word no reliance can be placed and the judge should not have attached any weight to his evidence.

Ernest Ross is not one of the proprietors of No. 41 village to whom permission to occupy the fourth depth was granted by the Department. His name is, however, among those of the proprietors said to have attended the meeting in the Ministry of Natural Resources. He too gave evidence that he had not rented land to the appellant. Like Willie Sampson, he does not appear to have known the extent of the land he was claiming as his, and said that he claimed six acres because the appellant told him that that was his acreage. He based his claim on a transport in his father's name for front lands. This is, of course, not proof of entitlement to any part of front lands and certainly not of entitlement to any lands in the fourth depth. However, he accepted rent from the appellant and there can be no doubt that the relationship of landlord and tenant between himself and the appellant was created.

In my view, the appellant established that all the respondents were his landlords and that he was lawfully in possession of the land on February 14, 1960. They trespassed upon the land and he is entitled to the injunction against all of them for which he asked and for general damages for trespass. I would allow the appeal and dismiss the cross-appeal. Judgment in the court below to be set aside and judgment entered for the appellant against the respondents on the claim for an injunction in the terms prayed and for \$500 general damages, and on the counterclaim for the appellant. The respondents to pay the costs here and below.

WYLIE, J.: I agree.

JACKSON, J.: I agree.

Appeal allowed.

Solicitors: *Richard A. Gunraj* (for the appellant); *Evelyn A. Luckhoo* (for the respondents).

DOOBAY v. SHIVLOCHNIE

[In the Full Court, on appeal from the magistrate's court for the West Demerara Judicial District (Luckhoo, C.J., and Khan, J.,) May 25, 1962.]

Bastardy—Married woman living apart from husband—Paternity imputed to another man—No proof of non-access by husband—Burden of proof.

The appellant was adjudged by a magistrate to be the putative father of the respondent's child. At the trial the respondent swore that she was a married woman living apart from her husband at the time of conception. The magistrate held that the effect of this evidence was to shift to the appellant the burden of proving that the husband (who was in the country) had access to the respondent at the material time.

Held: (i) where the parties are living apart under a decree of judicial separation, or under an order of a magistrate's court containing a provision that the parties shall be no longer bound to cohabit with one another, the presumption of legitimacy is reversed;

(ii) but in this case that was not so, and since opportunities of access existed at the time of conception the presumption of legitimacy still remained, though it was open to the respondent to show by evidence beyond reasonable doubt, and not merely by the balance of probability, that she had had no intercourse with her husband at the material time. The respondent had failed to discharge this proof.

Appeal allowed.

C. Lloyd Luckhoo, Q.C., for the appellant.

P. N. Singh for the respondent.

Judgment of the Court: On the 25th May, 1962, we allowed this appeal. We now proceed to give our reasons therefor.

The respondent Shivlochnie is a married woman living apart from her husband. On the 8th July, 1961, she gave birth to a child named Ivor Franklin Ramsaywack and she claims that the appellant Frank Doobay is the father of the child. On the 31st October, 1961, she applied for a summons against the appellant. The learned magistrate of the West Demerara Judicial District who issued the summons heard and determined the matter and adjudged the appellant to be the putative father of the child and ordered him to pay to the collecting officer the sum of \$2.00 per week as maintenance and education of the child until the child shall attain the age of 14 years or shall die.

The case for the respondent was to the effect that since August, 1958, she had lived separate and apart from her husband. Her husband left the Colony for England in or about September, 1960 and has not since returned to the Colony. Between August 1958 and September 1960, she had no sexual intercourse with her husband. On the 18th and 19th September, 1960, she had sexual intercourse with the appellant and on the 15th October, 1960, she missed her period and realised she had become pregnant. She told this to the appellant who gave her some tablets to drink in order to get rid of the baby but she did not drink any of the tablets. The appellant

continued to have sexual intercourse with her for another four months and then ceased seeing her.

After the birth of the child on 8th July, 1961, the child's birth was registered, the respondent being the informant, and the name of the father of the child was not given the Registrar of Births. Shortly after the birth of the child she wrote the appellant as a result of which the appellant came to her and gave her the sum of \$10 and said it was for the child.

Margaret Dowdon, 86 years of age, a neighbour of the respondent, gave evidence to the effect that during August, 1960, she saw the appellant visit the respondent often. After the birth of the child the appellant came to see the respondent and gave her something and later the respondent showed her \$10. She had heard the appellant tell the respondent that if the respondent talks his father would put him out.

The respondent's mother, Jagranie, gave evidence to the effect that the appellant used to take the respondent out every Saturday until about two months before the birth of the child. Jagranie said that on one night in August the appellant came to the respondent and in her presence and that of Mrs. Dowdon the appellant said he had received the respondent's letter and that he would support the child but did not want his father to know as he would be put out.

The case for the appellant was to the effect that he never had sexual intercourse with the respondent at any time, nor did he offer her any tablets to get rid of the baby, nor did he ever give her money. He admitted that he would drive her in his car but stated that it was always in the course of his business as a taxi driver. He admitted that he received a registered letter from the respondent in which she asked him to see her but did not allege he was the father of the child.

One Hollingsworth gave evidence on the appellant's behalf to the effect that in August, 1960, the respondent introduced him to a person who lived with her as her husband. That person was still living with her in December, 1960, when Hollingsworth vacated the premises in which he lived immediately below the premises occupied by the respondent, her husband and the respondent's mother and brother.

One Small testified on behalf of the appellant but his evidence was rejected by the magistrate who found him shifty.

We will say at once that there was ample evidence on the part of the respondent and her witnesses which if believed would sustain the respondent's complaint against the appellant. It is important therefore to see the approach taken by the magistrate in accepting the respondent's case and rejecting that of the appellant. It is well established that "every child born of a married woman during the subsistence of the marriage is *prima facie legitimate*—but in every case the husband and wife must have had opportunities of access to

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each other during the period in which the child could be begotten and born in course of nature and must not be proved to be impotent. The presumption, however, is not a presumption *juris et de jure*, which cannot be rebutted but a presumption only, which may be rebutted by evidence of circumstances proving the contrary, and such evidence must not be slight in its nature, but strong and satisfactory." [3 HALSBURY'S LAWS (3rd Edition), p. 87, para. 139].

In the present case the respondent when cross-examined admitted that she did not know whether or not her husband was in British Guiana and had only been informed that her husband had left the country about September, 1960. In any event the evidence is to the effect that at the time of conception her husband was still in this country if ever he did in fact depart it. That being so, opportunities of access still existed at the time of conception. The presumption of legitimacy still remained though it was open to the respondent to show by evidence beyond reasonable doubt and not merely by a balance of probability that she had had no intercourse with her husband at the material time. [See *Cotton v. Cotton*, [1954] 2 All E.R. 105, C.A.].

The learned magistrate in his memorandum of reasons for decision concluded that the onus of proving a double negative, that there was not non-access on the part of the husband to the respondent, shifted to the appellant, the respondent having sworn that she is a single (*sic*) woman living apart from her husband, and the defendant having been served with such a summons and had pleaded not guilty to it. This is in our view palpably wrong. And indeed the magistrate wholly failed to appreciate that rather the burden lay upon the respondent in the way indicated in *Cotton v. Cotton* as is stated above.

Nothing that we have said must be taken to refer to cases where the parties are living apart under a decree of judicial separation, or under an order of a magistrate's court containing a provision that the parties shall be no longer bound to cohabit with one another. In such cases the presumption of legitimacy is reversed. [See 3 HALSBURY'S LAWS (3rd Edition) p. 88, para. 140].

Having regard to the wrong approach taken by the magistrate we cannot be sure that the magistrate would have come to the same conclusion if he had properly directed himself.

For these reasons we allowed the appeal and set aside the magistrate's order. It will be appreciated that the appeal has not been allowed on the merits.

Appeal allowed

Solicitor: *L. L. Doobay* (for the appellant).

CHEW v. RICHMOND

[Supreme Court (Fraser, J.,) January 24, 25, February 12, 1962]

Contract—Agreement to grant lease—Commencement of lease and rent not stated in memorandum—Whether memorandum satisfies the requirements of the Civil Law of British Guiana Ordinance, Cap. 2, s. 3(D) (d).

A tenancy transaction between the parties was evidenced by a document whereby the defendant acknowledged the receipt from the plaintiff of the sum of \$80 for one month's rent of certain premises and undertook to grant the plaintiff a lease for the same premises for 15 years to be prepared thereafter. In an action by the plaintiff for specific performance of this undertaking it was submitted for the defendant that there was no sufficient memorandum in writing to satisfy the requirements of s. 3 (D) (d) of the Civil Law of British Guiana Ordinance, Cap. 2, inasmuch as the memorandum did not clearly indicate the date of commencement of the lease or the consideration for it.

Held: (i) in an action of this kind the memorandum relied upon must contain all the terms of the agreement between the parties and cannot be complemented by parol evidence. *Munday v. Asprey*, 13 Ch. D. 855, applied:

(ii) the memorandum relied upon disclosed no agreement with regard to the commencing date of the term nor with respect to the rent and in consequence failed to satisfy the requirements of s. 3 (D) (d) of Cap. 2.

Judgment for the defendant.

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

J. A. King for the defendant.

FRASER, J.: In this action for specific performance the plaintiff relies upon an agreement contained in a memorandum dated 29th August, 1958, and signed by J. A. Richmond, the husband and

authorised agent of the defendant. The defence is that this action cannot be maintained because there is no sufficient memorandum in writing to satisfy the requirements of s. 3 (D) (d) of the Civil Law of British Guiana Ordinance, Cap. 2, which is in substance the same as a portion of s. 4 of the Statute of Frauds.

The memorandum relied upon is worded as follows:

“\$80:

Georgetown, Demerara,
29th August, 1958.

Received from Mr. Richard Sue Sic Chew the sum of eighty dollars being one month's rent of premises consisting of the bottom flat of a two-storeyed building used for business and living quarters situate at Lot 3 Middleton Street, Campbellville, East Coast Demerara, payable in advance from the 1st September, to the 30th September, 1958. A lease for the term of fifteen years to be prepared hereafter with a clause that the tenant shall have the option of giving three months' notice terminating the said lease.

4 cts. stamps
29/8/58,
J. A. Richmond.”

For the defence it is submitted *inter alia* that the memorandum does not clearly indicate the date of commencement of the lease nor the consideration for the lease and is therefore not tenable as evidence of a contract for a lease as contemplated by the Civil Law of British Guiana Ordinance. It is urged for the plaintiff on the other hand that the date of commencement is 1st September, 1958, being the date upon which the tenancy commenced.

There can now be no doubt that in an action of this kind the memorandum relied upon must contain all the terms of the agreement between the parties and cannot be complemented by parol evidence—see *Munday v. Asprey*, 13 Ch. D. 855. Moreover, in the case of a contract for a lease, the memorandum must state all the material terms of the contract—see *Clarke v. Fuller* (1864), 16 C.B. (N.S.) 24; WOODFALL ON LANDLORD & TENANT, (25th Edition) at p. 162; and FRY ON SPECIFIC PERFORMANCE, ss. 341 *et seq.* The material terms required to be stated are the name of the lessor; the name of the lessee; the description of the property; the term and its commencement; the rent; any special covenants or stipulations. On the subject of the commencement of the term LUSH, L.J., in *Marshall v. Berridge*, [1881] 19 Ch. D. 233, which affirmed *Blore v. Sutton* (1817), 3 Mer. 237, said at pp. 244-45;

“Now it is essential to the validity of a lease that it shall appear either in express terms or by reference to some writing which would make it certain, or by reasonable inference from the language used, on what day the term is to commence. There must be a certain beginning and a certain ending, otherwise it is not a

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perfect lease, and a contract for a lease must, in order to satisfy the Statute of Frauds, contain those elements.”

This statement of the law was followed by Lord HALSBURY, L.C., in the case of *Humphrey v. Conybeare* (1899), 80 L.T. 40.

The important question in this case, therefore, is whether the document dated 29th August, 1958, clearly contains a commencing date of the term. I am of opinion that it does not and it is therefore unenforceable as a contract for a lease. It seems to me that the document is primarily a receipt for one month's rent arising from a monthly tenancy; and secondarily, it is an undertaking to grant to the tenant a lease for 15 years. The use of the words “A lease for the term of fifteen years to foe prepared hereafter . . .” indicates an intention on the part of the defendant's agent to grant the plaintiff a lease at some date subsequent to 29th August, 1958 (the date on which those words were written). This view is reinforced by the terms of another transaction which took place on the same day between the plaintiff and Edward Moore who was the tenant of the premises at that time. By that agreement the plaintiff purchased Moore's right, title and interest in the tenancy of the premises for \$1,000.00. Moore was a monthly tenant of the premises. By the memorandum of agreement between the parties it was stipulated that vacant possession of the premises would be given to the plaintiff on 15th September, 1958. This document was stamped, and executed by the parties in the manner which is normal for documents of that kind whereas the memorandum signed by James Richmond was executed as a receipt for a sum exceeding \$50.00. The first part of the receipt does no more than acknowledge by implication the plaintiff as the monthly tenant of the premises in substitution for Moore and therefore the memorandum relied upon as evidence of the contract for a lease is contained in the last sentence which reads:

“A lease for the term of fifteen years to be prepared hereafter with a clause that the tenant shall have the option of giving the landlord three months' notice terminating the said lease.”

There is no agreement with regard to the commencing date of the term, nor is there any agreement in the memorandum as to the annual rent. It is not therefore a memorandum which satisfied the provisions of s. 3 (D) (d) of the Civil Law of British Guiana Ordinance, Cap. 2.

A decree of specific performance is a discretionary remedy and the court may therefore award damages instead. An award of damages as an alternative remedy can only be made however if the agreement in respect of which the action is brought is one upon which a cause of action can be founded. In a case such as this the plaintiff can obtain damages only if the memorandum satisfies the requirements of s. 3 (D) (d) which provides as follows:—

“(d) no action shall be brought whereby to charge anyone upon—

any contract or agreement for the sale, mortgage, or lease of immovable property or any interest therein or concerning immovable property . . . unless the agreement or some memorandum or note thereof is in writing and signed by the party to be charged or some other person thereunto by him lawfully authorised.”

Holding, as I do, that the memorandum is inadequate, I must also find that the plaintiff is not entitled to damages. I believe, however, that the defendant’s agent knew that the plaintiff was interested in taking the tenancy only if he could also have obtained a lease for fifteen years and it is for that reason that the undertaking was given. I believe that the plaintiff was misled. He may have been in a different position in an action for rescission of a contract of tenancy. He has, however, retained the monthly tenancy and is not being ejected. While it is perhaps true that the plaintiff has suffered no damage nevertheless I believe that the defendant’s agent wilfully deceived him and I therefore order that both parties bear their own costs of the action.

The action is dismissed. Judgment for the defendant. Both parties to bear their own costs.

Judgment for the defendant.

Solicitors: *H. A. Bruton* (for the plaintiff); *D. DeCaires* (for the defendant).

GRIFFITH v. SEECHARRAN

[In the Full Court, on appeal from the magistrates' court for the Berbice Judicial District (Luckhoo, C.J., and Khan, J.,) May 25, 1962].

Firearm—Unlicensed possession—Licensed holder breaks and unloads gun and then gives it to another person to carry—Licensed holder out of sight of person carrying gun—Whether licensed holder exercised reasonable precautions—Whether the other person in unlawful possession of gun—Firearms Ordinance, Cap. 345, ss. 16(2) (a) and 18(1).

B., the licensed holder of a gun, broke it, unloaded it and then gave it to the respondent to carry. B. then fell back some distance away and was at one time out of sight while the respondent was carrying the gun. On these facts the respondent was charged with the offence of being in possession of a firearm without a licence and B with the offence of failing to ensure the safe custody of the firearm in breach of a condition of his licence. The magistrate held that in breaking the gun and unloading it before handing it over to the respondent, B had exercised reasonable precautions to ensure its safety, and that, this being so, the respondent could not be said to have been in unlawful possession of the firearm.

Held: (i) where the control at the material time is shown to be in a licence holder even though the firearm is in the hands of another person, possession may well be said to be in the licence holder; but in view of B's absence it could not be said that reasonable precautions were taken by him to ensure the safe custody of the gun;

(ii) the control of the gun was in the circumstances solely in the respondent and as such he had in his possession a firearm without holding a firearm licence in force at the time.

Appeal allowed.

K. M. George, Senior Crown Counsel (ag.), for the appellant.

Dwarka, Dyal for the respondent.

Judgment of the Court: The respondent Rohit Seecharran was charged summarily by the appellant with the possession of a firearm, contrary to s. 16 (2) (a) of the Firearms Ordinance, Cap. 345. It was alleged in the particulars of offence that on the 21st January, 1962, he had in his possession a single barrelled Stevens shotgun, without being the holder of a firearm licence in force at the time. This charge was heard together with a charge laid against Balgobin, the owner of the gun, under s. 18 (1) of the Ordinance, that he, being a licensed holder of a shotgun for which a licence was granted failed to comply with a condition of the said licence by failing to ensure the safe custody of the firearm. It would appear that the reference in the record to s. 18 (1) of the Ordinance is incorrect for s. 18 (1) refers to applications for grant of licences. Presumably, reference to s. 16 (2) (b) was intended.

After evidence was adduced by the prosecution, the respondent and Balgobin, the magistrate dismissed both complaints. Notices of appeal were filed in respect of each decision but the appeal against the dismissal of the complaint against Balgobin has since been abandoned.

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The case for the prosecution was to the effect that on 21st January, 1962, the respondent was seen carrying the shotgun at Enterprise Public Road, Canje, Berbice. When challenged he said that he was the owner of the gun and on being asked for his name gave a name other than his own. While he was being taken to the police station for enquiries he ran away. He was later recaptured and taken to the police station. Earlier Balgobin had gone to the police station and claimed the gun as his property and had stated how the gun came to be in the respondent's possession. This explanation is substantially that given the police by the respondent after he was recaptured and that told to the magistrate in his defence. It is to the effect that he went to work at the backdam with Balgobin who is his brother-in-law. As they were about to leave the backdam Balgobin broke the gun and asked him to carry out the gun. The respondent had no ammunition on him. On his way out with the gun he was apprehended by the police. The gun is licensed in Balgobin's name.

The magistrate held that Balgobin in breaking the gun and unloading it before handing it to the respondent had complied with that condition of the licence which required the holder to take all reasonable precautions to ensure the safe custody of the firearm. The magistrate also held that having so found, the respondent could not be said to have had the firearm in his possession without being the holder of a firearm licence in force at the time.

Section 16 (1) of the Ordinance provides as follows—

“16. (1) Subject to the provisions of this Ordinance, no person shall purchase, acquire or have in his possession any firearm or ammunition to which this part of this Ordinance applies unless he holds a firearm licence in force at the time.”

This provision is declaratory. By sub-s. (2) it is provided that—

“(2) If any person—

- (a) purchases, acquires or has in his possession any firearm or ammunition to which this Ordinance applies without holding a firearm licence in force at the time, or otherwise than as authorised by such a licence, or, in the case of ammunition, in quantities in excess of those so authorised; or
- (b) fails to comply with any condition subject to which a firearm licence is held by him;

he shall, subject to the provisions of this Ordinance, be liable, on summary conviction, to”

Paragraph (a) of sub-s. (2) of s. 16 provides for three distinct cases in which an offence may be committed—

- (i) where a person purchases, acquires or has in his possession a firearm or ammunition without a firearm licence then in force;

- (ii) where a person, though having a firearm licence in force, purchases, acquires or has a firearm or ammunition otherwise than as authorised by such a licence;
- (iii) where a person, though having a firearm licence in force, purchases, acquires or has ammunition in quantities in excess of those authorised by the licence.

The respondent did not fall within the last two categories. These two categories relate only to a licence holder. The respondent fell within the first of these three categories.

In the present case the respondent was carrying the shotgun at some distance away from Balgobin for when the police first apprehended the respondent Balgobin was not in sight. Further, the respondent was carrying the gun because Balgobin had found it inconvenient to do so himself. The breaking of the gun and retention of ammunition ensured that the gun could not be used unless it were put together and ammunition loaded into it (no difficult task). The presence of Balgobin while the gun was being carried by the respondent might well ensure that the gun is not put back together, loaded and fired. In view of Balgobin's absence it cannot be said that reasonable precautions were taken by Balgobin to ensure the safe custody of the gun for while the respondent might not have been in a position immediately to use the gun he may have made off with it or disposed of it to some unauthorised person.

In those circumstances the control of the shotgun (admittedly broken and without ammunition) was solely in the respondent and as such as he had in his possession a firearm without holding a firearm licence in force at the time. In our opinion the charge as laid was proved. Where the control at the material time is shown to be in a licence holder even though the firearm is in the hands of another person possession might well be said to be in the licence holder.

The appeal must be allowed and the order of the magistrate set aside. The respondent is convicted and is fined \$25, in default imprisonment for one month.

Costs of the appeal to the appellant—\$33.50.

Appeal allowed.

BASSOO v. TAHARALLY

[In the Full Court, on appeal from the magistrate's court for the East Demerara Judicial District (Luckhoo, C.J., and Khan, J. (ag.) May 4, 5, 25, 1962.)]

Labour—Minimum wages provided by law for persons employed in a shirt or garment factory—Whether applicable to person employed to make hats—Minimum Wages (Shirt and Garment Workers) Order, 1960, as amended by Order No. 20 of 1961.

Statute—Construction—Reports of Commissions preparatory to enactment of legislation—Not admissible.

The Minimum Wages (Shirt and Garment Workers) Order, 1960, as amended by Order No. 20 of 1961, provides for the payment of minimum rates of pay to certain categories of employees in "a shirt or garment factory". The term "garment" was not defined in the Orders, but the term "worker" was defined to mean "person employed in a shirt or garment factory, but does not include a person employed in an establishment whose business is wholly or mainly retail bespoke tailoring or dress making". The appellant was convicted of paying less than the minimum rates to a machinist employed in the making of hats, and of certain related offences. On appeal—

Held: (i) it is well established that in considering an Act the reports of Commissions which preceded the Act are inadmissible as showing intention;

(ii) the term "garment" used in the context of the Order must be restricted to those articles usually made by a tailor or dressmaker. A hat is therefore not a garment within the contemplation of the Order.

Appeals allowed.

Ashton Chase for the appellant.

E. A. Romao, Senior Crown Counsel, for the respondent.

Judgment of the Court: The main point for determination in these appeals is whether a hat is a garment within the contemplation of the Minimum Wages (Shirt and Garment Workers) Order, 1960 (No. 93), as amended by the Minimum Wages (Shirt and Garment Workers) (Amendment) Order, 1961 (No. 20).

It was admitted by the appellant that at all material times he carried on a hat factory in which ladies' hats were made for sale and that he employed the virtual respondent Agnes Reece in the making of ladies' hats in that factory.

The Minimum Wages (Shirt and Garment Workers) Order, 1960, as amended by Order No. 20 of 1961 provides for the payment to persons employed in certain categories in a shirt or garment factory of not less than the minimum rates of pay specified in the schedule to the Order. The term "garment" has not been defined in the Orders.

The appellant was convicted by the magistrate of the East Demerara Judicial District on three charges relating to the employment by him of Agnes Reece. The magistrate found that the appellant had employed Agnes Reece as a machinist in the making of hats and had

failed to pay her not less than the minimum rate of pay prescribed by the Order for a machinist. He also found that the appellant had failed to allow to Agnes Reece her entitlement to remuneration for holidays with pay under the provisions of the Holidays With Pay (Shirt and Garment Factory Workers) Order, 1958 (No. 10), and that he had failed to keep a register of wages as required by the provisions of the Labour Ordinance, Cap. 103.

The magistrate has in effect found that the making of ladies' hats is the making of garments within the contemplation of the Orders.

On behalf of the appellant it has been submitted that the magistrate erred in making such a finding. Reference was made to the definition of "garment" in the CONCISE OXFORD DICTIONARY—"Article of dress, esp. gown or cloak, (pl.) clothes; outward and visible covering of anything". At p. 32 of MAXWELL ON THE INTERPRETATION OF STATUTES (10th Edn.) it is stated that definitions in dictionaries have been deprecated, but, in more modern times they have increasingly been taken into account. It is there pointed out that in *Kerr v. Kennedy*, [1942] 7 KB. 409, at p. 413 ASQUITH, J., said that in the absence of any judicial guidance or authority dictionaries can be consulted. There seems to be no reported case in which the term "garment" has come up for judicial interpretation. Counsel has also referred to a passage which occurs at p. 332 of MAXWELL—

"When two or more words which are susceptible of analogous meaning are coupled together *noscuntur a sociis*. They are understood to be used in their cognate sense. They take, as it were, their colour from each other, that is, the more general is restricted to a sense analogous to the less general."

In the present case counsel argues the more general "garment" is to be restricted to a sense analogous to the less general "shirt".

It is conceded that the *ejusdem generis* rule cannot be applied. Further the expression is not "shirt or *other* garment". Counsel has urged that the first matter to be determined is the general scope of the Order and that inquiry should be made as to the object of the legislation. Counsel has informed us that the appellant's hat factory was established subsequent to the coming into operation of the relevant Orders and that the appellant's hat factory is the only hat factory in this country. We do not think that this latter observation is correct. There is at least one establishment in Georgetown where for some years now ladies' hats have been made.

We have been asked to look at the Report of the Advisory Committee which was set up (prior to the making of the relevant Orders) under the provisions of s. 7 of the Labour Ordinance, Cap. 103, to investigate conditions of employment in shirt and garment factories and to make recommendations as to the minimum rates of wages to be prescribed. We do not think that it is permissible in construing such an Order to consult the contents of the Report of an Advisory

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Committee. It is well established that in construing an Act reports of Commissions which preceded the Act to be construed are inadmissible as showing intention. While enquiry may be made by the courts to see if the statutory procedural steps have been complied with prior to the making of the Order in order to determine whether the Order has validly been made, the contents of the Report of the Advisory Committee cannot be looked at for the purpose of aiding in the construction of the Order.

Some considerable help is obtained in construing the term “garment” from the definition of “worker” in the principal Order as amended by Order No. 20 of 1961—

“‘worker’ means a person employed in a shirt or garment factory but does not include a person employed in an establishment whose business is wholly or mainly retail bespoke tailoring or dressmaking”

This definition seems to indicate that “garments” refer to those articles of clothing usually made by a tailor or dressmaker. Hats are not articles normally made by a tailor or a dressmaker and indeed the categories of persons employed in a hat factory are for the most part different from those set out in the schedule to the principal Order. Counsel for the respondent suggested that “garment” included headwear as well as footwear such as boots and shoes and in fact any article which was used as a covering for any part of the body. We do not agree that so extended a meaning can be given the term. We are of the opinion that the term “garment” used in the context of the Order must be restricted to those articles usually made by a tailor or a dressmaker. A hat is therefore not a garment within the contemplation of the Order.

It was urged by counsel for the respondent that in any event the matters ought to be remitted to the magistrate to make a finding as to whether he found the allegations relating to Agnes Reece’s employment as dressmaker proved. From the tenor of the magistrate’s memorandum of reasons for decision, it is implied that he found those allegations not proved.

The appeals must succeed. The conviction and sentences are set aside. The order made by the magistrate for payment by the appellant of arrears of wages is set aside. The appellant will get his costs of these appeals fixed at \$35.48.

Appeals allowed.

WHITE v. WHITE

[Supreme Court (Adams, J. (ag.)) May 28, 29, 1962.]

Rice lands—Action by tenant against landlord for declaration of tenancy, injunction and damages for trespass—Whether Supreme Court has jurisdiction to entertain claim—Rice Farmers (Security of Tenure) Ordinance, 1956, s. 51 (1).

The plaintiff sued for a declaration that he was the defendant's tenant of certain rice lands, an injunction and damages for trespass. For the defendant, it was submitted that the Supreme Court was without jurisdiction in view of s. 51 (1) of the Rice Farmers (Security of Tenure) Ordinance, 1956, which provides that ". . . any claim or other proceedings (not being proceedings before the assessment committee as such) arising out of this Ordinance shall be made or instituted in the magistrate's court". For the plaintiff, it was argued that where an injunction was sought the jurisdiction of the Supreme Court was not ousted and that its power to make a declaratory order had not been taken away.

Held: (i) questions involving the recovery of possession of a holding of rice lands and the extent and recovery of damages and penalties for breach of covenant of quiet enjoyment are specifically regulated by the Ordinance;

(ii) the relief for a declaration and injunction was dependent on the question whether or not the plaintiff was protected by the provisions of the Ordinance and could not be claimed without first taking proceedings before the committee to determine whether he was a tenant or not.

Judgment for the defendant.

John Carter for the plaintiff.

A. S. Manraj for the defendant.

ADAMS, J. (ag.): The parties in this action are brothers-in-law and their dispute centres around the right to possess a 50 acre plot of rice lands in the fourth depth of Plantation Cottage on the West Coast of Berbice. The plaintiff's claim is for:—

- (a) a declaration that he is the defendant's tenant of this area;
- (b) damages in the sum of \$3,000 for trespass to this land by the defendant in February, 1962;
- (c) an injunction against the defendant in relation to the said land; and
- (d) costs.

Because of the bitter relations between the parties and the urgent necessity to settle a dispute relating to rice lands, the affidavits of the injunction proceedings were treated as pleadings and the action was speedily heard.

It is common ground that the defendant is the holder of what is usually called a "provisional lease" of the particular area under reg.

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7 (1), (2) and (3) of the Crown Lands Regulations. The point in issue on the facts is whether the relationship of landlord and tenant exists between the parties, as the plaintiff alleges, or whether, as the defendant asserts, the plaintiff merely cultivated the land for reward at the request of the defendant's wife, who is his sister.

The plaintiff's case was that the agreement was that he was to pay one-third of the padi crop to the defendant as rent and that he ploughed, planted and reaped in 1959, 1960 and 1961. In 1959 he reaped 900 bags of padi and gave the defendant 300 bags of padi as rent. In 1960 the extent of his yield and the amount of his rent were the same. In 1961 he reaped 577 bags of padi and gave the defendant 200 bags as rent. In 1960, he shipped 100 bags of padi to Burma in each of the names of the defendant, his wife and Noel Crawford at the defendant's request and in 1961, he shipped 100 bags of padi in each of the names of the defendant's wife and Noel Crawford at the defendant's request.

As regards the alleged acts of trespass, the plaintiff stated that on 2nd February 1962 the defendant and his workman Winston White went on the rented land and ploughed part of it. On the following day the plaintiff ploughed about 30 acres of the land and the defendant also ploughed it. The plaintiff continued to plough it for a week and later received the following letter from Mr. Terence Richmond, the acting District Commissioner for West Berbice:—

“Dear Sir,

I have been informed by Mr. Stephen White that you are occupying a piece of land at Cottage which he permitted his wife to use and which she in turn allowed you to plant without his permission. He is anxious to have immediate possession of this land to plant a crop this year and you are advised to give it up immediately as otherwise a serious disturbance may result.

Mrs. S. White would also like to have possession of her portion in Moor Park which she also loaned to you.

Yours faithfully,
T. Richmond
Acting District Commissioner,
West Berbice.”

Mr. Manraj on behalf of the defendant has submitted that on the basis of the plaintiff's claim this court is without jurisdiction in view of s. 51 (1) of the Rice Farmers (Security of Tenure) Ordinance, 1956, which enacts:—

“51. (1) Subject to the provisions of subsection (3) of section 3 of the Summary Jurisdiction (Petty Debt) Ordinance, any claim or other proceedings (not being proceedings before the Assessment Committee as such) arising out of this Ordinance shall be made or instituted in the magistrate's court.”

He relied on a number of authorities.

In reply to Mr. Manraj's submission, Mr. Carter, counsel for the plaintiff, cited FRASER'S, J., decision in *Saul v. Small* (at p. 189 herein). In that action FRASER, J., considering the effect of s. 26 (1) of the Rent Restriction Ordinance, Cap. 186, which is similarly worded, decided that the Supreme Court had jurisdiction to grant an interlocutory injunction in favour of statutory tenants of a tenement controlled by the ordinance. Mr. Carter submitted that where an injunction was sought, this court's jurisdiction was not ousted and that its power to make a declaratory order had not been taken away. Further, he contended that as the main relief sought by the plaintiff was the declaration and injunction and as the claim for damages for trespass hinged on these orders, the proper forum was the Supreme Court.

I shall now consider the authorities and the relevant provisions of the Rice Farmers (Security of Tenure) Ordinance, 1956.

In *Evelyne v. Latchmansingh* (1961), 3 W.I.R. 107, 1961 L.R.B.G. 12, LUCK-HOO, C.J., dealt with the question of jurisdiction in a case where a statutory tenant was claiming damages for breach of covenant of quiet enjoyment, eviction and trespass in relation to premises protected by the Rent Restriction Ordinance. Delivering his judgment, the learned Chief Justice said as follows:

"In the present action the plaintiff's claim is wholly dependent upon the question whether or not she was protected by the Rent Restriction Ordinance and that being so the claim should have been instituted in the magistrate's court and cannot validly be brought in the Supreme Court, the jurisdiction of the Supreme Court having been ousted by the provisions of section 26 (1) of the Rent Restriction Ordinance, Cap. 186."

In the case of *Khan v. Rahaman* (Civil Appeal No. 41 of 1961), the Federal Supreme Court had cause to consider the question of jurisdiction in relation to lands protected by the Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956. The Chief Justice of that court observed that the Ordinance introduced some of the principles of the Rent Restriction Acts of the United Kingdom. He made this pronouncement:—

"The main object of the Ordinance, as its long title indicates, is to give security of tenure to tenant rice farmers. It achieves that object by imposing restrictions on the common law rights of landlords and tenants of rice lands and by the constitution of Assessment Committees in whom it vests power and authority to adjudicate upon matters arising out of the relationship of landlord and tenant and to make orders and give directions in relation thereto. By section 5 (1) a tenancy of rice lands runs from year to year commencing from the 1st day of May, but the rent—and annual rent—must be paid on the 31st December, and a landlord may not evict a tenant or give him notice to quit or

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otherwise terminate a tenancy, nor may the tenant terminate it, except in accordance with the provisions of the Ordinance.”

In a later passage of his judgment the learned Chief Justice made these remarks:—

“The jurisdiction of a Superior Court is not taken away except by express words—(CRAIES ON STATUTE LAW, 5th Edition 116). The legislature has seen fit to vest in assessment committees the power and jurisdiction to make orders for the recovery of possession of holdings of rice lands (section 11 (h) and section 29 (1)) and in section 29 (2) has stated in express words of general application that no such order or judgment is to be made except as provided in the subsection. It is also clear that the Legislature expressly intended to provide inexpensive remedies whenever disputes arise in relation to such tenancies, irrespective of the extent of the holdings or the amount of rent that may be payable—*vide* the definition of “holding” in section 2 and the extended and unlimited jurisdiction in regard to amount of rent that is conferred on a Court of Inferior Jurisdiction by section 51 (4). There is also section 26 (5) which provides that all appeals against decisions of assessment committees are to be heard by a judge in chambers and subsection (10) of the same section by virtue of which no fees are chargeable in respect of appeals except in one specified event.”

It is clear from the decision of *Khan v. Rahaman* that the Chief Justice of the West Indies made no specific distinction between contractual and statutory tenants so far as the application of provisions of the Ordinance was concerned.

In fact when one looks at Ordinance No. 31 of 1956, one observes that in every agreement of tenancy under the Ordinance whether contractual or statutory, certain conditions are implied, for example:—

“5. (1) (d) The landlord shall not evict a tenant or give him notice to quit or otherwise terminate the tenancy except as in this Ordinance provided”.

Under s. 11 (h) the Assessment Committee has power:

“(h) to hear and determine an application for the recovery of a holding to which this Ordinance applies.”

By s. 49:—

“49. Notwithstanding any provision in an agreement of tenancy making either the landlord or the tenant liable to pay any liquidated damages or any penalty in the event of any breach or non-fulfilment of any of the terms or conditions in this agreement, neither party shall be entitled to recover any sum in consequence of any such breach or non-fulfilment in excess of the damage actually suffered by him in consequence of the breach or non-fulfilment of any of the terms or conditions in the agreement.”

Again by s. 52 (1):

“52. (1) Any amount assessed, fixed, certified or ordered by a committee to be paid as compensation or damages under the provisions of this Ordinance may be recovered as a debt due under the provisions of the Summary Jurisdiction (Petty Debt) Ordinance.”

I am of the opinion that if the plaintiff were a tenant of rice-land, he should not have instituted proceedings in the Supreme Court for the following reasons:

- (1) He has alleged an eviction in part by the defendant landlord and a condition against such conduct is statutorily implied. According to the defendant, whom I believe, his wife delivered back possession of the land to him in 1962.
- (2) Questions involving the recovery of a holding fall within the province of the assessment committee.
- (3) Questions involving the extent of damages and penalties recoverable in the case of a breach of covenant of quiet enjoyment are specifically regulated by the Ordinance.
- (4) The mode of recovery of damages is also regulated by the Ordinance.
- (5) In the absence of specified conditions, all the basic conditions attached to the tenancy are laid down by law.

It is clear that the claim for damages for trespass is not entertainable by the Supreme Court. The relief for a declaration and injunction is dependent on the question whether or not the plaintiff is protected by the provisions of the Ordinance. If the question of recovery of possession arises out of the Ordinance, to bring a claim for injunction without first taking proceedings before the committee cannot give the court jurisdiction as the injunction claim is intended to give the plaintiff possession. The claim for a declaratory order will have the same effect and it is for the committee to say whether a person is a tenant or not, at least in the case where the person initiating proceedings alleges that he is the tenant.

Even if FRASER’S, J., decision in *Saul v. Small* were to have the far reaching consequences claimed by Mr. Carter, I would with respect not follow it in this particular action in view of the reasons that I have set out. But in my opinion the learned judge’s decision applied to the granting of an interlocutory injunction to maintain the *status quo* in the case of an attempt at forcible eviction. The unreported case of *Cloutt v. London and Provincial Stores Ltd.*, referred to in (1926) 161 L.T. 48, does not appear to support Mr. Carter’s contention. The report of *Cloutt’s* case is made as follows:—

“In the other case to which reference has been made (*Cloutt’s* case) a claim was made against the landlord by a tenant claiming to be a statutory tenant, for damages for trespass to and detinue of his chattels, and also for an injunction to restrain the landlord from interfering with his peaceful occupation of the premises, but inasmuch as, in this case, it would appear that the whole

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matter in issue was whether or not the plaintiff was protected by the Rent Acts, the Court of Appeal rightly held that the case came within section 17 (2), the issue as to trespass, detinue, and the injunction being wholly dependent on the question whether or not the plaintiff was so protected.”

Not only has this court no jurisdiction on the basis of the plaintiff’s statement of claim to entertain this action but on the evidence I am not satisfied by a balance of probabilities that the plaintiff is a tenant or is entitled to any of the orders claimed. The plaintiff was unable to produce any rent receipt or any written agreement of tenancy or other document to substantiate his claim. Even before action was filed, the defendant told the witness Richmond that his wife had been responsible for the plaintiff’s presence on the land. I am convinced that the parties had been on bad terms since 1949 or 1950 as a result of a report of an alleged criminal offence made by the defendant against the plaintiff at Weldaad Police Station. The theory put forward for the making of the alleged tenancy agreement by the plaintiff’s counsel that the defendant, being fearful of being sentenced to a term of imprisonment on a pending indictment, desired to make provision for his wife, was exploded by the evidence, which I accept, that the wife was already in receipt of an adequate income.

I accept the evidence of the plaintiff’s sister that the plaintiff agreed to plough and plant the defendant’s land at her request and without the defendant’s knowledge on the basis that the net profits were to be divided equally between them and that no relationship of tenancy was ever created between the parties. It was estimated that the operational costs would amount to one third of the gross returns.

The documents tendered by the plaintiff were at least as consistent with the defendant’s story as with his. It is true, for example, that in 1960 the plaintiff shipped 300 bags of padi in the names of 3 persons, including the defendant; but, if these shipments were meant as a payment of rental, the rent per acre would have been grossly in excess of the maximum rent allowed under the Ordinance.

It is true that I am somewhat sceptical both of the evidence of the defendant’s wife to the effect that it was the plaintiff’s idea to put the bags of padi in different names and of the defendant’s evidence that he did not know how many bags of padi his wife had received from the plaintiff for the Cottage land. But the plaintiff himself was not an impressive witness: he appeared to have been in a daze during cross-examination and took a long time to answer the simplest questions. Unsupported as his evidence is by any unequivocal documents or by any other witness, I cannot rely on it and, subject to the reservations already stated, I accept and believe the defendant’s evidence and that of his witnesses in cases of conflict.

I dismiss this action with costs to be taxed in favour of the defendant.

Judgment for the defendant.

Solicitors: *V. Lampkin* (for the plaintiff); *L. L. Doobay* (for the defendant).

HARRICHARRAN v. ATTORNEY GENERAL

[British Caribbean Court of Appeal (Gomes, P., Archer and Wylie, JJ.) May 29, 30, 1962.]

Trespass—Damages for trespass committed after writ filed—Whether judgment may include such damages.

In an action for trespass the damages awarded included an amount representing the net proceeds arising from a rice crop planted by the trespasser before the filing of the action but reaped by him afterwards. On the date on which the action was filed an interim injunction was granted on terms which permitted the trespasser to reap the crop when it was ripe and to pay over the proceeds into court.

Held: the trespass was terminated by the interim injunction and could not support the award of damages for any period after the injunction was ordered.

Appeal allowed.

J. H. S. Elliott, Q.C., for the appellant.

K. M. George, Senior Legal Adviser, for the respondent.

Reasons for Judgment: The only issue before the Federal Supreme Court on the hearing of this appeal was the measure of damages to be allowed for trespass in the particular circumstances. The learned trial judge had awarded not only a sum representing mesne profits (the award of which was not disputed) but also a further amount which was obviously intended to represent the nett proceeds arising from a rice crop planted by the appellant during the period that he was a trespasser. It was not suggested that the respondent (the Crown) had suffered any loss other than rent for the period of the trespass which was covered by mesne profits, but the learned trial judge apparently applied the principle of unjust enrichment to arrive at the conclusion that the trespasser should not be allowed to retain any of the proceeds arising from the disposal of the rice crop.

When the appellant developed his argument, it became common ground that this crop had been reaped after the trespass had been terminated as a result of an interim injunction issued on 1st October, 1960, the date on which the writ was issued. The court was at a loss to understand from the record why there should be any question of the trespasser having to pay damages in respect of the proceeds of a crop reaped after the owner of the land had been restored to possession and was of opinion that dealings with the crop subsequent to the termination of the trespass and the restoration of possession to the owner could not form the subject of damages for trespass.

It then transpired that there was an interim order not included in the record on appeal or in the list of documents omitted from the record and that the appellant had been permitted by this order of the court to go on the property and reap the crop after the termination of the trespass. This confirmed the view that these dealings could not form the subject of damages for trespass.

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When a copy of this interim order was produced for the inspection of the court, it was found to be an order by consent continuing the interim injunction until the determination of the action, subject to the appellant going on to the land for the sole purpose of reaping the crop; and the order continued

“and that the padi reaped therefrom be delivered and sold to the Mahaicony-Abary Rice Development Scheme and two-thirds of the proceeds thereof be paid into Court by the Mahaicony-Abary Rice Development Scheme and it is further by consent ordered that the said reaping and delivery be under the supervision of a person agreed upon by the parties and that the defendant without prejudice to the ultimate decision of the action do pay for the supervision and delivery of the padi to the Mahaicony-Abary Rice Development Scheme.”

The order makes no provision for the disposal of the proceeds paid into court and counsel for the Crown argued strenuously that its effect was merely that these proceeds were to follow the result of the action and should therefore be paid to the respondent. He also argued that the amount of these proceeds should still be ordered to be paid to the Crown on the basis that the crop formed part of the realty belonging to the Crown. He conceded that the question of unjust enrichment had not been advanced or argued by either party in the court below. Counsel for the appellant stated that the consent order had been made in pursuance of an arrangement between the parties, and that it had been his understanding that the proceeds had, by consent, been ordered to be paid into court merely to meet any damages awarded for trespass and that these proceeds were otherwise to be the property of the appellant. He contended, therefore, that it would not be in pursuance of that arrangement that the proceeds paid into court should follow the result of the action.

As the court was satisfied for the reasons given above that this sum could not be awarded as damages for trespass and, as the remainder of the argument concerning the arrangements leading up to the consent order (which did not include any order disposing of this sum) related to matters not before the Federal Supreme Court or even on the record, the court concluded that the most appropriate course was to refer the proceedings back to the court below for an enquiry into this aspect. Accordingly, the Federal Supreme Court allowed the appeal with costs to the appellant and ordered that the judgment of the court below be varied by striking out the award in favour of the plaintiff in respect of the nett proceeds of the rice crop and gave to both parties liberty to apply to the court below for an order disposing of these proceeds. It was the view of the court that, upon such an application, the parties would be at liberty to put forward evidence of any arrangement or of other circumstances to account for their consent to an order which did not itself purport to provide finally for disposal of these proceeds and that that court would then be in a position to do justice between the parties on this issue.

Appeal allowed.

EVA NG-A-YOW v. MENDONCA

[British Caribbean Court of Appeal (Gomes, P., Archer and Wylie, JJ.,) May 31, 1962.]

Principal and surety—Time given to debtor by creditor—Consent of surety not first obtained—Material variation—whether surety released.

In consideration of the sale by the respondent to V. of the respondent's share in a certain estate, V. undertook by a written agreement to make the respondent an immediate cash payment followed by four annual payments. The agreement incorporated a written undertaking whereby the appellant guaranteed to the respondent the payment by V. of "all sums of money due by him . . . under the abovementioned agreement . . . subject (to) notice in writing of any default . . ." V. paid the cash payment, but without the consent of the appellant was given time by the respondent to pay the remaining sums. V. failed to pay all four of the instalments but the respondent did not notify the appellant of any default until after the final default, when demand was made of the appellant for payment of the entire sum then due. In an action to recover this amount the trial judge held that the expression "any default" in the guarantee was not restricted to single defaults, that the guarantee agreement contemplated no time limit within which notice of default should be given, and that therefore the respondent was entitled to judgment. On appeal—

Held: (i) the guarantor was entitled to notice of each default. The notice that was given was a notice of complete or total default and was not the kind of notice that was in the contemplation of the parties:

(ii) a surety who receives notice of the terms of the principal agreement is deemed to contract "on the faith" thereof and any material variation of the principal agreement will release him;

(iii) the giving of time in this case by the creditor to the principal debtor without the surety's knowledge or consent was a material and substantial departure from, or variation of, the terms of the principal agreement and operated to release the surety from liability.

Appeal allowed.

G. M. Farnum for the appellant.

A. S. Manraj for the respondent.

GOMES, C.J.: This action was brought to enforce the terms of a guarantee executed by the appellant in favour of the respondent on the 27th September, 1955. The relevant facts are as follows:

Three beneficiaries under a will—two sisters and a brother—entered into an agreement whereby the brother agreed to purchase the share of each sister for the sum of \$13,587.24 each. A capital sum of \$1,793.62 was payable to each sister upon the signing of the agreement and a similar sum was also payable on the 31st December, 1955, to each sister in part payment for her share. Those two payments were made by the brother to each sister. The outstanding balance of \$10,000.00 in each case, was payable in four half yearly instalments of \$2,500.00, commencing on the 30th June, 1956. The last payment in each case was, therefore, due on the 31st December, 1957. Interest at four per cent per annum was payable in each case

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from the date when the second capital payment was made on the 31st December, 1955, such interest being payable monthly on the first day of every calendar month. Incorporated in the agreement was a guarantee of payment by the appellant in the event of default of payment by the brother. That guarantee is in the following terms:

“I, the undersigned, EVA NG-A-YOW, of 30, Hadfield Street, Georgetown, hereby guarantee to STELLA ALMIRA MARCUS and DOROTHY ONA MARTINS, referred to above, the payment by the said HERMAN ARNOLD VIEIRA of all sums of money due by him to them under the abovementioned agreement as aforesaid, with interest, subject as hereinafter mentioned:

1. Notice in writing of any default on the part of the said HERMAN ARNOLD VIEIRA is to be given by the said STELLA ALMIRA MARQUES and DOROTHY ONA MARTINS to the said EVA NG-A-YOW and within 30 (thirty) days from its receipt payment shall be made by me, the said EVA NG-A-YOW, of all sums then due from me under this guarantee.

Eva Ng-A-Yow
Guarantor.”

One of the sisters was paid her share in full, but none of the four instalments of \$2,500.00 was made to the other sister, the respondent. It would appear that the reason for this was that the brother was not in a position to meet both commitments at the same time and he was, therefore, allowed by the respondent to pay off her sister first (as she was leaving the territory) before commencing his payments to her. Her precise words, in giving evidence on this point, are:

“My brother asked me to give him a chance to pay off my sister as she was going to Barbados. Up to the time my sister went to Barbados, I agreed to wait for my payments. My sister left either in 1957 or 1958. After she left I kept pressing my brother for payment and he kept promising”.

On the evidence, the trial judge rightly found that the respondent had given time to her brother to pay the sums that were due and that the respondent did not notify the appellant of any default by her brother to pay any of the four instalments and that the first notification the appellant received in that respect was a letter dated 15th June, 1959, demanding payment of the full amount of \$10,000.00 and interest due under the agreement. It is to be observed that this first notification to the appellant was given with regard to “total” default, and it was given about eighteen months after the last instalment fell due, and just short of three years after the first instalment became due.

As I understand his judgment, the trial judge, in dealing with the law applicable to the case, commenced by saying that it is settled law that a contract of guarantee must be strictly construed, casting no different burden upon the guarantor than that which has been agreed upon, and be concluded by stating that the expression “any

default" in the guarantee was not restricted to single defaults and that the guarantee agreement contemplated no time limit within which notice of default should be given, and, therefore, the respondent was entitled to judgment.

Both at the trial and on appeal, a number of interesting questions relating to the law of suretyship were argued, but the first thing to be done where the construction of a written instrument comes into question is to ascertain from the language used in the instrument what was the intention of the parties. In my view, the words "any default" provide, or go a long way to providing, the key to the intention of the parties. The words "any default" can only refer to a transaction which is susceptible to two or more defaults for otherwise the qualifying word "any" would be inappropriate and meaningless; therefore, the words "any default" cannot, or ought not to be construed as meaning or including complete or total default, for if the parties had in contemplation complete or total default, there would have been no necessity for the use of the qualifying word "any", or it would have been a simple matter to have used appropriate words indicating complete or total default.

As I have said above, the trial judge was of the view that the expression "any default" was not restricted to single defaults. He did not give any reasons for holding that view but he must have considered that it included total default because this was a case of total default and he gave judgment for the respondent.

I suppose it is possible to argue that the words "any default" could, in the circumstances of this case, extend to a total default because, as two lots of payments were guaranteed, the word "any" could relate to any, of the two cases, that is to say, that there might be compliance in one case and not in the other, as is in fact the case. In my view, the answer to such an argument is, in the first place, that it is unwarranted as being unduly refined and, in the second place, it is quite impossible to maintain that it was in the contemplation of the parties that one debt could or would be discharged in full before there was any attempt to discharge the other: I say so because there is nothing whatever even to lend colour to such a suggestion.

In another portion of his reasons for judgment, the trial judge stated that any conditions precedent to the surety's liability must be fulfilled before recourse can be had to him. In this case, the conditions precedent to the surety's liability are, in my view, twofold: the first is that notice in writing of any default was to be given, and the second is that payment was not to be expected or made until the expiration of thirty days from the receipt of a notice of default. As I have stated above, the notice that was given in this case was a notice of complete or total default which, for the reasons that I have mentioned above, was not the kind of notice that was in the contemplation of the parties.

In my view, the vital question that arises in this case is—what is the legal effect of such a departure from the terms of the agreement by the giving of time by the creditor, *i.e.*, the respondent, to the primary debtor, *i.e.*, the brother, to pay his debt, without the knowledge of, or any notification to, the surety? The judgment at the trial did not turn on this question but, in my view, its determination is inescapable.

The terms of the guarantee make it quite clear that the surety was well aware of the terms of that agreement, that is to say, that the brother was required to liquidate his debt to each sister by four specific instalments on four specified dates. The surety knew what his precise commitments were and was entitled to conclude, after the expiration of the times for the respective payments and not having received any notification of default, that the terms of the agreement were being complied with. Indeed, there is authority for the proposition that, even if a surety “becomes aware that the creditor is going to give time or do something else which, if done without his assent, may discharge him”, he is not bound to warn the creditor against doing it—*per* BLACKBURN, J., in *Polak v. Everett (infra)*.

The law on this question is stated in 18 HALSBURY’S LAWS (3rd Edition) p. 502, para. 922, as follows:

“Any material variation of the terms of the contract between the creditor and the principal debtor will discharge the surety, who is relieved from liability by the creditor dealing with the principal debtor (or with a co-surety) in a manner at variance with the contract, the performance of which is guaranteed.

When a person becomes surety for another in a specific transaction or obligation, the terms and conditions of the principal obligation are also the terms and conditions of the suretyship contract, and if the creditor, without the consent of the surety, alters those terms to the prejudice of the surety, the latter will be free, it being the clearest and most evident equity not to carry on any transaction without the privity of the surety, who must necessarily have a concern in every transaction with the principal debtor, and who cannot as surety be made liable for default in the performance of a contract which is not the one the fulfilment of which he has guaranteed”.

One of the authorities referred to in the notes of that passage is the case of *Rees v. Berrington* (1795), 2 Ves. 540, in which at p. 543, Lord LOUGHBOROUGH, L.C., stated:

“The principle is a legal principle. In this Court they all appear principals: but establish the fact, that he is surety; he is a surety to a definite, not an indefinite, engagement. Here upon the second instalment the defendants have extended the time, before that instalment became due. If the time is extended after it becomes due, that makes a difference at law; for then the bond has been once forfeited. It is perfectly plain from the nature

of the engagement, that the plaintiff became security, that the debt should be paid at two periods: one has elapsed: the obligee thinks fit totally to change the nature of the security and the credit: he takes notes: he gives a further time of payment; and repeats the same thing as to the second instalment, which was not then due; and doing this, he does this material injury to the surety: he has a right the day after the bond is due to come here and insist upon its being put in suit: the obligee has suspended that, till the time contained in the notes runs out: therefore, he has disabled himself to do that equity to the surety, which he has a right to demand.

* * * *

It is the clearest and most evident equity not to carry on any transaction without the privity of him, who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact *his* affairs (for they are as much his as your own) without consulting him. You must let him judge, whether he will give that indulgence contrary to the nature of his engagement”.

In the case of *Polak v. Everett* (1876), 1. Q.B.D., at p. 673, BLACKBURN, J., stated:

“It has been established for a very long time, beginning with *Rees v. Ber- rington*, 2 Ves. 540, to the present day, without a single case going to the contrary, that on the principles of equity a surety is discharged when the creditor, without his assent, gives time to the principal debtor, because by so doing he deprives the surety of part of the right he would have had from the mere fact of entering into the suretyship, namely, to use the name of the creditor to sue the principal debtor, and if this right be suspended for a day or an hour, not injuring the surety to the value of one farthing, and even positively benefiting him, nevertheless, by the principles of equity, it is established that this discharges the surety altogether. The reason given for this, as stated in *Samuell v. Howard*, 3 Mer, 272, by Lord ELDON, is, because the creditor, by so giving time to the principal, has put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal or not, and because he in fact cannot have the same remedy against the principal as he would have had under the original contract. And he adds: ‘The creditor has no right, it is against the faith of his contract, to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety’. The principle being, as I understand it, that as it is very undesirable that there should be any dispute or controversy about whether it is for his benefit or not, there shall be the broad principle, that if the creditor does intentionally violate any rights the surety had when he entered into suretyship, even though the damage be nominal only, he shall forfeit the whole remedy. Whether that was a good or a just principle originally, is a matter which it is

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far too late to think about now. I must own I have had considerable doubts about the justice of that principle, but from the time of *Rees v. Berrington* it has been undisputed law, and nothing but the legislature can interfere to alter it.”

A third authority cited in the notes is the case of *Holme v. Brunskill*, [1878] 3 Q.B.D., where COTTON, L.J., said at p. 505:

“Where a creditor does bind himself to give time to the principal debtor, he, with an exception hereafter referred to, does deprive the surety of a right which he has, that is to say, of the right at once to pay off the debt which he has guaranteed, and to sue the principal debtor, and without inquiry whether the surety has, by being deprived of this right, in fact suffered any loss, the Courts have held that he is discharged. The exception to which I have referred is, where the creditor on making the agreement with the principal debtor expressly reserves his right against the surety, but this reservation is held to preserve to the surety the right above referred to, of which he would be otherwise deprived. The cases as to discharge of a surety by an agreement made by the creditor, to give time to the principal debtor, are only an exemplification of the rule stated by Lord LOUGHBOROUGH in the case of *Rees v. Berrington*: ‘It is the clearest and most evident equity not to carry on any transaction without the knowledge of him (the surety), who must necessarily, have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him’.

The true rule in my opinion is, that if there is any agreement between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet, that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged”.

In dealing with this question a further important point to be remembered is that the terms of the contract between the two creditors and the debtor have either been embodied in the guarantee or the surety had ample notice of the terms: this is made clear by the words of the guarantee where the surety states that she guarantees all sums of money due “under the abovementioned agreement as aforesaid”.

The trial judge, at the commencement of his judgment, made reference to the fact that the guarantee was incorporated in the principal agreement (presumably because it appears at the foot of the same document containing the agreement) but he did not deal with the converse case which is the situation here and which I have adverted to above. In such a case the rule is that a surety who receives notice of the terms of the principal agreement is deemed to contract "on the faith" thereof and any material variation of the principal agreement will release him. (*Vide* 18 HALSBURY'S LAWS (3rd Edition) p. 505, para. 927, and *Sanderson v. Ashton* (1873), L.R. 8 Exch. 73, at p. 76).

For these reasons, I am of opinion that there has been such a material and substantial departure from, or variation of, the terms of the principal agreement between the two creditors and the debtor (of the terms of which the surety was fully aware) without her knowledge or consent, that she is released from liability. I would, therefore, allow the appeal with costs to the appellant both here and in the court below.

ARCHER, J.: I agree. It is surprising that there should have been any argument about the meaning of the expression "any default" in the guarantee for the respondent understood that she had undertaken to notify the appellant whenever the debtor failed to pay any instalment. At p. 20 of the record her evidence reads:

"I was aware of the terms of the guarantee. I knew that notice of any default was to be given to the defendant. I agree that there were many defaults of payment. I did not notify the defendant because my brother made several promises to pay. I believed in my brother's promise as my sister received hers. During the time my brother was making promises, I saw defendant on several occasions in the store, but I cannot remember if I mentioned to her that I had not been paid".

The indulgence shown by the respondent to the debtor was without the assent of the appellant. The debtor bound himself to pay specific sums of money on fixed dates, together with interest on the capital sum remaining unpaid at any time after the two initial payments. The appellant guaranteed these payments and thereby undertook a limited liability.

Counsel for the respondent conceded that the agreement between the respondent and the debtor for an extension of time for payment of the debt due to her was for adequate consideration. It is true that the debtor was already under a contractual obligation to the respondent's sister, but the authorities show that the promise of performance of an outstanding contractual obligation is sufficient consideration for a promise by a new party. The respondent wished to accommodate her sister and her forbearance was not, therefore, gratuitous. The agreement between the debtor and her was a binding agreement and the effect of giving time to the debtor was to vary the original contract in a material particular and to the prejudice of the appellant. Not only did the extension result in the debtor's liability to pay in a

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lump sum what he had originally contracted to pay by instalments, but in an increase in the amount of interest due under the original agreement. This was completely at variance with the arrangement for payments which the appellant had guaranteed and, moreover, would, if binding upon her, have had the effect of exposing her to an increased liability and in circumstances in which she might have experienced extreme difficulty in recovering anything from the debtor. I think that the respondent's action clearly discharged the appellant from her liability under the guarantee and that the appeal must be allowed with costs both here and in the court below.

WYLIE, J.: I also agree that the original contract was materially varied to the prejudice of the surety and for that reason the appeal should be allowed with costs to the appellant both here and in the court below.

Appeal allowed.

BERNARI v. RAMJATTAN

[In the Full Court, on appeal from the magistrate's court for the Corentyne Judicial District (Luckhoo, C.J., and Miller, J.,) May 11, June 8, 1962.]

Criminal law—Embezzlement by a public officer—Payment of duty received by customs guard—Not part of duties of customs guard to receive such payments—Customs guard handed over money to officer having duty to receive such payments—Failure by latter to pay over money into revenue—Whether embezzlement by public officer or fraudulent conversion—Criminal Law (Offences) Ordinance, Cap. 10, s. 191.

A customs guard, having no duty to do so, collected from one K.S. a payment of duty on certain articles imported into the country, and made out and delivered a receipt therefor. He thereafter handed over the money to the appellant, an officer of Customs and Excise, whose duty it was to collect such money. The appellant failed to pay over the money into revenue and was convicted of the offence of embezzlement by a public officer, the case having been tried summarily with his consent. On appeal—

Held: (i) the customs guard might be a bailee of the money and would hold it in trust for K.S., but he would not have been entrusted with it as a public officer;

(ii) the fact that the customs guard paid over the money to the appellant did not make the receipt by the appellant a receipt of money entrusted to him by virtue of his employment;

(iii) the appellant might be guilty of the offence of fraudulent conversion but he was not charged with that offence.

Appeal allowed.

[**Editorial Note:** Reversed on appeal to the Federal Supreme Court. See later herein, and (1962) 4 W.I.R. 441.]

A. S. Manraj for the appellant.

E. A. Romao, Senior Crown Counsel, for the respondent.

Judgment of the Court: The appellant Antonio Bernari was charged indictably with embezzlement by a public officer, contrary to s. 191 of the Criminal Law (Offences) Ordinance, Cap. 10, but was tried summarily with his consent. He was found guilty and was convicted by the magistrate of the Corentyne Judicial District. He has appealed against this conviction.

The evidence disclosed that the appellant was employed as assistant to the Sub-Comptroller of Customs and Excise and Deputy Harbour Master at Springlands, Corentyne, Berbice, in the month of December, 1960. Between the 23rd December, 1960, and 27th December, 1960 (both dates inclusive) the Sub-Comptroller Mr. Lionel Bowling was on leave and the appellant carried on Mr. Bowling's duties in that period.

On 26th December, 1960, Customs Guard Perez collected the sum of \$10 from one Kissoon Singh purporting to be duty charged by Perez on certain articles brought by Kissoon Singh from Nickerie to British Guiana on board the motor vessel "Super". Perez wrote out what purported to be an acknowledgement of receipt from Kissoon Singh for that sum and gave it to Kissoon Singh. Perez in fact had no authority to collect duty on any article or to give a receipt therefor. On the following day Perez handed over to the appellant the sum of \$10 he had collected from Kissoon Singh. The appellant has not paid the money into revenue but has retained it.

The appellant has testified that he did receive the money from Perez but was under the impression that the money was the balance of a sum of \$17.50 which he said one Mardjo, the captain of motor vessel "Super", owed for overtime fees for entering, attending passengers and cleaning the motor vessel "Super" on the 25th December, 1960. The learned magistrate rejected the appellant's explanation in this regard and we are of the view that on this question of fact there was evidence on which he could reasonably so find.

The question for consideration is whether the appellant by failing to pay to his employers, the Colony of British Guiana, the sum of \$10 given him by Perez is guilty of the offence of embezzlement by a public officer. In so far as Perez is concerned he was employed as a customs guard and it was no part of his duties as a customs guard to receive moneys or give receipts therefor. It was the duty of the appellant to collect moneys paid as duty on articles coming into the Colony. Perez might be a bailee of the money received from Kissoon Singh and would hold the money in trust for him but he would not have been entrusted with the money as a public officer within the meaning of s. 191 of the Ordinance. The money would be still the property of Kissoon Singh and not that of the Government of British Guiana. Perez would not have been entrusted with the money by virtue of his employment as a customs guard even though the appellant may have asked him to receive such moneys. (See *Grimmond v. Wong*, 1956 L.R.B.G. 171). The fact that Perez paid over the money to the appellant does not make the receipt by the appellant a receipt

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of money entrusted to the appellant by virtue of his employment. It would be a receipt by the appellant of money received by Perez and held by Perez as a bailee in trust for Kisson Singh. The appellant may be guilty of the offence of fraudulent conversion but he has not been charged with that offence.

It is with regret that we are forced to the conclusion that the appeal must be allowed and the conviction and sentence set aside with costs \$37.88 to the appellant.

Appeal allowed.

KASSIM ALLY v. SINGH

[Supreme Court (Luckhoo, C.J.) May 5, 26, June 23, 1962.]

Negligence—Motor car driven by defendant at plaintiff's request—Plaintiff sitting beside defendant—Whether plaintiff in control of car.

At the request of the plaintiff his friend, the defendant, drove the plaintiff's car with the plaintiff sitting beside him. An accident having occurred, the plaintiff sued the defendant for damages resulting to the car through the defendant's negligent driving.

Held: the plaintiff remained in control of the car and could not recover.

Judgment for the defendant.

C. R. Wong for the plaintiff.

M. Poonai for the defendant.

LUCKHOO, C.J.: The plaintiff claims the sum of \$2,000 from the defendant for damage done to his (plaintiff's) motor car PF 47 as a result of a collision on the 4th October, 1959, at the corner of Third and Albert Streets, Georgetown, Demerara, between the plaintiff's car PF 47 then being driven by the defendant and motor car HF 342.

The plaintiff is a tailor and resides at lot 4, James Street, Albouystown, Georgetown. The defendant is a school teacher and resides at Stanleytown, New Amsterdam, Berbice. Prior to the accident they were on very friendly terms. The plaintiff would stay at the defendant's home when on a visit to Berbice and would have the use of the defendant's motor van while the defendant would stay at the plaintiff's home when on a visit to Georgetown and would have the use of the plaintiff's motor car PF 47.

On Sunday, 4th October, 1959, the plaintiff was the owner of motor car PF 47 which he had purchased some six months earlier from its previous owner. He had recently become a certified driver. At that date the defendant was staying at the plaintiff's home as his guest and was due to leave Georgetown by the afternoon train for Berbice. A mutual friend was hospitalised at St. Joseph's Mercy Hospital, Parade Street, Georgetown, and the plaintiff and defendant decided to visit him. The plaintiff and members of his family and

the defendant, who drove at the request of the plaintiff, proceeded by the plaintiff's car, a four cylinder 15.6 h.p. American Kaiser lefthand drive, to St. Joseph's Mercy Hospital, where they visited one Walter Hochan. They left that hospital shortly before 3 p.m. and proceeded to the Georgetown Railway Station where the defendant was to take the train for Berbice. However, the train was not scheduled to leave until 4.20 p.m. They therefore proceeded north along Lamaha Street with the defendant driving and the plaintiff sitting beside him. There is a conflict of evidence as to their intended destination. According to the plaintiff the defendant desired to visit his brother in Kitty and was proceeding north along Lamaha Street to go to Kitty when he said that he had forgotten his briefcase at the plaintiff's home and then turned south into Albert Street. According to the defendant the plaintiff said that he wished to go to Le Repentir Cemetery to visit his mother's grave and that they were proceeding north along Lamaha Street intending to go to Le Repentir Cemetery by way of Vlissengen Road (the most direct route) when the plaintiff asked that he should turn south into Albert Street. I was not impressed with the plaintiff's explanation in this regard and accept the defendant's explanation that it was the plaintiff who requested him to turn south into Albert Street. The defendant proceeded south along Albert Street and approached a major road—Third Street. He was required by the traffic law to stop at the junction of Albert Street with Third Street. Albert Street runs from north to south and Third Street from east to west. The defendant on approaching Third Street was driving at about 30 miles per hour and did not stop at the junction of Albert and Third Streets. His car came into collision with a Vauxhall motor car HF 342 which was being driven west along Third Street, On collision the plaintiff's car was spun to the west and after striking a lantern post brace in Third Street, went into the drain on the southern side of Third Street and then came back out and went into the drain on the northern side of Third Street. The Vauxhall car went six or seven rods into Albert Street on to the western parapet. I think that the plaintiff's evidence correctly describes what occurred immediately before the collision—

“He was travelling at about 30 m.p.h. while approaching the major road. Speed limit for Georgetown is 15 m.p.h. As he approached the major road he accelerated. I know that he was approaching a major road. When about 3 or 4 yards from major road I said ‘look ahead Major Road’. I should have spoken to him before, considering the speed at which he was driving. He was 50—60 feet from the major road when he started to accelerate. Before that he was driving at about 20 m.p.h.”

The evidence of Charles Henry, which I accept, supports that of the plaintiff that the defendant did not stop on approaching the junction. The defendant's evidence that he did brake and bring his car to a standstill about 4 or 5 feet over the junction is untrue. In coming to this conclusion I have not overlooked the contents of the motor insurance claim form, Ex “C”, signed by the plaintiff. I am satisfied that the plaintiff did sign the form well knowing the contents, more particularly that the defendant had stopped at the major road junction.

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But this was a lie told by the plaintiff to the insurance company. The plaintiff has also falsely sworn as to the circumstances under which he signed the claim form. However, the evidence of Charles Henry which was clear and convincing leaves no doubt in my mind whatsoever that the defendant failed to stop at the junction. It is perhaps not without significance that the defendant pleaded guilty to a charge of dangerous driving brought by the police in respect of the collision.

It clearly appears from the evidence that the collision was caused by the negligent driving of the defendant.

Counsel for the defendant, Mr. Poonai, has submitted that the plaintiff cannot recover against the defendant because the negligence of the defendant is in law the negligence of the plaintiff himself. Mr. Poonai has contended that the management and control of the vehicle at all material times rested with the plaintiff who was sitting beside the defendant. Mr. Poonai observed that where the relationship of master and servant exists and an accident occurs by reason of the servant's negligent driving the servant will have to indemnify his master. (See *Semtex Ltd. v. Gladstone*, [1954] 2 All E.R. 206, and cf. *Gregory v. Ford*, [1951] 1 All E.R. 121).

In the present case the defendant was not driving as the plaintiff's servant. Nor was he engaged on a frolic of his own. He was driving partly for the plaintiff's purposes and at the request of and under the control of the plaintiff who was present in the car at the time of the collision.

Mr. Poonai has cited the case of *Pratt v. Patrick*, [1924] 1 K.B. 488, in support of his submission that in such circumstances the plaintiff would be precluded from recovering damages from the defendant. In *Pratt's* case the defendant Patrick was being driven in his motor car by his friend, one Essex, they being accompanied by Pratt, the deceased husband of the plaintiff. Essex and Pratt were in the car at the invitation of the defendant. Essex drove the car at the invitation of the defendant and the defendant sat next to him. Owing to Essex's negligence the car collided with another vehicle and Pratt sustained injuries from which he later died. The plaintiff (Pratt's widow) sued the defendant under Lord Campbell's Act on behalf of herself and her four infant children for damages resulting from her husband's death. It was held by ACTON, J., that as the defendant was in the car and there was no evidence that he had abandoned his right of control he was liable notwithstanding that by a casual delegation he had entrusted its actual physical management and mechanical control to Essex. ACTON, J., applied the principle stated in *Samson v. Aitcheson*, [1912] A.C. 844, where Lord ATKINSON said (at p. 849)—

“The learned judge in the course of his judgment laid down the law upon this question, the only question now for decision, with, as it appears to their Lordships, perfect accuracy, in the following passage: ‘I think that where the owner of an equipage, whether a carriage and horses or a motor, is riding in it while it is being driven, and has thus not only the right to possession,

but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right, or is shewn by conclusive evidence to have in some way abandoned his right. If any injury happen to the equipage while it is being driven, the owner is the sufferer. In order to protect his own property if, in his opinion, the necessity arises, he must be able to say to the driver "Do this" or "Don't do that." The driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or the steering-wheel. The owner, indeed, has a duty to control the driver. If the driver is driving at a speed known to the owner to be dangerous, and the owner does not interfere to prevent him, the owner may become responsible criminally; *Du Cros v. Lambourne*. The duty to control postulates the existence of the right to control. If there was no right to control there could be no duty to control. No doubt if the actual possession of the equipage has been given by the owner to a third person—that is to say, if there has been a bailment by the owner to a third person—the owner has given up his right to control.' "As the Privy Council has stated, if any injury happen to the vehicle while it is so being driven the driver is the sufferer. He must be able to tell the driver "Do this" or "Don't do that" and the driver would have to obey, the owner having a duty to control the driver.

In the present case the owner (the plaintiff) was aware that the defendant was approaching the junction at too great a speed and has admitted in his evidence that he should have sooner than he did spoken to the defendant in an endeavour to get him to stop at the junction. The plaintiff's failure in this regard may have rendered him criminally liable. He cannot in such circumstances recover against the defendant for damage to the vehicle.

Were it possible legally to have awarded damages to the plaintiff his claim for \$150 paid to Branker for repairs to the damaged fender would have to be rejected as Fileen made a new fender for the car and included charge therefor in sum of \$850 he had made. Fileen did the entire re-wiring of the vehicle, yet the plaintiff has put forward bills for that item subsequent to Fileen's work. Fileen's evidence, which I accept, is to the effect that the repairs to the car were all done by January, 1961. Yet the plaintiff has tendered bills for articles bought after January, 1961, which he said were used in the repairs of the car. These items must be disallowed. I would have assessed the damages at \$925.89.

In the result the action is dismissed and judgment entered for the defendant with costs to be taxed. Certified fit for counsel.

At request of counsel for the plaintiff stay of execution for six weeks granted.

Judgment for the defendant.

Solicitors: *L. L. Doobay* (for the plaintiff); *N. O. Poonai* (for the defendant).

SINGH AND OTHERS v. INDUSTRIAL RESOURCES
LIMITED AND OTHERS

[Supreme Court (Adams, J. (ag.)) May 15, 16, 17, 18, June 4, 27, 1962]

Crown lands—Foreshore—Beach—Meanings of—Licence to take shell from shell beach—Whether licence includes shell deposits extending inland beyond normal beach.

The defendant company was granted a licence under the Crown Lands Ordinance, Cap. 175, to occupy for 21 years certain “shell beaches” in order to take and remove any shell found in the beaches for certain specified purposes. The company claimed to be entitled under its licence to remove all shell deposits including those extending inland beyond the beach, its contention being that all such deposits were included in the term “shell beaches” as used in the licence. The plaintiffs, who occupied the land adjoining the beach, sued for trespass.

Held: (i) “shell beach” cannot refer to an entirely different area from that connoted by the word “beach”. The noun “shell”, which has the function of an adjective, can only limit, qualify or describe the word “beach” but cannot extend or change its meaning;

(ii) the terms “beach” and “foreshore” are synonymous and the term “shell beach” refers to the area containing shells between the high and low water marks.

Judgment for the plaintiffs.

A. S. Manraj, J. I. Ramphal with him, for the plaintiffs.

M. C. Young for the defendants.

ADAMS, J.: This is the story of a boundary dispute in a remote and desolate area, of alleged looting in the bush and the dilemma of the Crown.

Although this action was filed only in February, 1962, a speedy hearing was ordered and the affidavits in the injunction proceedings were treated as pleadings because of the tense and explosive situation existing between the parties at Turtle Beach, which is crown land. During the hearing, which lasted several days, I heard a mass of evidence but, although I have scrutinised every word of it, I do not propose to comment on it in any great detail but merely to touch on the salient points. A number of legal questions has been posed. One of these, involving the construction of two words used together, is novel. The others are trite.

The plaintiffs are the holders of what is commonly termed a “provisional lease”. It is dated 14th October, 1961, is signed by the Commissioner of Lands and Mines and in it permission has been granted to them under reg. 7 (1), (2) and (3) of the Crown Lands Regulations, 1919, to occupy and commence work on the tract of 503 acres of crown land situate at a place known as Turtle (or Tiger Creek) beach, on the North West sea coast commencing about 100 feet south-east of their camps as shown on the sketch plan by B. A. Bannister, Government surveyor, dated 23rd January, 1961 and extending thence in a north-westerly direction for one mile with a depth of 4100 feet approximately.

The plaintiffs had applied on 25th April, 1959, for an agricultural lease and had been granted on 4th November, 1959, a provisional lease of 500 acres of crown land situate at a "place called 'Tiger Creek' on the sea coast between the Moruca and Waini Rivers and being about 4 miles north-west of a place known as 'Fox Beach' and about 18 miles south-west of 'Shell Beach'".

Later, on 1st February 1960, the plaintiffs applied to the Commissioner of Lands and Mines for a lease of the entire bay and on 22nd April, 1960, renewed this application for a lease of 2500 acres. On 18th May, 1960, the Commissioner refused to grant this request and in this letter and in a string of subsequent letters, dated 1st September, 1960, 30th September, 1960, 9th May, 1961, 30th October, 1961, and 2nd December, 1961, the Commissioner called upon the plaintiffs to confine their activities to the area to which they were entitled.

Meanwhile, on 23rd January 1961, B. A. Bannister had surveyed the area, which had been named Turtle Beach in 1959 by O. St. John, a scientific assistant at the Geological Department and, consequent upon negotiations between the plaintiffs and the Commissioner for an unusually long facade, the amended provisional lease of 14th October 1961, which has already been mentioned, had been granted.

I shall now consider the title under which the defendants claim. The 1st defendant, a mining company, applied on 2nd April, 1959, to the Commissioner for a lease to remove shells on the North West Coast and on 10th June, 1959, was granted a licence under the Crown Lands Ordinance, Cap. 175, to occupy for 21 years the "shell beaches in the area situate on the North West sea coast of the county of Essequibo, British Guiana, and more particularly known as Father's, Papaw and Fox beaches, lying between 70° 50' N. latitude 8° 05' N. latitude and estimated to contain about 500 acres" in order to take and remove any shell found in the beaches for the sole purpose of the manufacture of or the processing of lime products.

Clause 4 of this licence stipulated that the first defendant should not, without the permission in writing of the Director of Public Works first had and obtained, remove any sand, shell, clay, gravel, shingle or other substance from any portion of the beaches which was within fifty feet of the high water line.

Further, it was agreed by clause 5 that the first defendant would not obstruct or restrict the free access of any person to any landing place in any river, creek, lagoon or water-way adjoining or running through the area covered by this licence, or to any landing place on the sea coast of the said area.

In 1961 a controversy over the meaning of the word "beach" arose between J. E. Davis, the superintendent of lands in the Lands and Mines Department and C. S. Cole, the inspector of mines in the same department. The two officers put forward their respective views, without obtaining a decision, before the Commissioner, who

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invited the second defendant as the managing director of the first defendant company to make representations to the Minister of Trade and Industry. On 19th June, 1961, the Ministry advised the first defendant to write to the Commissioner to remove the ambiguity regarding the word “beach”.

Throughout the trial of this action the meaning of this word was the bone of contention and although both counsel referred to standard dictionaries for assistance, neither could cite any judicial decision or other authority on this point. In order better to understand the opposing views, one has to examine Bannister’s plan, Exhibit “E^b”, where starting roughly from north to south one sees the Atlantic ocean, then the low water mark, then the high water mark which coincides with the shell ridge, then immediately contiguous to this an elongated tract of land shaded pink, then a narrow strip of land and finally an area marked off with red lines as representing the plaintiffs’ leased land. I accept Bannister’s plan and survey subject to the observation that the red lines have been superimposed on it without any bearings to give but an approximate idea of the demarcations of the subject-matter of the plaintiffs’ lease.

Davis’s view is that advocated by the plaintiffs’ counsel. He said that the ordinary definition of a beach was the land between low and high water marks, that the shell beach did not include the pink portion on Exhibit “E¹” and that the defendants would have no need to enter this portion to carry out operations. He said that the officers of his department had a clear idea of the meaning of beaches but that there was a confusion on this subject in the minds of the second and third defendants. It was only comparatively recently that the second defendant was insisting that the term “shell beaches” covered all shell deposits, including those further inland. Further, according to Davis, there was deposit of shell between the low and high water marks.

The second defendant said that he understood the word “beach” to mean the debris that was deposited by the sea at the time of high tides and high tempests. While it is true that one of the meanings of the word “beach” to be found in the SHORTER OXFORD ENGLISH DICTIONARY is “the water-worn pebbles of the seashore”, I have no hesitation in rejecting the second defendant’s definition in the light of the context in which the term is used in the first defendant’s licence, especially in clause 4. How can the defendants remove gravel, shingle, sand, etc., from the beach unless the beach is something else than what is being taken away?

Cole, who was called by the defendants as a witness, frankly conceded that the accepted meaning of “beach” was the area between high water mark and low water mark but maintained that “shell beaches” were synonymous with shell deposits. He explained that shell deposits were created by wave action and were unstable because of the configuration of the coast and the trend of currents. The sea coast was affected by erosion and alluvion. Cole’s view was that the

right to collect shells was from the storm crest, which coincided with the high water mark, up to a point 50 feet inland because to mine nearer the sea would cause a destruction of the land by the sea. Both he and the second defendant regarded the pink portion of Exhibit "E"¹ as the shell beach. In fact the second defendant said that to mine within 50 feet inland of high water mark would destroy the barrier against the sea.

Attractive as the arguments of Cole and the second defendant may be, I cannot see how the term "shell beach" can refer to an entirely different area from that connoted by the word "beach". The prefatory noun "shell", which has the function of an adjective, can only limit, qualify or describe the word "beach" but cannot extend or change its meaning. If the word "beach" means the area between the tidal marks, the term "shell beach" cannot indicate an area fifty feet away from the beach but may convey the notion of a beach where shells are found. It therefore follows as a matter of logic that the pink portion, which lies further inland than the high water line, cannot be a shell beach.

Returning to the SHORTER OXFORD ENGLISH DICTIONARY, I observe that the other meanings assigned to "beach" are "the shore of the sea, the strand: *specifically*, the part lying between high-and low-water-mark". When I look at the meaning of "shore", I see among other meanings the following:—"in *Law*, usually the tract lying between ordinary high and low water mark." The meaning of "strand" is "that part of a shore which lies between the tide-marks".

Among *res communes* in Roman law was the sea-shore to the highest winter floods. In modern Roman-Dutch law, the sea-shore is the property of the Crown and extends to the same distance on the land side. In South Africa the sea-shore means by statute "the land between low-water mark and high-water mark".

A good definition of the foreshore in English law is to be found at p. 22 of COULSON AND FORBES ON WATERS AND LAND DRAINAGE (6th edn.), which reads as follows:—

"The sea-shore or foreshore may be defined as that portion of the land which is alternatively covered and left dry by the ordinary flux and reflux of the tides. Although, in common parlance, the word shore has often a more extensive meaning—taking in all that extensive belt of waste ground or strand, shingles, and rock liable to the action of every kind of tide—yet it is now finally settled that in legal intendment no more of that unclaimed tract is sea-shore or foreshore than that portion which lies below high water mark of ordinary tides."

The cases of *A.-G. v. Chambers* (1854), de Gex, M. & G. 206, and *Mellor v. Walmsley*, [1905] 2 Ch. 164, are helpful as to the meaning of foreshore. In the former case it was held that in the absence of all evidence of particular usage, the extent of the right of the Crown to the seashore landwards was *prima facie* limited by the line of the

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medium high tide between the springs and the neaps. In the latter case the meaning of the word “seashore” was discussed and it was treated as ordinarily equivalent to foreshore.

It is significant that when one looks at the learned text book of COULSON AND FORBES for the word “beach” in the index, one is referred to the word “foreshore”. In the case of *Musselburgh Magistrates v. Musselburgh Real Estate Co.*, 42 Sc. L.R. 247, it was said by two judges that “sea beach” was probably, in its general acceptance, synonymous with “sea shore” or “foreshore”. But this report was not available to me and I rely on a reference in STROUD’S JUDICIAL DICTIONARY.

Holding as I do that “beach” and “foreshore” are synonymous and that the term “shell beach” refers to the area containing shells between, the high-and-low water marks, I find that the pink portion on Exhibit “E¹” falls not only outside the area provisionally leased to the plaintiffs, as has been indicated by the Government surveyor Bannister, but also beyond the tract specified in the defendants’ licence. The first defendant company, its managing director, who is the second defendant, and its agent and licensee, who is the third defendant, are ordinarily entitled to collect shells only from the beach within a distance of 50 feet to the seaward of the high water line. The plaintiffs have alleged and proved to my satisfaction trespass by the defendants in relation to the pink strip only. Despite the righteous indignation so readily manifested by all parties, it is ironical to observe that neither side has a valid and lawful title to the pink strip.

What then is the plaintiffs’ position? They have undoubtedly been in possession at least since early 1959 of the pink portion shown on Exhibit “E1”. They discovered this as virgin land and part of the surrounding jungle and they cleared, broke in and cultivated it with much labour and at great personal expense. I believe and accept their evidence as to the extent of their cultivation and occupation and that their possession was much earlier in time than the defendants. They first planted in purported exercise of their rights under their original provisional lease and later retained their agricultural holdings on the pink strip despite repeated notices from the Commissioner of Lands and Mines. But it is no defence to a wrongdoer that the plaintiffs’ possession is unlawful. The fact of possession is sufficient. The defendants had no authority either written or oral from the Commissioner of Lands and Lines to invade or damage the plaintiffs’ camps, to make use of their provisions, to reap or damage their cultivations, to exclude them altogether from the pink strip, to prevent them from landing from the sea in order to pass their camps or to remove and use their tools and equipment. Such high-handed conduct, of which the defendants are manifestly guilty, cannot be condoned. Misguided they might have been but even off these lonely shores the Queen’s peace must be preserved and inhabitants of this country may not take the law into their own hands.

The plaintiffs claim, firstly, an injunction to restrain the defendants from entering upon their lands, the subject-matter of their provisional lease. This relief they cannot obtain because no such trespass took place or was threatened. The plaintiffs are however entitled to an injunction restraining the defendants from trespassing on or interfering with their plants and cultivations at Turtle Beach and I grant this order.

Bearing in mind that there is no claim for trespass to or conversion of goods, I cannot award special damages on this score but I award damages for trespass to the plaintiffs' crops, cultivations and land and conversion of their crops and cultivations, which I assess at \$1,500.00. This amount includes special damages for the wrongful conversion of a punt load of pumpkins, sweet potatoes and water melons, belonging to the plaintiffs, which were reaped from the pink strip by the defendants and transported by sea to Georgetown. No specific value was put on the plaintiffs' losses but I feel that a reasonable estimate of the lost crops is \$500.00.

I may say that except on the question of quantum of damages, which is in some particulars inflated, I accept and believe the evidence of the plaintiffs and their witnesses, wherever it is in conflict with that adduced on behalf of the defendants.

I wish to sound a note of warning to the plaintiffs and to offer a word of advice to the defendants. The plaintiffs should withdraw from any area to which they are not legally entitled. The defendants should apply to the Commissioner of Lands and Mines for a wider area to include the shell deposits that fall outside of the beach.

There will therefore be judgment for the plaintiffs to the extent already stated with costs to be taxed, certified fit for two counsel. Stay of execution for six weeks is hereby granted.

Judgment for the plaintiffs.

Solicitors: *D. Dial* (for the plaintiffs); *H. A. Bruton* (for the defendants).

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[In the Full Court, on appeal from the magistrate's court for the Berbice Judicial District (Fraser, J., and Khan, J., (ag.)) December 14, February 16, 1962.]

Criminal law—Sending or delivering an obscene writing—Separate offences of sending or delivering—Meaning of obscene writing—Summary Jurisdiction (Offences) Ordinance, Cap. 14, s. 141 (e).

Criminal procedure—Separate offences created by same provision—Charge amended after plea but before evidence by substituting one offence for the other—Necessity for further plea—Power of Full Court to substitute one offence for the other in complaint and conviction—Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s. 94—Summary Jurisdiction (Appeals) Ordinance, Cap. 17, s. 28.

Section 141 (c) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14, makes it an offence to send or deliver to any person any obscene writing. The appellant was charged with sending an obscene writing. After she had pleaded not guilty but before any evidence was led, the magistrate at the request of the prosecution amended the charge by substituting the offence of delivering. No fresh plea was taken but the defence was offered an adjournment which was declined on the ground that the appellant was not prejudiced. The appellant was convicted of delivering although the evidence disclosed a sending. On appeal —

Held: (i) the accepted test of obscenity is whether the tendency of the matter charged as obscenity is to deprave those whose minds are open to such material, and into those hands a publication of this sort may fall, *R. v. Hicklin* (1868), 11 Cox C.C. 19, applied;

(ii) but this test is inapplicable to a summary prosecution for sending or delivering an obscene writing. In this context an obscene writing is one which is either offensive to decency or modesty or expresses or suggests lewd thoughts; or offensive to the sense or the mind and is disgusting or filthy in expression;

(iii) section 141 (c) of Cap. 14 creates two offences—one of sending an obscene writing and the other of delivering an obscene writing. The amendment was competently made by the magistrate but the effect was to make a fresh complaint to which a plea should have been taken notwithstanding that a plea had already been made to the original complaint;

(iv) the failure to take a fresh plea from the appellant was however immaterial since her defence was conducted on the basis of a plea of not guilty and she was in no way prejudiced by the failure.

(v) by virtue of s. 218 (a) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, the complaint and conviction would be amended by the Full Court by substituting the word “sent” for the word “delivered” appearing therein.

Appeal dismissed.

[**Editorial Note:** Reversed on appeal. See later herein]

H. D. Hoyte for the appellant.

J. C. Gonsalves-Sabola, Crown Counsel, for the respondent.

Judgment of the Court: The appellant, Magdalene Budhu, was charged summarily before a magistrate for sending to Christina Mohan a letter containing obscene writing contrary to s. 141 (c) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14. At the hearing before the magistrate the complaint was amended by substituting the offence of “delivering” an obscene writing for that of “sending” an obscene writing as originally charged. In the order of conviction the appellant was apparently convicted for the offence of delivering an obscene writing and was fined \$35.00 and ordered to pay \$4.50 costs. She appealed against that conviction on four grounds.

At the hearing before this court counsel stated without reservation that the writing was repulsive and lewd but submitted that however morally indefensible it may be it did not amount in law to an obscene writing. He relied upon the test laid down by COCKBURN, C.J., in *R. v. Hicklin* (1868), 11 Cox C.C. 19, and stated at p. 26 as follows:

“ . . . the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”

This test is accepted as authoritative. Lord GODDARD, C.J., referred to it as a classic definition in delivering the judgment of the Court

of Criminal Appeal in the case of *R. v. Reiter*, [1954] 1 All E.R. 741. It has been given statutory form in the Obscene Publication Act, 1959 (7 and 8 Eliz. 2, c. 66), s. 1 of which declares that:—

“(1) For the purposes of this Act an article shall be deemed to be obscene if its effect . . . is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.”

For the reasons which we are about to give, however, we do not think that the test is applicable to a summary prosecution for sending or delivering an obscene writing.

Hicklin's case was an appeal against an order made under the provisions of the Obscene Publications Act, 1857, which was an act passed for more effectually preventing the sale of obscene books, pictures, prints and other articles. The act did not create any offence. It merely prescribed the powers of a magistrate where obscene writings were kept in certain places for sale or publication. At common law the publication of obscene or indecent matter was an indictable misdemeanour—see 1 Hawkins, c. 5, and 4 Bl. Comm. 65. *Reiter's* case was an indictment for publishing an obscene libel. The position seems to be that in cases of publication of obscene matter the accepted definition of obscenity is that laid down by COCKBURN, C.J., in *R. v. Hicklin* which must be considered as authoritative with reference to the publication of obscene matter.

In British Guiana the offence of publishing or exhibiting obscene matter is an indictable offence under the provisions of s. 352 of the Criminal Law (Offences) Ordinance, Cap. 10, and is punishable by imprisonment for two years. In a prosecution under that section the definition of obscenity framed in *Hicklin's* case would be applicable.

The prosecution in this case was not for publishing or exhibiting obscene matter. It was a summary prosecution for delivering (or sending) an obscene writing. The offence is created in a compendious section dealing with breaches of the peace and is set out as follows:—

“141. Every one who —

(c) sends or delivers to any person any obscene writing, engraving, picture, or other representation;

shall, on conviction thereof, be liable to a penalty of fifty dollars or to imprisonment for two months.”

This offence is similar to that created by ss. 3 and 4 of the Indecent Advertisements Act, 1889, (52 and 53 Vict., c. 18) by which it is made a summary offence for anyone to deliver or send any inhabitant or to any person in or passing along any street, etc., any picture or printed or written matter which is of an indecent or obscene nature.

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Two earlier statutes dealt with cognate offences. The Vagrancy Act, 1824, dealt with wilful exposure of an indecent exhibition in a public place; and the Town Police Clauses Act, 1847, dealt with exhibiting to public view any profane, indecent or obscene representation in a public place to the annoyance of residents or passengers.

The question therefore is what is the meaning of obscene in the context of s. 141 (c) of Cap. 14. We have seen no case in which the test of obscenity in *Hicklin's* case was applied to prosecutions under the Indecent Advertisements Act, 1889. The reason is, no doubt, that that test is applicable to the publishing, selling or exhibiting of obscene matter tending to corrupt public morals which is indictable and not to the summary offence of sending or delivering an obscene writing. As far as we have been able to ascertain the words "obscene writing" or "obscene nature" in the legislation creating the summary offences have not received judicial interpretation and, in our judgment, the meaning to be ascribed is that which is understood in common language—*A.G. v. Winstanley* (1931), 2 D. & Cl. 302; CRAIES ON STATUTE LAW, (3rd Edition) Chapter 5. Applying this principle and adopting the definition given in the SHORTER OXFORD ENGLISH DICTIONARY, an obscene writing is one which is either offensive to decency or modesty and expresses or suggests lewd thoughts; or offensive to the sense or the mind and is disgusting or filthy in expression. We have read the document alleged to have come from the appellant and it appears to us that a considerable portion of its contents is of a most shockingly filthy description, is highly offensive and disgusting.

We now turn to the argument that the magistrate committed a specific illegality in that he amended the particulars of offence to charge the appellant with delivering a letter containing obscene writing after the appellant had pleaded not guilty to a charge of sending a letter containing obscene writing. It was submitted that the magistrate had no jurisdiction to amend the charge before evidence was led and that, in any event, the defendant should have been given the opportunity to plead to the amended charge. It appears that the case was called on 23rd March, 1961, when the defendant pleaded not guilty to a charge of sending an obscene writing. No evidence was led on that day. On 22nd June, before evidence was led the magistrate on the application of the prosecutor amended the charge to substitute an allegation of delivering an obscene writing. Counsel's objection to this amendment was not allowed. The case then proceeded on the original plea of not guilty.

It seems to us that s. 141 (c) of Cap. 14 creates two offences—one of sending an obscene writing and the other of delivering an obscene writing. A complaint in a summary prosecution need not be in writing when made but the clerk of the court is required to reduce it to writing—see s. 7 (1) of Cap. 15. This must be done before a summons is issued under s. 10 (1). After service of the summons, which is only for the purpose of obtaining the attendance in court of a defendant, the court may then proceed to hear the complaint under

s. 26 if both parties appear. The court is required by s. 27 to ask whether the defendant is guilty or not guilty and if a plea of not guilty is made the court shall then proceed to hear both sides of the case. It must, we think, be necessarily implied that the court is required to hear the evidence on the complaint to which the defendant has pleaded. Although there is no specific provision in the Ordinance, there seems to be no reason why a complaint cannot be amended to plead a different offence before evidence is led provided this is done in the presence of the defendant. But the effect of this is to make a fresh complaint to which a plea should be taken notwithstanding a plea having been already made to the original complaint.

The question is—whether the omission to ask the defendant in this case to plead to the new complaint is of so grave a nature as may be said to have substantially affected the merits of the case. It is not suggested that the defendant may have pleaded guilty to the new complaint. Notwithstanding the objection taken, the defendant's case was conducted on the basis of a plea of not guilty and it is in these circumstances inconceivable that the defendant would have made a plea other than that of not guilty. If this assumption is right then the matter must turn on the factor of prejudice. Even though the defendant was in personal attendance she would nevertheless have been entitled to an adjournment to consider or prepare her defence to the new complaint of delivering an obscene writing. It is the case, however, that counsel appearing for the defendant waived his right to an adjournment on the ground that the defendant was not prejudiced. We are therefore unable to hold that, in the circumstances of this case, the omission to require the defendant to plead to the new charge was such an illegality that substantially affected the merits of the case as would satisfy the provisions of s. 9 (k) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17. We wish to make it clear, however, that omissions of the kind which occurred in this case may, in certain circumstances, substantially affect the merits of a case and for this reason magistrates may be well advised to avoid them.

The fourth ground of appeal is that the magistrate's decision could not be supported having regard to the evidence. The appellant was convicted for delivering an obscene writing. The evidence does not support this. If believed, the evidence disclosed that the appellant was guilty of sending an obscene writing. There is no doubt that if on a charge for delivering the evidence disclosed a sending, the magistrate is empowered by the provisions of s. 94 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, to amend the charge to allege the offence of sending instead of delivering having regard to the fact that both offences are created by the same paragraph of the Ordinance, viz: paragraph (c) of s. 141 of Cap. 14. We have already said that the charge as amended on 22nd June, 1961, must be treated as a new complaint to which the appellant should have been required to plead. If this view of the law is correct it follows, therefore, that if there is a variance between the complaint and the evidence that the magistrate could have amended the charge accordingly. In our judgment he ought to have done so but his omission to do so is not fatal. By virtue of s. 28 (a) of the Summary Juris-

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diction (Appeals) Ordinance, Cap. 17, the Full Court has power to make any order which the magistrate ought to have made and we consider this a proper case for the exercise of that power. We therefore order that the word “delivered” appearing in the complaint and in the order of conviction be deleted and that the word “sent” be substituted. Having made that order we wish to add only that in our opinion there was ample evidence to support a conviction for the offence of sending an obscene writing. Before dismissing this appeal we wish to express our appreciation for the manner in which counsel on both sides conducted their cases.

This appeal is dismissed with costs to the respondent fixed in the sum of \$25. Subject to the amendment ordered the conviction and order of the magistrate are affirmed.

Appeal dismissed.

PARK v. NICODIMUS AND ANOTHER

[Supreme Court (Date, J.) June 7, 14, 28, 1962.]

Rice lands—Licence—Co-owners—Arrangements for each co-owner to use land one year at a time—Occupying co-owner purported to rent land to stranger for rice planting—Whether tenancy or mere licence created—Whether the purported tenant entitled to protection of Rice Farmers (Security of Tenure) Ordinance, 1956, s. 3.

P., together with N. and others, owned a certain piece of rice land in undivided shares. By arrangement among them each co-owner would use the land for one year at a time. If the co-owner who was entitled to use the land could not make use of it he or she would get a stranger to occupy and cultivate it for the year in consideration of a monetary payment (referred to as “rent”) to that co-owner. N., who was the co-owner entitled to occupy the land in 1957, “rented” it to the plaintiff, a stranger, for \$60 for that year and later purported to extend this “tenancy” to 1958 also. In the meanwhile, the co-owner who was entitled to use the land in 1958 rented it out for that year to D. The plaintiff alleged that D. trespassed on the land in 1958 and accordingly sued N. and D. for damages, his contention being that he held a tenancy, and not a mere licence, and that accordingly his occupation could not be terminated except as provided by s. 3 of the Rice Farmers (Security of Tenure) Ordinance, 1956.

Held: (i) exclusive occupation of property is no longer regarded as inconsistent with the occupier being a licensee and not a tenant. Whether or not a relationship of landlord and tenant has been created depends on whether the conduct of the parties indicates an intention that the occupier was to have an interest in the land or merely a personal privilege without such an interest;

(ii) the description of the payments made for the occupation of land as rent is not decisive as to the nature of the occupancy;

(iii) N. could not pass on to the plaintiff more than he himself had at the material time, namely, the privilege of occupying and using the land in 1957 to the exclusion of all other persons;

(iv) the plaintiff’s occupation of the land in 1957 was as a licensee and not as a tenant and he was therefore not entitled to the protection of s. 3 of the Ordinance.

Judgment for the defendant.

K. Prasad for the plaintiff.

Dwarka Dyal for the second named defendant.

DATE, J.: This is an action for trespass and it concerns two parcels of undivided rice lands comprising altogether about 3 or 3½ acres at Alness Village, Corntyne, in the county of Berbice. The land originally belonged to Alfred Park who died in 1927. By transport No. 427 dated July 25, 1931, it was transported by S. S. M. Insanally (the officer appointed under the District Lands Partition and Re-Allotment Ordinance for the partition and re-allotment of Plantation Alness) to the first defendant (Charles Nicodimus) and George Wiggins for one undivided eighth, and to Kate Matthews (nee Park), Jane Park, Daniel Park, Amy Lucius (now Roberts), Nora Benjamin, Hamblet Park and Wilson Park for seven undivided eighths.

In accordance with a domestic or family arrangement made between the co-owners they occupied the land in turn, each using it for one year at a time and being responsible for the payment of the rates for that year. When the turn of a co-owner came round if it was not convenient for him or her to cultivate the land himself or herself, he or she would get a stranger to occupy and cultivate it for the year. The sum paid by the stranger for the use of the land was, it would appear, usually referred to as "rent". Daniel Park, the eldest of the co-owners, was the one who notified the others when it was their turn to use the land. He was accepted by the others as a sort of manager for the land.

The co-owner entitled to the use of the land for the 1957 crop year was the first defendant. He elected not to cultivate it himself and "rented" it to the plaintiff for the year for \$60.00. The crop reaped by the plaintiff was poor owing to drought. He discussed the matter with the first defendant and the latter took it upon himself to tell the plaintiff that if the plaintiff paid the rates for that year he could have the use of the land for the ensuing year (1958) at a similar rental, *i.e.* \$60.00. On December 16, 1957, the plaintiff paid the rates, which amounted to \$42.00. That same day the first defendant gave the plaintiff a receipt for \$52.00 "in full payment for three acres of rice lands at Alness Village" and another for \$9.00 "as advance on \$60.00 for the use of 3 acres of rice lands at Alness Village, for the year ending December, 1958."

In respect of the 1957 "rent" the sum of \$8.00 had been paid by the plaintiff to the first defendant before December 16, 1957.

According to the first defendant, Daniel Park was a consenting party to the arrangement for the occupation of the land by the plaintiff in 1958. This I do not believe. Unfortunately Daniel Park died last year, so the court has not had the advantage of this testimony. But in addition to the evidence given by the second defendant and Amy Roberts, there are two circumstances that stand out and stamp the first defendant's testimony on this point as untrue. Before I deal with these circumstances let me explain that the second defendant's case is that on November 28, 1957, he agreed with Daniel Park, who was acting on behalf of Amy Roberts, a co-owner, to rent the land in question for the year 1958 and that very day paid to Daniel Park the sum of \$23.00 on account. I am quite satisfied that under the family arrangement it was Amy Roberts' turn to use the land in 1958 and that she authorised Daniel Park to make the arrangement with the second defendant. Subsequently she herself saw the second defendant and confirmed the arrangement.

The two circumstances which, in the unhappy absence of Daniel Park himself, go to show that the first defendant ought not to be believed when he said that Daniel Park was a party to the agreement to let the plaintiff have the use of the land in 1958 are these: (1) the receipt issued by Daniel Park for the payment by the second defendant of the \$23.00 towards the "rent" for 1958 is dated November 28.

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1957—that is to say, 19 days prior to the alleged agreement with and payments by the plaintiff; (2) the first defendant in his evidence said:

“One Sunday morning in 1958 the plaintiff came to me and told me that the second defendant said that Daniel Park was renting him the rice field. I went to my uncle Daniel. Daniel said he was eldest and the manager. He said it was his father’s land and he was manager My uncle Daniel agreed that he had rented the land to the second defendant.”

It is significant that when his uncle made those statements the first defendant said nothing to the effect that his uncle had previously consented to the arrangement for the plaintiff to use the land in 1958. Further, there is no suggestion that Daniel Park was at the time suffering from loss of memory or any other mental incapacity.

In my opinion the evidence taken as a whole shows that the first defendant had no authority to enter into any agreement with the plaintiff whereby the latter would occupy the land in 1958.

The plaintiff testified that he (through his servant or agent) ploughed and broadcast padi on 2½ acres of the land in December, 1957, for the 1958 crop and was in 1958 prevented by the second defendant from ploughing the other half acre. He said he subsequently found that half acre ploughed and he broadcast padi on it.

I am not persuaded that the plaintiff ploughed or broadcast padi on any part of the land in question for the 1958 crop. The evidence of his witness, Saduboy, who is supposed to have done the ploughing, was inconsistent with his own as to the rate charged for the ploughing. The relevant entries in the account book produced by Saduboy appeared to me to have been specially made for the purposes of this case. I was not favourably impressed by the demeanour of either the plaintiff or Saduboy in the witness-box. Then there is the evidence of the first defendant who said:

“I do not know that plaintiff ploughed the land in December, 1957. In 1958 he came and told me that the second defendant had stopped him. He said that when he went to plough the second defendant stopped him and told him that Daniel Park had rented the land to him. When plaintiff came and complained he said: ‘Charles, what kind of arrangement ah you make? Ah you rent the land give me for 1958 and when I go and plough the bed Davis stop me say Daniel rent the bed to him.’ After that he never complained to me. He never told me if he had ploughed or if he had shied.”

Though Charles Nicodimus is also a defendant in these proceedings it was obvious from the manner in which he gave his evidence that he was bent on assisting the plaintiff as much as possible. Had the plaintiff actually ploughed or broadcast I think he would have told the first defendant so.

In the circumstances I accept the second defendant's allegation that it was he who did all the ploughing and broadcasting in respect of the 1958 crop, which he reaped.

I also disbelieve the plaintiff's testimony that he did not know that the land belonged to several persons, including Daniel Park, and that the first time he got to know that was when the second defendant reaped the crop in August, 1958. The receipts (exhibits 'B1' and 'B2') which the plaintiff obtained from the Ulverston-Alness-Salton Local Authority for the payment of the rates on December 16, 1957, describe the land as the property of Nicodimus and others, and the plaintiff said that that very day he carried the receipts to the first defendant who took him to Daniel Park and told the latter about the receipts. Clearly that exercise would have been pointless unless Daniel Park had some interest in the land.

In the statement of claim filed by the plaintiff he claimed (a) a declaration that he is a tenant of the first defendant of the land in dispute, (b) \$770.50 damages for trespass (that sum representing the value of the padi he estimated he would have got from the 1958 crop), and (c) an injunction. At the trial, however, he intimated that he no longer wanted possession of the land and abandoned claims (a) and (c).

The main argument advanced by the plaintiff's counsel was that the plaintiff's occupation of the land in respect of the 1957 crop was a tenancy and not a licence and the plaintiff was therefore entitled to the protection of the Rice Farmers (Security of Tenure) Ordinance, 1957, s. 3 of which provides:

"3. Anything in any law or in any agreement in respect of the letting of rice lands to the contrary notwithstanding every agreement of tenancy, whether written or oral, shall be deemed to be an agreement of tenancy from year to year and no such agreement, whether made before or after the commencement of this Ordinance, shall be terminated by the landlord or toy the tenant, except as in this Ordinance provided."

This submission was based on two grounds: first, that the plaintiff was in exclusive occupation of the land in 1957; secondly, that the agreement between him and the first defendant provided for the payment of "rent" for such occupation.

As regards the first ground, the modern authorities, *e.g.*, *Cobb v. Lane*, [1952] 1 All E.R. 1199, show clearly that exclusive occupation of property is no longer regarded as inconsistent with the occupier being a licensee and not a tenant, and that whether or not a relationship of landlord and tenant has been created depends on the intention of the parties, in the ascertainment of which the court must consider the circumstances in which the person claiming to be a tenant went into occupation and whether the conduct of the parties indicates that the occupier was intended to have an interest in the land or merely a personal privilege without such interest. A lucid exposition of the law is to be found in the judgment of DENNING, L.J., in *Errington v. Errington*, [1952] 1 All E.R. 154, 155:

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“In distinguishing between [a tenancy and a licence], a crucial test has sometimes been supposed to be whether the occupier has exclusive possession or not. If he was let into exclusive possession, he was said to be a tenant, albeit only a tenant at will whereas if he had not exclusive possession he was only a licensee This test has, however, often given rise to misgivings because it may not correspond to realities. A good instance is *Howard v. Shaw* (1841), 8 M. & W. 118, where a person was let into exclusive possession under a contract for purchase. ALDERSON, B., said that he was a tenant at will, and PARKE, B., with some difficulty agreed with him, but Lord ABINGER, C.B., said (8 M. & W. 122):

‘While the defendant occupied under a valid contract for the sale of the property to him, he could not be considered as a tenant.’

Now, after the lapse of a hundred years, it has become clear that the view of Lord ABINGER was right. The test of exclusive possession is by no means decisive. The first case to show this was *Booker v. Palmer*, [1942] 2 All E.R. 674, where an owner gave some evacuees permission to stay in a cottage for the duration of the war, rent free. This court held that the evacuees were not tenants, but only licensees. Lord GREENE, M.R., said ([1942] 2 All E.R. 677):

‘To suggest there is an intention there to create a relationship of landlord and tenant appears to me to be quite impossible. There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind.’

Those emphatic words have had their effect.

We have had many instances lately of occupiers in exclusive possession who have been held to be not tenants, but only licensees

The result of all these cases is that, although a person who is let into exclusive possession is, *prima facie*, to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee.”

As regards the other limb of the argument urged by counsel for the plaintiff, again the authorities reveal that the description of the payments made for the occupation of land as rent is not decisive as to the nature of the occupancy. In *Ministry of Agriculture and Fish-*

eries v. Matthews, [1949] 2 All E.R. 724, for instance, the words “tenant”, “rent”, “additional rent”, “during his tenancy”, “good tenantable repair”, “shall not assign or sub-let”, and “non-payment of rent” were all used in the agreement in writing entered into by the parties. Nevertheless it was held that the agreement was not a lease but an agreement for leave and licence to use the land. In the course of his judgment CASSELS, J., said ([1949] 2 All E.R. 727):

“The first issue to be decided is: What is the nature of this agreement? Is it a tenancy agreement or is it an agreement merely giving to the defendant leave and licence to be in occupation of this land? At first reading, the words and phrases in use, and, I think, unfortunately in use, in this document might easily lead one to regard it as a tenancy agreement It almost seems as if the draftsman has left nothing out which could make it look more like a tenancy agreement. The Minister, of course, has only such powers as the regulation confers on him. He is not the owner of the land; he has no interest in the land: and, therefore, he cannot grant a lease. He merely has possession through the agricultural committee, under the regulation. He can only pass on what he has himself, namely, the use of the land.”

In the recent case of *Kassim v. Town Clerk of Georgetown* (at p. 57 herein), the main question for determination was whether the occupier of a stall in the Stabroek Market was a tenant or a licensee of the Georgetown Town Council. The terms and conditions for the letting of stalls in the Market are contained in the City (Market) By-Laws made under the provisions of s. 206 of the Georgetown Town Council Ordinance, Cap. 152. The By-laws themselves refer to the occupant of a stall as a tenant and the amount to be charged for the occupation of a stall as rent. The occupation of a stallholder is exclusive to all other persons. There is provision against subletting. After examining the circumstances under which the Stabroek Market came to be vested in the Georgetown Town Council and pointing out that in England the relationship between the occupier of a stall and the market owner would be that of licensee and licensor despite the fact that the stallholder has exclusive possession of the soil on which the goods are exposed for sale, Luckhoo, C.J., said this:

“Does the use of the terms ‘tenant’ and ‘rent’ in the By-laws make the relationship any different in British Guiana? It is well settled that in determining whether an agreement creates between the parties the relationship of landlord and tenant or that of licensor and licensee the decisive consideration is the intention of the parties (23 HALSBURY’S LAWS, 3rd Edition, p. 427, para. 1022). In the present case the relationship is determined by the provisions of a statute In the construction of statutes the meaning to be given to terms contained therein is governed by the intention of the Legislature By-law 15 provides for transfer of ‘tenancies’ of stalls so that it is contemplated that a stallholder has some assignable interest. It is in the context of that

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By-law that the provision relating to sub-letting must be viewed. In my opinion the plaintiff holds under a contractual licence which is assignable by virtue of the provisions of the By-laws.”

The broad principles laid down in the cases cited are clear and are, I think, applicable to the instant case. The first defendant could not pass on to the plaintiff more than he himself had at the material time, namely, the privilege of occupying and using the land to the exclusion of all other persons for the 1957 crop year in accordance with the family arrangement to which he had agreed in lieu of his rights as owner of one undivided eighth part or share in the land with George Wiggins. Clearly he could not without the consent of the other co-owners transfer to the plaintiff more than he had under either the transport or the family agreement.

In my opinion the only proper inference to be drawn from the evidence accepted by the court is that the plaintiff's occupation of the land in 1957 was as licensee and not as tenant. He is therefore not entitled to the protection of s. 3 of the Rice Farmers (Security of Tenure) Ordinance, 1957.

The question that now arises is whether the plaintiff is in these circumstances entitled to judgment against the first defendant in this action. I think not. The action is an action for damages for trespass, and the court finds that there was no trespass. Any remedy to which the plaintiff might be entitled as against the first defendant would, it seems, have to lie in contract. An order for costs could, however, be made against the first defendant in these proceedings; but in considering that aspect of the matter the plaintiff's conduct should, I think, also be taken into account. He has wasted a lot of time and thrown away a considerable amount of costs in connection with his false allegation that he ploughed 2½ acres and broadcast the whole 3 acres of the land for the 1958 crop. He should therefore be deprived of a substantial part of the costs that he would otherwise have been able to recover from the first defendant.

For the reasons given, this action is dismissed with costs in favour of the second defendant to be paid by the plaintiff, certified fit for counsel. The first defendant must pay to the plaintiff three-quarters of the costs paid by the plaintiff to the second defendant.

Judgment for the defendants.

Solicitors: *A. Vanier* (for the plaintiff); *Dabi Dial* (for the second-named defendant).

BOARD OF COMMISSIONERS OF CURRENCY. BRITISH
CARIBBEAN TERRITORIES (EASTERN GROUP)
v. A.-G. AND D'AGUIAR

[Supreme Court—In Chambers (Persaud, J.) May 18, 19, 21, June 30, 1962]

Statutory body—Currency Board—Authority to issue currency, employ officers and institute criminal proceedings—No statutory provisions expressly incorporating Board or enabling it to sue and be sued—Whether Board suable—Currency Ordinance, 1959.

Practice and procedure—Authority to solicitor—Action purportedly instituted by Currency Board—Authority to solicitor signed by member of Board—Member not authorised by statute to institute proceedings—No evidence that proceedings in fact authorised by Board—Validity of authority to solicitor.

Construction summons—Currency Board—Statutory duty to convert currency, with power to charge commission—Application by Board to determine whether in particular circumstances it may refuse a demand for conversion—Whether any legal right claimed—Competence of summons.

The Currency Ordinance, 1950, gave the force of law to an Agreement setting up a Currency Board with the right to issue currency in certain British territories in the Eastern Caribbean, and with related powers and duties including the right to employ officers and servants and power to institute criminal proceedings. There was, however, no provision expressly incorporating the Board or enabling it to sue and be sued.

Section 7 of the Ordinance required the Board on demand by the citizen to convert into sterling such amount of its currency as he might present, subject to the right of the Board to charge a commission. The Board refused a demand by the second-named defendant on the ground that he had failed to produce an exchange control permission from the Minister of Finance about the legal necessity for which the second-named defendant and the Government were in dispute. The Board thereupon brought a construction summons to determine the validity of the legislation which in the view of the Government required the permission, and to determine whether the Board was entitled to refuse the second-named defendant's demand for conversion.

A construction summons may be taken out under O. 42, r. 1, by "any person claiming to be interested under a deed, will or other written instrument", and under O. 42, r. 2, by "any person claiming any legal or equitable right (depending) upon a question of construction of an Ordinance"

The Board consisted of an executive commissioner and five other members. Its duties were to be discharged by no less than three of its members. The executive commissioner, by whom the authority to solicitor was signed, had no statutory authority to institute proceedings and there was no evidence on record to show that the Board had in fact authorised the proceedings.

Held: (i) although no express words are used in the Ordinance, the various provisions indicate that the Board is a corporate body, and therefore can sue and be sued;

(ii) the authority to solicitor was fatally bad;

(iii) to refuse to convert is not a right within the meaning of O. 42, r. 2; and though the Board had an interest *in* the pronouncement of the validity

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or otherwise of the impugned legislation it had no interest *under* the Ordinance or the Agreement or the impugned legislation.

Judgment for the defendants.

Wharton, Q.C. (of the Bar of Trinidad and Tobago), for the plaintiff.

Dr. F. H. W. Ramsahoye, A.-G., and *M. Shahabuddeen, S.-G.*, for the first-named defendant.

J. H. S. Elliott, Q.C., for the second-named defendant.

PERSAUD, J.: This is an originating summons taken out by the plaintiffs (hereinafter referred to as the Board) for the determination of the following questions. The plaintiffs also seek a declaration of the rights of all parties concerned; that provision be made for the costs of this application, and for such further or other relief as the court shall deem fit. The questions as set out in the summons are—

1. whether upon the true construction of the Currency Ordinance, 1959 (No. 8. of 1959), the Governor's Order of the 18th day of December, 1961—The Exchange Control (Scheduled Territories) Order, 1961 (No. 81 of 1961) purportedly made under sub-s. (4) (b) of s. 3 of the Exchange Control Ordinance, 1958 (No. 28 of 1958), was or is, *ultra vires* and invalid and therefore null and void and of no effect.
2. whether in the circumstances the plaintiff is, or would be, lawfully entitled to refuse a demand made by the defendant D'Aguiar (without his first obtaining the permission of the Governor or the Minister of Finance) dated the 12th April, 1962 (or any other similar demand or demands) for conversion into sterling payable in London of the sum of \$25,000.00 duly tendered under and by virtue of the provisions of s. 7 of the Currency Ordinance (No. 8 of 1959).

The Exchange Control Ordinance, 1958, was enacted on the 1st November, 1958, and brought into force with effect from the 1st September, 1959, and has for its objects the conferring of powers, and imposition of duties and restrictions in relation to gold, currency, payments, securities, debts and the import, export, transfer and settlement of property, and for purposes connected with the matters aforesaid. The Currency Ordinance, 1959, was enacted on the 16th May, 1959, and came into operation on that day, but giving the Agreement which appears in the schedule to the ordinance the force of law as from the 1st July, 1956.

I shall first attempt to consider the preliminary objections raised by the Solicitor General, and the answers made thereto.

The first objection is that the Board is not a legal *persona*, and therefore not competent to bring these proceedings. Under article 1 (1) of the Agreement in the schedule to the Currency Ordinance,

1959 (hereinafter referred to as the Currency Agreement), a Board of Commissioners of Currency styled the "Board of Commissioners of Currency, British Caribbean Territories (Eastern Group)" was constituted. This has the effect of making the Board a statutory body, but argues, the Solicitor General, unless the parent statute authorises such a body to sue in a court of law, and the Currency Ordinance has no such provisions, the Board may not bring these proceedings, as it is not a body corporate. In the case of *R. v. D'Andrade, ex parte D'Aguiar* (at p. 130 herein), JACKSON, F.J., held the view that the Board is a statutory body and not a corporation; but it has been urged that this was merely *obiter*. Unless the Board can be regarded as a corporation in law, it would seem that the point about its inability to sue is well taken. In *Mackenzie-Kennedy v. Air Council*, [1927] 2 K.B. 517, it was held that the Air Council which had been established by the Air Force (Constitution) Act, 1917, was a statutory creation, and could not be sued. BANKES, L.J., said—

"In the absence of distinct statutory authority enabling an action for tort to be brought against the Air Council, I am of opinion, both on principle and upon authority, that no such action is maintainable. The Air Council are not a corporation, and even if they were to be treated as one, the respondent's position would not be improved."

Again ATKIN, L.J., in his judgment asked this question, "Can then the Air Council so constituted be sued in tort?" And he answered this—

"Unless the Air Council is by its constitution created a corporation I think the answer must be clearly in the negative."

In *Tone River Conservators v. Ash* (1829), 10 B. & C. 349, LITTLEDALE, J., had expressed this view—

"To create a corporation by charter or Act of Parliament it is not necessary that any particular form of words be used. It is sufficient if the intent to incorporate be evident."

In the *Mackenzie-Kennedy* case, ATKIN, L.J., considered this dictum, and went on to point out that the Air Council had most if not all of the characteristics of the Tone River Conservators, *viz.*, a name, perpetual succession, and a right to sue and to be sued in their corporate name. ATKIN, L.J., nevertheless, was of the view that the Air Council could not be sued. I find the penultimate paragraph of Lord ATKIN'S judgment of some interest, and in my view, it indicates that the final word on this matter had not been said. Lord ATKIN said—

"In these circumstances I am unable as at present advised to find in the words of the Legislature 'the manifest intention to incorporate' which LITTLEDALE, J., in the case cited rightly thought essential. I should, however, deem myself free to reconsider this opinion if hereafter in a case between different parties further assistance were afforded to the court than could be given by the respondent in the present case. In any event I am also

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at present inclined to the view that the Air Council, if a corporation, are being sued in a representative capacity which, as I have said, is impossible,”

This question came to be considered by the House of Lords in the recent case of *Bonsor v. Musician's Union*, [1955] 3 All E.R. 518. In that case the plaintiff was a member of the Musicians' Union which was registered as a trade union under the appropriate statute. The plaintiff was expelled from the union, and he brought an action to test the validity of his expulsion, and for damages. It was held that the union was a legal entity and though not a corporation in the strict sense, it could be sued. I can do no better than repeat extracts from the judgments in the case of *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, both in the court of first instance, and in the House of Lords, all of which gained the approval of their Lordships in the *Bonsor* case. Said FARWELL, J., in the *Taff Vale* case—

“Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual, a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlation of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The legislature has legalised it, and it must be dealt with by the courts according to the intention of the legislature.”

In the House of Lords, Lord HALSBURY had this to say—

“If the legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a court of law for injuries purposely done to its authority and procurement.”

Now I must apply these criteria to the Currency Ordinance, 1959, by virtue of which the Board was created. A consideration of the old Currency Ordinance is of no assistance, as the provisions are substantially the same. There is little room for doubt that the Board is a legal entity having been so created by statute. Certain duties devolve, and certain powers are conferred on it, including the establishment of its headquarters and offices, and the employment of “such agents, officers, and persons as may be required”. There is provision for its perpetuity, and article 1 (b) of the Currency Agreement clearly, in my judgment, contemplates the Board acting as a body, and so does s. 11 (3) of the Ordinance. This subsection provides that a prosecution may be brought by the Board (itself) or by a duly authorised agent. In my view, although no express words are used in the Ordinance, the various provisions indicate that the Board is a corpor-

ate body, and therefore can sue and be sued. In the case of *R. v. D'Andrade, ex parte D'Aguiar*, JACKSON, F.J., expressed the view that the Board is a statutory body, and not a corporation. This question did not seem to arise for determination, and in any event does not appear to have been fully argued. The statement is, in my judgment, *obiter*.

The second objection is that on the face the proceedings have been instituted without authority, that is, that the purported authority signed by Mr. L. P. Spence, the Executive Commissioner, on behalf of the Board is no authority really. It is conceded that an originating summons would be subject to the same requirements as a writ of summons. Rule 8 of Order 3 of the Rules of the Supreme Court provides that a plaintiff's solicitor, unless authorised by a general power *ad lites* duly registered and recorded in the Deeds Registry, shall, when presenting a writ of summons to the Registrar, produce an authority in writing, signed by the plaintiff or his attorney, appointing the solicitor to act for him in the action. If, as I hold, the Board is a corporate body, then it follows that the Board must authorise the bringing of legal proceedings. In the affidavit to the summons, Mr. Spence has sworn that he was authorised by the Board to swear to the affidavit, but I do not find any statement that the Board has authorised these proceedings. The Executive Commissioner authorises the solicitor to act on *his* behalf. His duties seem to be restricted to the responsibility, subject to the direction of the Board, for all executive matters connected with the procurement, issue, retirement, distribution and holding of the Board's notes and coins (article 1 (4) of the Currency Agreement), but does not include the institution of legal proceedings, while any duty devolving and power conferred by the Board may be discharged or exercised by any three members (Article 1 (6)). In *R. v. D'Andrade ex parte D'Aguiar* (at p. 130 herein) the Federal Court held that "may" in this paragraph must be read to mean "must". I find, therefore, that the purported authority is bad in law. Mr. Wharton has urged that once the Registrar accepts a writ, then it must be assumed that the Rules have been complied with. If this proposition were correct, then it would mean that a defendant can never take a preliminary objection to an irregularity. Mr. Wharton next urges that even if the purported authority is bad, it falls to be governed by Order 54, which deals with irregularities and the method of taking objections to irregularities. In my judgment, if the authority is bad, there is no authority on the record, and if there is no authority on the record, the proceedings may not be brought. This makes for a fatality rather than a mere irregularity. Order 54 is not therefore pertinent to the matter.

"The unauthorised issue of a writ of summons on behalf of another, or its issue under an authority which the author had no power to give is in a sense an irregularity, but in the sense that the defendant named in the writ is entitled to have it set aside as of right. It is not an act open to a plaintiff and done without the observance of some formality connected with it by rules of

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court, but an act altogether unwarranted by law.” [*The Georgetown Coconut Est. Ltd. v. The Argosy Co. Ltd.*, 1917 L.R.B.G. 78.]

In *Richmond v. Branson & Co.*, [1914] 1 Ch. 968, the plaintiff was described as a person “of unsound mind not so found”. The action was brought by her next friend, and the defendants denied that the plaintiff was a person of unsound mind. It was held that the defendants, by raising the issue as to the unsoundness of mind of the plaintiff, were in effect denying the authority of the plaintiff’s solicitors to bring the action, and that that was not an issue which it was competent to them to raise at the trial. While not ruling that this question could not be raised at all, WARRINGTON, J., held that it could not be raised in answer to the claim. This action was concerned with the delivery of certain title deeds to the plaintiff, and the defendants pleaded that they were willing to deliver the deeds, but that they could not deliver to the next friend unless the plaintiff was in fact adjudged to be a person of unsound mind. It was in this oblique way that the question of the authority to the solicitor arose; the point was not expressly taken, and I am of the view that this decision does not assist the Board in the matter before me.

This conclusion would, it seems, dispose of this matter, but in deference to the able arguments presented in this matter, I would deal with the third objection of the Solicitor General. This would be on the assumption that I am wrong on the question of the authority.

The third objection is that the court has no jurisdiction to enquire into the validity of legislation on a construction summons. It is conceded that this is a summons under Order 42, but it is urged on behalf of the Board that the right of the Board to refuse a demand to convert is really the substantial matter to be settled, as this affects the Board’s right to commission under s. 7 (1) (b) of the Currency Ordinance, 1959, and as such, falls within O. 42, r. (2). It has also been urged that it was open to the Board to rely upon the Currency Agreement as being an instrument under which it has an interest. This would bring the summons under r. (1) of O. 42. Rule 2 of the Order provides as follows:—

“Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of an Ordinance, may apply by originating summons for the determination of such questions of construction, and for a declaration as to the right claimed.”

As I apprehend the matter, a right in the strict sense is the legally recognised claim a person may have against another person, that other having a corresponding duty to the person who enjoys the right. The right which the Board enjoys under s. 7 (b) of the Currency Ordinance, 1959, is the right to demand a certain commission for the conversion of currency. To refuse to convert is not, in my judgment, a right, and the Board’s right to commission upon conversion is not under attack. To adopt the language of DANKWERTS, J., in *Rigden*

v. *Whitstable Urban District Council*, [1958] 2 All. E.R. 730, at p. 732, it does not seem to me that the Board is claiming any legal or equitable right which depends upon the Governor's Order.

Rule 1 of Order 42 provides—

“Any person claiming to be interested under a deed, will, or other written instrument, may apply by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested.”

Referring to the word “interested” in this rule, in *Mason v. Schupisser* (1899), 81 L.T. 147, STIRLING, J., said,

“The word is a wide one, and ought to extend, as it seems to me, to the claim of any person who has an interest of any sort, whether vested or contingent, whether absolute or defeasible, whether in possession or reversion under an instrument within the meaning of the rule.”

Mr. Wharton has urged that the Board has an interest in the Currency Agreement. It should be borne in mind that the Agreement now has the force of statute, but this apart, whatever interest the Board may have under the Agreement, that interest is not impugned. No doubt the Board is interested, or has an interest, in the pronouncement on the validity or otherwise of Order No. 81 of 1961, but whether the summons raises the question of the Board's interest *under* the Ordinance or Agreement or the Order is another matter. I am of the opinion, therefore, that the second objection is also well taken. The result is that the summons must be dismissed.

I have come to this conclusion with a great deal of regret, as I feel if I may express an opinion having regard to the arguments advanced by both sides—that a matter of this nature ought to be determined on its merits.

I now must turn my attention to the question of costs as in this case, this is the position. The plaintiffs have joined as defendants the Attorney General, on whose behalf certain successful submissions which dispose of the summons have been made, and Mr. P. S. D'Aguiar, on whose behalf arguments supporting the plaintiffs' case were advanced. That a defendant wins an action by relying on a mere technicality is no ground for depriving him of his costs. It seems therefore that the Attorney-General is entitled to his costs which I order to be taxed. As between the plaintiffs and the second-named defendant, justice will be met if each party were to bear his own costs, and I so order.

Judgment for the defendants.

Solicitors: *M. T. I. Julien* (for the plaintiffs); *S. M. A. Nasir*, Crown Solicitor (for first-named defendant); *J. Edward DeFreitas* (for second-named defendant).

COMMISSIONER OF LANDS AND MINES AND A.-G. v. BELL

[Supreme Court (Adams, J. (ag.)) January 5, March 22, 23, April 7, May 25, June 30, 1962.]

Limitation—Crown lands—Provision barring right of action to recover land after 12 years—Whether applicable to Crown—Title to Land (Prescription and Limitation) Ordinance, Cap. 184, s. 5.

In an action instituted by the Commissioner of Lands and Mines but to which the Attorney General was later added as a plaintiff, the Crown claimed possession of certain crown lands occupied by the defendant. The defendant, who had applied to the Commissioner of Lands and Mines in 1947 for permission to occupy the lands, pleaded *inter alia* that he was upwards of 30 years in continuous and uninterrupted possession, and contended that the action was barred by s. 5 of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184, which provides that “no action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him. . . .”

Held: (i) in a claim by the Crown for the recovery of possession of crown lands the proper plaintiff is the Attorney-General and not the Commissioner of Lands and Mines;

(ii) the application was an acknowledgment in writing of the Crown’s title as contemplated by ss. 18 and 19 of Cap. 184;

(iii) section 5 of Cap. 184 does not apply against the Crown. Indeed, Cap. 184 does not contain any limitation period that is applicable against the Crown. Section 3 may be used as a sword against the Crown, but there is no section that may be employed as a shield.

Judgment for the second-named plaintiff.

M. Shahabuddeen, Solicitor General, and *H. Ramkelawan*, Crown Counsel, for the plaintiffs.

L. F. S. Burnham, Q.C., N. Bissember with him, for the defendant.

ADAMS, J.: In this action the plaintiffs claim:—

- (a) an order for the recovery of possession of the Crown land in rear of Plantations Trafalgar and Union, West Coast, Berbice, being the area formerly held by the proprietors of Trafalgar and Union under permission No. 3712 and an area in rear thereof inland to the back boundary of absolute grant No. 4961 situated on the right bank of the Abary River; and
- (b) an injunction to restrain the defendant from re-entering the said land.

In their statement of claim the plaintiffs allege ownership in the Crown of the said lands and a right to possess them and also say that the defendant was in wrongful occupation of portions of the said lands.

In his defence the defendant says that the said lands are the property of the defendant and several other persons and form part

of Plantations Trafalgar and Union on the West Coast of Berbice, of which they are the owners. Alternatively, the defendant alleges upwards of thirty years of continuous and uninterrupted possession of the said lands, challenges the competency of the 1st plaintiff to bring these proceedings and contends that as the second plaintiff's cause of action did not accrue within twelve years of the commencement of his action, his claim is barred by s. 5 of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184 of the LAWS OF BRITISH GUIANA.

Mr. Shahabuddeen, counsel for the plaintiffs, eventually conceded that the 1st plaintiff had no *locus standi*. That is also my view. Section 3 of the Lands and Mines Department Ordinance, Cap. 170, enacts that the Commissioner of Lands and Mines shall perform the duties from time to time imposed on him by Ordinance and any other duties that he is directed or required to perform by the Governor. He has certain duties assigned to him under this chapter and under the Crown Lands Ordinance, Cap. 175, but no power to sue in respect of Crown Lands. The Attorney General is legally entitled to bring claims by the Government against any private person by virtue of s. 46 of the Supreme Court Ordinance, Cap. 7.

The documentary evidence is important. The lands referred to in the statement of claim consist of 425.752 acres of Crown land in the 2nd depth of Plantations Trafalgar and Union and a contiguous portion of the 3rd depth extending about 2,055 feet south-westwards up to a wire fence. Plantations Trafalgar and Union are also known as lots 29 and 30 respectively and are shown on an old Dutch plan by Van Schoonenbeck as having each an area of 500 Rhymland acres.

Beyond the 1st depth of Plantations Trafalgar and Union there is a plot of land consisting of 425.752 English acres in the 2nd depth, which was held under lease No. 908 from the Crown by the Local Authority of Trafalgar and Union Country District from 1st January, 1916, until it has cancelled for non-payment of rent on 31st December, 1923.

On 27th August, 1925, Henry Josiah James and four other men applied for a permission to graze cattle on this area. They were issued a permission, which was cancelled on 11th May, 1929.

On 19th August, 1929, the defendant and many other proprietors applied to the Commissioner of Lands and Mines for a permission for cattle grazing purposes in respect of this very area of 425.752 acres. They were issued under the Crown Lands Regulations a permission No. 3712, dated 30th April, 1931, which after many renewals expired on 31st December, 1946.

On 18th February, 1947 the defendant and other signatories forwarded the following application to the Commissioner of Lands and Mines:—

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“Sir,

We, the undersigned, on behalf of ourselves and the other proprietors of the Villages Union and Trafalgar, West Coast, Berbice, do hereby make application to you for permission to occupy the piece of reserved Crown land situate aback of the said villages Union and Trafalgar. We desire to use the said reserved Crown land, if permission be given, for agricultural and cattle grazing purposes.

We shall be glad if in your reply hereto you mention the acreage of the said reserved Crown land.

We have the honour to be,

Sir,

Your obedient servants

(etc.)”

On 9th and 10th June, 1951, the late S. S. M. Insanally, sworn land surveyor, surveyed at the request of the defendant and others land that he described as follows:—

“Plantation Union comprising the W¹/₂ lot No. 29 and lot No. 30 and Plantation Trafalgar and all lands in rear (if any) occupied and claimed under prescriptive rights, situate on the West Coast of Berbice.”

The Government land surveyor, R. Jagernauth, served a notice on Insanally, objecting to the inclusion of the 2nd depths of Plantations Trafalgar and Union and other Crown lands to the rear of these. He made a sketch plan, which was tendered as Exhibit “L”, to show the areas wrongly taken in by Insanally. On this plan the area washed in red is the 2nd depth and the area hatched in red is the Crown land in its rear.

The defendant and other persons petitioned the Governor on 3rd May, 1954 in respect of lots 28, 29 and 30. The following paragraphs among others appear in this petition:—

“4. That Mr. Tronchin, a Government surveyor, in spite of verbal protest by your petitioners, divided up the land in 1914 and apportioned part of it to the Plantation Abary Company Limited and claimed that the remaining portion sixteen hundred acres were Crown lands.

5. That the re-survey in 1914 by Mr. Tronchin was invalid in that it should have been based on the original survey and plan drawn up by Mr. William Downer at the time of purchase, acquisition and occupancy of the land by your petitioners throughout the period extending from 1841 to 1914.

7. That many of the peasant-proprietors being then mostly illiterate and incapable to assert their rightful claim to their

land either legally or otherwise constitutionally, resorted to the expediency of paying, under constant protest, the fees charged by the officers of the Crown for occupancy or lease as exemplified in a letter No. 450/19 from the Local Government Board addressed to them and dated 30th March, 1921, one from the Department of Lands and Mines dated 17th July, 1950, and another from the Department of Local Government dated 22nd January, 1953. Thus morally, at least, the charge of laches cannot be sustained against your petitioner's claim."

To understand the situation of the areas under dispute, one has to examine Jagernauth's sketch plan, Exhibit "L". Proceeding roughly north-east to south-west, one sees first the Atlantic Ocean, then the public road, then the railway line, then the extremity of the first depths of Plantations Trafalgar and Union, then a portion washed in red the south-west boundary of which was laid down by S. S. M. Insanally as the extremity of the first depth of each plantation and finally a portion hatched in red and ending at a barbed wire fence, which portion including Crown reserves was claimed by Insanally under prescriptive rights as belonging to the defendant and others. The distance from the public road to the sea is approximately 5,750 feet, from the public road to the extremity of the first depths is 6,783.44 feet, from the extremity of the first depths as shown by Exhibit "L" to the extremity of the first depths as laid down by Insanally is 3,336 feet and from this latter line to the barbed wire fence is 2055 feet. Adjoining Pln. Trafalgar is Pln. Onverwagt and next to Pln. Union is Pln. Tempe. I accept the whole of the evidence of the witnesses Jagernauth and Davis. I also accept as reliable the evidence of the Crown lands ranger, Suresh Chandra, who stated that at the boundary laid down by Insanally as the extremity of the first depths was the Bacchus Canal, that further inland was Ochroe dam and that beyond Ochroe dam was an area held by the British Guiana Rice Development Company in 1958.

The Abary Plantation Limited, a company mentioned by the proprietors in their petition to the Governor, had obtained a grant from the Crown, No. 4961 of 28th December, 1910, of 500 rhymland acres abutting the Abary River and situated further inland of but contiguous to the two portions of land described in the statement of claim. This 500 acre tract was transported in 1954 to various companies.

The second depth portion of Plns. Trafalgar and Union, claimed by the Crown in the statement of claim, is shown washed in red on Exhibit "L" and the 3rd depth portion, the subject-matter of the statement of claim, is the portion hatched in red on Exhibit "L". On the evidence I find that both these portions of land are Crown lands. While there may be multiple proprietors for the 1st depths of Plns. Trafalgar and Union, as may be seen from the two transports tendered in this action, the defendant has not produced any document of title in respect of the second and third depths. His defence, therefore, must rest on his allegation of prescriptive user.

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I shall now consider the defendant's defence of long possession from the factual point of view. In order to do so, I shall treat the 2nd depth and 3rd depth portions separately.

As regards the 2nd depth, that is, the tract coloured red in Exhibit "L", the evidence of the defendant and his witnesses, McLean Johnson, Evan Benjamin and Felix Moriah was to the effect that the villagers occupied it for rice planting and cattle grazing from early times. The plaintiffs' witness Chandra said that in 1958 he saw that slightly more than two-thirds of this area, the southern extremity of which was the Bacchus Canal, was under rice cultivation. I find, however, that the defendant's and other villagers' possession of the red tract was not adverse to the true owner but was permissive and referable to the lease in favour of the Local Authority of Trafalgar and Union Country District and the permissions in favour of Josiah James and others and the defendant and others.

As regards the 3rd depth area between Bacchus canal and Ochroe dam, that is, the tract hatched in red, the evidence as to possessory rights is conflicting. Chandra, who was a reliable witness, said that a rice farmer might occasionally leave his land fallow for 2 or 3 years and yet one could see signs of cultivation on the land. He did not, however, see any signs of rice cultivation on this portion of the 3rd depth.

For the defence, the witness McLean Johnson, whose evidence was unreliable even if only for the reason that he was unable to read the plan Exhibit "L", said that Ochroe dam adjoined Bacchus canal, that Ité dam was where Chandra had placed Ochroe dam and that cattle were depastured by the villagers on the area hatched in red. At one stage he said that the area from the sea to Ité dam had always been planted with rice or occupied by cattle. According to him, the occupiers' rights were based on transport. He admitted that the defendant had once told him that he had applied for a permission to occupy Crown land because many other persons had done so.

The witness Evan Benjamin said that in 1910 people first planted rice between Bacchus canal and Ité dam and that for the past 40 years they had stopped doing so. In the light of his evidence I reject the testimony of Felix Moriah that his uncle, who died in 1931 or 1932, used to plant rice in the said area and also the defendant's evidence that his father, brothers, sisters and he himself planted rice in this area.

On the evidence, therefore, I am satisfied that the defendant and other villagers and their predecessors in title did not plant rice within the last forty years on this area in the 3rd depth. Cattle might have grazed on it from time to time but I am not satisfied that up to 1947 the defendant's possession was continuous or uninterrupted or adverse to the Crown. The defendant stated that he viewed this area as the 2nd depth whereas in fact it was a portion of the 3rd depth. He also said that his application for a permission to occupy Crown lands, which he had forwarded to the Commissioner of Lands and Mines on 18th February, 1947, was in relation to this area. This application

was an acknowledgment in writing of the Crown's title, as contemplated by ss. 18 and 19 of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184, and together with the other exhibits in the action and the defendant's sworn admission that a few cattle owners paid rent to the Crown leads me to the conclusion that before he took legal advice the defendant never challenged but always acknowledged the Crown's title. As was said by LANGLEY, J., in *Incorporated Trustees of the Church in the Diocese of Guiana v. McLean*, 1939 L.R.B.G. 182 at pp. 194 and 195:—

“The courts have always scrutinised every claim to title by prescription very closely, whether against a private individual or the Crown. To cite UPINGTON, J., in *Blanckenburg v. The Colonial Government* (1894), 11 Juta, 94, who said:

‘It would be difficult to satisfy me that as against the Crown prescription runs, unless the proof is of the most positive character.’

Can there be said to be anything positive in the proof of the circumstances of this case, which although concerning a private body and not the Crown, is governed by that principle?

Another aspect arises in the principle laid down in *George v. Shinwell*. There must be evidence that at the time of taking possession an intention existed to take that action as of right.”

I am also not satisfied that the Crown was up to 1947 excluded from possession of the whole of the 3rd depth portion under dispute.

Mr. Burnham, counsel for the defendant, has however submitted that even if the defendant can establish only 12 years' adverse possession before the joinder of the second plaintiff, the action must be dismissed because of s. 5 of Cap. 184 which lays down:—

“5. No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or, if it first accrued to some person through whom he claims, to that person.”

Mr. Shahabuddeen has contended that this section does not apply to the Crown. So far as my research goes, no local judge has ever expressed a considered opinion in writing on this point.

According to s. 23 of the Interpretation Ordinance, Cap. 5:—

“No enactment shall in any manner whatsoever affect the right of the Crown, unless it is therein expressly stated, or unless it appears by necessary implication, that the Crown is bound thereby.”

In the ease of *Perry v. Eames* (1891), 64 L.T.R. 438, at p. 440, the following passage, which was cited by Mr. Shahabuddeen, appears in the judgment of CHITTY, J.:

“The Crown is not named in that section, but is named in the first and second sections. Therefore, regard being had

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to the general rule that the Crown is not bound by a statute unless named, a very strong case arises for holding that the Crown is not bound by the third section.”

Mr. Burnham cited the case of *Din v. Boodhoo and Tetry*, 1944 L.R.B.G. 219, where it was held by the West Indian Court of Appeal that s. 4 (2) of the Civil Law of British Guiana Ordinance, Cap. 7, and s. 14 of The Limitation Ordinance, Cap. 184 (Major edition), applied to immovable property in this Colony. But, as Mr. Shahabuddeen rightly pointed out, this case is not an authority for the application of the sections to the Crown and in the Major edition the 12 year period was only a limitation period.

In 10 HALSBURY'S STATUTES OF ENGLAND, at p. 428, it is stated that the Crown is not bound by the Real Property Limitation Acts, 1833 and 1874, as it is not mentioned therein but that there are special statutes dealing with Crown lands. A reference is made to the case of *Thomas v. Pritchard*, [1903] 1 K.B. 209 at p. 212. Section 5 of Cap. 184 is *in pari materia* with s. 1 of the Real Property Limitation Act, 1874.

In s. 4 of the Limitation Act, 1939, there is a specific reference to the Crown as follows:—

“4 (1). No action shall be brought by the Crown to recover any land after the expiration of thirty years from the date on which the right of action accrued to the Crown or, if it first accrued to some person through whom the Crown claims, to that person.”

Section 30 (1) of this Act also stipulates that it applies to “proceedings by or against the Crown in like manner as it applies to proceedings between subjects.”

It is clear that unlike in the English Act of 1939 the Crown is not expressly mentioned in s. 5 of Cap. 184. But can it be said that it appears by necessary implication that the Crown is bound by the section?

In s. 3 of Cap. 184, except for the proviso, the Crown is expressly bound. This section reads as follows:—

“3. 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.”

It will be observed that the Crown is expressly exempted from the proviso.

By necessary implication of sub-s. (4) of s. 9, which says:

“(4) Subsections (1) and (3) of this section shall not apply to any tenancy at will or lease granted by the Crown.”

the Crown is bound by sub-s. (2) of s. 9 of Cap. 184 which enacts as follows:—

“(2). A tenancy from year to year or other period, without a lease in writing, shall, for the purposes of this Ordinance, be deemed to be determined at the expiration of the first year or other period, and accordingly the right of action of the person entitled to the land subject to the tenancy shall be deemed to have accrued at the date of such determination:

Provided that, where any rent has subsequently been received in respect of the tenancy, the right of action shall be deemed to have accrued on the date of the last receipt of rent.”

Mr. Burnham has submitted that s. 9 (2) has its *raison d'être* only in s. 5 of Cap. 184 and that therefore the Crown is bound by section 5 by necessary implication.

I do not agree with this submission. Section 9 (2) is consistent with s. 5 but I do not see why it cannot refer with equal logic to s. 3, where the words “if such possession . . . was not taken or enjoyed by . . . some consent or agreement expressly made or given for that purpose” have been inserted.

Further, if Mr. Burnham's contention were correct, s. 13 would also apply to the Crown as a consequence. This section says:

“13. At the expiration of the period prescribed by this Ordinance for any person to bring an action to recover land, the title of that person to the land shall be extinguished.”

The grotesque result of this chain of reasoning would be that whereas prescriptive title to Crown land might be acquired after a period of thirty years, the Crown's title to its land would be extinguished after a period of twelve years and there would therefore be a hiatus in the title of Crown land for a period of eighteen years.

In my opinion, s. 5 relates back to the proviso of s. 3, which exempts the Crown from its provisions. I therefore hold that the Crown is not bound by section 5 either by express words or by necessary implication.

I may mention that the defendant and his witnesses, whom I had under close scrutiny in the witness box, appeared to be partisan to their own cause. If they were ever in adverse possession of the 2

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areas, the subject-matter of this action, such possession commenced at the earliest in 1947. But I am inclined to believe that it was only after Insanally's survey in 1951 that they claimed these areas as their own. If my belief is correct, then the defendant did not even have twelve years' adverse possession before 1961. But in view of my construction of the Ordinance, such a finding of fact is of academic importance.

I go further. I agree with Mr. Shahabuddeen's submission that Cap. 184 does not contain any limitation period that is applicable against the Crown. Section 3 may be used as a sword against the Crown but there is no section that may be employed as a shield.

While I express the hope that for the sake of better relations with the villagers the Crown will in its discretion grant leases to them on favourable terms, I award judgment to the added or second plaintiff with costs to be taxed against the defendant. I grant the second plaintiff:

- (a) An order for the recovery of possession of the Crown land in rear of Plantations Trafalgar and Union, West Coast, Berbice, being the area formerly held by the proprietors of Trafalgar and Union under permission No. 3712 and an area in rear thereof inland to the back boundary of absolute grant No. 4961 situated on the right bank of the Abary River;
- (b) an injunction to restrain the defendant from re-entering the said land.

The first plaintiff's claim is dismissed and he must pay the defendant's costs up to the time of the joinder of the added plaintiff. I also grant the defendant a stay of execution for six weeks.

Judgment for second-named plaintiff.

Solicitors: *S. M. A. Nasir*, Crown Solicitor (for the plaintiffs); *M. E. Clarke* (for the defendant).

MATHURA AND OTHERS v. MCDOOM AND BROTHERS

[Supreme Court—In Chambers (Luckhoo, C.J.) April 4, May 8, June 30, 1962.]

Rice lands—Rice assessment committee—Deliberations—Member not present throughout entire hearing—Whether such member may take part in deliberations—Rice Farmers (Security of Tenure) Ordinance, 1956, ss. 13, 14 and 15.

Rice land—Certificate of assessment—Effective date of commencement of first certificate—Estate charges—Maintenance works constructed by trespasser—Whether cost of works can be taken into account in fixing estate charges payable to landlord—Meaning of “acre”—Rice Farmers (Security of Tenure) Ordinance, 1956, ss. 20 and 23(1) (d).

The appellants were tenants of the respondents in respect of certain rice lands held by the respondents on licence from the Crown. On the 19th May, 1956, the Crown purported to revoke the licence, and retook possession of the lands. In August, 1956, as a result of the judgment of PHILLIPS, J., in *A.-G. v. McDoom* (1959 L.R.B.G. 112) the Crown returned possession to the respondents. While the Crown was in possession Government spent \$5,662.82 on maintenance works on the land and received rent from tenants. Section 20 of the Rice Farmers (Security of Tenure) Ordinance, 1956, provided that the first certificate of assessment of the maximum rent should come into force on the 1st May, 1956, or on such later date as might be specified in the certificate. The first certificate issued by the assessment committee was to take effect from 1959 only. On appeal by the tenants, it was alleged on their behalf that two members of the committee, who were present during a part of the hearing, were wrongfully prevented by the chairman from taking part in the deliberations.

Held: (i) a hearing before a rice assessment committee is a judicial proceeding and its decision would be vitiated if a member who did not attend all the hearings (including inspections made) were permitted to take part in the deliberations;

(ii) the certificate should have been issued with effect from 1st May 1956;

(iii) the respondents were not entitled to any amount in respect of estate charges for the years 1956, 1957 and 1958 since the maintenance works done in those years were done at the expense of a wrongdoer and not at the expense of the respondents;

(iv) the term “acre” as used in the Ordinance refers to an English acre and not to a Rhymland acre.

Appeal allowed in part.

C. Lloyd Luckhoo, Q.C., for the appellants.

K. Bhagwandin for the respondents.

LUCKHOO, C.J.: These appeals have been brought against the decisions of the Assessment Committee for the Essequibo-Demerara area in respect of forty-seven applications made to the Committee by the appellants to have the maximum rentals of their holdings assessed, fixed and certified for the years 1956, 1957, 1958, 1959 and 1960. These appeals, like the applications, have been heard together by consent of all parties.

MATHURA v. McDOOM

The appellants are, and for some time prior to the year 1956 have been, tenants of the respondents M. A. McDoom & Bros., of holdings of ricelands situate in the second depth of Plantation Blankenburg, West Coast, Demerara. The second depth of the plantation is held by the respondents under licence of occupancy from the Crown and is about 300 acres in extent. On the 19th May, 1956, the Crown purported to revoke the licence on the ground of non-payment of rent and retook possession of the second depth. The appellants, however, were permitted by the Crown to continue cultivation of rice on their holdings. Litigation in respect of the purported revocation followed and was finally determined in favour of the respondents on the 13th June, 1960, when it was held by the Federal Supreme Court that the revocation of the licence was invalid. (See 1960 L.R.B.G. 127). The respondents had re-entered into possession of the second depth in August, 1959, no doubt consequent upon the decision in favour of the respondents given by PHILLIPS, J. (granting relief from forfeiture). (See 1959 L.R.B.G. 112). In the period between the purported revocation and the re-entry of the respondents, some of the tenants of holdings in the second depth paid rent (based on the rental rate existing in 1956) to the Crown. During the course of the hearing of these appeals it has been stated that the amount of \$7,430.43 collected by Government from tenants as rents has not been refunded to the tenants nor paid over to the respondents. During the period the Crown was in possession Government spent \$5,662.82 on maintenance works in the second depth. For the respondents, evidence has been given to the effect that during the year 1959 the respondents have caused certain improvement works to be done in respect of the second depth at a cost of \$19,884.44. This amount has been challenged by the appellants and the evidence in this regard will be dealt with later in this judgment.

The Committee made two visits of inspection to the lands in the second depth and their inspection report forms part of the record. In the Reasons for Decision appearing on the record of appeal it is stated that the Committee considered that it would be reasonable to make the certificates (of maximum rentals payable) effective from the 1st April, 1956, as requested by the appellants having regard to the fact that the respondents (landlords) had issued statements pursuant to s. 27 (1) of the Rice Farmers (Security of Tenure) Ordinance, 1956, claiming the maximum rent and that the appellants would be liable to pay the maximum rent from 1956 by reasons of s. 27 (3) of that Ordinance. It is further stated in the Reasons for Decision that the Committee, however, by a majority decision issued the certificates with effect from 1959 the year when the improvements were carried out by the respondents.

Before considering the questions as to the amount to be assessed, fixed and certified as the maximum rental and the effective date the certificate should bear, it is necessary to refer to two points raised by counsel for the appellants at the commencement of the hearing of these appeals. The first point raised was that the record of appeal appears to be incomplete in that there is only what purports to be the majority decision signed by the Chairman of the Committee.

Counsel stated that he was in possession of what purports to be a copy of reasons for decision by the dissenting member Mr. Ramlakhan, the tenants' representative, and dated 8th May, 1961, and that he was instructed that the original thereof had been sent by Mr. Ramlakhan to the Chairman of the Committee. The Reasons for Decision appearing on the record bear the date 25th April, 1961. At my direction, the Registrar enquired of the Chairman whether such a document had been received. In reply the Chairman has stated that a careful search of the original case jackets has failed to disclose the existence of such a document and that in the normal course a memorandum of Reasons for Decision of a dissenting member of the Committee would be included in the record of appeal. The Chairman also stated that neither he nor the clerk who prepared the record of appeal had any recollection of the receipt of such a document from Mr. Ramlakhan. In view of the contents of the Chairman's communication in this regard, counsel for the appellants did not pursue the point that the record appeared to be incomplete.

Counsel for the appellants also raised the point as to whether all of the members who at one time or another heard evidence in the matters or inspected the lands in the second depth had been afforded the opportunity of deliberating. With my leave a letter signed by both counsel for the appellants and counsel for the respondents was sent to the Chairman making enquiry in that regard. In reply the Chairman has stated that only three members of the Committee were present throughout the entire proceedings and that he considered that only those three members could vote. Rajroop, one of the five members who had heard the evidence given on the first day of hearing, the 5th April, 1961, did not attend the sitting on the second day of hearing, the 7th April, 1961, and Ramsamooj, another of the members, who had attended at the hearing when evidence was given and at the first of the two inspections did not attend at the second inspection.

Counsel for the appellants submitted that both Rajroop and Ramsamooj should have been afforded an opportunity of deliberating and that although it does not clearly appear that they attended and were prevented from deliberating, yet from the Chairman's communication it is clear that if they did attend with a view to deliberating the Chairman would not have allowed them to deliberate. That counsel argued would be tantamount to a refusal to permit those members to deliberate. Reference was made to the provisions of s. 9 (2) and (4) of the Ordinance whereby three members of a committee including the chairman or acting chairman shall form a quorum and all matters and questions shall be decided by a majority of votes. Reference was also made to the case of *Veerassamy and Rajpattie v. Hoptown Co-operative Land Society*, No. 1848 of 1959, Demerara, an appeal from the Assessment Committee for Demerara-Berbice decided by me on the 11th March, 1961, wherein one of the grounds of appeals filed was that the Committee erred in permitting members on the Committee who had not attended all the hearings of the applications to form a quorum and determine the matters raised. Counsel for the appellant in the present appeal was counsel for the appellant in that matter and has stated that I had held that the Committee did not err

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in so doing. In the written judgment delivered in that matter it was stated that the appeal was first argued before JAILAL, J., who reserved judgment but died before the judgment he had prepared could be signed and delivered and that after hearing the arguments of counsel I had come to the same conclusion as JAILAL, J., had done and for the same reasons, and that my judgment was substantially that prepared by JAILAL, J. I have consulted that judgment and can find no reference to the point now under consideration. My notes of the argument advanced by counsel for the appellants and by counsel for the respondents in that appeal also contain no reference to this point. Perhaps passing reference only was made to that ground of appeal. If I did express any opinion on the point it was not a considered opinion and was without the assistance of any argument thereon. I have also conferred with MILLER, J., who decided a similar point in another appeal and he has informed me that he held (in an oral judgment) that only those members of a Committee who have sat throughout the proceedings may take part in the deliberations.

Considering the point after hearing argument thereon in these appeals I am of the opinion that the decision of a Committee would be vitiated if a member or members of the Committee who did not attend all of the hearings (including inspections made) were permitted to take part in the deliberations. A hearing before the Committee is a judicial proceeding and subject to the provisions of the Ordinance (No. 31 of 1956), the evidence which may be given on an application of this kind is regulated by the provisions of the Evidence Ordinance, Cap. 25. (See ss. 13, 14 and 15 of the Ordinance, No. 31 of 1956). It is inconceivable that a decision can be arrived at by members of a Committee some of whom were absent at one or more sittings when evidence was given. A simple illustration should suffice to show that this is so. If at one sitting the chairman and two members attended and heard the evidence led in support of an applicant's case and at another sitting the chairman and two other members attended and heard the evidence led in support of the respondent's case how could deliberations by the chairman and the four members take place for a decision to be made?

In my view the Chairman's opinion as expressed in his communication in reply to counsel's letter of enquiry is correct.

The next question to be determined is whether the Committee should have issued a certificate in respect of the years 1956, 1957 and 1958 having regard to the fact that the applications before the Committee were in respect of those years as well as the year 1959-1960. The maximum rent of holdings in the second depth had never been assessed. Section 20 of the Ordinance provides that the first certificate issued under the provisions of s. 18 (which relate to the issue of certificates of maximum rent) shall come into force on the 1st May, 1956, or on such later date as may be specified in the certificate. Where the tenancy began in or before 1956 the effective date would normally be 1st May, 1956. Where the tenancy began after the year 1956, the effective date would normally be in the year when the tenancy commenced. Where the rent had previously been ascer-

tained, assessed and certified then the provisions of s. 19 of the Ordinance would apply and the effective date of the certificate would be the date of the certificate or such date as may be specified in the certificate.

The Committee erred in not issuing certificates in respect of the years 1956, 1957 and 1958. While it is true that Government when wrongfully in possession during the period May, 1956, to August, 1959, had made certain expenditure by way of maintenance works in the second depths that expenditure was not made by the respondents although it would enure to their benefit. The object of the provisions of s. 23 (1) (d) of the Ordinance (which relate to the inclusion of an amount as estate charges in the ascertainment of the maximum rent) is to ensure that a landlord is in some measure recompensed for expenditure he incurs in the improvement and maintenance of any holding. Here the respondents have not incurred any such expenditure during the years 1956, 1957 and 1958 though a wrongdoer has done so. The respondents cannot get any amount in respect of estate charges for the years 1956, 1957 and 1958. The matter will have to be referred back to the Committee to make a fresh investigation in respect of the years 1956, 1957 and 1958 subject to the direction that the expenditure of \$5,662.82 incurred by Government on the maintenance of the second depth cannot be taken into consideration in ascertaining, assessing and certifying the maximum rents of holdings therein.

Some argument has been addressed to me on the question whether the maximum rent should relate to English acres or to Rhymland acres. In so far as the areas of the appellants' holdings are concerned it matters not in what measurement the parties choose to express their extent. In the Ordinance it is implicit that the maximum rent should be ascertained, assessed and certified in relation to the acreage of the holdings. There is no definition of the term "acre" in the Ordinance but some assistance in the determining whether "acre" wherever that term occurs in the Ordinance means an English acre or a Rhymland acre may be obtained from a consideration of s. 23 (1) (c) where provision is made for the addition of an amount equivalent to the amount per acre payable by the landlord in respect of holding by way of rates under the Water Conservancy Ordinance, Cap. 236, or the Boerasirie Creek Ordinance, Cap. 275. Under those Ordinances rates are assessed on certain specified plantations per English acre. The acreages of the plantations appear in the schedule to those Ordinances and are expressed in English acres. It seems reasonable to conclude that the term "acre" used throughout the Ordinance (No. 31 of 1956) refers to an English acre. The evidence on behalf of the appellants is to the effect that the parties have in their contracts of tenancy expressed the areas in terms of Rhymland acres. There is, however, much force in the argument of counsel for the respondents that the appellants would not have stated their areas as they have done in their applications if they had objected at a survey of the holdings carried out at the instance of the respondents. Even if the contractual tenancies were expressed to be in relation to Rhymland acres the Committee itself in assessing the measurements would have to convert

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to English acres for that is the statutory basis for calculation of the maximum rents. As the matter stands, the Committee did not err in regarding the acreages as those given by the appellants in their applications.

The final question for determination is whether the Committee erred in fixing the maximum rents at \$19.59 per acre with effect from 1st May, 1959. A very painstaking analysis of the evidence—both oral and documentary—has been made by both counsel for the appellants and counsel for the respondents. It was pointed out by counsel for the appellants that Ebrahim McDoom (for the respondents) stated that work on the intake koker started in 1955 and that expenditure of \$7,329.00 (of the total expenditure of \$19,889.44 claimed to have been incurred by the respondents in effecting improvements and for maintenance works in the second depth) was incurred in that respect. The Committee treated this as expenditure made for the year 1st May, 1959, to 30th April, 1960, and this does not appear to be unjustified when it is considered that the Crown revoked the respondents' licence and was in possession from May, 1956, until August, 1959. It is true that other expenditure claimed to have been incurred was in fact incurred after August 1959 and during 1960. However, every tenancy of a holding of riceland is by the Ordinance deemed to be a yearly tenancy commencing on 1st May of the year in which the contract was made and ending on the 30th April of the following year. The Committee was not in error in treating the expenditure incurred by the respondents as referable to the year 1st May, 1959, to 30th April, 1960. The Committee inspected the second depth and by a majority was satisfied that the work was done on the land as stated by Ebrahim McDoom and that the cost of the works as stated by him was substantially correct. The inspection disclosed the estate to be in good condition with little room for improvement. The Committee therefore assessed and certified the maximum rent at \$19.59 per acre being \$10.00 basic rent, 89c. per acre increase in drainage rates under s. 25 (1) (b) and \$8.70 per acre as estate charges under s. 25 (1) (d). The effective date was fixed at 1st May, 1959. The criticisms of counsel in relation to evidence of yields have not been overlooked. The Committee's acceptance of the evidence for the respondents as to the amount of the expenditure incurred has not been shown to be wrong. It has not been shown that the Committee's decision in respect of their assessments for the year 1959 (1st May, 1959—30th April, 1960) is unreasonable and cannot be supported having regard to the evidence.

In the result the certificates issued by the Committee in respect of the year 1959 are affirmed. In so far as the applications relate to the years 1956, 1957 and 1958 the matter is referred back to the Committee for fresh investigation to be made with the direction given earlier in this judgment to the effect that the expenditure of \$5,662.82 incurred by Government on the maintenance of the second depth cannot be taken into consideration in that regard.

The appeals are allowed in part. There will be no order as to the costs of the appeals.

Appeals allowed in part.

SINGH v. ODITT AND ODITT

[British Caribbean Court of Appeal—Civil Appellate Jurisdiction (Gomes, P., Archer and Wylie, JJ.) May 17, 18, 21, July 19, 1962.]

Company—Vacation of office of director—Three persons the sole share-holders and directors of a private company—Dispute among directors—Allegation by minority share-holder that the offices of the other two directors have been vacated by reason of their participation in the profits of certain contracts with the company—Contracts related to a particular rice crop—Thereafter majority share-holders would be certain to be reelected directors—Petition for winding up filed by minority share-holder—Discretion of court to declare offices of directors vacated—Claim for accounts, but no account ever requested prior to the institution of proceedings—Claim not sustainable.

All the shares of the A.C.R. Company were held either by or in trust for the R.D. Company. Under a tri-partite agreement entered into by the two companies, the two respondents and the appellant, the respondents and the appellant agreed to acquire the entire paid-up share capital of the A.C.R. Company. The purchase price was to be paid to the R.D. Company in instalments. Clause 8 of the agreement prohibited any sale, transfer, assignment, letting or other disposition of the land owned by the A.C.R. Company until the full purchase price was paid. On the same day on which that agreement was made a second agreement was entered into among the purchasers with the object of regulating their respective rights in relation to the acquisition of the paid-up share capital of the A.C.R. Company. Clause 5 of this agreement provided that each party should be entitled to one-third of the shares in the A.C.R. Company and one-third of all the assets of that company. After the purchase each of the purchasers was appointed a director of the A.C.R. Company, the first-named respondent being also appointed chairman and the second-named respondent manager. On 20th March, 1961, it was decided at a meeting of the directors (the appellant voting against) that the company should plant 1,000 acres of its land in rice. The appellant, claiming that each director had a right to cultivate one-third of the company's land on his own account, proceeded against the objections of the respondents to cultivate 1,000 acres of the company's land in rice.

The respondents thereupon sued for an injunction and damages for trespass. The appellant counter-claimed for a series of declarations, for accounts and for an injunction and damages for loss in connection with his rice cultivation. Under clause 57 of Table A of the Companies Ordinance, Cap. 328, (which was incorporated in the Articles of Association of the company) the office of a director shall be vacated if he is concerned in or participates in the profits of any contract with the company. The respondents had nevertheless participated in the profits of certain contracts with the company for the supply of finance and machinery in respect of the cultivation of the rice crop for the company. FRASER, J., dismissed both the claim and the counter-claim. The appellant appealed on the grounds that the trial judge erred in refusing (a) to make a declaration that the two respondents had vacated their offices as directors under clause 57 aforesaid; (b) to make a declaration that the appellant was entitled to one-third of the assets and one-third of the shares in the company; and (c) to order an account. While the appeal was pending the appellant filed an application for the winding up of the company.

Held: (i) when the cause or mischief that occasioned the vacation of office by a director ceased, the director, if the board of directors thought fit, would again become eligible for election as a director;

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(ii) in this case the alleged ground of vacation related to the planting of a particular rice crop and it was clear that thereafter the respondents were certain to be re-elected as directors;

(iii) in view of these circumstances and of the filing of the winding up petition the trial judge did not err in declining to make a declaration that the respondents had vacated their offices as directors;

(iv) with regard to the claim for a declaration that the appellant was entitled to one-third of the assets and one-third of the shares in the company, no dispute appeared to have arisen in this regard and in view of the clear language of clause 5 of the second agreement no dispute could arise;

(v) the claim for an account was rightly refused since no account was ever requested and as a director of the company the appellant was in a position to apprise himself of what was happening.

Appeal dismissed.

Dr. F. H. W. Ramsahoye and R. H. Luckhoo for the appellant.

G. M. Farnum for the respondents.

GOMES, P.: On December 20, 1960, a tripartite agreement was entered into between the Rupununi Development Co., Ltd. (hereinafter referred to as “the development company”), the parties to this action, and the Abary Cattle Ranch Co., Ltd. (hereinafter referred to as “the company”), whereby the parties to this action agreed to acquire the entire paid-up share capital of the company. At the date of the agreement the share capital of the company comprised 1,954 shares, 1,904 of which were held by the development company and the remaining 50 by the directors of the company in trust for the development company, and by virtue of the agreement those shares were to be transferred to the parties to this action in the following proportions, *i.e.*, 652 to Harry Crashed Oditt (the first-mentioned plaintiff), 651 to Deonandan Oditt (the second-mentioned plaintiff) and 651 to the defendant. The development company also undertook to deliver to the purchasers all the assets of the company which comprised freehold lands and Crown land leases and permissions of occupancy, approximately 2,500 head of cattle, 10 shares in Meat Marketing, Ltd., and certain cash and credits in the bank and in a deposit account.

The purchase price was to be paid in instalments, commencing with a down payment in cash and the balance was to be secured by a first mortgage on the whole of the company’s undertaking and by hypothecation of its shares and this was coupled, in part payment of the purchase price, with an obligation on the part of the purchasers to sell not less than 1,500 of the 2,500 head of cattle to Meat Marketing Ltd., who would credit the development company with the proceeds of the sales. Meat Marketing, Ltd., appears to have been, or still is, a subsidiary of the development company and it was a term of the agreement that the company or the purchasers would not in any way charge or dispose of the 10 shares referred to above until the whole of the purchase price had been paid.

On the same day, *i.e.*, December 20, another agreement was entered into between the two plaintiffs (who are brothers) and the

defendant, the object of which was to prescribe the terms and conditions on which the defendant would be admitted as a partner or co-purchaser with the plaintiffs in the acquisition of the whole undertaking which is the subject-matter of the tripartite agreement abovementioned. The two relevant paragraphs of this agreement between the parties are as follows:

“5. On the due observance and performance by the parties hereto of the provisions and undertakings of this agreement and of the provisions and undertakings in the agreement between the parties hereto and Rupununi Development Co., Ltd., each party shall be entitled to one-third of the shares in the Cattle Ranch and one-third of all of the assets including the cattle of the said Company and also one-third of and in all shares held by the Cattle Ranch in the Meat Marketing Co., Ltd.”

“7. The parties hereto hereby undertake and agree with each other to do nothing inimical to the interest of each other or inimical to the proper management and control of the assets of the Cattle Ranch.”

After the acquisition of the undertaking the plaintiffs and the defendant became the directors and only shareholders in the company and the first-named plaintiff was appointed chairman, and the second-named plaintiff manager, of the company.

On March 28, 1961, at a meeting of the directors, one of the plaintiffs moved, and the other plaintiff seconded, a motion that the company plant 1,000 acres of its land in rice. The defendant objected to this proposal and suggested or moved that each director should lease 1,000 acres of land from the company and plant his own rice. The other two directors did not agree and the original motion was carried and the manager was authorised to go ahead with the rice cultivation. As all the revenue from the sale of the cattle had to be paid over to the development company towards satisfaction of the purchase price, a question arose in regard to the provision of working capital to carry on the concern. The two plaintiffs proposed that each director should lend the company \$1,000.00 for that purpose but the defendant said he was not in a position to lend the company any money. A motion was then carried that the manager be authorised to purchase what was necessary for the efficient management of the ranch and that the amount be credited to the manager's account until such time as the shareholders should provide a working capital.

In pursuance of the company's resolution the manager set about to prepare the land for rice cultivation but the defendant did likewise on his own behalf. This aspect of the matter is dealt with by the trial judge as follows:

“This action arises from the refusal by the defendant to accept the decision by the Oditts to plant 1,000 acres only for the company. Without paying due regard to the agreements he signed on December 20, 1960, the defendant resolved to cultivate 1,000 acres of the company's land in rice and wrote the chairman to this effect on April 28, 1961. Mr. A. G. King, solicitor, on behalf of

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Harry Prashad Oditt, wrote the defendant on May 8 warning him against this course. On May 13, Messrs. Gomes and Gomes replied to Mr. A. G. King setting out a series of complaints against the Oditts and stating that the defendant intended to continue with his cultivation. It is obvious from that letter that Messrs. Gomes and Gomes were instructed that the Oditts were personally cultivating 1,000 acres. I have no doubt that those instructions were not correct. I accept that such cultivation as the Oditts undertook was done on behalf of the company. This letter was received by Mr. A. G. King on May 15 and this action was filed on May 17.”

In their action the plaintiffs claimed an injunction and damages for trespass and the defendant counterclaimed for a series of declarations, for specific performance of the agreement between the plaintiffs and himself, for accounts with respect to the sale or other disposal of the cattle, for an injunction and damages for loss in connection with his rice cultivation. The trial judge dismissed both claim and counterclaim and the defendant now appeals on three grounds.

The three grounds are that the trial judge erred in refusing (a) to make a declaration that the two plaintiffs, *qua* directors, had vacated their offices, and (b) to make a declaration that the defendant is entitled to one-third of the assets and one-third of the shares in the company, and (c) to order an account. The claim for a declaration that the defendant is entitled to a one-third share in the concern was not claimed at the trial, but on appeal that request was substituted for the claim at the trial for a decree of specific performance of the agreement between the parties, no doubt because of the view expressed by the trial judge that the terms of the agreement were being implemented in so far as the circumstances permitted.

With respect to the first ground of appeal, counsel for the appellant submitted that the trial judge entirely misconceived the legal position in regard to the directors, by reason of the facts that under clause 57 of Table A of the Companies Ordinance, Cap. 328, (which was incorporated in the Articles of Association of the company), the office of a director shall be vacated if he is concerned in, or participates in, the profits of any contract with the company, and the evidence at the trial fairly shows that the rice venture was financed by the respondent, Deonandan Oditt, and that certain tractors belonging to him and his brother, Harry, had been hired to the company for ploughing the land, and that by reason of those two facts both of the respondents had automatically vacated their offices as directors. In support of that submission, counsel cited the cases of *Star Steam Laundry Co. v. Dukas* (1913), 108 L.T. 367, and *Re Bodega Co., Ltd.*, [1904] 1 Ch. 276.

The evidence discloses that Deonandan Oditt financed the company to an extent of about \$21,000, and that he had hired four of his tractors to the company for which he claims the company owes him \$8,000. In the case of Harry, the evidence is that he jointly with two others owns two tractors which were hired to the company for the same purpose, but it is doubtful whether Harry knew anything of that

transaction and he, in fact, denied any knowledge of it at the trial. This aspect of the matter was dealt with by the trial judge in his reasons for decision as follows:

“Some argument turned on whether the Oditts were still directors of the company in the light of certain contracts for the hire of their machinery to the company. It is, I think, to be accepted that the manager, Deonandan Oditt, was authorised to purchase whatever was necessary for the efficient working of the company and I am satisfied on the evidence that he has done as well as he could in all the circumstances. With regard to Harry Prashad Oditt’s interest in a tractor it is my view that his conduct would have to be examined by the directors before he can be deemed to have ceased to be a director and that if such a meeting had to be convened that he should have due notice of the purpose.”

The legal position is well settled by the two cases that were cited by counsel for the appellant, but the question really argued on the hearing of the appeal was whether, in the circumstances of this case, the trial judge erred in not exercising his discretion in granting the declaration asked for.

As found by the trial judge, the evidence discloses that the appellant has entirely misconstrued his position under the two agreements to which he was a party. According to his own evidence, his understanding of the situation was that after the execution of the agreement, the land was to be divided into three portions, one portion going to each of the parties and that each of them would be free to cultivate his own rice, and pasture and market his third share of the cattle. He maintained that the company would not transact any business but that only its name would be used. He also stated that there would be no meetings of directors and that that was the state of affairs that he wanted. In cross-examination, his attention was drawn to clause 8 of the tripartite agreement which prohibits any sale, transfer, assignment, letting or other disposition of the land until the full purchase price was paid, but the only answer he could give was that he did not understand the provision in that clause to affect or extend to the directors.

The evidence also discloses that the cattle were wild and a large area of the land would be required for the purpose of grazing and pasturing, yet the appellant embarked upon his own cultivation of rice and, in doing so, ploughed some of the pasture land that was reserved for the fattening of steers before they were sent to market. It is not surprising therefore that the trial judge considered that it is difficult to conceive a situation more fraught with the makings of a deadlock than that in which the parties found themselves.

Another aspect of this matter that warrants consideration is this: Deonandan Oditt, in giving evidence on October 13, 1961, stated that the rice which had been planted would be due for reaping by the end of that month and that another \$30,000 would be required to meet the expenses for that and other purposes connected with it. The

hearing of this appeal was commenced on May 17, 1962. The court was not, of course, aware of the situation on this latter date with respect to whether any further rice cultivation had taken place after the 1961 crop had been reaped. I mention this point for the following reason: In the case of *Re Bodega Co., Ltd.*, [1904] 1 Ch. 276, it was held that when the cause or mischief that occasioned the vacation of office by a director ceased, the director, if the board of directors thought fit, would again become eligible for election as a director. If, therefore, in this case the cause for complaint ceased after the 1961 crop had been reaped and marketed, then Deonandan Oditt, or both he and his brother would, if in fact their offices had been vacated, have become again eligible for election as directors and there would have been no possibility of doubt as to the outcome if they were put up for re-election. Such a contingency was put by the court to counsel for the appellant and he was asked whether any useful purpose would be served if the court made a declaration that the respondents had, in fact, vacated their offices, for the day after such an order was made they would probably set about calling a meeting and having themselves re-elected as directors. At that point, counsel for the respondents informed the court that the appellant had filed a petition to have the company wound up and that it had been fixed for hearing early in the following month, *i.e.*, June. The reply of counsel for the appellant was to the effect that it was important to know who were the directors of the company because the business of the company was still being carried on, and that a declaration that the respondents had vacated their offices would assist the appellant in the administration of the affairs of the company and would also strengthen his case in the winding up proceedings. In his reasons for judgment, the trial judge stated:

“The agreements of December 20 are being implemented and therefore no question of specific performance arises. No distribution of shares or assets is possible until the company has met its obligation to the Rupununi Development Company. It may be that the defendant genuinely fears that the Oditts are carrying on the business of the company in a manner which is oppressive and unfair to him. His remedy is a petition for winding up but certainly not a declaration to this effect.”

In all the circumstances that I have related I am not convinced that the trial judge erred in declining to make a declaration that the respondents had vacated their offices as directors, and especially so, as the proper remedy in the deadlock which has arisen is now being sought, and I do not think that any expression of further views should be given which might cause embarrassment to the tribunal which will hear and determine the winding up petition, except possibly to conclude by saying that it is very probable, even if a declaration was made, that it would be rendered nugatory within a short time thereafter by the action which I have indicated above.

With respect to the second ground of appeal, I consider that the terms of the agreement and the ultimate entitlement of the appellant thereunder is reasonably clear both by clause 8 of the tripartite agree-

ment referred to above and by clause 5 of the agreement between the parties to this action which is set out in full in the earlier part of this judgment. No dispute as to the appellant's entitlement appears to have arisen and, in my view, none can arise, for the language of clause 5 is as clear as can be. Here again, I consider that no useful purpose would be served in making the declaration under this head.

With respect to the third ground of appeal which complains of the refusal of the trial judge to order an account with regard to the sale and disposal of the cattle, I think the simple answer to that is that no account has ever been requested, much less demanded by the appellant and, as a director of the company, he is in a position to apprise himself of what is happening, and I am not convinced that the finding of the trial judge was erroneous when he stated:

"I am satisfied that the plaintiffs have not removed or sold cattle in violation of the agreement with the Rupununi Development Company and that the defendant is not entitled to an injunction."

For these reasons, I would dismiss the appeal with costs to the respondents.

ARCHER, J.A.: I agree. WYLIE, J.A.: I agree.

Appeal dismissed

Solicitors: *Andrew Gomes* (for the appellant); *A. G. King* (for the respondents).

DEMERARA TURF CLUB LTD. AND OTHERS v. PHANG

[British Caribbean Court of Appeal (Gomes, P., Archer and Wylie, JJ.) May 21, 22, 23, 24, July 20, 1962.]

Interlocutory injunction—Precise legal position of parties cannot be determined until trial—Substantial legal issues involved—Submission that action could not succeed in law and that therefore interlocutory injunction should be refused—Whether injunction should be granted.

D.T.C. is a limited liability company conducting horse racing in British Guiana and the other appellants are its directors. Friction arose between the appellants and the respondent, a bookmaker, in consequence of the respondent's practice of running certain pools on the basis of D.T.C.'s horse race meetings. In consequence, D.T.C.'s stewards and directors declared the respondent to be a warned-off person, communicated this position to the Jockey Club of England and displayed a notice to the same effect on the Club's premises. The respondent was not a member of the D.T.C., and had not been notified of any intention to consider the taking of such action against him. He neither owned nor raced horses in British Guiana but he owned and raced horses in England. By arrangement between D.T.C., and the Jockey Club in England the warning-off notice was enforceable automatically by the Jockey Club, with the result that the respondent would be

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unable to race his horses in England. He in consequence sued for a declaration that the decision to deem him a warned-off person was null and void, an injunction restraining the further publication of any statement to that effect and damages for libel.

The appellants appealed from a decision of the Full Court (1961 L.R.B.G. 211) affirming a decision of GORDON, J., (1960 L.R.B.G. 396) granting the respondents an interlocutory injunction. In support of the appeal it was argued that the respondent had no right to a declaration because there was no contractual relationship between the parties and no violation of his legal rights, and that therefore GORDON, J., should have refused the injunction.

Held: (i) it is undesirable in doubtful cases to give a final decision in interlocutory proceedings on the legal issues which will finally determine the rights of the parties, when a trial is still to take place;

(ii) where, as in this case, the precise legal position of the parties cannot be determined until the action is tried and in the meantime the position is doubtful, the court will consider the balance of convenience to the parties;

(iii) irreparable damage would result to the respondent if the interlocutory injunction was refused and the balance of convenience lay entirely with him.

Appeal dismissed.

J. O. F. Haynes, Q.C., with E. V. Luckhoo, for the appellants.

J. H. S. Elliott, Q.C., and G. M. Farnum for the respondent.

WYLIE, J.: The first appellant is a limited liability company engaged in organising horse racing and running race meetings in British Guiana. The other appellants are directors of the appellant company. The respondent is a bookmaker who conducts pools on race meetings, and up to 28th May, 1960, did so on race meetings organised by the appellant company. He also owns and races horses in England, but not in British Guiana.

Prior to 29th May, 1960, there had been considerable friction between respondent and appellant company, apparently arising from the fact that the respondent did then conduct his pools on the appellants' race meetings, thus presumably benefiting financially from the efforts of the appellants in organising racing programmes, entries and so forth, and, of course, conducting the meetings. The volume of betting handled by the appellant company may have been adversely affected by these pools. Some attempts were made to negotiate an arrangement between the parties whereby the respondent would pay for making use of the appellant company's racing programmes, but no continuing arrangement was agreed to.

In 1959 the appellant company commenced proceedings against respondent in respect of the use of appellants' programmes by respondent. These proceedings have not yet been heard, but there is an interim injunction in force restraining the respondent from making use of these programmes for the purposes of his pools. Nevertheless, his pools conducted on the Demerara Turf Club races continued. According to the respondent's affidavit, on 3rd February, 1960, the appellants ran a race in two divisions, causing one of respondent's

pools to be abandoned. On 28th May, 1960, the judge did not declare fourth place in one race run that day, thus causing another pool to be abandoned.

On 27th May, 1960, the respondent received the following letter:

“Mr. J. Phang, Jnr.,
1 High Street, Georgetown.

Sir,

You are requested by the Stewards of the May-June D.T.C. Meeting and the Directors of the Demerara Turf Club Ltd., as a person coming within the scope and province of rule 9 of the Rules of Racing of the Demerara Turf Club Ltd. to meet them at D’Urban Park on Sunday, the 29th May, at 9.30 a.m. in respect of the following item on the agenda:

‘Domestic consideration of the conduct of individuals coming within rule 9 of the Rules of Racing of the Demerara Turf Club Ltd., in running or organising or assisting in the organisation of Pools run on the May/June Meeting to the prejudice of the said Club.’

Faithfully,
H. Mohamed
Secretary.

Copy of Rules of Racing enclosed”.

The same day the respondent replied to this letter in the following terms:

“The Secretary,
Demerara Turf Club Ltd.,
Robb Street,
Georgetown.

Sir,

I have received your letter of the 27th May, 1960, requesting me to meet the Stewards and Directors on Sunday, the 29th May, 1960, to consider the following item on the agenda as being within Rule 9:—

‘Domestic consideration of the conduct of individuals coming within rule 9 of the Rules of Racing of the Demerara Turf Club Ltd., in running or organising or assisting in the organisations of Pools run on the May/June Meeting to the prejudice of the said Club.’

As I am not a member of the Demerara Turf Club Limited, and do not come within any of the categories or persons mentioned

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in Rule 9, I regret that I am unable to attend the meeting as no useful purpose would be served.

Yours faithfully,
J. Phang, Jnr.”

Rule 9 at that time read as follows:

“9. The Stewards and Directors have power to regulate, control, take cognisance of, and adjudicate upon the conduct of all officials, and of all owners, nominators, trainers, jockeys, grooms, persons attendant upon horses, and of all persons frequenting the stands or other places used for the purpose of the meeting, and they have power to punish at their discretion any such person subject to their control with warning off, disqualification, a fine not exceeding one hundred dollars and with suspension from acting or riding. Any jockey so suspended shall not ride in any race during such suspension.”

There does not appear to be any facts disclosed in the affidavits which would bring the respondent within any of the categories set out in this rule.

After the failure of the judge to declare the fourth horse in the race on 28th May, 1960, the respondent caused the following letter to be sent to one of the director appellants, who is also president of the Club:

“May 28th, 1960.

Mr. L. C. Luckhoo, Q.C.,
Georgetown.

Sir,

In view of certain information received on Friday, the 27th of May, and on Saturday, the 28th of May, in connection with the running of the final race of the 2nd day Meeting of the Demerara Turf Club Ltd., you are requested to attend a meeting summoned by the management of the joint sponsors of the Fabulous Four-Cast to be held at 31, High Street, Georgetown, on Wednesday, the 1st June, at 5.30 p.m. to enquire into:—

- (a) The instructions issued by the Stewards (you are one) that the Judge should refrain from placing the horse finishing fourth in the final race of the day, contrary to Rules 51 & 52 of the Rules of Racing.
- (b) The decision of the Stewards of the meeting to allow the placings of the 2nd and 3rd horses to remain as official despite the fact that an objection had been lodged against a horse other than the winner, as indicated by the hoisting of the red and white flag, immediately after the race.
- (c) Statements received from responsible persons which suggest that the actions of the officials concerned were

premeditated and contrary to the accepted practice and Rules of Racing.

The results of this meeting will be made known to the public, and its findings with supporting statements, affidavits and photographs will be forwarded to the Stewards of the D.T.C. and the Stewards of the Jockey Club.

All for your information and guidance.

Yours faithfully,

FABULOUS FOUR-CAST POOL,

J. Phang, Jnr.”

According to the affidavit sworn to by the President of the Club, the Directors and Stewards did meet on 29th May, 1960, pursuant to the notice given to respondent in their letter of 27th May, but no action was taken in regard to that subject other than to adopt a new rule which is not relevant to subsequent happenings. After the meeting had broken up, the President received the respondent's letter of 28th May, 1960. He re-convened the meeting and the respondent was declared a “warned off” person.

This decision was communicated to the Jockey Club of England and apparently a notice to the same effect was displayed at the Demerara Turf Club's premises.

The respondent thereupon commenced proceedings against the appellants claiming—

- (1) a declaration that the decision to deem respondent a “warned off” person is null and void and of no effect;
- (2) an injunction to restrain the appellants from further publishing any statement to the effect that the respondent is a “warned off” person;
- (3) damages for libel in respect of the notice on the Club's premises that the respondent is a “warned off” person;
- (4) damages for unlawful conspiracy.

The respondent obtained *ex parte* an injunction restraining appellants from publishing to anyone and in particular to the Jockey Club of England any statement to the effect that he had been “warned off”. On a summons in chambers to continue this injunction, GORDON, J., after full argument, ordered it to continue. The appellants appealed from the decision of GORDON, J., to the Full Court of British Guiana and, again after full argument, the appeal was dismissed, but the order was amended to refer to “further publication”, it being common ground that publication had already occurred before the original injunction was granted.

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This appeal has been brought from that decision of the Full Court which in effect confirmed the order of GORDON, J., to continue the injunction. There are numerous grounds of appeal ranging over all aspects of the law applicable to the original application. At the hearing of this appeal, counsel for the appellant first argued the question whether the circumstances set out in the affidavits disclosed that the plaintiff could have any right in law to the declaration and injunction asked for in the writ, his submission being that the respondent had no such right and that therefore no interlocutory injunction could issue in respect of that part of the claim. When he had concluded this part of his argument, the court intimated that it would hear the respondent in reply thereto without hearing the appellants on the further aspects involved in the claim for damages for libel.

The question of irreparable damage was then argued on behalf of appellants and the respondent was heard only on those aspects which had been argued for appellants. In the view that I take of the facts disclosed in the affidavits, it still remains unnecessary to consider any aspects other than those concerned with the claim for a declaration and injunction, including, of course, the question of irreparable damage.

As to the respondent's claim for a declaration and an injunction, for the appellants it was argued at length that there was no right to a declaration because there was no contractual relationship between the parties and no submission to the jurisdiction and that there was no violation of any rights in property or proprietary rights belonging to the respondent of which the respondent could complain in law. It followed, it was contended, that, on the application for an interlocutory injunction, the judge should have held that this part of the plaintiffs' claim could not succeed in law, even if the alleged facts were established at the trial, and that therefore the judge should have exercised his discretion against the issue of an interlocutory injunction. The principal authorities were reviewed at length and it was submitted that, on a proper analysis of the judgments, such cases as *Abbott v. Sullivan*, [1952] 1 All E.R. 226, and *Byrne v. Kinematograph Renters Society Ltd.*, [1958] 1 W.L.R. 762, supported the submission that no declaration should issue, notwithstanding the judgment of PILCHER, J., in *Davis v. Carew Pole*, [1956] 2 All E.R. 524. It was argued that there was no violation of any legal rights because the appellants were entitled under the rules of the Club to do what they had done and that, in any event, all they had done was to prevent the respondent from entering on the Club's premises.

On the question whether there was evidence of irreparable damage, it was submitted that all that the evidence showed was that racehorses would be prevented from running in certain races. It was not shown that any means of livelihood would be affected. These circumstances did not disclose damage of a kind that was irreparable. At most, it showed there might be some difficulty in assessing damages and that was not sufficient.

In considering this appeal, it is necessary to keep in mind that, in spite of the lengthy grounds of appeal, all that is really involved is the question whether the judge, when exercising his discretion in favour of granting the injunction, acted in accordance with the recognised principles, when examining the question whether the respondent had any legal right on which his claim in his writ could be based. No authority is required for the proposition that a court of equity would, in appropriate circumstances, grant an interlocutory injunction when the legal right claimed was clearly established or for the further proposition that it would be granted if a *prima facie* case in favour of the right was established.

In a large number of disputed cases, however, it is likely that the precise legal position of the parties cannot be determined until the action is tried and that in the meantime the position may be doubtful. In such cases, the court will consider the relative position of the parties. In 21 HALSBURY'S LAWS (3rd Edition) under the subject of interlocutory injunctions at page 366, the law is summarised to the following effect:—

“Balance of convenience considered. Where any doubt exists as to the plaintiff's right, or if his right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the defendant will suffer, if it is granted, lies on the plaintiff”.

KERR ON INJUNCTION has a passage to the same effect at pages 20 and 21 in the fourth edition and the passage is repeated in later editions.

The authorities for these two summaries of the law are numerous. It is sufficient to refer to the following instances where the court was considering applications for interlocutory injunctions.

In the case of *Hilton v. Earl of Granville* (1841), Cr. & Ph. 283, at page 293, the Lord Chancellor observed—

“Now with regard to the law on the subject, I am desirous of abstaining from the expression of any opinion; but I am bound to look at it so far as it may serve as a guide to the decision I ought to come to upon this motion. Since the argument, I have looked at all the cases which have been cited; and certainly it is impossible to say that the law, as established by those cases, is, at present, in a state which enables anyone precisely to determine what the result in the present case will be”.

After reviewing the law and the facts, at page 297, the Lord Chancellor turns to the question of balance of convenience in these terms:

“Under these circumstances, therefore, seeing the state in which the law appears to stand, without, however, expressing any opinion upon it, and considering that by granting the injunction I shall be stopping the working of a mine, a thing which, of all others, this Court is most averse to do (though it may under certain circumstances be compelled to do it), considering also the great expense which has been incurred, and the great injury which, if the Court should turn out to be wrong, would be inflicted on the party claiming the right to work the mine; and, on the other hand, the nature of the injury which the plaintiff may sustain if he turns out to be right; I have to determine, whether, balancing the question between these two parties, and the extent of inconvenience likely to be incurred on the one side and on the other, it is the most proper exercise of the jurisdiction of the Court to grant the injunction or to withhold it”.

In *Plimpton v. Spiller*, [1876] 4 Ch. D. 286, unlike the previous case, it was not the legal right which was involved, but the question whether the facts would in law constitute an infringement of the admitted right. JAMES, L.J., has this to say at page 289:

“And then, of course, the Court, not forming an opinion very strongly either one way or the other whether there is an infringement or not, but considering it as a fairly open question to be determined at the hearing, and not to be prejudiced by any observation in the first instance, reserves the question of infringement as one which will have to be tried at the hearing, and which it will then have to consider. There will always be, no doubt, the greatest possible difficulty in determining what is the best mode of keeping things *in statu quo*—for that is really what the Court has to do—to keep things *in statu quo*—until the final decision of the question”.

In *Elwes v. Payne*, [1879] 12 Ch. D. 468, all members of the Court of Appeal decided the issue purely on balance of convenience, expressing no view on the ultimate rights of the parties.

In *Newson v. Pender*, [1884] 27 Ch. D. 43, the only question to be decided was one of law, the facts not being in dispute, and the Vice-Chancellor granted the interlocutory injunction to stay the parties' hands until the question of law could be decided. The Court of Appeal affirmed that decision without making any conclusive decision as to the rights of the parties. JAMES, L.J. twice in the course of his judgment observes that additional material may come to light at the hearing and LINDLEY, L.J., at page 64 observes:

“The case to my mind presents several questions of difficulty which will have to be encountered, but we cannot upon the present materials go the length of saying that the plaintiffs have lost all their rights and are entitled to no relief—that would

certainly be going too far upon such materials as we have got before us. I do not propose to discuss with any exactness or in any detail what their rights may be”.

Child v. Douglas (1854), DeG. M. & G. 736, as the headnote states, is an authority for the proposition that where the question in dispute is doubtful, the burden of proof is on the plaintiff to show that the balance of convenience is in favour of granting the injunction, but in the course of giving judgment, KNIGHT-BRUCE, L.J., after setting out at length what he considered to be the four points for decision at the hearing of the cause, said at page 740:

“As to three of these four points, the present impression upon my mind, on the materials before the Court is unfavourable to the plaintiff’s case. Still if the act intended to be done by the defendant were one which, if completed, would substantially or seriously prejudice the plaintiff or his house, I should probably have been disposed, even with the view which I take of three of the points, to interfere by injunction until the question in dispute could be decided at the hearing”.

TURNER, L.J., opens his judgment at page 741 by stating:

“This case raises questions of importance which will have to be decided at the hearing. The plaintiff has elected that the cause shall not now be heard, and the question therefore now to be decided is chiefly one of comparative inconvenience”.

In *Harman v. Jones* (1841), Cr. & Ph. 300, the Lord Chancellor went even further when he said at page 301:

“The proper office of the Court, upon an application of this kind, is not to ascertain the existence of a legal right, but solely to protect the property, until that right can be determined by the jurisdiction to which it properly belongs. It is the duty of this Court to confine itself within the limits of its own jurisdiction; and, therefore, it is a fundamental error in an order of this kind, to assume finally to dispose of legal rights, and not to confine itself to protecting the property pending the adjudication of those rights by a Court of law”.

As appears from some of the foregoing authorities, the courts in giving judgment on these applications have frequently drawn attention to the undesirability of attempting in doubtful cases to give a final decision in the interlocutory proceedings on the legal issues which will finally determine the rights of the parties, when a trial is still to take place.

Of course, the circumstances in each case ought to be taken into account. While it might be claimed to be unlikely that the issues concerning the claim for a declaration and an injunction will be affected by facts and considerations that appear at the trial of this issue, it cannot be assumed that this will in fact be the position. For other issues concerning libel, and possibly conspiracy, will be enquired

into and evidence affecting the first claim may thus come to light. Moreover, a most important circumstance is the attitude of the appellants. This court was informed that, before the judge in chambers, the respondent was prepared to accept the hearing of the application as the trial but that the appellants refused to allow this course to be followed. The appellants were entitled to adopt this attitude and presumably did so for good reason. This can only strengthen the view that this would not be an appropriate case in which to endeavour to determine the legal principles applicable to the real issues without a proper trial. Moreover, undesirable features may develop at trials, if, on the disposal of interlocutory proceedings, a judicial opinion is obtained on the substantial issues to be tried on the hearing.

In my judgment therefore it would not be appropriate to endeavour to determine the legal principles governing this dispute and I consider it sufficient to observe that, not only is the view of PILCHER, J., in *Davis v. Carew Pole* adverse to the appellants' submissions, but the judge in chambers and the three judges of the Pull Court have all concluded that at least there are substantial issues to be tried, a view with which I agree. GORDON, J., in granting the application, summed up the position in regard to the claim for a declaration and an injunction in these words:

“Having regard to the facts that the plaintiff is not a member of the Demerara Turf Club, that he does not own or race a horse in British Guiana, and the controversial aspect from the affidavits as to whether the plaintiff did frequent the meeting as contemplated by Rule 9 of the Demerara Turf Club, the jurisdiction of the defendants to act as they did is a matter which can only be determined at the trial after the hearing of evidence on the issues raised in the action.

In pp. 41 of the affidavit of the second-named defendant are set out the reasons for the ‘warning off’; clearly the particulars of these allegations will have to be heard and examined before a Court can consider whether:—

- (a) the defendants acted within the scope of any particular rule of their club; and
- (b) whether they were justified in making the warning off order in the circumstances in which they did.

On the evidence before it, this court while by no means deciding the issue, is exercised in mind as to whether the defendants were justified in the circumstances of the case in resorting to the drastic action of warning off, and thus making a disqualified person of one who is not a member of their club, and who, apart from running a competitive business with them away from their premises and acting in a manner which they described as inimical to their interest, had nothing to do with them.

This action of the defendants is rendered all the more serious when by their resolution the plaintiff is automatically deprived from racing in the United Kingdom which hitherto he

had every right to do. It is in this regard that the plaintiff should and is entitled to enquire whether the defendants in acting as they did, acted in keeping with their rules.

SCRUTTON, L.J., in *Chapman v. Ellesmore*, L.J.R. 1932, said 'This Court is not a Court of Appeal from the Stewards as to findings within their jurisdiction'. Have the defendants in this case acted within their jurisdiction? The circumstances of the case tend to indicate doubts on this issue".

That I consider to be a sufficient summary of the position to show that the judge properly exercised his discretion and that this court should not accede to the appellants' submission that, on this application, there should be a decision finally determining that the respondent could not succeed in his claim for the reasons advanced by counsel.

The Full Court, after considering at some length the question whether, in any event, a declaration of right could in law be granted on the allegations set out in the affidavits, decided this issue in favour of the respondent and then reviewed the arguments for and against the grant of a declaration on the facts in a manner which indicates that the court at least considered there were substantial questions to be argued, concluding with these words:

"For the reasons given it appears to us that there are serious questions, and many of them, to be tried between the parties and that the grant of an interlocutory injunction by the trial judge was, in all the circumstances, a proper exercise of his discretion in the light of the issues which are to be tried".

These views as to the attitude to be adopted towards the submissions of the appellants accord with mine and I respectfully adopt them. Consequently, I do not consider it necessary or appropriate to set out my views on the law concerning these matters.

I would only add some observations with respect to the appellants' contention that the only effect of this "warning off" order is to exclude the respondent from the appellant company's premises and that the appellant company has no responsibility for what action by other racing authorities may follow. One can surely be excused for expressing the view, without deciding the question, that this seems a somewhat naive view to take of a decision which, under the club's own rules, normally carried with it many more consequences (even if most, or all, of those further consequences will not concern this respondent) and was immediately communicated to the Jockey Club in England, where it would have these further consequences to the respondent. If the intention of the appellants had been merely to prevent the respondent from coming on to their property, they had power in a proper case to do that under rule 8 (b) without making a "warning off" order. Perhaps one can also be excused for expressing the view that it would probably cause surprise, not only to those expected to be learned in the law, but also to those for whose benefit the law is presumed to exist—the community in general—if there was no legal remedy available

to a person whom the owner of property desired to prevent from entering the latter's premises when, instead of using a suitable available method of forbidding entry in a straight forward manner, the latter used other methods which it was general knowledge would lead directly to serious interference with property belonging to that person, when there was no indication at all that he was about to enter the forbidden premises and it was quite unnecessary to cause such interference to achieve this alleged object. A person other than a lawyer might also be excused for imagining that the commonsense legal presumption that reasonable persons intend to cause the natural, probable and foreseeable consequences of their own acts would apply to such conduct rather than that all attention should be focused upon the technical language by which their action is known in the racing world. I do not lose sight of the fact that the appellants' action was admittedly motivated by a letter from the respondent, which reasonable persons might consider to be ill advised. But all this makes it obvious that when these issues do come for trial, such views will be strongly urged, and perhaps opposed by the appellants. Surely, therefore, there are serious questions to be argued on the trial of this action—some of them issues of fact in respect of which no decided view ought to be taken until all evidence has been brought forward and witnesses subjected to cross-examination. I must therefore not be taken to be expressing any final views on these matters, but I have said sufficient, I trust, to show that I cannot agree with the appellants' submission that this Court should at this stage conclusively decide that the respondent has no legal right which would warrant a declaration in his favour.

Before granting any interlocutory injunction, the court must be satisfied that, assuming a legal right to exist, the act to be restrained will necessarily violate that right and will necessarily result in damage involving "that species of injury which the Court calls irreparable, before the legal right can be established upon trial." (KERR ON INJUNCTIONS (4th Edition) p. 14). The respondent claims ownership of four racehorses in England and, with it, the usual rights accompanying ownership of that class of property, including the right to race these horses in England under, and in accordance with, those rules of racing in force in England and applicable to him and his horses in the events in which his horses run. A study of the relevant rules and of the other circumstances disclosed in the affidavits (and especially the communications between the appellant company and the Jockey Club of England) leaves no room for doubt that, in the absence of an interlocutory injunction, the respondent's horses will be unable to run in any events which are run subject to the rules of the Jockey Club. This is a result of reciprocal arrangements between recognised turf authorities and follows from the action taken by the appellants to "warn off" the respondent. The latter claims that the appellant company has no legal justification or right for taking that action in respect of him. On that ground, he intends to seek at the hearing a declaration that the decision of the appellant company that the respondent be deemed to be a "warned off" person is null and void and of no effect and also an injunction to restrain publication of a statement to the effect that he is a "warned off" person. If this claim is sound

it follows that the act to be restrained will necessarily cause violation of the respondent's rights to which I have referred. These are clearly rights connected with the ownership of property—the ownership of these horses.

The nature of the damage that this would cause to the respondent is that his horses would be unable to run in events for which they are entered. It is common knowledge that a racehorse acquires its reputation, and therefore its value, from the results of its performances in races and that reputation and value may be very considerable indeed, even after its racing days are over. It is equally common knowledge that if a horse is debarred from certain important races, its performance in which may affect its reputation more than in other races, that horse may never again have the opportunity to run in these races because of age qualification. There is no doubt, therefore, that the effect of further publication of the decision of the appellant company may be to cause serious injury the full effect of which it is quite impossible to estimate and which therefore may never be adequately protected or vindicated by any attempt at assessment of damages. Indeed, the respondent claims only a declaration and an injunction in respect of this part of his claim. These would seem to be the appropriate remedies having regard to the feature that it may be quite impossible to assess compensation by way of damages, because of the extreme difficulty of giving due consideration to all factors involved, including, of course, the uncertainty of racing, of which perhaps even some judges may have more than mere judicial knowledge. In my judgment, therefore, the damage likely to result from publication of the decision of the appellant company is not only substantial but definitely of a class which the court should call irreparable.

Counsel for the appellants very properly conceded that, if the question of balance of convenience should arise, there was no doubt that, whereas the respondent would suffer great inconvenience from the act sought to be restrained, the appellants could not put forward any corresponding claim that the proposed interlocutory injunction would seriously inconvenience them. This is obvious from the facts disclosed in the affidavits.

I am of opinion, therefore, that it was not appropriate on this application to decide the contentions put forward by the appellants that the respondent cannot obtain a declaration in these proceedings and that there has been no violation of his legal rights. To put these contentions at their highest from the appellants' point of view, they involve substantial questions to be argued which can only be determined upon trial and consequently, at this stage, the rights of the respective parties may be said to be uncertain until after trial. I am further of opinion that irreparable damage would result to the respondent if the interlocutory injunction was refused, whereas it was not shown that any damage would result to the appellants if it was granted. Consequently, as was conceded, the balance of convenience lay entirely with the respondent.

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Accordingly, I consider the judge in chambers has exercised his discretion in a proper manner and I would dismiss this appeal with costs to the respondent.

The appellant contended, as was done before the Full Court, that C. Lloyd Luckhoo should not be bound by the injunction because he was not at the meeting which decided to “warn off” the respondent. Sufficient was said during the hearing to dispose of this contention and accordingly I do not refer to it further in this judgment.

At the conclusion of the hearing, counsel for the respondent suggested that this court might make an order for an early hearing. The court was informed that an order was made on 27th February last that the cause was ripe for hearing and the plaintiff entitled to file a request for hearing subject to the right of the defendants to request a postponement of the hearing until the determination of the present appeal. There is no doubt that the trial of this action has been unduly delayed and it might appear to a person not a party to these proceedings that the most expeditious method of disposing of the interlocutory injunction would be to have an early trial. There was, however, no argument before this court on this question and this court is faced with an order of a judge in chambers made after consideration of the contents of affidavits not before this court and after hearing counsel. Moreover, the condition imposed in favour of the defendants will presumably disappear upon the judgment of this court being delivered. The respondent would then be free to file a request for hearing and presumably to ask the court below for an early trial. That is clearly always desirable where an interlocutory injunction has been issued preventing one party from exercising what he claims to be his rights until the cause is tried. See the Lord Chancellor’s observation on this aspect in *Harman v. Jones* referred to above.

For the reasons I have given, I would not accede to counsel’s suggestion, but merely emphasise that, so far as is shown by the circumstances disclosed in the course of considering this appeal, an early trial of this long-delayed action seems to be highly desirable.

GOMES, P.: Having had the opportunity and advantage of reading the judgment which has just been delivered, I have decided that no useful purpose would be served by writing one of my own for, although I would not have dealt with the authorities as thoroughly as my brother WYLIE has done, much of what I would have said would conform substantially with what he has stated and the conclusion arrived at would be the same. I therefore agree with it.

With regard to the observations made at the end of his judgment, I only wish to say that, while not dissenting from any of them, I am tempted to add some of my own but, on further consideration, I doubt whether they would be appropriate in this proceeding, being purely interlocutory.

ARCHER, J.: I agree.

Appeal dismissed.

BRITISH GUIANA & TRINIDAD MUTUAL LIFE INSURANCE
CO. LTD. v. HARRY

[Supreme Court (Bollers, J.,) February 19, 20, 21, 1962]

Guarantee—Past consideration—Consideration not stated in memorandum—Failure to make full disclosure—Enforceability of guarantee—Civil law of British Guiana Ordinance, Cap. 2, s. 18.

In 1955 the plaintiffs rented a motor car to the defendant's husband under a hire purchase agreement guaranteed by the defendant. On the 3rd April, 1957, the husband and the plaintiffs entered into a new hire purchase agreement in relation to the same car. On the 10th April, 1957, at the plaintiffs' request the defendant executed a document guaranteeing the second hire purchase agreement which included *inter alia* the balance due on the first hire purchase agreement together with the amount of \$741.61 as an amount of commission advanced to the husband on account of his work as a canvasser for the plaintiff. The defendant was not told of the inclusion of this item in the purchase price nor was the second hire purchase agreement made at her request.

Held: (i) the second guarantee was given in respect of an existing debt, was without fresh consideration and unenforceable:

(ii) in British Guiana to charge a person to answer for the debt of another the note or memorandum in writing signed by the party to be charged must contain the consideration for the promise as well as the promise itself, and parol evidence for the consideration is inadmissible. *Martin v. United Diamond Fields of British Guiana*, 1930 L.R.B.G. 31, followed;

(iii) if there be anything in the transaction that might not naturally be expected and the knowledge of which would have prevented the surety from entering into the transaction, the creditor is under an obligation to disclose it. The plaintiffs were guilty of undue concealment in not disclosing the true position relating to the inclusion of the amount of \$741.67.

Judgment for the defendant.

C. L. Luckhoo, Q.C., for the plaintiffs.

H. D. Hoyte for the defendant.

BOLLERS, J.: This is a claim by the plaintiff company against the defendant surety for the sum of \$851.67 being the balance due under a contract of guarantee, whereby the defendant by an agreement in writing dated 10th day of April, 1957, guaranteed to the plaintiff company, payments by her husband, the principal debtor, of the monthly instalments of \$50 per month commencing on the 30th April, 1957, and each subsequent instalment on the last day of each and every succeeding month until the whole of the purchase price, *i.e.*, \$1,675.13, due under a hire purchase agreement in respect of a Morris Minor motor car No. P 9131, shall have been paid.

Under the contract of guarantee the defendant agreed with the company that if any part of the monthly instalments shall be in arrears and unpaid for the space of seven days the defendant, the guarantor, would upon the request of the company forthwith pay such unpaid instalment or part of an instalment as the case may be to the company, and the liability of the guarantor shall not be affected by any indulgence shown by the company to the principal debtor so that the guarantor shall be liable as if a principal debtor and not a surety.

In the affidavit of defence there is an admission by the defendant that on the 10th April, 1957, she and her husband entered into a new agreement with the plaintiff company for the repayment of the balance due under a former agreement with the company and the cost of repairs to the said motor car. The defendant further alleges that there is included in the particulars of claim an amount of \$741.67 representing a transfer from "canvasser's commission advanced" which forms no part of her contract of guarantee, and which she alleges relates solely to the hire purchase agreement in respect of a motor car between the principal debtor and the plaintiff company.

The defendant avers that the plaintiff company did not disclose to her at any time that the principal debtor was indebted to them for "canvasser's commission advanced" in the sum of \$741.67.

The facts which are not in dispute disclose that in 1955 the company hired to Mr. Stanley Gordon Harry, the principal debtor, who was then a canvasser of the company, motor car No. P. 9131 under a hire purchase agreement, whereby he was to pay the sum of \$50 per month as rent for the hire of the said motor car until the whole amount of the purchase price, *i.e.*, \$1,722.67, shall have been paid by him, on which event under the usual hire purchase arrangement the property of the car should pass to him. On the same day in January, 1955, the defendant signed a contract of guarantee whereby she agreed that if any monthly instalment or any part thereof shall be unpaid for a space of 7 days she would on the request of the company forthwith pay such instalment or part thereof as the case may be. In 1957 the balance due under the hire purchase agree-

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ment was \$558.21 and the principal debtor was in arrears with his monthly instalments in respect of the whole sum.

The principal debtor then requested that other sums should be taken into account and a new hire purchase agreement was entered into. The sums of \$375.25 for repairs and parts to the motor car paid by the company and \$47.54 interest and \$741.61 transferred from "canvasser's commission advanced" account were all taken into account and the total \$1,722.67 was then considered as the purchase price of motor car P. 9131 and a new hire-purchase agreement entered into by the principal debtor and the company on the payment of \$1.00 by the principal debtor deducted from the total amount on the signing of the agreement. Under this agreement the principal debtor was to pay the sum of \$50 at the end of each calendar month as rent until the whole amount was paid; this agreement was signed on the 3rd April, 1957, and the company then requested of the principal debtor that his wife, the defendant, should execute an agreement of guarantee similar to the previous agreement of guarantee that she had signed in 1955. Such an agreement was prepared and sent to the principal debtor and subsequently returned to the company after being executed by the defendant and witnessed by the principal debtor; this agreement was then signed by three directors of the company. In 1957, 1958, 1959 and 1960 certain payments were made by the principal debtor until the sum of \$871 was paid and the balance then due in July, 1961, when the writ was filed was \$851.67. In January, 1957, there was correspondence between the company and the defendant in which the company called upon the defendant under the terms of her contract of guarantee to pay off the balance due to the company by her husband under the hire purchase agreement of 1955. The defendant replied asking for particulars of cash paid by the principal debtor and cash owed by him to the company; those particulars were supplied and then the new hire purchase agreement and contract was signed.

In May, 1959, at the request of the principal debtor the cost of repairs to the car was paid by the company and the time for paying the instalment due on the hire purchase agreement was extended. In February, 1961, the company wrote the principal debtor stating that his payments of instalments under the hire purchase agreement were unsatisfactory and on that same date wrote to the defendant pointing out that the principal debtor had failed to pay his monthly instalments and called upon her to pay \$50 per month under her guarantee.

On the 6th April, 1961, the company again wrote to the defendant pointing out to her that the principal debtor had failed in his undertaking to the company and the balance due under the hire purchase agreement was \$851.67 which was outstanding, and called upon her to pay it under her contract of guarantee; in answer to this the defendant asked for particulars of payment made by the principal debtor from January, 1955, and appears to have forgotten that she had signed a new contract of guarantee in 1957.

On 5th May, 1961, by letter, the company reminded her that she had signed a new contract of guarantee in 1957 when a new hire

purchase agreement was entered into by the debtor and then proceeded to give her particulars of payments under both hire purchase agreements. A demand for the sum owing was then made by the company's solicitor and the defendant's solicitor replied saying that according to their client's recollection the balance of the amount owing was \$251.67. On 27th November, 1961, the defendant paid into the Royal Bank of Canada to the credit of the plaintiff company the sum of \$110 which she considered was the balance due under the hire purchase agreement in respect to the said Morris Minor motor car. There remained therefore the sum of \$741.67 being the amount transferred from the "canvasser's commission advanced" account to the hire purchase agreement account for which the defendant now states she is not liable under the contract of guarantee.

Counsel for the defendant has taken three points which I will consider in the following order:

1. There was no consideration valid in law to make this contract of guarantee enforceable or effective in any way.
2. The contract of guarantee (Exhibit "C") is not a sufficient memorandum in writing to satisfy the requirements of s. 18 of Cap. 2 of the Civil Law of British Guiana Ordinance and is therefore un-enforceable in law.
3. The agreement was void because the plaintiff company failed in its duty to the defendant to disclose to her that the sum mentioned in the second hire purchase agreement and contract of guarantee did not refer to a hire purchase agreement *simplicitor* but in fact to several sums which included the sum of \$741.67 for canvasser's commission.

With reference to the first point CHITTY ON CONTRACTS (21st Edition) at para. 814, states that in the case of a guarantee the mere existence of the debt or default, in respect of which it is given is not a sufficient consideration to support it, so that unless there be some further consideration for the promise of the guarantor such promise will be void. The author goes on to point out that a promise to pay a debt already incurred by another is not binding without some new consideration such as forbearance or without showing that such past consideration was given at the request of the defendant.

Counsel submits that on the evidence the plaintiff company has failed to show any new consideration given for the promise of the guarantee. He urges that the mere existence of the debt or default of a principal debtor in this case is not sufficient to support the defendant surety's promise to the creditor which must in all cases be founded on a new consideration. He cited 18 HALSBURY'S LAWS (3rd Edition) paras. 782 and 783, for the proposition that the consideration for the surety's promise need not move from the creditor to the surety, it is sufficient if it moves from the creditor to the principal debtor but this must be at the surety's request. In *Morley v. Boothby* (1825), 3 Bing. 107, BEST, C.J., stated the principle in these words:

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“No court of common law has ever said that there should be a consideration directly between the persons giving and receiving the guarantee. It is enough if the person for whom the guarantor becomes surety receives a benefit, or the person to whom the guarantee is given suffer inconvenience, as an inducement to the surety to become guarantee for the principal debtor.”

I myself have searched the evidence in vain to see whether I could find any advantage or benefit conferred upon the defendant at the time of the signing of the contract of guarantee, or whether the plaintiff company were made to suffer any further inconvenience to which they were not put before the signing of the contract of guarantee, in order to find some inducement for her to guarantee.

Mr. Moore, the company’s managing director, has admitted that there was no dealing with the defendant at all, hence it could not be said that she had made any request of the plaintiff company. It appears that before the agreement was entered into between the plaintiff, company and the defendant the principal debtor owed the sum of \$558.21 on the former hire purchase agreement and the company was in a position to sue him, but there is no evidence that the company did sue or intended to sue and at the request of the defendant they forbore from so doing. In the words of CHITTY

“a promise to pay a debt already incurred by another is not binding without some new consideration such as forbearance or without showing that such past consideration was given at the defendant’s request.”

Counsel for the plaintiff company has pointed out a number of benefits that accrued to the principal debtor immediately before and after the signing of the contract of guarantee, *i.e.*, the forbearance of the company in respect of monthly instalments being in arrears and unpaid for the space of seven days which is a term of the guarantee, the further forbearance of the company from taking steps to enforce payment of any arrears of monthly instalments due and unpaid by the debtor for the space of seven days, and he points out that there is no part of the original hire-purchase agreement between the debtor and the company which allows any period of grace for the payment of an instalment.

In my view these are all matters which existed after the signing of the contract of guarantee and do not amount to a fresh consideration as they were not made or done at the request of the surety. The other benefits which counsel for the plaintiff has pointed out accrued to the surety existed before the signing of the contract of guarantee and undoubtedly were:

- (1) The company would not take any steps in respect of the \$558.21 due under the former hire-purchase agreement.
- (2) The company was willing to make further advances to the debtor including the transfer of \$741.67 from canvasser’s commission account.

- (3) The company agreed to give the debtor 35 months more to pay the new obligation.
- (4) The company gave to the principal debtor and need not have given spare parts for the motor car.

It must be pointed out however that these benefits were not conferred upon the principal debtor by the plaintiff company at the request of the defendant surety. I must therefore uphold the submission of the defendant's counsel on this point and express my further agreement with him that the debt which the defendant purported to guarantee was an existing debt although it related to monthly instalments to be paid in the future; the maxim *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void) can have no application to the circumstances of the present case as it was decided in *Midland Motor Showrooms v. Newman*, [1929] All E.R. 521, in another connection, that a hire purchase agreement is one and indivisible. While, therefore, it is true that the monthly instalments related to the future the defendant in this case was in effect guaranteeing the purchase price under the hire purchase agreement which was indivisible. As the learned author of *WILD ON THE LAW OF HIRE PURCHASE* puts it at p. 10:

“The consideration is usually that the hire purchase agreement is entered into by the owner at the request of the surety. When the consideration is so expressed it is advisable that the contract of guarantee is concluded before the hire purchase agreement is signed otherwise it may be said that the guarantee is given for past consideration which would not be sufficient.”

In this case the contract of guarantee was signed and executed 7 days after the hire purchase agreement and does not state, and there is no evidence of it, that the hire purchase agreement was entered into by the parties at the request of the surety. On the contrary, the contract of guarantee pre-supposes an existing debt and states “whereas the husband of the guarantor is indebted to the company under a hire purchase agreement.” I hold therefore that the guarantee by the defendant was given in respect of an existing debt and the language used was expressive of a past consideration. The agreement is therefore unenforceable.

Under the second point the relevant words of s. 18 of the Civil Law of British Guiana Ordinance, Cap. 2, read as follows:

“No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another, unless the agreement upon which the action is brought or some memorandum or note thereof is in writing and signed by the party to be charged therewith, or some other person thereunto by him, lawfully authorised.”

This section is the equivalent of s. 4 of the English Statute of Frauds and has the effect of rendering the contract unenforceable. It follows that any document signed by the party to be charged or his agent and containing the terms of the contract is sufficient to satisfy the

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statute; of course there must be consideration in every case unless the contract is under seal and it has been held in the past that a statement of this consideration must be included in the writing. In England, however, this is no longer good law since the Mercantile Law Amendment Act, 1856, s. 3 of which abolished the necessity for the memorandum of a guarantee to contain any statement of the consideration given to the guarantor in return for the guarantee. This however is not the true legal position in British Guiana where no provision similar to s. 3 of the Mercantile Law Amendment Act, 1856, has been introduced. GILCHRIST, J., pointed this out in the local case of *Martins v. United Diamond Fields of B.G. Ltd.*, 1930 L.R.B.G. 31, and referred to the old English authorities of *Wain v. Warlters* (1804), 5 East 10, and *Saunders v. Wakefield* (1821), 4 B. & Ald. 595, where it was held that to charge a person to answer for the debt of another, the note or memorandum in writing signed by the party to be charged must contain the consideration for the promise as well as the promise itself, and that parol evidence for the consideration was inadmissible.

Having held that there was no consideration for the promise of the guarantor in this case one could hardly expect to find it stated in the memorandum. Had the agreement stated that the principal debtor was indebted to the company under a hire purchase agreement made at the request of the defendant surety my conclusion might well have been otherwise.

On the face of the contract of guarantee no mention is made of any consideration in respect of any forbearance by the company at the request of the surety in order to induce her to enter into the contract nor does there appear any fresh benefit or further inconvenience to the plaintiff company. Indeed there is no specific undertaking as to forbearance. The contract is therefore rendered unenforceable.

In my view the third point is fatal to these proceedings and I agree with the submission by counsel for the defendant that the company was guilty of undue concealment when they failed to disclose to the surety that the contract of guarantee in respect of the new hire purchase agreement did not refer solely to a sum due on a hire purchase agreement but included the sum of \$741.67 transferred from "canvasser's commission advanced" account to the hire purchase agreement account. I agree with counsel when he says that if they failed to disclose to her something relating to the contract which was so vital that it ought to have been disclosed to her then they would be guilty of undue concealment and the contract would be void. As is well known a surety is a debtor favoured by the law and bound only to the letter of his engagement. This principle of undue concealment bears no relationship whatever to the allegation of fraud, and in *Railton v. Matthews*, H.O.L. (1844), 10 Clarke and Finnelli, where the trial judge directed the jury "that the concealment to be undue must be wilful and intentional," the House of Lords held that the direction was wrong in point of law and that mere non-communication of circumstances affecting the situation of the parties, material for

the surety to be acquainted with, and within the knowledge of the person obtaining a surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself. Lord COTTENHAM in his speech stated:

“It is impossible to contend, after what Lord ELDEN lays down in the case of *Smith v. The Bank of Scotland*, 1 Dow. 272, that a case may not exist in which a mere non-communication would invalidate a bond of mere suretyship.”

Further on he stated:—

“In my opinion there may be a case of improper concealment or non-communication of facts which ought to be communicated, which would affect the situation of the parties, even if it was not wilful and intentional, and with a view to the advantage the parties were to receive.”

Thirty-four years later FRY, J., in *Davies v. London and the Provincial Marine Insurance Company* (1878), 8 Ch. 469, considered that the proposition that the contract between surety and creditor was one *uberrimae fidei* was not sound in law, but went on to say that very little said which ought not to have been said and very little not said which ought to have been said would be sufficient to prevent the contract being valid. KERR ON FRAUD AND MISTAKE at p. 94 states that if the creditor is specially communicated with on the subject he is bound to make a full, fair and honest communication of every circumstance within his knowledge calculated in any way to influence the discretion of the surety on entering into the obligation and points out that the creditor is not under any duty to disclose to the intended surety voluntarily without being asked any circumstances unconnected with the particular transaction. The information as to the \$741.67 transferred could not be said to be a circumstance unconnected with the transaction. On the contrary it formed part of the purchase price under the hire-purchase agreement.

In my opinion the creditor is bound to disclose voluntarily without being asked any circumstance connected with the transaction and KERR makes it clear that if there be anything in the transaction that might not naturally be expected to take place between the parties concerned in it, the knowledge of which it is reasonable to infer would have prevented the surety from entering into the transaction, the creditor is under an obligation to make the disclosure. This statement of the law answers the argument of counsel for the plaintiff that the surety could have asked for particulars and obtained the full disclosure. In the circumstances this does not arise as the matter was not one unconnected with the transaction. The defendant might well have been willing to guarantee a hire purchase agreement in respect of a motor car used by her husband in the course of his work or even a sum advanced to him for the purpose of purchasing spare parts for the motor car but certainly had she known of the “canvasser’s commission advanced” account she might have hesitated and this circumstance might well have prevented her from entering into the contract, as she might have considered it a useless act on the part of

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her husband to underwrite or insure persons who failed to pay their first premiums, *vide* judgment of VAUGHN-WILLIAMS, L.J., in *London General Omnibus Company Ltd. v. Holloway*, [1912] 2 K.B. 78. The purchase price in the later hire purchase agreement far exceeds the purchase price on the earlier agreement but it is not irresistible inference that it included a sum due on a debt unrelated to the motor car.

Counsel for plaintiff company has attempted in the course of his argument to import into the dealings between the principal debtor with the creditor the concept of agency; he has argued that the principal debtor was the agent of his wife in respect of the hire purchase agreement and also the contract of guarantee and on the strength of Mr. Moore's evidence the plaintiff company would never have entered into the hire purchase agreement if the defendant was not prepared to sign the contract of guarantee. He urges that any benefit, advantage or gain by the principal debtor was also conferred on the surety as it accrued to the principal debtor as agent for the surety. In my view this argument is fallacious as there is not a tittle of evidence to support the finding that the debtor was acting as agent for the surety. There is no presumption of agency in these circumstances as exist where a wife pledges her husband's credit for necessities when she is regarded as her husband's agent of necessity. It is precisely this situation that caused the company to find itself in these difficult waters. The agents of the company who dealt with the principal debtor may well have thought that he had the consent and authority of his wife to obtain these further benefits and payments conferred on him but they never took the trouble to interview the defendant or to write to find out whether such authority existed. This situation then may have caused the failure of the duty to disclose.

In the circumstances the points taken are considered sound and the claim must fail and be dismissed with costs to the defendant fit for counsel.

Judgment for the defendant

Solicitors: *V. C. Dias* (for the plaintiffs); *M. E. Clarke* (for the defendant).

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[Supreme Court (Luckhoo, C.J.) January 11, 12, February 12, 13, 14, March 16, 20, July 25, 1962.]

Bill of sale—Sale of motor buses—Buses later hired by purchaser to vendors wider hire purchase agreement—Whether transaction was one of bill of sale.

The plaintiffs were in arrears on certain hire purchase agreements under which they were in possession of certain motor buses. In order to meet their indebtedness they sold the buses to the defendant under two written agreements whereby they gave immediate possession of the vehicles to the defendant and agreed to transfer to him forthwith all the registrations, licences and certificates relating thereto. Subsequently they made application to the licensing authority to transfer to the defendant the registrations and road service licences. At the time of the sale it was orally agreed that the buses might be repurchased by the plaintiffs within six months and that in the meanwhile the plaintiffs would operate the buses and retain the profits. At the end of the six month period the plaintiffs, being unable to purchase, entered with the defendant into an agreement of hire purchase relating to the buses. The parties were however informed by the police that as the buses were being operated under road service licences they could not be worked under the agreement of hire purchase. They thereupon agreed to regard this agreement as cancelled. The defendant was a registered money lender but the agreement of sale did not provide for the payment of interest. Subsequent to the sale repairs were effected to the vehicles at the defendant's expense and one of the plaintiffs was employed by him as a chauffeur on one of the buses. In an action by the plaintiffs seeking a declaration that the agreements of sale and the agreement of hire purchase were bills of sale for the repayment of a loan by the defendant to the plaintiffs with interest thereon and were void for non-compliance with the provisions of the Bills of Sale Ordinance, Cap. 337,

Held: (i) in cases of this description it does not matter that what the hirer really wants is to obtain a loan if he in fact carries out the transaction by means of a real sale and a real hiring back;

(ii) it might be considered that the defendant drove a hard bargain when the plaintiffs were in financial difficulties but this fact could not transmute what was really a sale into a loan, and there was in fact a true sale.

Judgment for the defendant.

L. F. S. Burnham, Q.C., C. A. F. Hughes with him, for the plaintiffs.

S. D. S. Hardy, A. O. Fung-Kee-Fung with him, for the defendant.

LUCKHOO, C.J.: In this action the plaintiffs seek a declaration that agreements of sale and purchase dated 21st February, 1958, and 21st March, 1958, and an agreement of hire purchase dated 3rd September, 1958, made by them with the defendant in respect of three motor buses and a motor bus chassis were made to provide security for the repayment of a loan by the defendant to the plaintiffs in the sum of \$13,621.08 with interest thereon and are bills of sale within the meaning of the Bills of Sale Ordinance, Cap. 337. The plaintiffs seek a further declaration that those agreements being bills of sale are void for non-compliance with the provisions of the Bills of Sale Ordinance, Cap. 337, a declaration that at all material times they

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were the owners of the said vehicles, an order for the delivery of the said vehicles to them, alternatively the sum of \$40,000 as damages for conversion of the said vehicles, damages in the sum of \$10,000 for trespass to the said vehicles and costs.

The vehicles concerned are —

- (1) motor bus with registration number BA. 20,
- (2) motor bus with registration number B.8386,
- (3) motor bus with registration number B.9231,
- (4) Bedford motor bus chassis numbered AC.1911108 with engine number A.2/78837 later given registration number B.G.136.

The chassis of each of these vehicles had been purchased under hire purchase agreements made with the Central Garage Ltd. the agents in British Guiana for the chassis. The bodywork of each of the motor buses was constructed locally. B.8386 was registered in the name of David Grant (who died before the hearing of this action commenced) in December, 1949. BA.20 was registered in August, 1951, in his name as the owner. B.9231 was registered in March, 1951, in the name of James Grant as the owner. David Grant was given possession of the chassis (given registration number B.G. 136) under an agreement of hire purchase with the Central Garage Ltd. in August, 1957.

David Grant operated the buses BA.20 and B.8386 on the route New Amsterdam to Mara, E.B. Berbice, and back while James Grant operated B.9231 on the route New Amsterdam to Skeldon, Corentyne, and back.

According to the evidence of Chiranjiv Singh, which I accept, during the year 1957 he and David Grant entered into an agreement of partnership in respect of the operation of the three buses and the chassis which was intended to be put later into operation as a motor bus. At that time David Grant represented to him that he (D. Grant) was the owner of all of the vehicles. Chiranjiv Singh believed this representation to be true and did not seek to verify it. Chiranjiv Singh and David Grant valued the partnership assets at \$14,000. On that basis Chiranjiv Singh's half share was \$7,000. In pursuance of this agreement he paid over to David Grant and to the Central Garage Ltd. (in respect of amounts due under the hire purchase agreements) sums totalling \$4,958.47. At that time BA.20 was being driven by one Ivan George and Chiranjiv Singh was the conductor on that vehicle and was, under the partnership agreement, responsible for its working from 8th October, 1957. B.9231 was being driven by James Grant and B.8386 was being driven by David Grant's son. Chiranjiv Singh asked David Grant to have the registration of the vehicles transferred into their joint names as owners. Until that was done the road service licences under which the motor buses operated could not be transferred into their joint names. However, David Grant did not have the transfer of the registrations effected. David Grant had

also represented to Chiranjiv Singh that the necessary licence fees and insurance premiums in respect of the buses had been paid. But on the 16th October, 1957, the driver of bus BA.20 was charged for driving the bus without a licence and without insurance and was later convicted and fined on those charges. In December, 1957, David Grant refused to effect the transfer of the road service licences into their joint names and as a result Chiranjiv Singh ceased to pay any money to the Central Garage Ltd. in respect of the amount due under the hire purchase agreements.

On the 26th January, 1958, the three motor buses and the chassis were seized by the Central Garage Ltd. for failure of the hirers to pay instalments due under the hire purchase agreements. David Grant then approached the defendant and asked him for a loan in order to pay up the amount then due to the Central Garage Ltd. and have the vehicles released.

Eventually, on the 21st February, 1958, the defendant, the plaintiffs and Chiranjiv Singh went to the Central Garage Ltd. where it was arranged (see Teixeira's evidence) that the vehicles including the chassis would be purchased by David Grant and Chiranjiv Singh from the Central Garage Ltd. for \$8,217.61—an outright sale. The defendant had obtained two bank drafts—one for \$8,000 (Ex. "U") and the other for \$4,000 (Ex. "U2")—and he endorsed them over to David Grant who paid off Central Garage Ltd. and Chiranjiv Singh. The defendant also paid at David Grant's request the sum of \$79.50 storage fees for the seized vehicles and \$346 in respect of a cheque drawn by David Grant which had been dishonoured. Apparently, in addition to the two bank drafts the defendant paid by cheque or in cash the remainder of the moneys in excess of the amounts stated on the bank drafts. There is no dispute that he did pay all those amounts and indeed in paragraph 3 of the plaintiffs' statement of claim it is stated that the defendant paid the sum of \$13,721.08 in February, 1958. Chiranjiv Singh gave the defendant a receipt for the sum of \$4,958.47 as being "for D. Grant" "in full payment of amount due for partnership in buses and (2 ton) two ton chassis" (Ex. "V"), and the Central Garage Ltd. gave the defendant a receipt for payment by him of \$8,396.11 being payment in full "for second hand Buses and 2 Ton chassis." (Ex. "W"). David Grant gave the defendant a receipt for \$346 stated therein as being part of the amount of \$8,742.11 paid to Central Garage Ltd. on his account in connection with Barclays Bank Cheque No. 16/E38659 dated 10th September, 1957, returned unpaid by the Bank to the Central Garage Ltd., with remarks "Refer to Drawer" (Ex. "X"). All of these receipts bear the date 21st February, 1958. At the same time was executed an agreement of sale and purchase bearing the same date and signed by David Grant as the vendor and the defendant as the purchaser. In that agreement it is recited that David Grant is the owner of the vehicles specified therein (the three buses and the chassis) and is desirous of selling them to the defendant who is desirous of purchasing them from the vendor. The terms of the agreement are that the vehicles are sold to the purchaser for \$13,621.08 (the receipt of which has been acknowledged in the agreement) at the signing of the Agreement, that the vehicles

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are sold free from all debts and encumbrances, that the vendor thereby gives to the purchaser possession of the vehicles immediately after the execution of the agreement and finally that the vendor expressly agrees to transfer to and in favour of the purchaser forthwith after the execution of the agreement all the registrations, licences and certificates of fitness of the vehicles.

The vehicles were released by Central Garage Ltd. to the defendant and the chassis which was at the Central Garage Ltd. premises in Georgetown was driven to Berbice by David Grant. The other vehicles had been stored at the premises of one Fazal in New Amsterdam after seizure at the instance of the Central Garage Ltd. On release they were taken away from Fazal's premises by David Grant.

On the 15th March, 1958, James Grant made application in writing (Ex. "O") to the Licensing Authority for transfer to the defendant of the registration and road service licence of B.9231 on the ground that the vehicle had been purchased by the defendant from him on the 21st February, 1958.

The plaintiffs and the defendant went to Superintendent of Police Rex Jones (who, prior to the hearing, left British Guiana on transfer) for the purpose of effecting transfer of the registrations and road service licences as contemplated by the agreement of sale and purchase dated 21st February, 1958. Mr. Jones read the agreement and observed that it has not been signed by James Grant, the owner of B.9231. He told the parties that only James Grant could effect a transfer of the licence and registration of that vehicle to the defendant. As a result the plaintiffs and the defendant caused another agreement of sale and purchase to be prepared at the chambers of Mr. Persram, barrister-at-law. That agreement (Ex. "C") is identical in its terms and conditions with the earlier agreement (Ex. "B") save that the ownership of B.9231 is stated to be in James Grant. This later agreement dated 21st March, 1958, was executed by both plaintiffs and the defendant on the 24th March, 1958, Mr. Jones initialling the agreement when James Grant signed it. Applications were then made by the plaintiffs to the Licensing Authority for the transfer to the defendant of the registrations and road service licences.

The plaintiffs continued to operate the buses and on the 3rd September, 1958, they entered into an agreement (Ex. "D") with the defendant in respect of the vehicles including the chassis. That agreement has been described in the course of the hearing as a hire purchase agreement. The defendant is described as "the owner and/or renter" of the vehicles and the plaintiffs as "the hirers and/or rentees". Under the agreement, which is stated to be for a term of 5 years commencing on the 3rd September, 1958, the plaintiffs agreed to rent the vehicles from the defendant at a monthly rental of \$375. The agreement contains the more usual provisions found in agreements of that kind in this country. On the previous day, the 2nd September, 1958, application was made in writing to the Licensing Authority by both plaintiffs (Ex. "L" and "M") for a transfer of the registrations and road service licences in respect of the three motor

buses to and in favour of the defendant on the ground that the defendant had purchased the buses on the 21st February, 1958, from them. In the hire purchase agreement there is recited that the defendant is the owner of the buses as well as the road service licences. Obviously this was recited in anticipation of the transfer of the road service licences being made in the defendant's favour pursuant to the plaintiffs' application of the previous day. It is common ground that no rents have ever been paid by the plaintiffs to the defendant under the hire purchase agreement or at all. The reason for this will be considered later in this judgment. The plaintiffs continued to operate the buses after the 3rd September, 1958, and until November, 1958, when BA.20 and B.8386 came into the possession of the defendant. The chassis had come into possession of the defendant since August, 1958, and B.9231 came into the defendant's possession in about February 1959. In what circumstances these vehicles came into the defendant's possession will also be considered later. The defendant has since operated those buses or the buses replacing them as his own property.

The circumstances which led to the defendant paying the amount of \$13,621.08 in respect of the plaintiffs' indebtedness on the 21st February, 1958, must be examined. According to James Grant when the vehicles were seized by the Central Garage Ltd. he and David Grant went to Mr. Jones and consequent upon advice given them by Mr. Jones they approached the defendant for a loan. This is not disputed. James Grant has sworn that later the defendant agreed to lend them money to the extent of their indebtedness but required security for the loan and it was then agreed that the vehicles as well as a parcel of land at California, Berbice River, owned by David Grant would be given as security. James Grant has also sworn that it was also agreed that they (the plaintiffs) would have to enter into an agreement of hire purchase with the defendant in respect of the vehicles and that they would be allowed six months to pay to the defendant the sum of \$18,000 being the amount to be loaned and interest thereon. James Grant has said that it was intended to pay that sum by obtaining a loan of \$15,000 from the B.G. Credit Corporation and that it was agreed that the balance of \$3,000 would be repaid at the rate of \$500 per month over the 6 month period.

It is common ground that since the vehicles were released by the Central Garage Ltd. and until they finally came into the defendant's possession in November, 1958 (BA.20 and B.8386) and in about February, 1959 (B.9231) the plaintiffs kept all the moneys obtained from their operation. The reason given by James Grant for this is that the defendant had promised to keep the vehicles in good repair and had failed to do so. James Grant has stated that he was always endeavouring since February, 1958, to get the defendant to have a hire purchase agreement executed and that the defendant was responsible for the delay in executing such an agreement until 3rd September, 1958. He has also stated that the defendant caused B.9231 to be seized in January, 1959, and that in November, 1958, the defendant had caused BA.20 and B.8386 to be seized.

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The defendant has stated that he was at first approached by David Grant for a loan to have the vehicles released. He did not agree to lend the money required but agreed to pay off Grant's indebtedness to the Central Garage Ltd. in order that Grant could sell him the vehicles for the amount so paid and it was their intention that the plaintiffs would endeavour to re-purchase the vehicles from him within six months, and though no sum was discussed for re-purchase he had in mind the sum of \$14,500 which he estimated would give him a profit of about \$800. The defendant has further stated that it was agreed that for 6 months after the release of the vehicles, the buses were to be operated by the plaintiffs who were to retain the profits. At the end of the 6 month period the plaintiffs were not able to re-purchase and at their request the agreement of hire purchase dated 33rd September, 1958, was executed. When this agreement was shown to Mr. Jones by the parties, Mr. Jones informed them that as the buses were being operated under road service licences they could not be worked under the agreement of hire purchase and on the advice of Mr. Fung-a-Fat, barrister-at-law, they thereafter regarded that agreement as cancelled. The defendant has stated that in August, 1958, he caused B.8386 to be seized as a result of something told him by his son (who has since died). The bus was kept by the defendant for one day only and was returned to David Grant. This seizure was prior to the execution of the hire purchase agreement. In November, 1958, David Grant had told him that he was unable to operate the buses BA.20 and B.8386 and handed them over to him. Thereafter in December, 1958, and January, 1959, David Grant was employed by him to drive one or other of those buses. He has stated that on or about the 19th January, 1959, James Grant informed him that bus B.9231 was out of order and had no tyres and told him that he could take possession of it and he did so.

The agreement relating to the parcel of land at California according to the defendant was not intended to be a part of any security for a loan and was made after David Grant had said that he was more interested in getting money than owning the land.

It is not disputed that when he paid off the plaintiffs' indebtedness the defendant had no intention of himself operating a bus service. The defendant was at all material times a registered moneylender and a businessman. His interest in the transaction of the 21st February, 1958, was solely one of financial gain. The plaintiffs were in financial difficulties. They owed \$13,621.08 to the Central Garage Ltd. and to Chiranjiv Singh. Some of the vehicles had been in use for several years, one since 1949 and the other two since 1951. By 1958 the value of bodywork and chassis must have depreciated to a fairly considerable extent. James Grant has stated that the chassis of BA.20, B.8386 and B.9231 were purchased for \$5,000, \$5,000 and \$6,000 respectively and the new chassis was purchased in August, 1957 for over \$4,000. The total purchase prices of the four chassis when all were new would be about \$20,000. The buses were not in a state of good repair when they were seized by the Central Garage Ltd. I

think that the plaintiffs being in financial straits were induced by the defendant to accept as purchase price for the vehicles the exact amount of their indebtedness with a promise to resell them to the plaintiffs if the plaintiffs could raise a loan from the B.G. Credit Corporation within six months thereafter. It is true that there is no mention in either of the agreements of sale and purchase of such a promise. Neither is there any mention in the agreement of any arrangement by the plaintiffs to pay to the defendant \$18,000 or any other sum after six months. It is difficult to appreciate why no agreement for the payment of interest on the sum of \$13,621.08 was signed on or about the 21st February, 1958, if the transaction were a loan. A loan to that extent repaid by the plaintiffs at a later date without interest would have resulted in no financial gain to the defendant. The defendant is not a philanthropist as counsel for the plaintiffs observed when he sought to make a point in a different respect. I do not believe James Grant's evidence to the effect that it had been agreed that an agreement of hire purchase would be executed on the 21st February, 1958, and that the defendant delayed until the 3rd September, 1958, to have one executed. I accept the defendant's evidence that it was only after it had become apparent that the plaintiffs were unable to raise a loan to re-purchase that the agreement of hire purchase was entered into, the payments thereunder to extend over a period of 5 years.

The agreement of hire purchase was prepared by Mr. C. J. E. Fung-a-Fat, barrister-at-law. The defendant was Mr. Fung-a-Fat's client and with the plaintiffs he went to Mr. Fung-a-Fat to have the hire purchase agreement prepared. The agreement of sale and purchase dated 21st March, 1958, was handed to Mr. Fung-a-Fat. It would appear that having regard to what was stated in the agreement of sale and purchase about the transfer of the road service licence Mr. Fung-a-Fat assumed that the licences had been duly transferred. He sent the parties to Mr. Jones who told the parties in effect that a hire purchase agreement relating to motor buses could not be operative where they were being run under road service licences. The parties returned to Mr. Fung-a-Fat and related to him what Mr. Jones had said. Mr. Fung-a-Fat spoke with Mr. Jones over the telephone and Mr. Fung-a-Fat agreed with Mr. Jones' opinion. He thereupon told the parties that the hire purchase agreement was ineffective. Mr. Fung-a-Fat has admitted that he did not write the word "cancelled" on the document though he could have done so but said that he did not contemplate that litigation would later ensue. Counsel for the plaintiffs has criticised Mr. Fung-a-Fat's evidence and has asked that it be rejected as untrue. I have very carefully considered counsel's criticisms but I have come to the conclusion that Mr. Fung-a-Fat is a witness of truth and that his testimony should be accepted.

Reference has been made to paragraph 24 of the statement of defence wherein it is stated that the parties cancelled the hire purchase agreement because it failed to carry out their intentions *and that the hire purchase agreement was not registered because it was cancelled*. Counsel for the plaintiffs has contended that this latter

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portion of the paragraph would seem to indicate that the defendant (or his legal adviser) considered that it was required by law that the agreement should be registered as a bill of sale. However, it is clear from the statement of defence that the defendant was averring that the transaction between himself and the plaintiffs was never one of loan but rather was one of sale and purchase.

For the plaintiffs it was contended that the agreement of sale and purchase of the land at California formed part of the security for a loan. A comparison of that agreement (Ex. "A") with the agreement relating to the purchase by David Grant from one Cyrus Ward (Ex. "EE") shows that Kissoon, then clerk to Mr. Persram, followed the form and wording of the latter in drafting the former but the introduction of additional terms in Ex. "A" is significant. A term is introduced as to David Grant (the vendor) taking steps to obtain transport for the land and for advertisement and passing of transport to and in favour of the defendant by David Grant simultaneously with the receipt of transport by Grant from Cyrus Ward. Another term introduced is that the land is sold free from all debts and other encumbrances. The consideration stated therein is \$4,000, payment of which is acknowledged. In fact no money was paid and when Kissoon had typed the agreement and expected to see the money paid he was told that the money would not be paid until the passing of transport. In Ex. "EE" (the agreement of sale and purchase of the land signed by David Grant and Cyrus Ward) the receipt of the full purchase price of \$750 is acknowledged therein. The wording of this portion of the agreement Ex. "A" except for the amount of the purchase price follows exactly the wording in Ex. "EE", and I think accounts for Kissoon's inclusion of a similar statement in Ex. "A".

The defendant could hardly be expected to pay the purchase price or a part thereof to the plaintiff David Grant on the 20th February, 1958, in view of the fact that on the following day the defendant would have to pay \$13,621.08 to liquidate the plaintiffs' indebtedness (though this may not have been known to Kissoon).

Two weeks before that agreement was executed Mr. Rohlehr, a licensed auctioneer and valuer, had sworn an affidavit of valuation of the land in which he put the marketable value at \$5,000.

Two handwritten receipts have been admitted in evidence, one dated 21st February, 1958, for the payment by the defendant to a sworn land surveyor Mr. J. Phang on behalf of David Grant of \$200 on account of \$301 fees for the survey of the land, (Ex. "DD"), and another (Ex. "DD2") dated 14th March, 1958, for the balance of \$101 also paid by defendant to Phang on behalf of David Grant. The land was surveyed and a plan prepared. On Ex. "DD2" appears the note in pencil "14/3/58 Received Plan of the lands today also". The receipts bear the signature "J. Phang" and no real attempt has been made to show that these receipts or their contents are fictitious. Further, the defendant entered into possession of the land shortly after the 20th February, 1958, and built a little house on it. David

Grant's tenants vacated the lands and the defendant caused the land to be cultivated. David Grant did not, however, pass the conveyance to the defendant but this does not detract from the circumstances which point to the agreement Ex. "A" being a genuine agreement of sale and purchase and I so find.

There was admitted in evidence at the request of counsel for the plaintiffs (from the custody of the plaintiffs) what purports to be a carbon copy of an original letter dated 22nd March, 1958, addressed by David Grant to the Superintendent of Police, New Amsterdam, Berbice. The object, of course, of the production of this document was to lend support to the plaintiffs' case that the transaction in issue was a loan. A search of the records of the Superintendent of Police has failed to discover the original of that document and after hearing the unconvincing evidence of James Grant in respect of its preparation and delivery to Mr. Rex Jones I have no hesitation in holding that what purports to be a copy of the document (Ex. "J") has been concocted.

It will be observed that the applications for the transfer of road service licences by James Grant on the 15th March, 1958, and by both plaintiffs on the 2nd September, 1958, were each simple requests for transfers on the ground that the vehicles had been sold to the defendant and not a request for a temporary transfer together with a history of the matter as contained in Ex. "J".

Evidence was given with respect to repairs effected to the vehicles from time to time after the defendant had secured their release from the Central Garage Ltd. I find that the defendant paid for the repairs to the vehicles. Whether or not the defendant caused the vehicles to be seized from the plaintiffs is of little moment. The defendant has stated that David Grant asked him to take B.8386 and B.A.20. The fact remains that David Grant thereafter was employed by the defendant as a chauffeur on one of the buses and was paid a weekly wage. This fact rather points to the defendant and not David Grant being the owner of the buses. James Grant has said that he spent \$1,500 on B.9231 after the signing of the agreement of sale and purchase in March, 1958. He has not been able to produce a single bit of documentary evidence in support of this alleged expenditure. This is but one of the falsehoods told by James Grant during the course of his evidence and indeed he could well be described as a stranger to the truth. The mere recorded words of this witness cannot recapture his unsatisfactory demeanour.

In the matters of this kind as we stated by CAIRNS, J., in *North Central etc. Co. v. Brailsford*, [1962] 1 All E.R. 502, at p. 506—

"There are relevant authorities, and from them I think that the following propositions can be derived: (i) if a person deliberately with a clear understanding of what he is doing, and with all appropriate formalities, sells his property to a finance company and then hires it back under a hire purchase agreement, the agreement is not a bill of sale (*Yorkshire Railway Wagon Co.*

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v. *Maclure*, [1882] 21 Ch. D.309, a decision of the Court of Appeal; and *British Railway Traffic and Electric Co. v. Kahn* (1921, W.N.52, a decision of ROWLATT, J.);

(ii) If the purpose of the transaction is to enable the hirer to dispose of the property to a customer, the courts will more readily hold that the agreement is not a bill of sale (*Staffs Motor Guarantee, Ltd. v. British Wagon Co. Ltd.*, [1934] All E.R. Rep. 322; [1984] 2 K.B. 305, a decision of MAC KINNON, J.);

(iii) If the hire purchase agreement is a mere device to cloak a loan, the document is a bill of sale (*Maclure's case*, per LINDLEY, L.J.);

(iv) In considering whether the real transaction is one of loan, it is necessary to look behind the documents to discover their true nature (*Polskey v. S. & A. Services, S. & A. Services v. Polskey*, [1951] 1 All E.R. 185, a judgment of Lord GODDARD, C.J., affirmed by the Court of Appeal, [1951] 1 All E.R. 1062 n;

(v) If the facts are not truly stated in the documents, this is a circumstance tending to show that the documents are a mere cloak (*Polskey's case*)."

It was observed by ROWLATT, J., in *British Railway Traffic and Electric Co. v. Kahn* (1921), W.N.52, that in cases of this description it does not matter that what the hirer really wants is to obtain a loan if he in fact carries out the transaction by means of a real sale and a real hiring back. In the present case the earlier documents represented that the defendant should buy the vehicles and that the property should pass to the defendant. There was the understanding between the parties that the defendant would resell to the plaintiffs if they could raise a loan from the B.G. Credit Corporation within six months. This did not materialise and the hire purchase agreement was prepared but did not become operative after Supt. Jones had spoken with Mr. Fung-a-Fat.

The circumstances of this case point to what may perhaps be considered a hard bargain driven by the defendant at a time when the plaintiffs were in financial difficulties. But this fact cannot transmute what is really a sale into a loan. I find that the agreements of sale and purchase are in fact what they represent—a true sale.

The plaintiffs' claim must therefore be dismissed with costs to the defendant to be taxed.

Judgment for the defendant.

Solicitors: *M. E. Clarke* (for the plaintiffs); *Dabi Dial* (for the defendant).

DEMERARA ELECTRIC COMPANY LIMITED v. INLAND
REVENUE COMMISSIONERS

[Supreme Court—In Chambers (Fraser, J.,) October 27, 30, January 11, 1962]

Income tax—Claim for deduction—Expenditure on valuation of assets with view to selling and/or carrying on undertaking under improved statutory conditions—Whether deductible—Income Tax Ordinance, Cap. 299, ss. 12(1) and 14(b).

The appellants contended that they were entitled to deduct from their chargeable income expenses incurred on the wages paid to their staff and otherwise in connection with the preparation of a valuation of their undertaking with a view to selling it to Government, and/or for the purpose of carrying on the undertaking under improved statutory conditions. The persons involved were employees of the company and it was argued that their wages would have had to be paid in any event and were therefore part of the recurrent expenses of running the company's business.

Section 12 (1) of the Income Tax Ordinance, Cap. 299, provides that "for the purpose of ascertaining the chargeable income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred . . . in the production of the income . . ."; and s. 14 provides that "no deduction shall be allowed in respect of . . . (b) any disbursement or expenses not being money wholly and exclusively laid out or expended for the purpose of acquiring the income."

Held: whether the valuation was prepared in contemplation of a sale of the company's undertaking or for the purpose of carrying on the undertaking under improved statutory conditions, the purpose was a capital purpose and not a revenue purpose, and accordingly the expenditure was not deductible; and it made no difference whether or not the persons involved were on the permanent staff of the company and would have received the payments in the ordinary course of their employment.

Appeal dismissed.

J. H. S. Elliott, Q.C., for the appellants.

R. M. F. Delph, S.G. (ag.), for the respondents.

FRASER, J.: This is an appeal against the decision of the Board of Review dismissing the appellants' appeal to the Board from the additional assessment of \$25,533.90 made by the Commissioner on a chargeable income of \$56,742 being a part of the gross chargeable income of the appellants for the year of assessment 1958. At the hearing, counsel for the appellants said that he was pursuing this appeal in so far only as it related to grounds 7 and 8 of the grounds of appeal. Ground 7 refers to the expenditure of \$5,780.97 on salaries and wages of senior and supervisory staff and distribution personnel of the appellants; ground 8 refers to the expenditure of \$8,294.47 on travelling expenses and services of Mr. H. L. Talbot, a director of the appellants. The effect of this approach is to accept the Commissioner's assessment to the extent of \$19,199.95. The contest is therefore limited to the remainder of \$6,333.95 payable on the amount of \$14,075.44 which was expended for the purpose set out in grounds 7 and 8.

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It was submitted that the expenditure was incurred for the purpose of valuing the assets of the Demerara Electric Company for either of two reasons, viz:

1. that the company's undertaking might be sold to the Government of British Guiana; or
2. that, in the expectation of being asked to carry on its undertaking, the company intended to request that it be allowed a reasonable return on its capital.

The Board of Review in arriving at its decision was satisfied "that when the appraisal was made by the company it was done for the sole purpose of a sale," and held that, "accordingly, the expenditure incurred does not come within the provision of s. 12 (1) of Cap. 299 but was capital expenditure."

The Board of Review had adequate material upon which to take that view of the facts. I also unhesitatingly take the same view on the facts. I do not intend to review the course of the negotiations between the company and the Government because the Board, in a careful decision, set out a full history of the matter, I only wish briefly to point out why the purpose in the year 1957 could only have been for a sale of the company's undertaking to the Government.

The negotiations between the company and the Government had an uneven course. When the appeal came before the Board of Review in February, 1961, the position of the Government had changed considerably from what it was in 1958, when the company was asked to continue its undertaking because the Government then saw no prospect of obtaining sufficient funds for the purchase of the Demerara Electric Company. Presumably, that was the position when the assessment was made by the Commissioner in April, 1959; but by February, 1961, the Government had made the necessary financial arrangements for the purchase. It is therefore important to bear in mind that the assessment appealed against relates to the company's business in 1957 which is examinable for purposes of income tax in the year of assessment 1958. Whatever changes may have occurred in the negotiations in the year 1958 are not relevant to the considerations in this matter.

In 1954 the Government required the company to carry out a number of improvements to their distribution system. In that same year the company refused to comply with the requirements and requested the Government to withdraw the requirements and allow the company to carry on. The company sought to impose two conditions to its willingness to continue, firstly, that it be assured a fair return of profits which was proposed as 8½% on the value of its then capital assets (after payment of income tax); and, secondly, that the Demerara Electric Company Ordinance be amended to authorise an increase of the company's borrowing power.

By July, 1956, it was clear that the Government had rejected the proposal of an 8½% return of profits. It seems to be clear also that

by November, 1956, the company expected the Government either to buy the company's undertaking or to withdraw the requirements made in 1954—(see letter dated 20th November, 1954, by the General Manager to the Ministry of Communications and Works). This situation is emphasised by another letter dated 15th December, 1956, in which the General Manager reminded the Ministry that:

“ the company has spared no effort to terminate this problem, even going so far as to offer to sell its undertaking to Government to clear the way for the needed increase in generating capacity.”

In order to resolve the issues in this developing situation a meeting was held on 15th January, 1957, at which Mr. Kendall, Member for Communications and Works, presided. Mr. H. L. Talbot and the General Manager of the company attended. Mr. Talbot agreed to a valuation being made by Mr. Egerton and promised his company's co-operation. He also stressed the need for urgency and hoped that a final decision would be reached on the question of the Government's purchase as far as possible in advance of 27th May, 1957, when the Governor in Council would have had the power to revoke the company's franchise. Mr. Pickworth, who presumably attended as an adviser of the Government, suggested that, providing the question of a final valuation was within hand, it would be reasonable for the Government to ask the company for an extension of its offer to sell beyond 27th May. Following this meeting the General Manager wrote the Ministry and suggested that Government and the company mutually arrange between them the details for undertaking the proposed valuation.

On 23rd May, 1957, before the completion of the valuation and immediately following a resolution passed by the Legislature on that same day, Mr. Kendall wrote the General Manager informing him that the Government had decided to accept the company's offer to sell its undertaking.

The company submitted its return of income for the year 1957 on 20th June, 1958. In the statement of general expenses submitted with the return the sum of \$56,742.24 was shown as Franchise Requirements Expenses incurred in 1957. Particulars of these expenses were first sought by the Commissioner on 16th July, 1958. The company's accountants replied on 5th August, 1958, as follows giving at the same time a summary of the expenses:

“During the year expenses were incurred in connection with requests made by Government under the existing franchise, which necessitated studies of our power station and distribution system by Montreal Engineering Company, Limited. On the spot investigations were carried out by personnel from our Montreal office, who were further assisted by our own personnel.”

In the summary given the two amounts as mentioned in grounds 7 and 8 of this appeal are included as expenses incurred for that purpose. In reply to another enquiry dated 8th August the company's accountants stated that:

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“The requests made by Government to which we referred were contained in the Letter of Requirements served by the Government on the company . . . or arose out of this letter and the franchise problems resulting therefrom.”

Actually, the company had ascertained as early as 1954 that the requirements would cost between \$14 million and \$17 million and had declined to comply with them. The only problem, if it can be called that, which arose in 1957 was the preparation of the valuation of the company’s assets in contemplation of a purchase by the Government.

In the meantime, however, on 15th July, 1958, the Governor, Sir Patrick Renison, wrote Mr. P. W. Raymer, the Vice-President of the company, informing him that the Government could see no prospect then of purchasing the company’s undertaking. Quite shortly after this, on 23rd July, the company again re-opened the question of carrying on its undertaking upon certain conditions. A memorandum containing the conditions was handed to the Governor. The company’s solicitors drafted legislation to give effect to those proposals. Those proposals were not accepted.

In September, 1958, the Commissioner indicated to the company’s accountants that he considered the amount to be a capital expenditure but requested more information. No information was supplied up to 16th January, 1959, the reason being that the company and the Government were still negotiating. On 20th April, 1959, when the information was still not forthcoming the Commissioner made the assessment appealed against in these proceedings.

The company’s objection was made on 9th June, 1959, and on 19th August the Commissioner asked for detailed information of the payments. The company’s reply was made by its accountants on 4th January, 1960. Attached to that reply was a statement by Mr. P. W. Raymer in which he stated, *inter alia*:

“. . . . that the purpose and ultimate aim of the valuation being carried out would be its use by the company in dealing with financial institutions and the enhancement of its earnings.”

The situation in 1957 did not justify that statement. By July, 1956, the Government had rejected the company’s proposal to carry on its undertaking. This aspect of the matter did not come up again for consideration between the parties until July, 1958. The evidence established that the valuation mutually agreed upon by the company and the Government to be done in 1957 was for the purchase of the undertaking by the Government.

The company has itself stated to the Commissioner that the expenditure was incurred for the purpose of a valuation of the company’s assets. If this valuation was to facilitate a sale to the Government, as I hold it was, then the expenditure is a capital expenditure.

Section 12 (1) of the Income Tax Ordinance, Cap. 299, provides:

“For the purpose of ascertaining the chargeable income of any person there shall be deducted all outgoings and expenses *wholly and exclusively incurred* during the year immediately preceding the year of assessment by that person *in the production of the income*”

Section 14 (b) provides:

“For the purpose of ascertaining the chargeable income of any person no deduction shall be allowed in respect of

(b) any disbursement or expenses not being money wholly and exclusively laid out or expended for the purpose of acquiring the income.”

In considering these matters the purpose of the payment is the important factor. In the case of *Ralli Estates Limited v. Commissioner of Income Tax*, [1961] 1 W.L.R. 329, Lord DENNING said at p. 335:

“Their Lordships prefer, therefore, to turn back to the words of the Act and ask whether the payments were expenses wholly and exclusively incurred ‘in the production of the income’ of the payer: and this means that you must look at the purpose of the payments. Were they paid in order to acquire a capital asset? or for a capital purpose? If so, they are capital expenditure. But if for an income purpose, they are revenue expenditure.”

Can it be said that expenditure on a valuation for the purpose of negotiating a sale of a company’s undertaking is an expenditure for an income purpose? I think not. It is clearly a capital expenditure and is therefore not deductible. It does not matter whether the purpose is fulfilled. The attainment of the object has no bearing, for purposes of taxation, on the purpose for which the expenditure is incurred and in this case it is immaterial whether the negotiations for a sale broke down. I must hold for these reasons that the appeal fails.

Mr. Elliott urged that in any event the sum of \$5,780.97 spent on salaries and wages of senior and supervisory staff and distribution personnel of the company should be allowed for the reason that the company would have had to pay this sum whether or not the work was done because the persons involved are employees of the company and their emoluments are part of the recurrent expenses for running the company’s business. There is no evidence that these payments had necessarily to be made, but assuming that the persons involved are on the permanent staff of the company and would have received the payments in the ordinary course of their employment, that circumstance would not, in my opinion, make any difference. The company has itself represented that the work for which the sum of \$5,780.97 was paid was a part of the company’s exercise in preparing the valuation. That was the purpose of the payment. Administratively,

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it may have been done outside of ordinary working hours or it may have been done within the ordinary working hours. If the work was done within the ordinary working hours and, if, as a result, the company had to employ temporarily other labour to run its business, or contribute to the running of its business, in order to release those members of the senior and supervisory staff engaged on the valuation, it would seem that any moneys paid for such a temporary service ought to be deductible. In my judgment, it does not matter what administrative arrangements are made or what is the accounting practice. The test is—what was the purpose of the payment? Applying that test the Board of Review and this court have found that it was made for the purpose of preparing a valuation in contemplation of a sale of the company's undertaking which is a capital purpose and not a revenue purpose.

There is another ground upon which the appeal fails; but in view of my findings it is not necessary to give detailed examination to the aspect of the preparation of a valuation for the purposes of carrying on the undertaking under improved statutory conditions. The Board of Review gave reasons for holding that expenditure for this purpose would also be capital expenditure. I entirely agree with the conclusions reached by the Board on this aspect and if it became necessary to determine this appeal on that ground I would feel constrained to dismiss the appeal.

This appeal is dismissed. The whole of the Commissioner's assessment dated 20th April, 1959, is affirmed and the appellants are ordered to pay the costs of this appeal fixed at \$240.00.

Appeal dismissed.

Solicitors: *J. Edward DeFreitas* (for the appellants); *P. M. Burch-Smith*, Crown Solicitor (for the respondent).

GREENE v. HENRY AND ANOTHER

[Supreme Court (Persaud, J.) July 27, 1962]

Election—Corrupt practice—Personation of voter at instance of candidate's agent—Candidate not personally involved—Election avoided—Agent subsequently acquitted of personation in criminal proceedings—Removal of electoral incapacities from agent and candidate—Legislature (Appointment, Election and Membership Controversies) Ordinance, 1961, s. 35(6) and s. 37(1).

The election of the applicant H. was declared void by FRASER, J., who held that the applicant's agent A.C. was guilty of a corrupt practice in that he caused another person to personate a voter at the election. (See 1961 L.R.B.G.) As required by law, the judge submitted a report to the Speaker of the Legislative Assembly, whereupon the applicant and A.C. became subject to certain incapacities. A.C. was later acquitted by a jury upon an indictment for personation and thereafter his incapacities were removed by FRASER, J., under s. 37 (1) of the Ordinance, which provides that—

“Where any person is subject to any incapacity by virtue of the report of the court under s. 35 of this Ordinance and he or some other person in respect of whose act the incapacity was imposed, is on a prosecution acquitted of any of the matters in respect of which the incapacity was imposed, the acquittal shall thereafter . . . be reported to the court which may, if it thinks fit, order that the incapacity shall henceforth cease so far as it is imposed in respect of those matters”.

The applicant later applied for the removal of his incapacities. In opposition it was argued that it was anomalous for a candidate, whose election was declared void for corrupt practice, to be exculpated from the legal consequences which should follow such avoidance, and that the court lacked jurisdiction to entertain the application.

Held: (i) a candidate is responsible, so far as his seat is concerned, for all the acts and misdeeds of the agent committed within the scope of his authority, although the candidate not only did not intend such acts to be done, but even did his best to hinder them;

(ii) a distinction must however be drawn between the liability of the candidate for the acts of his agents as regards his seat, and as regards penalties. In the latter case the act must be proved to have been done by the agent with the knowledge and authority of the candidate;

(iii) under s. 37 (1) of the Ordinance the court had jurisdiction to entertain the application and indeed on its own motion to exercise its discretion as to whether the incapacities would be removed.

Application granted.

J. O. F. Haynes, Q.C., for the applicant.

J. T. Clarke, with *H. D. Hoyte*, for the petitioner.

G. A. S. Van Sertima, Senior Crown Counsel, for the second-named respondent.

G. S. S. Gillette, Director of Public Prosecutions.

PERSAUD, J.: This is an application by way of motion brought under s. 37 (1) of the Legislature (Appointment, Election and Membership Controversies) Ordinance, 1961 (No. 34), to remove the

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incapacity imposed upon the applicant by s. 35 (6) of the Ordinance as a result of a report submitted to the Speaker of the Legislative Assembly by FRASER, J., in accordance with s. 35 (1).

The applicant was the respondent in an election petition brought by the petitioner. The petition was heard by FRASER, J., who held that the applicant's agent, Mr. Ashton Chase, a barrister-at-law, was guilty of a corrupt practice at the election, and so declared the election void. As he is required to do by law, the judge submitted his report to the Speaker of the Legislative Assembly, whereupon, Mr. Chase became subject to certain incapacities. Mr. Chase was subsequently acquitted by a jury upon an indictment for personation. Upon a motion moved on behalf of Mr. Chase, the incapacities were removed by FRASER, J., purporting to act under the provisions of s. 37 (1) referred to above. That section provides—

“Where any person is subject to any incapacity by virtue of the report of the Court under section 35 of this Ordinance and he or some other person in respect of whose act the incapacity was imposed, is on a prosecution acquitted of any of the matters in respect of which the incapacity was imposed, the acquittal shall, thereafter or, if an appeal may be made, after the expiration of the ordinary period allowed for making an appeal or, if an appeal is made and the acquittal is affirmed, after the appeal is finally disposed of or, if an appeal is made and is abandoned or fails by reason of non-prosecution thereof, after the appeal is abandoned or so fails, be reported to the Court which may, if it thinks fit, order that the incapacity shall henceforth cease so far as it is imposed in respect of those matters.”

I entertain no doubt, as FRASER, J., held in the motion on behalf of Mr. Ashton Chase, that the court has a discretion whether or not to remove the incapacity imposed, and that it was intended that such discretion should be exercised after consideration of all relevant circumstances.

While both sides concede that I am not bound by FRASER'S, J., decision on the motion, Mr. Haynes urges that in as much as Mr. Chase's incapacity has been removed, the present applicant has a strong case for the removal of his incapacity, while Mr. Clarke argues that I ought not to follow that judgment because the learned judge applied the wrong principles, that he was not guided by reason, and that he was inconsistent having in the original petition found Mr. Chase guilty of corrupt practice, and not to be a witness of truth. The principles enunciated by FRASER, J., in the motion by Mr. Chase as being the factors which he must consider were stated thus by the learned judge:—

- (1) Whether there was a proper trial on the merits before the jury. (The judge was here referring to the prosecution of Mr. Chase for personation);
- (2) Whether the material witnesses in the trial of the petition testified on the trial of the indictment; and

- (3) Whether on the face of the record of the trial of the indictment the verdict of the jury can be said to be a perverse verdict.

I accept that I am not bound by the opinions expressed by FRASER, J., but I would hesitate to differ from them without a good reason. I am not persuaded that he gave consideration to the wrong factors in arriving at his decision, and in any event I am not sitting as a Court of Appeal on his judgment. I feel, however, that I can properly take into account the fact that the judge has seen fit to exercise his discretion—in my view in accordance with the right principles—to remove the incapacity of the agent whom the same judge had on a previous occasion found guilty of corrupt practice.

Counsel for the petitioner has submitted that the situation is anomalous and without precedent to have a candidate, whose election has been declared void for corrupt practice under the Ordinance, now exculpated from the consequences of law which should follow such avoidance. Indeed, Mr. Clarke has referred me to a statement which appears on p. 338 of the 6th edition of PARKER'S ELECTION AGENT AND RETURNING OFFICER, which is to this effect—

“There is no power to grant relief against an act of bribery or personation, but with these exceptions, this power of awarding relief extends to all classes of election offences.”

To understand this statement, it is best to refer to the sentence which immediately precedes it in the same paragraph. It is this—

“The courts have the power of awarding relief, in many cases, to an innocent candidate, election agent, or other person, against the consequences of acts in which they have not participated, or which are due merely to inadvertence.

In my view, the statement relied upon by Mr. Clarke must mean an act of bribery or personation in the person seeking relief. Even if my understanding of the statement is incorrect, I am concerned not with interpreting that statement but rather with the meaning of s. 37 (1) of our Ordinance. I have already indicated in this judgment that this section vests a discretion, and it specifically provides for circumstances such as this. I regret I cannot agree that this court has no jurisdiction to entertain this motion when it seems from the section itself that the court may on its own motion exercise its discretion. To say that there is no similar relief available under the Representation of the People Act, 1949, of the United Kingdom is inaccurate, as s. 152 (1) of that Act contains provisions substantially similar to our s. 37 (1). I am of the firm opinion that this court has jurisdiction to entertain a motion of this nature, and to grant the relief sought if it thinks fit.

In his report made to the Speaker of the Legislative Assembly on the 30th November, 1961, pursuant to s. 37 of the Legislature (Appointment, Election and Membership Controversies) Ordinance, 1961, FRASER, J., wrote as follows:—

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- “(a) No corrupt or illegal practice was proved to have been committed by or with the knowledge of the candidate George McLinton Henry.
- (b) The candidate George McLinton Henry at the election on the 21st August, 1961, was guilty by his agent Ashton Chase of a corrupt practice in reference to the election, the same being aiding and abetting Sookhoo of Alexander Village to personate Mohamed Youssuff, registered elector No. 447 for Polling Division 19 in Electoral District No. 23 Houston—contrary to section 82 of the Representation of the People Ordinance, 1957, No. 3 of 1957.
- (c) The persons proved at the trial to have been guilty of the corrupt practice are:
 - 1. Ashton Chase, Esquire, barrister, President of the Senate.
 - 2. Sookhoo, fisherman of Alexander Village, East Bank, Demerara.
- (d) There is no reason to believe that corrupt practices or illegal practices extensively prevailed at the election for Electoral District No. 23—Houston.”

As I understand the terms of this report, no act of corrupt or illegal practice could be laid at the door of the candidate, nor could any knowledge of such practice be imputed to him. And further, there was no finding of other acts of corrupt or illegal practice. However, a candidate is responsible, so far as his seat is concerned, for all the acts and misdeeds of the agent committed within the scope of his authority; although the candidate not only did not intend such acts to be done, hut even did his best to hinder them; or although such acts were done contrary to, and in defiance of, his express orders. The reason for this stringent law is that candidates put forward agents to act for them; and if it were permitted that these agents should play foul, and that the candidate should have all the benefit of their foul play without being responsible for it in the way of losing his seat, great mischief would arise. No one can win and wear a prize upon whose behalf the contest has not been legitimately and fairly carried on; the principal must suffer, and cannot hold the benefit in respect; of that in which his agent has compromised him. (See PARKER'S ELECTION AGENT AND RETURNING OFFICER, 6th Edn., p. 319). It may be worthwhile for aspirants to legislative honours, of whom there is no dearth in this country, to bear in mind these matters to which I have referred. A distinction must also be drawn between the liability of the candidate for the acts of his agents as regards his seat, and as regards penalties. In the latter case, the act must be proved to have been done by the agent with the knowledge and authority of the candidate. (*Op. cit.*) I feel that I can properly draw that distinction here having regard to the facts.

In the circumstances, I hold that it is fit to order the removal of the incapacity placed upon the respondent by virtue of FRASER'S, J.,

report to the Speaker, that incapacity being provided for by s. 35 (6) of the Ordinance. I order that that incapacity shall henceforth cease.

Before I conclude this judgment, I wish to refer to the case of *R. v. Hulme* (1870), 5 L.R.Q.B. 377, cited by learned counsel for the petitioner in his submission that Mr. Ashton Chase should have given evidence at his trial so that his credibility could have been tested, before his acquittal can be regarded as conclusive in the matter of the motion brought by him. I do not know that this is relevant to my consideration of the motion before me. But if it is, the case of *Hermiman v. Smith*, [1938] A.C. 305, in authority to the effect that in view of the jury's verdict, Mr. Chase's innocence must be conclusively presumed. The *Hulme* case concerned the granting of a certificate of indemnity to a witness who was sworn and who gave evidence before Commissioners appointed to inquire into the corrupt practices at an election. The Commissioners issued a certificate in which they stated that the witness had given false answers. It was held that to entitle him to a certificate the witness must make true answers to all questions, and that the certificate given by the Commissioners was no certificate within the meaning of the relevant Act. I believe that I have said enough to indicate that that case has no application to the matter now before me.

Application granted.

Solicitors: *Sase Narine* (for the applicant); *C. L. John* (for the petitioner); Crown Solicitor (for the second-named respondent).

KILDONAN AND NOURNEY LOCAL AUTHORITY v.
PARIAG AND ANOTHER

[Supreme Court (Khan, J. (ag.)) December 11, 1961, July 28, 1962]

Practice and procedure—Authority to solicitor—Action instituted in name of local authority—Authority to solicitor signed by chairman alone—Validity of authority—Local Government Ordinance, Cap. 150, s. 202.

The authority to solicitor to institute an action in the name of a local authority was signed by its chairman alone. It was submitted for the defendants that the authority was bad because of s. 202 of Cap. 150, sub-s. 1 whereof provides that “except as otherwise provided in this Ordinance, any document requiring to be signed by a local authority may be executed by two members thereof, one of whom shall be the chairman”.

Held: the authority to solicitor should have been signed by the chairman and also a member of the local authority and was bad in law.

Action struck out.

J. T. Clarke for the plaintiff.

Dwarka Dyal for the defendants.

KHAN, J.: The plaintiffs are a local authority—a corporate body entitled to acquire movable and immovable property under the

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provisions of the Local Government Ordinance, Cap. 150 of the LAWS OF BRITISH GUIANA. In this action the plaintiffs' overseer, Joseph Leitch, alone gave evidence which disclosed that in 1943 the plaintiffs acquired all the right, title and interest in and to the licence of occupancy No. "A" 92, dated the 22nd May, 1905, for the property described in the schedule of the licence and described in paragraph (2) of the statement of claim. The licence was originally vested in the proprietors of Pln. Kildonan, Corentyne, Berbice, but was later transferred on the 12th March, 1943, to the plaintiffs by the proprietors.

Before 1941, and at the time of the transfer in 1943, the defendants were occupying and planting a portion of the land—the subject matter of this action. One of the defendants, Pariag, now deceased, was one of the proprietors who joined in effecting the transfer in 1943 to the plaintiffs. The defendants continued to occupy the land in question but without permission and without payment of any rent to the local authority although they were requested to give up possession. The lands in question are situated in the second depth of Pln. Kildonan. The defendants own one and a quarter share of land in the first depth and they were given a proportionate share of land to cultivate in the second depth, but they continued to hold on to their possession of the land in question which measures 61 by 19 rods—about 4 acres.

The chairman in 1943 requested the defendants to quit the land but they refused. Several demands were made of the defendants to vacate the land in question but to no avail. In 1948 efforts were made by the plaintiffs to get possession of the land but this was resisted by the defendants in the magistrate's court which declined jurisdiction. In 1954 a writ was filed in the Supreme Court but this was later abandoned.

It was admitted by the plaintiffs that the defendants planted 134 coconut trees on the land and several fruit trees. The land was cleared and cultivated by the defendants at their expense and the cultivation continues on the land which was originally bush and swamp. It is not disputed that the defendants were in possession of this land before 1941, but it was submitted by the plaintiffs that time to run against the plaintiffs' local authority ought to be 30 years and not 12 years, as the local authority were agents of the Crown and that in 1954, when a writ was filed and the action subsequently abandoned time ceased to run.

Counsel for the defendants submitted—

- (1) that time commenced to run from 1943 when the licence was transferred to the plaintiffs;
- (2) that the chairman alone had no authority to authorise solicitor to bring these proceedings by virtue of s. 202 of Cap. 150, which requires the chairman and a member to execute any documents on behalf of the local authority.

It is submitted that the word "may" in the section must be construed to mean "must".

I shall deal with the second submission first. Now, at s. 202 (1) of Cap. 150 it is enacted as follows—

“Except as otherwise provided in this Ordinance, any document requiring to be signed by a local authority may be executed by two members thereof, one of whom shall be the chairman”.

It is submitted that on the construction the word “may”, in s. 202 (1) means “must”, and it is therefore obligatory that the authority to solicitor in this action must be signed by the chairman and a member.

In dealing with the submission one must of necessity examine the Ordinance to determine the absence or presence of any other authority in view of the proviso “except as otherwise provided in this Ordinance”.

I have examined the Ordinance. I find that s. 80 (1) empowers that a chairman of a local authority may, between any two meetings of the local authority exercise all the executive powers of the local authority provided that all acts so done by the chairman shall be reported to the local authority at the meeting next ensuing and any act of the chairman of which the local authority disapproves shall be null and void. This section in my view deals with the executive powers of a chairman in the general administration of the local authority, between meetings, in order to facilitate the day to day business of the authority, and was not intended in my view for proceedings of this kind. Having found no other section within the ambit of the proviso, I now proceed to examine the submissions that “may” in s. 202 (1) means “must” and is obligatory. In other words, “may” as used is imperative and not merely permissive or discretionary.

Now, at p. 239 in MAXWELL ON STATUTES, 10th Edition, the author states in paragraph (3), the head note being “may” and “must”, I quote—

“Statutes which authorise persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they “may”, or “shall, if they think fit,” or, “shall have power,” or that “it shall be lawful” for them to do such acts, a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expressions may have—to say the least—a compulsory force, and so would seem to be modified by judicial exposition. On the other hand, in some cases, the authorised person is invested with a discretion, and then these expressions seem divested of that compulsory force, and probably that is the *prima facie* meaning.”

In the decision in the House of Lords, in *Julius v. The Bishop of Oxford* (1880), 5 App. Cas. 214, it was stated as follows:—

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“From the nature of the English language, the word “may” can never mean “must”, that it is only potential and when it is employed there is another question to be decided, that is, whether there is anything that makes it the duty of the person on whom the power is conferred to exercise that power. If not, the exercise is discretionary, but when the power is coupled with a duty of the person to whom it is given to exercise it, then it is imperative.

Accordingly, when a statute enacts that a candidate at an election may be present at the polling place, or that a clergyman accused of an ecclesiastical offence may attend the proceedings of the commission appointed to enquire into the accusation, or that a company may construct a railway, or that a plaintiff may sue in one action for injury done to his wife as well as himself, cases in which the donee of the power has only his own interests or convenience to consult, the word “may” is plainly permissive only, and a mere privilege, or licence is conferred which he may exercise or not at pleasure. But in cases where the power is deposited with public officers to be used for the benefit of persons having rights in the matter it is no mere permission to do such acts. A duty is at the same time cast upon the persons empowered.”

In ODGERS at page 266 on this question, the learned author states—

“It therefore appears that the word “may” always gives a power; but the further question whether, given the power, there is a duty to exercise it, must depend on the words creating the power. If the donee has nobody’s interest to consult but his own, the power is permissive merely, but if a duty to others is at the same time created, the exercise of power will be imperative”.

In this case, I am of the opinion that the right to authorise legal proceedings is for the benefit of the members of the local authority and this right can be exercised only by the chairman and a member to prevent the failure of justice. In all such cases the intent of the Legislature, which is the test, is not to grant a mere discretion but to impose a positive and absolute duty. The authority to solicitor in this case must therefore be signed not only by the chairman but also by a member of the local authority. The present authority in this case, filed by the solicitor on the record is signed only by the chairman, one Mr. Wilson.

It is interesting to observe that at the hearing of this trial Mr. Wilson did not give evidence, but only Mr. Leitch, an overseer on behalf of the local authority. It has been held that where there is apparent authority—and there had been no objections as to authority—that the maxim *omnia praesumuntur rite esse acta* would apply. In this case, however, this is a statutory provision and in my view it is compelling.

In a recent case decided by the Honourable Chief Justice in respect to this very section, it was argued that the authority which

was only signed by the chairman was a nullity. Before the conclusion of the proceedings, however, the authority was ratified and it was held that that procedure cured the defect. In this case, however, no such steps were taken and indeed it was argued at the hearing that the word "may" was merely discretionary and so no steps were taken at all in putting right this defect. It is my view that the authority is bad and the plaintiff is not properly before the court.

In respect to the other submission that this action is statute barred, it was admitted by the Overseer Leitch who stated that he was 31 years an overseer to the plaintiffs' local authority and that the defendants were on the land since 1941. The licence was transferred in 1943, a period of over 16 years have elapsed before this action is brought. It is not disputed that the possession of the defendants was adverse.

Mr. Persaud on behalf of the local authority contended for the plaintiff that the statute of limitation ought to be 30 years and not 12 years because the local authority is in the position of the Crown. If I am right in holding that the authority to solicitor is bad, then, any finding on the later submission ought not to bind the local authority as they are not properly before the court as a party.

My view therefore on this second submission would be merely *obiter* and not binding on the plaintiff. I feel, however, having considered the second submission—and much time was spent on argument and consideration—that I should indicate my view even though *obiter* in respect to the submission. My view, however, would not act as a bar against the plaintiffs in re-instituting this action if properly authorised.

In this second submission, my view is, that the local authority in question is in the same position as a corporation and not in a position as the Crown. The limitation period is 12 years and not 30 years, in which case this action would be statute barred. The contention of counsel that the filing of the action in 1954 caused time to be halted and ceased to run thereafter is untenable. Under the Rules of Court, it is clearly stated that an action which has been deemed abandoned does not affect the running of time and so time commenced to run in this action from 1943 when the local authority demanded possession and was refused and these defendants continued to hold on to their possession *nec vi, nec clam, nec precario*—a period of over 16 years before this action has been filed.

In all the circumstances the purported plaintiffs not being properly before the court, that is, the local authority, the action has to be struck out as it would be improper to deal with this case on the merits if the plaintiffs are not properly before the court. This point on the first submission with respect to the authority ought to have been taken *in limine*. In consequence no cost is to be ordered against the local authority and this judgment would not act as a bar to further proceedings if the local authority so desires. The action is therefore struck out for want of authority.

Action struck out.

RAMKISSOON AND OTHERS v. SANKAR AND OTHERS

[Supreme Court (Persaud, J.) June 30, July 21, 28, 1962.]

Rice lands—Tenants' possession disturbed by third parties acting with authority of landlords—Action for breach of agreement, damages for trespass, declaration, specific performance and injunction—Whether Supreme Court has jurisdiction—Rice Farmers (Security of Tenure) Ordinance, 1956, s. 51 (1).

The plaintiffs claimed that by virtue of an oral agreement they held certain rice lands as tenants from S. who later put B. and R. into possession of part of the holding. The plaintiffs therefore sued S. for breach of agreement and B. and R. for trespass. For S. it was submitted *in limine* that the jurisdiction of the Supreme Court was ousted by the Rice Farmers (Security of Tenure) Ordinance, 1956, s. 51 (1) of which provides that “. . . any claim or other proceedings (not being proceedings before the assessment committee as such) arising out of this Ordinance shall be made or instituted in the magistrate's court.”

Held: (i) any application by a tenant for possession (or any other remedy which would have the effect of putting him in possession) must be brought under the Ordinance;

(ii) an action for trespass would normally be maintainable against B. and R., but this question would depend on whether or not the plaintiffs were entitled to possession, which in turn must be decided by the assessment committee. Until this was settled it was doubtful whether an action in trespass could be maintained.

Objection upheld.

D. Robinson for the plaintiff.

Mrs. A. Sankar-Adams for the first and second-named defendants.

J. O. F. Haynes, Q.C., for the third and fourth-named defendants.

PERSAUD, J.: The plaintiffs allege in their statement of claim that an oral agreement of tenancy had been entered into between themselves as tenants, and the first and second defendants as landlords whereby 45 acres of rice lands were let to them, and that they were put in possession of those lands by the first and second defendant's agents. Subsequently, the first and second defendants put the third and fourth defendants in possession of 24 acres of land part of the original 45 acres. The plaintiffs contend that this act on the part of the first and second defendants constitutes a breach of the agreement of tenancy, and that the third and fourth defendants have committed trespass to the 24 acres of land. The plaintiffs now seek a declaration that they are tenants of 45 acres of rice lands, possession of 24 acres, an order for specific performance of the agreement, an injunction restraining all the defendants from committing further acts of trespass, damages and mesne profits.

Counsel for the first two defendants has submitted *in limine* that this court has no jurisdiction to hear this matter as it arises out of the Rice Farmers (Security of Tenure) Ordinance, 1956 (No. 31) within the meaning of s. 51 (1) of the Ordinance which provides as follows:—

“Subject to the provisions of subsection (3) of section 3 of the Summary Jurisdiction (Petty Debt) Ordinance, any claim or

other proceedings (not being proceedings before the assessment committee as such) arising out of this Ordinance shall be made or instituted in the Magistrate's Court."

In *Evelyne v. Latchmansingh* (1961), 3 W.I.R. 107, 1961 L.R.B.G. 12, where an action was brought by a tenant against his landlord for breach of the covenant for quiet enjoyment, eviction, trespass by unlawful entry and dismantling of walls, and a breach of contract of tenancy, LUCKHOO, C.J., held that having regard to the provisions of s. 26 (1) of the Rent Restriction Ordinance, Cap. 186, (which is similar in terms to s. 51 (1) of the Rice Farmers (Security of Tenure) Ordinance) that if it was necessary for the plaintiff to rely on the Rent Restriction Ordinance the claim was one arising out of the Ordinance, and if it did, then the claim should have been brought in the magistrate's court. In that action the plaintiff was not claiming either an injunction or the recovery of possession and in this respect, in my view, differs from the case before me. The Chief Justice referred to the case of *Cloutt v. London Provincial Stores Ltd.*, 161 L.T. 48, in respect of which this statement appears:

"a claim was made against the landlord by a tenant claiming to be a statutory tenant claiming damages to and detinue of his chattels and also for an injunction to restrain the landlord from interfering with his peaceful occupation of the premises, but in as much as in this case it would appear that the whole matter in issue was whether or not the plaintiff was protected by the Rent Acts, the Court of Appeal rightly held the case came within section 17 (2), the issue as to trespass, detinue and the injunction being wholly dependant on the question whether or not the plaintiff was protected by the Rent Acts."

As FRASER, J., remarked in *Saul v. Small* (at p. 189 herein) s. 17 (2) of the Rent Act did not confer upon the County Court an exclusive jurisdiction although in the ordinary way proceedings ought to have been brought to that Court under the Act. In *White v. White* (at p. 316 herein) where a plaintiff claimed a declaration that he was the tenant of rice lands, damages for trespass and an injunction in relation to the said land, ADAMS, J., after referring to the Federal Court's decision of *Khan v. Rahaman* (No. 41 of 1961) said—

"It is clear that the claim for damages for trespass was not entertainable by the Supreme Court. The relief for a declaration and injunction is dependent on the question whether or not the plaintiff is protected by the provisions of the Ordinance. If the question of recovery of possession arises out of the Ordinance to bring a claim for injunction without first taking proceedings before the committee cannot give the court jurisdiction as the injunction claimed is intended to give the plaintiff possession. The claim for declaratory order will have the same effect as it is for the committee to say whether a person is a tenant or not, at least in the case where the person initiating proceedings alleges that he is the tenant."

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In that case ADAMS, J., was called upon to express an opinion, as I am in this case, on the implication of the provisions of the Rice Farmers (Security of Tenure) Ordinance, 1956.

In the *Khan v. Rahaman* case, which was an appeal against a judgment of the Supreme Court granting possession to the respondent upon a claim brought by him in respect of rice lands, the Federal Court held that the landlord could only have been given possession under the provisions of the Rice Farmers (Security of Tenure) Ordinance. The learned Chief Justice said:

“Although the language of section 29 is not as explicit or mandatory as it might have been in placing the fetter upon the jurisdiction of the Court, yet the object and provisions of the Ordinance make it impossible in my view to maintain successfully that the circumstances of this case are such that the Ordinance has no application to it and that the remedy of the landlord respondent was an action in law”.

There can be no doubt that so far as that case was concerned the relevant section was s. 29 as that section relates exclusively to the recovery of possession by a landlord. That this is so is clear from paragraphs (a) to (1) of subsection (2) of that section, and if there is any doubt, that doubt is set at rest by the provisions of subsection (3) which makes an order for the recovery of possession enforceable as an order under s. 46 of the Landlord and Tenant Ordinance, Cap. 185. In the action before me it is the tenant who seeks the various orders, including one for possession. It is settled law that the presumption is against the ousting of the jurisdiction of a superior court except by express words or necessary implication (see CRAIGS ON STATUTE LAW, 5th Edn., p. 116). Section 51 (1) of the Ordinance is to the effect that any claim or other proceedings (not being proceedings before the assessment committee as such) arising out of the Ordinance shall be made or instituted in the magistrate’s court. Section 52 (1) provides that any amount assessed, fixed, certified or ordered by the committee to be paid as compensation or damages under the Ordinance may be recovered under the provisions of the Summary Jurisdiction (Petty Debts) Ordinance, Cap. 16, this being another instance where the Ordinance makes specific provision for certain proceedings to be brought in a court of summary jurisdiction.

The crux of this matter seems to me to be the interpretation to be placed on s. 11 (h) of the Ordinance which gives the committee the power “to hear and determine an application for the recovery of a holding to which this Ordinance applies.” It is conceded that the Ordinance applies to the land in question and it remains to be settled whether paragraph (h) includes an application by a tenant. Nowhere in the Ordinance is there any provision that I can find dealing with an application by a tenant as such. Section 5 (1) (c), however, provides that a tenant shall not terminate his tenancy except as is provided in the Ordinance. The provisions other than those contained in para. (h) of s. 11 lead me to the conclusion that para. (h) refers to applications both by landlord and by tenant, particularly when regard

is had to the commencement of s. 11 which is: "Upon filing of *any* application under this Ordinance"

In my judgment any application by a tenant for possession (or any other remedy which would have the effect of putting him in possession) must be brought under the Ordinance. It seems to me from the dictum of Lord GREENE, M.R., in *Brown v. Draper*, [1944] 1 All E.R. 246, at p. 247, that however much the tenant may wish to do so, he may not deprive himself of the shelter of the Ordinance where the Ordinance provides that no agreement for the letting of rice lands shall be terminated except under the provisions of the Ordinance (s. 3), and any provisions in any agreement whereby the tenant purports to contract himself out of the provisions of the Ordinance shall be null and void (s. 48).

At first I had entertained the notion that the plaintiffs are not precluded from bringing an action for damages for a breach of contract under the common law. But it seems that I must jettison this idea, in view of what I have said in the earlier part of this judgment.

An action for trespass is maintainable against a person who has committed acts in violation of possession. Such an action would normally be maintainable against the third and fourth defendants, but this question would depend on whether or not the plaintiffs are entitled to possession which in turn must be decided by the assessment committee. Until this is settled, it is doubtful whether an action in trespass can be maintained.

In the result, I must find that the point is well taken, and must dismiss the claim. However, because of the fact that the question of jurisdiction had not been originally pleaded by the first and second defendants, and was pleaded by the third and fourth defendants after the question was raised by the Chief Justice, I will make an order for each party to bear his own costs.

I do not wish it to be understood that I am holding that a party who alleges the existence of a tenancy within the Rice Farmers (Security of Tenure) Ordinance may not in certain circumstances approach the Supreme Court for certain other remedies not within the pale of the Ordinance.

Objection upheld.

CRAIG v. INLAND REVENUE COMMISSIONER

[Supreme Court—In Chambers (Persaud, J.) June 29, July 20, September 1, 1962.]

Income tax—Insolvency—Income earned partly before and partly after receiving order made—Receiving order subsequently discharged—Whether taxpayer released by discharge order from tax on income earned before receiving order—Whether receiver liable for tax on income earned after receiving order—Insolvency Ordinance, Cap. 43, s. 31 (2) (d).

In 1960 the appellant was assessed to income tax in respect of income earned in 1959. On 10th March, 1959, he was adjudged insolvent, but was discharged in October 1961. It was argued that income tax on earnings before 10th March, 1959, were provable in insolvency and that the appellant was released from liability therefor by the order of discharge in consequence of s. 31 (2) (d) of the Insolvency Ordinance, Cap. 43, which provides that “an order of discharge shall release the insolvent from all other debts provable in insolvency.” It was also submitted that tax was not payable by the appellant on income earned after 10th March, 1959, as such income was the income of the assignee in insolvency, who was the Official Receiver. The income in question was, however, in fact received by the appellant save for a portion which was paid by him to the Official Receiver towards the liquidation of his debts pursuant to an order of court.

Held: (i) on the date of the receiving order the appellant’s income tax was incapable of being assessed, and therefore could not have been provable in bankruptcy, and was not a debt from which the appellant was released by virtue of the order of discharge;

(ii) save for the sum paid to the Official Receiver towards the liquidation of his debts pursuant to the order of court, the income received by the appellant after 10th March, 1959, was taxable after the permissible deductions.

Appeal allowed in part.

J. H. S. Elliott, Q.C., for the appellant.

G. A. S. Van Sertima, Senior Legal Adviser (ag.), for the respondent.

PERSAUD, J.: The appellant, who is a construction engineer, filed his income tax return in respect of income bearing year 1959, and he was assessed on that income in 1960. The income declared was comprised as follows:—

| | | | |
|-------------------------|--------|----|---------|
| Profits from profession | ... | .. | \$1,150 |
| Salary | | .. | \$7,920 |
| Pension | | .. | \$3,437 |

These amounts total \$12,507. As is usual, certain correspondence flowed between the appellant and the Commissioner’s office, the final result being that the appellant was allowed \$900 as personal allowance and \$124 for other deductions leaving a taxable income of \$11,483.00. The appellant had claimed the deduction of \$6,253 as trade losses, but this was disallowed by the Commissioner. The other relevant facts to this appeal are that the appellant was upon the application of the Official Receiver adjudged insolvent on the 10th March, 1959, and ordered to pay that officer \$150.00 per month towards the satisfaction of his debts, commencing from the 30th April, 1959. Pursuant to

this order the appellant paid the sum of \$1,350 in 1959. An order of discharge, subject to certain conditions, was made on the 2nd October, 1961.

It has been submitted on behalf of the appellant that:—

- (1) he is not liable to be taxed on earnings before the 10th March, 1959;
- (2) he is not liable to be taxed on earnings after the 10th March, 1959, as that income was the income of the Official Receiver; and in the alternative;
- (3) after the 10th March, 1959, the appellant would be liable to be taxed only on the balance left after deducting the amount paid to the Official Receiver under the order of court.

In developing his argument under the first head, counsel has urged that income tax on earnings before 10th March, 1959, are provable in insolvency, and the appellant having been discharged as an insolvent, can embrace the release provided him by section 31 (2) (a) of the Insolvency Ordinance, Cap. 43, which provides that—

“An order of discharge shall release the insolvent from all other debts provable in insolvency.”

Section 35 (3) of the same Ordinance provides that with certain exceptions, all debts and liabilities, present or future, certain or contingent, to which a 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. By sub-s. (9) (c) of the same section “liability” includes an obligation to pay. It would seem, therefore, that if on the 10th March, 1959, the appellant was under an obligation to pay income tax in respect of income earned in 1959, or if he had become subject to pay before his discharge by reason of an obligation incurred before 10th March, 1959, then such tax would be provable in insolvency, and the appellant would be released from meeting the liability by virtue of s. 31 (2).

In *Whitney v. I.R.C.*, [1926] A.C. 37, Lord DUNEDIN said—

“Now there are three stages in the imposition of a tax: there is the declaration of liability, *that is the part of the statute which determines what person in respect of what property is liable*. Next, there is the assessment. Liability does not depend on assessment. That *ex hypothesi*, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Later comes the method of recovery”

Again STOBY, J., in *C.I.R. v. Barcellos*, 1957 L.R.B.G. 105, said—

“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

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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.”

In this case, the income tax assessment was made after a receiving order was made, and after the court’s approval of a scheme of arrangement out of which the respondent Barcellos was appointed assignee and trustee of the debtor’s estate. The assessment related to income bearing years previous to the year of the receiving order, and really arose out of the evidence given by the debtor during his public examination. It was urged for the respondent that the tax so assessed was not an obligation incurred before the receiving order. The submission did not find favour with STOBY, J.

Counsel for the respondent before me has contended that by virtue of ss. 5 and 8 of the Income Tax Ordinance, Cap. 299, income tax chargeable, leviable and collectible must be tax for the year of assessment, and that such tax is not ascertainable, indeed the liability to pay such tax does not arise, until the end of the income-bearing year, or better still the commencement of the year of assessment. This submission would appear to be in the teeth of STOBY, J.’s dictum in the *Barcellos* case. The distinction to be drawn, in my view, is that in that case the tax had already been assessed when it was sought to claim the amount from the assignee. In *Re Hawkins*, [1894] 1 Q.B. 25, VAUGHAN WILLIAMS, J., said—

“In order to make a debt provable there must be at least a contingent liability, and there is a right of proof directly the receiving order is made if the amount is capable of being assessed.”

This was a case where a wife in whose favour an order for alimony had been made, sought to prove in bankruptcy against the husband, in respect of arrears which had accrued *after* the date of the receiving order and *before* the debtor’s discharge, and it was held that the wife’s proof ought not to be allowed.

Section 8 of the Income Tax Ordinance provides that tax shall be charged, levied, and collected upon “chargeable income”, and this term is defined in s. 2 as meaning the aggregate amount of income from certain specified sources (in which would fall the sources of income of the present appellant) remaining after allowing the appropriate deductions and exemptions. In other words, the chargeable income upon which income tax is assessed is not ascertained until the deductions and exemptions are allowed, and therefore, income tax is not capable of being assessed until this is done, and this cannot be done until the commencement of the year of assessment in respect of which the tax is charged, levied, and collected. On the date of the receiving order, the appellant’s income tax was incapable of being assessed, and therefore would not have been provable in bankruptcy. As was said by CAVE, J., in *Linton v. Linton*, [1885] 15 Q.B.D. 239, in considering the question whether future payments of alimony is a ‘debt or liability’ within the meaning of the Bankruptcy Act, 1883, “I should be altogether defeating the Act if, in a case of this kind, I were to allow

the husband to get rid of such an order by bankruptcy proceedings." Similarly, in the instant case, if I were to accept the first submission of the appellant it would be made easy for a taxpayer to avoid his liability to income tax by applying to be adjudged insolvent, and by being so adjudged before he has been assessed. I am of the view that the liability of the appellant on the date of the receiving order is not a debt within the meaning of s. 31 (2) (a) of Cap. 43.

Now to deal with the taxpayer's earnings after 10th March, 1959. Counsel submits that that income was really the income of the Official Receiver. Section 42 of the Insolvency Ordinance, Cap. 43, prescribes the property of an insolvent that is divisible among his creditors which includes

"all property belonging to or vested in the insolvent at the commencement of the insolvency, or acquired by or devolving on him before his discharge."

Section 51 of the Ordinance provides as follows:—

"(1) Until an assignee is appointed, the Official Receiver shall be the assignee for the purpose of this Ordinance, and immediately on a debtor being adjudged insolvent the property of the insolvent shall vest in the assignee.

(2) On the appointment of an assignee, the property shall forthwith pass to and vest in the assignee appointed."

Both in *Cohen v. Mitchell*, [1890] 25 Q.B.D. 262, and in *Re Pascoe*, [1944] 1 Ch. 219, the question arose as to the bankrupt's ability to deal with property coming under the bankruptcy, and with after-acquired property. The principle laid down in *Cohen v. Mitchell* was this—

" . . . until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against trustee."

In *Re Pascoe*, Lord GREENE, M.R., said,

" . . . the bankrupt was entitled to deal with his after-acquired property by means of transactions with third persons of the kind specified, and as against him the person with whom he dealt could not dispute his title, but these cases clearly do not establish the proposition that, as between the bankrupt and the trustee, after-acquired property belongs to the bankrupt until the trustee claims it."

These two cases were not concerned with the imposition of tax, but rather with the question whether or not the bankrupt or the trustee was entitled to certain after-acquired property. But in *Flemming's* case, 14 T.C. 83, the question for determination was whether the income

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(accruing during the period of sequestration) of two properties which had been included in the respondent's sequestration, but were not realised by the trustee was the income of the respondent. The respondent was claiming certain rebate of income tax in relation to the income derived from the properties, which income tax had been paid by the trustee. The President of the Court of Appeal said,—

“It is obvious that, unless during the years in question the annual value of the properties was income of the respondent, he cannot have any claim to abatement of it for income tax purposes; and accordingly everything depends upon the soundness of the proposition that the income consisting in the annual value of these properties was truly income of the respondent. I do not see how it can possibly be so described. It was part of the income arising from the sequestered estates vested in the trustee for the respondent's creditors. Any income that did arise from those estates was income of the trustee as such, and he (and he alone) had the right to put it into his pocket as it was not income that went or could go into the pocket of the respondent as income in any of the years in question.”

And Lord MORISON, one of the other three judges all of whom agreed with the views expressed by the President, said—

“If the respondent had himself been in right of the heritage in question during the years mentioned, I have no doubt that he would have been entitled to claim the deductions in question here. But the effect of the sequestration was that he had no income at all from the properties. During sequestration the income as well as the properties belonged to his trustee in bankruptcy and he could make no claim against the Crown for those deductions.”

Be it noted that *Flemming's* case dealt with income accruing from properties, while the case before me deals with profits from the appellant's profession, his salary and pension, and therein in my view lies the difference. The instant case seems to fall squarely within the decision of *Hibbert v. Fysh*, referred to in vol. 68, No. 1775 of “TAXATION” at p. 19. I have not had the benefit of the actual judgment, but in that case, the appellant, who had been adjudicated a bankrupt, received his earnings from his employment as a waiter which earnings he used for his own purpose. The appeal concerned tax years during which the bankruptcy order remained undischarged. It was contended by the appellant that as he was an undischarged bankrupt, the earnings assessed on him were not his own property, and therefore the assessments were invalid. It was held that the personal earnings of a bankrupt did not vest in his trustee in bankruptcy in so far as they were required for his maintenance and support of himself and his family, and that even to the extent to which they were surplus to that requirement, the trustee in bankruptcy had to intervene before he could lay any claim to such surplus.

In the case before me the whole of the appellant's income, salary and pension were received by him, save the sum of \$1,350.00 paid to

the Official Receiver towards the liquidation of his debts pursuant to an order of court. It seems to me, therefore, that that entire sum, which amounts to \$12,507.00, would be taxable after the permissible deductions. Counsel for the respondent concedes that the sum of \$1,350.00 referred to above, should be deducted. This would make the appellant's income \$11,157.00. The assessment will be varied to that extent, but in view of the fact that the appellant has been partly successful only, each party will bear his own costs.

Appeal allowed in part.

Solicitors: *A. G. King* (for the appellant); *S. M. A. Nasir*, Crown Solicitor (for the respondent).

RAMNAUTH v. SMITH

[In the Full Court, on appeal from the magistrate's court for the Corentyne Judicial District (Luckhoo, C.J., and Miller, J.) July 20, 27, September 7, 1962.]

Road traffic—Third party risks—Policy inoperative unless car driven by licensed driver—Car driven by unlicensed driver—Licensed driver sitting beside him—Whether car driven by licensed driver—Motor Vehicles and Road Traffic Ordinance, Cap. 280, s. 24 (1)—Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 281, s. 3 (1).

The appellant, an unlicensed driver, drove a motor car with the owner, a licensed driver, sitting beside him. The car was insured under a policy which contained an exception whereby the policy did not apply unless the car was being driven by a licensed driver. The appellant was convicted of the offence of driving the car when there was not a policy of insurance in force in relation to its user, contrary to s. 3 (1) of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 281. On appeal it was argued that the owner was also a driver and that the exception did not apply if one of the drivers held a licence to drive.

Held: (i) if the owner could be considered as a driver of the car at the material time even though the appellant was also a driver and was not licensed to drive a car, the vehicle would remain insured under the policy as the exception clause would not apply in such circumstances;

(ii) but the mere fact that the owner, who was licensed to drive, was seated beside the person in the driving seat was not enough to constitute the former a driver of the vehicle. *Evans v. Walkden*, [1956] 1 W.L.R. 119, applied.

Appeal dismissed.

M. Poonai for the appellant.

K. M. George, Senior Legal Adviser, for the respondent.

Judgment of the Court: The appellant Ramnauth has appealed against a conviction by the magistrate of the Corentyne Judicial District on a charge of driving motor car No. PM451 on the 18th February, 1962, at No. 60 Public Road, in the Corentyne Judicial

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District, when there was not a policy of insurance in force in relation to the user of the car, contrary to s. 3 (1) of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 281.

The evidence disclosed that the motor car was at the material time owned by one Dindyal Tulsie and was being driven by the appellant who was sitting in the driver's seat with Dindyal Tulsie sitting in the passenger's front seat next to the appellant. The defence, which was rejected by the magistrate, was to the effect that Dindyal Tulsie was driving the car and not the appellant and that the appellant was not in the car at the material time but had left the car some time before.

Before the magistrate the appellant admitted that he was not licensed to drive a motor car. He was convicted on the charge in respect of which this appeal has been brought as well as on a charge of driving the motor car when he was not the holder of a driver's licence, contrary to s. 24 (1) of the Motor Vehicles and Road Traffic Ordinance, Cap. 280. He has not appealed from this latter conviction.

Before us counsel for the appellant exhibited the policy of insurance in force in relation to the user of the car as well as the current driver's licence held by Dindyal Tulsie, the owner of the car. Counsel contended that as the evidence accepted by the magistrate disclosed that Dindyal Tulsie was at the material time sitting beside the appellant in the front seat of the car Dindyal Tulsie was a driver of the car also. Actually, the magistrate remarked that the evidence as to whether the owner was sitting in the back seat or in the passenger's front seat was conflicting but he did not state any finding of fact on that issue but confined himself to a finding as to who was sitting in the driver's seat at the material time. Reference was made to the case of *R. v. Wilkins* (1951), 115 J.P. 443, decided on appeal at the Berkshire Quarter Sessions. In that case the evidence given before the court of first instance, the Wokingham justices, was to the effect that a tractor owned by Wilkins (who was licensed to drive a tractor) was being driven by his sister who was not licensed to drive a tractor. Wilkins was at the material time standing on the tractor beside his sister who was sitting in the driver's seat. They were convicted by the Wokingham justices of driving the tractor while it was uninsured. On appeal, the evidence was heard by Quarter Sessions and it is stated that Quarter Sessions were of the opinion that from the evidence although Wilkins was not sitting in the driving seat nevertheless he retained effective control of the tractor and was himself a driver of the tractor at the material time for the purposes of s. 121 (1) of the Road Traffic Act, 1930, even though his sister was in the driving seat and was also a driver of the vehicle at the same time. As the exceptions clause in the policy of insurance did not apply if one of the drivers held a licence to drive, the vehicle remained insured under the policy and Wilkins and sister were therefore not guilty of driving an uninsured vehicle. In the present appeal if Dindyal Tulsie could be considered as a driver of the car at the material time even though the

appellant was also a driver and was not licensed to drive a car the vehicle would remain insured under the policy as the exceptions clause in the policy of insurance would not apply in such circumstances.

The mere fact that the owner who is licensed to drive such a vehicle is seated beside the person in the driving seat is not enough to constitute the former a driver of the vehicle. In *Langman v. Valentine*, [1952] 2 All E.R. 803, a learner who had no driving licence was sitting in the driver's seat and was being taught to drive a motor car by the owner who sat in the front seat next to the learner. The owner kept one hand on the handbrake and the other on the steering wheel and had the ignition key within his reach and was able to steer the car, stop it or start it. The learner had her foot in position on the accelerator and on the footbrake. It was held by the Divisional Court on appeal that both the learner and the owner were drivers of the car.

That case may be compared with *Evans v. Walkden*, [1956] 1 W.L.R. 109, which is on all fours with the present case. In *Evans v. Walkden* it was held by the Divisional Court that a person in the front passenger seat of his car was not a driver because he neither held the steering wheel nor any other of the car's controls. The fact that he was in a position to take over or assist in the driving was immaterial because he had not in fact done so. If it is considered that there is conflict in *R. v. Wilkins* (1951), 115 J.P. 443, with *Evans v. Walkden* then of course the latter being a decision of the Divisional Court must prevail. But it is *not* clear that there is conflict for the evidence upon which Quarter Sessions found that Wilkins retained effective control of the tractor has not been stated in the Justice of the Peace Report—the only report of the case. The facts set out in the head note and in the prepared summary in the report appear to be those given in evidence before the Wokingham justices.

In our opinion the facts of the present case are indistinguishable from those in *Evans v. Walkden*, [1956] 1 W.L.R. 109, and the owner Dindyal Tulsie was not at the material time a driver of the car.

We are unable to accede to the request of appellant's counsel to remit the matter to the magistrate to be re-heard and determined. Both the owner and the appellant have given evidence on oath before the magistrate as to who was in the driving seat at the material time, which the magistrate found to be false. It would be incomprehensible if we were to remit the matter for evidence on oath to be given to the contrary for the purpose of grounding a defence to the charge laid.

The appellant's conviction cannot be impeached and must be affirmed with costs \$28.60 to the respondent.

Appeal dismissed.

ALEXANDER v. LOCHABER LTD.

[In the Full Court, on appeal from the magistrate's court for the Berbice Judicial District (Luckhoo, C.J., and Miller, J.) June 27, September 7, 1962.]

Workmen's compensation—Limitation—Whether claim barred after three years—Workmen's Compensation Ordinance, Cap. 111, s. 37—Limitation Ordinance, Cap. 26, s. 8.

Section 37 of the Workmen's Compensation Ordinance, Cap. 111, provides that "the law, rules and practice" in civil actions in the magistrate's court shall *mutatis mutandis* apply to the determination of any questions arising under the Ordinance. In an application for payment of workmen's compensation, the magistrate held that by virtue of this provision the claim was barred by s. 8 of the Limitation Ordinance, Cap. 26, which provides that every action or suit in which damages may be recovered (save and except for libel and slander) shall be brought within three years next after the cause of action or suit has arisen.

Held: section 8 of the Limitation Ordinance, Cap. 26, does not apply to proceedings under the Workmen's Compensation Ordinance, Cap. 111.

Appeal allowed.

R. P. Rawana for the appellant.

H. Hanoman for the respondent.

Judgment of the Court: The point for determination in this appeal is whether the provisions of the Limitation Ordinance, Cap. 26, apply to claims for compensation brought under the Workmen's Compensation Ordinance, Cap. 111.

On the 3rd March, 1962, the appellant Theodore Alexander filed proceedings for the recovery of compensation against the respondent company Lochaber Ltd., in respect of an injury which he alleged had been sustained by him on the 1st September, 1958, arising out of and in the course of his employment by the respondent company. In the particulars supplied by the appellant in the magistrate's court the date the claim was made for payment of compensation was given as 9th October, 1958.

In the answer filed on behalf of the respondent, company one of the grounds in opposition taken was that the claim is barred by the provisions of the Limitation Ordinance.

When the matter came on for hearing before a magistrate of the Berbice Judicial District it was submitted *in limine* on behalf of the respondent company that the appellant's claim was barred as it had not been commenced within three years after the injury had been sustained. The learned magistrate considered this submission to be well founded and dismissed the claim. From that decision the appellant has now appealed. The magistrate held that the provisions of s. 8 of the Limitation Ordinance, Cap. 26, were applicable to the claim. Section 8 provides as follows—

"8. Every action and suit for any illegal or excessive levy, injury to property, whether movable or immovable, assault, bat-

tery, wounding, or false imprisonment, and every other action or suit in which damages may be recovered (save and except for libel or slander) shall be brought within three years next after the cause of action or suit has arisen.”

It is to be observed that s. 8 refers solely to actions in which *damages* may be recovered. All of the specified actions therein are actions in tort. No reference is made in s. 8 to claims for *compensation* and indeed, as counsel for the respondent has conceded, no reference to such a claim is contained in any other section of the Limitation Ordinance. Both the magistrate and counsel for the respondent company have expressed the view that s. 37 of the Workmen’s Compensation Ordinance, Cap. 111, provides that the Limitation Ordinance, Cap. 26, is to apply to proceedings brought under the Workmen’s Compensation Ordinance, Cap. 111. Section 37 of the Workmen’s Compensation Ordinance, Cap. 111, provides as follows—

“37. Save as is specially provided in this Ordinance a magistrate’s court shall, upon or in connection with any question to be determined thereunder have all the powers and jurisdictions exercisable and be subject to all the duties and obligations to be performed by a magistrate’s court of the district in or in connection with civil actions in such court and the law, rules and practice in such civil actions shall, *mutatis mutandis*, apply; and any order made by a magistrate under this Ordinance may be enforced as if it were a judgment or order of the Court.”

That section appears along with ss. 33 to 36 and ss. 38 to 40 under the heading “PROCEDURE”. It is contended that the provisions of the Limitation Ordinance, Cap. 26, are procedural and are, by virtue of s. 37 of the Workmen’s Compensation Ordinance, Cap. 111, applicable to claims under that Ordinance in the same manner as they apply to actions. Assuming that the argument is sound, the question which arises is, which of the provisions of the Limitation Ordinance, Cap. 26, applies? An examination of those provisions as mentioned earlier shows that none of those provisions apply to actions for the payment of *compensation*.

The magistrate has referred to the case of *Leivers v. Barber, Walker & Co., Ltd.*, [1943] 1 All E.R. 386, where by a majority (SCOTT and Du PARCQ, L.J.J., GODDARD, L.J., dissenting) it was held that the Limitation Act, 1939, s. 2 (1) (d) had no application to proceedings taken by the applicant workman. That was a case brought under the provisions of the Workmen’s Compensation Ordinance, 1906, in respect of an injury to his spine sustained by a workman in 1913. The employers had paid the workman compensation until 1921 although there was no award or recorded agreement. From 1918 until 1941 he was able to do light work and was employed by the employers as a driver on a stationary electric haulage engine. Gradually his disability got worse and after interruptions in his work from August 13, 1941, he became totally incapacitated. The employers throughout recognised his state of incapacity, total or partial, and the accident as its cause. From 1921 to October, 1940 and from November 6, 1940

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to August 13, 1941, he received no compensation. From August 13, 1941, he was paid compensation at the rate of 28 shillings per week. The worker in an application for review under Schedule I of the Workmen's Compensation Act, 1906 asked for an increase in respect of his incapacity from 1921 onwards. The employers contended that the proceeding for review was an action within the Limitation Ordinance, 1939, s. 2 (1) (9), being "a proceeding in a court of law" within the definition in s. 31 (1) of the Act and that therefore the action was barred; alternatively, that it was an arbitration under an Act of Parliament within s. 27 (6) of the 1939 Act and that consequently under s. 27 (1) the provisions of s. 2 (1) applied and the period of limitation was 6 years.

The magistrate in seeking to distinguish the provisions of the Workmen's Compensation Act, 1906, from the local Ordinance, Cap. 111, has in the first place referred to the fact that *Leivers v. Barber* was an application for review and not as in the present case a claim for compensation. While that is so, the judgment of the Court of Appeal dealt generally with the question of the applicability of the Limitation Act, 1939, to the Workmen's Compensation Act generally and not merely to the question of its applicability to an application for review.

The magistrate has also sought to draw a distinction between the procedure under the Act for arbitration proceedings and under the Ordinance for proceedings in a magistrate's court. In our opinion the forum for settlement of questions in such matters may be different but the intention of the legislation is the same—a summary settlement of the questions in accordance with substantive provisions which are identical for all practical purposes.

The matter is dealt with succinctly by DU PARCQ, L.J., in *Leivers v. Barber*, [1943] 1 All E.R. at pp. 397, 398, and we would like to adopt the reasons given by DU PARCQ, L.J., for the conclusion he reached—

"The main question argued on this appeal is that of the applicability of the Limitation Act, 1939, to a claim made under the Workmen's Compensation Act, 1906.

It is provided by the Limitation Act, 1939, s. 32, that the Act shall not apply to any action or arbitration for which a period of limitation is prescribed by any other enactment. I do not think that it can be doubted that if one finds in an Act 'a time limited for taking proceedings,' that Act is an enactment by which a period of limitation is prescribed for those proceedings. If this be granted, the question whether the Workmen's Compensation Act, 1906, is such an enactment seems to me to answer itself, or rather, to have been answered for us by the legislature; because s. 1 (4) of the Act contains the words:

'If, within the time hereinafter in this Act limited for taking proceedings, an action is brought . . .'

The reference, of course, is to s. 2 (1); so that the legislature, at any rate, had no doubt that the effect of s. 2 (1) was to limit the time for taking proceedings. It is true that the notice which the workman has to give, and the claim which he is required to make, may be informal in character; and it is true also that the claim is properly to be regarded as a necessary prelude or condition precedent to proceedings than as the initiation of proceedings. But in an Act which, in the words of the EARL OF HALSBURY (in a decision to which SCOTT, L.J., has referred) 'deliberately and designedly avoided anything like technology,' it is not, I think, surprising to find the legislature drawing no distinction between a claim which is the first step in proceedings and a claim which must be made before proceedings can be brought. In language which is plainly intelligible, Parliament has effectively prescribed a period of limitation. It has not used technical language, or language which a lawyer might have been expected to choose, and I do not overlook the fact that in *M'Cafferty v. Mac Andrews & Co.* (14), both Lord WARRINGTON (at p. 623), and Lord THANKERTON (at p. 627), say that the section in the 1925 Act which reproduces s. 2 (1) of the 1906 Act (I am quoting from the opinion of Lord THANKERTON):

' . . . does not limit the time within which the proceedings under the Act are to be brought, but it lays down two conditions precedent to such proceedings . . . '

These observations (if I may respectfully say so) are, of course, a correct statement of the effect of the section in precise legal language. They do not, however, in my opinion, detract from the force of the argument that the language used by the legislature clearly indicates that it intended the Workmen's Compensation Act to be regarded as an enactment prescribing a period of limitation. For present purposes, the true answer to the question raised by s. 1 (4): 'What is the time hereinafter in this Act limited for taking proceedings' cannot be, in my opinion, 'No time for taking proceedings is limited.'

It is true that the limitation applies only to 'taking proceedings' in the sense of initiating them, and that there are not separate periods of limitation for all subsequent applications for a review; but such applications are consequential upon the original claim for arbitration and are affected by the prescribed period of limitation in the sense that, unless the first step is taken within that period, none of the later steps will be permissible.

For these reasons, I am of opinion that the Limitation Act, 1939, has no application to the present case. I agree with SCOTT, L.J., that the Workmen's Compensation Act, 1906, constituted, as does the 1925 Act, 'a self-contained code'; and that it was never the intention of Parliament that the Limitation Act, 1939, should apply to proceedings under it."

Section 26 (2) of the Ordinance, Cap. 111, is identical with s. 1 (4) of the 1906 Act.

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The period of limitation referred to by DU PARCQ, L.J., as being included in the 1906 Act is contained in s. 2 of that Act, now replaced by s. 14 of the 1925 Act. The local counterpart of those provisions is s. 15 of the Ordinance, Cap. 111.

We would like to point out that s. 35 of the Workmen's Compensation Ordinance provides for applications not only by the workman but also by the employer. See also r. 3 and Forms 1 and 2 in the Workmen's Compensation Rules, 1955 (No. 9).

Finally, it may be pointed out that there is no equivalent in the Limitation Ordinance, Cap. 26, to the provisions of para. (d) of sub-s. (1) of s. 2 of the Limitation Act, 1939. That paragraph provides as follows—

“2. (1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say:—

(a) * * * * *

(b) * * * * *

(c) * * * * *

(d) actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.”

In the result, we are of the opinion that the learned magistrate erred in holding that s. 8 of the Limitation Ordinance, Cap. 26, had barred the appellant's claim. The order of the magistrate is set aside and the matter remitted to be reheard and determined accordingly.

Appeal allowed.

SERRAO v. DIYALJEE

[In the Full Court, on appeal from the magistrate's Court for the Georgetown Judicial District (Lukhoo, C.J., and Khan, J. (ag.)) September 8, 1962.]

Transport and Harbours Department—Authority to prosecute—Offence committed in presence of police constable—Whether police constable needs written authority to prosecute—Rules for Traffic, Rule 8.

Rule 8 of the Rules for Traffic by and in connection with the Colonial Railway and the Colonial Steamer Services provides as follows:

“8. Every person who is guilty of an offence against these rules shall be guilty of an offence punishable on summary conviction, and shall be liable to a penalty not exceeding forty-eight dollars, and if not known, may be arrested without warrant by any public officer or constable seeing the offence committed, or on a charge made by the Department or any person authorised by them.”

The respondent was alleged to have committed in the presence of the appellant, a police constable, the summary conviction offences of assaulting a servant of the Transport and Harbours Department when in the execution of his duty and of attempting to go on board the department's ferry steamer before the appointed time. At the close of the case for the prosecution it was contended for the respondent that under Rule 8 (*supra*) it was essential for the appellant to be authorised in writing to prosecute. The magistrate upheld this submission and dismissed the charges. On appeal—

Held: the authorisation was required only in relation to an arrest and not in relation to a prosecution, and even in the case of an arrest it would not apply to a constable who saw the offence being committed.

Appeal allowed; case remitted.

W. R. Persram, Senior Legal Adviser, for the appellant.

A. N. Karim, for the respondent.

Reasons for Decision: Milton Dyaljee appeared before a magistrate on the following charges brought against him by Police Constable No. 4741 Joseph Ser-rao—

- (1) Wilfully assaulting a servant of the Transport and Harbours Department when in the execution of his duty, contrary to r. 2 (15) of the Transport and Harbours Department Rules, Cap. 261;
- (2) Attempting to go on board the Transport and Harbours Department ferry steamer before such time appointed by a duly authorised servant of the Department, contrary to r. 2 (10) of the Transport and Harbours Department Rules, Cap. 261;
- (3) Indecent language on the Transport and Harbours Department Ferry Stelling, contrary to r. 2 (14) of the Transport and Harbours Department Rules, Cap. 261.

Dyaljee filed a cross charge against James Grenada, an employee of the Transport and Harbours Department, for assault, contrary to s. 21 of the Summary Jurisdiction (Offences) Ordinance, Cap. 14, and another against Cendrecourt, an officer of the Transport and Harbours Department, for using insulting language to his (appellant's) annoyance contrary to s. 141 (b) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14.

All of the charges were heard together by the magistrate by consent of the parties.

The evidence for the prosecution (charges brought by the police) disclosed that on Saturday, 28th November, 1961, between 4 p.m. and 4.20 p.m. Dyaljee came to the gate at the southern entrance of the Georgetown Ferry Stelling. That gate leads to the gangway where cars are loaded onto the steamer. Cendrecourt, a clerk employed by the Transport and Harbours Department and attached to the Georgetown Ferry as Supervising Officer in charge, was directing cars on

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board. Passengers were already on board having entered the stelling by the normal gangway for passengers—the upper gangway. Grenada, a ticket collector employed by the Department, was at the gate which is for use by passengers going to the lower gangway, for packages, cycles and cars. When Diyaljee came up to that gate passengers with cycles were being allowed to go through. Diyaljee (who did not have a cycle) forced his way past Grenada at the gate and made use of certain words complaint of which is made in the charge for indecent language. Cendrecourt had given instructions to Grenada that passengers entering through that gate should remain there until cars and passengers with cycles and those with packages to be freighted had gone aboard. Grenada asked the appellant if he had not heard the instructions given him by Cendrecourt. Diyaljee then insisted on going through the gate and in the process his finger got into Grenada's eyes. The respondent, Police Constable Serrao, who was on duty at the stelling, was standing near the gate and witnessed the incident. He then intervened and warned Diyaljee that he would be prosecuted.

At the close of the case for the prosecution it was contended by Diyaljee that by the provisions of section (really rule) 8 of Cap. 261 (subsidiary legislation) it was essential for P.C. Serrao to be authorised in writing to prosecute the charges. The magistrate agreed with that contention and dismissed the charges brought against Diyaljee after which Diyaljee asked leave to withdraw the charges he had brought against Cendrecourt and Grenada. Leave was granted by the magistrate so to do.

On appeal before us it was contended on behalf of the police that the provisions of r. 8 of the Rules for Traffic by and in connection with the Colonial Railway and the Colonial Steamer Services (at pp. 2506—2510 of Volume X of the LAWS) did not require P.C. Serrao to be authorised in writing to bring the charges.

Rule 8 provides as follows—

“8. Every person who is guilty of an offence against these rules shall be guilty of an offence punishable on summary conviction, and shall be liable to a penalty not exceeding forty-eight dollars, and if not known, may be arrested without warrant by any public officer or constable seeing the offence committed, or on a charge made by the Department or any person authorised by them.”

The first portion of the rule provides that any person who is guilty of an offence against those rules shall be guilty of an offence punishable on summary conviction and shall be liable to the penalty prescribed. The second portion of the rule deals with the *arrest* of an offender and provides that *if the offender is not known* he may be arrested *without warrant* by any police officer or constable—

- (a) who sees the offence being committed; or
- (b) on a charge made by the Department; or

(c) on a charge by any person authorised by the Department.

Arrest without warrant is only permissible if the offender is not known and such arrest can only be made in one or other of the conditions specified.

In any event Police Constable Serrao, the complainant on the charges, testified as to what he had seen and heard and that he told Diyaljee that he had committed those offences. He warned Diyaljee of prosecution and later brought the three complaints by way of summons.

Section 5 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, provides for the general right of making complaint unless it appears from the statute on which the complaint is founded that a complaint for that offence shall be made only by a particular person or class of persons. In the present case we are of the opinion that r. 8 does not provide that complaint under the Rules can only be brought by a person authorised in writing by the Department.

One further point was raised before us by counsel for Diyaljee, that there was no *prima facie* evidence that the Georgetown Ferry Stelling is a stelling at which colonial steamers stop. By r. 1 “colonial steamer” includes all vessels owned and worked by the Department and “stelling” includes a wharf. The reference to “colonial steamer” in those rules remains because the rules (Cap. 261) were made under an enactment, the Railway Purchase and Colonial Transport Ordinance, 1922 (No. 23) (Cap. 112 of the MAJOR Edition of the LAWS). That enactment was later replaced by the existing enactment and the rules made under the former enactment were specifically saved. The Department, formerly the Colonial Transport and Harbours Department, is now styled the Transport and Harbours Department. By s. 3 of the Ordinance, Cap. 261, the Department manages and carries on the Government vessels.

There was therefore *prima facie* evidence that the Georgetown Ferry Stelling is a stelling “at which colonial steamers stop.”

We held that the magistrate erred in dismissing the complaints at the close of the case for the prosecution and we allowed the prosecutor’s appeal and remitted the matter for the magistrate to call upon Diyaljee for a defence to the charges.

Appeal allowed; case remitted.

BACCHUS v. BEEKIE

[Supreme Court (Miller, J.) May 21, 26, July 7, September 10, 1962.]

Sale of land—Failure to complete within stipulated time—Whether time of the essence—Whether deposit forfeited.

The plaintiff deposited with the defendant \$600 under an agreement of purchase dated 24th February, 1961, whereby transport was to be advertised and passed within three months. The plaintiff swore to his affidavit of purchase on 24th May, 1961, and on the following day sent it with his half share of the disbursements to the defendant's solicitor. The defendant refused to complete the sale or to return the deposit on the ground that the plaintiff had failed to accept transport within the stipulated time. The defendant's affidavit of sale was itself sworn to only on 5th May, 1961, so that the earliest time the transport could have been passed was 29th May, *i.e.*, outside of the stipulated period. The plaintiff was at all times in possession of adequate funds and willing to complete the sale. In an action by the plaintiff for specific performance and other reliefs.

Held: time was not of the essence of the contract and the defendant was not entitled to forfeit the deposit.

Judgment for the plaintiff.

A. W. E. Roberts for the plaintiff.

J. O. F. Haynes, Q.C., for the defendant.

MILLER, J.: By an agreement in writing made between the plaintiff and defendant on the 24th February, 1961, at Georgetown, in the County of Demerara, and Colony of British Guiana, the defendant agreed to sell and the plaintiff to purchase certain immovable property, namely, lot number 92 (ninety-two), Section K, Campbellville, East Coast, Demerara, for the price of \$6,000.

The agreement provides for the payment of a deposit of \$600, which was duly paid by the plaintiff, and transport was to be advertised and passed within three months from the date of the agreement. It is the plaintiff's claim that notwithstanding repeated requests by him orally and in writing, the defendant neglected and refused to take any step towards the completion of the agreement. He seeks:

- (a) Specific performance of the said agreement.
- (b) Further or alternatively, damages for breach of the said agreement.
- (c) Alternatively, rescission of the said agreement and repayment of the deposit of \$600 (six hundred dollars) paid thereunder with interest from the 24th day of February, 1961.
- (d) A declaration that he is entitled to a lien on the said property for his deposit together with interest thereon and damages and costs awarded in this action.
- (e) Further or other relief.
- (f) Costs.

The defendant, by his defence, says the plaintiff was never at the material times, ready and willing to perform the said agreement. He did not swear to his affidavit till the 23rd day of May, 1961; and, by his own act, rendered it impossible for the transport to be advertised and passed within the time limited by the agreement, that is, by the 24th May, 1961. Further, by the terms of the agreement, the sum of \$600 paid by the plaintiff became forfeit, and the agreement was at an end.

The plaintiff is represented by his wife who holds a power of attorney which is duly deposited in the Registry of the Supreme Court. He swore to his affidavit with respect to the sale and purchase on the 24th May, 1961. On the following day, the affidavit along with his half share of the disbursements were deposited with the defendant's solicitor, but they were returned on the 25th May, 1961, on the ground that the plaintiff failed in terms of the agreement—Exhibit 'A'—to accept transport within the period of three months. That is evidenced by the letter, Exhibit 'D', written by solicitor for the defendant.

The defendant has produced his transport and his affidavit sworn to on the 5th May, 1961; and his contention is that he was willing at all times and, in fact, was pressing from the month of March for the fulfilment of the agreement and passing of transport. He contends the \$600 paid on the entering of the agreement is now forfeit. In *Parris v. Burton*, 1949 L.R.B.G. 61, the evidence revealed the purchaser never had the slightest prospect of being in possession of the sum of money required by the date specified or within a reasonable time thereafter. I do not have before me any evidence to lead me to such a conclusion, and I do not so find after seeing the parties and giving a close consideration to the evidence. In fact, from the bank ment—Exhibit 'K'—the plaintiff had to his credit for period 31st December, 1960, to 30th April, 1962, \$7,280.63.

On looking at the conduct of the parties, and all the surrounding circumstances, I find myself forced to the conclusion that time was not of the essence of the contract. The agreement entered into anticipated and provided for completion within three months. Yet, the vendor (defendant) did not swear to his affidavit till the 5th May—a Friday. Transport could not have been passed before the 29th May. See Deeds Registry Ordinance, Cap. 32, 2nd Schedule, Rule 5 (1) and Rule 7. Therefore, when the plaintiff swore to his affidavit on the 24th May, and forwarded his share of the transport expenses, the contract was not, and could not, in my opinion, have come to an end. In such circumstances, the defendant cannot hold himself entitled to retain the amount of \$600 received by him. There has been no repudiation on the part of the plaintiff. On the contrary, I find he was always willing and ready; and, in those circumstances, he would, in my view, be entitled to the return of his deposit.

“In the absence of express agreement to the contrary, when a payment by way of deposit is made to a vendor by a purchaser at the time of the contract for sale, then, in the event of due performance the sum so paid is taken into account as part of the

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purchase money; in the event of the contract being rescinded by mutual consent, then the sum so paid is recoverable by the purchaser, but when the contract is repudiated by the purchaser the amount so paid is forfeited and remains in the hands of the vendor.” *Nadim Antar v. Valverde*, 1942 L.R.B.G. 444.

Again, in *Fernandes v. Gumbs and Nascimento*, 1943 L.R.B.G. 303, in circumstances where the purchaser abandoned the contract through financial difficulties, and made new offers, the vendor would be entitled to treat the contract at an end, and would not be bound to return the deposit. I do not find repudiation or abandonment on the part of the plaintiff.

This is a matter which, to my mind, should have been settled. On the 22nd May, 1962, the hearing was adjourned on the 26th May for such a purpose. It was, for me, a matter of great disappointment when, on that day, I was told the defendant was continuing to defend the matter. I believe from the circumstances, and from what was said in court, the plaintiff was at all times willing to carry out his contract and complete his purchase. I was told the defendant was also willing; and it was because of those statements an adjournment was allowed for the fulfilment. It did not happen, and it became a fight to a finish. The defendant embarked on other ventures at the time, and wanted money. I hope, and sincerely hope, I am not uncharitable in saying the defendant—so I seem to think—had hopes, after his affidavit, of a better bargain, and while holding on tenaciously, and with the greatest strength and vigour to the money (\$600), by his own deliberate and wilful act brought the contract to an end.

I find the plaintiff, in the circumstances of this case, is entitled not only to the return of the sum of \$600 (six hundred dollars) which was intended, and in fact made as a part payment of the purchase price, but also to some damages for the defendant’s breach of his agreement, and conduct which I regard as wilful. There will be judgment for the plaintiff in the sum of \$900 (nine hundred dollars). Costs certified fit for counsel.

Judgment for the plaintiff.

Solicitors: *H. D. Eleazar* (for the plaintiff); *N. C. Janki* (for the defendant).

DIN v. NORTH KLIEN POUDEROYEN VILLAGE COUNCIL AND THE
DRAINAGE AND IRRIGATION BOARD

[Supreme Court (Persaud, J.) April 10, 11, 12, 13, 14, 22, 24, 25, 1961, September 15, 1962]

Practice and procedure—Misnomer—Local authority sued under old name—Withdrawal of action—Whether local authority entitled to costs.

Crown servant—Drainage and Irrigation Board—Action in tort against Board—Whether Board enjoys crown immunity from actions in tort.

Justices protection—Acts of omission—Whether entitled to protection—Justices Protection Ordinance, Cap. 18, ss. 8 and 14.

The plaintiff commenced an action against “the North Klien Pouderoyen Country District”. In 1960 the local authority by that name ceased to be a country district and became a village district by the name of “North Klien Pouderoyen Village District.” The latter entered appearance to the writ and all the necessary pleadings were exchanged. At the trial the plaintiff discontinued the action against the authority but opposed an application for costs on the ground that the action had been commenced against a non-existing party. The authority applied for its description in the action to be amended to reflect its proper name.

Held: the application for an amendment would be granted as there was merely a misnomer and costs would be awarded to the local authority;

The plaintiff’s case against the Drainage and Irrigation Board, which was added as a defendant, was that the Board, in carrying out certain statutory drainage and irrigation works, negligently committed various acts of omission and commission with the result that the plaintiff suffered serious losses to his crops. For the defence, it was contended that the Board was a Crown servant and could not be sued in tort, and further that the Board was entitled to the protection of the Justices Protection Ordinance, Cap. 18. For the plaintiff, it was argued that such protection did not apply in respect of acts of omission.

Held: (i) the Board was not an agent or servant of the Crown and was suable in tort;

(ii) but that even if the plaintiff was alleging acts of omission and nonfeasance the Board was entitled to the protection of the Ordinance.

Judgment for the defendants.

J. O. F. Haynes, Q.C., M. Young with him, for the plaintiff.

J. H. S. Elliott, Q.C., for the North Klien Pouderoyen Village Council.

M. Shahabuddeen, S.G., for the Drainage and Irrigation Board.

PERSAUD, J.: When the writ in this matter which is dated the 8th June, 1960, was filed, it named “The North Klien Pouderoyen Country District” (referred to as ‘the first named defendants’) as the defendants. Subsequently, the present defendants (in this judgment referred to as ‘the Board’) were added by an order of court, and when this matter came up for trial before me, counsel for the plaintiff sought leave to discontinue the action against the first named defendants. Counsel for the first named defendants contended that the action should be dismissed, after applying that the description of his

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clients be amended to read ‘the Village Council of the North Klien Pouderoyen Village District’, and urging that the plaintiff had misnamed the first named defendants.

Prior to the 9th January, 1960, there was a ‘North Klien Pouderoyen Country District’. This ceased to be a country district upon that date when the same area was declared a village district to be known as the ‘North Klien Pouderoyen Village District’. So that although the first named defendants were mis-described in the writ, they were at one time known by the former description. In my view, having regard to the decision of *Etablissement Baudelot v. R. S. Graham & Co. Ltd.*, [1953] 2 Q.B. 271, in which *Alexander Mountain Co. v. Rumere Ltd.*, [1948] 2 K.B. 436, was considered, the court may grant an application for an amendment where there has been a misnomer. Where there is an inaccuracy in the statement of the name of the defendant on the writ, it may be corrected by the defendant in his appearance, and in such case the plaintiff should adopt the correction in his statement of claim. In the instant case not only did the first-named defendant’s solicitor enter appearance without correcting the mis-description, but the authority to solicitor is signed by a D. R. Bishun as the Chairman of the ‘North Klien Pouderoyen Country District’. It was not until the defence was entered that an attempt was made to correct the mistake by setting out in the rubric “North Klien Pouderoyen Village Council, incorrectly sued as ‘the North Klien Pouderoyen Country District’ Defendants”. Thereafter, the plaintiff followed this pattern of rubric. I do not feel, therefore, that I can properly dismiss the action against the first-named defendants because of the mis-description. Under Order 24, r. 2, of the Rules of the Supreme Court, I can give leave to a plaintiff to discontinue an action upon such terms as to costs as may be just. (See also Order XXVI of the Rules of the Supreme Court, 1883). I propose to order that the plaintiff be given leave to discontinue against the first-named defendants, but he must pay their taxed costs up to the date of the making of the application.

There remains before me an action between the plaintiff and the Board which I proceeded to hear and will now give my judgment.

The plaintiff is a rice farmer and owns rice lands which falls within the North Klien Pouderoyen Drainage Area declared to be such by Order in Council No. 40 of 1953 in so far as existing works were concerned, and then by the Drainage and Irrigation (Declaration of Area and Validation of Acts) Ordinance, 1954 (No. 43) for all purposes. Prior to the Order in Council, the area in question was not subject to any organised or legally established drainage scheme.

The evidence apart, several legal points were argued, and I shall attempt to deal with these.

Counsel for the Board has urged that the Board is a crown servant and as such is not liable in tort. Counsel has traced what he has described as the “historical descent” of the Board from the Director of Public Works to its present constitution, and has urged that the

Director of Public Works was pre-eminently a crown servant, performing his duties on behalf of the Crown. He has also referred me to various provisions of the Drainage and Irrigation Ordinance which provide for the control of the revenue of the Board by the Financial Secretary. There can be no doubt but that the Board is a statutory body, having been incorporated by the Drainage and Irrigation Ordinance, Cap. 192. Counsel has drawn the distinction between the provisions of this Ordinance, and the Meat Industry Act, 1915, which was examined in *Metropolitan Meat Industry Board v. Sheady*, [1927] A.C. 899. In that case, the question was whether a certain sum of money owing to the Board was to be preferred in liquidation proceedings as being a debt owed to the Crown. It was held that the Board was not an arm of the Crown, notwithstanding the fact that the appointment of its members and officers were made by the Governor of the state who could also veto certain of their powers. Counsel has also drawn my attention to the fact that in that case, the business now carried on by the Meat Industry Board had previously been carried on by private enterprise (not the position with the Drainage & Irrigation Board), and monies collected as toll, etc., were payable into a fund apart from the state fund, and prays in aid of his submission various sections of the local Ordinance, particularly s. 25 (2). In my opinion this subsection does not assist me on this particular point, as it is intended to deal with cases of emergency. An examination of the Ordinance discloses that the powers of the Board are subject to a great extent to the control of the Governor in Council, and apart from the *ex officio* members who are employees of the Crown, the members are appointed by the Governor-in-Council. In addition, s. 65 (3) of the Ordinance provides for payment into general revenue of all sums received in consideration for the sale of lands, etc., while s. 34 (2) provides for the payment to the Financial Secretary of all amounts of annual payments made by proprietors of estates. All these are matters which may be taken into account, but the test as to whether a body is a crown servant or not remains as laid down by DENNING, L.J., in *Bank Voor Handel v. Slatford*, [1952] 2 All E.R. 956, at p. 970—

“ Crown immunity depends not only on whether the person has Crown status but also whether the activity in question is a Crown activity Not only must the activity be a Crown activity, but also, in accordance with the original rule which I have mentioned, the activity must be such that the Crown purposes would be prejudiced unless immunity were afforded to it.”

The fact that the Board may be subject to the control of the Government does not make it a servant or agent of the Crown (See *Tamlin v. Hannaford*, [1949] 2 All E.R. 327. I would therefore hold, in spite of the able argument of the learned Solicitor General, that the Board is not an agent or servant of the Crown, and so is suable in tort.

The next point taken on behalf of the Board is that the Board is entitled to the protection of s. 8 of the Justices Protection Ordinance, Cap. 18, which provides that—

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“No action shall be brought against a justice for anything done by him in the execution of his office unless the action is commenced within six calendar months next after the act complained of has been committed.”

The argument on this aspect of the case proceeded on the assumption that the Board falls within the meaning of “a justice”, but issue was joined on the interpretation to be placed upon the words “anything done”. Counsel for the plaintiff contends that a distinction must be drawn between acts of mis-feasance as contemplated by ss. 2 and 8 of Cap. 15, and acts of omission or non-feasance as has been alleged and pleaded by the plaintiff, that the acts complained of by this plaintiff are acts of omission or non-feasance and therefore it is not necessary for the action to be commenced within six calendar months next after the act complained of has been committed as contemplated by s. 8 (1). A notice, purporting to be under s. 8 (2) was given to the Board on the 5th May, 1960. The writ was filed on the 8th June, 1960, and the unamended statement of claim alleged refusal and neglect to carry out certain works from 1955 to “the present time”. Pursuant to an order of court, the Board was joined as a defendant on the 10th February, 1961.

Both in the indorsement of claim, and in the amended statement of claim which the plaintiff was given leave to file during the hearing of this action, the plaintiff has alleged failure on the part of the Board to do certain acts whereby the plaintiff suffered damage. A notable exception is paragraph 8 (a) and (c) of the amended statement of claim which is reproduced hereunder.

“8 (a) During the years 1953-1960 aforesaid the defendant Board blocked a certain cut in the southern dam which cut was used by the plaintiff in the drainage and irrigation of his lands whereby the plaintiff’s lands aforesaid was improperly drained and irrigated during the said period resulting in loss of crops and pecuniary damage.

(c) All the aforesaid acts and/or omissions were done or omitted unlawfully, maliciously and without reasonable and probable cause.”

It would appear that the use of the words in the latter part of paragraph (c) were inserted to bring the action within the ambit of s. 2 of Cap. 18; at least the language is the same. Indeed the plaintiff in his evidence said—

“I believe that the inconveniences I have suffered were caused by the Board through spite. I say the Board was negligent in doing the work; an unreasonable time was taken to do the work. (In addition much of the work was badly done.”

It may be of some use to set out as briefly as I can the allegations upon which the plaintiff bases his claim as disclosed in his evidence. These are—

- (1) a sluice was badly constructed in 1953;
- (2) the northern drainage trench was badly dug;
- (3) the dam on which the plaintiff passed his machinery was blocked by a deposit of silt removed from the northern drainage trench which was dug in June—August, 1954, and as a result the plaintiff was forced to build a dam;
- (4) the dam which the plaintiff built and which is referred to in (3) above was blocked by deposit taken from the southern trench;
- (5) in July or August, 1955, the Board began digging the northern trench, from the other direction, causing a blocking of the dam over which the plaintiff passed his machinery. This state of affairs continued until 1959;
- (6) certain cuts in a dam through which the plaintiff drained his lands prior to 1954 were filled in by the Board, resulting in flooding of his lands;
- (7) in March, 1959, the plaintiff's bed heads were covered with deposits of earth obtained from a trench which was being dug by the Board, and the plaintiff lost his crops which were then being cultivated on those bed heads;
- (8) in October, 1959, the plaintiff could not pass his machinery along the northern dam because it was blocked by deposits dug from the northern trench. This situation was remedied in October, 1960.

From all of this, I have gathered that the plaintiff is alleging acts of mis-feasance. It is a fact that the plaintiff's pleadings are drafted in such a manner as to suggest that he rests his action on the Board's non-feasance, and failure to perform certain acts, but the true nature of his claim is, in my view, based on acts done by the Board, in which case it falls to be governed by s. 8 (1) of the Justices Protection Ordinance, Cap. 18. Assuming therefore that the Board is liable in negligence in the execution of the work, that liability would be limited to negligence occurring within six months of the filing of the writ.

Several authorities on both sides were cited in connection with this point. The plaintiff relies heavily on *Umphelby v. McLean*, (1817) B. & A. 42, as approved in *Royal Aquarium Society Ltd. v. Parkinson*, [1892] 1 Q.B.D. 431. In the former case, an action was brought to recover an excessive charge made by the defendants as tax collectors. The point was taken the action was for a non-feasance in not returning money which the defendants had seized from the plaintiffs, and Lord ELLENBOROUGH, C.J., agreed with this submission, holding that there must be some positive act done or fact committed. In the latter case it was held that words spoken are not "an act done or fact committed". Therein in my view lies the distinction between the *Royal Aquarium* case and the other cases referred to by the Solicitor General. In *Brocklebank Ltd. v. R.*, [1925] 1 K.B. 52, as in the *Umphelby's* case, a certain sum of money was paid upon demand

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by the suppliants to the Shipping Controller, after which the suppliants prayed a declaration that the Controller was not entitled to demand payment, and they also prayed repayment. The relevant statute required notice of action to be given in the case of an action being brought “for anything due in pursuance of the Act”. It was held, contrary to the argument of the suppliants, that the thing done was the act of demanding and taking of the toll, and not the refusal by the Crown to return the money so exacted, and therefore notice was necessary. In *Wilson v. The Mayor and Corporation of Halifax* (1868), 32 J.P. 230, in which *Umphelby v. McLean* was cited in the course of the argument, KELLY, C.B., said,

“ . . . it is now settled by authority that an omission to do something that ought to be done in order to complete the performance of a duty imposed upon a public body under an act of parliament, or continuing to have any duty unperformed, amounts to ‘an act done or intended to be done’—within the meaning of those clauses requiring notice of action, for the protection of public bodies, under acts of parliament imposing public duties.”

In *Holland v. Highway Board of Norwich* (1876), 40 J.P. 517, it was held that the omission to replace a hand rail of a bridge was “something done” under the relevant legislation. In *Midland Rly. Co. v. Withington Local Board* (1883), 47 J.P. 789, which was an action for the recovery of the payment of money made under a mutual mistake, it was held that the payment and the keeping of the money was an act done within the meaning of the statute. BRETT, M.R., did go on to say that if the withholding of the money was not an act done, then the statutory words “omitted to be done” would cover that cause of complaint. Having regard to the authorities, even if the plaintiff is alleging acts of omission and non-feasance, it would appear that this matter would fall to be governed by s. 8 (2) of the Justices Protection Ordinance, Cap. 18. It follows, then, that he would be entitled to recover damages only for the period of six months immediately preceding the joining of the Board as a defendant to these proceedings. The Board was joined on the 24th January, 1961.

I pause to make certain observations on the question whether or not the Board had a duty as opposed to a power to carry out the works authorised, and to maintain them. It seems to me that there is a duty cast upon the Board, and the Board would be liable for the negligent performance of that duty.

Having regard to my view that this matter is governed by s. 8 (2) of the Justices Protection Ordinance, Cap. 18, the Board would be liable, provided negligence is proved, to damages for the blocking of the northern dam from July 1960 to September or October of the same year, when, according to the plaintiff the nuisance was remedied. The other acts complained of fall outside of the limitation period. (See *Mabro v. Eagle, etc. Insurance Co.*, [1932] 1 K.B. 485).

The northern trench was dug as part of the works in an endeavour to improve the drainage and irrigation facilities of the whole area, and there can hardly be any dispute but that the deposit of the spoils on the banks of a trench that was being dug was necessary for the operation to be successfully carried out. The question for me to determine is whether the spoils were allowed to remain on the dam longer than was absolutely necessary, and whether by so doing, the Board created a nuisance. The plaintiff has alleged malice, but in my opinion, he has failed to prove it. The digging of the northern trench in 1960 was done during the regime of Mr. Brandon, the then Superintendent of Works. In his opinion, which I accept, the work was completed with reasonable despatch. During the time the digging took place, I believe that the plaintiff could not use the dam for purposes of passing his machinery, but he has not suffered any damage, as he was permitted by a Mr. Rayman to pass his machinery on the latter's tends. I must therefore find that negligence has not been established against the Board, and will dismiss the claim. The Board must have its costs to be taxed, certified fit for counsel.

Judgment for the defendants.

Solicitors: *H. A. Bruton* (for the plaintiff); *S. M. A. Nasir*, Crown Solicitor (for the Drainage Board); *H. B. Fraser* (for the North Klien Pouderoyen Village Council).

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[Supreme Court (Date, J.) July 17, 23, 24, September 18, 1962]

Constitutional law—External relations—Currency Agreement made by Colonial Governments—Order relating to exchange control made by Governor on ministerial advice—Order seriously affects Agreement—Whether Order should have been made by Governor acting in his discretion—Constitution of British Guiana, 1961, articles 22 and 33.

Constitutional law—Protection from deprivation of property without compensation—Provisions of Exchange Control Ordinance, 1958, brought into force after promulgation of 1961 Constitution—Effect of provisions to place plaintiff's securities in custody of bank and under control of Minister of Finance—No provision for payment of compensation—Whether unlawful deprivation of property rights—Exchange Control Ordinance, 1958, ss. 17 and 18—Constitution of British Guiana, 1961, article 12.

Statute—Exchange Control Ordinance, 1958—Provisions designed to ensure free flow of sterling among scheduled territories, including all British territories—Power in Governor to amend schedule by Order—Schedule amended by Order to exclude all territories except British Guiana—Validity of Order—Exchange Control Ordinance, 1958, ss. 3 and 9—Exchange Control (Scheduled Territories) Order, 1961.

Declaratory action—Whether such action lies against the Attorney-General—Whether Governor's fiat necessary—Supreme Court Ordinance Cap. 7, ss. 3 and 46—Civil Law of British Guiana Ordinance, Cap. 2 s. 3 (B)—Order 23, r. 3, R.S.C. 1955.

The Currency Ordinance, 1959, gave the force of law to an Agreement made by the Government of British Guiana and certain other British West Indian Governments relating to the issue and control of currency in their territories by a Currency Board established for the purpose. The currency issued was to be backed by sterling, and s. 7 of the Ordinance granted to the citizen a right to convert the currency issued into sterling.

The Exchange Control Ordinance, 1958, included provisions restricting dealings in "foreign currency", save where the permission of the Minister of Finance was first obtained. However, by virtue of s. 4 (a) "foreign currency" did not include currency issued by the Government or under the law of any part of "the scheduled territories". "The scheduled territories" included a number of territories (including all British territories) listed in the first schedule to the Ordinance, but by s. 3 (4) (b) the Governor could at any time by Order amend the schedule either by the addition or exclusion of territories or otherwise. On 18th December, 1961, the Governor purported to make the Exchange Control (Scheduled Territories) Order, 1961, whereby all the territories with the exception of British Guiana were deleted from the schedule. In the view of the Government the effect of this Order was to prevent the conversion of local currency into sterling under s. 7 of the Currency Ordinance, 1959, unless the permission of the Minister of Finance was first obtained.

On December 22 and 23, 1961, the plaintiff attempted to convert \$50,000 (B.W.I.) into sterling but was told by the local branch of the Currency Board that the conversion could not be effected without the permission of the Minister of Finance, which had not been obtained. The plaintiff claimed that he had a right to conversion without such permission. The Minister of Finance on the other hand wrote him a letter stating that he would be committing a criminal offence if he attempted to convert without permission.

Article 22, of the Constitution of British Guiana, 1961, required the Governor in the exercise of his functions to obtain and act in accordance with the advice of the Council of Ministers except *inter alia* in the exercise of any function conferred upon him by the Constitution which was expressed to be exercisable by him in his discretion. Article 33 provided that "a Minister shall

not be charged with responsibility for defence or external affairs (other than trade relations . . .) responsibility for which shall vest in the Governor, acting in his discretion". The Exchange Control (Scheduled Territories) Order, 1961, was, however, made by the Governor in accordance with ministerial advice.

Sections 17 and 18 of the Exchange Control Ordinance, 1958, provided for securities to be held by an authorised depository who was prohibited from parting with such custody except with the permission of the Minister of Finance. On 31st January, 1962, the Governor issued a Proclamation under the Ordinance bringing those sections into force. Article 12 of the 1961 Constitution afforded protection from deprivation of property without compensation, taut no provision for compensation was made for the owners of the securities.

The plaintiff sued for declarations that he was under no obligation to obtain any permission in order to effect conversion and that the Order and Proclamation were unconstitutional. For the defence, it was argued *inter alia* that it was not competent for the plaintiff to bring a declaratory action against the Attorney General and that he could only sue with the fiat of the Governor under s. 46 of the Supreme Court Ordinance, Cap. 7.

Held: (i) by virtue of the common law it is competent to sue the Attorney-General in a declaratory action, and in the circumstances there was no adequate alternative remedy;

(ii) the Exchange Control (Scheduled Territories) Order, 1961, if valid, would seriously affect the operation of the *Currency* Agreement and disturb the external relations of British Guiana with the Colonial Governments participating in the Agreement. Consequently, the Order related to external relations and could only have been made by the Governor acting in his discretion. As the Order was in fact made by the Governor acting on ministerial advice, it was null and void;

(iii) the essential scheme of the Exchange Control Ordinance, 1958, was to maintain the free flow of sterling in all sterling areas. The Order, if valid, would prevent that flow and was therefore inconsistent with the provisions of the Ordinance and *ultra vires*;

(iv) sections 17 and 18 of the Exchange Control Ordinance, 1958, gave the Government possession of the securities and could not be brought into force without at the same time providing by law for the prompt payment of adequate compensation as required by article 12 of the Constitution of British Guiana, 1961.

Judgment for the plaintiff.

J. H. S. Elliott, Q.C., with Mrs. *A. Ali-Khan* for the plaintiff.

Dr. F. H. W. Ramsahoye, Attorney-General, with *H. P. Ramkelawan*, Crown Counsel, for the defendant.

DATE, J.: The facts in this case are not in dispute.

The plaintiff is a resident of British Guiana and a member of the Legislative Assembly of the Colony. He is and was at all material times the owner of securities (as defined in the Exchange Control Ordinance, 1958) in companies incorporated in the United Kingdom. The certificates in respect of these securities are held in England. The plaintiff is also a customer of Barclays Bank D.C.O., London, and has there an account which is and was at all material times in credit.

On December 18, 1961, the Governor of British Guiana purported to make the Exchange Control (Scheduled Territories) Order, 1961,

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under the provisions of s. 3 (4) (b) of the Exchange Control Ordinance, 1958, and in accordance with article 22 (1) of the Constitution of British Guiana which is an annex to the British Guiana (Constitution) Order in Council, 1961.

Paragraph (1) of article 22 of the Constitution requires that in the exercise of his functions the Governor shall, subject to the provisions of the other paragraphs of the article, obtain and act in accordance with the advice of the Council of Ministers or of a Minister acting under the general authority of the Council of Ministers. Paragraph (2) provides that paragraph (1) shall not apply to the exercise by the Governor of (a) any function conferred upon him by the Constitution which is expressed to be exercisable by him in his discretion, or on or in accordance with the recommendation or advice of, or with the concurrence of, or after consultation with, any person or authority other than the Council of Ministers, or (b) any function conferred upon him by any other law which is expressed to be exercisable by him in his discretion or which he is otherwise authorised by such law to exercise without obtaining the advice of the Council of Ministers.

The Exchange Control Ordinance was enacted on November 1, 1958, and all of its provisions, except ss. 17 and 18 came into force on September 1, 1959. The objects of the Ordinance, as set out in its long title, are to confer powers, and impose duties and restrictions in relation to gold, currency, payments, securities, debts, and the import, export, transfer and settlement of property, and for purposes connected with such matters. Section 3 is the first section in Part 1 of the Ordinance and reads as follows:

"PART I

GOLD AND FOREIGN CURRENCY

3. Dealings in gold and foreign currency.

(1) Except with the permission of the Governor, no person, other than an authorised dealer, shall, in the Colony, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, any person other than an authorised dealer.

(2) Except with the permission of the Governor, no person resident in the scheduled territories, other than an authorised dealer, shall, in the Colony, do any act which involves, is in association with or is preparatory to buying or borrowing any gold or foreign currency from, or selling or lending any gold or foreign currency to, any person outside the Colony.

(3) Where a person buys or borrows any gold or foreign currency in the Colony or, being a person resident in the scheduled territories does any act which involves, is in association with or is preparatory to the buying or borrowing of gold or foreign currency outside the Colony, he shall comply with such

conditions as to the use to which it may be put or the period for which it may be retained as may from time to time be notified to him by the Financial Secretary.

(4) In this Ordinance—

- (a) the expression ‘foreign currency’ does not include any currency or notes issued by the Government or under the law of any part of the scheduled territories but, save as aforesaid, includes any currency other than sterling and British West Indian dollars and any notes of a class which are or have at any time been legal tender in any territory outside the Colony, and any reference to foreign currency, except so far as the context otherwise requires, includes a reference to any right to receive foreign currency in respect of any credit or balance at a bank; and
- (b) the expression ‘the scheduled territories’ means the territories specified in the first schedule to this Ordinance, so, however, that the Governor may at any time by order amend the said schedule, either by the addition or exclusion of territories or otherwise, and the said expression shall be construed accordingly.”

Section 9 is in Part II of the Ordinance, under the caption “Payments”, and is as follows:

“9. *Compensation deals.*

(1) Except with the permission of the Financial Secretary, no person shall in the Colony make any payment to or for the credit of a person resident in the scheduled territories, and no person resident in the scheduled territories shall in the Colony do any act which involves, is in association with or is preparatory to the making of any such payment outside the Colony, as consideration for or in association with—

- (a) the receipt by any person of a payment made outside the scheduled territories, or the acquisition by any person or property which is outside the scheduled territories; or
- (b) the transfer to any person, or the creation in favour of any person, of a right (whether present or future, and whether vested or contingent) to receive a payment outside the scheduled territories or to acquire property which is outside the scheduled territories.

(2) Nothing in this section shall prohibit the making of any payment in accordance with the terms of a permission or consent granted under this Ordinance.”

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As a result of s. 20 (2) (d) of the British Guiana (Constitution) Order in Council, 1961, "Minister of Finance" must now be substituted for "Financial Secretary" wherever the latter expression appears in the Exchange Control Ordinance.

When the provisions of the Ordinance other than ss. 17 and 13 came into operation the first schedule read thus:

"FIRST SCHEDULE

THE SCHEDULED TERRITORIES

1. The fully self-governing countries of the British Commonwealth except Canada.
2. Any Colony under the dominion of Her Majesty.
3. Any territory administered by the Government of any part of Her Majesty's dominions under the trusteeship system of the United Nations.
4. Any British protectorate or British protected state.
5. South West Africa.
6. The Irish Republic.
7. Iraq.
8. Iceland.
9. Burma.
10. The Hashemite Kingdom of Jordan.
11. The United Kingdom of Libya."

Brief reference should here be made to the Currency Ordinance, 1959, which was passed by the Legislature of British Guiana on March 25, 1959, and was brought into force on May 16, 1959. It is an Ordinance to amend and consolidate the law relating to currency (Cap. 283) and to implement an agreement made on January 28, 1958, to provide for a uniform currency in the Eastern Group of the British Caribbean territories comprising Barbados, British Guiana, Trinidad and Tobago, the Leeward Islands and the Windward Islands. The agreement makes provision for the appointment of a Board of Commissioners of Currency consisting of 5 Commissioners, one on behalf of each of the five Governments or groups of Governments mentioned, and in addition an Executive Commissioner who is also to be a member of the Board. Under the agreement, which by s. 3 of the Ordinance is clothed with the force of law as if enacted in the Ordinance, the Board has the sole right to issue currency notes and coin in the territories administered by the participating Governments. Section 7 of the Ordinance is as follows:

"7. (1) The Board shall issue on demand to any person desiring to receive currency notes in British Guiana, currency notes to the equivalent value (at the rate of one dollar for four shillings and two pence) of sums in sterling lodged with the Crown Agents in London by the said person, and shall pay on demand through the Crown Agents to any person desiring to receive sterling in London the equivalent value calculated as aforesaid of currency notes lodged with the Board in British Guiana by the said person:

Provided that—

- (a) no person shall be entitled to lodge with the Crown Agents or the Board as the case may be less than such minimum sum as may from time to time be prescribed for the purpose of obtaining currency notes or sterling as the case may be; and
- (b) the Board shall be entitled to charge and levy from any person obtaining currency notes or sterling commission at such rate or rates as the Board may think fit not exceeding three-quarters per centum and in addition the cost of any telegrams sent by the Board or by the Crown Agents in connection with any transfer as above described.

(2) The Board may, at its option, issue and receive coin in the same manner and subject to the same conditions as are prescribed in subsection (1) of this section for the issue and receipt of currency notes.”

The Exchange Control (Scheduled Territories) Order, 1961, which purports to amend the first schedule to the Exchange Control Ordinance, 1958, by the exclusion therefrom of “all territories referred to therein except British Guiana,” was made by the Governor on December 18, 1961, under para. (b) of s. 3 (4) of the said Ordinance “in accordance with paragraph (1) of article 22 of the Constitution of British Guiana.” The Order was published in the Official Gazette of December 19, 1961.

On December 22 and 23, 1961, the plaintiff tendered 50,000 British West Indian dollars to the Senior Currency Officer, the duly authorised agent of the Board of Commissioners of Currency, at the Board’s office in Georgetown and demanded that the Crown Agents pay to him in London the equivalent value in sterling. The demand on December 22 was made both orally and in writing, and was in the following terms:

“The Senior Currency Officer, Currency Board.

I am Peter Stanislaus D’Aguiar, a resident of the Colony of British Guiana.

I have come to make demand of you the Board of Commissioners of Currency in this Colony to convert B.W.I., currency notes to the amount of 50,000 dollars, which I am now lodging with you here in British Guiana, into sterling the equivalent of which I desire to receive in London through the Crown Agents.

I make this demand under and by virtue of my rights under the provisions of section 7 (1) of the Currency Ordinance, No. 8 of 1959.

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I am willing to comply with all the provisions of the whole of the said section and with any other relevant requirements of the said Currency Ordinance, and call on you in turn to make due compliance with the said Ordinance and give effect to your obligations thereunder in respect of my aforesaid demand.

I will now give you a copy of what I have just said.”

The demand made on December 23 was accompanied by the handing to the Senior Currency Officer of a letter by the plaintiff’s solicitors, as follows:

“The Board of Commissioners of Currency, British Caribbean territories (Eastern Group) and the Executive Commissioner,

General Post Office,

Georgetown.

Sirs,

We are instructed by our client, Mr. P. S. D’Aguiar, that yesterday he tendered to your agent or officer in British Guiana the sum of \$50,000 in currency notes and offered to pay the prescribed commission and cost of a telegram to the Crown Agents and informed your agent or officer that he desired to receive in London the equivalent in value of the said notes and that your agent or officer asked to be allowed until 9.30 this morning to consider what he should do.

As Solicitors for Mr. D’Aguiar we hereby demand that you accept for lodgment the said sum of \$50,000 in currency notes pursuant to the provisions of section 7 of the Currency Ordinance, (1959) No. 8, and that as soon as possible thereafter you instruct the Crown Agents by telegram to pay on demand its equivalent in sterling to our client or his authorised bankers, Barclays Bank D.C.O., 29 Gracechurch Street, London.

If you refuse to comply with this demand, our client will have no alternative but to apply for a mandamus to compel you to perform your statutory duties.

Yours faithfully,

CAMERON & SHEPHERD.”

The Senior Currency Officer, after consultation with the Commissioner of Currency for British Guiana, refused to accept the notes or effect the conversion without the permission of the Minister of Finance.

On or about January 9, 1962, the plaintiff received from the Minister of Finance a letter dated January 6, 1962, in these terms:

“Mr. P. S. D’Aguiar, M.L.A., Brickdam, Stabroek, Georgetown, Demerara.

Sir,

It has been brought to my knowledge that since the coming into force of the Exchange Control (Scheduled Territories) Order, 1961, you have made attempts to have British West Indian dollars converted into sterling without the permission required under the provisions of the Exchange Control Ordinance, 1958.

Under the law as it now stands, no such conversion may be effected without permission, and an attempt to convert without permission is punishable as a criminal offence. In this respect, your attention is drawn to the provisions of Part II of the Fifth Schedule to the Exchange Control Ordinance, 1958, which contains relevant provisions relating to penalties for offences against the Ordinance.

Copies of this letter are being sent to the Director of Public Prosecutions and to the Commissioner of Police.

Very truly yours,

CHARLES JACOB, Jr.,

Minister of Finance,

cc. Director of Public Prosecutions.

Commissioner of Police.”

On January 10, 1962, the plaintiff’s solicitors replied to the Minister of Finance informing him, among other things, that they had been instructed to institute proceedings in the Supreme Court against the Government for a declaration that the Order made by the Governor on December 18, 1961, is *ultra vires*, unconstitutional and ineffective.

The plaintiff claims declarations (a) that he is under no obligation to obtain any permission in order to convert British West Indian dollars into sterling payable in the United Kingdom, (b) that the Governor has no power under article 22 (1) of the Constitution of British Guiana to amend the Scheduled Territories in the first schedule to the Exchange Control Ordinance, 1958, at all, alternatively by the exclusion of any country within the sterling area, or in the further alternative all countries other than British Guiana, and (c) that the Exchange Control (Scheduled Territories) Order, 1961, is unconstitutional and *ultra vires* the Exchange Control Ordinance, 1958.

In this action the plaintiff also asks for certain declarations in respect of a Proclamation made by the Governor on January 30, 1962, and in respect of paragraph 111 of the Budget Speech delivered by the Minister of Finance in the Legislative Assembly on January 31, 1962. The Proclamation in question appointed January 31, 1962, as the day

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on which the provisions of ss. 17 and 18 of the Exchange Control Ordinance, 1958 (which relate to the deposit of certificates of title to securities with authorised depositaries), shall come into force. On January 30, 1962, the Governor also purported to make the Exchange Control (Authorised Depositaries) Order, 1962, under s. 2 (1) of the Ordinance and "in accordance with paragraph (1) of article 22 of the Constitution." This Order authorises Barclays Bank, D.C.O., and the Royal Bank of Canada to act as authorised depositaries in relation to securities for the purposes of the Ordinance. The Order was published in the Official Gazette of January 31, 1962. That same day the Minister of Finance in his Budget Speech (para. 111) stated:

"With regard to foreign assets, every resident person will be required to declare immediately all foreign assets (*e.g.* securities, property and bank accounts). All securities and certificates of title will then have to be registered in the Exchange Control and placed in the hands of 'authorised depositaries' their disposal requiring the express permission of the Minister of Finance. Foreign bank accounts will be allowed only where required to facilitate normal commercial transactions."

In respect of this second leg of the case the plaintiff claims declarations (a) that the Proclamation dated January 30, 1962, bringing into force ss. 17 and 18 of the Exchange Control Ordinance, 1958, and the said sections are unconstitutional, and (b) that all the acts done by the Governor or the Minister of Finance or intended to be done in furtherance or in purported pursuance of ss. 17 and 18 of the Exchange Control Ordinance, 1958, or paragraph 111 of the Budget Speech of the Minister are unlawful and constitute a contravention of the provisions of the Constitution of British Guiana.

Having outlined the facts, the relevant legislation and the plaintiff's claims, I must now deal with an objection by counsel for the defendant that proceedings of this nature cannot properly be brought against the Attorney-General. Numerous arguments were advanced in this connection. The first was that the only statutory provision that authorises proceedings against the Attorney-General is contained in s. 46 of the Supreme Court Ordinance, Cap. 7, that only claims of a nature described in sub-s. (2) thereof can be brought against the Attorney-General, and that such claims must be brought in the manner prescribed by subsection (3). These two subsections of s. 46 are as follows:

"Claims by private parties against the Government. (2) All claims against the Government of the Colony which are of the same nature as claims which may be preferred against the Crown in England by petition, manifestation, or plea of right, may, with the consent of the Governor, be brought in the Court, in a suit instituted by the claimant as plaintiff against the Attorney-General as defendant, or any other officer authorised by law, or from time to time designated for that purpose by the Governor.

How action commenced. (3) The claimant shall not issue a writ of summons, but the action shall be commenced by the

filing of a statement of claim (with an address for service thereon) in the Court, and the delivery of a copy thereof at the chambers of the Attorney-General or other officer authorised or designated as aforesaid.”

Section 47 (1) of the Ordinance requires the Registrar to cause such statement of claim to be laid before the Governor, and provides that if the Governor grants his consent, the statement of claim shall be returned to the court, with the fiat of the Governor endorsed thereon. In this case the proceedings were commenced by writ of summons, and the fiat of the Governor was not obtained or sought.

Counsel for the defence submitted that the expression “Government of the Colony” in sub-s. (2) of s. 46 means the executive Government, the Crown; that the statement of claim does not disclose any such claim against the Government as would enable proceedings to be instituted against the Attorney-General under s. 46 (2), and that in any event there has been no fiat of the Governor as is required by the section. He stressed the fact that the provisions of s. 3 (B) of the Civil Law of British Guiana Ordinance, Cap. 2—*i.e.*, that the common law of the Colony shall be the common law of England including therewith the doctrines of equity as administered by the courts of justice in England, and the Supreme Court shall administer the doctrines of equity in the same manner as the High Court of Justice in England—are governed by the words “save as provided by . . . any other Ordinance” which appear at the beginning of the section, and contended that the effect of these introductory words, coupled with the provisions of s. 46 of the Supreme Court Ordinance, Cap. 7, is strictly to confine proceedings against the Attorney General to those mentioned in s. 46 (2) of Cap. 7. I am not persuaded that this is so. Section 46 (2) is clear and precise. It defines what may be done in British Guiana as regards claims against the Government of the Colony *which are of the same nature as claims which could be preferred against the Crown in England by petition of right* before the coming into operation of the Crown Proceedings Act, 1947. Subsection (3) of the section obviously applies only to claims which fall within sub-s. (2). The section has nothing whatever to do with claims within the rule in *Dyson v. Attorney General*, [1911] 1 K.B. 410, and [1912] 1 Ch. 158, on which the plaintiff relies. In that case the Commissioners of Inland Revenue had issued notices accompanied by forms which they required to be filled up within thirty days stating that failure to make a return within that period would entail a penalty not exceeding £50. One of the notices was sent to Dyson, who maintained that the form was *ultra vires* the statutory powers under which it purported to be issued. Dyson brought proceedings against the Attorney-General under O. 25, r. 5, claiming a declaration that he was under no obligation to comply with the requisition. The proceedings were commenced by writ of summons. No fiat was obtained. The Court of Appeal held that the action against the Attorney-General without recourse to a petition of right was lawfully instituted and that Dyson was entitled to the declaration claimed. In the course of his judgment COZENS-HARDY, M.R. ([1911] 1 K.B. 415-417) said:

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“It has been settled for centuries that in the Court of Chancery the Attorney-General might in some cases be sued as a defendant as representing the Crown, and that in such a suit relief could be given against the Crown. *Pawlett v. Attorney-General*, Hadres’ Rep. 465, is a very early authority on this point. *Laragoity v. Attorney-General*, 2 Price 172, is a case where this matter was a good deal discussed. In *Deare v. Attorney-General*, 1 Y. & C. Ex. 197, the Attorney-General demurred to such a bill. Lord ABINGER, *ibid*, at p. 208, said: ‘I apprehend that the Crown always appears by the Attorney-General in a Court of justice, especially in a Court of Equity, where the interest of the Crown is threatened. Therefore a practice has arisen of filing a bill against the Attorney-General, or of making him a party to a bill, where the interest of the Crown is concerned,’ and the demurrer was overruled. But it is said that these authorities have no application except in cases in which the Crown rights are only incidentally concerned, and that where the rights of the Crown are the immediate and sole object of the suit the application must be by petition of right: see MITFORD ON PLEADING, p. 30. I do not think the distinction thus suggested is supported by authority, nor do I think the distinction would avail the Attorney-General in the present case. The case of *Hodge v. Attorney-General*, 3 Y. & C. Ex. 342, is an important decision. . . . This seems to me a distinct authority that the Court has jurisdiction to maintain an action against the Attorney-General as representing the Crown, although the immediate and sole object of the suit is to affect the rights of the Crown in favour of the plaintiffs. . . . So far as I can discover, the authority of *Hodge v. Attorney-General* has never been challenged, and I think it ought to be followed. It was suggested that there was something peculiar in the jurisdiction of the old Court of Exchequer which might account for such a decision. I cannot adopt this view. No doubt the Court of Exchequer on the Revenue side had peculiar functions which are not transferred by the Judicature Act to all branches of the High Court, but its equity jurisdiction had nothing peculiar as distinguished from the Court of Chancery, to which by statute this jurisdiction was transferred. What the old Court of Chancery could do can now be done by both Divisions of the High Court.

But then it is urged that in the present action no relief is sought except by declaration, and that no such relief ought to be granted against the Crown, there being no precedent for any such action. The absence of any precedent does not trouble me. The power to make declaratory decrees was first granted to the Court of Chancery in 1852 by s. 50 of 15 & 16 Vict, c. 86, under which it was held that a declaratory decree could only be granted in cases in which there was some equitable relief which might be granted if the plaintiff chose to ask for it: see *Rooke v. Lord Kensington* (1856), 2 K. & J. 753. The jurisdiction is, however, now enlarged, for by Order xxv., r. 5, ‘no action or proceeding shall be open to objection on the ground that a merely declaratory judgment, or order, is sought thereby, and the Court may make binding declarations of right whether any consequential relief is

or could be claimed or not.' I can see no reason why this section should not apply to an action in which the Attorney-General, as representing the Crown, is a party. The Court is not bound to make a mere declaratory judgment, and in the exercise of its discretion will have regard to all the circumstances of the case. I can, however, conceive many cases in which a declaratory judgment may be highly convenient, and I am disposed to think, if all other objections are removed, this is a case to which r. 5 might with advantage be applied . . ."

FARWELL, L.J., (*ibid.* 422) had this to say:

"The present is not a case for a petition of right at all; the Crown is not directly affected, but the plaintiff seeks a declaration from the Court of the true construction of an Act which imposes burdensome and expensive enquiries upon him, and for non-compliance with which he is threatened with fines. The argument on behalf of the Attorney-General admits for this purpose the illegality of the inquiries, but claims for a Government department a superiority to the law which was denied by the Court to the King himself in Stuart times."

I have dealt at some length with *Dyson v. Attorney General* and shall have much more to say about it because that case was strongly canvassed by counsel on both sides.

Section 3 of our Supreme Court Ordinance, Cap. 7, enacts that the Supreme Court of British Guiana shall be a supreme court of record and shall have all the authorities, powers and functions belonging or incident to a court of that character according to the law of England. As already mentioned, s. 3 (B) of the Civil Law of British Guiana Ordinance, Cap. 2, provides that the common law of the Colony shall be the common law of England including therewith the doctrines of equity as administered by the courts of justice in England, and the Supreme Court shall administer the doctrines of equity in the same manner as the High Court of Justice in England. Then there is O. 23, r. 3, of our Rules of the Supreme Court, 1955, which is in substance identical with O. 25, r. 5, of the English Rules under which the declaratory action in *Dyson's* case was brought. It was nevertheless urged by counsel for the defendant that a declaratory order such as was made in *Dyson's* case cannot be made against the Attorney General of this Colony because of s. 23 of our Interpretation Ordinance, Cap. 5, which provides that "No enactment shall in any manner whatsoever affect the right of the Crown, unless it is therein expressly stated or unless it appears by necessary implication that the Crown is bound thereby." Counsel's submission in this regard was based solely on the absence of any similar statutory provision in England. That being so, it is, I think, sufficient to observe that s. 23 of our Interpretation Ordinance is merely declaratory of the common law: *Thomas v. Pritchard*, [1903] 1 K.B. 209, at p. 212; *Re Wi Matua's Will*, [1908] A.C. 448, at p. 449.

Another argument advanced by counsel for the defendant was that the court will not make a declaratory judgment where an adequate

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alternative remedy is available (22 HALSBURY'S LAWS, 3rd edn., p. 750, para. 1611). He suggested that in this case an alternative remedy which the plaintiff could adopt to test the validity of the legislation in question would be by way of writ of mandamus against the Board of Commissioners of Currency after due demand on them for the conversion of dollars into sterling. Apart from the fact that the conversion of dollars into sterling touches only one limb of this case, it would appear from the judgment delivered in this court on June 30, 1962, by PERSAUD, J., in *Board of Commissioners of Currency v. Attorney-General and D'Aguiar* (at p. 350 herein) that the views of the Board with regard to the validity of the Exchange Control (Scheduled Territories) Order, 1961, are the same as those of the plaintiff and that if mandamus proceedings could, in some way or the other, be instituted, the court would have to direct that the Attorney-General be added as a party to argue in support of the validity of the order, otherwise there would be no dispute. Further, an application to the Board for conversion might immediately lead to unpleasant consequences to the plaintiff as well as other persons. In the course of his submissions on the merits of the case counsel for the defendant himself argued that if the plaintiff caused an officer of the Board to take any step which would enable the plaintiff to have a right to property abroad—whether the right be present or future, vested or contingent—both the plaintiff and the officer would be liable to prosecution. The Minister of Finance in his letter of January 6, 1962, warned the plaintiff that even an attempt to convert is punishable as a criminal offence. In these circumstances it is, to say the least, impossible to treat seriously counsel's submission that a declaratory judgment does not lie because of the existence of an adequate alternative remedy by way of mandamus against the Board.

There are two other grounds on which counsel for the defendant sought to distinguish this case from *Dyson v. Attorney-General*. It would be convenient to deal with these two grounds together. One is that in *Dyson's* case the penalty for failure to comply with the demands (if lawful) of the Commissioners of Inland Revenue was a civil penalty recoverable at the instance of the Attorney-General. The Master of the Rolls commented on this aspect of the matter ([1911] 1 KB. at p. 415) and said it suggested to him that the Attorney-General ought to be liable to an action in so far as he threatened to enforce a penalty based upon non-compliance with an unauthorised notice. In the instant case there is no civil penalty for which the Attorney-General or anyone else can sue. Subsection (3) of s. 1 of Part II of the fifth schedule to the Exchange Control Ordinance, 1958, provides that any person in or resident in the Colony who contravenes any restriction or requirement imposed by or under the Ordinance, and any such person who conspires or attempts, or aids, abets, counsels or procures any other person, to contravene any such restriction or requirement shall be liable—

- (a) on summary conviction, to imprisonment for not more than three months or to a fine or to both;
- (b) on conviction on indictment, to imprisonment for not more than two years or to a fine or to both.

Section 2 of the same Part of the Fifth Schedule enacts that no proceedings for an offence shall be instituted "except by or with the consent of the Attorney-General." By virtue of s. 20 (2) (e) of the British Guiana (Constitution) Order-in-Council, 1961, the fiat now required is that of the Director of Public Prosecutions and not the Attorney-General.

The other ground urged by counsel for the defendant is based on the difference between the exercise of executive functions and the exercise of legislative functions. He contended that what is being challenged in this case is the validity of legislation and that that can only be canvassed in proceedings between the proper parties since no one is charged with the duty of defending Parliament and the Attorney-General does not represent the Government in the exercise of legislative functions. Counsel for the plaintiff, *contra*, argued that delegated legislation is made by executive acts and that when the Orders in question were being made by the Governor he was performing executive functions on the advice of a Minister or of the Council of Ministers. It seems to me that while the acts of the Governor in making the Orders may perhaps be described as legislative acts, he made or purported to make them on the advice of a Minister (or Ministers) charged with executive responsibility under article 33 of the Constitution and acting *qua* Minister in the exercise of such responsibility. Be that as it may, the fact is that by the Minister of Finance's letter of January 6, 1962, and paragraph 111 of his Budget Speech enforcement of the Orders and Proclamation have undoubtedly been threatened by the executive Government.

In *Dyson's* case, where only a civil penalty was involved, FLETCHER MOULTON, L.J., said ([1912] 1 Ch. at p. 168):

"There must be some way in which the validity of the threats of the Commissioners can be tested by those who are subjected to them before they render themselves liable to penalty, and I can conceive of no more convenient mode of doing so than by such an action as this."

FARWELL, L.J., ([1911] 1 K.B. at p. 421) made these comments:

"it would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty."

Later (*ibid.* 423, 424) he used much stronger language:

"in the present case we find the law officers taking a preliminary objection in order to prevent the trial of a case which is of the greatest importance to hundreds of thousands of His Majesty's subjects. I will quote the Lord Chief Baron in *Deare v. Attorney General* (1 Y. & C. Ex. at p. 208): 'it has been the practice, which I hope never will be discontinued, for the officers

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of the Crown to throw no difficulty in the way of proceedings for the purpose of bringing matters before a court of justice when any real point of difficulty that requires judicial decision has occurred.' I venture to hope that the former salutary practice may be resumed. If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the courts are the only defence of the liberty of the subject against departmental aggression."

Many of the comments of the Lords Justices of Appeal in *Dyson's* case can be applied with even greater force to the instant case in which the plaintiff stands in jeopardy of imprisonment. True it is that there is no civil penalty for which the Attorney-General can sue, but I do not think that that by itself is sufficient to take this case out of the rule in *Dyson*. It would indeed be strange if liability to the far more serious penalty of imprisonment could have the effect of depriving a person of such a fundamental right. In his book on CROWN PROCEEDINGS, GLANVILLE WILLIAMS (at p. 96), in considering what is the vital factor that enables the subject to bring the Attorney-General before the court in an action for a declaration, says: "it is submitted that this factor is some breach of duty towards or threatened interference with the subject on the part of Government." This, I think, is an accurate statement of the law.

The present proceedings appear to me to be not only the most convenient but, indeed, the only practicable way of testing the validity of the subsidiary legislation in question. It would be intolerable that the plaintiff should have to wait to be prosecuted to know what is the law.

The objection taken by counsel for the defendant is disallowed.

I turn now to the merits of the case.

The arguments of counsel for the plaintiff in relation to the Exchange Control (Scheduled Territories) Order, 1961, fell under two main heads: first, that the Order is invalid because (a) it is unconstitutional, and (b) it is inconsistent with the terms of the Exchange Control Ordinance under which it was made and is therefore *ultra vires*; secondly, that even if the Order is valid it does not affect the transaction in question because (a) the transaction is not prohibited by any of the provisions of the Exchange Control Ordinance, and (b) the Exchange Control Ordinance, and *a fortiori* the Order, cannot affect the operation of s. 7 of the Currency Ordinance, 1959.

Before dealing with any of these points brief reference should perhaps be made to the history of the legislation of this Colony with regard to currency.

The Currency Ordinance, 1839, established dollars and cents as the denomination of moneys of account of British Guiana. Prior to 1915 notes were issued by banks operating in the Colony. The first notes to be issued by the Government were issued under the Currency Notes Ordinance, 1915, which required a certain proportion of the notes to be backed by coin. This state of affairs continued until the

coming into force of the Government Currency Notes Ordinance, 1937, which introduced the modern sterling exchange standard. Section 6 of that Ordinance required the Board of Commissioners of Currency established by the Ordinance to convert notes into sterling on demand, on terms similar to those in s. 7 of the Currency Ordinance, 1959.

By virtue of the Trinidad and Barbados Currency Notes Ordinance, 1941 (Cap. 286), Barbados and Trinidad Currency Notes became legal tender in British Guiana with effect from July 1, 1941.

In 1946 a currency conference was held at Barbados between representatives of the Governments of the Eastern Group of the British Caribbean Colonies comprising Barbados, British Guiana, the Leeward Islands, Trinidad and Tobago, Grenada, St. Vincent, St. Lucia and Dominica. That conference recommended that a unified system of currency notes and coin for the Eastern Group of the British Caribbean Colonies be established. Legislation was passed in each of the colonies concerned to give effect to an Agreement embodying the recommendations of the conference, the relevant British Guiana legislation being the Currency Ordinance, 1950 (Cap. 283). Section 7 of that Ordinance is identical with s. 7 of the Currency Ordinance, 1959, which latter Ordinance was enacted to give statutory sanction to a fresh Agreement made in 1958 by the Governments of the Eastern Group of the British Caribbean Colonies in terms almost identical with those of the previous Agreement.

As regards the constitutionality of the Exchange Control (Scheduled Territories) Order, 1961, counsel for the plaintiff referred to article 61 of the Constitution, which states that "subject to the provisions of this Constitution, the Governor may, with the advice and consent of the Senate and Legislative Assembly, make laws for the peace, order and good government of British Guiana," and to articles 33 and 34 of the Constitution, the relevant portions of which are:

"33. *Responsibilities.* (1) Subject to the provisions of this Constitution, the Governor acting in accordance with the advice of the Premier, may, by directions in writing, charge any Minister with responsibility for any matter or any department of government and designate the style by which any Minister so charged shall be known:

* * * * * *

(2) Nothing in this article shall empower the Governor to confer on any Minister authority to exercise any power or discharge any duty that is conferred or imposed by this Constitution or any other law on the Governor or any person or authority other than that Minister.

(3) Without prejudice to the generality of the last foregoing paragraph, except for the purpose of submitting questions relating to such matters to the Council of Ministers and conducting Government business relating to such matters in any chamber of the Legislature, a Minister shall not be charged with responsi-

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bility for defence or external affairs (other than trade relations falling within the scope of the authority conferred by article 34 of this Constitution), responsibility for which shall vest in the Governor, acting in his discretion.

34. *External trade.* (1) Without prejudice to the powers of Her Majesty's Government in the United Kingdom to regulate the external affairs of British Guiana, the Government of British Guiana shall have authority to conduct trade relations between British Guiana and other countries.

(2) The scope of the authority that is vested in the Government of British Guiana by the preceding paragraph shall be such as may be defined by, and shall be exercised in accordance with, the terms of such communications as may from time to time be made to the Government of British Guiana by Her Majesty's Government in the United Kingdom, and every such communication shall be published in the Gazette."

The scope of the authority vested in the Government of British Guiana by article 34 is defined in a despatch from the Secretary of State for the Colonies to the Governor dated July 12, 1961, and published in the Official Gazette of August 5, 1961. Paragraphs 2 and 5 of that communication are as follows:

"2, Subject to the provisions of paragraph 5 below, the scope of the executive authority of British Guiana with respect to its trade relations with other countries shall be as follows:—

- (a) The Government of British Guiana shall have authority to negotiate and conclude trade agreements with other countries, whether bilateral or multilateral, relating solely to the treatment of goods but excluding agreements relating to establishment matters (*i.e.* those affecting the rights of persons and companies of the contracting parties) and to shipping.
- (b) The Government of British Guiana shall have responsibility for arranging or permitting visits of a trade or commercial nature by representatives or residents of British Guiana to any other country, and by representatives or residents of any other country to British Guiana.

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"5. In view of the general responsibility of Her Majesty's Government in the United Kingdom for the external affairs of British Guiana, the Government of British Guiana will inform Her Majesty's Government in good time of the initiation of any proposals for the exercise of the authority defined in subsections (a) and (b) of paragraph 2 above and of the progress of any negotiations undertaken in exercise of that authority. The British Guiana Government will be informed by Her Majesty's Government when such proposals or negotiations conflict or are likely.

when implemented, to conflict in any way with their international commitments or responsibilities and the British Guiana Government will abide by the decision of Her Majesty's Government with regard to modification or discontinuance of the proposals or negotiations in any such event."

Counsel for the plaintiff stressed the words "Subject to the provisions of this Constitution" at the beginning of article 61 and urged that the Constitution provides for *internal self-government* and does not confer on the British Guiana Government power to make laws in relation to matters with other countries. He submitted that if it could be shown that the amendment effected by the Exchange Control (Scheduled Territories) Order, 1961, affects "external affairs" it could not be justified on the ground of trade relations. He asked special attention to the words "responsibility for which shall vest in the Governor, acting in his discretion" appearing in article 33 (3) of the Constitution, and to the fact that the Exchange Control (Scheduled Territories) Order, 1961, purports to have been made by the Governor "in accordance with paragraph (1) of article 22 of the Constitution". He contended that the Governor cannot act under that provision of the Constitution except in relation to matters in the charge of a Minister, when he must accept the advice of the Minister, and that as regards matters reserved to the Governor's discretion, the Governor must exercise that discretion.

In elaboration of this argument counsel contended that the Exchange Control Ordinance, 1958, is an offshoot of the Defence (Finance) Regulations made under the Emergency Powers Defence Acts, 1939 and 1940, as a result of the Second World War. He urged that such regulations were made in the United Kingdom and throughout the sterling area to protect sterling and prevent the purchase of foreign currency without permission. The United Kingdom Regulations defined the expression "sterling area" as the United Kingdom, the Isle of Man and such other territories as may be declared by order of the Treasury to be included in the sterling area. Our regulations defined it as the United Kingdom, the Colony and such other territories as may be declared by order of the Governor to be included in the sterling area. In 1947 the United Kingdom regulations were replaced by the Exchange Control Act, 1947. Our local regulations continued in force until the enactment of the Exchange Control Ordinance, 1958.

In 40 HALSBURY'S STATUTES (1st edition), pp. 622, 623, there is a "Preliminary Note" relative to the United Kingdom Act. It contains the following passages:

"The purpose of this complicated and far-reaching Act is to enable the Treasury to control the export of capital from the 'sterling area', re-named by the Act the 'scheduled territories', in order to safeguard our balance of payments

Subject to a number of important modifications, the Exchange Control Act, 1947, continues in force the system of exchange control imposed by the Defence (Finance) Regulations

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The Act, although designed to apply to capital transactions only, confers very wide powers on the Treasury to regulate all foreign payments.”

Counsel for the plaintiff contended that the object of our Exchange Control Ordinance is to contribute to the protection of the sterling area as against foreign currencies, and that it was never intended that such legislation should apply to transactions within the sterling area. He submitted that the Ordinance (which came into force on September 1, 1959) did not affect the Currency Ordinance because it never touched payments within the sterling area, and that any attempt to cut down the operation of the Currency Ordinance by interfering with the right to demand conversion of our currency notes into sterling would be an attempt to legislate for “external affairs” and would not be within the competence of the local Legislature under the existing Constitution. He observed that if the term “sterling area” had been retained in use instead of “scheduled territories” the absurd effect of the Exchange Control (Scheduled Territories) Order, 1961, would have been to provide that the sterling area shall consist of British Guiana only, and that s. 4 (a) of the Exchange Control Ordinance, as amended by the Order, now reads thus:

“4. In this Ordinance—

- (a) the expression ‘foreign currency’ does not include any currency or notes issued by the Government or under the law of any part of British Guiana but, save as aforesaid, includes any currency other than sterling and British West Indian dollars and any notes of a class which are or have at any time been legal tender in any territory outside the Colony.”

Counsel for the defendant sought to defend the constitutionality of the Order by contending, first, that the Order deals with finance, which, he said, was substantially a matter of internal management, and does not relate to external affairs. He said that there was no justification for the plaintiff’s assumption that the Exchange Control Ordinance was passed to protect sterling; that convertibility of British West Indian dollars into sterling is not mentioned in the Agreement in the First Schedule to the Currency Ordinance and is not a subject of agreement between the Governments of the Eastern Group of the British Caribbean Territories, but is a matter of our particular law. He argued that the Exchange Control Ordinance does not prevent conversion but only puts a restraint on convertibility by prohibiting a demand for conversion without permission. What the Legislature cannot do, he said, is to devalue the currency because that would be an infringement of the Agreement; but the Legislature can repeal, amend or modify s. 7 of the Currency Ordinance. He submitted that his argument that this is a matter of finance and not external affairs finds support in s. 20 of the British Guiana (Constitution) Order in Council, 1961, which validates all laws in force in British Guiana immediately before the date of the coming into operation of the present Constitution and provides that all laws which have been made

before that date but have not previously been brought into operation may be brought into force on or after that date.

It is true that the words of s. 7 of the Currency Ordinance are not repeated in the Agreement set out in the First Schedule to the Ordinance, but s. 3 of the Ordinance provides that the Agreement shall have the force of law as if enacted in the Ordinance, and the Ordinance, including the Agreement, must be read as a whole.

Article 3 (1) of the Agreement provides that the Board shall establish a currency Fund which, subject to the terms of proviso (a) to paragraph (4) of the article, shall be held in London by the Crown Agents for meeting the redemption of currency and shall not be applied for any other purposes except as provided by the Agreement. Paragraph (1) of article 6 provides that if the assets of the Fund should at any time prove inadequate to meet "*legal demands* on the Board for the conversion of currency into sterling," each participating Government shall be liable to meet any deficiency in the Fund. Paragraph (2) of that article goes on to say that if the value of the Fund shall at any time be less than the face value of the currency notes and current coin in circulation and in the opinion of the Secretary of State it shall be necessary to make up such deficiency in the Fund each participating Government shall be liable for the sum which in the opinion of the Secretary of State is required to be paid into the Fund. Article 8 provides that any dispute arising from the interpretation of the Agreement shall be referred to the Secretary of State whose decision shall be final and binding on all the Governments concerned.

Reading the Ordinance as a whole it is apparent that a complete scheme to provide for and control the supply of currency to the Eastern Group of the British Caribbean Territories was agreed upon by the participating Governments and approved by the Secretary of State and that an essential part of that contractual inter-territorial scheme was the convertibility of British West Indian dollars into sterling on demand. The very expression conversion of currency necessarily involves a country other than British Guiana. Unilateral interference by any of the participating Governments with the free convertibility of dollars into sterling was never contemplated; it constitutes a violation of the Agreement with the other countries concerned and comes within the scope of external affairs. External affairs are not the same as international affairs. Article 72 (1) (b) of the Constitution shows they include intercolonial affairs.

As regards the effect of s. 20 of the British Guiana (Constitution) Order in Council, 1961, on laws passed before the coming into operation of the present Constitution (a matter urged by counsel for the defence), it should be noted that the last five lines of sub-s. (1) of the section provide that all such laws shall be construed, in relation to any period beginning on or after the coming into force of the Constitution, with such adaptations and modifications as may be neces-

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sary to bring them into conformity with the provisions of the Constitution. The soundness or otherwise of the defendant's counsel's argument in this connection therefore hinges on the answer to his next submission which was that even if the Exchange Control (Scheduled Territories) Order, 1961, relates to external affairs, the provision in article 33 (3) of the Constitution that a Minister may not be charged with responsibility for external affairs means that a Minister may not be charged with *executive* responsibility for such affairs, such responsibility being vested in the Governor acting in his discretion, and that the legislative powers conferred by the Constitution include power to make laws relating to external affairs, subject only to the overriding powers of Her Majesty's Government to legislate in respect of such matters. As I understood it, counsel's argument was not that the Order comes within the ambit of "trade relations". He urged that article 72 (1) (b) (which deals with the powers of the Governor to declare that any Bill introduced or motion moved in the Senate or the Legislative Assembly for the purpose of the regulation of relations between British Guiana and any other country shall have effect if that chamber fails to pass such Bill or to carry such motion within such time and in such form as the Governor thinks reasonable and expedient) implies that a Bill relating to external affairs can be introduced and passed by the respective chambers of the Legislature without the Governor so directing. It is, I think, important to note that article 74 (3) requires the Governor to reserve for the signification of Her Majesty's pleasure any Bill which appears to him to affect relations between British Guiana and any other country unless authorised by a Secretary of State to assent thereto. In effect, these provisions of the Constitution require the Governor to act on the advice of Her Majesty's Government, and not on the advice of the local Legislature, in regard to measures affecting relations between British Guiana and any other country. *A fortiori* the Governor cannot make subsidiary legislation on the advice of a Minister or of the Council of Ministers in matters affecting relations between British Guiana and any other country.

Another argument advanced by counsel for the defendant was that the power to amend the First Schedule to the Exchange Control Ordinance as conferred on the Governor by s. 3 (4) (b) of the Ordinance is not expressed to be exercisable in the Governor's discretion, therefore under article 22 of the Constitution it is a function which is not exercisable otherwise than in accordance with the advice of the Council of Ministers or of a Minister. A complete answer to that is, I think, to be found in para. (2) (a) of article 22 coupled with the provisions of article 33 (3) of the Constitution. The absence of express words in the Exchange Control Ordinance is explained by the fact that when that Ordinance was passed the Constitution then in force did not require the Governor to act on the advice of Ministers in any matters. Article 16 of that Constitution required the Governor to consult the Executive Council in certain cases but article 17 thereof provided that he need not act in accordance with their advice.

It follows from what I have said that in my opinion the Exchange Control (Scheduled Territories) Order, 1961, is unconstitutional and invalid.

For the reasons urged by counsel for the plaintiff, I am also of the opinion that the Order is inconsistent with the provisions of the Exchange Control Ordinance, 1958, under which it was made, and is therefore *ultra vires*. Although the literal wording of section 3 (4) (b) of the Ordinance would appear at first blush to give the Governor unlimited power to amend the First Schedule thereto, the section must be read and construed in the light of the purposes of the Ordinance, its history and the objects it seeks to achieve. Further, the Governor cannot exercise his powers under the Ordinance to effect an amendment which would be inconsistent with the provisions of the Ordinance itself.

In view of these findings, the other arguments advanced by counsel for the plaintiff with respect to the Exchange Control (Schedule Territories) Order, 1961, do not arise.

As regards that part of the plaintiff's claim which relates to the Proclamation made by the Governor on January 30, 1962, appointing January 31, 1962, as the day on which ss. 17 and 18 of the Exchange Control Ordinance, 1958, shall come into force, counsel for the plaintiff argued that the purported bringing into operation of those provisions of the Ordinance is unconstitutional and void because it contravenes the provisions of paragraph (1) of article 12 of the Constitution which provides that no interest in or right over property of any description shall be compulsorily acquired, and no such property shall be compulsorily taken possession of, except by or under the authority of a written law and where provision applying to that acquisition or taking of possession is made by such a law requiring the prompt payment of adequate compensation. Counsel submitted that paragraph 2 of the article does not save ss. 17 and 18 of the Exchange Control Ordinance because those sections were not in force before the present Constitution came into operation. He urged that property has been taken possession of in this case, and that in so far as the Minister of Finance in paragraph 111 of his Budget Speech manifested an intention to take possession of the property of the plaintiff in contravention of article 12 (1) of the Constitution, this also would be unconstitutional, and the plaintiff would be entitled to redress by virtue of article 13 (1) of the Constitution which enacts that if any person alleges that any of the provisions of Part I of the Constitution (under which both articles 12 and 13 come) has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matters which is lawfully available, that person may apply to the Supreme Court for redress.

Sections 17 and 18 of the Exchange Control Ordinance are as follows:

“17. (1) This and the next following section shall apply to any security except—

(a) a security which is registered in the Colony otherwise than in a subsidiary register, and

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on which none of the dividends or interest is payable on presentment of a coupon; and

(b) any such other securities as may be prescribed,

and in the following provisions of this section and in the next following section the expressions "security", "certificate of title" and "coupon" mean respectively a security to which the said sections apply, a certificate of title to such a security, and a coupon representing dividends or interest on such a security.

(2) It shall be the duty of every person by whom or to whose order (whether directly or indirectly) a certificate of title is held outside the Colony, to cause the certificate of title to be kept at all times, except with the permission of the Financial Secretary, in the custody of an authorised depository, and nothing in this Part of this Ordinance shall prohibit the doing of anything for the purpose of complying with the requirements of this subsection.

(3) Except with the permission of the Financial Secretary, an authorised depository shall not part with any certificate of title or coupon required under this section to be in the custody of an authorised depository:

Provided that this subsection shall not prohibit an an authorised depository:

- (a) from parting with a certificate of title or coupon to or to the order of another authorised depository, where the person from whom the other authorised depository is to receive instructions in relation thereto is to be the same as the person from whom he receives instructions;
- (b) from parting with a certificate of title, for the purpose of obtaining payment of capital moneys payable on the security, to the person entrusted with payment thereof;
- (c) from parting with a coupon in the ordinary course for collection.

(4) Except with the permission of the Financial Secretary no capital moneys, interest or dividends shall be paid in the Colony on any security except to or to the order of an authorised depository having the custody of the certificate of title to that security, so, however, that this subsection shall not be taken as restricting the manner in which any sums lawfully paid on account of the capital moneys, interest or dividends may be dealt with by the person receiving them.

(5) Except with the permission of the Financial Secretary, an authorised depository shall not do any act whereby he recognises or gives effect to the substitution of one person for another as the person from whom he receives instructions in

relation to a certificate of title or coupon, unless there is produced to him the prescribed evidence that he is not by so doing giving effect to any transaction which is prohibited by this Ordinance.

(6) Where a certificate of title which under this section should for the time being be in the custody of an authorised depositary is not in the custody of an authorised depositary, then, except with the permission of the Financial Secretary, no person shall in the Colony, buy, sell, transfer, or do anything which affects his rights or powers in relation to, the security, or do any act which involves, is in association with or is preparatory to any such transaction outside the Colony.

(7) Except with the permission of the Financial Secretary, no person in or resident in the Colony shall, in the case of a certificate of title with coupons (whether attached or on separate coupon sheets), detach any of the coupons otherwise than in the ordinary course for collection.

18. (1) Where a certificate of title to a security is by the last preceding section required to be and is in the custody of an authorised depositary, the provisions of this section shall, except so far as the Financial Secretary otherwise directs, have effect in relation thereto until—

- (a) there are delivered to him the prescribed declarations as to the ownership of the security and the residence of the owners thereof; and
- (b) in the case of a certificate of title which—
 - (i) would ordinarily be accompanied by coupons (whether attached or on separate coupon sheets); but
 - (ii) when it comes into custody of the authorised depositary wants, in order to render it complete, any coupons which would not in the ordinary course have been detached for collection,

there have also been deposited with him the coupons so wanting at the time when the certificate of title comes into his custody:

Provided that where the said declarations have been delivered to an authorised depositary and he has parted with the certificate of title, paragraph (a) of this subsection shall not again apply on the certificate coming into the custody of another authorised depositary or again coming into his own custody.

(2) Except with the permission of the Financial Secretary, the authorised depositary shall not part with or destroy the certificate of title or any coupons belonging thereto, otherwise than as mentioned in paragraphs (b) and (c) of the proviso to subsection (3) of the last preceding section, or do any act where-

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by he recognises or gives effect to the substitution of one person for another as the person from whom he receives instructions in relation thereto:

Provided that, where the person from whom an authorised depositary receives instructions in relation to any certificate of title becomes bankrupt in the Colony or dies, this subsection shall not prohibit the authorised depositary from recognising the trustee in bankruptcy or personal; representative as the person entitled to give instructions in relation to the certificate of title.

(3) The authorised depositary shall place any capital moneys, dividends or interest on the security received by him to the credit of the person by virtue of whose authority he received them, but shall not permit any part of the sums received to be dealt with except with the permission of the Financial Secretary."

Counsel for the defendant stressed the use of the word "custody" and not "possession" in ss. 17 and 18 of the Exchange Control Ordinance. He contended that in this case there is no question of any person's possession of property being taken away, and no intention to deprive anyone of property or reduce the value of the securities; all that is required, he said, is that custody of the certificates of title to the securities should be given to authorised depositaries, and what is lost is only control of the manner in which the securities may be dealt with. The legislation, he added, does not infringe proprietary rights.

The question raised is one of considerable difficulty concerning which there appears to be a dearth of authority. The following passages at pp. 105 and 106 of ALAN GLEDHILL'S FUNDAMENTAL RIGHTS IN INDIA were cited by counsel for the defendant:

"American jurists regard the power of 'social control' as inherent in 'the state'. It takes three forms, the 'police power,' the taxing power, and 'eminent domain'

The 'police power' emerged as an antidote to the strict interpretation of the American Fifth Amendment 'No person shall be deprived of life, liberty, or property without due process of law'. It is the power to regulate public health, morals, and safety, to promote public finance and general prosperity. Its exercise is permissible to protect a social interest more important than social liberty, provided that the means bear a reasonable relation to the end. It is justified on the ground that no one should be permitted to use his property or exercise his rights so as to injure the property or rights of another.

As the scheme of the Indian Constitution is to enumerate exhaustively and distribute powers by the Legislative Lists, and as India has rejected the doctrine of 'due process', it is difficult to find a place for 'police power' in its constitutional law.

'Eminent domain' is the power of 'the state' to take the property of the subject against his will by authority of law for a

public purpose on payment of compensation. It is referred to in another part of the Fifth Amendment in these terms:—‘nor shall private property be taken for public use without just compensation.’

It may obviously be difficult to assign a particular instance of ‘social control’ to its appropriate category, and the American Courts have often found it especially difficult to determine whether a given instance of taking of private property was an exercise of the ‘police power’, as ‘the state’ was interested to maintain, since no compensation need then be paid, or an exercise of ‘eminent domain’, in which case the law authorising it would be invalid, unless just compensation were provided.”

Counsel for the defendant urged that the provisions of ss. 17 and 18 of the Exchange Control Ordinance are akin to the ‘police power’ contained in the American Constitution and are not inconsistent with or related to article 12 of our Constitution which contemplates loss of property or the bundle of rights relating to property within the meaning of ‘eminent domain’. This argument is attractive but fails to take account of the vast difference between the provisions of our Constitution and those of the American Fifth Amendment. Article 12 of our Constitution expressly sets out two fundamental rights of the people of this Colony: one is that no property of any description shall be compulsorily taken possession of, except by or under the authority of a written law and where provision applying to that taking of possession is made by such law requiring the prompt payment of adequate compensation. I am not concerned with questions of policy: what powers a Government ought or ought not to have, etc. My duty is to interpret the Constitution as it stands, and it seems to me that there can be no room for doubt as to the meaning of article 12. It also appears that even if custody of the certificates be all that the authorised depositaries will get under ss. 17 and 18 of the Exchange Control Ordinance, the owners at any rate will be deprived of legal possession, since they will have no control over the certificates or the authorised depositaries. Sections 17 and 18 appear to be designed to give possession to the Government and to confer power on the Financial Secretary (now Minister of Finance) to issue directions to the authorised depositories. If that is so, and I think it is, then the present Constitution prohibits the bringing into operation of those sections without at the same time providing by law for the prompt payment of adequate compensation, and the Governor’s Proclamation of January 30, 1962, is unconstitutional.

There remains the question whether the court should exercise its discretion in favour of the plaintiff in these proceedings; the power to make a declaratory judgment is always a discretionary one. The general principles applicable to the exercise of that discretion are summarised at para. 1611 of 22 HALSBURY’S LAWS (3rd edition). After giving the most careful consideration to all the relevant circumstances, I am satisfied that in this case the declarations claimed by the plaintiff should be granted. It is hardly necessary for me to explain that ss. 17 and 18 of the Exchange Control Ordinance may properly

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be brought into operation at some fixture time upon provision being made for the prompt payment of adequate compensation.

In the result, the following declarations are made:

(1) the Governor acting under and in accordance with article 22 (1) of the Constitution of British Guiana has no power to amend the Scheduled Territories in the First Schedule to the Exchange Control Ordinance, 1958;

(2) the Exchange Control (Scheduled Territories) Order 1961, is unconstitutional and *ultra vires* the Exchange Control Ordinance, 1958;

(3) the plaintiff is under no obligation to obtain any permission in order to convert British West Indian dollars into sterling payable in the United Kingdom;

(4) the Proclamation dated January 30, 1962, bringing into force sections 17 and 18 of the Exchange Control Ordinance, 1958, and the said sections are unconstitutional; and

(5) the acts done by the Governor or the Minister of Finance or intended to be done in furtherance or in purported furtherance of section 17 and 18 of the Exchange Control Ordinance, 1958, or paragraph 111 of the Budget Speech of the Minister are unlawful and constitute a contravention of the provisions of the Constitution of British Guiana.

The defendant must pay the plaintiff's costs to be taxed. Certified fit for two counsel. Stay of execution for two weeks granted.

Judgment for the plaintiff

Solicitors: *E. de Freitas* (for the plaintiff); the Crown Solicitor (for the defendant).

BENNETT v. ETWARIE

[In the Full Court, on appeal from the magistrate's court for the Berbice Judicial District (Luckhoo, C.J., and Miller, J.) July 20, September 7, 29, 1962.]

Workmen's compensation—Claim by mother in respect of son's death—Son's contribution less than half of mother's housekeeping money—Whether mother was a dependant of son—Workmen's Compensation Ordinance, Cap. 111, s. 2.

The respondent claimed workmen's compensation from the appellant in respect of the death of her son, from whom she used to receive \$4.96 a week. Her income from her own earnings and other sources exceeded that amount. On appeal from the decision of the magistrate, who awarded compensation, it was argued for the appellant that the respondent was not entitled to compensation, for the reason that she was not a dependant of her son within

the meaning of s. 2 of the Workmen's Compensation Ordinance, Cap. 111, which provides that " 'dependants' means such of the members of a workman's family as were wholly or mainly dependent upon the wages of the workman at the time of his death"

The answer filed by the appellant in the magistrate's court did not specifically raise this issue, but although it became clear at the outset of the cross-examination of the applicant that the issue was being raised no objection was taken thereto and the issue was considered by both counsel in their addresses.

Held: (i) the respondent was partially but not mainly dependent upon the wages of the workman at the time of his death and was not therefore a dependant within the meaning of the Ordinance;

(ii) an answer is intended to define the issues which are to be decided at the hearing of an application and the traverses therein should be specific, but in the circumstances it could not be said that the applicant was prejudiced by the question of dependency being put in issue at the hearing.

Appeal allowed.

C. L. Luckhoo, Q.C., for the appellant.

H. Hanoman, with *M. R. Persaud*, for the respondent.

Reasons for Decision: On the 29th September, 1962, we allowed the appellant Bennett's appeal against the decision of a magistrate of the Berbice Judicial District awarding the respondent Etwarie (applicant) the sum of \$1,834 on a claim brought by her under the provisions of the Workmen's Compensation Ordinance, Cap. 111, in respect of the death of one Seecharran called Paulson on the 22nd October, 1960. We held that there was no proof that the respondent was a dependant of the deceased within the contemplation of the Workmen's Compensation Ordinance, Cap. 111. Under s. 7 of the Workmen's Compensation Ordinance, Cap. 111, compensation shall be payable to or for the benefit of a deceased's workman's dependants as provided by the Ordinance.

By s. 2 the term "dependants" is defined as follows—

' "dependants" means such of the members of a workman's family as were wholly or *mainly* dependent upon the wages of the workman at the time of his death . . . : provided that a person shall not be deemed to be mainly dependent on the wages of another person unless he was dependent *mainly* on the contributions from that other person for the provision of the ordinary necessities of life suitable for persons of his class and position.'

The respondent, the mother of the deceased Seecharran, stated in evidence that Seecharran was the eldest of six children and was 14 years of age at the time of his death. She had sent him out to work because her husband used to drink out his earnings and was unfaithful to her. She planted a kitchen garden from which she earned \$1.50 to \$2.00 per week and reared fowls. She would sell at the New Amsterdam Market on Saturday mornings. During the rice cutting season she cut rice for other persons at \$6.00 or \$7.00 per week. Her husband earned \$12.00 per week. She said that the deceased earned \$4.96 per week and would give her money every Saturday morning which she used for the purchase of food for the deceased and for her

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other children. She used her own money to purchase goods on Saturday mornings. She has also stated that since the death of her son her husband has become a more responsible person.

At the conclusion of the evidence in the case it was submitted on behalf of the employer that from the applicant's evidence she could not be held to be a dependant of the deceased either wholly or *partially*. For the applicant it was submitted that she was a dependant as it is a mother's duty to provide for herself and her children by the cumulative effect of what she earns plus what the deceased earned.

While it was shown that some of the deceased's money was used in the purchase of food for the children forming part of the applicant's household it was not shown that the applicant was dependent *mainly* on contributions from the deceased for the provision of the ordinary necessities of life suitable for persons of her class and position. At most it was shown that she was a *partial* dependant. This might have sufficed in proof of a claim prior to the enactment of the present Ordinance in 1952. Since then, however, before an applicant can succeed on a claim of this kind it must be admitted or proved that he or she was dependent *mainly* on contributions from the deceased for the provision of the ordinary necessities of life suitable for persons of his or her class or position.

It was urged by counsel for the applicant that the answer filed by the employer did not put in issue the question of dependency in that there was no specific denial of the applicant's dependency. Counsel argued that the general traverse of a denial of all the allegations and averments made and contained in the applicant's claim was insufficient the more so because the employer had specifically denied that the deceased was a workman within the meaning of that term in the Ordinance and had given details of the manner in which the deceased had met his death in support of that specific denial.

It is appreciated that an answer is intended to define the issues which are to be decided at the hearing of an application and the traverses therein should be specific. In the present case a general traverse was filed but no particulars were requested on behalf of the applicant. At the outset of the cross-examination of the applicant it became clear that the employer was putting in issue the question whether or not the applicant was a dependant and this was appreciated by counsel for the applicant whose re-examination was confined to eliciting the amount the applicant earned from her kitchen garden and its insufficiency for her maintenance. The addresses of both counsel as recorded by the magistrate show that the issue of dependency was considered by them to be one of the matters in issue. It cannot fairly be said that the applicant was prejudiced by this question being put in issue at the hearing. No application for an adjournment was made by counsel for the applicant on that ground.

For these reasons we allowed the appeal and set aside the order of the magistrate.

Appeal allowed.

INLAND REVENUE COMMISSIONER *v.* Estate of NICHOLSON

[Supreme Court (Khan, J.) January 8, 9, 10, 11, 29, October 15, 1962.]

Opposition—Estate duty not yet assessed—Whether such duty can ground an opposition.

Estate duty—Not yet assessed—Whether Crown has interest in property of estate until duty paid—Estate Duty Ordinance, Cap. 301, s. 11.

Section 11 (1) of the Estate Duty Ordinance, Cap. 301. provides that “the estate duty payable in respect of any property of a deceased person shall, unless or until it is paid . . . , be a preferent claim on all the property and effects of the deceased”; and s. 12 provides that “the heir and executor of every deceased person shall be under the same liability to pay the estate duty, payable in respect of the property and effects becoming subject thereto, on his death, as if that duty had been a debt incurred by the deceased person”.

The plaintiff opposed the passing of transport of property forming part of the estate of N. on the ground that additional estate duty was due, owing and payable by the estate. The duty was not yet assessed, but it was argued for the plaintiff *inter alia* that from the time of the death of N., by virtue of s. 11 of the Estate Duty Ordinance, Cap. 301, a charge was created on all the property of the estate and would endure until all the duty was paid; and that this charge constituted an interest in the *res* and could found an opposition.

Held: (i) the preferent claim created by s. 11 (1) of Cap. 301 is not an interest in the *res* itself and cannot ground an opposition;

(ii) until it is assessed the estate duty does not become payable and cannot ground an opposition;

(iii) on the evidence, the estate was not without other property from which the additional duty could be paid and the opposition could not be justified on the ground that the plaintiff would be otherwise remediless.

Judgment for the defendant.

M. Shahabuddeen, Solicitor General, for the plaintiff.

J. H. S. Elliott, Q.C., for the defendant.

KHAN, J.: The Commissioner of Inland Revenue Wilfred Goulding Stoll, on the 21st day of October 1960 entered an opposition to the passing of transport of E½ lot 99 N, Cummingsburg, Georgetown, by the defendant to and in favour of Ovid A. H. Johnson of 5 Stonar Road, W. 14, London, England, advertised on the 8th day of October, 1960, in the Official Gazette and numbered 91 therein for the counties of Demerara and Essequibo. In this notice of opposition the plaintiff stated his reasons for opposition as follows:

- (1) “That estate duty payable under the Tax Ordinance, Cap. 298, and the Estate Duty Ordinance, Cap. 301, as amended by the Estate Duty (Amendment) Ordinance, No. 13 of 1956, amounting to the sum of \$5,700.00 with interest from the estate of Jacob A. Nicholson, deceased, is outstanding and remains to be paid to me.
- (2) That it is not competent for the said Rosamund Ann Nicholson represented herein as aforesaid to transport the said

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property to Ovid Ashworth Hercules Johnson aforesaid without first paying or compounding to the satisfaction of the opponent the said defendant”.

In the statement of claim the plaintiff claims

- (a) the sum of \$7,335.83 with interest at the rate of 6% per annum from the 9th day of May 1960 to the date of pay ment of the said sum *due, owing and payable* as estate duty by the defendant to the plaintiff as aforesaid; alternatively, the amount (with interest aforesaid), which with the estate duty previously paid in respect of the said estate is sufficient to cover the estate duty chargeable according to the true value of such estate due in accordance with s. 20 (2) of the Estate Duty Ordinance, Cap. 301.
- (b) A declaration that the opposition entered by the plaintiff to the passing of the conveyance by way of transport advertised in the Official Gazette on the 8th day of October, 1960, is just, legal and well founded.
- (c) An injunction in terms of paragraph 9 (c) of the statement of claim.
- (d) Costs.

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

On the 2nd day of November, 1959, Jacob Alexander Nicholson, late of 99 New Market and Carmichael Streets, Georgetown, Demerara, died in England testate, and domiciled at the time of his death in this colony. On 25th day of April, 1960, an estate duty declaration with inventory was declared in respect of the property of the said deceased in the sum of \$68,141.28 and estate duty in the sum of \$4,173.09 was paid on the 7th day of May, 1960, and a certificate in terms of s. 15 (3) of the Estate Duty Ordinance, Cap. 301, was issued by the proper officer. On the 13th May, 1960, probate of the will of the said deceased was granted to the defendant as sole executrix.

On 17th September, 1960, the plaintiff, having received certain information, wrote the defendant and her attorney (H. B. Fraser) as follows:—

“Inland Revenue Department,
Estate Duty Division,
P.O. Box 24,
Georgetown 9,
Demerara.

PAM/EEN.

ED 171/60

Sir,

Estate : Jacob Alexander Nicholson, deceased.

With reference to the above estate, I have to inform you that it is understood that the deceased had much more insurance on

his life and probably on the life of other persons at the time of his death, and also property somewhere in the United Kingdom. If this is correct, I have to ask therefore that you file a corrective declaration and have all his property declared and duty paid thereon.

(2) If you still maintain the contrary, I shall have to ask you as well as the wife of the deceased to give me separate affidavits in support of these facts.

(3) Kindly favour me with an early reply and oblige.

I have the honour to be,
Sir,
Your obedient servant,
? ?
for Commissioner of Inland Revenue.

Mr. Henry B. Fraser,
Solicitor,
High & Commerce Streets,
Georgetown.”

On the 7th October 1960, the plaintiff again wrote the defendant and her attorney H. B. Fraser as follows:—

“Inland Revenue Department,
Estate Duty Division,
P.O. Box 24,
Georgetown 9,
Demerara,

ED 171/60
Sir,

7th October, 1960.

Estate ; Jacob Alexander Nicholson, Deceased.

The declaration made by you in the above estate is under reference.

2. It is now discovered that the deceased held approximately \$63,421.00 in insurance with Crown Life and not \$27,000 as mentioned in the declaration.

3. The Commissioner of Inland Revenue is presently not satisfied as to the loan from Pearl Walcott, Joan Barry Austin, and Phyllis Nicholson Mathews, being proper deductions against the estate. He desires further proof in respect of these. He considers the market price of East ½ 99 New Market Street is \$60,000. He also understands that the deceased owned property in the United Kingdom. In view of all this, a corrective declaration by the executrix is required. All further information should be supported by her personal affidavit.

4. Kindly favour me with a copy of the estate duty declaration made in the United Kingdom.

I have the honour to be
Sir,
Your obedient servant,
? ?
for Commissioner of Inland Revenue.

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Mr. H. B. Fraser, Solicitor,
276 Peter Rose Street,
Queenstown, Georgetown.

Mrs. Rosamond A. Nicholson,
106 East Sheen Avenue,
London, S.W. 14, England.”

The plaintiff received no reply to the above letters which showed that the deceased held life insurance policies with the two named companies to the value of \$65,224.90 and not \$27,000 as declared—a difference of \$38,224.90 being undeclared.

On the 8th October, 1960, the defendant advertised the passing of transport of E½ lot 99 North Cummingsburg in the Official Gazette. On 21st October, 1960, the plaintiff filed notice of opposition, and on the 31st October 1960 the plaintiff filed the writ herein. The property opposed is the only immovable property of the estate available in the Colony. There is however the sum of \$12,975.03—being part of the property of the deceased estate—still in the possession of the Crown Life Assurance Society Ltd., held for the minor J. A. Nicholson until he attains 21 years. (He is still a minor). The defendant has not declared the required corrective declaration up to the present time.

In her defence filed on the 24th April, 1961, the defendant denied the reasons for opposition. She contended that she was not indebted to the plaintiff at the date of the notice of opposition, nor at the date of the writ herein—31st October 1960. She denies that the sum of \$5,700.00 or \$7,335.83 or any sum has become due and owing in respect of estate duty since the date of the certificate issued to her on 25th April, 1960. On these facts counsel for the defendant submitted:

(1) That at the date of the notice of opposition and at the date of writ and even to the present time, there is no ground to entitle plaintiff to oppose the transport, as no debt was existing at the time of opposition.

(2) That an amount for which one may be liable, but which is not ascertained, cannot be the subject matter of an opposition action.

The duty claimed is not up to the present time assessed. It is disputed. For such an action the debt must be both liquidated and liquid and must be due at the date of the notice of opposition. The only exception being in the case “where the debt which is liquidated and liquid is not due at the date of opposition, but it can be shown that the debtor is impecunious and the object of the transport is to give undue preference to a creditor.” In this case, counsel contended, there was other property belonging to the estate to the tune of \$12,000, and the plaintiff would not have been remediless.

The law relating to opposition and transports and mortgages is peculiar to British Guiana and quite foreign to the principles of English law. In 1916, when the rules of English law were introduced to a great extent by the Civil Law of British Guiana Ordinance, No. 15 of that year, it was provided “that the law and practice relating to

the right of opposition in the case of both transports and mortgages shall be the law and practice now administered in such matters by the Supreme Court of British Guiana." As pointed out in Chapter VI of DUKE'S TREATISE ON THE LAW OF IMMOVABLE PROPERTY IN BRITISH GUIANA there has never been any statutory enactment defining what constitutes "a right to oppose", and so the Supreme Court had to frame its decisions on the then common law of the Colony, viz:— Roman-Dutch law. The principles were settled in 1892 when in *Administrator General v. Willems* (1892), 2 L.R.B.G. p. 130, Sir DAVID CHALMERS, C.J., held that a claim for damages in respect of a tort could not found an opposition. He reviewed the authorities and after quoting from "MATTHAEUS DE ACTIONIBUS" stated *inter alia*:—"It will be obvious that this enumeration although very comprehensive applies only to those who have *some sort of right to or in the property* and not at all to persons having a mere claim or personal action against the debtor;" and again, after referring to similar systems obtaining under the old civil law in France, Spain, Trinidad, the Cape, Ceylon and Lower Canada, he states at p. 136: "all the systems are similar as to their main features, and in all the faculty to oppose arises in virtue of some right to or in the property sought to be disposed of and in no case mentioned does it arise upon a personal claim against the owner of that property." (The learned Chief Justice had previously stated that the 3rd class of persons who can oppose according to MATTHAEUS are the "*quasi domini et creditores*").

The following year in *Hogg v. Butts*, 1893 L.R.B.G. 88, it was held that a mortgage of real property specifically set out and described in the mortgage bond as security for the debt, does not give the mortgagee any right to oppose the transport of other property of the mortgagor not included in or affected by the mortgage. Further, a fluctuating balance arising out of debtor and creditor transactions under the stipulations of a mortgage is not a liquid claim giving any right to oppose whilst the transactions continue running.

In *Austin v. Austin* the plaintiffs sought to oppose a transport by defendant. The plaintiffs were the children of one Austin, and the defendant his widow. They alleged that the defendant had not accounted to them in respect of her husband's estate and they had a right of action against her for accounts, which right of action formed the basis of their claim for opposition. DALTON, J., held that the statement of claim disclosed no cause of action and at p. 76 said this:—

"This right of opposition as has been decided in these courts is based upon a right in or to the property to be conveyed or mortgaged or to a nexus upon it, as, for example, to prevent an undue preference being given thereby to any party. The mere right to one does not of itself give any right to oppose. That is not questioned. The plaintiffs claim no right to the property sought to be conveyed; they admit defendant's right to it. They claim no nexus upon it. They merely say that they have a right against her for accounts, a right which if it exists of itself gives them no claim at all against her in respect of her interest in the land."

This case reiterates the principle that the claim must be liquidated and liquid.

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And again in *Fereira v. Cabral*, 1923 L.R.B.G. 133, decided by the West Indian Court of Appeal in 1924, the court laid down the law thus:

“No action in opposition can succeed which is not founded on a liquidated claim, so that if the opposer has to ask for an account to be taken in order to establish what is due to him he cannot successfully oppose.”

In *DaSilva v. Sukraj*, 1942 L.R.B.G. 43, STAFFORD, J., inquired in respect to what claims oppositions to transports and mortgages would lie, *i.e.*, into the substantive law involved by the right of opposition thereto, apart from the adjectival law of procedure to enforce such opposition, and at p. 51 said *inter alia*:—

“Rights of opposition founded on a claim or interest in the property itself and rights founded on a claim against the owner of the property. The former would always found an action, so the fact that they founded oppositions in the nature of interpleaders to execution sales, as well as opposition by way of injunction proceedings or interdicts against transports and mortgages scarcely calls for comment. But claims against the owner of the property sought to be transported or mortgaged offer a wider field for enquiry. One of the classifications one might use in Roman-Dutch law would be to consider such claims as liquid or illiquid. A liquid claim was one founded upon some instrument or some writing signed by the proposed defendant such as a promissory note, bond, I.O.U., “good” (called in South Africa a “good for”) or a merchant’s account if signed as correct by the defendant. On such claims provisional sentence might be obtainable; (*vide* NATHAN’S COMMON LAW OF SOUTH AFRICA, vol. 4, p. 2,230 *et seq*). An illiquid claim was one founded on damages or even on debt, such as a merchant’s account if not signed by the debtor in acknowledgement of their correctness, and its recovery necessitated an action and trial “*rau actie*,” *vide* NATHAN’S COMMON LAW OF SOUTH AFRICA, vol. 17, p. 2094; *Kruger v. Van Vuvren’s Executrix* (1816), S.S.C. (S.A.) 162, where DE VILLIERS, C.J., at p. 168 shows the distinction. From these authorities one may fairly conclude that although every liquid claim was for a liquidated amount or remedy as we understand the term liquidated today, every liquidated amount did not found a liquid claim. To consider “liquid” and “liquidated” as synonymous terms, as some of the judgments of the Supreme Court have done, is incorrect and leads to confusion.”

The hearing of the above action before STAFFORD, J., was brought to an end by reason of the termination of that judge’s period of office on 21st February, 1942. The action was heard *de novo* before VERITY, C.J., and although the learned Chief Justice’s ruling differed from that of STAFFORD, J., on the preliminary point, the guiding principles relating to the right of opposition were strictly observed. (*Vide* 1942 L.R.B.G. 158—162).

Counsel for the plaintiff reviewed these principles and agreed that there were two categories of persons entitled to oppose. In the

first category, were persons having *dominium* in the *res* itself or some legal or equitable right therein. In the second category were creditors having a liquidated demand or a claim of such a nature that it can properly be made the subject matter of a specially indorsed writ. In a series of persuasive arguments—both attractive and skilful—Mr. Shahabuddeen contended that the plaintiff's statement of claim did not lay claim to estate duty *simpliciter* but estate duty due under s. 11 of Cap. 301, which provides:—

- “11. (1) The estate duty payable in respect of any property of a deceased person shall, unless or until it is paid as hereinafter provided, be a preferent claim on all the property and effects of the deceased of every kind and of every part thereof ranking immediately after debts (if any) due from the deceased to the Crown or Colony, and the whole or any part of the duty if unpaid, may be recovered by parate execution out of any part of the property or effects in the possession of any person whomsoever, or by action against any person to whom any of the property or effects have been transferred or delivered, to the extent of the value of the property or effects so transferred or delivered: Provided that no person to whom any of the property or effects has been transferred or delivered *bona fide* and for valuable consideration, after the certificate hereinafter mentioned of the proper officer is placed in the Registry shall be under any liability for the payment of the estate duty, nor shall the property or effects in his possession be subject to any claim in respect thereof.
- (2) A certificate purporting to be signed by the Registrar and to state the amount of the unpaid duty shall, in proceedings by way of parate execution under this section, be conclusive, and in all other proceedings hereunder be *prima facie* evidence of the statements therein contained”.

It is Mr. Shahabuddeen's submission that the above section created a charge on all property liable to estate duty until paid, the charge being mere liability as well as actual liability, and existing from the time of death. He contended that the precise amount is irrelevant because the plaintiff has a charge on the land which is an interest in the *res* itself. “The attempted conveyance by the defendant was an attempt to convey the property free of the charge which is a legal or at least an equitable right in the property itself.” He submitted that the plaintiff was a person within the first category, and it is therefore not necessary to ascertain the financial basis of that right to found an opposition. The claim is in the “*res*” itself (he argues).

In my view one must examine whether a *preferent claim* creates an interest in the *res* itself. In Chapter 6 of DUKE'S TREATISE ON THE LAW OF IMMOVABLE PROPERTY IN BRITISH GUIANA, at p. 18, the learned author has set out a wide variety of cases to illustrate the first cate-

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gory of persons having the right to oppose. The learned author states *inter alia* :—

“We shall now proceed to consider in detail the first branch of this rule. A person may have *dominium* in the *res* advertised in the following way as is shown from these cases :—

Pabaroo et al v. McNeil, L.J. 30.12.13; *Archer et al v. Rodrigues*, L.J. 28th February, 1912; *Herbert et al v. Cummings*, L.J. 28th October, 1910; HAWTAYNE, J., *Benjamin v. Samuels*, L.J. 25th June, 1910—*Hipplewith v. Davis*, L.J. 3rd January, 1912. *Ramlall v. Whyte*, (1919). *Dalsing v. Omraosing*, L.J. 12th December, 1903. *Demerara Bauxite Coy. Ltd. v. L. M. Hubbard*, 1921 L.R.B.G. *Chapman v. Wong*, L.J. 23rd March, 1910. *Jones v. Porter*, 18th March, 1910, (Full Court) B.G.:

It is observed from the above cases that “an interest in the *res* itself” means nothing less than “ownership” of some interest:—legal or equitable—which is attached to the *res* itself and a person having such a right may insist on having that interest itself and reject the offer of the value of the interest when ascertained.

In *Joseph v. Joseph* (1960), 3 W.I.R., the appellant and respondent, who were husband and wife, jointly purchased certain premises. The wife advanced \$500 in the joint venture and transport was taken in the appellant’s name. He subsequently advertised transport of the property and the respondent entered opposition to the conveyance. She then brought an action for a declaration that her opposition was just, legal and well-founded and for an injunction restraining the appellant from passing transport. It was held that once it is established that an opponent has an interest in the land, either party can take proceedings to have the question of that interest determined. In his judgment HALLINAN, C.J., said *inter alia* :—

“Counsel for the appellant relied on an analogy between an opposition based on an interest in land, and one based on a claim for a liquidated amount. The latter ground for opposition is not found in Roman-Dutch Law, but was evolved by the practice of the Supreme Court in British Guiana and obtains statutory authority under s. 3 (D) (d) of the Civil Law of British Guiana Ordinance, Cap. 2. The Supreme Court has refused to extend this ground of opposition to a claim which is unliquidated and which could not be the subject of a specially endorsed writ. The reason for this is not hard to seek. The court has evolved a procedure that comes close to giving security to an unsecured debt; it would be going too far if a man could not alienate his immovable property merely because someone made a claim that could not readily be ascertained in proceedings under a specially endorsed writ.”

All the authorities show that the cases falling under the first category are cases where the interest is attached to the property itself, and the plaintiff may refuse the value of the interest and claim the

interest itself. In *Joseph v. Joseph (supra)* the wife had contributed \$500 to the original purchase price—her claim was in the “*res*” itself and she had the right to refuse the offer of the return of the \$500 and claim her interest in the *res* itself as an owner. On the other hand, had she loaned the \$500 to her husband and had a preferential claim for the \$500 on the property, she could not refuse the amount when tendered because it was a contract debt and not an interest in the *res* itself. If the contention of counsel for the plaintiff is correct then, the plaintiff would be in a position of an owner to claim an interest in the property itself. But can he in this action claim an interest in the *res* itself? I am satisfied from the authorities I have examined, that s. 11 (1) of Cap. 301 creates no more than a preferent claim, *i.e.*, a debt the payment of which shall rank in priority to all other debts except the Crown or Colony (if any), and this preferent claim is not the kind of interest contemplated in the first category above to ground an opposition action, *i.e.*, an interest in the *res* itself.

I shall now examine the second category. Is the plaintiff a creditor with a liquidated demand or a claim of such a nature that it can properly be made the subject matter of a specially endorsed writ?

Mr. Shahabuddeen submitted that a demand is a liquidated demand for the purpose of opposition if, the relevant facts being known, the precise amount due can be mathematically computed without reference to the court. He claims that if all the facts were known in this case, all that was necessary was to compute the duty from the schedule. On the other hand, Mr. Elliott submitted that where a trial is necessary to determine the precise amount due that debt cannot found an opposition unless it is also liquidated: and cited in support *Da Silva v. Sukraj (supra)*, DUKE’S TREATISE ON THE LAW OF IMMOVABLE PROPERTY, Chapter VI, and DALTON’S CIVIL LAW OF BRITISH GUIANA.

Is the amount claimed due, owing and payable? To determine this question, one must of necessity look at the Estate Duty Ordinance, Cap. 301. Section 11 (1) describes the nature of the claim and the mode for the recovery of payment of estate duty. Section 12 imposes liability on the heir and executor of every deceased person to pay estate duty as if that duty had been incurred by the deceased person. It empowers the executrix to pay the duty or raise the money to pay from the property and effects of the deceased estate. Section 13 outlines the procedure and the method of arriving at the amount payable as estate duty. Section 14 empowers the Registrar to assess the duty if he is satisfied with the inventory and estimate of value given in the declaration, and for appeal if dissatisfied. Section 15 provide that :—

“(1) On the duty payable being assessed as aforesaid, the proper officer shall cause to be made on the declaration a memorandum of the amount of estate duty payable.

(2) The person making the declaration or his agent shall thereupon pay into the Treasury the duty so assessed and the Financial Secretary shall give a receipt therefor.

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(3) The proper officer shall then prepare a certificate under his hand, setting forth that the inventory and declaration have been duly delivered and that the estate duty, if that duty is payable, has been paid, and stating the value as shown by the inventory of the property on which it is payable.

(4) No will shall be received by any officer of the Registry for deposit or for recording therein unless there is delivered therewith the certificate referred to in sub-section (3) of this section.”

Section 20 provides for the payment of further duty. This is the relevant section in respect to the claim which is the subject of this action. By s. 20 (1) if at any time it is discovered that the property subject to estate duty on the death of the deceased was, at the time of the delivery of the certificate, of greater value than the value mentioned in the certificate, the heir or executor shall, within 6 months after the discovery, deliver a further declaration with an account to the proper officer.

By s. 20 (2) the person making the declaration or his agent shall thereupon pay to the officer whose duty it is to receive it the amount which, with the duty previously paid on a declaration of the estate and effects, is sufficient to cover the duty chargeable according to the true value thereof, and shall at the same time pay to the Registrar interest upon that amount at the rate of 6 *per centum per annum* from the date of the certificate or from such subsequent date as the Registrar thinks proper.

By s. 20 (3) the Registrar, on the receipt of that declaration and account, shall cause a fresh certificate to be written by the proper officer, setting forth the true value of the estate and effects as then ascertained, and that certificate shall be substituted for, and have the same force and effect as, the certificate hereinbefore mentioned.

Section 23 provides the procedure on default of return of inventory or declaration.

It therefore seems to me from the above provisions that estate duty must be assessed under s. 15 before it is payable. The amount payable can only be ascertained after assessment which is a condition precedent to payment.

The defendant was requested for the first time on 17th September, 1960, to make a corrective declaration under s. 20 of the Estate Duty Ordinance. She had 6 months after the discovery to deliver a further declaration. The notice of opposition was filed on the 21st October, less than one month after she was asked to make the corrective declaration. At the time of the filing of the notice of opposition and the writ, the defendant was not indebted to the plaintiff for the sum claimed or at all.

Counsel for plaintiff cited a passage from *Trustees of Diocese of Guiana v. J. E. McLean*, 1939 L.R.B.G. 190, dealing with a charge on

land under s. 23 of Cap. 165 for the recovery of drainage and irrigation rates. LANGLEY, J., in that case stated at p. 190: "In my, opinion this section creates a charge on the land, a *statutory preferential lien* on land enforceable by a process *in rem*, subject to the proviso".

Counsel further argued that s. 11 (1) of the Estate Duty Ordinance provides for collection of unpaid duty also by parate execution and that is evidence of an interest in the *res* itself. In Roman-Dutch law, the words "parate" and "summary execution" are synonymous terms for a process of immediate execution without previous legal proceedings—the procedure which is set out at p. 106 of DALTON'S CIVIL LAW is as follows :—

"Demand is made for the sum due, notice being served on the person or property liable. Within 24 hours of such demand, unless a longer time is specifically fixed by the Ordinance in question providing for the use of this remedy, request is made to a judge for *fiat executio*. On such fiat being obtained, execution may follow immediately".

It is my view that parate execution cannot follow under s. 11 (1) of Cap. 301 *unless and until assessment is made and the amount of duty ascertained*. It is really machinery—a summary process *in rem* for the collection and payment of a liquidated debt. It is certainly no evidence of an interest in the *res* itself, within the context of opposition principles of law or practice as is obtained in this Colony.

Mr. Shahabuddeen further submitted that the liability to pay estate duty was imposed immediately after the testator's death and liability continues until paid. He cited *Whitney v. I.R.C.*, [1926] A.C. 37, where Lord DUNEDIN said:—

"Now there are three states in the imposition of a tax; there is the declaration of liability, that is the part of the statute which determines what person in respect of what property is liable. Next, there is the assessment. Liability does not depend on assessment. That *ex hypothesi* has already been fixed. But assessment particularises the exact sum which a person is liable to pay. Later comes the method of recovery".

It is common ground that liability without ascertainment of the liquid amount due, cannot ground an opposition action. *Ajuban v. Amir and Hogg v. Butts (supra)* (1893), 3 L.R.B.G.

In the instant case, several issues have to be determined before the assessment can be completed. Both counsel for plaintiff and defendant have advanced arguments on several issues in respect to the policies of insurance on the question of aggregation, contingency and with reference to the Married Women Property Acts. There are wide conflicts of opinion and the determination of these issues would reflect one way or the other on the final amount of duty payable by the defendant. The issue in respect to the legality of the increased valuation of the property by the plaintiff has also to be determined

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and this also would reflect one way or the other on the actual amount of duty payable.

Finally, it is the submission of the plaintiff that a creditor has the right to oppose for a liquidated demand even though the time for payment has not yet arrived when the opposition is entered, so long as there is evidence to show that the debtor was “*vergens ad inopiam*” or in other words in such a position that the creditor would be remediless, and that if judgment was obtained otherwise there would be no chance of recovering the amount.

In *Gaskin v. Francisco* the defendant made a promissory note in favour of the plaintiff payable on 30th November, 1906. The note was discounted at the B.G. Bank. The defendant advertised transport and the plaintiff opposed on the 23rd February, 1907. In the suit subsequently instituted by him he claimed payment of note and an order restraining passing of transport. The note was dishonoured at maturity. The plaintiff received notice of such and paid. It was held on these facts that the fact of permitting the note to be dishonoured was *prima facie* evidence of inability to pay it in the absence of any expressed intention to contest its validity and that therefore there was evidence that the defendant was “*vergens ad inopiam*” and that the plaintiff consequently had a right to oppose the transport. Injunction was granted but judgment deferred as it was not due when the opposition was entered. Mr. Shahabuddeen contended that assuming that only a liquid demand can found an opposition and assuming that he is wrong in saying that the demand was a liquid demand, because it was due at death, then the demand being at least a *liquidated demand* still entitled the plaintiff to oppose since in the absence of opposition the plaintiff would have been remediless. I find this contention untenable in the light of the large amount of over \$12,000 being part of the estate held by the Crown Life (Insurance Company for the minor J. A. Nicholson. This was known by the proper officer, Mr. Dennison. Moreover the plaintiff was not remediless. There were other remedies available to the plaintiff if the fears he entertained were reasonably justified. The plaintiff elected in the circumstances to use the procedure of opposition which was groundless. If his fears were reasonably justified, he certainly could have invoked the aid of injunction, *vide* DALTON’S CIVIL LAW, p. 19. In *Edwards v. Viera*, 1919 L.R.B.G. 133, the distinction is drawn between proceedings in “opposition” and proceedings by way of injunction or interdict. The former gives a modified and limited remedy in a special case, but does not of itself shut out the right of proceeding by ordinary injunction where opposition proceedings cannot be taken.

In the leading case of *Ferreira v. Cabral*, decided by the West Indian Court of Appeal in 1924, the learned judge laid down the law thus:—

“No action in opposition can succeed which is not founded on a liquidated claim, so that if the opposer has to ask for an account to be taken in order to establish what is due to him, he cannot successfully oppose”.

Both counsel expressed the view that the facts of this case were never before the subject matter of an opposition action, and in consequence there was no authority on all fours.

It is my considered opinion that the right of opposition which is a matter of substantive law is based on well-defined principles and that any extension of those principles must be brought about by legislation.

For these reasons, I declare the opposition entered by plaintiff unjust, illegal and not well-founded. The plaintiff's claim is therefore dismissed with costs to be taxed certified fit for counsel.

Judgment for the defendant.

EVELYN v. WILLIAMS

[Federal Supreme Court (Gomes, C.J., Lewis and Marnan, JJ.) February 21, 23, 1962.]

Practice and procedure—Time for appealing—Application for enlargement on ground of financial embarrassment—Particulars of grounds not stated—Necessity for giving such particulars—Enlargement given only in exceptional circumstances.

Order 2, r. 3 (4), of the Federal Supreme Court (Appeals from British Guiana) Rules, 1999, as amended, empowers the Federal Supreme Court “in exceptional circumstances” to grant an extension of time for appealing. Order 2, r. 3 (5), requires an application for extension to be supported by an affidavit setting forth good and substantial grounds for the application and by grounds of appeal which *prima facie* show good cause therefor.

The applicant applied for an extension of time to appeal on the ground of financial embarrassment but failed to give particulars of such embarrassment or to set out his grounds of appeal.

Held: (i) under Order 2, r. 3 (4), the court does not have an unfettered discretion to grant extension of time. It is necessary for an applicant who seeks the indulgence of the court to show such circumstances as will satisfy the court that his is an exceptional case;

(ii) it is not sufficient for an applicant to make a bare statement that he was financially embarrassed. He must set out in his affidavit sufficient material to satisfy the court of his financial circumstances and that they were such as to constitute such an exceptional circumstance as entitles him to ask to be relieved of the legal bar which arises under the Rules by lapse of time;

(iii) per MARNAN, J., the applicant’s affidavit must also set forth grounds of appeal which *prima facie* show good cause therefor.

Application dismissed.

L. F. S. Burnham, Q.C., for the applicant.

P. A. Cummings for the respondent.

LEWIS, J.: In this application the applicant in his affidavit states that on 8th September, 1961, his action for a declaration of title and for trespass to a piece of land was dismissed and he was ordered to pay the sum of two hundred and forty dollars as costs. The time for filing an appeal under the rules of this Court expired on 20th October, 1961. He says that only a few days before the said 20th day of October, 1961, he was made aware of this time limit and before he could travel to Georgetown to consult his solicitor and realise a sum of money to meet solicitor’s fees and disbursements for the appeal the time limit had expired and that he has now realised the solicitor’s fees and disbursements.

The court has been informed by learned counsel who appears for the applicant that an earlier application had been made to a judge in chambers just one day too late for the judge to have jurisdiction under the Rules to make an order, and he urged that in view of that fact, and of the statement in the motion that the appellant was financially embarrassed, this court should extend the time within which the applicant might file an appeal.

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The relevant rule is contained in O. II, r. 3, para. 4 of which, as amended, reads as follows:—

“In exceptional circumstances, the court having power to hear and determine an appeal may on application extend the time within which an appeal may be brought beyond the period delimited for an application to a judge of the Court under this rule.”

This court has on more than one occasion pointed out that under this rule there is not an unfettered discretion to grant extension of time. It is necessary for an applicant who seeks the indulgence of the court to show such circumstances as will satisfy the Court that his is an exceptional case and when those circumstances are shown then the court may, and no doubt in the normal course will, grant an extension of time.

In the present case the applicant has alleged that he was financially embarrassed. It is necessary for me to draw attention to the fact that para. 4 of his affidavit, which deals with this part of his allegations, merely states that before he could travel to Georgetown to consult his solicitor and realise a sum of money to meet fees and disbursements the time limit had expired. It does not set out any circumstances which show that at the time in question there was financial embarrassment or that that financial embarrassment was of such a nature as to prevent the applicant from being able at the time to meet the necessary expenses.

In my view it is not sufficient for an applicant to make a bare statement that he was financially embarrassed, as has been done in this case. He must set out in his affidavit sufficient material to satisfy the court of his financial circumstances and that they were such as to constitute such an exceptional circumstance as entitles him to ask the indulgence of the court and that he may be relieved of the legal bar which arises under the Rules by lapse of time.

It was suggested by learned counsel for the applicant that the statement that he was financially embarrassed put upon the respondent the onus of showing that that was not so, and that that fact not having been denied, the court should take it as proof that there was this alleged financial embarrassment.

The answer to that, in my view, is two-fold. First of all, circumstances which create financial embarrassment are in the personal knowledge of the applicant and it must therefore be for him to allege and prove them; secondly, it is the duty of the applicant to satisfy the court that his allegation is correct and for that reason, as I have said before, it is necessary for him to set out a sufficiency of material. I do not think that the circumstances set out in this case are sufficient. I think that this is an application of the very weakest kind and in my opinion this application ought to be refused with costs.

GOMES, C.J.: I agree and would only add that having had a full opportunity of considering the application, which has just been described as one of the weakest that have ever been presented before

this court, I consider that to grant the application in the circumstances would amount to a negation of the Rules.

MARNAN, J.: I also agree. LEWIS, J., has already drawn attention to sub-rule 4 of rule 3 of Order II in its amended form. Sub-rule 4 is the sub-rule which provides that it is only in exceptional circumstances that this court may grant an application of this nature when the application is made after the time within which a single judge of the court may deal with it. I think that attention should also be drawn to sub-rule 5 of the amended rule 3. Sub-rule 5 provides *inter alia*:

“ . . . Every summons or notice of motion filed shall be supported by an affidavit setting forth good and substantial reasons for the application and by grounds of appeal which *prima facie* show good cause therefor.”

In passing, it is to be observed that there is nothing new about that provision since the corresponding provision was contained in the old sub-rule 3 of rule 3 of Order II. The requirement is two-fold: the affidavit must set forth in the first place good and substantial reasons for the application. To my mind one meaning, if not the most obvious meaning, of those words is that the application must set forth a good excuse for the applicant's lateness. The second requirement is that the affidavit must set forth grounds of appeal which *prima facie* show good cause therefor. That means, to my mind, good cause for the appeal, although, of course, the grounds of appeal themselves can never be conclusive of the result of the appeal that is to be argued. But in this particular case, having regard to the affidavit which has been filed, it seems to me to be quite clear that neither have good and sufficient reasons for the application been disclosed, nor have there been shown any grounds of appeal which *prima facie* show good cause therefor.

It is not, in my view, sufficient merely to say “I am advised by my solicitor and verily believe that I have good grounds of appeal as the judgment was against the weight of the evidence adduced.” It would be quite wrong in dealing with this application to go into any general discussion of what would amount to good grounds of appeal, and although I am not saying that the formal ground of appeal that the judgment was against the weight of the evidence is not, in law, a valid ground of appeal, to my mind the words of sub-rule 5 mean something more than that. If the court is to be asked to exercise its discretion in favour of the applicant, the affidavit should disclose some grounds which show, whether on advice or otherwise, that the applicant has cause to believe his appeal to have a reasonable prospect of success. No such grounds were disclosed in this case, and therefore I agree that this application should be dismissed with costs.

Application dismissed.

Solicitors: *M. E. Clarke* (for the applicant); *Abraham Vanier* (for the respondent).

R. v. PARSRAM

[Supreme Court—Demerara Assizes (Persaud, J.) October 18, 19, 1962.]

Criminal law—Attempt to commit arson—Inflammable liquid thrown by accused on door of dwelling house at night—Accused in possession of matches—Whether an attempt.

At 3 a.m. the accused was found crouching under the stairway of a dwelling house just after a mixture of kerosene oil and paint oil had been thrown on the door of the house. Upon being pursued he threw away a tin which when recovered smelt of gasolene. In his bosom was found a bottle containing a mixture of kerosene oil and paint oil. He was also found to be in possession of a box of matches. On his trial on indictment for attempting to set fire to the dwelling house, it was submitted at the close of the case for the prosecution that there was no evidence to show that it was the accused who threw the liquid at the door and that the evidence did not amount to an attempt to set fire.

Held: (i) in addition to the *actus reus* and the intention, the act alleged to be an attempt must be sufficiently proximate to the crime intended but this does not mean that only the penultimate act can constitute an attempt. It may very well be that the ante-penultimate act is an attempt to commit an offence;

(ii) there was enough evidence on which the jury could be asked to infer that it was the accused who threw the kerosene oil and paint oil on the door and it was for the jury to say whether from the circumstances he intended to commit the crime which he was charged with attempting.

Submission overruled.

G. A. G. Pompey, Crown Counsel, for the Crown.

A. S. Manraj for the accused.

PERSAUD, J.: On the 3rd March, 1962, one Fred Bowman occupied part of the bottom flat of a two-storeyed premises at the corner of Louisa Row and Bent Street, Georgetown, where he carried on a business popularly described as a parlour. The entrance to his parlour faced Louisa Row. He and his family occupied a portion on

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the ground floor east of the parlour as a dwelling-place. The door of the dwelling-place opens north into the yard, and this entrance is also in Louisa Row. About one foot away and to the west of Mr. Bowman's door is the bottom of a stairway which goes to the upper flat westwards.

About 3 a.m. on the 4th March Mr. Bowman, who had with his family retired to bed earlier, heard a noise outside of his dwelling-place; it sounded as though liquid was being thrown against his door. He went outside and found the accused crouching under the stairway. Mr. Bowman observed some liquid between the door and the ground sill and the smell was one of gasolene. He asked the accused why he had thrown gasolene on the door, and why he wanted to burn the place.

The accused said he had not thrown gasolene on the door and walked away, whereupon Mr. Bowman followed him on to Louisa Row. There the accused was arrested by a policeman. The accused was seen to throw away a tin which was recovered, and which smelt of gasolene. A bottle also smelling of gasolene was recovered from the accused's bosom. This bottle was later examined by a scientific officer of the Analyst Department, and was found to contain a mixture of kerosene oil and paint oil, a combination that would burn readily. A piece of plastic cloth was found under Bowman's door; a mixture of kerosene oil and paint oil had been thrown over it. Later, on the way to the station, a box of matches was found on the accused.

It is upon this evidence that the accused has been indicted for attempting to set fire to the premises of Mr. Bowman; and it is submitted on behalf of the accused that this is not enough to go to the jury. Counsel submits:—

- (i) there is no evidence to show that it was the accused who threw the liquid (whatever it was) on Mr. Bowman's door; and
- (ii) the evidence does not amount to an attempt to set fire.

I am of the opinion that there is enough evidence on which a reasonable jury can infer that it was the accused who splashed the liquid on the door, and that the composition of that liquid was kerosene oil and paint oil. I must therefore, examine the second, and by far the more difficult submission.

In his DIGEST OF THE CRIMINAL LAW, Sir JAMES STEPHEN defined an attempt to commit a crime as:

“an act done with intent to commit that crime and forming part of a series of acts which would constitute its actual commission, if it were not interrupted. The point at which such series of acts begin cannot be defined, but depends upon the circumstances of each particular case.”

And a suggested definition is found in SALMOND ON JURISPRUDENCE, (9th Edn.) at p. 530, and it is this:—

“An attempt is an act of such a nature that it is itself evidence of the criminal intent with which it is done.”

It is perhaps redundant to say that to constitute an attempt, there must be an *actus reus*. As was stated in *Eagleton's* case (1855) Dears. 515, at p. 538:—

“The mere intention to commit a misdemeanour is not criminal. Some act is required”

And not only must there be an *actus reus*, but there must be an intent. As is stated in SALMOND'S JURISPRUDENCE (*op. cit.*).

“Every attempt is an act done with intent to commit the offence so attempted. The existence of this ulterior intent or motive is of the essence of the attempt.”

This is how the learned author of the 16th edition of KENNY'S OUTLINES OF CRIMINAL LAW deals with the question:—

“. . . . in all crimes an *actus reus* must consist in something done (or omitted), and in attempt the deed must be one performed in actual furtherance of the crime intended. And, in addition, that deed must be such that it raises a presumption that the accused was aiming at the crime in question. In other words the accused must have actually done things which are steps intentionally taken in furtherance of some specific aim, and which themselves are enough to suggest beyond reasonable doubt what that specific aim was.”

“In order to convict of an attempt, it must be shown that the accused intended to consummate the particular crime, or rather (since knowledge of the law is not required) intended to procure the consequences that in law amount to the crime.” (GLANVILLE WILLIAMS' CRIMINAL LAW, THE GENERAL PART (2nd Edn.) p. 618).

In addition to the *actus reus* and the intention, the act must be sufficiently proximate to the crime intended to amount to an attempt.

“Acts remotely leading towards the commission of an offence are not to be considered as attempts to commit it, but acts immediately connected with it are.” (*Eagleton's* case, *supra.*)

This does not in my view mean that only the penultimate act can constitute an attempt, even though the latter portion of Baron PARKE'S judgment in the *Eagleton's* case would seem to suggest this. It may very well be that the ante-penultimate act is an attempt to commit an offence as was the case in *R. v. Linneker*, [1906] 2 K.B. 99 (C.C.R.). In that case, the prisoner was indicted with attempting to discharge a loaded revolver at the prosecutor with intent to do him grievous bodily harm. Evidence was that during an interview between the prisoner and the prosecutor, the prisoner drew a loaded revolver from his coat pocket. The prosecutor immediately seized the prisoner and prevented him from raising his arm. A struggle ensued during which the prisoner nearly succeeded in getting his arm free, but after a few minutes the prosecutor wrested the revolver from him and he was taken in custody. During the struggle, the prisoner said to the prosecutor several times: “You've got to die.” Held that there was evidence upon which the prisoner could properly be convicted of an attempt to

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discharge a loaded firearm within the meaning of the relevant section. This view seems to be supported by the decision in *Hope v Brown*, [1954] 1 All E.R. 330. There the respondent was charged with attempting to sell meat at a price exceeding the maximum. There was no evidence of an offer to sell, but there was evidence that correct price tickets were on the meat, and that another set of tickets with higher prices was in a drawer. The respondent admitted that he had instructed an employee to change the tickets before delivery of the meat. Held, this was merely an act of preparation. Lord GODDARD, L.C.J., said that what had remained to be done before there could be an attempt was the affixing to the meat of the false tickets. Until that was done the matter was in embryo and intention. The Lord Chief Justice did not say that for there to be an attempt to sell, there must have been either an offer to buy or to sell. See also *R. v. Laitwood*, 4 Grim. App. R. 248.

I have found a reference to a case decided in Queensland, Australia, where it was held that where the defendant poured petrol over premises but was arrested before he had time to attempt to light it, his act was not sufficiently proximate to amount to attempted arson. As is stated by GLANVILLE WILLIAMS (*op. cit.*) in a ruling of that kind the law of attempt is left practically without operation, for either the conduct of the accused amounts to mere preparation or the offence is consummated.

Counsel for the defence has submitted that the splashing of an inflammable liquid on to Bowman's door is not in itself a criminal offence, and asks, what crime then could the accused be guilty of attempting? He cites *R. v. Dalton Ltd.* (1949), 118 L.J.R. 1626. He has, if I may say so, misunderstood the import of that decision. The headnote to that case reads thus, and needs no further comment from me:—

“Steps on the way to the commission of what would be a crime if the acts were completed may amount to an attempt to commit the crime to which, if not interrupted, those steps would have led; but steps on the way to the doing of something thought to be a crime, which is thereafter done, but which turns out to be no crime, cannot constitute an attempt to commit a crime.”

I have also given consideration to *R. v. Bloxham*, 29 Crim. App. R. 37, in which *Eagleton's* case (*supra*) and the much cited case of *R. v. Robinson*, 11 Crim. App. R. 124, were referred to. In the *Bloxham* case, the appellant, an employee of a district council, took one L to the premises of the council where a refrigerator belonging to the council was kept. He agreed with L to sell her the refrigerator. He received the agreed price, and told L that a van could be sent to collect the refrigerator. He took no steps to implement the bargain. He was charged with attempted larceny, and it was held that he could not be guilty. The *ratio decidendi* can be clearly gathered from the Lord Chief Justice's remarks at p. 39:—

“The very essence of the offence of larceny is the asportation and if the appellant had done anything which could amount to an attempt to take and carry away the refrigerator, he would of course have been guilty of the offence with which he was charged. But the fact is that he took no step whatever connected either immediately or remotely with taking and carrying this refrigerator.”

That I can take into account the circumstances in which the accused was found on the premises to determine whether there is evidence of an attempt which should be left to the jury is supported by *R. v. Miskell*, [1954] All E.R. 137.

I feel that there is enough evidence on which the jury can be asked to infer that it was the accused who threw kerosene oil and paint oil on the door of Mr. Bowman, and it is for them to say whether from the circumstances he intended to commit the crime which he is charged with attempting.

Submission overruled.

LA BORDE v. SECRETARY, HAGUE RECREATION CLUB

[In the Full Court, on appeal from the magistrate's court for the West Demerara Judicial District (Luckhoo, C.J., and Khan, J.) September 1, 15, October 20, 1962.]

Club—Application for renewal of registration—Opposition by police on grounds on which a registered club may be struck off the register—Competence of such opposition—Registration of Clubs Ordinance, Cap. 321, ss. 5, 6, and 13.

Appeal—Right of—Application for registration of club—Opposition by police—Whether police can appeal—Registration of Clubs Ordinance, Cap. 321, s. 19—Summary Jurisdiction (Appeals) Ordinance, Cap. 17, s. 3.

Section 5 (1) of the Registration of Clubs Ordinance, Cap. 321, requires an application to be made for the registration of every club before it first opens and thereafter for its registration annually. Under s. 6 the Commissioner of Police or a commissioned officer of police authorised by him is entitled to oppose any such application on any of the grounds of complaint set out in s. 13 (1) of the Ordinance. Section 13 (1) provides that the magistrate, on complaint in writing by any person, may, if he thinks fit, make an order directing any registered club to be struck off the register on all or any of certain grounds. The respondent club, which had already been registered, applied under s. 5 for "re-registration". The police opposed the application on two of the grounds set out in s. 13 (1). The magistrate, however, held that the police could not validly object to an application except by way of complaint brought under s. 13.

Held: (i) the Commissioner of Police (either by himself or by a duly authorised commissioned officer of police) could validly enter objection to any application brought under s. 5 on any of the grounds set out in s. 13 and without bringing a complaint under the latter provision;

(ii) the police have a right of appeal under the provisions of s. 19 of the Ordinance,

Appeal allowed.

LA BORDE v. HAGUE RECREATION CLUB

Judgment of the Court: This appeal has been brought by Superintendent of Police La Borde, against the decision of the magistrate of the West Demerara Judicial District granting an application by the secretary of the Hague Recreation Club, a proprietary club, for an order for registration of the club in respect of the year 1962.

The club had been entered on the register of clubs for the year 1961 and on the 15th December, 1961, the secretary of the club made application to the magistrate under s. 5 of the Registration of Clubs Ordinance, Cap. 321, for what he described in the application as “re-registration” of the Club. Section 5 prescribes the mode of application to be made *annually* for an order for registration of a club. The secretary of the club in pursuance of s. 6 of the Ordinance, duly gave notice to the Commissioner of Police of the application for registration of the Club and furnished him with a copy of the return which had been filed in accordance with s. 5 (2) of the Ordinance. The Commissioner of Police thereupon authorised Superintendent of Police La Borde, a commissioned officer of police, to take any action or perform any duty under the provisions of s. 6 of the Ordinance. Under s. 6 the Commissioner or a commissioned officer of police authorised by him is required to verify the particulars contained in the return; make inquiries to enable him to inform the magistrate, to whom application is made, upon the matters to be considered by him; to attend the hearing of the application; and to be entitled to object to the making of an order for registration of the club either generally or on any of the grounds of complaint (in s. 13) upon which a magistrate is entitled to direct a club to be struck off the register.

Superintendent La Borde objected to the making of the order requested generally and on two of the grounds specified in s. 13. At the hearing before the magistrate it was contended for the applicant that Superintendent La Borde did not have a right to object to the grant of the application. The magistrate upheld this contention and directed that the club be entered in the register. It would appear from the magistrate’s memorandum of reasons for decision that the magistrate considered that the objection by Superintendent La Borde related to a complaint under s. 13 for an order to strike the club off the register. There seems to have been some confusion in the mind of the magistrate as to the nature of applications to which the provisions of s. 5 of the Ordinance relate. It seems to us quite clear that the provisions of s. 5 relate not only to applications for original entry on the register but also to applications for subsequent entry. In the present case there was no question of any complaint by the police brought under s. 13 of the Ordinance for an order directing that the club be struck off the register. The Commissioner of Police, through a duly authorised commissioned officer of police, made objection as provided by s. 6 of the Ordinance in relation to the application made by the secretary of the club under s. 5.

The magistrate was in error in holding as he did that the Commissioner of Police (either by himself or by a duly authorized

commissioned officer of police) could not validly enter objection to an application except by way of a complaint brought under s. 13 of the Ordinance.

The further question arises as to whether the appellant Superintendent La Borde is entitled to appeal against the decision of the magistrate. It is provided by s. 19 (2) of the Ordinance that an appeal shall be made to the Full Court from any conviction, judgment, order or decision of a magistrate made or given under the Ordinance, and the procedure in respect of such appeals shall be such as is laid down in the Summary Jurisdiction (Appeals) Ordinance, Cap. 17. In the Ordinance there appears a reference to the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, in this connection but this is obviously an error for the Summary Jurisdiction (Procedure) Ordinance contains no provisions which relate to the procedure in respect of appeals to the Full Court. Such procedure is only to be found in the Summary Jurisdiction (Appeals) Ordinance, Cap. 17.

By s. 3 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, unless the contrary is in any case expressly provided by Ordinance, anyone dissatisfied with a decision of a magistrate may appeal therefrom to the Full Court in the manner and conditions mentioned in the Ordinance, Cap. 17.

It was held by the Full Court (HOLDER, C.J., STOBY and DATE, JJ.) in *Bernari v. McDougall*, 1958 L.R.B.G. 221, that the right of appeal given by s. 3 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, is limited to a person who was a party to the proceedings—a plaintiff or a complainant on the one hand and a defendant on the other.

In the present case the applicant is in the position of a plaintiff and Superintendent La Borde is in the position of an opposite party or defendant. As such both have a right of appeal under the provisions of s. 19 of the Registration of Clubs Ordinance.

In the result we find that the magistrate misconceived the position of Superintendent La Borde and did not duly consider the application.

The appeal is allowed and the order of the magistrate set aside with the direction that the matter be remitted to the magistrate of the West Demerara Judicial District to be reheard and determined. Costs of this appeal \$34.28 to the appellant.

Appeal allowed.

MAIKOO v. BARRATT AND ANOTHER

[Supreme Court—In Chambers (Luckhoo, C.J.) July 17, 31, August 14, 21, 22, September 4, 18, 25, November 10, 1962.]

Action by purchaser for specific performance of agreement for sale of land—Defence that vendor holds in trust for life and that purchaser had agreed that contract should be rescinded if she wished—Wife testified for vendor but did not join herself as a party—Defence rejected and specific performance ordered—Whether wife, though not, a party, bound by decision.

Pursuant to an agreement of sale J.B., advertised transport to M. but later refused to pass it on the alleged ground that he held the property in trust for his wife, that the agreement was subject to rescission if she should oppose the sale, and that she in fact opposed the transport. In an action by M. for specific performance the wife gave evidence for J.B. but the court rejected the defence and ordered specific performance. J.B. nevertheless refused to pass transport to M. and in consequence the latter applied by summons for an order empowering the Registrar of Deeds to pass the transport to him. J.B. did not appear in answer to the summons but counsel appeared on behalf of his wife, and on application of counsel for ML and without objection from counsel for the wife, the wife was joined as a co-defendant in the proceedings relating to the application. The conveyance had been re-advertised shortly before the summons came on for hearing but was again opposed by the wife on the ground that she was joint owner of the property with her husband. M.'s application was brought after the entry of this opposition but before any action was taken by the wife to enforce it.

Held: (i) persons interested may by consent, and on submitting to the jurisdiction, attend on a summons in an action to which they are not parties, and they will be bound thereby;

(ii) it is not necessary that a person should be a party to a suit in order to be bound by its result; so long as he had both full notice of the suit and opportunity of making himself a party to it if he wished, he cannot complain of injury and will be bound by the decision of the court in the suit as distinct from a compromise.

Application granted.

F. Ramprashad for the plaintiff.

J. H. S. Elliott, Q.C., Mrs. A. Ali-Khan with him, for the co-defendant.

Reasons for Decision: This application by way of summons was taken out by Maikoo in Action No. 336 of 1961 Demerara for an order that the Registrar of Deeds be empowered to pass transport to him (Maikoo) in respect of immovable property situate at lot 42 First Avenue, Bartica.

When the summons came on for hearing on the 17th July, 1962, the defendant James Barratt did not appear and he has never appeared at any time throughout these proceedings. On the 17th July, 1962, Mrs. Ali-Khan appeared on behalf of Lily Barratt, the wife of the defendant James Barratt. On the application of Mr. Ramprashad, counsel for Maikoo, counsel for Lily Barratt not objecting, Lily Barratt was joined as a co-defendant in these proceedings, Mrs. Ali-Khan agreed to dispense with re-service upon Lily Barratt of the summons and affidavit in support. The matter was then adjourned to the 31st July, 1962, when Mr. J. H. S. Elliott, Q.C., appeared for Lily Barratt.

In order to appreciate the points at issue in this application it is necessary to set out the history of this matter. At the hearing

of the summons before me it was agreed that the record of appeal to the Federal Supreme Court be referred to for the pleadings, the evidence and the judgment of the trial judge. The plaintiff Maikoo had brought action No. 336 of 1961 Demerara by way of specially indorsed writ against the defendant James Barratt for specific performance of an agreement of sale and purchase dated 10th January, 1961, whereby James Barratt sold to Maikoo the immovable property situate at lot 42, First Avenue, Bartica. In his affidavit of defence, James Barratt admitted entering into the agreement of sale and purchase with Maikoo but sought leave to defend the claim on the grounds set out at paras. 6, 7 and 8 of his affidavit of defence which are as follows:

“6. I admit that I am the owner by transport of the property described in paragraph 1 of the plaintiff’s statement of claim, but the said property is held by me in trust for myself and my wife Lily Barratt and this fact was within the knowledge of the plaintiff at the time the agreement of sale was entered into; and it was further agreed between the plaintiff and myself that should my wife oppose the said sale the said agreement would become rescinded and the plaintiff would receive back all monies advanced by way of purchase price.

7. That on the 18th day of February, 1961, my wife the said Lily Barratt entered opposition to the conveyance of the said property and accordingly I immediately refunded to the plaintiff the sum of \$765 (seven hundred and sixty-five dollars) advanced together with \$10.00 representing interest on the said sum.

8. That having admitted the claim of my wife the said Lily Barratt to the said property, I also withdrew my instructions to the Registrar for conveyance and paid over to the plaintiff the sum of \$114.22 on the 28th day of February, 1961. I also authorised the plaintiff’s solicitor to uplift the sum of \$124.60 refundable by the Registrar so as to indemnify the plaintiff completely for all expenses incurred by him for conveyancing. The plaintiff has never returned to me any of the monies repaid to him as aforesaid.”

On this affidavit leave to defend was granted without pleadings by the Bail Court Judge. The action was duly heard by PERSAUD, J., who made an order against James Barratt for specific performance of the agreement of sale and purchase. Lily Barratt testified at the hearing before PERSAUD, J., in support of her husband’s defence and of her claim of an interest in the property but apparently did not consider it necessary to apply to be joined as a co-defendant. The plaintiff Maikoo, having no claim or remedy to be enforced against her, could not and did not apply for her to be joined as a co-defendant.

PERSAUD, J., found that Lily Barratt was not entitled to any portion of the property. As is stated in the judgment of PERSAUD, J., Lily Barratt had entered opposition to the conveyance by way of transport by James Barratt to Maikoo when it was advertised on the 4th February, 1961. James Barratt refunded the deposit by Maikoo

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by money order and sought to cancel the agreement on the ground that the parties agreed that this would be done in the event of the wife opposing. Thereafter, Maikoo brought the action for specific performance.

In the course of his judgment PERSAUD, J., said—

“The parties having accepted that the agreement Exhibit “A” was in fact entered into, it is necessary for me only to consider the question whether Mrs. Barratt, the wife of the defendant, was in fact entitled to a half of the property, and whether the agreement was subject to the oral condition that the sale would be revoked in the event of the wife entering an opposition.

There can be no doubt that lot 42, First Avenue, Bartica, was acquired by the defendant during the time when he and his wife were living and working together, and while a court is at liberty to find that a party who is not mentioned in a transport has an interest in the particular property and could give effect to such a finding in an appropriate order, yet in this case I must say at once that I was left unimpressed by the evidence of Mr. and Mrs. Barratt on this score. Mrs. Barratt, who claims half share in the property, has given her evidence in so unsatisfactory a manner and appeared so shifty and unable to give a straight answer that I am compelled to place little credence on her evidence. Normally, a party who claims part of a property finds himself on the opposite side of the person in whose name the property stands. In this matter, however, it is the case that Mrs. Barratt has given evidence on her husband's behalf, and even though the husband admits his wife's interest in the property, he was quite prepared to enter into a secretive agreement for the sale of the same property and to keep the proceeds entirely to himself. I am of the opinion that Mrs. Barratt has given evidence merely to buttress her husband's case, and that her entering of the opposition was not *bona fide*. I therefore cannot hold that she is entitled to any portion of the property, particularly so, when the evidence is that the defendant withdrew the sale after the opposition was entered, and that he and his wife have reconciled their differences—whatever differences there were—after she entered the opposition.”

And later—

“The defence contends that there was never any separation between the defendant and his wife and that his wife continued to carry on a shop at lot 42 and to occupy the premises above the shop while carrying on another business across the road. This I find to be inaccurate as the plaintiff himself says that his wife is still living at the premises to which she had moved while he continues to live with his daughter in Georgetown. Mrs. Barratt had moved across the street as long ago as October, 1959, when she commenced business of her own and according to the defendant she continued to carry on a parlour from that time to the end of that year. The defendant further says that he took the plaintiff to the premises one day and showed him around. In

respect of this incident the plaintiff has alleged in evidence that not only did the defendant show him around but also handed him the key to the premises. This bit of evidence has not been challenged by the defendant. He would not, in my view, have done so had the circumstances he now alleges existed at the time.

I, therefore, must come to the conclusion that there was no condition attached to the agreement of sale, and that the opposition entered by Mrs. Barratt was not genuine.”

James Barratt appealed to [the Federal Supreme Court against PERSAUD, J.’s judgment. The appeal was duly heard by the Federal Court on the 22nd March, 1962. After hearing counsel for the appellant James Barratt, counsel for the respondent Maikoo not being called upon to reply, the appeal was dismissed with costs to Maikoo the trial judge’s judgment being affirmed.

Notwithstanding the order of the Federal Supreme Court James Barratt refused to pass transport to Maikoo and on the 2nd May, 1962, a copy of the order of court was served on James Barratt by registered post. The conveyance was re-advertised in the Official Gazette on the 2nd June, 1962, numbered 55 for the County of Demerara, but to the transport there was an entry of opposition filed by Lily Barratt alleging that she is a joint owner of the property with her husband. The grounds of this opposition are identical with those filed in respect of the advertisement before the action had been brought and are the same as those advanced by Lily Barratt before PERSAUD, J., at the trial of the action between Maikoo and James Barratt and which the learned trial judge rejected. (See p. 71 of the Federal Supreme Court Appeal Record).

Before Lily Barratt followed up her entry of opposition with a writ of summons in action No. 1451 of 1962 Demerara, Maikoo filed the present application by way of summons. Mention is made of this fact because during the course of the argument Mr. Elliott had contended that the present application should have been brought in the opposition proceedings rather than in the proceedings between Maikoo and James Barratt. When it was observed that at the stage at which the present application was brought the entry of opposition had not yet been followed up by the issue of a writ of summons in action No. 1451 of 1962 Demerara referred to in the appeal motion to the Full Court and that in any event Mrs. Ali-Khan had not objected on request for the joinder of Lily Barratt as a co-defendant in the present application, Mr. Elliott did not pursue the point and quite rightly too for as stated in the ANNUAL PRACTICE, 1961, at p. 324, persons interested may by consent, and on submitting to the jurisdiction, attend on a summons in an action to which they are not parties, and they will be bound thereby.

A somewhat similar point arose in respect of a levy obtained by a third party in another suit in the case of *Demerara Storage Co., Ltd., v. Demerara Wharf and Storage Co., Ltd.*, 1942 L.R.B.G. 306, at p. 308, where the plaintiffs took out a summons in the suit in which the decree for specific performance was made, to prevent a judgment

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creditor in another suit from proceeding with a levy on the property which was the subject of the order for specific performance. It was submitted that the procedure adopted by the plaintiffs was inapt and that the court would not in the specific performance action set aside a levy regularly issued in execution of a judgment obtained by a third party in another suit. VERITY, C.J., held that “where such a course is necessary to give effect to its own order the court will restrain the conduct of a third party even though he be not a party to the suit.”

Before me it was contended on behalf of Lily Barratt that it was not competent for an order to be made compelling the performance of the order of PERSAUD, J., as confirmed by the Federal Supreme Court on appeal until these new opposition proceedings brought by Lily Barratt (the second such proceedings she has brought) have been heard and determined. I rejected that contention as contrary not only to reason and commonsense but also to law.

If it were the case that the second and new opposition proceedings had first to be entertained, heard and determined then the possibility of a decision by another judge in favour of the wife based upon the identical evidence led before PERSAUD, J., cannot be ruled out for the reason that the credibility of the witnesses would determine the issue. That decision may on the evidence be affirmed on appeal and there would be co-existing two orders of the court affirmed on appeal both of which could not be carried out. No court could allow the opposition proceedings to proceed for to do so might be to stultify the prior order for specific performance and to use the words of VERITY, C.J., observed in *Demerara Storage Co., Ltd. v. Demerara Wharf and Storage Co., Ltd.*, 1942 L.R.B.G. 306, “from such a result the court will protect itself and the party for whose benefit the order was made.” This seems to me to be the result from the approach of commonsense and reason. That apart, it is not necessary that a person should be a party to a suit in order to be bound by its result: so long as he had both full notice of the suit and opportunity of making himself a party to it if he wished he cannot complain of injury and will be bound by the decision of the court in the suit as distinct from a compromise. This rule appears to have been stated in *Newell v. King and Weeks*, 2 Phill. 224, by Sir JOHN NICHOLL and applied in *Ratcliffe v. Barnes* (1862), 2 Ew. & Tr. 486; *Wytch-erley v. Andrews*, (1871) L.R. 2 P.D.; *Young v. Holloway*, [1895] p. 87; and in *In re Lart: Wilkinson v. Blades*, [1896] 2 Ch. 788. It is true that these were all in respect of proceedings in matters relating to probate and administration of deceased persons estates but the principle appears to be a general one.

In *Young v. Holloway*, [1895] p. 87, the President in the course of his judgment after referring to *Newell v. King and Weeks* (2 Phill. 224) said (at p. 90):—

“This case was followed *Ratcliffe v. Barnes*, in which Sir CRESSWELL CRESSWELL said: ‘The general principle, as I collect it is this, that where a party has had full notice, and has had

the opportunity of availing himself of the contest, he will be bound by the decision. That was not a mere dictum, but the express decision of a very learned judge, SIR JOHN NICHOLL'. In the case of *Wytcherley v. Andrews* Lord PENZANCE drew a distinction between a person being bound by the decision in a suit and by a compromise made between the parties to it, and in the course of his judgment said: 'There is a practice in this court, by which any person having an interest may make himself a party to a suit by intervening, and it was because of the existence of that practice that the judges of the Prerogative Court held that if a person, knowing what was passing, was content to stand by and see his battle fought by somebody else in the same interest, he should be bound by the result, and not be allowed to reopen the case.' The learned judge proceeded, indeed, to illustrate this rule by reference to the practice in Chancery of allowing one member of a class of persons having common interests to represent the whole. Perhaps the principle on which these representative actions are permitted is somewhat different from that of the rule in the Probate Court; but I think that Lord PENZANCE clearly intended to lay down that, in the Probate Court, the rule of a person being bound by proceedings to which he was no party depends on his cognizance of the proceedings, and his capacity to make himself a party; and further than this I do not think the authorities go."

There are three conditions to be fulfilled before a person not a party to a suit will be bound by the decision in that suit—

- (a) he must have full knowledge of the suit:—
- (b) he must have an opportunity of making himself a party to the suit;
- (c) there must be a decision of the court in the suit and not a compromise.

It is clear that Lily Barratt had full knowledge of the suit. Not only did she enter opposition to the conveyance prior to the commencement of the suit but she also gave evidence on oath testifying as to her alleged ownership with her husband in the property. Under the existing Rules of the Supreme Court she could, had she so desired, have applied to be made a co-defendant. This she refrained from doing. The decision of the judge was given. There was no compromise of the suit. As was said by Lord PENZANCE in *Wytcherley v. Andrews*, (1871) L.R. 2 P.D. at p. 329, persons who are willing to stand by while a contest is going on are bound by the decision of the court.

It may not be amiss to point out that the provisions of r. 14 of O. 14 of the Rules of the Supreme Court, 1955, have their counterpart in England in O. 16, r. 11. As is seen from the notes to that rule (ANNUAL PRACTICE, 1961, p. 345) a person may be joined as a defendant even after judgment so long as anything remains to be done in the action, e.g., though it be only an assessment of damages.

The application of the plaintiff Maikoo that the Registrar pass transport of the property to Maikoo was therefore granted.

Application granted.

ALLEN v. ALLEN

[Supreme Court (Luckhoo, C.J.) November 1, 16, 1962.]

Opposition—In respect of arrears of maintenance—Whether competent.

Solicitor—Acting for defendant in passing a mortgage—Acting against defendant in opposing passing of same mortgage—Whether competent for solicitor to act in both matters.

The plaintiff opposed the passing of a mortgage by the defendant on the ground that the defendant was in arrears of maintenance due under an order of court made in favour of the plaintiff. The plaintiff's solicitors had acted for the defendant in preparing the necessary documents relating to the advertisement of the mortgage, but it was not suggested that any confidence reposed in them by the defendant was or was likely to be violated by them in the present proceedings.

Held: (i) there was no objection to the solicitors acting in the present proceedings for the plaintiff against the defendant;

(ii) arrears of maintenance do not constitute a debt at law, are not recoverable by way of action and cannot support an opposition action.

Judgment for the defendant.

J. A. King for the plaintiff.

The defendant appeared in person.

LUCKHOO, C.J.: This is an opposition action brought by the plaintiff Daphne Una Allen against the defendant Frank Rudolph Allen in respect of the sum of \$285 being the balance of maintenance due, owing and payable by the defendant at the date of the issue of the writ of summons.

By an order of the Supreme Court dated 7th January, 1961, the defendant was ordered to pay to the plaintiff a periodic sum as maintenance. For the period 1st May, 1962, to 31st August, 1962, the balance of maintenance due, owing and payable was \$285.

The defendant sought to pass a conveyance by way of mortgage to and in favour of Barclays Bank D.C.O. advertised in the Official Gazette of the 1st September, 1962, and numbered 40 therein. On the 14th September, 1962, the plaintiff entered opposition to the passing of the conveyance and on the 24th September, 1962, followed up the filing of notice of opposition with the writ of summons in this action.

Solicitors who were acting for the plaintiff in the opposition proceedings are the same solicitors who had acted for the defendant in the preparation of the necessary documents relating to the advertisement of the mortgage.

It is admitted that since the filing of the writ of summons the defendant has paid the sum of \$140 and that the amount remaining unpaid at the date of the hearing of this action is \$145.

The facts as contained in the plaintiff's affidavit verifying claim and the defendant's affidavit of defence not being in dispute the sole questions which fall for determination are as follows:—

- (a) whether it is competent for the same solicitors who acted for the defendant in the preparation of the necessary documents relating to the advertisement of the mortgage to act for the plaintiff in the opposition proceedings filed in relation thereto;
- (b) whether it is competent for opposition proceedings to be brought in respect of arrears of maintenance due under an order for the payment of maintenance.

It does not appear that in the present proceedings there arises any conflict of interest or duty in the solicitors so acting. It is not suggested that any confidence reposed in solicitors by defendant in respect of the mortgage transaction has been or is likely to be violated by the solicitors acting for the plaintiff in the present proceedings. I can see no objection to the solicitors acting in the present proceedings for the plaintiff against the defendant. That disposes of the first question.

It is enacted by proviso (b) to para. (D) of s. 3 of the Civil Law of British Guiana Ordinance, Cap. 2 (which came into operation on 1st January, 1917) that the law and practice relating to the right of opposition in the case of transports and mortgages "shall be the law and practice now administered in those matters by the Supreme Court". The decisions of the Supreme Court have established as is stated at p. 17 of DUKE'S LAW OF IMMOVABLE PROPERTY, that the right to oppose is confined to (a) persons having *dominium* in the *res* itself or some legal or equitable right therein, and (b) to creditors having a liquidated demand or claim of such a nature that it can be made the subject matter of a specially indorsed writ. See also *Andrew v. Barratt*, 3rd December, 1913, a decision of the Full Court referred to at p. 15 of DUKE'S LAW OF IMMOVABLE PROPERTY. To succeed the plaintiff in the present action would have to bring her claim within the second category of persons entitled to oppose. The question as to whether a person to whom money is due, owing and payable under an order of the court in respect of maintenance and alimony applications was considered in the case of *Rodney v. Loncke* (1960), 3 W.I.R. 28, 1960 L.R.B.G. 307. I do not in this judgment propose to repeat what was said in the earlier judgment. I adhere to the view therein stated that arrears of alimony do not constitute a debt at law and are not recoverable by way of action. Such a debt may be recovered in one or other of the ways mentioned in that judgment. Arrears of maintenance are in the same position and likewise cannot be recovered by way of action. The plaintiff therefore does not have a demand or a claim of such a nature that it can be made the subject matter of a specially indorsed writ.

It is perhaps not without significance that (apart from *Rodney v. Loncke*), there appears to be no instance so far as my researches and those of counsel go in which an action has been brought to obtain

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judgment for the payment of arrears of alimony or maintenance. And there is no case so far as I am aware in which opposition proceedings have been brought in respect of arrears of alimony or maintenance payable under an order of court.

The plaintiff's claim in these proceedings is misconceived and must be dismissed. The opposition she has entered is declared unjust, illegal and not well founded. Costs to the defendant.

Judgment for the defendant.

Solicitor: *B. Fullwell* (for the plaintiff).

DORSETT v. EDWARDS

[In the Full Court, on appeal from the magistrate's court for the Georgetown Judicial District (Miller and Bollers, JJ.) November 17, 1962.]

Road traffic—Careless driving—Stop light signal—Whether enough—Whether driver must ensure that signal has been appreciated by vehicle behind—Motor Vehicles and Road Traffic Ordinance, Cap. 280, s. 37(1).

As the respondent was driving his motor lorry towards a branch road he slowed down, sounded his horn, signalled to turn south, looked into his rear view mirror, saw the lights of a motor vehicle approaching behind him a good distance away and formed the opinion that it was safe to turn. As he was taking the angle he saw another reflection in the mirror, which was south of the first light he had seen, and suddenly he experienced a crash. He immediately applied brakes. The magistrate having acquitted the respondent on a charge of dangerous driving, the police appealed, their contention being that it was not enough for the respondent to have given the proper signal but that he ought also to have ascertained whether the signal had been observed by the driver of the oncoming vehicle.

Held: (i) a stop light operated by the brakes of a motor vehicle does not give sufficient warning of a driver's intention to slow down or stop. A hand signal should also be given;

(ii) where the driver of a vehicle decides to turn his vehicle it is not enough for him to give the appropriate signal and then turn immediately; he must ascertain whether there is any traffic coming behind him and whether his signal has been observed;

(iii) but on the facts it could not be said that the respondent failed to exercise that degree of care and attention which a reasonable and prudent driver would have exercised in the circumstances.

Appeal dismissed.

K. Bhagwandin, Police Legal Adviser, for the appellant.

F. R. Allen for the respondent.

Judgment of the Court: In this appeal, the respondent was charged for the offence of careless driving, contrary to s. 37 (1) of

the Motor Vehicles and Road Traffic Ordinance, Cap. 280, in that he drove his motor lorry without due care and attention.

After evidence was led on both sides, the magistrate found that the case had not been proved against the respondent and acquitted him, and it is from this order of acquittal that the prosecution have appealed on the main ground that the decision was erroneous in point of law.

The evidence led by the prosecution in the court below was to the effect that on the 15th day of December 1961 about 11.30 p.m., the respondent was driving his lorry CD737 east along the East Coast Public Road and on his approach to Bel Air Branch Road, a road which intersected the public road on its southern side, he swung his lorry to the right or south in an effort to turn into the branch road, in the pathway of an on-coming taxi vehicle without giving the appropriate signal, thus causing the left front of the taxi to ram the right side of the lorry in its middle, six feet away from the southern edge of the public road. The lorry had therefore completed its turn and was six feet away from the entrance to the branch road at the point of the collision. It is significant that the driver of the taxi did not give evidence but its passenger gave evidence and stated that although he was anxious to get to his destination the taxi was not travelling at a speed greater than 25 miles per hour and that the driver of the lorry gave no signal and swung suddenly into the pathway of the taxi which was about to pass it. The driver of a car also proceeding east behind the lorry and which was passed by the taxi supported this evidence that he saw no signals and that the lorry had made a sudden turn to the right; the taxi, he maintained was travelling at 30-35 m.p.h. The police constable who examined the lorry after the accident found that the red stop lights at the back of the lorry, operated by means of the foot brakes, were in working order.

The evidence of the defendant, which the magistrate accepted, was that on his approach to the branch road, he gave the appropriate signal by putting out his right hand indicating that he was turning to the right or south and that his lorry, although it possessed no mechanical means of giving a signal, he presumed that his red stoplights which were in working order came on when he pressed his brakes as he slowed down in his approach to the corner. It can be observed here however, that a stop light operated by the brakes of a motor vehicle does not give sufficient warning of the intention of a driver to slow down or to stop. A hand signal should also be given. [*Croston v Vaughan*, [1937] 4 All E.R. 249]. He however admitted that the tray of the lorry projected 16 inches beyond the cab, the driver of a vehicle directly behind the lorry might therefore not see his signal.

The learned magistrate in her memorandum of reasons for decision found that the respondent, the driver of the lorry, had given the appropriate signal but that the driver of the taxi after over-taking the car ahead of it did not keep a reasonable and proper look out and

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did not see the signal given by the defendant. If the finding of the magistrate had stopped there we would have had no reason to find fault with them but she went on to say that she found that the driver of the taxi was travelling at a speed of about 35-40 miles per hour and was attempting to over-take the lorry at this speed, when the impact took place and as a result she found that the driver of the taxi was to be blamed for the accident.

In our view, the magistrate fell into error when she sought to address her mind to the question as to who was to be blamed for the accident. Her duty clearly was to examine the evidence and arrive at a conclusion whether the prosecution had proved the respondent guilty of the offence of careless driving and that could only be done by considering the question whether the respondent, at the time of the collision, was exercising that degree of care and attention which a reasonable and prudent driver would have exercised in the circumstances, and it would make no difference whether his failure to do so was due to an error of judgment, or any other cause. (*Simpson v. Peat*, [1952] 2 Q.B. 24). The finding, therefore, that the taxi driver was responsible for the accident was irrelevant. It is trite law, however, that an appeal is not an appeal from the memorandum of reasons for decision given by the magistrate, but from the actual decision of the magistrate. The magistrate having rejected the evidence for the prosecution and having accepted the evidence of the respondent, we are in as good a position to decide the question whether the respondent in the circumstances exercised the degree of care and attention as one would in the circumstances expect from a reasonable and prudent driver.

Counsel for the appellant has pressed on this court, that it was not enough for the respondent to have given the appropriate signal, he ought to have ascertained whether his signal had been observed by the driver of the on-coming vehicle. He cited *Sorrie v. Robertson* (1944) S.C. (J) 98, where the driver of a motor vehicle, knowing that he was being overtaken by a motor-cyclist gave the appropriate signal that he was going to turn 50 yards ahead of the point where he intended to turn. After giving the signal he took no steps whatsoever to ascertain whether it had been observed and the motor-cyclist did not in fact see it and as a result there was a collision. The Scottish Court of Judiciary held that his conviction was warranted because the driver knew of the over-taking motor-cyclist and accordingly had a duty to observe whether his own signal had been appreciated. Accordingly counsel for the appellant submits that as the respondent admitted in cross-examination that he saw a light in his mirror as he went south and this light was on the southern side of the road it was his duty to ascertain whether his signal had been observed.

In the recent case of *Pratt v. Bloom*, (1958) CRIMINAL CASE AND COMMENT, page 101, decided on appeal by the Queen's Bench Divisional Court, a taxi-cab driver was proceeding along the Great North-

Way with a passenger who told him to turn to the left. The driver however put on his right blinking indicator. Another car being driven in the same direction but behind the taxi seeing this blinking indicator on, began to overtake the taxi-cab on its near side, when suddenly the passenger in the taxi shouted to the driver, "No, not right, left." The taxi-cab driver, without taking any precaution to see whether anything was coming up behind him, put on his left indicator and immediately turned to the left, into the path of the on-coming car. It was held that it was impossible to say that the taxi-cab driver was not, at the least, guilty of careless driving. We agree with the submission of counsel for the appellant that these cases lay down the principle that where the driver of a vehicle decides to turn his vehicle, it is not enough for him to give the appropriate signal and then turn immediately, he must ascertain whether there is any traffic coming behind him and whether his signal has been observed. It may be that he may have plenty of time in which to turn safely but if in turning in the pathway of on-coming traffic he is guilty of a mere error of judgment, nevertheless the offence of careless driving has been committed by him.

In his statement made to the police on the scene of the accident on the night in question, the respondent stated that as he approached the branch road, he slowed down, blew his horn and signalled to turn south, looked into his rear view mirror, saw the lights of a motor vehicle approaching behind him, a good distance away, and formed the opinion that it was safe to turn. As he was taking the angle another light reflected in the mirror which was south of the first light he had seen and suddenly he experienced a crash to the right wheel of his lorry. Immediately he applied his brakes. All of this evidence given by the respondent was accepted by the magistrate and suggests that the driver of the taxi was travelling at a fast rate of speed, and did not observe the signal because of failure to keep a reasonable and proper look out. We are of the opinion that the respondent having slowed down and given a stop-light signal as well as the appropriate signal to turn right and having looked into his rear-view mirror and ascertained that it was safe to turn, any driver of on-coming traffic on the southern side of the road, keeping a reasonable and proper look out would have seen the respondent's signal. That being so, it is impossible for us to say that the respondent failed to exercise that degree of care and attention which a reasonable and prudent driver would have exercised in the circumstances.

This appeal must therefore be dismissed with costs to the respondent fixed in the sum of twenty-five dollars.

Appeal dismissed.

WHITE v. GUIANA GRAPHIC LIMITED

[Supreme Court—In Chambers (Persaud, J.) November 20, 28, 1962.]

Libel—Innuendo—Allegation as to what publication meant—Such meaning not alleged to be the natural or ordinary meaning—Whether effect is to plead an innuendo—Whether particulars may be required.

In an action for libel the plaintiff pleaded that a certain publication meant and was understood to mean that the plaintiff was cruel and was a woman of ungovernable and/or of bad temper and character. On application by the defendant for particulars, it was objected that O. 19, r. 6 (ii) (which permitted such an application in England) was inapplicable in British Guiana and that there was no local equivalent thereof.

Held: (i) Order 19, r. 6 (ii) (U.K.), is applicable in British Guiana by virtue of O. 1, r. 3 (B.G.);

(ii) since the practice is to regard a plea beginning with the words “the publication meant and was understood to mean” as a plea of innuendo from extrinsic facts, the plaintiff, unless he adds the words “in their natural and ordinary meaning” to show that he was not pleading an innuendo proper, would no doubt be ordered to give particulars under O. 19, r. 6 (ii) (U.K.). *Grubb v. Bristol United Press* [1962] 3 W.L.R. 25 applied;

(iii) as the plea in question did not include the words “in their natural and ordinary meaning”, the plea would be regarded as an innuendo proper and particulars would be ordered.

Order accordingly.

O. M. Valz for the plaintiff.

J. H. S. Elliott, Q.C., for the defendant.

PERSAUD, J.: In this matter the plaintiff has filed a writ alleging that the defendants did publish a libel concerning her, and she has claimed \$5,000.00 as damages. After reproducing the allegedly offensive article in her statement of claim, the plaintiff has pleaded that:—

“The said photograph and the words printed thereunder and the said caption and article are disparaging to the plaintiff in her profession as a nurse and mean and understood to mean that the plaintiff is cruel and is a woman of un-governed and/or bad temper and character and is either so unkind or so negligent as to be completely unfit to be a nurse or a person having charge of persons who may need kindness and sympathy from anyone responsible for their case.”

The defendants have now taken out a summons praying for an order for particulars in respect of the innuendo which is contained in the latter portion of the paragraph reproduced above. Mr. Elliott for the defendants accepts the position that before 1949, when O. 19, r. 6 (2), of the United Kingdom Rules of the Supreme Court was made, he could not properly have asked for particulars. Mr. Valz contends that if r. 6 (2) were applicable to this country, the defendants would be entitled to the particulars, but as this rule does not form part of the local rules, the common law of England would apply by virtue of s. 3 (3) of the Civil Law of British Guiana Ordinance, Cap. 2. This

section provides that the common law of the Colony shall be the common law of England as at the 1st January, 1917. Mr. Valz submits that the defendants are not entitled to the particulars asked for.

Rule 6 (2) of Order 19 of the English Rules of the Supreme Court provides as follows:—

“In an action for libel or slander if the plaintiff alleges that the words or matter complained of were used in a defamatory sense other than in their ordinary meaning, he shall give particulars of the facts and matters on which he relies in support of such sense.”

There is in our Rules of the Supreme Court no equivalent to O. 19, r. 6 (2), of the English Rules of the Supreme Court, but O. 1, r. 3, of our Rules provides as follows:—

“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*.”

It seems to me, therefore, that r. 6 (2) would be applicable to the matter before me.

The effect of this rule was considered in *Grubb v. Bristol United Press Ltd.*, [1692] 3 W.L.R. 25, where the plaintiff claimed damages for libel. The defendants asked for particulars of the facts relied on in support of the innuendoes and certain particulars were given. The defendants then applied to strike out all the innuendoes pursuant to O. 19, r. 6 (2), on the ground that the innuendoes could not be pleaded since the particulars alleged no support for any of them.

Held, that a true innuendo—that was, an allegation that the words were used in a defamatory sense other than their ordinary meaning—could not be supported by a mere interpretation of the words of the libel itself, but must be supported by extrinsic facts or matters there being one cause of action for the libel itself, based on whatever imputation or implication could reasonably be derived from the words themselves, and another, different, cause of action, the innuendo, based on an extended meaning created by a conjunction of the words with something outside them, and O. 19, r. 6 (2), requires that particulars of such extrinsic facts or matters be given. Said HOLROYD PEARCE, L.J., at p. 38:—

“In my judgment the strong body of authority which has been cited leads to the conclusion that any innuendo (that is, any allegation that the words were used in a defamatory sense other than their ordinary meaning) cannot rely on a mere interpretation of the words of the libel itself, but must be supported by extrinsic facts or matters.”

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And again at p. 40:—

“Although it is not done in practice, I see nothing to prevent the plaintiff, if he chooses, from pleading what he contends to be the ordinary meaning of the words, either in a case where it is doubtful whether a defamatory inference is within the ordinary meaning or even where the words are plainly defamatory. He would merely be providing the defendant with the nature of his case on that point. But, since the practice is to regard a plea beginning ‘By the said words the defendant meant and was understood to mean’ as a plea of innuendo from extrinsic facts, the plaintiff, unless he added the words ‘in their natural and ordinary meaning’ to show that he was not pleading an innuendo proper, would no doubt be ordered to give particulars under Order 19, rule 6 (2).”

In the matter before me, the plaintiff does not add the words referred to above by HOLROYD PEARCE, L.J. Therefore, it would follow that she is pleading an innuendo proper, and should give the particulars asked for. It is ordered that the plaintiff give the particulars requested in paragraphs (2), (3) and (4) of the summons, and that she pay the costs of these proceedings in any event.

Particulars to be delivered within 14 days from date.

Order accordingly.

MOUNT EVERARD LUMBER COMPANY LTD. v. LUMBER AND
STONES SALES LIMITED

[Supreme Court (Luckhoo, C.J.) October 17, November 23, 1962.]

Opposition—Pending action for trespass—Defendant admits liability but damages not quantified and judgment not entered—Whether such liability can found opposition proceedings.

In an action for trespass by the plaintiff against the defendants, the defendants admitted liability for certain trespasses but the amount of damages was not quantified and judgment not entered. The defendants then advertised a second mortgage on their property in favour of the daughter of the defendants' director and principal shareholder. The plaintiffs opposed the passing of the mortgage, their contention being that where liability in tort is admitted in legal proceedings, though the amount of damages has not been quantified, a right of opposition exists.

Held: (i) only two categories of claims are recognised by the courts as founding oppositions: (a) claims in or to the property about to be conveyed, mortgaged or leased, and (b) claims by simple contract creditors against the owner of the property. *Ajubun v. Amir*, (1931-37) L.R.B.G. 348, applied;

(ii) an opposition cannot be founded on liability in tort where, though such liability has been admitted, the damages remain to be quantified.

Judgment for the defendants.

R. M. F. Delph for the plaintiffs.

J. O. F. Haynes, Q.C., for the defendants.

LUCKHOO, C.J.: This is an opposition action in which the plaintiffs, Mount Everard Lumber Co., Ltd., seek to restrain the defendants, Lumber and Stone Sales Ltd., from passing a second mortgage advertised in the Official Gazette of the 4th August, 1962, and numbered 67 therein for the counties of Demerara and Esse-quiibo to and in favour of one Sinatool Deen.

The reasons of opposition are set out in the plaintiffs' statement of claim as follows—

“1. That you, the said proponents, are a limited company incorporated in this colony on the 21st January, 1958, and that your members and directors are Fazlah Karim Rahaman, his wife Bibi Phatoon Rahaman, his son Mohamed Saleem Rahaman, and his daughter Bibi Simoon Rahaman.

2. That by an agreement in writing dated the 22nd January, 1958, the said Fazlah Karim Rahaman sold his business of saw-miller and lumber dealer and all property connected with the said business carried on by him at the said mudlot 8 including the said mudlot 8 to you in consideration of the sum of \$25,000 to be satisfied by the issue by you to him or his nominee of 250 shares of a nominal value of \$100 each, and that thereafter transport of said mudlot 8 was passed to you.

3. That during the years 1959 and 1960 you trespassed upon our mudlot 9, adjoining your said mudlot 8 to the south, which we own by transport No. 490 of the 19th April, 1951, and did extensive damage to our property thereon, in particular pulling down the greater part of our wharf when dragging logs up to your sawmill.

4. That on the 15th May, 1961, we issued a writ commencing action No. 815 of 1961, Demerara, against you and the said Fazlah Karim Rahaman, in which we claimed damages for the said and other trespasses and for a nuisance created by the vibrations and sawdust caused by your heavy reciprocating gangmill.

5. That the said action came on for hearing before the Honourable Mr. Justice DATE on the 17th April, 1962, and the said hearing was continued on the 25th and 30th April, the 7th, 8th, 9th, 10th, 11th, 15th and 28th May, the 1st June, the 3rd, 4th, 5th, 6th, 9th, 10th, 11th and 12th July, and the 7th and 8th August, 1962, when the hearing was concluded and the learned trial judge reserved his judgment.

6. That the value of your said mudlot 8 is about \$100,000 and there is thereon already a first mortgage in favour of Barclays Bank D.C.O. for approximately \$50,000.

7. That the said Zinatool Deen, in whose favour the said second mortgage is advertised, is the daughter of the said Fazlah Karim Rahaman, your director and principal shareholder.

8. That you are truly and justly indebted to us for the damage caused to us as aforesaid and claimed by us in the said action,

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and that you have only advertised the said second mortgage in favour of the daughter of your director and principal shareholder because of hearings of the said action to the 4th August aforesaid indicated that you would be liable to us for a large amount of damages and you wished to defraud us by rendering any judgment which we might obtain against you nugatory.

9. That it is not competent for you to seek to pass the said second mortgage without first satisfying the judgment in the said action or giving security therefor.”

Shortly after service of the writ of summons was effected on the defendants a summons was taken out on behalf of the defendants to have—

- (a) the notice and reasons of opposition (which had been entered and filed on the 17th August, 1962) struck out as being null and void and as not disclosing any legal ground of opposition and as being an abuse of the process of the court;
- (b) the specially indorsed writ of summons based on the aforesaid notice and reasons of opposition struck out as not disclosing a cause of action and as bad in law.

The summons came on for hearing and it was by consent ordered that the affidavit filed by the defendants in support of the summons be treated as a pleading in the action and that the hearing of the action should proceed thereon (with leave to defend granted) and that there should be no order as to the costs of the proceedings by way of summons.

At the hearing of the action consequent upon that order it was agreed by counsel for the defendants that in action No. 815 of 1961, Demerara, referred to in paragraph 4 of the reasons of opposition, it had been conceded that certain trespasses had been committed by the defendants on the plaintiffs' property, liability for these trespasses being disputed only as to the quantum of damages to be awarded the plaintiffs.

The substantial point for determination is whether the plaintiffs can found these opposition proceedings on liability for tort admitted in legal proceedings before a court of competent jurisdiction the damages therefor not having been quantified at the time of entry of opposition.

By the Civil Law of British Guiana Ordinance, 1916 (No. 15 of 1916) it was provided “that the law and practice relating to the right of opposition in the case of both transports and mortgages shall be the law and practice now administered in such matters by the Supreme Court of British Guiana.” That enactment came into operation on 1st January, 1917, and the provision in question now appears in proviso (a) to s. 3 (D) of the Civil Law of British Guiana Ordinance, Cap. 2. As has been observed by the learned author of *A TREATISE ON*

THE LAW OF IMMOVABLE PROPERTY IN BRITISH GUIANA (DUKE) at p. 13, Chapter VI, there has never been any statutory enactment defining what constitutes a "right to oppose" and so the courts have had to frame their decisions on the common law of the Colony—Roman-Dutch law.

It is conceded that a person may oppose where he has *dominium* in the *res* itself or some legal and equitable right therein. It is also conceded that creditors may oppose if they have a liquidated demand or a claim of such a nature that it can properly be made the subject matter of a specially indorsed writ. Counsel for the plaintiffs has referred me to the judgment of STAFFORD, J., (ag.), in *da Silva v. Sukraj*, 1942 L.R.B.G. 43, at pp. 52, 53, where reference is made to opposition proceedings which succeeded in respect of claims in tort—

"In the Minutes of the Supreme Court for the years 1855 and 1856, one finds the first instance, the three cases of *Hector John v. Adam Rankin*. In action No. 6, the plaintiff, on the 28th November 1855, instituted an action against the defendant for three acts of malicious prosecution and for one act of conversion, and claimed damages, which in those days were always for a named sum, in respect of occurrences alleged to have taken place at the defendant's Pln. Bladen Hall, East Coast, Demerara. While the above action was pending, the defendant on the 15th December, 1855, advertised transport, subject to a mortgage, of Pln. Maria Johanna *cum annexis*, Essequebo, and the plaintiff opposed this transport on the 28th December, on the ground of his claim for damages for tort pending as aforesaid, alleging the defendant's inability to transport until such claim were secured. Thereafter the plaintiff instituted an action, No. 9, in pursuance of his said opposition. The defendant again advertised transport of Maria Johanna, but not subject to mortgage, rather there was an advertisement of a mortgage in his favour by the transportee, on the 12th January, 1856. The plaintiff again opposed on the 18th January, and instituted another action to establish this opposition, and in respect of the same claim for damages. Appearances were entered in all three actions, and on their coming on for hearing on the 7th July, 1856, there are minutes to the effect that 'evidence in action No. 6 should be considered evidence in Nos. 9 and 10.' After a contested trial, judgment in No. 6 was delivered on the 26th July 1856 in favour of the plaintiff for damages totalling \$126.00 on all the four causes of action. Thereafter appear the minutes of the same date in Nos. 9 and 10:—'Both the plaintiff's and defendant's counsel have declared that a sentence in this case must follow such sentence as might be given in cause No. 6. The sentence in No. 6 being in favour of the plaintiff is sufficient ground for the sentence being in his favour and none other need be assigned.' The court (ARRINDELL, C.J., BEETE and ALEXANDER, JJ.) then passed formal sentences, or orders as they would be called to-day in causes 9 and 10, decreeing the oppositions just, legal and well-founded, and interdicting the defendant from passing the aforementioned transports, until he had paid or secured the amount of the judgment aforementioned. One can hardly imagine that Chief Justice ARRINDELL (who had

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himself practised at the bar in British Guiana, as he recorded in a report to the Privy Council in *re the Appeal of Forte et al*—Minutes of the Supreme Court of 5th December 1853) and his two puisnes, together with counsel engaged, a total of five lawyers, would all concur in a sentence unfounded in law or practice; and one must conclude that at that date both the law and the practice recognised oppositions to transports of unliquidated claims, even for torts.

But *John v. Rankin* does not stand alone. In *Gomes v. Gomes and de Govia*, recorded in the Minutes of the Inferior Court of Civil Justice, 1st September, 1877, HAMPDEN KING, Senior Puisne Judge, declared an opposition on foot of a claim for \$240 damages for trespass to land just, legal, and well founded, gave judgment for \$160 damages on the adjoined claim in trespass and condemned the defendant to pay the same or give security ‘as prayed.’ *Watson v. Sproston orig. defendant, and Little and Drysdale, co-defendants*, Supreme Court, 8th May 1872, is another instance of an opposition to two mortgages on the ground of an unliquidated claim for accounts joined to an interest in the property—that the original defendant was trustee of the said property on behalf of the plaintiff. This claim was unsuccessful, but on other grounds. It is possible that search among the records of both the Supreme Court and the Inferior Court of Civil Justice would disclose other similar proceedings. It is a matter for regret that these judgments were not drawn to the attention of Sir DAVID CHALMERS and his Court.”

STAFFORD, J., (ag.) observed (at p. 46) that the two judgments which have had the greatest effect upon the law and procedure in oppositions to voluntary alienations and encumbrances were those delivered by CHALMERS, C.J., in *Adm. Gen., re da Costa v. Willems*, (1892) 2 L.R.B.G. 180 (in which ATKINSON and SHERIFF, JJ., concurred), and in *Hogg v. Butt*, (1893) 3 L.R.B.G. (N.S.) 88, (in which SHERIFF and NICHOL, JJ., concurred). In the *Willems* case it was held that opposition to a mortgage of immovable property did not lie in respect of an unascertained claim for damages for alleged torts by the owner of the property. In the *Butt* case it was held that a simple contract creditor can oppose a voluntary alienation of encumbrance of his debtor’s property provided that the creditor’s claim is not contingent or uncertain. STAFFORD, J., while observing that *John v. Rankin* and *Gomes v. Gomes & de Govia* were not drawn to the attention of the Court in *Willems’* case and in *Butt’s* case conceded (at p. 53) that after the judgments in *Willems’* and *Butt’s* cases no oppositions to transports or mortgages on foot of unliquidated claims were successful. STAFFORD, J., also observed that

“in consequence, we have today the ridiculous anomaly of a claimant for 5 cents, if his claim be ‘liquidated,’ having the meagre right to enter opposition to the alienation of property no matter what its value, while one, whose claim may be both genuine and vast, has, if his claim be for an unliquidated amount, and whether in contract or in tort, to stand by and see the proposed defendant divest himself of all immovable property, and not to say his movable property, in preparation for defending the claimant’s suit.”

It may be observed that in so far as the latter portion of STAFFORD, J.'s observation is concerned the English litigant is in no better position. In so far as the question of liquidated claims is concerned the situation can be altered by the legislature placing a lower limit on the amount for which opposition can be made. Further, the opposition rules provide for a deposit in the Registry of the amount claimed with an amount for costs pending the outcome of the proceedings in which event the conveyance may proceed.

Counsel for the plaintiffs has not urged that there exists today a right of opposition in respect of claims in tort where liability is not admitted by the defendant. He submits, however, that where liability in tort is admitted in legal proceedings before a court of competent jurisdiction (as it has been in action No. 815 of 1961 Demerara) though the amount of damages has not been quantified, a right of opposition exists.

In *Ferreira v. Cabral*, 1923 L.R.B.G. 133, the appellant Ferreira had brought a claim by way of opposition against the respondent Cabral to restrain him from passing transport of certain immovable property on the ground that the respondent's testator was indebted to the appellant and others. The trial judge dismissed the appellant's claim. On appeal to the West Indian Court of Appeal it is stated in the headnote of the report that at the close of the arguments for the appellant it was submitted on behalf of the respondent that there was no necessity to consider the points raised by the appellant because the action had been misconceived for the reason that the claim involved the taking of accounts and that it was a fixed principle governing actions by way of opposition that, if founded on a money claim, they must be in respect of a liquidated sum. The judgment of the West Indian Court of Appeal had this to say (at p. 134)—

“No action in opposition can succeed which is not founded on a liquidated claim, so that if the opposer has to ask for an account to be taken in order to establish what is due to him he cannot successfully oppose. Inasmuch therefore as the plaintiffs in the case allege that the \$3,000 was given to Augustinho Ferreira by their mother to invest, it is clear that an account would have first to be taken to find out whether in the course of investment the capital sum had been increased or decreased before they could found their action. This has not been done and the first ground for opposition therefore fails.”

In *Andrew v. Parratt*, G.J. 3rd December, 1913, RAYNER, C.J., EARNSHAW and HILL, JJ., defined “*liquidated claim*” as a claim in which the amount involved is a matter of calculation from fixed data so that any two persons working out the amount would arrive at the same amount.

Fernandes v. Gomes and Walcott, No. 15 of 1921, referred to in DUKE'S TREATISE at p. 16, was an opposition suit in respect of a claim for goods sold and delivered where the prices were not agreed upon. It was submitted on behalf of the defendant that the claim was not of

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a liquidated nature since the prices were not agreed upon. It is stated by the learned author of Duke (who appeared as counsel for the plaintiff) that as the claim could have been specially indorsed it was properly made the subject of opposition proceedings.

In *Ajubun v. Amir*, (1931-37) L.R.B.G. 348, an opposition action founded on a claim in detinue, the trial judge SAVARY, J., himself raised the question whether the action was sustainable in view of the nature of the claim on which it was based. After considering certain authorities starting from *Willems'* case and including *Ferreira v. Cabral*, 1923 L.R.B.G. 133, SAVARY, J., said that in his opinion the law and practice of the courts seem well settled and recognise only two categories of claims as founding oppositions: (a) claims in or to the property about to be conveyed, mortgaged or leased, (b) claims by simple contract creditors against the owner of the property. SAVARY, J., also stated that the right of opposition was in his opinion rather a matter of substantive law than a rule of practice and is based on well defined principles and that any extension of those principles must be brought about by legislation.

Counsel for the plaintiffs has contended that the cases of *John v. Rankin*, heard before three judges of the Supreme Court of British Guiana even though sitting in its original jurisdiction, have been decided by a court of co-ordinate jurisdiction with the West Indian Court of Appeal in *Ferreira v. Cabral*. It is not necessary for me to decide whether or not that contention is sound for were I to consider myself free to follow one or the other I would follow *Ferreira v. Cabral*. One can readily see what chaos and abuse of the process of the court is likely to arise if *John v. Rankin* were to be followed on the point now in issue. However, it seems to me that, although there have been cases in the past where opposition actions founded on claims in tort have succeeded, the law and practice in respect of opposition actions have at least since *Willems'* case in 1892 been well settled and is as stated by SAVARY, J., in *Ajubun v. Amir*, (1931-1937) L.R.B.G. 348. Even though liability in tort may be admitted but the amount of damages has not been quantified, the plaintiffs can be in no better position than the appellant Ferreira was in his opposition suit against Cabral in the case of *Ferreira v. Cabral*, 1923 L.R.B.G. 133, referred to above. In my opinion it matters not whether liability is admitted or not so long as the damages remain to be quantified.

The plaintiffs' opposition is not well founded and must fail.

One other matter remains to be mentioned. Counsel for the defendants has contended that in any event the plaintiffs' action must fail because contrary to r. 7 of the Rules of Court (Business of the Deeds Registry) he has failed to bring a claim to enforce his accrued claim for damages.

In *Fernandes v. Gomes and Walcott*, No. 308 of 1920 and No. 15 of 1921 Demerara (referred to at p. 25 of DUKE'S TREATISE) MAJOR, C.J., made an order for consolidation of the two actions, one brought on a specially indorsed writ where leave to defend was granted, and

the other opposition proceedings in respect of the same claim. An examination of the pleadings filed in the latter action discloses that (contrary to what DUKE in his TREATISE has stated on p. 25) it was sought therein to enforce that claim. In the present case, however, the opposition proceedings were brought after the trespass action had been fully heard and decision reserved. In such circumstances I do not think that it was necessary for the plaintiffs in the present opposition action to seek to enforce their claim for damages for trespass.

The plaintiffs' claim is dismissed with costs to be taxed certified fit for counsel. The opposition entered by the plaintiffs is declared unjust, illegal and not well founded.

Judgment for the defendants.

Solicitors: *B. Fulwell* (for the plaintiffs); *Dabi Dial* (for the defendants).

JONAS v. MAHADEO

[Federal Supreme Court (Gomes, C.J., Lewis and Marnan, JJ.) February 23, 1962.]

Practice and procedure—Order for security for costs—Failure to provide security within stipulated time—Application thereafter made for extension of time—No jurisdiction to grant extension—F.S.C. Rules, 1959, O. 2, r. 20 (3).

The applicants failed to comply with an order of court requiring them to lodge security for costs in respect of their appeal. In consequence their appeal was ordered dismissed in accordance with Order 2, r. 20 (3), of the Federal Supreme Court (Appeals from British Guiana) Rules, 1959, which provides that an order for security for costs shall direct that in default of the security being given within the time limited therein, or any extension thereof, the appeal shall stand dismissed with costs. After the time stipulated by the order expired, the applicants applied for an extension of time to enable them to tender the required security.

Held: Order 2, r. 20 (3), is specific in its terms, and in the absence of any authority in the rule to reinstate an appeal, the court has no jurisdiction to do so.

Application dismissed.

C. *Weithers* for the applicants.

A. W. E. *Roberts* for the respondent.

GOMES, C.J.: In this matter an order was made on the 30th day of January, 1962, ordering the defendants in the action (the present applicants) to deposit with the Registrar security in the sum of one thousand dollars within fourteen days from the date of the order. On the 13th day of February, 1962, that is to say, the day before the time had expired, a transport was tendered on behalf of the proposed appellants to the Registrar by way of security, but, on the Registrar observing that there was an existing mortgage on the property mentioned in the transport, he refused to accept it.

Having regard to the fact that that was the day on which the applicants had to comply with the order, one would have thought that on that day an application would have been filed for an extension of time in view of the then difficulty the appellants were experiencing in raising the security. But that was not done. A letter appears to have been written to the Registrar to which the Registrar replied. However, that is purely a historical observation as the appellants were then out of time in complying with the order. There is now before the court an application for an extension of time of fourteen days in order to tender the required security.

After the time expired an order was drawn up and entered in the matter of the application for security on the 1st day of February and the concluding portion of the order states:—

“ AND THE COURT DOTH ORDER that in default of the (defendants) appellants giving such security or making such lodgment as aforesaid within the time aforesaid the said appeal do stand dismissed with costs out of this court without further order.”

That is in compliance with sub-rule (3) of rule 20 of Order II of the Federal Supreme Court (Appeals from British Guiana) Rules, 1959, which provides that an order for security for costs shall direct that in default of the security being given within the time limited therein, or any extension thereof, the appeal shall stand dismissed with costs.

It appears to me that the question that arises on this appeal is, "Has this court any power or authority to reinstate this appeal?", because it would appear that at the moment there is nothing before the court except the application of the applicant.

In my view, sub-rule (3) of rule 20 is rather specific in its terms in that the rule states what is to be done where there is a failure to lodge security. It does not provide that the judge shall do this or that, nor does it confer any discretion on a judge; but it states what should happen to the appeal if there is a failure to lodge necessary security.

In the course of argument the court directed the attention of counsel for the applicants to the provisions of rule 15 (3) and rule 24 of Order II. The former, that is to say, sub-rule (3) of rule 15, provides for the case where an appeal has been dismissed for default in filing records and documents and it confers a discretion on the court where good and sufficient cause is shown to restore the appeal. Similarly, under rule 24, where an appeal may be struck out owing to non-appearance of the appellant, the court is empowered on application if it thinks fit, and on such terms as to costs as it deems just, to direct that the appeal be re-entered.

Reference may also be made to the preceding rule—rule 23—which provides that where an appellant fails to appear when his appeal is called the appeal may be struck out or dismissed with or without costs. It is to be observed that the following rule, that is to say, rule 24, only deals with the case where the appeal is struck out and not where it is dismissed.

The view that I take of rule 15 (3) and rule 24 is that they give definite indications that the rule-making authority gave full consideration to the cases dealt with in those rules and there is no reason to believe that it was purely by lack of thought or accident that the rule-making authority failed to make similar provision in a case where an appeal is directed to stand dismissed in the circumstances mentioned in rule 20. Indeed, I think that the observations I have just made support the view which I expressed earlier that sub-rule (3) of rule 20 of Order II is specific in its terms and that in the absence of any authority in the rule to reinstate an appeal this court has no jurisdiction to do so. For those reasons I would dismiss this application with costs.

LEWIS, J.: I agree and do not think it necessary to add to what has been said.

MARNAN, J.: I also agree.

Application dismissed.

R. v. GOMES

[Supreme Court—Demerara Assizes (Bollers, J.) December 12, 13, 1962.]

Criminal law—Evidence—Evidence available at preliminary enquiry but not called—Notice given to defence of intention to call such evidence at the trial—Admissibility of such evidence.

In a trial for rape the defence was given one week's notice of the intention of the prosecution to lead evidence which, though available to the prosecution at the preliminary enquiry, was not called there. On objection by the defence to the admissibility of this evidence—

Held: (i) an application at the trial to lead evidence which though available to the prosecution was not called at the preliminary enquiry, will not be granted save in cases where for good reason the witness could not be produced at the preliminary enquiry, in which case on notice being given that the prosecution intend to rely on this evidence, it might be led at the trial. In other cases, additional evidence may be led only where it was obtained after the close of the preliminary enquiry and after due notice to the defence;

(ii) where evidence, though available, was erroneously not led at the preliminary enquiry, the Director of Public Prosecutions may under s. 77 of the Criminal Law (Procedure) Ordinance, Cap. 11, cause the preliminary enquiry to be re-opened for the purpose of taking such evidence.

Objection upheld.

J. C. Gonsalves-Sabola, Crown Counsel, for the Crown.

J. O. F. Haynes, Q.C., for the defence.

BOLLERS, J.: In this indictment for rape in so far as the case against the accused Gomes was concerned, the prosecution sought to adduce evidence of similar facts to which objection was taken by the defence. In dealing with the issue it is not necessary for me to state

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the details of the evidence proposed to be led; it is sufficient for me to say that the new and additional evidence was, of course, highly prejudicial.

The preliminary investigation of this matter took place on the following days in August and September, 1962: August 29 and 30, and September 10, 11, 12, 13, 14, 19, 20, culminating in the committal of the accused on September 21, 1962, and the statement of the witness whose evidence the prosecution proposed to adduce was dated August 8, 1962, and referred to events alleged to have taken place some twelve or fifteen months before the date of the alleged offence. It was conceded then in court on both sides that at the time of the preliminary inquiry in this matter the prosecution was in possession of the statement of the witness and that the witness was available for the purpose of giving the necessary evidence. This important point was therefore argued on that basis and proceeded on the footing that the witness was available to the prosecution at the time of the preliminary inquiry.

It was submitted by counsel for the defence that the evidence which the prosecution proposed to lead was inadmissible by reason of the fact that it was available to the prosecution at the time of the preliminary inquiry and they failed to make use of it and as a result it would be contrary to the notions and principles of British justice and fair play if the prosecution were allowed at this late stage to introduce this evidence, the main effect of which would be to cause embarrassment and surprise to the accused person, who, if he denied the incident, would have to commence searching for witnesses and other material in setting up the defence of alibi. He argued that if this evidence were led, it would defeat the very object of the preliminary inquiry, the purpose of which was to make the accused aware of the case he was called upon to meet. Counsel cited *R. v. Connor* (1845), 5 L.T.O.S. 433; *R. v. Ward* (1848), 2 Car & Kir. 759; *R. v. Gleenslade* (1870), 11 Cox C.C. 412; and *R. v. Flannagan and Higgins* 1884, 15 Cox C.C. 403.

Counsel for the Crown, on the other hand, urged that there could be no element of surprise or embarrassment to the defence as notice in writing of the evidence and a copy of the statement of the witness had been served on the prisoner at least one week before the date it was sought to be adduced, and even if there were, the position could be cured by granting the necessary adjournment of the trial.

Under s. 151 (1) of the Criminal Law (Procedure) Ordinance, Cap. 11, provision is made for the adjournment of the trial in a case where a witness who has not made any deposition may give evidence at the trial on the serving of a notice to the other side in order to prevent the element of surprise. It reads as follows:

“(1) If the court is of opinion that the accused person is taken by surprise, in a manner likely to be prejudicial to his defence, by the production on behalf of the Crown of a witness who has not made any deposition, and of the intention to produce

whom the accused has not had sufficient notice, or if the court is of opinion that the Crown is entitled to produce rebutting evidence, the court may, on the application of the accused person, or of the Attorney-General, as the case may be, adjourn the further trial of the cause, or discharge the jury from giving a verdict and postpone the trial.”

It is clear that this section does not create the right in the prosecution to lead additional or further evidence at the trial of an accused person where that evidence does not appear on the depositions. The section assumes and recognizes the existence of that right but sets out the procedure to be adopted where the right is exercised by the Crown and emphasizes the importance of an adjournment to avoid the element of surprise. This right to lead further or additional evidence is not to be found in any section of our Criminal Law (Procedure) Ordinance, and indeed, as stated by Lord GODDARD in *R. v. London Quarter Sessions (Chairman), Ex p. Downes*, [1953] 2 All E.R. 750, there is no statutory authority for leading new and additional evidence but such a right exists at common law founded on practice. Lord DEVLIN in his book, *THE CRIMINAL PROSECUTION IN ENGLAND*, at p. 93, has stated that there is no case which lays down the rule that such evidence can be led on notice in writing being given but the practice is unquestioned and there is no doubt about it.

Under s. 16 of the Criminal Law (Procedure) Ordinance, Cap. 11, the practice and procedure of the Supreme Court of this Colony shall be as nearly as possible the same as that for the time being in force for the criminal matters in the High Court of Justice in England. The right, therefore, to lead further and additional evidence on notice in writing at a trial in British Guiana exists in common practice and is a right at common law. What we are concerned with here, however, is whether evidence which was available to the prosecution at the time of the preliminary inquiry can now be properly led at the trial. In *R. v. Connor* (1845), 5 L.T.O.S. 433, the defence complained that since the committal of the prisoner, a great body of additional evidence had apparently been produced to the Grand Jury about which they knew nothing and on which, no doubt, a bill had been found by the Grand Jury. They argued that if this were permitted, the prosecution would be enabled to keep back the most important witnesses and conceal their evidence until the trial. The judge held that he had no power, in the circumstances, to interfere and pointed out that it was very desirable that the whole evidence should be supplied to the prisoner *but he did not understand that there was any complaint made in the particular case of any undue withholding of evidence before the magistrates*. He stressed that it was then the ordinary case of fresh evidence being adduced before the Grand Jury, returns of which cannot of course be made by the magistrates. Indeed, the head-note to the case reads as follows:

“Where additional evidence has been obtained on the part of the prosecution, after the return of the depositions and committal of the prisoner, he is not entitled either to copies of such evidence or a list of the witnesses. He may, however, look at the bill in court.”

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It is obvious, therefore, that this case deals with the right of the prosecution to lead further evidence which has come to their knowledge after the committal of the prisoner. *R. v. Ward* (1848), 2 Car. & Kir. 759, is cited in ARCHBOLD (34th Edn.), at para. 1375, as authority for the proposition that witnesses may be called for the Crown, whose depositions were not taken before the committing magistrate and whose names were not on the back of the indictment, provided that notice of intention to call such additional witnesses, with a copy of the evidence which it is proposed that they should give, ought to be given to the prisoner and sent to the court. When carefully examined this case establishes no such proposition. The prisoner was indicted for burglary and one of the witnesses who gave evidence before the magistrate and signed the deposition gave further evidence which did not appear in his deposition. Counsel for the defence allowed the evidence to go in without objecting to it, but in his final address to the jury he complained that by this means the information which the Indictable offences Act, 1848 [U.K.], intended to be given to the prisoner was being withheld and the object of the Act defeated. The learned judge, in summing up to the jury, expressed the opinion that the depositions were not taken for the purpose of affording information to the prisoner but because of the possibility that a witness might be unable to attend through death or otherwise, there should not by reason of this be a failure of justice. He pointed out that until a few years ago the prisoner had no right even to see the depositions but within recent times it was thought right that he should see them in order to know why he was committed and therefore *the prosecution had the right to give additional evidence discovered subsequent to the taking of the deposition* but if, of course, the prosecution was going to exercise that right it was only fair that the prisoner's counsel should be apprised of the character of such evidence. Here again, it should be stressed that this case deals with evidence discovered after the date of committal.

In *R. v. Stiginani* (1867), 10 Cox C.C. 552, at the trial of the accused who was indicted for the offence of "wounding with intent to murder", after all the witnesses for the prosecution who were produced before the magistrate had been examined, a new witness was tendered whose deposition had never been taken and in respect of whom the prosecution had given no notice to the prisoner that it was their intention to call him. Objection was taken to the witness giving evidence. WILLES, J., ruled that the evidence tendered would not be admitted. He held that the object for which the legislature required depositions to be taken was that the person charged might know what was going to be proved against him, and who was going to prove it, and thus might be able, if necessary, to make inquiries as to the character of the witnesses on the part of the prosecution, or prepare to defend himself in any way he thought fit. He expressed the opinion that the object of the legislature would be entirely defeated if witnesses not examined before a magistrate were allowed to be produced at the trial without any previous intimation to the prisoner either of their names or of what they were going to prove. As far as he was concerned, he would never permit the reception in criminal cases of evidence of which the prisoner had no previous intimation.

In this case it is not clear whether the evidence of the witness sought to be adduced was available to the prosecution before the magistrate or not, and the evidence was merely refused on the ground that no notice had been given of it.

Three years later, in *R. v. Greenslade* (1870), 11 Cox C.C. 412, this same position arose where the witness had not given evidence before the magistrate and notice of his evidence had not been given to the prisoner or his attorney. The judge referred to *Stiginani's* case, but, however, overruled the objection and admitted the evidence. He ruled that evidence of this sort must be received but that notice of its production ought to be given to the defence and if not given might be the subject of a strong comment. In giving his judgment the learned judge said that he had consulted WILLES, J., in reference to *Stiginani's* case, and he had his authority for saying that his judgment in that case was incorrectly reported. In a note to this case WILLES, J., is reported as saying that he had been erroneously reported as ruling the evidence not to be admissible in point of law and admitting that evidence of which notice has not been given is admissible. He went on to say, however [(1870, 11 Cox C.C. 413]:

“ . . . but the practice when I came to the Bench was, and it is, I think, a proper practice, that the names and a concise statement of the proofs of the *witness who had turned up since the committal*, and more especially if they speak to new facts, ought to be supplied to the Judge in time to charge the Grand Jury, and at all events to the prisoner or his counsel.”

Here again, the judge speaks of the practice of admitting the evidence of witnesses obtained since the committal and makes no mention of witnesses whose evidence was available to the prosecution at the time of the proceedings before the magistrate. Indeed, I can find no case dealing with such a position, and, to my mind, the answer to the question seems to lie in the significant fact of this lack of authority on the point, that is, it would be contrary to British principles of justice and fair play that such evidence, if available, should be deliberately withheld and produced at the trial which would only result in embarrassment to the accused person.

Lord DEVLIN in CRIMINAL PROSECUTION IN ENGLAND has pointed out that the purpose of the inquiry which is conducted before the justices is to determine whether a person should be made to stand his trial, and if he should, whether he should be kept in custody meanwhile. In his view, the first duty of the magistrates is to see that there is sufficient evidence against the accused, and they are called upon to inquire whether there is such evidence, that if it be uncontradicted at the trial, a reasonably minded jury may convict upon it. In other words, Lord DEVLIN is saying that the magistrates are there to see whether a *prima facie* case has been made out by the prosecution. With great respect to the learned author, I think that he might have added that the inquiry also serves the dual purpose of making the prisoner aware of the case he has to meet and giving him the opportunity to probe it and counter it. The accused Gomes was denied that opportunity in respect of the available evidence. Lord DEVLIN, in my

view, places the matter beyond doubt when he states at p. 93 how the prosecution can be compelled to make a complete disclosure of the whole of its case:

“How does the compulsion operate? Would not the advocate for the prosecution, if as tactically minded as his colleague for the defence, want to retain at least as much as he could of the element of surprise? Would it not be his object to disclose only as much of his evidence as was necessary to secure a committal and to try to keep some cards up his sleeve? The answer is that he is not permitted to do that. He is not obliged at the trial to confine his case only to the material which he put before the magistrates because he may obtain other material *afterwards*: but if he does so, he must disclose it by serving on the defence a notice setting out in the form of a statement by the witness the additional evidence he proposes to call. In this way the defence get to know the whole of the material that will be put against them.”

The learned author speaks of evidence obtained by the prosecutor afterwards and not before or at the time of committal. In such a case the prosecutor must give notice of such evidence to the prisoner and disclose his whole case.

In *R. v. Flannagan and Higgins* (1884), 15 Cox C.C. 403, counsel for the prosecution, before he began to examine his witnesses, intimated that he proposed to begin with some questions on a subject which did appear on the depositions and which he had only been able to communicate to the defence that morning. The judge said that if the prosecution pressed the evidence, he could not exclude it, but if the defence asked for an adjournment in order to prepare the new evidence he would grant it. The head-note to this case is most interesting. It speaks of the production of fresh evidence on behalf of the prosecution (not known, or forthcoming, at the preliminary investigation, and not, previously to the trial, communicated to the other side), which may be ground for a postponement of the trial if it appears necessary to justice. To my mind, the words in parenthesis explain the meaning of new, fresh and additional evidence. The evidence which the prosecution seek to lead in this case and which was available to them at the time of the preliminary inquiry was, in reality, not new or additional evidence, but stale evidence based on a statement in their possession at least three weeks before the preliminary inquiry and as such inadmissible.

I must not be understood as having decided that in all cases where the prosecution may be in possession of material or a statement from a witness at a preliminary inquiry, if they fail to make use of such material they cannot properly do so at the trial. To my mind the answer as to whether they would be prevented from so doing at the trial depends upon the availability of the material or the evidence. It may be that they may be in possession of a statement but the witness at the relevant time may be abroad, or his whereabouts unknown, or too ill to travel, in which case on notice being given that they intend to rely on this evidence it might be led at the

trial. See *R. v. Wright* (1934), 78 Sol. Jo. 879, where it was in dispute whether a certain document was written by the prisoner and the prosecution at the trial tendered specimens of his handwriting without specific notice being given but there was evidence before the magistrate which showed plainly that they intended to compare the handwriting on the document with the specimen of the handwriting of the prisoner. In those circumstances the Court of Criminal Appeal ruled that no injustice was done and it was a mere grievance that could be corrected by adjournment.

The rule as to exclusion of available evidence would not operate adversely to the prosecution where a prosecutor by a careless omission fails to lead certain evidence, for under s. 77 of the Criminal Law (Procedure) Ordinance, Cap. 11, the Director of Public Prosecutions (formerly the Attorney-General) may, if he thinks fit, re-open the enquiry for the purpose of taking any evidence or further evidence. Under s. 76 (1) of the Ordinance, that right is given both to the prosecutor and the accused person, and the deposition of the witness is to be treated as a deposition taken upon the preliminary inquiry.

I have come to the conclusion, therefore, that the contention of counsel for the accused is sound and it would be wrong, unfair and contrary to the principles of British justice and fair play to admit this evidence sought to be introduced by the prosecution at this stage, even though notice in writing of it was served on the accused person one week before the application for leave to lead the evidence was made, and I rule that they are not competent so to do. In any event, even if my opinion is wrong that this evidence is not admissible, in the exercise of my discretion I would exclude it as in the circumstances I would consider that its prejudicial effect at this late stage would greatly outweigh its probative value.

Objection allowed.

R. v. TAYLOR AND EVENING POST, *ex parte* D.P.P.

[Supreme Court (Date, Miller and Khan, JJ.) December 3, 17, 18, 1962.]

Contempt of court—Pending criminal trial—Publication in press—Whether necessary to prove intention to prejudice fair trial.

As a result of the publication of an article in the Evening Post the trial of a criminal case was stopped. The D.P.P. then applied for and obtained an order *nisi* calling upon the newspaper company and its editor to show cause why writs of attachment should not issue against them for contempt of court.

Held: it is not necessary for the applicant to allege or prove that there was on the part of anyone concerned an intention to prejudice the fair trial of the criminal case. The mischief consists not in some attitude or supposed attitude to the court itself, but in the prejudice to the accused persons. It is not something which affects the status of the court but something which may profoundly affect the rights of citizens.

Application granted.

G. S. S. Gillette, Director of Public Prosecutions.

L. A. Luckhoo, Q.C., for the respondent.

Judgment of the Court: On 14th November, 1962, the hearing of a certain criminal case was commenced before a judge and jury in the Supreme Court of this Colony. That same afternoon an article appeared in the “Evening Post” newspaper as a result of which the trial was stopped on the morning of the 15th November and postponed to the January, 1963, assizes.

The respondents, Peter Taylor and Co. Ltd., are the publishers and proprietors of the “Evening Post”; the respondent Peter Taylor is a director of the company; it was he who, *qua* director, signed the copy of the “Evening Post” of the 14th November, 1962, which was delivered at the office of the Premier in accordance with the provisions of the Newspapers Ordinance, Cap. 130.

On 3rd December, 1962, an order *nisi* was made at the instance of the Director of Public Prosecutions calling upon the respondents to show cause why writs of attachment should not issue against them for contempt of court in publishing and causing to be published the aforementioned article. Certified copies of the order were served on the respondents who filed an affidavit in which they reserved the right to raise legal objections but, subject thereto, expressed their profound regret and offered a full and unqualified apology to the court should the court hold that the publication in question constitutes a contempt of court.

When the respondents appeared before us to show cause yesterday certain procedural questions were raised by their counsel. Upon his attention being attracted to certain decided cases and rules, however, he promptly stated (and in our opinion quite rightly) that he did not wish to pursue the preliminary objections and that the respon-

dents would waive any rights they might have to service on them of the affidavits and exhibits filed by the Crown Solicitor if the court took the view that the article in question amounted to contempt of court.

In the present case it is not alleged that there was on the part of anyone concerned an intention to prejudice the fair trial of any of the accused persons at the hearing of the case which started on 14th November, 1962; it is not necessary that such intention should be alleged or proved: what is said is that the publication of the article was calculated to obstruct, interfere with or improperly prejudice the administration of justice. As was pointed out by Lord HEWART, C.J., in *R. v. Editor of "Daily Mirror"* (1927), 28 Cox C.C. 325, the phrase "contempt of court" is, in relation to the kind of subject with which we are now concerned, a little misleading. The mischief consists not in some attitude or supposed attitude to the court itself, but in the prejudice to accused persons. It is not something which affects the status of the court, but something which may profoundly affect the rights of citizens. In the words of Lord HARDWICKE, L.C., "There cannot be anything of greater consequence than to keep the streams of justice clear and pure." This cannot be achieved if matter is published which tends to prejudice mankind against persons while their causes are being heard.

For obvious reasons it is undesirable that further publicity should be given to the contents of the article in question; suffice it to say that we have carefully examined the article and are satisfied that it does amount to contempt of court of the kind already mentioned.

In mitigation, counsel for the respondents has urged the court to take into consideration, in addition to the affidavit of the respondents, an apology published on the front page of the "Evening Post" of 20th November, 1962, and a statutory declaration by Victor Hall, the reporter, who admits to having drafted and submitted the offending paragraph of the article in question. In his statutory declaration Hall states that he had been reporting for the "Evening Post" for only nine months and adds:

"I made notes from the opening address by the Crown Prosecutor and wrote the same for publication in the said Evening Post on sale on the same day. As an introduction to the said story I wrote a paragraph utilising facts known to me in connection with recent criminal proceedings without realising the implication of introducing such facts into the instant report to which the Crown Prosecutor had made no reference.

"I deeply regret having written the said introduction and story and would humbly state that I did so without any intention of obstructing, interfering with, or improperly prejudicing the administration of justice or the proceedings before the court. In my ignorance and inexperience I did not think I was doing wrong in making statements of facts and now that my error has been pointed out I unreservedly and humbly offer my deep, sincere and profound apology."

R. v. TAYLOR, *ex parte* D.P.P.

It is hardly necessary for us to point out that the employment of inexperienced reporters renders it all the more necessary that special care should be exercised by those who publish newspapers.

Nevertheless the conduct of the respondents since the publication of the article, including their contrition expressed in court through their counsel, will, as is always done, be taken into consideration; so also will the fact that this is, we believe, the first contempt of this kind to be brought before this court. Should offences occur in the future similar leniency may not be extended.

The order of the court is that the respondent Peter Taylor and Co. Ltd. do pay to the Crown a fine of \$500 within seven days or a writ will issue. They must also pay the taxed costs of these proceedings. Having regard to the circumstances as disclosed in the affidavits, we agree with the Director of Public Prosecutions that there is no need to make a separate order against the respondent Peter Taylor.

Order accordingly.

Solicitors: *S. M. A. Nasir*, Deputy Crown Solicitor (for the applicant); *L. Persaud* (for the respondents).

[END OF VOLUME]

REYNOLDS v. YARDE

[Federal Supreme Court (Gomes, C.J., Lewis and Marnan, JJ.) February 23, 1962].

Appeal—Full Court—Requirement for notice of appeal to be given within 14 days—Whether intervening Sundays should be excluded—Summary Jurisdiction (Appeals) Ordinance, Cap. 17, s. 4 (1) (b)—Interpretation Ordinance, Cap. 5, s. 5(1).

The applicant filed notice of appeal to the Full Court sixteen days after the pronouncement of the decision appealed from. Section 4 (1) (b) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, requires such a notice to be given within fourteen days. The Full Court dismissed the appeal as being out of time. On application for leave to appeal from this decision it was argued for the appellant that in computing the statutory period intervening Sundays should be excluded.

Held: the Sundays which intervened in the course of the statutory period were properly counted.

Application refused.

K. Prasad for the applicant.

J. C. Gonsalves-Sabola, Crown Counsel, for the respondent.

LEWIS, J.: This is an application for leave to appeal against a decision of the Full Court given on 13th December, 1961. When the appeal was called before the Full Court counsel for the respondent took a preliminary objection on the ground that the appellant had failed to comply with the provisions of s. 4 (1) (b) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, in that the notice of appeal was filed sixteen days after the pronouncement of the decision by the magistrate, whereas the Ordinance required that it be done within fourteen days. The Full Court, after hearing argument and a careful consideration of the matter, upheld the objection and dismissed the appeal. From that decision this appeal has been taken.

Only one matter arises for determination. Counsel for the applicant contends that having regard to the provisions of s. 5 (1) and the definitions of “days” and “day” in the Interpretation Ordinance, Cap. 5, the Sundays which intervened in the course of the running of the statutory time ought not to have been excluded and this appeal was accordingly filed in time. Those definitions are as follows: —

“Days” means clear days;

“day” means twenty-four hours to be reckoned *de momento in momentum*, unless a Sunday or public holiday intervenes, in which case the Sunday or holiday shall not be included in the computation of those hours.

Mr. Prasad has submitted that there is no contrary intention expressed in the Summary Jurisdiction Ordinance and that accordingly, in the interpretation of the expression “fourteen days” in the Summary Jurisdiction (Appeals) Ordinance, Sundays ought to be excluded.

I am unable to agree with that submission. Section 5 of the Interpretation Ordinance begins as follows: —

“In this Ordinance and in every Ordinance passed after the commencement of this Ordinance, and in every official document made or executed after the commencement of this Ordinance, unless the contrary intention appears—”

I agree with the submission of Mr. Gonsalves-Sabola, who appeared for the respondent, that where the Legislature expressly defines “days” and “day” it shows a clear intention that different meanings as assigned in those definitions should be attributed to those expressions. Therefore, it is not apt in the interpretation of those words to invoke the provisions of s. 2 of the same Ordinance which states that “words in the singular shall include the plural and words in the plural shall include the singular unless the contrary intention appears.” As Mr. Gonsalves-Sabola has pointed out the fact that the Legislature has seen fit to define both expressions is a clear indication that in interpreting the word “days” the definition of “day” is not to be taken into account. But more than that. In my view the expression “clear days,” which is not itself defined in this Ordinance, is a well-known expression with a well-known interpretation. I would refer to the definition as given in BURROWS’ WORDS AND PHRASES JUDICIALLY DEFINED, Vol. I, p. 446. There, referring to the case of *Armstrong v. Great Southern Gold Mining Company* (1911), 12 C.L.R. 382, *per* GRIFFITH, C.J., at p. 388, the learned author states:—

“the term ‘clear days’ may be regarded as a well-known term in law with a well-known interpretation which has existed for more than half a century. When reference is made to ‘clear days’ in a rule for the protection of another party, it is a minimum. When the rule is for the advantage of the party who is to take action, it may be a maximum. In either case it denotes a limit. When it is a minimum, two days, one before and after the period, are determined by it. But, when you talk of doing a thing within a period of a certain number of days, it is quite clear that the end of the last day is the furthest limit. It is impossible to say that a thing required to be done within seven days is done within seven days if done on the eighth day, and it is impossible to make any alteration of the limit by adding the word ‘clear’.”

This matter is not without some authority in this colony. The attention of the Court has been drawn by counsel on both sides to the case of *Seecharan v. Kuntie*, 1946 L.R.B.G. 287, in which a similar point arose. In that case it was held that although Sundays were in the Public Holidays Ordinance stated to be public holidays and *dies non*, yet in the computation of time under the Summary Jurisdiction (Appeals) Ordinance Sundays were not to be excluded.

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Mr. Prasad argued that the attention of the court in that case was not drawn to the definition of “day” in the Interpretation Ordinance. He said that that case was wrongly decided because it failed to take account of that definition. It is true that it does not appear from the report that the court gave consideration to the definition of “day,” but for the reason that I have already stated I do not think that the definition of “day” is relevant to the interpretation of “fourteen days” as expressed in the Summary Jurisdiction (Appeals) Ordinance.

In their reasons for their decision in the instant case, the Full Court referred to the case of *R. v. The Justices of Middlesex* (1843), 7 Jur. 396. In that case, at p. 397, WILLIAMS, J., delivering the judgment of the court in an appeal in which the interpretation of a similar expression was involved, said of the words “within six days after the cause of such complaint shall arise”—

“But the question which I have to determine arises upon the distinct language of the statute and upon that language how can I say that this notice was given within six days? It was indeed conceded that it was not; but it was argued that Sunday ought not to be reckoned in the computation. No authority is cited in support of this argument; and in the absence of such, I think that the plain words of the Act are not to be got rid of.”

If any further authority is needed I would only refer to the recent Ordinance No. 16 of 1960—the Interpretation (Amendment) Ordinance, 1960—which inserts after s. 9 of that Ordinance a new section, 9 A. It is only necessary to refer to the second subsection of that section:—

“Where by or under any Ordinance, any period of time dating from a given day, act, or event, is prescribed or allowed for any purpose, and the last day of any such period falls on a Sunday or public holiday, unless the contrary intention appears, the period shall include the next following day which is not a Sunday or public holiday.”

In my view, if the interpretation for which Mr. Prasad contends is right it would not have been necessary for the Legislature to pass this subsection. Clearly here it is being provided that although the period might, when computed according to the ordinary interpretation, end on a Sunday—in other words, a Sunday is included in the computation of the time—yet it will be a proper observance of the law if the act required to be done is done on the following day.

For these reasons I think that the decision of the Full Court is right, that the Sundays which intervened in the course were properly counted, and that this appeal should be dismissed.

GOMES, C.J.: I agree and would only add that I consider that the fourteen days mentioned in subs. 1 of s. 4 of Cap. 17 are consec-

utive days and that the definition of the term “day” is not relevant for that purpose. I agree with the judgment which has just been delivered and do not think that I can usefully add anything thereto. I would refuse this application.

MARNAN, J.: The appellant was convicted of fighting with another woman and fined twenty dollars by the learned magistrate. She appealed to the Full Court and on getting there was met by the preliminary objection that her notice of appeal was out of time. That was in fact the case, unless Sundays were to be treated as *dies non* for the purpose of computing the statutory fourteen days allowed for giving notice of appeal. It would indeed be a novel and extraordinary thing if that were the law in British Guiana having regard to the law elsewhere so far as I know it. I speak, of course, only of criminal law, but in that respect it is to be noted that the matter is stated briefly in *STONE’S JUSTICES’ MANUAL*, 1957 edition, at p. 543 as follows:—

“Where the statute says nothing about Sunday, the days mentioned mean consecutive days, including Sundays, which must therefore be counted.”

A number of decisions are cited in support of that statement of the law of which the most recent is *R. v. Grenville*, 21 Cr. App. Rep. 108. The headnote is as follows:—

“For the purpose of the statutory notice of appeal Sunday is not a *dies non*.”

That statement of the rule relating to notices of appeal in criminal cases where time is limited by statute, could scarcely be more clear or more concise. But it is contended on behalf of the appellant that by virtue of the definition of the word “day” in s. 5 of the Interpretation Ordinance of British Guiana a different meaning is to be attached to the word “days” in Cap. 17, namely, the Summary Jurisdiction (Appeals) Ordinance, s. 4 (1) (b).

I have nothing to add to what has already been said in relation to that matter and, in particular, as to the definition of the word “day” being irrelevant in these proceedings, since the word “days” is expressly defined. Moreover, if one comes to look *de bene esse* at the definition of the word “day” in s. 5, it is perfectly clear that “day” means anything but “clear day.”

The case of *Seecharan v. Kuntie* which has been referred to makes it clear, to my mind, that the law in British Guiana in this respect is the same as elsewhere. If the attention of the court was not drawn to the Interpretation Ordinance upon the hearing of that case, I think that was only because the argument based on the Interpretation Ordinance is misconceived, and was probably not advanced by counsel because it was a wrong argument, if indeed it occurred to anyone at all.

For these reasons I agree that this application for leave to appeal must be refused.

Application refused.

KASSIM v. TOWN CLERK OF GEORGETOWN

[Supreme Court (Luckhoo, C.J.) December 20, 1961, January 8, 17, 18, February 27, 1962]

Licence—Stall in market—Provision for payment of rent and prohibiting subletting—Stall holder has exclusive possession—Whether stall-holder is a licensee or a tenant—Whether entitled to protection of Rent Restriction Ordinance, Cap. 186—City (Markets) By-laws.

Declaratory action—Service of notice terminating licence—Contention that notice unreasonable in length and ineffectual to terminate occupation—Licensor neither takes nor threatens any action to evict licensee—Whether declaratory relief available.

The plaintiff occupied a floor space in the Stabroek Market for which he paid to the Clerk of Markets a monthly “rent” of \$19.68. His occupation was subject to the terms and conditions contained in the City (Markets) By-Laws: By-Law 3 vested the control and supervision of the market in the Clerk of Markets subject to the discretion of the Georgetown Town Council. By-Law 10 provided that the tenancy of every stall should be by the day, week or month and that the “rent” should in all cases be payable in advance. By-Law 12 prohibited sub-letting. By-Law 15 permitted the transfer of tenancies of stalls with the consent of the Clerk of Markets and upon the payment of the prescribed fees. The Clerk of Markets having served the plaintiff with a notice terminating his tenancy, the plaintiff sued *inter alia* for a declaration that his occupation of the stall was entitled to the protection of the Rent Restriction Ordinance, a declaration that the notice was a nullity and an injunction restraining the defendant from acting on the notice.

Held: (i) the use of the terms “tenant” and “rent” in the By-Laws was not conclusive of the relationship between the parties;

(ii) the plaintiff held under a contractual licence which was assignable by virtue of the provisions of the By-Laws. The plaintiff did not hold a tenancy and was not therefore entitled to the protection of the Rent Restriction Ordinance;

(iii) with respect to the notice, the defendant had asserted no legal right or formulated any specific claim nor could it be said that any particular exercise of a power was contemplated by the defendant and there was therefore no good reason why a declaration should be granted in relation thereto;

(iv) a distinction is to be drawn between the termination of a licence by notice and the length of notice which must be given the licensee. Even if the notice was unreasonable in length it was not invalid on that account.

Judgment for the defendant.

J. O. F. Haynes, Q.C., for the plaintiff.

C. Lloyd Luckhoo, Q.C., for the defendant.

LUCKHOO, C.J.: The main question for determination in this action is whether the occupier of a stall in the Stabroek Market in Georgetown is a tenant or a licensee of the Georgetown Town Council.

The plaintiff carries on a haberdashery business at a structure in the Stabroek Market which occupies a floor space of 14 feet by 12 feet. That area of floor space, which under the provisions of By-Law 2 of the City (Markets) By-Laws (Subsidiary Legislation, Cap. 152) is a stall, was in May, 1953, transferred to the plaintiff with the

approval of the Clerk of Markets by the previous occupier. The plaintiff paid to the previous occupier the sum of \$3,000 as goodwill. On the floor space transferred to him the plaintiff erected a structure in which he conducts his haberdashery business. He pays the sum of \$19.68 per month to the Clerk of Markets as "rent" for the floor space. His occupation of the stall is subject to the terms and conditions contained in the City (Markets) By-Laws.

It is common ground that the plaintiff has never committed any breach of those By-Laws which would empower the Clerk of Markets to terminate his occupation of the stall. He has always remained ready, able and willing to pay the "rent" due in respect of his occupation of the stall.

On the 15th of September, 1960, the Clerk of Markets served on the plaintiff a notice in the following terms:—

"As you are aware, the Council have decided to undertake the zoning of the Stabroek Market in order to improve not only the lay-out but also the structural designs of the stalls therein.

It is proposed to commence from the stall A occupied by you, and, in accordance with the plan approved by the Council, the stalls in this line will be used solely as restaurants.

Owing to the congestion that already exists in the Market I regret my inability to offer you a site elsewhere to which you may be transferred so as to enable you to carry on your business.

The Council are anxious to proceed without much further delay with the zoning work, and having regard to the fact that your tenancy is a monthly one, in all the circumstances, I hereby give you notice, and you are hereby required, to vacate the said stall A occupied by you not later than the 31st October, 1960.

As the zoning of the Market develops, should there be any stall available, if you so desire you will be given preference to the tenancy thereof."

The plaintiff has nevertheless remained in occupation of the stall and the Clerk of Markets has declined to accept the amount payable in respect of the stall.

The plaintiff instituted this action on the 2nd of November, 1960, in which he claims—

- (a) a declaration that his possession and use of stall A cannot in any event be determined by the Council by notice to quit while the plaintiff is able, ready and willing to pay the rent due in respect thereof and while the plaintiff observes the statutory terms and conditions of the said tenancy as are expressed in the City (Markets) By-Laws, No. 2 of 1952, Cap. 152, Subsidiary Legislation;
- (a) (i) a declaration that the premises the subject matter of this action are controlled by the Rent Restriction Ordinances in force on 15th September, 1960, and now in force;

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- (b) a declaration that the said notice to quit dated the 15th of September, 1960, and served upon the plaintiff is a nullity;
- (c) an injunction restraining the Council from acting upon the said notice.

The terms and conditions for the letting of stalls in the Stabroek Market are contained in the City (Markets) By-Laws made under the provisions of s. 206 of the Georgetown Town Council Ordinance, Cap. 152. By By-Law 3 of the By-Laws the Stabroek Market is under the control and supervision of the Clerk of Markets subject to the discretion of the Council.

By-Law 9 provides that when any stall becomes vacant the Clerk of Markets may let the same to any approved person at such rent as shall from time to time be fixed by the Clerk of Markets.

By-Law 10 provides that the tenancy of every stall shall be by the day, week or month, and the rent shall in all cases be payable in advance. It also provides that in default of payment of the rent due the tenant if he is in possession shall be forthwith ejected by the Clerk of Markets who may, in addition to any other remedy for the recovery of the rent, seize and sell any goods in such stall sufficient for the payment thereof.

On breach of certain other By-Laws the Clerk of Markets is also empowered to eject the tenant forthwith.

By-Law 12 prohibits sub-letting by a tenant of a stall. On a breach of that By-Law the tenancy is deemed to have been terminated and the tenant may be ejected by the Clerk of Markets if he fails to vacate the stall after a request to do so has been made by the Clerk of Markets. Provision is also made by By-Law 15 for the transfer of tenancies of stalls with the consent of the Clerk of Markets and upon payment of the prescribed fees. These are among the more important of the By-Laws to which reference has been made during the course of the argument.

Counsel for the plaintiff has submitted that the relationship between the Council and the plaintiff is that of landlord and tenant. He has sought to support that submission by an examination of the terms and conditions set out in the By-Laws. He has observed that the By-Laws themselves refer to the occupant of a stall as a tenant and the amount to be charged for the occupation of a stall as a rent. The occupation of the plaintiff as a stallholder is exclusive to all other persons. The rental for a stall is payable daily, weekly or monthly. There is a provision against sub-letting which he contends would be unnecessary if the relationship were one of licensor and licensee for he further contends that a licence is forthwith terminated if the licensee goes out of occupation as a licensee has no transferable interest. Counsel has referred to a number of cases in some of which the relationship was held to be that of landlord and tenant and in others that of licensor and licensee. It seems to me that each of those cases depended upon its own particular facts. Counsel in

further support of his submission referred to the fact that the wording of the terms and conditions contained in the existing By-Laws is practically identical with the wording of similar terms and conditions in the By-Laws of 1919 which they replaced and that in the 1919 By-Laws the occupier of a stall was referred to as a tenant and the fee he paid as a rent. Further, he contended that the enactment of the Rent Restriction Ordinance, in 1941, did not affect the nature of the relationship between the Council and the occupier of a stall.

I think that some light is thrown on the question as to the relationship of the Council and the occupier of a stall by consideration of the nature of a market and the circumstances under which the Stabroek Market came to be vested in the Georgetown Town Council.

As is stated in 25 HALSBURY'S LAWS (3rd Edition) at p. 381, para. 737—

“at common law a market is a franchise conferring a right to hold a concourse of buyers and sellers to dispose of the commodities in respect of which the franchise is given. The term is also applied to the like right when conferred by Act of Parliament. Though strictly applicable to the right itself the term is often applied to the concourse of buyers and sellers or to the marketplace or to the time of holding the market.”

And at para. 775 (pp. 397, 398), it is stated that—

“payments made for the enjoyment of the exclusive occupation of any portion of the soil for the purpose of exposing goods for sale in a market or fair are usually known as stallage, pittance, pennage or rent. Stallage is the appropriate term for payment for the liberty of placing a stall on the soil”

At para. 777 (p. 398)—

“stallage is payable wherever there is any exclusive occupation of a particular portion of the soil by a person or a group of persons”

The Mayor and Town Council of Georgetown, a body corporate, was first constituted and established in the year 1860 by the Georgetown Town Council Ordinance, 1860 (No. 1). The Stabroek Market was in existence before the enactment of that Ordinance as is readily seen from the provisions of s. 139 of that Ordinance. The occupiers of stalls, booths, stands and counters were referred to in that Ordinance as “tenants” and they were required to pay “rent” monthly in advance on pain, in default thereof, of the tenant or occupier being ejected by the Clerk of the Markets, and of such stall, booth, stand or counter being let to some other person (s. 146) and in the event of any tenant or occupier of any market stall, etc., not paying the monthly hire in advance and not being in consequence thereof ejected from such stall, etc., the Clerk of the Markets was himself liable and responsible for such hire (s. 147). Ordinance No. 1 of 1860 also contained provisions similar to the existing provisions for the numbering and registration of stalls. By s. 146 it was stated that the

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stalls, booths, stands and counters were to be put up “to annual competition as heretofore.” There was no provision in the 1860 Ordinance similar to the existing provision against sub-letting. Section 175 of the 1860 Ordinance provided that the market tenants contravening any of the regulations were liable to expulsion. The existing provisions (contained in the By-Laws) are substantially the same as the provisions contained in the 1919 By-Laws and in the 1860 Ordinance except that there was no provision contained in the 1860 Ordinance against sub-letting.

It seems to me that since the year 1860 a tenant of a stall pays “rent” for the enjoyment of the exclusive occupation of a portion of the “soil” for the purpose of exposing goods for sale in the market. It is really a payment for the liberty of placing a stall on the soil and in England the “rent” would be termed “stallage.” In England the relationship between the occupier of the stall and the market owner would be that of licensee and licensor, despite the fact that the stallholder has exclusive occupation of the soil on which his goods are exposed for sale. His occupation is very much like that of the occupier of a bookstall on a railway platform where the occupier has been held to be a licensee (See *Smith v. Lambeth Assessment Committee*, [1882] 16 Q.B.D. 327, C.A.). He pays for the *liberty* of placing a stall upon the soil.

Does the use of the terms “tenant” and “rent” in the By-Laws make the relationship any different in British Guiana? It is well settled that in determining whether an agreement creates between the parties the relationship of landlord and tenant or that of licensor and licensee the decisive consideration is the intention of the parties (23 HALSBURY’S LAWS (3rd Edition) p. 427, para. 1022). In the present case the relationship is determined by the provisions of a statute.

In the ordinary relationship of landlord and tenant a tenant is a person who holds of another. In the construction of statutes the meaning to be given to terms contained therein is governed by the intention of the Legislature. Sometimes a term is defined in the statute itself to include categories which ordinarily would not fall within the meaning of that term. In the context of the 1860 Ordinance, a stallholder’s relationship with the Georgetown Town Council was no different from that of a stallholder in a market under the English common law. Did the subsequent introduction of the provision against subletting have the effect of changing that relationship? I think not. A purely personal licence is not assignable but a contractual licence may or may not be assignable depending on the terms of the agreement between the parties. Stallholders occupy by virtue of a contractual arrangement.

By-Law 15 provides for transfer of “tenancies” of stalls so that it is contemplated that a stallholder has some assignable interest. It is in the context of that By-Law that the provision relating to sub-letting must be viewed. In my opinion the plaintiff holds under a contractual licence which is assignable by virtue of the provisions of the By-Laws.

The declarations asked for at sub-paragraphs (a), (a) (i) and (b) of paragraph 8 of the plaintiff's amended statement of claim cannot therefore be made.

The plaintiff also seeks a declaration that the notice to quit served on the plaintiff is a nullity. Under Order 23, r. 3, of the Rules of the Supreme Court, 1955, it is provided that "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether any consequential relief is or could be claimed."

This provision is identical with that of Order 25, r. 5, of the English Rules. It was established by *Guaranty Trust Co., of New York v. Hannay*, [1915] 2 K.B. 536, that the jurisdiction to make a declaration under the rule is not confined to cases in which the plaintiff has a complete and subsisting cause of action apart from the rule. However, where specific relief other than a declaration is not sought, the jurisdiction is one which should be exercised with great caution. A claim for a declaration only, not followed by a claim for consequential relief, will be carefully watched. (See ANNUAL PRACTICE, 1961, p. 578).

The defendant has asserted no legal right nor formulated any specific claim nor can it be said that any particular exercise of a power is contemplated by the defendant. Assuming for the moment that the Clerk of Markets can validly sign such a notice in the way he has done, all that he has done is to notify the plaintiff that he is required to vacate the stall occupied by him by a specified date. There is no threat or statement of intention to bring any action, legal or otherwise, on failure to vacate by the specified date or at all. No reported authority has been cited to me where a declaratory judgment has been given in respect of such a notice and I can see no good reason why it should be given in these circumstances. Further, having regard to the principles upon which injunctions are granted, I see no good reason why in the circumstances of this case an injunction should be granted the plaintiff restraining the defendant from acting on the notice.

It has been further submitted that assuming the notice was properly signed by the Clerk of Markets, it did not validly terminate the plaintiff's licence to occupy the stall as the length of the notice was unreasonable in the circumstances. In the first place it would appear that a distinction is to be drawn between the termination of a licence by notice and the length of notice which must be given the licensee. The rights of a licensee upon such termination depend upon the circumstances of each case, and as was stated by WYLIE, J., in *Kellar v. Narayan* (1959, 1 W.L.R. 373, at p. 378 [1959 L.R.B.G. 165 at p. 169])—

"Moreover, these two cases (*Canadian Pacific Railway Company v. R.*, [1931] A.C. 414, and *Minister of Health v. Bellotti*, [1944] 1 K.B. 298), illustrate how varied in extent these rights may be in so far as concerns a right to remain upon the property after the actual revocation of a licence. Where, however, a licence has

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conferred on a licensee a right to occupy the property to which the licence relates, including a right to bring his goods thereon, it is clear that one of the rights to which a licensee is entitled after revocation is a right to remain in occupation for a period of time that is reasonable in all the circumstances for the purpose of removing both himself and his goods. Thus, in *Bellotti's* case ([1944] 1 All E.R. at p. 243) Lord GREENE, M.R., has this to say —

‘The true view, in my judgment, quite apart from the question of notice of intention to revoke the licence (as to which I shall say a word later), is that where a licence is revoked the licensee has, in spite of the revocation, whatever in the circumstances is a reasonable time to enable him to remove himself and his possessions from the scene of the licence.’ ”

And again, per GODDARD, L.J., (*ibid.*, at p. 245),—

‘If a licensor determines the licence, he is bound to give a reasonable time within which the determination is to take effect, so that the licensee can collect himself, his property or whatever it may be, from the premises in respect of which the licence is withdrawn. He is bound to give a reasonable time and, if he does not and takes proceedings before the reasonable time has elapsed, he loses his action.’

It is to be noted that, in that case, the licensor took proceedings to obtain orders for possession and GODDARD, L.J., was obviously referring to such proceedings in this passage.”

In *Bellotti's* case it was pointed out that the suggestion that the notice must specify a reasonable time contained in the judgment of the Privy Council in *Canadian Pacific Railway Co. v. R.*, [1931] A.C. 414, at p. 433, was directed only to the special facts of that case. If this is the correct view then even though a notice of termination states a period which is not reasonable the notice would not be *ipso facto* bad. If proceedings for possession are not taken before a reasonable period has elapsed after the notice is given then the proceedings may well succeed.

In the present case the defendant does not seek an order for possession. Indeed, the defendant seeks no order at all save that the plaintiff's claim be dismissed with costs.

For the reasons given earlier in this judgment the plaintiff's claims for the declarations and injunction sought must be dismissed with costs to the defendant to be taxed certified fit for counsel.

Judgment for the defendant.

Solicitors: *N. O. Poonai* (for the plaintiff); *F. I. Dias* (for the defendant).

D'AGUIAR v. D'ANDRADE

[Supreme Court (Luckhoo, C.J.,) January 16, February 1, 6, 9, March 3, 1962.]

Mandamus—Currency Board—Six members—Not less than three members could act—Mandamus sought against one member to enforce duty of Board—Whether mandamus lies against that member—Currency Ordinance, 1959.

Mandamus—Currency Board—Headquarters in Trinidad—Branch in British Guiana—Demand made at branch—Whether demand properly made of the Board—Currency Ordinance, 1959.

The Currency Ordinance, 1959, gave statutory force to an agreement setting up a Currency Board for the Eastern Group of the British Caribbean Territories. The Board consisted of six members, and its relevant duties were to be discharged by not less than three of them. Only one member, the respondent, resided in British Guiana. The headquarters of the Board were in Trinidad but a branch office was established in Georgetown. The prosecutor presented to the officer at the branch office \$50,000 in B.W.I. currency notes and demanded that the Board should, in accordance with its statutory duties, pay over to him in London the equivalent in sterling. After consulting the respondent, the officer refused to effect the conversion on the ground that the appellant should first produce a permit thought to be required by the exchange control laws. The appellant, who denied that any permit was necessary, applied for and obtained an order *nisi* for a mandamus to compel the respondent to effect the conversion on behalf of the Board. On behalf of the respondent, showing cause, it was argued that the duty to convert rested on the Board as a whole and not on any individual member of it, and that in any event no sufficient demand in law was made of the respondent.

Held: (i) the respondent acting alone had no power to effect the conversion and the writ of mandamus did not lie to him;

(ii) the demand at the branch office was not a demand made of the respondent.

Rule discharged.

[**Editorial Note:** An appeal to the Federal Supreme Court was dismissed. See later herein.]

J. H. S. Elliott, Q.C., F. R. Wills with him, for the prosecutor.

Dr. F. H. W. Ramsahoye, Attorney General, with *M. Shahabuddeen*. Crown Counsel, and *Doodnauth Singh*, Crown Counsel (ag.), for the respondent.

LUCKHOO, C.J.: On the 16th of January, 1962, an order *nisi* was made by the court on a motion at the instance of Peter Stanislaus D'Aguiar (hereinafter referred to as the prosecutor), calling upon the Commissioner of Currency for British Guiana, William Peter D'Andrade (hereinafter referred to as the respondent), to show cause why a writ of mandamus should not be issued directed to him commanding him to accept on behalf of the Board of Commissioners of Currency, British Caribbean Territories (Eastern Group), the sum of \$50,000 in British West Indian currency notes tendered to the said

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Board in British Guiana by the prosecutor and thereafter to cause the equivalent value of the said sum in sterling to be paid through the Crown Agents to the prosecutor in London as required by the provisions of s. 7 (1) of the Currency Ordinance, 1959.

The motion was duly entered for hearing on the 24th of January, 1962.

The order *nisi* was served upon the respondent who filed an affidavit setting forth certain facts upon which counsel for the respondent has submitted *in limine* that the proceedings are improperly constituted as they stand. It was decided upon application of counsel for the respondent that this objection *in limine* should be heard and determined without first proceeding to hear argument by counsel on the merits of the motion.

After second counsel for the respondent, Mr. Shahabuddeen, had made his submissions *in limine* the respondent was cross-examined on his affidavit by counsel for the prosecutor in respect of matters relating to those submissions.

Before dealing with the submissions it will be necessary to refer to certain of the provisions of the Currency Ordinance, 1959 (No. 8), the Agreement contained in the first schedule thereto, the facts as set out in the affidavits sworn by the prosecutor and the respondent and the oral testimony of the respondent in order to appreciate the submission and the answer of the prosecutor's counsel thereto.

The respondent is Secretary to the Treasury in British Guiana and has at all material times been a member of the Board of Commissioners of Currency, British Caribbean Territories (Eastern Group), which is constituted by the Currency Ordinance, 1959 (No. 8), having been appointed as such member by the Secretary of State for the Colonies upon the nomination of the Governor of British Guiana in pursuance of an Agreement set out in the first schedule to the Ordinance.

The Board has been constituted to provide for and control the supply of currency to the territories administered by the Governments participating in that Agreement made on the 28th of January, 1958, between the Governments of Barbados, Trinidad and Tobago, the Leeward Islands and the Windward Islands. The Agreement provides for a uniform currency in the Eastern Group of the British Caribbean Territories.

In addition to the respondent there are four other members of the Board appointed by the Secretary of State for the Colonies, the Governors of Barbados, Trinidad and Tobago, the Leeward Islands and the Windward Islands nominating one such member to represent his respective territory. There is also an Executive Officer of the Board appointed by the Secretary of State. He has the title "Executive Commissioner" and is responsible, subject to the direction of the Board, for all executive matters connected with the procurement,

retirement, distribution and holding of the Board's notes and coin. The Executive Commissioner is also a member of the Board. The Board has its headquarters in Trinidad and offices in British Guiana and other territories. The Board is empowered to employ such agents, officers and persons as may be required. For British Guiana Mr. C. G. Small has been appointed Senior Currency Officer and is in charge of the Board's office in British Guiana.

Under the Agreement the Board has the sole right to issue currency notes and coin in the territories administered by the participating Governments.

The Currency Ordinance, 1959, was enacted in British Guiana to amend and consolidate the law relating to currency (the Currency Ordinance, Cap. 283) and to implement the Agreement to provide a uniform currency in the Eastern Group of the British Caribbean territories. Under the Ordinance the Board has the sole right to issue and re-issue currency notes and coin in British Guiana. Under s. 7 (1) of the Ordinance the Board is *inter alia*, required to pay on demand through the Crown Agents to any person desiring to receive sterling in London the equivalent value calculated in the manner provided by that sub-section of currency notes lodged with the Board in British Guiana by such person, provided that no. person is entitled to lodge with the Board less than such minimum sum as may from time to time be prescribed by Regulations made by the Governor of British Guiana after consultation with the Board and with the approval of the Secretary of State for the purpose of obtaining sterling; provided further that the Board is entitled to charge and levy from any persons obtaining sterling commission at such rate or rates as the Board may think fit and not exceeding $\frac{3}{4}$ per centum and in addition the cost of any telegrams sent by the Board in connection with any such transfer. Section 7 provides as follows: —

“7. (1) The Board shall issue on demand to any person desiring to receive currency notes in the Colony, currency notes to the equivalent value (at the rate of one dollar for four shillings and two pence) of sums in sterling lodged with the Crown Agents in London by the said person, and shall pay on demand through the Crown Agents to any person desiring to receive sterling in London the equivalent value calculated as aforesaid of currency notes lodged with the Board in the Colony by the said person:

Provided that—

(a) no person shall be entitled to lodge with the Crown Agents or the Board as the case may be less than such minimum sum as may from time to time be prescribed for the purpose of obtaining currency notes or sterling as the case may be; and

(b) the Board shall be entitled to charge and levy from any person obtaining currency notes or sterling commission at such rate or rates as the Board may think fit, not exceeding three-quarters per centum and in addition the cost of any telegrams sent by the Board or by the Crown Agents in connection with any transfer as above described.

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(2) The Board may, at its option, issue and receive coin in the same manner and subject to the same conditions as are prescribed in subsection (1) of this section for the issue and receipt of currency notes.”

On the 22nd of December, 1961, the prosecutor attended the office in British Guiana of the Board of Commissioners of Currency, British Caribbean Territories (Eastern Group), and there tendered to Mr. C. G. Small, Senior Currency Officer, the sum of \$50,000 British West Indian Currency notes. The prosecutor read the following statement to Mr. Small:—

“I am Peter Stanislaus D’Aguiar, a resident of the Colony of British Guiana.

I have come to make demand of you the Board of Commissioners of Currency in this Colony to convert B.W.I. currency notes to the amount of 50,000 dollars, which I am now lodging with you here in British Guiana, into sterling the equivalent of which I desire to receive in London through the Crown Agents.

I make this demand under and by virtue of my rights under the provisions of section 7 (1) of the Currency Ordinance, No. 8 of 1959.

I am willing to comply with all the provisions of the whole of the said section and with any other relevant requirements of the said Currency Ordinance, and call on you in turn to make due compliance with the said Ordinance and give effect to your obligations thereunder in respect of my aforesaid demand.

I will now give you a copy of what I have just said.”

The prosecutor handed Small the statement he had read. Small then spoke with the respondent on the telephone about the prosecutor’s demand and the respondent asked Small if the prosecutor had a permit for the transfer of the money. On enquiry by Small the prosecutor stated that he did not have such a permit and that he did not intend to apply for one. Small asked the respondent if it would be illegal to exchange currency notes for sterling payable in London without a permit. The respondent told Small that he thought it would be illegal to do so but that he would like to check. The respondent at that time had observed the Attorney General passing in the corridor of his office and spoke to him about the matter. The respondent then told Small that he had been advised that it would be illegal for the exchange to be made without a permit but that he could not give him instructions and that he (Small) should check with the Attorney General.

It is clear that the respondent was of the opinion that he had no authority himself to give directions or instructions to the Senior Currency Officer who is an officer appointed by the Board with the approval of the Governor of British Guiana and is in charge of the British Guiana centre or office by virtue of administrative rules made by the Board for the guidance of currency officers.

After Small had spoken with the respondent, Small told the prosecutor that he would not accept the notes and asked to be allowed until 9.30 o'clock the following morning to consider what he should do. On the following morning the prosecutor's solicitors wrote the Board and the Executive Commissioner of the Board a letter referring to the prosecutor's tender on the previous day of \$50,000 in currency notes for receipt of the equivalent in sterling in London and offered to pay the prescribed commission and cost of a telegram to the Crown Agents and demanding that the lodgment of the said sum be accepted pursuant to the provisions of s. 7 of the Currency Ordinance, 1959. It was stated in the letter that on a refusal to comply with that demand the prosecutor would have no alternative but to apply for a mandamus to compel the Board or the Executive Commissioner to perform their statutory duties. On the same day the prosecutor attended with one of his solicitors at the Board's office in Georgetown and again made a demand in terms similar to his previous demands. He also tendered the sum of \$50,000 in British West Indian Currency notes to Small who said that he would be prepared to accept the money if the prosecutor first obtained a permit for its transfer. Small then spoke with the Attorney General (not the respondent as stated in paragraph 9 of the prosecutor's affidavit) and then informed the prosecutor that the transfer of the money would be a violation of the Exchange Control Ordinance, 1958 (No. 28), and that it would be a criminal offence for him to transfer it without permission. In the meanwhile the solicitor who had accompanied the prosecutor to Small delivered to Small the letter addressed to the Board and to the Executive Commissioner.

On the 27th of December, 1961, the prosecutor spoke with the Executive Commissioner in Trinidad who told him that nothing had been reported to him about currency restrictions in British Guiana and that there was a Commissioner in British Guiana (the respondent) who was authorised to transact the business of the Board in British Guiana.

On the 9th of January, 1962, the Minister of Finance in British Guiana wrote the prosecutor stating that it had been brought to his knowledge that since the coming into force of the Exchange Control (Scheduled Territories) Order, 1961, he (the prosecutor) had made attempts to have British West Indian dollars converted into sterling without permission required under the provisions of the Exchange Control Ordinance, 1958, and that any attempt to do so without permission was in contravention of the provisions of the Exchange Control Ordinance, 1958, and punishable as a criminal offence. The Minister also informed the prosecutor that copies of his (the Minister's) letter were being sent to the Director of Public Prosecutions and to the Commissioner of Police.

On the 10th of January, 1962, the prosecutor's solicitors replied to the Minister's letter informing the Minister that the prosecutor had instructed them to apply to the court for a mandamus against the Board and to institute actions against the Government for declarations that the Orders which the Governor had purported to

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make in this connection in December, 1961, are *ultra vires*, unconstitutional and ineffective.

On the 15th of January, 1962, the prosecutor filed this motion against the respondent.

In order to succeed in this application for the issue of a writ of mandamus it is necessary for the prosecutor to show —

- (a) that the respondent was under a duty by statute to do the act required by the prosecutor to be performed, that is, to convert currency notes into sterling;
- (b) that the prosecutor demanded of the respondent that the conversion be effected;
- (c) that there was a sufficient refusal by the respondent to effect the conversion.

It is not disputed that under the provisions of s. 7 (1) of the Currency Ordinance, 1959 (No. 8), the Board is under an imperative statutory duty of a public nature which specially affects the rights of individuals including those of the prosecutor. It has, however, been submitted on behalf of the respondent—

- (a) that the respondent was never under any duty to convert currency notes into sterling in favour of the prosecutor;
- (b) that in any event there was in law no sufficient demand and refusal.

Dealing first with the submission that the respondent was not under any statutory duty to convert currency notes into sterling it was contended by counsel for the respondent that the reported cases in which mandamus went to an officer or a member of a society are those in which the particular officer or member was *himself* under the statutory duty in question. At paragraph 170, on p. 91 of 11 HALSBURY'S LAWS (3rd Edition), it is stated —

“A mandamus will issue to an official of a society to compel him to carry out the terms of the statute by which the society is controlled.”

The following examples were cited: —

In *R. v. Pharmaceutical Society* (1854), 2 W.R. 220, where the writ was directed to the Registrar, a duty was charged directly upon the Registrar to make out a list required by s. 5 of the Pharmacy Act, 1852 (15 & 16 Vict. c. 56), (since repealed).

In *R. v. Aldham and United Parishes Insurance Society* (1851), 16 J.P. 149, the Act 10 Geo. 4, c. 59, s. 9 (now repealed), required the secretary or other principal officer of a society within that Act to sign a notice for convening a general meeting to consider certain matters. The rule *nisi* was directed to the secretary who was an

officer named in that provision of the Act which related to the signing of such notices. On argument against the order *nisi* it was held that s. 9 of the Act imposed upon a principal officer when applied to by a requisition of the proper number of members, the duty of signing a notice for convening a general meeting for the purpose mentioned.

In *R. v. St. Pancreas Church Trustees* (1837), 6 Ad. & El. 314, the writ was directed to the clerk of the Trustees as well as to the Trustees to produce certain accounts in compliance with the provisions of the statute 56 Geo. 3, c. 39. The statute 1 & 2 Will. 4, c. 60, s. 34, provided that “the said vestry are hereby required, by their said clerk, to produce certain accounts.”

Counsel for the respondent stated that he could find no reported case of mandamus issuing against an officer of a statutory body in respect of a duty cast upon the statutory body itself and referred to the cases of—

- (i) *R. v. Lords of the Treasury*, 10 Ad. & El. 357;
- (ii) *R. v. Income Tax Special Purposes Commissioners*, [1888] 21 Q.B.D. 314;
- (iii) *R. v. Local Government Board* (1874), 38 J.P. 165;
- (iv) *Board of Education v. Rice*, [1911] A.C. 179,

where the duties in question were respectively cast on the Lords of the Treasury, the Commissioners, the Local Government Board and the Board of Education, and the writ was directed to those bodies.

It was pointed out by COLERIDGE, J., in *R. v. Payn* (1837), 6 Ad. & El. 392, that it is not true to say that mandamus will not lie against an inferior officer and that the issue is not the inferiority of the officer but whether any duty is imposed directly on him. At p. 401, COLERIDGE, J., said—

“The result of the cases cited appears to be merely this: that, “where the application is for a mandamus to justices in special his masters or any competent authority, and who upon disobeying that order will be liable to indictment, we do not proceed by mandamus. The court leaves the case to the ordinary remedies, not because the party is too low but because he has received an order from competent authority.”

Counsel for the respondent has contended that the duty of conversion of currency notes into sterling has not been directly imposed on the respondent and that therefore mandamus cannot lie against him to perform that duty.

Counsel for the prosecutor has submitted that the duty cast on the Board by s. 7 of the Ordinance is cast on each and every member of the Board which is an unincorporated body. He contends that

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there is no need to join the other Commissioners in order to secure the performance of that duty. He has referred to a passage appearing in *SHORT & MELLOR'S PRACTICE OF THE CROWN OFFICE* (2nd Edition) at p. 223, where it is stated that

“where the application is for a mandamus to justices in special session or out of session, the order *nisi* should only call upon those justices who have been applied to, and have refused to do the act required; it does not appear to be necessary to include in the application all the justices who refused to do the act if there were more than sufficient to do it.”

The case cited in support of that statement is *R. v. Ellis* (1842), 12 L.J.M.C. 20. By analogy it is argued that only one member of the Board need be included in the application where that member has refused to do the act. That argument, however, proceeds on the premise that it is competent for one member of the Board to perform the act of conversion of currency notes into sterling. Counsel for the respondent contended that in the instant case there was no provision in the Ordinance whereby it could be urged that duty to convert was cast on individual members of the Board and further, that article 1 (6) of the Agreement specifically provides that any duty devolving and any power conferred on the Board may be discharged or exercised by any three members In contradistinction he referred to the case of *Mackenzie Kennedy v. The Air Council* (1927), 96 L.J. K.B. 1145, which dealt with a provision in the constitution of the Air Council—the Air Force (Constitution) Act, 1917, s. 81—under which an Order in Council was made assigning definite official duties to persons to whom official titles were given. Clause 4 of the Order in Council provides that—

“Subject to the foregoing provisions as to the transaction of business in separate divisions, the powers and duties of the Air Council may be exercised and performed by any three of their number and notwithstanding any office, the holder of which is a member of the Air Council, is temporarily vacant.”

Clause 3 of the Order provides that the Secretary of State, who by clause 1 is recognised as President of the Air Council, is to be responsible to His Majesty and Parliament for all the business of the Air Council and that all business other than business which the Secretary of State specially reserves to himself is to be transacted in certain principal divisions. It is also provided by that clause that each individual member of the Air Force is responsible for that part of the work and of the business of the Air Force.

Counsel urged that if it were competent for individual members of the Air Council to perform the duties imposed by statute on the Air Council it would not have been necessary to include clause 4 in the constitution of the Air Council.

Counsel for the respondent further contended that even if it could be argued that the duties contemplated by s. 7 of the Ordinance are

cast on individual members, those duties are nevertheless intended by the Ordinance to be exercised collectively and consequently the respondent as an individual member of the Board lacks the power to obey the mandamus asked for.

Reference was made during the course of the argument in respect of reg. 3 of the Currency (Notes) Regulations whereby it is provided that *for the purposes of the Regulations* every member of the Board is a currency officer. However, it is to be observed that none of the purposes of the Regulations deal with the performance or otherwise of the duty to effect conversion imposed on the Board by s. 7 of the Ordinance.

Reference was also made during the course of the argument to the Rules for the Guidance of Currency Officers of the Board. These Rules are purely administrative and are not made by virtue of any provision of the Ordinance. Recent amendments to these Rules have been referred to in the respondent's affidavit but according to the respondent the amendments have not yet been put into operation. Under Rule 49 (ignoring the proposed amendment not yet put into operation) all cables and letters to the Crown Agents are required to be signed by the Financial Secretary (now the Secretary to the Treasury) or administrator at any centre or sub-centre. The Financial Secretary (or Secretary to the Treasury) may not be a member of the Board. Nothing in the 1958 Agreement requires that he should be. In any event the administrative Rules cannot override the provisions of the Ordinance and it is the Ordinance to which one must have regard in deciding whether the duties cast by s. 7 of the Ordinance are cast upon individual members of the Board. Section 7 places the duty to convert currency notes into sterling upon the Board. By s. 2 of the Ordinance, the Board means the Board of Commissioners established in accordance with the terms of the Agreement. Paragraph (6) of article 1 of the terms of the Agreement requires the Board in its performance of any duty to be performed by the Board to act by at least three of its members. While it has been stated by the respondent that the conversion into sterling in British Guiana had up to the time of the prosecutor's application been automatic and without individual reference to the Board it is to be presumed that this was so because the Board as such in its discretion decided that such a procedure should be adopted. The procedure may not be as automatic as at first sight it appears to be for by proviso (b) to s. 7 (1) of the Ordinance the Board—not any member of the Board—is entitled to charge and levy from any person effecting conversion to sterling commission at such rate not exceeding three-quarters *per centum as the Board thinks fit*. (If the person who desires to effect the conversion declines to pay the rate of commission fixed by the Board the Board may refuse to effect the conversion or, perhaps, it may decide to reduce the rate of commission to a figure which is acceptable to the person who wishes the conversion to be made and then the conversion will be made. One member of the Board cannot, unless he is authorised by the Board itself properly constituted, perform the act required by the proviso (b) to s. 7 (1) of the Ordinance. Once, however, the person desiring to convert

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complies with the requirements of the provisos, the Board is bound to convert, apart from any valid enactment to the contrary.

In my opinion the provisions of s. 7 construed in the light of the Ordinance as a whole including the terms of the Agreement which are incorporated into the Ordinance contemplate that the Board should act collectively (by at least three members) and not individually. The duty to convert is cast upon the Board itself and not upon the individual members of the Board. The relevant words of s. 7 of the Ordinance—"the Board shall pay on demand" cannot in my opinion be read as 'the Board or any of the members of the Board shall pay on demand'

In respect of his submission that the demand made of the Board or of the Senior Currency Officer did not in law constitute a demand of the respondent, counsel for the respondent agreed that if it could be held that s. 7 (1) imposed a duty on individual members of the Board to convert the demand of the Board would be a good demand of the respondent.

In view of the conclusion to which I have come in respect of the construction to be put upon section 7 (1) of the Ordinance it is unnecessary to deal with this submission any further except to say that I hold that in law there was no demand made of the respondent. The demand of the Senior Currency Officer appointed by the Board as such, while an agent of the Board, cannot be regarded as a demand of an individual member of the Board. He is not an agent of one or more *individual* members of the Board. It follows that if there was in law no demand of the respondent there could be no refusal by him. In any event the respondent's answers in cross-examination on his affidavit do not disclose that he advised or instructed Small to refuse the conversion unless a permit were first obtained by the prosecutor. Small does not appear to have consulted with the respondent after the respondent had advised him to seek the advice of the Attorney General. It may well be that had the respondent been told that the Attorney General considered that a permit was necessary he would, if the duty to convert was cast on him, have refused to effect the conversion but that is mere conjecture.

In coming to the conclusion that the objections *in limine* are sound and that the order *nisi* must therefore be discharged it will be appreciated that the court has not dealt with the merits of the application and therefore cannot express in these proceedings any opinion as to whether a permit to convert currency notes into sterling is required by law. That issue must, perhaps, be left to be determined in proceedings which may possibly be brought at some time in the future.

Costs to respondent.

Rule discharged.

Solicitors: *J. Edward De Freitas* (for the applicant); *S. M. A. Nasir*, Deputy Crown Solicitor (for the respondent).

GURRICK v. JOHN

[Supreme Court (Fraser, J.), March 5, 1962.]

Evidence—Case for defendant closed—Plaintiff applies to recall witness and to lead additional evidence through fresh witness—Power of court to deal with application—Supreme Court Ordinance, Cap. 7, ss. 32 and 76—O. 24, rr. 27 and 28—Evidence Ordinance, Cap. 25, s. 88.

After the close of the case for the defendant, counsel for the plaintiff applied for leave to recall a witness and to lead additional evidence through a fresh witness. The latter was intended to supply a gap in the evidence to which the court had drawn attention in the course of the trial. Counsel for the plaintiff also invited the court to consider whether or not it should exercise its powers under s. 88 of the Evidence Ordinance, Cap. 25, to call or recall on its motion any competent person as a witness.

Held: (i) the power to call a witness on its own motion is one which a court should use sparingly and never as a means of rescue for the inadvertence of a party;

(ii) in the exercise of the court's discretion the application to recall the witness would be granted;

(iii) the test in an application to lead additional evidence when the case is closed is whether the plaintiff has been surprised by the evidence led by the defendant. It could not be said that the plaintiff was taken by surprise.

Order accordingly.

J. O. F. Haynes, Q.C., for the plaintiff.

L. F. S. Burnham, Q.C., for the defendant.

FRASER, J.: The hearing of this action commenced on 4th May, 1961. After several adjourned hearings the case for the defendant was closed on 9th February, 1962. Before the commencement of the address by counsel for the defendant, Mr. Haynes, for the plaintiff, intimated that he intended to seek the court's leave to recall a witness and to lead additional evidence through a fresh witness.

On 23rd February, 1962, Mr. Haynes asked for leave (a) to recall Mr. D. N. Persaud, a sworn land surveyor, to give evidence of measurements taken by him after he had testified; and (b) to call Mr. S. S. R. Insanally, a sworn land surveyor, to give evidence of the dimensions and area of the land.

It was submitted that the court had a discretion at common law to permit such evidence to be led, and alternatively, that the court could admit it in the exercise of the power created by s. 32 of Cap. 7: "to make orders as to the procedure to be followed or otherwise which the Court considers necessary for doing justice in the cause or matter whether that order has been expressly asked for by the party entitled to the benefit thereof or not." In developing this submission Mr. Haynes urged that, having regard to the circumstances of this application, the court should also consider whether or not to exercise the power given by s. 88 of the Evidence Ordinance, Cap. 25, to call or recall on its own motion any competent person as a witness.

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I wish to say at once that I do not consider the circumstances *of* this application meet for the exercise of the power given by s. 88 of Cap. 25. The power to call a witness on its own motion is one which a court should use sparingly and never as a means of rescue for the inadvertence of a party. The provisions of s. 32 of Cap. 7 appear to me to be inapplicable in this case. In my opinion that section deals with the steps to be taken in the conduct of any cause or matter rather than with the means by which particular facts may be proved and the mode in which evidence thereof may be given in any proceedings. I am fortified in this opinion by the provisions of s. 76 of Cap. 7 which reads as follows:

“76. The power to make rules of court includes power to make rules for regulating the means by which particular facts may be proved and the mode in which evidence thereof may be given in any proceedings, or in any application in connection with or at any stage of any proceedings.”

In the Rules of the Supreme Court, 1955, apart from Orders 33 and 34, there are no specific rules regulating all the matters contemplated by s. 76 of Cap. 7; but rr. 27 and 28 of O. 34—Evidence Generally—are helpful in understanding the approach to evidence in civil matters. Rules 27 and 28 provide as follows:

“27. Evidence taken subsequently to the hearing or trial of any cause or matter shall be taken as nearly as may be in the same manner as evidence taken at or with a view to a trial.

28. The practice with reference to the examination, cross examination, and re-examination of witnesses at a trial shall extend and be applicable to evidence taken in any cause or matter at any stage.”

These rules clearly presume the possibility that evidence may be called in any cause or matter at any stage of the hearing or even subsequently to the hearing or trial. In this case the addresses of the parties have not commenced and, having regard to the provisions of r. of O. 33, the hearing of this action is undoubtedly still in progress. At common law it is in the discretion of the judge whether he will permit a witness to be recalled by one of the parties—see 15 HALSBURY’S LAWS (3rd Edition) at pp. 445/446, and the cases of *Adams v. Banhart*, 1 Cr. M. & R. 681; and *Cattlin v. Barker* (1847), 17 L.J. C.P. 62. Counsel for the defendant agrees that it is a matter of discretion and I therefore grant leave to the plaintiff to recall the witness D. N. Persaud for the purpose of clarifying the evidence he has given with regard to the dimensions of the land, and, if possible also with regard to the area of the land in order to assist the court in making a finding on the legality of the title conveyed by the defendant to the plaintiff

I now turn to the second limb of the application, *i.e.*, to call a fresh witness to lead additional evidence. Counsel for the defence has conceded that the judge in his discretion can grant such leave but urged that there was no element of surprise in this case and therefore the discretion should not be exercised as the grounds to justify such

an exercise do not exist. On this aspect of the matter the authorities do not appear to be as numerous as in cases where the application is merely for the recall of a witness. Mr. Haynes has cited a number of cases; some of them are criminal cases. For my own guidance I would prefer to rely upon the course adopted in civil matters.

In 15 HALBURY'S LAWS (3rd Edition) it is stated at p. 446:

"Leave will be given to a party, even after his own case is closed, to call fresh evidence when he has been taken by surprise in the course of his opponent's conduct of his case."

The authority cited for this proposition is *Bigsby v. Dickinson* (1876), 4 Ch. D. 24. A similar proposition is stated in ROSCOE'S EVIDENCE IN CIVIL ACTIONS, (19th Edition) at p. 165. In that case it was held that where a party is taken by surprise by a point made against him at the hearing, the judge may, if he think right, at any stage of the trial allow him to produce rebutting evidence; and if such permission is refused, the Court of Appeal will, in a proper case, permit the fresh evidence to be taken on the appeal. In *Bigsby v. Dickinson*, *supra*, JAMES, L.J., said at p. 28:

"And at no period of a cause is it too late to shew that confusion and error have arisen from two persons, or two plans, or two things passing by the same name, and more especially to shew that through such confusion the court had been deceived by a misleading experiment performed in its own presence And the result shewed that if that evidence had been excluded the case on that point would not have been decided according to the truth of the facts, but according to the mode in which the case had been forensically conducted."

It is not without interest to note that in a Practice Note appearing in (1952) W.N. 532, HILBURY, J., said it was irregular for counsel to offer to call a witness after a case had been closed, when comment was made by the judge that the witness had not been called; and held that there was no right at that stage to make a substantial application unless to call evidence in rebuttal. In this case before me my recollection is that I intimated to counsel for the plaintiff that the evidence was deficient in that there was no clear proof that the areas of land transported violated the provisions either of the Local Government Ordinance, Cap. 150, or the Public Health Ordinance, Cap. 145.

There is sometimes a thin line between evidence rebutting the defendant's case and evidence confirming a plaintiff's case. The principles are, however, well expressed in 15 HALBURY'S LAWS (3rd Edition) at pp. 271 and 272, para. 495, as follows :—

"495. *Right to call rebutting evidence:*

When the onus of proof on all issues is on one party, that party must ordinarily, when presenting his case, adduce all his evidence, and may not, after the close of his opponent's case, seek to adduce additional evidence to strengthen his own case. Where, however the onus of proof is partly on the plaintiff and partly on

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the defendant, the plaintiff may adduce all his evidence in the first instance, or may limit his evidence to those issues the onus of proving which rests upon him, and in that case the plaintiff may, after the close of the defendant's case, adduce evidence to rebut the evidence of the defendant upon those issues the proof of which rested with the defendant. Where a party has the right to adduce further evidence after the close of his opponent's case, the evidence must be strictly confined to rebutting his opponent's case, and must not merely confirm his evidence-in-chief.

The judge, however, has a discretion to allow a party to produce further evidence, even where such evidence could have been produced in the first instance, if he considers that it is necessary in the interests of justice to admit such evidence. The judge will generally allow such evidence to be produced where the party who seeks to produce it has been taken by surprise, and for that reason did not produce it in the first instance."

While it is true that the overriding consideration is service to the interests of justice, it is not enough merely to assert that the application is intended for that purpose. It must clearly appear to be so from the evidence so far led. The case cited in HALSBURY'S on this point is *Doe d. Nicoll v. Bower* (1851), 16 Q.B. 805. That was an action for ejectment. On the trial the case for the plaintiff was that Thomas Breeze, deceased, under a devise from whom Elizabeth Breeze, one of the lessors of the plaintiff, claimed, had let the land to the defendant, and that the defendant had received due notice to quit.

"The letting and the payment of rent by Bower were proved. Counsel for the plaintiff then called for the receipt for the rent: which the defendant accordingly put in. It purported to be signed by Thomas Breeze, 'for himself and George Nicoll.' George Nicoll had survived Thomas Breeze. Counsel for the defendant then contended that this shewed a joint tenancy in Thomas Breeze and Nicoll; and that, as it was admitted that Thomas Breeze was dead, the estate by survivorship had come wholly to George Nicoll, and Thomas Breeze's devise could not take effect. For the plaintiff it was contended that the words in question were forged: and evidence was produced for the purpose of proving this. The defendant's counsel then put in evidence another receipt in the same form. At the close of the case, before the Lord Chief Baron had begun to sum up, counsel for the plaintiff requested to be allowed to put in further evidence. This was objected to on the part of the defendant, but the Lord Chief Baron admitted it, subject to the leave after mentioned. Evidence was accordingly given for the purpose of shewing that Thomas Breeze and George Nicoll were not joint tenants; but that Thomas Breeze was owner of one undivided ninth part of the land by one title, and George Nicoll of the other eight ninths by another title, through one James Nicoll. A verdict was then found, on the demise of Elizabeth Breeze, for one ninth; leave being reserved to move for a nonsuit, or to enter a verdict for the defendant."

On appeal the question was whether the judge admitted the evidence at an improper stage. It was held that the Court of Appeal would not

interfere with the discretion exercised by the judge, if the evidence is not itself inadmissible, unless it appears that an irregularity has occurred causing actual injustice. The ground upon which the judge at first instance allowed the evidence is not stated but it would seem that the element of surprise did arise in the defendant's contention for a joint tenancy in answer to the plaintiff's case of a tenancy in common. Moreover it was clearly necessary to rebut the defendant's claim.

The test in an application to lead additional evidence when the case is closed is whether the plaintiff has been surprised by the evidence led by the defendant

I am unable to say that the plaintiff in this case has been taken by surprise. On the contrary, the plaintiff's case from the outset involved proof that the areas of land were less than the transportable area prescribed by the local Government and Public Health Ordinances. I must therefore refuse leave to call Mr. S. S. R. Insanally. It is perhaps fortunate for the plaintiff that the evidence on this aspect can possibly be given by Mr. D. N. Persaud who is a sworn land surveyor and who has already given some evidence on this aspect of the case.

It is ordered that defendant's costs of this application be taxed fit for counsel and paid by the plaintiff in any event.

Order accordingly.

BRITISH GUIANA MINE WORKERS' UNION v. CAESAR

[Federal Supreme Court (Lewis, Marnan and Jackson, JJ.,) March 13, 1962.]

Trade Union—Expulsion in breach of natural justice—Rules of union provided for appeal to delegates conference—Whether failure to appeal barred action.

The respondent, a member of the appellant union, sued for a declaration that he was expelled from the union in breach of the rules of natural justice. Rule (b) (15) of the union's rules gave him a "right to appeal to the delegates conference", whose decision was to be final. On appeal from the judgment of FRASER, J., in favour of the respondent (1961 L.R.B.G. 168), it was argued for the union that the respondent, having failed to appeal to the delegates conference, was precluded from instituting proceedings in the Supreme Court.

Held: where, as in this case, a man is expelled from a union without regard to the principles of natural justice, unless (which was not so here) the rules expressly constitute a contract between him and the union that he must first exhaust his domestic appellate remedies, he is entitled to go directly to the courts for redress. *Annamunthodo v. Trinidad Oilfield Workers' Trade Union* (1961), 3 W.I.R. 650, applied.

Appeal dismissed.

L. A. Luckhoo, Q.C., with *J. O. F. Haynes, Q.C.*, for the appellants.

Ashton Chase for the respondent.

B.G. MINE WORKERS' UNION v. CAESAR

LEWIS, J.: In this case the appellants seek to have set aside the judgment of FRASER, J., in which he held that the respondent had been wrongfully expelled from the appellant union, because his expulsion had taken place without his having been charged or summoned to attend before the meeting of the general council which purported to expel him, and without any opportunity having been given him to defend himself.

At the commencement of the hearing, counsel for the appellants very properly conceded that expulsion in such circumstances amounted to a violation of the principles of natural justice, and stated that he would not argue the ground of appeal in which that decision of the learned trial judge was challenged. Learned counsel, however, put forward a proposition which, indeed, had been taken in the court below, and against which the trial judge had decided, that the respondent ought to have taken his case to the domestic appellate body, namely, the annual conference of delegates, before instituting proceedings in the Supreme Court. The attention of the court was drawn to three cases, but it is only necessary to refer to the third of these cases, namely the recent decision of the Privy Council in the case of *Annamunthodo v. Oil Field Workers' Trade Union* (1961), 3 W.I.R. 650.

It is unnecessary to refer to the facts of that case because, having opened the case to this court, learned counsel for the appellant stated that, having regard to parts of the judgment in that case, he no longer wished to pursue the proposition. At p. 656 of the report Lord DENNING, who delivered the judgment of the Privy Council, said:

“The third question is whether Waiter Annamunthodo has lost his right to complain by appealing to the annual conference of delegates.”

Having referred to rule 11 (7) of the union's rules, which was pertinent in that case, and which is almost identical with rule (b) (15) of the appellant union's rules, his lordship went on:

“Even if the order of expulsion were capable of being affirmed or disaffirmed their Lordships cannot regard an appeal (that is, an appeal to the domestic appellate body under the relevant rule) as an act of affirmance. On the contrary, it is a disaffirmance—a complaint against the order of expulsion. If he had not appealed it might have been said that he should have done so, that he should have exhausted all internal means of redress, before having recourse to the courts. Such a plea was upheld in the special circumstances that prevailed in *White v. Kuzych*, [1951] A.C. 585.”

Now, on examination of the case of *White v. Kuzych* to which his lordship there referred, it appears that in that case the rules of the society expressly required the expelled member to exhaust the domestic remedies before going to the courts. His lordship then went on:

“It was therefore quite proper for him to appeal to the annual conference before coming to the courts even though he was not bound to do so.”

Later on in his judgment Lord DENNING said:

“If a domestic tribunal fails to act in accordance with natural justice, the person affected by their decision could always seek redress in the courts. It is a prejudice to any man to be denied justice.”

Although in the case of *Annamunthodo* the plaintiff had appealed to the domestic tribunal, it would seem that in principle it would be difficult to maintain the proposition which learned counsel advanced as a ground of appeal in this case, and the expression of view by Lord DENNING is, in my opinion, in favour of that principle—that where a man is expelled from a union without regard to the principles of natural justice, as in this case, unless the rules expressly constitute a contract between him and the union that he must first exhaust his domestic appellate remedies, then he is entitled to go directly to the courts for redress.

For these reasons this appeal, in my view, ought to be dismissed with costs.

MARNAN, J.: I agree. The particular clause in the trade union rule which distinguishes *White v. Kuzych* from the *Annamunthodo* case was a clause which was really designed to protect the union from litigation, for it was to the effect that no member could sue the union in a court of law until he had exhausted his domestic possibilities of redress. In the present case, however, the court has had an appeal involving a very different rule which is, as has been pointed out, almost word for word with the rule considered in *Annamunthodo v. Oil Field Workers' Trade Union*.

Mr. Haynes, in my view quite rightly, has taken one point only, and equally rightly and, if I may say so, courageously, directed the attention of the court to the only three cases which appear to be relevant to his point. It is not his fault that the principles laid down expressly in the *Annamunthodo* case are directly contrary to his argument, and he had the courage to recognize that fact as soon as the similarity of the two rules became apparent. I am grateful personally for the conciseness of his argument which leaves no doubt in my mind that his appeal must be dismissed with costs.

JACKSON, J.: I agree that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *L. L. Perry* (for the plaintiff); *S. M. A. Nasir* (for the defendants).

SINGH v. EDWARDS AND OTHERS

[Federal Supreme Court (Lewis, Marnan and Jackson, JJ.) March 13 and 14, 1962.]

Trust—Intestacy—Eight beneficiaries—Oral agreement for eldest beneficiary to acquire transport in his name in trust for all beneficiaries—No written evidence of agreement—Denial of trust—Enforceability—Limitation—Civil Law of British Guiana Ordinance, Cap. 2, s.2, proviso (d).

J, who owned a quarter share in certain lands, died in 1923 intestate leaving eight children as her sole beneficiaries. Her sister, S, obtained letters of administration for her estate but, having fallen ill, arranged at a family conference for the eldest child, B.S., to take over the administration and to vest title in himself for the property on behalf of all the beneficiaries. B.S. accordingly obtained transport in his name. Thereafter he made oral statements in recognition of the trust, and in part executed it by conveying certain portions of the property to some of the beneficiaries. B.S. died in 1956, and it was then discovered that he had devised to his son, the appellant, some of the property belonging to the other beneficiaries. The appellant denied the trust, and thereupon the respondents, five of J's children, sued to enforce it. On appeal from the decision of the trial judge, who gave judgment for the respondents, it was argued for the appellant that the respondents were guilty of laches, and that there was no writing evidencing the creation of the trust as required by s. 3, proviso (d), of the Civil Law of British Guiana Ordinance, Cap. 2, but this objection was not pleaded.

Held: (i) notwithstanding proviso (d) to s. 3 of the Civil Law of British Guiana Ordinance, Cap. 2, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute in order to keep the land himself. *Rochevoucauld v. Boustead*, [1897] 1 Ch. 198, applied;

(ii) the cause of action arose only after the death of B.S., when the respondents discovered that he had failed to carry out the terms of the trust in failing to devise to them the full share in the property to which they were beneficially entitled. As the respondents brought their action promptly, the defences of limitation and laches could not in any event be supported.

Appeal dismissed.

K. Prasad for the appellant.

No appearance on behalf of the respondents.

LEWIS, J.: The appellant is the executor of the estate of his uncle, Baldeo Singh, who died on 13th December, 1956. This case raises the question whether certain property, being lot No. 4 part of lot 68 in the lots 67-74 Country District, situate on the Corentyne Coast, county of Berbice, was acquired by Baldeo Singh for himself absolutely or subject to a valid trust in favour of himself and other beneficiaries of the estate of his mother Janakiah. Baldeo Singh's father, one Danraj, who died in 1911, had by his will devised this property to his wife Janakiah and his three lawful children, Baldeo, Shivbarran and Punni in equal shares. Janakiah married again and the five respondents are the issue of that marriage. She died intestate on the 3rd April, 1923, and her undivided quarter share in the property devolved to her eight children in equal shares. At that date all her children were minors, and in 1924 her sister Scillwanteah obtained letters of administration to her estate. The position with respect to the property then was that each of the three elder children owned one undivided 9/32 share, and each of the five younger children an undivided 1/32 share.

In 1929 Scillwanteah, being ill and feeling unable to carry on the administration of the estate, held a conference at her house at which were present Baldeo Singh, then of full age, Walter Edwards, the eldest of the respondents, Scillwanteah and her husband Shrikissoon, and certain other relatives including Chatterpaul Singh. The learned trial judge accepted the evidence of Chatterpaul Singh that at that conference Baldeo Singh agreed to take over from Scillwanteah the administration of Janakiah's estate, and that in order that the title to the property might be vested in him it should be put at execution sale for rates and taxes and he would buy it in. The practice of acquiring title by this expedient is well established in British Guiana. On 8th May, 1930, Baldeo Singh purchased lot No. 68 at execution sale for \$8.20 and on 16th June, 1930, transport was duly passed to him. At the time of this transaction the respondents were in the care of Baldeo Singh with whom they lived in his house on lot 4. Roni, daughter of Punni, also lived with him.

The learned judge also accepted the evidence of the respondents Walter Edwards and Alice Edwards, and of their cousin Roni, that throughout his life time Baldeo acknowledged that they had an interest in the land derived through their respective mothers, Janakiah and Punni, and that on occasions when they asked that their shares be given to them he promised that on his death he would by his will leave them their shares "in proportion to the shares your mother left you." The evidence of Alice was also accepted that she and her husband cultivated the rice-fields without interference during Baldeo Singh's lifetime.

In 1950 Mr. Yhap, surveyor, in his capacity of partitioning officer, partitioned lots Nos. 67 and 68, Corentyne. He stated in evidence that Baldeo Singh presented both his own transport and the probate of the will of Shivbarran, then deceased, whose executor and one of whose devisees he was, in support of his claim, and was in consequence awarded the following lots:

5 house lots: 165, 166, 167, 168, 169 in section A.

10 house lots: 161 to 168, 171, 172 in section B.

3 cultivation lots, i.e., ricefields area: 5, 58, 67.

1 reef lot: 5.

All the abovementioned lots were comprised in lot 4, No. 68. Thereafter Baldeo Singh transported one house lot each to the respondents Alice and Doris and promised to leave to them by will shares in the cultivation lots. He also transported seven house lots to the appellant and two to strangers. He died in 1956 and by his will dated June 1956 he devised one house lot each to the respondents Walter, Daniel and Sonny, and one house lot to Roni. To the appellant and the appellant's son Darasan Singh he devised the remainder of his property; and in pursuance of this devise the appellant in his capacity of executor transported to himself and his son the remaining house lots 162 and 167, section B, the three cultivation lots, and the reef lot.

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It appears from the evidence of Mr. Yhap that the house lots transported to the respondents are much less valuable than those transported to the appellant and his son, while the cultivation lots, 10.65 acres in extent, are far more valuable than the house lots.

The present action was brought because the appellant denies that Baldeo Singh held lot 4, and the lots subsequently allotted to him by the partitioning officer, in trust, and that the respondents have an interest as beneficiaries in the cultivation lots.

On the evidence set out above the learned trial judge came to the conclusion that the respondents "had clearly established a trust in the property in their favour in respect of their mother Janakiah's undivided quarter share" therein "and a breach of that trust when Baldeo Singh by his will failed to carry out the terms of the trust by devising some share in the cultivation lots and reef lots to them." He considered that although the appellant, having inherited both his father's share and his uncle Shivbarran's share, was entitled to a greater share of the property, the respondents had been denied and defrauded of their share in the cultivation and reef lots. Counsel on both sides, having agreed that if judgment were entered for the respondents (plaintiffs) it should be restricted to the cultivation lots only, the learned judge entered judgment declaring the trust and ordering the appellant to pass transport accordingly.

Although at the hearing of this appeal learned counsel for the appellant abandoned the ground of appeal which alleged that the judgment is against the weight of the evidence, I have thought it necessary to set out the main facts on which the learned judge relied in view of two other grounds put forward by counsel. The first of these was that the trust which the judge held to be proved was established by an agreement between the administratrix Scillwanteah and Baldeo Singh, that Scillwanteah could not as administratrix create a trust, that this amounted merely to a delegation of her duties which was invalid; and, secondly, that in any event there was no writing to evidence the creation of the trust as required by s. 3, proviso (d), of the Civil Law of British Guiana Ordinance, Cap. 2.

In my view, these submissions are based upon a misconception of the effect of the evidence in fact and in law. The respondents' case as pleaded was that Baldeo Singh had purchased the property at execution sale as trustee for himself and the other beneficiaries of the estate of Janakiah, and this trust was established by evidence of the circumstances in which he purchased it, his promise to Scillwanteah, his special relationship to the respondents, and his subsequent recognition of the trust by his oral statements, his promises to Janakiah's heirs to satisfy their claims through his will, and his satisfaction in part of those claims by the transports to Alice and Doris and devises to Walter, Daniel and Sonny of certain house lots. The objection under the proviso (d) of s. 3 of the Civil Law of British Guiana Ordinance (which corresponds to s. 7 of the Statute of Frauds) was not pleaded, and the belated application of counsel for the appellant for leave to amend the defence in order to plead it cannot

avail him. For Baldeo Singh's executor, the appellant, now seeks to deny the trust and claim the land as Baldeo's absolutely, and the devise of the cultivation lots to him and his son alone was itself a denial of the respondents' rights and a fraud upon the trust. Such an objection is entirely contrary to the well established principle that the court will not allow the Statute of Frauds to be made an instrument of fraud.

This ground of appeal, as well as two other grounds based upon the Statute of Limitations and the defence of laches are, in my opinion, all covered by the decision in the case of *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196. In that case the plaintiff was in 1873 the owner of certain property subject to a large mortgage. The mortgagee was desirous of calling in the mortgage, and the plaintiff, fearing that her first husband, from whom she was divorced, would buy in the mortgage and foreclose, entered into an arrangement with the defendant and the mortgagee that the mortgagee should sell the property at auction and that the defendant should buy it in at a price sufficient to cover the amount due on the mortgage. The defendant bought in the property which was conveyed to him as absolute owner. Thereafter he managed the property and from time to time remitted to the plaintiff various sums out of the profits. In 1879 the firm of which the defendant was a member became bankrupt. In 1880 the defendant's trustee in bankruptcy repudiated the plaintiff's claim to the property. The defendant never expressly did so, and the plaintiff never gave either of them to understand that she had given up her claim, but she took no active steps to assert it till 1894, when she commenced an action against the defendant (who had obtained his discharge). Her case was that he had purchased the estates as trustee for her subject to a lien for his advances. The defendant pleaded—(1) that the estates were conveyed to him as beneficial owner; (2) the Statute of Frauds; (3) that the plaintiff's claim, if proved, was barred—(a) by the defendant's bankruptcy; (b) by the Statutes of Limitation; (c) by laches and delay.

The Court of Appeal, being of opinion that the evidence, which partly consisted of letters signed by the defendant, completely proved that the defendant purchased as a trustee for the plaintiff, and held the property as such trustee subject to a lien for his expenditure, held that even if the letters signed by the defendant did not contain enough to satisfy s. 7 of the Statute of Frauds, parol evidence was admissible; and as the whole of the evidence taken together established that the defendant had purchased as a trustee, the plaintiff was entitled to a decree. Further, that a trust thus established is an express trust within the definition given in *Soar v. Ashwell*, [1893] 2 Q.B. 390, and the Statute of Limitations therefore is no defence to the claim. The court further held that although for twelve years after the correspondence between the plaintiff and the defendant had ceased the plaintiff had taken no proceedings, yet, as she had done nothing actively to lead the defendant to suppose that she had given up her claim, there was nothing against her but the lapse of time; and that the mere lapse of time in a case of express trust was not a bar.

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Dealing with the defence based upon the Statute of Frauds, LINDLEY, L.J., who delivered the judgment of the court, said, at p. 206:—

“It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud; and that it is a fraud on the part of a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself. Consequently, notwithstanding the statute, it is competent for a person claiming land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of conveyance and the statute, in order to keep the land himself.”

Applying this decision to the facts of the instant case, I am clearly of opinion that this appeal fails. I should add, on the questions of the limitation of actions and laches, that I agree with the learned judge in holding that the cause of action did not arise in the lifetime of Baldeo Singh; it only arose after his death when the respondents discovered that he had failed to carry out the terms of the trust in failing to devise to them the full share in the property to which they were beneficially entitled. As the respondents brought their action promptly the defences of limitation and laches could not in any event be supported.

Counsel for the appellant invited the court, if it disagreed with his submissions, to vary the learned judge’s order by ordering a sale of the cultivation lots so as to avoid possible fragmentation of the property. He also submitted that the order for payment of costs against the defendant in his individual capacity was harsh and should be varied and costs be made payable out of the estate of Baldeo Singh. I do not think that any sufficient reason has been shown for interfering with the judge’s order. The respondents are entitled to the shares for which the learned judge has ordered that transport be passed to them, and I see no reason why this court should compel them to be compensated in money instead. Insofar as the costs are concerned, the learned judge gave as his reason for his order that transports of the cultivation lots have already been passed to the appellant. In addition to this the appellant stated in evidence that there is nothing left of the estate of Baldeo Singh for administration, so that an order for costs to be paid out of that estate would be of no value.

For these reasons the appeal should be dismissed with costs to be paid by the appellant in his individual capacity.

MARNAN, J.: I agree.

JACKSON, J.: I agree.

Appeal dismissed.

Solicitor: *A. Vanier* (for the appellant).

SAMUELS v. BOTTLERS (BRITISH GUIANA) LIMITED

[Federal Supreme Court (Gomes, C.J., Lewis and Marnan, JJ.) February 14, 15, March 15, 1962]

Labour—Watchman—Occasional duty after regular hours to open gate—Residence in rent-free quarters—Whether such occasional duty entitles him to wages as a watchman—Minimum Wages (Watchmen) Order No. 63 of 1956, s. 2.

Factory—Overtime—Weekly employee—Normal hours not fixed—No basis for computation of overtime hours—Factories Ordinance, Cap. 115, ss. 26 and 29.

The appellant was employed by the respondents as a watchman on a weekly basis. At his request he was allowed to live rent-free on the premises to be watched. His hours of work were from 7 p.m. to midnight. After midnight he could retire, but subject to an occasional duty to open and close the gates as required. He claimed overtime payment in respect *inter alia* of his services rendered after midnight and on Sundays and public holidays.

Section 29 (1) of the Factories Ordinance, Cap. 115, empowers the Governor in Council to prescribe the rate at which factory employees shall be paid . . . (a) in respect of work on any day in excess of eight hours or in respect of work in any week in excess of the normal hours of work prescribed under s. 26 (1) (a) of the Ordinance; (b) in respect of work on (non-Christian) public holidays; and (c) in respect of work on Sundays and other Christian public holidays. Section 29 (4) of the Ordinance provides that where the appropriate rate has not been fixed the rate shall be, in the case of work on Christian holidays, “twice the rate at which the person employed would but for this section be paid, and, in the case of any other work, one and a half times the rate at which the person employed would but for this section be paid.” No regulations were made under s. 26 (1) (a) prescribing the number of hours of work during which a person might normally be employed in a factory in any week.

Held: (i) the duty to open and close the gates after midnight did not by itself constitute a watching or guarding of premises;

(ii) to claim overtime payment, a weekly employee must relate the number of hours worked by him in a week to the prescribed normal number of hours per week and not to the prescribed normal number of hours per day;

(iii) but until regulations were made under s. 26 (1) (a) of Cap. 115 prescribing “the number of hours of work during which a person may normally be employed in a factory . . . in any week”, there was no scope for the application of s. 29 (4) of the Ordinance;

(iv) the appellant was however entitled to overtime payment under s. 29 (4) of Cap. 115 in respect of work done on Sundays and public holidays.

Appeal allowed in part.

Ashton Chase for the appellant.

C. Lloyd Luckhoo, Q.C., with *M. S. Rahaman* for the respondents.

LEWIS, J.: This is an appeal against that part of the judgment of LUCKHOO, C.J., disallowing the plaintiff-appellant’s claim for \$6,878.01 alleged to be due to him by the respondents for overtime

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pay as a factory watchman. The claim is based upon the provisions of the Minimum Wages (Watchmen) Order, No. 63 of 1956, made under s. 8 of the Labour Ordinance, Cap. 103, and s. 29 of the Factories Ordinance, Cap. 115. I shall refer to these provisions in greater detail later. The notice of appeal also challenged the judgment for \$30 in favour of the appellant in respect of his claim for holidays with pay, but this was not pursued at the hearing of the appeal.

The appellant's case was that the terms of his employment as arranged in April, 1955, were that he should work as a watchman at the respondent company's factory premises in D'Urban and Hardina Streets between the hours of 4.30 p.m. and 7.30 a.m. daily including Sundays, and that his duties as watchman included opening the gates to let vehicles in and out of the premises throughout the night, and lighting the boiler fire at about 4.30 a.m.; that for these services he was paid first \$13.50 per week, later adjusted to the prescribed minimum wage of \$15.00 per week. He claimed to be entitled to overtime in respect of hours worked daily in excess of eight hours and to double time or time and a half for Sundays and public holidays.

The respondents alleged that the appellant's hours were at first 4 p.m. to midnight, later changed to 7 p.m. to midnight; that the appellant's duty to open the gates after midnight was not part of his duties as watchman but was an occasional duty referable to the fact that he was at his request allowed to live rent free on the premises; and they denied that it was his duty to light the boiler.

The trial judge found in favour of the respondent as to the hours of employment, holding that though the appellant may occasionally have watched the premises after midnight this was not at the request of the respondents; and he further found that although the appellant was under a duty to open and close the gates as required even after midnight and to light the boiler in the morning these were not part of his duties as a watchman and that he was accordingly not entitled to be paid overtime.

Counsel for the appellant argued three main grounds of appeal, *viz:*—

1. that in view of certain findings of fact made by the trial judge, he ought to have found in favour of the appellant on the issue of his hours of employment, and that the trial judge failed to give sufficient weight to the cumulative effect of these findings as supporting the appellant's contention;
2. that there was no evidence or no sufficient evidence to support the finding that the appellant was employed as watchman only up to midnight;
3. that the learned judge did not address his mind to the question of the appellant's entitlement to overtime for Sundays and holidays.

Grounds 1 and 2 may be considered together. The main issue in the case was whether or not the appellant's contract of employment required him to watch the premises after midnight and continuously until morning. In order to prove this the appellant himself testified to this effect; and he called witnesses to prove that they had seen him watching after midnight, that he had opened the factory gates to let vehicles in and out at odd hours after midnight; and that he regularly lit the boiler. The witnesses, King, a neighbour who kept his motor car in the factory yard with the respondents' permission, and Corporal Mickle, a policeman, also living nearby who did a late beat three times weekly, said that they saw the appellant patrolling or standing at the gate "after midnight" and "at 1,30 a.m.". Corporal Mickle's evidence related to the period mid – 1955 to February, 1960, and King's to the period May, 1956 to May, 1958. The witnesses Elcock and Compton stated that they substituted for the appellant when he fell ill in 1959—Elcock for two weeks and Compton for six weeks. Elcock, an assistant foreman at the factory, said that he worked from 4.30 p.m. to 7 a.m. seven days a week, and Compton from 6 p.m. to 6 a.m. each of them being paid \$15.00 per week.

For the respondents, Spencer, the factory manager, and Nothnagel, a director, both stated that the arrangement made with the appellant when he was employed in April, 1955, was for working hours from 4 p.m. to midnight, which Spencer said he later changed from 7 p.m. to midnight as checkers were on the premises up to 7 p.m. and a watchman was not required before that hour. He denied having made the arrangements for watching after midnight about which Elcock and Compton had testified. Spencer further stated that the company expected the appellant to open the gates at night as and when necessary because he lived on the premises with their permission and the gate keys were left with him. A considerable amount of evidence was led on both sides on this question of the appellant's residence on the premises, the respondents contending that he lived there from 1955 to 1960 and the appellant maintaining that he lived there only between May and August, 1956. The trial judge found in favour of the respondents on this issue and his finding has not been challenged in this appeal. In the light of this finding, the judge considered that the appellant's duty to open and close the gates on occasions did not necessarily involve the inference that he was employed as a watchman after midnight. "Such a duty," he said, "could conceivably be referable to an obligation imposed in return for the privilege of residing rent free in a room on the premises as is contended for by the defendant company."

Counsel for the appellant has quite frankly admitted that a grave stumbling block in the way of the appellant's success was a letter put in evidence by the respondents. This letter, dated 4th May, 1956, at the time when the respondents gave him permission to "remain" was prepared by Spencer and signed as "approved" by the appellant in the room at the back of their premises. The second paragraph is as follows:—

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“It is understood that your presence on the premises does not constitute a change in your conditions of employment in which it has already been agreed that your hours of work will commence at 7 p.m. in the evening until midnight, from Monday through Saturday of each week.”

About this the learned judge said:—

“I find it difficult to believe that Samuels signed Exhibit “B” without first ascertaining what was typed on the document and he must have known that the period of work stated therein was from 7 p.m. until midnight.”

Counsel for the appellant submitted that the only reasonable inference from the judge’s findings that appellant (a) did sometimes watch the buildings after midnight, (b) was required to open and close the gates for trucks, and (c) lit the boiler in the mornings, was that notwithstanding this letter the appellant was employed as a watchman up to 7.30 a.m. He points to the fact that the duties in respect of the gates and the boiler are not mentioned in the letter, and that Spencer does not suggest that he ever discussed them with the appellant as a *quid pro quo* for his residing on the premises. This shows, he says, that they were not separate duties, but part of his duties as watchman. He refers to the favourable impression made on the judge by both Elcock and Corporal Mickle, and to the improbability that the company would have required substitutes to work longer hours than the appellant was himself engaged for.

I appreciate the force of counsel’s submissions, but I am not convinced that the learned judge was wrong in the conclusion which he reached. The appellant stated in his evidence that he had claimed and been promised payment for overtime from April, 1955, when he received his first week’s wages, yet after working for a year without payment of overtime he signed the letter of the 4th May, 1956, acknowledging that his hours of employment were from 7 p.m. to midnight. He also stated that in 1957 and 1958 he again claimed overtime from Nothnagel, being told on each occasion that he would be paid in due course. Nothnagel, whose evidence the judge accepted, denied this, stating that the appellant merely asked for an increase in wages, which was refused. I agree with the judge that it is “difficult to believe that the plaintiff would have been content to wait year after year for his overtime pay and be put off by Nothnagel telling him to bear up or to be of good cheer.” It seems inconceivable too that any business concern would indefinitely postpone a claim by one of its employees for overtime, more especially a claim for daily overtime of seven hours. Moreover, as Spencer said, it would have been cheaper to employ two watchmen than to pay so much overtime, and such an arrangement is most unlikely. Finally, the judge accepted the evidence of the respondents’ witnesses Lilleyman and Fernandes, that on several occasions when they wanted the gates opened after midnight they had to awaken the appellant and get him out of his room: this is inconsistent with the existence of a duty to watch.

Counsel further submitted that if even the appellant was at liberty to retire after midnight, the fact that he was present on the premises and bound to get up and open the gates was sufficient to support his claim. I cannot agree with this submission. The term “watchman” is defined in s. 2 of the Minimum Wages (Watchmen) Order as “any person employed to watch or guard any premises other than private dwelling places.” In my opinion the duty to open and close the gates does not by itself constitute watching or guarding premises; and an employee whose duty permits of his retiring to bed and being aroused in order to open a gate can hardly be called a watchman in any sense and certainly not within the meaning of this definition. In order to succeed in his claim for overtime as a watchman the appellant must establish that his duties during the relevant period fell within the statutory definition of “watchman.” See *France v. James Coombes & Co.*, [1929] A.C. 496.

For these reasons I think that there was sufficient evidence to support the conclusion reached by the learned judge on the facts and that this appeal fails in so far as it relates to overtime. There is, however, a further reason why in law the appeal in that respect cannot succeed. The appellant was employed on a weekly basis and in order to succeed in a claim for overtime must prove that he has worked in any week more than the normal hours prescribed by statute for weekly employees. Section 8 of the Labour Ordinance empowers the Governor-in-Council to prescribe by order the minimum rates of wages payable in any occupation, and the order may prescribe time-rates, piece rates and overtime rates. Under this section the Minimum Wages (Watchmen) Order No. 63 of 1956 was made, the minimum wage for a watchman being fixed at \$15.00. The Factories Ordinance contains no provision for fixing minimum wage rates other than overtime rates, and it is accordingly only under the Minimum Wages (Watchmen) Order that a factory watchman can claim payment of a minimum wage. Section 4 of the Order fixed hourly rates of overtime for hours worked in any one week in excess of the “normal hours” of work as prescribed by the Hours’ of Work (Watchmen) (No. 2) Regulations, 1953, also made under the Labour Ordinance, but as those Regulations expressly exclude watchmen employed in factories from their application this section is inapplicable to the present case. The appellant however relies upon section 29 of the Factories Ordinance, subsections (1) and (4) of which are as follows—

“(1) The Governor-in-Council may make regulations prescribing the rate at which a person who is employed in a factory, or in any occupation in a factory, shall be paid—

- (a) in respect of work on any day in excess of eight hours or in respect of work in any week in excess of the normal hours of work prescribed under paragraph (a) of subsection (1) of section 26 of this Ordinance;
- (b) in respect of work on any public holiday, other than as specified in paragraph (c) of this subsection, within the meaning of the Public Holidays Ordinance;

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- (c) in respect of work on Sundays, Christmas Day, the day after Christmas Day if Christmas falls on a Sunday, the day commonly known as Boxing Day, the first week-day of January, Good Friday, Easter Monday or Whit-Monday.

(4) Where, in relation to any factory or to any occupation in a factory the appropriate rate under paragraphs (a), (b) or (c) of subsection (1) of this section has not been fixed in regulations made under this section, such rate shall be, in the case of work on any day specified in paragraph (c) of subsection (1) of this section, twice the rate at which the person employed would but for this section be paid, and, in the case of any other work, one and a half times the rate at which the person employed would but for this section he paid.”

No appropriate rates for overtime have been fixed under paragraphs (a), (b) or (c) of subsection (1) of this section, and it is said that the provisions of subsection (4) apply. I agree that they apply to the case of Sundays and Public Holidays (paragraphs (b) and (c)), and to daily wage workers (paragraph (a)), but in my view a claim for overtime cannot be maintained under this subsection by workers employed on a weekly basis. Such a claim must be “in respect of work in any week in excess of the normal hours of work prescribed under paragraph (a) of subsection (1) of section 26 of this Ordinance”, and until the Governor-in-Council prescribes “the number of hours of work during which a person may normally be employed, in a factory . . . in any week” there is no scope for the application of section 29 (4) in this respect. In this connection it is of interest to compare section 8 (6) of the Labour Ordinance:—

“8. (6) The expression ‘overtime rate’ means a rate (whether a time-rate or piece-rate) to apply, in substitution for the prescribed rate which would otherwise be applicable, in respect of hours worked by an employee in any week or on any day in excess of the number of hours declared in regulations made by the Governor-in-Council under the provisions of this Ordinance to be the normal number of hours per week or for that day in the occupation.”

It is perfectly clear from this definition that a weekly employee must relate the number of hours worked by him in a week to the prescribed normal number of hours per week, and not to the prescribed normal number of hours per day, and I am of opinion that s. 29 (1) and (4) must be interpreted in a similar way.

The position is, however, different with respect to Sundays and public holidays. The appellant received a weekly wage of \$15.00. ‘Week’ is defined in s. 2 of the Factories Ordinance as “the period between midnight on Saturday night and midnight on the succeeding Saturday night”, that is seven complete days. His average daily wage

was therefore \$2.1428 and he was entitled to be paid double time or time and a half, as prescribed, in respect of public holidays; if his employment included Sundays he was also entitled to double time for Sundays.

The question remains, was the appellant employed to work on Sundays? The learned judge made no finding on this point and counsel for both parties have asked this court to do so. The evidence is clear that he did so work, and I am of opinion that he did so in pursuance of this agreement with the respondents. The appellant, Elcock and Somerset all say that Sundays were included. Nothnagel, who made the arrangement with the appellant, does not exclude Sundays. Spencer makes no reference to Sundays when speaking of the arrangement between Nothnagel and the appellant at which he was present. The respondents rely upon the letter of 4th May, 1956, which states "that your hours of work will commence at 7 p.m. in the evening until midnight from Monday through Saturday of each week." The stress here is laid upon the hours of work and it is quite possible that the significance of the phrase "Monday through Saturday" as excluding Sunday as a day of employment may not have been apparent to the appellant's mind at the time he signed the letter. It seems to me unlikely that the company would have left their premises unguarded on Sunday night. I am of opinion, therefore, that the preponderance of evidence is in favour of the appellant on this question.

The appellant was therefore entitled to payment for the Sundays and public holidays on which he worked for the respondents between April 1955 and April 4th, 1960 on the basis of double time or time and a half, as prescribed by s. 29 (4) of the Factories Ordinance. He has already received payment at the average daily rate for these days, and the amount now due to him is \$588.50.

I would vary the judgment of the court below by entering judgment for \$618.50. The parties should pay their own costs.

GOMES, C.J.: I agree.

MARNAN, J.: I also agree.

Appeal allowed in part.

Solicitors: *Dabi Dial* (for the appellant); *A. G. King* (for the respondent).

HARRY BADGE v. BRIJLALL

[Supreme Court—In Chambers (Persaud, J.,) October 12, 1961, January 13, 1962.]

Right of appeal—Rice Assessment Committee—Decision to re-hear an application for assessment of rent—Whether appeal lies therefrom.

Rice Assessment Committee—Rehearing of application to assess rent—Governed by practice and procedure of magistrate's court—Grounds for reopening a hearing.

At the hearing of an application to assess the rent of certain rice lands, neither the landlord nor his counsel appeared before the Rice Assessment Committee and no excuse for their absence was tendered. The application was heard in their absence and a decision given. Thereafter the Committee granted an application by the landlord for the reopening of the hearing.

Held: (i) there is a right of appeal from a decision of a Rice Assessment Committee ordering the rehearing of an application for the assessment of rent;

(ii) the rehearing of such an application is governed by the law and practice of the magistrate's court;

(iii) the matters which ought to be considered by a tribunal hearing an application for the reopening of an investigation are (a) the reason for the applicant's failure to appear when the case was heard; (b) whether there had been undue delay in making the application so as to prejudice the other side; (c) whether the other side would be prejudiced by an order for a new trial so as to render it inequitable to permit the case to be reopened; and (d) whether the applicant's case was manifestly insupportable. *Grimshaw v. Dunbar*, [1953] 1 All E.R. 350, applied;

(iv) the landlord's absence was not satisfactorily explained.

Appeal allowed.

M. Churaman for the appellant.

D. Dyal for the respondent.

PERSAUD, J.: This is an appeal from a decision of the rice assessment committee granting an application for the re-hearing of an application for the fixing of the maximum rent of 13 acres of rice lands, the property; of the respondent, and of which the appellant alleged that he was a tenant at the material time. The application for the assessment of the maximum rent was commenced on the 10th May, 1960, when both parties, together with their respective legal advisers, were present. Evidence was taken, and the matter was then adjourned to the 24th May, 1960, when it would appear that neither the respondent nor his counsel was in court and no excuse for their absence is recorded as having been received. However, the matter was concluded in the respondent's absence, and the maximum rent certified on that day. The assessment certificate was issued to take effect from the 1st May, 1959. On the 27th March, 1961, the respondent applied to the committee for a re-opening of the application under the provisions of s. 21 or, alternatively, under s. 51 (2) of the Rice Farmers (Security of Tenure) Ordinance, 1956. This application was heard: on the 18th July, 1960, and on the 25th July, 1960, the committee handed down its decision in writing in which it made an order for the re-opening of the investigation. It is against that order that this appeal is brought.

During the course of the argument counsel for the appellant stated that a previous application for a re-hearing had been made by the respondent on the 16th August, 1960, but was later discontinued. There is no record before me as to this fact, but the statement was not refuted by counsel for the respondent, and therefore I accept it.

Counsel for the respondent has urged—

- (1) that the order appealed against is interlocutory and does not fall within the provisions of s. 26 of the Ordinance;
- (2) that there is no provision which limits the time fixed for bringing applications of this nature, conceding, however, that the time must be reasonable.

The first submission made by counsel is to the effect that a "decision" in s. 26 of the Ordinance means a final decision, and in

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as much as the order for the reopening of the investigation is not final, the appellant has no right of appeal. This submission ignores the provisions of s. 26 of the Ordinance. Subsection (1) of that section gives a tenant and landlord the right of appeal where they are dissatisfied with a “decision” of an assessment committee. Subsection (2), which fixes the time to do certain things in order to launch an appeal, clearly contemplates a decision which includes, besides an assessment of the maximum rent, any other order or judgment. Again subs. 5 (d) vests in the judge on appeal the power to affirm, vary or reverse the order or decision.

In my opinion, an appellant has a right of appeal in a matter of this nature.

With respect to the second point raised by counsel for the respondent, it is a fact that s. 51 (2), which authorises the assessment committee to rehear applications, does not fix a time within which such an application may be brought. Section 51 (3) of the Ordinance, however, provides—

“The law and practice of the magistrate’s court shall, subject to the necessary modifications, apply to any claim or other proceedings made or instituted under this Ordinance.”

The law of the magistrate’s court is regulated by the Summary Jurisdiction (Civil Procedure) Rules, Part XX, r. 1. Under this rule an application for a new hearing shall be made to the court within 14 days after the hearing of the action or such further time as the court or a magistrate may allow. Presumably, where a party who wishes to apply for a new hearing under this rule is out of time, he must first apply for an extension of time within which to file his application for the new hearing. No such step was, taken in the matter before me.

In any application for a reopening of an investigation the matters which ought to be considered by the tribunal hearing the application are these—(a) the reason for the applicant’s failure to appear when the case was heard; (b) whether there had been undue delay in making the application so as to prejudice the other side; (c) whether the other side would be prejudiced by an order for a new trial so as to render it inequitable to permit the case to be re-opened; and (d) whether the applicant’s case was manifestly insupportable. [See *Grimshaw v. Dunbar*, [1953] 1 All E.R. 350].

I have considered all these matters, and I would answer them in favour of the appellant in this case. A court is not to concern itself with sympathetic considerations. A party to an action is entitled *prima facie* to have it heard in his presence, and if his absence is satisfactorily explained, he may be granted a new hearing provided he comes to the court within a reasonable time. I cannot say that this is the case here. In the circumstances I must allow this appeal. The order of the assessment committee appealed against is set aside, and the respondent must pay the appellant his costs fixed at \$25.00.

Appeal allowed.

D'AGUIAR BROTHERS LTD. v. RAMDEO AND ANOTHER

[Federal Supreme Court (Lewis, Marnan and Jackson, JJ.) March 16, 1962]

Practice and procedure—Request for hearing filed—Previous notice of default of defence required but not given—Whether request for hearing a nullity or irregularity—O.32, rr. (1), (3) and (9)—O.25, r. 15.

Order 32, rule (3), provides that a cause or matter shall be ripe for hearing when *inter alia* (a) the defendant has failed to deliver a defence and the plaintiff has complied with the provisions of Order 25. The applicable provision of Order 25, viz. r. 15, provides that a request for final judgment in default of defence shall not be filed unless notice has been served upon the defendant calling upon him to remedy his default within fourteen days after service of such notice.

Held: (i) the mere failure to do some act which a statute or rule prescribes as a prerequisite to filing some other proceeding does not necessarily make the latter proceeding a nullity;

(ii) failure to serve (where required) a notice of default of defence before filing a request for hearing is an irregularity and not a nullity.

Appeal dismissed.

[**Editorial Note:** For the decision of the Full Court see 1961 L.R.B.G. 315]

J. H. S. Elliott, Q.C., for the appellants.

S. D. S. Hardy for the respondents.

LEWIS, J.: This case raises the much discussed but nonetheless difficult question whether, where a step in an action has been taken without due compliance with the rules of practice, such proceeding is a nullity or merely an irregularity.

On the 12th of June, 1957, the respondents issued their writ against the appellants (the second-named defendants) and another, claiming damages for negligence in connection with a collision which occurred on the 26th November, 1956. On 1st July, 1957, appearance was entered on behalf of the appellants. On 3rd July, 1957, the statement of claim was filed, and on 13th July, 1957, the other defendant entered appearance in person. On 11th February, 1958, the respondents filed a certificate of default, a proceeding which was authorised by former rules of practice but for which the rules now in force do not provide. On the same day they filed a request for hearing, and the Registrar made an entry for hearing. Between that date and 11th April, 1958, certain other steps were taken by the other defendant, but these are not material to the present appeal. No further proceedings were taken in the action.

Notice of the date fixed for hearing was in due course advertised in the *Official Gazette* in accordance with O. 56, r. 2, and the case came on for hearing on 19th September, 1960. An objection *in limine* was then taken on behalf of the appellants that:

- (1) the request for hearing was a nullity, having been filed without a notice of default of defence having first been served upon the appellants in accordance with O. 25, r. 15; and
- (2) the action must be deemed abandoned and incapable of being revived under O. 32, r. 9 (1).

It is conceded that no such notice was served on the appellants and there can be no doubt that the request for hearing was premature.

The learned trial judge held that the omission to serve the notice of default of defence was an irregularity, and that as the appellants must have been aware of it and had failed to make application within a reasonable time to have it set aside they must be deemed to have waived the irregularity. He therefore over-ruled the objection and ordered the appellants to file their defence within fourteen days. An appeal to the Full Court was dismissed, and the appellants have now brought this appeal from the order of the Full Court.

The matter is of some importance to the appellants because the period of limitation for filing an action has now elapsed. If this action has been abandoned no new action can be brought.

The relevant rules governing a request for hearing are as follows:—

“ORDER 32

1. (1) When a cause or matter has become ripe for hearing, it shall be the duty of the plaintiff or other party in the position of plaintiff to file a request for hearing within six weeks thereafter.

* * * *

3. (1) Subject as hereinafter provided a cause or matter shall be ripe for hearing when —

(a) the defendant is in default of appearance or has failed to deliver a defence and the plaintiff has complied with the provisions of Order 11 or Order 25 as the case may be;

(b) the pleadings have been closed by the delivery of a reply or if no reply has been delivered after the time for delivery of a reply has expired:”

* * * *

For the purposes of this case the pertinent provision referred to in O. 32, r. 3 (1) (a), is O. 25, r. 15, which reads as follows:—

“ORDER 25.

15. No request for final judgment in default of defence shall be filed unless notice in writing has been served upon the

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defendant calling upon him to remedy his default within fourteen days after service of such notice. A copy of such notice shall be filed in the Registry immediately after service thereof with an indorsement thereon of the time, place and particulars of the service of such notice.”

* * * *

This rule speaks of “request for final judgment” and not “request for hearing”, but appears to be the only provision of O. 25 applicable, and I am of opinion that its provisions are imported into O. 32, r. 3 (1), because—(a) r. 9 (1) of the same Order (O. 25), dealing with actions other than those referred to in the preceding rules of the Order, makes provision for the filing of a request for hearing “subject to the provisions of r. 15 of this Order”; and (b) a request for hearing in cases where no defence has been filed, impliedly contains a request for final judgment after hearing.

The other rule which I think I should set out is O. 32, r. 9, which, insofar as it is relevant, reads as follows:—

“ORDER 32

9. (1) A cause or matter shall be deemed altogether abandoned and incapable of being revived if prior to the filing of a request for hearing or consent to judgment or the obtaining of judgment—

- (a) any party has failed to take any proceeding or file any document therein for one year from the date of the last proceeding had or the filing of the last document therein;

* * * *

(2) The instituting of a cause or matter which has been deemed altogether abandoned shall be of no effect in interrupting any period of limitation.”

Mr. Elliott, for the appellants, submitted that the premature request for hearing was a nullity and not an irregularity. O. 25, r. 15, he said, prohibited the filing of a request for hearing unless the notice of default had first been served upon the appellants, while O. 32, r. 1, only permitted its filing after the action became ripe for hearing. He relied upon a passage from CHITTY'S ARCHBOLD'S PRACTICE, 14th Edn., p. 445, cited in *Smythe v. Wiles*, [1921] 2 K.B. 66, at p. 76, which states:

“Where the proceeding adopted is that prescribed by the practice of the Court, and the error is merely in the manner of taking it, such an error is an irregularity, and may be waived by the laches or subsequent acts of the opposite party; but where the proceeding itself is altogether unwarranted, and different from that which, if any, ought to have been taken, then the

proceeding in general is a nullity, and cannot be waived by any act of the party against whom it has been taken.”

He contended that the request for hearing filed in this case is a proceeding altogether unwarranted and a nullity.

The distinction between a nullity and an irregularity is well established, although it is not always easy to decide into which category a particular proceeding falls. If the proceeding is a nullity it is incurably bad and there is no need for an order of the court to set it aside, but on application to the court it will be set aside *ex debito justitiae*; if it is merely an irregularity which may be waived the court has power to set it aside, but has a discretion whether or not it will do so. O. 54, r. 1, states that non-compliance with a rule of practice “shall not render any proceedings void unless the Court or a Judge shall so direct, but such proceedings may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge shall think fit.” This rule, which is similar to the English O. 70, r. 1, on the face of it appears to be applicable to all proceedings which do not comply with the rules, but it is well established that it only applies to proceedings which are voidable, that is, irregular, and not to those which are void, that is, nullities. [See *Anlaby v. Praetorius*, [1888] 20 Q.B.D. 764, and *Craig v. Kanssen*, [1943] K.B. 256].

I do not propose to attempt to lay down any categorical test for deciding whether a proceeding is void or voidable. I think, however, that a proceeding or step is “altogether unwarranted” if there is no enactment or rule under which it can be taken: it is different from the step or proceeding contemplated by the enactment or rule upon which the party who takes it purports to rely. But where the proceeding is one prescribed by the rules or enactment but the party makes some slip or blunder in the manner of taking it, it is a mere irregularity which may be waived. I think that the request for hearing filed in this case falls within the latter class and is not a nullity.

The citation from CHITTY, referred to above, was also quoted by BANKES, L.J., in *Pringle v. Hales*, [1925] 94 L.J. K.B. 458. In that case the plaintiff, who was tenant of a house within the Rent Restrictions Acts, lodged at a county court on January 30, 1924, a plaint for rent alleged to be overpaid. The claim for the overpayment could not be brought in that court without the leave of the judge or registrar on an application supported by affidavit, and no affidavit was sworn until February 5. The rent alleged to be overpaid was, under s. 8 (2) of the Rent Restrictions Acts, 1923, recoverable on or before January 31, 1924, but not afterwards. On lodgment of the plaint on January 30, a plaint note under the seal of the court was given to the plaintiff, and a summons to the defendant was issued, all bearing date January 30, 1924. This was clearly irregular, but at the trial of the action no objection was taken by the defendant to the jurisdiction of the court by reason of the irregularity. On appeal it was contended that

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all proceedings in the county court before February 5, 1924, were null and void, and constituted a defect in the jurisdiction of the county court which was not an irregularity and could not be waived. It was held that it was merely an irregularity which did not deprive the county court judge of jurisdiction to hear the action, but was one which could be, and had been waived by the defendant.

Smythe v. Wiles and *Pringle v. Hales* are, in my opinion, authorities which illustrate the principle that the mere failure to do some act which a statute or rule prescribes as a prerequisite to filing some other proceeding does not necessarily make the latter proceeding a nullity. The principle has been applied in the cases of *Gafoor v. Choy* (1959 L.R.B.G. 188) and *Burnett v. Demerara Co. Ltd.* decided in this court on 14th June, 1960, and 17th June, 1960, respectively. *Gafoor v. Choy*, is directly relevant to the present appeal. There it was held that the filing of a request for hearing before any pleadings had been filed and without an order under O. 30, r. 8, dispensing with pleadings having been made, was not a nullity but an irregularity which had been waived either by agreement between the parties or by the defendant having subsequently taken steps in the action with knowledge of the irregularity.

This question has more recently been considered by the Privy Council in the case of *MacFoy v. United Africa Company, Ltd.*, [1961] 3 All E.R. 1169. In that case the plaintiffs, having properly issued a writ for monies alleged to be due for goods supplied, to which the defendants entered an appearance, delivered and filed a statement of claim. Delivery of the statement of claim during the long vacation was a breach of the Rules of the Supreme Court, O. 64, r. 4, which prohibits the delivery or filing of a pleading during the long vacation, unless by the direction of the court or a judge, and the statement of claim was filed without any such direction. The defendant, having failed to deliver a defence within the time allowed, such period being reckoned from the end of the long vacation, the plaintiffs signed judgment against him in default of defence. Subsequently, the defendant applied to have the judgment set aside. His application was dismissed, and in the Court of Appeal and before the Privy Council he contended that the delivery of the statement of claim in the long vacation was a nullity. It was held that it was a voidable act, not a nullity.

Lord DENNING, who delivered the Board's reasons, said at p. 1173:—

“No court has ever attempted to lay down a decisive test for distinguishing between the two: but one test which is often useful is to suppose that the other side waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw? Suppose for instance in this case that the defendant, well knowing that the statement of claim had been delivered in the long vacation, had delivered a defence to it? Could he afterwards have applied to

dismiss the action for want of prosecution, asserting that no statement of claim had been delivered? Clearly not. That shows that the delivery of a statement of claim in the long vacation is only voidable. It is not void. It is only an irregularity and not a nullity. It is good until avoided.”

The test referred to by Lord DENNING is, if I may respectfully say so, both simple and useful. Applying it to the facts of the present case, one may ask: If, after knowledge of the request for hearing, the appellant had delivered and filed his defence, or if, when the case came up for trial, he had availed himself of his right to cross-examine witnesses, could he afterwards, in justice, complain? The purpose of a request for hearing is to authorise and enable the Registrar to enter the case for hearing. It is obviously premature and may be prejudicial to the defendant if the case is not yet ripe for hearing: but if the defendant, with knowledge of the premature request, completes the pleadings or contests the case, he suffers no prejudice and clearly cannot complain. This shows that the filing of the request for hearing prematurely is an irregularity and not a nullity.

In my opinion, therefore, this appeal fails and should be dismissed with costs.

JACKSON, J.: I agree.

MARNAN, J.: So far as is relevant to this appeal O. 32, r. 9, of the Rules of the Supreme Court, 1955, which are presently current in British Guiana, reads as follows:

“ORDER 32:

9. (1) A cause or matter shall be deemed altogether abandoned and incapable of being revived if prior to the filing of a request for hearing or consent to judgment or the obtaining of judgment —

(a) any party has failed to take any proceeding or file any document therein for one year from the date of the last proceeding had or the filing of the last document therein;”

The present case was a simple action for damages for negligence arising out of a road accident. The statement of claim was served on the 3rd July, 1967. On the 11th February, 1958, the plaintiffs filed a document which upon its face purported to be a request for hearing. Order 32, r. 9 (1), itself, provides, in effect, that the filing of a request for hearing puts an end to the running of the period of one year contemplated in r. 9 (1) (a). It is clear from the rest of Order 32 that this is because the Registrar is required by rule 6 to enter the cause on the hearing list on the day on which the request for hearing has been filed, and thereafter the inactivity of any party

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cannot affect the length of time which may pass between entry of a cause on the hearing list and the date upon which the action may come on for trial.

The point in the present case is, and was in the court below, whether the document filed on the 11th February, 1958, was a request for hearing within the meaning of O. 32, r. 9 (1). In this court counsel for the appellants first contended that the so-called request for hearing was irregular, though not invalid or void. Later he submitted that it was completely void. In the Full Court, from whose decision this appeal has been brought, the sole argument was that the request was a nullity. That argument was rejected, and the Full Court held that the filing of the request was a mere irregularity. It is therefore somewhat surprising that in this court the appellants should have begun by accepting the decision of the Full Court that only irregularity was involved, but nevertheless submitted that they were entitled to succeed, and then sought to resurrect an attack on that decision which was not made either by counsel's opening or by their notice of appeal.

The defect in the purported request for hearing relied upon by the appellants is, and always has been, that it was filed before the cause had become ripe for hearing within the meaning of O. 32, r. 1 (1). The circumstances in which a cause becomes ripe for hearing are specified in rule 3, which so far as relevant to the facts of this case provides that one such set of circumstances is where the defendant has failed to deliver a defence and the plaintiff has complied with the provisions of Order 25. The Full Court held that the particular provision of Order 25 required to be complied with was, and could only be r. 15, which reads as follows:

“ORDER 25:

15. No request for final judgment in default of defence shall be filed unless notice in writing has been served upon the defendant calling upon him to remedy his default within fourteen days after service of such notice. A copy of such notice shall be filed in the Registry immediately after service thereof with an indorsement thereon of the time, place and particulars of the service of such notice.”

It is common ground that the plaintiffs had not served or filed any notice calling on the defendants to remedy their default, namely default in filing a defence, before filing the request for hearing in this case. It is true that O. 25, r. 15, does not expressly refer to a request for hearing, but to a request for final judgment, which is a step in a different mode of procedure in default of defence. Nevertheless the Full Court held, and I agree, that the combined effect of O. 32, r. 3 (1) (a), which does expressly refer to Order 25, and O. 25, r. 15, is to apply the provisions of the latter rule to the filing of a request for hearing. The request for hearing was therefore defective in that

it was filed without notice having been given to the defendants calling on them to remedy this default in pleading.

In conceding at the beginning of his argument that the filing of the request for hearing without previous notice to the defendants was a mere irregularity, counsel also conceded the corollary, namely, that the irregularity could have been waived. But he submitted that it had not been waived, and that until waiver there was no effective request for hearing on the file. This argument is in conflict with the provisions of O. 54, r. 1, which deals with the effect of non-compliance with the rules, and I am unable to accept it. It was submitted that both the court of first instance and the Full Court were in error in assuming that the defendants had knowledge of the irregularity at an early stage and had waived it by failing to take any steps to have the request for hearing set aside. But even if the defendants in fact had no knowledge of the irregularity until shortly before the action came on for trial, the effect of O. 54, r. 1, is that the request for hearing was valid as such, *ab initio*, however vulnerable. Had the defendants in fact waived the irregularity, the only effect of such waiver would have been to remove the vulnerability, which is otherwise preserved by the latter part of O. 54, r. 1.

When this position was pointed out by the Court, counsel for the appellants sought to withdraw his concession that only irregularity was involved and to argue that the filing of the request was a nullity. He submitted, as had been unsuccessfully submitted below, that compliance with O. 25, r. 15, is a condition precedent to the obtaining of judgment. Even if that were so it is quite a different matter to contend that such compliance is a condition precedent to the trial of an action, which was the stage reached in the present proceedings when objection to the request was taken *in limine*. But, in my opinion, this is a clear case of an irregularity as opposed to a nullity in that the filing of the request was a step provided for by the rules which was defective only in the failure to take another step required by the rules, which should have preceded it. I do not think it is necessary to refer to the numerous authorities mentioned in *Burnett v. Demerara Co. Ltd.*, which apparently has not yet been reported, because there it was conceded that a mere defect, in procedure, which is not a *sine qua non* of jurisdiction, can be waived. The issue was whether the particular defect deprived the court of jurisdiction. In *MacFoy v. United Africa Co. Ltd.*, [1961] 3 All E.R. 1169, a comparable question arose. Lord DENNING, in a passage at page 1173 which has already been read by LEWIS, J., referred to the test of supposing that the procedural flaw had been waived.

If the question whether waiver would have rectified the matter in this case be posed, that question must, in my view, be approached and answered in the same manner. It may well be that the request for hearing still remains in what I have referred to as a state of vulnerability. But the submission that the defect relied on nullifies the request for hearing irregularly filed is not seriously tenable, having regard to the express provisions of Order 54.

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Nothing that I have said is intended to encourage or restrict any further steps which either party may be disposed to take in this action. This appeal relates merely to an objection *in limine*, and I agree that it must be dismissed with costs.

Appeal dismissed.