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**THE LAW REPORTS OF
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1963

The Privy Council

The British Caribbean Court of Appeal

and

The Supreme Court of British Guiana

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BRITISH CARIBBEAN COURT OF APPEAL

THE HON. SIR CLYDE ARCHER (President)

THE HON. SIR DONALD JACKSON

and

The judges of the Supreme Courts of Barbados, British Guiana and the Windward Islands and Leeward Islands, *ex officio*.

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CHEONG v. BARCLAYS BANK D.C.O. AND Dr. SZMUK.

[Supreme Court (Date, J.) August 9, 10, September 19, December 4, 1962, January 9, 1963.]

Banking—Assurance by bank that customers cheques would be paid—Sale of diamond on strength of such assurance—Subsequent stop payment notice given by customer to bank—Right of customer to give such notice and of bank to stop payment—Bills of Exchange Ordinance, Cap, 338, s. 7

Banking—Dishonouring of cheques by bank—Suit by customer against bank for damages—No previous demand for payment—Whether required where bank has repudiated customer's right to payment—Special damages not proved—Plaintiff entitled to nominal damages only.

On 26th February, 1960, the second defendant S., a diamond dealer, agreed to buy a diamond from the plaintiff for \$72,000. At the plaintiff's request he wrote out two cheques in favour of the plaintiff, one for \$40,000 and the other \$32,000, drawn on the defendant Bank. However, before parting with the diamond or accepting the cheques the plaintiff said that he wanted to be certain that the cheques were good and valid and that payment could be made on them at once. S. thereupon took the plaintiff to the defendant Bank, by whom S. had for some time been financed in his business. The position was explained to the Bank Manager, who assured the plaintiff that the cheques were good and valid and that payment would be made immediately, but not in cash, and offered to make out the Bank's official cheque for the whole \$72,000. The plaintiff agreed to take the Bank's cheque but, accepting a suggestion from the Manager that he should do some banking business with the Bank, he agreed to deposit S's cheque for \$32,000 into a current account there and then to be opened up for him by the Bank, and to take the Bank's cheque for the remaining \$40,000. The Manager thereupon directed an official of the Bank to prepare the official cheque and to open the account, adding that the transactions were to go through on the following day, the time then being after banking hours for the day. Later the Manager gave the plaintiff an official cheque for \$40,000, a cheque book and the bank deposit slip for \$32,000, saying "you now have all your money at your disposal".

S. then deposited the diamond in a canister kept by the Bank, which could only be opened by two keys, one held by the Bank, and the other held by S. Under a general letter of hypothecation all diamonds so deposited by S. were held by the Bank by way of security for all advances made by the Bank to S. and could in certain circumstances be disposed of by the Bank for the purpose of liquidating S's indebtedness to the Bank. The diamond was never returned to the plaintiff.

Later that day S. came to feel that the diamond possessed a flaw and had been over valued, and in consequence directed the Bank in writing to stop payment of the cheque for \$32,000. The notice having been received before the Bank opened for business next morning, the Bank stopped payment and offered to return the cheque to the plaintiff. The latter however refused to receive it, maintaining that the transaction was completed the previous day and that the amount of \$32,000 had already been credited to his account. Thereafter the plaintiff issued two cheques, one for \$1,400 to F.L. and another for \$25,000 to E.C., which, however, the Bank refused to honour. The plaintiff protested against this, but the Bank replied that there was no sum at the credit of his account.

The plaintiff thereupon sued the defendants jointly and severally for the sum of \$32,000 as damages for conspiracy. As against the Bank he also claimed damages for breach of contract for dishonouring the two cheques drawn in favour of F.L. and E.C. respectively.

For the Bank it was argued that it was understood by the parties that the cheque would not be cleared until the following day and that before clearance could be made S. had countermanded payment. Reliance was placed on a note appearing at the bottom of the paying-in slip and counterfoil signed by the plaintiff in respect of the \$32,000 and stating, "Customers are advised that the Bank reserves the right at its discretion to postpone payment of cheques drawn against uncleared effects which may have been credited to the account", and upon s.7 of the Bills of Exchange Ordinance, Cap. 338, which provides that the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by countermand of payment. It was also contended that in any event demand on the Bank for payment was necessary before the Bank could be sued and that no such demand had been made.

Held: (i) the sale of the diamond was effected at the Bank on the strength of an assurance given by the Bank that the Bank would pay the two cheques offered to the plaintiff by S.;

(ii) the Managers directive about the transactions going through the following day referred only to the formality of making the necessary entries in the Bank's books for the Bank's convenience;

(iii) the Manager was no more free to stop payment of the cheque for \$32,000 than he was to stop payment of the Bank's official cheque for \$40,000;

(iv) the Bank had impliedly waived the customary condition appearing at the bottom of the printed paying-in slip;

(v) the necessity for demand could be got rid of by waiver and in this case the Bank had waived the necessity when it repudiated the plaintiff's right to be paid any part of the \$32,000;

(vi) in the absence of proof of special damages the plaintiff was entitled only to nominal damages against the Bank for dishonouring the two cheques drawn on F.L. and E.C. respectively;

(vii) the claim for damages for conspiracy failed as the Bank was doing what was conceived (or misconceived) to be a duty to a customer and in that sense acting in its own interests, and there was no combination to cause injury to the plaintiff such as to give rise to an action for conspiracy.

Judgment for the plaintiff.

E. V. Luckhoo and M. S. Rahaman for the plaintiff.

J. H. S. Elliott, Q.C., and Mrs. A. Ali-Khan for the first defendant.

L. F. S. Burnham, Q.C., and H. D. Hoyte for the second defendant.

DATE, J.: The evidence in this case shows that on 22nd February, 1960, the plaintiff, who is a diamond seeker, took a 48⁵/₈ carat diamond to a warden of the North-West District and obtained a permit under the Mining Regulations to convey the diamond to Georgetown. On the 23rd February, the plaintiff paid the Lands and Mines Department, Georgetown, the prescribed royalty on the diamond. Two days later, accompanied by one Frank Lonck, he took the diamond to the office of the second defendant, who was then dealing in diamonds, and inquired whether the latter was interested in purchasing it. The second defendant examined the diamond under a magnifying glass, as also did Mr. L. F. S. Burnham who was summoned by the second defendant. On enquiry by the second defendant the plaintiff intimated that he wanted \$100,000 for the diamond. The second defendant said he would have to communicate with his company abroad and asked the plaintiff to return the following day.

On the 26th February, 1960, the plaintiff returned to the second defendant's office. On this occasion he did not bring the diamond with him. It had been left at the Royal Bank of Canada, Water Street, for

CHEONG v. BARCLAYS BANK

safe keeping. Lonck was again present. The second defendant telephoned Mr. Burnham and asked him to compute the price of the diamond on the basis of \$1,500 per carat. After that telephone conversation the second defendant offered the plaintiff \$72,000 for the diamond. While the question of price was being discussed Mr. Burnham arrived and indicated that he was proceeding to New York within a few hours and that the intention was that the diamond should be taken by him with a view to its sale over there. After some further discussion the price of \$72,000 was agreed upon between the plaintiff and the second defendant. The two of them and Lonck then proceeded to the Royal Bank of Canada, Water Street, where the diamond was produced. The second defendant asked the plaintiff if he would accept a cheque for the amount of the purchase price. The plaintiff requested two cheques: one for \$40,000 and the other for \$32,000. Thereupon the second defendant wrote cheques on Barclays Bank in those sums in the name of Linsig which, it has been established, is the name in which the second defendant and Mr. L. F. S. Burnham were trading in diamonds. When the plaintiff saw the cheques he told the second defendant that he wanted to be certain that they were good and valid and that payment could be made on them at once. The second defendant assured him that that could easily be done and explained that he had for some time been financed by Barclays Bank (the first defendant) to purchase diamonds; he offered to take the plaintiff to Barclays Bank, which is obliquely opposite the Royal Bank of Canada. Accompanied by Lonck they went to Barclays Bank and were taken to the Manager's office. As to what transpired there evidence has been given by the plaintiff and by the Manager and Assistant Manager of Barclays Bank. Neither Lonck nor the second defendant testified; it was explained that both of them are at present out of the Colony.

According to the plaintiff it was he who carried the diamond to Barclays Bank. He said they reached the Manager's office around 1.55 p.m. He could not recollect seeing the Assistant Manager in that office. His version of what happened is that the second defendant told the Manager, "This gentleman here, Mr. Cheong, has a very large diamond that he is selling to me for \$72,000. I wrote out two cheques for him for that amount but he refuses to let me have the diamond until he is certain that the cheques are good and valid and payment is made immediately." He (plaintiff) told the Manager that what the second defendant had said was correct and that unless the Manager honoured the cheques and made payment immediately he would not part with his diamond. The Manager asked to be allowed to see the diamond. He handed it to the Manager who looked at it for a while then returned it saying: "Of course the Bank will honour these cheques because they are good and valid, and payment will be made immediately but not in cash; if you agree I would make out my own Bank's cheque which is as good as cash for the \$72,000." He agreed to accept the Bank's official cheque and the Manager asked him if he was not going to do some banking business with Barclays, adding that a Bank is the proper place for keeping such a large sum of money. He agreed to bank \$32,000; the Manager suggested a current account so that if he needed the money right away he would

have a cheque book to use; with this suggestion he concurred, and the Manager called in an employee of the Bank and directed him to make out the Bank's cheque for \$40,000 and to bring a cheque book and specimen signature card. The Manager himself then filled up a Bank deposit slip and counterfoil (Exhibits "C" and "C2") for \$32,000, which the plaintiff signed. Shortly afterwards a Bank employee came in and gave the Manager a Barclays Bank cheque for \$40,000, a cheque book and a specimen signature card. The Manager gave him the cheque, the cheque book and the Bank deposit slip saying, "You now have all your money at your disposal." The Manager also told the Bank employee to debit the plaintiff's account with \$1.00 for the cheque book. He (plaintiff) then handed the diamond and permit to the second defendant and left with Lonck, leaving the second defendant with the Manager. Around 2.15 p.m. that same day he gave the Barclays Bank cheque to the Royal Bank of Canada, received \$1,000 in cash and opened a savings account with the Royal Bank with the balance of \$39,000.

The Manager of Barclays Bank said that between 10 and 11 a.m. on the 26th of February, 1960, Mr. Burnham telephoned him. Around 2 p.m. the second defendant came to his office accompanied by two people. The second defendant introduced one of them to him as Mr. Cheong (the present plaintiff). The Assistant Manager was in the room. The second defendant produced his cheque book with cheques for \$40,000 and \$32,000, respectively, made out in favour of V. T. Cheong and said, "This is the transaction Burnham spoke to you about." On raising his head he saw the second defendant holding up a stone between his fingers; in his other hand was a permit. He (the Manager) never touched the stone at all. He said, "Gentlemen, I am very sorry; it is after two o'clock and I will be unable to have these cheques cashed," whereupon both the second defendant and the plaintiff said almost simultaneously that they did not want cash, the second defendant adding, "Mr. Cheong would like to have your cheque for this one," handing over the cheque for \$40,000, "and to open an account for the other one," handing over the cheque for \$32,000. He asked the plaintiff if this was what he wanted and the plaintiff replied in the affirmative. He then pressed the inter-telephone buzzer for Mr. Chan, the head of the ledger department. When Chan came in he told him that the plaintiff wanted to get the Bank's official cheque "for this cheque", handing him the cheque for \$40,000 drawn by Linsig, and that the plaintiff wished to open an account with the other cheque for \$32,000. He also said to Chan, "This transaction is to go through tomorrow." While he was speaking to Chan, another employee of the Bank, a Mr. Ruddle, who was in charge of the vault, came in with a locked cash box which was placed before the second defendant. (It appears that this was done as a result of a request made to Ruddle by the second defendant while the latter was going into the Manager's office.) There are two separate locks to that box; the Bank keeps the key to one and the second defendant keeps the key to the other. The box was opened in the Manager's office and the second defendant put the diamond and permit into it. The box was then re-locked by the second defendant and Ruddle, and the latter took it away. At no time did the Manager see the diamond in the posses-

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sion of the plaintiff. The only person he saw with it up to the time it was placed in the box was the second defendant. After Ruddle left with the box the Manager asked to be excused and went through the northern door of his office into the adjoining office of the Sub-Manager, Mr. Cooke. From there he sent a message to the second defendant, who joined him in Cooke's office. In the privacy of Cooke's office he discussed the matter more freely with the second defendant than he could have done in the presence of the others, and was satisfied that the transaction should be allowed to go through as arranged in his office. He returned to his office by one door and the second defendant by another. The plaintiff, Lonck, the Assistant Manager and Chan were there when he returned. He could not remember seeing Chan hand the plaintiff the things he had ordered for the plaintiff. He himself did not complete any of the documents. He did not write on the deposit slip or counterfoil. The handwriting on them, other than the signatures of the plaintiff, is that of Chan. Very shortly after he returned to his office the plaintiff, the second defendant and Lonck went away. They left together.

The Assistant Manager of the Bank said that he did not take part in the discussions in the Manager's office on the 26th of February. He had only recently assumed duty at that branch and was temporarily using a desk in the Manager's office. He saw Mrs. Camacho, the Manager's secretary, bring the plaintiff, the second defendant and another gentleman into the Manager's office and he overheard snatches of the conversation that ensued. He heard the Manager say that they were too late to get cash for the cheques. He heard the second defendant reply that the plaintiff did not want cash for the cheques but wanted one of Barclays Bank's cheques in exchange for one of the cheques and would like to use the other in opening a current account. The Manager pressed the inter-communicating buzzer and Chan walked in. He heard the Manager tell Chan that the plaintiff would like to have one of the Bank's official cheques "for this one" and to open a current account with "the other one." He also heard the Manager tell Chan that the transactions were to go through on the following day. Ruddle came in with a tin box and placed it on the Manager's desk in front of the second defendant who opened his lock to the box. Chan left the office. The box was re-locked and taken away by Ruddle. Shortly afterwards the Manager left his office through the northern door. About a minute later, Cooke came in through the eastern door and asked the second defendant to accompany him. The second defendant left through the eastern door. Chan returned to the Manager's office with the documents for the plaintiff. The Manager then returned to his office through the northern door and the second defendant through the eastern door. Chan was still in the office. Shortly afterwards the second defendant, the plaintiff and the other gentleman left.

It is common ground that on the morning of the 27th of February, 1960, Barclays Bank sent the plaintiff the following letter which constitutes Exhibit "E" in this case:

“BARCLAYS BANK D.C.O.,
Water Street.
Demerara Branch.

27th February, 1960.

Mr. Vincent I. Cheong,
128 Carmichael Street,
Georgetown.

Dear Sir,

Cheque No. BI 61319 dd. 26.2.60 for \$32,000 drawn by Linsig f/o yourself.

We have to advise that the abovementioned cheque has been “stopped” by the drawer and we shall be pleased if you will call on us at your earliest convenience.

Yours faithfully,
[Signature not legible]
pro Manager.

In his evidence the Assistant Manager stated that when he arrived at work on the morning of the 27th he saw the Accountant, Mr. Kelly, and also Exhibit “E”. Payment of the cheque had been stopped just before the Bank opened for business on the 27th. The stop payment order, Exhibit “Q”, is as follows:

“To

BARCLAYS BANK D.C.O.

Demerara Branch.

Please stop payment of cheque No. BI 61319 drawn for \$32,000.00 dated 26.2.60 in favour of VINCENT I. CHEONG until further orders from me in writing.

LINSIG”

Date 26th February, 1960.

The Assistant Manager said that around 10 a.m. on the 27th the plaintiff came to the Batik in response to the letter, Exhibit “E”. He offered to return the stopped cheque to the plaintiff but the plaintiff refused to accept it saying he was going to see the second defendant. On Monday, 29th February, the plaintiff returned to the Bank and said he had seen the second defendant who had informed him that the cheque was now in order and the Bank would pay it. He (the Assistant Manager) told the plaintiff he had received no notification to that effect and suggested that the plaintiff bring the second defendant to the Bank. The plaintiff never did so. On March 1st or 2nd the plaintiff returned to the Bank and said he had seen the second defendant but the latter would not accompany him to the Bank. The plaintiff was very annoyed because the Bank had not given him credit for the cheque for \$32,000.

CHEONG v. BARCLAYS BANK

The Manager testified that if the second defendant had not stopped payment of the cheque as he did, the cheque “would have gone through” on the 27th of February and the plaintiff would have had his \$32,000. When he spoke to the second defendant in Cooke’s office on the 26th he had then been satisfied by the second defendant about the value of the diamond. He would have been willing to give the plaintiff the Bank’s official cheque for the whole of the \$72,000 if the plaintiff had so desired. The responsibility for stopping payment of the cheque for \$32,000 was solely that of Linsig. He played no part in deciding to stop payment. The Bank merely carried out instructions.

The plaintiff’s version of what happened on the 27th of February was that after receiving the letter, Exhibit “E”, he went to Barclays Bank, arriving there around 10 o’clock. He told the Assistant Manager that he was very annoyed over the letter and asked what it could be all about; how could the amount for \$32,000 be stopped by the second defendant when the Manager of the Bank had made it quite clear the previous day that the transaction was completed and the amount was credited to his account. The Assistant Manager said there appeared to be some misunderstanding and that he (the plaintiff) should get in touch with the second defendant. He tried to get in touch with the second defendant but did not succeed until around 4.30 p.m. He told the second defendant about the letter and demanded an explanation. The second defendant said there was an oversight somewhere but that he had spoken to the Manager of the Bank concerning the matter which was now settled and that the plaintiff could proceed to make use of his \$32,000. As a result of that conversation he (the plaintiff) drew a cheque for \$1,400 in favour of Frank Lonck (spelt “Locke” by mistake) on 29th February and another for \$25,000 on 1st March in favour of Enid Cheong, his sister, both of these cheques being taken from the cheque book given him by the Bank on 26th February. Neither cheque was paid by the Bank. On 1st March he went back to the Bank accompanied by his sister Enid Cheong. (This was probably after the receipt by him of a letter dated 1st March, 1960, from the Bank requesting him to call at the Bank, bringing his cheque book, at his earliest convenience.) He did not carry his cheque book as he considered that the Bank had no right to it. He told the Assistant Manager that he was very annoyed at the Bank not honouring his cheques and enquired the reason, explaining that he had on 27th February seen the second defendant who said he had spoken to the Manager and the cheques were all right. He further told the Assistant Manager that the Manager himself had said on the 26th of February that he (plaintiff) had \$32,000 in cash in the Bank on which he could draw cheques from the book issued to him. The Assistant Manager replied that there was still some misunderstanding about the transaction and that the plaintiff must get hold of the second defendant and come in together with him to the Bank to finalise matters, pointing out that he would be there until 12 o’clock that day. The Assistant Manager offered to give him Linsig’s cheque for \$32,000. He declined it, saying he already had \$32,000 to his credit in the Bank. He left and

went and told the second defendant what had occurred and asked the second defendant to accompany him to the Bank. The second defendant refused. As a result he consulted Mr. Malcolm Young, Barrister-at-Law, who wrote the following letter to the Manager of the Bank:

“3rd March, 1960.

The Manager,
Barclays Bank D.C.O.,
Water Street, Georgetown.

Dear Sir,

I am instructed by my client, Mr. Vincent I. Cheong, of Lot 128, Carmichael Street, Cummingsburg, Georgetown, to enquire the reason for your refusal to give credit to Enid A. Cheong for the sum of \$25,000 drawn on my client's account by cheque No. 15/Bⁿ 72771 dated 1st March, 1960.

My client advises me that on your assurance he accepted a cheque for \$32,000 from Dr. Szmuk which was deposited to his (my client's) account on 26th February, 1960, and my client is insisting that the sum of \$32,000 must remain standing to his account as of date and had so been when his cheque for \$25,000 was presented to you for payment.

My client feels that in view of your assurance and your acceptance of the cheque deposited on 26th February, you cannot now deny him credit for the sum of \$32,000 deposited to his account.

If I do not hear from you within 48 hours legal proceedings will be instituted against you.

Yours faithfully,

Malcolm C. Young.”

On 7th March, 1960, the following reply was sent by the solicitors of the Bank:

“7th March, 1960.

Malcolm C. Young, Esq.,
Barrister-at-Law,
18, High Street,
Georgetown.

Dear Sir,

We are instructed by the Manager of Barclays Bank D.C.O., to reply to your letter of the 3rd March, 1960, written on behalf of Mr. Vincent I. Cheong.

Our client states that no assurance whatever was given to your client in regard to the cheque for \$32,000. Your client was

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present with Dr. Szmuk when the Manager said that as it was after hours (it was 2 p.m.) the transaction would have to be put through on the following day. If your client will refer to the lodgment slip which was given to him he will find the following statement printed at the end of the slip, *viz.*:—

‘Customers are advised that the Bank reserves the right at its discretion to postpone payment of cheques drawn against uncleared effects which may have been credited to the account.’

In fact, Dr. Szmuk stopped payment of the cheque before it could be cleared. Accordingly, there was no sum at the credit of your client’s account when this cheque for \$25,000 in favour of Enid A. Cheong was presented for payment.

We must add that our client was surprised to receive your letter as Dr. Szmuk subsequently informed him that your client had agreed to the postponement of payment of the cheque.

Yours faithfully,
Cameron & Shepherd.”

No part of the \$32,000 in question was ever made available to the plaintiff by Barclays Bank.

The plaintiff now claims from the defendants jointly and severally the afore-said sum of \$32,000 and damages for conspiracy. As against the first defendant he claims damages for breach of contract for dishonouring the cheques drawn by him in favour of Frank Lonck and Enid Cheong.

The plaintiff had also claimed damages for fraud and fraudulent misrepresentations, but this was abandoned during the course of the trial.

Paragraphs 5, 6, 7, 11 and 12 of the defence of the second defendant are as follows:

“5. As to paragraphs 4 and 5 of the amended statement of claim the defendant admits that the plaintiff had a 48% carat diamond as alleged but says it was the plaintiff who offered it for sale to him for \$72,000.

6. The defendant informed the plaintiff that he (the defendant) was not skilled in assessing the quality or value of diamonds and the plaintiff assured the defendant that he (the plaintiff) had the requisite skill, experience and knowledge in such matters and then expressly warranted the said diamond to be the first water and worth the said sum of \$72,000.

7. The defendant says that relying wholly on the said warranty he purchased the said diamond on the 26th day of February, 1960.

* * * *

11. The defendant says that on the said 26th day of February, 1960, after delivery the said diamond was found to be of

inferior quality and not of first water as warranted by the plaintiff.

12. The defendant says that the said diamond being of inferior quality and not of first water as expressly warranted by the plaintiff was valued by expert valuers at \$25,000, and further says that this sum was the highest price it could fetch in the market.”

The second defendant counter-claimed for damages for breach of warranty.

The only witness called, apart from the plaintiff and the Manager and Assistant Manager of Barclays Bank, was Charles Vincent Lampkin, a diamond trader of 35 years' standing. He said that diamonds vary in colour and that their value is based on colour, shape, and external or internal flaws. The highest price is paid for white, good-shaped diamonds without internal or external flaws. A “first water” diamond is a white flawless diamond of good shape: a top quality diamond.

Lampkin testified that on the 26th of February, 1960, he went to the office of the second defendant who had sent for him. While he was there the plaintiff and Lonck came in. The second defendant asked the plaintiff and Lonck to produce the diamond so that he could show it to Lampkin. Despite the second defendant's insistence they refused. The plaintiff asserted that it was a first water diamond and there was no need to show it around. The second defendant then said that he would have to take over the diamond without Lampkin seeing it but that Lampkin would see it later. He (Lampkin) then left. Later in the day the second defendant again sent for him. Around 1 p.m. he went to Barclays Bank. There the second defendant showed him the diamond in the presence of Bank officials. He examined it and valued it at \$500 a carat. It was not a first water diamond. It was an off-colour diamond and was badly shaped. It was decidedly off-colour and “any novice could have seen that it was not white.”

Lampkin went on to say that he had known the second defendant for about a year before 26th February, 1960. The second defendant had consulted him on previous occasions concerning the valuation of diamonds. It seemed to him that the second defendant knew nothing about diamonds.

It is significant that neither the Manager nor the Assistant Manager of Barclays Bank was asked anything about Lampkin's examination of this diamond, nor was any other Bank official called. It was also significant that Lampkin places the time of the examination of the diamond by him at Barclays Bank as being around 1 p.m. whereas the rest of the evidence in the case is to the effect that the diamond was not handed over to Barclays Bank until around 2 p.m. Yet more significant is the fact that the second defendant has not

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seen fit to show the court the diamond in view of Lampkin's evidence that any novice could see that it is not white.

The diamond was sent to New York on 27th February, 1960, despite the fact that that very morning the second defendant instructed Barclays Bank (on a form dated 26th February) to stop payment of the \$32,000 cheque. It is alleged by the defence to have been returned to the Water Street branch of the Bank on 6th May, 1960, and to have remained there until 20th November, 1962, when it was again sent to New York.

On 10th August, 1962, the second day of the hearing of this case, the Manager of the Bank in the course of his evidence said that he was unable to bring the diamond to court because the second defendant was not available with his key. But on 20th November, 1962, while the trial was still in progress the diamond was again sent to New York. On each occasion it was insured for \$72,000.

Lampkin's story is an unlikely one and I was very unfavourably impressed by his demeanour in the witness-box. It would indeed be strange that with so large a sum as \$72,000 involved the second defendant's suspicions would not have been aroused by the plaintiff's alleged conduct in refusing to allow Lampkin to inspect the diamond. In my opinion there is no substance whatever in the defence and counter-claim based on warranty. The second defendant is clearly liable for payment of the sum of \$32,000 claimed, and his counter-claim must be dismissed.

It remains to be considered whether the first defendant is also liable in respect of that \$32,000; whether the first defendant is guilty of breach of contract in not paying the two cheques drawn by the plaintiff in favour of Frank Lonck and Enid Cheong, respectively; and whether the claim against the defendants for damages for conspiracy has been established.

In one particular the evidence of the Assistant Manager appears to differ from that of the Manager, and that is in connexion with what the Manager told Chan after handing the latter the two cheques drawn by Linsig. The Manager said he gave Chan the cheque for \$40,000 and told him the plaintiff wanted the Bank's official cheque in exchange for it, and that the plaintiff wished to open an account with the cheque for \$32,000, adding: "*This transaction* is to go through tomorrow." In this context the expression "*This transaction*" might be interpreted as relating only to the opening of an account with the \$32,000 cheque. According to the Assistant Manager, however, what the Manager said to Chan was that "*the transactions*" were to go through the following day, referring to both the issuing of the Bank's official cheque and the opening of the new account. On this point I think the account of the Assistant Manager should be accepted. Among other things, the Bank's "Paid" stamp which appears on the requisition (Exhibit "P") for the Bank's cheque for \$40,000 bears the date 27th February, 1960.

Reference should here be made to a general letter of hypothecation executed by Linsig in favour of Barclays Bank on 12th December, 1959. The relevant portion of it reads thus:

“To: BARCLAYS BANK D.C.O.

In consideration of your continuing my account or giving me such advances or other banking accommodation from time to time as I may require and you may think fit, I hereby hypothecate, pledge and charge to you all diamonds which I may from time to time hand you for shipment whilst in your possession or in transit under your control and I hereby agree that the said diamonds and the proceeds thereof are to be held by you as a continuing security for the payment on demand of all advances, banking accommodation and/or expenses which you may make, afford or incur to or for me in connection therewith and all other liabilities to you present and future and in case of my default to make payment as aforesaid you are to be at liberty to exercise all rights over the said diamonds as if you were the absolute owners thereof.”

The diamonds delivered to Barclays Bank by Linsig were the only security held by the Bank for the credit facilities provided for Linsig by the Bank. According to the Manager, immediately before the transaction in question on 26th February, 1960, the security from Linsig held by the Bank was some \$25,000 in excess of their arranged overdraft. It is admitted by the Manager that the placing of the diamond in question in the box at Barclays Bank on 26th February, 1960, gave the Bank in relation to that diamond all the rights set out in the general letter of hypothecation, including the right to sell that diamond to clear outstanding advances made to Linsig. Under cross-examination the Manager said: “If I thought that the diamond belonged to the plaintiff and that the second defendant had not acquired it I would not have allowed it to be locked up in that box because that box gave the Bank the right to hold the diamond as security.”

It is common ground that before the plaintiff went to Barclays Bank at all two separate cheques, for \$40,000 and \$32,000, respectively, had been made out. I am satisfied that the Manager did not write on the paying-in slip or the counterfoil (Exhibits “C” and “C2”) as alleged by the plaintiff. The handwriting on those documents, other than the signatures of the plaintiff, is Chan’s. There can also be no doubt that the Manager did leave his office and go into Cooke’s office and have a conversation there with the second defendant. The incident is hardly one that the Manager would elect to invent: it could not in any way improve the position of the Bank or enhance the Manager’s prestige. But I am satisfied that the Manager did use words calculated to convey to the plaintiff an assurance that Barclays Bank would pay the two cheques offered to him by the second defendant. The whole purpose of the visit to that Bank was to get such an assurance. I am satisfied that the property

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in the diamond passed from the plaintiff to the second defendant at Barclays Bank and not earlier as suggested by counsel for the first defendant, and that hut for the agreement of the Bank to pay the cheques the sale would not have gone through.

Much emphasis was placed by counsel for the first defendant on what the Manager of the Bank told Chan about the transactions going through the following day, coupled with the printed statement appearing at the bottom of the paying-in slip and counterfoil signed by the plaintiff:

“Customers are advised that the Bank reserves the right at its discretion to postpone payment of cheques drawn against uncleared effects which may have been credited to the account.”

Counsel for the first defendant contended that upon receipt by the Bank of the stop payment order from Linsig the Bank was, in accordance with ordinary banking practice and law, obliged to stop payment of the \$32,000 cheque since it had not yet been “cleared.”

At pp. 195 and 196 of *SHELDON ON THE PRACTICE AND LAW OF BANKING* (Fifth Edition) the following passages appear under the caption “Current Accounts. —Payments to Credit”:

“All paying-in slips should be signed or initialled by the customer or the person paying in the credit on his behalf. . . . It is important that the receiving cashier should see that the date on the slip corresponds with the date on which the credits are paid into the bank. The receiving cashier stamps and initials the slip and also the counterfoil. This stamping is a mere acknowledgement, and does not mean more than that, if the items on the paying-in slip are in order, they will be credited to the customer Unless there has been an express agreement to the contrary, or it has been the usual course of business between the parties so to do, a customer is not entitled to draw against credits as soon as he has paid them into his bankers. He must, before drawing, give the banker reasonable time to make the necessary entries in his books. If the banker has followed the usual practice of crediting cheques as cash before clearance, he can, nevertheless, return cheques drawn against such uncleared credits marked ‘Effects not cleared’, unless there is an agreement, express, or implied from the course of business, permitting the customer to draw against such cheques. For their further protection, bankers often print a notice in their pass books or on their paying-in slips reserving the right to dishonour cheques drawn against uncleared items.”

Section 76 of the Bills of Exchange Ordinance, Cap. 338 [B.G.], provides that the duty and authority of a banker to pay a cheque drawn on him by his customer are determined by countermand of payment. In relation to the corresponding provision in s. 75 (1) of

the Bills of Exchange Act, 1882 [U.K.], SHELDON says (at p. 51): "This right of stopping payment exists up to the moment when the hanker is about to pay or to bind himself to pay the cheque." Those last words "*or to bind himself to pay the cheque*" are, in my opinion, of special relevance to the instant case. As already pointed out, the whole purpose of the visit to Barclays Bank by the plaintiff and the second defendant on 26th February, 1960, was so that the plaintiff would get the assurance of the Manager of the Bank that the two cheques from Linsig would be paid by the Bank. I think the proper inference to be drawn from what occurred in the Manager's office is that a special agreement was entered into between the three parties concerned, *i.e.*, the plaintiff, the second defendant and the Bank, and that the Manager of the Bank bound the Bank to pay both cheques and impliedly waived the customary condition which appears at the bottom of the printed paying-in slips used by the Bank. It was, I find, in consideration of that special agreement that the plaintiff parted with his property in the diamond. Thereafter it did not lie in the mouth of the second defendant to give instructions to the Bank to stop payment of the \$32,000 cheque, nor was the Bank at liberty to accept such instructions. The Manager's directive to Chan, the head of the ledger department, about the transactions going through the following day must on my view of the facts be taken to refer to the formality of making the necessary entries in the Bank's books, for the Bank's convenience. The Manager having bound the Bank to pay the cheques was no more free to stop payment of the one for \$32,000 than he was to stop payment of the Bank's official cheque for \$40,000. It is not unimportant to observe that the entries in the Bank's books in respect of the official cheque for \$40,000 were made on 27th February, 1960, though that cheque was cashed at the Royal Bank of Canada on the afternoon of 26th February, 1960. As counsel for the plaintiff put it, the transaction was one and indivisible.

It was also contended by counsel for the first defendant that the first defendant was entitled to judgment on the claim against him for \$32,000 since a demand on the Bank for payment of that sum was necessary before the Bank could be sued and no such demand was made. For support for this submission counsel cited *Joachimson v. Swiss Bank Corporation*, [1921] 3 K.B. 110 (C.A.), the head note to which is as follows:

"When money is standing to the credit of a customer on current account with a banker, in the absence of a special agreement a demand by the customer is a necessary ingredient in the cause of action against the banker for money lent."

Joachimson's case shows that the general rule that the debtor's obligation to repay his creditor involves the duty of seeking him out and tendering payment does not apply to banker debtors. But, as was pointed out by ATKIN, L.J. [1921] 3 K.B. at p. 132, "the necessity for a demand may be got rid of by special contract or by waiver. A repudiation by a bank of the customer's right to be paid any particular sum would no doubt be a waiver of any demand in respect of such sum."

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In the instant case there was, in my opinion, a clear repudiation by the first defendant of the plaintiff's right to be paid any part of the \$32,000 in question. Apart from the conversations between the Assistant Manager and the plaintiff at the Bank we have the letter from the Bank dated 27th February, 1960 (Exhibit "E"), informing the plaintiff that the \$32,000 cheque had been "stopped": the dishonouring of the cheques for \$1,400 and \$25,000 drawn by the plaintiff in favour of Frank Lonck and Enid Cheong; the letter to the Bank from the plaintiff's solicitor dated 3rd March, 1960, insisting that the plaintiff had \$32,000 in his account at the Bank, and the reply from the Bank's solicitors dated 7th March, 1960, stating that there was no sum at the credit of the plaintiff's account at the Bank. Furthermore, in paragraph 11 of the filed defence the first defendant after admitting paragraphs 10 to 12 of the statement of claim pleaded that the plaintiff drew the cheques for \$1,400 and \$25,000 "knowing that he had no funds in the said account with the first defendant with which to meet them." In these circumstances the defence of no demand before suit cannot be sustained and the plaintiff is, in my opinion, entitled to judgment against the defendants jointly and severally in the sum of \$32,000 under the first part of his claim.

As regards the claim against the first defendant for damages for breach of contract in dishonouring the two cheques drawn by the plaintiff in favour of Frank Lonck and Enid Cheong, respectively, the plaintiff is entitled to nominal damages only, no special damage having been pleaded or proved. The law on this aspect of the matter is summarised in the head note to *Gibbons v. Westminster Bank*. [1939] 2 K.B. 882, as follows:

"In an action by the customer of a bank, who is not a trader, against that bank for breach of contract in wrongfully dishonouring his cheque when his account was in sufficient funds to meet it, the plaintiff, unless he plead and prove special damage can recover only nominal damages."

It was not suggested that either of these two cheques was drawn by the plaintiff in the course of trading. Accordingly, the sum of \$10 is fixed as damages under this head.

In my opinion there is no merit whatever in the claim for damages for conspiracy. In refusing to pay the cheque for \$32,000 the first defendant was, it seems to me, doing what was conceived (or misconceived) to be a duty owed to a customer, and in that sense acting in its own interests. I am not persuaded that there was any combination to cause injury to the plaintiff such as would give rise to an action for conspiracy.

For the reasons stated, there will be judgment for the plaintiff against the defendants jointly and severally for \$32,000, and also against the first defendant for the further sum of \$10, and the second defendant's counterclaim is dismissed. The defendants must pay three-

quarters of the plaintiff's costs on his claim. The second defendant must pay the full costs of the plaintiff in respect of that defendant's counterclaim. Certified fit for two counsel. Stay of execution for six weeks granted.

Judgment for the plaintiff.

Solicitors: *V. C. Dias* (for the plaintiff); *D. de Caires* (for the first defendant); *M. E. Clarke* (for the second defendant).

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[Supreme Court (Khan, J.) January 30, 31, February 14, 16, August 2, 3, 14, 1902, February 25, 1963]

Slander—Investigation by head of department into loss of receipt books—Plaintiff responsible for custody of books—Plaintiff called a rogue by head of department in presence of other officers assisting in the investigation—Whether defamatory—If so, whether privileged—Whether actionable—Defamation Ordinance, 1959.

The defendant, who was the General Manager of the Transport and Harbours Department, was investigating the loss of certain receipt books for the custody of which the plaintiff, a station master of the department, was responsible. The plaintiff gave unsatisfactory answers to questions asked in the course of the investigation, and in consequence the defendant, in the presence of other investigating officers, said “Robinson you are a rogue”. In an action by the plaintiff for slander,

Held: (i) having regard to the context and the particular circumstances in which the offending words were used they did not admit of a defamatory meaning;

(ii) if the words were defamatory they were used as rebuke and abuse of the plaintiff in the particular circumstances where he was deliberately lying when he had a duty to tell the truth. In “such circumstances no action for slander lies;

(iii) in any case the words were spoken on an occasion of qualified privilege.

Judgment for the defendant.

A. S. Manraj, for the plaintiff:

M. Shahabuddeen, Solicitor General, for the defendant:

KHAN, J.: This is an action by Stephen Oliver Robinson, a station master employed by the Transport and Harbours Department, against Col. Gavin B. Thompson claiming \$10,000 as damages for alleged slander uttered by the defendant to the plaintiff on the 26th September, 1960.

The Transport and Harbours Department is operated under the Transport and Harbours Department Ordinance, Cap. 261 (hereinafter called the Ordinance). It is a composite department operating railways, shipping, road transport and port and harbour services in the Colony. In this department there are over 2,200 employees who work under the General Manager who is responsible for the general administration.

By s. 4 (3) of the Ordinance it is provided as follows:—

“The General Manager, subject to the provisions of the Ordinance, shall have and exercise the powers and functions and discharge the duties set forth in the first schedule of this Ordinance in addition to those powers and functions and duties specifically assigned to him by this Ordinance”.

By the first schedule enacted under the provisions of Ordinance No. 21 of 1946 the General Manager was empowered, subject to such

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departmental orders as may from time to time be made by the Governor—

- (a) to appoint persons as employees of the Department to posts which are not on the permanent pensionable establishment of the Colony, and to dismiss persons so appointed;
- (b) to grant vacation leave, sick leave, casual leave and accident leave to persons employed by the Department who are not on the permanent pensionable establishment of the Colony;
- (c) to make advances to persons employed by the Department who are not on the permanent pensionable establishment of the Colony.

The plaintiff, who is 58 years of age, joined the department in 1926 as a gateman. In 1958 he held the post of station master at the Rosignol Railway Station where 5 clerks and 10 porters worked under his supervision. In his absence, the senior guard—one Hercules—deputised for him. The post of station master is not one on the permanent pensionable establishment of the Colony. It falls within the first schedule of the Ordinance which empowered the General Manager to appoint persons to the post of station master and to dismiss persons so appointed.

The defendant is a professional transport officer with over six years' military service, retiring with the rank of Colonel in 1946. He served in Germany with the British Transport Commission for five and a half years ending in 1951. In 1952 he was recruited to British Guiana as Traffic Manager of the Transport and Harbours Department, and in 1954 was appointed to the post of General Manager under the provisions of s. 4 (1) of the Ordinance. Under the defendant's management the services of the department expanded, yielding an increase in revenue of over one million dollars.

During September, 1960, the plaintiff was station master of Rosignol Railway Station. His duties included selling rice received from the Rice Marketing Board, receiving payments and issuing receipts for the same. The plaintiff was responsible to the defendant (as General Manager) for the safe custody of all rice receipt books kept at the Rosignol Station. It is the practice for auditors from the Transport and Harbours Department's head office to make periodic checks of all stations including Rosignol. The plaintiff, who was on duty at Rosignol Station on the 21st September, 1960, left the station that same evening to consult his doctor at the Georgetown Hospital. Senior Guard Hercules was left in charge of the station in the absence of the plaintiff. The following day—September 22nd—the plaintiff consulted his doctor in Georgetown. He returned to Rosignol Station the following day—23rd September—by the morning train, arriving there at around 11.05 a.m. He resumed duty immediately, relieving Hercules.

On the said 23rd September, 1960, 2 auditors—Messrs. Cheong and Morgan from the head office of the department, travelled to

Rosignol to audit the books of that station. They arrived there at the same time as the plaintiff and on the same train. During the course of the audit Cheong requested Hercules to produce the used rice receipt books dating back from the last audit. Hercules spoke to the plaintiff at his office. He (Hercules) then told Cheong that he did not find the books. Shortly after the plaintiff was told by Hercules in the presence and hearing of the two auditors that the auditors required the "used rice receipt books" dating back from the last date of the previous audit for the purpose of their audit. The plaintiff left and went to his private office. On his return, he reported that he could not find the books. It was then 12.30 p.m. The plaintiff explained that he had left the *used rice receipt books* in his desk drawer and did not know what had become of them. The auditors continued their audit. About 3 p.m. Cheong reported to the chief accountant Mr. Man-Son-Hing at the head office. By 3.30 p.m. Sgt. Wylis, who is attached to the Transport and Harbours Department, had already joined the auditors. In the presence and hearing of Morgan and Sgt. Wylis, Cheong asked the plaintiff for the used rice receipt books, and the plaintiff told Cheong that the missing receipt books might be located in the adjoining room where all books and papers were kept, and that as soon as he found them he would send them to the office, so that the audit could be completed. Both Morgan and Cheong left Rosignol Station on the 3.55 p.m. train. The plaintiff also left Rosignol by the said train and got off at De Kinderen Platform, about 30 miles from Rosignol.

On arrival at Georgetown the auditors reported their findings to head office. In consequence the plaintiff was summoned to the head office, Georgetown. He went first to Mr. Sykes' office. Later the defendant held an investigation in respect of the reported loss of rice receipt books from the Rosignol Station. Those present at the investigation were Messrs. Sykes, Man-Son-Hing, Cheong, Morgan, Sgt. Wylis, the plaintiff and the defendant. At the meeting the defendant explained to the plaintiff that the loss or destruction of accountable documents was a very serious offence, and the withholding of information as to what caused the rice receipt books to be missing was an irregularity for which the employee concerned could be interdicted from duty while disciplinary proceedings could be initiated in accordance with standing orders. At the conclusion of that morning's hearing the defendant decided to interdict the plaintiff from duty and to institute disciplinary proceedings. The investigation was then adjourned to Monday 26th September, 1960. Shortly after the adjournment, the plaintiff received the following notice from the department:

"24th September, 1960.

Station Master, S. O. Robinson,
Rosignol Station,

(Through Traffic Manager and Stations' Supt., E.C. Rly.)

You are interdicted from duty on half pay with immediate effect pending the outcome of investigations into the disappearance of receipt books from Rosignol Station.

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You will report to the Traffic Manager at 08.00 hours on Monday, 26th September, 1960.

G. B. Thompson,
General Manager.

Transport & Harbours Department
Head Office, Georgetown,
cc: Chief Accountant.”

The investigation was resumed on the morning of Monday, 26th September, 1960, at the defendant’s office which is air-conditioned and sound proof.

From the evidence adduced, I believe that Sgt. Wylis was not present on this occasion; but all the other aforementioned persons who were present at the meeting of the 24th September were present at the meeting of the 26th September. What took place at this meeting is the subject matter of the present action for slander. The plaintiff’s version of the circumstances leading up to the alleged slander by the defendant are as follows:

“On Monday, 26th September, 1960, I went to the Head Office as requested by the letter (Exhibit ‘A’) at 8 a.m. On arrival at the defendant’s office, I saw the defendant in the office with Messrs. Cheong, Morgan, Sgt. Wylis, Sykes and Man-Son-Hing. The defendant began the investigation as he did before. The defendant asked me what had happened to the missing rice receipt books. I told him that I was informed by Guard Hercules that he (Hercules) instructed Jackson to burn the books. The Traffic Manager, Mr. Sykes, then said to me ‘*you are a liar*’. The defendant said ‘*you are a rogue*’. Defendant spoke in a loud tone of voice and harshly; everyone could have heard. *I then asked the defendant to repeat what he had said*, because on the 24th when he told me I was interdicted from duty and I was about to speak to him defendant said ‘*Robinson you are a rogue*’. I then told the defendant that since he decided that way, I shall seek legal protection”.

The plaintiff then left the defendant’s office and went across to the Transport Union Executives.

On 9th November, 1960 the plaintiff caused Mr. Robert Adams, Barrister-at-Law, to write the letter of demand Exhibit “B” to the defendant. In reply the plaintiff received Exhibit “C” (read). The plaintiff further stated in his evidence that his relations with the defendant were not good, as nothing he did in the line of his duty met with the defendant’s approval.

Under cross-examination, the plaintiff admitted that around 3.45 p.m. on 25th September Hercules told him that he (Hercules) had caused the missing books to be burnt in order to clear the congestion in the desk drawer. The plaintiff considered the loss of the books an important matter. He saw no cinders and asked no questions. Plaintiff admitted that the defendant asked him why he withheld information as to the destruction by fire of the rice receipt

books from the auditors, whom he could have informed while he was on the said train from Rosignol to Mahaicony; plaintiff replied in these words:

“The reason why I did not tell the auditors of the destruction by fire of the receipt books was that I had already told them that I would search for the books, and if I find them I would bind them and send them. I knew that I would have had to make a report, and in that report I would have stated what Hercules told me about the books.”

Under further cross-examination the plaintiff stated *inter alia*:

“It is true that I allowed the auditors to leave with a feeling (in respect to the books) that was incorrect. A man who allowed me to labour under a false and incorrect impression I would call ‘dishonest’.....It is true that all the persons who were present at the investigation on Monday, 26th September, 1960, were members of the department and interested in the accounting of the missing receipt books. Mr. Sykes is a senior officer sharing in the administration of the department.....When the conference was held on Saturday and on Monday 26th September no member of the public was present. I never told anyone that the defendant slandered me in the presence of members of the public. No member of the public was present. The office door was closed to the public. I agree that as a station master I was responsible for the custody of the receipt books.”

The defendant’s version of what took place at the meeting on the 26th September, 1960, is in the following words:

“Mr. Sykes told plaintiff that certain rice receipt books for the period preceding September could not be found, and the interrogation proceeded from there. As a result of questions put, plaintiff admitted that he had known that the rice sales receipt books were destroyed by fire; and that he had known this before the auditors left Rosignol on 23rd September, 1960, but that he never told them. I got the impression that Station Master Robinson was reluctant to supply information which he ought to have readily made available to myself and the other inquiring officers who were in the inquiry. It was necessary for me to put questions over and over again because the attitude of the plaintiff was evasive. I continued very carefully to assure myself that the Station Master clearly understood the questions put to him. I mentioned several times that his attitude was unco-operative and almost hostile. I cautioned him several times on the importance of giving truthful answers. I informed him that certain information had been brought before the investigation and I asked him several specific questions pertaining to this information. I ask plaintiff if he had made a telephone call about 7 a.m. on the morning of 22nd September from Georgetown Railway Station. He replied that he had not done so. He emphasised by saying that he did not set foot on Georgetown Station on 22nd September. I cautioned him again at that stage

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and asked him to reflect and refresh his memory. He said he did not wish to reflect as he is positive that his statement was true. He then added, 'In any event if I did make a telephone call from Georgetown Station on the morning of 22nd September, 1960, what was I supposed to have said?'. I then said, 'If I inform you that there is irrefutable evidence that you entered Georgetown Station and requested permission to use the telephone to call Rosignol, would this refresh your memory?'. Plaintiff replied, 'who ever say so is lying'. I then asked plaintiff if I informed him that there was also reliable information from Rosignol end of the line that he did call Rosignol Station, that he spoke to members of the staff there and identified himself to them, would this enable him to make any correction to what he already said? He repeated that he did not call Rosignol Station and persons who said he did were lying. I went over this ground more than once with the same result. He (plaintiff) made other allegations against other persons. I then told plaintiff, 'Robinson you are a rogue'. My tone of voice was conversational as he was just across my table. He never asked me to repeat it. I never repeated it. I only used the sentence once. I used the phrase in honest pursuit of my responsibilities as General Manager, and I used it interrogatively to convey the meaning that answers given by plaintiff, which I knew to be untrue, were repeated over and over again and in particular as General Manager of the department I could not accept the accusations of lying which he made against the other employees.

When the plaintiff told me that he knew of the destruction of the receipt books by fire but did not tell the auditors as he could have done, I considered that his conduct was inexcusable and his action deliberate. I had all those circumstances in mind when I called him a rogue. The meeting subsequently terminated."

The auditor Joslyn Cheong gave evidence in support of the defendant's version—of what took place at the meeting of 26th September, 1960.

On a consideration of the whole of the evidence, I believed and accepted the facts as stated by the defendant and supported by Mr. Cheong. The defendant impressed me as a witness of truth and a person with a high sense of responsibility and integrity. I did not believe or accept the plaintiff's evidence that the defendant repeated the words complained against, nor did I believe the plaintiff when he stated that Sgt. Wylis was present at the second meeting on the 26th September. The defendant did not impress me as a person who disliked the plaintiff, but a person who took his duties seriously and made every effort to discharge them conscientiously and fairly. The witness Jackson called by the plaintiff impressed me as a witness of convenience. I accept the evidence of the witness Carrington, President of the Transport Workers' Union. His evidence is not in conflict with the defendant's evidence but certainly in conflict with paragraph 3 of the letter of 9th November, 1960, Exhibit "B".

At the close of the defendant's evidence counsel for the defendant asked leave to recall the plaintiff, who further stated *inter alia*:

"About 2—3 weeks after the incident, I asked Mr. Camacho to arrange an interview with Mr. Sykes. I did admit at that interview that I did make a telephone call from the Georgetown Railway Station on the 22nd September. During the inquiry on the 24th and 26th September, I denied making the said phone call. My explanation is that (1) I had fowls at Rosignol and I wanted to tell Jackson where to find the feed; and (2) there were some drums of oil to be sent to New Amsterdam and I told Jackson not to employ any new labour. I do admit that the defendant *was quite right to insist that I did make the call, and I denied it. Well I lied!*"

Under re-examination by Mr. Manraj the plaintiff stated *inter alia*:

"I did not *deliberately lie*, I told the Colonel that I could not remember making the phone call. After the Colonel insisted that I answer, I denied making the phone call. The phone call was partly domestic and partly official".

It is on the above facts that the plaintiff launched this action.

In paragraph 4 of the statement of claim the plaintiff avers that "by the said words the defendant meant and was understood to mean that the plaintiff, who was a person of good character, was dishonest, unfit to associate with other persons, had no place in society, and was unfit to be employed by anyone to hold any responsible position".

In short the defence is:

- (1) That the words are not defamatory in themselves and that there is no evidence on which the court could find that the meaning of words, as understood by a reasonable person, is the meaning assigned to them by the innuendo pleaded in the statement of claim.
- (2) If the words are defamatory, no special damage is pleaded or proved. There is no evidence to support paragraphs 4 and/or 5 of the plaintiff's statement of claim—as a result no cause of action.
- (3) The words were spoken on an occasion of qualified privilege.

The first question to be decided is this: Are the words defamatory in themselves?

"A statement is defamatory of a person of whom it is published if, broadly speaking, it is calculated to lower him in the estimation of right thinking members of the community, or to cause him to be shunned or avoided or expose him to hatred, contempt, or ridicule; or to disparage him in his office, profession or calling". (24 HALSBURY'S LAWS, 3rd edn., p. 19, para. 40).

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In considering whether the words used here were capable of bearing a defamatory meaning, the test which had been laid down by Lord SELBOURNE in *Capital and Counties Bank v. Henty*, 7 App. Cas. 741, must be considered. "The test", he said, "according to the authorities is whether under the circumstances in which the matter was published reasonable men to whom the publication was made would be likely to understand it in a defamatory sense".

By para. 4 of the statement of claim the plaintiff alleged: "By the said words, the defendant meant and was understood to mean that the plaintiff, who was a person of good character, was dishonest, unfit to associate with other persons, had no place in society and was unfit to be employed by anyone to hold any responsible position". Having regard to the context and the circumstances in which the alleged words were used, can they be considered capable of bearing the meaning which the plaintiff attributed to them? No evidence was adduced to show that the words were or would be so understood by anyone. In *Capital and Counties Bank v. Henty* (*supra*) BRETT, L.J., said *inter alia*, "It is unreasonable that where there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the words alleged".

The plaintiff pleaded in para. 3 of the statement of claim that Cheong was present at the alleged incident. Cheong's account as to what took place immediately before the alleged words were used is as follows:

"The plaintiff was then asked about a telephone call which he had made from the Georgetown Railway Station on 22nd September, 1960, at about 7.15 a.m. He denied it emphatically. He said 'whoever said I made a telephone call from Georgetown Station is lying'. At first he said that he did not remember and when the Colonel asked him again he said 'the person who said so is lying'. The plaintiff was emphatic and said he did not even set foot at the station. The plaintiff then added 'If I were supposed to make a telephone call what was I supposed to have said?' It was at this stage that the defendant said 'Robinson, you are a rogue'".

The whole of the evidence of the defendant and Cheong disclosed that the plaintiff was deliberately lying in the course of being interrogated in respect of the circumstances surrounding the loss of the receipt books which were in his custody. The evidence disclosed that the whole conduct of the plaintiff surrounding the missing receipt books was evasive and questionable. When the defendant pressed the plaintiff in the "teeth" of telling facts to refresh his memory about making the telephone call at the Georgetown Railway Station, the plaintiff insisted in making liars of the defendant's informants. It was within this context and in these circumstances that the defendant rebuked the plaintiff by calling him a "rogue". Immediately before the plaintiff was called a rogue, he (plaintiff) deliberately made liars of the defendant's informants. However, the plaintiff when recalled to the witness box, admitted that he was indeed

at the Georgetown Railway Station as was suggested by the defendant; and moreover that he did make a telephone call to Rosignol. Whatever explanation is now made by the plaintiff it is manifest that he was lying during the investigation on 26th September, 1960.

It is the submission of counsel for the defendant that in the context of the above circumstances the words complained against is not defamatory in themselves. A number of cases were cited in support of the argument. I considered *Robinson v. Mellor* (1601), Cro. Eliz. 843, 78 E.R. 1069; *Cockaine v. Hopkins* (1677), 2 Lev. 214, 83 E.R. 525; *Lancaster v. French* (1728), 2 Stra. 797, 93 E.R. 855, where the use of the word "rogue" was held not defamatory.

It was further submitted that in the context in which the words were used the alleged words were merely words of heat and abuse and not actionable. In 24 HALSBURY'S LAWS, 3rd Edition, at p. 25, it is stated as follows:

"No action of slander lies for mere words of heat or vulgar abuse. Whether the words used made a definite charge of crime or of dishonest or immoral conduct, or were only used as words of general abuse, depends on the manner in which they were spoken and on the other circumstances of the case".

Mr. Manraj for the plaintiff conceded that where such words are used in certain circumstances they are not actionable, but contended that in this case the circumstances indicate that the words alleged are actionable *per se*. Having examined the authorities and having regard to the context and the particular circumstances in which the offending words were used, I held the view that the words as used do not admit of a defamatory meaning. But if I am wrong in so finding and the words are *prima facie* defamatory, I am of the view that the alleged words were used at the time when it was used as rebuke and abuse of the plaintiff in the particular circumstances when the plaintiff was deliberately lying when he was required and had a duty to tell the truth in the course of an interrogation. In such circumstances no action for slander lies.

But assuming I am wrong again in both views I have expressed and the alleged words are not words of heat and are defamatory, are the words actionable without proof of special damage? In this respect Mr. Manraj conceded that no special damage was pleaded but he relied on s. 4 of the Defamation Ordinance, No. 17 of 1959, and contended that the alleged words were actionable *per se* in that they were calculated to disparage the plaintiff in his office of a station master. In support of this argument he relied on the case of *Kent v. Pockock*, 2 Stra. 1168.

This was the case where a magistrate was defamed in his office. Mr. Manraj likened the plaintiff in the category of a magistrate and submitted that the plaintiff was a station master. At the time of the alleged slander the plaintiff was not a casual labourer but held office which called for the discharge of administrative functions; plaintiff was the holder of a high office in a lower category—although he

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could have been dismissed by the defendant alone—but still falls within the protection of s. 4 of the Defamation Ordinance, No. 17 of 1959.

The circumstances which occasioned the use of the alleged slanderous words were in connection with the truthfulness of the plaintiff in respect of the loss of accountable documents while he was absent on leave from his station on the 22nd September, 1960. I am unable to appreciate that in the context of the use of the offending words that the plaintiff suffered disparagement in his office of a station master—but assuming such a construction could be applied in favour of the plaintiff, was this not an occasion of qualified privilege?

It is not disputed that the alleged words were spoken during an investigation conducted in private and in confidence by the defendant with the assistance of employees into the conduct of the plaintiff in relation to the loss and/or destruction of certain rice sale receipt books kept in the premises of the defendant's station at Rosignol, and for the safe custody of which the plaintiff, as station master of Rosignol, was *answerable* to the defendant who was the General Manager of the department.

All the persons present at the meeting of the 26th September, 1960, had a common and corresponding interest in the subject matter and also in the publication of the said words. The plaintiff admitted that no member of the public was present at the investigation.

It was conceded by Mr. Manraj for the plaintiff that the investigation which was held on the 26th September, 1960, was an occasion which would give rise to qualified privilege, but he contended that the privilege was destroyed during the meeting, in that the occasion had drifted away from the enquiry of the lost rice receipt books to a certain telephone call and that was outside the scope of the inquiry—moreso, counsel contended, even if the words were used within the scope of the investigation the language was excessive and is evidence of malice which destroyed the privilege.

Counsel cited in support of his argument *Adam v. Ward*, [1917] A.C. 340; *White v. Stone*, [1939] 2 KB. 827; *Owen v. Hall* (1881), 6 Q.B. 343.

The law is well settled that the onus of proving malice is on the plaintiff. In *Clarke v. Mollymeaux* (1877), 3 Q.B. at p. 249, COTTON, L.J., clearly stated the law thus:—

“When once the learned judge has laid down that the occasion was privileged the only question for the jury to consider was whether the defendant acted from a sense of duty or was actuated by some improper motive, and the onus of proving that the defendant was influenced by some improper motive, that is, that he acted maliciously was on the plaintiff”.

Before I deal with the question of malice I shall examine the submission of learned counsel for the plaintiff that the privilege was destroyed in that the alleged words were used outside the scope of the enquiry. The plaintiff stated in his evidence *inter alia*:

“I was on duty as station master at Rosignol up to the 21st September, 1960. On the evening of the 21st September I left Rosignol for Georgetown to see the surgeon specialist of the Public Hospital Georgetown. When I left my office at Rosignol that evening I had left all the rice sale receipt books and the ledgers in the office. The receipt books were in the desk drawers and the ledger left on my desk..... After seeing Mr. Stracey on the 22nd September, I returned to the office at Rosignol on the 23rd September, 1960..... Before I left for Georgetown on the 21st September, 1960, I had left these two books in the desk drawer”.

From *that* evidence it is clear that the receipt books in question disappeared during the absence of the plaintiff between the evening of the 21st and about midday on the 23rd September, 1960. The plaintiff in the course of the investigation was questioned about a communication with his station on the 22nd September. It was known by the defendant that the plaintiff did speak to his station, but when this was put to the plaintiff he denied emphatically. This was certainly an incident to query at the enquiry. Can it really be said that the plaintiff's interrogation in respect of his communication on the telephone with Rosignol station was outside the scope of the enquiry? I think not. In his judgment in *Adam v. Ward (supra)* Lord ATKINSON said *inter alia*:

“What would be the effect of embodying separable foreign and irrelevant defamatory matter in a libel? Would it make the occasion of the publication of the libel no longer privileged to any extent, or would those portions of the libel which would have been within the protection of the privileged occasion, if they had stood alone and constituted the entire libel, still continue to be protected, the irrelevant matter not being privileged at all and furnishing possible evidence that the relevant portion was published with actual malice? In the absence of all guiding authority the latter would, in my opinion, be more consistent with justice and legal principle, and I think it is in law, the true result”.

Lord ESHER, M.R., in *Nevill v. Fine Arts and General Insurance Company*, [1892] 2 Q.B. at page 170 in the following words, which found favour with and were adopted by Lord DUNEDIN (*Adam v. Ward*), pronounced on the subject:

“But when there is only an excessive statement having reference to the privileged occasion, and which, therefore, comes within it, then the only way in which the excess is material is as being evidence of malice. In none of the cases on the subject, so far as I know, has it been held that the privilege is taken away when there has been such an excessive statement, unless

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the jury has found that there was malice. I protest against the notion that a judge has a right to say that, if the jury find that the statement is excessive, though they decline to find actual malice, the law infers it. If the law did so it would often be inferring what is not true. A man may use excessive language and yet have no malice in his mind”.

It is now convenient to deal briefly with the evidence on which the plaintiff relies in support of proof of malice.

- (1) An alleged repetition of the alleged slander to the plaintiff.

This evidence was negated by both the defendant and Cheong’s testimony and I have already indicated that I accept the testimony of the defendant and his witnesses.

- (2) In the evidence of Carrington it is disclosed that defendant did not repeat the alleged slander but merely said “yes” to the question put to him by Carrington.

I have examined the whole of the evidence and I do not find in any of the incidents referred to in the course of the trial or those relied on by the plaintiff that the defendant was actuated by any spite or ill will. The evidence shows that the defendant was actuated by a high and sincere sense of duty throughout the investigation and his utterance of the alleged slander was prompted merely by that sense of duty and fair play to the other employees of the department in the exercise of that duty.

The result is that even if it were to be conceded that the alleged slanderous words were actionable *per se*, the degree of qualified privilege is a complete answer.

For the above reasons the action fails on all grounds. The action is accordingly dismissed with costs certified fit for counsel.

Judgment for the defendant.

KHAN v. SHAFFIEULLAH

[Supreme Court (Bollers, J.) February 12, March 4, 1963]

Res judicata—Opposition action based on alleged contract of sale dismissed—Subsequent action by opposer for damages for breach of same contract—Whether matter res judicata.

Practice and procedure—Claim by plaintiff as administrator joined with claim made by him personally—No allegation that latter arose out of estate administered by plaintiff—Whether joinder competent—O. 16. r. 4, of R.S.C., 1955.

The plaintiff, as administrator of the estate of B., deceased, opposed the Passing of transport by the defendant, as executrix of the estate of S., deceased, on the ground that the defendant had previously sold the property concerned to B. The opposition action was dismissed on the ground that B. had failed to perform the contract of sale, which was in consequence rescinded by the defendant; and the transport was thereafter passed. The plaintiff now sued as administrator of B's estate for damages for breach of the same contract and for goods wrongfully seized by the defendant but belonging personally to the plaintiff. It was objected for the defendant that the matter was *res judicata* and further that the plaintiff could not properly join a claim in his personal capacity in an action brought by him in a representative capacity.

Held: (i) although the claim for damages for breach of contract could not have been made in the opposition action, it necessarily involved the same issues of fact and law as to whether there was a breach of contract, as were determined in that action, and the matter was therefore *res judicata*;

(ii) the plaintiff's claim on behalf of B's estate could be joined with the claim made by him personally only if (which was not the case) the latter arose out of the estate of the deceased.

Objections upheld.

M. S. H. Rahaman for the plaintiff.

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

BOLLERS, J.: The plaintiff in this action, No. 1434 of 1962, in his capacity as administrator of the estate of Boodhoo, B.R. No. 7 of 1899, deceased, on the 1st day of June, 1961, entered an opposition suit, No. 1958 of 1961, against the defendant personally in respect of the passing of a conveyance by way of transport as advertised in the Official Gazette of the Colony of British Guiana on the 20th day of May, 1961, and numbered 19 therein, to wit: Transport by the defendant to and in favour of Pooran Mohabir of Ridge, Wakenaam, Essequibo, of certain property described in the present action as "North-half of lot number 26 (twenty-six) and lot number 27 (twenty-seven), Section B, Middlesex, in the County of Essequibo and Colony of British Guiana, with all the buildings and erections thereon, inclusive of the concrete drying floor and factory building with the engine, machinery, fittings, accessories, tanks, boilers and all other equipment therein."

In his reasons for the opposition the plaintiff alleged that the defendant had by contract dated the 10th January, 1960, sold the aforementioned property to Boodhoo, deceased, of Good Intent, Esse-

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quibo, and as a result it was not competent for the defendant to transport the said property to the said Pooran Mohabir. The plaintiff then claimed in his statement of claim in respect of the action which followed in his prayer for relief:

- (a) An order of the court declaring the opposition entered by him in his aforesaid capacity to the passing of a conveyance, to wit: transport by the defendant in favour of Pooran Mohabir, advertised in the Official Gazette of the 20th May, 1961, and numbered 19 therein, to be just, legal and well-founded.
- (b) An order of the court restraining the defendant from passing the said conveyance referred to herein.
- (c) An order of the court for specific performance of the agreement entered into by the said Boodhoo, deceased, and the defendant dated 13th day of January, 1960.
- (d) An order of the court declaring that the estate of the said Boodhoo, deceased, is entitled to receive from the defendant title in respect of the property sold by her to the said deceased and referred to in the agreement of sale dated 13th January, 1960.
- (e) An order of the court compelling the said defendant to pass transport of the said property to the plaintiff in his aforesaid capacity as administrator of the estate of the said Boodhoo, deceased, for the benefit of the beneficiaries of the estate of the said deceased.
- (f) An order of the court directing the Registrar of Deeds of the Supreme Court of British Guiana to pass transport of the said property to the plaintiff in his aforesaid capacity, in the event of the defendant failing and/or refusing to do so within a fixed time to be approved by the court for so doing.
- (g) Costs.

In her statement of defence to the opposition action the defendant pleaded at paras. 3 and 4 that she had personally and by her solicitor made several demands of the deceased, Boodhoo, to take steps to receive conveyance of the said property under the agreement but Boodhoo had never taken steps to complete the agreement. The defendant averred that she personally and through her solicitor had also made several requests on the plaintiff to complete the said agreement but without effect. Finally in paras. 5 and 6 the defendant pleaded that by reason of the non-performance of the contract by the plaintiff she had rescinded the contract and would contend:

- (a) the plaintiff is not entitled to an order for specific performance or the other consequential orders asked for;
- (b) the plaintiff's opposition is bad and unjust and untenable at law.

The Honourable Chief Justice heard the action and dismissed it on the 26th of April, 1962. In the order of court entered on the 22nd of May, 1962, which appears in the certified copy of proceedings laid over in this court by consent of the parties it was ordered that each party bear his own costs of the action and that the plaintiff should recover nothing against the defendant and it was declared that the opposition entered by the plaintiff to the passing of the said conveyance by way of transport be deemed unjust, illegal and not well-founded.

In the present action on a writ which is generally endorsed, the plaintiff in his statement of claim, in paras. 1, 2 and 3 makes the allegation that by an agreement of sale in writing dated the 13th day of January, 1960, the defendant in her capacity as executrix of the estate of Shaffieullah, deceased, sold to Boodhoo, deceased, of Good Intent, Essequibo, the said property already described, for the purchase price of \$4,900 in pursuance of which the purchaser paid to the vendor the sum of \$2,200 on the signing of the agreement, whereupon it was agreed between the parties that the balance of the purchase price, \$2,700, be paid at the passing of the transport by the vendor to the purchaser. In para. 5 he avers that a further sum of \$200 was advanced by the plaintiff to the vendor at her request on account of the purchase price of the property. In para. 7 he alleges that there was a breach of this agreement by the defendant when she agreed to sell the property to Pooran Mohabir of Ridge, Wakenaam, Essequibo, and eventually advertised transport of the property in favour of Pooran Mohabir and actually passed transport to the said Pooran Mohabir although the plaintiff had been willing to receive transport of the property.

At this stage it must be interposed that the plaintiff at paras. 5, 6 and 8 alleged that Boodhoo, deceased, died on 21st March, 1960, and his heirs continued in occupation of the property whereupon the defendant wrongfully and unlawfully entered the property and dispossessed and deprived the plaintiff who was then in occupation of his personal property to the value of \$326.70.

As a result of the alleged breach of agreement in writing the plaintiff claimed exactly the same orders of court as claimed in the opposition action save and except that in the opposition action he claimed that the opposition be declared just, legal and well-founded and also an order restraining her from passing the conveyance to Pooran Mohabir, both of which orders for obvious reasons could not be claimed in the present action. In the present action, however, the plaintiff in his prayer for relief seeks an order of the court which was not sought in the opposition action, *viz.*, that the defendant be ordered to pay to him the sum of \$10,000 as damages and pecuniary compensation for breach of the said contract and for goods wrongfully seized from the plaintiff as per particulars hereunder:

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To cash advanced by Boodhoo	\$ 2,200.00
" cash advanced by plaintiff	200.00
" goods seized by defendant	326.70
" damages for breach of contract and loss of business due to dispossession since the year 1960 .. .. .	..	..	<u>\$ 7,273.30</u>
			<u>\$10,000.00</u>

It must be observed that the plaintiff in the opposition suit could not have claimed the remedy of damages as it is well settled that no action in opposition can succeed which is not founded on a liquidated claim. *Fereira v. Cabral*, 1923 L.R.B.G. 133. For the opposition to be successful the claim must be both liquid and liquidated, for as KHAN, J., pointed out in *I.R.C., v. Nicholson*, 1962 L.R.B.G. 470, at pp. 475-476 of his judgment, there are only two categories of persons entitled to oppose, firstly, those persons having *dominium* in the *res* itself or some legal or equitable right therein, and, secondly, 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.

The parties then are the same in both actions save and except that in the earlier action the defendant was sued in her personal capacity and in the present action she is sued in her capacity as executrix of the estate of Shaffieullah, deceased. It is conceded that in the earlier action, nothing turned on this point.

Counsel for the defendant now raises two preliminary objections to this action which I prefer to treat as one objection in two parts. Firstly, that the matter on the record is now *res judicata* and, secondly, the plaintiff cannot properly join a claim in his personal capacity in an action brought by him in a representative capacity.

On the first point, counsel points out that as it is common ground that the transport of the property has already been passed then the orders sought under (a), (b), (c) and (d) of the relief cannot be pursued.

With respect to the claim for damages and pecuniary compensation for breach of the contract, counsel agrees that this remedy was not claimed in the earlier action but submits that it necessarily involves the same finding of fact and law already determined in the previous action by the Honourable Chief Justice. In the present action the defence to the alleged breach of contract is exactly the same as the defence in the opposition suit, and in para. 5 of the defence the defendant denies paras. 7, 8 and 9 of the statement of claim which alleges that there was a breach of the contract by the defendant and damage to the extent of \$10,000 flowed from that breach. It follows, therefore, that the Honourable Chief Justice in the earlier action, although he gave no decision in writing, must have considered whether in fact there was a valid contract in existence between the parties and whether or not there was a breach

committed by one party or the other and whether or not the party against whom the breach was committed was entitled to treat the contract as discharged by the breach and claim a rescission under it by reason of the non-performance or repudiation of the contract on the part of the other party to it.

For the opposition suit to have been dismissed the court must of necessity have found that there was no valid contract or, if there was a valid contract, that the plaintiff was in breach and the defendant in those circumstances was in a position to treat the contract as rescinded. It was open to the plaintiff in the opposition suit to have claimed the return of the \$2,200 paid on account of the purchase price of the property and in pursuance of the contract as it was a liquidated sum and an amount which could have been ascertained. Had he done so there would have been no question that the result of the case would have been the same had the court arrived at the conclusion that the money was deposited as earnest or as a guarantee for the due performance of the purchaser's obligations if the breach of contract was committed by him. *Vide Doobay v. Moulai*, 1942 L.R.B.G. 411. The court is not precluded from finding that the money was paid with that intention even though the words "on account of the purchase price" are used. *Bhola Persaud v. Van Tull*, 1922 L.R.B.G. 44, at p. 49.

It is well settled, however, that where the intention is that the money should form a part payment of the full amount due, then if the contract is rescinded for the purchaser payer's default, the payee vendor is required at law to restore the money, subject to a cross claim for damages. (CHESHIRE AND FIFOOT'S LAW OF CONTRACT, 5th Edition, at p. 497). The plaintiff has not alleged in his statement of claim that this sum of money was paid in part payment of the full amount of the purchase price, nor has he claimed to recover the sum as such but seeks to include it in his claim for damages and pecuniary compensation which clearly he cannot do if he is in breach. This issue therefore does not arise in these proceedings and in my view remains undecided.

Counsel for the plaintiff in reply has submitted that the issues determined in the earlier action were not the same as those which arise in the instant action because the first action was an opposition action, whereas this is an action for damages for breach of contract. There can be no merit in this submission as the principle to be applied in matters *res judicata* is not to be based or determined on the remedies which are sought but on whether or not the issues raised are the same resulting in a finding or decision already given in earlier proceedings. It is well established that the doctrine of *res judicata* is a fundamental doctrine of all courts that there must be an end of litigation "*interest reipublicae ut sit finis litium.*"

SPENCER BOWER in his DOCTRINE OF RES JUDICATA at para. 184 states:—

"There is no estoppel *per rem judicatam* unless the case put forward by the party sought to be estopped, not only relates to

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the same matter (in the physical sense) as that which was the subject of the judicial decision in the former proceedings, but also raises the identical question of law, or issue of fact, which either expressly, or by necessary implication, in accordance with canons of construction already expounded, was in substance determined by such decision.”

And the learned author of EVEREST AND STRODE’S LAW OF ESTOPPEL at p. 83, points out in more detail that:

“The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form any opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”

When we apply the principles set out in these passages on the statement of the law, the conclusion must be reached that the same points which the Honourable Chief Justice in the earlier decision was called upon to consider and determine must of necessity engage the attention of this court in the present action. The apt statement of the law on this point appears in 13 HALSBURY’S LAWS, 2nd Edition, at para. 464, where it is pointed out that though the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue in the first action is conclusive in a second action between the same parties and their privies. And this principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact, or one of law, or one of mixed fact and law.

I hold, therefore, that substantially the same points have already been decided in the prior proceedings, and the matter is now *res judicata* and the plaintiff is estopped from raising the issues in the present action. For the court to determine those issues now would be to sit in judgment on appeal on a decision by the Honourable Chief Justice.

With respect to the second point, counsel for the defendant has referred me to a passage in 16 HALSBURY’S LAWS, 3rd Edition, p. 479, para. 977:

“Claims by or against an executor or administrator as such may be joined with claims by or against him personally, provided that the personal claims are alleged to arise with reference to the estate of which the executor or administrator is the representative.”

This is actually O. 18, r. 5, of the English Rules of the Supreme Court, which corresponds with O. 16, r. 4, of the local Rules.

The illustration of this rule is given as *Padwick v. Scott, re Scott’s Estate, Scott v. Padwick*, [1876] 2 Ch.D. 736, at p. 743, where claims by a plaintiff who was both executor and reversioner were held to be misjoined and the plaintiff was put to election on which he

would proceed. The ANNUAL PRACTICE 1959, Vol. 1, at p. 435, states that personal claims against executors which have not any reference to the estate are not within this rule and may be struck out. (*Whitworth v. Derbyshire*, 41 W.R. 317).

Counsel now submits that in para. 6, and the particulars of the plaintiff's property of the statement of claim which deal with the claim brought by the plaintiff in his personal capacity, the plaintiff has not averred that the claim in respect of his personal property arises out of the estate of the deceased nor has he alleged any connection between his property and the estate of the deceased person.

In my opinion this submission is sound and it appears to me to be perfectly logical that the claims may not be joined. If the court were to find in favour of the plaintiff on both claims, then it appears to me that it would be improper to enter judgment in favour of the plaintiff in his capacity as administrator and then proceed to enter judgment for the plaintiff in his personal capacity.

Counsel for the plaintiff has conceded that in the statement of claim it is not alleged that personal property of the plaintiff which was damaged bore any relation to the estate or that the claim arose with reference to the estate in respect of which the plaintiff in a representative capacity has sued, but has stated that the plaintiff was administering the estate of the deceased and had reduced his personal property into the possession of the estate when the alleged damage was done. As a result, he submits, it is now a matter for amendment. Counsel, however, has stated from the bar table that if the court were to find in favour of the defendant on the first point of this preliminary objection he would not press for the necessary amendment as it would be pointless to proceed only on the claim brought by the plaintiff in his personal capacity.

In the result, I have arrived at the conclusion that the preliminary objection taken is sound and the action must be dismissed with costs to the defendant to be taxed fit for counsel.

Objection upheld.

Solicitors: *J. E. Too Chung* (for the plaintiff); *Dabi Dial* (for the defendant).

WIGHT v. PERSAUD

[Supreme Court (Luckhoo, C.J.) May 10, 11, 14, 22, June 6, 19, 28, July 6, 1962, March 6, 1963]

Malicious prosecution—Application against legal practitioner made to Legal Practitioners Committee—Allegations of professional misconduct—Whether damage to fair fame—Application struck out without having been investigated by Committee—Whether application terminated in favour of practitioner—Whether application made without reasonable or probable cause—Omission by practitioner to apply for costs—Whether action for malicious prosecution lies—Legal Practitioners Ordinance, Cap. 30, ss. 28 and 34 (2).

Abuse of process of court—Application against legal practitioner made to Legal Practitioners Committee—Application struck out—Whether legal practitioner affected by executive action concerned with application—Whether action lies for malicious abuse of process of court—Legal Practitioners Ordinance, Cap. 30.

Legal practitioner—Application by client to Legal Practitioners Committee—Application struck out without being investigated—Whether Committee competent to do so—Whether powers of Committee, judicial—Legal Practitioners Ordinance, Cap. 30, s. 28, and r. 6 of Rules set out in Schedule thereto.

The plaintiff obtained judgment in the magistrate's court against the defendant for disbursements advanced and fees due for cases done by the plaintiff as the defendant's solicitor. The defendant paid the amount of the judgment without appealing. Later, however, he applied under s. 28 of the Legal Practitioners Ordinance, Cap. 30, for an order striking off the plaintiff's name from the roll of the Court or suspending him from practising as a legal practitioner on the ground that the plaintiff had overcharged for the work done and had refused to allow the defendant to inspect the relevant case jackets in order to ascertain what persons owed the defendant money. However, before the plaintiff's claim had been filed in the magistrate's court the defendant's son and agent had inspected the relevant accounts in the plaintiff's chambers and the defendant himself had promised to pay the full amount claimed. The defendant failed to appear on two occasions when the application was called before the Legal Practitioners Committee, and on the second occasion the Committee struck out the application. The plaintiff did not apply for costs. He, however, brought an action for damages for malicious prosecution, alternatively, for malicious abuse of the process of the court.

Section 28 (2) of the Legal Practitioners Ordinance, Cap. 30, provides for applications against legal practitioners to be transmitted by the Registrar "to the Committee for investigation," and sub-s. 4 requires the Committee to "hear the application". Rule 6 of the Rules set out in the Schedule to the Ordinance provides that "if either party fails to appear at the hearing the Committee may, upon proof of service of the notice of hearing, proceed to hear and determine the application in his absence". Section 28 (5) provides that "where any application has been heard, the Committee shall..... (b) where, in their opinion, no case of misconduct is established against the legal practitioner, dismiss the application and report their findings to the judges of the Court....." Rule 11 of the Rules requires the Committee to "hear all applications in private". Section 34 (2) enables a successful legal practitioner to apply to a judge in chambers for costs to be paid to him by the applicant.

Held: (i) the Committee is required to exercise judicial powers;

(ii) the proceedings before the Committee had been brought by the defendant maliciously and without reasonable or probable cause;

(iii) broadly speaking, the bringing of an ordinary action maliciously and without reasonable or probable cause will not support a subsequent action for malicious prosecution even though in the former proceedings fraud was charged;

(iv) where, however, in the former proceedings imputations are made which must affect the fair fame or credit of a defendant even before he can successfully refute them, an action for malicious prosecution will lie;

(v) but an application to the Committee to strike off or suspend a practitioner supported by an affidavit containing allegations of unprofessional or fraudulent conduct on the part of the practitioner involves no publication and therefore does not *ipso facto* result in damage to fair fame;

(vi) in any case, an application cannot be got rid of by a "striking out" of the application in the true sense of those words, though it may be withdrawn with leave of the Committee. The Committee is under a duty to investigate every application and where it has done so the use of words like "struck out" to signify the conclusion of the proceedings must be interpreted to mean dismissed. In this case, however, the Committee had not investigated the application and the matter could not be said to have terminated in favour of the plaintiff or at all;

(vii) further, the Ordinance provides for a successful legal practitioner to be compensated in costs in quite the same way as, a successful defendant in an ordinary action, and where the practitioner omits or neglects to apply for his costs he cannot seek to recover them in a separate action;

(viii) in an action for abusing the process of the court in order illegally to compel a party to give up his property, it is not necessary to prove that the action in which the process was improperly employed has been determined or to aver that the process was sued out without reasonable or probable cause;

(ix) but the action for malicious abuse of the process of the court lies not for abuse of the process itself but for executive action concerned with such process, and the plaintiff could not succeed on this ground since he could not show any executive action concerned with the defendant's application.

Judgment for the defendant.

J. O. F. Haynes, Q.C., with *H. D. Hoyte* for the plaintiff.

C. Weithers for the defendant.

LUCKHOO, C.J.: In this action the plaintiff Claude Vibart Wight claims against the defendant J. D. Persaud the sum of \$50,000 for malicious prosecution of the plaintiff by the defendant on the 25th March, 1961, and on the 3rd June, 1961, before the Legal Practitioners Committee; alternatively, for malicious abuse of the process of the court; alternatively, for malicious unlawful legal proceedings.

The plaintiff is a barrister-at-law duly admitted and practising his profession in British Guiana under the provisions of the Legal Practitioners Ordinance, Cap. 30 of the LAWS OF BRITISH GUIANA since the year 1925. The plaintiff, acting as solicitor as is provided for in the aforesaid Ordinance, was employed by the defendant during the month of June, 1957, to do certain legal work for the defendant between the 27th June, 1957, and the 7th October, 1958. The plaintiff made disbursements for the defendant in the filing of claims on his behalf in the civil jurisdiction of the magistrate's courts in Georgetown in respect of debts and in other matters. On the 22nd October, 1959, the plaintiff rendered the defendant an account for the work done by him in those matters. By the account the defendant was required to pay to the plaintiff the sum of \$268.31. The defendant not having paid any part of that sum, the plaintiff instituted a claim against the defendant in the magistrate's court at Georgetown for the sum of \$250 as being the amount due, owing and payable by the defendant to the plaintiff for money paid and advanced and for work

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done and services rendered by the plaintiff to the defendant at the defendant's request from June 1957, to October 1958, as more fully appears from the bill of particulars attached to the claim. The plaintiff abandoned the sum of \$18.31 in order to bring the matter within the jurisdiction of that court. The defendant filed a defence to the claim in the following terms—

“2. The defendant denies paragraph 2 of the plaintiff's claim and states that he and the plaintiff C. V. Wight made an agreement in 1957, whereby the plaintiff C. V. Wight would advance money to file cases against names and debtors of the defendant's business, and when judgment is obtained against the debtors, the plaintiff would collect the judgment, costs and fee awarded by the court, and deduct the costs and counsel fee for himself. It was further agreed between the plaintiff and the defendant that the plaintiff C. V. Wight would be entitled to 10% of the judgment collected by him exclusive of the costs and counsel fee.

3. The defendant admits that the plaintiff filed all the cases mentioned in the particulars attached to the plaintiff's statement of claim, but denies owing the plaintiff the sum of \$250.00 or any other sum for money paid and advanced, and for work done and services rendered by the plaintiff to the defendant at the defendant's request from June 1957 to October 1958, or on any other request from June 1957, to October 1958, or on any other date.

4. The defendant denies the allegations contained in the plaintiff's statement of claim as if the same were set out herein verbatim, and traversed seriatim.”

In his sworn testimony in the magistrate's court the defendant said—

“I made an agreement with the plaintiff. The agreement was that I would pay him 10% of the amount of claims I brought in. I brought in \$1,309 in claims against different persons. Counsel Mr. Wight promised to advance it. This is a list of the names of the persons who were to be sued, tendered, admitted and marked Exhibit “B”. The plaintiff was to pay in the disbursement. The client would have to pay costs and fee. I never collected any of the amounts. I was to pay plaintiff 10% of the amount of my claim. I collected through Mr. Wight \$186.00, and first \$100.00 next \$65.00 and latter \$21.65 from a levy. I would have to pay if the debtors did not pay.”

Both the plaintiff and his clerk Mr. Badri Nauth swore before the magistrate that prior to the filing of the claim the defendant had sent his son and agent to the plaintiff's chambers to inspect the accounts. Mr. Badri Nauth also swore that he spoke to the defendant about the sum of \$268.31 and that the defendant said that he would come in to pay the amount. On the 25th July, 1960, the magistrate found the plaintiff's claim proved and gave judgment in his favour for the amount claimed \$250 with costs \$5.80 and counsel fee \$31. No appeal has been lodged against the decision of the magistrate and the defendant has since fully paid off the amounts so awarded.

On the 5th December, 1960, the defendant filed an application No. 96 of 1960 Demerara under the provisions of s. 28 of the Legal Practitioners Ordinance, Cap. 30, directed (as required by r. 1 of the Rules contained in the Schedule to the Ordinance) to the Registrar of the Supreme Court that the plaintiff may be required to answer the allegations contained in his affidavit dated the 5th December, 1960, which accompanied the application, and that his (plaintiff's) name be struck off the roll of the Court or that he may be suspended from practising as a legal practitioner or that such other order may be made as the Court thinks just. Section 28 (1) of the Ordinance provides as follows—

“(1) An application by a client or other person aggrieved to require a legal practitioner to answer any allegations made by such client or person against the legal practitioner, or to strike the name of the legal practitioner off the roll of the Court shall be made to the Registrar and shall be verified by affidavit.”

The application was in Form 1 of the Rules (see p. 692 of Volume 1 of the LAWS OF BRITISH GUIANA)

In his affidavit the defendant swore—

“I, J. D. Persaud of 155 Alexander Street, Kitty, East Coast Demerara, make oath and say as follows:—

1. Claude Vibart Wight has been employed by me in a professional capacity to represent me against certain debtors on June 27, 1957, to 7th October 1958. I advanced him no money but it was agreed that he will collect from my debtors all cash due to me, this was to be done if after sending them letters of demand then they were to be put to suit.

Some were put to suit as shown on a statement submitted to me by him, certain payments were made to him as shown on the said statement. I received the sum of \$165 for which receipts were given to him.

Some time later he place me in suit and claimed \$250 as fees and cost balance.

He also according to the statement of account sent in to me I have noticed there was an excess amount of \$132.94 and judgment was obtained in the sum of \$286.80 and now he refuses me permission to see the case jackets to ascertain what other persons who owes us money.

He never charged me a specific fee as counsel for me.”

In accordance with sub-s. (2) of s. 28 of the Ordinance the Registrar transmitted the defendant's application to the Legal Practitioners Committee for investigation under the provisions of Part II of the Ordinance.

On the 25th February, 1961, the application was fixed for hearing before the Legal Practitioners Committee on the 25th March, 1961, the parties being notified of the fixture for hearing. When the matter was called on for hearing on the 25th March, 1961, the plaintiff appeared and was represented by counsel and solicitor. The defend-

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ant did not attend but his son Albert Vernon Persaud attended. The matter was then postponed to the 3rd June, 1961, when the plaintiff represented as before appeared before the Committee. The defendant was again absent but his son Albert Vernon Persaud attended and produced to the Committee what purported to be an authority dated 3rd June, 1961, and signed by the defendant authorising the said Albert Vernon Persaud his son to appear on his behalf before the Committee and to conduct all proceedings in the matter.

Having regard to the provisions of r. 8 of the Rules contained in the Schedule to the Ordinance the Committee quite properly declined to permit the defendant's son to appear on the defendant's behalf. The Committee disposed of the application by way of striking it out. On the flysheet in the Registrar's file containing the documents filed in the application appears the following entry of the proceedings on the 3rd June—

“Applicant is absent on second occasion. Committee takes a very serious view of applicant's absence. Authority to his son produced by him and retained.

Matter struck out.”

The defendant has never since sought to pursue the matter of his complaint.

The plaintiff contends that the application brought by the defendant under s. 28 of the Legal Practitioners Ordinance, Cap. 30, was instituted maliciously and without reasonable and probable cause. The plaintiff alleges that he has been put to the expense of defending those proceedings and that damage to his fair fame has been occasioned by the bringing of the application.

It has not been contended on behalf of the plaintiff that the proceedings before the Legal Practitioners Committee were in the nature of criminal proceedings. Counsel for the plaintiff has submitted that an action for malicious prosecution lies in respect of both criminal and civil proceedings and concedes that in order to succeed the plaintiff must prove—

- (a) that the defendant prosecuted him;
- (b) that the prosecution ended in the plaintiff's favour;
- (c) that the defendant must have acted without reasonable and probable cause; and
- (d) that he acted maliciously.

Counsel for the defendant has submitted that the proceedings before the Legal Practitioners Committee are in the nature of administrative proceedings by a domestic tribunal and are not judicial proceedings. He contends that there can be no prosecution unless the proceedings which have been brought are judicial proceedings. The functions to be performed by the Committee under the Legal Practitioners Ordinance are very similar to those which were performed by the Disciplinary Committee in England under the Solicitors Act, 1888, and it is beyond dispute that the proceedings before the latter

were held to be judicial proceedings. In *Lilly v. Roney* (1892), 61 L.J.Q.B. 727, 8 T.L.R. 269, decided under the Solicitors Act, 1888, it was held that the Disciplinary Committee upon an application to strike off the rolls or suspend were exercising judicial powers. See also *Addis v. Crocker*, [1960] 2 All E.R. 629, in respect of similar proceedings under the Solicitors Act, 1958. It may also be mentioned that in *A.G. of the Gambia v. N'Jie*, [1961] 2 All E.R. 504, the Judicial Committee of the Privy Council pointed out that although judges exercising jurisdiction to strike off the rolls or to suspend from practising do not sit as a court of law but act as a disciplinary authority, they are under a duty to act judicially and are exercising judicial powers. A perusal of the provisions of s. 28 of the Legal Practitioners Ordinance, Cap. 30, and of the rules contained in the Schedule to the Ordinance regulating the procedure to be followed by the Committee, makes it quite clear that the Committee is required to exercise judicial powers.

No reported case has been cited to me nor have my researches been able to discover any where similar proceedings before a Legal Practitioners Committee or a like tribunal have later resulted in a claim for malicious prosecution.

It is necessary therefore to consider the opinions expressed by textbook writers on this subject and reports of cases where actions were held to lie in respect of certain civil proceedings.

The learned author of WINFIELD (1st Edn.) has observed that the tort of malicious prosecution arose out of the old action upon the case for conspiracy which lay against a single person as well as against persons acting in combination, that action eventually becoming known as the action for malicious prosecution. In *Savile v. Roberts* (1698), 1 Ld. Raym. 374, HOLT, C.J., classified damages as of the following three kinds any one of which may support an action for malicious prosecution—(i) to a man's fair fame; (ii) to the safety of his person; (iii) to the security of his property. Apart from malicious criminal proceedings the tort has been held to apply to certain types of malicious civil proceedings of which the following are examples—

- (a) malicious bankruptcy proceedings;
- (b) malicious winding up proceedings against a company (*Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q.B.D. 674);
- (c) malicious procurement of ex-communication by an ecclesiastical court (*Hocking v. Matthews* (1670), 1 Vent. 86, 86 E.R. 60; *Gray v. Dight* (1677), 2 Show. 144, 89 E.R. 848; cf. *Fisher v. Bristow* (1779), 1 Doug. K.B. 215).

It has also been pointed out by the learned author of WINFIELD ON TORTS (1st Edn.) at p. 653 that in each of these examples the proceedings though civil in nature involved a scandalous attack on a plaintiff's credit or reputation and in the author's opinion it is uncertain whether the malicious institution of any civil proceedings is actionable. He considered that there is no good reason why the bring-

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ing of civil proceedings maliciously and without reasonable or probable cause should not be actionable. He also observes that the case of *Corbett v. Burge* (1932), 48 T.L.R. 626, does not set the matter at rest. In that case a debtor had paid his debt but was nevertheless sued for it. He brought an action against his creditor for maliciously causing judgment to be entered against him but was unsuccessful as he was unable to prove any malice on the part of the creditor. The learned author of WINFIELD has observed that whether he would have been successful had he been able to prove malice cannot be ascertained from the report of the case.

The learned author of POLLOCK ON TORTS (15th Edn.) at pp. 235 *et seq.*, has expressed the view that “generally speaking it is not an actionable wrong to institute civil proceedings without reasonable and probable cause even if malice be proved. For in the contemplation of the law a defendant who is unreasonably sued is sufficiently indemnified by a judgment in his favour which gives him costs against the plaintiff.” The learned author of POLLOCK (at pp. 236, 237) continues—

“But there are proceedings which, though civil, are not ordinary actions, and fall within the reason of the law which allows an action to lie for malicious prosecution of a criminal charge. That reason is that prosecution on a charge, ‘involving either scandal to reputation, or the possible loss of liberty to the person’, [*Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q.B.D. 674, at p. 691], necessarily and manifestly imports damage. Now the commencement of proceedings in bankruptcy against a trader, or the analogous process of a petition to wind up a company, is in itself a blow struck at the credit of the person or company whose affairs are thus brought in question. Therefore such a proceeding if instituted without reasonable and probable cause and with malice is an actionable wrong. Other similar exceptional cases were possible so long as there were forms of civil process commencing with personal attachment; but such procedure has not now any place in our system; and the rule that in an ordinary way a fresh action does not lie for suing a civil action without cause has been settled and accepted for a much longer time [*Savile v. Roberts* (1698), 1 Ld. Raym. 374, 379; 12 Mod. Rep. 208, 210]. In common law jurisdictions where a suit can be commenced by arrest of the defendant or attachment of his property, the old authorities and distinctions may still be material. The principles are the same as in actions for malicious prosecution, *mutatis mutandis*: thus an action for maliciously procuring the plaintiff to be adjudicated bankrupt will not lie unless and until the adjudication has been set aside.”

The learned author of SALMOND ON TORTS (12th Edn.) at pp. 689 and 690, has expressed the opinion—

“The bringing of an ordinary civil action (not extending to any arrest or seizure of property) is not a good cause of action, however unfounded, vexatious, and malicious it may be. The reason alleged for this rule is that an unfounded and unsuccessful civil action is not the cause of any damage of which the law

can take notice. Even for the injury which baseless accusations made in a civil action may inflict upon the reputation of the defendant it would seem that no action lies. It seems that a litigant may maliciously and without reasonable ground make the gravest charges of fraud or other disgraceful conduct without incurring any other liability than that of paying the costs of the proceedings. To what classes of civil proceedings this exemption applies is far from clear. Will an action lie at the suit of a person maliciously joined as a co-respondent in a divorce suit, or at the suit of a person against whom affiliation proceedings have been maliciously taken, or at the suit of a solicitor whom the defendant has maliciously endeavoured to have struck off the roll? If malicious proceedings in bankruptcy are, as we have seen, a good cause of action, there seems no reason why a similar conclusion should not be drawn with respect to the proceedings mentioned. Again, there seems to be no reason why an action should not lie for the institution of unfounded and malicious proceedings before a court-martial or some administrative or domestic tribunal. The adverse decision of such a body may cause serious damage to the reputation or livelihood of the party accused."

In 25 HALSBURY'S LAWS under the heading "Malicious Abuse of Civil Proceedings" there appears at para. 717 (on p. 367) the following—

"The law allows every person to employ its process for the purpose of asserting his rights without subjecting him to any liability other than the liability to pay the costs of the proceedings if unsuccessful. In civil proceedings, however, which involve an interference with liberty or property, or affect, or are likely to affect, reputation, an action lies analogous to an action for malicious prosecution, if those proceedings are undertaken maliciously and without reasonable and probable cause."

At para. 718 (on p. 367) it is pointed out that in an action for abuse of civil proceedings the plaintiff has to allege and prove a case similar, *mutatis mutandis*, to that of a plaintiff in an action for malicious prosecution.

The opinions of the textbook writers are largely founded on their understanding of the judgments delivered in the Court of Appeal in *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q.B.D. 674. It is therefore necessary to examine closely those judgments and to seek to extract the *ratio decidendi*. In that case (as is set out in the head-note) "the defendant, who had been a shareholder in the plaintiff company, instructed certain brokers to sell his shares, and signed a transfer. The brokers informed him that they could not sell the shares, but the transfer was not returned to him. After waiting ten or eleven days he presented a petition to wind up the company on the ground of fraud in its formation, and of the impossibility that it could carry on business at a profit. At the time of presenting the petition the company, which was a trading company, had property of a large amount and its debts were trifling. The defendant was not then in fact a shareholder: his shares had been sold and the trans-

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fer had been registered. Upon discovering that his shares had been sold he gave notice that the petition would be withdrawn, and it was ultimately dismissed without costs. The company having brought an action for falsely and maliciously and without reasonable or probable cause presenting the petition, at the trial no proof of damage to the company was given beyond the liability to pay its own costs of defending itself against the petition: and upon this ground the company was non-suited at the close of its case." The trial judge, STEPHEN, J., was of the opinion that if an action for maliciously presenting a petition to wind up a company could be maintained at all, special damage must be shown in order to support it and that in this case no special damage was proved. He also was of the opinion that the plaintiff company had not proved a want of reasonable and probable cause.

The Queen's Bench Division (POLLOCK, B., and MANISTY, J.) refused a rule for a new trial on the ground that they considered the court bound by the decision in *Cotterell v. Jones* (1851), 11 C.B. 713, the effect of which is set out in BULLEN AND LEAKE'S PRECEDENTS OF PLEADINGS, Chap. 3, p. 351 (3rd Edn.) as follows (see 11 Q.B.D., p. 678)—

"In an action for malicious prosecution of civil proceedings special damage must be charged in the declaration and proved in order to sustain the action; the extra costs incurred in successfully defending a civil action, beyond the amount of costs awarded by the court, are not damage sufficient to maintain this action."

A rule for a new trial was, however, granted by the Court of Appeal (BRETT, M.B., and BOWEN, L.J.). The Court of Appeal held that although the liability to pay "extra costs" was not a ground of legal damage, a new trial must be had because an action would lie for falsely and maliciously and without reasonable or probable cause presenting the petition to wind up which was necessarily injurious to the credit of the company. The court also held that on the facts there was a want of reasonable and probable cause for presenting the petition.

BRETT, M.R., (at p. 683) in the course of his judgment observed that in *Savile v. Roberts* (1698), 1 Ld. Raym. 374, HOLT, C.J., had laid down three heads of damage which will support an action for malicious prosecution—(a) damage to a man's person; (b) damage to a man's property; (c) where a man's fair fame and credit are injured.

BRETT, M.R., pointed out that "under the old law as to bankruptcy it was held that where a man was falsely and maliciously and without reasonable or probable cause made a bankrupt, two kinds of legal injury were inflicted on him: first, in order to get rid of the bankruptcy, he was obliged to incur expense, and that was injury; secondly, it was held that to allege of a trader that he was insolvent and liable to be made a bankrupt, was injury to his fair fame and credit, of which the law would take notice. Therefore under the old system of bankruptcy a trader had a good cause of action, if he was made a bankrupt falsely and maliciously and without reasonable or probable cause." BRETT, M.R., went on (at pp. 684, 685) to disagree with the opinion expressed by MARTIN, B., in *Johnson v. Emerson*, (1871) L.R. 6 Exch.

329, that under the Bankruptcy Act, 1869, an action could not be maintained for falsely and maliciously and without reasonable or probable cause procuring an adjudication in bankruptcy because the alleged creditor has only asked for a judicial decision. BRETT, M.R., adopted the opinion expressed by CLEASBY, B., in that case that such an action can be maintained “because by the petition, which is the first process, the credit of the person against whom it is presented is injured before he can show that the accusation against him is false; he is injured in his fair fame, even though he does not suffer a pecuniary loss.....By proceedings in bankruptcy a man’s fair fame is injured just as much, since the Bankruptcy Act, 1869, as it was before, because he is *openly* charged with insolvency before he can defend himself. It is not like an action charging a merchant with fraud, where the evil done by bringing the action is remedied at the same time that the mischief is published, namely, at the trial.”

Then BRETT, M.R., proceeding to consider the case before the court said (at p. 685)—

“The present case, therefore, is reduced to this question, namely, is a petition to wind up a company more like an action charging fraud or more like a bankruptcy petition? *In my opinion it is more like a bankruptcy petition, and the very touchstone of this point is that the petition to wind up is by force of law made public before the company can defend itself against the imputations made against it; for the petitioner is bound to publicly advertise the petition seven days before it is to be heard and adjudicated upon:.....I think that under those circumstances an action will lie.*”

BOWEN, L.J., after referring to the sort of damage which HOLT, C.J., had laid down in *Savile v. Roberts* (1698), 1 Ld. Raym. 374, could found such an action, said (at pp. 689, 690) —

“It seems to me that no *mere* bringing of an action, although it is brought maliciously and without reasonable or probable cause will give rise to an action for malicious prosecution. In no action, at all events in none of the ordinary kind, not even in those based upon fraud where there are scandalous allegations in the pleadings, is damage to a man’s fair fame the necessary and natural consequence of bringing the action. Incidentally, matters connected with the action, such as the publication of the proceedings in the action, may do a man an injury; but the bringing of the action is of itself no injury to him. *When the action is tried in public his fair fame will be cleared, if it deserves to be cleared; if the action is not tried, his fair fame cannot be assailed in anyway by the bringing of the action.*”

Then at p. 691—

“But although an action does not give rise to an action for malicious prosecution, inasmuch as it does not necessarily or naturally involve damage, there are legal proceedings which do necessarily and naturally involve that damage; and when proceedings

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of that kind have been taken falsely and maliciously and without reasonable or probable cause, then, inasmuch as an injury has been done the law gives a remedy. Such proceedings are called indictments—I do not say every indictment, but I mean all indictments involving either scandal to reputation or the possible loss of liberty to the person, that is, all ordinary indictments for ordinary offences. In its very nature the presentation or the prosecution of an indictment involves damage, which cannot be afterwards repaired by the failure of the proceedings, to the fair fame of the person assailed, and for that reason, as it seems to me, the law considers that to present and prosecute an indictment falsely and without reasonable or probable cause, is a foundation for a subsequent action for malicious prosecution.”

After referring to the old and the new bankruptcy laws and stating that he was in agreement with the opinion of BRETT, M.R., that the false and malicious presentation without reasonable or probable cause, of a bankruptcy petition against a trader under the Bankruptcy Act, 1869, gave rise to an action for malicious prosecution, BOWEN, L.J., (at pp. 692, 693) said—

“In the present instance we have to consider whether a petition to wind up a company falls upon the one side of the line or the other—whether as the Master of the Rolls has said, it is more like an action which does not necessarily involve damage, and therefore will not, however maliciously and wrongfully brought, justify an action for malicious prosecution, or whether it is more like a bankruptcy petition. I do not see how a petition to wind up a company can be presented and advertised in the newspapers without striking a blow at its credit.”

Then after referring to the various abuses which are indulged in for the purpose of extorting the payment of some debt which ought to be the subject of civil redress, BOWEN, L.J., said—

“I therefore answer the two first questions—whether this action will lie, and whether it will lie without further proof of special damage—in the following manner: *I think that the action will lie for the reason that special damage is involved in the very institution of the proceedings* (which *ex hypothesi* are unjust and without reasonable or probable cause) for the purpose of winding up a going company.”

On a consideration of the judgments of BRETT, M.R., and BOWEN, L.J., in that case the following points seem to emerge —

- (i) broadly speaking the bringing of an ordinary action maliciously and without reasonable or probable cause will not support a subsequent action for malicious prosecution;
- (ii) this is so even though in the former proceedings fraud was charged;
- (iii) where, however, in the former proceedings imputations are made which must affect the fair fame or credit of a defendant even before he can successfully refute them then an action for malicious prosecution will lie.

In bankruptcy or winding up proceedings the law requires publication of the proceedings before a defendant can defend himself and damage is to be presumed from the moment of publication. BRETT, M.R. (at p. 685) has put the matter succinctly when he said—

“and the very touchstone of this point is that the petition to wind up is by force of law made public before the company can defend itself against the imputations made against it.”

Counsel for the plaintiff has placed much reliance upon the *obiter* remarks of CAVE, J., in *Lilly v. Roney* (1892), 8 T.L.R., 642, at p. 643, in an action for libel in respect of the contents of the affidavit filed against the solicitor in support of certain charges brought by the defendant Roney before the Incorporated Law Society. It was held by the Divisional Court that by reason of privilege an action for libel would not lie. CAVE, J., is reported as having stated that the affidavit was the commencement of judicial proceedings and part of them. CAVE, J., is also reported as having offered the advice that the solicitor's remedy would appear to be an action for malicious prosecution if the solicitor could show absence of reasonable and probable cause for commencing the proceedings. The judge in chambers had decided that no cause of action was disclosed the matter being absolutely privileged. The Divisional Court varied this order by giving leave upon payment of costs for a claim to be made for malicious prosecution. Whether in fact the solicitor availed himself of that leave and if so whether he failed or succeeded on such a claim has not been stated in the report.

In the present action the plaintiff claims that his fair fame has been damaged and that he has been put to the expense of retaining counsel and solicitor to defend the proceedings brought by the defendant before the Legal Practitioners Committee. He contends that the allegations made in the defendant's affidavit if accepted may well be considered to amount to charges of dishonourable or disgraceful conduct. The plaintiff contends that the defendant had alleged that he (the plaintiff) overcharged him and being aware of that fact refused to permit him to see the case jackets in order to check the charges made.

I shall deal separately with the question of the expense to which the plaintiff was put in defending the proceedings before the Committee. Applying the criteria suggested by the Court of Appeal in the *Quartz Hill* case the first question is whether the proceeding's before the Committee are more like an action with imputations of fraud than proceedings in bankruptcy or winding up proceedings. An application under s. 28 of the Legal Practitioners Ordinance, Cap. 30, is, like an action, made by filing the proceedings in the Registry of Court. The hearing is by r. 11 of the Rules required to take place in private and without even a publication in the Gazette (unlike the case of an action) of the fixture. The report of the Committee is required to be filed in the Registry but is not open for inspection by the public (s. 28 (6) of the Ordinance). There is no requirement by the law for publication of the application or of the proceedings. It is true that a clerk in Registry or other court officers become aware

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of such an application or the contents of such an application but this is in no way different from the like situation when pleadings containing allegations of fraud are filed in the Registry. If, for any reason, the Committee fails to ensure a hearing in private its failure so to do can hardly be used against an applicant to ground an action of malicious prosecution.

I am unable to agree with the submission of counsel for the plaintiff that the making of an application to the Legal Practitioners Committee under s. 28 of the Ordinance to strike off or suspend a practitioner supported by an affidavit containing allegations of unprofessional or fraudulent conduct on the part of the practitioner *ipso facto* results in damage to fair fame. If there is no publication there can be no damage to fair fame. There is no such publication as contemplated by law to the Committee nor to the Registry officers who have to deal with such applications in the ordinary course of their respective duties. Nor is there publication if some other person is made aware of the nature of the allegations contained in the application or affidavit in support thereof any more than there is publication in an action containing allegations of fraud against a defendant if those allegations are disclosed to some other person. So the fact that the defendant's son Vernon Persaud was sent by the defendant with an authority to appear on his behalf before the Committee does not amount to publication of the kind adverted to by the judges of the Court of Appeal in the *Quartz Hill* case.

Now for the question of the costs incurred in defending the application. The basis of the general rule in respect of civil actions is explained by BOWEN, L.J. (at p. 690) as follows—

“The bringing of an ordinary action does not as a natural or necessary consequence involve any injury to a man's property, for this reason, that the only costs which the law recognises, and for which it will compensate him are the costs properly incurred in the action itself. For those the successful defendant will have been already compensated, so far as the law chooses to compensate him. If the judge refuses to give him costs it is because he does not deserve them: if he deserves them he will get them in the original action: if he does not deserve them, he ought not to get them in a subsequent action.”

The position is different in respect of costs awarded in criminal proceedings. In *Berry v. British Transport Commission*, [1962] 1 Q.B. 306, C.A., it has been held that in criminal proceedings as *distinct from civil proceedings* the plaintiff may recover such amount as he reasonably expended in his defence in excess of the costs awarded as such costs are not intended to compensate an accused person in respect of the expenses he incurred in his defence.

Provision is made by s. 34 (2) of the Legal Practitioners Ordinance, Cap. 30, for a practitioner to apply to a judge in chambers for an order for the payment by an applicant of the costs of the proceedings before the Committee and of the application as ascertained on taxation where the Committee has reported that there is no *prima*

facie case of misconduct against the practitioner. This can only contemplate a case where the Committee has required the practitioner to appear to answer the allegations, otherwise there would be no question of costs being occasioned him in respect of the proceedings.

Assuming for the moment that the proceedings brought by the defendant terminated in favour of the plaintiff, the plaintiff would have been entitled to apply under s. 34 (2) of the Ordinance for costs even though no formal report was made to the judges by the Committee. If on such an application to a judge in chambers it is ascertained that no report had been made by the Committee it is within the inherent jurisdiction of the judge to call upon the Committee to report in accordance with the provisions of the Ordinance. If an application is investigated by the Committee the use of words like "struck out" to signify the conclusion of the proceedings (I leave aside for the present the question whether in fact the application was investigated as is required by the Ordinance) must in my view be interpreted to mean "dismissed" for the Committee is required by sub-ss. (2), (3) and (4) of s. 28 of the Ordinance and the rules made thereunder to *investigate* the application under the provisions of Part II of the Ordinance. The Committee's functions may be compared with those of a magistrate holding a preliminary inquiry under the provisions of the Criminal Law (Procedure) Ordinance, Cap. 12, into a charge of an indictable offence. An application submitted by the Registrar to the Committee for investigation under the provisions of s. 28 (2) of the Ordinance cannot be got rid of by a "striking out" of the application in the true sense of those words though it may be withdrawn with leave of the Committee (r. 13).

Assuming that the Committee has properly carried out its functions in respect of an application made under s. 28 of the Legal Practitioners Ordinance the only possible conclusions it may reach are those stated in sub-s. (5) of that section. Section 28 (5) provides as follows:—

- “(5) Where any application has been heard, the Committee shall—
- (a) where a case of misconduct has, in their opinion, been established against the legal practitioner, report their findings to the judges of the Court; or
 - (b) where, in their opinion, no case of misconduct is established against the legal practitioner, dismiss the application and report their findings to the judges of the Court and may make such recommendations in relation thereto as they may think fit.”

In the event of the Committee finding on investigation of the application that no case of misconduct is established the Committee is bound to report accordingly to the judges of the Court. Section 34 (2) of the Ordinance is only applicable on such a finding. Section 34 (2) provides as follows—

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“Where the Committee has reported that there is no *prima facie* case of misconduct against a legal practitioner, he may apply to a judge in chambers for an order that the applicant do pay the costs of the proceedings before the Committee and of the application as ascertained on taxation.”

By r. 21 such an application shall be made by summons filed with the Registrar. The practitioner is compensated by such costs in quite the same way as a successful defendant is in an ordinary action and like the latter cannot claim “extra costs” in an action for malicious civil prosecution. Where there is power to award costs and a defendant omits or neglects to apply for his costs, he cannot seek to recover them in a separate action.

On the question of the power of the Committee to award costs to the practitioner the case of *Lilley v. Roney* (1892), 8 T.L.R. 269, is instructive. That was a case in which unfounded and gross charges of professional misconduct had been made against a solicitor. The Statutory Committee absolved the solicitor absolutely. Under those circumstances, the report was not proceeded with. The solicitor brought the matter before the court to have his costs in defending himself. For the defendant it was contended that the court had no jurisdiction to award costs as the Solicitors’ Act 1888 (51 & 52 Vict. 265) did not distinctly give them and the costs were in proceedings not before the court. The Divisional Court, however, considered that it could fairly be inferred from the Act that the court could award costs where an unwarrantable application was made against a solicitor. On appeal to the Court of Appeal *sub nom. Re Lilley, Ex parte Roney* (1892), 8 T.L.R. 377, the court held that on a construction of s. 13 of the Act there were no words which could be held to make it a condition precedent to the award of costs that the report should be brought before the court and that the Act gave the court jurisdiction to award the solicitor against whom proceedings had been wrongfully taken.

Many of the provisions of the 1888 Act and the Rules contained in the Schedule thereto are similar to the provisions of the Legal Practitioners Ordinance and the Rules contained in the Schedule thereto. It will be observed that while there is no comparable specific provision to s. 34 (2) of the Ordinance in the 1888 Act and Rules (relating to the award of costs to a solicitor where there is no *prima facie* case of misconduct) nevertheless the case of *Lilley v. Roney* (1892), 8 T.L.R. 269, confirmed in *Re Lilley, Ex parte Roney* (1892), 8 T.L.R. 377, decides that an exonerated solicitor may get his costs of the application.

Reference should be made to the case of *Hocking v. Matthews* (1670), 1 Vent. 87, cited by the learned author of WINFIELD (1st Edition) as an example of an action for malicious civil proceedings being held to apply in the case of malicious procurement of excommunication by an ecclesiastical court. The report of that case (86 E.R. 60) commences as follows—

“An action upon the case was brought for maliciously impleading, and causing him to be excommunicated in the Ecclesiastical Court; whereby he was taken upon an excom ‘cap’, and imprisoned, until he got himself absolved.”

It is important to observe that such a proceeding involved the possible loss of liberty and further no costs could be recovered by a party who was cleared of the accusation. The report goes on—

“The defendant pleaded not guilty, and found against him; and it was afterwards moved in arrest of judgment, that the declaration was not good; for no action will lie for suing a man in the Spiritual Court, tho’ without cause, no more than in suing in the Temporal Courts. For FITZ N.B. is, that a man shall not be punished for bringing the King’s Writs. So Hob: *Waterer and Freeman’s* case. And it hath been lately held, that no action will lie for an indictment of trespass, tho’ *false*; but an action of the case will lie for suing in Court Christian for a temporal cause. But the Court in this cause gave judgment for the plaintiff: for tho’ in an action between party and party in the Ecclesiastical Court; where (if the matter goes for the defendant) he shall have his costs, no action will lie if the Court hath jurisdiction: yet where there is a citation *ex-officio*, and that is prosecuted maliciously without ground, the party shall have his action; *for in such a suit he can have no costs*: and so in *Carlion and Mill’s* case adjudged, 1 Cro. 291, and this shall be so intended after the verdict, or otherwise the defendant should have shewed it to be otherwise and justified.”

Gray v. Dight (1677), 2 Show. 144, and *Fisher v. Bristow* (1779), 1 Doug. K.B. 215, were referred to by the learned author of WINFIELD. In *Gray v. Dight* it was held (89 E.R. 848) that an action on the case lies for maliciously citing a church-warden to account in the Ecclesiastical Court knowing that he had accounted before. Excommunication but no *capias* ensued. There was no express damage laid. The court held that although nothing ensued but excommunication it would consider the consequences of an excommunication. Liability to a term of imprisonment is a consequence of excommunication. *Fisher v. Bristow* was an action for a malicious presentment (for incest) in the ecclesiastical court of the archdeaconry of Huntingdon. The report of that case is terse—

“*Demurrer* to the *declaration*, and cause assigned, that it was not stated, how the prosecution was disposed of, or that it was not still depending. The court were clearly of the opinion, that the objection was fatal, and said it was settled that the plaintiff in such an action, must shew the original suit, wherever instituted to be at an end; otherwise he might recover in the action and yet be afterwards convicted on the original prosecution.”

The first question has been discussed above on the assumption that the proceedings terminated in the plaintiff’s favour. Let us see

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whether in fact they did so terminate. The record of proceedings before the Committee does not show that the Committee proceeded in accordance with rr. 6 and 7 of the Rules contained in the Schedule. Rules 6 and 7 provide as follows—

“(6) *Absence of party*—If either party fails to appear at the hearing the Committee may upon proof of service of the notice of hearing proceed to hear and determine the application in his absence.

(7) *Evidence of affidavit*—In any case in which the legal practitioner does not appear and the Committee determines to proceed in his absence the Committee may, either as to the whole matter or as to any particular fact or facts, proceed and act upon evidence given by affidavit. In any case in which the applicant does not appear or both the applicant or the legal practitioner do not appear and the Committee determines to proceed in his or their absence, the Committee shall act upon the affidavit of the applicant as *prima facie* evidence of the facts deposed to therein.”

There was no attempt made by the Committee to investigate the application. The Committee simply struck out the application for non-appearance of the applicant. Nothing was decided by the Committee as to the merits of the application. I can find nothing in the Ordinance or the Rules to authorise a procedure such as that adopted by the Committee and I can see nothing which could have prevented the defendant from filing a fresh application making the same allegations had he desired so to do. The proceedings have not terminated in favour of the plaintiff anymore than proceedings would have terminated in favour of an accused person if, at the preliminary inquiry into the charge laid against him, the magistrate “struck out” the charge on the non-appearance of the prosecutor.

Counsel for the plaintiff has submitted that the doctrine of *omnia praesumuntur rite esse acta* would apply and that it must be held that the Committee carried out their functions in accordance with the provisions of the Ordinance and the Rules in the Schedule thereto. He contends that the words “struck out” used by the Committee must be construed as meaning “dismissed”. However, where there is, as in the present case, evidence which shows the contrary the doctrine cannot be invoked.

The position is not comparable to that of the entry of a *nolle prosequi* in criminal proceedings. Nor is the position the same as in the Trinidad case of *Salamat Ally v. Pereira*, Appeal No. 198 of 1958, to the Full Court (cited by counsel for the plaintiff) where a plea of *autrefois acquit* was held to succeed where in earlier summary proceedings the words “struck out” appeared. I have not seen the report of that case but as I understand the argument of counsel the only permissible mode of disposing of the proceedings in favour of the defendant was a dismissal of the complaint and it was held that the words “struck out” which were written by the magistrate to indicate such a disposal must be construed as meaning “dismissed”.

It would appear that the Trinidad law enables a summary jurisdiction complaint to be disposed of by a magistrate by way of dismissal if the prosecution is not carried on.

In my opinion in the present case the proceedings brought by the defendant did not *terminate* in favour of the plaintiff. In fact there was no termination at all. The effect of the Committee's order was that the Committee declined to investigate the application.

The next question to be considered is whether the plaintiff has shown that the defendant acted without reasonable or probable cause.

I believe the evidence of the plaintiff's clerk Mr. Badri Nauth that the defendant's son prior to the filing of the claim in the magistrate's court inspected the case jackets to which the account rendered relates and that thereafter the defendant spoke with Mr. Nauth and promised to pay the amount due as stated on the account. I do not believe the defendant's testimony that he did not have such information as would be necessary for writing up his books of accounts in relation to the debtors. The conspicuous lack of interest shown by the defendant when the application came before the Committee subsequently confirms this. I am satisfied that he was well enough to attend before the Committee on both occasions when the matter was called and that his application was not *bona fide*. Applying the classic test as enunciated by HAWKINS, J., in *Hicks v. Faulkner* (1878), 8 Q.B.D. 167, at p. 171, approved by the Privy Council in *Herniman v. Smith*, [1938] A.C. 305, at p. 316, I find that the plaintiff has proved that the proceedings brought by the defendant were brought without reasonable or probable cause. These matters also disclosed that the defendant was actuated by malice. However, in view of the conclusions I have reached on the other aspects of the plaintiff's claim for malicious prosecution, this claim fails.

The plaintiff, in the alternative, claims damages for malicious abuse of the process of the court. It has been held in *Grainger v. Hill* (1838), 4 Bing. N.C. 769, that in an action for abusing the process of the court in order illegally to compel a party to give up his property, it is not necessary to prove that the action in which the process was improperly employed has been determined or to aver that the process was sued out without reasonable or probable cause. TINDAL, C.J., in the course of his judgment said (at p. 773)—

“The second ground urged for a non-suit is, that there was no proof of the suit commenced by the defendants having been terminated. But the answer to this, and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and probable cause for the defendants' proceedings, is the same: that this is an action for the abusing of the process of the law, by applying it to extort property from the plaintiff, and not an action for a malicious arrest or a malicious prosecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reason-

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able and probable cause alleged as well as proved. In the case of malicious arrest, the sheriff at least is instructed to pursue the exigencies of the writ: here the directions given, to compel the plaintiff to yield up the register were no part of the duty enjoined by the writ. If the course pursued by the defendants is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to such new and special circumstances; and his complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it is founded on reasonable or probable cause."

The other judgments delivered in that case were to like effect. In that case the plaintiff, the master and proprietor of a fishing smack, borrowed from the defendants £80 upon having the repayment of that loan secured to them by way of a mortgage of the smack. The defendants wrongfully sought to compel the plaintiff through fear and duress of imprisonment to give up a register and a certificate of the register of the vessel, which were not included in the mortgage security, well knowing that without the register the plaintiff could not put to sea and that the money loaned on mortgage had not become due. The plaintiff refused to give up the register and the defendants caused and procured him to be arrested and imprisoned.

It has been pointed out by the learned author WINFIELD (1st Edn.) at p. 654, that an action for malicious abuse of the process of the court lies not for abuse of the process itself but for executive action concerned with such process. Taking that approach in respect of the present case the plaintiff could not succeed in an action for malicious abuse of the process of the court for he cannot show any executive action concerned with the defendant's application. In any event having regard to the fact that costs may be obtained on application by an absolved practitioner no special damage can be pleaded. It is stated at pp. 914 and 915 (para. 1729) of CLERK AND LINDSELL ON TORTS (12th Edn.) that "an action lies for the abuse of ordinary civil process, which differs only from an action for malicious prosecution in that the gist of it seems to be the special damage. Malice and absence of reasonable and probable cause must be proved in the same manner in the one as in the other.....it must be proved also that the proceedings came to a due legal end."

The third alternative claim—that of malicious unlawful legal proceedings—could hardly be sustained and was not pressed at the hearing of this action.

In the result the plaintiff's claim fails and is dismissed with costs to be taxed.

Judgment for the defendant.

Solicitors: *L. L. Doobay* (for the plaintiff); *O. M. Valz* (for the defendant).

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[In the Full Court, on appeal from the Magistrate's Court for the East Demerara Judicial District (Date, C.J. (ag.), and Khan, J.) March 1, 22, 1963]

Road traffic—Third party risks—Use of uninsured motor vehicle—Car insured only where used for private purposes—Conveyance, of passenger for reward on isolated occasion—Whether payment was made as a result of any binding contractual relationship between driver and passenger—Whether user covered, by policy—Motor Vehicles and Road Traffic Ordinance, Cap. 281, s. 4 (1) (b) proviso (ii).

The appellant's motor car was insured under a policy which did not cover "use for hire or reward." He drove the car up to a police decoy and another police constable, who were both in plain clothes and standing on the road, and asked how far they were going. The decoy said they were going up to Annandale. He and his colleague then got into the car and were driven by the appellant up to Annandale where they got out. There the decoy asked the appellant, "How much for the drop?" The appellant said "fifty cents each", whereupon the decoy gave him a dollar note. On this evidence the appellant was convicted *inter alia* of using the motor car when there was not in force a policy of insurance in respect of third party risks in relation to the user thereof, contrary to s. 3 (1) of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 281.

On appeal it was argued for the appellant that there was no evidence that the appellant habitually used his car for hire or reward, or of any binding contractual relationship between the appellant and the decoy relating to the use of the car.

Held: (i) the particular circumstances of this case warranted the inference that a legally binding contractual relationship was intended;

(ii) the law requires all drivers to have third party insurance except in so far as risks to passengers in the car are concerned; and it compels drivers to cover risks to passengers also if the car is habitually used for hire or reward;

(iii) but whether the car is habitually so used does not affect the question whether the use of the car for hire or reward even on an isolated occasion is in fact covered by the terms of the Particular policy;

(iv) in this case the use of the car for conveying the policemen for reward was not in fact so covered, and the appellant was therefore guilty of the offence of using the car when there was not in force a policy of insurance in relation to the user thereof. *Mohamed v. Edwards*, 1960 L.R.B.G. 107, applied.

Appeal dismissed.

R. H. McKay for the appellant.

K. Bhagwandin for the respondent.

Judgment of the Court: This is an appeal against the decision of a magistrate of the East Demerara Judicial District convicting the appellant of using a motor car on the Annandale Public Road when there was not in force a policy of insurance or security in respect of third party risks in relation to the user thereof, contrary to s. 3 (1) of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 281 [B.G.]. Arising out of the same set of circumstances the appellant was also charged with using the car for a purpose other than that for which it was licensed, contrary to s. 23 (1) of the Motor Vehicles and Road Traffic Ordinance, Cap. 280 [B.G.].

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The two cases were tried together with the consent of the parties. The appellant was also convicted of the offence under Cap. 280 but has not appealed against that conviction.

The evidence which appears to have been accepted by the magistrate was to the effect that the appellant was the owner of motor car PL 16; it was insured as a private car only; the policy of insurance expressly provided that the policy did not cover "use for hire or reward". On October 20, 1962, P.C. Kuldip, a police decoy, and P.C. Persaud, both dressed in plain clothes, were standing on the Clonbrook public road; the appellant's car driven by the appellant came up to them and stopped; the appellant asked them how far they were going; Kuldip said they were going to Annandale; Kuldip and Persaud got into the front seat of the car and it carried them to Annandale where they got out. Up to that stage the question of payment had not been mentioned. The appellant came out of the car and went behind it, by the trunk of the car. Kuldip then asked the appellant, "How much for the drop?" The appellant said, "50 cents each". Kuldip gave the appellant a dollar note, the serial number of which had been taken at the Cove and John Police Station. While the appellant still had the dollar note in his hand two other policemen came up on a motor cycle. The appellant denied having taken any money from Kuldip.

At the trial in the magistrate's court the appellant asserted that he had previously known Kuldip and Persaud, and that they stopped his car on the day in question and asked for a drop to Annandale. Kuldip denied having known the appellant before that day. Persaud did not give evidence. The magistrate in his reasons for decision said that he did not believe the evidence of the appellant that he gave Kuldip and Persaud a "free drop".

P.C. Henry, one of the two policemen who came up on the motor cycle while the appellant had the dollar note in his hand, testified that from Clonbrook to Annandale the fare "is sometimes 25 cents" but that there is no "schedule for fares".

Before us only one ground of appeal was pressed by counsel for the appellant: that the decision was erroneous in point of law because the learned magistrate did not direct his mind to the principles of law applicable to the ingredients of the case. Counsel's argument under this general head was two-fold: (1) that the magistrate did not consider whether the appellant and Kuldip intended a legally binding contractual relationship; (2) that there was no evidence that the appellant habitually used his car for hire or reward.

It will be convenient to deal with the second limb of the argument first. It is based on certain remarks made by BRANSON, J., in *Wyatt v. Guildhall Insurance Co.*, [1937] 1 All E.R. 792, and involves an interpretation of s. 3 (1) and s. 4 (1) of Cap. 281 which are in substance identical with s. 35 (1) and s. 36 (1), respectively, of the Road Traffic Act, 1930 [U.K.]. The relevant portions of ss. 3 (1) and 4 (1) of Cap. 281 are as follows:

“3. (1) Subject to the provisions of this Ordinance it shall not be lawful for any person to use or to cause or permit any other person to use a motor vehicle on a public road unless there is in force in relation to the user of the vehicle, by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Ordinance.

* * * * *

4. (1) In order to comply with the requirements of this Ordinance a policy of insurance must be a policy which—

* * * * *

(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle on a public road:

Provided that such policy shall not be required to cover—

* * * * *

(ii) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise.

* * * * *

In *Wyatt v. Guildhall Insurance Co.* (*supra*) the plaintiff was a passenger in a motor car insured against third party risks with the defendants. The plaintiff and a friend had arranged to travel to London by train; but the owner of the car, having to go to London to give evidence, offered to take them for 25s. each. During the journey the car collided with a lorry. The plaintiff recovered judgment for damages and costs against the owner of the car, and then brought this action to recover the sum so awarded from the defendant insurance company, relying upon the Road Traffic Act, 1934, s. 10, which deals with the duty of insurers to satisfy judgments against persons insured in respect of third party risks. As in the instant case, the car was insured under a private motor car policy for use for social, domestic and pleasure purposes only. It was held that the policy did not cover the use which was made of the car on the journey in question. Upon that finding it was unnecessary for the judge to decide any other ground argued. Nevertheless, having regard to the arguments before him BRANSON, J., went on to express the view that the owner of the car was not bound by the Road Traffic Act, 1930, s. 36 (1), to have in force a policy of insurance to cover any liability he might incur *to the plaintiff* in the circumstances of that journey which was an isolated occasion, the effect of the section being only to require the owner to have such a policy in force where the vehicle is habitually used for the carriage of passengers for hire or reward. In relation to para. (ii) of the proviso to s. 36 (1) of the 1930 Act, BRANSON, J., said:

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“If the contention which is urged by Mr. Paull is the correct one, if anybody takes a passenger in his car for anything which may be called a reward, he immediately becomes liable to penalties if he has not got a policy which covers *that* person [the italics are ours]. It seems to me that this sub-section is really dealing with vehicles which are normally or habitually used in the way in which the exception mentions, and the mere fact that upon one isolated occasion a man takes some reward—it need not even be a monetary reward—for the conveyance of a passenger in his car, is not intended to render him liable to penalties if he has not got a policy which covers *that passenger* [our italics] on that occasion. After all, this is a statute which is imposing penalties, and if there are two constructions possible it is right to adopt the one which does not turn the user of the car into a criminal user. It is possible, I think, to see, as Mr. Hallett says, in the form of the language used, the distinction between the liability in respect of ‘persons carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence’, which is obviously directed to the moment of the accident, and the case of a vehicle in which passengers ‘are carried for hire or reward’. The words at the commencement of the proviso, ‘except in the case of a vehicle in which passengers are carried’, cannot be read with the words ‘at the time of the occurrence’; and that being so, I think one must read the exception as a clause by itself and as not joined up to the language at the end of the proviso, ‘at the time of the occurrence of the event out of which the claims arise’. The effect is then that, unless this is a vehicle in which passengers ‘are carried for hire’ in the sense in which one would generally use that kind of expression, as, for instance, ‘a house in which parties are given’ or ‘a shop in which umbrellas are kept’, that is to say habitually given or kept, I think the proviso applies without the exception.”

The Full Court of the Supreme Court of this Colony has on several occasions considered *Wyatt's* case and rejected arguments similar to those now advanced by counsel for the appellant. In *Mohamed v. Edwards* (1960), 2 W.I.R. 206, (1960 L.R.B.G. 107) for example, where the facts were similar to the facts in the instant case, the Full Court (Luckhoo, Ag. C.J., and BOLLERS, Ag. J.) said (at pp. 208-209):

“Paragraph (ii) of the proviso to s. 4 of the Ordinance provides that a policy of insurance in respect of third party risks shall not be required to cover liability in respect of the death of or bodily injury *to persons being carried in or upon or entering or getting into or alighting from a motor vehicle at the time of the occurrence of the event out of which a third party claim arises*, except in the case of a motor vehicle in which passengers are carried for hire or reward. This exception has been construed in *Wyatt v. Guildhall Insurance Co., Ltd.* to refer to cases where passengers are carried for hire or reward not on isolated occasions but habitually. But the exemption contained in the provisions of that paragraph of the proviso relates only to the

category of persons (in italics) referred to therein. No third party policy of insurance at all is required in respect of such category of persons—passengers—where persons who are within that category are not habitually carried for hire or reward. This does not affect persons in any other category or the limitation of purposes for which the vehicle may be used contained in the policy issued. A third party policy of insurance is still required in respect of any other category of persons and the policy will be subject to the limitation of purposes for which the vehicles may be used which is stated therein.

We do not understand *Wyatt's* case to lay down a general rule that the words 'carried for hire or reward' wherever they may appear in the Ordinance mean 'carried habitually for hire or reward'. The appellant could not lawfully use his car for hire or reward even on an isolated occasion without there being in force in respect of such user the *appropriate* policy of insurance."

Counsel for the appellant strongly criticised this passage from the Full Court's judgment and said he could not comprehend what "other category" of persons the court had in mind.

It is important to bear in mind that in *Wyatt v. Guildhall Insurance Co.* BRANSON, J., was dealing with a claim brought by a person who was a passenger in the car and came within the category of persons mentioned in para. (ii) of the proviso. We cannot agree that this is the only category of persons for whose benefit the Act was passed. Indeed, the main purpose of the Act (and of our Ordinance) is the protection of persons who are not passengers, *i.e.*, pedestrians and other users of the road. They do not come within the exemption of para. (ii) of the proviso. Once this is kept in mind there can be no difficulty in construing the meaning of the language used by the Full Court in *Mohamed v. Edwards (supra)* and it is readily seen that there is in fact no conflict between the decision in that case and the remarks made by BRANSON, J., in *Wyatt v. Guildhall Insurance Co.*—even if BRANSON, J.'S remarks are not treated as obiter.

The statute requires that all cars used on public roads must have the appropriate policy of third party risks insurance. Para. (ii) of the proviso exempts insurance against passenger risks only, but even that exemption ceases if the car is habitually used for hire or reward. In other words, the law requires all drivers to have third party insurance except in so far as risks to passengers in the car are concerned; and it compels drivers to cover risks to passengers also if the car is habitually used for hire or reward.

For support for his contention in relation to the other limb of his submission, counsel for the appellant relied mainly on the judgment of the Court of Appeal in the recent case of *Coward v. Motor Insurers Bureau*, [1962] 1 All E.R. 531. In that case one Cole had habitually transported a fellow-workman, Coward, to their place of

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work on the pillion seat of his solo motor cycle. There was an arrangement whereby the passenger Coward paid Cole an unascertained weekly amount for transporting him to and from work. On one such journey both workmen were killed in an accident. Coward's widow obtained judgment against Cole's administratrix, but the judgment went unsatisfied as Cole's policy of insurance did not cover pillion passengers. Coward's widow brought an action against the defendants, the Motor Insurers Bureau, in respect of the unsatisfied judgment. Under an agreement between the defendants and the Minister of Transport the defendants had undertaken to satisfy a judgment in respect of any liability which was required to be covered by a policy of insurance under Part 2 of the Road Traffic Act, 1930 [U.K.], whether or not the persons liable were in fact covered by a policy of insurance. The basic question, therefore, was whether Cole was bound to insure his passenger against accident while carrying him on the pillion seat of his motor cycle.

Held: (i) neither Coward nor Cole intended this arrangement to be a legally binding contractual relationship; (ii) a solo motor cycle on which a passenger is carried for hire or reward is a motor vehicle within s. 36 (1) (b) (ii) of the Road Traffic Act, 1930: but that enactment applied only where a passenger was being carried for hire or reward under a legally binding contract, express or implied, and therefore did not apply in that case; accordingly the policy of insurance which Cole was required by s. 35 (1) of the Act of 1930 to have in force did not have to recover the passenger, so that his widow was not entitled to recover from the defendants. In the course of the judgment of the court read by UPJOHN, L.J., he said (at pp. 536, 537):

“.....there was an arrangement whereby Coward did pay weekly a sum, the exact amount of which was not ascertained by admissible evidence, to Cole for transporting him between Aylesbury and Cowley to and from work.

This, however, does not determine the question whether this arrangement contemplated that the parties would enter a legal relationship enforceable in the courts of this country. On this point, the fact that both parties are dead, we believe matters little, for if the question had been posed to Coward or Cole: 'Did you intend to enter into a legal relationship?' each would probably have answered 'I never gave it a thought'. *The practice whereby workmen go to their place of business in the motor car or on the motor cycle of a fellow-workman on the terms of making a contribution to the costs of transport is well known and widespread.* In the absence of evidence that the parties intended to be bound contractually, we should be reluctant to conclude that the daily carriage by one of another to work on payment of some weekly (or it may be daily) sum involved them in a legal contractual relationship. The hazards of everyday life, such as temporary indisposition, the incidence of holidays, the possibility of a change of shift or different hours of overtime, or incompatibility arising, make it most unlikely that either contemplated that the one was legally bound to carry and the other

to be carried to work. It is made all the more improbable in this case by reason of the fact that alternative means of transport seem to have been available to Coward. On the probabilities of the case, therefore, we reach the conclusion that, while admitting the evidence rejected by the learned judge which, in our judgment clearly proved an arrangement whereby Coward paid a weekly sum to Cole for transporting him to and from his work, neither party intended to enter into a legal contract.”

The facts and probabilities in the instant case are somewhat remote from those in *Coward v. Motor Insurers Bureau*. In the present case the appellant told the magistrate that he had known Kuldip and Persaud before the day in question. As already mentioned, Kuldip denied knowing the appellant, and Persaud was not called as a witness. Even if the appellant did know Kuldip and Persaud, however, there was no evidence to suggest that they were friends, let alone fellow-workmen. It seems to us that the particular circumstances of this case warrant the inference that a legally binding contractual relationship was intended.

It was also urged by counsel for the appellant that the magistrate in his reasons for decision did not state that he had addressed his mind to this aspect of the matter, *i.e.*, the nature of the transaction between the appellant and the constables. It was not necessary for the magistrate to do so in so many words. In our opinion it is implicit in his memorandum of reasons for decision that this aspect was not overlooked by him. Among other things, the memorandum recalls that in passing sentence the magistrate “remarked openly that there are more private cars operating as hire cars than hire cars.”

In the result, this appeal fails on both limbs of the ground argued by counsel for the appellant. The appeal is accordingly dismissed and the conviction and sentence are affirmed. The appellant must pay the respondent’s costs of this appeal fixed at \$28.12.

Leave to appeal to British Caribbean Court of Appeal is granted.

Appeal dismissed.

PERSAUD v. MANDERSON

[In the Full Court, on appeal from a magistrate's court (Persaud and Khan, JJ.)
March 15, 30, 1963]

Rent restriction—Excess rent—Claim by tenant for recovery of rent paid in excess of standard rent and permitted increases—Whether excess recoverable for whole period of tenancy or only from date of assessment—Rent Restriction Ordinance, Cap. 186, s. 7(1) and (16), and s. 14.

Section 7 (1) of the Rent Restriction Ordinance, Cap. 186, enables a tenant or landlord to apply to the rent assessor "to have the standard rent of the premises ascertained and certified, and the maximum rent of the premises assessed, fixed and certified". Section 7 (16) provides that "where the landlord or his agent is for any reason unable to prove any fact required to be proved for the purpose of ascertaining the standard rent or fixing the maximum rent" the rent assessor may "assess and certify a standard rent, and assess, fix and certify a maximum rent.....which in (his) opinion.....is a reasonable standard rent and a reasonable maximum rent....." Section 14 (2) provides that where "in respect of any period subsequent to the material date (as defined in s. 14 (3)), any tenant has paid.....rent.....which exceeded the standard rent by more than the amount permitted under this Ordinance, the amount of such excess shall.....be recoverable from the landlord....."

The respondent was a tenant of the appellant of certain premises for a period commencing on 1st August, 1960 (*i.e.*, after the material date) at an agreed rental of \$25 per month. On application by him and in the absence of any evidence by the appellant, the rent assessor issued a certificate dated 9th January, 1962, stating that the standard rent had been "ascertained and fixed" at \$15 per month. He awarded no permitted increases. The tenant then obtained judgment from the magistrate's court for the excess paid over the entire period of the tenancy. On appeal it was argued for the landlord that the excess was recoverable only in respect of that period of the tenancy which was subsequent to the date of the certificate.

Held: (i) in the circumstances the standard rent was not ascertained under s. 7 (1), but assessed under s. 7 (16);

(ii) the expression "standard rent" in s. 14 (2) means standard rent whether ascertained under s. 7 (1) or assessed under s. 7(16), and the excess was recoverable for the entire period of the tenancy.

Appeal dismissed.

M. G. Fitzpatrick for the appellant.

O. M. Valz for the respondent.

Judgment of the Court: The respondent was a tenant of the appellant of certain premises in Georgetown as from the 1st August, 1960, to the 31st December, 1961, at an agreed rental of \$25.00 per month. Upon an application of the respondent to have the standard rent ascertained and certified, and the maximum rent assessed, fixed and certified under s. 7 (1) of the Rent Restriction Ordinance, Cap. 186, the rent assessor, in the absence of any evidence by the appellant (landlord), upon whom the onus to prove the standard rent lies, and after an inspection of the premises, arrived at the conclusion (to use neutral words) that \$15.00 per month was the standard rent. The rent assessor issued his certificate dated the 9th January, 1962, in which he used the words "ascertained and fixed" in relation to the standard rent, and the maximum rent chargeable. He awarded no permitted increases.

The respondent then brought a civil claim in the magistrate's court seeking to recover the sum of \$120.00 as excess rent for the

period of the tenancy less two months' rent not paid. No evidence was led in this matter, but the assessor's certificate and reasons for decision were put in by consent. Upon these documents, and after hearing submissions of solicitors, the magistrate ruled that the excess rent was recoverable. His view of the findings of the rent assessor is that the latter 'ascertained' the rent, and not 'assessed' it, and therefore the matter fell to be governed by r. (b) in *Nathoo v. Sabga* 1952, L.R.B.G. 120, at p. 121, as enunciated by STOBY, J. That rule is as follows:—

“If the rent assessor has not reduced the standard rent then excess rent is recoverable from the material date as defined in the Ordinance even though there is an effective date in the certificate”.

Counsel for the appellant submits that it cannot be said that the rent assessor reduced the standard rent, as there was no standard rent prior to the issue of his certificate, and therefore the respondent was not entitled to recover arrears from the commencement of the tenancy, as r. (b) set out above would not then apply.

Section 2 of the Ordinance defines “standard rent” as the rent at which a dwelling house.....was let on the 3rd September, 1939, or where the dwelling house.....was not then let, the rent at which it was let before that date, or in the case of a dwelling house.....let after that date, then subject to the provisions of s. 2 (7) of the Ordinance, the rent at which it was first let. In our view, this definition contemplates the ascertainment of the standard rent at three different points of time, and must relate to its ascertainment by some evidence.

Counsel for the appellant urges that the magistrate has drawn an artificial distinction between the word ‘ascertained’ and ‘assessed’ which distinction does not really exist, and that the words are used interchangeably in various sections of the Ordinance. An examination of sub-ss. (1) and (16) of s. 7 in our view points to a distinction. Section 7(1) provides as follows:—

“Any tenant, and a landlord, of any premises to which this Ordinance applies under section 3 or section 5, may make application to the rent assessor for the area in which the premises are situate to have the standard rent of the premises ascertained and certified, and the maximum rent of the premises assessed, fixed and certified.”

This sub-section exposes the steps which the rent assessor is required to take, and must be read together with the definition of standard rent in s. 2 and also with sub-s. (9) of s. 7. From the evidence available to him the rent assessor ‘ascertains’ or finds out accurately or determines or establishes what the standard rent is. Having done this he certifies it. The next step is for him to add the permitted or authorised increases under s. 15 of the Ordinance, and having done this, he arrives at a figure which represents the maximum rent chargeable. This latter process is the ‘assessment’. To assess

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means to charge with a certain sum upon, as a tax; to value property for the purpose of taxation; to rate; to set or fix. Having assessed the maximum rent the rent assessor fixes and certifies that maximum rent. Sub-section (2) of s. 7 does not, as counsel for the appellant has urged, alter the meaning of the word ‘ascertain’; there is nothing in this sub-section to suggest this.

Sub-section (16) of s. 7 provides that where the landlord or his agent fails to attend before the rent assessor, or declines to give evidence, or is unable to prove any fact required to be proved for the purpose of ascertaining the standard rent or fixing the maximum rent, the rent assessor may assess and certify a standard rent, and assess, fix and certify a maximum rent which in his opinion is a reasonable standard rent and a reasonable maximum rent having regard to all the circumstances of the case and the standard rents of and the maximum rents chargeable of similar premises in the same area. Clearly this sub-section contemplates the situation where no evidence of the standard rent is forthcoming from the landlord or his agent; and in these circumstances the rent assessor is required to fix a reasonable standard rent. In so doing he cannot be said to be *ascertaining* the standard rent, but he *assesses* the standard rent. Having done so, he certifies it and then the process follows that in sub-s. (1), that is, he assesses, fixes and certifies the maximum rent. This is precisely what the rent assessor did in the case before us, in that he fixed the standard and maximum rent at \$15.00 per month.

Sub-section (2) of s. 14 of the Ordinance provides that where a tenant has paid rent which exceeded the standard rent by more than the amount permitted such excess shall, notwithstanding any agreement to the contrary, be recoverable from the landlord by the tenant. We understand the term “standard rent” in this sub-section to mean standard rent whether ascertained or assessed in the sense in which we have interpreted the terms in this judgment; and we understand the term “amount permitted” to mean the standard rent together with the amount permitted or authorised under the Ordinance. If subsequent to the material date the tenant has paid rent in excess of the maximum rent then that excess is recoverable. In the instant case the maximum rent is the same as the standard rent and it is clear that the tenant overpaid the landlord by \$10.00 per month as from the commencement of the tenancy. While we agree with the magistrate’s distinction between “ascertaining” and “assessing” of the standard rent we do not agree, in view of the reasons we have already given, that the rent assessor ascertained and not assessed the standard rent. As we have already indicated he could only have assessed such rent. The magistrate in his reasons referring to the rent said:

“If it has been assessed I would be inclined to award repayment from the effective date of the certificate.....”

but does not give his reasons for this view. It seems to be based on the dictum of STOBY, J., in *Nathoo v. Sabga* (*supra*) when the learned judge was referring to a decision of the Full Court of *Griffith v. Moseley* also decided in 1952. STOBY, J., said:

“In that case the respondent Walter Moseley had recovered judgment before a magistrate for the sum of \$61.05 as excess rent paid by him to the appellant Edna Griffith for a period of 15 months from the 1st December, 1948, to 28th February, 1950, in respect of premises situate at lot 8 Camp Street, Georgetown. On the 25th February, 1950, the rent assessor ascertained the standard rent and assessed the maximum rent and dated the certificate 25th February, 1950. The magistrate awarded judgment for the full sum claimed despite the fact that the certificate was dated 25th February, 1950, and this decision was varied on appeal and excess rent awarded from the 25th February. But the *ratio decidendi* was not merely because the effective date of the certificate was the 25th February, but also because the rent assessor in conformity with his powers under the 1947 Amendment Ordinance had reduced the standard rent from \$20.00 to \$10.50. The rent of \$20.00 being the standard rent was a legitimate charge until reduced and it would have been manifestly unfair to permit the tenant to recover an amount which was never overpaid. As pointed out in the decision it was within the power of the assessor to make the certificate retroactive, in which case the reduced standard rent would be payable from the date stated in the certificate, but as he did not do so, the new standard rent only took effect from the date of the certificate and excess rent only recoverable from that date.”

When the decision of the Full Court of Appeal in *Griffith v. Moseley*, 1952 L.R.B.G. 10, is examined, we find that the facts in that case are similar to the facts in the instant case, except that in that case, it was established that the premises were first let at a certain figure subsequent to 1947, and that figure was the standard rent. The decision in *Griffith v. Moseley* turned on the proviso to s. 7 (2) of the Rent Restriction Ordinance, Cap. 186 (formerly the proviso to s. 4B (1A) of Ordinance No. 23 of 1941, as amended by s. 4 (a) of Ordinance No. 30 of 1948). The court appreciated the apparent conflict between this proviso and what is now s. 14 (2) of Cap. 186. After reciting the latter subsection, the court said:

“According to sub-section (3), the ‘material date’ for premises such as these in the instant case is the 1st January, 1946, the premises having been built and rented for the first time since 8th March, 1941.

It should be obvious that the above sub-section (referring to what is now section 14 (2) of Cap. 186) refers to the ‘standard rent’ as defined by the Ordinance. A right to recover rent for the period specified in each class of controlled premises which was in excess of that ‘standard rent’ is given to the tenant. When, however, the legislation subsequently in Ordinance 3 of 1948 gave power to the rent assessor on application by the tenant to reduce the ‘standard rent’ and then fix a lower standard rent for the premises, it must have seemed unfair and inequitable that the land-

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lord who, acting within his rights under the then existing Ordinance, had been receiving rent not in excess of what was allowed should, because of a reduced assessment of the 'standard rent' under a new Ordinance, find himself compelled to refund to his tenant what was since deemed to be an excess of rent. Accordingly the proviso to 4B (1A) was inserted to protect the landlord in cases of reduced standard rents from being forced to refund excess rent which had been paid for any period antecedent to the coming into operation of the new Ordinance."

It will be seen at once that although STOBY, J.'S reference to *Griffith v. Moseley* in his decision in *Nathoo v. Sabga* was in general terms, the decision in the former case was on a particular ground, and does not have universal application. Rather, the decision in *Griffith v. Moseley* recognises the implication of s. 14 (1).

We are of the view, having regard to the nature of the evidence available before the magistrate, that the instant case falls within the pale of s. 14 (1).

In the result, we are of the view that the tenant would be entitled to recover the excess rent paid, as this matter falls under r. (b) of the rules set out in *Nathoo v. Sabga*. To hold otherwise would mean that a landlord would be entitled to charge an exorbitant rent before it is assessed, and if the rent assessed turns out to be lower than that charged by the landlord, the tenant may not recover the excess. This cuts across our interpretation of s. 14 (2).

The appeal is dismissed, and the decision of the magistrate affirmed. The appellants must pay the costs of the respondent fixed at \$28.36.

Appeal dismissed.

Solicitor: *H. A. Bruton* (for the appellants).

ISAACS v. LOCAL GOVERNMENT BOARD

[Supreme Court (Persaud, J.) March 16, April 6, 1963]

Practice and procedure—Petition seeking nullification of notice published by Local Government Board declaring that a country district shall cease to be a country district—Whether competent to proceed by way of petition—Local Government Ordinance, Cap. 150. s. 24 (1) (b)—Order 2 of R.S.C. 1955.

Acting under s. 24 (1) (b) of the Local Government Ordinance, Cap. 150, the Local Government Board published a notice in the Official Gazette declaring that two country districts should cease to be country districts as from a certain date. The petitioner, who owned land in one of the districts, sought by way of petition an order of the court that the declaration so made and published by the Board was null and void and of no effect. For the Board it was objected that the procedure by way of petition was incorrect, and reliance was placed on Order 2 of the Rules of the Supreme Court 1955 which provides that:—

“Save and except where proceedings by way of petition or otherwise are prescribed or permitted by any Ordinance, by the Common Law of this Colony, by these Rules or by any Rules of Court, any person who seeks to enforce any legal right against any other person or against any property shall do so by a proceeding to be called an action.”

For the petitioner it was contended that at common law a right against the Crown could be enforced only by way of petition.

Held: the Board is a separate and distinct entity from the Crown and the procedure by way of petition is not available against it.

Objection upheld.

C. Weithers for the petitioner.

David Singh, Senior Legal Adviser (ag.), for the respondent.

PERSAUD, J.: The village known as Hopetown situate on the west sea coast of the county of Berbice bounded on the east by the Atlantic Ocean, on the west by crown lands, on the north by Bel Air or No. 22, and on the south by Onderneeming or No. 20, was on the 30th August, 1902, declared to be a country sanitary district under the provisions of the Public Health Ordinance, 1878, and by virtue of s. 7 of the Local Government Ordinance, 1907 (No. 13), became a country district. Its status as such was perpetuated by s. 23 of the Local Government Ordinance, 1945 (No. 14), which provided as follows:—

“Every area of land which at the commencement of this Ordinance is a village district or a country district shall be a village district or a country district, as the case may be, under this Ordinance.”

(See s. 23 of the Local Government Ordinance, Cap. 150). On the 17th April, 1920, a notice was published in the Official Gazette under the hands of the Secretary and Chairman of the Board, declaring the eastern portion of Bel Air or No. 22, situate on the west coast of the county of Berbice to be a country district to be known as the

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Bel Air Country District, under s. 8 of the Local Government Ordinance, 1907 (No. 13). On the 22nd December, 1956, notices purported to be given under the hand of the Secretary of the Local Government Board were published in the Official Gazette declaring that the Bel Air Country District and the Hoptown Country District shall cease to be country districts as from the 1st January, 1957, inclusive. That the Local Government Board had authority so to do is apparent from the provisions of s. 24 (1) (b) of the Local Government Ordinance, Cap. 150. On the 11th January, 1958, the Hoptown-Bel Air Country District was declared a village district under s. 24 of the latter Ordinance and a notice to this effect was published in the Official Gazette of the 11th January, 1958.

The petitioner, who is the owner by transport of a piece of land in the Hoptown-Bel Air Village District, seeks by way of petition an order of the court that the declaration made by the Local Government Board and published in the Gazette of the 22nd December, 1956, is null and void and of no effect, and such other orders as the court may deem just.

Several reasons were set out in the body of the petition upon which this court is asked to say that the declaration is bad, but for the purposes of this decision it is not necessary to examine those reasons, as counsel for the Board has taken a preliminary objection to the effect that the remedy sought by the petition is not one which can be pursued by way of petition. He has referred to Order 2 of the Rules of the Supreme Court, 1955. This rule provides as follows:—

“Save and except where proceedings by way of petition or otherwise are prescribed or permitted by any Ordinance, by the Common Law of this Colony, by these Rules or by any Rules of Court, any person who seeks to enforce any legal right against any other person or against any property shall do so by a proceeding to be called an action.”

Counsel also submits that the proper proceedings would be by way of originating summons under Order 42. He may be right but I am not called upon in this decision to express an opinion as to what the correct procedure is; I am merely to determine whether a petition is the correct procedure; in my view it is not. There is no provision in the Local Government Ordinance which enables a person having a claim against the Local Government Board to enforce that claim by way of petition. Indeed, there is specific provision to the effect that the Board can sue and be sued.

Counsel for the petitioner has submitted that the Rules of the Supreme Court are silent as to how proceedings such as these may be initiated, and in developing his argument, has referred to the Crown Proceedings Act of 1947 and to the position of persons seeking a remedy against the Crown before and after 1947. Presumably, he was seeking to establish that under the common law of this colony, a petition would lie by virtue of the provisions of s. 3 (B) of the Civil Law of British Guiana Ordinance, Cap. 2, which introduced the

English common law as the common law of this colony. He urged that the position in this country is the position as it was in England prior to the 1947 Act when persons seeking to enforce a right against the Crown could only go by way of petition. As I apprehend the position in the United Kingdom, prior to 1947, persons could by way of petition seek a remedy against the Crown for a breach of contract and in connection with certain other matters, but did not have a right to sue in tort. Since 1947 the Crown may be sued in tort. This consideration apart, for counsel's argument to have some merit, it must be established that the Local Government Board is one and the same entity as the Crown. This clearly is not the case as s. 4 of the Local Government Ordinance declares the Board to be a body corporate with perpetual succession and a common seal and with power to sue and be sued. The Board, therefore, is a separate and distinct entity from the Crown and the rule applicable to proceedings against the Crown prior to 1947 is irrelevant in my judgment to this matter.

In my view the point is well taken, and I would therefore dismiss this petition. The petitioner must bear the costs of the Local Government Board.

Objection upheld.

Solicitor: *O. M. Valz* (for the petitioner).

Re BRADY (an infant)

[Supreme Court—In Chambers (Persaud, J.) April 2, 30, 1963]

Adoption—Consent of parent—Mother willing to allow child to remain with foster parents provided no adoption order made—Whether mother’s consent unreasonably withheld—Adoption of Children Ordinance 1955, ss. 10 (4) (a) and 11 (1) (c).

A mother’s illegitimate child had been cared for since it was four months old by the applicants, who were the parents of the child’s natural father. The mother was an Anglican but she had the child baptised as a Catholic and the child was in fact being brought up as such by the applicants, who were themselves Catholic. When the child reached eight years of age the applicants applied for an adoption order, but the mother refused to give her consent, stating that she really had no objection to the applicants keeping the infant provided no adoption order was made. The child was comfortably looked after by the applicants and expressed a preference to remain with them.

Section 10 (4) (a) of the Adoption of Children Ordinance, 1955, provides that “adoption orders shall not be made in any case except with the consent of every person.....who is a Parent or guardian of the child,.....”; but s. 11 (1) (c) provides that “the court may dispense with (such) consent if it is satisfied that (such) consent is unreasonably withheld.”

Held: (i) the fact that a mother has left her infant child in the care of foster parents is not tantamount to her having abandoned the child, and the fact that she had previously consented to the adoption is not evidence that her consent was unreasonably withheld;

(ii) but, on the evidence, the mother in this case had no genuine wish to have her child and her consent was unreasonably withheld.

Order accordingly.

Re BRADY (an infant)

M. E. Clarke for the applicants.

C. M. L. John for the mother of the infant.

PERSAUD, J.: I wish to commence this judgment by using the language used by HARMAN, J., at the commencement of his judgment in *Re F. (An Infant)*, [1957] 1 All E.R. 819, at p. 820: "This is that comparative rarity, a contested application for adoption".

The infant Ian McDonald Brady was born on the 20th May, 1955, of the body of Iris Clarke (in this judgment referred to as the mother) while the latter was a single woman. One Ivan Jacob Brady, the son of the applicants, is the father of the infant. The mother has since married, and is living with her husband with three of her children by another man in her property at Peter's Hall, East Bank, Demerara. The three children who are now of school-going age were all born before the birth of the infant. The mother seems to be comfortably off; her husband is in steady employment receiving a salary of \$25.00 per week, while the mother herself earns about \$48.00 per month. She works away from home two days per week.

The applicants are husband and wife. The husband is a bookkeeper and is employed on a part-time basis earning \$70.00 per month. They have grown-up children who themselves earn, and the evidence is that these children contribute to the upkeep of the applicants' home. The infant has lived at the home of the applicants and has been cared for by them since he was about four months old, and there can be little doubt that they, particularly the wife, have formed a deep attachment for him. He in turn has come to regard them as his parents, and his father as his godfather. He does not seem to be aware of the existence of the mother as his mother, and does not so regard her.

The father of the infant was at the relevant time an overseer at Pln. Farm, East Bank, Demerara, and secretary of the Mess there. The mother was employed at the mess as a maid. It was in those circumstances that the infant was conceived. At that time the mother lived at Providence. She now occupies her own house at Peter's Hall, which is also occupied by her sister and the latter's family which comprises of her husband and 8 children. The mother says that this is a temporary arrangement, and that her sister and family will live there only until she has had her ninth child, after which they will be required to seek accommodation elsewhere, thus making the entire house available to the mother and her family.

The application now before the court is by way of a summons in which the applicants pray for an order that they be authorised to adopt the infant pursuant to the provisions of the Adoption of Children Ordinance, 1955 (No. 12). These proceedings are necessary in view of the fact that the mother is unwilling to give her consent to an adoption order being made in favour of the applicants. The mother's consent is required under s. 10 (4) (a) of the Adoption

of Children Ordinance, 1955, but s. 11 (1) (c) of the same Ordinance provides *inter alia* that the consent may be dispensed with if the court is satisfied in any case that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld. The applicants contend that the mother is withholding her consent to this adoption order unreasonably.

It may be just as well to set out the relevant sections of the local Ordinance which are similar in content to the Adoption Act, 1950 (14 Geo. 6 C. 26) of the United Kingdom. Section 10 (4) (a) of the local Ordinance provides as follows:—

“Subject to the provisions of section 11 of this Ordinance, adoption orders shall not be made.....in any case except with the consent of every person or body who is a parent or guardian of the child or who is liable by virtue of any order or agreement to contribute to the maintenance of the child”;

And s. 11 (1) (c) provides—

“The court may dispense with any consent required by paragraph (a) of sub-section (4) of section 10 of this Ordinance if it is satisfied.....in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld.”

As is required by s. 5 of the Ordinance, the Adoption Board has carried out certain investigations into this matter, and has submitted a report to the court which now forms part of these proceedings. It is apparent from the report that the amenities available at the appellants' home are better than those available at the mother's home; the infant appears to be comfortable, and well-cared. The report ends with this paragraph:—

“The Board is of the opinion that the applicants are fit and proper persons to be authorised to adopt the child but the mother's rights cannot be ignored. The dispensing of her consent on the ground that it is being unreasonably withheld is a matter for determination by the court.”

The mother claims that it was because of an arrangement made with the father of the infant that the latter was taken to one Mrs. Xavier, an aunt of the father so that the mother could resume her occupation, while the father maintains that the child was removed to Mrs. Xavier's home and then to his parents' home because the mother expressed the desire to be rid of the child. It is a fact that the mother did not resume her work at the mess, but instead moved to Peter's Hall. The mother has also said that before the baby was born, she and the father had agreed that he would repair her house,

Re BRADY (an infant)

and she would give his parents the child. She denies opposing the making of the order because she wants money, but she also says that she really has no objection to the applicants keeping the infant, provided no adoption order was made. She has also testified to the fact that she is an Anglican by religion, even though she caused the infant to be baptised in the Roman Catholic faith. The applicants say that the child attends the Catholic Church, and is being brought up in that faith.

In the course of his argument solicitor for the mother has attracted my attention to two cases which, he contends, support the mother's position. In the first case of *Watson v. Nikolaisen*, [1955] 2 Q.B. 286, a mother who had handed her child to friends by whom she desired it to be adopted, signed a form consenting to the adoption of the child in the belief that it was the final and irrevocable step in the adoption (which it was not). Later she withdrew her consent to the adoption. It was urged that the mother had abandoned the child, and was withholding her consent unreasonably. It was held that she had not 'abandoned' the child within the meaning of s. 3 (1) (a) of the Adoption Act, 1950 (*supra*) and so far as the question of the mother's unreasonably withholding of her consent was concerned,

“.....in adoption proceedings, unlike proceedings for care and custody, the welfare of the child is not the primary consideration. The parent may have forfeited his or her rights to have the care and custody of a child, but it is quite another thing to say, that, because of that, he or she must give a consent to the child being adopted so that it becomes a member of the family of the adopting parents and the natural parents lose all parental rights in relation to the child.”

It is to be observed in this case that the justices who heard the matter in the first instance formed the view that the mother was sincere in her desire to re-take possession of the infant and had not acted whimsically in such desire. In the instant case, how can I say that the mother is sincere in the expression of her desire to have the child when she has said that she has no objection to the applicants keeping the child, provided no adoption order is made?

In *Re F. (An Infant)*, [1957] 1 All E.R. 819, the parents of the child had signed an adoption agreement relating to a child who had been given over to the applicants by the parents, and who had lived with the applicants in Jamaica since she was eight months old. The child had been handed over to the applicants on account of the mother's mental illness for which she required treatment in the United States of America to which country her husband took her. After a protracted illness the mother recovered her health well enough to resume looking after her family, which included two children in addition to the child the subject matter of the application. She expressed this desire. In the meantime, the applicants had

taken the child to England where they applied to adopt the child. There was no doubt that they were financially well able to provide the child with all the amenities of life. It was also established that the parents themselves were well able to look after the child. It was held in the circumstances that the parents' refusal now to consent to an adoption order was not unreasonable, and the consent which they had given by the adoption agreement was revocable until an adoption order was made. In the course of his judgment, HARMAN, J., said at p. 824—

“There are a brother and sister in this case. They both know this child as their sister. Are they to be told she is not their sister any longer? It seems to me one has only to state it to see that such a thing is impossible. I feel the greatest sympathy for the applicants. They have behaved very well, and they are not to be criticised in any way. But, in a matter of this sort, the parents by nature have rights which only in very special circumstances are they to be debarred from using. These parents have not misbehaved themselves in any way so as to disentitle themselves from saying: ‘This is our child; we will not have her made the child of another’.”

I ought to point out that in the case I have just referred to the mother was recognised by everybody, including the child herself, as her mother. Presents were given. And there can be little doubt that the child's knowledge who her parents were was considered of great importance in the court's decision.

Solicitor has also referred me to the decision of the Full Court in the case of *Alexander v. Ferrell*, 1958 L.R.B.G. 69. This was an appeal from a judge in chambers against an order made under the Infancy Ordinance, Cap. 39. It was held that though the welfare of the child was of the first and paramount consideration, it was not the only consideration, but was one among several other considerations including giving the child an opportunity of winning the affection of its parents.

Section 13(1) (b) of the Adoption of Children Ordinance, 1955, provides as follows:—

“The court before making an adoption order shall be satisfied—
(b) that the order if made will be for the welfare of the infant, due consideration being for this purpose given to the religious denomination of the parties and to the wishes of the child, having regard to the age and understanding of the child.”

I pause here to refer to the evidence of the mother to the effect that even though she herself and her other children are of the Anglican faith, she baptised the infant in the Catholic Church. It turns out that the applicants are themselves of the Roman Catholic religion, and the infant is being brought up to observe the tenets of this faith. I am inclined to the view that the baptismal of this infant in the Catholic religion was no accident; that it is more likely that the

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mother was aware that the infant's father and the latter's parents belonged to this faith, and this knowledge motivated her to this course of action. In answer to me, the infant, who appeared to understand the questions put to him, expressed the wish to remain with the applicants.

The authorities are clear that the fact that a mother has left her infant child in the care of foster-parents is not tantamount to her having abandoned the child, and the fact she had previously consented to the adoption is not evidence that her consent was unreasonably withheld. (See *Re K. (An Infant), Rogers and Another v. Kuzmicz*, [1952] 2 All E.R. 877).

It seems to me that I should approach this matter bearing in mind the dictum of HARMAN, J., in *Re F. (An Infant) (supra)* where he was dealing with the question of adoption. HARMAN, J., said at p. 830—

“It is one of the most anxious jurisdictions which falls on the Court of Chancery, for adoption, as has been pointed out, is a permanent change in the status of the person adopted, and may alter his or her citizenship. It alters the family to which he or she belongs. It alters both the child's rights and the child's duties as a citizen of this country. It is, therefore, a matter which at the best, and even when unopposed, must be looked at with great circumspection as so momentous a change is to be made in a child's life, the child having in ninety-nine cases out of a hundred no say in the matter, because he or she is too young.”

I have already alluded to the fact that I questioned the child in this case, and that he appeared to understand the questions, giving thereto intelligent answers.

In the *Rogers'* case (*supra*), it was held that no doubt the removal of the child from his foster parents would cause him temporary unhappiness, but that fact had no bearing on the question whether the mother's withholding of her consent to the adoption was or was not unreasonable. Again, in *Hitchcock v. W.B. and Others*, [1952] All E.R. 119, Lord GODDARD, at p. 122, differentiated between the question of custody and guardianship on the one hand and that of adoption on the other, and said that the fact that the adoption will be for the benefit of the child is not an answer to the question whether a parent is unreasonably withholding his consent.

In the cases referred to up to now in this judgment, the objecting parent expressed the desire to resume the custody of the child, while in the instant matter, the mother, while saying that she would like to have the child, has also said that she really does not have any objections to the applicants retaining the custody of the child. This alone, to my mind, shows that her wish to have her child is not a genuine one.

It is my view that upon being called upon to deal with a matter of this sort a court is required to bear in mind the dicta laid down from time to time, and be guided by them, while not ignoring

the circumstances of each particular case. For instance, in *Re A.B. (An Infant)*, [1949] 1 All E.R. 709, it was held that an order authorising the adoption by married persons of an illegitimate grandchild (as is the case here) could be made in special circumstances, but only with great caution and never as a matter of course. In that case, VAISEY, J., made the adoption order, and said—

“Every case must, however, be judged on its own facts, dealt with on its own merits, and decided on a balance of considerations.....”

In *Re G. (An Infant)*, [1962] 2 All E.R. 173, a case under the Adoption Act, 1958, (7 & 8 Eliz. 2, c. 5) which also contains the words “for the welfare of the infant” as one of the matters which must be taken into account in the making of an adoption order, an order was refused by the court of first instance on the ground that the adopting parents were of one religious faith while the mother of the child was of another faith. On appeal, it was held that the paramount question is the welfare of the child, and that the judge ought to have decided what was best for the child, and should not have—as he did—based his decision on the difference in religious persuasion. In that case the infant was under one year of age, and so the court did not have the benefit of the child’s wishes.

Another case to which I was referred by solicitor for the applicants was *Re G. (DM.) (An Infant)*, [1962] 2 All E.R. 546. This was another instance where the words “for the welfare of the infant” as contained in the Adoption Act, 1958, s. 7 (1) (b), came up for consideration. In that case, the mother of the child did not oppose the adoption order, but the local county council appealed from an order made by justices. It was held that the principles regarding the welfare of infants acted on by the court in appeals relating to guardianship, custody, care and control of infants were equally applicable in determining whether the making of a particular adoption order would be for the welfare of an infant within the meaning of s. 7 (1) (b) of the Adoption Act, 1958.

I have taken all the circumstances into account, and I have given anxious consideration to this matter, having regard to the various dicta expressed from time to time. I have considered the reasons why the mother opposes this application. I have already indicated that this is not a genuine opposition in my view, and while an adoption order will not be made as a matter of course, I am inclined to grant this order in all the circumstances.

The order of the court will therefore be that the applicants be authorised to adopt the infant Ian McDonald Brady. There will be no order as to costs.

I am not unaware of the provisions of s. 13 (2) of the Ordinance which empowers the court to impose such terms and conditions as it may think fit. I do not feel that this is a fit case in which to impose terms and conditions upon the making of the adoption order.

Leave to appeal if necessary granted.

Order accordingly.

ANDERSON v. DE CORUM AND PETER TAYLOR & CO. LTD.

[Supreme Court—In Chambers (Persaud, J.) March 19, April 30, 1963]

Libel—Innuendo—Meaning assigned to offending words in statement of claim without reference to extrinsic facts—Whether a true innuendo—Whether defendant entitled to particulars.

Libel—Defence of fair comment and rolled up plea—Application for particulars—O. 17, r. 25.

In para. 4 of his statement of claim in an action for libel the plaintiff alleged that by the words complained of “the defendants meant and were understood to mean that the plaintiff was guilty of conspiring.....to commit (certain) irregularities.....”, but no reference was made to any extrinsic facts in support of this inference. In para. 9 of their defence the defendants pleaded that the words complained of were “fair comment made.....on facts truly stated in the said letter.....” In para. 10 they raised the rolled-up plea. In relation to the latter O. 17, r. 25, provides that the defendant “shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.” Each side applied for particulars.

Held: (i) in respect of para. 4 of the statement of claim the defendant was not entitled to particulars as the plaintiff had not pleaded a true innuendo and, in support of the inference, was relying not on extrinsic facts but only on the words complained of;

(ii) the plaintiff was not entitled to Particulars in respect of para. 9 of the defence, as the defendants relied on the “facts truly stated in the.....letter”;

(iii) the plaintiff was however clearly entitled to particulars in respect of para. 10 of the defence.

Order accordingly.

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

E. V. Luckhoo for the defendants.

PERSAUD, J.: The plaintiff claims from the defendants damages for an alleged libel published in a newspaper of which the first-named defendant is alleged to be the editor, and the second-named defendants the printers, publishers and proprietors. The allegedly offensive article is reproduced in the statement of claim, and in para. 4 thereof the plaintiff alleges that “by the said words the defendants meant and were understood to mean that the plaintiff was guilty of conspiring with certain named members of the Credit Corporation Board aforesaid to commit irregularities in relation to the Corporation’s business and further was guilty of nepotism and improper and irregular conduct generally in the discharge of his public duties as a member of the Board aforesaid and in particular was guilty of collusion and improper conduct along with the other named members aforesaid in approving a loan by the Corporation to one Mrs. Benn; and further that the plaintiff was a dishonest and corrupt person ignorant of and incompetent in business affairs and unfit to retain either of his said offices.”

In their defence, the defendants have pleaded *inter alia* at paras. 9 and 10—

“The said words set out in para. 3 of the statement of claim are a fair comment made in good faith and without malice on facts truly stated in the said letter which are matters of public interest.

Alternatively, in so far as the said words consist of statements of facts, the said words are true in substance and in fact; in so far as the said words consist of expressions of opinion, they are fair comment made in good faith and without malice upon the said facts which are matters of public interest.”

Both the plaintiff and the defendants have now taken out summonses for certain particulars. The plaintiff seeks particulars in respect of paras. 9 and 10 above, while the defendants seek particulars in respect of para. 4, and they were heard together by consent. I will deal with the defendants’ summons first.

The defendants ask for particulars of whether the meanings given by the plaintiff to the words are meanings in their ordinary sense, or meanings by reasons of innuendoes, and particulars of the facts and matters upon which the plaintiff will rely in support of any meanings by way of innuendoes.

I do not agree that this matter is governed by O. 17, r. 16, of the local Rules of the Supreme Court. This rule makes it unnecessary for the plaintiff to state any extrinsic fact or innuendoes for the purpose of showing the application to the plaintiff of the defamatory matter.

Counsel for the defendants urges that as the local rules are silent on this matter, O. 19, r. 6 (2), of the United Kingdom Rules of the Supreme Court should apply. This rule was considered by me in *White v. Guiana Graphic Ltd.*, 1962 L.R.B.G. 501, in which the defendants took out a summons asking for particulars in respect of an innuendo. In that matter I held that the pleading amounted to an innuendo, and that O. 19, r. 6 (2), of the English Rules was applicable, and that the plaintiff should give particulars of the facts and matters on which she relied in support of the alleged innuendo. I also gave consideration to the decision in *Grubb v. Bristol United Press Ltd.*, [1962] 3 W.L.R. 25, where it was held that a true innuendo could not be supported by a mere interpretation of the words of the libel itself, but must be supported by extrinsic facts or matters. In the course of his judgment in the *Grubb’s* case, HOLROYD PEARCE, L.J., said at p. 40.

“.....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. r. 6 (2).”

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In the case now before me the words “in their natural and ordinary meaning” are not pleaded by the plaintiff, but counsel has in the course of his argument, intimated that the plaintiff has not pleaded an innuendo. This was the stand taken by counsel in *Loughans v. Odhams Press Ltd.*, [1962] 2 W.L.R. 692. This would mean that the plaintiff is relying on the actual words used, and may not lead any extrinsic evidence in an attempt to attach any meaning to the words complained of, other than their natural meaning. The question here is, “Has a true, as opposed to a false, innuendo been pleaded”. If a true innuendo has not been pleaded, then no particulars are necessary.

In the *Loughans’* case (*supra*) the plaintiff pleaded—

“By the said words the defendants.....meant and were understood to mean that the plaintiff was guilty of and had committed the murder.....The plaintiff will rely upon the words contained in the said article.”

It was held that the Rules of the Supreme Court, O. 19, r. & (2), merely required the plaintiff to give a defendant notice by particulars of any facts or matters which he intended to prove in support of the contention made in his innuendo that the words bore a particular meaning; and if the defamatory meaning was a matter of inference from the terms of the statement complained of, and the plaintiff intended to rely on no extraneous facts in support of the inference, it was sufficient compliance with the rule if he so stated in his particulars, and that, since the case was one in which, if the words did bear the meaning alleged, it could only be an inference from the terms of the article as a whole, the plaintiff was entitled to plead an innuendo to that effect.

In the *Grubb’s* case, UPJOHN, L.J., who had also sat in the *Loughans’* case dealt with the decision in the latter case, and while affirming the correctness of that decision, met the criticisms of that decision in the following words at p. 43—

“I think much of the difficulty that has arisen in the proper understanding of *Loughans’* case may have been because the use of the word “inference” has been misunderstood. The use of this word has been seized upon as authority for the proposition that it is proper and permissible to plead a special meaning going beyond the ordinary and natural meaning of the words used without relying on any additional facts. For my part I entirely dissent from this proposition, for it was never suggested to us in *Loughans’* case that the plaintiff in his pleading was departing from the natural and ordinary meaning of the words used. As I understood the argument, the word “inference” was used to convey the idea and was so understood, at least by me, that, although the fact was not starkly stated in the article that the plaintiff had murdered Rose Robinson, that is what the words would be understood to mean by anyone reading the article in their natural and ordinary meaning without know-

ing anything more. Such a plea not going beyond the natural and ordinary meaning of the words used has been described as a false innuendo, and, if a true innuendo be an innuendo which extends the ordinary meaning of the words used and requires proof of facts to support such meaning, I am content to accept the adjective "false". It is, however, right to point out that in the highest court the word "innuendo" has been used to include what I am content to call a false innuendo: see *John Leng & Co. Ltd. v. Langlands* (1916), 114 L.T. 655, 32 T.L.R. 255, *per* Lord HALDANE."

I am of the opinion that this is the position of the instant case, that a true innuendo has not been pleaded, and in the circumstances. I make no order for particulars, and para, 4 of the statement of claim will stand as it has been pleaded.

The matter is succinctly put by HOLROYD PEARCE, L.J., in his judgment in the *Grubb's* case at p. 37—

"There is no logical reason why an innuendo or extension of the ordinary meaning of the words (creating a separate cause of action) should be born from the libel where there is no extrinsic fact to give it life. If a defamatory inference should reasonably be drawn from the words themselves they are in their natural and ordinary meaning defamatory. If, however, it should not reasonably be drawn, then the words are not defamatory and cannot be made so by merely pleading an innuendo without facts to support it."

Now to deal with the plaintiff's summons. O. 17, r. 25, of the Rules of Court provides (as does r. 22 A of the U.K. Order 19) as follows:—

"Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he shall give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true."

In para. 9 of the defence, the defendants have set up a plea of fair comment *simpliciter*, on matters of public interest. It is not necessary for them to give particulars of the facts which show that the matters are matters of public interest, for this is a question of law. If the comment is based solely on facts stated in the alleged libel, it should be so stated (*Aga Khan v. Times Publishing Co.* (1924), 130 L.T.R. 746). This is what the defendants have done here when they use the words ".....on facts truly stated in the said letter....." It would seem therefore that the plaintiff is not entitled to the particulars he seeks with respect to par. 9 of the defence, as the defendants rely on the "facts truly stated in the.....letter." Had

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they pleaded the general plea of fair comment by the use of the words “The said words are fair and *bona fide* comment on a matter of public interest” and nothing more, particulars of the facts on which the comment was based would be ordered.

The position is different with respect to para. 10. In that paragraph the defendants have pleaded the “rolled-up plea” as an alternative. And the rule is clear that in such circumstances, particulars must be given. The defendants are therefore ordered to give the particulars sought in relation to para. 10 of the defence—within 14 days from today; failing which the said paragraph will be struck out.

I am content to order that the costs of these applications be costs in the cause.

Order accordingly.

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PERSAUD v. MCPHERSON

[Supreme Court (Date, J.) September 17, 18, 27, 28, October 16. November 9, 1962, January 14, 1963.]

Contract—Illegality—Sale of business situated at certain premises—Business prohibited from being operated there by town planning laws—Both parties ignorant of prohibition at time of transaction—Enforceability of contract—Town and Country Planning Ordinance, Cap. 181, s. 8.

Under a written agreement P. agreed to sell to M. an eating house business started and conducted by P. at certain premises in Georgetown and to let the premises to M. at a certain rental. Both parties were unaware at the time of the transaction that the business was prohibited by the town planning laws from being conducted at the particular premises. On later becoming aware of this, M. sued for a declaration that the agreement was illegal, and for the return of the monies paid by her thereunder as monies had and received to and for her use. P. in turn sued for rent due under the agreement. In support of M.'s case it was argued that the parties were not *in pari delicto*, and that P. was the more blame worthy of the two in that it was her duty to find out whether she could properly start the business at the particular premises.

Held: (i) the contract was illegal and the parties were *in pari delicto*;

(ii) the contract of tenancy contained in the written agreement was itself tainted with illegality and was therefore unenforceable;

(iii) no order would be made for the return to M. of the monies paid by her under the agreement.

*McPherson's claim allowed in part.
Persaud's claim dismissed.*

J. O. F. Haynes, Q.C., for McPherson.

C. V. Wight and A. S. Manraj for Persaud.

DATE, J.: These two actions between Gertrude McPherson and Parbatie Persaud were consolidated on the application of counsel on both sides. The facts admitted or proved are as follows.

In December, 1960, Persaud and her husband acquired and moved into possession of lot 112 New Market Street, Georgetown, Demerara. The building on the lot was a new building and had not been previously occupied. Transport for the property was passed to them late in 1961. From December 1960 till February 8, 1961, Persaud carried on the business of an eating house and parlour known as "Shanta's

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Delicatessen” in the upper portion of the building on the lot. She then moved the business to the lower portion of the building.

On or about August 13, 1961, Persaud caused to appear in the Sunday Graphic the following advertisement:

“Prosperous 4 corner business spot at corner Camp and New Market Streets, also 3-storey flat. Apply 112 New Market Street.”

In consequence of this advertisement McPherson went to Persaud, and on August 18, 1961, an agreement in writing (Exhibit “A”) was executed. This agreement was drawn up by Messrs. Luckhoo and Luckhoo, legal practitioners, as a result of a joint visit to them by McPherson and Persaud. Under clause 1 of the agreement McPherson agreed to buy from Persaud the latter’s right, title and interest in and to the business then being carried on by Persaud as “Shanta’s Delicatessen” at lot 112, New Market Street, as a going concern, including all fixtures, fittings and utensils used in the operation and management of the business, for \$4,400, in respect of which sum Persaud acknowledged having received \$1,500 on account.

Clause 2 of the agreement stipulated that Persaud should give up possession of the business to McPherson not later than one month from August 18, 1961, and that upon such delivery of possession McPherson would pay the balance of the purchase price, namely, \$2,990. The business was handed over to McPherson on September 15, 1961, from which date she has been in possession of the entire premises.

Clauses 3, 4, 5, and 6 of the agreement are as follows:

“3. It is hereby agreed between the Vendor and the Purchaser that the Purchaser shall pay to the Vendor for the whole of the said building including the business premises a monthly rental of \$150.00 (one hundred and fifty dollars) for the use and occupation thereof. The said rental is payable in advance and is to commence from the date on which possession is given to the Purchaser.

4. The whole of the said building inclusive of the business premises on the ground floor is rented as aforesaid for a fixed period of 12 (twelve) months from the date of the giving of possession of the same to the Purchaser with a right of renewal at the option of the Purchaser for a further period of 12 (twelve) months at the said rental of \$150.00, with such sums as may have to be added thereto consequential upon an increase of rates and taxes.

5. It is a term and condition of this agreement that the Vendor shall give the Purchaser the right of exercising an option to purchase the said building and property at 112, New Market Street, Georgetown, aforesaid, at the end of the fixed period of 12 (twelve) months from the date of the Purchaser going into

possession thereof for the stipulated purchase price of \$23,000.00, subject to the usual conditions. If this option to purchase is exercised by the Purchaser then transport of the said property is to be advertised forthwith and the aforesaid rental of \$150 per month will only become payable from the end of the aforesaid fixed period of 12 (twelve) months to the time of the passing of transport to the Purchaser.

6. The right of renewal for a further period of 12 (twelve) months at the option of the Purchaser as aforesaid only becomes operative if the Purchaser does not avail herself at the above specified time of exercising her option to purchase the said property at the aforesaid purchase price of \$23,000.00.”

The uncontradicted evidence of Persaud is that for about a month before the execution of the agreement McPherson and one Cliffy had been visiting the delicatessen “keeping an eye on the business” and that during this period Persaud gave McPherson “lessons” and the latter “looked into the business.”

A further sum of \$800 on account of the purchase price of the business was paid by McPherson between August 18 and September 13, 1961, on which latter date a bill of sale was executed by her in favour of Persaud in respect of the chattels bought—as security for the payment of the balance of the purchase money, namely, \$2,100. The bill of sale was registered on September 13, 1961, but there has been no renewal of the registration as required by s. 9 of the Bills of Sale Ordinance, Cap. 337. It therefore became ineffective as a security as from September 13, 1962.

Since the execution of the bill of sale, McPherson has made payments thereunder totalling \$200.

On January 2, 1962, Persaud’s solicitors, Messrs. Luckhoo & Luckhoo, wrote to McPherson about her failure to pay instalments and interest due under the bill of sale. On January 9, 1962, McPherson’s solicitor replied as follows:

“9th January, 1962

Luckhoo & Luckhoo,
Legal Practitioners,
Chambers,
2, Croal Street,
Georgetown,
Demerara.

Dear Sirs,

My client Miss Gertrude McPherson has placed in my hands your letter to her on behalf of your client Parbatie Persaud, dated the 2nd January, 1962.

Miss McPherson does not deny that certain instalments and interest payable under the terms of the bill of sale dated the 13th September, 1961, remain unpaid, but she is profoundly disturbed

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over certain information recently communicated to her. According to this information the business sold to her by your client is being or might well be held to be illegally conducted by Miss McPherson on the ground that the area in which the premises are situate has been classified as a residential area. Consequently at any time Miss McPherson may be called upon to remove the business or cease carrying it on. Furthermore Miss McPherson understands that Parbatie Persaud was refused application by the Proper Authority to carry on the business. My client fears that proceedings may be taken against her by the Proper Authorities.

Miss McPherson has been advised to be very careful about what she does under the agreements since she became aware of the alleged or probable illegality of the transactions.

In the circumstances she would like to get some assurance from Parbatie Persaud as to the true position of affairs. Miss McPherson is anxious not to do anything which might make her knowingly a party to any illegality and thereby prejudice her position.

Yours faithfully,
S. NARAIN.”

On January 12 Messrs. Luckhoo & Luckhoo wrote to McPherson’s solicitor as follows:

“12th January, 1962.

Mr. Sase Narain,
Solicitor,
South Street,
Georgetown.

Dear Sir,

Re: Parbatie Persaud and McPherson

We thank you for your letter in reply to ours but frankly cannot see the applicability of the issues raised therein to the transaction in question and consider the same to be quite irrelevant and speculative.

However we have sent on your letter to Mr. H. B. Fraser, Solicitor, who is now acting for Parbatie Persaud.

Yours faithfully,
LUCKHOO & LUCKHOO.”

The next step was the service on January 26, 1962, by Persaud on McPherson of a notice of seizure of and intention to sell at public auction the chattels mentioned in the bill of sale to enforce payment of the instalments and interest due under the bill of sale. No further action in this connection has been taken.

It has not been proved that Persaud was ever refused application “by the Proper Authority”, or by anyone, to carry on the business of

an eating house at the premises in question, as alleged in the letter from McPherson's solicitor dated January 9, 1962. On the contrary, certified extracts from the Register of Eating Houses in the custody of the Town Clerk of Georgetown show that the premises were actually registered as an eating house, first in the name of Persaud, then in the name of McPherson. There is also uncontradicted evidence that no action has ever been taken or threatened against either.

Neither the option to renew the contract of tenancy for a further period of twelve months nor the option to purchase the premises has been exercised by McPherson, but she is still in possession.

On March 1, 1962, McPherson filed her writ in action No. 472 of 1962 against Persaud. During the course of the trial McPherson's counsel abandoned certain parts of her claim. She now claims (a) a declaration as to whether or not the written agreement dated August 18, 1961, purporting to be an agreement of sale by Persaud to her in respect of the business situate at lot 112, New Market Street, as a going concern, with the fixtures, fittings and utensils pertaining thereto, was and is illegal as being in breach of the provisions of the Town and Country Planning Ordinance, Cap. 181 [B.G.], and subordinate provisions passed thereunder; (b) a declaration as to whether or not she is bound in law to honour the terms of the contract referred to in (a); (c) an order for the rescission or cancellation of the written agreement of sale dated August 18, 1961; (d) the return of the sum of \$2,300 paid by her under the agreement of August 18, 1961, as money had and received to and for her use; (e) an injunction restraining Persaud from putting up for sale at public auction under the provisions of the Bills of Sale Ordinance, Cap. 337, all or any of the chattels specified in the bill of sale. No claim has been brought for the return of the \$200 paid by McPherson under the bill of sale.

Persaud's action against McPherson was commenced by writ filed on April 19, 1962. She claims from McPherson the sum of \$600 as rent due by McPherson for lot 112, New Market Street, under the written agreement dated August 18, 1961, for the period January 1 to April 30, 1962, at the rate of \$150 per month; alternatively, she claims from McPherson the sum of \$150 per month from January 1 1962, to April 30, 1962, for the use and occupation of the aforesaid premises. It is common ground that McPherson has not paid any rent for this period.

During the course of the trial counsel for Persaud conceded that the Greater Georgetown Plan, which is a scheme approved by the Governor in Council on October 9, 1951, and published in the Official Gazette on October 27, 1951, under s. 8 of the Town and Country Planning Ordinance, Cap. 181, classifies an area including the premises in question as a residential area and prohibits the carrying on in that area of an eating house or delicatessen business, and that the contract dated August 18, 1961, is an illegal contract. Section 29 of the Ordinance provides that every person who wilfully does any act which is a contravention of a provision contained in a scheme shall

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be guilty of an offence and shall be liable, on summary conviction thereof, to a penalty of \$250 and, in the case of a continuing offence, to a further penalty of \$25 for every day during which the offence continued.

Counsel for McPherson conceded that having regard to such cases as *Alexander v. Rayson* (1936), 52 T.L.R. 131, and *Archbolds (Freightage) Ltd. v. S. Spanglett Ltd., Randall (Third Party)*, [1961], 2 W.L.R. 170, McPherson is unable to claim a *locus poenitentiae* and could not succeed in recovering the sum (\$2,300) claimed by her, or any part of it, unless she could show that she was not *in pari delicto* with Persaud in relation to the illegal contract. The authorities show that for this purpose (a) the material time is when the contract was made, (b) the burden of proof is on the person seeking to recover (*Howarth v. Pioneer Life Assurance Co. Ltd.* (1912), 107 L.T. 155), and (c) ignorance of the law is no excuse.

The main argument advanced by counsel for McPherson to support his contention that the parties were not *in pari delicto* and that Persaud was the more blameworthy of the two was that Persaud had started a new business in a new building which had not previously been occupied. He maintained that it was Persaud's duty to find out whether she could properly start that new business there; she failed to do so and, after carrying on the business for some time, advertised it for sale; in such circumstances, he argued, any reasonable person seeing the advertisement would be entitled to assume that the business could lawfully be carried on in that locality. He contended that Persaud was responsible for McPherson being saddled with an illegal business but said he could not go to the extent of submitting that Persaud's conduct amounted to misrepresentation. Indeed, could he have done so, the claim would doubtless have been differently framed.

The case upon which counsel for McPherson relied almost entirely was *Kiriri Cotton Co., Ltd. v. Dewani*, [1960] 2 W.L.R. 127 (J.C.). It should therefore be carefully examined. The headnote to that case shows that the appellant company, in consideration of granting to the respondent a sublease of a flat in Kampala, Uganda, 'for residence only' for a term of seven years and one day, asked for and received from him a premium of 10,000/-, contrary to the provisions of s. 3 (2) of the Uganda Rent Restriction Ordinance, 1949. As in the instant case, neither party thought that they were doing anything illegal. The Ordinance made no provision for the recovery of illegal premiums, and the respondent, having gone into occupation of the flat under the sublease, thereafter claimed the return of the 10,000/- as money received by the appellant company for the use of the respondent. The Judicial Committee of the Privy Council held that the duty of observing the law was firmly placed by the Ordinance on the shoulders of the landlord for the protection of the tenant, and that the appellant company and the respondent were not therefore *in pari delicto* in receiving and paying respectively the illegal premium which, therefore, in accordance with established common law principles, the respondent was entitled to recover from the landlord. In the course of the judgment of the Judicial Committee, which was delivered by

Lord DENNING, he pointed out that neither party thought they were doing anything illegal and that the mistake as to the law was made because of their lawyers' failure to refer to certain definitions in the Ordinance. After alluding to the principles stated by Lord ELLENBOROUGH in *Langton v. Hughes* (1813), 1 M. & S. 593, at p. 596, by LITTLEDALE, J., in *Hastelow v. Jackson* (1828), 8 B. & C. 221, at p. 226, and by Lord MANSFIELD in *Lowry v. Bourdieu* (1780), 2 Doug. K.B. 468, at p. 472, Lord DENNING said ([1960] 2 W.L.R. 132. 133. 134):

“It is clear that in the present case the illegal transaction was fully executed and carried out. The money was paid. The lease was granted. It was and still is vested in the plaintiff. In order to recover the premium, therefore, the plaintiff must show that he was not *in pari delicto* with the defendant. That was, indeed, the way he put his claim in the pleadings..... Mr. Elwyn Jones, for the appellant, said they were both *in pari delicto*. The payment was, he said, made voluntarily, under no mistake of fact, and without any extortion, oppression or imposition, and could not be recovered back. True, it was paid under a mistake of law, but that was a mistake common to them both. They were both equally supposed to know the law. They both equally mistook it and were thus *in pari delicto*. In support of this argument the appellant referred to such well-known cases as *Harse v. Pearl Life Assurance Co.*; *William Whiteley Ltd. v. The King*; *Evanson v. Crooks*; and particularly to *Sharp Brothers & Knight v. Chant*.

Their Lordships cannot accept this argument. It is not correct to say that everyone is presumed to know the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law on the matter. *Ignorantia juris neminem excusat*. Nor is it correct to say that money paid under a mistake of law can never be recovered back. The true proposition is that money paid under a mistake of law, by itself and without more, cannot be recovered back. JAMES, L. J., pointed that out in *Rogers v. Ingham*. If there is something more in addition to a mistake of law — if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake — then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other — it being imposed on him specially for the protection of the other — then they are not *in pari delicto* and the money can be recovered back; see *Browning v. Morris*, by Lord MANSFIELD. Likewise, if the responsibility for the mistake lies more on the one than the other — because he has misled the other when he ought to know better — then again they are not *in pari delicto* and the money can be recovered back; see *Harse v. Pearl Life Assurance Co.*, by ROMER, L. J. These propositions

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are in full accord with the principles laid down by Lord MANSFIELD relating to the action for money had and received

In applying these principles to the present case, the most important thing to observe is that the Rent Restriction Ordinance was intended to protect tenants from being exploited by landlords in days of housing shortage. One of the obvious ways in which a landlord can exploit the housing shortage is by demanding from the tenant 'key-money.' Section 3 (2) of the Rent Restriction Ordinance was enacted so as to protect tenants from exploitation of that kind. This is apparent from the fact that the penalty is imposed only on the landlord or his agent and not upon the tenant. It is imposed on the person who 'asks for, solicits or receives any sum of money,' but not on the person who submits to the demand and pays the money. It may be that the tenant who pays the money is an accomplice or an aider and abetter (see *Johnson v. Youden* and section 3 of the Rent Restriction (Amendment) Ordinance, 1954), but he can hardly be said to be *in pari delicto* with the landlord. The duty of observing the law is firmly placed by the Ordinance on the shoulders of the landlord for the protection of the tenant: and if the law is broken, the landlord must take the primary responsibility. Whether it be a rich tenant who pays a premium as a bribe in order to 'jump the queue,' or a poor tenant who is at his wit's end to find accommodation, neither is so much to blame as the landlord who is using his property rights so as to exploit those in need of a roof over their heads.

Seeing then that the parties are not *in pari delicto*, the tenant is entitled to recover the premium by the common law."

The *ratio decidendi* in *Kiriri's* case is, I think to be found in the penultimate paragraph quoted from the judgment:

"In applying these principles to the present case, the *most important* thing to observe is that the Rent Restriction Ordinance was intended to protect tenants from being exploited by landlords in days of housing shortage.....*The duty of observing the law is firmly placed on the shoulders of the landlord for the protection of the tenant.*"

Harse's case, to which Lord DENNING referred in *Kiriri's* case, is typical of the majority of cases in which persons have been held not to be *in pari delicto*. In that case the agent of the defendants, an insurance company, believing his statement to be true, represented to the plaintiff that an insurance effected by the plaintiff upon the life of his mother would be a good and valid insurance, and the plaintiff, relying upon that representation, effected an insurance with the defendant on his mother's life, and paid the premiums thereunder. It was held that as the plaintiff was entitled to assume that the defendants' agent would have a knowledge of insurance law, the parties were not *in pari delicto*, and the premiums could consequently be

recovered back. In the course of his judgment Lord ALVERSTONE. C. J. said ([1903] 2 K.B. 97, 98):

“It seems to me that the parties in the present case were not *in pari delicto*. The defendants’ agent is a person who ought to be presumed to have a peculiar knowledge of the particular branch of law relating to insurance; he pressed the plaintiff to insure the life of his relative, and represented to him that such an insurance could be legally effected. Under the circumstances it was reasonable that the plaintiff should rely upon that representation.”

CHANNELL, J., stated the position in this way ([1903] 2 K.B. 98, 99):

“The question whether under the circumstances of this case the premiums can be recovered back is an important and difficult one. If these contracts of insurance were merely void, there would be no difficulty whatever: the premiums, being paid without consideration, could clearly be recovered back. But the contracts, being contrary to the statute, are not merely void, but illegal. Then does that fact that they are illegal as well as void prevent the premiums from being recovered? That depends upon the applicability of the maxim, ‘*In pari delicto potior est conditio defendentis.*’ Can a man who has entered into a contract which is illegal excuse himself within the meaning of that maxim by saying that he did not know it was illegal? No doubt it is commonly said that every man is presumed to know the law. But there is ample authority for saying that that proposition is by no means universally true. It seems to me that in the case before the Court the plaintiff is entitled to plead his ignorance of the law. If a man who has no knowledge of insurance law is asked by an agent of the insurance company, who probably does know and certainly ought to know the general principles of the law relating to his business, to insure the life of another person, and in answer to an inquiry as to whether the insurance will be legal and valid is told by the agent that it will, then if he is fraudulently told so, and if the agent knows that the insurance will not be legal, it is quite clear that the premiums can be recovered back. The decision of the Court of Appeal in *British Workman’s and General Assurance Co., v. Cunliffe* is a direct authority for that. And in the Court below we held, and I am prepared to hold now, that fraud is not essential, and that, as between parties situated as are the parties before the Court, where the contract has been procured by a statement which though innocent is not true, the money can equally be recovered back, unless there was some conduct on the part of the plaintiff so wrong that he cannot be heard to set up the illegality of his contract. I can see nothing that has happened in the present case to disentitle the plaintiff from recovering.”

In the instant case no statutory duty is cast upon Persaud, as in *Kiriri’s* case, nor can she be presumed to have been possessed of special skill or knowledge as in *Harse v. Pearl Life Assurance Co.* In my opinion the present case is clearly distinguishable from all the

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cited cases in which the plaintiff was allowed to recover money paid. I am not persuaded that McPherson has discharged the burden which rests upon her of proving that the parties were not *in pari delicto*. They both knew the locality. They both acted innocently. Neither can rely on ignorance of the law. In my opinion they are *in pari delicto* and McPherson cannot recover the sum paid by her under the illegal contract.

As regards Persaud's claim for rent, it seems clear that the contract of tenancy contained in the written agreement dated August 18, 1961, was itself tainted with illegality and is therefore unenforceable: *Gas Light Co., v. Turner*, (1840) C.P. Exch. 609. Persaud was selling the business carried on at the premises in question as a going concern. The intention of the parties was that the business would be carried on in those premises, and the tenancy was to enable it to be so carried on. In my view the whole contract is unenforceable.

Persaud's alternative claim for use and occupation must, in my opinion, also be disallowed. Outside of the terms of the written agreement of tenancy, which has been held to be tainted with illegality, there is no evidence whatever as to the value of the premises. Assuming that the court could look at the terms of the illegal contract, surely any claim for use and occupation would have to be based on the value of the premises for use for lawful purposes—which may be very different indeed from their value for use as business premises.

Counsel for McPherson contended that the contract was one and indivisible and that the court could not make any award for use and occupation even in respect of the upper portion of the premises which was not intended to be used for business purposes. On this point it is unnecessary for me to express any concluded opinion. It is sufficient to say that there is no evidence before the court on which it could make such an award. Even if the court could for this purpose have regard to the rental fixed in the written agreement for the entire premises, there is nothing to indicate to the court what portion of that rent would be reasonable for the user of the upper part of the building.

For the reasons given, action No. 894 of 1962 by Persaud against McPherson is dismissed.

In action No. 472 of 1962 by McPherson against Persaud there will be a declaration that the written agreement dated August 18, 1961, purporting to be an agreement of sale by Persaud to McPherson of the business at lot 112, New Market Street, as a going concern, with the fixtures, fittings and utensils pertaining thereto, was and is illegal as being in breach of the provisions of the Town and Country Planning Ordinance, Cap. 181, and subordinate provisions passed thereunder, and that McPherson is not bound in law to honour the terms of that agreement. There will also be an order for the cancellation of that agreement. But no order will be made for the return to McPherson of the \$2,300 (or any portion thereof) paid by her under the agreement; nor does the court see any necessity for grant-

ing an injunction restraining Persaud from putting up for sale by auction any of the chattels specified in the bill of sale; there is no threat by her to do so, and it is accepted that the registration of the bill of sale not having been renewed that document is unenforceable.

As regards costs, the court considers that justice would be met by ordering in both actions that each party should bear her own costs, and orders accordingly.

McPherson's claim allowed in part.

Persaud's claim dismissed.

Solicitors: Sase *Narain* (for McPherson); *H. B. Fraser* (for Persaud).

ENMORE ESTATES LTD. v. SIRINARINE

[In the Full Court, on appeal from the magistrate's court for the Georgetown Judicial District (Luckhoo, C.J., and Khan, J.) May 11, 25, 1963]

Workmen's compensation—Capacity of injured workman for resumption of work—Disagreement between medical advisers of workman and employer—Reference to medical referee—Referee decides in favour of employer—Whether payment should cease on date of reference to referee or on date of his report—Workmen's Compensation Ordinance, Cap. 111, s. 12 (13) proviso (ii), and s. 43 (3).

The appellant employers made half-monthly payments to the respondent, an injured workman, from the date of the injury until 28th November, 1961, when the respondent was certified fit for work by the appellants' doctor. On 1st December, 1961, the workman's doctor recommended him for two weeks' leave. On the application of the appellants, made under s. 43 (1) of the Workmen's Compensation Ordinance, Cap. 111, the Commissioner of Labour referred the matter on the 12th December, 1961, to a medical referee. The respondent was examined by the referee on the 13th December, 1961, who on that date reported him fit to resume work at once but made no pronouncement as to his incapacity in the interval since he had been examined by the employers' doctor. The magistrate held that the respondent was entitled to periodic payments until the 13th December. On appeal it was argued for the employers that the workman was entitled to payment at most until the 12th December when the matter was referred to the referee.

Section 43 (3) of the Ordinance provides that a medical referee shall "give a certificate as to the condition of the workman and his fitness for employment.....and that certificate shall be conclusive evidence as to the matters so certified". Proviso (ii) to s. 12 (3) provides that "where an application has been made in pursuance of.....s. 43 to refer the dispute to a medical referee, it shall be lawful for the employer, pending the settlement of the dispute, to pay into court.....(a).....the whole of each periodic payment becoming payable in the meantime; and the sum so paid into court shall, on the settlement of the dispute, be paid to the employer or to the workman, according to the effect of the certificate of the medical referee....."

Held: (i) the referee should have included in his certificate a pronouncement as to the incapacity of the workman between the date of the certificate issued by the employers' doctor and the date of the referee's own certificate;

(ii) the magistrate was in error in holding that the referee's certificate was effective from the date on which it was issued.

Appeal allowed.

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

D. C. Jagan for the respondent.

Reasons for Decision: The sole point for determination in this appeal is what is the effective date of the operation of a medical referee's certificate issued under the provisions of s. 43 (3) of the Workmen's Compensation Ordinance, Cap. 111.

The appellants admit that the respondent Sirinarine is a workman within the contemplation of the Workmen's Compensation Ordinance, Cap. 111. The respondent sustained personal injury by accident which occurred on the 28th August, 1961, and which arose out of and in the course of his, employment by the appellants as a cane-cutter. The appellants made half-monthly payments to the respondent from the date of the accident until the 28th November, 1961. On that day the respondent was certified fit for work by Dr. Beadnell. On the 1st December, 1961, the respondent was examined by Dr. Prasad who recommended that he be given two weeks' leave. Application was thereafter made on the 5th December, 1961, by the appellants to the Commissioner of Labour under the provisions of s. 43 (1) of the Workmen's Compensation Ordinance, Cap. 111, for the reference of the matter to a medical referee. The matter was referred by the Commissioner of Labour to the medical referee on the 12th December, 1961. The respondent was examined by the medical referee on the 13th December, 1961, who found that the respondent was fit to resume work at once and issued a certificate to that effect on that date.

For the appellants it was contended before the magistrate that the effective date of the operation of the medical referee's certificate is the date of the report of Dr. Beadnell, while for respondent it was contended that the effective date is the date of the examination of the workman by the medical referee.

The magistrate's findings are as follows:

"The whole case hinges on the interpretation of s. 12 of Cap. 111, which sets out the conditions under which an employer can determine periodic payments. Section 12, sub-s. 3 (i) (ii), states that where the workman is certified fit for work he can within ten days submit to his employer a counter certificate signed by a duly qualified practitioner disagreeing with the findings of the employer's doctor. If that is done the matter must be referred to a medical referee. While awaiting the report from the medical referee periodic payments must continue, with this exception, that instead of paying it to the workman it is paid into court.

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Upon receipt of the medical referee's report, the necessary adjustments are made of the money paid into court to the workman and employees.

In this case therefore the amount should have been paid into court. Periodic payment will only cease on the report of the referee, not on the report of the estate's medical practitioner. The referee certified the applicant fit for work on the 13th December, 1961.

The applicant is therefore entitled to periodic payment until that date."

At the hearing of this appeal counsel for the appellants stated that while it might well be contended that the effective date of the operation of the medical referee's certificate is the date of Dr. Beadnell's report, he was content to submit that the appellants are not liable to make periodic payments beyond the date of the reference to the medical referee, that is to say, the effective date of the medical referee's certificate is the date of such reference.

Section 12 of the Ordinance which is in terms identical with s. 12 of the Workmen's Compensation Act, 1925 (U.K.), sets out the conditions under which an employer may end the periodic payments of compensation. We appreciate that there is no liability on the employer *in any circumstances* to continue the payment of compensation after a cessation of incapacity (*Ocean Coal Co. v. Davies*, [1927] A.C. 271; 19 B.W.C.C. 429). However, under proviso (ii) to s. 12 (3) of the Ordinance where an application has been made in pursuance of s. 43 of the Ordinance to refer the dispute to a medical referee it shall be lawful for the employer pending the settlement of the dispute to pay into court:—

"(a) where the notice was a notice to end the periodic payment, the whole of each periodic payment becoming payable in the meantime;

(b) where the notice was a notice to diminish the periodic payment, so much of each periodic payment so payable as is in dispute; and the sum so paid into court shall, on the settlement of the dispute, be paid to the employer or to the workman, according to the effect of the certificate of the medical referee, or, if the effect of that certificate is disputed as in default of agreement, may be determined by the court or, on appeal, by the Full Court of Appeal";

Counsel for the appellants relies upon a passage in the judgment of SCOTT, L.J., (with whose judgment MACKINNON and FINLAY, L.J.J., concurred) in *Burrows v. Evans & Co. Ltd.* (1939), 32 B.W.C.C. 168, at p. 172, in support of his contention that the effective date of the operation of the medical referee's certificate is retrospective to the date when the reference was asked for. In that case *Burrows*, a coalcutter, fell and strained his back in October, 1935. Liability for the accident having been admitted by his employers, he was paid compensation until he resumed work in January 4, 1936. On October 9, 1936, he twisted his back while handling a tub and was totally incapaci-

tated. His employers paid him compensation until his return to work on January 2, 1937. He worked until July 4, 1938, being off work on nine occasions during that period. He ceased work on July 4, 1938, alleging that he was incapacitated by the condition of his back. Payment of compensation was resumed on that date but was ended on July 19, 1938, after notice had been served on him in accordance with s. 12 (3) of the Workmen's Compensation Act, 1925. The matter was referred by consent to a medical referee. On August 2, 1938, the medical referee certified that the workman had wholly recovered from the injury by accident sustained in October 9, 1936, that his incapacities had ceased and that he was fit for his ordinary work. Upon his employers' refusal to pay further compensation the workman filed an application for arbitration in respect of the earlier accident of October 10, 1935, claiming compensation for total incapacity from July 19, 1938. At the arbitration, the county court judge refused to treat the medical referee's certificate as conclusive in respect of the accident of October 10, 1935, and after hearing evidence, including that of the medical referee, made an award of compensation for total incapacity as from July, 1938. On appeal to the Court of Appeal it was held that the county court judge erred in failing to treat the medical referee's certificate as *prima facie* referable to both accidents and therefore as conclusive evidence that the workman had recovered from the effects of both accidents.

The Court of Appeal also held that the effect of the certificate was retrospective to the date on which the reference was requested and brought to an end the workman's right to compensation under the Act. In the course of his judgment SCOTT, L.J., (at p. 171) said:—

“In my view, that decision of the learned judge was not open to him, in the light of the certificate of August 2, 1938 (that the workman had wholly recovered from the effects of the accident in 1936) for this reason, that that accident was an accident which was said to have affected the workman's back in the same sort of way, generally, as the accident of 1935 had, and if he had recovered in 1938 wholly, so far as his back was concerned, and was fit to do his ordinary work, then *prima facie* that recovery must cover and include the effects from the earlier accident. If that be so, the certificate was binding on the learned judge.”

If we may say so with respect, the reasoning of SCOTT, L.J., is entirely logical and correct. The learned Lord Justice (at p. 172) said:—

“It was submitted to us on behalf of the employers that the proceedings for a medical certificate must be treated as having the same effect as an application for review, and that the operation of the certificate, therefore, must be retrospective to the date when the reference is asked for. I think the submission is right, and therefore, in my view the appeal must be allowed and judgment entered for the employers.”

It is this latter passage, upon which counsel for the appellants has founded his argument. However, the passage must be read in the

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light of the facts of the case in the judgment of SCOTT, L.J., set out above.

On the facts of the *Burrows'* case and the finding that the medical referee's certificate was *prima facie* referable to both accidents and therefore conclusive evidence that the workman had recovered from both accidents, it was not possible to reach any other conclusion but that the effect of operation of the certificate must be retrospective to the date of the reference to the medical referee.

Counsel for the respondent cited to us the case of *Read v. Anchor-Donaldson, Ltd.* (1925), 19 B.W.C.C. 502, on appeal to the Court of Session (Scotland) before the Lord Justice Clerk (Alness), Lords ORMIDALE, HUNTER and ANDERSON. In that case as is stated in the headnote to the report:

“The workman had been injured by accident arising out of and in the course of his employment, and had been in receipt of compensation. The employers alleged that the workman had completely recovered on March 8, 1925, and applied for a reference to the medical referee. The order for a reference was made on May 18, 1925, and the medical referee gave his report on June 2, 1925, in which he stated that the workman was fit for his ordinary work. The workman applied for the matter to be referred again to the medical referee as he had made no pronouncement on the question of incapacity during the period March 8, 1925, to June 2, 1925. The application was refused by the arbitrator on the ground that there was no jurisdiction to order a second reference.”

It was held by the Court of Sessions that the further reference was merely ancillary to the reference already ordered, and the arbitrator had power to make the order.

In that matter it was submitted on behalf of the employers that a re-remit though competent where the report of a medical referee is ambiguous, was not competent in the particular case and that the medical referee was disentitled in the remit made to him from dealing with the past condition of the workman, and that he was bound to deal only with his present condition. The Lord Justice Clerk in the course of his judgment said (at p. 507):—

“I find what I conceive to be a complete answer to it in s. 14 (2) which has been repeatedly referred to in argument. That section, as Mr. Carmont put it, would appear to provide a complete code for the settlement of the matter, and, in particular for the settlement of the question who is to be entitled, employer or employee, to the money which had meantime been consigned in the court to await the result of the medical referee's report. I regard that provision as, in effect, setting up a statutory multiple pouding, in which the rights of parties are determined, and in which the claimant is eventually ranked and preferred in accordance with the decision of the medical referee on the mat-

ter submitted to him. The section, to my mind, postulates that that report must deal with the destination of the consigned money. The argument of the respondent appears to me to deny all effect to that provision. If the report of the medical referee is silent with regard to the past condition of the workman, then the provision which I have referred to is entirely nugatory, for the argument postulates that, in any event, the respondent must receive the consigned money and the employer shall not. The argument is in the teeth of the statutory provision and cannot receive effect.”

Lord ANDERSON (at p. 511) in the course of his judgment said:—

“In this case the respondent advanced two contentions, as I understand his argument, with neither of which I have been able to agree. The first was that the duty of the medical referee is to decide nothing more than the condition of the workman and his fitness for his employment as at the date of the reference examination. I am unable to assent to that contention. Because it seems to me that it ignores entirely the provisions of s. 14 of the Workmen’s Compensation Act, 1923, proviso (ii) [s. 19 of the 1925 Act], which refer to a dispute that the medical referee is called upon to settle. That dispute, seems to me, is just the dispute which exists between two medical practitioners taking different views as to an employee’s condition as at a special date and as over a special period of time. The solution of that dispute determines the ownership of the consigned fund, and the person whose duty it is primarily to decide that dispute is, according to the section, the medical referee.”

The proviso (ii) to s. 14 of the 1923 Act (s. 12 of the 1925 Act) is in terms identical with proviso (ii) to s. 12 of the Workmen’s Compensation Ordinance, Cap. 111.

The Lord Justice Clerk (at pp. 507 and 508) stated that in the remit the medical referee should have been asked to state, if he could, when the workman in his opinion became fit for work and Lord ANDERSON stated his conclusions as follows (p. 512):—

“The conclusions I have reached are these: (1) that it is competent for this medical referee to decide the dispute as to the workman’s condition as at and subsequently to March 8; (2) that he was asked to do so; (3) that he has not done so; and (4) that the arbitrator has power to remit to him to get this dispute determined.”

That in the instant case the employers did not in fact pay any fund under s. 12 of the Ordinance into court (they were not bound to do so; see *Ocean Coal Co. v. Davies*, [1927] A.C. 291) cannot have the effect of making their position any different than it would have been had they done so. The case of *Read v. Anchor-Donaldson* is indistinguishable from the instant case and not in conflict with the conclusion of SCOTT, L.J., in *Burrows v. Evans & Co. Ltd.* (1939), 32 B.W.C.C. 168, at p. 172, which has its basis in the particular cir-

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cumstances of that case. The provisions of s. 43 (3) of the Ordinance (which relates to the contents of certificates of medical referees) are in terms of those contained in s. 19 (3) of the 1925 Act. The medical referee in each case is required to give a certificate as to the condition of the workman and his fitness for employment and it is provided by the sub-section that his certificate is conclusive as to the matters stated therein.

In the instant case the medical referee made no pronouncement, as he should have done in his certificate as to the incapacity of the workman between 28th November, 1961 (the date of Dr. Beadnell's certificate) and 13th December, 1961 (the date of the certificate of the medical referee). The learned magistrate was in error in coming to the conclusion that the certificate of the medical referee was effective from 13th December, 1961.

However, as this has been stated to be a test case for the purpose of obtaining a decision on the point raised, we will simply allow the appeal without making any further order.

Leave to appeal granted to the respondent.

Appeal allowed.

Solicitor: *F. I. Dias* (for the appellants).

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[Supreme Court (Date, J.) January 23, 24, 28, 29, 30, February 6, 7, 8, 9, 14, May 27, 1963]

Domestic tribunal—Police Force—Dismissal of sergeant on disciplinary charges—Inquiry into charges by police court of inquiry—Whether sergeant entitled to copy of report of court of inquiry—Rules of natural justice—Constitution of British Guiana, 1961, articles, 5, 103 and 115—Police Regulations, Cap. 77, regs. 50-57.

Police Force—Power of Commissioner to dismiss sergeant—Constitution of British Guiana, 1961, article 103 (2) and (5)—Police Regulations: Cap. 77, regs. 50-57.

Justices Protection—Dismissal of sergeant by Commissioner of Police—Action for declaration that dismissal invalid—Notice of intended action not served—Whether notice necessary—Justices Protection Ordinance, Cap. 18, ss, 8 and 14.

Arising from certain incidents which occurred on February 16, 1962, the plaintiff, a sergeant of police, was charged disciplinarily with three offences of disobedience and an offence of improper conduct, contrary to paras. 2 and 44 respectively of reg. 54 of the Police Regulations, Cap. 77. The charges were enquired into by a court of inquiry appointed under reg. 51 by the defendant, the Commissioner of Police. At the commencement of the proceedings the plaintiff was told by the court of inquiry that he was liable to dismissal if he was found guilty on any of the charges. He was allowed to cross-examine witnesses and to call evidence of his own. The court of inquiry forwarded its notes of evidence and its considered opinion to the defendant. The plaintiff was supplied with a copy of the notes of evidence but not of the opinion. After considering the notes of evidence and the opinion the defendant found the plaintiff guilty on all the charges and ordered his dismissal.

In notifying the plaintiff of the dismissal the defendant stated that he had acted under article 103 (2) of the Constitution of British Guiana, 1961, which provides that “power to dismiss.....persons holding.....offices in the Police Force of or below the rank of chief inspector shall vest in the Commissioner of Police”. Para. 5 of that article provides that the Commissioner’s disciplinary powers “shall be exercised in accordance with such provisions as may.....be made in that behalf by any law of the Legislature and, in particular offences against Police Force discipline, and the punishment that may be imposed for any such offence, shall be such as may be prescribed by or under any such law”.

Regulation 51 of the Police Regulations, Cap. 77, empowers the Commissioner to appoint a court of inquiry “to inquire into any charge or complaint or any breach of regulations or any other matter appertaining to the Force”. Regulation 53 deals with the procedure to be observed by a court of inquiry in inquiring into any charges. Regulation 54 prescribes a number of disciplinary offences, including the offences for which the plaintiff was charged. Regulation 55 provided that “for each and every breach of the regulations as above the Commissioner may.....(2) in the case of a non-commissioned officer”, impose certain punishments short of dismissal. Reg. 56 empowered the Commissioner to delegate certain of his disciplinary powers, and reg. 57 conferred a limited power of punishment on certain police officers.

By s. 87 (5) (a) of the British Guiana (Constitution) Order in Council, 1953, as amended in 1956, the disciplinary powers of the Commissioner and other police officers under regs. 55-57 were “deemed to have been delegated.....by the Governor.....until.....revoked by the Governor”. By sub-s. 3 (a) the Governor was empowered to delegate some of his disciplinary powers. In the exercise of this authority the Governor made the Delegation of Powers (Police Officers) Regulations, 1960, which dealt with the same area of legislation covered by regs. 55-57 of the Police Regulations but conferred on the Commissioner and on certain other police officers disciplinary

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powers which were obviously inconsistent with the provisions of reg. 55-57. The 1360 Regulations were repealed by the 1981 Constitution.

The plaintiff sued for a declaration that the defendant's decision dismissing him was invalid and for an injunction restraining the defendant from enforcing the decision. In support of the claim it was argued that the defendant's constitutional power of dismissal could not be exercised until a law of the Legislature was enacted prescribing the offences in respect of which the defendant could dismiss; alternatively, that the defendant's disciplinary powers in respect of the offences charged were limited to the punishments laid down in reg. 55; and, further, that even if the defendant had jurisdiction to dismiss the plaintiff the failure to supply the plaintiff with a copy of the report was a breach of the rules of natural justice and a violation of the provisions of article 5 (1) of the 1961 Constitution, which provides that "in the determination of his civil rights and obligations a person shall be entitled to a fair hearing". No notice of intended action had however been served, and in defence it was argued *inter alia* that the action was in consequence barred by virtue of ss. 8 and 14 of the Justices Protection Ordinance, Cap. 18.

Held: (i) article 5 of the 1961 Constitution has no application to disciplinary proceedings against public officers;

(ii) disciplinary proceedings against public officers do not attract the same strict rules that obtain in a court of law and technicalities should not be lionised. What is essential in this regard is that the officer should know what acts are alleged against him and what are the possible consequences of his being found guilty. This information was in this case adequately conveyed to the plaintiff;

(iii) regs. 50, 51 and 54 of the Police Regulations, Cap. 77, were never revoked. They were still in force by virtue of s. 20 (1) of the British Guiana (Constitution) Order in Council 1961 (relating to the continuation of existing laws) and were a "law of the Legislature" within the meaning of article 103 (5) of the 1961 Constitution;

(iv) by necessary implication regs. 55-57 of the Police Regulations, Cap. 77, must be deemed to have been revoked by the Delegation of Powers (Police Officers) Regulations, 1960, and were no longer in force;

(v) the defendant had jurisdiction to dismiss the plaintiff;

(vi) it is only if the real object of the section is to restrain a serious or irreparable injury requiring the intervention of the court, *e.g.*, where a local authority is improperly pulling down a house or stopping up a sewer, that it is not necessary to give notice of action. This was not such a case and notice was necessary.

Judgment for the defendant.

[Editorial Note: An appeal to the British Caribbean Court of Appeal was dismissed. See (1965), 9 W.I.R. 143, B.C.C.A.]

J. O. F. Haynes, Q.C., and *C. A. F. Hughes* for the plaintiff.

M. Shahabuddeen, Solicitor General, and *D. A. Singh*, Senior Legal Adviser (ag.), for the defendant.

DATE, J.: At all times material to this case the defendant was the Commissioner, and the plaintiff a sergeant, of the Police Force of British Guiana.

On February 16, 1962, the plaintiff was stationed at the Finance Office, Police Headquarters, Eve Leary. During the course of that day certain incidents occurred at Police Headquarters as a result of which the plaintiff was charged with the following offences: (a) disobeying a lawful order given to him by Inspector Bryan at the Finance Office at about 3.45 p.m. to go to the armoury to draw arms; (b) disobeying a lawful order given to him by Superintendent J.

Greathead at the Finance Office at about 4 p.m. to go to the armoury to draw arms; (c) improper conduct at about 4 p.m. by sitting down in the Finance Office and saying that he did not care if he was dismissed or put in gaol; (d) disobeying a lawful order given to him at the Finance Office by Inspector Bryan between 3.30 p.m. and 4.30 p.m. to fall in outside the Finance Office under arms.

The first, second and fourth-mentioned offences were charged as being contrary to reg. 54 (2) of the Police Regulations, Cap. 77 (Subsidiary Legislation, British Guiana), while the third was charged as being contrary to reg. 54 (44) of the said Regulations. These Regulations, it should be observed, were originally made under the Police Ordinance, Cap. 77, which was repealed by the Police Ordinance, 1957. Sub-section (2) of s. 107 of the 1957 Ordinance provides that all regulations made under the Police Ordinance, Cap. 77, and in force at the time of the commencement of the 1957 Ordinance shall, in so far as they are not in conflict with the provisions of the 1957 Ordinance, continue in force until revoked by regulations made under the 1957 Ordinance.

Arthur H. Jenkins, then Deputy Commissioner of Police (Acting), was constituted a court of inquiry which inquired into the charges on April 17 and 19, 1962. The plaintiff appeared at the inquiry and was represented by his friend. At the commencement of the proceedings he was told by the court of inquiry that he was liable to dismissal from the Police Force if he was found guilty on any of the charges. He was allowed to cross-examine witnesses and to give evidence and also to call witnesses on his own behalf. The court of inquiry forwarded its notes of evidence and considered opinion to the defendant. The plaintiff was supplied with a copy of the notes of evidence but not of the considered opinion of the court. He was never told that he could forward any views or points to the defendant after the sittings of the court of inquiry.

As a result of the consideration by the defendant of the notes of evidence and the considered opinion of the court of inquiry the defendant found the plaintiff guilty on all the charges and ordered his dismissal.

On May 9, 1962, the plaintiff received the following letter from the defendant:

“Office of the Commissioner,
Police Headquarters,
Georgetown,
British Guiana.
9th May, 1962.

No. 5796 Sergeant Cumberbatch,

You have been found guilty of the following disciplinary offences committed on the 16th of February, 1962, during the period of rioting and disturbances which occurred in Georgetown—

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- (1) Disobeys a lawful order
- (2) Improper conduct

and I hereby order your dismissal from the Police Force in accordance with the powers vested in me under the provisions of article 103 (2) of the Constitution of British Guiana with effect from the 9th of May, 1962.

2. You have the right to institute an appeal against my decision to the Governor and your attention is drawn to the Police Regulation 59, and paragraph 32 of Force Order No. 12/1957 on the subject of disciplinary procedure a copy of which is attached.

W. R. Weber,
Commissioner.”

Article 103 (2) of the Constitution of British Guiana provides that power to dismiss and to exercise disciplinary control over persons holding offices in the Police Force of or below the rank of chief inspector shall vest in the Commissioner of Police.

Regulation 59 and para. 32 of Force Order No. 12/1957, to which reference is also made in the defendant's letter of 9th May, 1962, lay down the procedure to be followed by any member of the Force who thinks himself wronged by the Commissioner and desires to appeal to the Governor.

The plaintiff has since the decision of the defendant appealed to the Governor who has upheld the defendant's decision except that he allowed the appeal in relation to the fourth charge.

So far as the parties are aware, it has always been the practice not to disclose the report of a police disciplinary inquiry submitted to the Commissioner of Police or the Governor for consideration. The Commissioner never considers himself bound by the opinion of a court of inquiry.

The plaintiff's statement of claim, as amended, claims (a) a declaration that the decision of the defendant dismissing him was and is invalid and a nullity in law; alternatively, an order of this court setting aside the said decision as voidable; (b) a declaration that the order of the defendant ordering the dismissal of the plaintiff with effect from May 9, 1962, was and is invalid and a nullity in law; alternatively, an order of this court setting aside the said order as voidable; (c) a declaration that the plaintiff was at all material times and still is a member of and a sergeant in the British Guiana Police Force and as such is entitled to receive the proper salary of such rank from May 9, 1962, until he duly ceases to be a member of the said Force; (d) an injunction restraining the defendant from acting upon or enforcing the aforesaid purported order of dismissal; (e) payment to the plaintiff of whatever sum shall be due and payable as salary from and since the month of May 1962.

During the course of the trial the plaintiff's counsel said he had to concede that an order for the payment of salary could not be made by this court.

The main argument advanced on behalf of the plaintiff was that the failure to supply the plaintiff with a copy of the considered opinion of the court of inquiry and to give him an opportunity to be heard thereon either orally or in writing, was a breach of two of the rules of natural justice; (i) *audi alteram partem*; (ii) justice must not only be done, but must manifestly be seen to be done. Counsel maintained that the defendant was the adjudicating officer in this matter and that it was vital that the plaintiff should know what case was presented to the defendant against him and be given a chance to make representations in respect thereto, particularly as the court of inquiry was entitled to express opinions as to the credibility of the witnesses who gave evidence before the court. Counsel urged that the hearing before the court of inquiry was merely a step in the procedure to a determination of guilt by the adjudicating officer, the defendant; that these breaches of the rules of natural justice rendered the decision of the defendant voidable, and that the plaintiff should be granted an order setting aside the decision. At a later stage I shall have to deal with the special defence of the Justices Protection Ordinance which has been pleaded. At this stage I merely wish to state that if, as submitted by counsel on both sides (and accepted by me), the alleged breaches of the rules of natural justice, would not render the decision of the defendant void but only voidable, then the defence under the Justices Protection Ordinance, if held to be applicable to an action for declarations and an injunction, would be a bar to this action in so far as it is based on breaches of the rules of natural justice.

Counsel for the plaintiff also contended that the defendant had no jurisdiction to dismiss the plaintiff; alternatively, that he had no jurisdiction to dismiss the plaintiff in the manner in which he did because, said counsel, article 103 (2) of the Constitution of British Guiana under which the defendant purported to dismiss the plaintiff, when taken in conjunction with articles 103 (5) and 115 (2) (b) do not give the Commissioner of Police jurisdiction to dismiss for a breach of reg. 54 of the regulations made under Cap. 77 (hereinafter referred to as the Police Regulations); further, even if it does give such jurisdiction, this is subject to the dismissal not violating the provisions of article 5 (1) and (3) of the Constitution which relate to fundamental rights. The special defence raised under the Justices Protection Ordinance would appear to be inapplicable to this part of the plaintiff's case: *Richards v. Murphy* (1960), 2 W.I.R. 143.

Paragraph (5) of article 103 of the Constitution provides that any power to dismiss or to exercise disciplinary control that is vested in any person by para. (2) of the article (the substance of which has already been stated) "shall be exercised in accordance with such provisions as may.....be made in that behalf by any law of the Legislature and, in particular offences against Police Force

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discipline, and the punishment that may be imposed for any such offence, shall be such as may be prescribed by or under any such law.”

Paragraph (2) of article 115 of the Constitution enacts that in the Constitution unless it is otherwise provided or required by the context “any reference to a law of the Legislature shall be construed as including a reference to a law of any Legislature established for British Guiana at any time before the date when this Constitution comes into force and to any instrument having the force of law made in exercise of a power conferred by a law of the Legislature.”

Paragraph (1) of article 5 of the Constitution provides that in the determination of his civil rights and obligations a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality. Paragraph (3) of the same article goes on to say that all proceedings of every court and proceedings for the determination of a person’s civil rights or obligations before any other tribunal (including the announcement of the decision of the court or tribunal) shall be held in public.

Let me say at once that I am not persuaded that article 5 of the present Constitution has any application to disciplinary proceedings against public officers. Still less am I persuaded that the word “thereunder” in s. 106 of the Police Ordinance, 1957, has the effect of rendering the Police Regulations made under Cap. 77 inoperative. Section 106 enacts that “all members of the Force shall, in respect of any matter not provided for in this Ordinance or in any regulations made thereunder, be subject to the provisions of Colonial Regulations and General Orders as are from time to time in force.” Counsel for the plaintiff sought to argue that since the Police Regulations were not originally made under the 1957 Ordinance they were not saved by s. 107 (2) of the Ordinance and that, therefore, the procedure that should have been invoked in this case is the procedure laid down under General Order 80. I am clearly of the opinion that any provisions of the Police Regulations that were in force immediately before the 1957 Ordinance came into operation and were not in conflict with the provisions of the 1957 Ordinance were continued in force by virtue of s. 107 (2) of that Ordinance.

To my mind the real problem here—and a formidable one indeed — is to determine what effect the various constitutional instruments since 1953 and certain regulations made thereunder in 1960 have had on regs. 50, 51, 54, 55, 56 and 57 of the Police Regulations. The difficulty arises from failure to revise the Police Regulations to keep pace with the constitutional changes that have occurred since 1953.

Regulation 50 provides that all breaches of the regulations by sub-officers or constables shall be investigated by the Commissioner or by an officer or officers. The expression “sub-officer” is defined in the parent Ordinance as including an inspector and a non-commis-

sioned officer. Regulation 51 says that the Commissioner may order a court of inquiry, which shall consist of one or more officers appointed by him, to inquire into *any charge or complaint or any breach of regulations or any other matter appertaining to the Police Force*. It also provides that the president of the court shall take notes of the evidence given before the court and shall submit to the Commissioner such notes of evidence “together with the considered opinion of the court.” Regulation 54 provides that any sub-officer or constable “who does any of the following things shall be deemed to have committed a breach of regulations and be amenable to the punishment laid down for such breach”—then follows a list of 44 offences including:

“(2) disobeys any lawful order given him by his superior officer in rank, whether verbally or in writing, or by authorised signals on parade”, and

“(44) is guilty of any improper conduct.”

Regulations 55 to 57, on the other hand, empower certain named officers to impose certain named punishments within the framework of the parent Ordinance. Regulation 55 reads thus:

“55. For each and every breach of the regulations as above the Commissioner may—

- (1) in the case of an inspector, forward the evidence to the Governor for his disposal;
- (2) in the case of a non-commissioned officer—
 - (a) admonish, reprimand or severely reprimand him; or
 - (b) impose on him a fine not exceeding at any one time ten days’ pay; or
 - (c) suspend him from pay and duty for any period not exceeding twenty-eight days; or
 - (d) reduce him in rank; and
- (3) in the case of a constable—
 - (a) admonish, reprimand or severely reprimand him; or
 - (b) impose on him a fine not exceeding at any one time ten days’ pay; or
 - (c) suspend him from pay and duty for any period not exceeding twenty-eight days; or
 - (d) order his confinement to barracks or station for any period not exceeding twenty-eight days, with drill; or
 - (e) confine him to barrack cells for a period not exceeding seven days.”

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Section 87 (1) of the British Guiana (Constitution) Order in Council, 1953, which came into force on April 1, 1953, after the previous Constitution had been suspended, vested in the Governor “the power to appoint.....and to dismiss and to exercise other disciplinary control over.....public officers”, the term “public officers” being defined in s. 2 (1) as meaning the holder of any public office. Section 87 (1) provided that the powers so vested in the Governor “shall be exercised in accordance with the law from time to time in force in the Colony.”

There the matter remained until December 19, 1956, when the British Guiana (Constitution) (Temporary Provisions) (Amendment) Order in Council, 1956, added the following sub-sections to s. 87 of the 1953 Order in Council:

“(3) (a).....the Governor may delegate (in such manner and on such conditions as he may think fit) to any public officer any of the powers conferred upon him by sub-section (1) of this section.

* * * * *

(5) (a) If it is provided by or under any law enacted before the commencement of this Order that any public officer shall have power to exercise disciplinary control over other public officers, such power shall be deemed to have been delegated to that officer by the Governor in accordance with the provisions of sub-section (3) of this section and accordingly the power shall be exercisable by that officer.....unless and until it is revoked by the Governor.

(b) Any provision of any law enacted before the commencement of this Order and any instrument made under any such law shall, to the extent that it confers power upon any public officer to exercise disciplinary control over other public officers, cease to have effect, unless it shall have been sooner repealed or revoked, upon the revocation of the power by the Governor.”

The position in 1953 seems to have been that regulations 55 to 57 of the Police Regulations were repugnant to the provisions of s. 87 (1) of the 1953 Order in Council in that those regulations conferred power on persons other than the Governor to punish. For that reason regs. 55 to 57 ceased to have effect. By virtue of the 1956 amendment of the 1953 Order in Council, however, regs. 55 to 57 appear to have been resurrected and to have become effective once more. This state of affairs continued until 1960 when the Governor in the exercise of the powers conferred on him by the 1956 amendment of the Order in Council made regulations entitled the Delegation of Powers (Police Officers) Regulations, 1960. Regulation 3 thereof dealt with the same area of legislation covered by regs. 55 to 57 of the Police Regulations but conferred on the Commissioner and certain other Police Officers disciplinary powers which were obviously inconsistent with the provisions of regs. 55 to 57. By necessary implication, therefore, regs. 55 to 57, which had been resurrected in

1956, must be deemed to have been revoked by the Delegation of Powers (Police Officers) Regulations, 1960, made by the Governor.

It is common ground that the 1961 Constitution impliedly repealed the Delegation of Powers (Police Officers) Regulations, 1960. This Constitution brought to an end all the delegated powers and conferred on the Commissioner in his own right power to dismiss and exercise disciplinary control over persons holding offices in the Police Force of or below the rank of chief inspector. There can be no question of regs. 55 to 57 of the Police Regulations being in force at the present time.

But what effect, if any, have the statutory instruments made since 1953 had on regs. 50, 51 and 54 of the Police Regulations?

The first thing to be observed is that the scope of inquiry of the court to be appointed by the Commissioner under reg. 51 is not restricted to breaches of regulations: it embraces "any charge or complaint or any breach of regulations or any other matter appertaining to the Force." Further, it is clear that before reg. 55 was by implication revoked, the procedure of reg. 51 was used even where a charge was brought against an inspector and the question of punishment rested with the Governor.

Upon a careful consideration of the regulations as a whole, together with the general scheme of the Ordinance under which they were made, it seems to me that regs. 50 and 51 deal purely with procedural matters and that reg. 54 merely defines certain breaches of regulations but does not fix the punishment for such breaches or say who is to impose it.

I can find no such repugnance between regs. 50 to 54 of the Police Regulations and the changes made in 1953, 1956, 1960 or 1961 as would justify a conclusion that the former were by necessary implication revoked by any of the latter. It is well settled that an implied revocation operates only in so far as is strictly necessary. In my opinion regs. 50, 51 and 54 were never revoked and are still in force by virtue of s. 20 (1) of the British Guiana (Constitution) Order in Council, 1961. They are a "law of the Legislature" within the meaning of article 103 (5) of the present Constitution.

As to whether the charges brought against the plaintiff should have been stated to be contrary to reg. 54 is to my mind debatable; one of the many alternative submissions made by counsel for the plaintiff was that any misconduct by a sergeant now falls to be dealt with by the Commissioner under the general powers conferred on him by article 103 (2) of the Constitution and that there is now no punishment "laid down" (*vide* introductory words of regs. 54 and 55) for a breach of regulations. The better course would probably have been to adopt the words of reg. 54 in formulating the charges without stating the offences to be contrary to that regulation. Be that as it may, the fact is that before the inquiry commenced it was made clear to the plaintiff that he would be liable to dismissal if found guilty

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on any of the charges brought against him; and it has not been suggested that he was in any way misled or prejudiced, nor has it been suggested that the acts he was found guilty of committing did not warrant dismissal. The contention of his counsel was that the statement that dismissal was contemplated was ineffective because there was no power to dismiss the plaintiff on a charge contrary to reg. 54, even though he might have been dismissed for the same acts had no reference been made to that regulation.

It must, I think, be borne in mind that we are considering disciplinary proceedings against a member of the Police Force and that such proceedings are dealt with by persons who have no legal qualifications. The authorities show that disciplinary proceedings against public officers do not attract the same strict rules that obtain in a court of law and that technicalities should not be lionised. What is essential in this regard is that the officer should know what acts are alleged against him and what are the possible consequences of his being found guilty. I think that this information was adequately conveyed to the plaintiff and that there is really no substance in this part of his action.

I must now consider the special defence that in dismissing the plaintiff the defendant was acting in the execution of his office as Commissioner of Police and that since no notice under s. 8 (2) of the Justices Protection Ordinance, Cap. 18, was served on him, the plaintiff's claim, in so far as it is based on alleged breaches of the rules of natural justice, is statute barred. For the reasons already indicated, this defence would be a complete bar to this part of the plaintiff's claim if the protection of the Ordinance extends to actions for declarations and an injunction such as the instant one.

The relevant portions of s. 8 of the Justices Protection Ordinance are as follows:

“8. (1) 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.

(2) The action shall not be commenced against the justice until one calendar month at least after notice in writing of the intended action has been delivered to him, or left for him at his usual place of abode, by the party intending to commence the action, or by that party's attorney or agent, wherein the cause of action and the court in which the action is to be brought shall be clearly and explicitly stated”;

It is common ground that the Commissioner of Police is, by virtue of s. 14 of the Ordinance, a “justice” within the meaning of s. 8 (2), and that no notice of intended action was served on the defendant. Counsel for the defendant submitted that in these circumstances this court has no jurisdiction to entertain this action. For support of his contention he relied mainly on *Abrams v. School*

Governors (1960), 2 W.I.R. 187, in which LUCKHOO, C.J., considered *inter alia* the case of *White v. Town Clerk of Georgetown*, 1939 L.R.B.G. 144, and held that the defendants were entitled to the protection of the Justices Protection Ordinance. The claim in *Abrams'* case, as in the present case, was for declarations and an injunction.

Counsel for the plaintiff stressed the wording of the Justices Protection Ordinance and submitted that LUCKHOO, C.J., took a wrong view of *White v. Town Clerk of Georgetown* and that in so far as *Abrams'* case ruled that a notice of intended action was required under the local Ordinance for an action for a declaration it was bad law. He referred to certain passages in the judgment of CAMACHO, C.J., in *White's* case and invited the court to follow the judgment of ADAMS, J. (Ag.), in *Gray v. Bartica Village Council* (1961), 3 W.I.R. 255, in preference to that of LUCKHOO, C.J., in *Abrams'* case. A careful examination of the facts, claims and *rationes decidendi* in those three cases is therefore necessary. I shall deal with the cases in the order in which they were tried.

In *White v. Town Clerk of Georgetown* the plaintiff was a registered voter under the Georgetown Town Council Ordinance. He sued the Mayor and Town Council of Georgetown for declarations of invalidity of (a) the general appraisalment of properties for rates and town taxes for the year 1939, (b) magisterial orders on appeals from such appraisalment, and (c) certain resolutions passed by the Town Council. Injunctions were claimed and the plaintiff by special leave served on the defendant, with the writ, notice of motion for interim injunctions. On the motion coming on for hearing the defendant objected that the action and the motion were unsustainable as the plaintiff had not served on the defendant a notice of intended action in compliance with s. 8 of the Justices Protection Ordinance as required by s. 232 of the Georgetown Town Council Ordinance. CAMACHO, C.J., held that these statutory provisions did not apply to equitable relief by way of injunction and overruled the objection.

In *Abrams v. School Governors* the plaintiff had been employed by the members of the Governing Body of Anglican Schools in British Guiana, the first-named defendants, as an assistant teacher. His employment was subject to the provisions of the Education Code, regulations made under the provisions of the Education Ordinance. Under the Education Code the appointment and termination of employment of teachers rested directly with the first-named defendants subject to the prior approval of the Director of Education, the second-named defendant. The plaintiff was convicted on a summary charge of being in possession of prohibited publications, contrary to s. 4 of the Undesirable Publications (Prohibition of Importation) Ordinance, 1952, and was fined \$25 or one month's imprisonment in default of payment of the fine. He was subsequently dismissed by the first-named defendants with the approval of the second-named defendant, the ground of the plaintiff's dismissal being given as his conviction on the abovementioned charge. He brought an action against the defendants claiming *inter alia* a declaration that his dismissal was null and void, an injunction in the usual terms and, in

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the alternative, damages for wrongful dismissal. The claim against the second-named defendant, the Director of Education, was dismissed on the ground that the Director of Education was a crown servant and no action lay against a crown servant in his official capacity whether for a declaration or for any other remedy. As regards the first-named defendants, it was held that the employment and dismissal of teachers was a necessary incident in the performance by them of a statutory duty in the control and management of their school and that the dismissal of the plaintiff was, therefore, an act done in the execution of their office under and by virtue of the Education Ordinance. In the course of his judgment LUCKHOO, C.J., compared provisions of the Justices Protection Ordinance with the corresponding provisions of the U.K. Act and said (1960), 2 W.I.R. 198]:

“In my opinion the provisions of the Justices Protection Ordinance, Cap. 18 [B.G.], apply to the present case and the plaintiff having failed to comply with the requirement to give notice of action as well as to bring the action within the period limited by s. 8 (2) of the Ordinance, his action must fail.

It was also argued by counsel for the plaintiff that in view of the fact that equitable remedies were claimed by the plaintiff the provisions of s. 8 of the Ordinance would not apply to the action. It was pointed out by Lord MAUGHAM in his speech in the House of Lords in *Griffiths v. Smith*, [1941] 1 All E.R. 66, at p. 76, that it was held in *Graigola Merthyr Co., Ltd. v. Swansea Corpn.*, [1928] Ch. 31, that s. 1 of the Act of 1893 [U.K.] applied to *quia timet* actions, although the repeated references in the section to an act done and to neglect or default might well point to another conclusion. The case of *White v. The Town Clerk of Georgetown*, 1939 L.R.B.G. 144, cited by counsel for the plaintiff in support of his contention, really only decides that the requirement of the statute as to notice of action would not apply to summary relief by injunction. If it did, the wrong might be irremediable and this could not be intended. The plaintiff's action is not one of this type and I can find no authority in support of the contention of counsel for the plaintiff, and none was cited, that the requirement as to notice of action does not apply where equitable remedies are claimed.”

In *Gray v. Bartica Village Council*, the defendants, the local authority of the Bartica Village District, carried out an appraisalment of buildings in the district for the purpose of levying rates thereon. One of the appraisers was a lessee of a lot of crown land within the district. By s. 96 (2) of the Local Government Ordinance, Cap. 150, a proprietor of any lot or building in the district must not be appointed as an appraiser. The plaintiffs claimed a declaration that the appraisalment was a nullity and an injunction restraining the defendants from acting on it and levying the rate. Section 206 of the Ordinance stipulates that no process may be issued against a local authority until the expiration of one month

after notice in writing has been served on the local authority. Section 207 contains a provision for tender of amends by the local authority after receipt of a notice of action. The defendants submitted that as no notice had been served on them the action should be dismissed. ADAMS, J. (AG.), said [(1961), 3 W.I.R. 257]:

“In this action, the plaintiffs are asking for equitable relief. They are seeking a declaration and an injunction. In *Chapman v. Michaelson*, [1909] 1 Ch. 238, a claim for a mere declaration was held not to be equitable relief. But in *Lodge v. National Union Investment Co., Ltd.*, [1907] 1 Ch. 300, where the plaintiff’s claim was for (1) a declaration, (2) delivery up to him of certain documents, (3) repayment of a sum of money and (4) alternatively a declaration, it was held to be an equitable action. S. A. DE SMITH in his textbook JUDICIAL REVIEW OF ADMINISTRATIVE ACTION, 1st Edn., pp. 404, 405, says that there is no compelling reason why the declaratory order and the declaratory judgment should not continue to be described as equitable remedies. I am of the view that as the plaintiff’s claim for an injunction is a substantial one, they have instituted an equitable action.

Counsel for the plaintiffs has strenuously argued that as the plaintiffs’ claim is for equitable relief there was no necessity to serve a notice of intended action on the defendants.”

Later he added (*ibid.* 259, 260):

“I have come to the conclusion that this action cannot fail merely because the plaintiffs did not serve a notice in writing on the defendants in pursuance of s. 206 of the Local Government Ordinance. It is true that the word ‘process’ taken by itself is sufficiently extensive to embrace a claim for equitable relief. But s. 207 must be read as a qualification of s. 206. Taken in conjunction with s. 207, the word ‘process’ in s. 206 (1) is restricted to actions where amends can be tendered, that is to say, to actions for damages and cannot extend to equitable claims.

I do not base my opinion on the probability of irremediable harm to the plaintiffs. My view is founded on a construction of the sections of the Ordinance in the light of judicial decisions. But it does appear to me that the plaintiffs were entitled to move quickly for an injunction in the circumstances of this action. An important principle was involved, a large community was affected and as I understand from counsel for the plaintiffs that the rates were alleged to be excessive, there might have been some proprietors who were unable to make these payments.”

No reference to *Abrams’* case is made in *Gray’s* case. The reason for this may well be that the former had not yet been reported when the latter was being tried. But it is important to observe that the same authorities were considered in each. It is also important to observe that while the present case is on all fours with *Abrams’* case, these two cases are easily distinguishable from *Gray*

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and *White* in each of which the plaintiff desired a speedy remedy by way of injunction to prevent a wrong which might be irremediable.

I think the true dividing line, in so far as one can be drawn in matters of this kind, is to be found in *Flower v. Local Board of Low Leyton*, (1877) L.R. 5 Ch.D. 347, in which the Court of Appeal had to consider a section (s. 264 of the Public Health Act, 1875) similar to s. 206 of our Local Government Ordinance, Cap. 150. The judgment of JESSEL, M.R., with which JAMES, L.J., and BAGGALAY, J.A., concurred clearly indicates that the correct approach is to distinguish between the principal object of the action, on the one hand, and claims by way of subsidiary relief, on the other, and that it is only if the real object of the action is to restrain a serious or irreparable injury requiring the intervention of the court—*e.g.*, where a local authority is improperly pulling down a house or stopping up a sewer—that it is not necessary to give notice of action. In such a case a claim for an injunction would be entertained without notice even if the action also contained a claim for damages, because the claim for damages would be only subsidiary to the claim for an injunction.

In the instant case, as in *Abrams*'s, the position is just the reverse: the substantial and principal claim is for a declaration; the claim for an injunction is merely subsidiary.

Coventry v. Wilson, [1939] 1 All E.R. 429, is perhaps a useful case in this connection. There the plaintiff claimed declarations with respect to his dismissal from the Liverpool Police Force and complained of a breach of the rules of natural justice. The Court of Appeal upheld the decision of TUCKER, J., that the action came within the provisions of s. 1 (1) of the Public Authorities Protection Act, 1893, and was statute-barred.

For the reasons stated I can see no justification for not following the judgment of LUCKHOO, C.J., in *Abrams v. School Governors*, a case which, as already mentioned, is indistinguishable from the present one. I therefore hold that s. 8 (2) of the Justices Protection Ordinance applies to this action and that the plaintiff not having given the prescribed notice his action must fail.

Although it is unnecessary to the decision of this case, in ordinary circumstances I would have gone on to express my views on the lengthy and very interesting arguments advanced by counsel on both sides in connection with the plaintiff's complaint about breaches of the rules of natural justice. For two reasons I have decided not to do so: first, because the facts of this case are not in dispute; and secondly, because a case that was very strongly canvassed by counsel on both sides—*Ridge v. Baldwin*, [1962] 2 W.L.R. 716—has recently been reviewed by the House of Lords which on March 14, 1963, reversed the decision of the Court of Appeal. The arguments advanced before me were based on the judgments delivered by HOLROYD PEARCE, HARMAN and DAVIES, L. JJ., in the Court of Appeal. Owing to the General Strike in British Guiana which commenced

over five weeks ago no report of the speeches delivered in the House of Lords is yet available and it is not known when such report will be received. In all the circumstances I do not feel justified in delaying the delivery of this judgment any longer.

Judgment will accordingly be entered for the defendant with costs certified fit for two counsel. Stay of execution for six weeks granted.

Judgment for the defendant.

Solicitors: V. Lampkin (for the plaintiff); the Crown Solicitor (*S. M. A. Nasir*) for the defendant.

GILLIAN WONG v. CHEDDIE

[Supreme Court—In Chambers (Persaud, J.) April 25, May 27, 1963]

Practice and procedure—Administrator ad litem—Proposed, appointee unwilling to act—Whether court may nevertheless appoint him—Deceased Persons Estates’ Administration Ordinance, Cap. 46, ss. 16 and 17—O. 14, r. 38, of R.S.C. 1955.

Section 16 of the Deceased Persons Estates’ Administration Ordinance, Cap. 46, provides that “where it appears expedient to the Court to do so, it may on the application of any interested party appoint any person or persons to be an administrator to administer the estate of a deceased person in any of” certain specified cases. Section 17 (b) enables the court to limit the appointment of an administrator to a particular object. Order 14, r. 38, provides that “if in any cause, matter or other proceeding it should appear to the Court or a Judge that any deceased person who was interested in the matter in question has no legal personal representative, the Court or a Judge.....may appoint some person to represent his estate for all the purposes of the cause, matter or other proceeding on such notice to such person, if any, as the Court or a Judge shall think fit.....”

The plaintiff claimed damages against the defendant for injuries suffered in an accident involving the defendant’s vehicle driven by his agent or servant B who himself died as a result of the accident. The defendant denied that B was his servant or agent and applied for the Crown Solicitor to be appointed as an administrator *ad litem* of B’s estate so that the defendant might seek leave to serve a third party notice on the administrator. The Crown Solicitor, however, was unwilling to be appointed although the defendant was prepared to offer him an indemnity towards all expenses.

Held: the court has no power to appoint a person (including the Crown Solicitor) against his will to represent the estate of a deceased person.

Application refused.

O. M. Valz for the applicant.

B. Fulwell for the father of the deceased.

PERSAUD, J.: This is an application by Ramoo Cheddie, the defendant in the original action, for the appointment of an administrator *ad litem* of the estate of Christopher Burrowes, deceased, so that the defendant may seek leave to serve third party notice on the

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administrator. In the original action, the plaintiff claims damages against the defendant for injuries suffered in an accident involving the defendant's vehicle driven by his agent and/or servant, and a vehicle belonging to the plaintiff's father and driven by the deceased Christopher Burrowes with the plaintiff in it. Christopher Burrowes died as a result of the same accident.

In his pleadings the defendant has alleged that Christopher Burrowes was at the relevant time the servant and/or agent of the plaintiff's father, but this has been traversed. Hence, the defendant now seeks to join the estate of the deceased.

When this application was first called before me, it being *ex parte*, I made an order for a certified copy of the proceedings to be served upon the father of the deceased Christopher Burrowes, and a date for hearing two weeks later was fixed. Upon the matter being called on the latter date, the father did not appear, and it was only after he was informed by the solicitor for the plaintiff that the court was waiting on him that he made his appearance accompanied by solicitor. I mention these circumstances if only to indicate that while the court would be disinclined to hear any matter in the absence of the parties' legal advisers, parties have only themselves to blame if the hearing is proceeded with in their absence when they do not appear at the appointed time, to say nothing of the discourtesy intentional or otherwise that is shown to the court.

The father of the deceased does not consent to being appointed as administrator *ad litem*, and Mr. Valz has urged that the Crown Solicitor should be appointed, and has offered an indemnity towards all expenses, etc. Order 14, r. 38, which deals with the appointment of legal personal representatives in any cause, matter or other proceeding, also authorises the court to proceed with the matter in the absence of any person representing the estate of the deceased person. The full rule is reproduced hereunder:—

“If in any cause, matter or other proceeding it shall appear to the Court or a Judge that any deceased person who was interested in the matter in question has no legal personal representative, the Court or a Judge may proceed in the absence of any person representing the estate of the deceased person or may appoint some person to represent his estate for all the purposes of the cause, matter or other proceeding on such notice to such person, if any, as the Court or a Judge shall think fit, either specially or generally by public advertisement, and the order so made, any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter or proceeding.”

It will be seen at once that this rule is the same as O. 16, r 46, of the United Kingdom Rules of Court. This latter rule received judicial attention in *Pratt v. London Passenger Transport Board*,

[1937] 1 All E.R. 473, where it was held that there was no power to appoint a person (including the Official Solicitor) against his will to represent the estate of a deceased person. In the course of his judgment, SLESSER, L.J., said at p. 477:—

“.....it would be contrary to all principles of justice, and indeed contrary to decided authority, as there is, to hold that that power to appoint such person to represent the estate could be made against the will and without the consent of the person sought to be appointed.”

Solicitor for the applicant has submitted that the appointment can and should be made under the provisions of ss. 16 and 17 of the Deceased Persons Estates' Administration Ordinance (*supra*). The answer to this submission was given by SCOTT, L.J., in the *Pratt's* case (*supra*), at p. 480, where he held that for practical purposes neither appointment under O. 16, r. 47, nor under an order by a Court of Probate is possible without consent,

“and therefore no procedure can regularly be employed unless a person is willing to consent, and he will not consent in a normal case unless he is protected adequately against the financial risks involved in his appointment for the purpose of litigation.”

In the more recent case of *Lean v. Alston*, [1947] 1 All E.R. 261, where the facts were similar to the allegations contained in the pleadings in this matter, it was held that the court had the power to make the appointment and that the appointment should be made, even though the deceased person had not been concerned in the original action. At p. 263 of the judgment, SCOTT, L.J., said:—

“My own view is that it was obviously right to make the order, and for this simple reason. If the case is decided with the representative of the estate of the deceased bicycle driver present as a third party, the question of contribution will be decided by the judge after hearing evidence in the action and at the minimum of expense to the two parties concerned in the question of contribution. If he did not hear it with the representative of the deceased bicycle driver present, the right of the defendant to bring an action for contribution afterwards would be an obvious waste of money to have a second trial, and it might be very unfair to the defendant because a material witness might in the interval have died.”

If we were to substitute for the “deceased bicycle driver” in that passage the words “deceased Christopher Burrowes”, this court would wish to express the same sentiments. But in that case the question of the unwillingness of the person appointed did not arise as was the position in the *Pratt's* case. Indeed, in *Lean v. Alston* (*supra*) the widow of the deceased bicycle driver was given an opportunity

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to appear, and she elected not to do so, whereupon someone else was appointed. It was against this appointment upon which the matter reached the Appeal Court which decided that the appointment was good. That decision really concerned itself with the question whether O. 16, r. 46, was applicable only where a person already a party to the proceedings had died and there was no legal personal representative of such party, and also with whether in his discretion the master ought to have made the appointment. The first question was answered in the negative, and the second in the positive.

In my judgment, I can only appoint the father with his consent, and this he has refused. I have sought the consent of the Crown Solicitor but he also is unwilling to be appointed administrator *ad litem*. The application is therefore refused; each party to bear his own costs, in the circumstances.

Application refused.

RE WIGHT (Deceased)

[Supreme Court—In Chambers (Bollers, J.) February 14, June 5, 1963.]

Administration of estates—Legacy for monthly payments—Consent order that payments be made as from one month after death of deceased—Whether payments conditional upon estate having sufficient assets to meet debts—Whether interest payable on arrears of legacy—Deceased Persons Estates’ Administration Ordinance, Cap. 46, s. 46 (1)—Civil Law of British Guiana Ordinance, Cap. 2, s. 12 (2)—Law Reform (Miscellaneous Provisions) Ordinance, Cap. 4, s. 13 (1).

The respondent was given a legacy of \$500 per month under the last will of his deceased father who died on 1st March, 1981. In an application by the executors for directions it was by consent ordered on 12th June, 1968, that the bequest be paid to the respondent as from one month after the date of the deceased’s death, and that the question of the respondent’s entitlement to interest on arrears of payments should be reserved, with liberty to apply. No payments having been made, the respondent applied for an order that the legacy be paid in accordance with the order of court with interest on the arrears. For the applicants it was argued that the order of court should be interpreted to mean that the legacy should be paid after payment of the debts of the estate and that interest was only payable in respect of monthly sums due as from one year from the date of the deceased’s death.

Section 46 (1) of the Deceased Persons Estates’ Administration Ordinance, Cap. 46, provides that an estate shall be administered and distributed by the executor not later than 12 months from the day on which probate is granted to him; and O. 55, r. 64 (U.K.), provides that where a judgment or order is made directing an account of legacies interest shall be computed on such legacies after the rate of 4 *per centum per annum* from the end of one year after the testator’s death, unless otherwise ordered, or unless any other time of payment or rate of interest is directed by the will. But s. 12 (2) of the Civil Law of British Guiana Ordinance, Cap. 2, provides that “in all proceedings before any court of justice founded upon contract in which no rate of interest is specifically stated, the court shall award interest, if it so thinks fit, at the rate of 6 *per centum per annum* and no more”; and s. 13 (1) of the Law Reform (Miscellaneous Provisions) Ordinance, Cap. 4, provides that “in any proceedings tried in any court for the recovery of any debt or damages, the court may” award interest not exceeding 6 *per centum per annum*.

Held: the debt due from the estate was founded upon a contract based upon the order of court and interest was payable on the arrears at 6 *per centum per annum* on the basis that the first payment should have been made one month after the date of the deceased's death.

Order accordingly.

E. V. Luckhoo for the applicants.

B. O. Adams, Q.C., for the respondents.

BOLLERS, J.: The applicants in this originating summons are the executors under the last will and testament of Percy C. Wight, deceased, hearing date the 30th September, 1959. The respondent is a legatee under the last will and testament of Percy Claude Wight, deceased, who died on the 1st day of March, 1961.

On the 22nd December, 1961, the applicants herein filed an originating summons against the respondent asking for the determination of certain questions and for directions thereon included in which were the questions: (a) In what manner, and as from what time does the sum of \$500 become payable and whence should the sums be paid? (b) All further questions which may arise in relation to the payment of the said legacy. An affidavit in support of the summons was filed in which one of the executors swore that the legatee had made several demands for the payment of the sum of \$500 per month under clause (c) of the said will of the deceased. Clause (c) of the said will reads as follows:

“To my son, Vibart, I leave the sum of five hundred dollars (\$500) per month for life, and at his death the sum of twenty thousand (\$20,000) dollars each to his two children Jacqueline and Tessa.”

The respondent filed no affidavit in reply but on the 22nd May, 1962, an amicable settlement was arrived at between the parties and an order by consent was made by CHUNG, J., in chambers which order was duly entered on the 12th June, 1962, and in which it was by consent ordered, *firstly*, that the bequest of \$500 per month to Claude Vibart Wight be paid to him as from one month after the date of the death of the said Percy Claude Wight, deceased, and *secondly*, that the question of interest which is being claimed by Claude Vibart Wight on his said bequest of \$500 per month be reserved. Liberty to apply. The second question therefore remained unanswered.

In this application, the respondent asks for an order that in respect of his general legacy of \$500 per month interest on the said sum be made payable to him as from one month from the date of the death of the deceased in accordance with the order of the court made by CHUNG, J., on the 22nd May, 1962, as stated above.

Counsel for the applicants submits that payment of a general legacy is conditional upon the estate having sufficient assets to meet the just and lawful debts of the estate, for example, payment of estate duty, and that these should be first paid after a realisation of the assets, and as a result the order of the judge should be inter-

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preted to mean that the legacy should be paid after payment of the just debts of the estate and after preferential creditors have been satisfied as from one month after the date of the death of the deceased.

With this contention I cannot agree, as on a strict interpretation of the order of the court, it appears to me that the applicants represented their ability to pay the said legacy out of the funds of the estate when they consented to the order that the legacy be paid to the respondent as from one month after the date of death of the deceased. In any event one year has already passed since the death of the deceased within which time they have had the opportunity to inform themselves of the state of the testator's property. See 16 HALSBURY'S LAWS, 3rd Edn., para. 613.

In fact WILLIAMS ON EXECUTORS AND ADMINISTRATORS, 14th Edn., at p. 825 states:

“After the expiration of the year from the death of the testator, the general legacy will carry interest, though payment is, from the condition of the estate, impracticable, and though the assets have been unproductive. The general rule was stated by Lord REDESDALE in *Pearson v. Pearson*: Whether the fund bears interest or not is totally immaterial in the case of pecuniary legacies’.”

The more important problem is whether the said legacy should bear interest as from one month from the date of the death of the deceased in respect of monthly arrears of \$500 due to the legatee.

HALSBURY'S LAWS, 3rd Edn., Vol. 16, para. 362, states:

“Where no special time is fixed for the payment of a legacy, it carries interest at 4% per annum from the expiration of one year after the testator's death, although expressly made payable out of a particular fund which does not fall in until after a longer period.”

Counsel for the applicants submits therefore that if interest on the legacy is payable, it is only payable in respect of monthly sums due as from one year from the date of the death of the deceased.

HALSBURY'S LAWS, 3rd Edn., Vol. 16, para. 571, tells us that the reason for this general rule is that a year from the date of death is a reasonable time within which a personal representative should realise investments which it is not proper to retain. He has within that time an opportunity to inform himself of the state of the testator's property, and during that period he cannot be required to pay any legacies even though they are expressly directed by the testator to be payable within the year. He is entitled, however, and this is important, to pay them within the year if he chooses. It must be observed that under the order the executors agreed that the bequest to the respondent be paid to him as from one month after the date of the death of the deceased.

Hence s. 44 of the Administration of Estates' Act, 1925, enacts that:

“Subject to the foregoing provisions of the Act, a personal representative is not bound to distribute the estate of the deceased before the expiration of one year from the death.”

A similar section exists in our law under s. 46 (1) of the Deceased Persons Estates' Administration Ordinance, Cap. 46, which provides that an executor shall administer and distribute the estate which he is appointed to administer according to law not later than 12 months from the day on which probate is granted to him subject, of course, to further time being given to him upon sufficient cause being shown by him.

WILLIAMS ON EXECUTORS AND ADMINISTRATORS, 14th Edn., p. 824, at para. 1271, makes it quite clear that general legacies in their nature carry interest and the interest is to be computed from the time at which the principal is actually due and payable and reiterates at para. 1272 that where no time of payment is fixed the executor is by law allowed one year from the testator's death to ascertain and settle his affairs, and upon this ground interest is payable on a general legacy from that time unless some other time is fixed by the will. The author points out that interest thus payable is not in any sense a legacy given by the testator but is a sum given to the legatee because justice requires that owing to the failure to pay his legacy in due time, he should be put in the position in which he would have been, had it been so paid.

In England the rate of interest is fixed by Order 55, r. 64, which provides that where a judgment or order is made directing an account of legacies interest shall be computed on such legacies after the rate of four per cent per annum from the end of one year after the testator's death, unless otherwise ordered, or unless any other time of payment or rate of interest is directed by the will and in that case according to the will. In a note to this order the ANNUAL PRACTICE, 1963, p. 1565, states:

“Where no time for payment is fixed, the legacy is payable at, and therefore bears interest from, the end of the year after the testator's death. (*Lord v. Lord* (1867), L.R. 2 Ch. 782; *Walford v. Walford*, [1912] A.C. 658.)”

In the instant case, no time for the payment of the legacy was fixed, and counsel for the applicants submits that the Rules of the Supreme Court, 1955, being silent on the matter, in accordance with O. 1, r. 3 of the said rules, the English rule should be followed and cited *Re Pollock* [1943] 2 All E.R. p. 443, in which it was decided that interest on a legacy would only be payable from the date of the death of the testator where there is a direction in the will to pay the legacy *immediately* after the death of the testator.

In my view, this submission fails to appreciate the position that applicants under the relevant order of court made by consent of

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the parties agreed that the bequest of \$500 per month should be paid to the legatee as from one month after the date of death and as counsel for the respondent correctly points out under s. 12 (1) of the Civil Law of British Guiana Ordinance, Cap. 2, it is a debt due from the estate interest on which is recoverable at the rate of six per centum per annum. Section 12 (1) reads:

“Where interest is now payable upon any contract, expressed or implied, for payment of the legal or current rate of interest, or where upon any debt or sum of money interest is now payable by any rule of law, the same rate of interest shall be recoverable as if this provision had not been enacted.”

Sub-section (2) states:

“In all proceedings before any court of justice founded upon contract in which no rate of interest is specifically stated, the court shall award interest, if it so thinks fit, at the rate of six per cent per annum and no more.”

In my judgment, this debt due from the estate is founded upon a contract based upon the order of court dated 22nd May, 1962, the consideration for which moving from the promisee was a forbearance to demand and sue for the payment of his legacy which ought to have been paid to him one year after the date of the death of the deceased. In any event, if I am wrong in my view that this is a claim founded upon contract, there is s. 13 (1) of the Law Reform (Miscellaneous Provisions) Ordinance, Cap. 4, which states that in any proceedings tried in any court for the recovery of any debt, the court may, if it thinks fit, order that there should be included in the sum for which judgment is given, interest at such rate, not exceeding six per cent per annum as it thinks fit on the whole or any part of the debt or for the whole or any part of the period between the date when the cause for action arose, and the date of the satisfaction of the judgment.

The conclusion to which I have come in answer to the question asked, therefore, is that interest fixed at the rate of six per cent per annum will be payable on the said legacy of \$500 per month as from one month from the date of the death of the deceased in respect of monthly arrears of the said legacy; and I order accordingly. I understand that three payments of \$500 have already been made and I need hardly observe that in respect of these sums interest will not be payable. Costs of this application to the respondent C. V. Wight to be taxed fit for counsel to be paid out of the estate.

Order accordingly.

Solicitors: *Miss Ena Luckhoo* (for the applicants); *Sase Narain* (for the respondent).

MOHABIR v. BABOONI

[Supreme Court (Luckhoo, C.J.) April 22, May 6, 20, 27, 30, June 1, July 6, 1963.]

Indian immigrants—Marriage according to Hindu rites—Requirements for issue of non-impediment certificate—Certificate issued in relation to non-party—Validity of marriage—Application by party for cancellation of registration of marriage—Whether applicant aggrieved by the registration—Indian Labour Ordinance, Cap. 104, ss. 142 and 161.

The proviso to s. 142 (1) of the Indian Labour Ordinance, Cap. 104, provides that before a marriage according to religion and personal law is contracted under that section “the parties thereto shall first obtain a certificate, signed by the Agent General, to the effect that there does not appear.....to be any impediment to the intended marriage, and the marriage shall not be deemed to have been duly contracted unless that certificate has been first obtained.”

Through a confusion of names the non-impediment certificate relating to the marriage of the parties in this case was in fact issued as between the “wife” and another man. The “husband” applied for cancellation of the registration of the marriage under s. 161 of the Ordinance which provides that “where registration under this Ordinance has been made of a marriage or divorce anyone aggrieved by the registration may apply to the Chief Justice to have it cancelled.....”

Held: (i) the marriage was invalid;

(ii) but the applicant was not aggrieved by the registration and was not competent to apply for its cancellation.

Application refused.

N. P. Sharma for the applicant.

David Singh, Senior Legal Adviser (ag.), for the Immigration Agent General.

Reasons for Decision: On the 18th August, 1959, the applicant Cecil Mohabir and one Babooni went through a ceremony of marriage according to Hindu rites at Meten-Meer-Zorg, West Coast, Demerara, and on the 21st August, 1959, the marriage was entered in the register of marriages contracted in the Colony pursuant to the provisions of s. 143 of the Indian Labour Ordinance, Cap. 104, as being one contracted under the provisions of s. 142 of that Ordinance between Mohabir, No. 1850 B.R. 1929, born 3.11.29 Plantation de Kinderen, and Babooni, No. 3759 B.R. 1932, born 3.7.32 de Willem Front.

On the 5th April, 1963, the applicant filed an application by way of motion supported by affidavit under the provisions of s. 161 of the Ordinance to have the marriage cancelled, alternatively, to have the entry relating to the marriage in the register of marriages amended or corrected by the substitution therein for the name Mohabir, the date and place of birth and birth register number in relation thereto, of the name “Cecil Mohabir”, the date and place of birth “Born 14th November, 1925” at “Blyendaal, West Canje, Berbice” and the birth register number as “Creole Register No. 298—C”.

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The application came to be made as a result of Mohabir, the person whose name, date and place of birth and birth register number appear in the register of marriages, desiring to contract a marriage with one Chandramattie under the provisions of s. 142 of the Ordinance. When in December, 1962, Mohabir sought to make the necessary application for the issue of a certificate of non-impediment as required by s. 142 of the Ordinance, it was discovered by the Immigration Agent General that such a certificate had already been issued in respect of Mohabir No. 1850 B.R. 1929 (Mohabir) and Babooni and a marriage contracted pursuant to that certificate and registered under the provisions of the Ordinance in the year 1959 between those persons.

The affidavits and the relevant certified entries from the registers kept by the Registrar General and the Immigration Agent General show that Cecil Mohabir was in fact born on the 14th November, 1925, at Blyendaal, West Canje, Berbice, to one Ramsarran, also called Mohabir, and one Tillari. Tillari died within six weeks of the applicant's birth while Ramsarran died on the 11th March, 1926. The applicant then resided with one Sancharie of Blyendaal, West Canje, until her death in 1946 whereupon he resided until 1955 with his paternal aunt Sukhia. Apparently his birth was not registered under the provisions of the Registration of Births and Deaths Ordinance, Cap. 162, within the period specified therein, possibly because of an oversight due to the untimely deaths of his parents shortly after his birth. However, on the 26th January, 1963, the applicant's birth was registered and on the 13th February, 1963, a certificate of birth was issued the applicant by the Immigration Agent General wherein it appears that his name was on that date entered in the Creole Birth Register.

In 1955 the applicant went through a form of marriage according to Hindu rites with Babooni and since then they have been living together as man and wife. Babooni has borne the applicant five children. During 1959 the applicant and Babooni wished to have their cohabitation placed upon a legal basis and on the 17th August, 1959, they made application for a non-impediment certificate for the purpose of getting married in accordance with the provisions of s. 142 of the Ordinance. The application was written out by a clerk to the Immigration Agent General and signed by the applicant and Babooni. The applicant had submitted a certified copy of the Registrar-General's extract of a birth certificate which bore the name "Mohabir". That extract related to a person other than the applicant but this was not appreciated by the clerk at the Immigration Agent General's office who dealt with the application.

In the same extract the "mother's name" was given as Sukhandei, but the "father's name", was not stated. On reference to the birth register kept by the Immigration Agent General the name of the father of "Mohabir" was given as "Shuker 2602 B.R. 1900". The parents of Mohabir were Shuker and Sukhandei.

The Immigration Agent General erroneously concluded that the applicant was the same person referred to as "Mohabir" in the

Registrar-General's extract and that his parents were Shuker and Sukhandei and upon these erroneous conclusions issued the applicant and Babooni the certificate of non-impedient for which they had applied describing the applicant therein in the following manner:

“Mohabir, m.b. 3.11.1929 at Pln. De Kinderen, 1850, B.R. 1929 F.N. Shuker 2602 B.R. 1900; M.N. Sukhandei”.

On the 18th August, 1959, the applicant and Babooni went through a ceremony of marriage performed by Pandit Naubat Tiwari and a notification of marriage to that effect was given on a printed form in which the name and particulars of the bridegroom were inserted to accord with the description given in the certificate of non-impediment. The bridegroom signed his name as “Mohabir”. This notification of marriage form duly completed was transmitted to the Immigration Agent General who, on the 21st August, 1959, caused an entry of the marriage to be made in the register of marriages.

That this entry of the marriage in the Register of Marriages is erroneous in its description of the applicant is undisputed. The questions which arise for consideration are:

- (a) whether, in the events which have occurred, the marriage is valid;
- (b) whether the erroneous entry should be cancelled under the provisions of s. 161 of the Ordinance; or
- (c) whether, in the inherent jurisdiction of the court, the erroneous entry may be cancelled or, if the marriage is valid, be corrected.

Under the provisions of s. 142 of the Ordinance the obtaining of a non-impediment certificate is a condition precedent to the contracting of a marriage in accordance with the provisions of that section. The effect of non-compliance with that condition precedent is stated therein:

“and the marriage shall not be deemed to have been duly contracted unless that certificate has first been obtained.”

Sub-section (2) of that section provides:

“If the marriage referred to in the certificate is not contracted within three months from the date of the certificate, the certificate shall on the expiration of that period become null and void.”

The effect of these provisions is that failure to obtain a non-impediment certificate or failure to have the marriage contracted within three months of the date of the certificate would render invalid a marriage contracted according to religion and personal law as contemplated by s. 142 of the Ordinance. What then is the position if a non-impediment certificate were issued which is defective in that it relates to a male person other than the prospective bridegroom, not being a mere misnomer. It seems to me that there would be no effective non-impediment certificate in existence relating to the proposed marriage

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and that a marriage in such circumstances cannot be deemed to have been duly contracted. Such a marriage would be invalid and an entry of such a marriage in the register of marriages contracted in the Colony ought not to be made.

In the instant case in the events which have occurred the marriage on the 18th August, 1959, between the applicant and Babooni must be deemed not to have been duly contracted and is invalid and the registration thereof ought not to have been made.

Section 161 of the Ordinance provides for cancellation of the registration of such a marriage on the application of a person aggrieved by the registration. Is the applicant a person "aggrieved by the registration" within the contemplation of that section? As the matter stands he can hardly be considered to be aggrieved by the registration. Indeed it is Mohabir and not the applicant Cecil Mohabir who would be aggrieved by the registration.

The remaining question to be determined is whether, in the inherent jurisdiction of the court, the erroneous entry should be cancelled. Assuming, but not deciding, that there is inherent jurisdiction in the court to cancel the registration of the marriage now in question, I do not think that such a jurisdiction should be exercised in this case for the reason that there is in existence a person appearing in the proceedings who may move the court under the provisions of s. 161 of the Ordinance to order the necessary cancellation.

The application is therefore refused.

Application refused.

Solicitor: *Crown Solicitor* (for the Immigration Agent General).

Re a LEGAL PRACTITIONER

[In the Full Court (Luckhoo, C.J., Bollers and Persaud, JJ.) April 26, 27, May 3, 13, 1963.]

Legal practitioner—Barrister retained to conduct appeal—Solicitor on record—Fees paid to barrister—Whether barrister practising as a solicitor—Jurisdiction of Legal Practitioners Committee—Legal Practitioners Ordinance, Cap. 30 ss. 28 and 41.

Natural justice—Complaint by client against legal practitioner in Legal Practitioners Committee—Affidavit in support of complaint sworn to before member of Committee—No objection taken before Committee—Whether proceedings of Committee vitiated.

A barrister was retained at a fee of \$480 to conduct an appeal. A solicitor was on record but most of the fee was paid by the client directly to the barrister. On complaint by the client against the barrister for misconduct in his handling of the appeal, the Legal Practitioners Committee, after a hearing, made a report to the judges of the Supreme Court, who then called the practitioner before the Full Court to show cause why an order should not be made striking off his name from the Court Roll or suspending him from practising.

Section 28 of Part II of the Ordinance, which deals with discipline, vests the Committee with jurisdiction to hear a complaint against “a legal practitioner”, and this expression is defined by s. 26 (b) to mean “a barrister whose name is on the Court Roll and who in any matter the subject of an application under s. 38 of this Ordinance has practised as a solicitor.” Section 41 of Part III of the Ordinance, which deals with the definition of the respective functions of barristers and solicitors, provides that “in this Part unless the context otherwise requires..... ‘to practise as a solicitor’ means to perform or do any act or thing which is in England usually performed or done by a solicitor and not by a barrister.”

On behalf of the barrister it was contended *in limine* that a barrister can only come within the ambit of s. 28 if he is guilty of misconduct in a matter in which he may lawfully practise as a solicitor, and that under s. 42 in a case of this kind a barrister is not authorised to receive fees. It was also contended that the report of the Committee was void because one of its members had sworn the applicant to the affidavit filed with the Committee. There was no suggestion, however, that the member had anything to do with the preparation of the affidavit and no objection had been taken before the Committee.

Held: (i) although it might have been desirable that that member, having sworn the applicant, should have refrained from taking any part at the hearing, the objection not having been taken before the Committee, the court could not now in the exercise of its discretion entertain it;

(ii) ss. 42 and 43 of the Ordinance contemplate appearance in court and do not include any act which a solicitor may do as a solicitor out of court, such as receiving money for disbursements. If a barrister does this act he is practising as a solicitor.

Submissions overruled.

J. O. F. Haynes, Q.C., for legal practitioner.

H. O. H. Khan, Chief Parliamentary Counsel (ag.), and *K. S. Massiah*, Parliamentary Counsel (ag.), for the Attorney General.

Judgment of the Court: Upon an application of Oscar Llewelyn Lopes, the Legal Practitioners Committee (in this judgment referred

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to as the Committee) heard evidence in connection with a complaint brought under the provisions of s. 28 (1) of Legal Practitioners Ordinance, Cap. 30, against the legal practitioner, who is a barrister. The legal practitioner did not appear, but was represented by counsel who elected not to lead evidence, but relied on certain submissions. The Committee submitted a report in which it found that the practitioner received certain monies from the client, and did not account therefor, and that in so doing, he was acting as a solicitor.

The Committee found that the legal practitioner had advised an appeal to the Federal Supreme Court from a judgment against the applicant in a matter in which the practitioner was counsel and Mr. A. Vanier was solicitor. The practitioner was retained at a fee of \$480.00 to conduct the appeal, and the applicant paid at various times sums amounting to \$355.00 to the practitioner and not to the solicitor. The grounds of appeal were not filed in time, and this necessitated an application in chambers for an extension of time. This the practitioner did, but later withdrew the application whereupon the applicant was ordered to pay \$30 costs. The practitioner then filed an application in the Federal Supreme Court for an extension of time within which to bring an appeal. He did not appear at the hearing, and the application was struck out with costs \$150. A third application was filed, and on this occasion another practitioner held the brief of the legal practitioner and withdrew the application, whereupon an order for costs in the sum of \$112.84 was made against the applicant. Yet a fourth application was filed and dismissed, and the applicant was ordered to pay \$184.24 in costs. We agree with the Committee that, having regard to the fate of the previous applications, this last application could hardly have succeeded. Thus, by a series of futile attempts on the part of the practitioner, the applicant was made liable in costs to the extent of \$477.08.

Upon the matter being called before this court, the practitioner was called upon in accordance with s. 28 (9) of the Legal Practitioners Ordinance, Cap. 30, to show cause why an order should not be made against him.

Mr. Haynes for the practitioner has made the following submissions *in limine*:

(1) The Committee had no jurisdiction to deal with the application in as much as the application itself and the evidence as well did not establish that the practitioner was a legal practitioner in relation to the matter within the meaning of s. 26 (b) of Cap. 30. If this is so, then the findings of the Committee are a nullity, and this court cannot properly consider the report. In the circumstances, there is nothing upon which the court may exercise its inherent jurisdiction.

(2) In so far as the findings of misconduct in relation to acting as a solicitor while the practitioner was in fact a barrister, and that he employed a dummy solicitor are concerned, there were no such allegations by the applicant. If the Committee took the view at the end of the evidence that it disclosed misconduct not complained of, the complaint should have been dismissed, or the

practitioner called upon to answer any misconduct proved. Any finding of misconduct not alleged in such circumstances would be void as violating the rules of natural justice in that the practitioner was not given an opportunity of being heard.

(3) The entire report is void because one of its members swore the applicant to the affidavit before the Committee. There was a real likelihood of bias, and in any event justice would not manifestly appear to have been done.

In our view the last submission is without merit. There is no suggestion that that member of the Committee had anything to do with the preparation of the affidavit. While we agree that it might have been desirable that that member, having sworn the applicant, should have refrained from taking any part at the hearing, the objection not having been taken then, we would not now in the exercise of our discretion entertain this submission. (See *R. v. Nailsworth Licensing Justices*, [1953] 2 All E.R. 652).

Dealing with the first submission that the Committee had no jurisdiction to entertain the application, counsel submitted that a barrister can only come within the ambit of s. 28 of the Ordinance having regard to the definition of the expression "legal practitioner" in s. 26 (b) if he is guilty of misconduct in a matter in which he may lawfully practise as a solicitor; that s. 42 prescribes the occasions when a barrister may so practise, and that if a barrister does any act not prescribed in s. 42, he is not acting as a solicitor within the meaning of the Ordinance, and therefore he is not amenable to the jurisdiction of the Committee. In other words, counsel contends that a barrister may only be disciplined within the provisions of Part II of the Ordinance if he is lawfully acting as a solicitor.

Section 28 of Part II of the Ordinance, which deals with discipline, vests the Committee with jurisdiction to hear a complaint against a "legal practitioner" and this expression is defined by s. 26 (b) to mean:

"A barrister whose name is on the Court Roll and who in any matter the subject of an application under s. 28 of this Ordinance has practised as a solicitor."

It is true that the expression "to practise as a solicitor" is not defined in Part II of the Ordinance, but the term is met with in Part III. Section 41 therein provides as follows:—

"In this Part unless the context otherwise requires, the following expressions have the meanings herein assigned to them—

'to practise as a solicitor' means to perform or do any act or thing which is in England usually performed or done by a solicitor and not by a barrister."

Counsel has submitted that this definition must be restricted to Part III of the Ordinance, which is what s. 41 enacts. It is to be observed that Part III of the Ordinance deals with the respective functions of barristers and solicitors, and specifies matters where a barrister or

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solicitor is entitled to act alone and have audience, where a barrister has exclusive audience, where a barrister may practise as a solicitor, and where a barrister may not practise as a solicitor. If counsel's contention is correct, then if a barrister does an act which does not fall within the purview of s. 42, such act is not practising as a solicitor even though it may be an act or thing which is in England usually performed or done by a solicitor and not by a barrister. Such an argument would necessarily imply that s. 42 embraces every possible act that a solicitor may do, and ignores the fact that s. 42, as do ss. 43, 44 and 45, deals with *contentious business*. No doubt this is the reason why s. 42 uses the words "act alone and have audience", while in section 43 the expression "shall have exclusive right of audience" appears. Undoubtedly these two sections contemplate appearance in court and do not include any act which a solicitor may do as a solicitor out of court, such as receiving money for disbursements. If a barrister does this act, he is, in our view, practising as a solicitor. Indeed s. 45 of the Ordinance places the matter beyond dispute when it makes it clear that where a barrister is required by s. 43 (2) to be instructed by a solicitor (when the barrister alone has the exclusive right of audience) he shall not be entitled to practise as a solicitor. We are therefore of the view that in receiving money in which were included fees for disbursements the practitioner practised as a solicitor, and in these circumstances the Committee had jurisdiction to hear this matter.

We will not concern ourselves with the court's inherent jurisdiction to deal with a matter of this sort. Suffice it to say that counsel concedes the existence of that jurisdiction, but contends that there is nothing before this court on which it can properly exercise its inherent jurisdiction. The jurisdiction was also recognised by the Full Court in *Re a Legal Practitioner* in a judgment published in the Gazette of the 9th September, 1950, at p. 667. Dealing with the submission that the practitioner was acting *qua* barrister and not *qua* solicitor, and therefore his conduct was not subject to the jurisdiction of the Committee, the court said at p. 670:

"The point is of no importance since he would as a barrister be subject to the inherent jurisdiction which this court has over both barristers and solicitors."

It is not correct to say that the practitioner was not given an opportunity to be heard. It is nearer the truth to say that in this instance the proceedings before the Committee were treated by the practitioner with a certain degree of nonchalance. If, as has been urged, the practitioner was out of the colony during the relevant time, it is surprising that counsel who appeared for him did not so inform the Committee, but chose instead to make certain submissions and to rely on them. If, as it would appear, counsel had confidence in his submissions, then the presence or absence of the practitioner would have made little difference. Again, a scrutiny of the records discloses that instead of putting his cards on the table and informing the Committee that the practitioner was out of the Colony, as is now being alleged, and perhaps asking for an adjournment on that ground, counsel closed his case and declined to lead any evidence. It is incon-

ceivable that counsel would have so acted without instructions. In these circumstances we cannot grant the application to send this matter back to the Committee for the practitioner to be heard.

Finally, we wish to refer to another aspect of this matter. Mr. Haynes has criticised the Committee's finding that Mr. Vanier acted as a 'dummy' solicitor in the proceedings out of which the complaint in this matter arose. Mr. Haynes has urged that there was no evidence to support this finding. It would appear that the Committee came to this conclusion after they found that the legal practitioner received monies intended for disbursements. We mention this matter if only to condemn the practice of solicitors acting as 'dummies'. We wish to draw attention to the fact that this is not the first occasion on which the Full Court has had to express condemnation of this practice, which serves only to mislead the court before which the matter comes up for adjudication.

The submissions *in limine* having failed, the practitioner is now required to show cause why an order shall not be made against him.

Submission overruled.

Solicitor: *Sase Narain* (for the legal practitioner).

SAUL AND SAUL v. SMALL

[Supreme Court (Persaud, J.) November 28, 29, December 7, 13, 1962, June 14, 1963.]

Licence—Passageway leading to kitchen, living room, toilet and bath of demised premises—Whether tenant's right of user over passageway is a bare licence revocable at will.

Landlord and tenant—Action for damages for breach of covenant for peaceful and quiet enjoyment of premises—Premises subject to Rent Restriction Ordinance—Whether claim arises out of Ordinance—Whether Supreme Court has jurisdiction—Rent Restriction Ordinance Cap. 186, s. 26 (1).

The plaintiffs rented certain premises from the defendant. The doors of the living quarters and kitchen opened on to a passageway which also served as the only means of access to the bath and toilet facilities intended for the use of the plaintiffs. The landlord having blocked the passageway, the plaintiffs sued for damages for breach of covenant for peaceful and quiet enjoyment of the premises and, in the alternative, for wrongful interruption of and interference with their right of occupation. In defence, it was contended that the plaintiffs' use of the passage-way was a bare licence and as such was revocable at the will of the licensor; and that the Supreme Court had no jurisdiction by virtue of s. 26 (1) of the Restriction Ordinance, Cap. 188, which provides that ".....any claim or other proceedings.....arising out of this Ordinance shall be made or instituted in the magistrate's court".

Held: (i) the matter did not arise out of the Ordinance and the Supreme Court therefore had jurisdiction to hear it;

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(ii) the plaintiffs' user of the passageway amounted to a licence which was a necessary incident of a contract of letting and was irrevocable so long as the tenancy subsisted.

Judgment for the plaintiffs.

H. D. Hoyte for the defendant.

PERSAUD, J.: The plaintiffs, who are husband and wife, claim from the defendant the sum of \$500 as damages for breach of actual and/or implied covenant for the peaceful and quiet enjoyment of premises rented by them of him; and alternatively the sum of \$500 as damages for the defendant's wrongful interruption and interference with the plaintiffs in their use and occupation of certain premises occupied by the plaintiffs as the tenants of the defendant. The plaintiffs also claim an injunction restraining the defendant and/or his agents and servants from interrupting or interfering with their use and occupation of the said premises, and from excluding them from the said premises.

In January, 1959, the parties entered into a written agreement whereby the defendant sold to the plaintiffs a cake-shop with the goodwill and stock in trade as a going concern. The cake-shop was situate in a building owned by the defendant, the land being owned by one Peters. The selling price agreed upon was \$1,800 of which \$1,300 was paid upon the signing of the agreement; a further sum of \$100 was to be paid on the 31st January, 1959, and the balance of \$400 was spread over a six-month period earning interest at the rate of 5 per cent per annum. That sum has since been paid off. It was further agreed that the defendant would let to the plaintiffs the building in which the cake-shop was being carried on at the rate of \$25 per month. This included dwelling quarters behind the shop, and a shed to the west of the building and attached to it, which was to be used by the plaintiffs as a kitchen. There were an eastern and a western passageway on either side of the building leading to the back of the premises where the bath and toilet were situated. The plaintiffs were entitled to the use of these facilities, and their way of approach was through a western door from the dwelling place along the western passageway. There was a back door to the kitchen which opened on to the western passageway, so that the plaintiffs were able to get to the kitchen from their living quarters without having to pass through the shop. The western door of the living quarters was the only exit into the yard other than through the shop itself by way of the shop's front door. A wall separated the plaintiffs' dwelling place on the south from another set of dwelling quarters on the north which was occupied by one Mrs. Ault when the plaintiffs took up occupation in January 1959. Mrs. Ault gave up her tenancy in June, 1961, after she had been served with a notice to quit by the defendant.

The plaintiffs allege that the defendant blocked up the western passageway with part of a fence and old building materials, and barred the kitchen door, thereby interfering with their peaceful and quiet enjoyment of the demised premises. The defendant contends that he was engaged in carrying out certain repairs to the premises which necessitated the barring of the kitchen door and the blocking of the western passageway, and that he had provided an alternative

route to the facilities at the back of the premises through the premises formerly occupied by Mrs. Ault; that the second named plaintiff was aware of the nature of work being executed, and had agreed to use the alternative route. The defendant erected a septic tank across the greater width of the western passageway. It is a fact that the defendant erected a passageway for the use of the plaintiffs by cutting a space running east to west between the defendant's premises and those occupied by Ault, presumably by shifting the separating wall. This was completed in June 1962. These proceedings were commenced in January 1962.

I find as a fact that the course of conduct of the defendant in this matter was directed towards getting the plaintiffs to vacate the premises. Having secured from the plaintiffs the sum of \$1,800 for the goodwill of the shop in 1959, and having put them in occupation of the shop and also of the living quarters for which he charged and received a rental of \$25 per month, he found himself on the horns of a dilemma when he received a notice from the public health authorities in May 1960 to demolish the shed which was included in the demised premises and which the plaintiffs used as a kitchen. His problem was to comply with the notice without at the same time exposing himself to damages at the suit of the plaintiffs. So on the 17th February, 1961, he served the plaintiffs with a notice to quit the premises by the 31st March, 1961, giving as his ground that the premises were required for urgent reasons, and threatening legal proceedings if the notice was not complied with. The plaintiffs did not comply with the notice. The defendant summoned them for possession of the premises, but withdrew the summons. On the 3rd July, 1961, the defendant issued a receipt for \$25 to the plaintiffs for the rent of the premises in respect of the same month. In that receipt he wrote the words "Balance ten dollars" both on its face and at the back. In answer to the allegation of the plaintiffs that he was seeking additional rent, he has explained the receipt by saying that the plaintiffs had owed him ten dollars from the previous month; but he has admitted that notwithstanding that, he had given them a full receipt in respect of the previous month's rental. This explanation I do not believe. I accept the second-named plaintiff's version of this incident, that is, that the defendant sought an additional \$10, but that she refused to pay this amount whereupon he wrote on the receipt as has been indicated. In August, 1961, an application was made by the second-named plaintiff to the rent assessor for the assessment of the rental of the premises. From the foregoing summary of the facts, it is apparent that the relationship between the plaintiffs and the defendant was not cordial.

It would appear from the permission to repair from the local authority (Ex. 'E') that an application for permission to carry out those repairs to the building itself had been made by the former owner, Mr. Peters, to the local authority. Permission was given on the 20th July, 1960, to carry out the work, which consisted of the demolishing of the existing landing and steps, of the addition of a gallery to the upper flat, and the erection of new steps and landing as is indicated in the plan Ex. 'K'. The second named plaintiff knew from the outset that the defendant intended to carry out certain repairs, but

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I am satisfied that the extent of these repairs was never discussed between the parties. I am also satisfied that it was not within the contemplation of the parties at the time the contract of tenancy was entered into that the plaintiffs would have been required to give up the possession of the premises so soon after. Had it been otherwise, I doubt whether the plaintiffs would have parted with \$1,800 for the goodwill of the business. The defendant has impressed me as being a callous individual who having received the full price he demanded for goodwill was no longer concerned with the convenience of the plaintiffs who were now his tenants, and their relationship having deteriorated, he made up his mind to make it as uncomfortable as possible for them that they would be forced to leave the premises. He barred the kitchen door so that the plaintiffs could not use it any longer, and he placed enough rubble in the western passageway as to make it entirely impassable. In addition, he erected a septic tank across the western passageway, intending no one to walk over the tank to get to the back of the yard. No fault can be found with his erecting the septic tank, even though I am not sure that he had the prior approval of the local authority, nor can he be criticised for not wanting persons to walk over the septic tank because of the damage that might have been caused thereby. But I find from the evidence that he did not offer the plaintiffs an alternative route to the back of the yard until July 1962, when he granted them permission to pass through the premises formerly occupied by the tenant Ault. This, it is observed, was some time after it was ordered that the interim injunction should continue until the determination of the case. The defendant has since constructed a passageway between the two apartments so that the plaintiffs may now use it to gain access to the back of the yard without having to go through the shop. This was some time after these proceedings were commenced.

On the 6th January, 1962, an interim injunction was granted restraining the defendant from interfering with the plaintiffs' use of the cake-shop, the living quarters, the store-room (the kitchen), and the western passageway. That interim injunction was on the 18th April, 1962, ordered to be continued until the final determination of this action. I have had the benefit of reading the judgment of FRASER, J., in which this order was made, and in which the question whether or not the Supreme Court has jurisdiction to grant an injunction having regard to the provisions of s. 26(1) of the Rent Restriction Ordinance, Cap. 186, was discussed (See 1962 L.R.B.G. 189).

When the matter came before me counsel for the defendant again raised the question of jurisdiction, and submitted that s. 26 (1) of the Rent Restriction Ordinance, Cap. 186, ousted the jurisdiction of this court in a matter of this nature dealing with the award of damages. He urged that FRASER, J., dealt only with the interlocutory order, and the judgment did not consider the question of damages. This matter has received consideration in a number of cases and has been the subject matter of written decisions including in the instant case when FRASER, J., dealt with the granting of the interlocutory injunction. FRASER, J., accepted the position that where there is a

claim for money whether as damages or otherwise arising as a consequence of the statutory provisions (referring to the provisions of the Rent Restriction Ordinance, Cap. 186) such claim is tenable only in the magistrate's court and the Supreme Court has no jurisdiction to entertain it. In *Evelyne v. Latchmansingh* (1961), 3 W.I.R. 107 (1961 L.R.B.G. 12), LUCKHOO, C.J., held that if it is necessary for the plaintiff to rely on any provision of the Rent Restriction Ordinance to establish his claim, the claim is one arising out of the Ordinance, and therefore should be made or instituted in a magistrate's court in accordance with s. 26 (1) of the Rent Restriction Ordinance. This is an action, as I have already indicated, for damages for breach of a covenant for the peaceful and quiet enjoyment of certain premises, and in the alternative for the wrongful interruption and interference of the plaintiffs' rights of occupation of those premises. In my view this matter does not arise out of the Ordinance and therefore this court would have jurisdiction to hear it. A general rule undoubtedly is that the jurisdiction of superior courts is not taken away except by express words or necessary implication (*Albon v. Pyke* (1842), M. & G. 421). "A general rule applicable to the construction of statutes is that there is not to be presumed without expressed words, an authority to deprive the Supreme Court of a jurisdiction it had previously exercised or to extend the privative jurisdiction of the Supreme Court to the inferior court." (*Dunbar v. Scottish County Investment Co.* (1920), S.C. 210, at p. 217) (CRAIES ON STATUTE LAW, 5th Edn., pp. 115-117).

It has been agreed upon all sides—and this is the law—that upon the letting of a house an implied undertaking by the lessor for quiet enjoyment is to be implied from the mere relationship of landlord and tenant (*Ferreira and Fernandes v. Mansfield*, 1947 L.R.B.G. 73). As is stated in (FOA'S GENERAL LAW OF LANDLORD AND TENANT 7th Edn.) at p. 292.

"The question whether the quiet enjoyment of the premises demised has been interrupted or not is in every case one of fact; and the covenant is broken although neither the title to the land nor the possession of the land may be otherwise affected, where the ordinary and lawful enjoyment is substantially interfered with by the acts of the lessor or of those lawfully claiming under him."

In *Owen v. Gadd*, [1956] 2 All E.R. 28, the lessors let to the lessee a lock-up shop for a term of ten years. The lessee covenanted to use the premises for the purpose of retailing baby carriages, radio sets, etc. There was a covenant for the peaceful and quiet enjoyment of the premises. Soon after the lease was entered into, the lessors, without warning the lessee, erected scaffolding to carry out repairs which were urgently required. In an action for damages it was held that there was a breach of quiet enjoyment. I refer to this case to indicate that if there is a breach of quiet enjoyment by the landlord, the urgent necessity of the repairs would be no answer in an action in tort as this is. I have not overlooked the fact that in the case before me Mrs. Saul has admitted that she was aware that repairs were to be carried out to the building, but this fact, to my mind, makes no difference to the principle enunciated in *Owen v. Gadd* (*supra*)

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Counsel for the defendant has submitted that the use of the western passageway was a bare licence, and as such was revocable at the will of the licensor. But was this the true nature of the user (to use a neutral word)? The door of the plaintiffs' living quarters opened out on the western passageway, as did the door of the kitchen. The bath and toilet facilities intended for the use of the plaintiffs were located at the back of the yard, and could, at the commencement of the tenancy, only have been reached by means of the western passageway. With these facts in view, it is impossible to come to any conclusion but that the user amounts to a licence which is a necessary incident of the contract of letting, and is irrevocable so long as the tenancy subsists. (See *Quail v. Pollard*, 1948 L.R.B.G. 174). And this tenancy subsists, or at least it subsisted during the time the defendant blocked the passageway. The defendant's blocking up of the passageway, and the barring of the kitchen door is in my judgment more than a mere interference with the comfort of the plaintiffs; it amounted to physical interference with the enjoyment of the demised premises. (*Browne v. Flower*, [1911] 1 Ch. 219, at p. 228). See also *Manchester Sheffield & Lincolnshire Rly. v. Anderson*, [1898] 2 Ch. 394. at p. 401.

To return to the facts briefly, I hold the view that the defendant having failed to get the plaintiffs to vacate the premises, he resorted to acts that left a lot to be desired—acts aimed at making the life of the tenants miserable, and to discommode them. I find that the defendant was malicious in encumbering the passageway, and he did not seem to appreciate the full import of the injunction granted against him, as he continued to block up both the kitchen door and the passageway even after the injunction was granted. I can find no excuse for such behaviour. In my view this was a deliberate and persistent attempt by a landlord to drive the tenant out of possession; he showed a total disregard for the rights of the tenant.

I find for the plaintiffs in this action and award damages in the sum of \$200 with costs.

There is no point in affirming the order for the interlocutory injunction granted by FRASER, J., in so far as the western passageway is concerned as the plaintiffs now enjoy an alternative passageway. The remainder of that order should also go, as the plaintiffs are protected adequately by the Rent Restriction Ordinance in respect of the shop and the dwelling place.

Judgment for the plaintiffs.

Solicitors: *O. M. Valz* (for the plaintiffs); *M. E. Clarke* (for the defendant).

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[British Caribbean Court of Appeal (Jackson, P., Luckhoo and Date, JJ.A.)
May 17, 20, 21, 22, 24, 27, June 19, 1963.]

Criminal law—Rape—Whether prosecution must provide corroborative evidence negating defence of duress—Lies told by accused can be corroboration—Burden of proof.

The appellant was convicted of the offence of rape. S., who was jointly tried on the same charge, was acquitted on a defence of mistaken identity. The case for the prosecution was that by pre-arrangement with the appellant a gunman affected to force the appellant into having sexual intercourse with a girl, and that photographs of the act were taken by the gunman for the benefit of the appellant. The defence was duress. The accused however lied about the time and place of the appearance of the gunman. In this regard the trial judge directed the jury that if they felt that the lie arose out of a sense of guilt, it was for them to say whether it amounted to corroboration of the girl's evidence. On the question of duress, the jury were directed that if they found that the appellant acted under a genuine threat then he "would be merely an innocent agent and no offence would have been committed by him." On appeal it was argued for the appellant that the prosecution should have led corroborative evidence to show that the defence of duress was not established; that the trial judge misdirected the jury on the question as to whether the lie told by the appellant could be corroboration: and that the jury should have been directed that the prosecution must lead such evidence as would satisfy them that the appellant did not act under duress.

Held: (i) the corroboration which the prosecution is required to provide must relate not to a matter of defence but, on the contrary, must go to confirm the story of the prosecutrix in showing that a crime had been committed by the accused;

(ii) the direction relating to the lie told by the appellant was not erroneous as the judge merely explained to the jury in what circumstances a lie may be regarded as corroboration and left it entirely to them to decide whether the particular lie could be so regarded;

(iii) there can be no doubt that duress is a defence and that when there is sufficient evidence, as in this case, the burden is on the prosecution to satisfy the jury that the act of the appellant was a voluntary one, and that the jury must be satisfied beyond reasonable doubt;

(iv) it is, however, a misconception of the principle to state that the prosecution must lead such evidence as would satisfy the jury that the appellant did not act under duress. It may not be possible for the prosecution to lead such evidence in some circumstances but yet the jury may feel sure on the evidence as adduced that duress is negated;

(v) the directions on the question of duress were unambiguous, the proper questions were left to the jury and they satisfied the requirements of the law.

Appeal dismissed.

J. O. F. Haynes, Q.C., with *L. F. S. Burnham, Q.C.*, and *R. H. McKay* for the appellant.

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

JACKSON, P.: delivered the judgment of the court: The appellant and one Ajit Sadoo were jointly tried at the Demerara Assizes on an indictment accusing them of having carnal knowledge of Barbara Ann D'Aguiar without her consent. Sadoo, whose defence was

mistaken identity, was acquitted. The appellant was on 21st December, 1962, convicted and sentenced to five years' imprisonment.

On 2nd August, 1962, the appellant, who was a friend of the D'Aguiar family, left Georgetown, the capital of British Guiana, in his car with Barbara, aged 20 years, at about 3.35 p.m., for the purpose of taking her to her home at Enmore, East Coast Demerara, some 14 miles east of Georgetown. About five miles on the way he got out of the car at Plaisance telling Barbara that he was going to buy cigarettes; he went into a nearby shop. While he was away a man who appeared to have been waiting not far off went to the car and spoke to Barbara. On appellant's return this man asked for a "lift" to the "drive-in" cinema on the route. When the cinema was reached the man said he would go a little further. Appellant continued but when the car got to a bend in the road where another road intersected it, the man ordered appellant at the point of a revolver to turn the car around and drive back towards Georgetown; appellant did so; on reaching Georgetown he directed him to drive to the Air Base at Atkinson Field some 25 miles south of Georgetown; appellant obeyed. The car was driven by appellant to a lonely spot and parked on a slant which turned out to be suited for the purpose effected. Here, Barbara was ordered by the gunman to get into the back of the car and to take off her clothes; the appellant was also told to go to the back seat, and to have sexual intercourse with her. This he did. The most disgusting poses were ordered and still more disgraceful exercises performed, meanwhile the gunman with the aid of a photographic camera took pictures. The camera used was that of the appellant; it was first seen by Barbara at the Base in the hand of the gunman.

The functions having been concluded, at about 6.30–6.45 p.m. appellant drove the car to Georgetown and in to Kitty, and from there on to Enmore. The gunman at his request was put down on the way. On arrival at her home at about 9 to 9.30 p.m. Barbara recounted the events to her father; her story was confirmed by the appellant who, when reminded that he had passed several police stations to and from the Base and had not even attempted to make any report, said he was afraid of the gunman. Barbara, her father and appellant thereafter left in appellant's car and made a report to the police. The police that night found the camera in appellant's car. Appellant had previously stated to Barbara's father that the roll of film had been thrown away at Atkinson by the gunman on the way back from there. Subsequent search at Atkinson for the films was reported to be unsuccessful. On Monday, 6th August, the appellant's car, which was detained at the police station at Vigilance, was again searched and Inspector Adams found a tin containing 21 cigarettes and the roll of film alleged to have been thrown away, beneath and at the extreme end of the driver's seat. The photographic prints of the film show some of the exercises which took place in the car.

The main points argued by counsel for the appellant were embraced by the following submissions:—

- I (a) The learned trial judge did not make it clear to the jury that as the only issue in the matter was whether or not

the appellant had acted under compulsion of fear of death, corroboration must be directed to that issue;

- (b) that he indicated to the jury as possible corroboration evidence which was not capable in law of being corroboration, in that he, on the question as to whether or not a lie could be corroboration, misdirected the jury when he told them that if they felt that the appellant lied in his statement in the dock, that could be corroboration. Alternatively, he did not give them sufficient guidance on the principle to be applied in determining whether a lie was or was not corroboration.
- II (a) The burden of disproving that appellant had had intercourse with the virtual complainant while acting under fear of death was on the prosecution, and the jury should have been directed that the prosecution must lead such evidence as would satisfy them that appellant did not act under duress. This was not done and the omission was a misdirection in law which would vitiate the conviction unless this court feels on a proper direction any reasonable jury would have arrived at the same verdict.
- (b) There should have been clear directions on the nature of this defence and in particular there should have been more relation of the evidence to the law.
- III The effect of the summing-up was to emphasise the case for the prosecution and to leave the jury with inadequate assistance on evidence and arguments favourable to the defence particularly in respect of the evidence concerning or relating to the searching of the car of the accused, the finding of the roll of film therein, the behaviour of the parties at the Kitty Gasolene Station and the question whether or not the gunman accompanied the parties to Atkinson.

Attention is now directed to the submission on corroboration. In the case of *R. v. Clynes* (1960), 44 Cr. App. R, 158, C.A., STREATFIELD, J., in delivering the judgment of the court said at p. 161—

“It is quite true that in this court it has been laid down that a judge is not obliged to draw the jury’s attention to specific items of evidence which may or may not be corroboration, but it is, in our view, at least necessary, in order to make the warning intelligible, to tell the jury what is meant by corroboration. No particular language is necessary to describe it, but it is at least necessary to explain to the jury that what is required in some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of the offence.”

This was not contested by appellant’s counsel but he seemed to be under the impression that the prosecution must in this case lead corroborative evidence to show that the defence of duress was not established. We do not understand that to be the law nor is this

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court constrained by authority so to hold. Counsel for respondent justifiably submitted that there is no authority for saying corroboration must relate to a matter of defence but on the contrary that in all these cases the corroboration must go to confirm the story of the prosecutrix in that it would tend to show that a crime has been committed by the accused. The judge correctly in the course of his long and careful summing-up told the jury:

“As far as corroboration is concerned, therefore, what is required is evidence, firstly, which strengthens the evidence of the prosecutrix; secondly, which comes from an independent source; and thirdly, which implicates the accused in the commission of the offence.”

He had earlier directed the jury on the several elements which constitute the offence and had warned them of the danger of convicting the appellant on the uncorroborated evidence of Barbara D’Aguir. It was, however, clear from the evidence at the end of the case that there could be no doubt as to the commission by the appellant of the several acts constituting the offence and without her consent. The only other question left to be resolved was whether the acts were performed in the exercise of his free will.

As respects the other sub-head the direction was as follows:

“It sometimes happens that a lie can amount to corroboration of the girl’s evidence. The evidence as far as the number 1 accused is concerned is that he told the police that the gunman joined the car at Plaisance; from the dock he now says that the gunman appeared at the Base after the girl had agreed to go to the Base with him in the car. Now it is for you to say whether that is a lie on the part of number 1 accused person, it is for you to say whether that lie arises out of a sense of guilt. If you feel it does then it is for you to say whether that lie amounts to corroboration of the girl’s evidence as I have already enunciated to you.

“Counsel for number 1 accused suggested to you in the course of his address, that number 1 accused and the girl did lie when they made the report to the police and they concocted the lies for the consumption of the girl’s father in order to put the girl’s father off from believing that she had gone to the Base with Hilary (appellant) for a drive.

“A lie might or might not amount to corroboration according to the circumstances. A lie, for instance, arising out of pure panic would not be corroboration whereas a lie arising from a man’s sense of guilt may very well be.”

Appellant’s complaint is that a lie in that setting with regard to the time and place of the appearance of the gunman cannot amount to corroboration. All that the judge has done is to explain to the jury in what circumstances a lie may be regarded as corroboration and when it may not. He left it entirely to them to decide whether it was. In any event the main elements of the offence did not lack

support and the only real question was whether the acts of the appellant were performed under duress. We are satisfied that, even if it be assumed that the judge did err as has been suggested, a reasonable jury would have inevitably reached a conclusion of guilt if they felt sure that there was no duress.

There can be no doubt that “duress” is a defence and that when there is sufficient evidence, as in this case, the burden is on the prosecution to satisfy the jury that the act of the appellant was a voluntary one and that the jury must be satisfied beyond reasonable doubt. Indeed the defence was raised. We think however it is a misconception of the principle to state that the “prosecution must lead such evidence as would satisfy them (jury) ‘that appellant did not act under duress.’” It may not be possible for the prosecution to lead such evidence in some circumstances but yet the jury may feel sure on the evidence as adduced that duress is negated. In the view of this court there is evidence in the case on which the minds of the jury may be agitated and from which a conclusion one way or the other may be drawn; it is for the jury upon being attracted to the salient features to determine whether the will of the appellant was overborne by the gunman. It was contended for the appellant that the burden of disproving duress is on the prosecution and that accordingly directions to the jury on that issue should be given as are necessitated by defences of automatism, self-defence, and accident. In this latter connexion the observations of Viscount KILMUIR, B.C., Lord DENNING and Lord MORRIS OF BORTH-Y-GEST in the case of *Bratty v. Attorney General of Northern Ireland*, [1961] 3 W.L.R. 965, are instructive. Viscount KILMUIR, B.C., at p. 976, in his speech, after considering whether the proper direction to a jury in a case of automatism should be—

- (a) “that the jury will acquit if they are satisfied on the balance of probabilities that the accused acted in a state of automatism; or
- (b) that they should acquit if they are left in reasonable doubt on this point,”

said at p. 978:

“My conclusion is, therefore, that once the defence have surmounted the initial hurdle to which I have referred and have satisfied the judge that there is evidence fit for the jury’s consideration, the proper direction is that, if that evidence leaves them in a real state of doubt, the jury should acquit.”

Lord DENNING at p. 983 said:

“As the case proceeds, the evidence may weigh first to one side and then to the other and so the burden may appear to shift to and fro. But at the end of the day the legal burden comes into play and requires that the jury should be satisfied beyond reasonable doubt that the act was a voluntary act.”

Lord MORRIS OF BORTH-Y-GEST at p. 984 said:

“In the conceivably possible case that I have postulated (of a violent act committed by a sleep-walker) it would not necessarily be the duty of the prosecution in leading their evidence as to the commission of the act specifically to direct such evidence to negating the possibility of the act having been committed while sleep-walking. If, however, during the trial the suggested explanation of the act was advanced and if such explanation was so supported that it had sufficient substance to merit consideration by the jury, then the onus which is upon the prosecution would not be discharged unless the jury, having considered the explanation, were sure that guilt in regard to the particular crime charged was established so that they were left in no reasonable doubt. The position would be analogous to that which arises where a defence of self-defence is raised.”

In view of the elaborate argument that the direction given was not sufficiently clear, reference will be made to relevant passages in the summing-up which should materially assist in determining whether the summing-up in content and quality satisfies the approved standard in such cases. The summing-up extends from p. 306 to p. 478 of the record. At p. 313, in referring to the principles of law involved, the judge tells the jury “the first of these principles is perhaps the most important, and that is the onus is cast upon the Crown to establish the guilt of the accused persons beyond reasonable doubt;” he proceeds to explain how they must deal with each accused separately and apply the evidence.

At pp. 314—316 he deals with the presumption of innocence and explains what he means by proof beyond reasonable doubt. He continues “the onus is never cast on an accused person to establish his innocence. The burden of proving the guilt of an accused person rests on the Crown throughout the trial and it never shifts, it always remains with the Crown.”

At p. 323 he puts the case for the prosecution that there was a pre-arranged plot between the gunman and the appellant and that the hold-up was a sham and not a genuine hold-up; he explains that the case for the appellant was that he acted under duress, that he was compelled at gunpoint to have sexual intercourse with the girl without her consent. At p. 345 the judge directs:

“If you find that there was no pre-arranged plan between the accused persons and it was a case of genuine hold-up and the gunman was there with his revolver threatening the number 1 accused and the girl at gunpoint to have sexual intercourse with each other for his delight or any other reason, and they proceeded to do so, then the No. 1 accused (appellant) would be merely an innocent agent” and no offence would have been committed by him; and in those circumstances you would be bound to acquit him.”

At p. 452 he continues:

“So gentlemen if you accept his defence you must acquit him; if his defence leaves you in a state of reasonable doubt you must acquit him. If you feel that his defence is a tissue of lies it does not mean that you must convict him. All it means is that you will be thrown back on to the consideration of the whole of the evidence in the case, and you will consider the evidence led by the prosecution and the evidence led by the defence, then you will make up your minds whether the Crown has discharged the burden of proof placed upon it in establishing the number 1 accused’s (appellant’s) guilt beyond reasonable doubt.”

At pp. 457—458 the judge again deals with burden of proof; at p. 477 he ends on this note:

“Gentlemen, counsel for the Crown also asked me to direct you that if you are in a state of reasonable doubt as to the defence of number 1 accused (appellant), whether he was under duress or not, it is your duty to give the benefit of the doubt to the number 1 accused (appellant) and acquit him. I have already pointed that out, I must have said that at least three times to you.”

The summing-up must be viewed as a whole; it was a most painstaking one; the directions on the question of duress were unambiguous, the proper questions were left to the jury and they satisfied the requirements of the law. The arguments on this issue presented on behalf of the appellant by two eminent counsel are much appreciated but they are in the circumstances of this case unacceptable.

The evidence of the witness Adams, an inspector of police, about his search of the appellant’s car, was criticised and it was submitted on behalf of the appellant that the judge did not give adequate assistance to the jury to enable them properly to assess the quality of that evidence. Appellant’s counsel informed us that both he and counsel for the respondent had addressed the jury on that aspect, and urged that the jury might have had doubt about the evidence of the inspector if they had been properly directed.

On 3rd August, shortly after 4.30 a.m., the inspector on “searching” the car with the aid of a torch found the camera in the back seat. He stated that on a search of the same car on 6th August he found the roll of film and some cigarettes. The second search was not carried out in the presence of the appellant. Under cross-examination Adams said, referring to the “search” of 3rd August:

“It is not true that I searched the car at that time. Yesterday when I said at the start that I searched the car and then immediately changed to ‘I looked into the car’ I was thinking of the 6th August when I searched the car. It is not true I searched the car for films and when I did not find any I then searched the No. 1 accused.....I do agree that the words ‘I again searched the car’ mean that there

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had been a previous search. When I used the word 'search' I mean an examination of all parts of the car where things could be hidden. The word 'searched' should not have appeared. It should read 'I again went'."

The appellant in his statement from the dock had said in respect of the search on the 3rd August, "Inspector Adams with a bright torchlight removed the front and back seats of the car and pulled down the sun visors and also examined the trunk of the car."

After relating to the jury the whole narrative as given in evidence, the judge said:

"The suggestion is that the police planted this roll of film in the car and he never considered checking the car at that stage as a routine measure.

You have to ask yourselves: how the police could get hold of this particular roll of film depicting what had taken place at the Base and plant it in the car?

This witness was forced to admit that in his statement to the police he used the words 'again I searched Mr. Gomes' car which was still at Vigilance compound and I found under the driver's seat a roll of film secreted in the extreme right side of the car', which would suggest that there had been a previous search, but he maintained that there was no previous search on the 3rd August, 1962, he merely looked into the car. He says that on the morning of the 3rd August after he found the camera he asked the number 1 accused if he had the spent film. Number 1 accused had already told him that the film had been thrown away.

You will remember that counsel for the defence urged you to say that this car had been searched on more than one occasion and that it was searched when Mr. D'Aguiar and his daughter (Barbara) came back from Sparendam, early that morning. Mr. D'Aguiar said that the car was searched for the camera and they found it. It is a matter for you, gentlemen, but Mr. D'Aguiar's evidence is that he remained in the jeep and if you believe that, you have to ask yourselves whether he could properly say that the car was searched, or whether he is merely using the word in its general sense, meaning that the policemen did go into the car and had a look at it but there was no question of a thorough search being made."

Counsel had himself addressed the jury on the subject of this search; the trial judge pointed out the conflict or inconsistencies which had been or could be attributed to the testimony of Inspector Adams, called attention to the contrary version of the appellant in his statement from the dock, and adequately directed the jury. In the opinion of this court the foundation for the criticism by counsel is certainly not conspicuous and the complaint far from being substantiated.

Other points raised were implicit in those specifically dealt with incidental thereto or which flowed from them. These were all considered and found to be without merit.

In view of the conclusions already indicated it follows that this appeal fails and must be dismissed. The conviction and the sentence are affirmed.

Appeal dismissed.

DA SILVA v. BRITISH GUIANA CREDIT CORPORATION

[British Caribbean Court of Appeal (Jackson, P., Luckhoo and Date, JJ.A.)
June 13, 14, 17, 18, 19, 20, 21, July 19, 1963.]

Contract—Offer of appointment to appellant with free partly-furnished house—Acceptance with suggestion of allowance in lieu of house—Whether counter offer—Appellant a serving public officer—Whether possible non-release relevant to claim for breach of contract—Claim for damages for injury to appellant's reputation arising from breach of contract—Whether claim tenable.

Corporation—Execution of agreement—Statutory requirement for seal or signature of person specially or generally authorised by resolution to sign—Validity of offer of appointment made by secretary with authority of corporation—British Guiana Credit, Corporation Ordinance, 1954, ss. 7 and 13.

Corporation—Appointment of general manager—Statutory requirement that salary not to be fixed without prior approval of Governor-in-Council—Whether such approval of the essence of an action by appointee for breach of contract—Burden of proof as to whether such approval was given—British Guiana Credit Corporation Ordinance, 1954, s. 6 (1) and (2)—Order 17, r. 14, of R.S.C. 1955.

The appellant 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 appellant was chosen for appointment and it was decided that he be notified accordingly. The secretary to the corporation in consequence wrote to the appellant 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 appellant replied accepting the appointment and enclosing a draft service agreement, which he had prepared at the request and for the assistance of the secretary. The draft included a provision for the payment of a house allowance, whereas the advertisement referred to a condition for the provision of a free, partly furnished house. The letter of acceptance was read to the board which, however, proceeded to appoint another person to the post. The appellant thereupon sued for a declaration that he was the general manager, alternatively for damages for breach of contract including damages for injury to his reputation arising from the breach and resulting in difficulties in securing alternative employment.

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 required to be executed by the corporation.....shall be deemed to be duly executed and signed by a person or persons specially or generally authorised by resolution of the corporation so to sign”.

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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 sub-section without the prior approval of the Governor-in-Council”. In respect of the previous holder of the post of general manager the salary duly fixed was \$10,560 and the approved gratuity \$720 per annum making a total of \$11,280 per annum. The appointment offered to the appellant was at a salary of \$11,280 per annum. The appellant testified to the effect that he did not know whether this salary had been approved by the Governor-in-Council. The evidence however included a letter from the Financial Secretary, who was a member of the Governor-in-Council and the channel of communication between that body and the corporation, in which he referred to the filling of the post but did not challenge the salary fixed; and there was in fact no positive evidence that the approval of the Governor-in-Council had not been obtained.

Order 17, r. 14, provides that “any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be, and subject thereto, an averment of the performance necessary for the case of the plaintiff or the defendant shall be implied in his pleading”.

FRASER, J., gave judgment for the corporation holding that the letter conveying the offer of appointment was not executed by the corporation as required by s. 7 or s. 13, and that there was a failure to obtain the prior approval of the Governor-in-Council for the salary fixed. (See 1962 L.R.B.G 114). On appeal,

Held: (i) the appellant’s letter did not contain a counter offer but was in effect an unqualified acceptance;

(ii) the secretary’s letter conveying the offer of appointment did not fall within the ambit of s. 7 or s. 13. If it did, it was in fact written with the authority of the board and the requirements of the statute were satisfied;

(iii) the question of approval of the salary fixed was not of the essence of the cause of action and did not have to be specifically pleaded by the appellant;

(iv) the burden was on the respondent to establish that approval was not given and this the respondent failed to prove;

(v) the respondent had deliberately kept the appellant at bay despite his efforts to fulfil his part of the agreement and it was therefore not open to the respondent to submit an argument that the appellant was not in a position to take up his duties;

(vi) in this class of case claims based on injury to reputation causing diminution of a claimant’s chances to obtain new employment never as a rule sound in damages and the appellant’s claim in this respect could not be allowed;

(vii) the principal consideration relating to the measure of damages is what is a reasonable period within which the appellant would secure employment of a status not too distantly removed from the one of which he was deprived or, in short, when a man in his position could find reasonable employment;

(viii) damages would be awarded in the sum of \$30,460.

Appeal allowed.

[Editorial Note: An appeal by the respondent to the Privy Council was dismissed. See (1965), 7 W.I.R. 530, P.C.]

L. A. Luckhoo, Q.C., with John Carter, Q.C., E. V. Luckhoo and D. E. Hoyte for the appellant.

Dr. F. H. W. Ramsahoye with C. A. F. Hughes for the respondent.

JACKSON, P.: This is an appeal from the decision of a judge of the Supreme Court of British Guiana who dismissed an action by the appellant in which he asked inter alia for a declaration that he is the general manager of the respondent corporation, and in the alternative damages in the sum of \$100,000 for breach of contract. (See 1962 L.R.B.G. 114, and (1962), 4 W.I.R. 223).

The grounds of appeal may be summarised thus:

That the learned trial judge—

(a) erred in finding that there was a lack of mutuality between the parties on the 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;

(b) erred in finding that the appointment was *ultra vires* the defendant corporation based on his conclusion that there was no doubt that the Governor-in-Council never approved the salary of \$11,280 which the defendant corporation assigned to the post of general manager in the advertisement of 6th August, 1960;

(c) on the admission on the pleadings and on the evidence led was bound in law to find that there was a legally enforceable contract between the plaintiff and the defendant corporation and that the corporation had been in breach thereof;

(d) erred in finding that plaintiff was in part responsible for the defendant corporation's omissions and thereby ordered that he should pay one-half of the defendant corporation's costs.

It was urged by counsel for the appellant that s. 7 of the British Guiana Credit Corporation Ordinance, 1954, did not make it obligatory for a seal to be affixed on a document but that the section was only directory, and further that the corporation was a trading one and as such was exempted from putting a seal on contracts and other documents. He referred to s. 14 which sets out the general functions and orders of the corporation and to s. 15 which deals with the general powers of the corporation to transact business.

In view of the conclusion at which I have arrived on this latter issue it is unnecessary for me to discuss the arguments advanced for and against the contention that a true interpretation of ss. 14 and 15 would place the respondent corporation under the head of trading corporations and so relieve the corporation of the necessity to use the seal.

Section 7 of the Ordinance is 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

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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 amended is as follows:—

“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.”

The judge having considered s. 7, which deals with the affixing of the seal of the Corporation to instruments, and s. 13, said (1962 L.R.B.G. at p. 122):

“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 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.”

The reference to the two letters is irrelevant for those were letters to the manager of Barclays Bank authorising the bank to transfer some money from the corporation’s account to the current account of Mr. W. G. Carmichael who was then general manager of the corporation.

The first case, *A. R. Wright and Son Ltd. v. Romford Corporation*, [1956] 3 All E. R. 785, referred to by the learned judge is equally inappropriate; there was in that case an agreement not under seal which was executed not according to the provisions of the statute but in accordance with the corporation’s standing orders. The language of Lord GODDARD at p. 788 quoted by the trial judge in support of his contention does not help here:

“.....but s. 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.”

The particular power under standing orders was not authorised by statute. The second case *Cope v. Thames Haven Dock and Railway Company* (1849), 3 Exch. 841, is in no better category.

In the case now under review the statute specifically provides that a document shall be deemed to be executed by the corporation if signed by a person or persons specially or generally authorised by resolution so to sign.

The confirmed minutes of the meeting of 22nd September, 1960, record:—

“(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 to be notified that the position has been filled.*”

What better authority is required for the purpose of communicating to Mr. Da Silva the information that he was selected? Further evidence is that of Mr. Kransburg, the secretary, who stated:—

“I was also an applicant for the post of general manager. On 22.9.60 a meeting was held in connection with the appointment. The minutes Exhibit “D” are correct. When I returned to the meeting the chairman informed me that Mr. Da Silva had been selected for the appointment. This was done in the presence of the whole board. In the presence of the whole board I was instructed to inform Mr. Da Silva accordingly and all applicants that the appointment had been filled. No member of the board objected to these instructions. I carried out these instructions. I see Exhibit “E” dated 26.9.60. I signed the letter. I wrote it. I showed it to the chairman before I despatched it.”

It is my opinion that the corporation resolutely determined that appellant had been selected for the appointment, and that it was with the unanimous approval of the members of the corporation at that meeting that the secretary was charged with the duty of conveying the news to the appellant; this he did. This is in compliance with the statute. I have dealt with this on the assumption that the letter had to be signed in accordance with the terms of s. 13 to be effective. On the other hand I am not convinced that the statute could be inter-

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preted to mean that a letter by the secretary under proper direction at a meeting of the corporation conveying information of a result of a ballot or intimation that someone was selected for appointment or any other such information, should be under seal or would require a resolution strictly formal. Such a letter would not in my view fall within the ambit of s. 7 or 13. If it did, then as stated above the requirements of the statute have been satisfied.

The information brought an acceptance by the appellant in his letter dated 3rd October, 1960. The text is:—

“64 Brickdam,
British Guiana,
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. DaSILVA.”

A draft agreement was attached; this agreement carried a schedule of terms.

Counsel for defendant corporation submitted that the appellant was selected on the terms and conditions as advertised and that the schedule contained terms which are at variance with the terms advertised. He urged that the letter having regard to the circumstances and the correspondence could only be regarded as a counter or a conditional offer; the acceptance was not unreserved.

The paragraphs attacked in the schedule of terms as derogating from the advertisement are three in number, paras. 1, 3, and 5; the corresponding ones in the advertisement are 6, and 5.

ADVERTISEMENT

- “5. The post carries a salary of B.W.I. \$11,280 (equivalent at the current rate of exchange to £2,350 sterling) *per annum*, a free, partly-furnished house and leave facilities in accordance with the Government’s General Orders and Regulations in force at the time (now five days’ leave for each completed month of resident service, accumulative to a maximum of six months, with leave passages to a maximum of B.W.I. \$2,500).....

6. The appointment is non-pensionable and will normally be for three years in the first instance, but the duration of the initial contract is subject to variation to meet individual circumstances. The Corporation has under consideration a contributory pension scheme for its employees.”

SCHEDULE

- ‘1. (1) The engagement of the person engaged is for a period of six years’ resident service comprising two tours of three years each commencing from the date of assumption of duty which term may be extended as provided for in clause 8.
- (2)
3. A free, partly-furnished house will be provided or an allowance in lieu.
5. (1) The corporation may at any time determine the engagement of the person engaged on giving him twelve months’ notice in writing or on paying him six months’ salary.
- (2) The person engaged may, at any time after the expiration of three months from the commencement of any residential service, determine his engagement on giving the corporation three months’ notice in writing or on paying to the corporation one month’s salary.
- (3) If the person engaged terminates his engagement otherwise than in accordance with this agreement he shall be liable to pay the corporation as liquidated damages three months’ salary.

Before the merits of the submission are considered reference will be made to the circumstances which prompted the appellant to submit a draft agreement. They are found in the evidence of the appellant (Da Silva) and the secretary of the corporation, Mr. Kranenburg. Counsel for respondent urged that only the documentary evidence should be considered and the oral testimony of the appellant and Mr. Kranenburg should be avoided. This attempt to exclude from consideration admissible evidence received at the trial and which is relevant must be rejected. Da Silva stated:

“About a week later (*i.e.*, after the 26th September, 1960,) while speaking to the secretary over the telephone, he again asked me how soon would I be going over. I was waiting on the Financial Secretary and suggested to him that in the meanwhile he should prepare the usual agreement of service. The secretary informed me that he did not have the agreement of service of the previous General Manager and asked me to get out one of the standard Crown Agents and Colonial Office forms of agreement for his use as a draft. I wrote the letter exhibit “F”. I got one of the Crown Agents and Colonial Office forms and I attempted to modify it and sent it across to the secretary for his

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use.....In my draft agreement I made certain additions which were clauses in the standard Crown Agents agreement of service which I used as a draft at the invitation of the secretary to help him. I have a copy of the Crown Agents form.”

Under cross-examination:

“I wrote the corporation a letter on 3.10.60. When I said that I would enter into agreement with the corporation on the draft I meant that I would have entered into the terms of my draft or alternatively, if the corporation had amended the draft to comply with the terms of the advertisement, I would have entered into such agreement as modified by the corporation.”

Kranenburg stated:

“When I gave Da Silva the letter Exhibit ‘E’ I asked him how soon he thought he could assume duty. Da Silva said around the middle of December when he was finished with the Budget. D’Andrade was in office at the same time. This conversation took place in D’Andrade’s office. I think I said that would be all right.

About one week later Da Silva telephone me. In the course of the conversation he said that he hoped that I would prepare the service agreement for his appointment early. My recollection is that I told him that I did not have a copy of the agreement signed by Carmichael but that I knew it was in the form used by the Crown Agents. I told him he could get a copy of the form from the Colonial Secretariat. I asked him to get a copy and put up a rough draft of the terms of his appointment for my consideration.”

Re-examination:

“I was appointed secretary on 11.12.56. In July, 1959, I signed a service agreement. It was a considerable time after the appointment. It had retrospective effect.”

The testimony of the appellant and the secretary of the corporation discloses the reason for the draft which accompanied the appellant’s letter of 3rd October, 1960, and that it was specially requested from him by the secretary for use as a guide. It is manifest that it cannot sensibly be considered as containing a counter offer or as a document purporting to impose conditions alien to those in the advertisement. Again the word “shall” which is used there with the first person expresses simple futurity, whereas if “will” had been employed instead that might have tended to express a resolute determination or a fixed intention. An examination of para. 1 of the schedule shows that it is not repugnant to para. 6 of the advertisement; for the latter states that the duration of the initial contract is subject to variation to meet individual circumstances. The complaint made against para. 3 of the schedule is that it refers to an allowance in lieu of a free, partly-furnished house, since there was

not mentioned an alternative in the advertisement. Paragraph 5 of the advertisement states that the post carries “a free partly furnished house and leave facilities in accordance with the Government’s General Orders and Regulations in force at the time.....”

General Order 209 states:—

“209. A house allowance is an allowance granted to an officer who is entitled, by virtue of the appointment he holds, to free quarters, but for whom quarters are not available.”

This objection is therefore untenable. It is not disputed that at that time the General Manager’s house was occupied by a tenant.

The last complaint is about para. 5 of the schedule which refers to determination of the engagement. It is not suggested that a termination of engagement clause is not required nor that such a term is not in the Crown Agents’ model.

I have taken pains to refer to the objections and to compare the terms in the advertisement with the terms in the schedule. The objections in my opinion cannot find support in a comparison of the two documents. In the light, however, of the evidence my conviction is that the letter did not contain a counter offer but is in effect an unqualified acceptance. Several cases were cited on the question of conditional acceptance of an offer and on a counter offer in a letter of acceptance by an offeree, but the facts in those cases are fundamentally dissimilar to those giving rise to this case.

Counsel for respondent corporation asked leave to submit that the proviso to s. 6 (1) of the Ordinance was not complied with by the corporation and therefore any contract entered into, if at all, between the corporation and the appellant would be *ultra vires*.

Appellant’s counsel submitted that the first time this question was raised was by the respondent’s counsel during his final address at the trial; that the respondent did not plead it and that should preclude any argument on that basis as there was no compliance with O. 17, r. 14, of the Rules of the Supreme Court, 1955. The leave sought was granted.

The respondent corporation in the defence pleaded that the plaintiff’s appointment was *ultra vires* the provisions of the British Guiana Credit Corporation Ordinance, 1954, and before us counsel endeavoured to sustain that plea on the basis of s. 6 (1) of the Ordinance which reads as follows:—

“6 (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:

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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 sub-section without the approval of the Governor-in-Council.”

This plea found favour in the court below and the trial judge expressed his acquiescence in these terms (1962 L.R.B.G. at p. 129):

“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.”

The approach to this question may be better appreciated if a chronological account of events pertaining thereto is shown.

The Financial Secretary in a letter under date 22nd May, 1957, to the general manager of the corporation said,

“With reference to your letter dated 4th April, 1957, in connection with increases in the salaries of the general manager, the secretary and the chief accountant, I have to inform you that the Governor-in-Council has approved the revised salaries as follows:—

- (a) General Manager—£2,200 *per annum* with effect from 29th January, 1957.
- (b) Secretary—.....”
- (c) Chief Accountant—.....”

In addition, from March, 1957, a gratuity of £37 10s. was paid to the general manager for every completed three months’ service, thus making the total annual emoluments (£2,200 + £150) £2,350, *i.e.*, \$11,280.

On 4th August, 1960, a letter was written by the Deputy Financial Secretary to the Chief Secretary, who was a member of the Governor-in-Council, asking him to cause to be published in newspapers in Jamaica, Trinidad and Barbados, advertisement for the post of General Manager of the Corporation. This advertisement had previously been drafted by the Financial Secretary, a member of the Governor-in-Council. On 6th August, 1960, an identical advertisement appeared in the local press for the post of general manager. The text of this advertisement was drafted by the Financial Secretary who was a member of the Executive Council.

Paragraph 5 of the advertisement stated that the post

“carries a salary of B.W.I. \$11,280 (equivalent at the current rate of exchange to £2,350 sterling) *per annum*, a free, partly-furnished house. Leave facilities in accordance with the Govern-

ment's General Orders and Regulations in force at the time (now five days' leave for each completed month of resident service, accumulative to a maximum of six months, with leave passages to a maximum of B.W.I. \$2,500). A motor car allowance of \$25 a month for official journeys within the limits of Georgetown and of 28 cents a mile for official journeys outside of Georgetown will be paid. An overseas candidate will be provided with not more than five free sea passages to British Guiana for himself and his wife and children (under 18 years) if any, and on satisfactory completion of service return passages to his country of recruitment."

Paragraph 6 stated:

"The appointment is non-pensionable and will normally be for three years in the first instance, but the duration of the initial contract is subject to variation to meet individual circumstances."

Paragraph 7 dealt with qualification:

"Candidates for the post must have experience in business administration, banking or public administration, preferably on the industrial side. They must be capable of appraising the effects of the corporation's policies on the economic feasibility and general loan worthiness of projects for which loan proposals are made."

On 24th August, 1960, the appellant as an applicant offered his services to the corporation in the capacity of general manager. As a duly constituted meeting of the corporation on 22nd September, 1960, the appellant's offer was approved and he was chosen for the appointment as general manager. It was decided that appellant should be notified and the Government be advised of the appointment. This was done. The unsuccessful candidates were also notified. It is interesting to note that there were 26 applicants; 23 were eliminated and three remained from whom the choice was made—Messrs. Da Silva, Persaud and Luck. Da Silva received 5 votes, Persaud 2 and Luck none.

Da Silva was later notified by the following letter bearing date 26th September, 1960, signed by the secretary—

"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 at 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."

The secretary delivered the letter in person. On 3rd October, 1960, appellant signified his acceptance of the appointment by letter of that date already set out above.

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By letter dated 12th October, 1960, from the Financial Secretary, the chairman was informed that the membership of the corporation had been re-constructed. The period of office of the previous members expired on 25th September, 1960; the members were eligible for re-appointment. Only three of the old members, the chairman, the Deputy Financial Secretary and Mr. Gobin Biragie were re-appointed and Messrs. Andrew H. James, Peter Anderson, Joseph Jardim, Ivan Remington, Oswald H. Fisher, Jacob Bowman, and Muntaz Ali were the new members. Mr. Andrew James was to be deputy chairman of the corporation.

The Financial Secretary wrote to the chairman of the corporation on 18th October, 1960, the following letter—

“With reference to the secretary’s letter of 26th September and our subsequent conversation 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.

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 wider field.

I should be grateful if you would put the matter to your board accordingly.”

Appellant’s letter of 3rd October was read at a meeting of the corporation on 27th October, 1960. It was the first meeting attended by the new members. At the same meeting the Financial Secretary’s letter of 18th October was read to the newly constituted body when it was unanimously decided to reconsider the matter at a later date. Mr. James asked and it was agreed that members be furnished with (a) an up to date statement of the corporation’s financial position; and (b) particulars of the staff including pay and conditions of service.

The information requested by Mr. James was supplied and recorded in the minutes of the meeting of 25th November, 1960 as follows:—

*“British Guiana Credit Corporation
Authorised Establishment*

<i>A. Head Office Staff</i>	<i>Salary Scale</i>
<i>General Manager</i>	<i>\$11,280 p.a. (fixed)</i>
.....
.....”

The delay in supplying the information was due to the illness of the secretary.

At a meeting on 11th November, 1960, Mr. Luck, who had received no votes at the previous ballot when the appellant was selected, was considered suitable. The minutes record:—

“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.”

By letter to the corporation under date 7th December, 1960, appellant’s solicitors wrote *inter alia*:—

“On the 3rd October, 1960, our client by letter of that date accepted the appointment. He intimated that he was seeking a release as early as possible from Government to take up the appointment which he had accepted.

On the basis of the offer which had been made by the corporation and following upon his acceptance our client treated his appointment as being truly made and effected and proceeded to make the necessary arrangements for his early take over as general manager of the corporation.....Since the letter of offer and the acceptance by our client for the post of general manager, our client has received no further communication or intimation from the corporation and it was not until late in November when he received a copy of the minutes of the meeting held on the 11th November, 1960, that for the first time he became aware of efforts to replace him by another person for the post of general manager,

It is our client’s claim that he is the duly appointed general manager of the British Guiana Credit Corporation. He is ready and willing to take over and assume the responsibilities of his post within a reasonably short time.....”

No acknowledgment or reply to this letter was ever made.

At a meeting of the corporation on 9th December, 1960, the chairman informed the members of the receipt and the contents of the letter from the solicitors; the meeting decided after discussion that the letter be sent to the Financial Secretary for his information.

At the same meeting members were informed by the chairman of the text of a statement “regarding the appointment of Mr. G. E. Luck as general manager of the corporation, which the Minister of Trade and Industry intended to release on 10th December, 1960, at his usual Saturday morning press conference.”

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On 11th December, 1960, there appeared in a newspaper, the Sunday Graphic, a picture of the Minister of Trade and Industry and Mr. Luck in a handshake, with comments indicating that the Minister was congratulating Mr. Luck on his new appointment. The writ in this action followed on 13th December, 1960. On 16th December, 1960, the secretary signed Mr. Luck's letter of appointment on the direction of the corporation.

I revert to the subject of the objection raised by appellant's counsel.

Paragraph 19 of the defence is as follows:—

- “(19) The defendants will contend that any purported selection of the plaintiff for appointment as general manager of the plaintiff's corporation was invalid and bad in law because:
- (a) the advertisements for appointments were inserted in the newspapers in August, 1960, without the prior approval of the Governor-in-Council;
 - (b) the secretary of the corporation was not legally entitled to write the letter of 26th September, 1960. to the plaintiff;
 - (c) no approval of the purported appointment of the plaintiff as a civil servant by the Governor-in-Council was ever obtained by the defendants; and
 - (d) the plaintiff's alleged appointment was *ultra vires* the provisions of the British Guiana Credit Corporation Ordinance, No. 13 of 1954.”

It is to be observed that it was not pleaded that no approval of the salary was given by the Governor-in-Council. The gravamen of the complaints related to other aspects (a), (b), (c) and summed up in (d).

Order 17, r. 14, of the Rules of the Supreme Court states:—

“Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be, and subject thereto, an averment of the performance necessary for the case of the plaintiff or the defendant shall be implied in his pleading.”

The note of the trial judge of the address by respondent's (defendant's) counsel is as follows—

“Contract *ultra vires*. Even if there was a concluded contract the contract was *ultra vires*.

Figure of \$11,280 was unauthorised merger of gratuity and salary or unauthorised figure.

Refers to s. 6 of Ordinance 13 of 1954. Advertisement shows not only payment of salary but also of pension.”

The judge found for the respondent on this issue and pronounced the contention for the appellant that on failure to comply with O. 17, r. 14, the performance of the condition precedent must be implied, to be without merit. He purported to fortify this view thus:

“There is a world of difference between a condition precedent to the existence of 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.”

He referred to the note to r. 14 of O. 19 in the ANNUM, PRACTICE (English R.S.C.).

I do understand that “an allegation which is of the essence of a cause of action is not a condition precedent within the meaning of the rule and must still be pleaded.” In this instance I am of opinion that even if there was want of approval of the sum of \$11,280 that would not be the essence of the cause of action; the corporation is empowered to make a contract without reference to the Governor in Council and does not need any approval for an appointment; it is only in respect of an excess in remuneration over \$4,800 that approval from the Governor in Council is needed. A sum exceeding \$4,800 had already been approved since 1957.

Moreover I do not understand counsel for respondent to say in the court below or before us that the appellant had failed to plead that prior approval had been obtained but on the contrary appeared to rest respondent’s case on this, that the evidence established that the approval had not been obtained; that there was no authority for merging the salary \$10,560 with the gratuity \$720. That was the burden of his contention and was supposedly grounded on the evidence he sought to elicit from the appellant and to submit through the defence witness at the trial. Respondent tacitly accepted that the onus was on the defence to prove absence of authority and essayed to do just that.

That was the course the trial took and that fact is evidenced by the following observations by the judge (1962 L.R.B.G, at pp. 127 and 129):

“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.....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.”

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I think it was right for respondent's counsel to be permitted by this court to address on the question as to whether the approval was not given by the Governor in Council especially as there was some evidence on that subject admitted in the court below without objection by appellant's counsel. I am, however, of opinion that in the circumstances as there was no averment by the appellant and in the absence of any allegation by the respondent that the approval was not obtained, the burden was on the respondent to establish that approval was not given. I regret that I do not share the certainty of the learned judge that it was proved that the Governor in Council never approved of the salary. The sum total of the appellant's evidence viewed from any angle was that he did not know whether a salary of \$11,280 was approved by the Governor in Council for the post of general manager; he knew that hitherto a salary of \$10,560 and a gratuity of \$720 had been approved; in his view the two sums were "merged" but that was all. This guess was no doubt based on the fact that the two sums aggregate \$11,280. The learned judge misunderstood the appellant's evidence to be that there was absence of approval by the Governor in Council, and found that fact to be supported by Jaisar Girdhar, the acting chief accountant of the corporation. A reference to Girdhar's evidence discloses that he said in examination-in-chief:

"I know there was an advertisement for a general manager. There was no communication from the Government on the question of salary after exhibit "O", *i.e.*, in May, 1957".

Under Cross-examination he said:—

"In June-July 1960, I was a grade A clerk until September, 1961. After that I was made accountant (acting). In 1960, the accountant was R. Yerrakadoo. In 1960, Mr. Yansen was chief accountant. They would be better acquainted with what happened in 1960 than I would.

In March, 1957, a gratuity of £37.10s. was being paid for every completed 3 months of service."

I would unhesitatingly say the evidence shows with irresistible clearness that the view of the learned judge in that respect is mistaken and his finding cannot be supported.

The question whether approval had been obtained or not is one purely of fact. The knowledge on that score was peculiarly with the corporation and the Governor in Council; the former, a party in the action, could easily have called the Financial Secretary, the chairman of the corporation or the chief accountant to depone positively that no approval was given; the corporation avoided this but elected to present one who was only a grade A clerk, a junior officer at the material time. He had perforce to confess he could not speak with any certainty or authority and to admit that the persons more qualified by knowledge on that score would have been the chief accountant or the accountant. This attitude of the defence is in character with the flexible integrity mirrored by the Corporation and may be others actively concerned with the shaping of its administration. Why was

the Financial Secretary not called? Could this be due to an unfortunate timidity? He was the Government's financial adviser. He was a member of the Governor in Council and used as the channel of communication or liaison officer between the Governor in Council and the corporation. He personally drew up the vacancy notice for advertisement with the aid of files at his disposal, perhaps secret ones for it is common and certain knowledge the Governor in Council's decisions are secret until revealed by words or action.

It is to be remarked that in 1957 the general manager wrote to the Financial Secretary about his salary and that of other officers; he received a reply stating that the Governor in Council approved certain sums; but in 1960 action moved from the Governor in Council through the Financial Secretary to the corporation and the result was reflected in the draft advertisement. The Financial Secretary sent the draft advertisement for the appreciation of the corporation. He was the person who inserted the salary to be paid, \$11,280 *per annum*; he stated in paragraph 4 of the advertisement. "The general manager is the chief executive officer of the corporation appointed under s. 6 of the Ordinance". He must have been acutely aware of the proviso. It was from his department a request with a copy of the vacancy notice was sent to the Chief Secretary, another member of the Governor-in-Council to advertise abroad. The Financial Secretary sent the copy of the advertisement with salary inserted to the corporation for acceptance; the corporation approved. In essence that was the way the prior approval of the Governor in Council was signified. It was the *fons et origo* of the whole affair. It was the same Financial Secretary who after receiving the letter of the corporation's secretary advising the Government of appellant's selection for appointment wrote to the chairman: "I am directed to inform you that the matter was considered by the Governor in Council. I am to ask the Board of the Corporation to re-examine the *recommendation* as the Government is anxious that the best person available be obtained for the post," and also stated that if the persons who had so far applied had not been suitably qualified the vacancy should be readvertised over a wider field. It is significant the re-advertisement was to be on the same terms including salary. Why had the word "recommendation" found a place in the Financial Secretary's letter? Was it by inadvertence or by design? The evidence is that intimation of the selection was sent and not a "recommendation". It was a necessary courtesy by the corporation to intimate and nothing else. At whose direction was this letter sent? The obvious conclusion is that it expressed the view of the Governor in Council.

Between the 22nd September, 1960, when the corporation at a meeting selected the appellant by a majority of votes as the most suitable candidate, and the 27th October the next meeting of the corporation several events had occurred. All the members of the corporation went out of office as stated earlier, three were re-appointed and seven new ones were appointed.

The Financial Secretary's letter of 12th October, 1960, was followed by another on 18th October, 1960, to which reference has already been made. The members were informed of both of these letters

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at the meeting of 27th October. At this meeting it was decided that a special meeting should be fixed for a reconsideration of the appointment in terms of the Financial Secretary's letter.

It is noteworthy that the post of general manager was not re-advertised nor were any new applications solicited. At a meeting of the 11th November it was unanimously agreed that Mr. Luck 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." The corporation has full power to appoint a general manager without any approval of the Governor in Council and one looks in vain in the Ordinance to find anything which says the Governor in Council must approve the selection.

The appellant was never at any stage told that his appointment was cancelled or that steps were being taken or had been taken to review the question of the appointment of a general manager. Added to this curious attitude by the corporation no reply was afforded to the letter of the appellant's solicitors. In these times, sparse though the occasions may be when moral standards seem to be honoured, one immutable principle one would expect to prevail in the dealings of a corporation of such connexions is the observance of strict ethical conduct by which only, in my view, confidence can be maintained. This principle the corporation has honoured in the breach.

The pleadings did not raise the question of approval of the salary by the Governor in Council as stated in the proviso to s. 6 (1). That seemed to be a closed chapter, in other words it was already settled and within the knowledge of the Financial Secretary, the mouthpiece of the Governor in Council for he was the author of the text of the advertisement which included the salary. The raising of the question at the hearing in the course of the address by counsel or in the late stages of the case seems only an afterthought.

Further, the evidence is clear that a salary of \$10,560, a sum in excess of \$4,800, had already been approved for the post of general manager; the statutory requirements had therefore been complied with; the salary is attached to the post and not to the officer. The respondent never sought to suggest that the approval had been revoked but the effect of the complaint was, that authority to call the \$720 salary was not approved by the Governor in Council. It seems idle to contend that that is the essence of a cause of action; this contention is more like a frantic search by an ill fated passenger in a dark and dismal night in stormy seas for a plank in a shipwreck. On an analysis of the established and admitted facts the conclusion that the Governor in Council did approve of the salary is inescapable.

On the question of damages it was submitted on behalf of the appellant that he must be placed in the same position as if the contract had been performed as far as money can do it; counsel amplified this by saying, that was equivalent to the amount appellant would have earned had the contract been observed, subject to a deduction in re-

spect of any amount accruing from any other employment which the appellant in minimising damages could reasonably have obtained.

The claim, he submitted, should be calculated on the basis of the normal period of first employment, 3 years, as stated in the advertisement, in respect of the following items:—

- (a) Salary for that period at \$11,280 *per annum*.
- (b) Free partly-furnished house estimated at the rental value proved—\$2,700 *per annum*.
- (c) Leave passages as advertised and in accordance with the General Orders—\$2,500.
- (d) Injury done to the appellant's reputation which had resulted and may result in pecuniary loss by difficulty in getting employment.

It is convenient first to deal with the last item. This claim is in the teeth of a principle which is inveterate and has been hallowed by authority. The principle was clearly enunciated in *Addis v. Gramophone Co.*, [1909] A.C. 488; 78 L.J.K.B. 1122.

In this class of case, breach of contract claims based on injury to reputation causing diminution of a claimant's chances to obtain new employment never as a rule sound in damages; there may be exceptional cases but the evidence has not disclosed anything that may be deemed exceptional to take this case out of the rule; the conduct of the respondent corporation might have left much to be desired but in a case of breach of contract damages are not awarded or aggravated for mere transgression of a moral code.

Respondent's counsel submitted that appellant was not in a position to take up his appointment about the middle of December as he had informed the secretary, because he was not released from service in the Government.

Appellant had written to the Financial Secretary on 16th October, 1960, following his letter of acceptance of the new post dated 3rd October, 1960, but had received no reply. On 8th December he wrote to the Secretary, Public Service Commission (through the Financial Secretary), adverting to his previous letter and also for permission to accept paid employment during his pre-retirement leave "as is usual". He received a reply to this letter on 12th January, 1961. The Financial Secretary wrote then saying that his application for leave was approved as from 16th January, 1961, and that the request for permission to retire at the age of 50 years was under consideration. This permission was later given as was reasonably and correctly anticipated. On 7th November, 1945, the then Colonial Secretary of British Guiana, Mr. W. L. Heape, wrote to the British Guiana Civil Service Association in these terms:—

- "3. The Secretary of State agrees that the provisions of s. 2 of the 1944 Ordinance, which amends s. 8 of the Principal Or-

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dinance of 1933, may be interpreted to provide for voluntary retirement at 50 with the approval of the Secretary of State. The view taken by this Government is that an application to retire at 50 should normally be granted and not refused except for strong reasons of public interest and the Secretary of State endorses that view.”

On 7th December, 1960, through his solicitors appellant wrote to the respondent corporation emphasising his willingness and readiness to enter upon his new duties within a reasonably short time; this was an opportunity for the respondent corporation, if in doubt as to its truth, to take him at his word and test the genuineness of the statement. There was no response, and the repudiation by the respondent corporation of its obligations became progressively apparent and insistent. Is it open to the respondent who deliberately kept the appellant at bay despite his efforts to fulfil his part of the agreement in the known circumstances to submit in argument that the appellant was not in a position to take up his duties? I think not; such a submission in my view is of specious acceptability.

The appellant in his evidence stated that he had endeavoured to obtain suitable employment in and out of the Colony and had failed. He enumerated some of his efforts. This evidence was not contested. It was urged for the respondent, though with not much warmth or seriousness, that the appellant could have even at that late stage withdrawn his application for leave to retire in order to mitigate the damages.

Indeed the appellant recognised his duty to mitigate damages and endeavoured to satisfy this requirement by seeking employment elsewhere. The die was already cast so far as his employment in the civil service was concerned for he had already taken the final step.

The principal ground requiring active attention is what is a reasonable period within which the appellant would secure employment of a status not too distantly removed from the one of which he was deprived or in short when a man in his position could find reasonable employment. From the date indicated by the appellant that he would have been ready to take up employment, which by mischance was the time Mr. Luck’s letter of appointment was signed (16th December, 1960), to the time decision in the case was delivered, 19th March, 1962, the efforts of the plaintiff to secure other employment had proved unrewarding even though some 15 months had expired. Avenues of like employment in the business world in these parts appear to be rare if one may judge from the failure of the appellant, a man undoubtedly well qualified for the purpose, who had occupied the high office of Deputy Financial Secretary in the Government of this colony. I think it would be a just appraisal to set the period for necessary compensation to two years with the following result:—

(a) Salary at \$11,280 per annum	\$22,560
(b) In lieu of partly-furnished quarters at \$2,700 per annum	—\$ 5,400
(c) The equivalent of leave passages	—\$ 2,500
Total	\$30,460

Counsel for respondent contended that whatever damages, if any, may be awarded should be reduced by the sum appellant received from his accumulated leave, a benefit which had been previously earned but had to be deferred on account of the exigencies of the service. I do not accept this contention. It does not commend itself to me any more than it would if the submission included the absorption of the sum the appellant received as gratuity after his 28 years' service.

For the reasons I have given I would allow the appeal, reverse the judgment and order appealed from, and order that judgment be entered for the plaintiff (appellant) in the sum of \$30,460 with costs here and in the court below.

LUCKHOO, J. A.: I concur.

DATE, J. A.: I agree.

Appeal allowed.

Solicitors: *V. C. Dias* (for the appellant); *Sase Narain* (for the respondent).

GANPATSINGH AND ANOTHER v. WALDRON

[British Caribbean Court of Appeal (Jackson, P., Luckhoo and Date, JJ. A.)
June 10, 11, July 19, 1963.]

By-laws—Contravention of building by-law—Suit by adjoining landowner to enforce compliance—Whether tenable—New Amsterdam Town Council By-Laws, Cap. 161, By-law 13.

Trespass—Appellant wilfully constructed building so as to cause eaves to overhang neighbouring lot—Neighbour's supply of light and air affected—Neighbour's right to supply not proved—Whether claim for damages lies.

By-law 13 of the New Amsterdam Town Council By-laws, Cap. 161, provides that "every new building shall be so erected that it shall stand not less than three feet within the side or back boundary line of the lot or portion of a divided lot on which it shall be situate". The appellants constructed a building such that a wall of it stood less than three feet away from the side boundary with the respondent's land. The eaves of the building in fact projected across the boundary. In the result the supply of light and air to the respondent's house was affected. In an action by the respondent for a mandatory injunction and for damages for trespass and nuisance the trial judge awarded \$50 damages and ordered the appellants to remove their building or dismantle so much of it as was necessary to comply with the By-laws. (See 1962 L.R.B.G. 245). It was not, however, proved that the respondent had acquired by grant or prescription any right to light or air through a defined passage or aperture. On appeal,

Held: (i) the breach of the by-law affected the public interest and entitled the Attorney-General to bring appropriate proceedings to enforce compliance, but a person aggrieved was confined to the summary remedies provided by law for such a breach and could not claim an injunction;

(ii) the appellants could not in these proceedings be ordered to comply with the provisions of the by-laws but they would be ordered to remove or dismantle so much of their building and the eaves thereof as extended beyond the respondent's boundary

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(iii) the necessity for considering whether any prescriptive rights had been acquired by the respondent in relation to light and air did not arise as the appellants were guilty of wilful trespass in causing the eaves of their building to project over the respondent's land.

Appeal dismissed; order varied.

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

S. D. S. Hardy for the respondent.

DATE, J.A.: These are appeals against the decisions of a judge of the Supreme Court in actions Nos. 81 and 163 of 1969 (Berbice) which were consolidated and heard together.

The appellants (husband and wife) are the owners by transport No. 858 of 1958 of a parcel of land part of the southern hack quarter of lot 16 in that part of the town of New Amsterdam which is known as Smyth Town. Before 1958, and as long ago as 1931, the first-named appellant's mother had owned this property with the buildings and erections thereon. During this period the first-named appellant acted as her agent.

The respondent is the executrix of the estate of her late husband Frederick Waldron who died on 28th January, 1958. He was owner by transport No. 162 of 1942 of the parcel of land immediately to the east of the appellants' portion. The two properties are on the southern side of New Street and are bounded on the north by the drain alongside New Street and on the south by an inter-lot drain dividing lots 16 and 17. It is accepted that the only means of determining the common boundary between the two sub-lots is in accordance with occupation, no dimensions being given in either of the transports and there being no comprehensive plan of the town of New Amsterdam describing the various lots and parts thereof in relation to measurements.

The proceedings in the court below centred around a triangular strip of land (hereinafter referred to as the triangle) claimed by both sides. At the apex of the triangle is a paal planted by Joseph Phang, sworn land surveyor, in July, 1957. It was put there with the concurrence of the parties as representing the northern extremity of their common boundary. At the south-eastern end of the triangle is a second paal planted by Phang in July, 1957. Neither side was consulted by him as to the location of this paal. At the south-western end of the triangle is a third paal 16 inches to the west of the second one. The third paal was planted by Phang in February, 1959.

Briefly, the appellant's case in the court below was that the common boundary between the sub-lots is a line extending from the apex of the triangle to the south-eastern end of it. They maintained that since 1931 there had been a fence along that line and that in 1958 it was simply replaced by a sturdier fence put in the same position.

The respondent's case was that in 1957 there had been portions of an old fence of wire mesh and barbed wire along parts of the

common boundary, that the common boundary extended from the apex of the triangle to the south-western end of it, and that in 1958 the appellants erected a new fence but along the north-eastern line of the triangle instead of where the remains of the old fence had been.

It was common ground that in March, 1959, the new fence was pulled down by the respondent and that during the latter part of 1958 and early part of 1959 the appellants erected a two-storeyed building on their sub-lot.

In action No. 81 the appellants claimed a declaration that the triangle formed parts of their sub-lot; they also claimed damages for trespass for the removal of their fence and an injunction. In action No. 163 the respondent complained that the new two-storeyed building was erected by the appellants without the permission in writing of the Mayor and Town Council, New Amsterdam, that the eastern wall of the building is less than three feet from the common boundary contrary to the New Amsterdam Town Council By-Laws. Cap. 161 (Subsidiary), and that the eastern eaves of the building project over the respondent's sub-lot and unreasonably obstruct the light and air to which the respondent is entitled and have made the bedrooms on the western side of her house uncomfortable to be in. The respondent claimed (a) an order that the appellants break down or remove such part of the new building erected by them as the court may order, (b) an order that the appellants break down the entire building, (c) damages for trespass and nuisance, and (d) an injunction restraining the appellants from occupying, letting or disposing of their property until they comply with such order as the court may make.

The learned trial judge found that the common boundary between the sub-lots was as alleged by the respondent, that is to say, along the north-western line of the triangle. He dismissed action No. 81. As regards action No. 163 he found that the eaves of the appellants' new building projected beyond the common boundary, that the appellants had contravened by-law 13 of the New Amsterdam Town Council By-Laws (which enacts that "Every new building shall be so erected that it shall stand not less than three feet within the side or back boundary line of the lot or portion of a divided lot on which it shall be situate"), and that the proximity of the eastern wall of the appellants' building affects the light and air to the respondent's house. He awarded the respondent nominal damages of \$50 and ordered the appellants to remove their building or dismantle so much of it as to comply with the By-Laws.

Counsel for the appellants conceded that the appeal in respect of action No. 81 turned wholly upon findings of fact made by the learned trial judge. It was not nor could it be suggested that there was no evidence to support the judge's findings, but counsel urged that the findings were unreasonable having regard to two circumstances in particular, the first being concerned with the planting by Phang in July 1957 of a paal at the south-eastern end of the triangle. It was admitted that Phang had been employed by the respon-

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dent to perform the July 1957 survey, and that the respondent was aware of the position in which she placed that paal but did nothing about it until several months later, after she had been called upon by the first-named appellant to pay rent for a bit of land within the triangle on which her septic tank stands. She actually paid him 25 cents in May 1958 and received from him through the post a receipt describing the payment as “the amount due for the period January—December 1958 for the use and occupation” of the bit of land. This payment constitutes the second of the two circumstances strongly canvassed by counsel for the appellants.

The learned trial judge accepted the explanations given by the respondent and her six witnesses (including Phang) with respect to both of these matters. That evidence was to the effect that the purpose of the July 1957 survey was to settle a dispute over the boundary between the respondent’s sub-lot and the sub-lot to the east of it; at that time there was no dispute over the common boundary between the appellants’ and the respondent’s sub-lots; after Phang had fixed the boundary then in dispute he obtained the agreement of the respondent and the first-named appellant as to the northern extremity of their common boundary; from this point he measured the northern facade of the respondent’s land, found it to be 57.6 feet, and caused a similar distance to be measured off westwards from the respondent’s south-eastern boundary; he observed that that line ended 16 inches east of the intersection of the respondent’s and appellants’ palings where there was a post and part of a wire mesh fence indicating the respondent’s actual occupation; in spite of this he without authority placed a paal at the point where the 57.6 feet ended. Some time in 1958 he received a letter from the respondent’s solicitor; he served a notice on the appellants and in February 1959 revisited the premises; on this occasion he observed that the post which had been at the intersection of the palings in July 1957 had been removed and placed in line with his paal and that from this post there was a new fence extending northwards, part of which traversed the respondent’s septic tank; he planted a paal 16 inches to the west of the other paal, at the spot where the post had been in July, 1957. This accounts for the three points of the triangle to which I have referred.

There was also evidence before the trial judge to the effect that it was the appellants’ carpenter Shan who had erected the new fence and that at the time he did so he cut off 16 inches from the western end of the runner on the respondent’s southern boundary fence. The covered piece of runner was shown to Phang by the respondent’s son-in-law in February 1959. It was also admitted in evidence as Exhibit “G”.

As regards the payment of the 25 cents by the respondent, the evidence showed that the respondent’s septic tank had been built since 1946 and that the very first time that any payment was demanded in respect of the land on which it stands was in May 1958, about three and a half months after the death of the respondent’s husband. According to the first-named appellant the septic tank pro-

jects about 16 inches into his land. He said that in May 1958 he told the respondent that now that her husband was dead he could no longer permit her to have the septic tank on his land without paying rent and that she agreed to pay 25 cents per year and paid him 25 cents. When he sent her the receipt to which reference has already been made she refused to open her door so he posted the receipt.

In her testimony the respondent alleged that the first-named appellant when questioned as to why he was asking for payment, asserted that "the first survey had shown that the septic tank had fallen into his land." She maintained that she only gave him the 25 cents pending Phang's return. Later she received the receipt through the post.

In the course of his judgment (1962 L.R.B.G. 245, at pp. 246 and 247) the learned trial judge said (the first-named appellant being there referred to as the plaintiff, and the respondent as the defendant):

"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 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 Shan 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 Shan 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

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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 principles to be applied by an appellate tribunal in dealing with a case of this kind have often been considered by the House of Lords. In *Powell v. Streatham Manor Nursing Home*, [1935] A.C. 243, and *Flower v. Ebbw Vale Steel, Iron and Coal Co.*, [1936] A.C. 206, H.C., their Lordships stated that where the credibility of witnesses was an essential element in the decision of a judge sitting without a jury, there being a conflict of evidence of fact, an appellate court ought not save in the clearest cases to set aside the decision of the trial judge who has seen and heard the witnesses. In the more recent case of *Benmax v. Austin Motor Co. Ltd.*, [1955] 1 All E.R. 326, Lord REID (at p. 329) cited with approval the statement of Lord THANKERTON in *Watt (or Thomas) v. Thomas*, [1947] 1 All E.R. 582, at p. 587, that where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge an appellate court should not come to a different conclusion on the printed evidence unless it is satisfied that any advantage enjoyed by the trial judge by reason of his having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

Applying these rules to the instant case I am clearly of the opinion that the appeal against the trial judge's decision in action No. 81 must fail. I would accordingly dismiss that appeal with costs to the respondent.

Counsel for the appellant's submissions in respect of action No, 163 fell into three compartments, the first relating to the alleged breach of by-law 13, the second to the alleged interference with light and air to the respondent's premises, and the third to trespass.

His main contention on the first of these questions was that the respondent could not sue for a breach of by-law 13; that the only person who can bring an action for breach of by-laws is the Attorney General. In this connexion he referred to by-law 92 which provides penalties for breaches of the New Amsterdam Town Council By-Laws and cited the following passage from 21 HALSBURY'S LAWS (3rd Edn.), para. 727:

"Where a statute merely creates an offence, without creating a right of property, and provides a summary remedy, a person aggrieved by commission of the offence is confined to the summary remedy, and cannot claim an injunction, although proceedings may be brought by the Attorney General if the public interest is affected."

Counsel also attracted attention to the statement in LUMLEY ON PUBLIC HEALTH (11th Edn.), Vol. iv, p. 4441 that:

"When by-laws are contravened the remedies contained in them are not the only remedies available. The court can enforce compliance with them by injunction in an action by the Attorney General."

These statements of the law are well supported by authority. It was however submitted by counsel for the respondent that they relate only to public wrongs and can have no application to the circumstances of the present case. A complete answer to that is to be found in *Attorney General v. Kerr and Ball* (1914), 79 J.P. 51, at p. 53, where LUSH, L.J., said:

"Obedience to by-laws even as to the construction of a dwelling-house, is, I think, a public duty, and disobedience to their instructions is *prima facie* a public wrong."

In the course of his judgment in *Devonport Corpn. v. Tozer*, [1903] 1 Ch. 759, ROMER, L.J., said (at p. 764):

"I think it rather to be deprecated that public bodies, such as the plaintiffs in the case, should be at liberty, without the leave of the Attorney General, to commence expensive proceedings such as these, at their own will."

There, ROMER, L.J., was dealing with an action by a public body for an injunction for breach of by-laws. The need for restricting the indiscriminate launching of such action by private individuals is all the greater.

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I take the view that in so far as action No. 163 hinges on a breach of by-law 13 it is improperly constituted and that the order made cannot properly be tied to the New Amsterdam Town Council By-Laws.

It was submitted by counsel for the appellants that the correct principles of the law relating to nuisance were not considered in the court below in dealing with the respondent's complaint that the eastern eaves of the appellants' building obstructed the light and air to her house. It is the case that no evidence was adduced to the effect that the respondent had acquired by grant or prescription any right to light or to air through a defined passage or aperture, and that in his judgment the trial judge simply stated, "Even though the flow of air may not be substantially affected, I find that it was affected, and more so the light."

In my opinion the necessity for considering whether any prescription rights had been acquired by the respondent did not arise having regard to the trial judge's finding of wilful trespass in relation to the eaves of the appellants' new building which overhang the respondent's land. The judge found there was no acquiescence on the part of the respondent, that she had raised the question of the correct boundary line as soon as she was asked to pay rent in respect of the septic tank (that is, before the construction of the appellants' building had been commenced), and that the appellants were in effect trying to steal a march. In these circumstances the respondent is clearly entitled to a mandatory injunction compelling the appellants to pull down any part of their structure which is trespassing on her land. To hold otherwise would be to place a premium on the expropriation of property that is not for sale.

At the hearing of this appeal counsel for the respondent also contended that the encroachment on the respondent's land is not limited to the eaves of the appellants' new building but that the eastern side of the body of the building itself is on the respondent's subplot to the extent of about 1 foot 7 inches. He sought to show this by making use of figures appearing on a building plan (Exhibit 'D') which had been submitted by the appellants to the Mayor and Town Council of New Amsterdam and which apparently formed the basis of the Council's permission to build. This encroachment was not pleaded nor does it appear to have been seriously agitated in the court below. Since, however, the common boundary is now clearly defined by the northern paal planted by Phang in July 1957 and the southern paal planted by him in February 1959, it would in any event be convenient to relate the order of the court to that boundary.

For the reasons already stated, I am satisfied that the appellants cannot in these proceedings be ordered to comply with the provisions of the New Amsterdam Town Council By-Laws though they may be well advised to do so before any further proceedings are instituted. I think a proper order would be that the appellants do within three months from the date hereof remove or dismantle so much of their building (including the eaves thereof) as extends beyond the re-

spondent's western boundary as established by Phang in February 1959. I would also order that the appellants pay the respondent three-quarters only of her costs in the court below. Subject to this variation of the learned trial judge's order I would dismiss this appeal and make no order as to the costs of this appeal.

JACKSON, P.: I agree. LUCKHOO, J. A.: I agree.

Appeal dismissed; order varied.

Solicitors: *K. W. Fulwell* (for the Appellants); *Dabi Dial* (for the respondent).

SALISBURY v. DIAS

[British Caribbean Court of Appeal (Jackson, P., Luckhoo and Date, JJ.A.) May 30, 31, July 19, 1963].

Sale of land—Vendor unable to pass title for whole property sold—Claim by purchaser for specific performance and abatement of purchase price.

The appellant's father held transport for the east half of lot 201 Kitty, where for many years he lived with his family (including the appellant) in a house in a paled yard. In 1959 the father was adjudged insolvent and the Official Receiver appointed as assignee of his estate. The respondent then bought the east half of lot 201 from the Official Receiver at auction and received transport for it. Acting through his father as agent, the appellant in turn bought from the respondent the land enclosed by the palings. A survey later established that the land so purchased fell 17.35 feet within the true western boundary of the half lot and extended 6.25 feet outside of the eastern boundary encroaching to the latter extent on an adjoining lot. The appellant refused to accept transport for such part of the property as the respondent could lawfully convey unless the purchase price was substantially reduced. The respondent sued for specific performance and in the alternative for rescission of the contract. The appellant counter-claimed for specific performance and abatement, but failed to establish how the abatement claimed should be computed. Judgment was given for the respondent. (See 1961 L.R.B.G. 490). On appeal the appellant sought to claim a rescission of the contract with a return of the deposit and damages for breach of contract.

Held: (i) the parties were *ad idem* as to the property the subject matter of the agreement; there was a common mistake between them but this related to a mere misdescription of the property;

(ii) as a general rule a vendor may be compelled to convey such interest as he may have in the subject matter of the sale if the purchaser choose to accept it without compensation;

(iii) the sole remedy sought by the appellant before the trial judge being one of specific performance with abatement, on the state of the evidence before the trial judge (there being no evidence of what the abatement claimed should be) he would not have erred in finding that there should be a decree for specific performance without abatement;

(iv) there was no ground on which the appellant could be allowed a change of front on appeal. This is permitted only in the most exceptional circumstances.

Appeal dismissed; order varied.

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

S. L. Van B. Stafford, Q.C., with *C. A. F. Hughes* for the respondent.

LUCKHOO, J. A.: This action concerns the property described in an agreement of sale and purchase dated 23rd June, 1959, between the respondent Ursula Mendes Dias as vendor and the appellant Cecil Eustace Salisbury as purchaser of “the eastern half of lot 201 Barr Street, Kitty, in the Kitty and Alexanderville Village District, with the buildings, and erections thereon.”

In 1946 Mortimer Salisbury, the father of the appellant Cecil Salisbury, became the owner by transport of the property described in transport No. 20 of the 14th January, 1946 as follows:

“Eastern two-thirds of eastern three-fourths, that is to say, the eastern halves of lots numbers 201 (two hundred and one) and 202 (two hundred and two) parts of that part of Plantation Kitty situate on the east coast of the county of Demerara and colony of British Guiana, known as the Village of Alexanderville, which said lots are laid down and defined on a diagram of an extension of the Village of Alexanderville being a portion of Plantation Kitty made by John Peter Prass, Sworn Land Surveyor, dated 24th November, 1888, and deposited in the office in Georgetown of the Registrar of British Guiana on 24th day of November, 1888, with all the buildings and erections thereon, save and except one building thereon, owned by J. C. Wellington, subject to the right to the proprietor or proprietors of the adjoining premises on the west of the land hereby transported namely, the western one-third of the eastern three-fourths of the said lots, to empty the sewage from the water closet installed on the front one flat house as at present existing into the septic tank laid down on the land hereby transported, subject to the payment by the proprietor or proprietors of the western one-third of the eastern three-fourths of the said lots to the proprietor or proprietors of the land hereby transported of one half of the cost of the maintenance, upkeep and repairs of the said septic tank in good order and condition, and subject to a First Mortgage passed in favour of the British Guiana and Trinidad Mutual Fire Insurance Company, Limited, on the 30th October, 1944 No. 440.....”.

These half lots run in a general north to south direction. Mortimer Salisbury went into occupation of a parcel of land situate between palings on its eastern and western sides as the eastern half of lot 201. In 1954 Mortimer Salisbury went to reside in a house situate on this parcel of land and has ever since been residing there with his family including the appellant. In 1956 a receiving order was made against Mortimer Salisbury and in April, 1959, he was adjudged insolvent. In June, 1959, the Official Receiver in his capacity as the assignee of the estate of Mortimer Salisbury put up for sale at public auction the eastern halves of lots 201 and 202 and those half lots were purchased by the respondent Mrs. Ursula Mendes Dias on the 16th June, 1959. Transport therefor was passed to her by the Official Receiver on the 24th August, 1959. The description of that property in

the respondent's transport is substantially the same as in Mortimer Salisbury's transport except for reference to Wellington's house (which had been removed prior to the respondent's purchase of the property) and the mortgage which apparently had been cleared off.

On the 17th June, 1959—the day after the sale to the respondent—Mortimer Salisbury, desiring to retain the family home on what he occupied as the eastern half of lot 201, approached the respondent and offered to buy that half lot with the buildings and erections thereon for an undisclosed purchaser. A few days later they met by arrangement at the office of Mr. H. A. Bruton, solicitor. There, Mortimer Salisbury introduced his brother-in-law Issri Persaud as the intended purchaser. An agreement of sale and purchase in respect of the eastern half of lot 201 was prepared by Mr. Bruton with Issri Persaud being named as the purchaser. Mortimer Salisbury took away the unsigned agreement after arranging to meet the respondent at Mr. Bruton's office on the following day. On meeting as arranged on the following day at Mr. Bruton's office Mortimer Salisbury produced another agreement of sale and purchase in relation to the property which differed from the one prepared on the day before by Mr. Bruton only in that the purchaser named was the appellant Cecil Salisbury, a son of Mortimer Salisbury, and the provision relating to forfeiture of the deposit had been omitted. The appellant later came to Mr. Bruton's office and this agreement of sale and purchase was executed by the appellant and the respondent. The appellant paid the sum of \$3500 on account of the purchase price. The appellant, whose father has been in possession of the property the subject matter of the agreement of sale and purchase since 1946, was formally given possession thereof under the terms of the agreement. The appellant has admitted that throughout the transactions relating to the agreement of sale and purchase Mortimer Salisbury has acted as his agent.

On the 14th October, 1959, the necessary papers, which included the affidavit of the appellant as purchaser, were lodged with the Registrar of Deeds for conveyance by way of transport of the east half of lot 201 to be advertised to and in favour of the appellant. In the affidavit of purchaser sworn by the appellant on the 13th October, 1959, the description of the property purchased was not simply that stated in the agreement of sale and purchase but was as set out in the transport of the respondent passed to her by the Official Receiver on the 24th August, 1959.

On the 20th October, 1959, the appellant wrote the Registrar of Deeds requesting him to stay advertisement of the transport until further notice on the ground that the instructions to advertise were not in accordance with the agreement of sale and purchase entered into between the parties and would have to be rectified.

On the 14th September, 1959, that is prior to the appellant swearing his affidavit of purchase on the 13th October, 1959, Mortimer Salisbury as agent of the appellant had told the respondent that there was a deficiency in the area of land between the palings with that agreed to be sold and transported by the respondent. This was said

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on the occasion when the respondent had caused S. S. R. Insanally, a sworn land surveyor, to establish the common boundary between the eastern halves of lots 201 and 202 in order that it could be ascertained whether the existing back building on the eastern half of lot 201 encroached on the eastern half of lot 202. This inquiry was provided for by the parties in the agreement of sale and purchase. It was discovered as a result of the survey carried out by S. S. R. Insanally that the existing back building was situate entirely on the eastern half of lot 201.

Consequent upon the appellant's letter of the 20th October, 1959, requesting the Registrar of Deeds to stay advertisement of the conveyance, the respondent on the advice of her solicitor engaged the services of Messrs. Wong and Khan, sworn land surveyors, to carry out a survey of the entire property she had purchased from the Official Receiver. For some reason which does not appear in the evidence Wong and Khan did not carry out the survey. Sometime in November, 1959, S. S. N. Insanally, a sworn land surveyor (not to be confused with S. S. R. Insanally) sent a notice of intended survey to the respondent at the instance of the appellant. Thereupon, solicitor for the respondent wrote the appellant and S. S. N. Insanally informing them that S. S. N. Insanally was not permitted to enter upon or to undertake any survey of the property, the respondent having objected to the survey by S. S. N. Insanally.

It has turned out upon a survey carried out by C. S. Spence, a sworn land surveyor, on the 7th December, 1959, that the parcel between the eastern and western palings agreed to be sold by the respondent and purchased by the appellant falls 17.35 feet within the true western boundary of that half lot and 6.25 feet outside the true eastern boundary, encroaching to that latter extent on lot 195 which is in the ownership of one Mrs. Fraser. At the hearing of this appeal it was stated that the house in which the appellant resides encroaches on lot 195 for a distance of 3 feet. The portion falling 17.35 feet outside the western palings has for over twelve years been in the occupation of the owners of the west half of lot 202 which in 1959 was in the ownership of one Beharry.

S. S. N. Insanally had been present on behalf of the appellant at Spence's survey. Insanally was later instructed by the appellant to carry out a survey of the eastern half of lot 201 and sent a notice of intended survey to the respondent. He was however prevented by the respondent from carrying out a survey.

In correspondence passing between the legal advisers of the parties since Spence's survey the respondent called upon the appellant to take transport of such portion of the eastern half of lot 201 as had been conveyed to the respondent and was occupied by the appellant, failing which the respondent would treat the agreement as rescinded, refund the amount already paid under the agreement less any advances made and would require the appellant to pay her the sum of \$75 per month as from the 23rd June, 1959 (the date of the agreement) until possession were delivered up by the appellant to the re-

spondent. In reply the appellant intimated that he would be prepared to accept transport of the property (that portion which the respondent could lawfully convey) on condition that the purchase price was reduced by \$2,000. The respondent thereupon filed a writ of summons claiming specific performance of the agreement of sale and purchase and damages for breach of contract. In the alternative the respondent claimed rescission of the agreement, possession, mesne profits and other consequential relief. The appellant in his statement of defence and counterclaim asked for an order for a survey of the east half of lot 201, specific performance of the contract or damages for breach of contract. The pleadings of the appellant also raised the question of the property being sold free of any servitude, but although this was an issue at the trial (decided by the trial judge in favour of the respondent) no such question falls for consideration in this appeal, counsel for the appellant conceding that the property if conveyed must be conveyed subject to the servitude described in the respondent's transport.

Counsel for the respondent (plaintiff) in his opening address at the trial of the action stated that the respondent was not asking for rectification of the agreement but was asking for a rescission of the agreement. He also observed that the parcel as occupied consists of only a little more than one half of the east half of lot 201 and also a portion of lot 195 for which the respondent has no title. Counsel for the respondent suggested to the trial judge that the fairest solution of the difficulty would be rescission of the contract, the return to the appellant (defendant) of the deposit and the payment by the appellant of mesne profits or a sum for the use and occupation from the date of the agreement to the date of delivery of possession by the appellant to the respondent.

Counsel for the respondent (plaintiff) in his closing address reaffirmed the stand he had taken in his opening address though the respondent in her evidence had stated that she sought specific performance of the contract or, in the alternative, rescission of the contract. Counsel for the appellant (defendant) submitted that there should be a decree of specific performance with an abatement of the purchase price.

The trial judge has found, and counsel do not challenge his finding in this regard, that at the date when the parties entered into the agreement of sale and purchase what the respondent intended to sell to the appellant and what the appellant intended to purchase from the respondent was the property situate between the palings. The miscellaneous condition inserted in the agreement, while it required a plan to be made and the position of the existing back building ascertained in relation to the respondent's eastern half of lot 202, did not contain anything which would suggest that either party was in doubt about the true positions of the eastern and western boundaries.

It is apparent from the record that the case for the appellant (defendant) proceeded before the trial judge on the basis that what the appellant had agreed to purchase was the mathematical eastern

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half of lot 201. The cross-examination of Spence by counsel for the appellant and the arguments adduced by counsel indicate that before the trial judge this was the stand taken by the appellant and in the grounds of appeal filed this is also clearly indicated at para. 2 (d). Indeed, Mortimer Salisbury on the 14th September, 1959, (on the occasion when S. S. R. Insanally had determined that the existing back buildings was situate entirely on lot 202) had told the respondent that he was sorry that she had already taken transport from the Official Receiver because the land did not contain a half lot and he felt that the respondent could have compelled the Official Receiver to find the extra portion of land and give it to the appellant. This is important for it indicates the attitude adopted by or on behalf of the appellant in the appellant's dealings with the respondent.

The learned trial judge has found that on the evidence the respondent intended to sell and agreed to sell to the appellant the portion of land which was in occupation of Mortimer Salisbury with the building thereon on that the appellant, through his agent Mortimer Salisbury intended to buy and agreed to buy that portion of land with the building thereon, the land being situate between the eastern and western palings and regarded by the appellant and Mortimer Salisbury as being the east half of lot 201.

Neither counsel for the appellant nor counsel for the respondent at the hearing of this appeal has sought to impugn this finding of fact by the learned trial judge which indeed is fully supported by the evidence he has accepted.

The learned trial judge also quite rightly came to the conclusion that the parties being *ad idem* as to the property the subject matter of the agreement there was a common mistake between the parties as to a mere misdescription of the property. The learned trial judge also came to the conclusion that the purchaser has got all or substantially all of what he had agreed to purchase. This finding has been challenged by counsel for the appellant at the hearing of this appeal who pointed out that Spence's evidence disclosed that the whole occupation by the appellant was 35.25 feet on the northern side including 6.25 feet encroaching on lot 195. The occupation converges to the south, the convergence being two feet on the southern side. The area which the respondent can lawfully convey to the appellant is 3460 square feet, whereas the parties contemplated an area somewhat over twenty *per centum* in excess of that figure. It cannot therefore be considered that the appellant was getting substantially what he had agreed to purchase in so far as quantity of land is concerned, though it may well be considered that having regard to the object of the appellant's purchase the defect in quantity did not so effect the substance of what he had bargained for were it not for the fact that the house in which the appellant resides is situate partly on lot 195.

It is undoubted that a court in the exercise of its equitable jurisdiction may order rectification of a misdescription due to the common mistake of the parties. The real question in the instant case is whether the contract so rectified should be specifically enforced with or without abatement of the purchase price or should be rescinded.

This question must be decided on the position as it was before the trial judge by whom a judicial discretion was to be exercised rather than on any change in the wishes of the parties since the trial judge delivered his judgment. This observation is made because at the hearing of this appeal counsel for the appellant abandoned the appellant's stand at the trial and indeed the main remedy stated in the grounds of appeal for specific performance with abatement of the purchase price and now seeks to obtain a rescission of the contract with a return of the deposit and damages for breach of contract by the respondent. Counsel for the respondent at the hearing of this appeal in supporting the judgment of the learned trial judge pursued the remedy of specific performance as formulated in the statement of claim and asked for by the respondent in her evidence and abandoned his plea made at the trial for rescission of the contract and the other remedies referred to earlier in this judgment.

In the first place where a vendor is unable to give title as to a part of the property it is for the purchaser to decide whether or not he wishes to go on with the contract. In the instant case, the appellant as purchaser did wish to go on with the contract and before the trial judge he claimed specific performance with compensation. The respondent as vendor wished to enforce the contract and also claimed specific performance. The appellant had he wished to do so, might have claimed rescission of the contract though he would have been unable to succeed in general damages for breach of contract because of the rule in *Bain v. Fothergill* (1873), L.R. 7 H.L.C. 158. The issue before the trial judge eventually was narrowed down to this: whether specific performance of the contract rectified to include the correct description of the property which the respondent could legally convey should be granted with or without an abatement in the purchase price. The trial judge held that prior to the date of the contract Mortimer Salisbury was unaware that the respondent could not give a title to the whole of the east half lot 201 and that as the parties were *ad idem* as to the property the subject matter of the agreement the appellant could not obtain an abatement of the purchase price. The trial judge also found that the appellant and Mortimer Salisbury were aware of the existence of the servitude already referred to at the time the contract was made. As had already been stated counsel for the appellant does not challenge this latter finding.

It is not doubted that as a general rule a vendor may be compelled to convey such interest as he may have in the subject matter of the sale if the purchaser choose to accept it without compensation. Where (as in the court below in the instant case) the purchaser claims specific performance with an abatement of the purchase money the general rule is that laid down by Lord ELDON in *Mortlock v. Buller* (1804), 10 Ves. 292, at p. 315:

“If a man, having partial interests in an estate, chooses to enter into a contract representing it and agreeing to sell it as his own, it is not competent to him afterwards to say that, though he has valuable interests, he has not the entirety, and that, therefore, the purchaser shall not have the benefit of his contract. For

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the purpose of this jurisdiction the person contracting under these circumstances is bound by the assertion in his contract; and, if the vendee chooses to take as much as he can have, he has a right to that, and to an abatement.”

The position is perhaps more comprehensively stated in *DART ON VENDORS AND PURCHASERS* (8th Edn.) at p. 931 as follows:

“The result of the authorities appears to be that, except where there is a good defence on the ground of hardship, mistake, or injury to third parties, the court will (in the absence of an express stipulation excluding compensation, or entitling the vendor to rescind) insist on a vendor making good his contract to the extent of his ability, and on his submitting to a proportionate reduction of the purchase money, if the purchaser was ignorant of the defect at the date of the contract, and is willing to complete on these terms.”

It is stated in *FRY ON SPECIFIC PERFORMANCE* (6th Edn.) at p. 588, that the court will almost invariably refuse specific performance with an abatement in favour of a purchaser who contracted with knowledge of the defect at the date of the contract.

The trial judge has rejected the evidence of Mortimer Salisbury relating to his alleged doubt as to the true boundaries of the east half of lot 201 and has found that at the date of the contract Mortimer Salisbury believed that he was in occupation of that half lot within its true boundaries. The trial judge also found that the appellant himself had no knowledge one way or the other of the true boundaries of the east half of lot 201 and the question of any doubt as to the true positions of those boundaries never arose in so far as both the appellant and Mortimer Salisbury were concerned until after the contract was made. This was a finding of fact eminently suitable for the learned trial judge to make and an appellate tribunal would be loath to disturb this finding having regard to the fact that it involved the acceptance and rejection of evidence of parties whom this court did not have the benefit of observing as had the learned trial judge. There are passages in the judgment of the learned trial judge which appear to be in conflict with his finding that at the time when the contract was made Mortimer Salisbury was not doubtful of the true position of the boundaries of the east half of lot 201. Perhaps the learned trial judge was dealing with Mortimer Salisbury’s evidence on this aspect on the assumption that it might be accepted as true. Counsel for the appellant has submitted that any knowledge gained by Mortimer Salisbury not in the course of his agency cannot be imputed to the appellant and that the relationship of father and son does not have any bearing on this legal principle. It is, however, unnecessary for the purposes of this case to decide whether this submission is sound in view of the trial judge’s rejection of Mortimer Salisbury’s evidence on this aspect of the matter.

Although both the appellant and the respondent erroneously and honestly believed at the time of entering into the contract that the respondent could convey the entire portion situate between the pal-

ings, the appellant was in fact misled that he could get the title for the entire portion of the land between the palings. However, it does not automatically follow that the appellant is entitled to an abatement. From the letter dated 23rd February, 1960, addressed by the appellant's solicitors to the respondent's solicitors the abatement asked for was \$2,000. This was on the basis that the mathematical east half of lot 201 was, with the buildings and erections thereon, the property contracted to be sold to the appellant and that there was no servitude attached to the enjoyment of the property. On that basis the deficiency (according to para. 2 (d) of the appellant's grounds of appeal) would be 2,268 square feet out of 5,728 square feet or about 39 per centum of the area agreed to be conveyed.

In fact the deficiency in the area of the land is just over 20 per centum and the contract price of \$10,000 must be related not only to the deficiency of land area but also to the value of the buildings and erections thereon and the existence (now conceded) of the servitude. The burden was upon the appellant to give some evidence in order to establish what abatement, if any, should be granted. This evidential burden the appellant has failed to discharge. The sole remedy sought by the appellant before the trial judge being one of specific performance with abatement, on the state of the evidence before the trial judge he would not have erred in finding (as he did on the other grounds) that there should be a decree for specific performance without abatement.

The appellant cannot blow hot and cold at the same time. In the court below he elected to stand or fall by his sole plea for specific performance with abatement. Nothing has been advanced on his behalf on appeal which would allow a change of front; this is permitted only in the most exceptional circumstances.

Counsel for the respondent has submitted that the appellant has, under the agreement of sale and purchase, obtained a possessory title to that portion of the property situate between the palings which the respondent cannot convey by way of transport. Such investigation as was made in the court below of the possession of Mortimer Salisbury by himself and his predecessors in occupation is wholly insufficient to enable a court to come to any conclusion on this aspect of the matter. Further, it was never within the contemplation of the parties when they entered into the contract that the appellant would be given other than title by way of transport.

Counsel for the respondent has referred to the fact that the order made by the trial judge does not deal with the possibility of the appellant failing to accept transport of the property which the respondent has been ordered and directed to convey. The order of the trial judge should be varied by the addition thereto of the further order that in the event of the defendant failing to pay or cause to be paid to the plaintiff the balance of purchase price with interest thereon, or to accept transport of the property, the agreement of sale and purchase shall be deemed to be rescinded and the sum of \$3,500 paid by the defendant to the plaintiff forfeited to the plaintiff.

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The defendant has been in occupation of the property under the contract without payment of any sum therefor. The contract, had there been no appeal, should have been completed by the passing of transport by the end of December, 1961. In the circumstances I would order that the appellant should pay a reasonable sum for use and occupation of the property from the 1st January, 1962, until transport is accepted by him or until he vacates the property whichever is the sooner. The only evidence on the question as to what would be a reasonable sum for use and occupation of the building came from the respondent. She said that the upper flat is worth \$75 per month. The appellant should pay \$75 per month for the use and occupation of the property for the period above stated. In the event of the appellant failing to accept transport he shall vacate the property on or before 1st November, 1963.

I would order that the judgment of the trial judge should be affirmed subject to the variations stated above and subject to rectification of the contract by amendment of the description of the property agreed to be sold by the respondent to the appellant and to be purchased by the appellant from the respondent.

The respondent's costs of this appeal and in the court below to be paid by the appellant.

JACKSON, P.: I agree.

DATE, J.: I concur.

Appeal dismissed; order varied.

Solicitors: *H. B. Fraser* (for the appellant); *H. A. Bruton* (for the respondent).

MOHABIR SINGH v. RAMESH SINGH

[In the Full Court, on appeal from the magistrate's court for the Corentyne Judicial District (Bollers and Chung, JJ.) April 27, July 20, 1963].

Trespass—Gratuitous licence to plant rice on appellant's land—Whether revocable at will—Whether licensee entitled to reasonable notice—Suit by licensee for trespass—Whether tenable.

Magistrate's court—Jurisdiction—Plaintiff alleges he was given gratuitous licence by defendant to plant rice on defendant's land,—Defendant denies allegation—Whether incorporeal right in question—Whether magistrate's court has jurisdiction—Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, s. 3 (3).

The respondent claimed that the appellant gave him an acre of land to plant rice, and that after he had cultivated it the appellant entered on the land and proceeded to reap the crop. The appellant denied having given the land to the respondent to cultivate, and alleged that the respondent was never in possession of it and that the rice had been planted by the appellant. The magistrate accepted the respondent's story and awarded him damages for trespass, holding that he was a licensee of the land. On appeal it was argued for the appellant, first, that it is not competent for a

mere gratuitous licensee to maintain an action in trespass, and, secondly, that if the respondent had a licence it was coupled with the grant of an interest in the land and was therefore an incorporeal right, with the consequence that the jurisdiction of the magistrate's court was excluded by virtue of s. 3 (3) of the Summary Jurisdiction (Petty Debt) Ordinance, Cap 16, which provides that "the (magistrate's) court shall not have cognisance of any action in which any incorporeal right.....may be in question."

Held: (i) a gratuitous licence is revocable subject to the limitation that the licensee must be given reasonable time in all the circumstances to remove himself and his belongings from the premises;

(ii) the respondent could maintain an action in trespass because on the facts he was in exclusive possession and occupation of the land and was given no time at all in which to cut his rice and quit the land;

(iii) if the respondent had the right to plant, cut and remove the rice from the appellant's land, he enjoyed what is known as a *profit a prendre* and held a licence coupled with an interest in land;

(iv) this is an incorporeal right, and as the respondent's claim to it was being disputed by the appellant, without there being anything to suggest that the defence was not *bona fide*, the magistrate ought to have declined jurisdiction.

Appeal allowed.

K. Prasad for the appellant.

C. Molai for the respondent.

Judgment of the Court: This appeal arises out of an action for damages brought by the respondent against the appellant in the magistrate's court for trespass whereby the respondent claimed that the appellant had in January, 1962, given him one acre of rice land in the first depth at Friendship, Corentyne, to plant rice for the year 1962, and that after he had entered into possession and ploughed the land three times and planted it with rice and cleaned it in pursuance of the promise, the appellant in September, 1962, entered on the land, proceeded to reap the growing rice and prevented him from entering the land and threatened his life should he dare to enter thereon. He claimed \$250 damages for the damage done by the appellant to the one acre of growing rice planted by him.

The appellant denied the trespass and stated in evidence that he had not given the land to the respondent to cultivate, the respondent was never in possession of the land, nor had he planted rice thereon, but rather the land had always remained in his (appellant's) possession, and the rice growing thereon had been planted by him and was his property.

The magistrate found as a fact that:—

(1) The appellant had shown the respondent the said land and had given it to him to plant for the year 1962.

(2) In pursuance of the promise the respondent had entered into possession of the land and had ploughed and planted the land.

(3) In September, 1962, when the rice was not fully ripe, the appellant and his servants and agents had entered upon the land, cut the growing rice, and had converted it to his own use.

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The magistrate then arrived at the conclusion that the respondent was a licensee of the land, and accordingly entered judgment in his favour and awarded damages and costs.

Counsel for the appellant made certain submissions before the magistrate which were overruled and which he now raises on appeal on the ground that the decision was erroneous in point of law.

Firstly, that it is not competent for a mere gratuitous licensee to maintain an action in trespass. In support of this contention counsel cited *Hill v. Tupper* (1863), 2 H. & C. 121.

Secondly, that if the respondent had a licence in the land it was a licence coupled with the grant of an interest in the land which is an incorporeal right, and as a result in accordance with s. 3 (3) of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, the magistrate ought to have declined jurisdiction.

The submission on the first point raised is probably based on a statement made in SALMOND ON THE LAW OF TORTS, 8th Edn., at p. 218, where the learned author in dealing with the question as to who could maintain an action of trespass to land makes the point that ownership of land unoccupied by possession is protected by other remedies but not by an action of trespass. Thus a landlord cannot sue for a mere trespass to land in the occupation of his tenant. The author then continues:

“The mere use of land without the exclusive possession of it is not a sufficient title to give an action of trespass for the disturbance of that use. Thus in general a lodger or boarder has no possession of the room in which he is lodged, and cannot sue in trespass for any disturbance of that use.”

Counsel has overlooked the fact that in the present case the magistrate found that the respondent was a licensee who had entered into possession of the land. Possession means the occupation and physical control of the land and what amounts to possession is a question of fact in each case. As Lord FITZGERALD stated in *Lord Advocate v. Young*, (1887) 12 App. Cases at p. 556: “By possession is meant possession of that character of which the thing is capable.” When therefore the learned magistrate found that the respondent had entered into possession at the time of the alleged acts of trespass, it was implicit in his finding that the respondent was in exclusive possession and occupation of the land, and as a result could maintain an action in trespass.

It is true that an English common law licence did not give an exclusive possession, and a licensee as stated by VAUGHN, C.J., in *Thomas v. Sorrel*, (1674), Vaughn 351, is a person who has permission to do an act which without such permission would be unlawful, “A licence properly passeth no interest, nor alters or transfers property in anything but only makes an action lawful which without it had been unlawful. As a licence to hunt in a man’s park, to come into his house are only actions which without licence had been unlaw-

ful. It follows that a licensee has no interest in the land and accordingly has no remedy against his third party who disturbs him in the exercise of his licence." See CLERK AND LINDSELL ON TORTS, 11th Edn., at p. 539.

In *Hill v. Tupper* (1863), 2 H. & C. 121, the plaintiff had acquired by grant under the seal of a canal company an exclusive right of keeping pleasure boats for hire upon the canal. He sued at law for damages a stranger who infringed this monopoly and it was held he had no such cause of action. It was said in the Court of Exchequer: "This grant merely operates as licence or covenant on the part of the grantors and is binding on them as between themselves and the grantee, but gives him no right of action in his own name for any infringement of the supposed exclusive right." POLLOCK, C.B., in the course of his judgment pointed out that:—

"a grantor may bind himself by covenant to allow what rights he pleases over his property, but the law will not allow him to carve out his property so as to enable the grantee of such a limited right to sue a stranger in the way here contended for."

It must be made clear that in *Hill v. Tupper* the plaintiff, unlike the respondent in the present case, did not have exclusive possession of the canal.

A mere or bare licensee then has an action for damages against the licensor for any disturbance of the licence committed by him. For although a licence does not confirm any legal estate or interest in the land which is subject thereto, it nevertheless amounts to a valid contract between licensor and licensee and is enforceable at law in the ordinary way of an action for damages for breach of contract. He, however, could not maintain an action in tort such as trespass against his licensor who disturbed him in the exercise of that right.

Thus SALMOND ON THE LAW OF TORTS, 8th Edn., at pp. 262 and 263 states:—

"A licence is an agreement (not amounting to the grant of a legal easement or profit) that it shall be lawful for the licensee to enter upon the land of the licensor, or to do some other act in relation thereto which would otherwise be illegal.

At common law a licence was revocable at will by the licensor, even though granted for a fixed term and was therefore no justification for any act done in the exercise of it after revocation. This is known as the rule in *Wood v. Leadbitter* (1845), 13 M. & W. 838."

In this case the licensee framed his action in trespass for assault against his licensor who had procured his expulsion from a racehorse which he had entered by purchasing a ticket when they asked him to leave, and it was held that he could not maintain the action. Although the licence had been revoked improperly and in breach of contract its revocation was nonetheless effective. The licence was terminated and the plaintiff was a trespasser and could not sue in

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tort for his expulsion by order of the occupiers. He would however have had a good cause of action in contract. SALMOND ON THE LAW OF TORTS, 11th Edn., at p. 264, however states:—

“This rule has now disappeared since the fusion of law and equity the reason being that a licence granted for a fixed period is in all ordinary cases specifically enforceable an injunction being obtainable to prevent its premature revocation. In the case of *Hurst v. Pictures Theatres, Ltd.*, [1915] 1 K.B. 1, the law was finally settled that the rule in *Wood v. Lead-bitter* now applies only to cases in which the licence is of such a nature that an injunction against its premature revocation could not be granted in conformity with the rules of equity.”

It is well settled that in the case of a licence for valuable consideration made under a contract that the licence may only be revoked subject to the terms and conditions of the contract, in which case equity would grant an injunction to restrain its premature revocation, *Winter Garden Theatre Ltd., v. Millenium Productions Ltd.*, [1948] A.C. 173. As the 12th Edn., of SALMOND ON TORTS puts it:—

“It seems therefore, that the formal rule of law that a licence is revocable despite any contract has been converted into a rule of construction that a licence is *prima facie* revocable but subject to the terms of any contract between the parties. The extent to which the licensor has disabled himself from exercising his power of revocation will have to be ascertained according to the ordinary principles of construction. It may well be that an injunction could be obtained to restrain the revocation of a licence which is intended to cover a substantial tract of time. But the courts will also probably be ready to assume that a licence granted for valuable consideration for a limited time and a limited purpose is intended to be irrevocable until that purpose had been accomplished in the manner contemplated.”

SALMOND’S 8th Edition, at p. 264, states that the rule in *Wood v. Lead-bitter* even if not considered obsolete is still subject to the limitation that a licensee whose licence is revocable is entitled to reasonable notice of revocation and that a licence is irrevocable at law if coupled with or granted in aid of a legal interest conferred on the purchaser; and in support of the former proposition the author cites *Cornish v. Stubbs*, (1870) L.R.C.P. 334, *Mellor v. Watkins*, (1874) L.R. 9 Q.B. 400, *Canadian Pacific Railway Company v. The King*, [1931] A.C. 414.

In *Cornish v. Stubbs* WILLES, J., stated the law in these terms:—

“Under a parole licence the licensee has a right to a reasonable time to go off the land after it has been withdrawn before he can be forcibly thrust off it; and he could bring an action if he were thrust off before a reasonable time had elapsed.”

BOVELL, C.J., dealing with the particular terms of a licence stated:

“It seems almost necessary from the nature of the licence, that the plaintiff should have had a right to a reasonable time to remove his goods; and, if he had, that right has been interfered with, and the plaintiff was entitled to bring this action.”

In *Mellor v. Watkins*, COCKBURN, C.J., stated:—

“Reason and commonsense alike require that, although a licence may be revocable at any moment, the licensee should have a reasonable time for removing off the premises what he has been licensed to put upon them.”

BLACKBURN, J., was of the same opinion:—

“It seems but reasonable that the person giving the licence, though revocable at any time, must give the licensee sufficient time to remove the articles from the premises; and, at all events that he is bound to give the licensee reasonable notice.”

In *Kellar v. Narayan* (1960), 1 W.I.R., at p. 378, the Federal Supreme Court held that the respondent was a licensee and as such was entitled to receive reasonable notice within which to remove himself and his things from the premises. WYLIE, J., in his judgment at p. 378 cited Lord Justice GODDARD’S dictum in *Minister of Health v. Bellotti*, [1944] 1 All E.R. 238:—

“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 has been 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.”

In the *Winter Garden Theatre* case the view was expressed that the licensee was entitled to a notice specifying a reasonable length of time at the end of which the licence would determine and also to a further packing up period.

It remains now to be seen whether there is any distinction to be drawn between the rights of a mere licensee and those of a gratuitous licensee. In *Vaughn v. Vaughn*, [1953] 1 Q.B.D, at p. 762, a husband left his wife in the matrimonial home of which he was the owner and after she had obtained a decree of divorce against her promised her that she could remain and live in the house rent free. Lord EVERSLED, M.R., held that she was entitled to remain in the house as a bare licensee and the licence was therefore revocable subject to the limitation that she must be given reasonable time in all the circumstances to remove herself and her belongings from the house in respect of which the licence operated. In CLERK AND LINDSELL ON TORTS, 11th Edn., at p. 540, the only difference is stated at p. 540:—

“A gratuitous licence can be revoked by notice given at any time, so that if the licensee remains on the land after the revocation he is a trespasser. A licence granted for valu-

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able consideration under a contract can only be revoked in accordance with the terms of the contract.”

At p. 539 the author recites that:—

“A licensee who remains on land after his licence expires or is properly revoked is a trespasser. He is entitled however to a reasonable time in which to leave and remove his goods and until such reasonable time has elapsed he cannot be prevented from entering on the land for the purpose of removing his goods.”

In the instant case the respondent was given no time at all in which to cut his rice and quit the land. The answer therefore to the first point raised must be in the affirmative—that in the circumstances he could maintain an action in trespass.

In considering the second point may we say at once that it is our view that this is a case of a licence coupled with an interest in land and is irrevocable, in which case the respondent could not be ejected from the land until the expiration of the licence.

The classic example of a licence coupled with an interest in property is given in all the text books on the law of torts as:—

“If A sells to B timber lying on A’s lands, on the terms that B may enter and carry it away, the licence conferred is an irrevocable licence, because it is coupled with and granted in aid of the legal property in the timber which the contract of sale confers on B.”

CLERK AND LINDSELL at p. 541 states:—

“For example, a licence to hunt in a man’s park and carry away the deer killed to his own use, to cut down a tree on the man’s ground, to carry it away the next day after to his own use, are licences to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and the cut down trees are grants and as such are irrevocable.”

It follows that if the respondent had the right to plant, cut and remove the rice from the appellant’s land he enjoyed what is known as a profit a prendre and held a licence coupled with an interest in land. Thus in *Mason v. Clarke*, [1955] A.C. 788, where a man had the benefit of an oral agreement entitling him to catch rabbits on a certain estate (profit a prendre), the House of Lords held that he could recover damages from another for his interference with the exercise of those rights. A profit a prendre is described in CLERK AND LINDSELL at p. 610 as an incorporeal right and it is made clear that the owner of such a right can sue for the disturbance of such a right. The *DICTIONARY OF ENGLISH LAW* by Earl JOWITT states that there were two kinds of hereditament, corporeal and incorporeal, and the former was tangible and the latter intangible (meaning the rights and profits

annexed to or issuing out of the land). The concept of a profit a prendre is not unknown to our law and is mentioned in s. 3D (b) of the Civil Law of British Guiana Ordinance, Cap. 2, where it is enacted that the law relating thereto shall be as at present administered by the Supreme Court of British Guiana, which of course is Roman-Dutch Law. A profit of this nature in Roman-Dutch Law is given in VAN LEEUWEN'S COMMENTARIES as a full usufruct, which is the right of drawing and enjoying all the fruits, profits and income of another's property without diminution of such property and of disposing of the same according to one's pleasure. SALMOND in his JURISPRUDENCE, 8th Edn., at p. 282, states that a corporeal thing is a material object, and an incorporeal thing is the subject matter of incorporeal ownership, *i.e.*, a *jus in re aliena* and is any proprietary right except the right of full dominion over a material object.

Section 3 sub-s. (3) of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, has already received judicial construction by this court and the relevant section reads as follows:—

“The (magistrates) court shall not have cognisance of any action in which any incorporeal right, or the title to any immovable property, is or may be in question.”

In *Jones v. McRae*, (1931—1937) L.R.B.G. 128, the Full Court held that under this section where the question of title to land is raised, the duty of the magistrate before adjudicating is to ascertain whether the defence is *bona fide* with evidence to support it. We are of the opinion in this case that had the learned magistrate properly considered this principle (and there is nothing on the record to show that he did) he must have arrived at the conclusion that the court did not have jurisdiction. The respondent was asserting that the incorporeal right of planting crops on the land and removing them therefrom had been given to him, whereas the appellant was saying that such a right had not been given to the respondent and he was the owner of the land by transport which had actually been planted by him. There was nothing to suggest that the defence was not *bona fide*. In these circumstances the magistrate ought to have declined jurisdiction.

For these reasons the appeal must be allowed and the order of the magistrate set aside with costs to the appellant fixed at \$35.00.

Appeal allowed

GARNETT v. JAGROOP AND TOWN CLERK OF GEORGETOWN

[Supreme Court (Luckhoo, C.J.) June 18, 27, July 5, 1963]

Negligence—Child crossing street in front of parked motor lorry—Impossible for driver to see child—Driver checked road and sounded horn—Without waiting for any appreciable interval driver drove forward—Child killed—Whether driver negligent—Whether child guilty of contributory negligence.

Damages—Five year old child killed in motor accident—Law Reform (Miscellaneous Provisions) Ordinance, Cap. 4—Accidental Deaths and Workmen's Injuries (Compensation) Ordinance, Cap. 112.

A five year old child was crossing a street about a foot in front of a parked truck. She was too short to be seen by the driver who was seated in the cabin. On being called forward by a fellow worker, the driver checked the road and sounded his horn, but without waiting for any appreciable interval he drove forward and in the result the child was killed almost instantaneously. The child was trying to reach a bridge leading to her mother's yard, but the truck was parked in such a way that she could not be expected to get on to the bridge except by going around in front of the truck. The mother, who was 40 years of age, sued individually and in her capacity as administratrix of the child's estate for damages.

Held: (i) the accident was caused solely by the negligence of the driver. There was no contributory negligence on the part of the child;

(ii) under the Law Reform (Miscellaneous Provisions) Ordinance, Cap. 4, \$275 would be awarded for loss of expectation of life and \$30 for pain and suffering;

(iii) under the Accidental Deaths and Workmen's Injuries (Compensation) Ordinance, Cap. 112, the measure of damages is the net pecuniary loss which has been suffered and is likely to be suffered by the claimant. Where the deceased is an infant child, as in the Present case, there is normally no actual loss. A mere speculative possibility of benefit is not enough:

(iv) under Cap. 112, \$275 would therefore be awarded in respect of prospective loss but this amount must be reduced by taking into account the award under Cap. 4.

Judgment for the plaintiff.

D. A. Robinson for the plaintiff.

C. L. Luckhoo, Q.C., for the defendants.

LUCKHOO, C.J.: The plaintiff Mary Garnett, the mother of the deceased child Shelley Garnett and administratrix of the deceased child's estate, claims damages under the provisions of the Law Reform (Miscellaneous Provisions) Ordinance, Cap. 4, and the Accidental Deaths and Workmen's Injuries Compensation Ordinance, Cap. 112, in respect of an accident as a result of which the child was killed on the 20th November, 1962.

The child who, at the time of her death, was 5 years and 1 month old, resided with her mother and two sisters at King Edward Street, Albouystown, Georgetown, and attended a primary school situate a short distance away to the north of her home. At about 10.45 a.m. on the 20th November, 1962, while returning home from school she was knocked down in King Edward Street just outside of her home by a garbage truck No. L.C. 163 owned and operated by the Mayor and Town Council of Georgetown and driven by the first-named defendant who at all material times was employed to drive that truck.

The first question to be decided is whether it is proved that the accident was due to the negligent driving of the defendant Jagroop. The truck, manned by three garbage collectors, employees of the Mayor and Town Council of Georgetown (apart from the driver), had been driven south along King Edward Street for the purpose of collecting garbage in that area. Jagroop brought the truck to a standstill on the western side of King Edward Street opposite to the entrance to the yard in which the plaintiff's home was situate in order that dustbins standing outside of the eastern palings of that yard (which is on the western side of King Edward Street) should be cleared by one of the collectors. The two other collectors proceeded on foot to clear bins outside of yards farther south along King Edward Street. Jagroop remained seated in the driver's seat in the cab of the truck (a righthand drive vehicle). The truck was parked facing south about 3 or 4 feet from a drain at the western edge of the roadway. A wooden bridge across the drain from the roadway gave access to the yard in which the plaintiff's house is situate. The roadway at that point is 19 feet 9 inches in width.

The plaintiff testified that she was sitting on the top step of the stairway to her house awaiting the arrival of Shelley from school when the truck came up and was parked opposite to the entrance to her yard. She said that one of the collectors had started to clear the garbage from two bins outside of the eastern palings of her yard when she saw Shelley and another child, one Sandra Trotman, daughter of a neighbour, coming home from school walking south along King Edward Street. She then proceeded down the stairs to meet Shelley and had reached near to her gate (which is about 70 feet east of her house) when suddenly she saw the truck move off at high speed. By that time the children had reached the front of the truck and appeared as if they were attempting to cross the front of the truck to get to her bridge. Sandra jumped across to the edge of the drain but Shelley who also tried to get across in front of the truck was knocked down by the left front wheel and killed.

The only other eyewitness of the accident who testified (apart from the driver) was Basil Persaud what at the time of the accident lived in a house in the same yard as the plaintiff. He said that he was applying hairdressing to his hair when he came to his window facing east onto King Edward Street and saw the truck in motion going slowly south about 3 feet from the drain on the western side of the roadway. He said that he saw a little girl about one foot in front of the left front wheel of the truck and the truck ran over the girl. He said that he called out to the driver "Stop, stop. Look the truck run over a little girl." The truck stopped about 3 rods farther south. The child had fallen where she was run over—in the middle of the roadway.

The defendant Jagroop swore that he had stopped the truck about 3 or 4 feet from the western edge of the road and remained seated in the driver's seat while one of the collectors, Sancho, emptied the bins outside of the plaintiff's yard. The other collectors went farther south to other bins. Sancho then called out to him "Move up." He then started up the engine of his truck, sounded his horn twice, looked through his two rear view mirrors and on seeing nothing coming from behind and nothing coming from in front of his vehicle he

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started to move off in a southerly direction. He heard a shout "Stop, stop", come from the direction of a house on the western side of the street south of the position of his vehicle. By then he had moved forward a distance of about 18 feet. He looked towards the direction of the house from which the shout came and then brought his truck to a standstill some 3 rods south of the point from which he had moved off. Basil Persaud came up and he (defendant) saw a child lying on the roadway.

The measurements taken by Police Constable Daniels at the scene shortly after the accident occurred do not throw doubt on the evidence of the defendant Jagroop that his vehicle had been parked some 3 or 4 feet from the western edge of the roadway. The width of the truck is 6 feet 10 inches. The body of the child was lying 10 feet from the western edge of the roadway. The deceased was 3 feet 2 inches tall and the height of the windshield from the ground was 4 feet 10 inches. The length of the cab of the truck is 5 feet 5 inches.

It is to be observed that both Jagroop and Persaud stated that they were not aware of the presence of Sandra at the scene either before or after the accident. Persaud had come to his window only a moment before the accident occurred and did not thereafter remain at the scene for any considerable length of time. Jagroop was unaware of the presence of any child until he left the cab of his truck after the accident had occurred and might easily have overlooked the presence of Sandra if indeed she had remained on or about the roadway immediately after the accident occurred.

It seems that the deceased Shelley had with her friend Sandra walked along the offside of the truck out of the view of Jagroop and had reached the front of the truck when Sancho shouted "Move up" to indicate that he had completed the task of emptying the bins outside of the plaintiff's yard. Jagroop then started the engine, observed from his mirrors that nothing was coming from behind and the front being clear sounded his horn twice and moved forward. It is true that neither the plaintiff nor Persaud heard the sound of a horn but whether or not the horn was sounded makes no difference in this case for it is not apparent that any appreciable interval was allowed to go by before Jagroop moved forward. The cause of the accident was Jagroop's inability to see a child of the deceased's height, 3 feet 2 inches, either walking along the offside of his truck or attempting to cross a foot or two in front of his truck by reason of the height of his cab above the level at the offside front wheel of 3 feet 2 inches from the roadway. Evidence was given that Jagroop sitting in the driver's seat was unable to see below a level of 52 inches (4 feet 4 inches) at that point.

The question is whether Jagroop used reasonable care which a skilful driver would have exercised in the circumstances. In my opinion he did not. The level of vision of the driver at the point of his left side front wheel was such that the driver was under a duty either by himself or with the aid of another to ascertain whether it was safe to move off. It is a matter of degree and I do not wish to be

understood as saying that a driver before he moves off must ascertain whether unusual dangers exist. The circumstances show that the truck moved off at a normal rate of speed. I can find no contributory negligence in the child. The truck was parked in such a way—necessary no doubt for the proper loading of the garbage—that the child could not be expected to get onto the bridge which led into her mother's yard except by going around the front of the truck. It will be appreciated that Sancho was removing garbage from bins towards the back of the truck and would have been blocking entry to the bridge from that direction. It was not unreasonable for the child to walk close alongside a stationary truck and to endeavour to cross one or two feet from its front. *I find that the accident was caused solely by the negligence of Jagroop, the driver of the truck.*

The next question is what damages are to be awarded. Under the Law Reform (Miscellaneous Provisions) Ordinance, Cap. 4, the first head of damages is that for loss of expectation of life. The deceased was 5 years 1 month old at the time of her death. The measure of damages laid down by the House of Lords in *Benham v. Gambling*, [1941] A.C. 157, 1 All E.R. 7, is in effect the loss of prospects of a happy life. For children of that age in England the amount awarded would be about £200. In British Guiana the award under this head is normally a little above \$200. I would award \$275 under this head. The second head of damages is that for pain and suffering. The deceased must have died almost instantaneously. I assess the damages under this head at \$30. The total award under the Law Reform (Miscellaneous Provisions) Ordinance, Cap. 4, would be \$305.

Under the Accidental Deaths and Workmen's Injuries (Compensation) Ordinance, Cap. 112 (the local counterpart of Lord Campbell's Acts) "there is no question of what may be called bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities" (*per* Lord WRIGHT in *Davies v. Powell Duffryn Associated Collieries Ltd.*, [1942] A.C. 601, at p. 617.) The measure of damages is the net pecuniary loss which has been suffered and is likely to be suffered by the plaintiff. Where the deceased is an infant child, as in the present case, there is normally no actual loss. Can it be said that there has been established a reasonable expectation of pecuniary benefit if the deceased had lived? A mere speculative possibility of benefit is not enough. In *Barnett v. Cohen*, [1921] 2 K.B. 461, the deceased was a boy just under 4 years of age at the date of his death. In an action brought by and on behalf of the boy's father it was held that there was no evidence of damage, present or prospective, and that the action failed. There the deceased was a bright healthy boy who had gone to school. The plaintiff (his father) had two other children, both boys, aged 9 and 13. In the present case the plaintiff (mother) has two other children, both girls, aged 9 and 13. The judgment of MCCARDIE, J., in *Barnett v. Cohen* at p. 472 seems to be relevant to the present case —

"The plaintiff has not satisfied me that he had a reasonable expectation of pecuniary benefit. His child was under four years

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old. The boy was subject to all the risks of illness, disease, accident and death. His education and upkeep would have been a substantial burden to the plaintiff for many years if he had lived. He might never have aided his father at all. He might have proved a mere expense. I cannot adequately speculate one way or the other. In any event he would scarcely have been expected to contribute to the father's income, for the plaintiff even now possesses £1,000 a year by his business and may increase it further, nor could the son have been expected to aid in domestic service. The whole matter is beset with doubts, contingencies and uncertainties. Equally uncertain, too, is the life of the plaintiff himself in view of his poor health. He might or might not have survived his son. That is a point for consideration, for, as was pointed out by BRAY, J., when sitting in the Court of Appeal, in *Price v. Glynea and Castle Coal Co.*, 9 B.W.C. 188, 198: 'Where a claim is made under' Lord Campbell's Act, as it is here, it is not only a question of the expectation of life of the deceased man, but there is also a question of the expectation of life of the claimant.' Upon the facts of this case the plaintiff has not proved damage either actual or prospective. His claim is pressed to extinction by the weight of multiplied contingencies. The action therefore fails."

The present plaintiff is not proved to be in bad health. She is 40 years of age and it is possible that the child, had she not been killed, might have rendered services in her mother's household for some time after she had grown up. I would award \$275 in respect of prospective loss.

There is no dispute that the funeral expenses amounted to \$155 and the loss of clothing to \$12. The total loss under the provisions of Cap. 112 would be \$442. The amount must be reduced taking into account the award under the Law Reform (Miscellaneous Provisions) Ordinance, Cap. 4. The plaintiff is entitled to judgment in the sum of \$472 being—

(1) Funeral expenses .....	...	...	\$155
(2) Loss of clothing .....	...	...	12
(3) Loss of expectation of life	...	...	275
(4) Pain and suffering .....	...	...	<u>30</u>
			<u>\$472</u>

Costs to the plaintiff on the lower Supreme Court scale.

Judgment for the plaintiff.

Solicitors: *C. M. L. John* (for the plaintiff); *F. I. Dias* (for the defendants).

BRITISH GUIANA CREDIT CORPORATION v. HANIFF DEEN.

[Supreme Court (Luckhoo, C.J.) November 23, 30, 1962, January 17, 1963]

Limitation—Enactment removing loans due to corporation from application of Limitation Ordinance—Debt statute barred at time of enactment—Whether enactment enables corporation to recover debt—British Guiana Credit Corporation Ordinance, 1954, s. 47, as amended by Ordinance No. 18 of 1962.

In 1952 the defendant took a loan from the New Mahaicony Credit Bank Ltd., which was operated under the provisions of the Cooperative Credit Banks Ordinance, 1944. In 1953 or early 1954 the Credit Bank was wound up and the Ordinance repealed by the British Guiana Credit Corporation Ordinance, 1954. By s. 55(2) of the latter “every loan made under the Cooperative Credit Banks Ordinance 1944 by the local credit banks..... (was) deemed to have been made with the authority of the plaintiff Corporation.....”

The plaintiff sued on the 23rd October, 1961, for repayment of the loan. On 1st June, 1962, while the action was pending, s. 47 of the British Guiana Credit Corporation Ordinance 1954 (which relates to the protection of the corporation) was amended by Ordinance No. 18 of 1962 to include a new subsection reading: “(2) Nothing in the limitation Ordinance shall in any way affect any right of the Corporation in connection with any loan made by it.” And s. 3 of the amending Ordinance provided that “nothing in this Ordinance shall apply in relation to any action determined prior to this Ordinance.” For the plaintiff it was argued *inter alia* that the effect of the amendment was to take out of the cognisance of the Limitation Ordinance all debts whenever created except those in respect of which an action had been determined prior to the enactment of the amendment.

Held: the amendment did not apply to actions in which the remedies were barred by the Limitation Ordinance at the time the actions were brought, nor did it remove the statutory bar to the remedy where action had not been brought and the bar not therefore pleaded prior to the enactment of the amendment.

Judgment for the defendant.

[**Editorial Note:** An appeal to the British Caribbean Court of Appeal was dismissed. See (1965), 8 W.I.R. 213].

D. Jagan for the plaintiffs.

M. S. Rahaman for the defendant.

B.G. CREDIT CORPN. v. DEEN.

Reasons for Decision: During the year 1952 the defendant Haniff Deen, who was a member of the New Mahaicony Co-operative Credit Bank Ltd., made application to that Bank for and was granted a loan of \$240 at 6% per annum interest repayable half yearly. The loan was granted for the purpose of the cultivation of rice by the defendant and was so utilised. However, because of adverse weather conditions the defendant's growing crop was lost. Despite assistance from the Department of Agriculture the defendant's crop for the year 1953 was also lost because of adverse weather conditions.

Some time during the latter part of 1953 or early in 1954 it was decided to wind up the existing credit banks operated under the Co-operative Credit Banks Ordinance, 1944 (No. 16). The New Mahaicony Co-operative Credit Bank Ltd. was one of those credit banks and the members including the defendant thereof were refunded their share capital. The functions of the credit banks were taken over by the newly created British Guiana Credit Corporation operating under the provisions of the British Guiana Credit Corporation Ordinance, 1954 (No. 13). By s. 60 of that Ordinance the Cooperative Credit Banks Ordinance, 1944 (No. 16), among other Ordinances relating to credit banks, was repealed.

Apparently, the defendant considered that with the refund of his share capital and the winding up and dissolution of the New Mahaicony Credit Bank Ltd. his obligation to repay the loan had disappeared. This of course was not so for by s. 55 (2) of the British Guiana Credit Corporation Ordinance, 1954 (No. 13), it was enacted that

“every loan made under the Co-operative Credit Banks Ordinance, 1944, by the local credit banks, together with any interest thereon, and still due and owing on the date of the coming into operation of the Ordinance (No. 13 of 1954) shall be deemed to have been made with the authority of the Corporation and all promissory notes, bills of sale, charges and instruments of whatsoever nature for securing the repayment of any such loan to the local credit banks shall be deemed to have been made in favour of the Corporation which is hereby substituted without any other formality for the local credit banks in every deed and every mortgage or charge or other document evidencing any such loan for securing its repayment.....”

The Ordinance No. 13 of 1954 came into operation (by Proclamation No. 9 of 1954) on the 21st June, 1954.

The defendant has never made any payment of interest or repayment of capital on the loan. By virtue of the provisions of s. 3 of the Limitation Ordinance, Cap. 26, the loan became statute barred six years after it had become due. This action was filed on the 23rd October, 1961. On the 1st June, 1962, s. 47 of the British Guiana Credit Corporation Ordinance, 1954 (No. 13) (which relates to the

protection of the Corporation) was amended by Ordinance No. 18 of 1962 to include the following new subsection—

“(2) Nothing in the Limitation Ordinance shall in any way affect any right of the Corporation in connection with any loan made by it.”

It was further provided by s. 3 of the amending Ordinance that—

“Nothing in this Ordinance shall apply in relation to any action determined prior to this Ordinance.”

Before dealing with the effect of the amendment to s. 47 of the Ordinance (No. 13 of 1954) reference should be made to the provisions of s. 15 (e) of the Limitation Ordinance, Cap. 26, upon which counsel for the plaintiffs relied in support of his submission that even apart from the amendment to s. 47 of Ordinance 13 of 1954, the debt was not statute barred. Section 15 (e) provides as follows —

“Nothing in this Ordinance shall in any way affect the rights of the Crown or apply or extend to—

(e) any bond, bill, note, or other evidence of debt issued by any bank corporation or by or on behalf of the Colony;”

Counsel contended that the British Guiana Credit Corporation is a bank corporation and that s. 15 (e) has the effect of taking a debt to the B.G. Credit Corporation out of the provisions of the Limitation Ordinance. That the Legislature and the draftsman of the amending Ordinance did not share counsel's view is evident by the enactment of the amendment. The provisions of s. 15 (e) refer to bonds, bills and bank notes, etc., *issued by* a bank corporation and not to any bond, bill, note, etc., issued by a person *to* a bank corporation.

Counsel next submitted that the effect of s. 47 (2) of the Ordinance, No. 13 of 1954, is to take out of the cognizance of the Limitation Ordinance all debts whenever created except those in respect of which an action had been determined prior to the enactment of the amending Ordinance (No. 10 of 1962) on the 1st June, 1962. It is not disputed that s. 47 (2) will apply to loans made prior to the enactment of that subsection and where the limitation provisions did not apply at the time of the coming into operation of the subsection.

It will be observed that the present action was filed on the 23rd October, 1961, by way of a specially indorsed writ of summons and had the hearing of the action been concluded later in 1961 or prior to 1st June, 1962, the defendant would have been able successfully to plead s. 3 of the Limitation Ordinance in defence. Counsel's argument would have the effect that if an action though filed prior to 1st June, 1962, were determined after that date, a defendant would be deprived of the plea of the limitation provision even if that plea were properly on the record before the date of determination of the

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action. It is difficult to contemplate that the liability of a person should depend upon the availability of a judge to hear and determine litigation.

The amendment, if the submission of counsel for the plaintiffs is sound, would have the effect of placing in jeopardy all those debtors who having paid off their debts have, after the period of limitation had elapsed and placing reliance upon the limitation provision prescribing the period of limitation, destroyed the evidence of their payment. It is appreciated, however, that wherever the intention is clear that an enactment is to have retrospective operation, it must be so construed despite the fact that the consequences may appear to be hard and unjust.

Those serious consequences apart, can it be said that the legislature intended retrospective operation of the provisions of s. 47 (2) of Ordinance 13 of 1954 either in the sense that debts previously statute barred would no longer be statute barred or in the sense that where the provision is lawfully pleaded in an action not yet determined at the date of the enactment of the subsection its protection is to be withdrawn thereafter?

In construing enactments which deal with limitation provisions it is important to bear in mind the general policy of such provisions. It is generally accepted that the intention of the Legislature in passing statutes of limitation is well expressed in the judgment of BEST, C.J., in *A'Court v. Cross* (1825), 3 Bing. 329. at pp. 332 and 333, and by Lord ATKINSON in *Board of Trade v. Cayzer*. [1927] A.C. 610, at p. 628. BEST, C.J., said—

“It has been supposed that the Legislature only meant to protect persons who had paid their debts, but from length of time had destroyed the proof of payment. From the title of the Act to the last section, every word of it shows that it was not passed on this narrow ground. It is, as I have often heard it called by great judges, an Act of peace Long dormant claims have often more of cruelty than of justice in them Christianity forbids us to attempt enforcing the payment of a debt which time and misfortune have rendered the debtor unable to discharge. The Legislature thought that if a demand was not attempted to be enforced within six years, some good excuse for non-payment might be presumed, and took away the legal power of recovering it.”

Lord ATKINSON said—

“The whole purpose of the Limitation Act is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for a number of years respectively and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use.”

In *R.B. Policies at Lloyds v. Butler*, [1950] 1 K.B. 76, at pp. 81 and 82, STREATFEILD, J., was of the view that the courts should not assist those who go to sleep on their claims and the view that the statute is an Act of peace equally represented the policy of the Legislature.

As is stated in MAXWELL ON STATUTES (10th Edn.) at p. 213—

“It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication” and at p. 214—

“A statute is not to be construed to have a greater retrospective operation than its language renders necessary. Even in construing a section which is to a certain extent retrospective, the maxim ought to be borne in mind as applicable wherever the line is reached at which the words of the section seem to be plain. For it is to be observed that the retrospective effect of a statute may be partial in its operation.”

And at p. 221—

“In general, when the law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights.”

I do not think that the provisions of sub-s. (2) of s. 47 as enacted can be said to show a clear intention to apply to actions in which the remedies were barred by the Limitation Ordinance at the time the actions were brought. Do the provisions of s. 3 of the amending Ordinance have that effect?

The provisions of s. 3 of the amending Ordinance No. 10 of 1962 purport to remove from the ambit of the new subsection all actions determined prior to the enactment of the amending Ordinance on the 1st June, 1962. With respect, it is somewhat difficult to see why it was considered that such a provision was necessary. I see nothing in the amending Ordinance which can possibly be construed as affecting actions determined prior to the enactment of the amending legislation.

I do not think that anything contained in s. 3 of the amending Ordinance can be used to support the view that the provisions of s. 47 (2) are retrospective in the sense that they deprive a debtor of a statutory defence lawfully set up by him during the pendency of an action. Nor do I think it can successfully be urged that s. 47 (2) has the effect of removing the statutory bar to the remedy where action had not been brought and the bar not therefore pleaded prior to the enactment of the provision.

For those reasons I dismissed the plaintiffs' claim against the defendant.

Judgment for the defendant.

THE OGLE COMPANY LTD. v. HACKETT AND OTHERS

[In the Full Court, on appeal from the magistrate's court for the Georgetown Judicial District (Luckhoo, C.J., and Bollers, J.) May 18, 27, 28, June 13, August 8, 1963.]

Appeal—Magistrate's court—Notice of appeal—Time for serving—Computation—Notice sent by registered post—Received out of time—Whether a mere irregularity—Whether Full Court can extend time to allow fresh service—Summary Jurisdiction (Appeals) Ordinance. Cap. 17, s. 4 (1) and s. 16 (1).

Appeal—Magistrate's court—Notice of appeal served on counsel who appeared for respondent in magistrate's court—Authority of counsel to accept service—Summary Jurisdiction (Appeals) Ordinance, Cap. 17, s. 4 (1) (a) and (b).

Appeal—Magistrate's court—Security—Separate actions by same plaintiff against different defendants—Actions consolidated by magistrate—One set of security only provided—Whether security adequate—Summary Jurisdiction (Appeals) Ordinance, Cap. 17, s. 5 (1) and (3).

The appellant filed separate actions in the magistrate's court against each of the thirty-five respondents. By consent of the parties the actions were consolidated by order of the magistrate who on 31st October, 1962, gave judgment in favour of the respondents. On 13th November, 1982, the appellant lodged with the clerk of court a notice of appeal in writing; and on the same date purported to serve a copy of the notice on each respondent by registered post. The notices were however received by the respondents only between the 15th and 17th November. On 14th November the appellant had attempted to serve all the notices of appeal on counsel who had appeared in the magistrate's court for some of the respondents but he refused to accept them.

It was argued for the respondents that the notices were not served on the respondents "within fourteen days after the pronouncing of the decision" as required by s. 4 (1) (b) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17. In reply it was contended that by virtue of s. 14 (1) of Cap. 17, as amended by Ordinance No. 29 of 1855, the Full Court had jurisdiction to grant the appellant an extension of time for the purpose of serving the notices and that therefore the default was a mere irregularity and not a nullity. Section 16 (1) of Cap. 17, however, provides that "if the applicant makes default in the due prosecution of his appeal.....he shall be deemed to have abandoned the appeal." For the respondents it was also argued that separate security should have been lodged in respect of each respondent. In reply it was contended that this was unnecessary as the actions had been consolidated by the magistrate and heard as a single action.

Held: (i) in cases in which a period is fixed within which a person must act or take the consequences, the day of the act or event from which the period runs should not be counted against him;

(ii) service of the notice of appeal should therefore be effected before or at latest on the last day of the prescribed period, which in this case was 14th November, 1962;

(iii) the authority of counsel on whom it was sought to serve the notices ceased at the determination of the proceedings in the magistrate's court;

(iv) in view of s. 16 (1) of Cap. 17 the Full Court had no discretion to grant an extension of time to the appellant to enable the notices to be properly served;

(v) separate security was required in respect of each respondent as the effect of the order for consolidation was not to merge all the different causes

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of action into one or to destroy the individual or separate character of each cause of action, but was merely to permit the court to hear several different causes of action together when it was convenient to do so.

Appeal struck out.

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

L. A. Luckhoo, Q.C., for Nos. 1–7 respondents,

J. Carter, Q.C., for Nos. 8–14 respondents,

C. A. F. Hughes for Nos. 15–21 respondents,

M. G. Fitzpatrick for Nos. 22–28 respondents,

B. S. Rai for Nos. 29–35 respondents.

Reasons for Decision: In this appeal no less than 35 actions for possession were filed against that number of respondents (all tenants of the appellant company), in the magistrate's court which subsequently, at the hearing of the actions, were by consent of the parties consolidated by order of the magistrate under r. 1, Part 8 of the Summary Jurisdiction (Civil Procedure) Rules, Cap. 12. These actions were duly heard and disposed of and decision given on the 31st October, 1962, in favour of all the respondents. Notice of appeal was not given by the appellant company at the time of the pronouncing of the decision but on the 13th November, 1961, acting in accordance with s. 4 (1) (b) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, they lodged with the clerk of court one notice of appeal in writing and on the same date they purported to serve a notice of appeal in writing on each respondent by registered post. In the case of each respondent an official envelope of the office of solicitors for the company bearing an embossed stamp "Cameron and Shepherd" franked "25 cents 13.11.62" was used and on the back of the envelope the words "G.P.O. Registration 14.11.62 last day for service" appeared. The respondents all lived at La Penitence. The envelopes and their contents all went to the Albouystown Post Office going through the normal course of postage for registered letters and bore the post office stamp dated 15.11.62. On that date, therefore, all the envelopes containing the respective notices of appeal addressed to the respondents were awaiting delivery at the Albouystown Post Office. The actual dates of receipt of the notices vary between the 15.11.62 and 17.11.62. It must be observed that although one notice of appeal in respect of the consolidated actions was lodged with the clerk in respect of each respondent, the appellant company purported to serve a notice of appeal on him and proceeded then in pursuance of s. 5 (1) and (3) of the Summary Jurisdiction (Appeals) Ordinance to deposit one single sum of three dollars as security for the due prosecution of the appeal and the further single sum of twenty-five dollars for the security for the payment of any costs awarded against them by the court respectively.

At the hearing of the appeal two preliminary objections were taken by the various counsel for the respondents in a submission in which they all concurred. Firstly, that the appellant company had failed to comply with s. 4 (1) (b) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, as the notices of appeal addressed to

each respondent were served out of time, *i.e.*, not within the time limit of 14 days after the pronouncing of the decision as prescribed by the said section, in which case this court had no jurisdiction to entertain the appeal. Secondly, that there was a non-compliance on the part of the appellant company with s. 5 (1) and (3) of the Summary Jurisdiction (Appeals) Ordinance as a result of which, by virtue of s. 16 (1) of the said Ordinance, the appeal should be deemed abandoned and should stand dismissed for want of due prosecution in this court.

In respect of the first point, counsel for the respondents submitted that the notices ought to have been served on or before the 14.11.62 and having been served on the 15.11.62 and on subsequent dates, they were out of time. In support of this contention counsel relied on *Gonsalves v. Dargan*, 1920 L.R.B.G. 25, *Robertson v. Yarde*, 1920 L.R.B.G. 98, *Singh v. Brazao*, 1925 L.R.B.G. 162, and the recent case *Sattaur v. Ramsaroop* No. 1477/1961 Demerara decided by this Court on the 17th February, 1962. (See 1962 L.R.B.G. 25). Counsel for the appellant company submitted in reply that since the court under s. 14 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, as repealed and re-enacted by s. 2 of the Summary Jurisdiction (Appeals) (Amendment) Ordinance, 1955 (No. 29), had jurisdiction to put the matter right and grant the appellant an extension of time in which "the act should be performed", *i.e.*, to serve the respective notices of appeal, the default was a mere irregularity and not a nullity, and the respondents not having taken any steps to move the court prior to the date of the hearing of the appeal to have the appeal struck out, they could not properly do so now. Counsel also stated, and it was admitted by the respondents, that on the 14.11.62 the appellant company attempted to serve all the notices of appeal on Mr. L. A. Luckhoo, Q.C., counsel for some of the respondents, who refused to accept them. In which case, if that was considered good service, that act would be within the prescribed time. Counsel relied strongly on *McFoy v. United Africa Co.*, [1961] 3 All E.R. 1169, *Demerara Co. v. Burnett* (1959), 1 W.I.R. 437, and in support of his second proposition he cited *Lady De La Pole v. Dick* (1885), 29 Ch.D 351.

Section 4 (1) (b) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, reads as follows:

"4. (1) An appellant may

(a) * * * * *

(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."

It is clear that the appellants failed to comply with the provisions of this subsection and were in default when they failed to serve a copy of the written notice of appeal on each respondent on or before 14.11.62. As was stated in the judgment of WORLEY, C.J., and WARD, J., in *Sharples v. Lawrence*, 1951 L.R.B.G. 37, neither the

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Interpretation Ordinance nor O. XLII of the Rules of Court, 1900 (which relates to appeals) (now O. 46 of the Rules of Court, 1955) contains any special rule for the computation of time; the general rule will therefore apply, viz:

“In cases in which a period is fixed within which a person must act or take the consequences, the day of the act or event from which the period runs should not be counted against him.” (32 HALSBURY’S LAWS, 2nd Edn., para. 207).

The act must therefore be done either before or at latest on the last day of the prescribed period, which in the present case was 14.11.62. Over and over again this court has decided that unless an appellant complies strictly with the directions contained in this subsection his appeal will not be heard. The reason advanced for refusing to entertain the appeal in such circumstances is that the court is without jurisdiction, the Full Court having no jurisdiction with respect to appeals from magistrates’ decisions except such as is expressly given by the Ordinance. As BOLAND, J., pointed out in *Williams v. Chesney*, 1953 L.R.B.G. 2, the Ordinance in force is the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, and it was accordingly always held that the appellant shall perform at the time and manner prescribed in ss. 4, 5 and 8 (3) thereof all that he is directed to do before the hearing of his appeal. The notice of appeal must therefore then be filed and served in strict conformity with s. 4 (1) (b).

In *Gonsalves v. Dargan*, 1920 L.R.B.G. 25, a preliminary objection was taken at the hearing of the appeal on the ground that the notice of appeal and grounds of appeal were not served on the respondent within the fourteen days allowed by law. The decision was given on the 31st October and on Friday, 14th November at 10.15 a.m. the notice and reasons of appeal were posted in a registered envelope to the respondent and in the ordinary course of postal delivery would have been delivered at his residence on the same day. As a result of information received the respondent went to the post office on the 15th and received the registered letter. This was the day after the time for service had expired. Under these circumstances the Court of Appeal held that the appeal could not be heard and must stand dismissed. In that case the appeal was heard before a single judge, BERKELEY, ag. C.J., who considered s. 2 of an Ordinance 30 of 1907 which provided that —

“where any Ordinance authorises or requires any document to be served by post..... then unless the contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying 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”,

and arrived at the conclusion that in the absence of the words “unless the contrary is proved” it may well be that notices (under these acts) transmitted in a registered letter would be deemed to have been

served at the time when such letter would be delivered in the ordinary course of post.

In *Robertson v. Yarde*, 1920 L.R.B.G. 98, which was an appeal from the decision of a single judge who had made an order of dismissal in respect of an opposition action entered but not proceeded with to the sale at execution of certain property levied on, the Court of Appeal on a preliminary objection being taken considered O. XLIII, r. 8, whereby it was prescribed that notice of appeal had to be served within 21 days from the date of judgment. The judgment was dated 5.5.1919 and the appellant waited until the last day (26th May) to comply with the Rule of Court. The 26th May was a Monday and the service of notice of appeal therefore after 4.00 p.m. was service on the following day, Tuesday, and it was held that the objection was sound and the action must be dismissed.

In *Singh v. Brazao*, 1925 L.R.B.G. 162, where the notice of reasons of appeal from an order of the magistrate's court was shown to the respondent who declined to accept the notice but was not informed as to the nature of the documents, and that a few hours before the expiration of the time within which service could be effected the said documents were pushed under the door of the respondent's residence, there being no proof that the respondent returned to her house before the expiration of such period allowed for service, it was held that the service had to be effected within a certain time and there was no enactment that the mere leaving of the reasons of appeal at a respondent's house should be conclusive proof of service. The onus of proving service lay on the appellant and he had not in the opinion of the court discharged the onus placed upon him and the appeal was dismissed. It is not surprising to find that these older authorities established the proposition that where there was default by the appellant in performing the various acts within the prescribed time necessary to prosecute the appeal, the court had no jurisdiction to hear the appeal, because of s. 16 (1) of the Ordinance which states that if the applicant makes default in the due prosecution of his appeal he shall be deemed to have abandoned the appeal.

An examination of the authorities cited by counsel for the appellant at once reveals that these cases are not applicable in the present circumstances. *McFoy v. United Africa Co., Ltd.*, [1961] 3 All E.R. 1169, P.C., was a case decided on the interpretation of the Rules of the Supreme Court of Sierra Leone where it was held that the delivery of a statement of claim in the long vacation is an irregularity and thus is voidable if the court in its discretion under the Rules of the Supreme Court, O. 70, r. 1, so orders, but it is not a nullity and, unless it is set aside by order of the court, it remains good and will support a subsequent judgment in default of defence. The Privy Council in a judgment read by Lord DENNING considered the effect of non-compliance with the Rules of the Supreme Court of Sierra Leone and referred to O. 50, rr. 1 to 4, of the Rules of the Supreme Court of Sierra Leone which are in identical terms with O. 70, rr. 1 to 4, of the Rules of the Supreme Court of England, and incidentally

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with O. 54, rr. 1 to 4, of the Rules of the Supreme Court of British Guiana, 1955. The rule reads as follows:

“ 1. Non-compliance with any of these Rules or with any rule of practice for the time being in force 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.”

Lord DENNING in his judgment points out that the rule only applies to proceedings which are voidable, *i.e.*, where the non-compliance is a mere irregularity, and not to proceedings which are a nullity, for these are automatically void and a person affected by them can apply to have them set aside *ex debito justitiae* in the inherent jurisdiction of the court without going under the rule. Where the noncompliance consists of a mere irregularity, however, under the rule the act is only voidable and may be waived and there must be an order of the court setting it aside and the court would only do this if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it.

The principles discussed herein can however have no application to the present appeal where the court must of necessity be guided by s. 16 (1) of the Ordinance which does not give the court a discretion as in the case of the Rules of the Supreme Court but enacts that in the event of a default the appeal should be deemed abandoned. So in *Sattaur v. Ramsaroop*, 1962 L.R.B.G. 25, where the notice of appeal was sent to the respondent by registered post to an address in Albouystown, Georgetown, that is to say, the respondent's last and most usual place of abode, which address he first gave and subsequently withdrew in his evidence, furnishing a new address, but was unknown to counsel for the appellant, who was retained by the appellant after he had given his evidence and which notice was actually served on another person through whose agency it was finally delivered to the respondent after the expiration of fourteen days, this court reached the conclusion that there was a non-compliance and the notice was served out of time although when sent by registered post to the original address it was within the time, and accordingly made the order that the appeal must be struck out and dismissed. It also expressed the opinion that even if the notice were to be considered sent to the original place of residence given by the respondent it did not remain at this address and therefore it could not have been said to have been served on the respondent.

In *Gatti v. Shoemith*, [1939] 3 All E.R. 916, C.A., the Court of Appeal in England held that under O. LVIII, r. 15, Where leave to appeal had not been served within the prescribed time in the rule owing to a mistake by the legal adviser, the court may in its discretion grant leave to appeal and notwithstanding that the time for entering an appeal had expired. Sir WILFRED GREENE, M.R., in his judgment observed that before the year 1909 O. LVIII, r. 15, which was the order regulating the time for appeals to the Court of Appeal, was in a different form from that in which it was now cast. Under the order as it then stood, the power of the court to extend the time

for appealing required some special matter for the reason that the appeal could not be brought except by special leave of the Court of Appeal, and the court in those days very much disliked the imposition of a fetter upon its discretion which compelled it to refuse leave in cases where some unfortunate slip, the rectifying of which could have done no harm to anybody, had taken place. In 1909, however, the rule committee altered O. LVIII, r. 15, by striking out the reference to "special leave of the Court of Appeal" and prefacing r. 15 of O. LVIII with the words "Subject and without prejudice to the power of the Court of Appeal under O. XLIV, r. 7." That, therefore, put the matter of enlarging the time under O. LVIII, r. 15, under O. LXIV, r. 7, as the governing rule. The Master of the Rolls arrived at the conclusion that there was nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time, and in the result on the facts of the case it appeared to him that the case was one where the discretion of the court ought to be exercised and accordingly the necessary leave was granted. The distinction therefore to be drawn between these English cases and the circumstances of the present case is that in the English cases the court by Rule of Court (see present O. 58, r. 14) has a discretion in which to grant an extension of time whereas this court has no such discretion.

In considering whether service on the respondents' counsel after the conclusion of the proceedings in the magistrate's court was good service on the respondents whom that counsel represented at the hearing of the actions, one must of necessity refer to s. 4 (1) (a) of the Ordinance which speaks of the appellant at the time of the pronouncing of the decision and before the opposite party has left the courtroom either personally or by his counsel or solicitor giving verbal notice of his appeal in open Court. If this is not done a notice of appeal may be given within the prescribed time after the pronouncing of the decision. Section 4 (1) (b), however, speaks of serving a copy of the notice of appeal upon the opposite party. When contrasted with s. 4 (1) (a) it does not make particular mention of the appellant's counsel or solicitor. Those words are omitted. In *Lady De La Pole v. Dick* it was decided that a summons to examine a judgment debtor does not require personal service and if the debtor appeared in the action by a solicitor, the summons should be served on such solicitor. It must be noted, however, that that case did not turn on the interpretation of any statute. Moreover in *R. v. Oxfordshire, JJ.*, [1893] 2 Q.B. 149, it was held that service on the solicitor who appeared for the other party at petty sessions is not valid, as his authority ceased at the determination of those proceedings.

On the first point, therefore, we must uphold the objection that the notices of appeal were served out of time and as a result the appeals must be struck out and stand dismissed.

In respect of the second point, counsel for the appellants submitted that it was not necessary for his clients to have deposited more than the single sum of three dollars under s. 5 (1) of the Ordinance and more than the single sum of twenty-five dollars under s. 5 (3)

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of the said Ordinance as the actions had been consolidated by order of the magistrate in the court below and therefore proceeded to be heard as one single action. He cited: *Hodgkins v. Willis*, O.G. 4.1.1908; *Booth v. Appan*, O.G. 19.2.1909; *Sargent v. Agard*, O.G. 14.5.1910, *Malouf v. Atallah*, 1920 L.R.B.G. 162; *Williams v. John*, 1924 L.R.B.G.; *Alexander v. Das*, 1938 L.R.B.G. 206; *Nelson v. Charles*, 1941 L.R.B.G. 45; *Bovell v. Jasoda*, 1950 L.R.B.G. 151; and *Whitney v. McLean*, No. 1381/1959 Demerara (1960 L.R.B.G. 105); and contended that all these cases save and except *Booth v. Appan* decided that one deposit was enough where there were several respondents.

In *Hodgkins v. Willis*, O.G. 4.1.1908, where there was one appellant and several respondents and only one sum lodged to abide costs of the appeal, it was contended that there being more than one respondent a single sum should have been lodged for the costs of each respondent. LUCIE-SMITH, C.J. (ag.) on appeal, however, took the view that there was only one appeal and that only one sum need have been lodged to abide the costs of the appeal. He declared that the relevant section, which at that time was "s. 16 of the Magistrates' Decisions (Appeals) Ordinance, 1893", did not provide that a single sum should be lodged to abide the costs of each respondent. It is noteworthy that the learned Acting Chief Justice did not address his mind to the question whether the single sum actually deposited was sufficient to cover the costs of each respondent, if successful at the appeal. What must be pointed out, however, is that in that case unlike the present case there was only one complaint.

In *Booth v. Appan*, O.G. 19.2.1909, which was also a criminal case, there was also a single complaint against four defendants which was dismissed in the court below and the complainant appealed. There was a single recognizance entered into by the appellant in respect of one sum which was sufficient only to cover the costs of only one respondent. BOVELL, C.J., held that although there was a single complaint against all four respondents the offence created thereby was not joint but several in its own nature, the guilt or innocence of any person not being in any way affected by the guilt or innocence of any other person and, hence, the decision of the magistrate was in legal effect a separate acquittal of each defendant and the recognizance entered into was therefore insufficient. The appeal was dismissed. It is interesting to note that BOVELL, C.J., considered an aspect of the matter not touched upon by LUCIE-SMITH, C.J. (ag.), in *Hodgkins v. Willis* and that was that if the defendants had been convicted instead of being acquitted and had all desired to appeal, the appeal must have been regarded as separate appeals from separate convictions and each defendant would have been bound to enter into a separate recognizance in respect of a separate and distinct sum to abide the costs of appeal.

In *Sargent v. Agard*, O.G. 14.5.1910, also a criminal case where there were two appellants and one respondent and only one single sum lodged instead of two separate sums to abide the costs of appeal, the preliminary point was raised that the amount lodged by the appellant did not comply with s. 16 of the 1893 Ordinance. The appellants contended that as the offence was a joint one and that the

defendants were joined, it was in reality only one appeal and therefore only one single sum to abide the costs of the appeal was necessary. They, however, admitted that if they had chosen to give security by way of recognizance instead of a sum of money each one of them would of necessity have been required to sign a separate recognizance. HEWICK, C.J., (ag.), however, rejected the contention and pointed out in his judgment that there were many cases where it would be necessary to give separate notices and reasons for appeal when there was more than one appellant. He maintained that the offence in the case was charged jointly but the magistrate gave two distinct decisions. Hence the requirements of s. 16 had not been complied with and the appeal dismissed. This case, therefore, does not support the appellants in the present appeal.

In *Malouf v. Atallah*, 1920 L.R.B.G. 162, a case in which there were two complaints in a matter arising out of the same incident and which were really cross-actions, both matters being heard together by consent of the parties, in the magistrate's court in the first complaint the defendant Malouf was convicted and in the second Atallah was discharged. From this decision Malouf appealed and was an appellant in both suits and lodged only one single sum to abide the costs of the appeal. It was urged by solicitor for the respondent that under the provisions of s. 16 of the Magistrate's Decisions (Appeals) Ordinance, 1893, there should have been another single sum deposited in order to abide the costs of the appeal. Counsel for the appellant had given two separate notices of appeal and filed two separate sets of reasons of appeal. It, however, transpired that notice of appeal was given in open court and that the magistrate there and then fixed the amount to be deposited as security for costs, which really only covered the costs in respect of one complaint. DALTON, C.J. (ag.), took the view that the respondent having consented to the amount which was fixed by the magistrate, he could not later on object to the insufficiency of the security. The learned Chief Justice went on to hold, however, that although the objection must be overruled, in the absence of the respondent's consent to the sum fixed by the magistrate, the security given was under the circumstances sufficient to comply with the law. This of course was clearly *obiter dicta* and he arrived at the conclusion that while it was true there were two complaints, there was only one hearing, one decision, one appellant, one record of the appeal and one hearing of the appeal. In our view, this reasoning was erroneous because even though there was one hearing, there were two separate complaints involving two separate decisions although embodied in a single document and requiring two separate orders of the magistrate, "decision" there being given the same interpretation as it is today in the present Ordinance governing appeals, and that is "any final adjudication of a magistrate in a cause or matter before him and includes any order or other determination of the cause or matter."

In *Williams v. John*, 1924 L.R.B.G., where there were three appellants and five respondents and only one appellant had entered into a recognizance to abide the costs of the appeal but which included a sum not sufficient to satisfy all five respondents, it was held that

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the other two appellants could not proceed with their appeal but that the first appellant could do so as there was no rule of practice requiring him to enter into a separate recognizance for security for costs in respect of each respondent. The court held further that under the circumstances the amount of the bond entered into was insufficient but that the court had power to adjust it on application being made by the respondents. Sir CHARLES MAJOR, C.J., in his judgment took the view that he had the power under the Magistrate's Decision (Appeals) Ordinance, 1893, to make an adjustment of the costs and to order an increase, the obvious reason being that the magistrate under s. 16 of the Ordinance had the power to fix the sum to abide the costs of appeal in a recognizance entered into by the appellant. At this point, it must be observed that the present Ordinance governing appeals from decisions of the magistrate gives this court no such power. What is important, however, in this decision is that the learned Chief Justice did concern himself with the question whether there was a sufficiency of security to abide the costs of each respondent and laid down the test to be applied by an officer of His Majesty or by any person or court called upon to fix an amount for security for costs, and that is, a consideration of the probable costs of the particular appeal.

It is not necessary for us to deal with the cases of *Alexander v. Das*, 1938 L.R.B.G. 206, and *Nelson v. Charles*, 1941 L.R.B.G. 45, as this court has already said in *Whitney v. McLean*, 1962 L.R.B.G. 105, at p. 106, that we are unable to follow the decisions on this point.

It is sufficient for us to say that we are of the opinion that VERITY, C.J. (ag.), went wrong when he stated in his judgment that it would appear to be clear that the intention of the statute was not to secure the respondent against loss but to put the appellant under penalty in a fixed sum to obey the order of the court and so discourage the bringing of frivolous appeals by irresponsible persons. With respect to that learned judge, that is not the intention of the statute. The intention is clearly that the appellant should deposit the sum of money to secure the costs of the respondent in the event of the appeal being unsuccessful. As BOLAND, J., pointed out in *Bovell v. Jasoda*, 1950 L.R.B.G. 151, where there were four applications for the grant of a spirit shop licence under the Intoxicating Liquor Licence Ordinance, Cap. 107, and the appellant opposed each of the four applications which for convenience were considered together, each application is a separate and distinct cause or matter for the consideration of the Board and the Board is required to hear and consider each application separately and their decision in respect of each application is a separate decision, and it is against such a decision, either granting or refusing the application, that the appeal is directed. The fact that for the sake of convenience the applications are considered together does not exempt the Board from its duty of considering each application and giving a decision with respect to each application, and if the appellant desired to exercise his right of appeal in respect of these decisions he was required to give three separate notices of appeal and to pay the fees required by s. 5 of the Ordinance. If he does not do this the court has therefore no jurisdic-

tion to hear the appeal since the Ordinance provides that unless this has been done within the prescribed period the notice of appeal shall be of no effect.

In *Whitney v. Crawford*, 1962 L.R.B.G. 105, at p. 106, we expressed the view that the words “the appellant shall” in s. 53 of Chapter 17 mean “each appellant shall” and each appellant is required to give security to the extent of twenty-five dollars for the payment of any costs awarded against him even though he is jointly charged and convicted with another or other appellants. We take the opportunity in the present appeal of expressing our view that the same interpretation is to be given to s. 5 (1) and that the wording of that section is to be interpreted to mean that each appellant is required when he gives or lodges notice of appeal, other than in a criminal cause or matter, to deposit the sum of three dollars as security for the due prosecution of the appeal. In respect of both sub-ss. 1 and 3, if there is more than one appellant in a civil case each appellant is therefore required to deposit three dollars under sub-s. 1 and twenty-five dollars under sub-s. 3 in respect of each respondent. In the present appeal, where the original actions were consolidated and therefore proceeded as one action each action maintained and preserved its separate identity and each required a separate and distinct order to be made by the magistrate. The magistrate could have granted the order for possession sought in some cases and refused it in others, in which case we might have had appeals by the appellant company in some cases where the order for possession was refused and appeals by the tenants (who are now the respondents) against whom an order for possession was made. Is it to be said in such a case that single sums of three dollars and twenty-five dollars deposited by the appellant company would be sufficient to cover the costs of all those appeals? Certainly in the present situation these single sums could never actually secure the costs of each respondent. An absurd situation would have arisen if some of the present respondents had appealed in a case where orders had been made against them and one had made the required deposits to abide the costs of his appeal and the others had not followed suit but depended on the single sums deposited. If this appellant had then withdrawn his appeal and deposits thereon, could the other appellants have proceeded with their respective appeals when no security was deposited? The answer is clearly no. The effect of the order for consolidation therefore was not to merge all the different causes of action into one or to destroy the individual or separate character of each cause of action but was merely to permit the court to hear several different causes of action together when it was convenient to do so. The main purpose of consolidation is to save costs and time and therefore it will not usually be ordered unless there is “some common question of law or fact bearing sufficient importance in proportion to the rest” of the subject matter of the actions “to render it desirable that the whole should be disposed of at the same time”: *Payne v. British Time Recorder Co.*, [1921] 2 K.B. 16.

The appellant company therefore failed to comply strictly with s. 5 (1) and (3) of the Summary Jurisdiction (Appeals) Ordinance,

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Cap. 17, when they failed to lodge the separate sums of three dollars and twenty-five dollars in the case of each respondent and the appeal is therefore to be deemed abandoned and in the result must be struck out for want of jurisdiction and stands dismissed.

Appeal struck out.

Solicitors: *B. Fulwell* (for the appellants); *M. S. Fitzpatrick* (for Nos. 1—7 respondents).

HENRY v. SUBRATTIE

[In the Full Court, on appeal from the magistrate's court for the East Demerara Judicial District (Bollers and Persaud, JJ.) April 19, August 8, 1963.]

Road traffic—Third party risks—Motor car registered as private car, but insured and used as a hire car—Whether driver guilty of using uninsured vehicle—Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 281, s. 3 (1).

The respondent was charged with the offence of driving an uninsured motor car. The evidence was that he had driven the car for hire although it was at all material times registered as a private car. It was however insured under a policy in respect of use for hire or reward. The policy itself correctly referred to the car as PM 213 but the certificate of insurance referred to it as car HM 213; and s. 4 (4) of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 281, provides that "a policy shall be of no effect for the purposes of this Ordinance unless and until there is issued.....a 'certificate of insurance'." At the trial the manager of the insurance company testified on behalf of the respondent to the effect that the company regarded the vehicle as covered in respect of the particular use to which it was put. The magistrate dismissed the complaint and the police appealed.

Held: (i) the car could not have been used as a hire car since it was registered as a private car;

(ii) this being so, a contract which sought to insure the car for use for hire or reward was implicitly prohibited by the statute, the object of which was the protection of the public;

(iii) even if the contract was innocent in its origin it became illegal by virtue of its illegal performance in the respondent's use of the car for purposes of hire;

(iv) the policy was of no effect until the certificate was issued but the certificate itself did not cover the use of the particular car since when the certificate was issued there was no car carrying the registration number therein indicated.

Appeal allowed.

W. Persram, Senior Legal Adviser, for the appellant.

B. S. Rai for the respondent.

Judgment of the Court: The respondent was charged with using motor car No. PM 213 when there was not in force a policy of insur-

ance or security in respect of third party risks in relation to the user thereof contrary to s. 3 (1) of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 281. Section 3 (1) of the Ordinance provides as follows:—

“Subject to the provisions of this Ordinance it shall not be lawful for any person to use.....a motor vehicle on a public road unless there is in force in relation to the user of the vehicle, by that person.....such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Ordinance.”

Section 4 of the Ordinance makes provision for the requirements of policies of insurance, that is, that such a policy must be issued by a person who is an authorised insurer and must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle on a public road.

The learned magistrate found as a fact—and we agree with this finding—that on the 21st day of July, 1962 (the day of the alleged offence) motor car No. PM 213 was registered as a private car and had been used by the defendant for hire or reward on that day. But having regard to the evidence given by the manager of the Federal Life and General Insurance Company Limited, the learned magistrate came to the conclusion that on the day in question the respondent was adequately covered for the use to which the vehicle was put. Accordingly, the magistrate dismissed the complaint, and it is against that dismissal that this appeal has been brought.

The magistrate in his memorandum of reasons for decision referred to *Carnill v. Rowland*, [1953] 1 All E.R. 486, and seemed to have based his judgment on the opinions expressed in that case. In that case a cover note insuring the respondent against third party risks in relation to the use of a motor cycle combination by him contained the words “Exclusive and special condition: sidecar permanently attached.” The respondent removed the sidecar body but left the chassis on a third wheel attached to the motor cycle and drove it in that condition. He was charged with driving an uninsured vehicle contrary to the Road Traffic Act, 1930, s. 35 (1), and at the hearing a representative of the insurers stated in evidence that in spite of the removal of the body the insurers considered themselves “on risk”. It was held that the meaning of the words of the condition of the policy was doubtful and where the insurers expressed the view that what was attached to the motor cycle satisfied the conditions of the policy and stated that they would have accepted liability if an accident had occurred, the respondent could not be found guilty for driving an uninsured vehicle. It was also held that where a condition in a policy was clear and could only be construed to exclude the liability of the insurers the court was bound to act on that construction notwithstanding a statement by the insurers that they regarded themselves as being “on risk.”

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It seems, therefore, that notwithstanding the evidence of the manager of the insurance company in the case before us the position is as stated by PEARSON, J., at p. 488 in *Carnill v. Rowland*:

“.....that the test whether the policy of insurance was in force was not whether the insurance company considered itself on risk but whether it was in law liable to indemnify the user for damage and injury which resulted from the use of the vehicle at the time when no sidecar was permanently attached. If it was proved that there was no sidecar attached to this vehicle at the material time, the view of the insurance company that they were bound would manifestly be incorrect in law and would have to be disregarded.”

In our opinion the heart of this matter is whether or not on the relevant date the respondent's car was insured for the use of which it was put. There is no doubt that the respondent approached the insurance company with a view to obtaining “hire” insurance on the 19th of July, 1962. On that date the registration number of the car was PM 213 and according to the evidence of Corporal 4750 Smith, a witness for the prosecution, this car could not then have been used as a hire car, the certificate of registration then related to a private motor car. If this evidence is correct then a policy of insurance could not have been issued on the 19th of July, 1962, in respect of PM 213 for any use other than private use.

It is the case, that contracts may be either expressly or implicitly prohibited by statute. If one of the objects of the statute is the protection of the public or the furtherance of some other aspect of public safety a contract that fails to comply with the statute is implicitly prohibited. It cannot be denied that a statute which makes provision for the protection of persons using a motor vehicle other than the owner or driver himself is a statute for the protection of the public.

Even if the contract is not implicitly prohibited by the statute we are of the opinion that this is a case in which the contract becomes illegal because the way in which it was performed was illegal, in other words while the contract may have been innocent in its origin, it became illegal by virtue of its illegal performance in the appellant's use of the car for purposes of hire under the contract of insurance whereas in truth and in fact it was registered as a vehicle for private use. This involved the commission of an offence under s. 23 of the Motor Vehicles and Road Traffic Ordinance, Cap. 280, as enacted by s. 20 (2) of the said Ordinance. In *Anderson Ltd. v. Daniel*, [1924] 1 K.B. 138, it was held that the object of the statute was to protect a particular class of public—the buyers of artificial manure—and that the sellers could not recover the price since “the way in which they performed the contract was illegal.”

“The question of illegality in a contract generally arises in connection with its formation, but it may also arise, as it does here, in connection with its performance. In the former case, where the parties have agreed to something which is prohibited by Act of Parliament, it is indisputable

that the contract is unenforceable by either party. And I think that it is equally unenforceable by the offending party where the illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed upon between the parties was capable of being performed in a perfectly legal manner.”

If we are wrong in this reasoning, we wish to observe that s. 4 (4) of Cap. 281 provides as follows:—

“A policy shall be of no effect for the purposes of this Ordinance unless and until there is issued by the authorised insurer in favour of the person by whom the policy is effected a certificate (hereinafter referred to as a “certificate of insurance”) in the prescribed form and containing such particulars of any conditions subject to which the policy is issued and of any other matters as may be prescribed, and different forms and different particulars may be prescribed in relation to different cases or circumstances.”

Dealing with this aspect of the matter Mr. Rai has urged that the document to be looked at is the document described as the cover note, which is a document dated the 19th July, 1962, and issued on behalf of the Federal Life and General Insurance Company Limited and refers to motor car No. PM 213. Mr. Persram urges that we ought to look at the certificate of insurance which refers to the number of the vehicle as HM 213. It seems to us from the wording of s. 4 (4) of the Ordinance that until a certificate of insurance is issued the policy is of no effect. The certificate in this case refers to motor car HM 213 and it is clear that at the time when that certificate was issued there was no car carrying that registration number. In the circumstances how could it be urged that the respondent’s car was adequately covered?

In the result we are of the opinion that on either reasoning the appeal ought to succeed. The appeal is therefore allowed and the order of dismissal is set aside. We were minded to remit the matter to the magistrate with directions to record a conviction and to deal with the matter accordingly, but as we have been informed that the magistrate is no longer in the district out of which this appeal arose we will deal with the matter ourselves. The respondent is convicted for the offence charged and he is ordered to pay a fine of \$50.00 in default of two months’ imprisonment. He must also pay the costs of this appeal fixed at \$29.56.

Under the provisions of s. 3 (2) of Chapter 281, unless the court orders otherwise the respondent upon a conviction of this nature is exposed to being disqualified from holding or obtaining a driver’s certificate under the Motor Vehicles and Road Traffic Ordinance for a period of 12 months from the date of the conviction. We do not feel that this is a proper case in which the respondent should be disqualified and therefore we order otherwise.

Appeal allowed.

BARCLAYS BANK D.C.O. v. F. K. RAHAMAN

[In the Full Court, on appeal from the Bail Court (Date, Persaud and Khan, JJ.)
March 27, August 14, 1963]

Practice and procedure—Specially indorsed writ—Action against guarantor—Leave granted to file affidavit of defence—Affidavit not filed—Application by defendant for leave to issue third party notice to principal debtor—Application unsupported by affidavit—O. 12, r. 4, and O. 14, r. 17, of R.S.C., 1955.

Order 12, r.4 (1), enables a plaintiff in an action commenced by specially indorsed writ to apply for final judgment if he has filed an affidavit verifying claim; but under r.4 (2) the Judge may give leave to defend if he is satisfied by the defendant's affidavit that the defendant has a good defence to the action on the merits. In an action so commenced to recover on a guarantee, the defendant was given leave to file and serve an affidavit of defence. Without doing so he applied in the Bail Court for and was given leave to issue a third party notice to the principal debtor. Order 14, r.17, provides that where a defendant claims that he is entitled to contribution or indemnity from a non-party "he may, by leave of the Court or a Judge on an *ex parte*, application supported by affidavit, issue and serve a (third party) notice". On appeal,

Held: (i) a third party notice can only be lodged if the rules are complied with and in this case no part of the prescribed procedure was followed;

(ii) to avail himself of the right to defend in an action commenced by specially indorsed writ, it is incumbent on a defendant to file an affidavit disclosing some reasonable ground of defence;

(iii) a defendant's statement that he is entitled to be indemnified by a third party is no answer to the plaintiff's claim unless the third party has discharged the plaintiff's claim.

Appeal allowed.

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

A. S. Manraj for the respondent.

Reasons for Decision: This matter came up for hearing before us on the 27th March, 1963, when we heard arguments and allowed the appeal. We now record our reasons for so doing.

The appellants (plaintiffs), who are bankers carrying on business in this country, had filed a specially endorsed writ against the respondent (defendant) claiming the sum of \$3,000 together with interest on that sum from the 7th July, 1962, to date of payment at the rate of 8½ *per centum per annum*. The action arose out of an agreement in writing entered into on the 12th December, 1960, whereby the respondent stood as guarantor for one Reginald Brewer to the extent of \$3,000 guaranteeing the payment of the said sum on demand in writing or any part thereof that might be due, together with interest and bank charges. On the 21st June, 1962, there was due on the account of the said Reginald Brewer the sum of \$3,387.94, and, failing to collect any payment from Brewer, the appellants sued the respondent on the guarantee.

In Bail Court, leave was given to the respondent to file and serve an affidavit of defence. That affidavit was not filed within the time given, and the matter was further adjourned with costs to the

appellants. When the matter was next called, counsel for the respondent, while intimating to the court that his client intended to consent to judgment in favour of the appellants, applied for leave to file a third party notice on Reginald Brewer. Leave was granted, and it is against that order that this appeal has been brought.

In the Bail Court, the learned Chief Justice refused an application by the appellants for judgment against the respondent. He expressed the view that he was not bound forthwith to give judgment to the appellants under O. 12, r. 4, of the Rules of the Supreme Court, 1955, and said that he thought this was a fit case in which to exercise his discretion to grant the application to issue a third party notice.

The rule governing third party procedure is r. 17 of Order 14 of the Rules of Court, which provides—

“(1) Where in any action a defendant claims as against any other person not already a party to the action (in this Order called the third party)—

(a) that he is entitled to contribution or indemnity;

* * * *

he may, by leave of the Court or a Judge on an *ex parte* application supported by affidavit, issue and serve a notice (hereinafter called a third party notice).”

This rule goes on to make provision for the procedure to be followed to secure the attendance of the third party consequent upon the leave of the court being obtained.

No part of the above procedure was followed in this action and we are of the view that a third party notice can only be launched if the rules are complied with.

This view apart, we wish to refer to O. 12, r. 4, of the Rules of Court (see O. 14, r. 1, of the U.K. Rules). Rule 4 (1) enables a plaintiff to apply for final judgment if he has filed an affidavit verifying claim where both plaintiff and defendant appear or where the plaintiff appears and the defendant does not appear. Paragraph (2) of this rule provides as follows:

“The Judge may on any hearing under this Order give judgment for the plaintiff on his application: provided that if the defendant by his affidavit shall satisfy the Judge that he has a good defence to the action on the merits or shall disclose such facts as may be deemed sufficient to entitle him to defend, the Judge shall give leave to defend, subject to such terms, if any, as the Judge may impose or make such order or orders as may be just or otherwise as the case may require.”

Our interpretation of this rule is that once the defendant by affidavit satisfies the judge that he has a good defence or discloses facts which may be deemed sufficient to entitle him to defend, the judge must give leave to defend. To avail himself of this right it is incumbent on a defendant to file an affidavit; he cannot claim such a right

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merely by instructing counsel to appear in Bail Court and to state his case orally to the court even though the facts stated are facts which might very well have been included in an affidavit. This is not the rule and we feel that the rule ought to be complied with.

In this matter leave was granted to the defendant to file and serve an affidavit of defence; this was not done; and instead of applying for an extension of time within which to do so, the defendant, through his counsel, intimated that he intended to consent to judgment but asked for leave to file a third party notice. This question received judicial attention in *Anglo Italian Bank v. Wells* (1878), 38 L.T. (N.S.) 197, where it was held that when there is no fairly arguable point to be argued on behalf of the defendant effect must be given to the Rule of Court. A defendant is bound to show under this rule that he has some reasonable ground of defence to the action and a statement by him that he is entitled to be indemnified by a third party is no answer to the plaintiff's claim unless the third party has discharged the plaintiff's claim (*Thorne v. Steele*, (1878), W.N. 215, C.A.). At the hearing of the appeal before us counsel for the respondent admitted that even up to that late stage he was not aware of any defence that could be set up by Reginald Brewer to the appellants' claim.

For these reasons we were of the opinion that the learned Chief Justice was wrong in refusing the plaintiffs' application for summary judgment and for granting the defendant leave to serve a third party notice. We were accordingly moved to set aside the order made in Bail Court and we entered judgment for the plaintiff in the sum of \$3,000 and costs \$107.50. We also made an order for the respondent to pay the appellants' costs of this appeal to be taxed failing agreement.

Appeal allowed.

R. v. WILLIAMS

[Supreme Court—Demerara Assizes (Crane, J.) August 21, 1963]

Criminal law—Causing death by dangerous driving—Injuries incorrectly diagnosed and wrongly treated—Whether death caused by medical negligence—Whether prima facie case established—Motor Vehicles and Road Traffic Ordinance, Cap. 280, s. 35 (A).

The accused was charged with the offence of causing death by dangerous driving. The Crown led evidence through a pathologist, who had performed a *post mortem* examination, to show that certain abdominal injuries were the direct cause of death and could have been due to a motor accident. The evidence for the prosecution showed further, however, that as a result of an incorrect diagnosis the deceased was given medical attention only in respect of two lacerated wounds over the left eye and that if the correct diagnosis had been made his life might have been saved by an emergency operation. After the close of the case for the prosecution it was submitted for the defence that the direct cause of death was not the driving of the accused but the negligence of the doctors who made the incorrect diagnosis.

Held: (i) it is only if the second cause is so overwhelming as to make the original wound merely part of the history that it can be said that the death does not flow from the wound;

(ii) on the evidence it could not be said that the failure to make the correct diagnosis operated as a new and substantial cause of death in defeasance of the first and rendering the driving of the accused only part of the history of the case.

Submission overruled.

G. A. G. Pompey, Crown Counsel, for the Crown.

A. S. Manraj for the defence.

Ruling on no-case submission in the absence of the jury by CRANE, J.:

The indictment on which the accused stands charged reads— “Irving Williams is charged with the following offence:—

STATEMENT OF OFFENCE

Causing death by dangerous driving contrary to s. 35(A) of the Motor Vehicles and Road Traffic Ordinance, Cap. 280.

PARTICULARS OF OFFENCE

Irving Williams, on the twenty-first day of January, in the year of Our Lord one thousand nine hundred and sixty-three, in the county of Demerara, caused the death of Mohan Dataram by the driving of a motor vehicle on the road in a manner dangerous to the public.”

At the close of the case for the prosecution Mr. Manraj for the accused submitted that the Crown had failed to establish satisfactorily the cause of death, that is to say, that the driving of the accused caused the death of the deceased Mohan Dataram, and as a result there is no case to be left to the jury.

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It must be stressed that at this stage the court is concerned only as to whether there is a sufficient *prima facie* case against the accused, to require him to make a defence to the charge, and in considering this matter the evidence of Dr. Cyril L. Mootoo, acting Senior Bacteriologist and Pathologist, who performed the post-mortem examination is important, there being no question that the accused was not the driver of the motor car.

Dr. Mootoo says:

“I conclude that death was due to haemorrhage and shock following, rupture of the spleen, rupture of the liver, and rupture of the left aspect of the diaphragm.....I say the injuries I found done to the abdomen were the direct cause of death and could be due to a motor accident.”

Defence counsel however submits that it having been established from Dr. Mootoo's post-mortem examination that there had been a wrong diagnosis of the deceased's injuries by both Dr. Sankar and Dr. Poonai of the casualty department and patient's ward at the Public Hospital Georgetown, the latter having prescribed for two lacerated wounds over the left eye, when indeed the deceased sustained serious abdominal injuries of the nature described, it cannot be said that the accused caused the death of Dataram. To use juridical terminology, the contention is that it was the doctors' failure, or as counsel would have it, their “gross negligence” to diagnose properly that occasioned a *novus actus interveniens* which broke the chain of causation; it was the doctors' failure, contends counsel, to ascertain the precise nature of the injuries of the deceased by the symptoms exhibited which was the direct cause of death of Dataram, and not the driving of the accused.

Counsel cited several authorities in support of the view for which he contended, but it is sufficient to mention only two—*Stockdale's* case, 2 Lewins Crown Cases 220, and *Morby's* Case 15 Cox C.C. 35, both of which involve consideration of the standard of proof in cases on the subject of cause of death.

In the first case, Isabella Stockdale was indicted on three counts which charged *inter alia*, (i) that she feloniously did kill and murder her newly born child by casting it to the ground and exposing it to cold; (ii) that she left the child naked and uncovered and exposed to the cold frosty air in a certain field, and (iii) that she struck the child on the head with a stone. The medical evidence as to the cause of death was inconclusive in that it was revealed that the exposure to cold might have accelerated death, but whether it did so or not could not be said for certain; it was also revealed that though a contusion sustained by the child on the head was sufficient to cause death, it might have been occasioned by throwing the child to the ground, by striking it a blow, or by unintentionally letting it fall, but as it was clear there was no sufficient evidence that the prisoner did throw her child on the grounds, she was acquitted by the jury on the judge's instructions.

In *Morby's* case, the accused was indicted and convicted for the manslaughter of his son, a child under the age of 14 years by wilfully neglecting to provide the child with medical aid when it was suffering from confluent small-pox. It was established that death was due to small-pox, but there was no evidence to show that the non-supply of medical assistance by the accused was the direct and proximate cause of the death of his son, or of the acceleration of his death. It was the prosecution's duty to prove that the failure or omission of the father to supply medical assistance caused his son's death, and in endeavouring to establish this fact a medical witness was asked if medical advice and assistance had been called in at any stage of the disease, whether death might have been averted altogether. Again, as in the previous case, the evidence was inconclusive in establishing the cause of death, for though the doctor was prepared to say death might have been averted if medical aid had been called in at an earlier stage, he was unable to say that it would have been averted, but only that life might have been prolonged; and to this extent the evidence fell short of the standard of proof required by law.

With the correctness of these decisions no fault may be found, they being clear indications of the failure of the prosecution to establish proof beyond reasonable doubt as to the matter of the cause of death; but quite apart from this, the fact of whether the driving by the accused was the cause of the death must on a proper direction be left to the jury for decision, after a sufficient *prima facie* case had been made out; (See s. 35A (3) Motor Vehicles and Road Traffic (Amendment) Ordinance 1961), and the correct approach to a matter of this kind is concluded by authority.

In the case of *Thomas Joseph Smith*, 43 Cr. App. Cas. 121, a somewhat similar problem arose in relation to the cause of death of a soldier who had been stabbed by a bayonet, and in the respect that there was a failure of the medical officer to appreciate the seriousness of a deceased man's condition, *Smith's* case, is most decidedly in point. Just like in *Smith's* case, the evidence in the case under consideration is to the effect that if Dataram had received immediate, and a treatment different from that which he did in fact receive, he might not have died; and in fact might have stood a good chance of recovery if an emergency operation had been performed. Dr. Mootoo's evidence in this respect is as follows —

“There is nothing to indicate that an emergency operation would not have saved Dataram,”

and earlier on —

“had the correct diagnosis been made, the correct procedure should have been an emergency operation.”

Very like those in *Smith's* case the submissions of Mr. Manraj for the accused are that if there is any other evidence that the cause of death of Dataram was due to another cause, and Mr. Manraj would contend that this was the “gross negligence” of the two doctors who, by a wrong diagnosis, rendered the deceased's chances of sur-

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vival unlikely, then the cause of death could not result from the driving of the accused. To this contention I can do no better than reply in the words of Lord PARKER OF WADDINGTON with which I respectfully agree:—

“The court is quite unable to accept that contention. It seems to the court that if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.”

Applying the test in the above passage to the facts of the case in hand, can it be said that the failure of the two doctors to have diagnosed the injuries of the deceased correctly operate in defeasance of the first as a new and substantial cause of death rendering the driving of the accused only part of the history of the case, bearing in mind Dr. Mootoo’s evidence that, “I say the injuries I found done to the abdomen were the direct cause of death and could be due to a motor accident?”

We have then this composite situation in which the injuries received is a common factor, there is evidence that the driving caused the injuries while the death was caused by the injuries. What is the relation between the driving and the death? Could the driving be the cause of death? This is precisely what the law decrees must be answered by the jury, who will be directed that they have to be satisfied so that they feel sure that it was the driving of the accused which caused the death of the deceased before they can find him guilty.

For the above reasons, I rule there is a sufficient *prima facie* case for the jury to consider.

Submission overruled.

GURRICK v. PRADASCO CYCLE STORE LTD.

[Supreme Court (Luckhoo, C.J.) November 13, December 29, 1962, January 11, 17, February 7, March 6, 1963.]

Trespass—Malicious levy—Refusal of bailiff to release goods although, payment tendered—Whether bailiff an agent of execution creditor—Whether execution creditor liable—Summary Jurisdiction (Magistrates) Ordinance, Cap. 12, ss. 31 and 34—Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, ss. 43, 44, 45, 46, 51 and 54.

On 3rd November, 1961, at the instance of the defendant company, a magistrate's court issued a writ of execution to levy a judgment debt in the sum of \$226.31 due to the defendant by the plaintiff. On 8th November, 1961, the plaintiff paid the defendant \$100 on account. On 4th December, 1961, the bailiff demanded payment from the plaintiff of the full amount of the judgment debt. The plaintiff produced his receipt for the payment of the \$100 on account but did not tender payment of the balance actually due, and the levy was carried out. Shortly after this the plaintiff tendered payment of the balance but the bailiff did not accept it. On 15th December, 1961, the plaintiff issued his writ in this action claiming damages for malicious levy. In negotiations subsequent to the issue of the writ solicitor for the defendant incorrectly stated the balance in excess of what was due. The plaintiff at first refused to pay the balance claimed but eventually did so under protest, whereupon the goods were returned by the bailiff to the plaintiff. Section 51 of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, provides for the release of goods on tender of full payment "to the bailiff."

Held: (i) the levy was lawfully carried out as tender was only made afterwards;

(ii) the bailiff is an officer of the court and bound to obey the writ of execution. He is not in point of law the agent of the party who sues out the writ;

(iii) where, however, the bailiff is guilty of misconduct which was produced by the act of the execution creditor, the latter is liable;

(iv) but in the instant case nothing done by the bailiff in breach of his duty was induced by or on behalf of the defendant;

(v) there was no cause of action against the defendant at the date of the issue of the writ and the subsequent negotiations did not operate to give one.

Judgment for the defendant.

R. McKay for the plaintiff.

C. A. F. Hughes for the defendants.

Reasons for Decision: In this action the plaintiff Theophilus Gurrick claimed the sum of \$5,000 as damages for wrongful and malicious levy alleged to have been committed by the defendant company on the 4th December, 1961, in relation to goods and chattels the property of the plaintiff, alternatively, as damages for trespass by the defendant company wrongfully continuing to levy upon the plaintiff's goods and chattels and wrongfully remaining on the plaintiff's premises at lot 26, Leopold Street, Georgetown, and in possession of the said goods and chattels.

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The plaintiff was, at all material times, the proprietor of a furniture and hardware store situate at lot 26, Leopold Street, Georgetown. On the 27th April, 1960, the defendant company had filed a claim against the plaintiff in the sum of \$194.87 in the Georgetown Magistrates' Court in respect of goods sold, supplied and delivered by the defendant company to the plaintiff. That claim was heard by consent of the parties along with a claim C.J. No. 2863/60 brought by the plaintiff against the defendant company. Judgment in the sum of \$194.87 with costs \$4.84 and fee to counsel \$24 (totalling \$223.71) was given on the 7th July, 1960, by a magistrate against the plaintiff in favour of the defendant company in its claim while the plaintiff's claim was dismissed. Appeals against those decisions were dismissed on the 19th August, 1961, with costs \$15 to the defendant company. The plaintiff then filed two applications by way of motion in respect of those matters. The applications were dismissed by the Full Court on the 13th October, 1961, with costs \$7.50 in respect of each application to the defendant company. The total amount of judgment, costs and fee to counsel awarded the defendant company against the plaintiff by the magistrate and the Full Court in those proceedings was therefore \$253.71.

On the 18th October, 1961, the secretary of the defendant company applied for a writ of execution in respect of the aforesaid total amount of \$253.71, and on the 3rd November, 1961, a magistrate of the Georgetown Judicial District issued a writ of execution in the sum of \$226.31 being the balance due by the plaintiff to the defendant company after addition of the cost of the writ of execution 60 cents as provided for by s. 41 (3) of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, and deduction of the amount of \$28 which had been lodged by the plaintiff under the provisions of s. 5 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17. On the 8th November, 1961, five days after the issue of the writ of execution, the plaintiff paid to the defendant company the sum of \$100 on account of the amount due and solicitor for the defendant company on the same day consented to a stay of execution up to the 1st December, 1961. Notification of the consent to the granting of this stay was given in writing by solicitor for the defendant company to the clerk of court on the same day. (Exhibit "R"). The plaintiff did not pay any further sum, and on the 2nd December, 1961, the defendant company addressed a written notification (Exhibit "P") to the head bailiff of the Georgetown Judicial District in the following terms—

"This is to authorise Mr. S. Thomas to point out to the bailiff property to be levied on and to collect any monies due to us in the matter of *Pradasco Cycle Store Ltd. v. Theo. Gurrick.*"

Gaznabbi, a bailiff attached to the Georgetown Magistrates' Court Office, was instructed by the head bailiff to carry out the levy under the writ of execution. On the morning of the 4th December, 1961, Gaznabbi spoke with the plaintiff at the bailiffs' office and informed the plaintiff of the issue of the writ and of the amount in respect of which it was issued demanding payment of the amount endorsed thereon, \$226.31. The plaintiff left the bailiffs' office and returned about half an hour later with the receipt for the payment of \$100

he had made to the defendant company on the 8th November, 1961. Gaznabbi, however, insisted on payment of an amount not less than that endorsed on the writ of execution. The plaintiff refused to pay that amount but did not tender the sum of \$126.31 or any other sum.

Gaznabbi has endorsed at the back of the writ of execution (Exhibit "D") a certificate "This is to certify that I have duly demanded payment from the within named defendant at bailiffs' office at 10.50 a.m. on the 4.11.61 (*sic*) but without effect."

In his sworn testimony Gaznabbi has stated that he told the plaintiff that he would execute the writ at 2 p.m. on that day. Gaznabbi has also sworn that at 11.20 a.m. (that is, after he had demanded payment of the plaintiff of the amount endorsed on the writ) he telephoned the defendant company's office and asked to speak with Mr. Das; that someone purporting to be Mr. Das spoke with him in connection with his (Gaznabbi's) conversation with the plaintiff and that he (Gaznabbi) did not give credit to the plaintiff for payment of \$100 in respect of the transaction in question and that thereafter he proceeded to levy execution for the whole amount of \$226.31. I found that Gaznabbi swore falsely in respect of the telephone conversation alleged to have been carried on with Mr. Das and that in fact he made no such telephone call. Gaznabbi's demeanour at the hearing was such that it was evidence that he was seeking to shift the blame for what I found to be his own mistakes and this was but one instance of this fact.

During the afternoon of the 4th December, 1961, Gaznabbi proceeded to make the levy. He went to the plaintiff's store at lot 26, Leopold Street, Georgetown, accompanied by Thomas and one Prescott, another employee of the defendant company. Thomas had been authorised in writing by the defendant company to point out the property upon which the levy was to be made, and after the levy was made by the bailiff he was to load with Prescott's assistance the property levied on into a cart for conveyance to the bailiffs' office. On arrival at the plaintiff's store they found Muriel West, an employee of the plaintiff, but the plaintiff was not then present. Gaznabbi proceeded to levy execution under the writ of execution upon such of the movable goods of the plaintiff as was pointed out to him by Thomas who thereafter with Prescott's assistance removed those goods out of the plaintiff's store to the parapet outside of the store. When all but two pieces of the goods had been loaded into a cart for conveyance to the bailiffs' office the plaintiff arrived. Those two pieces of goods were then lying on the parapet outside of the plaintiff's store.

I found that Gaznabbi's evidence that the levy was carried out by him under what in effect amounted to coercion or duress on the part of Thomas was completely false and that he (Gaznabbi) was in fact in complete control of the situation throughout the proceedings.

The plaintiff went into the store and tendered to the bailiff Gaznabbi the sum of \$126.31 being the balance due under the writ

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of execution. At that time both Thomas and Prescott were outside the store having completed the loading into the cart of the goods already levied on. Gaznabbi called out to Thomas to come into the store indicating that the plaintiff had tendered the balance due under the writ of execution and that the goods already levied on should be brought back into the store. When Thomas attempted to re-enter the store the plaintiff who was in angry mood threatened to strike Thomas and refused to permit him to come into the store. Eventually the bailiff decided that he would not accept the balance of \$126.31 tendered to him by the plaintiff and with the cart and the goods levied on proceeded to the bailiffs' office where the goods were unloaded, checked and stored in the bailiffs' storeroom. Apparently what had transpired was reported to the defendant company's solicitor who went to the bailiffs' office at 3.40 p.m. that day and handed Gaznabbi a credit slip for the sum of \$100.

An inventory of the goods levied on and taken away from the plaintiff's store had been made by the bailiff Gaznabbi and a copy of the inventory left at the plaintiff's store. I found that the list of goods endorsed by Gaznabbi at the back of the writ of execution (Exhibit "D") contains all of the goods levied on and removed from the plaintiff's store. All of these goods were at a subsequent date released to the plaintiff. The plaintiff and his witness Muriel West endeavoured to show that a far greater number of articles had been taken away from his store. I found that the list Ex. "C" tendered by the plaintiff was concocted for the purposes of this action and that the testimony of both the plaintiff and of Muriel West in this regard was false. Gaznabbi's efforts to deceive the court that more goods than those he itemised at the back of the writ of execution might have been taken out of the plaintiff's store also failed.

On the 6th December, 1961, solicitor for the plaintiff wrote the defendant company demanding the sum of \$5,000 as damages for malicious and wrongful levy and informed the company that tender of the amount owing had been made but was refused by the company and/or the company's agent. Complaint was also made (untruthfully I have found) that Gaznabbi had not supplied the plaintiff with an inventory of the goods he had taken away.

On the 15th December, 1961, the writ of summons in this action was filed and on the 2nd January, 1962, solicitor for the defendant company replied to plaintiff's solicitor to the effect that if the balance due under the writ of execution (which he stated to be \$154.31) were paid his clients would be willing to release the goods. The amount in fact due was \$126.31 but solicitor for the defendant company appeared to have overlooked the fact that the amount of \$28 deposited by the plaintiff under the provisions of s. 5 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, had been already deducted (notionally at any rate) from the amount of costs awarded by the Full Court. The plaintiff, by letter from his solicitor dated 22nd January, 1962, took the stand that as solicitor for the defendant company had incorrectly stated the balance due, he (plaintiff) would not seek to offer any sum in payment. On the following day solicitor for the defendant

company wrote plaintiff's solicitor itemising the amounts he claimed as payable by the plaintiff. This itemised account shows that solicitor for the defendant company had overlooked the deposit of \$28. Thereupon, plaintiff's solicitor, on the 25th January, 1962, sent solicitor for the defendants his itemised list whereupon the latter replied on 2nd April, 1962, reiterating the stand he had taken. Finally, on 13th April, 1962, the plaintiff paid the sum of \$154.31 under protest whereupon the goods levied on were returned by the bailiff to the plaintiff.

The plaintiff's claim falls to be considered under three heads —

- (a) whether the levy was wrongful and malicious;
- (b) if the levy was lawfully made, whether refusal of the sum tendered by the plaintiff and the subsequent taking away of the goods levied on resulted in trespass to the goods;
- (c) whether the defendant company is liable in damages in either (a) or (b) above.

The procedure for dealing with execution against movable property is set out at Part IV in the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16. For the plaintiff it was submitted that the bailiff is agent of the execution creditor and that the latter would be liable in damages for all wrongful and malicious acts of the former in respect of a levy. A bailiff within the contemplation of the Ordinance, Cap. 16, is a creature of statute. He is appointed by a magistrate subject to the approval of the Governor by virtue of the provisions of s. 31 of the Summary Jurisdiction (Magistrates) Ordinance, Cap. 12, and his duties are prescribed also by statute—s. 34 of Cap. 12. Among his statutory duties is the executing of writs of execution against movable property. Section 43 of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, requires the writ of execution to be addressed to a bailiff and provides that by such a writ the bailiff shall be empowered to levy or cause to be levied, by distress and sale of the movable property of the party, the sum so ordered. Section 44 provides for the movable property seizable in execution by a bailiff and s. 45 provides that before executing any writ of execution "the bailiff shall demand from the party against whom it is issued, if he can with reasonable diligence be found, payment of all moneys demandable under the writ, and on non-payment thereof shall forthwith execute the writ according to its tenor." By s. 46 movable property taken into execution under any writ of execution shall remain in the custody of the bailiff until sale and delivery to a purchaser. Section 51 provides—

"If the party against whom execution has been issued, *after levy* and before any actual sale of his movable.....property, pays or tenders to the bailiff.....the sum of money and costs mentioned in the writ of execution, or that part thereof which the person entitled thereto agrees to accept in full of his debt or damages and costs, together with the fees mentioned in the writ, the execution shall be superseded, and the movable.....property of the said party so levied upon shall be discharged and released."

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Section 54 requires that all moneys coming into the hands of the bailiff shall be accounted for and paid by him to the clerk of court at the next sitting of the court after receipt thereof.

By s. 2 of Cap. 16 “bailiff” means a bailiff of the court, and, if there is no bailiff, includes any rural constable appointed either generally or specially by the magistrate, to execute the process of the court under that Ordinance. In the instant case, Gaznabbi was a bailiff of the court.

At the date of issue of the writ the plaintiff had not paid any sum on account. The writ was validly issued.

At the time the levy was carried out the bailiff had already made a demand at 10.40 a.m. on the 4th December, 1961, of the plaintiff for payment of the amount of \$226.31 endorsed on the writ of execution. The head bailiff Daniels had earlier been informed of the payment of \$100 on account of the amount of \$226.31 and in addition the plaintiff produced his receipt for \$100 to the bailiff Gaznabbi at the time of the demand though the plaintiff did not seek to tender any amount until after the levy had already been executed and the goods removed from his store. The levy was already complete when tender was duly made. In my view the levy carried out was lawfully made.

Dealing with the second question—whether there was trespass to the goods — I found that the plaintiff tendered to the bailiff Gaznabbi the balance owing and that Gaznabbi declined to accept same after the plaintiff refused to permit Thomas to re-enter the store. The goods had already been levied upon and impounded but it was the duty of the bailiff as required by s. 51 of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, to release the goods to the plaintiff. When the tender was made the goods had already been loaded onto the cart. The levy was complete. The subsequent taking of the goods to the bailiffs’ office and unloading and storing them were done under the direction of the bailiff, and, unless the bailiff could be regarded as the agent of the defendant company, no act done by either of the men Thomas and Prescott after the levy was complete could be regarded as being within the actual or ostensible scope of their authority so as to place liability upon the defendant company in trespass.

Counsel for the plaintiff referred to reported cases in England where it was held that the bailiff who made the levy was agent of the execution creditor. The first was *Hatch v. Hale* (1850), 15 Q.B. 10, where a bailiff was authorised to distrain for rent. It was held that the bailiff had implied authority to receive the rent and expenses due and that a tender to him operated as a tender to the landlord. If the bailiff refuses a tender on the ground that he was forbidden by the landlord to receive it and proceeds to sell the tenant’s goods, both the bailiff and his landlord are liable in trover. It was pointed out by counsel for the defendant company that the power to distrain for arrears of rent was described by Lord CAMPBELL, C.J., [(1850),

Q.B. 10 at p. 15] as an extraordinary power. It is at common law (apart from statutory enactments) exercisable only under the direction of the landlord or in the presence of the landlord or his agent though at common law chattels distrained on could not be sold. No judgment precedes distress for arrears of rent.

The case of *Crozer v. Pilling* (1825), 107 E.R. 969, 4 B. & C. 26, relied upon by counsel for the plaintiff, establishes that refusal by an execution creditor to release goods of an execution debtor after payment or tender made is sufficient *prima facie* evidence of malice in the execution creditor and that payment or tender entitles the debtor to the return of his goods. The cases cited by counsel for the plaintiff in this connection relate to execution by the sheriff or bailiff in enforcing judgments of the High Court in England under the Rules of the Supreme Court. At para. 30 in 16 HALSBURY'S LAWS (3rd Edn.) there appears the following in relation to the liability of the judgment creditor and his solicitor —

“A wrongful execution is a trespass and the judgment creditor and his solicitor are liable in damages to the judgment debtor. Thus when the writ of execution is set aside as illegally issued, or is issued and put in force after the debt has been paid, or after a valid tender of the amount due, the client and solicitor are liable; but neither of them is liable if it is left to the sheriff to do what is right.”

Where a judgment debt has been paid or valid tender made of the amount due and a writ of *fiery facias* issued thereafter the judgment is no longer of force or effect and an execution issued under it is void *ab initio* and an action for trespass lies without proof of malice [*Chissold v. Cratchley*, [1910] 2 K.B. 244]. No action lies without proof of malice where the execution creditor before payment sues out a writ of *capias* without countermanding it after payment. See *Scheibel v. Fairbain* (1799), 1 Bos. & P. 388, and also *de Medina v. Grove* (1847), 10 Q.B. 172 Exch., where execution was levied for the whole amount after part payment made to knowledge of both the execution creditor and his solicitor and action against them failed for want of proof of malice and want of reasonable and probable cause. It is to be observed that the sheriff must hand the proceeds of the execution, after deducting his costs, to the judgment creditor. He is personally liable to the judgment creditor for the proceeds of the execution.

The effects of some of the relevant provisions of the local enactment Ordinance 11 of 1893 (now Cap. 16) have been considered in the cases of *Schuler & Sons v. de Haney*, A.J. 27.5.1902; *Fung-Teen Fook v. de Freitas*, L.J. 7.12.1903; *Elliott v. Andrews*, L.J. 10.3.1906; *Giles v. New Anna Regina Plantation Co., Ltd.*, A.J. 8.5.1909. In *Schuler & Sons v. de Haney* the respondent claimed in the magistrate's court certain articles which had been levied on and taken into execution at the instance of the appellants by virtue of a judgment in their favour against one Thomas. The magistrate found that the goods levied on were the property of the claimant and not of Thomas and set aside the levy. He also ordered that the goods be restored to the

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claimant. That decision was given on the 22nd March, 1902. On the 1st April, 1902, a minute of the magistrate dated 21st March, 1902, was read in court to the effect that it had been brought to his notice that that part of the previous judgment which ordered the delivery of the jewellery could not be enforced as it stood, as from the evidence the jewellery was taken from the possession of the bailiff after levy. A further order was made by the magistrate that if delivery was not made of the jewellery ordered to be delivered by judgment of the 22nd March, 1902, within 7 days from date, the value of such jewellery \$23 should be paid as damages for non-delivery. The appellants appealed from this latter judgment. Two grounds of appeal were argued before A. V. LUCIE-SMITH, J.,—

- (a) that the bailiff is not the agent of the appellants and they are therefore not responsible for any loss occasioned by the negligence or carelessness of the bailiff; and
- (b) that it was not competent for the magistrate to alter his decision of the 22nd March, and to pronounce another decision on the 1st April, ordering damages to be paid in the event of the non-delivery of the jewellery.

In respect of the second ground of appeal LUCIE-SMITH, J., considered that the magistrate could not by a subsequent judgment alter the judgment already given by him except at the same sitting of the court or for the purpose of correcting a clerical error. In respect of the first ground of appeal LUCIE-SMITH, J., said—

“It appears from the evidence that the jewellery was lost shortly after it was taken possession of the bailiff. The bailiff is not the agent of the judgment creditor, he is an officer of the court, *Ramsey v. Eaton*, 10 M. & W. 22. The bailiff could only be considered the agent of the judgment creditor when the judgment creditor has specially appointed such bailiff or when the bailiff does some particular act by the express authority of the judgment creditor. See *Crowder v. Long*, 8 B. & C. 598; *Alderson v. Davenport*, 13 M. & W. 42; *Ford v. Leche*, 6 A. & E. 699. In this case the judgment creditor did not specially appoint the bailiff, I doubt if he could do so under the local law, and there is no evidence that the judgment creditor authorised the taking of the jewellery; the bailiff levied on it by virtue of his warrant. The claim brought by the claimant is for goods in possession of the bailiff. Once the goods were in the possession of the bailiff it appears to me the judgment creditor has no control over them and cannot be held responsible for them if subsequently lost by the bailiff. The bailiff was bound to comply with s. 57 of the Petty Debts Recovery-Ordinance, 1893. The magistrate could only give a judgment for the giving up of these goods by the bailiff or payment of the money for which those “goods had been sold and also order the judgment creditor to pay such damages as might have been occasioned by the wrongful taking of the goods. If the bailiff from any cause is unable to deliver the goods, that would be the subject of other proceedings. I am, therefore, of the opinion that the judgment creditor is not responsible for the lost jewellery and that this appeal on this ground must be allowed.”

The interpleader claim of *Fung-Teen Fook v. de Freitas*, L.J. 7.12.1903, is instructive in respect of the following passage in the judgment of HEWICK, J.—

“As regards damages a point was raised that as no one went to point out the goods the defendant (judgment creditor) is not liable. All the authorities are to the effect that in cases like this a defendant is liable for the results of the indorsement on the writ but not for verbal directions as distinguished from the directions on the writ itself.”

In *Elliott v. Andrews*, A.J. 10.3.1906, a magistrate upheld the respondent's claim to certain goods, the subject of a levy at the instance of the appellant against a third party and awarded the respondent damages. There was no evidence that the appellant had directed the talking of the particular goods. On appeal the award of damages was set aside.

Giles v. New Anna Regina Plantation Co., Ltd., A.J. 8.5.1909, was an appeal from the decision of a magistrate who, on a claim by the appellant to certain furniture taken in execution at the suit of the respondent company, disallowed the claim as regards some chairs and bricks valued \$26 and allowed it in regard to other articles of the value of \$22. The grounds of appeal argued were —

- (a) that Mr. Brassington as manager of the estate had no authority to bind the respondent company, and that he having authorised the levy the same should have been set aside;
- (b) that the articles levied on were taken out of the possession of the appellant, and that therefore it lay on the respondent company to prove that they were the property of the debtor.

BERKELEY, J., said in respect of the first ground that

“this levy was made under s. 43 of Ordinance 11 of 1893 (the same as s. 43 of Cap. 16) which makes no provision for the levy to be made under the direction of the execution creditor or his agent, and therein differs from No. 9 of 1903 which requires the distraint to be made under the direction of the landlord or his agent. I am of the opinion, therefore, that the act of the manager differed in no way from the act of any other person who might have given information to the bailiff as to the whereabouts of the goods.”

On the second point BERKELEY, J., said that it did not appear to have been taken before the magistrate and that moreover the magistrate seems to have followed the procedure laid down by s. 57 (2) of Ordinance 11 of 1893 and was right to do so.

In *Ramsey v. Eaton* (1842), 10 M. & W. 22, at p. 26 Lord ABINGER, C.B., said—

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“A notice to the bailiff is no notice to the execution creditor; the bailiff cannot be considered as his agent.”

Baron PARKE at p. 27 said—

“the sheriff is the officer of the court and bound to obey the writ, and is not, in point of law, the agent of the party who sues it out.”

Barons ALDERSON and ROLFE concurred in the judgments of Lord ABINGER, C.B., and Baron PARKE.

Where, however, the bailiff is guilty of misconduct, and that misconduct is produced by the act of the execution creditor, it is not competent for the latter to say that the act of the officer done in breach of his duty to the sheriff, and induced by the execution creditor, is the act of the sheriff [*Crowder v. Long* (1828), 8 B. & C. 598]. But in the instant case nothing done by the bailiff Gaznabbi in breach of his duty was induced by or on behalf of the defendant company.

One final point remains to be mentioned. The sale was fixed by the bailiff for the 14th December, 1961, at 10 a.m. (see indorsement at back of the writ of execution Ex. “D”) but was not proceeded with for what reason does not clearly appear from the evidence. The writ of summons in this action was issued on the 15th December, 1961. The goods levied on by the bailiff were required to be, by virtue of s. 46 (1) of Cap. 16, in the custody of the bailiff until sale and delivery to a purchaser. Although solicitor for the defendant company had at 3.40 p.m. on the 4th December, 1961, given the bailiff a credit slip for the payment by the plaintiff of \$100 no action appears to have been taken by the bailiff to put the matter right in view of his wrongful rejection of the tender made at the plaintiff’s store. By s. 51 of Cap. 16 payment or tender to the *bailiff* after levy on movable property would secure the release of the goods to the judgment debtor.

At the date of the issue of the writ of summons—15th December, 1961—I can find nothing which gave the plaintiff any cause of action against the defendant company. The subsequent negotiations between the parties ending by the payment of \$154.31 by the plaintiff to the defendant company did not operate to give a cause of action which was non-existent at 15th December, 1961. Further, there was nothing to show that the plaintiff could not secure the release of his goods from the custody of the bailiff by taking steps to make payment or tender *to the bailiff* of the amount actually due.

For these reasons, I dismissed the plaintiff’s claim with costs to be taxed certified fit for counsel.

Judgment for the defendant.

Solicitors: *J. A. Jorge* (for the plaintiff); *H. B. Fraser* (for the defendants).

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[Supreme Court—Demerara Assizes (Crane, J.) August 23, 1963.]

Criminal law—Offensive weapon—Possession of iron rod—Intention of accused to use it in defence of his family—Whether an offensive weapon—Prevention of Crimes Ordinance, Cap. 78, s. 11 (A.) (4).

Section 11 (A) (4) of the Prevention of Crimes Ordinance, Cap. 78, provides that “‘offensive weapon’ means any article made or adapted for use for causing injury to the person or intended by the person having it with him for such use by him.” The accused was in possession of an iron rod which he said he intended to use in order to protect himself and family. On a no-case submission—

Held: in the circumstances of the case the iron rod, though not made or adapted for causing injury to the person, was intended by the accused for such use and was accordingly an offensive weapon.

Submission overruled.

G. Pompey, Crown Counsel, for the Crown.

H. D. Hoyte for the accused.

Ruling on no-case submission in the absence of the jury by CRANE, J.: At the close of the case for the prosecution Mr. Hoyte for the accused submitted that there was no evidence to go to the jury that Exhibit “A”, the iron rod of which the accused was found in possession, is an “offensive weapon” within the meaning of the definition in s. 11 A (4) of the Prevention of Crimes Ordinance, Cap. 78, which reads:

“ ‘Offensive weapon’ means any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use by him.”

There is no dispute that the iron rod is an instrument not made or adapted for causing injury to the person, and that it falls within the second class of instruments classified by SALMOND, J., in *R. v. Petrie*, [1961] 1 All E.R. 466, as equivocal instruments or that the onus is throughout on the Crown to satisfy the jury that the accused did have the intention to use it for causing injury to a person. The only dispute is as to whether there is sufficient evidence that Exhibit “A” is in law an offensive weapon.

In endeavouring to prove the iron rod an offensive weapon the prosecution have relied on the second limb of the definition: “or intended by the person having it with him for such use by him,” and urges that the necessary intention is to be found in the circumstances of the case and from the statement of the accused in which he said, “I came out of my house with a piece of iron rod in my hand, in order to protect myself and family because I was afraid.”

With this contention I am entirely in agreement and consider there is indeed a case to go to the jury. I ask myself what clearer evidence of the intention with which the accused carried Exhibit

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“A” is needed when the accused himself says that he carried the iron rod to protect himself and family?

I will feel it my duty to tell the jury they should consider the nature of the instrument of which the accused was found in possession, the circumstances in which he was so found, including the general strike and the disturbances which prevailed in the country at the time, that the onus of proof remains throughout on the Crown to show that the accused intended to use the iron rod to injure someone, and that if they are not sure or are in any reasonable doubt about this, or are satisfied that the accused has discharged the evidential burden of proving lawful authority or reasonable excuse with which the Ordinance has saddled him, the discharge of which is not as high as that normally resting on the prosecution, they should acquit him of the charge.

Submission overruled.

[Editorial Note: The jury acquitted the accused.]

JAGAN AND OTHERS v. GAJRAJ

[Supreme Court—In Chambers (Luckhoo, C.J.) May 31, June 1, 5, 1963.]

Constitutional law—Privileges of the Legislative Assembly—Resolution of Assembly suspending member for disgraceful conduct—Competence of Supreme Court to inquire into existence and extent of power of Assembly to suspend or mode of exercise thereof—Constitution of British Guiana, 1961, articles 62 and 77.

The four plaintiffs were members of the Legislative Assembly of British Guiana, the first-named plaintiff being the Premier of British Guiana and the second-named plaintiff a Parliamentary Secretary to the Ministry of Agriculture, Forests and Lands. At a meeting of the Assembly held on 28th May, 1963, the defendant, who was Speaker of the Assembly, alleged that at a previous meeting on 21st May the second-named plaintiff had left his seat in a discourteous manner and that he and the other plaintiffs committed further acts of discourtesy in the lobby of the House. At the meeting on the 28th the defendant therefore called upon the plaintiffs to make an unqualified apology in the Assembly, but they refused to do so. The defendant then declared that the plaintiffs were guilty of gross disorderly conduct and directed them "to withdraw for the balance of the day's sitting." The plaintiffs having refused to withdraw, the defendant proceeded under Standing Order 41 (2) to name them, and in accordance with Standing Order 41 (3) called upon the senior Minister of the House to move a motion for their suspension. That Minister, however, declined to do so, and the defendant thereupon left it to the House to say whether there were any members prepared to move the motion and have it seconded. One of the members, who was not a minister, then moved that the plaintiffs be suspended "from the services of this House." The motion was seconded by another member and carried by a majority of two, the plaintiffs, despite the objections of one of them, not being permitted to vote. The defendant then called upon the plaintiffs to vacate their chairs and withdraw from the House but they refused to do so. The defendant then observed that he did

not have the members of his staff who could assist in having the plaintiffs vacate their chairs and declared that grave disorder existed in the House because of the plaintiffs' refusal to carry out his instructions. He thereupon adjourned the House to a date to be notified.

The Standing Orders of the House were made in pursuance of the provisions of article 62 of the Constitution of British Guiana, 1961, which empowered each chamber of the Legislature *inter alia* to make, amend and revoke Standing Orders for the regulation and orderly conduct of its own proceedings and the despatch of business. Article 77 of the Constitution provided that "the Legislature may by law determine and regulate the privileges, immunities and powers of the two chambers of the Legislature and the members thereof, but no such privileges, immunities or powers shall exceed those of the Commons' House of Parliament of the United Kingdom or of the members thereof." At the material time no law had been made in pursuance of the powers conferred on the Legislature by article 77.

On 31st May the plaintiffs brought an action against the defendant challenging the existence of the power to suspend them or, alternatively, the way in which the power was exercised, and applied *ex parte* for an interim order of injunction restraining the defendant from preventing them from sitting in the House. On the hearing of this application,

Held: (i) the Supreme Court has jurisdiction to inquire into the existence and extent of any privilege or power claimed by the Legislative Assembly;

(ii) the privileges, immunities and powers of the British Parliament are not automatically acquired by a colonial legislature but must be conferred by way of express grant or by necessary implication. The power of the British Parliament to punish a member for misconduct by way of committal has not been so conferred on the Legislative Assembly;

(iii) but the Legislative Assembly, having the power under its Standing Orders to regulate its internal procedure relating to orderly conduct, has authority to remove, suspend for a time or expel a member in order to preserve or maintain order in the House;

(iv) the Assembly is the sole judge of the occasion and the mode of the exercise of its privileges and powers in that regard, and the Supreme Court cannot interfere in or inquire into the mode of its exercise thereof;

(v) the acts complained of by the defendant, if held to be well founded, most certainly necessitated the use of the protective and self-defensive powers of the House.

Application refused.

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

LUCKHOO, C.J.: This is an *ex parte* application by way of affidavit sworn by the plaintiffs in an action filed by them on the 31st May, 1963, against the defendant Rahman B. Gajraj, personally and in his capacity as the Speaker of the Legislative Assembly of British Guiana, for an interim order of injunction restraining the defendant, his servants or agents or otherwise from in any way whatsoever interfering with, preventing or obstructing the plaintiffs or any of them from sitting and participating in the proceedings and in the activities of the Legislative Assembly or from exercising any of their rights as members thereof.

The plaintiffs are duly elected members of the Legislative Assembly.

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The first-named plaintiff Cheddi Berret Jagan is the Premier of British Guiana; the second-named plaintiff Sheik M. Saffie is Parliamentary Secretary to the Ministry of Agriculture, Forests and Lands; the third-named plaintiff, Victor Downer, and the fourth-named plaintiff, Derek Jagan, are members for Berbice East and for Suddie respectively.

According to the affidavit filed in support of this application, at a meeting of the Assembly held on the 28th May, 1963, the defendant in his capacity as Speaker purported to adjudge the plaintiffs guilty of acts, conduct and behaviour disgraceful and shameful and alleged that a breach of privilege of the Assembly had been committed by the second-named plaintiff when on the 21st May, 1963, he left his seat in an allegedly discourteous manner and continued in the lobby of the House and that breaches of privileges and acts of contempt of the House were committed by the other plaintiffs in the lobby of the House on the 21st May, 1963. In what is stated to be a verbatim report of the proceedings of the 28th May, 1963, filed with the plaintiffs' affidavit it is recorded to the effect that the defendant called upon the first-named plaintiff to make an unqualified apology in the Assembly in relation to those matters. This the first-named plaintiff declined to do, and the same request being made of the other plaintiffs by the defendant they all declined to do so. Thereafter, the defendant once more appealed to the plaintiffs to make the apology requested but they did not comply. The defendant then declared that the plaintiffs were guilty of gross disorderly conduct and stated that in accordance with Parliamentary procedure and also in accordance with their own Standing Order he now directed the plaintiffs "to withdraw for the balance of the day's sittings." The plaintiffs did not withdraw as directed. The defendant after referring to that fact and observing that his substantive mace bearer was absent proceeded under Standing Order 41 (2) to name the plaintiffs and in accordance with Standing Order 41 (3) called upon the Senior Minister of the House to move a motion for the suspension of the members named. The Minister declined to do as requested by the defendant who then stated that it was not compulsory that the Senior Minister should move the motion and that he left it to the House to say whether there were any members prepared to move a motion and have it seconded. One of the members, P. S. D'Aguiar (not a minister), then moved that the members be suspended "from the sittings of this House." In written submissions which have today been recorded as part of the arguments of counsel it is stated that a replay of the tape recording of the proceedings discloses that P. S. D'Aguiar in moving the motion used the words "from the services of this House" and not "from the sittings of this House" as appears in the verbatim report of the proceedings filed with the plaintiffs' affidavit. The motion was seconded by another member, R. E. Cheeks. The defendant then stated that it had been moved that the four members named be suspended "from the services of the House" and put that motion to the House. The plaintiffs were not permitted to vote on the motion and the fourth-named plaintiff challenged the count on the ground that his vote had not been taken. The motion was carried by a majority of two.

The defendant called upon the plaintiffs to vacate their chairs and withdraw from the House. The plaintiffs did not comply with this direction. The defendant observed that he did not have the members of his staff who could assist in having the plaintiffs vacate their chairs and declared that grave disorder existed in the House because a certain number of members—a considerable portion of the House—refused to carry out the instructions of the Chair. He thereupon adjourned the House to a date to be notified after stating that it did not seem to him that good sense would prevail within a short time on that day.

On the 31st May, 1963, the plaintiffs filed the writ of summons in this action claiming certain declarations, damages and an order which do not concern the present application, and an injunction in terms similar to the present application.

The plaintiffs contend that in respect of their suspension the defendant and the House purported to exercise powers which neither the defendant nor the House possessed or at least in a manner not provided for by law or by the Standing Orders of the Legislative Assembly and that by reason thereof the purported suspension of the plaintiffs is a nullity.

At the outset of the argument I intimated to counsel for the applicants (plaintiffs) that I wished to be satisfied that the Supreme Court of British Guiana (or a judge thereof) had jurisdiction in the matter having regard to the fact that the order requested would, if granted, have the effect of the court interfering with the internal affairs of the Legislative Assembly. I am much indebted to Mr. Haynes, counsel for the applicants, for the careful and painstaking arguments he has addressed to me in this matter, supplemented as they are by further arguments contained in the written submissions referred to above.

Mr. Haynes conceded that in England the High Court has no jurisdiction to entertain an action of the kind filed by the plaintiffs—a *fortiori* an application of this kind—and contended that this was by reason of the United Kingdom Parliament being a court which determines its own affairs. He submitted that a Colonial Legislature is not a court in that sense and that therefore an act of a Speaker of a Colonial Legislature of the kind complained of in the instant case can be questioned in a court of the law.

The cases of *Kielley v. Carson* (1842), 13 E.R. 225, P.C., *Fenton v. Hampton* (1858), 11 Moo. P.C.C. 347, and *Doyle v. Falconer* (1866), 4 Moo. P.C. C.N.S. 203, cited by Mr. Haynes, establish that the conduct of a Speaker of a Colonial Legislature may be questioned in a court in relation to the exercise of a power which he does not have. Those cases all involved committal for contempt by Colonial Legislatures, in the last named of a member of the House of Assembly of Newfoundland, and in the others of a non-member. Mr. Haynes has submitted that those cases are also authority for the general proposition that the acts of the Speaker of a Colonial Legislature in relation

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to the conduct of members in the House may be questioned in the courts, that is to say, any such act may be questioned even if exercised pursuant to a power which the legislature admittedly possesses. In *Doyle v. Falconer* Sir JOHN COLVILLE, who delivered the opinion of the Judicial Committee of the Privy Council, in the course of his judgment (at pp. 217, 218) said:

“It is admitted, however, that the case of *Kielley v. Carson*, which overruled *Beaumont v. Barrett* and has been followed by that of *Fenton v. Hampton*, must be taken to have decided conclusively that the Legislative Assemblies in the British Colonies have, in the absence of express grant, no power to adjudicate upon, or punish for, contempts committed beyond their walls. The case is one which, having regard to the constitution of the Committee before which it was argued for the second time, their Lordships must accept as an authority of singular weight. And if the elaborate judgment which was then pronounced has in terms left open the question which is raised on the present case, it has stated principles which go far to afford the means of determining that question.”

In *Doyle v. Falconer* the question was whether the Legislative Assembly of Dominica possessed the power of punishing a contempt though committed in its presence and by one of its members. The Privy Council held that it did not possess such a power which did not belong to a Colonial House of Assembly by analogy to the *lex et consuetudo Parliamenti* and which is inherent in the two Houses of Parliament in the United Kingdom, or to a court of justice, which is a court of record, a Colonial House having no judicial functions.

In that case Sir JOHN COLVILLE (at p. 218) said:

“The privileges of the House of Commons, that of punishing for contempt being one, belong to it by virtue of the *lex et consuetudo Parliamenti* which is law peculiar to and inherent in the two Houses of Parliament of the United Kingdom. It therefore cannot be inferred from the possession of certain powers by the House of Commons by virtue of that ancient usage and prescription, that the like powers belong to the Legislative Assemblies of comparatively recent creation in the dependencies of the Crown.

Again, there is no resemblance between a Colonial House of Assembly, being a body which has no judicial functions, and a court of justice, being a court of record. There is therefore no ground for saying that the power of punishing for contempt because it is admitted to be inherent in one, must be taken by analogy to be inherent in the other.”

After observing that the House of Assembly of Dominica had been created by exercise of the prerogative sanctioned by the common law and that the principle of the common law embodied in the maxim “*Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest*” applies to a body so created, Sir JOHN COLVILLE (at p. 219) said:

“The question, therefore, is reduced to this: Is the power to punish and commit for contempts committed in its presence one necessary to the exercise of such a body as the Assembly of Dominica, and the proper exercise of the functions which it is intended to execute? It is necessary to distinguish between a power to punish for a contempt, which is a judicial power, and a power to remove any obstruction offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self preservation. If a member of a Colonial House of Assembly is guilty of disorderly conduct in the House while sitting, he may be removed, or excluded for a time or even expelled; but there is great difference between such powers and the judicial power of inflicting a penal sentence for the offences. The right to remove for self-security is one thing, the right to inflict punishment is another. The former is, in their Lordships judgment, all that is warranted by the legal maxim which has been cited, but the latter is not its legitimate consequence. To the question therefore, on which this case depends, their Lordships must answer in the negative. If the good sense and conduct of the members of Colonial Legislatures prove, as in the present case, insufficient to secure order and decency of debate, the law would sanction the use of that degree of force which might be necessary to remove the person offending from the place of meeting and to keep him excluded.”

The Privy Council in *Doyle v. Falconer* has drawn a clear distinction between removal, suspension and expulsion on the one hand and the judicial power of inflicting penal sentence on the other hand. The former is permissible in a Colonial House of Assembly for its self-security without express grant while the latter is only permissible if it is expressly granted. The Privy Council in *Barton v. Taylor* (1886), 11 App. Cas. 197, P.C., at p. 206, also drew the same distinction. In each of the three cases referred to above the House of Assembly concerned sought to exercise judicial power of inflicting penal sentence upon the aggrieved party—a deprivation of personal liberty. In the instant case the defendant did not seek so to do but rather sought to remove for self-preservation. The gist of the defendant’s complaint, gauged from the contents of the verbatim report filed with this application is that the conduct of the plaintiffs in the House on the 28th May, 1963, was calculated to diminish the prestige of the House and so to limit its authority.

One of the submissions made on behalf of the plaintiffs is that while it is conceded that the House has the right to remove for self-preservation the mode of exercise of that right may be reviewed by a court of law.

I have carefully examined the opinions of the Judicial Committee of the Privy Council in the three cases cited to counsel in support of his proposition that generally the acts of the Speaker of a Colonial Legislature in relation to the conduct of members of the House may

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be questioned in the courts. It will be observed that while several questions were argued in the lower courts and in the Privy Council in those cases the Privy Council did not deliver an opinion in respect of all of them, and did not purport to endorse the opinions expressed in the judgments in the lower courts in respect of those questions. Reference should, however, be made to the fact that in *Fraser v. Hampton* it was held that the *lex et consuetudo Parliamenti* applies exclusively to the House of Parliament in England and is not conferred upon a Supreme Legislative Assembly of a Colony, or Settlement, by the introduction of the common law of England into the Colony and further that no distinction in this regard exists between Colonial Legislative Councils and Assemblies whose power is derived by grant from the Crown, or created under the authority of an Act of the Imperial Parliament.

In *Barton v. Taylor* (1886), 11 App. Cas. 197, P.C., the appellant, a member of the New South Wales Assembly, entered the Chamber within a week after the Assembly had passed a resolution that he be suspended from the services of the House. He was removed therefrom and prevented from re-entering it. He brought an action of trespass. It was held that the resolution must not be construed as operating beyond the sitting during which the resolution was passed. The judgment of the Privy Council was delivered by the Lord Chancellor, Lord SELBORNE, who adopted Sir JOHN COLVILLE'S statement in *Doyle v. Falconer* of the inherent or implied power in Colonial Legislatures to have a member removed or excluded for a time or even expelled. The Lord Chancellor (at pp. 204, 205) said:

“The power, therefore, of suspending a member guilty of obstruction or disorderly conduct during the continuance of any current sitting is, in their Lordships' judgment, reasonably necessary for the proper exercise of the functions of any Legislative Assembly of this kind; and it may very well be that the same doctrine of reasonable necessity would authorise a suspension until submission or apology by the offending member; which, if he were refractory, might cause it to be prolonged (not by the arbitrary decision of the Assembly, but by his own wilful default) for some further time.....

If these are the limits of the inherent or implied power, reasonably deducible from the principles of general necessity, they have the advantages of drawing a simple practical line between defensive and punitive action on the part of the Assembly. A power of unconditional suspension, for an indefinite time, or for a definite time depending only on the irresponsible discretion of the Assembly itself, is more than the necessity of self-defence seems to require, and is dangerously liable, in possible cases to excess or abuse.”

In respect of the length of suspension the Lord Chancellor (at p. 204) said:

“The principle on which the implied power is given confines it within the limits of what is required by necessity.

That necessity appears to their Lordships to extend as far as the whole duration of the particular meeting or sitting of the Assembly in the course of which the offence may have been committed. It seems to be reasonably necessary that some substantial interval should be interposed between the suspensory resolution and the resumption of his place in the Assembly by the offender, in order to give opportunity for the subsidence of heat and passion, and for the reflection on his conduct by the person suspended; nor would anything less be generally sufficient for the vindication of the authority and dignity of the Assembly.

The sitting or meeting, as a whole, has a practical unity. It commences with the usual forms of opening, when the Speaker takes the chair; it is terminated by the adjournment of the House. It has its proper rota of business (such as, in our House of Commons; the notices and orders of the day); a separate record of the whole business done at each such sitting or meeting (including the suspension of a member, if that should take place) is entered upon the journals. The 'services' of members in attendance at each such sitting or meeting is continuous; and at each adjournment that service is interrupted, not to be renewed until after an interval of some hours, days, or weeks, or even months, as the case may be."

Standing Order 41 (3) (c) of the Legislative Assembly of British Guiana fixes the time during which a suspension made under that Standing Order is effective. The Standing Orders were made under the provisions of article 62 of the Constitution of British Guiana which empowers each chamber of the Legislature *inter alia* to make, amend and revoke Standing Orders for the regulation and orderly conduct of its own proceedings and the despatch of business, and no question has been raised before me as to the validity of any of the Standing Orders made thereunder. See also S.O. 85 (Rules in cases not provided for by Standing Orders).

It is clear that no law has been enacted under articles 77 of the Constitution of British Guiana. That article provides as follows:

"The Legislature may by law determine and regulate the privileges, immunities and powers of the two chambers of the Legislature and the members thereof, but no such privilege, immunities or powers shall exceed those of the Commons' House of Parliament of the United Kingdom or the members thereof."

So that it does not appear that the Legislative Assembly in British Guiana has the authority to *punish* for contempt as had the Legislative Assembly of Victoria where the following law had been enacted under a provision similar in terms of article 77 of the Constitution of British Guiana:

"The Legislative Council and Legislative Assembly of Victoria respectively, and the Committees and Members

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thereof respectively, shall hold, enjoy and exercise such and the like privileges, immunities, and powers, as, and the privileges, immunities and powers of the said Council and Assembly respectively and of the Committees and Members thereof respectively, are hereby defined to be the same as at the time of the passing of the said recited Act was held, enjoyed, and exercised by the Commons' House of Parliament of Great Britain and Ireland, and by the Committees and Members thereof, so far as the same are not inconsistent with the said recited Act, whether such privileges, immunities or powers were so held, possessed, or enjoyed by custom, statute or otherwise."

See *Speaker of the Legislative Assembly of Victoria v. Hugh Glass* (1871), L.R. 3 App. Cas. 449, where the Privy Council reversed the judgment of the Chief Justice of Victoria who ordered the respondent (a witness at proceedings before a Select Committee of the Legislative Assembly) to be discharged on a writ of habeas corpus after he had been committed for contempt upon resolution of the Legislative Assembly.

Mr. Haynes has sought to rely on the following passage in the reasons for judgment of the Chief Justice in respect of his submission that the court has jurisdiction to enquire into the exercise of a privilege or power:

"Even assuming, for the purposes of argument that the right to issue a warrant as contended could have been acquired by the insertion of special and express terms, yet the general words of description by references are insufficient to negative the presumption that arises against that right having been given. If the powers of legislation on this subject are limited, the enactments passed by virtue of law and the warrant issued under this enactment should each show that the limit has not been exceeded. There must be some means of deciding the question of excess or no excess.....If there is no other tribunal before which in the first instance the question can be brought, to hold that this court, although so created, cannot consider the question, is in effect to say that no court can; and that in the case of limited powers no means exist of testing the validity of their exercise."

I agree with the view so expressed by the learned Chief Justice. But he was there speaking of the court's power to decide the existence and extent of the privilege or power claimed not of the manner of its exercise if it is found to exist.

Counsel has contended that in British Guiana the powers of the Legislature on this subject are likewise limited. However true that statement may be, it will readily be appreciated that the subject under consideration in the *Glass* case was the power to commit for contempt which is not an inherent or implied power as in the defensive power to regulate the orderly conduct of the proceedings of a

House of Assembly. This distinction is important as the authorities referred to below appear to indicate. It may also be observed in this connection that even in England the courts maintain the right to determine the limits of parliamentary privilege. But this is a far different thing from enquiring into the exercise of privilege so far as it concerns the House, which the courts in England will not do.

I am in agreement with the contention of counsel for the plaintiffs that the cases referred to above lay down that the privileges, immunities and powers of the British Parliament are not automatically acquired by a Colonial Legislature and that any privileges, immunities or powers in such a legislature must be by way of express grant or by necessary implication. However, the further contention of counsel to the effect that from those cases it can be deduced that immunity from the jurisdiction of the temporal courts is peculiar to the British Parliament and an incident thereof is too widely stated for the opinions delivered in those cases by the Privy Council (other than the *Glass* case) are confined to powers purported to be exercised by Colonial Legislatures where those powers were clearly nonexistent. That is not the case in the present matter. The power to suspend a member from the service of the House in order to preserve or maintain order in the House is a power incident to or inherent in the Legislative Assembly of British Guiana. This inherent power is only partly embodied in S.O. 41 of the Standing Orders which preserves a summary procedure for enforcing discipline but is not dependent upon that S.O. for its existence. (See MAY'S PARLIAMENTARY PRACTICE (1957 Edn.), at p. 62).

Nothing said in the judgments delivered in the well-known case of *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271, provides any foundation for the submission that the immunity of the House of Commons from control of the courts in its administration of that part of the statute law which has relation to internal procedure is one which Colonial Legislatures do not in like regard enjoy. Such immunity in the case of the House of Commons has been justified upon several alternative grounds. In that case the plaintiff Bradlaugh had been duly returned as a member of the House of Commons and required the Speaker to call him to take the oath required by 29 Vict. c. 19. The Speaker declined to do so and the House, upon motion resolved "that the Sergeant-at-Arms do exclude Mr. Bradlaugh from the House until he shall engage no further to disturb the proceedings of the House." Bradlaugh in an action against the Sergeant-at-Arms prayed for an injunction to restrain him from carrying out this resolution. It was held by the Court of Queen's Bench that it had no power to interfere in a matter which related to the internal management of the procedure of the House. Lord COLERIDGE, C.J., stated the question to be "whether, on the assumption that the resolution of the House of Commons forbade a member of the House within the walls of the House itself to do something which by the law of the land he has a right to do, such a resolution is one which the House of Commons has a right to pass; and whether if it has not this court could enquire into the right and allow an action to be maintained by a member of the House against the officer of the House charged by resolution of the House itself with the execution of its order."

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Lord COLERIDGE observed (at p. 274):

“Again, there can be no doubt, that in an action between party and party brought in a court of law, if the legality of a resolution of the House of Commons arises incidentally, and it becomes necessary to determine whether it be legal or not for the purpose of doing justice between the parties to the action: in such a case the court must entertain and must determine that question. Lord ELLENBOROUGH expressly says so in *Burdett v. Abbott* (14 East., at 148); and BAYLEY, J., seems to assume it at p. 161. All the four judges who gave judgment in *Stockdale v. Hansard* (1839) 9. Ad. & El. 1, assert this in the strongest terms.”

And (at p. 275), the Chief Justice said:

“Alongside, however, of these propositions for the soundness of which I should be prepared most earnestly to contend, there is another proposition equally true, equally well established, which seems to me decisive of the case before us. What is said or done within the walls of Parliament cannot be enquired into a court of law. On this point all the judges in the two great cases which exhaust the learning on the subject, *Burdett v. Abbott* and *Stockdale v. Hansard* are agreed, and are emphatic. The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive. To use the words of Lord ELLENBOROUGH: ‘They would sink into utter contempt and inefficiency without it’.”

That last sentence citing Lord ELLENBOROUGH’s observation appears to me to show that the courts of law consider it absolutely necessary for the very existence of the Houses of Parliament as a legislative body to be free from the courts’ interference in the jurisdiction of the Houses over their own members.

Lord COLERIDGE, C.J., at the conclusion of his judgment (at p. 277) made the following observations:

“If injustice has been done, it is injustice for which the courts of law afford no remedy. On this point I agree with and desire to adopt the language of my brother STEPHEN. The history of England and the resolutions of the House of Commons itself, show that now and then injustice has been done by the Houses to individual members of it. But the remedy, if remedy it be, lies, not in actions in the courts of law (see on this subject the observations of Lord ELLENBOROUGH and BAYLEY, J., in *Burdett v. Abbott*, (14 East., 150, 151 and 160, 161), but by an appeal to the constituencies whom the House of Commons represents.”

The lengthy and important judgment of STEPHEN, J., confirms and reinforces the conclusions reached by Lord COLERIDGE, C.J., in which MATTHEW, J., concurred. STEPHEN, J., observed that no pre-

cedent had been or could be produced in which any court had ever interfered with the internal affairs of either House of Parliament though the courts had on numerous occasions declared the limits of their powers outside of their respective Houses.

It is true that other and distinct grounds for upholding the rule, for rule, it is, has been given in the course of the judgments. For example, that it would provoke a conflict between the House of Commons and the court, "which would be a great evil" if the court sought to interfere in the internal procedure of the House. Further, that "an appeal would lie from a decision of the court to the Court of Appeal and thence to the House of Lords, which would then become the judge in the last resort of the powers and privileges of the House of Commons." These additional reasons do not detract from the main ground for upholding the rule.

Counsel further submitted that the applicants have the inalienable right of every citizen to approach the courts for determination of his rights. He cited in support the case of *Pyx Granite Co. Ltd. v. Ministry of Housing & Local Government*, [1959] 3 W.L.R. 346, *per* Viscount SIMONDS, L.C., at pp. 356-357, and contended that such a right cannot be taken away except by express enactment or by necessary implication. The answer to Mr. Haynes' submission in relation to a case of this kind is to be found in the judgment of STEPHEN, J., in *Bradlaugh v. Gossett* (1884), 12 Q.B.D., at pp. 285, 286:

"No doubt, the right of the burgesses of Northampton to be represented in Parliament, and the right of their duly elected representative to act and vote in Parliament and to enjoy the other rights incidental to his position upon the terms provided by law are in the most emphatic sense legal rights, legal rights of the highest importance, and in the strictest sense of the words. Some of these rights are to be exercised out of Parliament, others within the walls of the House of Commons. Those which are to be exercised out of Parliament are under the protection of this court, which, as has been shown in many cases, will apply proper remedies if they are in anyway invaded, and will in so doing be bound, not by resolutions of either House of Parliament, but by its own judgment as to the law of the land, of which the privileges of Parliament form a part. Others must be exercised, if at all, within the walls of the House of Commons; and it seems to me that, from the nature of the case such rights must be dependent upon the resolutions of the House. In my opinion the House stands with relation to such rights and to the resolutions which affect their exercise, in precisely the same relation as we the judges of this court stand in relation to the laws which regulate the rights of which we are the guardians; and to the judgments which apply them to particular cases; that is to say, they are bound by the most solemn obligations which can bind men to any course of conduct whatever, to guide their conduct by the law as they understand it. If they misunder-

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stand it, or (I apologise for the supposition) wilfully disregard it, they resemble mistaken or unjust judges; but in either case, there is in my judgment no appeal from their decision. The law of the land gives no such appeal; no precedent has been or can be produced in which any court has ever interfered with the internal affairs of either House of Parliament though the cases are no doubt numerous in which the courts have declared the limits of their powers outside of their respective Houses.”

I can find no authority which suggests that the right of a member of House of Commons to approach the court for determination of his rights is any less than that of a member of the Legislative Assembly of British Guiana and this is not any less true because colonial courts of law may enquire into the validity of legislation enacted by Colonial Legislatures which are of course required to act within the limits of their respective constitutions. Article 5 (1) of the Constitution is declaratory of the rights of the citizen which are no more than the rights of a citizen of the United Kingdom.

The validity of the Standing Orders is not in issue. Judicial notice is required by s. 24 (iv) of the Evidence Ordinance, Cap. 25, to be taken of the general course of proceedings and privileges of the Legislature but not of its journals or minutes of proceedings.

This brings us to the question as to whether in the first place it is competent for a court of law to enquire into those complaints involving as they do the internal management of the procedure of the Assembly, albeit of a Colonial Legislative Assembly.

As was observed by Lord ELLENBOROUGH and cited by Lord COLERIDGE, C.J., in *Bradlaugh v. Gossett* (1884), 12 Q.B.D., at p. 275, the foundation for the rule of non-interference in respect to the jurisdiction of the Houses of Parliament over the members is that if it were otherwise “they would sink into utter contempt and inefficiency without it.” How much more necessary is such a rule in respect of a legislature without the advantage of centuries of experience the British House of Commons enjoys! It seems to me, that unless there is clear authority to the contrary, this rule shall be regarded as of absolute necessity and essential for the authority of every legislature for without it they may be quite unable to exercise their constitutional functions. Without such a rule, the absurd consequences would follow that members of an opposition who are bent on obstruction rather than on their legitimate purpose of opposing could make it impossible to proceed to a conclusion with the business of the legislature by invoking the interference of a court of law at every stage of the proceedings. It seems to me it would be more in the interest of a Government of the day in any colony that there should be such a rule.

If courts of law were to interfere in this regard there is in principle no reason why prerogative writs should not issue to the Legislature for the courts would be exercising a supervisory juris-

diction over the Legislature in the conduct of its internal procedure dealing with order in the Assembly or Committee. One needs little imagination to see the chaos which would result if the courts sought to exercise such a jurisdiction.

This point is not entirely devoid of reported authority. There appears a reference in Volume 36 of the ENGLISH AND EMPIRE DIGEST at p. 400, para. 47, to a case relating to the Legislative Assembly of Queensland, Australia, where it is stated that it was held that as that Assembly had power under Standing Orders pursuant to the Constitution Act, 1867, s. 8, to regulate its internal procedure relating to orderly conduct, the Supreme Court had no jurisdiction to take cognizance of the mode in which the resolution for the suspension of a member was passed—*Brown v. Cowley* (1895), 6 Q.L.J., 234. The Law Library does not have a copy of this report. However, the decision in that case as reported in the ENGLISH & EMPIRE DIGEST is in consonance with the judgments delivered in the case of *Bradlaugh v. Gossett* (*ubi supra*). The decision in the Canadian case of *R. v. Bunting* (1885), 7 O.R. 524 (C.A.), referred to by counsel for the plaintiffs in his written submissions, in my opinion is to be construed as holding that the existence and extent of privileges and powers claimed by Parliament (Canadian) may be enquired into by the courts. I do not understand that case as being authority for the proposition that a court may enquire into the mode of exercise of a privilege or power which in fact is found or admitted to exist. Nor do the headnotes of the other Canadian cases of *Payson v. Hubert* (1904), 34 S.C.R. 400, and *Landers v. Woodworth* (1878), 2 S.C.R. 158, referred to in the written submissions, indicate such a view by the judges in those cases.

To sum up the position, I am of the opinion that the following may be deduced from the authorities cited:

- (1) The Supreme Court has jurisdiction to enquire into the existence and extent of any privilege or power claimed by the Legislative Assembly.
- (2) The Legislative Assembly, having the power under its Standing Orders to regulate its internal procedure relating to orderly conduct, is the sole judge of the occasion and the mode of the exercise of its privileges and powers in that regard and a Supreme Court cannot interfere in or enquire into the mode of its exercise thereof.
- (3) Without statutory authority the Legislative Assembly has no power to *punish* a member for misconduct by way of committal but has the power without statutory authority to order his removal or suspension for a time or to expel him.

In the present matter the verbatim report of the proceedings filed with the application shows that according to the Speaker's complaint the breach of privilege on the 21st May commenced while he was still in the Chamber itself, just after he had adjourned the sitting and continued while he was *entering* the lobby from the Cham-

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ber. Further acts were stated to have been committed while he was in the lobby on his way to the Speaker's Chamber. See also para. 3 of the plaintiffs' affidavit in this application. On the 28th May, 1963, the Speaker called upon the plaintiffs to purge themselves of their contempt by way of an unqualified apology. This the plaintiffs refused to do. This started the train of events which led to the plaintiffs being suspended under S.O. 41 wherein the period of their suspension is fixed.

It is clear that if the conduct of the plaintiffs either on the 21st May or 28th May was such as was calculated to diminish the prestige of the House and so limit its authority a breach of privilege was involved. What was complained of, if held to be well founded, most certainly necessitated the use of protective and self-defensive powers.

The Legislative Assembly had power to enquire into the question of breach of privilege brought to its attention by the Speaker and to exercise its powers in connection therewith.

The Legislative Assembly had power to suspend the plaintiffs for a limited period. The plaintiffs' suspension is for a limited period and can hardly be said to be out of proportion to the gravity of the breach charged.

In the case of *Barton v. Taylor* (1886), 11 App. Cas. 197, P.C., relied on by counsel for the plaintiffs, the suspension imposed was in the circumstances of that case not limited in time and indeed the appellant (at p. 201) argued that the suspension might have lasted two or three years. I can find nothing in the judgment of the Privy Council in that case which supports the contention for the plaintiffs that the court may enquire into the mode of the exercise of the power to suspend a member. The Privy Council in that case reiterated that a court had jurisdiction to determine whether the Assembly had the power contended for and the extent of that power—a very different thing from jurisdiction to enquire into the mode of its exercise.

It is not without significance that in none save one of the cases cited during the course of the arguments was there any order claimed for an injunction to issue directed to the Speaker or to anyone at all. My researches as far as they have gone have not discovered any instances of such an order being made. I have also been unable to discover any instance where any of the prerogative writs of *mandamus*, *certiorari* or prohibition has been issued to the Speaker of a Colonial Legislature.

Having come to the conclusion that there is in existence the privilege contended for by the defendant (as appears in the verbatim report), that such privilege includes a matter of the kind complained of and that it is not competent for this court to enquire into the mode of the exercise of the power to suspend the plaintiffs the application for an interim injunction must be refused.

If perchance the plaintiffs consider that injustice has resulted to them by reason of the mode of the exercise of the power of suspension not being cognisable by the court they may wish to reflect on the observations of Lord COLERIDGE, C.J., in the penultimate paragraph of his judgment in *Bradlaugh v. Gossett* (1884), 12 Q.B.D., at p. 277, cited above.

Upon application of counsel for the applicants leave to appeal is granted if such leave is necessary and if a right of appeal does in fact exist.

Application refused.

Solicitor: *Sase Narain* (for the plaintiffs).

PHILLIPS v. INLAND REVENUE COMMISSIONER

[Supreme Court—In Chambers (Luckhoo, C.J.) November 9, 1962, January 18, 1963]

Income Tax—Source of income—Tax-payer ceased working in Colony at end of 1959—No local source of income during following year—Whether taxable on income for 1959—Income Tax Ordinance, Cap. 299, ss. 2, 5 and 8.

Section 5 of the Income Tax Ordinance, Cap. 299, provides as follows:

- “5. Charge of Income Tax—Income tax, subject to the provisions of this Ordinance, shall be payable at the rate or rates herein specified for each year of assessment upon the income of any person accruing in or derived from the Colony or elsewhere, and whether received in the Colony or not, in respect of.....
- (b) gains or profits from any office.....”

Section 8 of the Ordinance provides as follows:

- “8. Basis of assessment—Tax shall be charged, levied, and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment.”

The appellant was a Puisne Judge of the Supreme Court of British Guiana until 15th December, 1959, when he was transferred to Jamaica. In 1960 he neither resided in British Guiana nor had any source of income there. It was argued for him that he could not be taxed for the year of assessment 1960 on his income for the preceding year because the tax was really imposed upon the income of the year of assessment and was merely measured by the income of the previous year.

Held: (i) despite the marginal notes, it is s. 8 which is the charging section, and not s. 5;

(ii) it is the chargeable income of the year immediately preceding the year of assessment which stands charged with payment of tax, and not the income or chargeable income of the year of assessment;

(iii) a person may be charged to tax for a particular year of assessment on income derived from a source which he does not possess in that year.

Appeal dismissed.

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

D. A. Singh, Senior Legal Adviser (ag.), for the respondent.

LUCKHOO, C.J.: The question for determination in this appeal is whether a person can be charged to tax for a particular year of assessment on income derived from a source which he does not possess in that year, having regard to the provisions of the Income Tax Ordinance, Cap. 299, as they existed at all material times.

The appellant was until the 15th December, 1959, a Puisne Judge of the Supreme Court of British Guiana. On the 16th December, 1959, he left British Guiana on transfer to Jamaica as a Puisne Judge and has never since resided in British Guiana nor been entitled to any income accruing or derived from British Guiana.

From the 1st January, 1959, until 15th December, 1959, income in the sum of \$9,187.10 accrued to the appellant in British Guiana in

respect of his office of Puisne Judge and on the 31st December, 1960, the respondent assessed the appellant to tax in the sum of \$488.88 on a chargeable income of \$4,137.

On the 19th January, 1961, the appellant objected to the said assessment but the respondent affirmed the assessment. On the 24th April, 1961, the appellant appealed to the Board of Review which dismissed the appeal. The appellant has now appealed to a Judge in Chambers.

For the appellant it has been submitted that the appellant is not exigible to tax in respect of income earned in British Guiana during the year 1959 (year of assessment 1960) because he had no source of income in British Guiana during the year of assessment 1960.

The two provisions of the Income Tax Ordinance, Cap. 299, which call for especial consideration in this appeal are ss. 5 and 8 as they stood at all material times.

Section 5 provides as follows:—

“5. *Charge of income tax*—Income tax, subject to the provisions of this Ordinance, shall be payable at the rate or rates herein specified for each year of assessment upon the income of any person accruing in or derived from the Colony or elsewhere, and whether received in the Colony or not, in respect of—

(a) * * * * *

(b) gains or profits from any office or.....; Provided that in the case of income.....which arises to a person who is not ordinarily resident in the Colony or not domiciled therein, the tax shall be payable on the amount received in the Colony.”

Section 8 provides as follows:—

“8. *Basis of assessment*—Tax shall be charged, levied, and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment.”

The expressions “year of assessment” and “chargeable income” are defined as follows:—

“ ‘year of assessment’ means the period of twelve months commencing on the 1st January, 1929, and each subsequent period of twelve months;”

(The Ordinance came into operation on the 23rd March, 1929, when income tax for the first time in the history of British Guiana became payable).

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“ ‘chargeable income’ means the aggregate amount of the income of any person from the sources specified in s. 5 remaining after allowing the appropriate deductions and exemptions under this Ordinance.”

Counsel for the appellant has contended that s. 8 is not a charging provision but is merely a machinery or measuring provision which must be read with the definition of the expression “chargeable income”. He has urged that s. 5 is the sole charging provision whereby income tax is payable upon income accruing in or derived from the Colony or elsewhere and that while measured by the previous year is collected for the year of assessment.

Reference was made by counsel for the appellant to a dictum of ROWLATT. J., in *Fry v. Burma Corporation* (1929) 15 Tax Cas. 113. H.L., at p. 120—

“You do not tax the years by which you measure: you tax the year in which you tax and measure by the years to which you refer.”

In England it is stated in SIMON’S INCOME TAX (2nd Edn.), Vol. I, at p. 14, para. 19—

“Whatever the basis of assessment and computation, the fundamental rule, that profits to be chargeable to income tax must have a source, still holds. Thus a taxpayer cannot be charged to tax for a particular year of assessment on income derived from a source which he does not possess in that year.”

The case cited in support of that statement of the law is *Brown (Surveyor of Taxes) v. National Provident Institution*, [1921] 2 A.C. 222; 8 Tax Cas. 57, 80, H.L. That case was concerned with assessments under Case I of Schedule D. of the Income Tax Act, 1842 (now replaced by Case III of Schedule D of the Income Tax Act, 1952) but is of general application as Lord HALDANE (at p. 85 of 8 Tax Cas.) said—

“It is to be observed that, broadly speaking at all events, the general principle of the Acts is to make the tax apply only to a source of income existing in the year of assessment.”

See also the opinions of Lord ATKINSON at pp. 89, 90, and Lord SUMNER at pp. 98, 99.

Reference was also made by counsel for the appellant to the opinion of the Privy Council in the case of *St. Lucia Usines and Estates Co. v. St. Lucia (Colonial Treasurer)*, [1924] A.C. 508. Under s. 4 (1) of the Income Tax Ordinance, 1910 (No. 9 of 1910) of St. Lucia it is provided that income tax is payable on certain income arising or accruing to any person residing in that Colony or to any person not residing in that Colony but having income derived from a source in the Colony. The appellant company had for some years down to 1920 owned estates and carried on business in St. Lucia and

had paid tax down to the end of that year. Since then it had sold all of its estates and had not carried on business there. In 1921 interest upon the unpaid part of the purchase price was payable to the company but not in fact paid. It was held by the Privy Council that though the interest was a debt accruing in 1921 it was not income arising or accruing in 1921 and that the company was not liable to pay income tax for that year. The Privy Council was of the view that there must be a coming in to satisfy the word "income" and that if a defaulting debtor does not pay the interest it cannot be said that the taxpayer has received nor has there accrued to him any income with respect to the debt.

The opinion of the Privy Council in the St. Lucia case is not really in point in the present appeal and does not assist in the determination of the point in issue.

In deciding whether the scheme of the local Ordinance in respect of the payment of income tax follows that of the English income tax legislation it will be useful to refer to certain cases decided under the Palestinian legislation. These cases were cited by counsel for the appellant who has kindly lent me the leaflets containing the judgments delivered in those cases.

In the first of those cases *Oshero v. Assessing Officer Tel-Aviv* (1942), Income Tax Appeal No. 20 of 1942 (10 P.L.R., March 1943, p. 134), the ground of appeal was that the appellant was being taxed again in 1942/43 in respect of the same sum on which he had already paid income tax in the year 1941/42. The appellant in that case had, previously to 1941, carried on business with his wife under a registered partnership which was formally dissolved on 19th November, 1941, the business being transferred to and thereafter carried on by a limited company of the same name and of which the appellant and his wife were the principal, if not the only shareholders. The company was incorporated on 19th November, 1941.

By s. 5 of the Palestinian Ordinance (which imposed income tax for the first time in the history of Palestine) income tax was payable for the year of assessment commencing on 1st April, 1941, and for each subsequent year commencing similarly on each 1st day of April. Section 6 as originally enacted was as follows—

"Tax shall be charged, levied and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment.

Provided that when in any year of assessment any person ceases to possess any source of income which was acquired by him prior to the 1st day of April, 1940, tax on the income from that source shall be charged, levied and collected upon the income of the year of assessment and not upon the income preceding the year of assessment."

The proviso was repealed with effect from 1st April, 1942, the following words being substituted therefor—

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“notwithstanding that the source of income may have ceased before or during the year of assessment.”

The similarity of s. 6 of the Palestinian Ordinance to s. 8 of the British Guiana Ordinance is readily apparent.

As the source of the greater part of the appellant's income had ceased during the year of assessment 1941/42 he was assessed in accordance with the proviso and was not assessed on the income for the year preceding that year of assessment. For the year of assessment 1942/43 he was assessable as stated in s. 6 as amended. The Assessing Officer contended the profits from the appellant's trade for the period 1.4.1941 up to 31.8.1941 should be included in the appellant's return. The appellant objected on the ground that he was being doubly taxed in that he had already paid tax on the profits of the business from 1.4.1941 to 31.8.1941 and that he could not be taxed again on the same amount. His objection being over-ruled by the Assessing *Officer* the appellant appealed to the *Supreme Court of Palestine*. His appeal was heard by GORDON-SMITH, C.J., who held that the appellant was not being taxed again but was being assessed again on the same amount in respect of a different year of assessment and was not being called upon to pay the tax again because the appellant, by his own action, was assessable for the purposes of his chargeable income for the year 1941/42, under the proviso to s. 6 and for the year 1942/43 he was assessable under s. 6 as amended by the 1942 amending Ordinance. GORDON-SMITH, C.J., observed that the cases cited for the appellant, *Bradbury v. English Sewing Co.*, [1923] A.C. 744, *I. R. Comrs. v. Roberts* [1925], 9 Tax Cas. 603, C.A., 41 T.L.R. 623, and *Brown v. National Provident Institution*, [1921] 2 A.C. 222, did not assist the appellant's case and, if anything appeared to be the other way.

Halaby v. Assessing Officer, Lydda District (Civil Appeal No. 345 of 1943) was a case stated by ROSE, J., for the opinion of the Supreme Court of Palestine sitting as a Civil Court of Appeal. ROSE, J., had held that s. 6 was a charging section and not merely a measuring section and that the Ordinance was “based on a system according to which the year preceding the year of assessment was to be regarded not merely as a measure of the income tax of the year of assessment but as the actual basis of the assessment.”

On appeal GORDON-SMITH, C.J., referred to his judgment in the *Osherovitz* case and observed that he had held that that was not a case of double taxation as the tax paid for 1941/42 was entirely separate and distinct from the tax for 1942/43, although the computation for the two successive years of assessment happened, by law, to be the same, in that particular case. GORDON-SMITH, C.J., also referred to the *Horowitz* case (Income Tax Appeal No. 9/42, 10 P.L.R. May, 1943, p. 255) which came to the Court of Appeal on a case stated. He has stated that the effect of his own judgment in that case was that s. 5 was the charging section and that s. 6 prescribed the temporal basis on which the income was to be assessed

or computed, namely, on the chargeable income for the year immediately preceding the year of assessment. GORDON-SMITH, C.J., also observed that COPELAND, J., was of the same opinion and quoting him as saying (at p. 268)—

“The next question is whether the tax is retroactive, that is to say, whether it is a tax on the previous year’s income as such, or is a tax on the income of the year of assessment calculated on the basis of the previous year’s income. I am of the opinion that the tax is not retroactive for several reasons.”

GORDON-SMITH, C.J., went on to say that one of the reasons given by COPELAND, J., was stated as follows—

“It is a tax, as it states, for each year of assessment, the income for the purpose of the tax being calculated by reference to the previous year’s income.”

GORDON-SMITH, C.J., has stated that after hearing further argument on ss. 5 and 6 he was still of the opinion that s. 6 was the measuring section or basis of calculation (the yardstick) on which the tax imposed by s. 5 is to be calculated or measured. He observed that the purpose of the proviso to s. 6 was to exempt taxpayers from payment of tax in respect of the first five months of the year of assessment 1941/42, the first imposition of income tax in the history of Palestine having come into force during the first year of assessment, namely on 1st September, 1941.

GORDON-SMITH, C.J., said that if the conclusion of ROSE, J., in the court below that s. 6 was also a charging section and directly imposed the tax on income of the year preceding the year of assessment then that was in direct conflict with s. 5 and there must be two separate and distinct charging sections, the one charging the tax on the income of the year of assessment and the other charging the same tax on the income of the year preceding that year of assessment. He observed that if that contention is correct, *prima facie* the result might conceivably be double taxation against which construction courts would naturally lean. GORDON-SMITH, C.J., considered that the marginal note to s. 6 “Basis of assessment” (which the majority EDWARDS and ROSE, JJ., considered to be quite a neutral term) could be looked at as a guide to the intention of the section and in his opinion it expressed the intention that the section was one of calculation computation or assessment. He felt that if s. 6 were a charging section the word “charge” would have been used in the marginal note as was done in the marginal note to s. 5. He considered that confusion had arisen by reason of the proviso to the section in the first instance and of the words substituted therefor in the second instance and felt that if in interpreting the meaning to be attached to the first three lines of s. 6, the proviso and the later substituted words are disregarded, the meaning to be attached became clearer.

It was appreciated by GORDON-SMITH, C.J., that if his views are correct other and more difficult questions would arise, one of them being the very question to be determined in the instant appeal. The

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other example given by GORDON-SMITH, C.J., of a difficult question which might arise was one similar to the question decided by the Privy Council in the *St. Lucia* case of 1924.

The majority of the court in *Halaby's* case took a different view. ROSE, J., whose case stated was before the Court of Appeal, was also one of the three members of the Court of Appeal. He concurred in the judgment delivered by EDWARDS, J. In his judgment EDWARDS, J., recited (briefly he said) the arguments of both counsel. Then he said that on the whole he considered that the arguments adduced on behalf of the respondent were sounder than those of the appellant and should prevail. He also said that he agreed generally with the reasons given by ROSE, J., in his judgment in the court below and with the arguments of the respondent's advocate addressed to the Court of Appeal. His conclusion he set out as follows —

“I think that s. 5 merely enumerates the classes or categories of sources of income on which tax has to be paid. It might have been more logical had the present s. 6 been s. 5 and *vice versa*. In my view, the marginal note to s. 5 “Charge of Income Tax” does not have the effect of making s. 5 the charging section, especially when one finds the word “charged” in line 1 of s. 6. The deliberate use of the word “notwithstanding” in line 4 of s. 6 is significant because it makes it quite clear that the legislature and the draftsman realised the effect on the subject, a taxpayer, of this provision. Whatever the consequences may be, these consequences were foreseen and presumably intended by those responsible for passing this enactment.”

These two Palestinian cases were referred to by BLAGDEN, AG. C.J., in the Trinidad case of *P.R. v. I. T. Comr.* (1959), 2 W.I.R. 149, where ss. 5 and 6 of the Trinidad Income Tax Ordinance, Cap. S3. No. 1 (for all material purposes in this appeal identical with ss. 5 and 8 of the British Guiana Ordinance) were required to be construed. BLAGDEN, AG. C.J., held that s. 5 charges income generally and not only chargeable income and is the paramount charging section, while s. 6 is a composite section embodying both charging and machinery provisions. Apparently the reports of the Palestinian cases were not available to the learned Chief Justice but he was referred to FELLMAN'S PALESTINE INCOME TAX LAW AND PRACTICE in which those cases have been discussed by the learned author in some detail.

The learned Chief Justice then considered the meaning of the expressions “income” and “chargeable income” in relation to the Trinidad Ordinance, referring to certain English authorities and then gave his conclusion as follows (p. 161)—

“The conclusion I come to from all these considerations is, that upon the true and proper interpretation of ss. 5 and 6, taking into account not only the wording of those two sections but the scheme and operation of the Ordinance as a whole, s. 5 is the paramount charging section, and that s. 6 is—to make use of a popular modern expression—in the nature of a “package” section embodying both charging and machinery provisions. Its status is

rather similar to that described by FINLAY, J. in *Danny v. Read* (1834), 18 Tax Cas. 254, where, commenting on the effect of the general charge imposed by Schedule E, and the provisions of Rule I thereto of the Income Tax Act, 1918 (U.K.) he said ((1934) 18 Tax Cas. at p. 259) :

‘You have the general charge imposed by Schedule E and then you have the First Rule, that the tax is to be ‘annually charged on every person having or exercising’ an office or employment of profit.....in respect of all ‘salaries, fees’ and so forth ‘for the year of assessment.’ There was some discussion before me as to whether that was a charging section or a machinery section. I, myself, think that probably a rule such as that which lays down that the tax is to be annually charged on a person, and annually charged on him in respect of certain things, is properly called a charging section, but it does not, to my mind, very much matter ‘whether you call it a charging section or a machinery section. Whether charging or machinery, you have to look at it and construe it as part of the Act.’

“I hold that s. 5 is the charging section but s. 6 is a charging section in part also. Section 6 which follows, specified the actual portion of the income upon which the general charge shall be imposed in practice. But I do not see how the specific application of charge in s. 6 can be read as detracting from or delimiting the generality of the charge in s. 5. Indeed so to hold would be to depart from a principle of construction where general words precede particular ones. See *Canadian National Rlys. v. Canada S.S. Lines, Ltd.*, [1945] A.C. 204, particularly the headnote and passages in the judgment of the court. Whether one calls s. 6 a charging section, or a machinery section, or a package section, it still has to be construed and given effect to, but that must be done subject to the generality of the provisions of s. 5.”

The comment of counsel for the appellant on the conclusions reached by BLAGDEN, C.J., (Ag), is that the s. 5 charges income in the year it is earned while s. 6 charges income in the year of assessment and that is inconsistent and seems to have been overlooked by the learned Chief Justice.

Counsel for the respondent submitted that s. 5 of the British Guiana Ordinance fixes the rates of taxation, types of income and persons to be taxed but does not specify the income of which particular year is to be taxed, that being dealt with by s. 8. Counsel for the respondent also observed that EDWARDS, J., in the *Halaby* case adopted the argument of counsel for the respondent (in that case) that the words “for each year of assessment” in s. 5 of the Palestinian Ordinance relate back to the rate payable and have nothing to do with income. I do not myself share this view. Counsel for the respondent also observed that in the United Kingdom tax is payable on income of the year of assessment and contended that in British Guiana tax is payable on the income in the year preceding the year of assessment. Reference was also made to certain provisions of s. 13

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(allowance for wear and tear), s. 15 (set off for loss), s. 18 (deductions for children), which relate to the year preceding the year of assessment.

Having had the advantage of considering the judgments in the cases cited before me and counsel's observations thereon and having due regard to the scheme of the British Guiana Ordinance it now falls for me to determine the question in issue in the instant appeal—that is to say—whether a person can be charged to tax for a particular year of assessment on income derived from a source which he does not possess in that year.

Section 5 specifies the categories of income upon which income tax is payable. It also provides that, subject to the provisions of the Ordinance, income tax is payable at the rate or rates specified in the Ordinance for each year of assessment in respect of such income. A glance at the sections appearing under the cross heading RATE OF TAX shows that tax is charged only upon chargeable income and not upon income as such.

Section 5 really enacts that income tax shall be payable at the rate or rates specified for each year of assessment upon the chargeable income of any person accruing in or derived from the Colony or elsewhere, and whether received in the Colony or not, in respect of income derived from the sources or categories specified.

Income outside of the specified sources is not touched either by s. 5 or by s. 8, and this is recognised by the definition of the expression "chargeable income" in s. 2 of the Ordinance as it stood at the material time.

To ascertain the chargeable income of a person it is first necessary to know what deductions and exemptions may be made. As counsel for the respondent pointed out the relevant provisions in this connection refer to the year immediately preceding the year of assessment. Where s. 5 is read in the way I have suggested there is no conflict with s. 8.

The words "subject to the provisions of this Ordinance" in s. 5 require that section to be construed along with s. 8. They both fall under the cross heading "IMPOSITION OF INCOME".

Section 8 specifically provides that income tax shall be charged, levied and collected for each year of assessment upon the chargeable income of any person for the year immediately preceding the year of assessment. I do not think that the marginal note can control or assist in the construction of s. 8 where the provisions of the section are unambiguous and clear. Quite clearly the provision states that tax shall be charged upon the chargeable income of any person for the year immediately preceding the year of assessment. It is that chargeable income which stands charged with payment of tax and not the income or chargeable income in the year of assessment. The marginal note to s. 5 cannot control or assist in the construction of

that section, for, construing ss. 5 and 8 together as they must be, the meaning of s. 5 is clear. I am of the opinion the conclusion (as set out above) reached by EDWARDS and ROSE, JJ., in the *Halaby* case is correct, and that s. 5 of the British Guiana Ordinance is the counterpart of s. 5 of the Palestinian enactment.

It follows therefore that under the provisions of the Income Tax Ordinance, Cap. 299, as they existed at all material times a person may be charged to tax for a particular year of assessment on income derived from a source which he does not possess in that year. The appellant was rightly assessed to tax in the sum of \$488.88 and the assessment is confirmed. The appeal is dismissed. Costs fixed by consent at \$240 to the respondent.

Appeal dismissed.

Solicitors: *J. E. DeFreitas* (for the appellant); *Crown Solicitor* (for the respondent).

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 11, 18, 28, 1963.]

Bastardy—Mother a married woman—Misdirection by magistrate on question of burden of proof as to non-access—Appeal allowed—Fresh complaint brought by mother—Whether matter res judicata.

The appellant was adjudged by a magistrate to be the putative father of the respondent's infant child. He appealed successfully to the Full Court which held that the magistrate had misdirected himself on the burden of proof in respect of the issue of non-access, the respondent being a married woman at the material time. In allowing the appeal the Full Court said "it will be appreciated that the appeal has not been allowed on the merits." (See 1962 L.R.B.G. 307). The respondent having succeeded on a fresh summons, the appellant appealed on the ground *inter alia* that the matter became *res judicata* as a result of the decision of the Full Court in the first proceedings.

Held: in proceedings for an order of affiliation a decision not upon the merits does not preclude fresh proceedings in respect of the same matter being taken.

Appeal dismissed.

[**Editorial Note:** The appellant applied unsuccessfully to the British Caribbean Court of Appeal for leave to appeal to that court. See 1964 L.R.B.G.]

C. L. Luckhoo, Q.C., for the appellant.

P. N. Singh for the respondent.

Reasons for Decision: The appellant Frank Doobay has appealed against the decision of the magistrate of the West Demerara Judicial District adjudging him to be the putative father of the child Ivor Franklin Ramsaywack born of the body of the respondent on the 8th July, 1961.

For the purposes of this appeal it is unnecessary to refer to the facts elicited in evidence.

Of the grounds of appeal filed argument was addressed to this court in respect of the following matters:

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- (a) that the matter was *res judicata* after an appeal brought by the present appellant in respect of earlier proceedings between the parties had been allowed;
- (b) that the learned magistrate erred when he considered evidence which had been given in the earlier proceedings;
- (c) that in the circumstances if the magistrate could not put aside the previous proceedings from his mind he ought to have requested that another magistrate should hear the case.

In respect of the first point raised the reasons for judgment of the Full Court in respect of the earlier proceedings were delivered on the 25th May, 1962, in appeal proceedings No. 666 of 1962 Demerara. (See 1962 L.R.B.G. 307). This court held that the learned magistrate had taken the wrong approach to a consideration of the facts of the case and allowed the appeal observing 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.

In the concluding paragraph of our judgment in that appeal we specifically stated that "it will be appreciated that the appeal has not been allowed on the merits," and indeed it was at the request of counsel for the appellant that we had refrained from making further order for the matter to be remitted to the magistrate to be reheard and determined having understood counsel's request to be based on the proposition that in bastardy proceedings the applicant (respondent) was at liberty to make the application again. During the course of argument on this point in the present appeal we brought this fact to the attention of counsel for the appellant who said that if the court proceeded on such an understanding he would not seek to press the point. That apart, the case of *R. v. May* (1880), 5 Q.B.D. 382, the Divisional Court on appeal from Quarter Sessions held (distinguishing *R. v. Glynne* (1871), L.R. 7 Q.B. 16) that in proceedings for an order of affiliation a decision not upon the merits does not preclude fresh proceedings in respect of the same matter being taken before the justices.

In respect of the second point argued that the learned magistrate erred when he considered evidence which had been given in the earlier proceedings, complaint is made that the magistrate in the instant proceedings considered the evidence given in the earlier proceedings in support of the appellant's case by one Small and one Hollingsworth neither of whom testified in the instant proceedings. The reference by the learned magistrate in his memorandum of reasons for decision to these persons is as follows:

"In the previous case I found the evidence of Small to be shifty, and I did not believe the evidence of Hollingsworth. I am of the same opinion as regards Small's evidence."

Counsel for the appellant contends that this passage in the memorandum of reasons for decision shows that in deciding to reject the appellant's testimony the learned magistrate must or might have been influenced by his consideration of Small's and Hollingsworth's testimony in earlier proceedings which did not form part of the evidence in the instant proceedings. The record in the earlier proceedings had been admitted in evidence at the instant proceedings at the request of solicitor for the appellant who had conducted the appellant's case before the magistrate no doubt in an endeavour to show that the instant proceedings were *res judicata*. Solicitor thereafter in the course of his address submitted *inter alia* that the evidence of corroboration of the applicant's testimony "ought not be received (believed?) in view of the evidence given in the previous proceedings."

The learned magistrate, after setting out the facts upon which the respondent's case was based, referred to the fact that the defendant denied having sexual intercourse with the respondent at any time and that the appellant did not call any witness on this occasion but had tendered a copy of the previous proceedings through the clerk of court. Then he stated:

"I believe the evidence of the applicant and her witnesses. I did not believe the evidence of the defendant. Mr. Doobay submitted there were discrepancies in the evidence given by the complainant's witnesses, and the evidence given at the previous hearing. Whilst this is so in a few instances, Dowdon is eighty-six years old now and the discrepancies were not of such a nature as to destroy the weight of her evidence which I believed before and which I still believe. The same thing goes for the mother. I believed that the complainant is living separate and apart from her husband, and was so living at the material time when she conceived for the defendant. *Yates v. Chippindale* (1862), 11 C.B.N.S. 512."

Then follows the passage to which exception has been taken by the appellant. In our opinion this passage meant to be merely an observation in answer to the submission made by solicitor for the appellant referred to above to the effect that the evidence of corroboration ought not to be received (believed?) in view of the evidence given in the previous proceedings.

We do not think that there is any good reason for holding that the learned magistrate had difficulty in putting aside from his consideration the evidence in the earlier proceedings. His reference to the evidence of Small and Hollingsworth appears to us to have been occasioned solely by solicitor's submission in that regard. The appeal is dismissed and the order of the learned magistrate affirmed with costs \$31.72 to the respondent. Application for leave to appeal to the British Caribbean Court of Appeal on the question of whether the matter was *res judicata* refused.

Appeal dismissed.

Solicitor: *L. L. Doobay* (for the appellant).

PHANG AND ANOTHER v. DEMERARA TURF CLUB LIMITED.

[Supreme Court (Persaud, J.) December 11, 12, 13, 14, 17, 18, 19, 20, 21, 1962, September 10, 1963.]

Copyright—Horse racing pools—Coupons—Rules relating thereto—Claim by plaintiffs that their rules copied by defendants—Whether breach of copyright—Copyright Act, 1911.

The parties ran separate pools on horse races conducted by the defendants and issued coupons in relation thereto. The coupons of both of the Parties required punters to forecast the first, second, third and fourth horses in that order. The plaintiffs' coupon was governed by a "rule of allocation of points" whereby "eight points (were awarded) for placing the first horse correct, four points for placing the second horse correct, two points for placing the third horse correct, and one point for placing the fourth horse correct," and by a "rule of substitution" whereby there would be a substitution of horses in the event of the selected horses being scratched. The defendants allocated points in the same proportion as the plaintiffs did, and also had a rule of substitution but this was not set out in substantially the same form of expression as the plaintiffs' rule and differed in its practical application. In an action by the plaintiffs for damages for infringement of copyright,

Held: (i) copyright does not extend to ideas, or schemes, or systems or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed assuming there is copyright;

(ii) there was no copyright in the plaintiffs' rule of allocation of points;

(iii) the plaintiffs' rule of substitution could and did attract copyright, but the defendants' rule of substitution was not a substantial appropriation of the plaintiffs' rule.

Judgment for the defendants.

L. F. S. Burnham, Q.C., with G. M. Farnum, for the plaintiffs.

C. L. Luckhoo, Q.C., with M. S. Rahaman, for the defendants.

PERSAUD, J.: The plaintiffs in this action are the owners of a business known as "The Fabulous Four-Cast Pool" which sponsors pools run on horse races from time to time and which seem to have enjoyed a great deal of popularity in this country. The defendants (hereinafter referred to as the Turf Club) are a company incorporated in this country under the Companies Ordinance, Cap. 328, and are the local racing authority sponsoring race meetings at their premises called the D'Urban Park; they themselves have operated pools from time to time run both on local races and on English races. For purposes of enabling would-be punters to take part in their respective pools, both the plaintiffs and the defendants published forms of entry. These forms have been and are in this judgment referred to as coupons. The plaintiffs' coupon required punters to forecast the first, second, third and fourth horses in that order in a selected race, and permitted of several combinations of horses. The coupon was designed to accommodate a series of combinations. The defendants also produced a coupon upon which entries to their pool were invited, and which also made provision to accommodate more than one line of entries. Here also punters were required to forecast the first, second, third and fourth horses in that order in a particular race. There is no rule of allocation of points in the coupon issued by the defendants on the 2nd April, 1958, and tendered in

evidence by the plaintiffs, so there is no saying how the allocation of points was made. But what may be regarded as the rule of substitution reads thus:—

“1. You are required to forecast the order in which the first four horses will finish in the race below according to the previously published rules in this pool. If a horse does not run, the selection will be deemed to fall on the next horse that does run which is not already selected in the entry.”

In a pool advertised by the defendants on the 23rd June, 1958, to be run on races held in Trinidad, there was this statement:

“The usual rules and conditions of this pool shall apply”, without setting out a rule of substitution or one dealing with the allocation of points.

The bone of contention in this matter lies in the claim by the plaintiffs to copyright in their coupon as a whole, but more particularly to two rules which have been published with their coupons, and which may for the sake of convenience be described as “the rule of allocation of points” and “the rule of substitution.” These rules were published as rules 2 and 3 of a coupon in the Daily Argosy of the 3rd October, 1956, and are reproduced hereunder:—

“2. Points will be awarded as follows:

- 8 points for placing the 1st horse correct;
- 4 points for placing the 2nd horse correct;
- 2 points for placing the 3rd horse correct;
- 1 point for placing the 4th horse correct.

3. In the event of a horse being scratched the selection will automatically become the next declared starter in the order of the above list; but if the next declared starter is already specified in the four-cast column then the selection will automatically be the next specified in the column.”

It would appear that the rule of substitution presented some difficulty in interpretation to patrons of the plaintiffs and so it became necessary in 1957 for the rule to be ‘amplified’ to use the first-named plaintiff’s language. This was done and the ‘amplified’ rule made its appearance in a coupon issued by the plaintiffs in April 1958 and is in the following form:

“In the event of a horse being scratched the selection will automatically become the next starter in the order of the programme as set out on the coupon, but if the next starter is already specified in the forecast column then the selection will automatically be the next starter not specified in the column. In the event of two or more horses being scratched in any column the substitute for the lowest is to be determined first regardless of the order in which the numbers appear in the column.”

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A great deal of time was spent in an effort to determine whether this rule was really an amplification of the original rule 3, or whether it was a new rule. In my view it was the combination of an amendment of the old rule, and an extension. The amendment lay in the provision for a "starter" rather than a "declared starter." A "declared starter," as the knowledgeable turfites understand the expression, is a horse which has been accepted for a race, and in respect of which the owner or trainer has given notice within the prescribed time of the intention to take part in that race, but still may not be sent out on that race, whereas a "starter" is a horse that has actually gone to the starting gates with the intention of taking part in the race. It must be apparent that it would be more attractive to the punter to know that the horse he has selected has at least presented itself at the starting gates, rather than run the risk of selecting a horse that may be scratched at the last moment. In other words, the punter gets a horse anyhow. The extension was that previously the plaintiffs' rule of substitution made no provision for the scratching of two horses of the four selected. They amended their rule to meet this situation. The plaintiffs contend that a great deal of thought and ingenuity went into the formulating of these rules, and therefore they attract copyright.

In May 1957 the defendants advertised a pool in which punters were required to forecast the first four horses correctly, as punters were required to do in respect of the plaintiffs' pool. These pools have been referred to during the course of the hearing of this matter for purposes of brevity as "1-2-3-4 Pools." Upon seeing this advertisement the plaintiffs communicated with the president and Mr. C. L. Luckhoo, a director of the Turf Club, and after some discussion it was agreed that as the defendants had already launched that particular pool they could complete it but that in future they would not operate any similar pools. As a result of this discussion an advertisement was published on behalf of the Turf Club to this effect, and it was after the Turf Club began re-advertising 1-2-3-4 pools and after they themselves had filed a writ against the present plaintiffs claiming copyright in their race programme, that the plaintiffs filed this writ claiming damages for infringement of copyright and an injunction restraining the defendants and/or their servants or agents from reproducing any part of the plaintiffs' coupon. The plaintiffs complain against the publication of a coupon in the "Evening Post" racing supplement of the 7th October, 1959, where it is written that that pool was being run under the usual D.T.C. Pool Rules.

Before I enter further upon a discussion of the matter before me, I wish to refer to a recent case which has been decided since I have heard the arguments in this matter. The case is that of *Francis Day & Hunter, Ltd. v. Bron*, [1963] 2 All E.R. 16. This is a portion of the headnote setting out the facts in that case which may not be without some interest to would-be composers of music:

"The opening bar of a song, 'In a little Spanish Town' composed in 1926, was a commonplace series of quavers found in previous musical compositions and was very similar to, though not identical with, the opening bar of a new

song, 'Why', composed in 1959. This opening phrase was developed over the remainder of the first eight bars by the use of the same devices or tricks of composition in both the songs, producing a definite or considerable similarity between them. 'In a little Spanish Town' had been extensively exploited in the United States and elsewhere by the publication of sheet music, by the distribution of records and by broadcasting. The composer of 'Why' was a man of thirty-three who had lived most of his life in the United States and had played various instruments in dance bands; his evidence was accepted that he had not seen or studied or in his recollection played the music of 'In a little Spanish Town' nor had ever to his knowledge heard it, although he might have heard it at a younger age. In an action for breach of copyright in 'In a little Spanish Town' brought against the publishers of 'Why' the trial judge found that he had insufficient factual material in the similarity of the works and in the inference that the composer of 'Why' had at some time heard 'In a little Spanish Town' to draw an inference in the absence of direct evidence and in the face of the composer's denial, that he had had sufficient knowledge or memory of 'In a little Spanish Town' to have copied it without knowing that he was doing so, rather than the similarity arose from coincidence, and accordingly the trial judge held infringement of copyright was not established."

This matter went to appeal, and it was sought to be argued that the denial of copying was irrelevant, for where a sufficient degree of similarity is shown, and it is further proved that the composer of the second work had access to the earlier work in the sense that he most probably had heard it, an irrebuttable presumption arises that the former has been copied from the latter. In dealing with this submission, WILLMER, L.J., said at p. 20:

"No authority was cited in support of this proposition, which, if well-founded, would eliminate the necessity for any further evidence once similarity coupled with access has been proved. In my judgment, the proposition contended for is quite untenable; the most that can be said, it seems to me, is that proof a similarity, coupled with access, raises a *prima facie* case for the defendant."

I pause here to observe that there is sufficient proof that the defendants in this case had access to the two relevant rules, but I will deal with the question of similarity later in this judgment.

Again at p. 27 of the same report, DIPLOCK, L.J., is recorded to have said:

".....Nevertheless it is well-established that to constitute infringement of copyright in any literary, dramatic or musical work there must be present two elements: First, there must be sufficient objective similarity between the infringing work and the copyright work, or a substantial part thereof, for the former to be properly described, not

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necessarily as identical with, but as a reproduction or adaptation of the latter; secondly, the copyright work must be the source from which the infringing work is derived. The necessity for the second element was expressly laid down by the Court of Appeal in *Purejoy Engineering Co. Ltd. v. Sykes Boxall & Co. Ltd.*” [(1955) R.P.C. 89] “and is, indeed, implicit in all compilation cases, including the recent case in this Court of *William Hill (Football) Ltd. v. Ladbroke (Football) Ltd.*” [not reported] “where tables of betting odds were unanimously held not to infringe the copyright in substantially identical tables because the authors of the later tables, although very familiar with the earlier tables, had in fact worked out the odds for themselves.

But while the copyright work must be the source from which the infringing work is derived, it need not be the direct source.”

I have referred to the *Francis Day’s* case in some detail because I am of the opinion that it fits the facts of the case I am required to decide.

Now back to the case in hand. The plaintiffs claim to copyright is to the entire coupon and the rules, but in his evidence the first-named plaintiff said that he objected to the operation of a 1-2-3-4 pool by the defendants, awarding points and using the rule of substitution which the plaintiffs have been using. Dealing with the coupon other than rules 2 and 3, I am of the opinion that there attaches no copyright, for if no skill or labour is employed in producing the particular form in which the work is expressed, there will be no copyright in it, even though it may embody an original idea or opinion. It must be borne in mind that ideas and opinions are not the subject matter of copyright, but only the form in which ideas or opinions are expressed.

Next I will consider rule 2 as contained in the plaintiffs’ coupon. The plaintiffs have not exhibited any 1-2-3-4 pool coupon published by the defendants in which the method of allocation of points is set out. But an examination of the results of a pool run by the defendants and published in the ‘Evening Post’ of the 7th April, 1959, leaves no doubt that the defendants allocated points in the same proportion as the plaintiffs did, that is 8 for the winner, 4 for the second horse, 2 for the third horse, and 1 for the fourth horse. The plaintiffs contend that the merit of this method of allocation lay in the fact that a person forecasting the first horse only correctly would always score more points than the person who forecasts the first horse incorrectly, but the second, third and fourth correctly. That this is so is apparent. The defendants have tendered an exhibit (Ex. ‘H’) purporting to be the draft rules settled by the then president of the Turf Club and Mr. C. Lloyd Luckhoo in which there is to be found an allocation of points rule in the same proportion as that referred to above. There can be no doubt that the idea is the same. Mr. Lionel Luckhoo has testified that the defendants formulated their rule in May, 1957, whereas the plaintiffs published their rule in

October, 1956, and it may be the case that the persons responsible for drafting the rule in Exhibit 'H' were subconsciously affected by the plaintiffs' rule because the evidence is that the plaintiffs' rule had by then been well publicised. But this is not enough according to the decision in *Francis Day and Hunter Ltd. v. Bron (supra)*. Even if there was a copying by the defendants of the plaintiffs' rule of allocation of points, does this rule contain the necessary characteristics to attract copyright? Copyright does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed assuming there is copyright. [See *Hollinbrake v. Truswell* (1893-94), 10 T.L.R. 663]. The law was laid down in *Macmillan & Co. Ltd. v. K. & J. Cooper*, 93 L.J. (P.C.) 113, at p. 121, by Lord ATKINSON in these words:

“What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree.”

This passage was quoted with approval by the Lord Chancellor in *Cramp & Sons Ltd. v. Smythson Ltd.*, [1944] A.C. 329, where the complaint was of an infringement of copyright in a diary from which were copied certain tables containing the usual type of information that is found in diaries. It was held that copyright was not established, since the commonplace matter of the tables left no room for taste or judgment and their selection did not constitute an original literary work.

In this case there can be no claim to copyright in the words “8 points for placing the 1st horse correct,” and when it is borne in mind, as the first-named plaintiff has himself admitted, that the table of allocation of points (if it can be so called) can be arrived at by anyone with an elementary knowledge of mathematics, then it must follow that this rule does not attract copyright.

So far as the rule of substitution is concerned, it is submitted that the plaintiffs are claiming copyright in the form in which the idea of substitution was evolved.

I will say at once that this rule of the plaintiffs can and does attract copyright. The defendants allowed for substitution in their pools long before 1958 so that it cannot be said that the idea was borrowed from the plaintiffs. But so far as the two rules which are the subject of this suit are concerned, the plaintiffs' rule was in existence earlier than that of the defendants. Both rules provide for substitution, but they are not in my view set out in the same fashion or in the same form or substantially the same form of expression. Indeed, when a study is made of the practical applications of the two rules side by side the results are not always the same.

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I cannot hold that the defendants' rule is a substantial appropriation—if it is an appropriation at all—of the plaintiffs' rule.

In the result, I must dismiss the plaintiffs' claim, and I make an order for them to pay the costs of the defendants fit for two counsel.

Judgment for the defendants.

Solicitors: *A. G. King* (for the plaintiffs): *V. C. Dias* (for the defendants).

DEMERARA TURF CLUB LTD. v. PHANG AND OTHERS

[Supreme Court (Persaud, J.) December 3, 4, 5, 6, 7, 1962, September 10, 1963]

Copyright—Racing programme—Inclusion of names of horses, owners, trainers, weight to be carried and other details of classification—Whether entitled to copyright—Publication of similar programme but with names of horses in a different order—Whether breach of copyright—Whether necessary to prove specific damages—Copyright Act, 1911.

The plaintiffs ran pools on horse races conducted by them. For the benefit of the public they prepared and published a racing programme in which they listed the names of the various horses for each event, together with the names of the owners and trainers, the weight each horse would be required to carry in that particular race, the class of each horse and other details of relevance to punters. The first three defendants also ran pools based on races conducted by the plaintiffs. In doing so they published in the fourth defendant's newspaper a pool coupon reproducing the plaintiffs' racing programme save that the names of the horses were stated in a different order. In an action by the plaintiffs for breach of copyright,

Held: (i) the plaintiffs' programme attracted copyright and was entitled to the protection of the Copyright Act, 1911;

(ii) the publication of the scrambled list was not a "fair dealing" within the meaning of the Act but was a publication of a substantial part of the plaintiffs' programme, and this exposed the publishers (including the fourth defendant) to damages;

(iii) it was not necessary for the plaintiffs to give proof of specific damages; damages were at large.

Judgment for the plaintiffs.

C. L. Luckhoo, Q.C., J. O. F. Haynes, Q.C., E. V. Luckhoo, and M. S. Rahaman for the plaintiffs.

L. F. S. Burnham, Q.C., G. M. Farnum, and H. D. Hoyte for the first three defendants.

C. A. F. Hughes for the fourth defendants.

PERSAUD, J.: The Copyright Act, 1911 (1 & 2 Geo. 5, c. 46) (4 HALSBURY'S STATUTES, 2nd Edn.) was, with the exception of certain provisions, brought into operation in this country with effect from the 1st July, 1912, by a proclamation published in the Official Gazette

of the 21st June, 1913. This Act is a consolidating and amending Act under which every literary, dramatic, musical, and artistic work, whether published or unpublished, is protected if there is sufficient originality of expression and the work has involved the application of some skill or labour of a substantial character. Section 1 (2) of the Act provides as follows:—

“For the purpose of this Act, ‘copyright’ means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever, to perform, or in the case of a lecture to deliver, the work or any substantial part thereof in public; if the work is unpublished, to publish the work or any substantial part thereof; and shall include the sole right—

- (a) * * * * *
- (b) * * * * *
- (c) * * * * *

(d) in the case of a literary, dramatic, or musical work to make any record, perforated roll, cinematograph film, or other contrivance by means of which the work may be mechanically performed or delivered, and to authorise any such acts as aforesaid.”

And s. 1 (3) provides that publication, in relation to any work, means the issue of copies of the work to the public.

Section 2 (1) of the Act provides:—

“Copyright in a work shall be deemed to be an infringement by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright: Provided that the following acts shall not constitute an infringement of copyright:

- (i) Any fair dealing with any work for the purpose of private study, research, criticism, review, or newspaper summary:”

These are the relevant provisions to be considered in this action in which the plaintiffs are seeking against the defendants jointly and severally the following remedies:—

(1) the sum of \$100,000 damages for—

- (a) breach, infringement and violation of the copyright of the plaintiffs;
- (b) the inducing by the first three defendants of the fourth-named defendants to commit a breach of contractual and equitable rights of the plaintiffs due to them by the fourth-named defendants whereby the plaintiffs have suffered damages

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- (2)
 - (a) An injunction restraining the defendants, their servants and agents from reproducing, publishing or authorising the reproduction or publication of the plaintiffs' race programme for the October race meeting, 1959, or any part thereof, in any manner whatsoever;
 - (b) an injunction restraining the defendants, their servants and/or agents from printing and/or publishing and/or reproducing and/or authorising the reproduction and/or publication of any copies of further copies of the entry coupon appearing on page 6 of the Daily Argosy newspaper of Tuesday 6th October, 1959, or from printing, publishing or reproducing the same or any part thereof in any manner whatsoever, and from issuing any such coupons in any manner whatsoever to the public.
- (3) A declaration that the Race Programme Exhibit "A" or any part thereof is the property of the plaintiffs and copyright, and cannot be reproduced in whole or in part."

The plaintiffs had also alleged conspiracy on the part of the defendants, but this allegation was not pursued during the course of the argument.

The plaintiffs the Demerara Turf Club Limited (referred to from time to time as the Turf Club) are a limited liability company and are the recognised horse racing authority for British Guiana. They run their races at the Demerara Turf Club, and are affiliated to the Jockey Club of England. The Jockey Club of England is itself one of the 'recognised' turf authorities of Great Britain, Ireland, and the Channel Islands. The races run by the plaintiffs are run in accordance with certain rules which are printed, and are called "Rules of Racing (1959)." These rules provide that the English Jockey Club Rules of Racing shall apply in cases not provided for by the local rules. The plaintiffs have been sponsoring race meetings every year, sometimes three times per year, at other times six times per year, for the past twenty years. It would appear that as a result of the efforts of the plaintiffs the standard of horse racing in this country has improved considerably, and, as a necessary result, so has the value in prize money. The plaintiffs would prepare and publish for the benefit of the public in general, and for racing fans in particular, a programme of the events, which has been described as the "Official Programme." In this programme are listed the names of the various horses for each event together with the names of the owners and trainers, the weight each horse will be required to carry in that particular race, and the classes of each horse. In the programme are also included a weight for age scale, and a classification of all the horses who have taken entries for the particular race meeting. As in all sporting events, the programme is a necessary adjunct to racing for the guidance of turfites and other persons

who may be interested either aesthetically or financially. But before a programme is compiled some amount of preliminary work is necessary. In addition to the registration of a horse and its colours with the Turf Club, a horse must be classified in one of the various classes according to its pedigree, its past performance, its age and place of birth. This work is done either by an official described as the classifier-handicapper or by a panel of three persons, all of whom are required to have some knowledge and experience of racing. From this exercise is produced a classification list, the classes ranging from class A1 to class H3 in which all the horses registered for a particular meeting are placed. The classification list together with what is described as a "Sheet Programme" but which really is a programme in embryo merely indicating the particulars of the proposed races for each day without naming the horses to take part in those races, are then circulated to members of the public so that persons may enter their animals in the events they consider most suitable to their prowess. When all the entries have been completed the next step is for the compilation of the programme which is to be used on the day of the races. To produce this programme it is necessary that the various entries be assorted according to class, and the weights to be carried by each horse is then calculated having regard to the information which is contained in the classification list and other information as regards past performance, etc. There are certain classification allowances which must be made so that no one animal is over-taxed out of proportion to his age or ability. The evidence is that this exercise is necessary before the compilation of each meeting's programme. According to the president of the Turf Club, attention is also given to the distance to be covered making sure that a horse is not required to take part in two consecutive races or to compete in a long distance race in its own class and also in a long distance race in a class above on the same day. The events must be so arranged also to attract the maximum number of entries and to permit of the maximum participation. This is obviously in the interest both of the horse owner and of the Turf Club.

As I have already indicated, when all of this is done the number of races for each day is decided upon and the programme printed. There can be no doubt that some amount of work and thought is put into the production of the classification list, the sheet programme and the official programme, and the first question I am required to answer is whether there is copyright in any of these lists. If there is copyright then I must go on to find the answer to the question whether or not the advertisement of a pool which appeared under the sponsorship of "Sports and Games" and "Gun's Super Service" and printed in a newspaper published by the fourth defendants constituted an invasion of the plaintiffs' rights, and if so, what damages ought to be awarded.

One of the questions upon which the plaintiffs must satisfy this court, assuming that copyright subsists in the programme, is whether the advertisement which appear in the Daily Argosy of the 6th October, 1959, does in fact relate to the sixth race of the first day of the October 1959 meeting, and if it does, whether it can fairly

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be said that there has been a breach of copyright in view of the fact that the names of the horses in the advertisement does not appear in the same order as they do in the programme. Let me say at the outset that I have no doubt whatever, having regard to the oral evidence and having regard also to the plaintiffs' publication in the Evening Post of the 7th October, another newspaper published by the fourth-named defendants, of a pool to be run by the plaintiffs on the sixth race of the first day of the meeting, that the advertisement which appeared in the Daily Argosy of the 6th October, can only have referred to that same race.

I will now go back to the first question as to whether or not there is copyright in the plaintiffs' programme.

It has been the settled law for some time now that ideas and opinions are not the subject matter of copyright, but only the form in which ideas or opinions are expressed, and these only to the extent that a substantial part of the form must not be plagiarised.

“It is not required that the expression should be in an original or novel form but that the work should not be copied from another work; it should originate from the author. Thus a report of a speech, a photograph of a picture, and a translation of a foreign work, are protected; and so too is a book of mathematical calculations, if independently worked out, even though in form identical with an existing book. The owner of a copyright has, in short, no monopoly in the subject matter. Others are at liberty to produce the same result, provided they do so independently, and, though they are not the first in the field, their work is none the less ‘original’ in the sense in which that word is used in the Copyright Act, 1911. But if no skill or labour is employed in producing the particular form in which the work is expressed there will be no copyright in it, although it may embody an original idea or opinion; there is therefore no copyright in news as such, but only in the form in which it is expressed, and there is no copyright in an advertisement slogan, or in the name of a horse selected as a probable winner.” (7 HALSBURY’S LAWS, 2nd Edn., p. 521).

With this general statement of the law in mind, I must pass on to examine the cases to ascertain whether the race programme is a ‘literary work’ within the meaning of s. 35 of the Act. As has already been noted, the term ‘literary work’ is not restricted to matters pertaining to letters or literature, but includes tables and compilations. Lord ATKINSON’S observations in delivering the judgment of the Judicial Committee in *Macmillan & Co. Ltd. v. K. & J. Cooper*, 93 L.J. (P.C.) 113, at p. 121, lays down the law on the subject in terms which are universally accepted. He said:

“What is the precise amount of knowledge, labour, judgment or literary skill or taste which the author of any book

or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case it must depend largely on special facts of that case, and must in each case be very much a question of degree.”

I have considered *Leslie v. J. Young & Sons*, [1894] A.C. 335, and *Cramp & Sons Ltd. v. Smytheson Ltd.*, [1944] A.C. 329, cases cited by Mr. Burnham. It was held in the former case that there was no copyright in time-tables issued by railway companies as this was information which was to be found in the railway companies' books, and proceedings could not be taken against a person who merely published information which is open to all the world to publish and to obtain from the same source. In the latter case, it was held that information extracted from pocket diaries and published in other diaries did not attract copyright because commonplace matter of tables contained in the diaries left no room for taste or judgment and the selection of the original information did not constitute an original literary work. These cases differ from the matter in hand in that there was no evidence there—indeed no suggestion—that there was any element of originality or skill.

In my view the true test or whether or not there is copyright is that laid down by PETERSON, J., in *University of London Press v. University Tutorial Press*, [1916] 2 Ch. 601, at p. 608. This is the test:

“.....the words ‘literary work’ cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word ‘literary’ seems to be used in a sense somewhat similar to the use of the word ‘literature’ in political or electioneering literature and refers to printed or written matter. Papers set by examiners are, in my opinion, ‘literary work’ within the meaning of the present Act. Assuming that they are ‘literary work’, the question then is whether they are original. The word ‘original’ does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of ‘literary work’ with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author.”

This is a case in which it was held that copyright subsisted in examination papers as ‘original literary work’, and which was referred to with approval in *British Broadcasting Co. v. Wireless League Gazette Publishing Co.*, [1926] 1 Ch. 433. In the latter case, it was held that the compilation of advance programmes relating to broadcasts attracted copyright as the compilation was a publication invol-

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ving considerable time, skill, labour and expense, and a publication of matter solely within the knowledge of the plaintiffs whose case was that copyright subsisted in the programmes. It is only right to add that it was conceded in that case that there may be no copyright in a mere list of names where the list conveys no useful information whatever, because to support every copyright there must be an element of literary value.

Two other cases in which it was held that copyright subsisted in lists are *Weatherby & Sons v. International House Agency & Exchange Ltd.*, [1910] 2 Ch. 297 (list of brood mares), and *Football League v. Littlewood Pools*, [1959] 2 All E.R. 546 (list of football matches). I will have cause to refer to the latter case later on in this judgment on the question whether the published coupon was a copy of the particular race in the programme.

Still another case which merits attention is *Mander v. O'Brien* (1934), S.A. S.R. 87. This is an Australian case and the report is not available to these courts. Reference to it is however found in 22 ENGLISH AND EMPIRE DIGEST at p. 62, n. 44, where it is stated that a published programme showing the names of horses entered for particular races, the weights and the barrier positions, is the subject of copyright under the Copyright Act, 1912. Presumably the reference of the Act of 1912 is to Australian legislation. The case nearest to the instant case is another Australian case of *Canterbury Park Race Course Co. Ltd. v. Hopkins* (1932), 49 N.S.W. W.N. 27, also reported at p. 62 of the same volume of the ENGLISH AND EMPIRE DIGEST, at note 43. In that case it was held that a list of acceptances of entries of horses for a particular race meeting arrived at after various preliminary processes attracted copyright.

Having regard to the authorities referred to, and to the evidence, I am of the opinion that the plaintiffs' programme attracted copyright, and is entitled to the protection of the Act.

I now pass on to consider the question whether or not the coupon the publication of which is attributed to the defendants is a reproduction of the work in any material form or the making of an adaptation of the work. It is necessary to draw attention to s. 1 (2) of the Act of 1911 which defines 'copyright' to mean 'the sole right to produce or reproduce the work or any substantial part thereof in any material form.' It follows that any person other than him in whom the right of copyright exists, may not produce or reproduce, etc. Attention must also be directed to the fact that in the allegedly offensive coupon the names of the horses are not placed in the same order in which they appear in the programme. It is not without interest to observe that a claim of copyright is made on the face of the coupon. So that whoever compiled the list as it appears on the coupon holds the view that the form was the result of skill, labour and ingenuity. I venture to express the opinion that it takes little labour and less skill and ingenuity to scramble a list of names.

In the *Littlewoods* case (*supra*) the defendants had copied the fixtures in the same order in which they were published by the plain-

tiffs. UPJOHN, J., expressed the view that if the defendants had prepared their own lists by using the information contained in the plaintiffs' list, and had prepared their own list by 'scrambling' the order of matches, it was possible to have successfully argued that the defendants were using only the information and were not reproducing the compilation. But the learned judge was careful to say that that was not a question which he was deciding.

A case relied upon heavily by the defence is *McCrum v. Eisner*, 117 L.T. 536. In that case the plaintiff was the owner of the copyright in a series of picture postcards, one of which represented a soldier reading the orders of the day with the legend underneath "And then we have all the rest of the day to ourselves". The defendant published a picture postcard also representing a soldier reading the orders of the day, and with a similar legend underneath, but the expression and get-up of the two cards were entirely different.

Held, that there was no infringement of the plaintiff's copyright, PATTERSON, J., expressing the opinion that no person comparing the two could possibly mistake the one for the other. The great point made in that case was that there was not a copying, while in the case before me the plaintiffs contend that there was a wholesale and deliberate copying from the 'Trinidad Guardian' of the 4th October, 1959, in which the plaintiffs caused a pool coupon to be published for the benefit of the Trinidad punters, and which pool was being run on the 6th race of Saturday's 10th October meeting. There is evidence, which has not been controverted, that copies of the 'Trinidad Guardian' were available to the public in this country on the very day of its publication. And if this is so, the information would have been well in time for the first publication of the coupon in the 'Daily Argosy' of the 6th October, 1959. The plaintiffs have not pursued their allegation of conspiracy between the first three defendants and the fourth defendants. There has been no evidence forthcoming from the defence as to the source of the information; indeed, the defence does not admit that their publication refers to the race in question. I prefer the view that the information was obtained as suggested by the defence, rather than the one suggested in cross-examination that the information might have been obtained from each owner of each horse entered for the particular race.

It cannot be pretended that the publication of the 'scrambled' list is a 'fair dealing' within the meaning of the Act. The list as it appears in the publication both in the 'Daily Argosy' and the coupon is complete in that no names are omitted, so that it is the whole of the plaintiffs' list. Dealing with what is a 'substantial part', Lord ELDON, L.C., in *Wilkins v. Aiken* (1810), 17 Ves. 422, at 426, said that the true test was whether there was a legitimate use of the plaintiff's publication in the fair exercise of a mental operation, deserving the character of an original work. In *Weatherby & Sons v. International Home Agency and Exchange Ltd.*, [1910] 2 Ch. 297, PARKER, J., said that the nature of the two publications and the likelihood or unlikelihood of their entering into competition with each other was not only a relevant but might even be the determining factor on the question

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whether in preparing one publication an unfair use has been made of another. There can be little doubt that there was heavy competition between the two pools.

In my judgment, the coupon published in the 'Daily Argosy' of the 6th October, 1959, was a publication of a substantial part of the plaintiffs' programme, and this would expose the publishers to damages.

A word now about the position of the defendant J. G. Fernandes. The plaintiffs allege in their pleadings that the first, second and third defendants are the part owners and/or sponsors and/or promoters and/or agents and/or servants of the business known as 'Sports and Games' and/or 'Gun's Super Service' and/or 'The Fabulous Fourcast Pool', and were at all material times concerned and interested and actually participated in the management, running and control of the said business (see para. 2 of the statement of claim). In para. 2 of the defence, the first and second defendants admit the allegations referred to above, but the third defendant denied them in so far as they related to him. From the evidence before me, I have come to the conclusion that the third defendant was one of the, if not the, moving spirit in the pools operated by the first and second defendants, and it is unnecessary for me to find that he was a co-owner for the purposes of this action. But participation by him in the management, running and control of the business has been established in my view beyond the shadow of a doubt. In the circumstances he too would be liable.

What then is the position of the fourth defendants? The plaintiffs have jettisoned the allegations of conspiracy and combination, and in any event, there is no evidence to support this allegation. The fourth defendants have admitted publication, but say that they published at the request of the other defendants, that the information was obtained from a copy of the 'Trinidad Guardian' of the 4th October, 1959, and that that information was no longer private property as it had been made public by the plaintiffs' publication (presumably in the 'Trinidad Guardian' referred to). The last contention of the fourth defendants is to misconceive the implication of the law dealing with copyright, and is in my view without merit. The fourth defendants—as in fact all the defendants—had early and ample notice that the plaintiffs were claiming copyright to their programme, and if with this knowledge, they were concerned in the publication of matters which later turned out to be protected under the copyright laws, well then they must also be liable. I believe that it is nearer the truth as has been deposed to by the plaintiffs' witness that the first three defendants had given the fourth defendants an indemnity in the event of the question being decided against them.

In *Exchange Telegraph Co. v. Gregory & Co.*, [1895] 1 Q.B. 147 (a case decided before the Copyright Act, 1911, came into effect), it was held that it was not necessary to give proof of specific damages; damages were at large. This principle gained the approval later on in an action for damages under the Copyright Act, 1911. (See *Fenning*

Film Service Ltd. v. Wolverhampton, Walsall and District Cinemas, Ltd., [1914] 3 K.B. 1171). In the instant case there is no evidence of actual loss by the plaintiffs, but, having regard to the population of the country of which, I believe, I can take judicial notice, the plaintiffs' pool was bound to be adversely affected. In my view, this has been a flagrant infringement, and fairly substantial damages should be awarded. As against the first three defendants jointly and severally, I would award the sum of \$1,500 and as against the fourth defendants I award the sum of \$500.

The defendants must meet the plaintiffs' costs fit for two counsel in the following proportion—the first three defendants to pay three-quarters and the fourth defendants one-quarter.

It follows from my findings that the plaintiffs are entitled to a declaration that the programme for the October 1959 race meeting is copyright.

An injunction may be granted in a proper case. In this case the plaintiffs seek an injunction restraining the defendants from reproducing, publishing, or authorising the publication of the race programme for the October 1959 meeting, and similar remedies in respect of the coupon which appeared in the 'Daily Argosy' of the 6th October, 1959. At this stage such an injunction will serve no useful purpose, and I refrain from making the order.

Judgment for the plaintiffs.

Solicitors: *V. C. Dias* (for the plaintiffs); *A. G. King* (for the defendants).

Re a LEGAL PRACTITIONER

[In the Full Court (Luckhoo, C.J., Date and Bollers, JJ.) September 14, 1963].

Legal practitioner—Disciplinary proceedings—Judgment debt collected by practitioner—Delay in paying over part to client—Whether misconduct—Legal Practitioners Ordinance, Cap. 30, s. 28.

A legal practitioner was paid a fee of \$90.75 to issue a writ for his client to recover the sum of \$325. Judgment for this amount was obtained with cost \$83, and the whole amount of the judgment was paid by the defendant to the practitioner. The practitioner's clerk then paid \$100 to the client, but over the next two years no further sums were paid despite several requests by the client. The practitioner's explanation to the client was that his clerk had absconded with various clients' monies and that he was financially embarrassed. On an application by the client the Legal Practitioners Committee found that the practitioner was guilty of misconduct, but the Committee expressed no opinion on the evidence that the practitioner had told the client that his clerk had taken away the money. In these circumstances, on the practitioner being called by the judges to show cause why an order should not be made striking off his name from the Court Roll or suspending him from practising, it was submitted for the Attorney General that unless the Com-

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mittee could properly find on the evidence that there was some misrepresentation or deceit practised by the legal practitioner the mere delay in paying over the money would not support the Committee's finding of misconduct.

Held: (i) a delay which continued over an extended period after repeated demands for payment might lead to an inference of an intention to misappropriate and, depending on the findings of the Committee, the delay in this case might well be misconduct;

(ii) it was necessary, however, for the Committee to say whether there was mere delay in the legal practitioner paying over the money to his client or whether in the circumstances they drew the inference that there was an intention on the part of the legal practitioner to misappropriate, and the matter would accordingly be remitted to the Committee for a specific finding to be made.

Matter remitted.

M. Shahabuddeen, Solicitor General, for the Attorney General.

C. A. Massiah for the practitioner.

Judgment of the Court: This is a matter of a complaint made against a barrister-at-law acting as a solicitor in respect of which the Legal Practitioners Committee acting in accordance with s. 28 of the Legal Practitioners Ordinance, Cap. 30, after an investigation of the matter, forwarded a report to the judges of this court which is now set down by the Registrar for the consideration of the court.

The Committee found that there was a *prima facie* case of misconduct committed on the part of the legal practitioner. At the commencement of the hearing of this matter in this court we indicated to counsel for the legal practitioner that on the findings of the report of the Committee we were of the opinion that a *prima facie* case of misconduct had been established against the practitioner and we would, therefore, call upon him to show cause why an order should not be made against him.

The findings of the Committee were, briefly, that the applicant retained the legal practitioner to issue a writ on her behalf for the sum of \$325 for which purpose the practitioner was paid fees totalling \$90.75. Judgment was subsequently obtained for the said sum \$325 and costs \$83. The practitioner later admitted to the applicant that he had been paid the full amount representing the judgment and costs and the applicant was then paid by the legal practitioner's clerk the sum of \$100 on account thereof. Several requests were later made to the legal practitioner for the balance of the amount due to the applicant but this sum was never paid and the legal practitioner told the applicant that his clerk had taken away various clients' moneys and that he would write the judgment debtor to find out whether the applicant's money had been paid into the practitioner's office or not. Subsequently the practitioner admitted to the applicant that the money had been paid in and said that owing to his clerk's misconduct he was financially embarrassed.

At the hearing before the Committee, the legal practitioner undertook to pay to the applicant the sum of \$225 whereupon the

Committee adjourned the matter for the purpose of enabling the practitioner to do this. On the resumption the practitioner paid to the applicant the sum of \$60 and the matter was further adjourned to enable the practitioner to pay a further sum. There was one more adjournment and the practitioner did not attend but sent a cheque for \$50 to the applicant. In all, therefore, the applicant received \$210. The legal practitioner did not give evidence.

The Committee found that the legal practitioner had received the various sums for and on behalf of the applicant, as already stated, while acting as her solicitor and had withheld a portion of the amount from her, while not entitled in law so to do. The Committee were therefore of the opinion that it was the practitioner's duty to account to his client within a reasonable time of the receipt of the money on her behalf or when called upon to do so and in failing to do so, he was guilty of misconduct.

At the hearing of this matter counsel for the legal practitioner conceded that the full amount owing by the practitioner to the applicant was \$115 on the judgment and \$83 in respect of costs, but stated that there had been an important development since the matter was set down for hearing, and that was, that the sum of \$115 had been paid over by the legal practitioner to the applicant; he asked that this fact be considered by the court in mitigation of any punishment that it might impose.

The Solicitor General (an *ex officio* member of the Legal Practitioners Committee) appearing on behalf of the Attorney General, said he felt worried as to whether the Committee's finding of misconduct was legally correct. He attracted the attention of the court to the case of *Re a Solicitor* (1895), 11 T.L.R. 169, in which it was held that delay on the part of a solicitor in paying over money collected by him, on his client's behalf, is not misconduct. In that case there was a charge against a solicitor that in April 1893 he was employed by the complainant to recover a sum of £12. 6s. 8d. due to her on a promissory note and undertook to do so for the sum of 10 shillings; having within a week obtained the money, notwithstanding numerous applications from his client, he retained the money for his own use until June 1893, and between that date and February 1894, paid her £3 16s. 0d.; eventually, after she had made an application to a magistrate and to the Incorporated Law Society he paid her the further sum of £4 16s. 8d, retaining £4 10s. 0d. as his costs. The Committee of the Incorporated Law Society found that the complainant was a simple character who could only write her name and came to the conclusion that the solicitor, having recovered the money, retained the greater part of it without her consent and, notwithstanding her repeated applications for payment, had only paid over the admitted balance after he was aware that the complainant had applied to the magistrate for assistance, and therefore they found that the solicitor had been guilty of professional misconduct. WILLS, J., giving the judgment of the court, that is, the Queen's Bench Division, held that there was no professional misconduct as there was no evidence of any misrepresentation or deceit by the solicitor. WILLS, J., said:

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“The court must have something beyond the mere nonpayment to constitute professional misconduct. There must be something amounting to misrepresentation or deceit and not merely the fact that the money has not been paid over.”

It is on the authority of this case that the learned Solicitor General submits that unless the Committee could properly find on the evidence that there was some misrepresentation or deceit practised by the legal practitioner the finding of misconduct would not be correct. He pointed particularly to the fine distinction made in a passage in the judgment of WILLS, J., in which he stated:

“If the Committee had found as a fact that the solicitor would not have paid the money but for the application to the magistrate, that would have been different; but they only found that he had not paid over the money until he was aware of the application to the magistrate. This was not sufficient to show professional misconduct.”

The Solicitor General urged that the applicant could always proceed under O. 40, r. 18, for an account or for the recovery of the money paid to the legal practitioner as her solicitor.

We do not agree that this 1895 case is authority for the proposition that where there is long and undue delay by a solicitor in paying over money collected by him on behalf of his client without any misrepresentation or deceit on his part there can be no question of misconduct. In our view, the question as to whether there is or is not misconduct would depend on the particular circumstances of the delay. In the 1895 case the period of delay was a mere matter of ten months. Conceivably, had the delay continued for a period of ten years after repeated demands for payment, the inference of an intention to misappropriate might have arisen and the decision of the Divisional Court might well have been different. In *Re a Solicitor*, 1947 L.R.B.G. 47, the Full Court, in its judgment, pointed out ill considering this English case of 1895 that it did not appear from the report of the case that there was any statutory duty to render an account and interpreted the case as authority for the proposition that delay on the part of a solicitor in paying over any money collected by him on his client's behalf is not necessarily misconduct. Furthermore, in *Kendall and Boodhoo v. Mungal Singh*, (1931—37) L.R.B.G. 67, where the question of misrepresentation and deceit on the part of the legal practitioner was never considered, the Full Court held that a legal practitioner who through impecuniosity delayed in repaying money to his client was guilty of professional misconduct. The Full Court in the circumstances considered that the refusal of the practitioner to repay the money was inexcusable for it was based on his self-serving conclusion that his client had insulted him. What is important in the judgment, however, is that it is made clear that the practitioner was later contrite and willing to repay but due to his impecuniosity he did not give early effect to his willingness to pay. The distinction to be drawn between the facts in that case and the circumstances in the present case is that in the former the practitioner received the moneys from his client for the purpose

of doing certain work, *i.e.*, making disbursements and filing a petition in a divorce suit. He did not do the work he was employed to do and failed after long delay to repay to his client, on demand, the money delivered to him for such disbursements. In the instant case there is no question of failure to do any work; the circumstances indicate a mere failure on the part of the practitioner to pay over to his client certain moneys received by him for and on her behalf.

The period of delay in the instant case appears from the record to be approximately two years which in our opinion, depending on the findings of the Committee, may well be misconduct.

The Committee noted in their report that the applicant stated in evidence that the practitioner told her that his clerk had taken away the money, but expressed no opinion in connection therewith. This allegation was put forward by the legal practitioner himself in cross-examination of the applicant but at the conclusion of her evidence the practitioner merely offered to pay over to the applicant the balance of the amount collected by him on her behalf. It does not appear from the record of the proceedings that the attention of the Committee was ever drawn to the case of *In Re a Solicitor* (1895), 11 T.L.R. 169. In our view it was necessary for the Committee to say whether there was mere delay in the legal practitioner paying over the money to his client or whether in the circumstances they drew the inference that there was an intention on the part of the legal practitioner to misappropriate the funds of his client received by him on her behalf.

It must not be overlooked that a client can always sue a solicitor for moneys received by him on his behalf, and under O. 40, r. 13, where the relationship of client and solicitor exists or has existed a summons may be issued by the client for the delivery of a cash account or the payment of moneys.

We consider that this matter should be remitted to the Committee to be re-heard and determined and for a specific finding to be made by them as already indicated. We order accordingly.

Matter remitted.

Solicitor: *O. M. Valz* (for the practitioner).

OGLE CO. LTD. v. HACKETT AND OTHERS

[In the Full Court, on appeal from a magistrate's court for the Georgetown Judicial District (Bollers and Persaud, JJ.) September 2, 25, 1963.]

Appeal—Magistrate's court—Notice of appeal served out of time—Appeal struck out—Motion for extension of time to serve notice of appeal and to give security for costs—Whether motion competent—Summary Jurisdiction (Appeals) Ordinance, Cap. 17, s. 14.

The appellants appealed from the decision of a magistrate's court in certain consolidated actions, but the appeal was struck out by the Full Court on the ground that the notices of appeal were served out of time on the respondents and on the further ground that the monies lodged by the appellants as security for prosecuting the appeals and for the costs of the respondents was inadequate. (See the report of the judgment of the Full Court earlier herein). The appellants now moved for an extension of time by seven days in order to serve the notices of appeal on the respondents, for an order that the services already effected within the extended period be declared to be good services, and for an extension of time within which they should give security. At the hearing of the application the appellants objected to the respondents being heard on the ground that they did not file affidavits in reply. However, s. 4 (2) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, provides that an extension of time shall not be granted unless the opposite party has had an opportunity of being heard.

Held: (i) the respondents were entitled to be heard in opposition to the application;

(ii) the appeal no longer subsisted; the appellants were in effect seeking to bring the appeal a second time and this they could not be permitted to do.

Application refused.

H. Shepherd, Q.C., with J. A. King, for the appellants.

L. A. Luckhoo, Q.C., John Carter, Q.C., C. A. F. Hughes, M. S. Fitzpatrick and B. S. Rai, for the respondents.

Judgment of the Court: The appellants are the owners of certain parcels of land of which the respondents numbering thirty-five, are the tenants. The appellants applied to a magistrate for possession of the various parcels of land, and the thirty-five actions were heard together consequent upon the magistrate making an order for consolidation. The magistrate found that it would have been reasonable to make the order for possession, and to grant the appellants possession would have been of less hardship than to deny them possession, but he dismissed the actions on the ground that there was no evidence as to the dates of the commencement of the various tenancies. The magistrate gave his decision on the 31st October, 1962, and on the 13th November, 1962, the appellants lodged one notice of appeal in writing with the clerk of court, and on the same day, they purported to serve a notice of appeal on each respondent by registered post. In addition, in purported compliance of s. 5 (1) and (3) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, the appellants lodged one sum of \$3, and one sum of \$25 to abide the costs of appeal, no doubt treating the whole matter as one appeal.

Upon the appeal coming on for hearing, counsel for the respondent took two points *in limine*—firstly, that the appellants had failed to comply with s. 4 (1) (b) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, as the notices of appeal had been served out of time, in which case, the Appeal Court would have had no jurisdiction to entertain the appeal; and secondly, there had been a non-compliance by the appellants with s. 5 (1) and (3) of the same ordinance. These submissions were argued fully, and the Full Court in a written judgment held that the preliminary objections were of merit, and adjudged that the appeal must be deemed to have been abandoned, and must be struck out for want of jurisdiction. The appeal was dismissed on the 13th June, 1963, and the reasons for decision handed down on the 14th August, 1963. (See report earlier herein).

The matter now engaging the attention of this court is an application by way of motion dated the 3rd July, 1963, for an order that the appellants may be at liberty to appeal from the decision of the magistrate, for an extension of time by seven days in order to serve the notices of appeal on the respondents, and that service already effected within this extended period be declared to be good service. The appellants further seek an extension of time within which they should give security for costs. In other words, the appellants are seeking the leave of this court to be afforded an opportunity to comply with the provisions of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, the non-compliance of which was held to be fatal to their appeal.

Under the present state of the law, and in these circumstances, the court must refuse leave to appeal. Before it was repealed and re-enacted, s. 14 (1) of the Summary Jurisdiction (Appeals) Ordinance, did speak of special leave to appeal. These words are, however, not repeated in the amending Ordinance—the Summary Jurisdiction (Appeals) (Amendment) Ordinance, 1955 (No. 29). This latter Ordinance provides that—

“(1) Notwithstanding the provisions of section sixteen of this Ordinance, any person who has failed to comply with any of the provisions of this Ordinance limiting the period of time within which, or prescribing the manner in which, any act shall be performed, may apply to the Court for an extension of the period of time within which such act shall be performed or for leave to perform such act in the prescribed manner and in his application shall state fully the reason for his failure to comply with such provision or provisions and the grounds on which he considers he should be given such extension of the period of time or leave.”

Counsel for the appellants has, upon counsel for the respondents attempting to address the court, submitted that the respondents should not be permitted to have audience, they not having filed affidavits in reply. The answer to this submission is to be found in the proviso to sub-s. (2) of s. 14 of the Summary Jurisdiction (Appeals) Ordinance which expressly provides that an extension of time or

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leave shall not be granted unless the opposite party has had an opportunity of being heard; and this is precisely the course of action we permitted to be taken in this matter.

This court has a discretion in granting leave or an extension of time, and it may exercise that discretion if it is satisfied that in all the circumstances it would be just and proper so to do. Among the matters which the Ordinance requires to be taken into account are whether *prima facie* the appeal sought to be brought has merit, and such other matters or circumstances as the court thinks just and proper to take into consideration in the exercise of such discretion.

Counsel for the appellants has submitted that this court ought to consider first the merits of this appeal, and then turn its attention to the reasons for failure to comply with the provisions of the Ordinance. In whatever order we consider these matters, we must first of all find in this instance, having regard to the sections of the Ordinance in connection with which leave is being sought, whether an appeal subsists. Unhesitatingly, the answer is in the negative. By bringing this motion, the appellants are attempting to bring another appeal, and were we to grant the prayer for relief, we would be attempting to infuse life into an appeal already dead. This matter received judicial attention in *Elias v. Spencer*, 1939 L.R.B.G. 225, in a decision of the then West Indian Court of Appeal. That decision turned, it is true, on the effect of a non-compliance with the West Indian Court of Appeal Rules after an appeal had been launched. The effect of the non-compliance of that rule was held to extinguish the right to appeal. We are of the opinion that the principle is equally applicable to the instant case. In the *Elias* case, reference was made at p. 229 to an older case of *Wong Fung Kiow v. John*, (12th November, 1907, Appeal Court) where a preliminary objection had been taken that the appeal was not rightly before the court. In the latter case the judges said—

“The respondents could ask, as they do now in effect, that the notice of appeal which was filed.....be dismissed. If their application were granted, the appellants have no power to bring another appeal, as they are now attempting to do.....”

On the same page in the *Elias* judgment, the president of the Court of Appeal said,—

“No authority has been cited to us to show that where a right of appeal has once been exercised and has been disposed of, any further right of appeal survives.....”

The same point arose in the case of *Dhajoo v. Thom*, 1939 L.R.B.G. 262, and was disposed of in similar fashion also by the West Indian Court of Appeal.

It seems to us that this case in hand falls squarely within the facts in the case of *Hassan v. Ramsaroop* (1962 No. 793—Demerara), a decision of the Full Court of Appeal. In that case, an appeal from

a magistrate had been heard, and dismissed by the Full Court of Appeal on a point *in limine* being taken as to the non-compliance by the appellant with the provisions of s. 4 (1) (b) of the Summary Jurisdiction (Appeals) Ordinance. Thereafter an application by way of motion was made to the Full Court seeking an extension of time to comply with the section. There also, the appellant had experienced some difficulty in serving the notice of appeal on the respondent. It was held that by his motion the appellant was seeking to be allowed to bring the appeal a second time, and that he could not be permitted to do so.

We are in full agreement with the decision in *Hassan v. Ramsaroop (supra)*. We feel that the submission made by the appellants lacks merit, and would refuse the application. The appellants must pay the respondents costs, fixed at \$5 in respect of each respondent. Liberty to apply.

Application refused.

R. v. PETER TAYLOR AND CO. LTD., *ex parte*
DIRECTOR OF PUBLIC PROSECUTIONS

[Supreme Court (Date, Bollers and Persaud, JJ.) September 2, 3, 4, 25, 1963]

Contempt of court—Publication attributing racialism to magistrates—Whether scandalising court—Whether contempt.

The respondents published an article in their newspaper saying *inter alia*: “Nor does it help much to end racial bitterness when one race is handled with kid glove before certain magistrates and another is shown the iron fist by those same magistrates.” On a motion by the Director of Public Prosecutions for a writ of attachment against the respondents for contempt of court,

Held: (i) the jurisdiction of the superior courts to punish by attachment or committal extends to contempt in respect of inferior courts;

(ii) an article which imputes unfairness and a lack of impartiality on the part of a judge in the discharge of his judicial duties constitutes a contempt of court, the gravamen of the offence being that by lowering his authority the publication interferes with the performance of his duties;

(iii) the article in question was a scandalous attack on magistrates and could only have the effect of bringing the administration of justice into disrepute. As such it was a contempt of court punishable *brevi manu*.

Order made absolute.

G. S. S. Gillette, D.P.P., for the applicant.

L. A. Luckhoo, Q.C., and J. Carter, Q.C., for the respondents.

Judgment of the Court: On the 9th August, 1963, we made an order *nisi* at the instance of the Director of Public Prosecutions call-

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ing upon the respondents, the publishers of the "Evening Post" newspaper, to show cause why a writ of attachment should not issue against them for contempt of court in publishing a certain article in the issue of the newspaper of 15th July, 1963. The article appears in the column of the newspaper entitled "Opinion" and is as follows:

"LET JUSTICE APPEAR

It is of first importance that if racial bitterness is to be brought to an end those who are charged with the administration of the law should at least appear to be scrupulously fair—not least among them being the magistrates who, because of the power vested in them to dispense summary justice are more open to criticisms than judges of the Supreme Court who have to rely on the verdict of the jury before punishment can be inflicted.

The magistracy, as everyone knows, is dominated by members of the very groups now engaged in racial conflict. And it is difficult to erase the impression from the minds of the public that, human nature being what it is, there cannot be strict impartiality among magistrates in the issues arising from the conflict. The suspicion takes greater root when discrepancies arise in the granting of bail for accused persons.

Admittedly the seriousness of their offences can be driven home to offenders when bail is refused. The refusal of bail can even act as a deterrent to would-be offenders, or can remove actual trouble-makers from the scene for a while.

But it is hardly within the competence of magistrates to act on the presumption that an accused person is guilty of a crime before he has been fairly tried. And it is an impingement on the rights and liberties of an individual to treat him as a criminal before he has been found guilty of a crime.

Nor does it help much to end racial bitterness when one race is handled with kid-glove before certain magistrates and another is shown the iron fist by those same magistrates.

This paper is watching with considerable interest the action of certain magistrates on the basis of bail reports which have been brought to its attention. And while the delicacy of the racial situation forbids, at the moment, that it should say anything to aggravate the racial rift, it is to be hoped that all magistrates will be equally conscious of their responsibilities, and will handle the racial situation with the delicacy it deserves."

With leave of the court an affidavit in reply was filed by Peter Taylor, a director of the respondent company, in which he stated *inter alia* that the article was written as a result of bail reports which had been brought to the attention of the newspaper, that the article never had as its aim the obstruction, interference or the prejudice of the administration of justice in proceedings before the magistrates' courts of this Colony, and that on the contrary the article sought to enlist the help of magistrates in dealing with the problems which

arose before them in a manner which would ensure not only that justice was done but give the impression and satisfaction that justice had also appeared to be done.

It is trite law that in considering a matter of this kind the article in question must be read as a whole. We have done this with the greatest care and are quite satisfied that the language of the article in its ordinary and popular meaning carries the imputation that in the matter of granting bail certain magistrates are influenced by racial considerations and are lenient to members of one race while being unduly severe to members of a different race. In our opinion the article clearly imputes lack of impartiality on the part of certain magistrates in the Colony. The question is whether this amounts to contempt of court and whether the order *nisi* granted by us should be made absolute.

A good starting point would be the judgment of Lord HARDWICKE in 1742 in the case which is generally cited as the *St. James' Evening Post* case (1742), 2 Atk. 469. At p. 471, Lord HARDWICKE classified the various types of contempt of court recognised by the law, as follows:

“There are three different sorts of contempt. One kind of contempt is scandalising the court itself. There may be likewise the contempt of this court in abusing parties who are concerned in causes here. There may be also a contempt of this court in prejudicing mankind against persons, before the case is heard.”

In all the subsequent cases and in textbooks on the subject this broad classification has been observed. In the instant case the contention of the Director of Public Prosecutions is that the article in question falls into the first of the three classes mentioned by Lord HARDWICKE—that is to say, scandalising the court itself.

R. v. Davies, [1904—1907] All E.R. 60, shows that scandalous attacks upon judges are punished by attachment or committal upon the principle that they are, as against the public, not the judge, an obstruction to public justice. The punishment is inflicted, not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the attack, but of protecting the public, and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the Court, from the mischief they will incur if the authority of the tribunal is undermined or impaired. The case stresses that by “authority” is there meant the deference and respect which is paid to the judges of a court and their acts. It also shows that this jurisdiction of the superior courts to punish by attachment or committal extends to contempts in respect of inferior courts. In the course of the judgment of the King’s Bench Division delivered by WILLS, J., he said (at pp. 65, 66):

“But what possible difference in principle can there be in respect of direct attacks upon courts or judges and of writings the tendency of which is to deprive the inferior courts beforehand of the possibility of doing even-handed and impartial justice

according to the due course of law? To hold that there was a distinction would give colour to the notion, which cannot be too strongly repudiated, that the offended dignity of a particular court or of the persons who compose it is the subject of punishment in such a case.

In *Helmore v. Smith* (No. 2) (1886), 35 Ch. D. 449, BOWEN, L.J., said (at p. 455): ‘The object of the discipline enforced by the court in case of contempt of court is not to vindicate the dignity of the court or the person of the judge, but to prevent undue interference with the administration of justice’ and a considerable part of the undelivered judgment of WILMOT, C.J., to which we have referred, is devoted to showing that the real offence is the wrong done to the public by weakening the authority and influence of a tribunal which exists for their good alone. He adds that such conduct is pre-eminently the proper subject of summary jurisdiction. Attacks upon the judges, he says, ‘excite in the minds of the people a general dissatisfaction with all judicial determinations.....and whenever men’s allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever—not for the sake of the judges as private individuals, but because they are the channels by which the King’s justice is conveyed to the people. To be impartial and to be universally thought so are both absolutely necessary for giving justice that free, open, and uninterrupted current which it has for many ages found all over this kingdom’: WILMOT’S OPINIONS, pp. 255, 256.”

Counsel for the respondents attracted attention to the following passage appearing in the judgment of the Judicial Committee of the Privy Council in *McLeod v. St. Aubyn*, [1899] A.C. 549, at p. 561:

“Committals for contempt of court are ordinarily in cases where some contempt *ex facie* of the court has been committed, or for comments on cases pending in the courts. However, there can be no doubt that there is a third head of contempt of court by the publication of scandalous matter of the court itself. Lord HARDWICKE so lays down without doubt in the case of *In re Read and Huggonson*, 2 Atk. 471. He says, ‘One kind of contempt is scandalising the court itself.’ The power summarily to commit for contempt of court is considered necessary for the proper administration of justice. It is not to be used for the vindication of the judge as a person. He must resort to action for libel or criminal information. Committal for contempt of court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice. Hence, when a trial has taken place and the case is over, the judge or the jury are given over to criticism.

It is a summary process and should be used only from a sense of duty and under the pressure of public necessity, for there can be no land-marks pointing out the boundaries in all cases. Committals for contempt of court by scandalising the court

itself have become obsolete in this country. Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them. But it must be considered that in small colonies, consisting principally of coloured populations, the enforcement in proper cases of committal for contempt of court for attacks on the court may be absolutely necessary to preserve in such a community the dignity of and respect for the court."

Counsel for the respondents adopted the words of Lord COLERIDGE in his summing-up in *R. v. Ramsey* (1883), Cab. & El. 126, on a trial for blasphemous libel: "Law grows, and though the principle of law remains unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the time." Counsel urged that much water had flowed under the bridge since 1899, that British Guiana, now on the verge of independence, can no longer be regarded as a backward country and that there can be no justification for not applying the practice in England to which reference was made by the Judicial Committee in *McLeod v. St. Aubyn* (*supra*).

It seems to us that the statement in *McLeod v. St. Aubyn* that committals for contempt by scandalising the court itself have become obsolete in England is too wide. This is borne out by the more recent cases of *R. v. Gray*, [1900] 2 Q.B. 36, and *R. v. Editor of the New Statesman, ex p. Director of Public Prosecutions* (1928), 44 T.L.R. 301.

In *R. v. Gray* (*supra*) it was held that the publication in a newspaper of an article containing scurrilous personal abuse of a judge, with reference to his conduct as a judge in a judicial proceeding which has terminated, is a contempt of court punishable by the court on summary process. In the course of the judgment Lord RUSSELL OF KILLOWEN at p. 40 said:

"Any act done or writing published calculated to bring a court or a judge of the court into contempt, or to lower his authority, is a contempt of court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts is a contempt of court. The former class belongs to the category which Lord HARDWICKE, L.C., characterised as 'scandalising a court or a judge.' That description of that class of contempt is to be taken subject to one and an important qualification. Judges and courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is public; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen. Now, as I have said, no one has suggested that this is not a contempt of court, and nobody has suggested, or could suggest, that it falls within the right of public criticism in the sense I have described. It is not criticism: I repeat that it is a personal scurrilous abuse

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of a judge as a judge. We have, therefore, to deal with it as a case of contempt, and we have to deal with it *brevi manu*. This is not a new fangled jurisdiction; it is a jurisdiction as old as the common law itself, of which it forms part. It is a jurisdiction, the history, purpose, and extent of which are admirably treated in the opinion of WILMOT, C.J., then WILMOT, J., in his OPINIONS AND JUDGMENTS. It is a jurisdiction, however, to be exercised with scrupulous care, to be exercised only when the case is clear and beyond reasonable doubt; because, if it is not a case beyond reasonable doubt the courts will and ought to leave the Attorney General to proceed by criminal information.”

We pause here to observe that in our view the article complained of in the instant case falls within the category described above as scandalising a court or a judge. Where an article imputes unfairness and a lack of impartiality on the part of a judge in the discharge of his judicial duties it was held in *R. v. Editor of the New Statesman, ex p. Director of Public Prosecutions* (*supra*) that such an article constitutes contempt of court and it was said that the gravamen of the offence was that by lowering his authority it interfered with the performance of his duties.”

Our attention has been attracted to the case of *Ambard v. A.G. of Trinidad & Tobago*, [1936] A.C. 322, and particularly to the observations of Lord ATKINS at p. 335 where he said—

“But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong-headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”

We would wish to point out that in the article complained of in the *Ambard* case the author was at pains to point out that he was not imputing partiality to any particular judge, but was merely inviting consideration of a matter that must cause adverse comment amongst the masses, that is, the matter of anomalous differences between sentences imposed by various magistrates and judges. In that case it was held that there was no contempt in the circumstances. We feel that the matter before us is similar to the *Gray* case. The publication constitutes a contempt, and exposes the respondents to attachment, for to say that magistrates in dealing with matters before them are influenced by racial considerations and are lenient to members of one race while being unduly severe to members of

another race is in our view a scandalous attack on magistrates and can only have the effect of bringing the administration of justice into disrepute. Articles of this nature can, to use the words of the court in *R. v. Parke*, [1903] 2 K.B. 432, poison the fountain of justice before it begins to flow.

The intention of the writer of an article of this nature is immaterial. "The test is whether the matter complained of is calculated to interfere with the course of justice, not whether the authors and printers intended that result, just as it is no defence for the person responsible for the publication of a libel to plead that he did not know that the matter was defamatory and had no intention to defame": per Lord GODDARD, C.J. in *R. v. Odhams Press Ltd., ex p. A.G.*, [1957] 1 Q.B. 73, at p. 80. Lack of intention or knowledge is no excuse. That the author of the article complained of lacks knowledge of the relevant matters which a magistrate is required to take into account in dealing with applications for bail is manifest; but this is no excuse. Perhaps he would have been well advised to familiarise himself with these matters before committing himself to print.

We do not regard this publication as a slight contempt. In our view, any statement which has the effect of bringing the administration of justice into disrepute is a contempt of court punishable *brevi manu*.

We therefore order that the order *nisi* be made absolute, and that the company of Peter Taylor and Company Limited pay a fine of \$250 recoverable by distress, for their contempt. They must also pay the costs of the Director of Public Prosecutions to be taxed, certified fit for counsel.

Order made absolute.

C. R. JACOB & SONS LTD. v. INLAND REVENUE
COMMISSIONER

[Supreme Court—In Chambers (Persaud, J.) January 5, March 9, July 13, August 31, September 30, 1963.]

Income Tax—Claim to deduction—Work done on business premises—Work in the nature of repairs and substantial improvement—Work spread out over three years—Whether capital or revenue expenditure—Income Tax Ordinance, Cap. 299, s. 12 (1) (d) and s. 14 (d).

The appellants owned three buildings in part used for the purposes of their business and in part rented out. The buildings were wooden buildings with concrete floors and were in a fairly good state of repair when acquired. For thirteen years no repairs were done. During 1957, 1958 and 1959 considerable work was done to all three buildings. In the case of one building, the wooden walls were replaced by concrete walls, the wooden beams were replaced by concrete columns, a new concrete floor and a completely new roof both in materials and in design were put in. In the case of the other two buildings, new concrete floors were put in and portions of the walls, roof and top floor were replaced by new materials. The appellants claimed that all the work done was in the nature of repairs and that in consequence the expenditure incurred was deductible for income tax purposes as a revenue expenditure.

Held: (i) the work done on the first building and in respect of the floors of the other buildings was in the nature of improvement and in consequence the expenditure incurred was a capital expenditure and as such not deductible for income tax purposes;

(ii) the fact that the improvement was effected over more than one tax period was irrelevant.

*Appeal allowed in part;
matter remitted for re-assessment.*

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

David Singh, Senior Legal Adviser (ag.), for the respondent.

PERSAUD, J.: These are really three appeals against three assessments in respect of the income-bearing years 1957, 1958 and 1959, but as the same arguments affected each matter, they were heard as one appeal both in this court and before the Board of Review.

Upon the matter being called in this court, the appellants sought and obtained leave to tender evidence by affidavit. I felt I could make such an order under r. 8 of the Income Tax Appeal Rules (Cap. 299—Subsidiary Legislation). Accordingly, two affidavits sworn to by the managing director of the appellant company were filed, and now form part of the record. The managing director was cross-examined by counsel for the respondent.

The appellants are a limited liability company incorporated in this country, carrying on the business of importers and exporters, provision merchants and commission agents, and were so doing during the relevant years, at their premises 15/16 Water and Holmes Streets, Georgetown. This appeal concerns three buildings on the premises to which certain works had been done over a period of time—1957 to 1959. These buildings can be referred to, as they have

been in the course of the argument, as the western, the central, and the eastern buildings. The cost of these works was claimed as deductions for income tax purposes in the year of assessment 1958, 1959 and 1960 in respect of the years 1957, 1958, and 1959 respectively, in the following sums—\$7,721.82 for 1957; \$6,739.40 for 1958; and \$6,566.19 for 1959, and as a result the chargeable income for the three years should be \$1,907, \$1,458 and \$1,490.30 respectively. The appellants claim that the sums of money spent on the works should be regarded as revenue expenditure, and as such, deductible for income tax purposes, while the respondent contends that those sums of money fell under the description of capital expenditure, not being deductible. The Board of Review upheld the contention of the respondent and disallowed the appellants' claim. It is against this decision of the Board that these appeals have been brought.

The works were done over a period of three years, and work was in fact done on each structure every year. But the appellants lumped together all the work done in each year, and claimed the total for that year as a deduction under the caption "Repairs to Property,"

Prior to 1957, except for a portion of a western gallery, both floors of the western building were occupied by tenants of the appellants for various business purposes. After the works had been completed, the lower flat was occupied by the appellants in connection with their business, while the top flat was rented out as offices. This cop flat had prior to 1957 comprised of 10 rooms, but these were now converted into 3 rooms. The appellants receive more in rent now than they did prior to the conversion. The central building, which is a one-flat building, was occupied by the appellants prior to 1957, and has been so occupied ever since. The bottom flat of the eastern building also has always been occupied by the appellants, while tenants have occupied the top flat.

The appellants acquired the eastern building in 1945, at a cost of \$8,500 and the western building in 1950. They paid \$65,000 for the entire block, and have since sold portions for sums amounting to \$53,500. When the property was purchased, the buildings were in a fairly good state of repair; they were all wooden buildings with concrete floors, and for 13 years, according to the Board of Review, no repairs were carried out. In 1957 a decision was taken to alter the internal arrangement of the western building to meet more adequately the appellants' business needs. Accordingly, the wooden walls were replaced by concrete walls, the wooden beams were replaced by concrete columns, the concrete floor was dug up, and a new concrete floor put in, and a completely new roof both in materials and in design was put on. As I have already noted, the internal walls on the ground floor were not replaced in their original position, and that floor is now being used by the appellants for their business, whereas prior to the execution of the work, it was occupied by tenants. In addition, a sun shed which borders this building on the north and west has been replaced by a new shed also of substantially different materials and different design. There can be no doubt that the work done to this building was of a substantial nature.

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Counsel for the respondent concentrated his cross-examination of the appellants' managing director in respect of the western building only; so that all the evidence I have before me in connection with the work done on the central and eastern buildings is contained in that officer's affidavits. It does not appear that very substantial work was done on these latter buildings except for the fact that the new concrete floors replaced the old concrete floors. It seems that portions of the walls, roof, and top floor have been replaced by new materials.

The question I must decide is whether the works carried out on these buildings are in the nature of repairs or improvements, for s. 14 (d) of the Income Tax Ordinance, Cap. 299, provides that no deduction shall be allowed in respect of any capital employed in improvements, while s. 12 (1) (d) of the same Ordinance makes provision for deductions to be allowed in respect of any sum expended for repair of premises, plant and machinery employed in acquiring income.

Counsel for the appellants' submissions may be conveniently stated as follows:

- (1) that the work done is in the nature of repairs;
- (2) that the Commissioner should assess income tax in respect of each year separately, and in so doing can only take into account the work done for one year—the year preceding the year of assessment;
- (3) that assuming some of the work is improvements, and some repairs, the appellants would be entitled to relief in respect of those portions found to be repairs.

For purposes of the last submission it will become necessary to deal with each building separately towards the end of this judgment. The main point to be considered is whether the works are in the nature of repairs or improvements, and this is the question I must go on to examine to find an answer thereto, bearing in mind that under the Income Tax Ordinance the onus of proving that the assessment complained of is excessive is on the person assessed (s. 57 (5)).

The first case that I should like to refer to is *Lurcott v. Wakely & Wheeler*, [1911] 1 K.B. 905. This was not an income tax matter, but was concerned with a covenant by a tenant to substantially repair, and keep in thorough repair and good condition the demised premises, and the question was whether the reversioner expectant having himself reconstructed a wall after the lessee failed to do so, could recoup the cost under the covenant. The house was very old, and the condition of the wall was caused by old age, and the wall could not have been repaired without rebuilding it. It was held that the reversioner could recoup from the lessee, thereby impliedly holding that the reconstruction of the wall was in the nature of repairs. In drawing the distinction between repairs and reconstruction, BUCKLEY, L.J., said at p. 924:

“Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety not necessarily the whole but substantially the whole subject matter under discussion.”

And he goes on:

“I agree that if repair of the whole subject matter has become impossible a covenant to repair does not carry an obligation to renew or replace.”

If the test laid down by BUCKLEY, L.J., were to be applied to the facts of the *Lurcott* case, it is easy to see why it was held that the replacement of a wall—which is really a subsidiary part of a building—was regarded as repairs. It is important to have regard to the latter statement by Lord Justice BUCKLEY where he envisages a situation where repair is an impossibility, in which case the tenant cannot be bound by the covenant.

Lord Justice BUCKLEY’S statement was quoted with approval in *Rhodesia Rlys. Ltd. v. Collector of Income Tax, Bechuanaland Protectorate* (1933), 149 L.T. 3. In that case, the appellant company-carried on a railway undertaking in the protectorate of Bechuanaland. The track was generally in a worn and dangerous state, and the company completely relaid 33½ miles of track, the line so laid being of the same weight as the old line. On a further 40½ miles, the old rails were relaid, but new sleepers were put in. Upon a claim being made in respect of this expenditure under the heading “Renewal of permanent way”, it was held by the Privy Council that the work constituted repairs and was allowable, that this was a case of relaying the line so as to restore it to its original condition. Said Lord MCMILLAN at p. 5 —

“The expenditure here in question was incurred in consequence of the rails having been worn out in earning the income of previous years on which tax had been paid without deduction in respect of such wear and represented the cost of restoring them to a state in which they could continue to earn income. It did not result in the creation of any new asset; it was incurred to maintain the appellants’ existing line in a state to earn revenue.”

I would like to refer to a passage in Lord MCMILLAN’S judgment in the same case at p. 5, which passage, it seems to me, lays bare the contrast between repairs and re-construction. It is this:

“Their Lordships find an excellent illustration of the accepted practice in such matters in the United Kingdom,.....in the case of the *Highland Railway Company v. Special Commissioners of Income Tax* (1885), 2 Tax Cas. 151. There the Highland Railway Company had relaid a portion of their main line and in doing so had substituted steel rails of greater weight for the previous iron rails. No question was raised as to the cost of relaying the rails except as regards the additional weight and cost of the improved rails as compared with the original

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rails. The railway company claimed to deduct the additional cost as a proper charge against revenue on the ground that no permanent improvement of their property had been effected by the substitution of the heavier and costlier steel rails and that they derived no additional revenue from the outlay. The Lord President (INGLIS) in rejecting the company's contention said, at p. 954: 'It must be kept in view that this is not a mere relaying of line after the old fashion. It is not taking away rails that are worn out or partially worn out and renewing them in whole or in part along the whole line. That would not alter the character of the line: It would not affect the nature of the heritable property possessed by the company. But what has been done is to substitute one kind of rail for another—steel rails for iron rails. Now, that is a material alteration and a very great improvement to the corpus of the heritable estate belonging to the company, and so stated, surely is a charge against capital. All that is done, it will be observed, from the details given with reference to this matter, is to charge the price of the rails and chairs—that is to say, the weight in addition to what was the original weight of the rails and chairs. That is the whole charge, and that is a charge made entirely for the improvement of the property—the permanent improvement of the property. Now, that that can be anything but a charge against capital, I am unable to see.'"

I have repeated at length this portion of the judgment, as in my view, this is the test to be applied in matters of this nature, and a test by which I propose to be guided.

The view expressed above is no different, in my judgment, from that expressed by DENNING, L.J., in the case of *Ralli Estates Ltd. v. Commissioners of Income Tax*, [1961] 1 W.L.R. 329, where upon a claim as revenue expenditure of a certain sum of money paid as royalty in respect of the acquisition of certain sisal estates in Tanganyika, it was held that that sum of money was part of the purchase money for a capital asset and therefore was capital expenditure and not deductible, even though the money was to be paid by monthly instalments. Said Lord DENNING 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 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. For instance, if a price is paid for freehold land, or a premium (properly so called) is paid for a long lease, it is not an expense incurred in the production of income, but in the production of capital. It is deductible as revenue expenditure, no matter whether the price or premium is paid by a lump sum or by instalments.....Again, if a manufacturer expends money on machinery or plant which is used again and again in his manufacturing operations, it is capital expenditure, and is not deductible in assessing his income, no matter whether he pays for it

in cash down or by instalments. But if a trader pays money for trading stock which he means to sell to customers as soon as he can, it is an expense incurred in the production of income, no matter whether it is paid in a lump sum or by instalments: and it is deductible.”

Besides laying down the test as to what is the nature of capital and revenue expenditure, this *dictum* puts to rest any doubts respecting the question as to whether the spreading out of the expenditure over a period of years really affects its nature. The answer is plainly no. This view is supported by a dictum of Lord MCMILLAN in *Rhodesia, Railways Ltd. v. C.I.T.* (*supra*) at p. 5 where he said, dealing with the replacement of worn railway lines:

“The fact that the wear although continuous is not and cannot be made good annually does not render the work of renewal when it comes to be effected necessarily a capital charge.”

The *Rhodesia Railway* case (*supra*) may be compared with the case of *Highland Rly Co. v. Balderston* (1889), 2 Tax Cas. 485. In the latter case a sum of money was expended in improving a section of the line so as to bring it up to the standard of the main line, to substitute heavy rails and chairs for lighter ones. It was held that such sum was not deductible from profits, as there was a material alteration and a very great improvement on the corpus of the heritable estate.

Two other decided cases merit attention if only to bring home the point that each case must be determined on its own peculiar facts. In *Phillips v. Whieldon Sanitary Potteries, Ltd.* (1952), 33 Tax Cas. 213, the company manufactured pottery at a factory, alongside which ran a canal. At one time the factory was separated from the canal by an embankment but this subsided and water seeped into the factory. A new barrier was built on the site of the old embankment. It was contended on behalf of the company that the new barrier was a replacement of the old one and that its cost was allowable. It was argued that this fell into the category of capital expenditure. At p. 219 of the report, DONOVAN, J., said:

“In my judgment, the ‘premises’ for the purpose of Rule 3 (d) may sometimes be the whole of the trader’s business premises and may sometimes be a specific building forming part of those premises. Thus, if a factory window were blown out, and had to be repaired, it would be obviously wrong to argue that as the entirety of the window has been restored it was not a repair to the premises. In such a case the ‘premises’ would be the entire factory, in relation to which the window would be a repair and nothing else. But if, for example, a retort house in a gasworks was destroyed and had to be rebuilt, one would hardly call that a repair to the gasworks. The size of the retort house would compel one to regard that as the premises for the purpose of Rule 3 (d); and since it had been replaced in full it would not be said to have been repaired. These examples illustrate what I think is the truth, that there is no line of approach to

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the problem which is exclusively correct. In some cases it will be right to regard the premises as the entire factory, and in others as some part of the factory. Whichever alternative is the right one to adopt will depend on the facts of the particular case.”

The other case is *Thomas Wilson (Keightley), Ltd. v. Emmerson* (1960), 39 Tax Cas. 360. There the appellant company carried on the trade of worsted spinners. Their mills included a three-storey building, the roof and top storey of which were found to be in a dangerous condition, and reconstruction of the premises was undertaken involving the heightening of the building and the construction of a new roof at a cost of £15,372. It was held that the whole of this sum was capital expenditure, and so not allowable. DANCKWERTS, J., said at p. 365—

“Now, of course, it is perfectly clear that repairs are not necessarily excluded when work is done which involves the replacement of various matters, so that the person having such repairs done, in the end, gets something new in place of something which was old.....But that is not really the conclusion of the difficulty in the present case, and I think the matter must be looked at as a whole. One must consider whether the building, as it turned out in the end, was merely the result of repair or whether it amounted to what was, or must be said to be, an improvement.”

It seems to me that the western building at least, is an improvement, and the fact that the improvement was effected over more than one tax period is irrelevant. Once the nature of the work has been ascertained, it matters little that the work was done over a period of three years. To hold otherwise would be to enable a taxpayer not to avoid but to evade income tax, and this is the evil which the whole scheme of the income tax laws is intended to prevent. I therefore hold that the works carried out on the western building amount to improvements, and so the cost thereof is not allowable. There can be no disintegration of the cost of the works as was suggested *in arguendo* in the case of *Lawrie v. C.I.R.* (1952), 34 Tax Cas. 20, but which submission was overruled. The decision of the Commissioners in so far as the expenditure on the western building is concerned is therefore affirmed, and I hold that the appellants are liable to pay income tax on the full amount expended on the improvement of this building.

The other two buildings were treated both by the respondent and the Board of Review as falling in the same category as the western building. The Board of Review in their decision said at para. 15:

“(1) The Board is of opinion that there was evidence that there was in fact a reconstruction by the appellant company of its business premises. The walls, roof and floor of the building said to be repaired were demolished and reconstructed. The reconstruction made the buildings different from what they used to be, and effected an improvement of the premises. The Board

is satisfied that there has been a reconstruction, and not a mere repair under s. 12 (1) (d) of the Income Tax Ordinance.

(2) The expenditure incurred by the reconstruction is capital expenditure, and not revenue expenditure. Such capital expenditure cannot be deducted under s. 12 (1) (d) of the Income Tax Ordinance.”

In sub-para. (1) above, the Board speak of ‘building’ in one breath and of ‘buildings’ in another. And this makes one suspect that the works done to all the buildings were considered as one job. In my judgment, this is the wrong approach. I feel that each building should be considered separately in these circumstances. If this is done, then the dictum of DANCKWERTS, J., in the case of *Jackson v. Laskers House Furnishers Ltd.* (1956), 37 Tax Cas. 69, referred to by the respondent in his reasons in support of the assessment would have no relevance if only because in that case it would appear that one building only was being considered.

I have examined carefully the affidavits tendered in this matter. and I have come to the conclusion that the cost of replacing the concrete floors in both the central and eastern buildings are not permissible allowances in that the floors are completely new floors and fall under the category of improvements. The other expenditure falls, in my view, under the head of repairs and would ha allowable.

The result of this judgment is that the matter will be referred to the Commissioner with directions that there should be a re-assessment for the three years in question, allowing only the cost of the work done to the central and eastern buildings save for the cost of the floors of those buildings which I hold to be improvements.

I make no order as to costs.

*Appeal allowed in part:
matter remitted for re-assessment.*

Solicitor: *N. C. Janki* (for the appellant company).

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[Federal Supreme Court—Civil Jurisdiction (Gomes, C.J., Lewis and Marnan, JJ.A.) February 20, 21, 22, March 29, 1962.]

Rice lands—Application by landlord to assessment committee for possession on ground of non-payment of rent—Application discontinued in consideration of undertaking by tenant to give up possession by a certain date—Breach of undertaking by tenant—Action by landlord in Supreme Court for possession—Whether tenancy terminated by tenant’s undertaking—Whether tenant still protected by statute—Whether Supreme Court has jurisdiction—Rice Farmers (Security of Tenure) Ordinance, 1956, s. 29.

The appellant was a tenant of the respondent in respect of certain rice lands. The respondent applied to the assessment committee for possession on the ground of non-payment of rent. The application was discontinued in consideration of an undertaking by the appellant to give up possession by a certain date. The appellant refused to comply with the undertaking and the respondent in consequence instituted an action for possession in the Supreme Court. Judgment having been given for the respondent, the appellant appealed.

Section 29 (2) of the Rice Farmers (Security of Tenure) Ordinance, 1956, provides that no order or judgment for possession of a holding of rice lands shall be made except as provided in that sub-section, i.e., by an order of the relevant assessment committee to be made on certain stipulated grounds. Section 34 provides that “nothing in this Ordinance shall prevent a landlord and a tenant from terminating an agreement of tenancy by mutual consent.”

Held: (i) the respondent’s forbearance to proceed further with the application for possession in the rice assessment committee was sufficient consideration for the appellant’s undertaking to give up possession;

(ii) but the agreement to give up possession was not by itself enough to terminate the tenancy. The agreement could only have that effect if it resulted in a surrender of the tenancy;

(iii) *per* GOMES. C.J. surrender cannot take place by act and operation of law unless there is a change of possession;

(iv) *per* LEWIS and MARNAN, JJ.A., apart from cases in which there has been a change of possession, the circumstances of a *bona fide* transaction may be such as to result in the termination of a tenancy and leave the former tenant’s occupation unprotected by the Ordinance, but there were no such circumstances here;

(v) *per* GOMES. C.T., and MARNAN, J.A., in any case the appellant by holding over became a statutory tenant by the force of the provisions of the Ordinance and could not be ordered to deliver up possession of his holding except by an order or judgment of the relevant assessment committee under the provisions of s. 29 (2) of the Ordinance.

Appeal allowed.

[**Editorial Note:** Referred to in *White v. White*, 1962 L.R.B.G. 316, *Ramkisson v. Sankar*, 1962 L.R.B.G. 411, and *Ramsahoye v. Ramsarran*, 1963 L.R.B.G. 89.]

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

S. D. S. Hardyal for the respondent.

GOMES, C.J.: In this case, the appellant (the defendant in the action) appeals against a judgment which ordered him to deliver possession forthwith of 92 acres of rice lands, part of Plantation Lot No. 63 on the Corentyne Coast, Berbice, which he held of the respondent under an agreement of tenancy. His appeal also

extends to the award of \$5,600 damages for trespass and the order for other consequential relief toy way of injunction which is included in the judgment.

As determination of the questions raised both at the trial and on this appeal depends upon the construction that is, to be placed upon certain of the provisions of the Rice Farmers (Security of Tenure) Ordinance, 1956 (hereinafter referred to as "the Ordinance"), I will first of all make some general observations about that legislation and then refer specifically to the relevant provisions which form the bases of the grounds of appeal. There is no dispute that the lands in question and the agreement of tenancy in relation thereto are rice lands and an agreement of tenancy of rice lands, respectively, within the meaning of the Ordinance.

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 s. 5 (1) a tenancy of rice lands runs from year to year commencing from the 1st day of May, but the rent—an annual rent—must be paid on the 31st December; and a landlord may not evict a tenant or give him notice to quit or otherwise terminate a tenancy, nor may the tenant terminate it, except in accordance with the provisions of the Ordinance. Section 29 (1) enables a landlord to apply to an assessment committee where he desires to re-possess a holding of rice land held by a tenant, but sub-s. (2) of the section provides that no order or judgment for the recovery of possession of the holding shall be made or given except upon one of the grounds enumerated in the subsection, and unless the assessment committee considers it reasonable to make the order or give the judgment. It may here be observed that one of the grounds—para. (a) of sub-s. (2)—on which a landlord may obtain possession is that his tenant has failed to pay the rent due by him by the time and in the manner when it became due.

Of the remaining provisions of the Ordinance, the two most relevant for the purposes of this appeal are, in inverse order, s. 48 and s. 34. Section 48 is as follows:

"Any provision in any agreement between a landlord and a tenant whereby the tenant purports to contract himself out of the provisions of this Ordinance shall be null and void",

and s. 34 states:

"Nothing in this Ordinance shall prevent a landlord and a tenant from terminating an agreement of tenancy by mutual consent".

As was pointed out by LUCKHOO, J., (now Chief Justice) in the case of *Hicken v. Ohab*, 1958 L.R.B.G. 98, the Ordinance introduces some

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of the principles of the Rent Restriction Acts of the United Kingdom.

Before dealing with the submissions of counsel for the appellant, it is necessary to set out the relevant facts that the pleadings allege and the evidence at the trial of the action discloses.

It appears that the appellant fell into arrears of rent in respect of the year 1956, as a consequent of which, the respondent, on the 7th January, 1957, filed an application before the relevant assessment committee for an order for delivery of possession of the land let or leased by him to the appellant. On the 25th March, 1957, that application came on for hearing before the committee when evidence on both sides was given and the committee reserved its decision. The matter was eventually called before the committee on the 29th April, 1957, when a settlement was reported and a note or record of the proceedings was made by the chairman in compliance with sub-s. (9) of s. 9 of the Ordinance. The note or record that was made by the chairman of the committee and signed by him and the other three members was in the following terms:

“In this matter, the parties have arrived at a settlement as follows:

- (1) that the agreement of tenancy between them be determined by mutual consent at the end of January 1958, when possession of 92 acres of land situate at No, 63 Corentyne, Berbice, rented by the respondent from the applicant will be delivered to the applicant—landlord.
- (2) that this application be discontinued”.

Two days after the landlord expected the tenant to give up possession, that is, on the 2nd February, 1958, he went on the land to take possession of it, but as the appellant and his two sons threatened him with violence, he left after about fifteen minutes. Two days later, he filed another application for possession of the land on the ground that the tenancy had been terminated by the agreement. The committee dismissed the application because it found that the tenancy had been terminated by virtue of the agreement and, as the relationship of landlord and tenant no longer subsisted, the committee had no jurisdiction, and added that the ground on which the applicant relied was not a ground under sub-s. (2) of s. 29 on which an order for possession could be made. Precisely what happened at the meeting on the 29th April, 1957, and the truth or accuracy of the note that was made by the chairman became an issue at the trial, and the finding of the trial judge on that issue was made a ground of appeal but, on indication of this court's view that there was evidence to support the judge's finding of fact that the chairman's note was an accurate record of what transpired, counsel for the appellant did not pursue that ground of appeal.

Counsel for the appellant also submitted that there was no consideration for that settlement or agreement, as the rent had been

paid and there was, therefore, nothing to settle, but later he conceded that the respondent's forbearance to proceed further with the application might be sufficient consideration, and he did not press the point.

The case for the respondent was that, as evidenced by the note or record set out above, the tenancy between the parties had been terminated by mutual consent within the meaning of s. 34 of the Ordinance as the respondent had discontinued his suit and the appellant had agreed to give up possession at the end of January, 1958, whereas the main part of the case for the appellant was that he had expressed his willingness to deliver up possession only if and when he obtained other suitable lands and, as he had not done so, he remained on. Counsel for the appellant argued that even if the fact is that the appellant had unconditionally agreed to give up possession at the end of January 1958, he was at liberty to change his mind, for reasons that will be stated later.

The trial judge held that s. 34 did not conflict with s. 48 because the language of the former section was specific and contemplated and authorised the making of an agreement such as the one that was made; that the agreement terminated the tenancy on the 31st January, 1958, and thereafter the appellant became a trespasser, and he gave judgment accordingly.

Counsel for the appellant submitted that the agreement did not in law terminate the tenancy because (a) it constituted a purported surrender *in futuro*; (b) it was not coupled with a giving up of possession, and (c) it constituted a provision in an agreement whereby the tenant purported to contract himself out of the provisions of the Ordinance contrary to s. 48 thereof. In amplification of his second reason, counsel contended that the true meaning and effect of s. 34 is that a tenant may validly surrender his tenancy by giving up possession with the consent of the landlord, not that he may contract out of the Ordinance. He further argued that, as the tenant had not in fact given up possession, the only way that he could be made to do so was by a judgment or order of an assessment committee under s. 29 (2) of the Ordinance, and therefore there was no jurisdiction in the court to make the order that it did.

Those submissions raise a number of interesting legal questions, but I do not propose to complicate the reasons for my decision by delving into any that, in my view, do not call to be dealt with.

I consider that the first question that arises for determination is—did the oral agreement between the parties have the effect of determining the tenancy, as the trial judge found?

By s. 4 of the Landlord and Tenant Ordinance, Cap. 185, a tenancy from year to year comprises and has the same qualities and incidents as it has by the common law of England. It is well-established that such tenancy can only be terminated by a legal notice to quit or by a surrender. No question arises in this case with respect to a legal

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notice to quit, for in whatever way the oral agreement is regarded, it is not, nor can it be construed as a legal notice to quit, because it does not comply with s. 28 of the Ordinance. The question that remains therefore is—has there been a surrender of the tenancy? Counsel for the appellant submitted that there has not, because a mutual agreement to put an end to the term cannot constitute a surrender by act and operation of law because there has been no change of possession, whereas counsel for the respondent maintains that the agreement has determined the tenancy by virtue of the provisions of s. 34 of the Ordinance.

The submission of counsel for the appellant is so well established that I will refer to only one case on the point. In the case of *Phene v. Popplewell* (1862), 12 C.B. (N.S.) 334, 142 E. R. (Rep.) 1171, there was also an agreement to put an end to the term. The tenant had handed over the keys to the premises, but a question arose whether the landlord had sufficiently exercised his option to accept a surrender so as to determine the tenancy. In his judgment, WILLES, J., said:

“There are many other ways in which to surrender by act and operation of law may take place: for instance, where the landlord and tenant have by mutual agreement consented that the term shall be put an end to, and the possession is changed in consequence, whether the landlord re-enters by himself or by a new tenant, that constitutes a surrender by operation of law”,

and BYLES, J., in his judgment stated, with reference to the authorities:

“It seems, however, to be plain from them all, that where there is an agreement between the landlord and the tenant that the latter shall relinquish and the former resume possession of the premises, and that agreement is acted upon by a change of possession that amounts to a surrender by act and operation of law within the third section of the Statute of Frauds”,

and KEATING, J., in his judgment stated:

“Any agreement between landlord and tenant which results in a change of possession—whether the former acts upon the agreement by re-letting, or by taking possession himself, or by some unequivocal acts showing his assent thereto—will amount to a surrender by act and operation of law.”

It is clear, therefore, that where a tenant, having agreed to give up possession (otherwise than by a valid notice to quit) changes his mind and remains on, the tenancy still subsists, for surrender cannot take place by act and operation of law unless there is a change of possession.

The argument of counsel for the respondent was that, by virtue of s. 34 of the Ordinance, the agreement put an end to the tenancy and, consequent thereon, to the relationship of landlord and tenant; that as that relationship came to an end, the provisions of the Ordinance no longer applied and, therefore, an assessment committee ceased to have any jurisdiction in the matter and that as the tenant did not

go out of possession, he became a trespasser and the remedy of the landlord was an action of law for the recovery of possession.

The admission or validity of such an argument depends upon the correctness of the first premise that the agreement terminated the tenancy. I have already shown that it did not do so at common law and I know of no statutory enactment either here or in England whereby a mere oral agreement can produce such a result.

Two of the judge's notes of the reply of counsel who appeared for the respondent at the trial are—"HILL AND REDMAN not an authority on a section with which it does not deal—section 34", and "In B.G. not necessary for a contract to surrender to be in writing"; and in his judgment, the judge, after reciting s. 34 and observing that it is peculiar to the Ordinance, stated:

"Provided such an agreement can be established, it is immaterial whether it is in writing or not".

It seems clear, therefore, that the judge agreed with the submission of counsel for the respondent at the trial (and it was the same on appeal) that the agreement had the effect of terminating the tenancy by virtue of the force of the provisions of s. 34. To me that means a mere oral agreement to terminate a tenancy at a future date can, within the meaning of s. 34, have the effect of actually terminating it. I do not consider that the section can have such an effect. In the first place, it does not say so and, having regard to the scheme and object of the Ordinance and the provisions of s. 48, I would expect that if the Legislature intended such an operation of the section, it would have used express words to say so. No doubt, a termination of a tenancy might be preceded by an agreement by mutual consent to do so and, if such an agreement is implemented by a change of possession, no question would arise. In my view, the section comes into effect where the tenancy has been determined by an actual giving up of possession.

There is, however, a further obstacle that confronts the case for the respondent, and it is the question of jurisdiction that counsel for the appellant raised. For the purpose of dealing with this submission, I will assume that the agreement did terminate the agreement of tenancy on the 31st January, 1958. It is clear that if that is so, the tenancy that was determined was the contractual tenancy, for that was the only tenancy subsisting before and on that day.

The next consideration is that the tenant refused to give up possession: the question is—did he become a statutory tenant?

Counsel for the respondent contended that if the tenancy was determined that put an end to the relationship of landlord and tenant and that, therefore, the provisions of the Ordinance ceased to apply to the parties. The first part of that submission may be correct in so far as it relates to the contractual tenancy but I do not agree with the second part of it for, as I have stated above, the Ordinance introduces some of the principles of the Rent Restriction Acts and, in my view, one of them is that, where a tenant holds over after the contractual

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tenancy has ended, a new relationship arises and he becomes a statutory tenant for an order for possession cannot be made except in accordance with s. 29(2) of the Ordinance. The new relationship that arises is stated in WOODFALL'S LANDLORD AND TENANT (25th Edn.) pp. 6 to 7, para. 11, as follows:

“A further illustration of the creation by statute of a new relationship of landlord and tenant occurs under the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939. Those Acts impose restrictions upon the recovery of possession by landlords of certain classes of dwelling-houses, and when a tenant continues in occupation solely by reason of the protection afforded by the Acts he becomes a ‘statutory’ tenant, and there arises a new relationship of landlord and tenant, distinct from the contractual relationship previously existing.”

Counsel for the appellant referred to an unreported Scottish case, the note on which is in the 1956 volume of the CURRENT LAW YEAR BOOK, para. 7660, and is as follows:

“In *Baird's Executrix v. Wylie*, 1956 S.L.T. (Sh. Ct.) 10, the landlord sued the tenant for possession of premises, and the tenant claimed the protection of the Rent Acts. Before the case was heard, the tenant agreed to give up possession at a stated date and a joint minute was prepared and signed by the tenant's solicitor. Before it could be given effect the landlord died. The Sheriff Court held that the tenant was entitled to change her mind and reside from the joint minute”.

The facts of that case appear to be rather similar to the facts of this case, and my view confirms with the decision in that the equivalent protection that is afforded by the Ordinance attaches to a tenant who changes his mind and holds over.

The jurisdiction of a superior court is not taken away except by express words—(CRAIGES ON STATUTE LAW, (5th Edn.) 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 (s. 11 (h) and s. 29 (1)) and in s. 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 s. 2 and the extended and unlimited jurisdiction in regard to amount of rent that is conferred on a court of inferior jurisdiction by s. 51 (4). There is also s. 26 (5) which provides that all appeals against decisions of assessment committees are to be heard by a judge in chambers and sub-s. (10) of the same section by virtue of which no fees are chargeable in respect of appeals except in one specified event.

Although the language of s. 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 at law.

In my opinion, therefore, the oral agreement, as evidenced by the note of the record of the proceedings before the assessment committee, did not have the effect of terminating the agreement of tenancy between the parties and that, even if I am wrong in that view, the appellant by holding over became a statutory tenant by the force of the provisions of the Ordinance and cannot be ordered to deliver up possession of his holding except by an order or judgment of the relevant assessment committee under the provisions of s. 29 (2) of the Ordinance.

In conclusion I wish to say that on the questions of statutory tenancy and jurisdiction I derived assistance from the judgments of the court in the cases of *Barton v. Fincham*, [1921] 2 K.B. 291, and *Brown v. Draper*, [1944] K.B. 309, which were cited by counsel for the appellant.

For these reasons, I would allow this appeal, with costs.

LEWIS, J.: I agree. First, a word about the facts. I think that the learned trial judge's conclusion that the minute of the assessment committee was a true record of the agreement reached between the parties on the 29th April, 1957, was fully justified by the evidence. The chairman of the committee testified that the minute was read over and agreed by the parties before it was signed, and that it was a true record of the settlement reached. The appellant stated in evidence that the date January 31 was never mentioned. The court would require clear and cogent evidence to satisfy it that the chairman had recorded, and all the members of the committee had signed, the statement that that date had been agreed upon as the date for delivery of possession when no such date was ever mentioned. I am also of opinion that there was consideration for the agreement. The parties either knew or honestly believed that it was within the competence of the assessment committee to make an order for possession of the land notwithstanding payment of the arrears of rent if they considered it reasonable so to do, although in practice they might not usually do so, and in these circumstances discontinuance of the proceedings was good consideration for the promise to give up possession.

As to the legal issues, the first question for decision is, whether the agreement of 29th April, 1957, was effective to determine the tenancy. The learned trial judge thought that it was. Section 34, he said, clearly permitted such an agreement, there was no need for it to be in writing, and it was not a contracting out of the Ordinance within the meaning of s. 48. In his view, the tenancy came to an end on 31st January, 1958, and the appellant holding over contrary to the agreement was a trespasser.

Sections 34 and 48 of the Ordinance are as follows:

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“34. Nothing in this Ordinance shall prevent a landlord and a tenant from terminating an agreement of tenancy by mutual consent.”

“48. Any provision in any agreement between a landlord and a tenant whereby the tenant purports to contract himself out of the provisions of this Ordinance shall be null and void.”

The learned trial judge appears to have taken the view that any agreement between landlord and tenant which in so many words stipulates for the determination of a tenancy would by virtue of s. 34 be effective in law for that purpose. I do not think that that is the true meaning or effect of s. 34. The purpose of the Ordinance, as the learned Chief Justice has stated in the judgment which has just been read, is to afford security of tenure for rice farmers, and the means by which it effectuates this purpose, are, *inter alia*, by placing restrictions upon the common law rights of the landlord and tenant individually to terminate the tenancy by notice to quit, and of the landlord to evict the tenant or obtain from the court an order for possession of the land. Sections 3, 5, 28 and 29 are relevant to these restrictions. Section 34, however, reserves to the parties, notwithstanding these restrictions upon their individual rights, their common law right to terminate the tenancy by mutual consent. In my opinion, the section gives no new right but merely preserves an existing right, which can, however, only be effectively exercised in a manner which satisfies the requirements of the common law. This involves the surrender or yielding up by the tenant of his estate to his landlord so that there is a merger with the immediate estate in reversion.

Surrender, like the tenancy itself, is founded upon a contract, being an act done by the tenant and accepted by the landlord. It may be either express or by operation of law. (See FOA, LANDLORD AND TENANT, 8th Edn., p. 977, citing Co. Lit. 337b, 338A.)

Counsel for the appellant submitted that the agreement in the instant case could not take effect as an express surrender since it provided that the term was to cease and possession be delivered at a future date. I agree with this submission, which is supported by the cases of *Weddall v. Capes* (1836), 1 M. & W. 50, and *Doe v. Milward* (1838), 3 M. & W. 328.

Did the agreement amount to a surrender by act and operation of law? I am clearly of opinion that it did not. It is sufficient for me to refer to the passage in FOA, LANDLORD AND TENANT, 8th Edn., at p. 629, which was cited with approval by SIR RAYMOND EVERSLED, M.R., in *Foster v. Robinson*, [1950] 2 All E.R. 342, at p. 346:

“It has been laid down that in order to constitute a surrender by operation of law there must be, first, an act of purported surrender invalid *per se* by reason of non-compliance with statutory or other formalities, and secondly, some change of circumstances supervening on, or arising from, the purported surrender, which, by reason of the doctrine of estoppel or part of performance,

makes it inequitable and fraudulent for any of the parties to rely upon the invalidity of the purported surrender.”

In my view the facts of the present case clearly do not fall within the ambit of this description. The agreement by itself was not sufficient, since it was not the intention of the parties that the term should immediately cease, but had the appellant acted upon it by giving up possession and the respondent accepted possession the surrender would have been complete.

In my judgment, therefore, the agreement was ineffective to determine the agreement of tenancy by mutual consent within the meaning of s. 34 of the Ordinance.

This being my view of the legal effect of the agreement, the questions relating to jurisdiction and statutory tenancy which were argued at the hearing of the appeal do not arise and I reserve my opinion on them. I would, however, draw attention to the decision in *Foster v. Robinson* (*supra*) where it was held that in determining the question whether there is a surrender by operation of law and premises within the control of the Rent Restrictions Acts, the same principles must be applied as those which would be applicable in any other case. In that case, the acceptance by the lessee of an interest in the premises which could not stand with the lease, namely, by his becoming a licensee with permission to occupy the premises free of rent for the remainder of his life, was held to be effectual to produce a surrender at law. So, too, in *Turner v. Watts* (1927), 97 L.J. K.B. 92, another case under the Rent Restrictions Acts, the tenant agreed to buy the premises and to pay interest on the unpaid purchase money, and the contract provided that the tenancy should cease. The tenant continued in occupation but failed to pay the purchase money, and the contract was rescinded. It was held that by the transaction the tenancy had gone and the tenant was not entitled to the protection of the Rent Restrictions Acts. I see no reason why these principles should not apply equally to the surrender of holdings under the Ordinance: the circumstances of a *bona fide* transaction may be such as to result in the termination of the tenancy and leave the former tenant's occupation unprotected by the Ordinance.

The question whether there is a conflict between the provisions of ss. 34 and 48 of the Ordinance was much argued at the hearing. In my opinion, where an agreement is effectual to terminate a tenancy by mutual consent, such an agreement is expressly permitted by s. 34 and does not amount to a contracting out of the provisions of the Ordinance: s. 34, construed in the manner set out earlier in this judgment, as permitting the exercise of the common law right of surrender, does not conflict with s. 48.

As I have said, however, I have come to the conclusion that the agreement in this case was not effectual to terminate the tenancy. The respondent is therefore not entitled to possession of the land and this appeal must succeed.

KHAN v. RAHAMAN

MARNAN, J.: Having regard to the decision in *Foster v. Robinson* and *Turner v. Watts* which have been referred to by LEWIS, J., I am of opinion that the statement by my Lord the Chief Justice that surrender can only take place by act and operation of law when there is a change of possession is too wide. Save in that minor respect, I agree with both judgments that have been read.

Appeal allowed.

Solicitors: *D. de Caires* (for the appellant); *Andrew Gomes* (for the respondent).

RAMJATTAN v. BERNARI

[British Caribbean Court of Appeal—Criminal Jurisdiction (Gomes, P., Lewis and Jackson, JJ.A.) July 17, 18, 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 public 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 official 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 respondent, an officer of customs and excise, whose duty it was to collect such money, but who had been absent earlier when payment was made to the customs guard. The respondent 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 by consent. The conviction and sentence were set aside on appeal to the Full Court which held that it was not part of the duties of the customs guard to receive the money and that when he Paid it over to the respondent this did not make the receipt by the latter a receipt of money entrusted to him by virtue of his employment. (See 1962 L.R.B.G. 331). On appeal by the prosecution,

Held: although the customs guard was not authorised to receive the payment, K.S.'s intention was that the money should be paid into revenue and his intention was carried out when the customs guard paid it over to the respondent who admittedly was authorised to receive it on behalf of the Government. At that moment the property in the money passed to the Government and in failing to hand over to the Government the respondent was guilty of embezzlement.

Appeal allowed.

E. A. Romao, Senior Crown Counsel, for the appellant.

A. S. Manraj for the respondent.

GOMES, P.: This is the judgment of the court. This appeal raises a question of law. The facts are not in dispute but they may be stated very briefly for the purposes of the appeal. They are these.

A man by the name of Kissoon Singh arrived as a passenger at a port of entry bringing with him some gifts. The customs duty on the gifts was assessed in the sum of \$10. At that moment the respondent, the customs officer who is authorised to assess and receive customs duty, was absent but a customs guard by the name of Perez was holding on for him in his absence. The sum of \$10 was paid by Kissoon Singh by way of customs duty to the customs guard Perez.

It was admitted that Perez was not a person authorised to assess or collect customs duty. He had, however, in the absence of the authorised officer received the amount and he gave a provisional receipt therefor to Kissoon Singh. Later on when the customs officer arrived, Perez paid over the \$10 to him in order that it might be paid in to its proper destination, that is to say, paid into revenue.

The respondent, having failed to bring the matter to account into revenue, was charged with embezzlement. He was convicted by the magistrate for the offence and fined. He appealed to the Full Court and the Full Court, after hearing arguments, allowed the appeal and quashed the conviction. (1962 L.R.B.G. 331).

From that decision of the Full Court the Crown has appealed to this court. Giving the reasons for decision the Full Court *inter alia* stated:

“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.”

If we may say so with respect we agree entirely with that part of the judgment of the Full Court. That court, however, went on to say that—

“the facts that Perez paid over the money to the appellant does not make the receipt by the appellant a receipt of money entrusted to the appellant (who is now respondent) by virtue of his employment.”

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This court does not agree with that view. When the money was paid by Kisson Singh, it was paid with the intention that it should be paid into the revenue as customs duty.

Although the payment to Perez was ineffective as he was not an authorised officer to receive it, Kisson Singh's intention was carried out when Perez paid it over to the respondent who admittedly received it in his capacity as customs officer and as a person authorised to receive it on behalf of the Government. At that moment the property in the money passed to the Government.

This is where we consider the Full Court fell into error for when Perez paid over the money he performed that which he undertook to do when he became the bailee of Kisson Singh, from whom he received the money.

The respondent in this court failed to pay over the money and, thereby intercepted it before it came into the possession of his employer. In such circumstances we consider him guilty of embezzlement. For these reasons the appeal is allowed and the order of the Full Court is set aside and the conviction and sentence restored. The court considers that the appellant is entitled to costs. The appellant will therefore have the costs in this appeal and of the Full Court.

Appeal allowed.

D'AGUIAR v. NEW GUIANA COMPANY LTD. AND ANOTHER

[Supreme Court (Bollers, J.) September 23, 24, 25, 26, 27, October 1, 1963]

Libel—Newspaper article—Allegation that politician's actions resulted in arson, looting and murder for which he now accuses others—Whether defamatory—False innuendo pleaded—Whether plaintiff may rely in the alternative on ordinary meaning—Measure of damages—Admissibility of evidence relating to other libels—Failure to apologise—Exemplary damages.

The first-named defendant company were the proprietors and the second-named defendant the editor and publisher of the "Thunder" newspaper, the official organ of the People's Progressive Party, which was then the political party in power. The plaintiff was a prominent businessman and the leader of the United Force, a political party in opposition to the People's Progressive Party. The defendants published in "Thunder" an article likening the plaintiff to Hitler and Mussolini, stating that his actions resulted in arson, looting and murder for which he now blamed others, and alleging that he had broken a lawful proclamation designed to keep the peace and had incited others to do the same. In an action for libel the plaintiff pleaded in his statement of claim that by the words used in the article the defendants were understood to mean that certain acts of arson, looting and murder which occurred in Georgetown on 16th February, 1962, were caused by or were the result of the actions of the plaintiff, and that the plaintiff was a reckless and irresponsible person who would stop at no means, even those of arson, looting and murder, to achieve his purpose. As a result of the

publication the advertisement signs of a certain company of which the plaintiff was managing-director were destroyed in various parts of the country with resulting loss to the company's business.

Held: (i) the meanings assigned by the plaintiff to the words in the article constituted a false or popular innuendo and if the plaintiff failed to satisfy the court as to those meanings it was open to him to rely on the ordinary and natural meaning of the words;

(ii) the words were reasonably capable of bearing and did in fact bear a defamatory meaning, and more particularly the defamatory meaning alleged;

(iii) with respect to damages, evidence was admissible of other libels published by the defendants of the plaintiff before and after the publication in question in order to establish malice in the minds of the defendants at the time of the publication;

(iv) although the plaintiff's company was a legal entity separate from him, any loss suffered by the company must of necessity affect the prestige of the plaintiff in his capacity as a businessman;

(v) in view of all circumstances, including the failure of the defendants to offer an apology, exemplary damages would be awarded in the sum of \$14,400.

Judgment for the plaintiff.

L. A. Luckhoo, Q.C., with D. Karran for the plaintiff.

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

BOLLERS, J.: In this case the plaintiff who is a businessman and politician seeks to recover damages for an alleged libel appearing in the newspaper "Thunder" in the issue of the 24th March, 1962, of which the first-named defendant company are the proprietors and the second-named defendant is the editor and publisher.

The newspaper "Thunder" is the official organ of the People's Progressive Party which is a political party and at present the ruling party in control of the Government. The plaintiff is the leader of the United Force, another political party in opposition to the People's Progressive Party.

In para. 5 of the statement of claim, the plaintiff alleges that the defendant, Neville Annibourne, and also the defendant company in the said newspaper falsely and maliciously wrote, printed and published and caused to be printed and published the following article of him in the way of his business and public capacity under the caption "D'Aguiar is no democrat":

"Mr. D'Aguiar has declared that he is not a fascist and that he supports democracy. Hitler and Mussolini were fascists. Like D'Aguiar, they called themselves patriots, nationalists. They went even further and posed as socialists—national socialists.

In the pre- and post-1929 depression and unemployment era they pretended to be friends of the workers while they were truly representing the landlord, Junker and capitalists classes.

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So does D'Aguiar. Hitler's main weapons were anti-Communist, jingoism, emotionalism, terror and fear.

Hitler's henchmen burned the Reichstag (Parliament) and accused the Communists. D'Aguiar's actions resulted in arson, looting and murder for which he now accuses and blames the P.Y.O. (Progressive Youth Organisation). Hitler made the Jews his scapegoat.

D'Aguiar and his fascist friends long ago singled out as their main focus of attack the Jewess and 'foreigner' Janet Jagan, now its another foreigner, Jack Kelshall.

D'Aguiar asked Dr. Jagan for a declaration that he is not a Communist and that he does not intend to establish a Government here 'patterned after that of Communist Cuba'.

This is not a time for declaration, but for deeds. Declarations are easily made and need not be sincere. Therefore, let their deeds speak for them.

Dr. Jagan has been active in politics for the past sixteen years, during which time he has led the people of British Guiana to their present constitutional status. All this was done lawfully and by consent of the electorate which returned him to office in three consecutive elections even though almost the entire press of the country was hostile to him and to his party.

GUARANTEE.

He has at the first opportunity enshrined in the Constitution of British Guiana a Bill of Rights guaranteeing all the freedoms cherished by all. He has upheld that Constitution. Even with the extraordinary powers vested in his Government by the Emergency Order he has done nothing to deny freedom to any individual by so much as a single arbitrary act.

His political intentions are enshrined in the Constitution of British Guiana, and he has given the undertaking that the Constitution of this country after Independence will contain the same safeguards for personal freedom. Mr. D'Aguiar's party and the other parties can help in ensuring that this is done.

Mr. D'Aguiar has been active in politics for little more than one year. In that time racial antagonisms have been sharpened. He has organised and led a campaign which was designed to bring about the downfall of the P.P.P.'s fully elected Government.

MASS HYSTERIA.

As a consequence of the campaign (commenced on the occasion of a royal visit)—mass hysteria was aroused resulting in arson and looting and the persecution of a particular section of our community.

Mr. D'Aguiar has broken a lawful proclamation designed to keep the peace and he has incited others to do the same.

The present record clearly points to Dr. Jagan as the true democrat. It is up to D'Aguiar to ensure that the record of his future political life is as democratic as Dr. Jagan's."

In paras. 6, 7, 8 and 9 of the statement of claim the plaintiff sets out what is undoubtedly a popular or false innuendo in which he seeks to allege what the words in their ordinary and natural meaning convey.

In paras. 6, 7, 8, 9 the plaintiff states:

"6. The defendants and each of them meant and were understood to mean by the said words set out above that the arson, looting and murder which occurred in the city of Georgetown on Friday the 16th February, 1962, was caused by, or was the result of the actions of the plaintiff.

7. The defendants and each of them meant and were understood to mean by the said words set out above, that the plaintiff was guilty of such grossly wrongful and illegal actions as caused and resulted in arson, looting and murder.

8. The defendants and each of them meant and were understood to mean by the said words set out above, that the plaintiff is a reckless and irresponsible person and would stop at no means, even those of arson, looting and murder, to achieve his purpose.

9. The defendants and each of them meant and were understood to mean by the said words set out above, that the plaintiff having caused and/or achieved his end of arson, looting and murder, sought to accuse, and accused the P.Y.O. (Progressive Youth Organisation), an organisation formed and controlled by the People's Progressive Party, of the arson, looting and murder which took place in the city of Georgetown on Friday the 16th February, 1962, whereas in truth and in fact, it was his actions that resulted in, and was the cause of the arson, looting and murder which occurred on the said 16th day of February, 1962."

The defendants in their written defence have denied these allegations in paras. 6, 7, 8 and 9 and they say that the words of the publication referred to in para. 5 of the statement of claim if published by the defendants (which they deny) do not mean and were not understood to mean, and were not printed or published with the meanings alleged in paras. 6, 7, 8 and 9 of the statement of claim; neither do the words bear nor are they capable of bearing any of the meanings alleged in the said paragraphs.

It has been clearly proved that the article, the subject-matter of the action, was published by the defendants and indeed no argument on that aspect of the matter was addressed to me at the hearing of the action.

It is well settled that the question whether a particular publication can be construed as a libel is a question of law for the judge

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“It has been stated over and over again and it is not in dispute, that the question for the judge is whether the writing or publication complained of is capable of a libellous meaning. It is for the jury if the judge so rules to say whether it has that meaning”—*Per* Viscount DUNEDIN in *Tolley v. Fry*, [1931] A.C. 333.

In this Colony where there is no jury CAMACHO, C.J., in *Woolford v. O. W. Bishop*, 1940 L.R.B.G. at p. 95 stated:

“On this aspect of the case the single duty which devolves on this court in its dual role is to determine whether the words are capable of a defamatory meaning and, given such capability, whether the words are in fact libellous of the plaintiff. If the court decides the first question in favour of the plaintiff, the court must then determine whether an ordinary, intelligent and unbiased person reading the words would understand them as terms of disparagement, and an allegation of dishonest or dishonourable conduct. The court will not be astute to find subtle interpretations for plain words of obvious and invidious import.”

And in the case of *Lewis v. Daily Telegraph Ltd.*, [1963] 2 W.L.R. 1063, Lord REID makes it clear that it is the duty of the judge to examine both the publication and the innuendo placed upon it and to rule whether the words appearing therein are capable of bearing a defamatory meaning and the test is the same in both instances. In his judgment at p. 1068 he states:

“I say that because it appears that when a particular meaning has been pleaded, either as a ‘true’ or a ‘false’ innuendo, it has not been doubted that the judge must rule on the innuendo. And the case surely cannot be different where a part of the natural and ordinary meaning is, and where it is not, expressly pleaded.”

Counsel for the defendants sought to draw a distinction between the circumstance where a true or legal innuendo is pleaded as opposed to the pleading of a popular or false innuendo. He submitted that in the former position where the plaintiff failed to establish the true innuendo he could fall back on the ordinary and natural meaning of the words in the offending publication but where the latter position obtained he could not do so and was bound by the innuendoes put forward by him in regard to the meaning or meanings attributed to the publication by him. This submission I do not accept, as a popular or false innuendo is merely the ordinary and natural meaning which arises from the words themselves which the plaintiff attributes to them. Indeed, in the case of *Lewis v. Daily Telegraph Ltd.*, where it was made clear that there was no question of an innuendo pleaded in its true sense, Lord MORRIS OF BORTH-Y-GEST in his judgment at p. 1073 stated :

“Before your Lordships, it was common ground that the fact that certain meanings were alleged by way of innuendo did not debar the plaintiffs from contending that such meaning were in fact the direct or ordinary or primary meanings of the words.”

And BUTTON ON LIBEL AND SLANDER at p. 54, after discussing the practice of the plaintiff in his statement of claim to place upon the words of which he complains an innuendo which sets out the defamatory meaning which the plaintiff attributes to them, and after pointing out that in strictness an innuendo is necessary only when the words in their natural and ordinary meaning are meaningless or innocent and became defamatory only by reason of special or extrinsic circumstances which give rise to a separate cause of action, states:

“And if the plaintiff fails to establish that the words bear the meanings which he attributes to them by his innuendo, he may still succeed if he can show that in their natural and ordinary meaning the words are defamatory.”

It is open then to the plaintiff if he fails to satisfy the court as to the meanings of the words attributed to them by him in his false or popular innuendo to rely on the ordinary and natural meaning of the words.

In considering whether the words in the publication and whether the meanings placed upon them by the plaintiff in his innuendo are capable of bearing a defamatory meaning, Lord REID in his judgment in *Lewis v. Daily Telegraph Ltd.* referred to the test laid down by Lord SELBOURNE, L.C., in *Capital and Counties Bank Ltd. v. Henty & Sons* (1882), 7 App. Cas. 741, and by Lord HALSBURY in *Nevill v. Fine Art and General Insurance Co., Ltd.*, [1897] A.C. 68, and came to the conclusion that in actions for libel the real question is what the words would convey to the ordinary man. In the former case Lord SELBOURNE said:

“The test according to the authorities is, whether under the circumstances in which the writing was published, reasonable men to whom the publication was made, would be likely to understand it in a libellous sense.”

In the latter case Lord HALSBURY said:

“What is the sense in which any ordinary reasonable man would understand the words of the communication so as to expose the plaintiff to hatred, or contempt or ridicule.....it is not enough to say that by some person or another the words might be understood in a defamatory sense.”

Lord REID put the test this way:

“Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naive. One must try to envisage people between these two extremes and see what is the most damaging meaning they could put on the words in question.”

He finalised his remarks on this aspect of the matter by remarking that what the ordinary man, not avid for scandal, would read into the words complained of must be a matter of impression.

In applying the test, therefore, I place myself in the position of the ordinary, honest, fair-minded and reasonable man in reading the publication and have no hesitation in arriving at the conclusion that the article itself and the meanings of the Words attributed to them by the plaintiff is capable of a defamatory meaning, and that the publication is one which Would tend to lower the plaintiff in the estimation of right-thinking members of society generally—*vide Sim v. Stretch*, 52 T.L.R. 669. It is trite law that in considering whether the publication is capable of bearing a defamatory meaning it must be read as a whole, that is, what comes after must be considered in the light of what went before and *vice versa*.

In the first two paragraphs of the publication the plaintiff is compared with Hitler and Mussolini who as everyone knows, and I can take judicial notice of it, were military dictators in their respective countries and who were adjudged by the world guilty of every major crime known to the law in any civilized country. History records that the lives of both men ended in tragic circumstances; the former by suicide, the latter by homicide. The plaintiff is accused of pretending to be like these two dictators, a friend of the worker while truly representing the landlord and capitalist classes. It is stated boldly that the former dictator burned the Parliament and then accused the communists of having done so, and immediately after that statement the categorical statement appears that the plaintiff D'Aguiar's actions resulted in arson, looting and murder for which he now accuses someone else or some other body of persons, the Progressive Youth Organisation. It is then pointed out that Hitler made the Jews his scapegoat, and immediately after those words the statement is made that D'Aguiar and his fascist friends have long ago singled out as their main focus of attack the Jewess and the foreigner and two names are mentioned. The next four paragraphs are devoted to pointing out that the plaintiff, D'Aguiar, had asked Dr. Jagan for a declaration that he was not a communist but this was no time for a declaration but a time for deeds. The article then declares, "Therefore let their deeds speak for them." The deeds of the two respective leaders are then given. The deeds of Dr. Jagan take the form of a eulogy and cannot be the subject of a complaint by the plaintiff. The deeds of the plaintiff, D'Aguiar, are then introduced by the observation that he has been active in politics for little more than one year and in that time racial antagonisms have been sharpened. The inference must arise then that the racial antagonisms have been sharpened by the plaintiff. The next assertion is that the plaintiff has organised and led a campaign which was designed to bring about the downfall of the P.P.P.'s fully elected Government, and cannot be the subject-matter of a complaint. As I understand it, any person living in a democratic society is by constitutional means permitted to do this (PLATO in his REPUBLIC speaking of democracy expounds the philosophy of equality of political opportunity and freedom for the individual to do as he likes which he regards as the salient features of democracy), but the article does not end there. It states that as a consequence of the campaign (and the inference is to be drawn that the author is referring to the campaign led by the plaintiff) mass hysteria was aroused resulting in

arson and looting and the persecution of a particular section of our community. The reasonable inference therefore to be drawn from those words is that the plaintiff led a campaign with the deliberate intention of causing the downfall of the elected Government and in so doing by his words and actions aroused mass hysteria in the populace which resulted in members of the community committing the offences of arson and looting and the persecution of a particular section of the community for which the plaintiff was primarily responsible. The following paragraph was conceded by counsel for the defendants to be capable of bearing a defamatory meaning when it states categorically that Mr. D'Aguiar had broken a lawful proclamation designed to keep the peace and had incited others to do the same thing.

The contention of counsel for the defendants that at the highest the article would convey to a fair-minded man that the plaintiff campaigned against the Government for the purpose of effecting its downfall in a manner which stirred up the emotions of people and produced hysterical behaviour and that such behaviour on the part of some of the people led them to commit arson, looting and murder, I do not consider sound, in view of the passage which appears earlier in the article which states that D'Aguiar's actions resulted in arson, looting and murder. Counsel's submission might have been on firmer ground had this statement been omitted from the article. The statement of the law laid down in the dictum of BRETT, L.J., in *Capital and Counties Bank Ltd. v. Henty & Sons* (1882), 7 App. Cas. 741, that "it is unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document" can have no application to the circumstances of the present case. This submission must therefore be dismissed, and I arrive at the conclusion that the words appearing in the publication and the meanings attributed to them by the plaintiff in paras. 6, 7, 8 and 9 of the statement of claim are reasonably capable of bearing a defamatory meaning and more particularly the defamatory meaning alleged.

Having arrived at the conclusion that the words of the publication are reasonably capable of bearing a defamatory meaning, I can see no logical reason why I should not find that the words do in fact bear a defamatory meaning. In deciding the ordinary and natural meaning of the words the jury must take into account the ordinary reasonable implications of the words. As COTTON, L.J., said in *Henty's* case in the Court of Appeal ((1880) 5 C.P.D, at p. 536):

".....one must consider, not what the words are, but what conclusion could reasonably be drawn from it, as a man who issues such a document is answerable not only for the terms of it but also for the conclusion and meaning which persons will reasonably draw from and put upon the document."

When the article compares the position and policy of the plaintiff with two well-known odious characters and states that the plaintiff like those two persons pretends to be a friend of the workers while

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truly representing the landlord and capitalist classes, those words must mean, and must be taken to mean, and do in fact mean that in the article the author was saying that the plaintiff, D'Aguiar, was guilty of hypocrisy. In these days when the majority of the electorate are considered to be what is known as "the workers", I can imagine no more damaging statement to a politician. To say that D'Aguiar's actions resulted in arson, looting and murder, for which he now blames the Progressive Youth Organisation, could only mean, and does in fact mean, that his actions, legal and/or illegal, resulted in arson, looting and murder for which he now falsely and hypocritically accuses another body of persons. There is the clear implication in those words that the plaintiff himself committed those criminal offences or conspired with others or incited others to commit the said offences. To speak of Hitler's attack on the Jewish race, the horrors of which are well known to the civilised world, and to say in the same breath that D'Aguiar and his fascist friends have long ago singled out as their main focus of attack the Jew and the foreigner is to place him in the same category as the dictator. And then further on in the article to assert that for the time he has been in politics he has sharpened racial antagonism is to hold him up to the community as a despicable person responsible for any racial hatred that might exist in the country. To say that D'Aguiar has led a campaign against the Government which aroused mass hysteria in the populace resulting in arson, looting and the persecution of a particular section of the community and then immediately to follow that up with the accusation of having broken a lawful proclamation designed to keep the peace and that he had incited others so to do, must convey the impression and mean to the ordinary man that the plaintiff is a reckless, lawless and irresponsible person who is prepared to break the law of the land and commit or cause other persons to commit major crimes for the purpose of bringing about the downfall of the duly elected Government by acts of violence. The publication I therefore find to be in fact defamatory of the plaintiff and does bear the meanings alleged by the plaintiff at paras. 6, 7, 8 and 9 of his statement of claim. In this conclusion I am fortified by the decision in *Blackburn v. London Express* reported in the "Times" newspaper of January 14, 1953, where it was held that to suggest that a politician is politically irresponsible is defamatory.

It follows that the plaintiff is entitled to damages and the question has arisen whether publication of other libels of the plaintiff published by this same newspaper before and after the publication which is the subject-matter of this action are admissible in evidence in order to establish malice in the minds of the publishers at the time of the publication. In the case of *Lee v. Huson* (1792), Peake 223, N.P., it was decided that in an action for a libel, other papers which are themselves libels on the plaintiff might be given in evidence to increase the damages. Lord KENYON, who presided at the trial, said that he thought that the letters which contained the other libels not the subject-matter of the action might be received in evidence, though they contained matter which was a ground for another action. In *Pearson v. LeMaitre* (1843), 5 M. & G. 700 (134 E.R. 742), where at that time there were conflicting decisions on this

question as to the admissibility in evidence of other words actionable in themselves, TINDAL, C.J., set the matter at rest when he stated in his judgment

“that either party may, with a view to the damages, give evidence to prove or disprove the existence of a malicious motive in the mind of a publisher of defamatory matter; but that if the evidence given for that purpose established another cause of action the jury should be cautioned against giving any damages in respect of it (and I here give myself the necessary warning). And if such evidence is offered for the purpose of obtaining damages for such subsequent injury it will be properly rejected.

He went on to say that upon principle the Court of Common Pleas felt that the spirit and intention of a party publishing a libel are fit to be considered by a jury, in estimating the injury done to the plaintiff; and that evidence tending to prove it could not be excluded simply because it may disclose another and different cause of action. The publication of other libels in the issues of 24th February, 1962, 3rd March, 1962, 10th March, 1962, 17th March, 1962, 31st March, 1962, 21st July, 1962, 28th July, 1962, 25th August, 1962, and 1st September, 1962, are therefore admissible in order to show the malice, that is, the intention and spite and ill-will that existed in the minds of the defendants at the time of the publication of 24th March, 1962. That these publications are libels and accuse the plaintiff of Hitlerite tactics is clear, and I need not refer to them in detail, but it is sufficient for me to say that at the bottom of each issue the words in bold type “SUPPORT P.P.P., BOYCOTT D’AGUIAR”, along with the libels appearing therein are strong evidence of a sustained attack on the character of the plaintiff, both as a politician and a businessman following a vitriolic pattern and show the malice that existed in the minds of the defendants at the time they published or caused to be published the libel which is the subject-matter of this action.

In MAYNE AND MCGREGOR, the leading text-book on damages, it is reported at p. 899 of the 12th edition:

“It is however reasonable to regard the malice of the defendant as increasing the suffering and the humiliation of the plaintiff, and to this extent it is material to the question of compensation.”

In *Barrett v. Long* (1851), 3 H.L.C. 395, Baron PARKE laid it down that a long practice of libelling the plaintiff may show in the most satisfactory manner that the defendant was actuated by malice in the particular publication, and that it did not take place through carelessness or inadvertence; and the more the evidence approaches to a systematic practice, the more convincing it is. The circumstances that the other libels are more or less frequent, or more or less remote from the time of publication of that in question, merely affects the weight, not the admissibility of the evidence. GATLEY ON LIBEL AND SLANDER (5th Edn.) at p. 625, states that in an action of libel the assessment of damages does not depend on any legal rule. The

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amount of damages is peculiarly the province of the jury who in assessing them is entitled to consider all the circumstances of the case. The jury is entitled to take into consideration the conduct of the plaintiff, his position and standing, the nature of the libel, the mode and extent of publication, the absence of any retraction or apology and "the whole conduct of the defendant from the time when the libel was published down to the very moment of the verdict." The jury may also take into consideration the conduct of the defendant before action, after action, and in court at the trial of the action.

On an examination of the conduct of the plaintiff counsel for the defendants sought to cross-examine the plaintiff on the findings of the Commission of Enquiry that sat in the Colony in June, 1962, for the purpose of investigating the causes of the disturbances in the Colony on 16th February, 1962, and succeeded in obtaining from the plaintiff an admission that the Commission had made certain uncomplimentary remarks about all the leaders of the various political parties including himself. On this evidence, counsel urged that any damage done to the plaintiff's capacity as a politician and/or businessman may have flowed from these findings of the Commission. I can see no justification from drawing this inference for the reason that the Commission sat in June 1962 and did not publish their report until November 1962 when it was made available to the public and in their conclusions in the report they did not find the plaintiff in any way responsible for the events that took place on that memorable day. The plaintiff on the other hand, stated in evidence, and it is not rebutted, that before this publication the supporters of the P.P.P. took the view of him that he was a good man and a good employer who paid his workers well but his party was useless. After the publication they adopted the attitude that he was a man to be hated, despised and destroyed as he was a man whose actions were responsible for looting, arson and murder in the disturbances of February 1962. This change of attitude took place some time before the Enquiry and long before the publication of the report of the Commission of Enquiry.

As to the position and standing of the plaintiff, the evidence is that he is chairman and managing-director of a private company of which he holds a large number of shares. He is also the chairman of a public company in British Guiana which brews and manufactures beer and stout and is the holder of a very large number of shares in this company. He is also the chairman of another public company incorporated in the island of Barbados which brews and manufactures beer. He is a member of the Legislative Assembly, being the member for Central Georgetown, and the leader of a political party. He is then a man of high standing in the community and he has stated in evidence that after this publication the business of D'Aguiar Bros. Ltd., of which he is chairman and managing-director, suffered a drop in business and their advertisement signs which had been erected along the various coasts of British Guiana had been maliciously destroyed by acts of vandalism, presumably done by persons who had read the article complained of. The company of D'Aguiar Bros. Ltd. is a complete and separate entity from

the plaintiff, consequently any loss suffered by the company would not be a loss sustained by the plaintiff. Nevertheless the plaintiff is employed by the company and it is reasonable to infer that any loss suffered by the company must of necessity affect the prestige of the plaintiff in his capacity as a businessman.

Libel is a tort actionable *per se* without proof of special damage where there is a presumption of law in the plaintiff's favour that damage must result from the publication of the libel upon him. "The plaintiff may be entitled to very substantial damages although his income has not been affected by the libel." (*Per* Lord REID in *Lewis v. Daily Telegraph*, [1963] 2 W.L.R., at p. 1072). In his capacity as a politician the plaintiff's un rebutted evidence is that he has lost more than money can repay and that his stature as a politician after the publication has seriously declined and is less now than before the article was written. Since the publication he has been subjected to hostile attacks by supporters of the P.P.P. when addressing them in districts in which they are predominant. The insulting word "fascist" has been hurled at him.

As to the nature of the libel itself, I find it to be a scurrilous attack on the character of the plaintiff both in his capacity as a politician and a businessman made without foundation and one of a series of libels published by a political newspaper against the plaintiff which was deliberately aimed at destroying or, in the words of the plaintiff, assassinating the character of the personality of the individual against whom the attack was levelled. At one time as a result of a novel suggestion by ATKINSON, J., in *Rook v. Fairrie*, [1941] 1 K.B. 50, it was thought that in a case tried without a jury, as the judge could speak his mind about the defendant the consequence should be a reduction in the amount of damages, but two years later in the case of *Knupffer v. London Express*, [1943] 1 K.B. p. 91, GODDARD, L.J., as he then was, destroyed this belief when he stated in his judgment that he found it difficult to subscribe to this view and felt that "if as a war-time measure a litigant might dispense with a jury he ought not, so far as is humanly possible, to be at any disadvantage for that reason, but as there are limits to the powers of a jury as regards damages, so there are to those of a judge."

In my view it was a grave and serious libel and must have greatly damaged the reputation of the plaintiff in his capacity as a politician and businessman. The circulation of this newspaper must of necessity be large as it is the organ of the ruling political party. The defendants had ample opportunity of offering an apology to the plaintiff and retracting the statements made in the publication at the time of the filing of their statement of defence and even afterwards when they found that they could not justify the statements made therein. It is surprising that they did not do so as the alarming statement was made by their counsel from the bar table that they had no knowledge of the individual who was the author of the article nor were they aware as to the circumstances in which the article was printed and published. Even when the Commission

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of Enquiry released their report to the public and did not say in their conclusions that the plaintiff was responsible for the disturbances on February 16, 1962, the defendants did not seek to offer an apology to the plaintiff which could be taken into account in mitigation of damages.

I therefore take all these circumstances into consideration in assessing the damages which must of necessity be exemplary, bearing in mind that the damages must be increased because of the introduction of other libels before and after the publication of the offending article, and I enter judgment in favour of the plaintiff against both defendants jointly and severally and award him the sum of \$14,400 as damages which may in some measure compensate him for the grave injury that he has suffered. The plaintiff is also entitled to his costs and as I consider that it is a matter in which senior counsel should be assisted by junior counsel, I certify fit for two counsel.

The plaintiff has stated that his primary purpose in launching this action was not so much to vindicate his character publicly, as that these publications should cease, and I therefore grant an injunction to restrain the defendants, their servants and agents from printing, circulating, distributing and otherwise publishing the said libel affecting the plaintiff.

Stay of execution for six weeks granted.

Judgment for the plaintiff.

Solicitors: *Carlos Gomes* (for the plaintiff); *Sase Narain* (for the defendants).

Re ARGYLE (deceased)

[Supreme Court—In Chambers (Luckhoo, C.J.) September 17, 23, October 4, 1963.]

Will—Executed in Demerara in 1887—Governed by Roman-Dutch law—Entire property devised to wife in one part of will—Property devised to children and grand-children in later part of will—Extent of interests of devisees.

The deceased, who died in 1887, made a will in Demerara in that year whereby he gave all his property to his wife. In a later part of the will he however said: “I give and bequeath to my beloved children.....and their children, grandchildren children’s heir my property to be equally divided amongst them share and share alike and in the event of anyone should die leaving no lawful issue or issues his, her or their shares shall be equally divided between the survivors.” On application by an heir for directions—

Held: (i) the will was governed by Roman-Dutch law;

(ii) the testator intended that his wife should take a life interest in the property;

(iii) the testator's grandchildren was instituted together with their parents and they were not all called together to the inheritance; one took before the other. The children were alone called to the inheritance, but if one of them died his share went to his lawful issue.

Order accordingly.

E. A. Triumph for the applicant.

LUCKHOO, C.J.: The applicant, who describes himself as one of the heirs of Providence Argyle (deceased), seeks the meaning and interpretation to be placed upon the following clause of the last will and testament of the deceased, made on the 9th November, 1874, in the county of Demerara and deposited with proof of due execution on the 20th October, 1887, in the Registrar's Office (now the Supreme Court Registry) at Georgetown, Demerara, the deceased having died on the 7th October, 1887—

“Thirdly I give and bequeath to my beloved children Alexander Argyle, Jane Bacchus, Judy Rutherford, Charlotte Rutherford, Peter Providence Argyle, Martha Elizabeth Argyle, Mary Ellen Argyle and William John Argyle and their children, grandchildren children's heir my property to be equally divided amongst them share and share alike and in the event of any one should die leaving no lawful issue or issues his, her, or their shares shall be equally divided between the survivors. I further direct that William John Argyle shall receive one-eighth more of my property than the other children exclusive of the dwelling house on Plantation La Jeannette.”

The applicant also seeks directions as to the persons who are beneficiaries under the said will and the appointment of the applicant to effect any sale of the aforesaid property on behalf of the persons entitled thereto.

The affidavit filed in support of the application is wholly lacking in material which could found an order in respect of the directions and appointment sought so that the matter is reduced to the meaning and interpretation to be placed upon the clause set out above considered in the light of the following provision in the deceased's will which comes immediately before the clause set out above—

“Second I will and bequeath to Cecilia Argyle my dearly beloved wife my entire estate comprised of the South half of Plantation La Jeannette, situate in Mahaica Creek, a piece of land situate on the West bank of Mahaica Creek near the old Ferry and lot number thirty-six North and South, part of Plantation Virginia situate on the Western bank of the Mahaica Creek (for and during the term of her natural life), together with all my houses, household goods, debts, and moveable effects.”

At the time of the death of the deceased on the 7th October, 1887, the law governing wills executed in Demerara was the Roman-Dutch law.

From the terms of the disposition of the immovable property specified in the second clause of the deceased's will, the deceased intended that his wife should take a life interest in that property.

Re ARGYLE (deceased)

The property referred to by the testator under "Thirdly" is the immovable property specified under "Second", for under "Second" the testator purported to dispose of his "entire estate" creating a *fideicommissum*, or inheritance over the land, under "Second."

Under "Thirdly" the testator's grandchildren are instituted together with their parents and it is not considered that they are all called together to the inheritance. One takes before the other. There is a direction in the clause as to what is to take place if anyone should die leaving no lawful issue—his share is to be equally divided among the survivors. The children are alone called to the inheritance but if one of them dies his share goes to his lawful issue. See VAN LEEUWEN at para. 13 on p. 384 of Vol. I of his treatise on the ROMAN-DUTCH LAW—

"13. If children are instituted together with their parents, as if the testator says, 'I appoint John, his children and further descendants, as my heir', it is not considered that they are all together called to the inheritance, but the one before the other, and on failure or predecease of one the other comes in his place by substitution. So that no direction of inheritance by way of *fideicommissum* from the one to the other takes place, unless such clearly appears from other circumstances: 1. *ult. Cod. de Verbos. Signific.* 1. 32 para. *ult. D. de legat.* 21. 8. 1. 3. *de Jure Codicillor. Vid. Peregrin, de fideicommiss.* art. 20. *Mantic, de conject. ultim. voluntat. lib.* 8. tit. 14. *num.* 10 *Joan a Sande*, lib. 4. tit. 5. *defin.* 6. *Anton. Fab. ad Cod.* lib. 6. tit. 22 *defin.* 10. 11. As was decided by the Court of Holland on 30 April, 1659, in the case of *Korstiaan Dirxz van Zyl cum, sociis*, plaintiff, against the further heirs of *Kryn Hendricks van Suanenburg*, defendants, in which the said Kryn Hendricks van Suanenburg had among others appointed as his heirs the children and grandchildren of Frank Meesz van Blommendaal, and it was held that, in the lifetime of both, the children of Frank Meesz alone were called to the inheritance to the exclusion of the grandchildren, who were considered only to have been called on the predecease of their parents."

At para. 14 on pp. 384 and 385 of VAN LEEUWEN'S, it is stated—

"14. But as regards the question whether representation or *plaatsvulling*, whereby the children together come to inherit *per stirpes* in their parents' place along with their uncles, takes place in entailed or *fideicommissary* inheritance, the common opinion is that, as the testator has called his nearest relatives *per fideicommissum* to the inheritance without selecting one particular person from among them, or stating how the inheritance shall be shared between them, he must be taken to have acted according to the general law of succession *ab intestato*: 1. 8. 1. 3. *D. de Jure Codicillor.* 1. 57. para. 2. *D. ad Senat. Trebell.* 1. 77. para. pen. *D. de leg.* 2, and in such case representation will take place, like and in so far as it would have done by succession without a will."

The interpretation to be given to the clause "Thirdly" in the deceased's will is perhaps only of academic interest. What has been done with the property since 1887 is of vital importance and on the facts set out in the application, as has already been observed, it is not possible to deal with any aspect of the application other than the question of the interpretation to be given to the words used in the clause "Thirdly."

Order accordingly.

DE CLOU AND ANOTHER v. DEMERARA BAUXITE CO.

[Supreme Court (Date, J.) September 24, 25, 1962, March 11, 12, 13, 14, 15, 16, June 5, 6, 7, October 15, 1963.]

Immovable property—Minerals—Land transported with reservation in favour of transporter of exclusive and unrestricted right to mine bauxite—Owner of reservation later acquires transport for undivided share in the land—Whether reservation amounts to servitude capable of extinction by non-user—Whether reservation extinguished by merger—Whether owner of reservation entitled to do open cast mining.

Evidence—Reservation in transport of right in favour of transporter to mine bauxite—Whether reservation limited to underground mining—Evidence taken de bene esse that when reservation was made bauxite could only be mined by open east method—No evidence that transportee knew this—Whether evidence admissible.

In 1914 M., for a small price, transported to the plaintiffs two undivided seventh shares in two lots of land known as Lower Coomacka, subject to a reservation in M.'s favour of "the exclusive and unrestricted right to mine on and take from the lands.....free from any charge or payment all bauxite and other ore, minerals and clay." No provision was made for the payment of compensation to the transportees in respect of the exercise of the right so reserved. In 1915 M. transported the reservation to N. In 1917 N. transported it to the defendant company which had been incorporated in 1916. In order to take advantage of the provisions of s. 23 of the Deeds Registry Ordinance, Cap. 32 (which came into force on 1st January, 1920) the defendants in 1920 transported the reservation back to N. who at once re-transported it to the defendants. In 1923 the defendants acquired transport for one undivided seventh share in the land and in 1949 they acquired transport for another undivided seventh share, the shares so acquired being stated in the transports as subject to the reservation. In 1916 and 1939 the defendants did exploratory work on the land, including the digging of test pits and the drilling of bore holes. In the meanwhile they had been working on certain adjoining lands, developing their mining operations in the direction of Lower Coomacka. Between 1955 and 1958 they carried out extensive open cast mining in Lower Coomacka, extracting considerable quantities of bauxite but doing substantial damage to the surface.

In 1958 the plaintiffs sued for damages for trespass and conversion and for related reliefs. On behalf of the defendants expert evidence was given *de bene esse* to the effect that in and since 1914 it was impossible to mine bauxite in British Guiana by underground methods, but it was not established that this was known to the plaintiffs in 1914, and on account of this it was on their behalf objected that the evidence was inadmissible. It was further argued for the plaintiffs that the reservation created a servitude which was extinguished by non-user; alternatively, that the reservation merged into the undivided shares in the land which were acquired by the defendants in 1923 and 1949; and that in any event the reservation authorised underground mining only.

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Held: (i) the reservation created not a servitude, but real rights analogous to what are known to the English law as profits a prendre in gross;

(ii) even if the reservation created a servitude, this was not extinguished by non-user because on the evidence there was no intention of abandonment on the part of the defendants;

(iii) even if the reservation created a servitude, the principle of merger did not apply to this case because (a) only an undivided interest was acquired by the defendants, and (b) in any event, the doctrine of merger arises only in relation to praedial servitudes;

(iv) the language employed in the reservation must be construed in the context of conditions as they existed in British Guiana in 1914. Thus construed, the language did not intend that bauxite should be extracted only by underground mining;

(v) the *de bene esse* evidence was admissible.

Judgment for the defendants.

J. O. F. Haynes, Q.C., and Ashton Chase for the plaintiffs.

J. H. S. Elliott, Q.C., and R. M. F. Delph for the defendants.

DATE, J.: By transport No. 839 of 28th November, 1914, from George Bain Mackenzie, the plaintiffs, who are brothers, are the owners of two undivided seventh shares in lands known as the Lower Coomacka lands' comprising an area of about 1,586½ acres. These lands are shown as lots 49—50 on the certified copy of a plan by J. C. Allen, sworn land surveyor, which constitutes Exhibit 'A' in this case. The lots numbered 51 and 52 on the plan are known as Upper Coomacka lands.

Transport No. 839 of 28th November, 1914, contains the following reservation:

“with reservation to the said George Bain Mackenzie and his heirs, executors, administrators, representatives and assigns of the exclusive and unrestricted right to mine on and take from the lands hereby transported free from any charge or payment all bauxite and other ore, minerals and clays and subject to all rights of way on, over and across the said lands at all times which the said George Bain Mackenzie may consider necessary for the purpose of mining and taking from the said lands the aforesaid substances and things.”

The plaintiffs claim to be entitled also to transport to and to be the equitable owners of two further undivided forty-second shares of the Lower Coomacka lands. They claim to have inherited these two undivided forty-second shares from their mother, the late Jane de Clou, who held them subject to the aforesaid mining reservation. The plaintiffs' claim to these two undivided forty-second shares is not admitted by the defendants nor has it been satisfactorily established by the evidence.

By transport No. 366 of 1915, the mining reservation was transported by George Bain Mackenzie to Wilthrop Cunningham Neilson and by transport No. 133 of 1917 Neilson transported it to the defendant company, which was incorporated in 1916.

In order to take advantage of s. 23 of the Deeds Registry Ordinance (which came into force on 1st January, 1920, and provided that every transport of immovable property other than a judicial sale transport passed from and after that date shall, subject to certain statutory claims and registered interests, vest in the transferee the full and absolute title to the immovable property or to the rights and interests described in the transport) the defendants by transport No. 303 of 1920 passed the mining reservation back to Neilson, and that same day Neilson by transport No. 304 of 1920 re-transported it to the defendants.

In 1923 the defendants became the owners by transport of one undivided seventh share and in 1949 of another undivided seventh share in the Lower Coomacka lands. Since then they have purported to purchase three further undivided seventh shares from certain persons who claim to be heirs *ab intestato* of persons who owned those shares, but the shares have not yet been vested in the defendants.

It is conceded by counsel for the defendants that the plaintiffs, who are co-owners with the defendants, have at all material times been living at Lower Coomacka and that in that sense they are co-possessors. Their residence is on flat land near the river. It is also common ground that the defendants own and exercise mining rights in respect of the adjoining lands known as Upper Coomacka.

In their pleadings the plaintiffs aver that upon the incorporation of the defendant company in 1916 the defendants dug a few exploratory or test pits at Lower Coomacka and took some samples of bauxite but that these mining operations ceased after about nine months and that thereafter the defendants never carried out "any further mining operations until in or around the month of May, 1955," when they "began to make large excavations into the ground from the surface." They aver that "from around the month of May, 1955, up to the present time the defendants have continued to mine bauxite on the said lands, have dug up and carried away several millions of tons of the soil of the said lands with the ore bauxite found therein, have made vast excavations about 70 feet deep from the surface and have cut down and destroyed the plaintiffs' timber and flooded the said lands."

They further aver that from about May, 1955, to the present time the defendants have by these operations extracted and carried away several million tons of bauxite and have sold and exported the same and have earned large profits to the extent of several millions of dollars which they have received and used for their sole benefit, rendering no accounts to the plaintiffs.

In their pleadings the plaintiffs also aver that the Lower Coomacka lands are now in danger of being rendered completely useless

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for building or cultivation purposes by the past and present mining operations of the defendants. The plaintiffs claim (a) \$100,000 damages for trespass to and conversion of their undivided shares or interest in the Lower Coomacka lands, and for waste and wrongful subsidence of the said lands; (b) a declaration that the defendants are trustees for the plaintiffs in respect of one-third part or share of the net profits earned by the defendants by the aforesaid mining of bauxite on the said lands; (c) an account of the net income derived from the said mining operations from the month of May, 1955, to the date on which such mining ceases; (d) payment to the plaintiffs of one-third part or share of the income or net profits shown upon such accounts; (e) an injunction restraining the defendants, their servants and agents from carrying on mining operations upon the said lands, at all or in the manner as aforesaid, and from interfering with the peaceful enjoyment of the lands by the plaintiffs, and from committing any acts of waste thereon; and (f) a declaration that the right to mine contained in the transport of the 28th November, 1914, is a servitude or usufruct or profit a prendre, and an order cancelling the same.

The main submissions made by counsel for the plaintiffs fall under three distinct heads. Under the first it was contended that the mining right transported to the defendants in 1920 is a servitude under Roman-Dutch law (which applies to this case) and that owing to non-user of the servitude it was extinguished either in 1944 or 1947 depending upon whether the correct period of prescription is held to be 30 years as suggested by some writers, or 33 years as suggested by others. Counsel maintained that the period of prescription must run from 1914 and not 1920 because the defendants, he said, are the assignees of the servitude that was created in 1914 in favour of George Bain Mackenzie.

The real questions for determination under this first head are, I think, whether the mining reservation is a servitude subject to extinguishment by non-user and, if so, whether the period of prescription is thirty or thirty-three years and whether there has in fact been non-user of the right for any such continuous period.

On this subject the available authorities are, to say the least, obscure. At p. 159 of HALL AND KELLAWAY ON SERVITUDES (second Edn.) appears the following:

“MINERAL AND MINING RIGHTS

Rights to prospect for and mine minerals can be separated from the ownership of the land and can be made the subject of a separate title. This may be done in respect of the whole or a portion of such land and of all or any particular minerals (s. 70, Act 47 of 1937 [South Africa]).

If these rights are constituted by the owner of one property in favour of another they are praedial servitudes, but the ordinary method is to grant them to a beneficiary personally when they are of the nature of personal servitudes. They are, how-

ever, freely assignable and pass to the beneficiaries' heirs (*van Vuuren v. Registrar of Deeds*, 1907, T.S. 289) and in *Well and Beaver Investments Ltd.*, 1953 (1) S.A. 164 (T) and 1954 (1) S.A. 13 (T), it was stated that they are actually quasi-servitudes. Owing to the fact that personal servitudes cannot be enjoyed beyond the lifetime of the beneficiary, it is difficult to see how they can really be regarded as personal servitudes at all. It is more correct to describe them as real rights *sui generis* and to recognise that they possess some of the characteristics of a personal servitude."

Unfortunately the authors of this excellent little book on servitudes in South Africa did not consider it expedient to develop the point and specify which characteristics of a personal servitude are possessed by mineral and mining rights. At p. 129 (*ibid.*) the authors express the view that a servitude may be lost by non-user for a period of 30 years. On that same page, however, reference is made to dominant and servient tenements in a manner that suggests that in dealing with the whole question of non-user the authors had in mind only praedial servitudes, and on the very first page of the book appears this warning:

"In the books it is often stated that servitudes have certain characteristics; these statements are correct when applied to praedial servitudes but are not necessarily so when applied to personal ones. This is because many of the old writers did not take personal servitudes into account and used the word 'servitudes' as referring to praedial servitudes exclusively."

In LEE'S INTRODUCTION TO ROMAN-DUTCH LAW (fifth Edn.) at p. 182 it is said that—

"a grant of mineral rights constituted in favour of the beneficiary personally and not in his capacity as owner of another property, would be in the nature of a personal servitude, but freely assignable and passing to his heirs. These rights are peculiar to the circumstances of the country [South Africa] and do not readily fall under any of the classes of rights discussed by the commentators."

The case cited in support of this statement is *Lazarus and Jackson v. Wessels*, (1903) T.S. 510; it is, of course, not available locally.

The other writers referred to by counsel on both sides are no more helpful on this point, and they seem to think that the period of prescription for non-user of a praedial servitude is one-third of a century, and not thirty years as suggested by HALL AND KELLAWAY. On the authorities available I am inclined to agree with the view expressed in HALL AND KELLAWAY that mineral and mining rights are strictly speaking not servitudes at all but are real rights *sui generis*. Where there is, as in this case, no dominant tenement, they are, I think, analogous to what are known to the English law as profits a prendre in gross.

In any case, what are the relevant facts in the matter now before me?

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On behalf of the plaintiffs evidence was given by the second-named plaintiff who is about 73 years old, and by Durant Brathwaite, David de Clou, James Edward Allicock, Hubert de Clou, John Duggan, Joseph Sampson and Ernest de Clou. The second-named plaintiff stated that some "prospecting" was carried out by the defendants on parts of Lower Coomacka around 1916 when they dug large and deep holes to get samples to take to their laboratory. He said that apart from this the defendants did nothing on the Lower Coomacka lands until 1952 when they began to clear some of the land and make preparations for opencast mining, which actually started in 1955; in this respect he was supported by Brathwaite, David de Clou, Allicock and Duggan. Brathwaite, a Grenadian, had come to British Guiana in 1925. That very year he worked with the second-named plaintiff and Charles de Clou cutting wood at Lower Coomacka. He became very friendly with the de Clous and lived with them from 1925 to 1928 when he began to work as a driller with the defendant company; his friendship with the de Clous continued. That drilling for the defendant company was done on lands other than the Lower Coomacka lands. Brathwaite said he saw no drilling at Lower Coomacka until 1952. He claimed he knew the boundary line between Upper and Lower Coomacka. He asserted that it was in 1952 that he drilled for the first time at Lower Coomacka. He explained the various stages of the defendants' operations: how the land had to be cleared of trees and bush and the earth (presumably the overburden) removed before the drilling commenced. He said he saw "bush forest" and earth being removed at Lower Coomacka in 1952 and 1953 preparatory to the drilling of the land. The drilling at that time was by a process called "paramanco"; the drilling went to a depth of between 12' and 28' depending on the depth of the bauxite in the area. After drilling, blasters came with explosives and blasting operations commenced. "After blasting is finished", to use Brathwaite's own words, "it [the land] is prepared for mining. It is mined by diesel shovels." He also explained how railway lines were put down as the defendants moved from mine to mine and that there were no railway lines (*i.e.*, mining lines) in Lower Coomacka before 1952 or 1953. Brathwaite said he stopped drilling at Lower Coomacka in 1958 when Boyles Bros, took over drilling operations. They are still drilling there but are using "porta" drills instead of "paramanco." Brathwaite maintained that he saw no drilling or mining operations at Lower Coomacka in 1939; he said that if opencast mining had been done there before 1952 he would have seen evidence of it; he saw none.

Under cross-examination he replied:

"Land is not mined until after exploratory drilling is done. The holes from the exploratory drilling disappear after a while. There might have been exploratory drilling before I came on the scene. There must have been exploratory holes drilled before I went there. The holes would not be visible sometime later. I am not in a position to say whether or not exploratory holes were drilled in 1939. I believe the defendants started to clear the bush around 1952 but I am not definite. It did not become

me to make that checking. I saw workmen clearing between 1952 and 1953.”

David de Clou, who is related to the plaintiffs and lives at Upper Coomacka, and James Edward Allicock, another relative of the plaintiffs, produced three written agreements—one dated 1st June, 1953, and the other two dated 25th March, 1955—to show that in those years they were employed by the defendants as contractors to cut and burn bush and trees at Lower Coomacka. John Duggan testified that in 1952 and 1953 he assisted David de Clou in such work. The burden of this evidence was to show that the first stage of the work (before even drilling was done) was started only in 1952 and that there could therefore have been no mining at Lower Coomacka before that time. David de Clou added that if holes had been dug for exploring he would have recognised them. He said that in clearing bush at Lower Coomacka he saw only testpits; between 1939 and 1952 he used to go about the Lower Coomacka lands regularly for the purpose of hunting; he saw no mining there during that period. Allicock and Hubert de Clou also asserted that they saw no mining at Lower Coomacka before 1952. Hubert de Clou testified that during 1949 the defendants were still working at Upper Coomacka but were near to the boundary line between Upper and Lower Coomacka; he saw no mining at Lower Coomacka until 1955.

Counsel for the plaintiffs submitted that even if there was exploratory drilling at Lower Coomacka by the defendants before 1944 that would not amount to an exercise of their mining rights under the reservation transported to them. Indeed, he went further and contended that even the clearing and stripping operations prior to opencast mining did not amount to an exercise of their reservation.

For the defence evidence was given by Gerald Hammond Herbert and Peter Antoon Snijders. Herbert first went to live at Mackenzie in 1927 and joined the defendant company in February, 1934. After spending about six months in the railway department of the company as a clerk he was transferred to the survey department. In May, 1939, he was posted to the exploration department which is responsible for prospecting for bauxite. Though not a qualified surveyor he was in charge of surveying, drilling and the transportation of equipment; in short, he was in charge of prospecting for bauxite. Before joining the company he had had long experience in survey work. An officer in charge of surveying he had about 150 men under him, including a Mr. Nehaul (now deceased) who qualified as a sworn land surveyor while in the employ of the defendants. Herbert could not be sure when it was that Nehaul qualified, but thought that in December 1938 he had already qualified. Herbert explained how he and his men laid down a base line and cross lines and put pegs at points 100-200 ft. apart along those lines when drilling was being done to indicate where the holes were drilled. He produced three documents drawn by Nehaul and himself—Exhibits ‘J’, ‘K’ and ‘L’—which he referred to at first as plans, then as photostatic copies of a tracing or tracings, and finally as blue prints. It was obvious

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that Herbert, though a good practical man who was endeavouring to speak the truth, was unfamiliar with the correct terminology of such documents and that Exhibits 'J', 'K' and 'L', as explained by Snijders, a graduate in mining engineering who now holds the post of chief mining engineer with the defendant company, are indeed blue prints, having been made from an original tracing by direct contact. It is clear that what happened was that an original tracing was made in December 1938 and that as exploratory drilling progressed blue prints were used to show the progress of the work. Where bauxite was found the holes were marked with colours on the blue prints, each hole being given a letter and a number. No two holes were given the same letter and number. Where bauxite was not found the holes were not coloured on the blue prints. Exhibits 'J', 'K' and 'L' also bear the initials "H.R.H."—the initials of the defendant company's geologist, H. R. Hose—as having been approved by him.

Herbert used Exhibits 'J', 'K' and 'L' to refresh his memory but maintained that he could from personal experience recall that he and other officers of the defendant company were working at Lower Coomacka in 1939 and that exploratory drilling took place there during that year. In this regard he was, he said, assisted by the fact that he was transferred in 1945 to the shipping department of the defendant company.

Both Snijders and Herbert were subjected to exhaustive cross-examination with regard to the blue prints. To a large extent that probing was invited by Herbert whose innocence of correct terminology led to some confusion.

Exhibit 'L' is of special significance. It bears the signatures of the head of the department (H. R. Hose) and of the superintendent, and immediately above their signatures appear these words and figures:

"Tracing up to date May 1939.
To report for the month of April 1939."

Exhibit 'L' purports to show that by May 1939, some twenty exploratory holes had been dug at Lower Coomacka. Herbert stated that Exhibit 'L' in fact accompanied the report for April 1939, and that the holes marked on Exhibits 'J', 'K' and 'L' were drilled between the 11th December, 1938, and 1st May, 1939. He actually saw the report for April 1939, though he did not prepare it.

Herbert further produced thirteen drill hole logs prepared by the foreman Donald I. Abrams (now deceased) who worked under him and whose signature he knows. Those logs constitute Exhibits 'M' 1—13 in this case; they cover the period 11th April, 1939, to 3rd May, 1939, and relate to the holes marked C1 to 13 on Exhibit 'L'. Snijders confirmed that these logs show the dates on which the bore holes were completed.

Snijders came to British Guiana in 1948 and joined the defendant company as mining engineer. He said that when he arrived overburden had already been removed from parts of Lower Coomacka. He was appointed chief geologist early in 1951. As chief geologist he was in charge of the originals of all tracings. He explained that Exhibits 'J', 'K' and 'L' are blue prints of an original tracing dated 10th December, 1938. He could not recollect ever having seen that original tracing and despite thorough search was unable to find it. He maintained, however, that once blue prints of a tracing are made it is unnecessary to use the original, that the blue prints are normally used and are more helpful for the purpose of showing the extent to which exploration had progressed at any given time; from month to month the work done is inserted on the original tracing but without the insertion of the dates on which such work is done, whereas each blue print shows the work done up to a given date only.

After the fullest consideration of all the evidence, both the plaintiffs' and defendants' on this point, I have no doubt whatever that the defendants did exploratory drilling at Lower Coomacka in 1989. Whether or not that in itself constitutes "mining", it is clear that the drilling of the exploratory holes was done in the exercise of their rights under their transport of the mining reservation. They could not have done that drilling unless they had the mining rights. It follows, therefore, that even if the reservation is subject to extinguishment by non-user for a period of thirty or thirty-three years there was in this case no such period of non-user. "VOET states that if a dominant owner has an *actus* and an *iter* over the same route and he exercises the *iter* only during the period of prescription he does not lose the *actus*": HALL AND KELLAWAY (second Edn.) p. 130. In BURGE'S COLONIAL LAWS, Vol. IV, Part II, at p. 535, the view is expressed that the important thing is whether there is evidence of an intention of abandonment by the owner of a servitude. In the English case of *Seaman v. Vawdrey* (1810), 16 Ves. 207, GRANT, M.R., declined to infer extinguishment of a mining reservation and said [at p. 209]:

"It is well known that the mines remained unwrought for generations; that they are frequently purchased, or reserved, not only without any view to working but for the express purpose of keeping them unwrought, until other mines shall be exhausted; which may not be for a long period of time."

In the instant case the evidence as a whole is in my opinion strongly against any intention of abandonment on the part of the defendants. All the evidence goes to show that throughout their mining operations the defendants were working from south to north—moving towards Lower Coomacka while they carried on opencast mining operations at Upper Coomacka. It would in my opinion be quite unreasonable to draw any inference of abandonment in relation to the Lower Coomacka lands.

Both on questions of law and fact, therefore, the plaintiffs' submissions in regard to extinguishment by non-user must in my opinion fail.

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The second broad submission of counsel for the plaintiffs was that from the moment the defendants acquired part-ownership in the land itself they became co-owners with the defendants, their mining reservation merged into their ownership of the land, and thereafter they were entitled to the profits of their mining operations only to the extent of their shares in the land and would have to account to all other co-owners. He cited many cases including *In re Downer*, 1919 L.R.B.G. 165, *D'Aguiar v. Obermuller*, 1948 L.R.B.G. 68, *Barry v. Mendonca*, 1923 L.R.B.G. 108, to show that every co-owner has an undivided interest in every inch of the land and is entitled to possession and use of any part of the land. He argued that there cannot be vested in any one person ownership of a portion of land and a servitude over that same land. He said that because of the strict rule of Roman-Dutch law that a man cannot have a servitude over his own land, the moment that man acquires an undivided interest in the ownership of the land his servitude disappears. On this basis, therefore, counsel contended that any mining operations by the defendants at Lower Coomacka subsequent to their acquisition of their first one-seventh undivided share in 1923 must in law be regarded as operations as co-owners. For support for this submission counsel for the plaintiffs relied largely on the following passage appearing at p. 131 of HALL AND KELLAWAY (second Edn.):

“Because no one can have a servitude over his own property, as soon as the same person becomes the owner of both the servient and dominant tenements the servitude is extinguished by merger (VOET, 8.6.2; HUBER, 2.45.3). *It is essential that there should be identity or title or otherwise there is no merger.* VOET says that it does not take place where two properties in respect of which servitudes exist have been held by separate people and then become their common property, or if the dominant and servient owners transfer to each other separate portions of their respective properties, or if one partner acquires the dominant and the other the servient tenement separately but the tenements are not included in the partnership assets. Again, if a servient tenement has been sub-divided and the owner of the dominant tenement purchases one of the sub-divisions, the servitude remains over the other sub-divisions provided they are large enough to allow of its being exercised (VOET, 8.6.3). Where, however, the owner of the *praedium dominans* acquires the ownership of the sub-divided part of the *praedium serviens* in respect of which the servitude is exercised, and does not acquire another portion of the land over which it is not possible to exercise it, the merger is operative and complete (*du Toit v. Visser*, 1950 (2) S.A. 93 (C)).”

Attention was also attracted to the following statement concerning merger in BURGE'S COLONIAL LAWS, Vol. IV, Part II, at p. 534:

“It is also extinguished by merger (*confusio*); that is, through common ownership of the dominant and servient tenements being united in the same person.”

Note (o) on that page, however, is significant:

“There was no extinction where the owner of the dominant land acquired only a part of the servient land, because servitudes, being indivisible, could not be partly extinguished and partly retained.”

Of interest in this connection is also a statement in 12 HALSBURY'S LAWS (third Edn.), p. 630, para. 1375, on the subject of profits a prendre under the English law:

“There can be no extinguishment by unity of ownership, however, unless the estate of the common owner in the servient tenement is at least as much as his estate in the profit a prendre.”

In this connection it is not unimportant to observe that no protest was lodged by the plaintiffs after the defendants acquired their one-seventh undivided interest in 1923 or further one-seventh undivided interest in 1949. This would seem to point to acquiescence on their part in the acts done by the defendants under the mining reservation. Equity leans against a merger.

It seems to me that even if the reservation in question could be regarded as a servitude the principle of merger does not apply to this case because (a) only an undivided interest was acquired by the defendants, and (b) in any event, the doctrine of merger arises only in relation to praedial servitudes. If it were otherwise the defendants would in 1923 and 1949 have purchased liabilities and not assets. A further aspect worthy of note is that the transports of 1923 and 1947 relating to the undivided interests purchased by the defendants are expressly stated to be subject to the mining reservation.

The third broad submission of counsel for the plaintiffs was that the mining reservation created in 1914 authorised only underground mining. He conceded that in order to exercise their rights it was necessary for the defendants to clear bush and cut down trees, but urged that agreements of this nature must be strictly construed and that the terms of this reservation did not permit opencast mining which destroys or does serious damage to the surface of the land. He did not suggest that bauxite had ever been obtained in British Guiana by methods other than those employed by the defendants, but argued that the court should look only to the terms of the reservation as contained in the transports and that the *de bene esse* evidence of Snijders that bauxite could not be obtained in British Guiana by underground mining should be ruled inadmissible, particularly as no mining for bauxite had taken place in British Guiana previous to 1914. In due course I shall have to rule on the admissibility of Snijder's evidence in this connection. The plaintiffs claim that the defendants must give accounts of all profits made by them from extracting bauxite by opencast methods and that an order should be made requiring them to pay to the plaintiffs one-third of such net profits. There is a further claim for \$100,000 damages for trespass to and conversion of the plaintiffs' undivided shares in Lower Coomacka and for waste and wrongful subsistence of the land; presum-

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ably this claim for damages is alternative to the claim for one-third of the profits.

The substantial question here is whether the words of the reservation granting the defendants "*the exclusive and unrestricted right to mine on and take from the lands.....free from any charge or payment all bauxite and other ore, minerals and clays*" give them a right to extract bauxite in a manner which destroys or seriously damages the surface of the land, or whether those words confer upon the defendants only a right to do underground mining.

On the evidence before me I am satisfied that the surface of the areas of the Lower Coomacka lands where opencast operations were carried out has been seriously damaged and rendered practically useless for agricultural purposes, at least for some considerable period of time. Lands in the vicinity of the areas so worked have also been affected by the "hydraulicising" which accompanies opencast mining. But I am far from being persuaded that previous to the defendants' operations these lands were in fact being used or were suitable for ordinary agricultural purposes. It appears that there used to be a small quantity of timber on parts of the areas affected but that most of it was removed by the plaintiffs and their relatives before 1952, no account being given to the defendants; what remained was cut between 1952 and 1955 when the defendants were actively preparing for opencast operations. There is no evidence to show that the areas affected have ever been used for building purposes or are suitable for such purposes. In my view the plaintiffs' witnesses grossly exaggerated the extent of the damage caused by the defendants' operations. I accept Snijder's evidence that at the time of the issue of the writ in October 1958 only about 100 acres of the Lower Coomacka lands had in fact been mined by opencast methods and that only about 228 acres of the entire 1,586½ acres comprising Lower Coomacka can be economically mined. It seems unlikely therefore that more than one-quarter of the Lower Coomacka lands will at any time be affected by the defendants' opencast operations; this estimate, of course, includes the areas affected by hydraulicising. It is pertinent to recall that the defendants are the owners by transport of two undivided seventh shares in the land.

Numerous cases were cited by counsel on both sides. At this stage I will deal in chronological order with a few of them.

In *Bell v. Wilson* (1866), 14 T.L.R. 115, there was a reservation of "all mines and seams of coal and other mines, metals, or minerals, as well opened as not opened.....with full liberty to search for, dig, bore, sink, work, win, and take, lead and carry away the same" and, generally, "to exercise, do, and perform every liberty, matter, and thing respectively for digging, sinking, winning, and working the said collieries, mines and minerals." A bed of freestone of considerable thickness lay at a depth of from 6 feet to 40 feet beneath the land, and the defendants began working the stone by open quarrying, thus rendering unproductive a large part of the land. It was held that the freestone was to be considered as a mineral but that

the defendants were not entitled to win or get the stone by surface works, or otherwise than by underground mining. In the course of his judgment, TURNER, L.J., said (at p. 116):

“I am satisfied that it was not intended by this deed that the freestone should be worked by the means which the defendants have adopted, or otherwise than by underground mining. The language of the exception points, I think, to this conclusion; it is an exception of mines ‘within and under the lands whether opened or unopened,’ words which are ordinarily used with reference to underground workings, and although perhaps it cannot be said that there are not words in the clause which might be construed to extend to and authorise workings upon the surface of the closes, it cannot, I think, be denied that the clause, taken as a whole points much more strongly to underground workings.”

The next case to which reference should be made is *Hext v. Gill* (1872), 7 Ch. 699, where the reservation was in respect of “all mines and minerals within and under the premises with full and free liberty of ingress, egress, and regress, to dig and search for, and to take, use, and work the said excepted mines and minerals.” The deed contained no provision for compensation. Under the tenement was a bed of china clay, the existence of which did not appear to have been contemplated by either party at the time, no china clay having ever been obtained from the lands of that duchy. It was admitted that china clay could not be obtained without totally destroying the surface. The Court of Appeal held that the china clay was included in the reservations but that the surface-owner was entitled to an injunction to restrain the owner of the minerals from getting it in such a way as to destroy or seriously injure the surface. The court said that when a landowner sells the surface, reserving to himself the minerals with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to show clearly that he is intended to have that power. In the course of his judgment, MELLISH, L.J., said (at pp. 713, 714);

“Then we come to the important question, whether there is power to get this china clay in the only way in which, according to the concurrent testimony of all the witnesses, it can be got, by a process which utterly destroys the surface of the land. A great number of cases were cited to us upon that point, in none of which was the language exactly similar to that in the case before us, and they must be referred to merely for the purpose of getting a principle from them. Now the cases shew that where the ownership of minerals is separate from the ownership of the surface, *prima facie* the owner of the surface is entitled to have his surface supported by the minerals. That is not confined, as contended by the Solicitor-General, to the case where the court has not before it the instrument under which the owner of the minerals derives his rights, but it also applies to cases where the court has the instrument before it, for the purpose of construing the instrument, to this extent, that *prima facie* the

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right to support exists, and the burden lies on the owner of the minerals to shew that the instrument gives him authority to destroy what is described by the judges as the inherent right of a person who owns the surface apart from the minerals. The question is, whether the words of the reservation in the present case mean that the ownership of the surface is altogether to be subject to the ownership of the minerals, so that the owner of the minerals may do whatever is necessary for the purpose of enabling him to get them, although it may of necessity utterly destroy the surface; or do the words, according to their true construction, only give a right, in the nature of an easement, to go upon the surface and dig through it for the purpose of getting at the minerals underneath? In my opinion, the short and ambiguous words of this reservation, according to their fair construction, only give a right to create what I may call temporary damage, and do not authorise the owner of the minerals absolutely to destroy or to cause a serious continuous and permanent injury to the surface.”

In a short concurring judgment JAMES, L.J., said (at p. 719):

“The long and uniform series of authorities appear to me to have established a very convenient and consistent system, giving the mineral owner every reasonable profit out of the mineral treasures, and at the same time saving the landowner’s practical enjoyment of his houses, gardens, fields, and woods, without which the grant to him would have been illusory.

But for these authorities I should have thought that what was meant by ‘mines and minerals’ in such a grant was a question of fact what these words meant in the vernacular of the mining world and commercial world and landowners at the end of the last century; upon which I am satisfied that no one at that time would have thought of classing clay of any kind as a mineral.”

In *Lord Provost and Magistrates of Glasgow v. Farie* (1888), 13 A.C. 656, the question was whether clay was included in the reservation of mines and minerals under the Waterworks Clauses Act, 1847. The eighteenth section of that Act provides that “the undertakers shall not be entitled to any mines of coal, ironstone, slate, or other minerals under any land purchased by them.” The appellants, by virtue of the Act and a conveyance contained a reservation of the “whole coal and other minerals in the land in terms of the Waterworks Clauses Act, 1847,” purchased from the respondent a parcel of land for the purpose of erecting waterworks. Under the land was a seam of valuable brick clay. The respondent worked this clay in the adjoining land, and having reached the appellants’ boundary, claimed the right to work out the clay under the land purchased by the appellants. It was held by the Judicial Committee of the Privy Council, reversing the decision of the Court of Session, that common clay, forming the surface or subsoil of land, was not included in the reservation in the Act, and that the appellants were entitled to an interdict restraining the respondent from working the

clay under the land purchased by them. In the course of his judgment Lord HALSBURY, L.C., said (at p. 669):

“I cannot help thinking that the true test of what are mines and minerals in a grant was suggested by JAMES, L.J., in the case of *Hext v. Gill*, which I shall have occasion hereafter to refer to, and although the Lord Justice held himself bound by authority so that he yielded to the technical sense which had been attributed to those words I still think (to use his language) that a grant of ‘mines and minerals’ is a question of fact ‘what these words meant in the vernacular of the mining world, the commercial world, and landowners’ at the time when they were used in the instrument.”

Lord MCNAUGHTEN added (at p. 687):

“Now the meaning of the word ‘mines’ is not, I think, open to doubt. In its primary signification it means underground excavations or underground workings. From that it has come to mean things found in mines or to be got by mining, with the chamber in which they are contained. When used of unopened mines in connection with a particular mineral it means little more than veins or seams or strata of that mineral. But however the word may be used, when we speak of mines *in this country* there is always some reference more or less direct to underground working.”

The next case to which I will refer is *Butterley Company Limited v. New Hucknall Colliery Company Limited*, [1909] 1 Ch. 37. It is of special interest in connection with Snijders’ *de bene esse* evidence. COZENS-HARDY, M.R., said (at pp. 46, 47):

“This appeal raises the important question whether the defendants are entitled to work a lower seam of coal, the working of which will necessarily occasion damage by subsidence to the plaintiffs, who are lessees of an upper seam. Now it has been laid down again and again in the House of Lords, and nowhere more clearly than in *Butterknowle Colliery Co. v. Bishop Auckland Industrial Co-operative Co.*, [1906] A.C. 305, that there is a presumption, in construing a document by which mines are severed from the surface, that a right to let down the surface by mining operations must be presumed not to exist *unless there are clauses in the instrument which expressly, or by necessary implication or intendment, are inconsistent with the presumption of support*. Evidence is admissible to explain the circumstances under which an instrument was executed, including facts known to both parties. *The meaning of words varies according to the circumstances*. There is another presumption which must not be overlooked, and which is expressed in the well-known maxim, ‘*Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*.’ This is only another way of asserting the proposition, which I believe to be good law and good sense, that an instrument ought not to be construed in such a way as to render it, to the knowledge of both parties, wholly inoperative.

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The maxim '*ut res magis valeat*' may be legitimately applied in construing the instrument. I cannot accept the argument that the duty of the court is to construe the instrument without reference to any evidence, and I find nothing in any of the cases in the House of Lords to support the argument. In every case which has been brought to our notice by counsel it was either proved, or admitted, or assumed that the subjacent mines could be worked in such a way as not to produce subsidence of the surface, and in that state of facts it was held that the first presumption to which I have referred must prevail, and that provisions framed in very wide language ought to be so construed as to apply only to such mining operations as would not cause subsidence."

The judgment delivered by FARWELL, L.J., is also instructive. He said (at pp. 51, 52, 53):

"The answer to the question on this appeal depends on the true construction of the five leases under which the plaintiffs hold, and which are the documents of severance of the upper seam claimed by them from the lower seams. It is now well settled that the owner of the surface, or of a higher seam, does not lose his common law right to support unless the document of severance takes it away, either by express words or by necessary implication; and by necessary implication I understand that which the courts infer from relevant admissible evidence for the purpose of giving to the transaction such efficacy as must have been intended by businessmen entering into such a transaction as explained in *The Moorcock* (1889), 14 P.D. 64, 69. It is also well settled that in construing a document — I quote Lord BLACKBURN in *River Wear Commissioners v. Adamson*, 2 App. Cas. 743, 763—'In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used.' Then, on the next page, after referring to wills, he goes on: 'In the case of a contract, the two parties are speaking of certain things only, and therefore the admissible evidence is limited to those circumstances of and concerning which they used those words: see *Graves v. Legg* (1854), 9 Ex. 709. In neither case does the court make a will or a contract such as it thinks the testator or the parties wished to make, but declares what the intention, indicated by the words used under such circumstances, really is.' One of the earliest illustrations of this is the maxim '*Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*,' for evidence is necessary to shew the nature of the subject-matter of the grant, and the impossibility of its enjoyment without the advantage claimed as granted by necessary implication, in order that the question can be raised at all.

And this is stated by Lord WENSLEYDALE, in *Rowbotham v Wilson*, 8 H.L.C. 360, in a passage quoted with approval by Lord CHELMSFORD, *Ramsey v. Blair*, (1876) 1 App. Cas. 703, and by BLACKBURN, J., L.R. 7 Q.B. 722. 'The rights of the grantee to the minerals,' says Lord WENSLEYDALE, 'by whomsoever granted, must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Prima facie*, it must be presumed that the minerals are to be enjoyed, and, therefore, that a power to get them must also be granted or reserved, as a necessary incident. It is one of the cases put by Sheppard (Touchstone, ch. 5, p. 89) in illustration of the maxim, '*Quando aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit*,' that, by grant of mines is granted the power to dig them. A similar presumption, *prima facie*, arises, that the owner of the mines is not to injure the owner of the soil above by getting them, if it can be avoided.' The learned lord obviously means by the words 'if it can be avoided' that the surface may be let down if the mines cannot be worked at all without so letting it down. The courts refuse to suppose that men execute deeds or documents apparently for business purposes and good consideration with the intention that such deeds or documents shall have no effect; and if it is once shewn that the surrounding circumstances at the date of execution were such that both parties must have known, or if it is proved or admitted that both parties knew at the date of the execution, that their deed could have no effect unless some further provision not expressed in the deed can be read into it, then such further provision is read in by necessary implication."

Finally, reference should I think be made to *Beard v. Moira Colliery Company Limited*, [1914] 1 Ch. 257. In that case, by an indenture of 1829 G., being seized in fee of certain estates, conveyed a portion of them, consisting of farm lands and houses, to H. By the terms of the deed all the mines and minerals under the lands conveyed were excepted from the conveyance, full and free liberty being reserved to G., his heirs and assigns, to enter upon the lands, to sink pits and shafts, and to exercise all other powers for working and getting the minerals "in as full and ample a way and manner as if these presents had not been made and executed." G. also covenanted to pay compensation for damage or injury done by digging and sinking pits and shafts or otherwise in exercise of the powers reserved to him. In an action by the plaintiffs, who derived title through H., for an injunction to restrain the defendants, claiming through G., from so working the minerals as to let down the surface, it was held that in construing deeds ordinary words ought to be given their plain and ordinary meaning and that having regard to the terms of the reservation, which gave the grantor full liberty to work and get the minerals in as full and ample a way as before conveyance, the plaintiffs' common law right to support was by necessary implication displaced, and the defendants had a right to let down the surface. In the course of his judgment SWINFEN EADY, L.J., who delivered the judgment of the Court of Appeal, said (at p. 264):

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“In the present case there is no right in express terms to let down the surface. But the question is whether such right is not a necessary implication from the language used.....As Sir Roger Gresley, was owner in fee, if he had not made and executed the conveyance to William Harris, he would have had a perfect right to let down the surface while working the minerals, and unless after conveyance he retained that right he would not have been able to work, procure, and carry away ‘in as full and ample a way and manner’ as before conveyance. It was a necessary implication from the language used that he should have a right to let down the surface, if he was to be able to work, procure, and carry away the coal in as full and ample a way and manner as before conveyance.....To introduce a clause into the conveyance of 1829 to the effect that the mines must be worked so as not to let down the surface would create an inconsistency with the actual clauses of the instrument as it stands.”

At p. 267 he added:

“The words used in the deed of 1829 are in their literal meaning clear and unambiguous, and that meaning is not excluded by any context, and we see no ground for introducing any supposed qualification or restriction. There is nothing in the deed to indicate it, or to define or limit it.”

Having set out the general principles laid down and developed in the United Kingdom cases, let me now revert to the *de bene esse* evidence of Snijders. The purpose of this evidence was to show not only that bauxite could not be worked by underground mining at the time when Snijders came to British Guiana in 1948, but that it could not have been so worked in 1914 when the original reservation was created. Snijders is a qualified geologist and gave expert evidence. After pointing out that there is actually an outcrop of bauxite at a certain part of Lower Coomacka, he said:

“From my experience as a geologist I would say that it is impossible to mine bauxite from the soil in British Guiana by underground methods because the soil is unconsolidated: it is loose. As an expert I say that the position is exactly the same as in 1914.”

Snijders’ ability to form such an opinion was not contradicted. What was said against the admissibility of his testimony was that there was no positive evidence to show that in 1914 *the plaintiffs knew* that bauxite could not be obtained in British Guiana by underground mining. It was argued that the absence of such proof was fatal to the admissibility of this part of Snijders’ evidence. I do not think that this is so. In *Butterley v. New Hucknall Colliery (supra)* COZENS-HARDY, M.R., weighed his words carefully when he said “Evidence is admissible to explain the circumstances under which an instrument was executed, *including* facts known to both parties.” Clearly he was not confining himself to facts known to both parties; that was merely mentioned by way of illustration having regard to the facts of that case.

In any event the authorities cited are United Kingdom cases; there the principal form of mining is coal mining. In British Guiana there has never been any coal mining. Previous to the creation of the original reservation in 1914 there had been no bauxite mining. It is in the light of these circumstances that one has to consider what was meant in the vernacular of the commercial world and landowners by the words used in the reservation, and as this is the first case of the kind to come before our courts I am not bound by authority. There is, so far as I can see, really no justification for importing the presumption that arises in the United Kingdom that in the absence of words to the contrary, underground mining must be understood. The language employed must be construed in the context of conditions as they existed in British Guiana in 1914. As was said by Lord BLACKBURN in *River Wear Commissioners v. Adamson*, 2 App. Cas. at p. 763, "the meaning of words varies according to the circumstances with respect to which they were used." What did the parties mean? It seems to me that in the particular circumstances of this case one of the relevant things to consider would be the methods by which bauxite could have been won in British Guiana at the time of the creation of the mining reservation. One must assume, I think, that a reasonable, prudent man would have addressed his mind to such a question before signing the agreement.

I can see no justification for excluding the *de bene esse* evidence given by Snijders. The objection to it is accordingly overruled.

A point in favour of the plaintiffs in considering whether opencast mining is permitted under this particular reservation is that the transport contains no provision for the payment of compensation. This is always an important factor in construing a mining reservation, and while the inclusion of a clause for compensation would not show conclusively a right to destroy the surface of the land, the absence of such a clause has been regarded as a circumstance against the existence of such a right. But the authorities show clearly that this is not the only factor to be considered. The language of the present reservation is very wide: "the exclusive and unrestricted right to mine on and take from the lands.....free from any charge or payment all bauxite and other ore, minerals and clays." The inclusion of the word "clays" without qualification or restriction is to my mind significant.

Two further circumstances are the very low prices paid from time to time for Lower Coomacka lands (see transports) and the fact that there is an outcrop of bauxite visible to the naked eye. The uncontroverted evidence of the geologist Snijders is to the effect that that outcrop of bauxite existed in 1914. It was on that basis that counsel on both sides addressed the court.

Counsel for the plaintiffs contended that the conduct of the plaintiffs subsequent to 1914 was irrelevant. In the special circumstances of this case I cannot agree that that is so. The state of mind of the plaintiffs in 1914 is a relevant question of fact; their conduct in subsequent years in not raising any objection when they saw,

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as they must have done, the opencast methods being employed at Upper Coomacka while the defendants were extending their activities towards Lower Coomacka, is I think some indication as to what they understood the reservation to be. Even when the drilling operations were done in Lower Coomacka in 1939 they offered no protest. It was not until about three years after opencast mining was in full swing at Lower Coomacka that they claimed it was not permitted under the reservation. Throughout the trial the witnesses called on behalf of the plaintiffs kept referring to the opencast methods employed by the defendants as “mining”. It is a little difficult to reconcile this with the contention that the expression “to mine” used by the plaintiffs in the reservation—and accompanied by the widest possible terms—does not include opencast mining.

It is also observed that when this action was launched the plaintiffs’ first complaint was in regard to the small rent being paid by the defendants for the strip of land over which their railway ran. It was alleged that the lease of the strip of land “was obtained by oppression on the part of the defendants and is a harsh and unconscionable bargain.” All in all the impression I have received is that now that the defendants have struck bauxite in a big way the plaintiffs feel that they made a poor bargain. Whatever justification there may be for such feelings, that can hardly be a ground for finding in their favour in this matter.

I am satisfied that it was not intended by the language used in the reservation that bauxite should be extracted only by underground mining. In my opinion the defendants are within their rights in making use of opencast mining, which is the only means by which bauxite could be worked in British Guiana at the time of the creation of the reservation.

For the reasons given, the third broad submission of counsel for the plaintiffs must also fail.

Judgment will accordingly be entered for the defendants with costs, certified fit for two counsel.

Judgment for the defendants.

Solicitors: *J. A. Jorge* (for the plaintiffs); *D. De Caires* (for the defendants).

DYAL v. BAKSH

[In the Full Court (Luckhoo, C.J., and Khan, J.) October 13, 20, November 10, 1962, January 19, 1963.]

Criminal law—Fighting—Joint offences—Does not include wounding or assault of one person by another—Summary Jurisdiction (Offences) Ordinance, Cap. 14, ss. 30 (b) and 139—Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s. 40.

The parties had been dismissed by a magistrate on a police prosecution for fighting alleged to have been committed contrary to s. 139 of the Summary Jurisdiction (Offences) Ordinance, Cap. 14. Thereafter the appellant was convicted by a magistrate on a complaint brought by the respondent charging him, on the same facts, with the offence of unlawfully and maliciously wounding the respondent contrary to s. 30 (b) of Cap. 14. On appeal it was argued for the appellant that by virtue of s. 40 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, it was competent for the magistrate on the earlier complaint to convict the appellant of the offence of common assault, and that the appellant could not afterwards be convicted of the offence of wounding, since this was an assault in circumstances of aggravation.

Held: (i) the gist of the offence of fighting is that, like the offence of affray, it is a joint offence. Where two persons are involved and one is acting merely in self-defence, that is not a fight;

(ii) the commission of the offence of fighting does not include the commission of the offence of one person wounding or assaulting another, and it was therefore not competent for the appellant on the charge for fighting to be convicted of the offence of wounding or assault.

Appeal dismissed.

J. O. F. Haynes, Q.C., with B. S. Rai for the appellant.

A. A. Gadwah for the respondent.

Judgment of the Court: The appellant Dyal was convicted by the magistrate of the East Demerara Judicial District on a complaint filed

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on the 27th March, 1962, charging him with unlawfully and maliciously wounding the complainant McDoom Baksh on the 25th December, 1961, contrary to the provisions of s. 30 (b) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14, and was sentenced to three months' imprisonment.

The evidence accepted by the learned magistrate disclosed that the injured man Baksh sustained several severe incised wounds and that they were inflicted by the appellant unlawfully and maliciously and not acting in self-defence.

Prior to the filing of the complaint by the respondent, the appellant and the respondent had been jointly charged by Cpl. of Police 5052 Wilfred Zephyr with the commission of the offence of a public fight, contrary to the provisions of s. 139 of the Summary Jurisdiction (Offences) Ordinance, Cap. 14. It is common ground that this complaint was in relation to the incident the subject matter of the complaint later brought by the respondent against the appellant. A certified copy of the record of proceedings before the magistrate in respect of the police complaint has, by consent, been referred to during the course of the argument in this appeal. The learned magistrate at the conclusion of that case dismissed the charge. As no appeal has been lodged by the police against the decision of the magistrate a memorandum of reasons for decision was not prepared. Possibly the learned magistrate accepted the evidence of Baksh and Scipio that there was no fight but an attack by Dyal upon Baksh.

It is submitted on behalf of the appellant that the appellant cannot be convicted on a complaint for wounding because the charge of public fight laid under s. 139 of the Ordinance was dismissed.

Counsel for the appellant has urged that by virtue of the provisions of s. 40 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, it was competent for the magistrate on the earlier complaint to convict the appellant of the offence of common assault and that the appellant cannot now be convicted of the offence of wounding which is an assault with circumstances of aggravation.

Section 40 of Cap. 15 provides as follows —

“40. Every complaint shall be deemed divisible; and if the commission of the offence charged, as described in the statute creating the offence, or as charged in the complaint, includes the commission of any other offence, the defendant may be convicted of any offence so included which is proved although the whole offence charged is not proved, or he may be convicted of an attempt to commit any offence so included.”

The question is whether the offence of public fight, contrary to s. 139 of Cap. 14 includes the commission of the offence of common assault.

By s. 139 of Cap. 14 it is provided that—

“Everyone who unlawfully fights with anyone else in, or in view or in hearing of, any public way or public place shall, on conviction thereof, be liable to a penalty of twenty-five dollars, or imprisonment for one month, in addition to any other punishment to which he may be liable.”

The ingredients of the offence of a public fight are—

- (1) there must have been a fight;
- (2) the fight must have taken place in, or in view or in hearing of any public way or public place.

To constitute a fight at least two persons must be involved in assault. Where two persons are involved and one is acting merely in self-defence that is not a fight. This was made clear in the judgment of the Court of Criminal Appeal in *R. v. Sharp and Johnson* (1957), 41 Cr. App. R. 86, at p. 93, where the indictment charged an affray—

“If two men are found fighting in a street, one must be able to say the other attacked him and he was only defending himself. If he was only defending himself and not attacking, *that is not a fight* and, consequently, not an affray.”

An affray has been defined as the fighting of two or more persons in a public place to the terror of Her Majesty’s subjects.

The gist of the offence of fighting is that, like the offence of affray, it is a joint offence.

One object of charging a joint offence was stated at p. 93 of the same report—

“Now, as the Recorder said, and we see no reason why he should not, one object in charging the appellants with an affray, which is of necessity a joint offence, is that in this class of case each prisoner throws the blame on each other and there is danger that, perhaps being disgusted with both and thinking each only got his desert, a jury will acquit both if the charges are of one wounding the other.”

It is important to observe that s. 40 of Cap. 15 comes into operation only if the commission of the offence charged *as described in the statute, or as charged in the complaint* includes the commission of any other offence. The words put in italics are all important in this connection. The offence charged is described in s. 139 as an unlawful fight *by one person with another person* and was so charged in the complaint filed by the police.

The commission of the joint offence charged does not include commission of the offence of one person wounding another nor the commission of the offence of one person assaulting another.

We are of the opinion, therefore, that on a charge of public fight under s. 139 of Cap. 15 it is not competent for a defendant to be found

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guilty of the commission of the offence of wounding or of assault. The learned magistrate did not err in proceeding to hear and determine in instant case.

The other grounds of appeal including the added grounds of appeal were either abandoned or not pursued. In any event we are of the opinion that they are without substance.

The appeal is dismissed and the sentence affirmed with costs \$47.40 to the respondent.

Appeal dismissed.

PERSAUD v. RAJAB

[Supreme Court—In Chambers (Persaud, J.) on appeal from the Rice Assessment Committee for the Berbice/Corentyne Districts, October 5, 19, 1963]

Rice lands—Estate charges—Expenses of developing second depth lands charged as rates on first depth lands—Power of assessment committee to call witness of its own—Rice Farmers (Security of Tenure) Ordinance, 1956, s. 23 (1) (b).

A local authority held the crown lands in the second depth of the village on lease from the Crown. The lands were allocated to local proprietors (including the respondent) in proportion to their holdings in the first depth. The cost of developing the lands were recoverable from the proprietors in the form of rates on the first depth holdings, the arrangement being that upon failure to pay the proprietor exposed his first depth holdings to levy and stood to lose his interest in the second depth. The appellant was a tenant of the respondent's lands in the second depth. On an application by him for assessment of rent the foregoing facts were proved through a witness recalled by the rice assessment committee after the case for the appellant was closed. The committee awarded a portion of the respondent's rates as estate charges payable by the appellant. On appeal it was argued that the committee had no power to recall and examine a witness, and that no rates were "payable" on the appellant's holding within the meaning of s. 23 (1) (b) of the Ordinance.

Held: (i) a rice assessment committee has power to call witnesses at any stage before decision;

(ii) the word "payable" in s. 23 (1) (b) of the Ordinance could only refer to rates leviable under the Local Government Ordinance, Cap. 150. The rates in question were not leviable upon the appellant's holding and could not therefore be passed on to him by way of estate charges.

Appeal allowed.

B. O. Adams, Q.C., for the appellant.

M. Poonai for the respondent.

PERSAUD, J.: The respondent (landlord) is the holder of 36 acres of rice lands situate in what has been described at the second depth of No. 57 Village, Corentyne. All lands in the second depth are crown lands, and may not be owned either by individuals or by the local authority. But where such lands fall within a village or country district, persons who own lands in the first depth are allocated lands in the second depth in proportion to their holdings in the first depth. The second depth lands remain crown lands, unalienable, and must be surrendered to the local authority upon the interest in the first depth lands ceasing to exist. Such is the nature of the respondent's holding in respect of the 36 acres of land already referred to. The appellant holds the entire 36 acres as tenant of the respondent.

This appeal concerns an application under s. 12 of the Rice Farmers (Security of Tenure) Ordinance, 1956 (No. 31) by the respondent (landlord) to the rice assessment committee to have the 1959 rent of the 36 acres of land aforesaid assessed. The committee heard evidence from the landlord in which he claimed \$2.50 per acre as estate charges, and from the village overseer to the effect that the

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local authority holds the second depth lands on a lease, that rates are collectible on the 36 acres, but that second depth lands are not appraised. This latter witness was recalled by the committee after the appellant (tenant) had closed his case, and he testified to the effect that the Government had empoldered the dams and trenches of the second depth, and had incurred considerable expense in making the lands suitable for rice cultivation; that the expenses so incurred are recovered from the proprietors of the first depth lands in the form of rates—both local authority and drainage and irrigation; and that upon failure to pay, the proprietor exposes his first depth lands to levy, and will lose his interest in the second depth lands. No doubt all of this evidence has been accepted and acted upon by the committee. The appellant led no evidence, but submitted that as local authority rates were not payable in respect of second depth lands, such rates ought not to have been passed on to the tenant. He relied upon *Rahaman v. Khan*, 1958 L.R.B.G. 240. The committee rejected this submission, and expressed the opinion that the decision of STOBY, C.J. (ag.), (as he then was) was given *per incuriam* and ought not to be followed.

Counsel for the appellant has submitted—

- (1) that the committee was wrong in not following the decision of *Rahaman v. Khan* (*supra*); and
- (2) that the committee went wrong in recalling the village overseer after the case had been closed.

I will deal with the second submission first. Counsel urges that s. 13 (1) of the Ordinance limits the powers of the committee to the taking of evidence adduced by the landlord and tenant, but does not give the committee the power to recall and examine a witness. In my opinion, sub-ss. (1) and (2) of s. 13 prescribe the right of a landlord and tenant to give evidence, call witnesses, produce documents, and of cross-examination; it has nothing to do with the committee's powers and duties. These matters are dealt with by s. 11. Subsection (3) of s. 13 enables the Committee to call witnesses, and in my view, the committee may do so at any stage before decision. After all, it is the committee's function to ascertain all the relevant facts, and once the parties are given the opportunity to be heard, there can be no justifiable complaint. I hold therefore that there is no substance in this submission.

Now to the first submission. If a judgment had been given *per incuriam*, a later court will not follow that judgment. It has been urged upon me by the respondent that the committee was right in holding that *Rahaman v. Khan* (*supra*) was wrong. Counsel for the respondent has adopted the committee's reasons for decision as part of his argument, and has cited the case of *Jeffrey v. Mendes*, 1928 L.R.B.G. 43, as authority for the submission that where a judgment is clearly wrong it should not be followed, even by an inferior court. Counsel has also informed the court that the decision in *Rahaman v. Khan* has never been followed by the particular rice assessment committee.

I can well imagine the hardship that may be experienced by landlords in the same position as the respondent in the application of that ruling. But hardship is one thing and interpretation of an Ordinance another. I can do no better than to quote from the judgment of De FREITAS, C.J., in *Jeffrey v. Mendes (supra)* at p. 50. The Chief Justice said—

“Whatever his feeling of sympathy or his sense of abstract justice may be, a judge is strictly confined to giving effect to the statute before him, and it is not within his power to construe an enactment according to his own present notion of what it ought to be, so as to give relief from an apparent hardship. There is an ancient and wise saying that ‘hard cases make bad law’. Bad law is made by decisions that attempt to soften hard cases. Where the meaning of an enactment is plain it is the rule that it is not within the province of a judge to consider its wisdom or its policy. His duty is not to make the law reasonable or congruous with his notion of colloquial ‘equities’, but to expound it as it stands, according to its real meaning. The function of a judge is *jus dicere* and not *jus dare*—to declare what the words of the enactment say that it means, and not to make law or give law. His function is not to legislate, but to interpret the Legislature’s meaning by what the Legislature has said.”

I do not believe that the Chief Justice lost sight of the fact that there are certain canons of construction which govern the interpretation of what the Legislature has said, and that judges must be guided by those canons.

I appreciate that I am not bound to follow the judgment of STOBY, C.J. (ag.), if I were of the view that it is wrong. I am of the opinion that his judgment is a correct one. The committee were of the view that the important word in s. 23 (1) (b) of the Rice Farmers (Security of Tenure) Ordinance, 1956, is “payable,” and that the evidence was that rates were payable in respect of the 36 acres. In my judgment, “payable” must mean legally payable, and is not concerned with the internal arrangement made by local authorities for the collection of rates. How then do rates become legally payable under the Local Government Board Ordinance, Cap. 150? Section 96 (1) of that Ordinance provides for the appraisal to be made of “the several lots and buildings, or some of them, or the several lots or some of them, or the several buildings or some of them” in any village or country district. Section 98 provides for the appraisal to be made, having regard to the condition and locality of the property. Section 105 (1) provides for the submission to the authority by the chairman, and then to the Local Government Board, of the estimate of the expenditure together with the rate on the total appraised value of the properties in the district proposed to be levied to meet the expenditure, and the amount of the total appraised value. It is clear that rate is only leviable on appraised value, and if there is no appraised value, there can be no rate. Ad-

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ditional rate may be levied but even this must be done in the same manner as is provided with respect to the annual rate. (See S. 107 (1) of Chapter 150).

It follows, therefore, that the word “payable” in S. 23 (1) (b) of the Rice Farmers (Security of Tenure) Ordinance, 1956, can only refer to rates leviable under the Local Government Ordinance.

Counsel’s submission to the effect that were the local authority to levy on second depth lands, they would be selling their own lands is, in my opinion, without merit and overlooks the provisions of s. 118 (2) of the Local Government Ordinance. First of all, the lands in question do not belong to the local authority but are crown lands, and secondly, crown lands may be appraised, and made liable to rates; thirdly, only the right, title and interest of the lessee, licensee or permittee may be taken in execution.

I agree with the judgment in *Rahaman v. Khan (supra)*. I appreciate that that decision did not cause any practical difficulty in that case in that the tenant occupied both first and second depth lands, and the permitted increase representing the rates were tacked on to the rental in respect of the first depth lands, so that the landlord did not lose. In the instant case, this is not the position; all the lands in question are situate in the second depth. It will be seen, therefore, that this decision may have far-reaching repercussions unless second depth lands are appraised or some other steps are taken to remedy the situation. Be that as it may, I am concerned only with the interpretation of the law.

The appeal will therefore be allowed. The certificate of assessment will be amended by the reduction of the maximum rent to \$14.05 per acre.

The appellant must have his costs of this appeal fixed at \$40.

Appeal allowed.

D'AGUIAR AND ANOTHER v. JAGAN

[Supreme Court (Persaud, J.) March 21, 22, 28, June 24, 25, 26, October 23, 1963.]

Libel—Defence of fair comment—Facts to be truly stated—Test of fairness—Measure of damages—Not to be out of proportion to enormity of attack.

The first-named plaintiff was a member of the House of Assembly and leader of a political party in opposition. He was also chairman and managing-director of D'Aguiar Bros. Ltd., the second-named plaintiffs, as well as of Bank Breweries Ltd. Both plaintiffs held shares in the latter company. The defendant was leader of the political party in power and Premier of British Guiana. On 31st January, 1962, the Government introduced a budget which included proposals for the imposition of a capital gains tax. The first-named plaintiff participated in demonstrations and made public speeches in opposition to the budget proposals, his view being that it was his function as a member of the opposition to oppose, expose and depose the Government. In the course of the action which he so took he made use of the facilities of the second-named plaintiffs. In reply, the defendant made certain public statements in which he said that the first-named plaintiff had sold land to a company that he was forming, the same day he bought the land, at a profit of 109%, netting over \$20,000. and that no tax had been paid thereon. The land in question had in fact been sold by the second-named plaintiffs to Bank Breweries Ltd, and, though the transaction resulted in a substantial profit, the first-named plaintiff had only participated in it as an official of both companies. Based on this transaction, the defendant also stated that the second-named plaintiffs were evading income tax and that they robbed, cheated, and lived at the expense of the working classes and on the sweat, tears and blood of the poor. In defence to an action for libel, the defendant pleaded fair comment on a matter of public interest;

Held: (i) the statements were capable of a defamatory meaning;

(ii) the defence of fair comment failed in relation to the first-named plaintiff because, although the matter was one of public interest, the facts upon which the comments were founded were not truly stated;

(iii) with respect to the measure of damages, the court must consider all the circumstances, both the conduct of the plaintiff and that of the defendant, bearing in mind that public figures must not be too sensitive to criticism and guarding against awarding a sum that is out of all proportion to the enormity of the attack. On this footing, the first-named plaintiff would be awarded \$1,000 as damages;

(iv) with respect to the second-named plaintiffs, the defendant, as far as he could ascertain the facts, had made substantially true statements:

(v) on the question as to whether the comments made in relation to the second-named plaintiffs were fair, the question to be considered was: Would any fair man, however prejudicial he might be or however exaggerated or obstinate his views, have written this criticism? Applying this test, the comments might be described as intemperate and even harsh, but they were nevertheless fair for the purposes of the defence of fair comment.

*Judgment for the first-named plaintiff.
Judgment against the second-named plaintiffs.*

Lionel Luckhoo, Q.C., E. V. Luckhoo for the plaintiffs.

Dr. F. H. W. Ramsahoye, Attorney-General, David Singh, Senior Legal Adviser (ag.), for the defendants.

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PERSAUD, J.: The first-named plaintiff Peter Stanislaus D'Aguiar is an elected member of the House of Assembly for Central Georgetown, the leader of a political party called the United Force, and a member of the opposition in the House of Assembly. He is also a businessman, being the chairman and managing director of D'Aguiar Bros. Ltd., the second-named plaintiffs. In addition, he is the chairman and managing director of a public company called Bank Breweries Ltd., the chairman of the Daily Chronicle Ltd., who are the publishers of a daily newspaper called The Daily Chronicle, and the proprietor and publisher of a newspaper called The Sun. This plaintiff regards himself as a successful businessman and there is no evidence to the contrary.

The second-named plaintiffs are a private company incorporated in this country. It is a family business, that is to say, the persons who hold the controlling interest are the first-named plaintiff and immediate members of his family. The first-named plaintiff settles general policy of this company, and can be regarded as the driving force behind the company. Indeed, on several occasions during the course of his evidence, the secretary of the company referred to the first plaintiff when he meant to refer to the company. This leads one to the conclusion that to some members of the public, the first-named plaintiff is regarded as being synonymous with the company. This may be a popular, though erroneous conception. Both plaintiffs own shares in Bank Breweries Ltd., though not the majority of shares; and they also own shares in the Daily Chronicle Ltd. By reason of all this business arrangement, the first-named plaintiff's influence in the three concerns mentioned cannot be gainsaid. The firm of D'Aguiar Bros. Ltd. are the manufacturers and distributors of alcoholic and aerated beverages. They also distribute the products of Bank Breweries Ltd.

The defendant is a dentist by profession. He is also engaged in the political field in that he is the leader of a political party called the People's Progressive Party, an elected member of the House of Assembly, a member of the Government and the Premier of the country.

On the 31st January, 1962, the Government introduced a budget which, according to the first-named plaintiff, sought to impose severe penalties on the masses, and was based on false economic principles. The first plaintiff has expressed the view that there was a spontaneous reaction to the budget; he was one of the persons who agitated and demonstrated against the budget; he participated in demonstrations and made public speeches, and he felt it his function as a member of the opposition to oppose, expose and depose the Government, and in pursuance of this function, he sought to put over his views not only in speeches, but also by means of picketing which was in the form of slogans directed against the defendant, the budget and the Government.

Between the 6th and 16th of February, the defendant made a series of broadcasts over the local broadcasting stations in which he

sought to defend the budget proposals, and to extol its virtues. In the course of these broadcasts, he made certain statements in which it is alleged that he alluded either by name or otherwise to the plaintiffs, and that he defamed them in those statements. He has admitted uttering those statements, but pleads fair comment.

It is clear to my mind that in his broadcasts (I will deal with the alleged release from his office later in this judgment) the defendant criticised persons who were opposed to the budget proposals, and he was seeking to convey to his listeners the fact that the persons who were bent on opposing the budget were doing so because they were in the category of persons who would have been caught by the proposals, and who would have had to pay additional tax. He referred to a particular transaction involving the sale of land by D'Aguiar Bros. Ltd. to Bank Breweries Ltd. in which Peter Stanislaus D'Aguiar played an important role, and cited that as a transaction which would have attracted capital gains tax – a tax hitherto not imposed, but one which was being introduced by the budget proposals.

The extracts of the various speeches set out in the statement of claim do not really present as complete a picture as the entire scripts which I have had the benefit of reading.

Notwithstanding the fact that the plaintiffs decided to file one action against the defendant, it is necessary to consider the matter as it affects each plaintiff separately. And I will now consider whether the first-named plaintiff has been defamed by the words used by the defendant.

The broadcasts do not really name the first-named plaintiff; they named the second-named plaintiffs and in my view, it is an inescapable conclusion that running through all the broadcasts was a reference, oblique though it might have been, to the second plaintiffs, and the pamphlet referred to in para. 8 of the statement of claim indicates that the defendant was confusing Peter Stanislaus D'Aguiar with D'Aguiar Bros. Ltd. If this is so, and the defendant was not careful enough to ascertain the facts, then he exposes himself to liability if he mis-states facts which amount to libel. It is also my finding that the broadcast as recorded in Exhibit A8 was intended to refer to the first-named plaintiff.

Counsel for the defendant has submitted that there is no proof that the issue of the pamphlet (Exhibit R) had been authorised by the defendant. I am at a loss to understand this submission when in his defence which has been signed by solicitor and counsel, the defendant has admitted using the words complained of. It does not now lie in counsel's mouth to urge that there is no proof as to the issue of the pamphlet. Perhaps counsel has overlooked the state of his pleadings. In any event, I am prepared to hold that there is ample evidence before me from which I can find that the defendant was responsible for the issue of the pamphlet. The material portion of the pamphlet reads as follows:

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“At present workers pay income tax on *their* earnings but a speculator may make 100% or more profit in less than a day on land and pay not a cent tax if real estate is not his line of business. This is exactly what happened when the leader of one of the groups which are now inciting the workers against the Government sold land to a company he was forming, the same day he bought the land, at a profit of 109%. His profit was over \$20,000. This was made in a day’s transaction and no tax was paid—no tax to help the Government to provide the facilities such as proper hospitals and better houses for the poor people of this country.”

Then later on:—

“The Government is making a special appeal to its employees not to be used by unscrupulous political aspirants.”

If, in fact, the first-named plaintiff had made for himself a profit of \$20,000, and no tax had been paid in connection therewith, this would have been a statement of fact, and no improper imputations could have been gleaned therefrom. So far as the first-named plaintiff is concerned, it matters not whether the transaction took place; what matters is whether he had in fact made for himself a profit of \$20,000. This is clearly not so. In a case where the defence of fair comment is pleaded, it is for the plaintiff to prove that the defendant is not protected by his plea, but for the defendant to prove that the comment is fair. To succeed in a defence of fair comment, the words complained of must be shown to be comment, to be fair comment, and to be fair comment on a matter of public interest. I find that this was a matter of public interest; it was a matter involving the imposition of a tax throughout the country, and therefore a matter which affected the public generally. Not only must a comment be fair, it must not mis-state the facts on which the comment is based, because a comment cannot be fair which is based on facts not truly stated, and if a defendant cannot show that his criticism contains no, or no material, mis-statements of fact, he will fail in his defence of fair comment, for a material mis-statement of facts on which comment is made negatives the possibility of the comment being fair. The burden of proof in this respect is on the defendant. He must not only establish that the matter which he defends as comment is comment, and is comment on a matter of public interest, but also that it is not founded on material mis-statements of fact in the so-called comment.

In the case before me, the defendant has not led any evidence, and this is not, in my opinion, a matter which falls to be governed by s. 8 of the Defamation Ordinance, 1959 (No. 17), which is in the same terms as s. 6 of the Defamation Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2 C.66), and which does not require the proof of every allegation of fact where a plea of fair comment is raised.

The plea of fair comment, in so far as the plaintiff D’Aguiar is concerned, therefore fails in my judgment. There is nothing wrong

in describing an individual as a speculator, as this is an accepted vocation in modern society in the same way that a moneylender or a financier is. But when it is said that a man has made a certain profit when he has not, and then he is further described in the same broadcast or pamphlet as an unscrupulous political aspirant, it is not possible to resist the conclusion that the words are capable of a defamatory meaning, when the test laid down in *Sim v. Stretch* [1936] 2 All E.R. 1237 is applied. That test is:—

“Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?”

In assessing damages to be awarded to a plaintiff, the amount must not be regarded as a fine to be imposed on the defendant, but as compensation for the plaintiff's injured feelings. A court should guard against awarding a sum that is out of all proportion to the enormity of the attack. A court, in my view, must consider all the circumstances, both the conduct of the plaintiff and that of the defendant. It has been said that public figures must not be too sensitive to criticism.

I accept the evidence of the witness Victor Hall to the effect that the defendant described the plaintiff D'Aguiar as a snake. This occurred at a political meeting in March 1963, a year after the publication of the offensive article, and shows that the defendant has at least on one occasion subsequent to the publication of the libel chosen not to describe the first-named plaintiff in complimentary terms. In assessing damages, a court is entitled to look at the whole conduct of the defendant from the time of the publication down to the time of verdict. On the other hand, it is also competent for a court fairly to consider the plaintiff's conduct, and the degree of respect which he has himself shown for the feelings of others. When the first-named plaintiff used the facilities of the firm of D'Aguiar Bros. Ltd. for purposes of his political activities, and when that firm would have been affected by the new budget proposals, it is not difficult to appreciate how the defendant came to regard the two plaintiffs as one entity bent on opposing, exposing and deposing the Government of the day. As I have already said, this is an incorrect conception.

Sitting as a jury and taking all the circumstances into account, I would award damages to the first-named plaintiff in the sum of \$1,000 together with taxed costs fit for two counsel.

The claim by the second-named plaintiffs must be dismissed for the reasons I give in the remainder of this judgment.

The complaint by D'Aguiar Bros. Ltd. is that the defendant has published that the firm of D'Aguiar Bros. Ltd. evade income tax, that they rob, cheat, and live at the expense of the working classes, and on the sweat, tears and blood of the poor. All of this is based primarily on the defendant's description of what I will describe as the land transaction. The secretary of the company has said that he understood the defendant to be referring to his company as exploit-

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ers. He has found the allegations made by the defendant regarding the land transaction substantially correct, but says that the shareholders of Bank Breweries Ltd. had expressed the view that D'Aguiar Bros. Ltd. had "pulled a fast one," to use his language, on them. Let us therefore examine the transaction.

I accept the evidence of the first-named plaintiff that money had been spent by D'Aguiar Bros. Ltd. on the improvement of the land, so that what would appear on paper as profits would not really represent the true profits. I also accept his evidence that there had been protracted negotiations between him and the Demerara Company Ltd. with respect to the piece of land. All of these matters would, of course, not have been known by the defendant by an examination of the transport papers.

On the 4th April, 1956, the Demerara Company Ltd. executed a transport for a block of land in favour of D'Aguiar Bros. Ltd.; the selling price was \$27,500. On that same day D'Aguiar Bros. Ltd. executed a transport to Bank Breweries Ltd. for a portion of that land for the sum of \$40,000. Incidentally, the first-named plaintiff was one of the signatories on behalf of D'Aguiar Bros. Ltd. as well as Bank Breweries Ltd. in relation to these transactions, I make this comment not in criticism of the plaintiff's conduct—as a businessman is quite entitled to have interest financial and otherwise in as many concerns as he wishes—but to indicate to what extent he was connected with the two businesses. On the face of the transaction, it would appear therefore that the second-named plaintiffs made a huge profit on one day. It has been conceded by the secretary that a transaction of this nature would have been caught by the new tax proposals. And one suspects that this is the real reason why the firm of D'Aguiar Bros. Ltd. found itself caught up in the stream of opposition to the budget proposals. It is true that the secretary has testified to the effect that his firm is not connected with any political organisation, but when his firm permits the first-named plaintiff to use its facilities to carry on his political activities, this evidence loses all its ring of veracity.

The law requires vendors and purchasers to swear to affidavits of purchase and sale when properties are to be advertised for sale. The first-named plaintiff has testified to the fact that on the 5th May, 1955, he paid to the Demerara Company Ltd. the sum of \$1,000 towards the agreed purchase price of \$27,500. I have seen no receipt for this amount, but its payment is acknowledged in a memorandum of sale dated the 14th January, 1956. Perhaps, this is the way in which businessmen who have confidence one in the other transact their affairs. But it does seem curious that on the *5th May, 1955*, the Demerara Company Ltd. was able to enter into an agreement of sale with D'Aguiar Bros. Ltd. for the sale of certain parcels of land laid down and defined on a plan dated *10th August, 1955*. It is observed that the sale by D'Aguiar Bros. Ltd. to Bank Breweries Ltd. is recorded as having occurred on the 10th September, 1955. This seems to me to be the more correct date on which all parties committed to writing all the terms agreed upon. I am not prepared

to hazard a guess as to why the agreement between Demerara Company Ltd. and D'Aguiar Bros. Ltd. was dated 13th January, 1956. But I am of the view that it is not unreasonable, after a careful examination of the papers, to come to the conclusion that a substantial profit had been made by D'Aguiar Bros. Ltd. in one day.

It is my judgment, therefore, that the defendant, as far as he could ascertain the facts made substantially true statements. And I have already indicated that undoubtedly this was a matter of public interest upon which the defendant was commenting. The remaining question is whether the comments were fair, for even though the first two conditions may exist, if the comments have gone beyond the limits of fair comment, the defendant would still be liable. Fair comment must be an honest expression of opinion, and will fail if the jury are satisfied that the libel is malicious. If a plaintiff can prove that a defendant was actuated by a malicious motive, that is to say, by some motive other than that of a pure expression of a critic's real opinion, the defendant will fail in his plea of fair comment, even though the language used does not otherwise exceed the limit of fair comment. [See *Thomas v. Bradbury, Agnew, Ltd.*, [1906] 2 K.B. 627]. In deciding the question, a jury have no right to apply the standard of their own taste and measure the right of the critic accordingly. If it were so, there would be an end of all just and necessary criticism, for a jury would be able to find a criticism unfair merely because they did not agree with the views expressed by the critic or think them correct. The question which the jury must consider is: Would any fair man, however prejudicial he might be, or however exaggerated or obstinate his views, have written this criticism [*Merivale v. Carson* (1887), 20 Q.B.D. 275, *per* Lord Esher, M.R.]. In the more recent case of *Turner v. M-G-M. Pictures*, [1950] 1 All E.R. 461, Lord Porter proposed the substitution of the word "honest" for the word "fair" in Lord Esher's statement above. I wish to quote *in extenso* a passage in his summing-up to a jury by Lord Hewart, L.C.J., in *Stopes v. Sutherland* (House of Lords Printed Cases, 1924, at p. 375) which, in my view, states the matter fairly and accurately, and by which criterion a judge sitting in the place of a jury, as I am, should be guided. Lord Hewart said—

"What is it that fair comment means? It means this—and I prefer to put it in words which are not my own; I refer to the famous judgment of Lord Esher, M.R., in *Merivale v. Carson*; 'Every latitude,' said Lord Esher, 'must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say (not whether they agree with it, but) whether any fair man would have made such a comment.....Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism have said.' Again, as Bray, J., said in *R. v. Russell*: 'When you come to a question of fair comment you ought to be extremely liberal,

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and in a matter of this kind—a matter relating to the administration of the licensing laws—you ought to be extremely liberal, because it is a matter on which men's minds are moved, in which people who do know, entertain very, very strong opinions, and if they use strong language every allowance should be made in their favour. They must believe what they say, but the question whether they honestly believe it is a question for you to say. If they do believe it, and they are within anything like reasonable bounds, they come within the meaning of fair comment. If comments were made which would appear to you to have been exaggerated, it does not follow that they are not perfectly honest comments.' That is the kind of maxim which you may apply in considering whether that part of this matter which is comment is fair. Could a fair-minded man, holding a strong view, holding perhaps an obstinate view, holding perhaps a prejudicial view—could a fair-minded man have been capable of writing this?—which, you observe, is a totally different question from this question, do you agree with what he has said ?”

Applying the test as set out above and conceding that the language of the defendant in referring to the second-named plaintiffs might be described as intemperate and even harsh, I hold the view that the plea of fair comment so far as the second-named plaintiffs are concerned would succeed, and as I have already indicated, their action must stand dismissed.

As against the second-named plaintiffs the defendant must have his taxed costs.

*Judgment for the first-named plaintiff.
Judgment against the second-named plaintiffs.*

Solicitors: *Carlos Gomes* (for the plaintiffs); *Crown Solicitor* (for the defendant).

R. v. GILBERT

[Supreme Court—Demerara Assizes (Persaud, J.) October 21, 22, 24 and 25, 1963.]

Criminal law—Unlawful possession of firearm—Machine gun found in carton under defendant's house—Other houses in same yard—Accused said carton contained cement and attempted to stop policeman from searching in it—Whether prima facie case of possession.

The defendant's home consisted of the southern half of a building which was about two feet off the ground. The northern half was also occupied and there were other buildings in the yard which was open to access by other persons. Under the defendant's home were some boards belonging to him. In executing a search warrant the police discovered under the boards a carton tied with a bit of string and partly covered with a jute bag. Asked whom the carton belonged to, the defendant said that it was his and that a friend had brought a little cement for him. When a policeman started to untie the string the defendant held both of the policeman's hands and said, "Aint ah tell you all is cement inside? Look cement all on the box." On the carton was seen a little cement dust, but inside was found a machine gun with four magazines and 950 rounds of ammunition. The defendant was then asked who was the friend who had brought him the cement, but he did not reply. These matters were given in evidence against the defendant at his trial on a charge for being in unlawful possession of the firearm and ammunition. On a no-case submission,

Held: the untruth told by the defendant as to the contents of the carton coupled with his behaviour in seeking to prevent the police from looking inside the carton established at least a *prima facie* case for him to answer.

Submission over-ruled.

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

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

PERSAUD, J.: Acting on information received and armed with a search warrant, a squad of policemen, including Inspector Renaldo and Cpl. Hopkinson, went to the defendant's premises at lot 128 Carmichael Street, Georgetown, on the 14th May, 1963, to search for arms and ammunition. Upon the arrival of the police, the defendant was sitting in his living room and Inspector Renaldo told him that he Renaldo had a warrant to search the defendant's premises for arms and ammunition. Renaldo read the warrant to the defendant and asked him if he had any of the articles mentioned in the warrant, whereupon the defendant invited the police to search. A search was carried out under the supervision of Inspector Renaldo first in the defendant's bedroom and living room; nothing was found. The defendant's kitchen, which was a separate structure from the house, was also searched but nothing was found. There was a heap of 24 pieces of boards under the defendant's house and partly projecting beyond the western wall of the house. When the defendant was asked to whom the boards belonged he replied that they were his and that they were firewood. Cpl. Hopkinson commenced to remove the boards. Under the boards was a carton tied with a bit of string and partly covered with a jute bag. The defendant was asked whom the carton belonged to, and he said it was his and a friend

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had brought a little cement for him. Cpl. Hopkinson pulled the carton from under the house and started to unloose the string when the defendant held both his hands and said "Aint ah tell you all is cement inside? Look cement all on the box." Hopkinson spoke to the defendant telling him to take it easy and the defendant released his hands whereupon Hopkinson untied the carton. In the carton were found a machine gun with 4 magazines and 950 rounds of ammunition.

The evidence so far is that the home of the defendant is the southern half of a building which is about two feet off the ground, and that the northern half was also occupied at the time; that the yard in which the building stands has other buildings both to the west and to the east and can fairly be described as an open yard to which persons have access. The space between the earth and the building is not enclosed.

Besides the firewood and the carton there were pieces of old zinc and an old car bonnet and broken bottles under the defendant's house. When the defendant told the police that someone had brought him some cement in the carton and after the carton was opened he was asked what that friend was, but he did not reply. On the box was seen a little cement dust.

On this evidence counsel for the defendant has submitted that I ought to withdraw the indictment from the jury on the ground that there is insufficient evidence because—

- (1) the machine gun was found under a building occupied in part by the defendant and in part by other persons in a yard admittedly accessible to a number of persons moving around;
- (2) in those circumstances there must be sufficient evidence from which a reasonable jury might reasonably infer that the defendant—
 - (a) had placed the machine gun in the carton; or
 - (b) that someone else had placed it there with his knowledge and agreement and that it should remain there under his control;
- (3) the evidence that the defendant admitted ownership of the carton was not sufficient by itself to raise the presumption of knowledge of and control over Exhibit 'D1' having regard to the circumstances set out in (1) above;
- (4) evidence of conduct of a suspicious nature is conclusive of possession only where it might not be reasonably referable to knowledge or guilt of some other offence.

The first submission is really a statement of the evidence so far and this is admitted on all sides. The third submission as stated

I accept as being correct if the words “.....the evidence.....is not sufficient by itself.....” are borne in mind. I pause here to point out that the Crown is urging that this is not the only evidence which has been led in this matter.

Counsel for the defence has referred me to the case of *Ezaz v. Chester* (Appeal No. 1188 of 1958) in support of the fourth submission, and has urged that even if the defendant's conduct was an attempt to prevent the police from opening the carton he may have done so because he might have believed that the cement was stolen, and has referred to the following dictum of the Full Court in that case:

“The learned magistrate's reasons for decision indicate that a circumstance to which he attached great importance in coming to his decision was the appellant's denial (in his statement to the police) of having brought his punt down the canal alongside dam “Y” on the evening of the 19th January, 1958. That certainly was a factor to be taken into consideration by the magistrate but we are inclined to think that he attached too much weight to it. The telling of a lie in such circumstances indicates guilty knowledge, but not necessarily as to the commission of the offence charged. It may be, for instance, that the punt was a stolen punt, in which case the appellant would not want to admit ever having been seen with it or to be questioned about it even though he may have had nothing to do with the ripping up of the boards from Bridge “A”.

I have not had the benefit of the magistrate's reasons in that case, but in my view, having regard to the evidence that the defendant was admitting to the police that cement was in the carton and that the carton was his, the submission that he might have attempted to arrest examination of the box for the reason urged does not stand scrutiny, and is, in my view, without merit. If the defendant believed that cement had been unlawfully obtained he would hardly have admitted to the police that cement was in the box; perhaps he might have told them that some other article was in the box or that the box was empty. It is the case that a jury is entitled to take into account that a lie had been told and to imply guilty knowledge therefrom if other circumstances exist. By this I mean that if all the evidence is that an accused person has told a lie about how he received goods, that in itself is not sufficient evidence that the goods were stolen. See *Cohen v. March* (1951), 2 T.L.R. 402. In the case before me the prosecution urge the existence of other circumstances from which, they say, the jury may infer knowledge on the part of the defendants as to the contents of the carton.

There is no evidence that the defendant did not in fact have cement at some time in that carton. Using this as a base, counsel for the defence has launched the proposition that the sole question is whether the defendant's conduct was such that a jury can infer from it that the cement was displaced by the gun with the defendant's complicity. Counsel has further urged that mere knowledge of the

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contents of the box is not enough to show possession of the contents and that the prosecution must prove control by the defendant of the article in the box. To this latter proposition counsel for the Crown has agreed, but he has urged that the evidence so far gives rise to a violent presumption of fact that the defendant was in control of the machine gun.

Had the prosecution proved all they have proved with the exception of the defendant's conduct, a no-case submission might very well have been successful. What I am required to say is whether his conduct would lead a reasonable jury to come to the conclusion that he had possession of the machine gun in the sense that he had control of it. This would necessarily imply knowledge on his part that the machine gun was in the carton while the carton was hidden under the boards. The test as laid down in *Bridges v. North London Railway* (1874), L.R. 7 H.L. 213, is for the judge

“to enquire whether there is evidence which, if uncontradicted, would justify men of ordinary reason and fairness in forming the proposition which the proponent is bound to maintain, having regard to the degree of proof demanded by the law with respect to the particular issue.”

In dealing with the sufficiency of evidence to support a conviction the Full Court in *Ezaz v. Chester* (*supra*) said that “in a criminal case suspicion, however strong, is never enough, nor is mere probability or likelihood; the standard required is certainty beyond reasonable doubt.”

Counsel for the defence has referred me to the case of *Braithwaite v. Harris*, 1951 L.R.B.G. 24, urging that that case is authority for the proposition that the defendant's denial of knowledge of the contents of the box is not evidence which can be considered in determining the question whether the case ought to go to the jury. If this was all that occurred I would agree. In *Braithwaite v. Harris* the Full Court took into account the fact that the appellant was not the lawful husband of the lady with whom he was living and that therefore they could each own separate property and that the lady's denial of ownership or possession was not to be regarded as evidence against the appellant, he having immediately protested when that denial was made. In the case before me no such events occurred. The defendant admitted the carton to be his property and said that it contained cement. What I understand him to have been saying to the police is that at the time of the search cement was in the carton. If the cement was his and had remained in the carton then it follows that he had not made use of it or at least of all of it. This coupled with his behaviour in seeking to prevent the police from examining the contents of the carton would, in my view, establish at least a *prima facie* case for him to answer. It could hardly be urged at this stage that the evidence adduced by the prosecution has been so discredited as a result of cross-examination or was so manifestly unreliable that no reasonable tribunal could safely convict upon it. What has been urged is in effect that there has been no evidence to prove an essential element in the alleged offence, that is, possession in the sense of control. With this I do not agree.

In deference to the argument of counsel for the defence, I would like to refer to two cases cited by him. The first case (also referred to by Crown counsel, is that of *Joseph Peter Cavendish* (1961), 45 Cr. App. R. 374. In that case drums of oil alleged to have been stolen were delivered to the premises of the appellant in his absence by the thief who at the same time took away seven empty drums. The appellant, upon being interviewed by the police, said he was out all day, and knew nothing about the oil. It was held that there was enough evidence upon which the case should be left with the jury. Counsel for the defence criticised the dictum of the Lord Chief Justice when he said, referring to the thief:

“He was undoubtedly the thief, and one has only to think of the answer to that question to realise that there was certainly some evidence which made it more probable than not that the delivery was by arrangement with the appellant.”

Counsel feels that the test of the evidence being “more probable than not” is not the true test. I do not understand the Lord Chief Justice to have been making any reference to the burden of proof, when he used those words. What I understand him to be saying is that it was more probable than not, that there was an arrangement between the thief and the appellant and if that were so there was at least a *prima facie* case to answer.

It was conceded that the *Cavendish* case was rather a borderline one. What, I believe, tipped the scale in favour of the prosecution, is the fact that the thief took away seven empty drums, and from this circumstance the jury might very well have concluded that there had been a prior arrangement between the thief and the appellant.

The other case is *Harries v. Thomas* (1917), 25 Cox C. C. 753, where the appellant, a licensee of certain licensed premises, was charged for unlawfully keeping open his licensed premises for the sale of intoxicating liquor during part of the time that his said licensed premises were required to be closed. There was no evidence of a sale of intoxicating liquor to anyone, there was evidence that persons entered the premises by means of a door which was closed but not locked. Lord READING, L.C.J., expressed the view that the evidence was equally consistent with innocence as with guilt, and the appellant ought to be acquitted. ROWLATT, J., was of the opinion that the prosecution had failed to make out a case. I can see no other conclusion to which the court could have come in that matter. The position would have been different had the prosecution been able to prove a sale of intoxicating liquor, or perhaps if it could have been proved that the appellant had opened and kept open all his doors through which the public desiring to purchase intoxicating liquor would ordinarily pass. The facts of that case are clearly distinguishable from the facts of the case before me.

As I have already indicated, I am of the opinion that there is a case to answer, and must refuse the application to withdraw it from the jury.

Submission over-ruled.

MARKS v. FIRST FEDERATION LIFE INSURANCE CO. LTD.

[Supreme Court (Bollers, J.) September 19, October 28, 1963.]

Insurance—Non-disclosure of material fact—Whether insurance company liable on policies.

The plaintiff took out three policies insuring him with the defendant company for loss of time resulting from sickness and other risks. In filling up the proposal form he was assisted by the company's agent who canvassed the policy. In answering a question in the form as to past illnesses the plaintiff concealed the fact that he had been hospitalised five months earlier and treated for amoebic hepatitis for a period of four weeks. Seven months after the policies were issued he suffered an attack from coronary insufficiency and was recommended by doctors for sickness benefit under the policies. The company paid for a while, but later discontinued payments and repudiated the policies after discovering the plaintiff's concealment of his previous illness. There was however no medical connection between the two illnesses. In an action for a declaration that he was duly insured under the three policies and entitled to the full benefits thereunder, the plaintiff alleged that he had informed the agent of his previous illness but that the agent had said not to bother about it.

Held: (i) insurance is a contract *uberrimae fidei* and requires full disclosure of such material facts as are known to the insured even though he does not appreciate their materiality and even though a reasonably prudent man would not do so;

(ii) the plaintiff was guilty of non-disclosure of a material fact and this entitled the defendants to repudiate the policies;

(iii) the plaintiff would be in no better position even if he had conveyed the information to the agent.

Judgment for the defendants.

S. D. S. Hardyal for the plaintiff.

John Carter, Q.C., for the defendant.

BOLLERS, J.: This is an action against a life insurance company in which the plaintiff claims a declaration that he is duly insured under three policies of insurance, *i.e.*, an industrial 20 year endowment, a hospitalisation and surgical and indemnity for loss of life or time from accidental injuries, and for loss of time from sickness, and that the policies still subsist and that he is entitled to the full benefits under the said policies.

The plaintiff, a cycle repairer, in September 1960 consulted Dr. Annamantadoo, a physician resident in New Amsterdam, who diagnosed that he was suffering from hepatitis, that is, an infection of the liver which produced a deeply jaundiced condition and as a result the plaintiff was referred to the New Amsterdam Hospital where he was admitted as a patient and treated for amoebic hepatitis for a period of four weeks. On the plaintiff's discharge from the hospital, he was pronounced cured by the physicians who attended to him in the hospital.

In February 1961 the plaintiff effected three policies of insurance with the company the total premiums for which were \$1.43 per week, two of which as already stated protected him from loss of time from work due to sickness and under which he was entitled to the

payment of \$7.60 per week by the company for any period he was ill up to a maximum of thirty weeks. In filling up the proposal form the plaintiff was assisted by the agent of the company who canvassed the policies. The plaintiff was asked questions by the agent who wrote in the answers to the questions supplied by the plaintiff and then the plaintiff signed each proposal form in relation to each policy, and the contracts were later effected by the company which issued the policies to the plaintiff.

About seven months later the plaintiff became ill and felt a pain across his chest as a result of which he consulted Dr. Mook-Sang in Georgetown who diagnosed that he was suffering from a blockage of a tube leading to the heart. Dr. Mook-Sang recommended the plaintiff for sickness benefit under the two policies and he was paid accordingly by the company for a period of three weeks. One month later the plaintiff was again recommended by Dr. Mook-Sang for two weeks benefit which the company paid. About three months later, Dr. Annamanthadoo diagnosed that the plaintiff was suffering from coronary insufficiency and recommended a further period of six weeks sickness benefit which the company paid.

In June 1962 the company insisted that the plaintiff undergo a medical examination by the company's physician Dr. Ramlall, who recommended a further period of six weeks sickness benefit which the plaintiff was paid by the company. The company then discovered that the plaintiff had been a patient in the hospital some weeks prior to the effective date of the three policies of insurance and in a letter to the plaintiff's counsel dated the 27th June, 1962, it was pointed out that under question 18 in the proposal form which the plaintiff signed, he was asked whether he had ever had any of the diseases mentioned in the long list of diseases and whether he had within the past five years received medical attention for any reason whatsoever and, if so, he was to give details below. His answer was no. Under question 10, he was also asked whether he was in good health and he gave the answer yes. The company then drew the attention of counsel to the declaration made by the plaintiff that the statements and representations in the proposal form were complete and true and that any misrepresentation or concealment of facts by him would render any policy null and void. They then called on the plaintiff to attend at their office. On the 7th July, 1962, the company wrote the plaintiff's counsel another letter pointing out that the plaintiff had since called at their office and disclosed that he had been hospitalised only five months prior to the taking out of the policies under which he claimed, and as that fact was concealed in the application his policy automatically became null and void. They decided, however, to refund to the plaintiff all of his premiums paid less the sums paid in sickness benefit and forwarded a cheque to cover this amount. They then refused to accept further premiums from the plaintiff and terminated the three policies of insurance. The plaintiff's counsel returned the cheque.

In this court it was contended by counsel for the defendant company that the company were entitled to terminate the policies as they

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had become null and void by reason of the non-disclosure of material facts in the proposal form by the plaintiff when he failed to disclose that within the period of five years prior to the effective date of the policies he had received medical attention and had failed to give details thereof. In support of this contention counsel cited *Newsholme Brothers v. Road Transport and General Insurance Company Limited* (1929), 45 T.L.R. 573, and *Dunn v. Ocean Accident and Guarantee Corporation Ltd.* (1933), 50 T.L.R. 32. Counsel for the plaintiff in reply submitted that the plaintiff in filling up the application form had in fact conveyed that information to the agent of the company who had said not to bother about it, and that the knowledge of the agent was the knowledge of the company which had effected the contract of insurance.

In dealing with this question I must state that I do not believe the plaintiff when he stated in evidence that he had conveyed the necessary information to the agent. In my view this evidence was given by the plaintiff purely for the purposes of his case. I must approach the problem therefore on the footing that the plaintiff in the proposal form had failed to disclose to the company that about four or five months prior to the effective date of the policies he had suffered from an attack of amoebic hepatitis and had spent a period of time in hospital during which time he received treatment for this disease. It is agreed, however, that there was no connection between the attack of hepatitis which produced the jaundiced condition and the coronary insufficiency or angina pectoris which came upon the plaintiff seven months after the effective date of the policies.

It is well settled that insurance is a contract *uberrimae fidei* and requires full disclosure of such material facts as are known to the assured. The assured must disclose everything known to him that is material in fact even though he does not appreciate its materiality and even though a reasonably prudent man would not do so; *vide London Assurance v. Mansel* (1879), 11 Ch. D. 363. As BAYLEY, J., said in *Lindenau v. Desborough* (1828), 8 B. & C. 586, at p. 592:

“I think that in all cases of insurance, whether on ships, houses or lives, the underwriter should be informed of every material circumstance within the knowledge of the assured; and that the proper question is, whether any particular circumstance was in fact material, and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to show that the party neglecting to give the information thought it material. But if it is held that all material facts must be disclosed, it will be the interest of the assured to make a full and fair disclosure of all the information within their reach.”

It is irrelevant that the non-disclosure causes no loss, and the Court of Appeal in England in *Locker and Woolfe Ltd. v. Western Australian Insurance Co., Ltd.*, [1936] 1 K.B. 408, have held that the definition of “material” contained in the Marine Insurance Act, 1906, namely, “every circumstance which would influence the judgment of a prudent insurer in fixing the premium, or in determining whether he

will take the risk" is applicable to all forms of insurance. As the learned authors of PRESTON AND COLINVAUX ON THE LAW OF INSURANCE (2nd Edn.), put it, "Everything is material which will guide a prudent insurer in determining whether he will take the risk and, if so, at what premium and on what conditions." The test to be applied whether a particular fact is one which ought to be disclosed is not what the assured thinks, nor even what the insurers think but whether a prudent and experienced insurer would be influenced in his judgment if he knew of it.

When I apply the test I cannot escape the conclusion that a prudent and experienced insurer in this case, had he known of the plaintiff's attack of hepatitis, would have been put upon his enquiry and undoubtedly might have been influenced in his judgment as to whether he should accept the risk of the life proposed or not. It may well be, in this case, that had the defendant company been informed of the plaintiff's previous illness, they would have chosen to accept the risk but that, after all, is their business if loss were sustained as a result. In the circumstances they have been deprived of the right of the consideration whether they should accept the risk or not. I hold, therefore, that there was a non-disclosure of material facts in this case when the plaintiff failed to state correctly that he had been in hospital for a certain period suffering from hepatitis of the liver within a period of five years prior to the effective date of the policies.

I have already found as a fact that the plaintiff did not convey the correct information under question 23 of the proposal form, but in the event of being found wrong on this issue I must yet approach the question as if that information had been supplied to the agent of the company. In *Bawden v. London, Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q.B. 534, where the local agent of the insurers filled in a proposal form for a one-eyed man who signed the form, the form had a printed declaration that the applicant had no physical infirmity. It was held by the Court of Appeal that the knowledge of the agent was the knowledge of the company and that the declaration was therefore no defence to the claim by the assured. In this case, LINDLEY, L.J., pointed out that the local agent of the company who filled up the form was admittedly an agent for the purpose of obtaining proposals for insurance. The insured was obviously blind in one eye and the agent knew it. It was the agent's duty to see that the form was correctly filled in but he knowingly filled it in incorrectly and passed on to the company a form that was not applicable to the facts. In those circumstances he felt that the knowledge of the agent was the knowledge of the company. In *Newsholme v. Road Transport and General Insurance Co. Ltd.*, [1929] 2 K.B. 536, the court of Appeal held that where an agent intentionally filled in untrue answers in the applicant's proposal form and the applicant signed it, the insurers were not bound as the fraud of the agent prevented his knowledge from becoming that of the insurers. In this case SCRUTTON, L.J., stated in his judgment:

"In my view, the decision in *Bawden's* case (8 T.L.R. 566, [1892] 2 Q.B. 534) is not applicable to a case where the agent

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himself, at the request of the proposer, fills up the answers in purported conformity with information supplied by the proposer. If the answers are untrue and he knows it, he is committing a fraud which prevents his knowledge being the knowledge of the insurance company. If the answers are untrue, but he does not know it, I do not understand how he has any knowledge which can be imputed to the insurance company.”

The Full Court of the Supreme Court in *Wellington v. Herbert*, 1961 L.R.B.G. 510, (LUCKHOOD, C.J., and BOLLERS, J.), stated that it was doubtful whether the decision in *Bawden's* case would now be followed though it may be explained as the learned authors of PRESTON AND COLINVAUX suggest on the footing that the contract was essentially one with a one-eyed man, that the company was fixed with notice of that fact and that the declaration should be construed in that light. In *Dunn v. Ocean Accident and Guarantee Corporation Ltd.* (1933), 50 T.L.R. 32, (1933), 47 L.I.L.R. 129, the plaintiff, a Mrs. Dunn, claimed a declaration that a policy of insurance, issued by the company to her in her maiden name, was valid and binding on the company on a certain date when her husband was killed while driving the motor car, the subject of the insurance. The proposal form was filled up by the plaintiff's husband acting as agent for the company and was signed by the plaintiff in her maiden name. The jury found that the plaintiff had failed to disclose all the material facts within her knowledge, that is, that her husband had been involved in accidents and that she was a married woman and the wife of the agent who would probably drive the car. The action was dismissed and on appeal it was contended that as the plaintiff's husband was agent for the defendant company and had put the form before the plaintiff, his knowledge must be imputed to the directors of the defendant company so that there had in fact been disclosure. This contention was rejected by the Master of the Rolls who held that it could not be said that the plaintiff's husband had acted as agent for the defendant so as to justify acceptance of a risk different from that stated in the form of insurance. He felt it was difficult to see how the plaintiff's husband by acting in defiance of his duty to the defendant company, was able to authorise the plaintiff to forego her duty to disclose such very material facts. The appeal was therefore dismissed.

I must, therefore, in the present state of the law, come to the conclusion that even if the plaintiff had conveyed this information to the agent he would be in no better position.

In the proposal form which the plaintiff signed he declared that the statements and representations which he made in the form were complete and true and that any misrepresentations or concealments of facts should render the policy null and void. This, in a policy of insurance, amounts to a warranty and a breach of it entitles the party aggrieved to repudiate his liability under the contract. The great advantage of warranties to insurers is that their breach entitles them to repudiate, quite irrespective of their immateriality, that is, in those circumstances the insurer can repudiate whether the breach is material or not: *vide* PRESTON AND COLINVAUX, p. 105.

It follows that this action must fail and judgment entered for the defendant company with costs fit for counsel.

Some time after decision was reserved, counsel for the plaintiff wrote me a letter making application to lead additional evidence through a fresh witness after the close of the defendants' case. I considered this application and rejected it on the ground that the plaintiff could not properly say that he had been taken by surprise by the evidence led by the defendants, for indeed they led no evidence. This was not a matter which arose *ex improviso* and the plaintiff was always in a position to lead evidence of the agent who, apparently, was always available. Without going further into the question I am prepared to follow the judgment of FRASER, J., in *Gurric v. John*, 1962 L.R.B.G., 74, with which I am in entire agreement.

Judgment for the defendants.

Solicitors: *R. N. Tiwari* (for the plaintiff); *V. Lampkin* (for the defendant).

CHINTAMAN v. BROWN

[In the Full Court, on appeal from the magistrate's court for the Berbice Judicial District (Persaud, J., and Cummings, J. (ag.)) October 12, November 2, 1963]

Criminal law—Unlawfully and maliciously killing a goat—Goat eating defendant's padi—Whether defendant acted reasonably in defence of his property—Summary Jurisdiction (Offences) Ordinance, Cap. 14, s. 55.

The defendant had a heap of padi stored in a paled yard. He found four goats eating the padi and struck one of them twice with a piece of wood. The goat fell down beside the heap bleeding from its nose while the others ran away. The appellant then picked up the injured goat and threw it over the palings. On this evidence he was convicted in the magistrate's court for unlawfully and maliciously killing the goat contrary to s. 55 of the Summary Jurisdiction (Offences) Ordinance, Cap. 14. He appealed on the ground that he had acted in defence of his property.

Held: the appellant had failed to discharge the burden, which rested on him, of showing either that there was in fact no practical means, other than killing the goat, of stopping the destruction of his padi, or that having regard to all the circumstances in which he found himself, he acted reasonably in regarding the killing as necessary for the protection of his padi against further destruction.

Appeal dismissed.

K. Prasad for the appellant.

K. Bhagwandin, Police Legal Adviser, for the respondent.

Judgment of the Court: This appellant appeals against a conviction of a magistrate for unlawfully and maliciously killing a goat, the property of one Baban, contrary to s. 55 of the Summary Jurisdiction (Offences) Ordinance, Cap. 14. The ground of appeal argued before us was that the learned magistrate erred in failing to consider whether the defendant (appellant) acted in defence of his property.

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The evidence which the magistrate accepted was to the effect that the goat in question together with three or four others were in a paled yard eating the appellant's padi which was heaped in that yard; the yard belonged to the appellant's brother; that the appellant struck the animal twice with a piece of wood and it fell down beside the heap bleeding from its nose. The other goats scampered away. The appellant picked up the injured goat and threw it over the palings, and when remonstrated with by the owner's 13-year-old daughter, he used filthy language.

The appellant led no defence, but relied upon certain submissions, among which was the one now being urged before us.

Counsel has submitted that the magistrate omitted to consider whether the appellant was acting in defence of his property, and further, that the appellant had a right to protect his property. Counsel has referred us to *Cresswell v. Sirl*, [1948] 1 K.B. 241. In that case, which was a civil one, but which was accepted both in *Goodway v. Becher*, [1951] 2 All E.R. p. 349, as well as in *Workman v. Cowper*, [1961] 2 W.L.R. 386, as authoritatively laying down the law on this subject, it was said that the rules of law may be stated thus—

“(1) The onus of proof is on the defendant to justify the preventive measure of shooting the attacking dogs.

(2) He has, by proof, to establish the propositions, but each proposition may be established in either of two ways.

Proposition No. 1: That at the time of the shooting, the dog was either:

- (a) actually (in the above sense) attacking the animals in question,
or
- (b) if left at large would renew the attack so that the animals would be left presently subject to real and imminent danger unless renewal was prevented.

Proposition No. 2: That either:

- (a) there was in fact no practical means, other than shooting, of stopping the present attack or preventing such renewal, or
- (b) that the defendant, having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack.”

We are of the opinion that in the case before us the proposition 1 (a) above was established in that at the relevant time the animal was eating the appellant's padi, and this would be in favour of the appellant, but from the circumstances, and particularly as the appellant did not give evidence, neither (a) nor (b) of proposition 2 was proved. In those circumstances, we feel that the magistrate was right in convicting the appellant.

We have observed the statement which appears as part of note (n) on p. 1920 of the 93rd Edition of STONE'S JUSTICES' MANUAL, to the effect that placing poisoned flesh in an enclosed garden for the purpose of destroying a dog in the habit of straying there is not acting maliciously within the relevant section (*Daniel v. James* (1877), 41 J.P. 712). This case was followed in *Smith v. Williams* (1892), 56 J.P. 840, where it was held that a farmer who shot two fowls whilst trespassing on his land where seed had recently been sown acted without malice and in defence of his crop. The court held itself bound by the decision in *Daniel v. James (supra)*. In a later case of *Armstrong v. Mitchell* (1903), 67 J.P. 329, where a keeper, seeing a dog come into a field over which his master had the shooting rights, and frightening the pheasants, shot at it, but not with the intention of killing it, but intending to injure it, if necessary, for the purpose of frightening it away, Lord ALVERSTONE. C.J., expressed the view that the full extent of the decisions in *Daniel v. James* and *Smith v. Williams* might have to be reconsidered if the point ever came up. In *Miles v. Hutchings*, [1903] 2 K.B. 714, WILLS, J., expressed the view that the dictum in *Daniel v. James* was too wide. In the more recent case of *Gott v. Measures*, [1941] 2 All E.R. 609, the law was stated by Lord GODDARD, L.C.J., in these words—

“A person may be justified in shooting a dog if he honestly believes that it is necessary as being the only way to protect his property.”

In *Goodway v. Becher*, [1951] 2 All E.R. 349, the appellant, who was the owner of a poultry farm, saw a dog belonging to the respondent's stepson chasing his chickens. Although the appellant had a gun at the time he did not fire at the dog, but he warned the respondent that if again he found the dog worrying the chickens, he would shoot it. On the next day the appellant saw the dog among his chickens and killed it. On being summoned for unlawfully and maliciously killing the dog, the justices found that, while the appellant acted under considerable provocation, ‘he did not exhaust every practicable means of stopping the dog from attacking the fowls and they convicted him. On appeal, it was held that the true test to be applied was whether the appellant had acted reasonably in what he did; in the circumstances, he had so acted; and, the conviction was accordingly quashed.

With respect, we are in agreement with the proposition set out above, but from the facts in the case before us, we cannot say that the appellant acted reasonably.

In *Workman v. Cowper*, [1961] 2 W.L.R. 386, the test laid down for the justification for killing a dog, was that there must be real and imminent danger to the animals it is being sought to protect from the dog.

It will be observed that all the cases to which we have so far referred, related to the killing of dogs. In the local case of *Bidessie v. Hossanah*, 1946 L.R.B.G. 296, the animal concerned was a sheep, and the property threatened or which was being damaged was padi.

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The appellant was engaged in the padi field cutting padi with a grass knife and he threw the knife at the animal which at that time was eating the padi in the field. The knife wounded the animal which died from the wound. It was held that for the protection of one's own property, or the property of one's employer, it is not unlawful to maim or even kill an animal, provided that such an act is necessary, and there was at the time a *bona fide* belief that only by such an act could the property be protected. The appeal was dismissed, and the Full Court of Appeal said—

“Perhaps this *prima facie* case of malice may have been rebutted by the appellant if he had testified that having the grass knife in his hand he acted on a sudden impulse to protect the rice without intending or considering the reasonable probability of injury to one of the sheep.”

We feel that the circumstances of the instant case are somewhat similar to those in the *Bidessie* case. A *prima facie* case of malice has been made out against the appellant which he did not seek to answer.

In the *Bidessie* case the Full Court considered the decision of the West Indian Court of Appeal in *Gonsalves v. Stephen*, 1922 L.R.B.G. 177, where the appellant was charged for maliciously maiming a dog. In the latter case the view was expressed that it was a question of fact for the magistrate to decide whether the appellant *bona fide* believed that it was necessary to hit a dog with a bar in order to drive him away or to recover his master's property, and dismissed the appeal. With this view this court is also in respectful agreement.

For the reasons we have given, and as we have already indicated, this appeal must fail. The appeal is dismissed, the conviction and sentence affirmed, and the appellant is ordered to pay the respondent's costs fixed at \$26.75.

Appeal dismissed.

WEITHERS v. BRITISH GUIANA PAWNBROKING
AND TRADING CO. LTD.

[Supreme Court (Persaud, J.) May 22, June 19, 20, July 2, 12, 20, November 6, 1963]

Sale of goods—Purchase of marine engine on advice of defendants' agent—Engine functioned well on two trips but thereafter gave trouble—Whether breach of fundamental condition of agreement.

Relying on the advice of the defendants' agent, the plaintiff purchased from the defendants a marine engine for the purpose of operating a certain boat. The engine functioned well on two occasions but thereafter gave trouble on account of the plaintiff's faulty mode of operating it. In an action by the plaintiff for damages for breach of warranty and related reliefs,

Held: in the absence of proof by the plaintiff that the trouble developed out of a fault which existed at the time of purchase but was not detected until after the second trip, the action must fail.

Judgment for the defendants.

C. A. Massiah for the plaintiff.

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

PERSAUD, J.: The plaintiff is a barrister-at-law. During 1960 he was also the manager of his father's rice lands situate about 30 miles up the Mahaicony River on the East Coast of Demerara. To get to and from these lands he had to travel by the river, and he decided to acquire a suitable boat and engine to do this. With this object in mind, he approached Allan Chung, at that time, the manager of the machine department of the defendants' company who were then the local agents of an outboard motor engine called the 'Gale Buccaneer.' A discussion ensued in which the plaintiff told Chung the purpose for which he needed an engine, and, as is to be expected of any salesman who wishes to sell his employer's products, Chung recommended the 25 H.P. 'Gale Buccaneer' engine. The plaintiff took Chung to see a boat which was really built to be used as a pleasure boat, but which the plaintiff wished to use to ferry workmen and building materials to his father's land where he was then engaged in erecting a house. It must be apparent that a pleasure boat may not be ideal for fetching building materials, but that it could be so used. It seems to me to matter little whether the boat was a pleasure boat or otherwise. What matters is whether the plaintiff acted on Chung's advice in deciding to buy the engine. I find that Chung advised the plaintiff to purchase a 25 or 35 H.P. engine, and the plaintiff decided on the latter, no doubt, because it is a more powerful engine.

As a result the plaintiff and defendants entered into a hire-purchase agreement (Ex. 'A'), on the 30th April, 1960, and in pursuance of this agreement, the plaintiff took possession of one 35 H.P. 'Gale Buccaneer' out-board engine, with serial number 36714. The plaintiff requested that the engine be equipped with a self starter, that is, for the engine to be started by an ignition key and switch

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rather than by what is described as manual starts. This was done by attaching a starter to the engine which was affixed to the stern of the boat, while the switch was installed on a dashboard at the bow where the steering wheel was situated. The engine was so constructed that it could be started either by using the switch or by manual starts. The latter necessitated the pulling of a cord attached to the engine itself, and must of a necessity have been more laborious than the former method. The engine could be operated without the starter.

On the first trip, with Chung present, the engine performed satisfactorily, and so it did on the second trip. It was from the third trip that, according to the plaintiff, it began to give trouble which necessitated his taking the engine back to the defendants, and requesting that it be looked at. It would appear that after this, the engine never performed satisfactorily when in the plaintiff's possession.

Three weeks after the plaintiff had taken possession of the engine, he took it back to the defendants and it was discovered that the armature, which is a part of the starter, was burnt. This meant that the starter could not be used, but did not necessarily mean that the engine could not work. Chung has expressed the view, and this has not been contradicted, that the armature was burnt because of overheating which was caused by depressing the starter button for too long periods. In my view, this could very well be the cause where persons not experienced in the operation of motors of this sort try to operate them. This incident must have occurred while the engine was in the possession of the plaintiff, and therefore, the defendants cannot be held liable therefor, unless the plaintiff can show that there was some fault in the armature. This he has failed to show.

It is a fact that up to October 1960, the plaintiff experienced trouble of one kind or another with the engine, and he took it to Chung on several occasions to be fixed. I do not doubt that the plaintiff was completely disillusioned with the performance of the engine, and on one of the occasions when he saw Chung, he told him to repair the engine and sell it. The plaintiff has expressed the view that he felt that that was tantamount to a repudiation of the hire-purchase agreement. This is clearly not so, particularly as he not only continued to pay the instalments thereunder, but he paid off the entire amount due on the agreement, the last such payment having been made by letter on the 26th July, 1961, after the defendants had on two separate occasions obtained judgment against him for unpaid instalments. It is true that in that letter, the plaintiff complained of the difficulties he had had with the engine, and threatened to sue for breach of warranty.

I find that the starter was replaced, and worked efficiently thereafter. I also find that the impellor blade was broken, and had to be replaced. The impellor is part of the mechanism of the water pump which keeps the engine supplied with water thereby preventing it from overheating. I accept as true that this blade could only have

been broken by the introduction of foreign matter into the pump. This could be due to working the engine in shallow water. In my view this must have happened while the engine was in the plaintiff's possession, and he cannot now seek to put this fault on the defendants' shoulders. Because of the plaintiff's inexperience in the handling of engines of this type, this damage could not have been detected immediately. The result was that the engine was worked in this condition, and it became over-heated.

It became necessary to fit a blade to the propeller in February 1961. This seems to support Chung's contention that the propeller had developed a fault, and unless this fault was corrected, the engine would vibrate, resulting in the slackening of bolts and screws, and in the "walking back" of the needle controlling the consumption of petrol. When this happens, a greater quantity of petrol is consumed. Chung adjusted this needle.

Having delivered the engine to the defendants, but not having taken steps to bring the hire-purchase agreement to an end as is provided for in the agreement, and having paid off the full price in July 1961, the plaintiff in September 1961, filed this writ against the defendants seeking damages for a breach of a condition precedent, for a breach of warranty, and for negligence. In addition the plaintiff has alleged a total failure of consideration.

In *Sankar Bros. Ltd. v. Singh* (1961), 4 W.I.R. 36, 1961 L.R.B.G. 341, it was held that where the defect in a tractor was such as to destroy the workable character of a machine, this would constitute a breach of a fundamental condition of the agreement; and where the defendant retained possession of the machinery, and had not taken steps to rescind the contract, there could not be said to be a total failure of consideration. In the case before me, the plaintiff not only retained the engine in his possession for some time, but he also had the use of it, and it worked satisfactorily on at least two occasions. His claim for failure of consideration must therefore fail for that reason.

The plaintiff alleges that the condition precedent was the statement by Chung to the effect that the defendants maintained an efficient staff to effect repairs to the 'Gale Buccaneer' engine, and they also carried replacement parts, and that relying upon these representations he entered into the hire-purchase agreement. These representations, even if made, cannot amount in law to a condition precedent, and even if they were, there was no disproving the statements made by Chung. In my view, therefore, the plaintiff cannot succeed in securing damages for a breach of a condition precedent.

There is no warranty clause in the hire-purchase agreement. Mr. Massiah contends strongly that this is a case of a breach of warranty, and the contract fails to be governed by s. 16 of the Sale of Goods Ordinance, Cap. 333. In s. 2 of that Ordinance, "warranty" is defined to mean—

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‘an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of that contract, the breach of which gives rise to a claim for damages, but not a right to reject the goods and treat the contract as repudiated.’

And s. 16 (a) of the same Ordinance provides as follows—

“Subject to the provisions of this Ordinance and of any Ordinance in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows—

where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller’s skill or judgment, and the goods are a description which it is in the course of the seller’s business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for that purpose, provided, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.”

The proviso above would normally apply if the plaintiff had placed an order for a Gale Buccaneer engine, but if at the time he placed the order, he made it clear to Chung that he was relying on his skill and judgment to ensure that the engine would be fit for the particular purpose, the proviso would have no application. [See *Baldry v. Marchall*, [1925] 1 K.B. 260, at p. 270]. I find that the plaintiff did rely on the advice of Chung on the purchase of the engine, but not on the size of the engine. I also find that the engine worked satisfactorily for the purpose it was intended on at least two trips, and unless the plaintiff can show that a fault existed at the time of purchase, but was not detected until after the second trip, he must fail. There is no such evidence before me. I am of the view that the faults developed later, and were due to the mode of operation, and not to any defect in the engine.

I have examined the cases referred to by counsel for the plaintiff. These are—*Wallace, Son and Wells v. Pratt and Haynes*, [1911-13] All E.R. 989; *Brown v. Sheen and Richmond Car Sales, Ltd.* [1950] 1 All E.R. 1102; *Karsales (Harrow) Ltd. v. Wallis*, [1956] 2 All E.R. 866; and *Lowe v. Lombank Ltd.*, [1960] 1 All E.R. 611. These cases do not decide any new principles of law. They all hold that the article sold must be fit for the purpose for which it is bought, and in the last two cases, it was decided that this rule held good even where there was an exception clause that there was not condition or warranty as to the fitness of the article for any purpose. In the *Karsales* case, it was held that a fundamental breach put an end to any term relating to a condition or warranty. These cases, although not without interest, are not applicable in my view in the instant case.

There is no evidence before me of any negligence on the part of the defendants or their servant Chung; And therefore I cannot hold them liable under this head.

The plaintiff's action must therefore fail for the reasons given on every side. He must pay the taxed costs of the defendants fit for counsel.

Judgment for the defendants.

Solicitors: *O. M. Valz* (for the plaintiff); *Sase Narain* (for the defendants).

D'AGUIAR v. BARROW

[In the Full Court, on appeal from the magistrate's court for the Georgetown Judicial District (Date, Bollers and Persaud, JJ.) January 9, 28, 1963.]

Criminal law—Evidence—Speaking at public meeting in respect of which no notice has been given to the police—Whether prosecution must prove that no notice has been given—Public Order Ordinance, 1955, ss. 3 (1) and 13 (1)—Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s. 8.

Criminal law—Evidence—Statement made in presence of defendant—Admissible, but not evidence against defendant except in so far as he by his conduct accepted it as true.

Appeal—Magistrate's memorandum of reasons—Requirements.

Section 3 (1) of the Public Order Ordinance, 1955, provides that "any person who desires to hold a meeting in a public place shall.....notify the appropriate officer of Police of his intention to hold the said meeting....." Section 13 (1) provides that "any person who (a) holds, organises or speaks at any meeting in a public place in respect of which no notice has been given under sub-s. (1) of s. 3.....shall be guilty of an offence."

The appellant was convicted by a magistrate of the offence of speaking in "a public place.....at a meeting in respect of which no notice had been given under s. 3(1)". He appealed on the ground that there was no evidence to establish that no notice had been given in respect of the meeting. In reply it was argued for the respondent that the matter was governed by s. 8 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, which provides that "any exception, exemption, proviso, condition, excuse or qualification.....may be proved by the defendant, but need not be specified or negatived in the complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the complainant."

Held: (i) where the particular enactment creates an absolute prohibition of a particular act unless the defendant can bring himself within certain exceptions, qualifications or excuses, *on proof* by the prosecution of the particular act, the burden of proof is shifted on to the defendant to show what is peculiarly within his own knowledge, *i.e.*, that he comes within the exemptions, qualifications, excuses, etc. This is described as discharging the evidential burden and does not require as high a degree of proof as in the case of the prosecution (proof beyond reasonable doubt) but merely proof on a balance of probabilities;

(ii) on the other hand, where the particular enactment does not create an absolute prohibition and the act is one which is lawful unless it is done

in a particular manner without lawful authority or excuse, the onus still remains on the prosecution to establish a *prima facie* case against the appellant that the act was done without lawful authority;

(iii) section 13(1) of the Public Order Ordinance, 1955, did not create an absolute prohibition, and the burden was accordingly on the prosecution to prove that no notice had been given;

(iv) the obligation to give such notice was on the holder of the meeting and not on a person who was merely a speaker at the meeting;

(v) evidence may be given of any statements made in the presence of an accused person; but a jury should be directed that such statements are only evidence against him in so far as he by his conduct accepted them as true;

(vi) a magistrate's memorandum of reasons for decision should state shortly and concisely his findings of fact and refer to any provisions of the law or legal principles applied to those facts.

Appeal allowed.

L. F. S. Burnham, Q.C., with *H. D. Hoyte* for the appellant.

David Singh, Senior Legal Adviser (ag.), for the respondent.

Judgment of the Court: On the 12th February, 1962, Senior Superintendent of Police Mervyn Barrow, in charge of "A" Division, Brickdam Police Station, was on duty at about 11.00 a.m. at the Parade Ground, Middle Street, Georgetown, when he saw a crowd of about 3,000 persons assembled there with placards and slogans. Various persons, one of whom was the appellant, Peter D'Aguiar, addressed the meeting over a loud speaker on matters which could be properly described as political. Superintendent Barrow approached the appellant and spoke to him informing the appellant among other things that he (Barrow) was the Chief Officer of the Police Division, Georgetown, in accordance with the Public Order Ordinance, 1955. The Superintendent warned the appellant that he might be prosecuted for holding and taking part in a public meeting at the Parade Ground, Georgetown, a public place, without notifying him, the Chief Officer or the appropriate officer. The appellant replied that he heard what was said but he was carrying on with a procession and was marching.

As a result of the events that took place at the Parade Ground on that day, the appellant was subsequently charged with the offence of "speaking at a meeting, contrary to s. 13 (1) (a) of the Public Order Ordinance, 1955," the particulars of which offence read as follows: "Peter D'Aguiar on the 12th of February, 1962, at a place known as Parade Ground, a public place in the Georgetown Judicial District, spoke at a meeting in respect of which no notice had been given under sub-s. (1) of s. 3 of the said Ordinance." At the conclusion of the case for the prosecution before the magistrate the appellant closed his case and did not give evidence nor did he lead a defence in answer to the charge but relied on certain submissions made by his counsel.

The magistrate in his memorandum of reasons has stated that he overruled the submissions, accepted the evidence for the prosecution and found as a fact that:

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- (1) the appellant did not comply with the requirements of Ordinance No. 56 of 1955;
- (2) there was a meeting at the Parade Ground, Georgetown, on the 12th February, 1962; and
- (3) the appellant did speak at that meeting.

The magistrate then proceeded to convict the appellant of the offence for which he was charged and imposed a fine of \$150, in default 3 months' imprisonment. It is from this conviction that the appellant now appeals on the ground that the decision was unreasonable and could not be supported having regard to the evidence, and was also erroneous in point of law because there was no evidence to establish that no notice had been given or sent as required by law.

The relevant part of s. 13 (1) of the Ordinance under which the charge was laid reads as follows:

“Any person who—

(a) holds, organises or speaks at any meeting in a public place in respect of which no notice has been given under subsection (1) of section 3 of this Ordinance or in respect of which a notice of the prohibition of such meeting has been served under subsection (3) of section 3 of this Ordinance or the holding of which is in any way contrary to any restrictions contained in a notice served under subsection (3) of section 3 of this Ordinance;

* * * *

shall be guilty of an offence.”

Section 3 (1) states:

“Any person who desires to hold a meeting in a public place shall, not less than forty-eight hours and not more than one month previous to the time at which he desires to hold such meeting, notify the appropriate officer of Police of his intention to hold the said meeting and of the time and the place at which the said meeting is to be held.

Provided, however, that where the appropriate officer of police is satisfied in respect of any meeting in a public place that having regard to the circumstances or for any other reason the said notice could not reasonably have been given within the time specified therefor in this section he may in respect of such meeting accept such shorter period of notice as he shall think fit.”

It will be seen at once that the person who is called upon to notify the appropriate officer of Police of his intention to hold a meeting and to give notice of the time and the place at which the meeting is to be held is the holder of the meeting and not the organiser or a speaker at the meeting. The appropriate officer to whom this notice must be sent is described in the definition section of the Ordinance as mean-

ing "the member of the Police Force for the time being in charge of the Police Station nearest to the place at which a meeting is to be held." We agree with the observation made by counsel for the appellant that the magistrate fell into error when he appears to have thought that it was for the appellant, as a speaker at the meeting, to give due notice thereof to the appropriate officer. The Chief Officer of Police is described in the Ordinance as meaning the member of the Police Force having chief command of the police in the police division or police district in which a meeting, gathering or assembly of persons, or a march or procession as the case may be is to be held; and under s. 5 (1) it is only when a person desires to hold or take part in any public procession other than a funeral procession that he is called upon to obtain the permission of this officer. Senior Superintendent Barrow was also under a misapprehension when he appeared to have thought that the appellant was under an obligation to notify him, as Chief Officer, when holding or speaking at a meeting.

In this court, counsel for the appellant submitted that the onus was on the prosecution to prove not only that the appellant spoke at a meeting but that he spoke at a meeting in respect of which no notice had been given by the holder of the meeting in accordance with s. 3 (1) of the Ordinance, and this the prosecution had failed to do. He submitted that s. 13 (1) of the Ordinance did not enact an absolute prohibition and that when the act complained of is not absolutely prohibited save for certain exceptions, the onus remains on the prosecution to prove all the elements of the charge. It was therefore incumbent upon the prosecution, in the case of a person charged with the offence of speaking at a meeting, to prove that he spoke at the meeting in respect of which no notice had been sent to the appropriate officer. Counsel sought to draw a distinction between those cases where the particular legislation enacted an absolute prohibition that a particular act must not be done unless the person charged came within certain exceptions or qualifications, in which case the fact of the exception or qualification being peculiarly within his knowledge shifted the burden of proof on to him of showing that he came within the exception or qualification, and those cases where the act was not absolutely prohibited and the burden of proof remained throughout on the prosecution to establish the elements of the charge. Finally, he submitted that if the proposition he had advanced was sound, the prosecution had not discharged the onus placed upon it in establishing that, in respect of the meeting at the Parade Ground on the 12th February, 1962, no notice had been given. Counsel cited *R. v. Rogers* (1811), 2 Camp. 654, *Huggins v. Ward*, (1873) L.R. 8 Q.B. 521, *R. v. Oliver*, [1943] 2 All E.R. 800, *R. v. Putland and Sorrell*, [1946] 1 All E.R. 85, *Reynolds v. G. H. Austin & Sons Ltd.*, [1951] 1 All E.R. 606, *Alexander v. Chalmers*, 1956 L.R.B.G. 146.

Counsel for the respondent in reply submitted that s. 13 (1) (a) of the Ordinance did create an absolute prohibition and prohibited a person speaking at a meeting unless notice had been given under sub-s. (1) of s. 3. He urged that the giving of the notice was a condition precedent to the holding or speaking at a meeting and that before a person could speak at a meeting such notice in accordance with

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s. 3(1) must be given. He submitted that once the prosecution established that there was a meeting and the appellant had spoken at that meeting then there was a sufficient *prima facie* case raised to cast the burden on the appellant of proving that he spoke at a lawful meeting and that the appellant was in a position to know whether it was a meeting in respect of which a notice had been given or not. He cited 15 HALSBURY'S LAWS, 3rd edn., p. 270, para. 493, and 25 HALSBURY'S LAWS, 3rd edn., p. 207, para. 377, and *Buckman v. Button*, [1943] 2 All E.R. 82.

In considering this difficult question as to whether the onus probandi lay on the defence or the prosecution to prove that the required notice had or had not been given, we must make it clear that we are not concerned here with the burden of proof as a matter of substantive law or pleading, that is, the burden of pleading an issue or issues termed the legal burden, which is fixed at the commencement of the trial (and never changes) by the rule that he who asserts must prove, in the civil law by the state of the pleadings and in the criminal law by the principle that the prosecution must prove its case throughout beyond reasonable doubt, but with the burden of proof as a matter of adducing evidence during various stages of the trial. This burden may shift continually from one party to the other, according as the evidence in one scale or the other preponderates. This burden rests upon the party who would fail if no evidence at all, or no more evidence as the case may be, were adduced by either side. See 15 HALSBURY'S LAWS, 3rd edn., paras. 488, 492 and 493.

There are two cases in which a burden of proof does not fall on the party on whom it would naturally fall and which are considered as exceptions to the general rule that the burden of proof rests with the party who asserts the substantial affirmative, and the exception with which we are concerned here is where the truth of a party's allegation lies peculiarly within the knowledge of his opponent the burden of disproving it, lies upon the latter. See 15 HALSBURY'S LAWS, 3rd edn., at p. 270, para. 493. In TAYLOR ON EVIDENCE (10th Edition) at p. 292, the learned author states that that party must prove it whether it be of an affirmative or a negative character and even though there be a presumption of law in his favour. The learned author cites in support of this proposition the case of *Apoth. Co. v. Bently* (1824), Ry. & M. 159, as an instance under the old law in an action for penalties against a person for practising as an apothecary without a certificate, that as the defendant was peculiarly cognisant of the fact whether or not he had obtained a certificate he could have no difficulty about producing it, the law compelled him to produce it. So too in *R. v. Turner* (1816), 5 M. & S. 206, where a carrier was prosecuted for possessing pheasants without being qualified by law so to do. There were ten different qualifications recognized by the Game Laws. In holding that the burden of proof of qualification was on the defendant, BAYLEY, J., said:

“I have always understood it to be a general rule, that if a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose know-

ledge it lies, and who asserts the affirmative is to prove it and not he who avers the negative.”

In *R. v. Scott* (1921), 86 J.P. 69, it was held that the onus of proving the fact of the possession of a licence or authority from the Secretary of State to sell dangerous drugs was on the defendant. In *Huggins v. Ward* (1873), L.R. 8 Q.B. 521, on an information for having diseased cattle in his possession and neglecting to give notice to a police constable, it was held that the burden of proving that he gave such notice was upon the defendant. In 15 HALSBURY'S LAWS (3rd Edition), p. 270, at para. 493, it was pointed out that the validity of this exception was questioned by some older authority but it has been applied in modern cases by the courts in criminal proceedings based on statute. The case in which the validity of the exception was questioned is given as *Abrath v. North-Eastern Railway Co.* (1883), 11 Q.B.D. 440. In view of this conflict of opinion, the earlier edition of 13 HALSBURY'S LAWS (2nd Edition) p. 546, para. 615, suggests that the following statement of the point is, perhaps, the one which is least open to objection:

“In considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge with respect to the fact to be proved which may be possessed by the parties respectively,”

and the learned authors then refer to the statement of the law appearing in STEPHEN'S DIGEST OF THE LAW OF EVIDENCE (11th Edition) article 96 of which is as follows:

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

In *Abrath v. North-Eastern Railway Co.* (1883), 11 Q.B.D. 440, which was an action for malicious prosecution, BOWEN, L.J., said (at p. 457) that in an action for malicious prosecution the plaintiff had the burden throughout of establishing the want of reasonable or probable cause for instituting the prosecution. He went on to say:

“In one sense that is the assertion of a negative, and we have been pressed with the proposition that when a negative is to be made out the onus of proof shifts. That is not so. If the assertion of a negative is an essential part of the plaintiff's case, the proof of the assertion still rests upon the plaintiff.”

BOWEN, L.J., made it clear in his judgment that if the assertion of a negative was an essential part of the plaintiff's case the proof of the assertion still rested upon the plaintiff and he did not agree that

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an exception existed in those cases where the facts lay peculiarly within the knowledge of the opposite party. In *Williams v. East India Co.* (1802), 3 East 192, the plaintiff in a civil action against the defendant, by his declaration, alleged that the defendant, who had chartered his ship, put on board a dangerous commodity without due notice to the captain and it was held that it lay upon the plaintiff to prove the negative averment. Lord ELLENBOROUGH (at p. 199) stated that the rule of law is, that where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burden of proving the contrary, that is, in such case of proving a negative, on the other side. In the following century, however, when the case of *Williams v. Russell* (1933), 149 L.T. 190, was decided and the defendant was convicted of using a vehicle without being in possession of a policy of insurance, TALBOT, J., followed the principle laid down in *R. v. Turner* and stated:

“where it is an offence to do an act without lawful authority, the person who sets up lawful authority must prove it, and the prosecution need not prove the absence of lawful authority. I think the onus of the negative averment in this case was on the accused to prove the possession of the policy required by the statute.”

In *R. v. Oliver*, [1944] K.B. 68, the appellant had been convicted on a charge of having sold sugar as a wholesaler without the necessary licence, contrary to the provisions of Art. 2 of the Sugar (Control) Order, 1940. At the trial the only evidence given was that called by the prosecution and was to the effect that the appellant had sold and delivered sugar to a number of persons and received payments for the quantities so delivered. The prosecution led no evidence to show that the appellant had no licence. In his summing-up to the jury the deputy chairman told the jury that the onus of proving that the appellant had a licence was on the appellant and that they must accept his direction that the appellant had no licence in view of the appellant's silence. The appellant was convicted and on appeal counsel submitted that the prosecution had not discharged the onus of proof which rested on the prosecution to show that the appellant had no licence to supply sugar. The Court of Criminal Appeal, presided over by Viscount CALDECOTE, C.J., held that the particular section under which the appellant had been charged created an absolute prohibition and that the submission by counsel for the appellant was wholly without merit as no one knew better than the appellant whether he had a licence or not. It was a fact peculiarly within his own knowledge and proof of that fact lay upon him. After an exhaustive review of the authorities, some of which are already referred to in this judgment, the court followed the decision in *R. v. Turner* (1816), 105 E.R. 1026, and the opinion of SWIFT, J., in *R. v. Scott* (1921), 86 J.P. 69, when he stated [(1921), 86 J.P. at p. 70]:

“It might be very difficult or impossible for the prosecution satisfactorily to prove that he did not possess any one or other of the qualifications which might entitle him to deal with the drug. But the defendant could prove without the least difficulty that he had authority to do it.”

The court finally arrived at the conclusion that it was not necessary in the circumstances for the prosecution to lead *prima facie* evidence of the non-existence of a licence. In *John v. Humphreys*, [1955] 1 W.L.R. 325, where the defendant was charged and convicted with driving a motor vehicle, he not being the holder of a licence contrary to s. 4 (1) of the Road Traffic Act, 1930, Lord GODDARD, C.J., in the Divisional Court stated that s. 4 (1) of the Road Traffic Act enacted that a person shall not drive a motor vehicle on a road unless he is the holder of a licence and that when an Act of Parliament provided that a person shall not do a certain thing unless he has a licence, the onus is always on that person to prove that he has a licence because it is a fact peculiarly within his own knowledge. And that principle, he pointed out, was laid down by *R. v. Oliver*, [1944] K.B. 68.

Professor GLANVILLE WILLIAMS in his book, CRIMINAL LAW (THE GENERAL PART), 2nd Edition, summarises the position at p. 904 as follows:

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

TAYLOR ON EVIDENCE, Vol. 1, 10th Edition, at p. 293, points out that this second exception holds good and compels the defendant to produce the necessary licence or authority (as the case may be), in proceedings for selling liquors, offences against the game laws, improperly exercising a trade or profession, and the like: in actions for penalties against the proprietor of a theatre, for performing dramatic pieces without the written consent of the author. Finally, in the local case of *Alexander v. Chalmers*, 1956 L.R.B.G. 146, where an application under s. 26 (1) of the Immigration Ordinance, Cap. 98, was made for the removal from the Colony of the appellant, and the only evidence proved against him was that he was a St. Lucian and had entered the Colony on a certain date, by a certain schooner, and was still in the Colony at the date of the application to the magistrate who made the order for his removal, and that when he produced his passport to the immigration officer, it was found that it did not bear a permit by the immigration authorities, the passport not being produced by the respondent (applicant in the court below) at the hearing of the application, the Full Court upheld the order of the magistrate for the appellant's removal out of the Colony, being of the view that s. 6 (3) of the Ordinance created an absolute prohibition when it stated:

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

and that being so. the respondent having proved that the appellant was in the Colony after the date of his disembarkation, the onus shifted on to the appellant to prove that he had done so with the consent of an immigration officer, and, as far as the passport was concerned, it was open to him to give notice to the respondent to produce the said document. In that case the Full Court after an exhaustive examination of the authorities (some of which, including *R. v. Oliver*, are referred to in this judgment) held that where a statute prohibits an act but provides exceptions, proof of the doing of the prohibited act impliedly supplies *prima facie* evidence that that act was done without lawful authority or excuse and the evidential burden of proof in respect of lawful authority or excuse is then cast on the defendant. The case of *R. v. Putland and Sorrell*, (1946) 1 All E.R. 85, was fully discussed and distinguished.

In that case, the appellants were convicted of the offence of having conspired to acquire, and having acquired rationed goods without surrendering the appropriate number of coupons in contravention of the Consumer Rationing (Consolidation) Order, 1944. In his summing-up, the trial judge directed the jury that, in a case of this kind, a defendant alone might know whether coupons had been surrendered or not, and therefore, if the prosecution had proved the whole case to the satisfaction of the jury, it was not necessary to prove that no coupons had been given in order to establish a case requiring an answer from a defendant. The appellants were convicted. On appeal, it was contended that the Order in question did not put the onus of proof on a defendant and the judge had therefore misdirected the jury in law in regard to the onus of proof. The prosecution contended that the onus of proving that he had surrendered the appropriate coupons was on the defendant because that was, very often, a fact peculiarly within his knowledge. HUMPHRYS, J., in delivering the judgment of the Court of Criminal Appeal said ([1948] 1 All E.R. at p. 86):

“We were referred in regard to that matter to *R. v. Oliver* which is binding upon us so far as it is relevant to the present case. The Order which was being considered in that case was the Sugar (Control) Order, 1940, which made it an offence for any wholesaler by way of trade to supply any sugar; it is an absolute prohibition, subject to this, that he may do so ‘in accordance with the terms of a licence, permit or other authority granted by.....the Minister.’ So that no person may do the act—no person may deal in sugar at all—unless he has a licence. The court held upon the terms of that Order, that the onus was on the defendant to prove that he had a licence, that being a fact peculiarly within his own knowledge, and the prosecution was therefore under no necessity of giving *prima facie* evidence of the non-existence of a licence. There is, in our opinion, a very broad distinction which must be observed between that case and the present. In that case the prohibition against doing the thing was absolute, and it was for the defendant, if

he wanted to show that he might do it lawfully, to provide some excuse such as licence or other authority from the Minister.

In this case, the offence (I am now dealing more particularly with the first two counts of this indictment) which is created is not in dealing in rationed goods, either by way of supply or by way of acquiring: that remains lawful. There is no reason why anybody should not deal in rationed goods if they like, but what is provided is that, if a person does deal in rationed goods in a particular way, he must do something else. *i.e.*, he must surrender the appropriate number of coupons. That seems to us to be a slightly different matter. The view we take of the onus of proof in such a case is this: we are not prepared to hold that the prosecution is bound to prove by evidence that in fact there was no surrender of coupons, because in many cases that would be quite impossible. But we do think that the prosecution, in making a charge against persons of having contravened this Order, must give some *prima facie* evidence to the jury upon which the jury would be entitled as reasonable people to find that there was no surrender of coupons. When the prosecution have done that, there is, in our opinion, not a change in the onus of proof, but there is a case against the defendants upon which the jury may convict them, unless they can upset the *prima facie* case which has been made against them. We are very far from saying that that means that the defendants must prove in the first instance anything at all."

The Full Court extracted the principle from that case which counsel for the appellant now advances in support of his contention. The principle is that where an act is lawful unless it is done in a particular manner without lawful authority or excuse, proof by the prosecution that the act was done in that manner is not sufficient *prima facie* evidence to sustain a conviction for doing the act in that manner without lawful excuse. Some *prima facie* evidence must be given by the prosecution from which it can be inferred that the defendant did not have lawful authority or excuse for doing the act in that particular manner.

A careful analysis of these cases therefore reveals on the one hand that where the particular enactment creates an absolute prohibition of a particular act unless the defendant can bring himself within certain exceptions, qualifications or excuses, on proof by the prosecution of the particular act, the burden of proof is then shifted on to the defendant to show what is peculiarly within his own knowledge. *i.e.*, that he comes within the exceptions, qualifications, excuses, etc. This, of course, does not require as high a degree of proof as in the case of the prosecution, proof beyond reasonable doubt, but merely proof on a balance of probabilities. This is described as discharging the evidential burden: vide *R. v. Carr-Briant*, [1943] 2 All E.R. 156.

We observe at this point that in this particular case it could not be properly urged that it would be peculiarly within the knowledge of the appellant, as speaker at a meeting, that the required notice had not been sent to the appropriate officer. Indeed, when we

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apply the dictum laid down in STEPHEN'S DIGEST, it cannot be said that the opportunities for such knowledge on the part of the appellant were as great as those afforded to the prosecution. *Vide* the apposite remarks made by DEVLIN, J. (as he then was), in his judgment in *Reynolds v. G. H. Austin & Sons Ltd.*, [1951] 1 All E.R. 612, paras. E, F, G and H.

On the other hand, where the particular enactment does not create an absolute prohibition and the act is one which is lawful unless it is done in a particular manner without lawful authority or excuse the onus still remains on the prosecution to establish a *prima facie* case against the appellant that the act was done without lawful authority.

We must now consider whether s. 13 (1) of the Public Order Ordinance, 1955, under which the charge was laid creates an absolute prohibition or not. In our view it does not create an absolute prohibition. That is usually done when the legislation enacts that no person shall do an act unless he comes within an exception, exemption, qualification, or possesses some lawful authority. This section has only to be contrasted with s. 5 (1) of the same Ordinance which states that "no person shall hold any public procession unless the permission in writing of the Chief Officer of Police has first been obtained" in order to see that it is not an absolute prohibition. Under the Ordinance, the mere act of holding or speaking at a meeting is not unlawful. In order to hold or speak at a meeting it is not necessary to obtain the permission of anyone; the act of holding or speaking at a meeting only becomes unlawful when it is done at a meeting in respect of which the required notice has not been sent to the appropriate officer. We are of the opinion, therefore, that what is prohibited in the section is merely the manner in which the act is done, *i.e.*, holding or speaking at a meeting in respect of which the required notice has not been sent. As Professor GLANVILLE WILLIAMS puts it in his book, CRIMINAL LAW (THE GENERAL PART), 2nd Edition:

"The decision in *R. v. Oliver* has been subtly restricted by confining it to circumstances where the prohibition against doing the thing is absolute, and it is for the defendant, if he wishes to show that he may do it lawfully, to provide some excuse such as a licence. It does not apply where the prohibition is only against doing the thing *sub modo* where *prima facie* evidence of contravention must be given."

Counsel for the respondent has submitted that this matter is governed by s. 8 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, which provides:

"Any exception, exemption, proviso, condition, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the statute creating an offence, may be proved by the defendant, but need not be specified or negatived in the complaint, and, if so specified or negatived, no proof in relation to the matter so specified or negatived shall be required on the part of the complainant."

This provision in our statute law is obviously taken from the English Magistrates' Courts Rules, 1952, r. 4, save and except that the word "condition" is added; and counsel urges that before the appellant could speak at the meeting it was a condition precedent that the required notice should be sent to the appropriate officer. The previous corresponding enactments in England which contained the section were the Indictable Offences Act, 1848, s. 8, the Summary Jurisdiction Act, 1848, ss. 8, 10, and the Summary Jurisdiction Act, 1879, s. 39. In this connection 15 HALSBURY'S LAWS, 3rd Edition, p. 270, para. 493, states:

"In respect of proceedings in a magistrate's court the legislature has cast the burden of proof of any exception, exemption, proviso, excuse or qualification on the defendant who relies on it for his defence."

In our view, s. 13 (1) of the Public Order Ordinance, 1955, does not create a condition as far as the speaker at a meeting is concerned, as he is not required to give notice. As already pointed out, the mere act of speaking at a meeting is not an unlawful act; it merely becomes unlawful when it is done without the prescribed notice being given. In other words, the prohibition is merely directed against speaking at a meeting *sub modo*.

Buckman v. Button, [1943] 1 K.B. 405, has no application to the circumstances of the instant case. In that case the appellant was charged with carrying on a business in respect of which he was required to make an application for registration and had failed to make such application. The particular Order in respect of which he was charged provided as follows:

"No person who is required by this article to make an application to be registered shall carry on any business referred to in this article after the prescribed date, unless he has made that application."

It was a case then of an absolute prohibition governed by s. 39 (2) of the Act of 1879, and CHARLES, J., in the Divisional Court stated:

"It is quite clear that, unless he makes that application he cannot trade in the way prescribed, and it is for him to show that he has made the application, or that he has an excuse for not having done so. In my view, the justices took the proper course in saying that it was not for the complainant to call evidence to show that this man had not made an application. It was for the appellant himself to give evidence or call evidence to show that he had that excuse or exemption which the Act had given him."

Even if we are wrong in our view that s. 13 (1) of the Ordinance did not create a condition against the speaker at a meeting, the prosecution in this case would be in no better position for as an Irish Judge said in *R. (Sheahan) v. Cork, JJ.*, (1907) 2 I.R., 11, in relation to r. 4 of the Magistrates' Court Rules, 1952:

"The section does not authorise the omission of anything which is made an essential constituent part of the offence created and described. The point does not depend on the mere use of the

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words 'except, etc.' A prohibition against selling bread except by weight would not authorise a complaint for selling bread *simpliciter*. A summons in that form would show no offence. The test or dividing line appears to be this:—Does the statute make the act described an offence subject to particular exceptions, qualifications, etc., which, where applicable, make the *prima facie* offence an innocent act? Or does the statute make an act, *prima facie* innocent, an offence when done under certain conditions? In the former case the exception need not be negatived; in the latter, words of exception may constitute the gist of the offence.”

Surely in s. 13 (1) of our Ordinance the words of the condition or exception (if they are such) “in respect of which no notice had been given” constitute the gist of the offence. As Professor GLANVILLE WILLIAMS has stated in his CRIMINAL LAW THE GENERAL PART), 2nd Edition, at p. 900, what this seems to mean is that an information which omits the exception will be bad if the information would not on a common sense view show that something *prima facie* wrongful has been done.

It follows, therefore, that the complaint having contained the words “in respect of which no notice had been given”—as indeed it must—the prosecution must prove that averment.

We have arrived at the conclusion that the burden of proof in this case was not on the appellant but on the prosecution to prove that the required notice had not been sent.

We must now consider the evidence in order to see whether the prosecution have established *prima facie* that the notice had not been sent.

It could hardly be urged that what Senior Superintendent Barrow stated in evidence that he had told the appellant (as already related) amounted to proof of any kind that the required notice had not been sent. In any case, Barrow was not the appropriate officer; and when he stated that notification of the meeting had not been given, it was purely hearsay evidence. It is an error to suppose that any statement made in the presence of the appellant is evidence against him. The true position is that evidence may be given of any statements made in the presence of an accused person: but a jury should be directed that such statements are only evidence against him in so far as he by his conduct accepted them as true. If nothing he did or said could be construed as an acknowledgment of the truth of the statement, then the jury should ignore the statement altogether. See *R v. Christie*, [1914] A.C. 545. Inspector of Police Herman stated in evidence that Superintendent Barrow told the appellant that he was holding a public meeting without permission from the chief of police. We have already pointed out the permission was not necessary. Inspector of Police Butts, in charge of Brickdam Police Station, who was then the appropriate officer, stated that he worked there between the 14th January, 1962, and the 14th February, 1962 (which, incidentally, under the Ordinance was not the relevant period in respect of this meeting, the correct period being 12th January to 10th February, 1962), and that, during that period of time, he received no

application from Peter Stanislaus D'Aguiar for permission to hold a public meeting or public procession at the Parade Ground, and he did not grant any such permission. He then went on to make the alarming statement that applications to hold meetings go to Senior Superintendent "A" Division. Under the Ordinance the required notice has to be sent to the appropriate officer. In any event, this officer was under a misapprehension when he considered that permission had to be obtained.

There appears to have been some doubt in the mind of the prosecution as to which police station was the nearest as the Officer in Charge of the Market Police Station was also called to give evidence and he stated that in 1962 he received no application from Peter D'Aguiar for permission to hold any meeting at the Parade Ground nor did he receive any such application from any member of the United Force. What connection there is between Peter D'Aguiar and the United Force is a matter of speculation. There is no evidence of any such connection.

It is quite clear that this evidence could not establish a *prima facie* case against the appellant in respect of failure to give or send the required notice to the appropriate officer. It would have been an easy matter for the prosecution to have led the evidence of the appropriate officer that he was that officer at the relevant time, as prescribed by the Ordinance, with respect to that meeting held on the Parade Ground on 12th February, 1962, and that the required notice had not been received by him. This the prosecution failed to do, and it cannot be said that a *prima facie* case against the appellant was established by them. Indeed, one wonders whether the person or persons whose duty it was to prepare and present the case appreciated the implications of the provisions of the Ordinance.

The appeal must therefore be allowed and the conviction and sentence of the magistrate set aside, with costs to the appellant fixed at \$29.32.

Counsel for the appellant has, not without justification, described the memorandum of reasons for decision of the magistrate as unhelpful and of no assistance. The magistrate has not shown in his memorandum that he applied his judicial mind to the relevant principles of law that arose on the evidence nor has he shown that he even considered the submissions made to him by learned counsel for the appellant. If the memorandum of reasons is to serve the purpose for which it is intended, magistrates should bear in mind the dictum of SAVARY, C.J. (Ag.), in the case of *Boston v. Kamall*, (1931-1937) L.R.B.G. 383, at p. 386:

"A magistrate should give the court a precise statement of the grounds of his decision. In view of the functions of this court this is best done by stating shortly and concisely his findings of fact and by referring to any provisions of the law or legal principles applied to those facts."

Appeal allowed.

Solicitors: *P. A. Crum Ewing* (for the appellant); *S. M. A. Nasir*, Crown Solicitor (for the respondent).

Re DEMERARA DEVELOPMENT CO. LTD.

[Supreme Court—In Chambers (Date, C.J. (ag.)) October 18, November 13, 1963].

Transport—Advertisement—Conditions in description of property not fully set out in advertisement—Incorporated by reference to another advertisement—Whether advertisement in order—Whether Registrar may refuse to certify title—Deeds Registry Rules, Cap. 32, rr. 5 and 9.

The appellant company filed instructions with the Registrar for advertisement of transports for separate pieces of land to be passed to separate persons. A number of conditions were set out in identical terms in the description of each property. These conditions were however set out in full in only one advertisement. The advertisements of the remaining lots, which were all published on the same day as that advertisement, merely referred to the conditions set out in the latter. The Registrar refused to certify title, and the company appealed.

Held: (i) truncated advertisements by reference were never contemplated by the Deeds Registry Ordinance, Cap. 32, and the Deeds Registry Rules, nor are they desirable. Conditions relating to a transport should always be set out in full in the advertisement thereof;

(ii) the Registrar had power to refuse to sign the certificate that the documents and title were in order for passing.

Appeal dismissed.

R. M. F. Delph for the appellants.

M. Shahabuddeen, Solicitor-General, for the Registrar.

DATE, C. J. (ag.): This is an appeal by the Demerara Development Company Ltd. (hereinafter referred to as the appellants) against the decision of the Registrar of Deeds requiring a notice of a transport by the appellants to Pratab Chandra Mahadeo and Vivekanand Mahadeo in respect of lot 185 B, being a portion of the south half of Pln. Eccles, East Bank, Demerara, to be re-advertised and refusing to certify the title of the appellants to pass the said transport.

Purported notice of the transport was given in advertisement No. 3 for the counties of Demerara and Essequibo in the first supplement to the Official Gazette of 3rd August, 1963, the description of the property ending with the words:

effect in the form annexed hereto, which certificate shall be affixed to the original transport, mortgage, or lease to which it relates, and thereafter the transaction shall be completed before the Court or the Registrar as the case may be.....”

When the documents were submitted to the Registrar for examination in accordance with the provisions of r. 9 (1) of the Rules, he examined them and was of the opinion that due notice of transport had not been given within the meaning of r. 5 (2). Not being satisfied that the documents and title were in order for passing, he declined to sign a certificate under r. 9 (2).

The questions for determination by me are (a) whether the truncated advertisement by reference is “due notice” of the transport within the meaning of r. 5 (2), and (b) if it is not “due notice”, whether the Registrar has power under r. 9 (2) to refuse to certify the title of the appellant to pass the transport.

It is common ground that the practice in years past has been to set out the conditions of the transport in full in the notice published under r. 5 (2) but that recently truncated advertisements by reference have sometimes been used. Copies of the Official Gazette going back as far as 1856 were produced to show the old practice.

Counsel for the appellants contended that what is required by r. 5 (2) is notice of the transport as distinct from its detailed conditions. This argument does not find favour with me. The conditions in question are enforceable as servitudes: see *Kitty V.C. v. Vieira* (1961), 3 W.I.R. 249, 1961 L.R.B.G. 88, *Rose v. Hanoman*, 1951 L.R.B.G. 135, and *Jaigopaul v. Clement*, (1960) 2 W.I.R. 203, 1960 L.R.B.G. 100; and r. 20 of the Deeds Registry Rules expressly provides that where land is acquired with special conditions attached those conditions must as long as they remain in force be embodied in every transport of the land. In my opinion the scheme of the Deeds Registry Ordinance and Rules, read as a whole, clearly requires notice to be given of all special conditions attaching to the transport. Failure to advertise such conditions is in my opinion failure to publish due notice of the transport within the meaning of r. 5 (2).

Counsel further argued that even if r. 5 (2) requires the special conditions attaching to the transport to be advertised this was in effect done in the advertisement of the transport in respect of lot 185 B in the first supplement to the Official Gazette of the 3rd of August, 1963, since the conditions subject to which the transport was to take effect were, by reference to the advertisement of the transport of lot 185 A set out *in extenso* in the same supplement to the Official Gazette. The advertisement relating to lot 185 A is numbered 2 while the advertisement relating to lot 185 B is numbered 3.

Counsel for the appellants argued that the special conditions attaching to the advertisement of the transport of lot 185 B are incorporated by cross-reference and are identifiable; that the Registrar’s discretion to satisfy himself that the notice was a proper

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notice arose only under r. 5 (2), and that after the notice, as settled by the Registry, had been published in the Official Gazette, the Registrar had no further power to object to the form of the notice.

As to the conditions being identifiable by reference to lot 185 A, it is not unimportant to observe that the truncated advertisement does not say that the lot 185 A to which reference is made is a portion of Pln. Eccles, nor does it refer to the number of the advertisement. Counsel for the appellants sought to get over this by saying that the advertisement of the transport for lot 185 A appears immediately before the one for lot 185 B and that there is no advertisement in the supplement of any lot 185 A other than that contained in advertisement No. 2. The supplement, it should be pointed out, contains 78 advertisements for the counties of Demerara and Essequibo, several of them (e.g., Nos. 4, 5, 8, 10, 11, 12, 13, 15, 16; 18, 20, 21, 22, 23, 25, 27, 29, 31) being truncated advertisements by reference to "lot 185A". If the appeal is allowed in respect of the truncated advertisement numbered 3, it would be difficult to disallow an appeal against the Registrar's decision in respect of any of the other truncated advertisements by way of reference to lot 185 A. In any case, it appears to me to be quite unreasonable to impose on laymen the burden of having to check through numerous lengthy and complicated advertisements in a supplement to the Official Gazette and to deduce at their peril to which advertisements cross-references apply. In my opinion truncated advertisements by reference were never contemplated by the Ordinance and Rules, nor are they desirable. The Ordinance and Rules were designed to provide for members of the public in a simple and accessible form all relevant information in regard to transports about to be passed, including the special conditions attaching to those transports. Those conditions should always be set out in full in the advertisement of the transport in question.

The Rules are also intended for the general guidance of the officers of the Registry, but s. 8 of the Ordinance expressly provides that the Registry shall be under the charge of the Registrar, and r. 9 (2) requires him to exercise a discretion; he is to sign a certificate only if he "decides that the documents and title are in order for passing." This clearly implies a power to refuse to sign the certificate even at that late stage if in his opinion the documents are not in order.

I think that the Registrar had power to require the transport in this case to be re-advertised and to refuse to certify the title of the appellants to pass the transport. This appeal is accordingly dismissed. There will be no order for costs.

Appeal dismissed.

Solicitors: *Cameron & Shepherd* (for the appellants); *Crown Solicitor* (for the respondent).

Re AJIT, a Debtor.

[Supreme Court (Cummings, J. (ag.)) October 7, 9, November 19, 1963.]

Insolvency—Allegation by debtor that petitioner's object was to prevent him from prosecuting an appeal—Whether petitioner's motive relevant—Insolvency Ordinance, Cap. 43.

Execution—Application for leave to appeal to Privy Council—Whether application operates as a stay of execution—Federal Supreme Court Regulations, 1958, reg. 48.

J. presented a petition seeking a receiving order against A. on the ground that the latter had committed an act of insolvency in connection with the non-payment of an amount of taxed costs awarded to J. in an action between the two of them. A. applied for leave to appeal to the Privy Council in the action and for a stay of execution pending the hearing and determination of the appeal. In opposition to the petition A. argued that the result of this application was that execution was stayed. J. then applied for leave to withdraw the petition, whereupon A. asked for compensation by way of damages on the ground that the petition had been brought without reasonable and probable cause.

Held: (i) an application for leave to appeal or for a stay of execution does not act as a stay;

(ii) even if the object behind the petition was to defeat the debtor's appeal, this did not imply an absence of reasonable and probable cause for the presentment of the petition and the debtor was therefore not entitled to compensation by way of damages for any injury or inconvenience which he might have suffered.

Order accordingly.

CUMMINGS, J.: This is a petition by Charles Ramkissoon Jacob (hereinafter referred to as the petitioner) for a receiving order against Chintamanie Ajit (hereinafter referred to as the debtor) on the ground that the debtor committed an act of insolvency.

On the 17th day of March, 1962, ADAMS, J. (ag.), in action No. 1262 of 1961—Demerara brought by the debtor (plaintiff) against the petitioning creditor (defendant) ordered that judgment be entered for the defendant (petitioner) and that the defendant (petitioner) recover his taxed costs in the action. On the 31st July, 1963, the Registrar issued a certificate certifying the taxed costs payable by the plaintiff (debtor) to the defendant (petitioner) to be in the sum of \$1,788.46. On the 28th August 1963, the petitioner's attorney filed in the Registry a request for the issue of an insolvency notice against the debtor. The Registrar on the same day duly issued an insolvency notice endorsed in accordance with the provisions of s. 3(2) of the Insolvency Ordinance, Cap. 43, which together with a certified copy of the order of court in action No. 1252 of 1961 was served on the debtor in this Colony on the 29th August, 1963. The debtor has not complied with the requirements in the notice nor with the provisions of ss. 3 (g) or (h) of the said Ordinance. In the circumstances the petitioner relies upon such non-compliance as an act of insolvency as provided by ss. 3 (f), (g) and (h) of the Insolvency Ordinance, Cap. 43.

Re AJIT, a Debtor.

The debtor denies the debt and in his affidavit filed in support of his notice of intention to deny asserts

- (a) that he had obtained a stay of execution of the judgment pending an appeal to the Caribbean Court of Appeal;
- (b) that the appeal was dismissed;
- (c) that he has applied for leave to appeal to the Privy Council and for a stay of execution pending the appeal.

He further asserts in his affidavit that—

“Under the registration it (the stay of execution) automatically continues to operate when an application is made for leave to appeal as of right to the Privy Council; and depending on the order granting conditional leave to appeal.”

Before any evidence was led I indicated that these proceedings seemed to disclose circumstances which might have invoked the exercise of the discretion in s. 9 (4) of the Insolvency Ordinance, Cap. 43, to which I shall refer later on in this judgment. Neither party led any evidence but the debtor stated that he had served a copy of his application for leave to appeal to the Privy Council and his application for a stay of execution pending the hearing and determination of the appeal on the petitioner’s solicitor, at that time Mr. N. C. Janki, Solicitor appearing for the petitioner, Mr. Debi Dial, said he was not in a position to deny that but he had not seen any such documents. It was possible, he said, that Mr. Janki might have been out of the Colony at the time and his clerk omitted to bring them to his attention on his return. He then (indicated that the debtor had just shown him copies of the documents and the filing receipt issued by the Registry and that he fully accepted that statement in the debtor’s affidavit. In the circumstances he requested a short adjournment to consider whether he would proceed with the petition. Upon resumption later the same day he requested leave to withdraw the petition but stated that he was instructed that the debtor’s application for leave to appeal had not been heard because the debtor had objected to its being heard by the only judge of the Caribbean Court who was available since it had been filed. The debtor offered no objection to the withdrawal of the petition but asked that he be awarded his costs and compensation by way of damages on the grounds set out at paras. 7 and 8 of his affidavit.

The question whether or not an appeal to the Privy Council operates as a stay of execution is not a question of fact which may be proved by an affidavit of the debtor. It is a question of law. Appeals to the Privy Council from British Guiana are governed by para. 48 of the Federal Supreme Court Regulations, 1958, which provides —

“48. Where the judgment appealed from requires the appellant to pay money or perform a duty, the Federal Supreme Court shall have power, when granting leave to appeal, either

to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Federal Supreme Court shall seem just, and in case the court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court for the due performance of such order, as Her Majesty in Council shall think fit to make thereon.”

Unless therefore a stay of execution is granted by the court at the time of delivering judgment there is no stay and an application for leave to appeal does not act as a stay, nor does an application for a stay act as a stay. The position then is that at the time of the filing of this petition there was no order staying execution. Had such an order been made different considerations might have arisen.

Section 9 (4) of the Insolvency Ordinance, Cap. 43, provides as follows:—

“Where the act of insolvency relied on is non-compliance with an insolvency notice to pay, receive or compound for, a judgment debt, the court may, if it thinks fit, stay or dismiss the petition on the ground that an appeal is pending from the judgment.”

The effect of this section is that the court has a discretion to—

- (a) make a receiving order; or
- (b) stay the petition until the determination of the appeal; or
- (c) dismiss the petition.

But this discretion is a judicial discretion and must be exercised in accordance with well established principles. I adopt as a correct statement of the law the passage at p. 66 in WILLIAMS ON BANKRUPTCY (15th Edn.):

“Where the appeal is *bona fide*, the proper order is to stay the petition generally, with liberty to apply, and where it is evidently frivolous a receiving order should be made.”

To this I may add that if the evidence discloses a want of reasonable and probable cause the petition should be dismissed.

As I have already indicated application was made to withdraw this petition hence it is unnecessary for me to exercise this discretion.

In these proceedings the question of compensation to the debtor by way of damages for any injury and inconvenience suffered by him as a result of the presentment of this petition can only arise if the debtor establishes that the petition was brought in the absence of reasonable and probable cause.

Re AJIT, a Debtor.

Accepting as I do all the debtor's allegations in his affidavit as well as in his statement in court, does this establish an absence of reasonable and probable cause? Quite apart from other considerations, it seems clear from the discretion vested in the court by s. 9 (4) of the Ordinance, that absence of reasonable and probable cause is not an unequivocal inference to be drawn from the mere pendency of an appeal from the judgment for the debt upon which the petition is founded.

Here an act of insolvency has been proved and the petitioner is seeking a legal remedy. Assuming that his motive is an improper one, does that vitiate reasonable and probable cause?

The case of *Re Nelson Cannon ex parte Percy Claude Wight, Creditor*, 1935 L.R.B.G. 260, is expressly in point. The facts in that case are clearly set out in the head-note which reads as follows:

“After the service of an insolvency petition on a debtor, he filed a notice of intention to oppose the petition in which he stated that the petition was not presented *bona fide* with a view of obtaining an adjudication but for the purpose of oppressing him and making him a bankrupt, and of stifling or defeating his appeal against the petitioner in action No. 212 of 1933 by the debtor against the petitioning creditor. In that action judgment was given for the defendant (the petitioning creditor) against the plaintiff (the debtor) with costs, and an appeal was pending to the West Indian Court of Appeal. Subsequent to the judgment in the action No. 212 of 1933 and while three executions had been levied on the property of the debtor, the petitioning creditor with knowledge thereof, purchased the debt \$3,035.96 on which the petition was founded for \$1,926.72. That debt was the only one which the debtor owed to the petitioning creditor.”

SAVARY, J. made a receiving order on the petitioner. In his judgment at p. 261 he stated —

“Counsel then invites me to the conclusion that the only reasonable inference to be drawn from these facts is that the petitioning creditor had the ulterior motive of defeating this pending appeal, that his conduct is oppressive and the petition an abuse of the process of the court, and that no order should be made on it. In reality the matter resolves itself into one of motive, and, apart from any legal consideration as to the effect of motive on proceedings of this nature, I have to consider whether the facts enumerated above lead me to the conclusion contended for by the debtor. Now the burden is clearly on the debtor to satisfy me as to this, and I can only say that although the facts are possibly open to the inference, contended for by the debtor, I can also visualise several other reasons for the petitioning creditor buying this judgment debt. In these circumstances I find that there is no evidence to lead me to the conclusion that the petitioning creditor bought this judgment debt in order to find bankruptcy proceedings so as to defeat the debtor's appeal. As I mentioned before, neither the petitioning creditor nor the debtor went into the witness box and it

would be pure conjecture on my part to come to that conclusion. This disposes of the matter, but as an important question of principle affecting the presentation of bankruptcy petitions was fully discussed, I think it right that I should express my view on it. The conclusion I have arrived at, which will indicate the point under discussion, is that mere motive is not sufficient to constitute an abuse of process or a fraud upon the court. This view is based on a decision of the Privy Council, the case of *King v. Henderson*, [1898] AC. 720, where most of the relevant authorities are discussed.”

At p. 731, Lord WATSON, who delivered the judgment, states:

“ Their Lordships do not dispute the soundness of the proposition that a plaintiff or petitioner who institutes and insists in a process before the bankruptcy or any other court, in circumstances which make it an abuse of the remedy sought or a fraud upon the court, cannot be said to have acted in that proceeding either with reasonable or probable cause. But, in using that language, it becomes necessary to consider what will, in the proper legal sense of the words, be sufficient to constitute what is generally known as an abuse of process or a fraud upon the court. In the opinion of their Lordships, mere motive, however reprehensible, will not be sufficient for that purpose; it must be shown that, in the circumstances in which the interposition of the court is sought, the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others, whether legal or equitable.”

and at p. 262 the learned judge continued —

“ Finally, I would like to set out some words of Lord Justice COZEN-HARDY in the case of *Fitzroy v. Cave* [1905] 2. K.B. 364, at p. 374, which though not a case in bankruptcy bears some analogy to the matter under consideration. They are as follows: It is further urged that his only object is to obtain a judgment which may serve as the foundation of bankruptcy proceedings, the ultimate result of which will be the removal of the defendant from his position as director of a company in which the plaintiff is largely interested. But I fail to see that we have anything to do with the motives which actuate the plaintiff, who is simply asserting a legal right consequential upon the possession of property which has been validly assigned to him. If the defendant pays, no bankruptcy proceedings will follow. If he does not pay, bankruptcy is a possible result.”

With great respect I agree with the view set out in that decision and consequently find that the debtor has not established an absence of reasonable and probable cause for the presentment of this petition. He is not therefore entitled to compensation by way of damages for any injury or inconvenience which he may have suffered. Leave is granted to the petitioner to withdraw this petition but the debtor will have his taxed costs in these proceedings.

Leave to appeal is granted if necessary.

Order accordingly

Solicitors: *Dabi Dial* (for the petitioning creditor).

KING v. DEMERARA CO. LTD.

[Supreme Court (Date, J.) September 17, October 15, November 20, 1963]

Labour—Plaintiff employed to watch steam dredge attached to iron punt—Whether plaintiff a watchman—Hours of Work (Watchmen) (No. 2) Regulations, 1953—Holidays with Pay (Watchmen) Order 1953—Minimum Wages (Watchmen) Order, 1956.

The Hours of Work (Watchmen) (No. 2) Regulations, 1953, the Holidays with Pay (Watchmen) Order, 1953, and the Minimum Wages (Watchmen) Order, 1956, provide that the expression “watchman” means “any person employed to watch or guard any premises other than private dwelling places, but includes a person employed otherwise than by the resident to watch or to guard a private dwelling place provided as a condition of employment.” The plaintiff was employed by the defendants to watch a steam dredge which was attached to an iron punt and used for the purpose of dredging the trenches of the defendants’ estate. The punt had no sleeping accommodation.

Held: the dredge and punt were at most a boat or lighter and not premises within the meaning of the definition, and accordingly the plaintiff was not a watchman.

Judgment for the defendants.

Ashton Chase for the plaintiff.

J. A. King for the defendants.

DATE, J.: The point I am required to determine is whether the plaintiff, an employee of the defendant company at Pln. Diamond, East Bank, Demerara, from 1954 to January 1959, was employed during the period March 1957 to January 1959 as a “watchman” within the meaning of the Hours of Work (Watchmen) (No. 2) Regulations 1953 (No. 30), the Holidays with Pay (Watchmen) Order 1953 (No. 13) and the Minimum Wages (Watchmen) Order 1956 (No. 63). In each of those statutory instruments the expression “watchman” is defined as meaning “any person employed to watch or guard any premises other than private dwelling places, but includes a person employed otherwise than by the resident to watch or to guard a private dwelling place provided as a condition of employment.”

The Orders mentioned prescribe the minimum rates of wages to be paid to watchmen. The period to which the claim in this action relates has been restricted to bring the claim within the Limitation Ordinance, Cap. 26, but it is common ground that the nature of the plaintiff’s employment was the same from the commencement of his employment in 1954 up to the time of his retirement on pension in January 1959. The plaintiff’s contention is that he was employed as a watchman but was not paid the minimum rates of wages prescribed for watchmen. The claim is for arrears of wages from March 1957 to January 1959. It was agreed by counsel on both sides that in the event of the court ruling that the plaintiff was employed as a watchman during the relevant period an effort would be made by them to settle the amount due to the plaintiff.

On behalf of the plaintiff evidence was given by the plaintiff himself, by Harry Nanan who took over the plaintiff's duties in January, 1959, and by Claud Glen, general secretary of the Guiana Workers Federation, who made certain representations for the plaintiff. On behalf of the defence evidence was given by Joe Narain, steam dredge operator at Pln. Diamond. It appears that the plaintiff was from time to time referred to by other employees of the defendant company as a watchman. It also appears that after Harry Nanan ceased working with the defendant company in 1961 he was paid a lump sum of f 500. This payment may have been made because of the 1961 amendment of the definition of 'watchman' to mean "any person wholly or mainly employed to watch over any specific property". The purpose of the 1961 amendment was clearly to bring a wider category of persons within the definition of 'watchman'. Counsel on both sides agreed that whether or not this was the reason for that payment the fact of the payment can have no bearing upon the question to be determined in this case. What matters is what work the plaintiff was in fact employed to do and whether that work came within the definition of 'watchman' in the statutory instruments then in force. The two witnesses who described in detail the plaintiff's work were the plaintiff and Joe Narain.

According to the plaintiff, his instructions were to watch a steam dredge which was attached to an iron punt by a piece of iron and also to watch the things in the punt and dredge, such as wood, an axe, a sledge hammer, gasoline, kerosene oil, grease, tools. His working hours were from 6 p.m. to 6 a.m. except on weekends when he worked from 1 p.m. on Saturday to 6 a.m. on Monday. He also had to light a boiler every morning, a task which took about 10 minutes to perform. Under cross-examination he said —

"I was to see that nobody troubled the dredge and the punt. I was to watch them and stop anybody from interfering with them.....The dredge goes to different parts of the cultivation. Wherever the dredge went I had to go."

Joe Narain, the dredge operator, said that—

"The steam dredge is a large iron punt—larger than an ordinary cane punt, but similar in shape. Inside it are a steam boiler, pumps, dredging machinery; and there is a winch on deck. Dredging machinery is machinery for digging out the trenches. The size is 30 ft by 9 ft. Nobody stays on the dredge at night except the watchman. On either side of the machinery there is a gangway of about 2 ft. At the front of the dredge is a space of about 5 ft. by the full width of the dredge; at the back is a space of about 2 ft. by the width of the deck. The winch is in front—in the 5-foot space on a platform. There are no sleeping quarters on the dredge. The dredge moves during working time—to where trenches need digging. The dredge is towed from place to place by tractor or mules.....The platform in front we call the deck. The winch on the dredge moves the dredge for short distance, e.g., 3 or 4 feet. When we have to move a long distance we use mules or tractors. When I speak of deck in front, it is only partly deck in front. The machinery is at a low level. The winch is on the platform."

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As will be seen, there is no real conflict between the testimony of the plaintiff and that of Narain as to the work the plaintiff had to do. The question is, was that employment “to watch or guard any premises”?

With respect to the expression “premises”, WHARTON’S LAW LEXICON says “the word properly applies to what has been previously described or mentioned, and is used only in that sense in well-drawn instruments. It is, however, often used as meaning land or houses”. All the law dictionaries condemn the use of the word “premises” in legal instruments except where it is intended to relate to something that has previously been described. The SHORTER OXFORD DICTIONARY gives as one meaning “a house or building with its grounds or other appurtenances.”

In *Andrews v. Andrews and Mears*, [1908] 2 K.B. 567, which was a Workmen’s Compensation case, BUCKLEY, L.J., said (at p. 570):

“The question here is this: The principal had undertaken to do certain carting work from the Albert Hall; was the public street between the Albert Hall and St. Quentin’s Avenue, at a distance of some 200 miles from the Albert Hall, ‘premises’ on or in or about which the principal had undertaken to execute the work or which were otherwise under his control or management? In my opinion a street, a public highway, was not for this purpose ‘premises’ on which the work was to be executed. That word implies some definite place with metes and bounds, say land, or land with buildings upon it”.

In *Dittmar v. Owners of Ship V 593*, [1909] 1 K.B. 389, another workmen’s compensation case, COZENS-HARDY, M.R., adopted the view that a vessel may be “premises” within the meaning of s. 4 sub-s. (4) of the Workmen’s Compensation Act, 1906. But it is clear that he was there referring to a large sea-going vessel as distinct from a boat or lighter.

In *Buller Hussain v. Demerara Company Limited*, Action No. 433 of 1961 Demerara, the plaintiff had been employed specifically to watch tractors, bulldozers and other machinery on the land in the immediate vicinity of a concrete building with a zinc roof some 40 ft. by 30 ft. called “the Garage”. LUCKHOO, C.J., found that the plaintiff’s duties were those of a person assigned to watch over a collection of vehicles varying in number from time to time and rejected the plaintiff’s claim that he had been employed as a watchman within the meaning of the statutory instruments with which the instant case is concerned. He said:

“It is true that those vehicles were to be found in the vicinity of the Garage building but in my opinion that fact does not have the effect of making the employment of the plaintiff one in which he was required to watch or guard any premises. He was required to watch or guard vehicles.”

Counsel for the plaintiff submitted that the judgment of LUCKHOO, C.J., in *Hussain's* case (under appeal) should not be followed. He contended that the Legislature intended to protect persons doing a certain type of work—watching or guarding—and that the place at which such work took place was only incidental. He referred to MAXWELL ON INTERPRETATION OF STATUTES (10th End.) p. 60, and urged the court to give the word ‘premises’ an elastic meaning. He laid special emphasis on the word “any” which precedes “premises” in the definition. I, however, fail to see how the adjective “any” can have the effect of bringing within the scope of the expression “any premises” something which does not belong to the genus “premises”. The intention of the Legislature must surely be ascertained from the language used by them. Incidentally, the 1961 amendment to which I have already alluded would seem to indicate that the Legislature themselves were not satisfied with the previous definition.

I am not persuaded that *Hussain's* case was wrongly decided, nor can I satisfactorily distinguish that case from the instant one. The dredge and punt are at most a boat or lighter. Their purpose is to deepen trenches. There is no sleeping accommodation. They are, in my opinion, akin to a bulldozer or piece of road-making machinery rather than a house or land.

In the circumstances I have reluctantly come to the conclusion that the plaintiff was not employed as a “watchman” within the meaning of the statutory instruments in force during the period March 1957 to January 1959. That being so, it follows that in this action judgment must be entered for the defendants.

Judgment for the defendants.

Solicitors: *A. Vanier* (for the plaintiff); *J. E. De Freitas* (for the defendants).

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[In the Full Court, on appeal from the magistrate's court for the West Demerara Judicial District (Date, C.J. (ag.), and Bollers, J.) October 12, November 26, 1963.]

Summary jurisdiction procedure—Summons to defendant stamped, with facsimile signature of magistrate—Whether summons validly issued—Defendant appears in answer to summons—Whether appearance cures any irregularity—Summary Jurisdiction (Procedure) Ordinance, Cap. 15, ss. 4, 7, 26, 94 (2) and 109.

The respondent appeared in the magistrate's court and pleaded not guilty in answer to a summons for a summary conviction offence. The summons and the related complaint were not signed personally by the magistrate who issued the summons, but merely stamped with the facsimile of his signature. The case was tried before another magistrate who concluded from the foregoing that the complaint had not been seen by the magistrate who issued the summons and that accordingly the summons had not been issued in the exercise of a judicial discretion. In the course of his decision the trial magistrate stated that as a magistrate he knew as a fact that many complaints without oaths were never seen by the magistrate and that the facsimile of the magistrate's signature was affixed indiscriminately by the clerks on the complaint as well as on the summonses. For these reasons the case against the respondent was dismissed. On appeal,

Held: (i) the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, does not require the complaint to be signed by the magistrate, his signature thereon being envisaged by the relevant form in the Ordinance only as an administrative act evidencing the exercise of his judicial discretion in issuing the summons;

(ii) the magistrate erred in using his private knowledge;

(iii) in the absence of evidence to the contrary it must be presumed that the complaint was properly laid before the magistrate and that he issued the summons as a result of the complaint by himself personally directing that a facsimile of his signature be affixed on the document by means of a rubber stamp. The summons served on the respondent was therefore signed by the magistrate;

(iv) even if the summons was improperly issued, the respondent having appeared before the magistrate and pleaded in answer to the charge, the magistrate had jurisdiction to hear and determine the complaint and he ought to have done so in accordance with s. 25 of the Ordinance.

Appeal allowed.

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

E. V. Luckhoo for the respondent.

Judgment of the Court: In the magistrate's court the respondent was charged with the offence of "unlawful possession of spirits exceeding in quantity one pint," contrary to s. 89 (1) of the Spirits Ordinance, Cap. 319.

The respondent appeared before the magistrate in answer to the summons served upon him and when the charge was read to him he pleaded not guilty. The magistrate recorded that plea on the case jacket. The summons which was served on the respondent was stamped by means of a rubber stamp with the facsimile signature of a magistrate who was the predecessor of the magistrate before

whom the case was called but the complaint without oath which was before the court was not signed by him. At the commencement of the proceedings counsel for the respondent took the objection *in limine* that the complaint before the court was bad in law in that it was not signed by the magistrate who issued the summons. The magistrate accepted this submission and dismissed the case against the respondent without taking evidence.

It is against this order of dismissal that the prosecution now appeals.

The magistrate in his memorandum of reasons for decision considered that as the complaint was not signed by his predecessor in office and as the summons issued under the complaint contained a rubber stamp facsimile of his signature it appeared that the magistrate had not seen the complaint at all and had therefore not exercised his judicial discretion in issuing the summons to the appellant based on the complaint. In the course of his decision the magistrate stated:

“As a magistrate I know as a fact that many complaints without oaths are filed by the police or private individuals which are never seen by the magistrate and the clerks put on the rubber stamp of the magistrate’s facsimile signature indiscriminately. This is done not only to the complaints but to the summonses as well.”

In this court counsel for the appellant has raised two points on appeal (which for the sake of convenience we shall consider in reverse order) under the ground of appeal that the decision was erroneous in point of law. It is submitted, firstly, that the magistrate had jurisdiction to hear and determine the complaint by virtue of the appearance of the respondent before him who pleaded in answer to the charge; secondly, that the magistrate in failing to sign the complaint was merely guilty of an administrative neglect which did not entitle the respondent to be acquitted of the charge to which he had pleaded.

In considering the second point, counsel for the appellant directed our attention to ss. 4, 7, 26, 94 (2) and 109 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15.

Section 4 of Cap. 15 lays down the mode of instituting a proceeding for the obtaining of an order against any person in respect of a summary conviction offence and states that it shall be done by a complaint made before the magistrate of a court. Section 7 then enacts that the complaint need not be in writing but if it is not made in writing the clerk shall reduce it into writing. The section reads as follows:

“7. (1) No complaint need be in writing, unless it is required to be so by the statute on which it is founded or by some other statute, but if a complaint is not made in writing, the clerk shall reduce it into writing.

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(2) Subject to the provisions of section 13 of this Ordinance every complaint may, unless some statute otherwise requires, be made without any oath being made of the truth thereof.

(3) A complaint may be made by the complainant in person, or by his counsel, or by any person authorised in writing in that behalf, and shall be for one offence only.

(4) 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.”

Section 108 enacts that subject to any rules which may be made under the Summary Jurisdiction (Magistrates) Ordinance, Cap. 12, the forms in the Second Schedule to the Ordinance may with the necessary variations and additions which the circumstances of the particular case require, be used in the matters to which they respectively apply and when so used shall be good and sufficient in law. Section 109 enacts that the provisions of the Ordinance relating to the form of any complaint, summons or other document shall be subject to the rule that every information, complaint, summons, warrant or other document shall be sufficient if it contains a statement of a specific offence with which the accused person is charged together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.

On a strict interpretation of the wording of these sections we find no difficulty in saying that the statute does not require the complaint to be in writing nor does it require the signature of the magistrate to be affixed on the complaint. The statute contemplates an oral complaint being made before the magistrate which must at some later stage be reduced into writing by the clerk. The obvious reason for this requirement is that the magistrate is called upon by s. 27 (1) of the Ordinance to state to the defendant the substance of the complaint and ask him whether he is guilty or not guilty.

Section 94 (2) enacts that 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 or for any variance between any complaint or summons and the evidence adduced in support thereof, and is taken from the Magistrate's Court Act, 1952, s. 100. In a note to this section in Vol. I of *STONE'S JUSTICES' MANUAL* (1963) it is stated that every information or complaint shall be sufficient in form if it complies with r. 4, and every summons based thereon shall be sufficient in form if it complies with r. 77 of the Magistrate's Court Rules, 1952. Rules 4 and 77 of these rules correspond with s. 7 (1) and s. 74 respectively, of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15. The English Rules then provide for the form of complaint and summons to be used as do ss. 108 and 109 of Cap. 15. The form prescribed under the English rules provides for swearing to the complaint before a Justice of the Peace although under r. 4 the complaint need not be in writing or on oath. Similarly, the form of complaint prescribed

by Cap. 15 which is Form I of the Second Schedule thereto provides for the signature of the magistrates before whom the complaint is made, as at the end of the complaint the words “exhibited before this.....day of.....19.....(signed) Magistrate.....District” appear.

Counsel for the respondent urges strongly that the presence of these words indicates that it was the intention of the Legislature that the magistrate should sign the complaint laid before him after it has been reduced into writing by the clerk. With this submission we cannot agree. This court has already laid it down in *Rai v. Brown*, 1957 B.G.L.R. 124, that a form in a schedule cannot be interpreted as controlling or diminishing the efficacy of a statutory enactment and that the court must construe the language of the section to which the schedule is appended. The form in the schedule has to be considered but it is not conclusive. If further authority were needed for this proposition, one need only refer to the judgment of Lord PENZANCE in *Dean v. Green* (1882), 9 P.D. 79, at p. 89, where he states *inter alia*:

“Such being the effect of the enacting portions of the statute, it would be quite contrary to the recognised principles upon which courts of law construe Acts of Parliament, to enlarge the conditions of the enactment, and thereby restrain its operation, by any reference to the words of a mere form, given for convenience’s sake in a schedule, and still more so, when that restricted operation is not favourable to the liberty of the subject, but the reverse.”

The learned trial judge felt that it was needless to cite authorities for these principles of construction but referred to the judgment of Lord COTTENHAM in *Re Baines* (1840), 1 Cr. & Ph. 31, where he said in relation to the schedules of the very statute which Lord PENZANCE was then considering: “If the enacting part and the schedule cannot be made to correspond the latter must yield to the former.”

We are of the opinion, therefore, that the complaint in accordance with s. 7 (1) of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, need not be signed by the magistrate and the signature envisaged by the form is only an administrative act which is merely evidence of the performance of the judicial discretion which the magistrate is called upon to exercise in the process of granting or refusing to issue a summons on the basis of the complaint. There can be no doubt that a summons is the result of a judicial act, and as Lord GODDARD, C.J., stated in *R. v. Wilson, Ex p. Battersea Borough Council*, [1947] 2 All E.R. 569, at p. 570:

“A summons is the result of a complaint which has been made to a magistrate on which a magistrate must bring his judicial mind to bear and decide whether or not on the complaint before him he is justified in issuing a summons.”

Section 10 (1) of Cap. 15 makes provision for the issuing of a summons by a magistrate whenever a complaint is made before him

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that any person has committed or is suspected to have committed any summary conviction offence within his jurisdiction, directed to that person, stating concisely the substance of the complaint and requiring him to appear at a certain time to answer the complaint. There is no provision in the Ordinance requiring the summons to be signed by the magistrate but again the form of the summons makes provision for the signature of the magistrate and, indeed, in *R. v. Hay Halkett, Ex p. Rush*, [1929] 2 K.B. 431, it was held by a Divisional Court that the absence of the names of the issuing justice on the served copy of a summons properly signed in the original was a mere want of which did not invalidate that copy of the summons or the service thereof. Lord HEWART, C.J., distinctly refrained from entering upon a discussion of the question whether if the original summons had lacked a signature it would have been protected by the words of s. 1 of the Summary Jurisdiction Act, 1848, which is now re-enacted by s. 100 of the Magistrate's Court Act, 1952, already quoted in this judgment.

It was held in *Bennett v. Brumfitt* (1867), L.R. 3 C.P. 28, that a summons signed by means of a rubber stamp is not invalid. In the instant case the copy of the summons served on the respondent bore the facsimile signature of the magistrate affixed by means of a rubber stamp.

In *Goodman v. Eban Ltd.*, [1954] 1 All E.R. 763, where a solicitor practising alone under a business name, sought to recover a sum for professional services rendered to the defendant company, the solicitor sent to the defendants a bill of costs accompanied by a letter which bore a facsimile of the solicitor's business name in the solicitor's handwriting impressed on it by a rubber stamp which the solicitor had himself affixed to the letter. It was contended that the requirement as to signature of s. 65 (2) of the Solicitor's Act, 1932, had *not* been fulfilled. The Court of Appeal held (DENNING, L.J., as he then was, dissenting) that the signature on the letter having been shown to have been placed on it by means of the stamp by the solicitor himself, the letter must be taken to be signed by him with the meaning of s. 65 (2) (i) of the Act which stated that the bill must be signed by the solicitor.

Sir RAYMOND EVERSLED, M.R., although he considered the practice of a signature by a rubber stamp generally undesirable, since such a method of signing did not carry with it the same authenticity or warrant of responsibility as a written signature, in the course of his judgment at p. 766 stated:

"In my judgment, therefore, it must be taken as established that where an Act of Parliament requires that a document be 'signed' by a person, *prima facie* the requirement of the Act is satisfied if the person himself places on the document an engraved representation of his signature by means of a rubber stamp."

In our view in the instant case the magistrate was wrong when he used his private knowledge to convey the impression that many

complaints filed are never seen by the magistrates and the clerks put on the rubber stamp signature indiscriminately. Such a practice is of course to be condemned, but there was no evidence of it in this case. The maxim *omnia praesumuntur rite et solemniter esse acta* must apply, and the official act must be presumed to have been done correctly. In the absence of evidence to the contrary it must be presumed that the complaint was properly laid before the magistrate and that he issued the summons as a result of the complaint, by himself personally directing that a facsimile of his signature be affixed on the document by means of the rubber stamp. The summons served on the respondent was therefore signed by the magistrate.

We are firmly of the view that there is no answer to the first point raised by counsel for the appellant.

In PALEY ON SUMMARY CONVICTIONS (10th Edn.) at p. 38 it is noted:

“Provided that the person charged appears and, without objection, answers the charge, the fact that there were irregularities in the proceedings leading to his appearance before the court does not deprive the court of jurisdiction to hear the case or invalidate any conviction which may result (*R. v. Hughes* (1879), 4 Q.B.D. 614; 43 J.P. 556; 14 Cox C.C. 284).”

At p. 41 under the caption “Waiver by Appearance” it is said:

“The appearance of a defendant before the court, and his answering to a charge without objection to the want of an information or summons, may operate to cure the want of either *R. v. Hughes* (1879), 4 Q.B.D. 614; 43 J.P. 556; 14 Cox C.C. 284).”

In *R. v. Hughes*, Hughes, a police constable, obtained an illegal warrant against Stanley for assaulting him and obstructing him in the discharge of his duty. Hughes arrested Stanley thereon and took him before the magistrates in petty sessions who convicted and sentenced Stanley to a period of imprisonment. No objection was taken by Stanley to the proceedings and he led the evidence of a witness to show he was *not* guilty. Hughes swore falsely and corruptly on the hearing of the charge against Stanley and was afterwards indicted for perjury committed by him and was convicted by a jury presided over by BRAMWELL, L.J. The learned judge by way of case stated to the Court of Crown Cases Reserved, reserved for the opinion of that court the question whether the justices had jurisdiction in petty sessions at the hearing of the charge against Stanley because there was no written information or oath to support the warrant for the arrest of Stanley which rendered it illegal, and as a result whether he ought to have directed an acquittal. The Court of Crown Cases Reserved (KELLY, C.B., *dissentiente*) held that the justices had jurisdiction to hear and determine the case against Stanley, notwithstanding that he was brought before them on an illegal warrant and there was no written information, and affirmed the conviction of Hughes.

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LOPES, J., in his judgment at p. 688 stated:

“I think the warrant in this case was mere process for the purpose of bringing the party complained of before the justices, and had nothing whatever to do with the jurisdiction of the justices. I am of opinion that whether Stanley was summoned, brought by warrant, came voluntarily, or was brought by force, or under an illegal warrant, is immaterial. Being before the justices, however brought there, the justices, if they had jurisdiction in respect of time and place over the offence, were competent to entertain the charge.”

HAWKINS, J., expressed a similar view when in his judgment at p. 688 he stated:

“Wrongful, however, as were the proceedings by which Stanley was brought into the presence of the magistrates, to answer a charge which up to that moment had never been legally preferred against him, yet before those magistrates, and in his presence, a charge was made over which, if duly made, they had jurisdiction.”

Later in his judgment at p. 690 he stated:

“A flood of authorities might be cited in support of the proposition that no process at all is necessary when the accused being bodily before the justices the charge is made in his presence, and he appears and answers to it.”

It follows that once the respondent appeared before the magistrate and pleaded in answer to the charge, the magistrate had jurisdiction to hear and determine the complaint which he ought to have done in accordance with s. 25 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15. As Lord ALVERSTONE, C.J., is reported to have once said:

“When you get a man before the court it is *not* necessary to have an information at all, and the court can either amend the information or deal with the case as not requiring any information.” *R. v. Tabrum* (1907), 71 J.P. 325.

This appeal must therefore be allowed, the order of dismissal of the magistrate set aside, and the case referred back to the magistrate with a direction to proceed to hear and determine complaint.

The appellant must have this costs against the respondent fixed at \$26.92.

Appeal allowed.

R. v. MARCUS AND OTHERS

[Supreme Court—Demerara Assizes (Bollers, J.) November 28, December 2, 6, 9, 13, 16, 20, 1963]

Criminal law—Deposition of absent witness—Application to tender in evidence—Whether necessary to prove that witness left the territorial waters of the Colony—Admissibility of embarkation card filled up by witness—Evidence Ordinance, Cap. 25, s. 95, as amended by Ordinance No. 29 of 1961.

In the course of a murder trial the prosecution applied under s. 95 of the Evidence Ordinance, Cap. 25, as amended by Ordinance No. 29 of 1961, to have admitted in evidence the deposition of a witness on the ground of his absence from the Colony. Sub-section 4 of that section provides that “it shall be sufficient evidence of absence from British Guiana.....to prove that the deponent was on board a vessel.....on his outward journey from British Guiana bound for some port or place beyond British Guiana.....” It was proved that the deponent had left by a ship which was piloted by a witness out of the Georgetown harbour. The witness had however left the vessel while it was still in territorial waters, and because of this it was submitted for the defence that there was no legal evidence that the vessel was bound for some port outside of British Guiana. The defence also objected to the admissibility, as to the truth of its contents, of an embarkation card filled up by the deponent immediately before his departure. In the card the deponent had stated his destination as Plymouth, England.

Held: (i) the prosecution were not called upon to prove that at the time when the vessel passed beyond the territorial limits or waters of the Colony on her outward voyage the vessel was bound for some port or place beyond the Colony;

(ii) the embarkation card was admissible in evidence as to the truth of its contents.

Submission overruled.

Doodnauth, Singh, Crown Counsel, for the Crown.

L. F. S. Burnham, Q.C., S. E. Brotherson, R. H. McKay and W. R. Adams for the accused.

BOLLERS, J.: In this indictment for murder, the prosecution under s. 95 of the Evidence Ordinance, Cap. 25, seek to tender and have admitted in evidence the deposition of Dr. Cyril Leslie Mootoo, the Government Bacteriologist and Pathologist, on the ground of absence from the Colony of British Guiana.

The defence oppose the application on the broad ground of failure to comply with the section and failure on the part of the prosecution to establish the requirements of sub-s. 4 of s. 95 as repealed and re-enacted by s. 2 of the Miscellaneous Enactments (Amendments) Ordinance, No. 29 of 1961, and more particularly they urge that there is no proof that the deponent was on board a vessel on its outward journey from British Guiana bound for some port or place beyond British Guiana.

The re-enacted sub-section reads as follows:

“(4) It shall be sufficient evidence of absence from British Guiana, within the meaning of this section, to prove that the

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deponent was on board a vessel or an aircraft on its outward journey from British Guiana bound for some port or place beyond British Guiana and that on inquiry, being made for the deponent before trial at his last or most usual place of abode or business he could not be found.”

and the prosecution, in support of proof of the requirements laid down in the sub-section, rely on the evidence given by D.C. Naraine, the constable whose duty it was to see the witness Mootoo board the ship, M.S. Oranjestad, as a passenger on the 3rd September, 1963, and not return with the ship, the evidence of the pilot Greaves who piloted the vessel 8½ miles out of the Georgetown harbour, the evidence of the immigration officer Lynch who received an embarkation card from the witness signed by him in the presence of the officer and who saw the witness leave on the ship and not return, and finally the evidence of the shipping clerk Fung whose duty it was to fill up a booking card on information supplied to him by the witness in respect of his passage and who saw the witness embark on the ship destined for Plymouth, England, in accordance with the information on the booking card. Both the embarkation card and the booking card were tendered and admitted in evidence.

The first submission which I must dispose of is that British Guiana in the sub-section includes the territorial waters of British Guiana and as the pilot stated that he believed that when he left the vessel it was still in the territorial waters of British Guiana, there was no legal evidence that the vessel was bound for some port outside of British Guiana. I have little hesitation in saying that the prosecution are not called upon to prove that at the time when the vessel passed beyond the territorial limits or waters of the Colony on her outward voyage, the vessel was bound for some port or place beyond the Colony. These words existed in the former sub-section which was repealed and which was enacted when aircraft were unknown. It was therefore found difficult to establish this requirement in the case of an aircraft and that is why the former sub-section was repealed and re-enacted with the vital omission of these words. The minimum proof of absence from the Colony then became proof that the deponent was on board a vessel or an aircraft on its outward journey from British Guiana bound for some port or place beyond British Guiana. If therefore the vessel or aircraft left from any point in British Guiana and it could be proved that on its outward journey it was bound for some port or place beyond British Guiana, then this requirement under the sub-section in my judgment is fulfilled.

The submission to which my attention has been most attracted is that the embarkation card is not admissible in evidence as to the truth of its contents but only as to the fact that the witness filled up such a form. Counsel urges that the document was not required by law to be kept as a record in the Immigration Office and therefore it would not be admissible under ss. 46 and 47 of the Evidence Ordinance, Cap. 25, as *prima facie* proof of the truth of its contents. Counsel submits that under s. 7 of the Immigration Ordinance, Cap. 98,

the passenger is under no duty to supply any information to the immigration officer, the passenger is under a duty to supply the necessary information for the preparation of a list to the master of the vessel and that the primary duty is on the master to supply the list of outgoing passengers to the immigration officer and as a result the information supplied by the passenger to the immigration officer in the form of a card is not such a document required by law to be made and kept by the immigration authorities and is therefore not an official record.

Section 7 of the Immigration Ordinance, Cap. 98, reads as follows:

“7. (1) The master of a vessel arriving from any place outside the Colony or departing from the Colony shall—

(a) answer truthfully to the best of his ability all proper questions relating to the passengers and members of the crew, in so far as is necessary for the purposes of this Ordinance, put to him by an immigration officer; and

(b) if required so to do, furnish the immigration officer with a list in duplicate, in the form from time to time approved by the Chief Immigration Officer, containing the names of the passengers and members of the crew arriving or departing as the case may be, and such other information as may be prescribed.

(2) Every passenger and member of the crew in a vessel arriving from any place outside the Colony or departing from the Colony shall supply the information necessary for the preparation of the list under subsection (1) of this section.

(3) Every immigration officer shall have the power to board and search any vessel at any time and at all places in the Colony.”

It is to be noted that sub-s. (2) of the section does not state expressly to whom the information is to be supplied by the passenger, but I am in agreement with counsel that by implication such information is to be supplied to the master of the vessel. It is clear too that the master must answer truthfully to questions relating to the passengers and, if required, he is to furnish the immigration officer with a list of the names of the passengers in duplicate. I part company, however, with counsel when he urges that the document is not an official record. It is obvious that the master would not be aware of the necessary information to be supplied concerning the passengers and must first obtain it from them in order to prepare a list and furnish it to the immigration officer. In my view, he does this when the passenger fills up the card and hands it directly to the immigration officer. All that happens is that the passenger acts as a medium for the supplying of the master's list to the immigration officer. The section does not lay down the form which the master's list should take when it is furnished to the immigration officer, but merely states that the form should from time to time be approved by the chief immigration officer. Any form can therefore be used and the form which the chief immigration officer appears to have approved,

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and this must be presumed, is the form prescribed in the schedule under the Immigration Regulations made by the Governor-in-Council under s. 35 of the Ordinance in respect of a passenger's declaration under s. 8 (1) (b) of the Ordinance which deals with persons entering the Colony. It is true that s. 7 deals with persons emigrating from the Colony and s. 8 with persons immigrating into the Colony and persons in the former category are not called upon to make a declaration as in the case of persons in the latter category, but for the sake of convenience the same form of supplying the necessary information and making the required declaration is used by the immigration authorities with the appropriate heading "Embarkation/Disembarkation Card" according to the particular case being applicable.

Quite apart from the passenger acting as a medium for the master of the vessel in supplying the list, it appears to me, though not supported by counsel for the prosecution, that an agency by conduct arises in this situation when the master of the vessel in pursuance of a statutory duty stands by and permits the passenger to fulfil it for him by supplying the necessary information to the immigration officer. As Lord CRANWORTH in *Pole v. Leask* (1862), 33 L.J. Ch. 155, H.L., at p. 161 said:

"Where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will, in general, be estopped from disputing the agency, though in fact no real agency existed."

The card with the information supplied then became part of the list furnished by the master and an official record. The document is therefore admissible in evidence as to the truth of its contents and shows clearly an intention on the part of the deponent witness to sail to Plymouth. The booking card also shows an intention on the part of the witness to sail on the M.S. Oranjestad to Plymouth, a port or place outside of British Guiana.

I am in agreement with counsel for the prosecution in his submission that with or without the admissibility of the documentary evidence, there is sufficient evidence on the record to prove that the ship M.S. Oranjestad, when it sailed from the Georgetown Harbour on its outward journey from British Guiana on 3rd September, 1963, with the deponent, Cyril Leslie Mootoo, on board, it was bound for a port or place beyond British Guiana. There is the further evidence of enquiry being made by the immigration officer and the constable at the residence and business place of the witness and the failure to find him which must not be over-looked, and I therefore arrive at the conclusion that I am reasonably satisfied by the oath of a credible witness of the absence of the deponent witness from British Guiana and I rule that the deposition be tendered and admitted in evidence and read to the jury.

Submission overruled.

BRITISH GUIANA TIMBERS LTD. v. TOOLSIE PERSAUD LTD.

(Supreme Court (Crane, J.) July 31, September 18, 19, 20, 24, 25, 26, December 20, 1963]

Negligence—Collision between vessels—Failure of each vessel to keep a proper look-out—Impossible to establish degrees of fault—Apportionment of liability—Limitation of liability—Pontoons towed by tug—Whether tonnage of pontoons and tug to be aggregated—Maritime Conventions Act, 1911, s. 1 (1) (a)—Merchant Shipping Act, 1894, s. 503 (1).

While towing two pontoons the defendants' tug "Tulpar" collided with the plaintiffs' pontoon No. 5 which was being shunted by the tug "Purple Heart". "Tulpar" apparently sustained no damages but pontoon No. 5 did, and the plaintiffs accordingly sued for damages on the ground of negligence. In defence it was pleaded that the collision had occurred because of the negligence of the "Purple Heart", that in any event the collision took place without the defendants' "actual fault or privity" within the meaning of s. 503 (1) of the Merchant Shipping Act, 1894, and that they were accordingly entitled thereunder to limit their liability to £8 per ton. The court found that there was a failure by the crews of both tugs to keep a proper lookout but that it was impossible to establish degrees of fault. Proviso (a) to s. 1 (1) of the Maritime Conventions Act, 1911, provides that "if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally".

Held: (i) liability would be apportioned equally;

(ii) the negligence of the defendants' servants did not *per se* render the defendants guilty of "actual fault or privity" within the meaning of s. 503 (1) of the Merchant Shipping Act, 1894, and consequently the defendants were entitled to limit their liability under that sub-section;

(iii) in the absence of evidence that the presence of "Tulpar's" pontoons contributed to the collision their tonnage would not be aggregated with "Tulpar's" tonnage for the purpose of computing the extent of the defendants' liability under the limitation provisions of s. 503 (1) of the Merchant Shipping Act, 1894.

Judgment for the plaintiffs.

[**Editorial Note:** For the decision of CRANE, J., on the question of costs see 1964 L.R.B.G.]

J. A. King for the plaintiffs.

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

CRANE, J.: On the morning of April 1, 1962, the tug "Purple Heart" owned and operated by the plaintiffs, was eastbound in the vicinity of Aliko Point in the Aliko Channel in the Essequibo River. She was travelling very fast making Houston on the east bank of the Demerara River, shunting on her port side pontoon (No. 5) loaded with greenheart piles.

In the same channel and at the same time there was the tug "Tulpar", owned and operated by the defendants. She was westbound with two pontoons in tow proceeding in the direction of Ampa in the Essequibo River when a collision occurred between her and pontoon No. 5. As a result the latter, after sustaining damage to its bulwark,

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stabilizers, stanchions and plating, shipped water and had to be beached on the eastern mudflat of the foreshore. Tulpar, however, suffered only minor damage—a dent on the port side of her stem.

In this action the plaintiffs' claim against the owners of Tulpar, Messrs. Toolsie Persaud Limited, the sum of \$7,500 general and special damages for the negligent and unskilful management of their vessel by the defendants' servants or agents. Particulars of negligence as alleged by the plaintiffs in their statement of claim are as follows.

The defendants' servants or agents were negligent in that they—

- (a) failed to keep a proper look-out;
- (b) failed to pass the Purple Heart and pontoon port to port as they could and ought to have done;
- (c) improperly and at an improper time put and kept the wheel of the Tulpar to port and/or caused or allowed the head of the Tulpar to fall to port and towards the Purple Heart and pontoon;
- (d) failed to starboard the wheel of the Tulpar;
- (e) failed to indicate their manoeuvres by the appropriate or any whistle signals;
- (f) failed to case, stop or reverse their engines in due time or at all;
- (g) alternatively, they failed to keep their course and speed;
- (h) they failed to comply with articles 27, 28 and 29 and alternatively with article 21 of the Regulations For Preventing Collisions at Sea.

The defendants deny negligence and reply by making counter allegations of the same nature in para. 3 of their defence averring that the collision was caused by the servants and agents of the plaintiffs who negligently managed and controlled the tug Purple Heart and pontoon No. 5, that such negligence put Tulpar in a dilemma and forced her on to the shoals on the western side of the channel. There is the further allegation that it was the plaintiffs' pontoon which collided with the Tulpar's stem.

The counter allegations of negligence are as follows:

- (a) Purple Heart had no properly certificated master on board: nor any certificated mate.
- (b) Plaintiffs' pontoon No. 5 had no light exhibited and carried a deck cargo standing about 5 or more feet above the deck obscuring and preventing any side lights on the Purple Heart; if there were such lights, from being visible on the port side on which side of the Purple Heart the said pontoon was made fast.

- (c) The Purple Heart failed to bring to above the Alik Channel to allow the Tulpar and her tow to pass through the channel.
- (d) The Purple Heart without giving any sound signal kept on the western, her port side of the channel when meet ing the Tulpar head on, thus forcing the Tulpar to take the edge of the shoal to keep her starboard side or else, with her tow astern, alter course to port and cross the Purple Heart's bow. Tulpar took the edge of the shoal to starboard and stopped her engines. She was carried along the edge of the shoal by the tide and the plaintiffs' still being shunted by Purple Heart which was still under was collided on its port side with Tulpar's stern.
- (e) The defendants say that in any event the occurrence took place without their actual fault or privity; that the tonnage of the Tulpar for liability is 46.18 tons and that if the Tulpar be culpable, which is denied, the defendants claim to limit their liability to damages computed on the said tonnage in accordance with the Merchant Shipping Acts as applicable to this colony.

The evidence reveals that Alik Channel at the point where the collision occurred is very narrow, particularly at low water when shoals are clearly seen. At high tide the channel would be about 300 feet wide, and at low tide it would of course be less. As may be expected in collisions on water, the point of impact cannot be established with the same exactitude as it would be on land and sometimes, as in this case, not at all.

The parties are not in agreement with the pencil marking on Exhibit A, "Admiralty Chart (No. 2782) of the Essequibo River, Leguan Island to Mamarikuru Islands", made by the plaintiffs' witness Levi Thomas indicating the spot where he saw pontoon No. 5 beached. There is agreement, however, that the accident occurred in the Alik Channel which is described as a restricted and very narrow channel in the vicinity of Alik point. There is also disagreement as to whether the tide at the time of collision was flooding or ebbing, and as to the exact time when the accident occurred. Time and tide tables were put in evidence (Exhibit B) and expert evidence called to establish the state of the tide at the time of the collision. The importance of this bit of evidence must not be underestimated in view of the "Rule of the Road" in River Navigation with which all vessels must comply.

Regulation 53(3) of the River Navigation Regulations, Volume X, Cap. 270, after indicating the type of sound signals which two vessels meeting end on, or near end on must make in a channel, directs as follows:

"The loaded vessel shall always have the right of way and must make these signals first; if both vessels are loaded then the vessel which has the tide astern shall have the right of way."

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It will now be fairly evident why each side has endeavoured to prove that it had the tide astern. Conflicts in the evidence, however, regarding the exact time when the collision occurred render inconclusive the state of the tide. Evidence for the plaintiffs is to the effect that the occurrence took place at 3.00 a.m.; for the defence that it took place at about 2.35 a.m. As to the state of tide, evidence for plaintiffs is that Purple Heart had the tide behind her at the time of the collision. "It was ebb tide at the time of the accident", said plaintiffs' witness Desmond King, who was at the helm at that time. "As we moved off", said defendants' witness Milton Joseph, who was at Tulpar's wheel at the time, "the tide was still flooding, but was about to ebb as we went on to Ampa."

In this state of conflict it is not possible for me even to have preferred the evidence of John R. Knott, a former Harbour Master in British Guiana to the effect that high water at Aliki Point on April 1, 1963, was approximately 3.15 a.m. For one thing this witness did not speak as one present at the collision; he was seated in court throughout the proceedings (from this I draw no adverse inference); he gave evidence of an expert nature from time and tide tables and Admiralty charts in evidence, and after being shown the red crayon marking on Exhibit A, the spot indicated by the defendants' captain Rodrigues as the approximate point of the collision, gave as his opinion that high tide was at 3.15 a.m. on April 1, 1962, at that spot.

There is however, a serious flaw in Knott's evidence. He said: "I have calculated this (time) from actual high water at the Georgetown Bar, not from predicted time."

I must observe that he gained this information just before coming to court after inspecting hydro-graphic records, and a tidal graph recorded by an automatic tide gauge at the Georgetown Bar. It is a matter for regret, however, that Mr. Knott was unable to procure a certified true copy of this graph which he had seen and from which he made calculations on the very day of trial. He said it was impossible to procure a copy of it, though he did not say why this was so. His evidence then is based on what he had seen on the tidal graph, and it is clear that he does not accept the figures at p. 11 of Exhibit B (the predicted time) that high tide occurred at 1.40 a.m. at the Georgetown Bar. From what he had seen on the tidal graph high tide there was actually about 12 minutes later; but with all respect to the qualifications and experience of this expert witness his evidence would be highly prejudicial to the plaintiffs' case were I to accept it; it is certainly not the best evidence capable of being furnished on the point. According to Knott high tide at the Georgetown Bar on April 1, 1962, was at 1.52 a.m. not 1.40 a.m.; and at the place of collision at 3.15 a.m. The position then with Knott's evidence is that it runs counter to the evidence afforded by Exhibit B with no basis for establishing the contrary, and since this is so, it is not possible to say which vessel had the tide astern and therefore which had the right of way in the Aliki Channel, both appearing to have been "loaded vessels". Moreover,

for a court to take into consideration evidence which a party to the proceedings has had no opportunity during trial to see and thus challenge by cross-examination seems to strike at the root of the judicial process.

There seems no doubt Purple Heart was indeed a loaded vessel for she was shunting a pontoon filled with logs so that if Tulpar was not loaded, Purple Heart would have had by the regulation abovementioned, the right of way.

But the point whether Tulpar was a loaded vessel was put to the defendants' witness Hilton Joseph in re-examination and this was his answer: "I would call my tug a laden tug because the two pontoons I pulled were just the weight for me to tug," and it would appear that this is the correct view from the following passage in MARSDEN'S LAW OF COLLISIONS AT SEA (11th Edn.) para. 228:

"In applying the collision regulations, the court usually treats the tug and her tow as one ship. But a tug with a ship in tow has not the same facility of movement as if she were *unencumbered*. She is not, therefore, in the same degree, mistress of her own movements, and in some cases she cannot by stopping or reversing her engines, at once stop or back the ship in tow. This, however, is a question of fact, and if it is practicable to comply with the regulations a tug omitting so to do will be held to blame. In taking measures to avoid a third vessel a tug has to consider her tow; and a step that would be right, and take her clear, if she were encumbered may bring about a collision between her tow and the ship which she herself has avoided—as a matter of seamanship.

"It has also been held that a tug with a vessel lashed alongside has a duty to be usually on the alert and to take no chance. Although it is the duty of a tug with a ship in tow to comply, so far as is possible, with the regulations for preventing collisions, it is also the duty of a third ship to make allowance for the encumbered and comparatively disabled state of a tug, and to take additional care in approaching her."

In my judgment, both Tulpar and Purple Heart were negligent; both contributed to and was responsible for the collision; both vessels were flagrantly negligent by failing to comply with reg. 53 which is as follows:

"53. (3) When two vessels are meeting end on, or nearly end on, the following sound signals must be made—

- (a) one short blast to mean: I require the starboard side of the fairway or mid-channel.
- (b) Two short blasts to mean: I require the port side of the fairway or mid-channel. (The loaded vessel shall always have the right of way and must make these signals first. If both vessels are loaded, then the vessel which has the tide astern shall have the right of way).

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(4) Vessel shall at all times when navigating any river having sharp bends, on approaching same, making the warning signal of one prolonged blast in order to indicate their presence to other craft.”

It is very plain that both vessels with full knowledge that each was negotiating a restricted and narrow channel was travelling too fast and neglected to keep a proper look-out; otherwise they could not have failed to see each other. Being loaded vessels, each in the circumstances, should have emitted a prolonged blast particularly, as Desmond King for the plaintiffs admitted: “The channel was not straight but had bends in it;” each side admitted its neglect to give any sound signal at all.

For the meaning of a “narrow channel” see 35 HALSBURY’S LAWS (3rd Edn.) para. 992 of which provides as follows:

“*Prima facie* a narrow channel is a channel bounded on either side by land, so that a vessel cannot navigate in any great width between the two banks; it is opposed to ‘at sea’. A narrow channel must have two boundaries which are close to one another, and a stretch of water which on one side is open to an indefinite extent cannot be a narrow channel. The court will not lay down what particular width or length will constitute a narrow channel; but while a narrow channel is of necessity comparatively small in breadth, it may also be very short in length.”

Regulation 53 clearly was not observed, and I must therefore conclude that both vessels were blameworthy. This being the case, it now remains for me to apportion liability between the parties and I do so equally by applying s. 1 of the Maritime Conventions Act, 1911, which lays it down that:

“1. (1) Where, by the fault of two or more vessels, damage or loss is caused to one of those vessels, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault:

Provided that—

- (a) if, having regard to all the circumstances of the case, it is not possible to establish different degrees of fault, the liability shall be apportioned equally; and
- (b) nothing in this section shall operate so as to render any vessel liable for any loss or damage to which her fault has not contributed.”

I find it impossible for me to establish degrees of fault, or to say exactly who had the right of way in the channel when the collision took place. The plaintiffs contend that it took place within 20 feet of the eastern bank of the river when Tulpar failed to keep her course and to pass Purple Heart to port and that they were put in

a dilemma when Tulpar suddenly turned to port. The defendants on the other hand contend that the collision occurred some 300–400 feet from the eastern side of the channel and was brought about by Purple Heart being too far on the western side and directly in the path of Tulpar and that when this situation was realised it was too late to alter course to starboard to avoid a collision. As I have already indicated both versions are unacceptable to me; both vessels are blameworthy and contributed to the accident.

There is no counterclaim; and from all appearances the defendants have suffered no loss whatever.

The plaintiffs, however, have claimed the sum of \$7,500 special and general damages from the defendants, but in view of s. 503 (1) of the Merchant Shipping Act, 1894, which is expressed to apply to all Her Majesty's dominions by s. 509 *ibid.*, the defendants have pleaded in the alternative limitation of their liability in respect of the damage caused to the Purple Heart to £8 per ton. Section 503 (1) so far as it is material reads:

“The owners of a ship, British or foreign, shall not where all or any of the following occurrences take place without their actual fault or privity, that is to say ((a) (b) (c) not applicable)—

(d) where any loss or damage is caused to any other vessel, or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship, be liable to damages beyond the following amounts, (that is to say):

- (i) (Not applicable).
- (ii) in respect of loss of, or damage to, vessels, goods, merchandise, or other things, whether there be life or personal injury or not, and aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.”

It is well settled that s. 503 of the Merchant Shipping Act, 1894, applies to this colony being within Part VIII of the 1894 Act; and it has been held by STOBY, J., in *Ballard v. West Bank Estates Ltd.*, 1958 L.R.B.G. 173, that s. 1 of the Merchant Shipping (Amendment) Act, 1921, applies by implication to British Guiana. In that section the word “ship” was construed to include vessels propelled by oars; and Mr. King for the plaintiffs strenuously argues that by parity of reasoning the recent Merchant Shipping (Liability of Shipowners & Others) Act, 1958, also applies to this colony.

By s. 1 of the 1958 Act limitation of liability is now raised to £23.13.10 per ton instead of £8 per ton as provided for in s. 503 (1) of the 1894 Act; but the short answer to Mr. King's contention is provided by s. 11 of the same Act, the material parts of which is as follows:

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“(1) Her Majesty may by Order in Council direct that the provisions of this Act, and (so far as they do not so extend apart from the Order) the existing limitation enactments, *i.e.*, (Part VIII of the Merchant Shipping Act, 1894) shall extend, with such exceptions, adaptations and modifications as may be specified in the Order to—

- (a) (Not applicable).
- (b) (Not applicable).
- (c) any colony, or any country or place outside Her Majesty’s dominions in which for the time being Her Majesty has jurisdiction.”

It seems to me therefore that the view contended for by Mr. Stafford is right, that an Order in Council is a *sine qua non* to bringing into force the amending legislation. No Order in Council has been proved or been referred to and my own searches have not been rewarding. I must therefore conclude that the limit of £8 for each ton of ship’s tonnage still applies in the colony and must necessarily form the basis in the assessment of damages.

Damages claimed comprise three heads:

(i)	Salvage expenses for pontoon	...	\$ 974.07
(ii)	Repairs to pontoon	...	3,318.77
(iii)	Loss of use of pontoon for 20 days at \$150 per day	... ..	<u>3,000.00</u>
			<u>\$7,292.84</u>

and in order to establish these the plaintiffs’ witnesses Allen Smellie and James Ashbee were called. The latter, the chief engineer of the plaintiffs, testified to the effect that head (i) was in respect of labour charges (\$328.11); cost of stores (\$135.96); and the use of the Purple Heart in salvage operations for 25½ hours at \$20 per hour (\$510.00).

In support of (ii) two invoices Exhibits D¹ D² were put in evidence showing the extent of damage caused to pontoon No. 5; these were challenged with regard to both the nature of the damages caused and the materials used and suggestions made that the repairs detailed were not all necessary and were not all caused by the collision, and though Mr. Ashbee admitted other work was indeed done to pontoon No. 5 costing \$3,061.12, this amount he insisted was paid for separately and not claimed for in this case. This additional work included painting and anti-fouling to the bottom of the pontoon.

It is significant that both Ashbee and Smellie saw damage done to the pontoon, and both were of the opinion that the work claimed for on Exhibits D¹ D² was consistent with the damage caused by

the collision and constituted a fair charge, and I am inclined to accept their version which, in my view, is amply borne out by the evidence.

There is one further aspect of Smellie's evidence on which I would care to comment, that is to say, Smellie's opinion that at the moment of collision Tulpar had very little "way on", and that if indeed she had, his opinion would be that she would have suffered far more damage than a mere dent on the plating of her stem. This evidence would appear to support the view that Tulpar had indeed stopped her engines before the collision, and that the defendants' witnesses who so testified had spoken the truth, but even were I to accept Smellie's evidence in this regard, it in no way alters my opinion that the crews of both vessels were not keeping a proper look-out and both contributed to the mishap. I am satisfied about this.

The third head of damages is for loss of the use of the Purple Heart for 20 days at \$150 per day which, suffice it to say, is a perfectly legitimate claim. I am therefore unable to say that the above charges were unjustified, unfair or otherwise exorbitant. In my view they are legitimate and are maintainable having been properly established by the evidence; I am hearing in mind it is the duty of the plaintiffs to mitigate the damage done to their vessel, and that the onus of proof of damage lies on them. In my judgment the damages claimed are clearly in accordance with the law as stated in 35 HALSBURY'S LAWS (3rd Edn.), paras. 1073-1075 and 1078.

The remaining question for decision is whether in the ascertainment of the amount for which limitation of the liability of the defendants is claimed is to be based on the tonnage of Tulpar *simpliciter*, or whether Tulpar's tonnage together with her two tows should be included. Should the combined tonnage of the three be aggregated for the purpose of fixing the limit of liability?

Tulpar's registered tonnage has been proved to be 36.43 tons as *per* Exhibit F an extract from the Register Book under the hand of the Register of Shipping. There is, however, no proof of the tonnage of Tulpar's tows, but even had there been, there is no evidence that the presence of the other two barges had contributed to the collision, which appears to be the criterion for aggregating tonnage.

In *The Freden* (1950), 83 L1. Rep. 427, a tug and three barges which it had in tow all belonged to the plaintiffs in the limitation action. The defendants contended that the tonnages of the tug and all the barges should be aggregated. The plaintiffs admitted that the collision with the defendants' vessel was caused by the negligent navigation of the tug and of one of the barges, namely, the barge that had actually come into contact with the defendants' vessel. PILCHER, J., held that the presence of the other two barges had not contributed to the collision, and on that basis held that only the tonnages of the tug and the colliding barge should be taken into account. He said this at p. 430:

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“Consequently, on that finding of fact, and applying the principle laid down in *The Harlow*, I have come to the conclusion that the plaintiffs are entitled to limit their liability to the statutory limit of the George Livesey and of the Bittern. Both of these vessels being in the same ownership, each of them falls within the wording of the appropriate section 503 of the Merchant Shipping Act, 1894. My judgment, therefore, in this case is that the plaintiffs here are entitled to the decree of limitation which they seek, based upon the tonnage of the George Livesey and the Bittern.....”

I find as a fact as did SELLERS, J., in *Beauchamp v. Turrell*, [1952] 1 All E.R. that though the servants of the defendants were guilty of negligent manage \$3,750 but they have claimed and have successfully established a limitation of the vessel Tulpar, this fact would not *per se* and without more render the defendants guilty of “actual fault or privity” within the meaning of s. 503 (1) of the Merchant Shipping Act, 1894, and consequently the defendants are entitled to limit their liability under that sub-section.

For the purpose of calculating Tulpar’s limitation of liability I must adhere to para. (a) of the sub-s. 2 of s. 503 of the Merchant Shipping Act, 1894, and take into computation its registered tonnage of 36.43 tons plus bridge space (3.92 tons) and the space required for engine-room accommodation of 9.75 tons, and I arrive at the figure of 46.18 tons to be used in the computation.

I have already found that the owners of Tulpar were fifty per cent blame-worthy, so that according to s. 1 of the Maritime Conventions Act, 1911, the owners of Purple Heart must bear half of the damage they suffered and the other half by Tulpar’s owners.

The position therefore is that the owners of Tulpar become liable to the owners of Purple Heart for liability as follows:— 46.18 tons x £8 per ton = £369.44 = \$1,773.31 for which sum judgment will be entered. The question of costs to be reserved for further argument.

Judgment for the plaintiffs.

Solicitors: *Cameron & Shepherd* (for the plaintiffs); *A. G. King* (for the defendants).

END OF VOLUME

A. P. SINGH v. CHUNILALL

[Supreme Court—In Chambers (Persaud, J.) on appeal from the decision of a rice assessment committee—September 1, 15, October 6, 16, 25, November 10, 17, 23, 29, December 15, 1962, February 2, 1963.]

Rice lands—Lands not yet fit for cultivation of paddy but let for that purpose—Whether rice lands within meaning of Rice Farmers (Security of Tenure) Ordinance, 1956.

Rice lands—Appeal—Objection to jurisdiction sought to be made on appeal but not made before assessment committee—Whether competent to do so—Rice Farmers (Security of Tenure) Ordinance, 1956, s. 51 (3)—Summary Jurisdiction (Appeals) Ordinance, Cap. 17, s. 9.

Appeal—Refusal of application for adjournment—Confusion as to date of hearing—Natural justice—Right to further opportunity to ventilate case.

The appellant-landlord appealed against an order made by an assessment committee for the issue of a certificate and assessment of damages for non-observance by him of the rules of good estate management pursuant to s. 38 (4) of the Rice Farmers (Security of Tenure) Ordinance, 1956. In support of the appeal it was argued *inter alia* that the lands in question were not rice lands within the meaning of the Ordinance for the reason that they were not yet fit for the cultivation of paddy at the time when rented. This point had not, however, been taken below. Section 51 (3) of the Ordinance provides that “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,” and s. 9 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, provides that an objection to the jurisdiction of the magistrate’s court may be taken on appeal provided that it was taken below. It was also argued that the assessment committee exceeded its jurisdiction in taking into account reports of inspections made in another application between the same parties and in respect of substantially the same land. The committee had done so purporting to act under s. 14 (4) of the Ordinance which enables a committee to “take into consideration any relevant facts which were found to be proved in some investigation under s. 12.....” Section 12 however deals with applications for the assessment of rent and other related matters. A further contention was that the committee acted in breach of the rules of natural justice in refusing an application by the appellant for an adjournment although, as was the case, there was some confusion as to the date of hearing.

Held: (i) section 9 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, applied by virtue of the provisions of s. 51 (3) *supra*, with the result that, since the question relating to jurisdiction had not been taken before the committee, it could not be taken on appeal;

(ii) in any case lands not yet fit for the cultivation of paddy but let for that purpose are caught by the Rice Farmers (Security of Tenure) Ordinance, 1956;

(iii) in dealing with an application under s. 38 a committee may inspect the holding concerned but cannot take into consideration any relevant facts which were found to be proved in an investigation under s. 12. It can do this only where an application for the assessment of rent under s. 12 is being dealt with;

(iv) as there was some confusion as to the date of hearing the appellant should be given an opportunity to have his cause fully ventilated.

Appeal allowed; matter remitted.

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

B. O. Adams, Q.C., for respondent.

PERSAUD, J.: This is an appeal by a landlord under s. 26 (1) of the Rice Farmers (Security of Tenure) Ordinance, 1956, against an order made by an assessment committee for the issue of a certificate and assessment of damages for non-observance by a landlord of the rules of good estate management pursuant to s. 38 (4) of the Ordinance.

Several grounds of appeal were filed but those argued before me can be summarised as follows—

- (a) that the lands in question are not rice lands within the meaning of the Ordinance;
- (b) that there is an error on the face of the record;
- (c) that the committee in purporting to act under s. 14 (4) of the Ordinance exceeded its jurisdiction in taking into account reports of inspections made in another application between the same parties and in respect of substantially the same land;
- (d) that in refusing an application by the appellant for an adjournment the committee committed a breach of natural justice.

I will attempt to deal with the grounds as they have been set out above. Exception has been taken to the first ground being raised, the reason given being that a question of jurisdiction may not be properly raised upon appeal. Counsel for the appellant has referred me to the case of *Francis Jackson Developments, Ltd. v. Stemp*. [1943] 2 All E.R. 601, where the question of the jurisdiction of the court to make an order for possession was raised for the first time on appeal. The tenant in that case was, on appeal, claiming that he was a tenant entitled to the protection of the Rent Restriction Acts, and that, therefore, no order for possession ought to have been made against him. Lord GREEN, M.R., in the course of his judgment, said—

“That point was one which, as I say, was not taken below, but it is one which, if brought to the notice of the court, the court is bound to take cognisance of, because the court has no jurisdiction to make an order for possession in a case to which the relevant provisions of the Act apply. Accordingly, there can be no objection to the matter being taken before this court, it being a matter which goes to the jurisdiction of the court.”

The Rent Restriction Acts of the United Kingdom do not contain a provision similar to s. 27 (2) of our Rent Restriction Ordinance, Cap. 186. This section provides that—

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

This, of course, would include s. 9 of that ordinance which provides that an objection to the jurisdiction of the magistrate’s court may be taken on appeal provided that it was taken in the court below. Unfortunately the Rice Farmers (Security of Tenure) Ordinance does

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not, as is the case of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, prescribe in so many words the grounds upon which an appeal may be founded, but s. 51 (3) of the former ordinance provides that—

“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.”

In my interpretation of this section, the words, “or other proceedings” include appeal proceedings brought under s. 26 of the Ordinance. It seems to follow that s. 26 does not exclude the application of s. 9 of the Summary Jurisdiction (Appeals) Ordinance to appeals brought under the Rice Farmers (Security of Tenure) Ordinance, 1956. In this case the point was not taken before the committee, and I am of the opinion that it may not now be taken.

Even if it could properly be taken before me, I am of the firm opinion that the land in question falls within the definition in the Ordinance. As I understand it, the appellant’s argument on this point is that the land not having been fit for the cultivation of paddy according to normal agricultural standards at the time of the commencement of the tenancy, and the rent having been fixed at \$6.00 per acre, the Ordinance did not apply. In my view the terms of the written contract which sought to deal with these matters do not succeed in taking the matter outside the pale of the Ordinance. When one looks at the proviso to s. 4 (1) of the Ordinance it is clear that the Ordinance contemplates that lands not yet fit for the cultivation of paddy but let for that purpose are caught by the Ordinance. I hold, therefore, that the assessment committee had jurisdiction to deal with this matter.

The application filed by the respondent described the extent of the holding as 280 acres comprising of the frontlands of Perth, Ex-mouth and Eliza, notwithstanding that the agreement of lease speaks of 600 acres more or less being the south half of Plantation Dunkeld and the backlands of Perth, Eliza, Exmouth and Paradise. It appears from the record that the application was amended by the chairman of the committee to read 600 acres. There is nothing to indicate on what date the amendment was made, but it is clear from the evidence of the respondent that he was seeking a non-observance certificate in respect of the entire holding. This was in no way attacked by the appellant and it seems to me that the chairman must have effected the amendment as a result of the evidence which was led. In those circumstances, I do not agree that there is an error on the face of the record.

It is further submitted for the appellant that it was not competent for the committee to take into account an inspection report made for the ascertainment of the maximum rent, as opposed to this application for the grant of a certificate of non-observance of good estate management. It is apparent from the record that two inspections were made in connection with the application for the ascertain

ment of maximum rent as a result of which two reports were prepared, and it is clear from the chairman's reasons for decision that the committee considered both of those reports in the matter now under review. Section 15 of the Ordinance provides for the inspection of a holding where an application under s. 12 (1) has been made, and s. 12 (1) provides for the making of an application to have the maximum rent of any holding assessed, fixed and certified. It would seem to follow that the inspection of a holding can be made only when an application under s. 12 (1) has been filed. It is perhaps useful at this point to make passing reference to s. 38 of the Ordinance if only to point out what appears to be a lacuna, that is, that there is no similar provision in that section.

Now to turn to s. 14(4) which provides as follows—

“The committee may take into consideration any relevant facts which were found to be proved in some investigation under s. 12 of this Ordinance notwithstanding the absence of formal proof of such facts.”

Section 12, as I have already indicated, provides for the filing of an application to have the maximum rent assessed, fixed and certified and for certain other matters. Section 13 provides for certain procedural matters which in my opinion must refer to the hearing of an application filed under s. 12. It is difficult to yield to the persuasive argument of the respondent that s. 14 (4) must be considered separately and apart from sub-ss. (1), (2) and (3) of the same section. Subsection (1) specifically mentions an investigation for the purpose of ascertaining and fixing the maximum rent. I am of the opinion that sub-s. (4) must be construed to mean that the committee may take into consideration relevant facts, etc., where an application under s. 12 is being dealt with. If this were not so, then having regard to the provisions of s. 11 of the Ordinance which prescribe the powers and duties of the committee, sub-s. (4) would not have been couched in the bald language “may take into consideration any relevant facts” without providing for the occasions when such facts may be taken into consideration. By this decision I do not wish to indicate that in dealing with an application under s. 38, the committee may not inspect a holding even though there is no express provision in that section for so doing. I say so because it seems to me implicit that an inspection would assist a committee to ascertain whether there has been non-observance of the rules of good estate management or of good husbandry.

This then is my interpretation of s. 14 (4), but it may appear to be a distinction without a difference, and I will therefore go on to examine the last submission of the appellant. For the purposes of this submission, I am not unmindful of the well known standard set by all courts which observe principles of British jurisprudence, that is, that justice must not only be done, but must appear to be done. The question is whether the appellant had a full opportunity to present his case to the committee. I wish to state at the outset that I do not question the rectitude of the committee or its chairman, but there does seem to have been some confusion as to whether this mat-

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ter was fixed to be concluded on the 12th of June as has been related before me by the chairman, or on the 13th as is alleged by the appellant. The confusion came about because the committee attempted to hear this matter together with one for the ascertainment of the maximum rent (referred to during the argument as No. 5 of 1961, and which is itself the subject of an appeal before me), and the untidy manner in which the evidence was led.

Action No. 5 of 1961 was filed on the 3rd January, 1961, and was adjourned from time to time until the 17th October, 1961, when the matter now under review which had been filed on the 19th September, 1961, was called. Action No. 5/1961 was part-heard on the 15th August, 1961 and again on the 31st October, 1961. On the 28th November, 1961, both matters were put down *sine die*. The next date was the 29th May, 1962, when both matters were heard at the Anna Regina Court. No. 5 of 1961 was fully heard except for the production of certain books, which was to be done on the 12th June, 1962. There is no doubt that the committee dealt with this matter on the 12th June, although the case jacket was endorsed with the date 13.6.62. After the hearing of the matter under review (No. 610 of 1961) on the 29th May, 1962, it was adjourned to the 12th June, 1962, and I am satisfied that the chairman intended to deal with both matters on that date at Suddie Magistrate's Court, and that the committee sat at Anna Regina on the 13th June. However, Mr. Fitzpatrick, counsel for the appellant in action No. 5 of 1961, formed the impression that the matters were put down on the 29th May for two consecutive days, the one in respect of which documents were to be produced (this would mean No. 5 of 1961) for the earlier day. In Mr. Fitzpatrick's mind, No. 5 of 1961 was to be concluded on the 12th June and No. 610 be continued on the 13th. It may well be that the appellant also was under this misapprehension, and so unable to produce all his witnesses on the 12th. I wish to draw attention to the fact that the appellant's case was closed on the 29th May, but from the record, it would appear that on the 12th June the committee gave both sides an opportunity to be heard again.

I have seen and heard the appellant in this matter, and I have formed the opinion that he is a difficult person and a procrastinator. No doubt, the chairman was of the same opinion, but if there has been a genuine misapprehension of the date of hearing—as might well be the case—he should be given an opportunity to have his cause fully ventilated.

I propose to allow the appeal and to remit the matter back to the committee for hearing *de novo*.

Now to the question of costs. On the 1st of September, 1962, when this matter was first called before me, Mr. Elliott, Q.C., appeared instructed by Mr. Carlos Gomes for the appellant while the respondent appeared in person, and asked for an adjournment on the ground that his counsel Mr. B. O. Adams, Q.C., was on that day unable to attend. Mr. Elliott did not object to the adjournment, but asked for the day's costs. I reserved the question of costs. On the

15th September Mr. Gomes, but not Mr. Elliott, and Mr. Adams appeared when Mr. Adams took certain preliminary points including the failure to file and serve grounds of appeal. Mr. Gomes asked for an adjournment to inspect certain documents. On the 6th October. Messrs. Gomes and Adams appeared. Certain further arguments were addressed to the court after which Mr. Gomes applies for an adjournment as Mr. Elliott was engaged in another court, whereupon Mr. Adams opposed the application. Up to then no grounds of appeal had been filed, and the court ordered that such grounds be filed within 14 days, and awarded costs to the respondent fixed at \$50.00.

The matter was next called on the 17th November, when Mr. Elliott appeared and asked for costs in respect of the 1st September when Mr. Adams had not appeared. On that day the appellant was not ready to go on with his appeal, and I fail to see how he can properly claim the costs for that day. A great deal of time was taken up on this question when Mrs. A. Sankar-Adams, a barrister-at-law and a Mr. Persaud, clerk to Mr. Stafford, Q.C., were called to give evidence as to events alleged to have occurred prior to the 1st September, 1962. To my mind all of this was quite unnecessary. The order for the payment by the appellant to the respondent of \$50.00 costs will stand. I do not feel that the appellant is entitled to costs for the 1st September.

So far as the costs of this appeal are concerned, it is a fact that the appellant has succeeded in obtaining one of the remedies he sought, that is of having the matter remitted for re-hearing. But finding, as I have done, that there could have been a misapprehension by the appellant as to the date of hearing, I feel that it would be inequitable to order the respondent to pay the costs of this appeal. The order of the court, therefore, is that each party should bear his own costs.

Appeal allowed; matter remitted.

Solicitors: A. Vanier (for the respondent); Carlos Gomes (for the appellant).

A. P. SINGH v. CHUNILALL

[Supreme Court—In Chambers (Persaud, J.) on appeal from the decision of a rice assessment committee—January 19, February 2, 1963.]

Rice lands—Agreement that no rent should be paid for first year of tenancy—Whether void—Rice Farmers (Security of Tenure) Ordinance, 1956, s. 48.

Rice lands—Assessment certificate—Rent fixed for five years—Whether valid—Rice Farmer (Security of Tenure) Ordinance, 1956, s. 4 (1).

On 27th April, 1960, the appellant-landlord agreed in writing to let to the respondent-tenant certain lands for the cultivation of paddy, but which were not then fit for that purpose, for a period of twelve years on the condition that no rent should be payable for the first year but that thereafter the tenant should pay a rental of \$6.00 per acre together with any drainage and irrigation rates levied. Upon an application by the landlord, dated 28th December, 1960, the assessment committee issued a certificate fixing the basic rent at \$4.00 per acre with effect from 1st April, 1961, and until 1st April, 1965.

Section 48 of the Ordinance provides that “any provision in any agreement between a landlord and a tenant whereby the tenant purports to contract himself out of the provisions of this Ordinance shall be null and void”; and the proviso to s. 4 (1) states that “where a contract of tenancy has been entered into in respect of land intended to be used for the cultivation of paddy, but not yet cleared and made fit for the cultivation of paddy according to normal agricultural standards, the basic rent chargeable.....shall be.....not exceeding such rate per acre during the first five years after the commencement of the tenancy as may from time to time be fixed by the assessment committee upon an application of either the landlord or the tenant.”

Held: (i) there is nothing in the Ordinance to prevent a landlord from letting his land free of rent; what he cannot do is to charge a rent in excess of that prescribed by the Ordinance;

(ii) the Ordinance contemplates an annual review of the rent by the committee where such a review is applied for, and the committee could not therefore bind itself for five years as it purported to do.

Appeal allowed in part.

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

B. O. Adams, Q.C., for the respondent.

PERSAUD, J.: This appeal emerges from an agreement of lease entered into by the parties by which the appellant on the 27th April, 1960, agreed to lease and the respondent to take on lease certain lands in the county of Essequibo for the purpose of the cultivation of paddy. For the purposes of this appeal, besides bearing in mind that the agreement purported to grant a lease of about 600 acres, it is necessary to bear in mind certain other clauses in the agreement. These are as follows:—

1. “For the first one year from the date of this lease the said lands shall be free of rent.
2. From the second and following years until the determination of this lease the sum of \$6.00 per acre, to be paid on the 31st December of every year. First payment to be made on 31st December, 1962. The lessee shall forthwith start preparing the lands and be in immediate possession

of same, also at all times during the continuance of this lease clean and prepare the said lands for the growing of rice and clearing and deepening trenches if necessary within the area, to the satisfaction of the lessee.”

(It seems that “lessee” here should read “lessor”).

3. “In the event that drainage and irrigation rates are levied on the said area of land hereby leased, the lessee shall pay all the rates in respect of the said land from year to year when it becomes due during the continuance of this lease in addition to rental of \$6.00 per acre aforementioned.
4. This lease shall be for a period of twelve years from the date hereof.”

Pursuant to the agreement, the respondent entered into occupation of the land, and planted paddy in 1960. He again planted in 1961. By some arrangement, the ascertainment of which is not relevant to this appeal, the acreage of land was reduced to 425 acres.

It will be seen that the agreement purported to fix the basic rent at \$6.00 per acre.

Upon an application dated 28th December, 1960, by the appellant, the assessment committee fixed the basic rent at \$4.00 per acre until the 1st April, 1965, and issued a certificate accordingly. The certificate is to take effect from the 1st April, 1961, and refers to s. 4 (1) of the Rice Farmers (Security of Tenure) Ordinance, 1956. Presumably the committee intends this section to be the authority under which the rent is fixed.

Counsel for the appellant while not challenging the fixing of the rent, urges—

- (a) that if the agreement is void, then the matter should be governed by the Ordinance, and the landlord should receive rent as from the commencement of the tenancy; and
- (b) that the committee acted *ultra vires* the Ordinance in fixing the basic rent for a period of 5 years.

The first question to which I must address my mind is whether the contract is void. Section 48 of the Ordinance provides as follows—

“Any provision in any agreement between a landlord and a tenant whereby the tenant purports to contract himself out of the provisions of this Ordinance shall be null and void.”

In my judgment, this section contemplates an agreement portions of which may be within the Ordinance, and portions without. In addition, it would seem that where a contract is partly legal, and partly illegal, provided the illegal consideration constitutes a subsidiary or minor part only of the total consideration, and the illegality does not

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involve a criminal act or one *contra bonos mores*, the illegal part of the consideration may be severed from the rest of the consideration and the legal provisions may be enforced. (See 8 HALSBURY'S LAWS (3rd Edn.) p. 147, and *Bennett v. Bennett*, [1952] 1 All E.R. 413). The clauses of the agreement that arise for consideration are clauses (1) and (2) as reproduced above.

There is nothing in the Ordinance to prevent a landlord from letting his land free of rent; what he cannot do is to charge a rental in excess of that prescribed by the Ordinance. As was the case with an Australian statute in *Lake View and Star Ltd. v. Cominelli*, [1937] A.C. 653, the Rice Farmers (Security of Tenure) Ordinance, 1956, was intended for the protection of the rice farmers. I can find nothing tainted in clause 1 of the agreement. The appellant may not urge—as in fact he did not—that there was a lack or a failure of consideration, for the respondent did clean some of the trenches. I am of the view, therefore, that in fixing the rental as from the 1st April, 1961, the committee was merely giving effect to the terms of the agreement.

That the committee acted *ultra vires* the Ordinance in ordering that the certificate of assessment shall be operative until the 1st April, 1965, is, in my opinion, apparent. Section 4 (1) of the Ordinance establishes certain zones, and fixes the basic rent in respect of each zone. The proviso to that section is in these words—

“Provided where a contract of tenancy has been entered into in respect of land intended to be used for the cultivation of paddy, but not yet cleared and made fit for the cultivation of paddy according to normal agricultural standards, the basic rent chargeable in respect of such land shall be as from the 1st day of May, 1956, not exceeding such rate per acre during the first five years after the commencement of the tenancy as may from time to time be fixed by the assessment committee upon the application of either the landlord or the tenant.”

The words “may from time to time be fixed” contemplates several applications either by the landlord or tenant during the five-year period, and I agree with the submission of the appellant that the committee's duty ended with the fixing of the basic rent without stating the period for which that basic rent would be payable. It is implicit that that rent would be payable in respect of the year in which it is fixed and any previous year that the committee may think fit, but not for any future year or years. Of course, if neither side seeks to have the rent varied from time to time, it remains as fixed. I have arrived at this conclusion having regard to two circumstances. The first is that every tenancy is a tenancy from year to year, and the second is that s. 27 (1) of the Ordinance compels the landlord to serve the tenant not later than the 30th of April in *every* year a statement of the basic rent with permitted additions. Provision is also made in sub-s. (2) of that section for the situation where the assessed rent exceeds or is less than the rent claimed in the statement, and for adjustment in those circumstances. All of this serves to show that

the Ordinance contemplates an annual review of the rent by the committee where such a review is applied for.

By granting the certificate in the terms in which it did, the committee has purported to bind itself for five years, and to do this is in my opinion, to misconceive the implications of the Ordinance.

The appellant's appeal will be allowed to the extent only of the deletion of the words "until 1st April, 1965" from the certificate of assessment dated 2nd July, 1962.

The position with respect to costs is not the same as in the other appeal between these parties, and with which I have already dealt. (See case immediately preceding in this volume). I think that the appellant is entitled to have costs in this matter, he having succeeded on one of his submissions. Those costs are fixed at \$80.00.

Appeal allowed in part.

Solicitors: *Carlos Gomes* (for the appellant); *A. Vanier* (for the respondent).

CONSORCIO EMPRESAS GRUPO DEL CONTE PARA LA
GUAYANA BRITANICA v. DAILY CHRONICLE LTD. AND ANOTHER.

[Supreme Court—In Chambers (Luckhoo, C.J.), September 11, 20, 27, October 5, 20, 1962, February 7, 1963.]

Practice and procedure—Action deserted—Limitation then expires—No order for or consent to revivor—Request for hearing then filed—Application untenable—O.32, rr. 8 (1), (2) and (3), R.S.C. 1955.

The plaintiffs' action for libel became deserted on 8th May, 1962. The alleged libel had been committed on 8th June, 1961, and by virtue of s. 9 of the Limitation Ordinance, Cap. 26, the action therefore became statute barred on 8th June, 1862. On 7th August, 1962, the plaintiffs filed a request for hearing without first having obtained an order for or consent to revivor. On 29th August, 1962, the defendants applied for an order striking out the request for hearing as a nullity. On the following day the plaintiffs applied for an order of revivor. Order 32, r. 8 (3), provides that "no order for or consent to revivor shall avail as an advantage to the plaintiff in respect of the Period of limitation applicable to the cause of action."

Held: if when an order for revivor is made or consent to revivor is given the limitation period has expired, the plaintiff cannot take advantage of an order for revivor or consent to revivor.

Plaintiffs' application refused.

Defendants' application granted.

J. O. F. Haynes, Q.C., with F. Ramprashad for the plaintiffs.

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

LUCKHOO, C.J.: These are two applications by way of summons heard together by consent. Both applications are dated of the 29th August, 1962. The earlier in point of time of filing is the one on behalf of the defendants (filed on the 29th August, 1962) for an order that the request for hearing filed by the plaintiffs on the 7th August, 1962, be struck out as a nullity, alternatively for non-compliance of the rules of the Supreme Court, 1955, and that the action be dismissed with costs. The later in point of time of filing is one on behalf of the plaintiffs (filed on the 30th August, 1962) for an order of revivor in the action.

The writ of summons in the action was filed on the 21st June, 1961. The defendants entered appearance thereto on the 28th June, 1961, and the plaintiffs filed their statement of claim on the 4th August, 1961. On the 13th September, 1961, the plaintiffs gave notice to the defendants under O. 25, r. 15, of the Rules of the Supreme Court, 1955, requiring them to file and deliver their defence within 14 days after the service of the notice failing which the plaintiffs would file a request for final judgment against the defendants. The defendants did not in compliance with that notice file a statement of their defence nor have they since done so.

The defendants claim that the notice under O. 25, r. 15, of the Rules of the Supreme Court, 1955, having been served upon the de-

defendants on the 13th September, 1961, by O. 32, r. 3 (1), of the Rules the action became ripe for hearing 14 days later, that is to say, on the 27th September, 1961, and by O. 32, r. 1, a request for hearing was required to be filed by the plaintiffs not more than 6 weeks later, that is to say not later than the 8th November, 1961. By the operation of O. 32, r. 8 (1), the action became deserted on the 8th May, 1962, and no further proceedings could validly be taken unless and until an order of revivor had been made by the court or a judge on the application of any of the parties or a consent to revivor and a request for hearing signed by all parties thereto had been filed as provided by O. 32, r. 8 (2).

For the defendants it was contended that the filing of a request for hearing on the 7th August, 1962, after more than 6 months had elapsed since the filing of the notice of default of defence and without compliance of the provisions of O. 32, r. 8 (2), the request for hearing was not validly filed and is a nullity; alternatively, it is irregularly filed and should be expunged from the record.

Counsel urged that the grant of an order of revivor of the action would have the effect of depriving the defendants of the limitation of one year period provided by s. 9 of the Limitation Ordinance, Cap. 26.

For the plaintiffs it was contended firstly that the correspondence which passed between the solicitors for the parties from the 5th October, 1961, to the 7th August, 1962, had the effect of waiving the position created by the notice of default of defence dated 13th September, 1961, alternatively, the correspondence created a position under which the defendants should be estopped from raising the contention that allowing a revivor of the action would interfere with the accrued right of the defendants in relation to the limitation period of one year provided by s. 9 of the Limitation Ordinance, Cap. 26.

Before referring to the correspondence passing between solicitors for the parties it is interesting to observe that in his affidavit filed in support of the plaintiffs' application for a revivor, solicitor for the plaintiffs expressed the view that by reason of the Rules of the Supreme Court, 1955 (to which reference has already been made) the action became deserted on the 8th May, 1962, and he stated that he had inadvertently filed a request for hearing on the 9th August, 1962, without first obtaining an order of revivor or consent to revivor. Solicitor for the plaintiffs also expressed the view that the request for hearing so filed is a nullity. This he repeated in his affidavit in reply to the affidavit filed in support of the defendants' summons. However in a further affidavit in reply to the affidavit filed in support of the defendants' summons solicitor for the plaintiffs stated that upon closer examination of the correspondence he had discovered that the action had not been deserted at all since their notice of default of defence filed and served "for the defendants (*sic*) on the 13th September, 1961, was, by consent of the solicitors in this action, waived altogether and treated as ineffective having regard to the understanding reached between them and embodied in a letter of

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the defendants' solicitor dated the 10th day of October,". Solicitor for the plaintiffs also said that he is of the view that a fresh notice in default should therefore have been filed and served before the plaintiffs filed a request for hearing in the action. Solicitor for the plaintiffs also attributed the delay in the matter to the defendants "who kept harassing me for particulars and security for costs and further and better particulars as will be seen from the letters referred to in paragraph 4 of my first affidavit....."

The correspondence referred to by solicitor commenced on the 5th October, 1961, by way of a letter from solicitor for the defendants to solicitor for the plaintiffs requesting further and better particulars of the statement of claim under paragraph 5. On the next day 6th October, 1961, solicitor for the defendants applied to solicitor for the plaintiffs for certain information relating to the names and addresses of the partners of the plaintiffs. Solicitor for the plaintiffs replied on 7th October, 1961, to the letter of the 5th October, 1961, asking for time for furnishing particulars to two weeks from the time of return of counsel who was then out of the Colony and stating that he understood that counsel would be back in about a week. Then comes the letter from solicitor for the defendants marked "D" upon which the plaintiffs place much reliance. It is dated 10th October, 1961, and is as follows—

"I am in receipt of your letter of the 7th instant in the above matter, and so far as I am concerned, time for filing Particulars may be extended as you request on the understanding that defence in the matter will not be filed until one month after the particulars are supplied."

What is stated therein must be read in the context of the request of solicitor for the plaintiffs in his letter dated 7th October, 1961. When solicitor for the defendants agreed in the letter marked "D" to an extension "as you request" he was not thereby agreeing to the treatment of the plaintiffs' notice of default of defence as ineffective. He merely agreed to make a concession as to the time within which the particulars requested were to be supplied provided that he would be given the concession of filing the defence not less than one month after the particulars were supplied. The very condition placed by solicitor for the defendants upon the grant of the request made by solicitor for the plaintiffs in his letter dated 7th October, 1961, shows that the notice of default of defence filed and served on the 13th September, 1961, was being treated as effective for the purpose for which it was intended. Certainly as late as 30th August, 1962, after these summonses were already prepared solicitor for the plaintiffs still laboured under the view that the action was deserted. How can he now say that the letter of the 10th October, 1961, had the effect for which he now contends in his further affidavit in reply?

On the 18th October, 1961, solicitor for the defendants by letter to solicitor for the plaintiffs referred to the fact that both of the plaintiffs normally reside out of the jurisdiction and he requested

security for costs be given in the sum of \$2,400. On the same day the names and addresses of the plaintiffs were supplied the defendants by solicitor for the plaintiffs.

It was not until the 3rd February, 1962, that solicitor for the plaintiffs replied to solicitor for the defendants informing him that he was now advised by counsel to inform him that the defendants were not entitled to the particulars requested and that the amount of security required was considered to be exorbitant.

On the 5th February, 1962, solicitor for the defendant replied stating his reasons for considering the amount of \$2,400 as security for costs not excessive and stating that he will inform counsel that the request for particulars had been refused and that if counsel so advises an application to the court would be filed for particulars to be delivered. On the 7th February, 1962, solicitor for the defendants expressed his willingness to accept \$1,200 as security for costs after he had been informed that the firm was resident in this Colony and had assets here.

On the 28th April, 1962, the solicitor for the plaintiffs reiterated that the particulars requested would not be given and requested the defence be served forthwith.

On the 14th May, 1962, comes an illuminating letter from solicitor for the plaintiffs in which quite clearly he recognised that the notice of default of defence was so far as he was concerned still effective and threatening that if he were forced to apply for final judgment in the Bail Court and a defence filed "at the eleventh hour" he will have to ask for costs.

Then on the 15th May, 1962, solicitor for the defendants in reply to the letter of 28th April, 1962, referred to a recent decision of the Court of Appeal in England in *Longhans v. Odhams Press Ltd.*, [1962] 1 All E.R. 404, on the question of particulars. To that letter solicitor for the plaintiffs replied on the 24th May, 1962, stating that the plaintiffs did not intend to rely on extraneous matters in proving their case except facts which lie within the defendants' own knowledge. Solicitor for the defendants on the 29th May, 1962, replied stating that this statement was wholly unsatisfactory. He referred solicitor for the plaintiffs to more recent authorities: *Grubb v. Bristol*; in the light of those authorities and what he had stated in his last letter, it seemed that the defendants were entitled in the absence of particulars of the facts and matters relied upon in support of the meanings alleged in paragraph 5 of the statement of claim, to have the paragraph struck out. In conclusion he informed solicitor for the plaintiffs that he would allow him 14 days to apply to amend the statement of claim failing which his instructions were to apply to have paragraph 5 struck out.

On the 21st July, 1962, solicitor for the plaintiffs replied further to the letter of the 15th May, 1962. He informed solicitor for the defendants that he was now advised to state that the plaintiffs

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would not with certain exceptions detailed refer to any extraneous matter in proving their claim. He also informed solicitor for the defendants that he had not yet had an opportunity of reading the authorities to which the latter had referred him.

On the 28th July, 1962, solicitor for the defendants reminded solicitor for the plaintiffs that he had not yet replied to his letter of the 29th May, 1962. He enclosed a copy of that letter and cited the reports in which the cases he had referred to could be found.

On the 7th August, 1962, solicitor for the plaintiffs wrote solicitor for the defendants enclosing notice of the request for hearing he had that day filed which he said he had done so as to avoid the abandonment of the action in September 1962, which he said would be one year from the last proceeding had or step taken in the action.

It will be observed that to the end of the correspondence solicitor for the plaintiffs had been acknowledging the effect of the notice of default of defence filed on the 13th September, 1961.

I can find nothing in the correspondence which could have the effect of a waiver of the position created by the notice of default of defence filed on the 13th September, 1961. Nor do I see any good ground for coming to the conclusion that the defendants should be estopped from raising the contention that allowing a revivor of the action would interfere with the accrued right of the defendants in relation to the limitation period provided by s. 9 of the Limitation Ordinance, Cap. 26.

I find that the action was by virtue of O. 32, r. 8 (1) deemed deserted.

It was next contended by counsel for the plaintiffs that the letters and conduct of the parties create special circumstances under which the court might properly allow a revivor even though the statutory limitation period has expired.

The action became deserted on the 8th May, 1962. It is true that subsequent to that date correspondence was passing between the solicitors in respect of the defendants' request for particulars and the question of security for costs. The action was still alive and pending even though deemed deserted. Had the plaintiffs put their case in order before the 8th June, 1962 (the publication in issue was dated 8th June, 1961) the action could still have gone forward. By operation of law (the rules have the force of statute) the action was deemed deserted and it could not be revived except in the way prescribed by law—that is to say, in accordance with the provisions of O. 32, r. 8 (2). This was not done and nothing that the parties did thereafter could affect the status of the action. The action remained deserted. There had been no negotiations for a settlement in progress and there was nothing to suggest that the plaintiffs should not take action to correct their position by applying for a revivor or obtaining a consent to revivor and filing a request for hearing signed by the parties.

I see nothing special in the circumstances of this matter which can assist the plaintiffs in respect of the granting of an order for revivor despite the expiry of the limitation period.

What advantage would it avail the plaintiffs if an order for revivor were granted? O. 32, r. 8 (3), provides as follows—

“No order for or consent to revivor shall avail as an advantage to the plaintiff in respect of the period of limitation applicable to the cause of action.”

By s. 9 of the Limitation Ordinance, Cap. 26, the period of limitation applicable to a cause of action in libel is one year after the libel is published.

The only way in which an order for or consent to revivor can avail as an advantage to a plaintiff in respect of a period of limitation is if such an order or consent is made or given after the limitation period has expired. To give some meaning to this provision it would follow that when an action becomes deserted the period of limitation which ceases to continue to run on the institution of the action must on the action becoming deserted, be deemed to continue to run up to the time the order for revivor or consent to revivor is made or given. If, when an order for revivor is made or consent to revivor is given the limitation period has expired a plaintiff cannot take advantage of an order for revivor or consent to revivor.

O. 32, r. 9, makes provision for the case where an action is deemed abandoned and incapable of being revived. The period of limitation which ceased to continue to run when that action was instituted is deemed to have continued to run as if that action had not been filed.

The provisions of O. 32, r. 8 (3), which did not appear in the Rules of the Supreme Court, 1900, as amended from time to time, were put into the Rules of the Supreme Court, 1955, in my view, to give statutory effect to the decision of WORLEY, C.J., in the case of *Argosy Co. v. Booker Bros.*, 1949 L.R.B.G. 145. In that case, as the headnote to the report states, three days before the period of limitation expired the plaintiffs issued their writ against the defendants claiming damages. The defence was filed on the 10th May, 1948, and the action therefore became ripe for hearing on the 10th June, 1948 (under the then existing Rules of Court). Neither the plaintiffs nor the defendants filed a request for hearing and in accordance with O. XXXII, r. 5 (1), the action was deemed deserted on the 10th December, 1948. On the 2nd May, 1949, the plaintiffs applied pursuant to Order XXXII, r. 5 (1), for revivor of the action. It was held by WORLEY, C.J., that the last day on which the plaintiffs could have brought their action was the 23rd February, 1948, and as their action was barred then by limitation the application for revivor failed.

WORLEY, C.J., arrived at his conclusion by analogy after consideration of the position in England in respect of applications for amendments to pleadings and to applications for renewal of writs. Counsel for the plaintiffs has submitted that the learned Chief Justice was misled as the analogies he considered were not presented to

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him in the correct light. After a consideration of the criticisms made by counsel in respect of the approach taken by the learned Chief Justice I am not convinced that the Chief Justice's approach was wrong. I do not set out counsel's criticisms nor seek to deal with them in detail for I am satisfied that the provisions of Order 32, r. 8 (3), conclude this aspect of the matter. It was submitted by counsel that a possible explanation of O. 32, r. 8 (3), is that a plaintiff cannot take advantage of an order of revivor to prevent a period of limitation from running. But it seems to me that the only practical effect of such a provision is that the period of limitation is no longer to be regarded as having ceased to run on the filing of the writ of summons but to continue to run to the date of the order for revivor or consent to revivor.

A further point argued was whether the request for hearing filed by the plaintiffs is a nullity or an irregularity. Had the request for hearing been filed before the action had become deserted but before notice of default of defence had been served as required by the Rules of the Supreme Court such a request for hearing would only have been an irregularity. The position may be the same where the action has become deserted whether the limitation period has or has not yet expired, but I express no concluded opinion in that regard.

Proceeding on the assumption that the filing of the request for hearing in this case was only an irregularity it cannot be said that the defendants waived the irregularity. They took no step in the proceedings except for the prompt application for an order to set aside the request for hearing.

In the circumstances of this case I can see no good reason why in the exercise of my discretion the irregularly filed request for hearing should not be struck out.

As I have already stated the action was deemed to be deserted by operation of law and having regard to the circumstances (quite apart from the effect of the provisions of O. 32, r. 8(3)) set out in this judgment I am unable to grant the application for an order for revivor. When the provisions of O. 32, r. 8 (3), are taken into account it is clear that the plaintiffs' application should not be granted.

The plaintiffs' application for an order for revivor is refused and the defendants' application that the request for hearing filed on the 7th August, 1962, be struck out is granted. The resulting effect on the fate of the action follows the operation of the Rules of Court.

The unfortunate situation which has come about in this action has resulted largely from the inattention of solicitor for the plaintiffs.

The defendants will get their costs of both applications certified fit for counsel in both cases.

Orders accordingly.

Solicitors: *J. A. Jorge* (for the plaintiffs); *A. G. King* (for the defendants).

RAMLAKHAN v. RAMDAI

[Supreme Court (Luckhoo, C.J.) November 7, 1962, February 7, 1963]

Husband and wife—Hindu marriage—Requirements thereof—Document signed by parties but no ceremony performed and no vows exchanged—Registration of marriage cancelled—Indian Labour Ordinance, Cap. 104, ss. 142 (1) and 161.

Section 142 (1) of the Indian Labour Ordinance, Cap. 104, provides that a marriage contracted between Indian immigrants who “profess the same religion, not being the Christian religion, and are subject to the same personal law, shall, if contracted according to the religion and personal law of those immigrants and registered under this Ordinance, be deemed to be valid as from the date of such marriage”. Section 161 enables the Chief Justice to order the Agent General to cancel the registration of such a marriage if “it appears that the registration ought not to have been made”.

The parties, who were both Indian immigrants of the Hindu religion, signed a document before a Pandit with the object of thereby contracting a marriage. No ceremony was however performed and no marriage vows exchanged.

Held: (i) it is sufficient to constitute a valid marriage ceremony according to Hindu personal and religious law if marriage vows are exchanged before a Pandit in the presence of two witnesses;

(ii) there was no valid marriage in this case and the registration would accordingly be cancelled.

Order accordingly.

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

R. N. Trim for the respondent.

LUCKHOO, C.J.: This is a motion on the part of the applicant Ramlakhan also known as Ramlakhan Seepersaud under s. 161 of the Indian Labour Ordinance, Cap. 104, for an order that the registration of a marriage made by the Immigration Agent General on the 12th February, 1962, between the applicant and the respondent Ramdai under the provisions of the aforesaid Ordinance be cancelled and that the Immigration Agent General be directed to cancel the said registration.

The grounds upon which the applicant seeks the order for cancellation are—

- (a) that no marriage ceremony was performed in accordance with the religious and personal law (the Hindu law) of the parties as required by the provisions of s. 142 of the Indian Labour Ordinance, Cap. 104, on the 12th February, 1962, or on any other date;
- (b) no witness was present or signed any document in the presence of the applicant.

The applicant and the respondent both profess the Hindu religion and are subject to the same personal law. They had known each other for about four or five years prior to November, 1961, when the applicant asked the respondent to marry him. He explained to her that his parents would not agree to their marrying each other and suggested that they should marry secretly. The applicant and his family

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are of the Brahmin caste, the highest of Hindu castes. His brother, S. S. Tiwari, is a Hindu priest. The respondent is a Chamar—that is to say she is of low caste. So it is not difficult to appreciate why the applicant suggested a secret wedding. The applicant was then residing with his mother and his brother Pandit S. S. Tiwari at Albion Front, Corentyne. The respondent agreed to a secret marriage being performed.

Pandit Ramsaywack Sharma, a Hindu priest, was approached by the parties to marry them according to Hindu rites. There is a conflict in the evidence as to how the approach came to be made to Pandit Sharma. According to the applicant it was the respondent's brother-in-law Basil who suggested that they should take their birth certificates to Pandit Sharma and arrange with him to have the marriage performed. The applicant has also stated that Basil promised to give him a house and ricelands and early in January 1962, he (applicant) and the respondent took their birth certificates to Pandit Sharma. On the 25th January, 1962, they returned to the Pandit's home where they signed a document which he and the respondent considered to be the performance of the marriage. On that night he slept with the respondent at Basil's home and had sexual intercourse with her. The next day he returned to his mother's home and has never lived again with the respondent. About two weeks after the 25th January, 1962, he realised that Basil would not give him a house and ricelands. The applicant has stated that had Basil given him a house and ricelands he would have lived together with the respondent and would not have brought these proceedings. He has also sworn that his brother Pandit S. S. Tiwari told him to bring these proceedings. The applicant has also sworn that on the 12th February, 1962, he did not go with the respondent to Pandit Sharma and that no ceremony was performed on that day nor on any other day.

Evidence has been given on behalf of the applicant that his mother Dhanwantia had died on the 5th February, 1962, and that the applicant had taken part in customary Hindu rites for twelve days thereafter which involved his constant presence at home under the surveillance of an aged female friend of the family, Ramrattie Ramrattan, by day and by night. Having seen the witnesses and heard their testimony in regard to these after-death rites I was not impressed with the evidence of any of the witnesses on this aspect and did not accept their testimony that it was the applicant who performed these rites. I find that on the 12th February, 1962, the applicant was in a position to accompany the respondent to Pandit Sharma and to sleep that night with the respondent at Basil's house.

The respondent has sworn that after the applicant had proposed marriage to her he arranged that they should travel to New Amsterdam on the following day and be married at the Immigration Office. They travelled to New Amsterdam as arranged but on arrival there found the Immigration Office closed. They returned to Rose Hall and went to the cinema. After the cinema was over the applicant took her to Pandit Sharma and arranged for their marriage. They left their birth certificates with Pandit Sharma who told them to return in 14

days. They did so on the 12th February, 1962, and were married by the Pandit according to the Hindu religion in the presence of the Pandit's wife and another woman.

Before deciding whether or not a ceremony was performed and if performed, it was in accordance with the Hindu personal law and religion, it is necessary to decide whether the parties did go to Pandit Sharma on the 12th February, 1962. On the 10th January, 1962, the Pandit had applied in writing to the Immigration Agent General for what he termed "marriage papers" for the parties giving the names, dates of birth, and residence of the parties and their parents. What he required were a non-impediment certificate and a form of notification of marriage. The non-impediment certificate was granted on the 18th January, 1962, and from the minutes recorded on Ex. "A" (a certified copy of the Pandit's application) the certificate and notification form were despatched to the Pandit on or after the 19th January, 1962.

A certified copy of the notification of marriage later sent by the Pandit to the Immigration Agent General for registration of the marriage of the parties bears the signatures of the parties and of two other persons as witnesses—Parbati and Babedhan Sharma (the Pandit's wife). The date of the marriage stated on the notification form is 12th February, 1962. There is no suggestion on the part of the applicant that his signature does not appear on that form but he says that he affixed his signature on the 25th January, 1962.

The Immigration Agent General entered the marriage in the Register of Marriages of Immigrants on the 23rd February, 1962.

The respondent has stated that on the occasion when she first visited Pandit Sharma to arrange for the marriage the Pandit told her to return with the applicant two weeks later and that she did so and that on that occasion the marriage was performed. It is clear that they had gone to see the Pandit prior to the 10th January, 1962. If they returned to the Pandit about 2 weeks later that would have been on or about 25th January, 1962. This supports the applicant's story that they returned on the 25th January. The Pandit said that on receipt of the non-impediment certificate he sent a message to the respondent's sister Pulwah to inform the parties of that fact. It seems reasonable to conclude that the Pandit received the documents shortly after the 19th January, 1962, and sent his message to Pulwah shortly thereafter.

This evidence supports the applicant's story that they returned to the Pandit on the 25th January, 1952, where the notification was signed by the parties and I so find. In arriving at that conclusion I have been influenced by the conflicts in the testimony of the respondent and of the Pandit as to who was present at the time of the marriage and by the *sorry figure cut by the Pandit when cross-examined* as to his conversation with Pandit Tiwari at a Shraad held after 12th February. *I have formed the view that the evidence of Pandit Sharma cannot be relied on in any matter which conflicts with that of the applicant.* I think that what he said were lies he had told to Pandit Tiwari was in fact the truth and that it was a true confession that he had not performed a ceremony of marriage between the parties.

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The applicant's evidence that he decided about two weeks after the 25th January that Basil would no longer honour his promise seems to me to provide the explanation for what occurred later. The respondent and Basil must have become aware that the applicant had decided that he would no longer cohabit with the respondent. What happened thereafter can only be conjectured. A likely explanation is that the Pandit was approached in that regard and then the date 12th February, 1962, inserted on the notification which was then forwarded to the Immigration Agent General for registration of the marriage. Possibly at first the Pandit had second thoughts about sending forward for registration a "secret marriage" without witnesses. Then when pressed by the relatives he may have yielded and filled in the date 12th February, 1962, procuring the signature of two persons as witnesses. It is not without significance that neither of the alleged witnesses, one of whom was the Pandit's wife, was called to testify.

Whatever the true explanation may be for the insertion of the date 12th February, 1962, I am convinced that the document was not signed on that date nor was any ceremony performed on that date or at all. I accept the applicant's testimony that all he did was to sign the document. *He made no marriage vow.* Had marriage vows been exchanged before the Pandit in the presence of two witnesses I would have held that sufficient to constitute a valid marriage ceremony. The elaborate ritual as described by Pandit Harry Narine Sharma is not necessary to constitute a valid marriage ceremony according to Hindu personal and religious law. Pandit Harry Narine Sharma later in his evidence was constrained to admit that the essentials for such a ceremony are the exchange of marriage vows and the giving away of the bride by her father. Eventually he conceded that the priest himself may act in place of her father in giving the bride away.

From Pandit Ramsaywack Sharma's own evidence it is apparent what little regard he has for the solemnity of the occasion of a marriage ceremony. The manner in which he said he performed the ceremony seems more in the nature of a purveyor of goods than of a priest carrying out a solemn duty. His evidence from the witness box shows what little regard he has for the sanctity of an oath. One cannot but wonder whether he is fitted for priestly duties. The respondent is entitled to much sympathy but in fact she was never lawfully married to the applicant.

In the result the applicant is entitled to have an order for the cancellation of the registration of the marriage with a direction to the Immigration Agent General to cancel the said registration. In the circumstances of the case each party will bear his own costs of these proceedings.

Order accordingly.

Solicitors: A. Vanier (for the applicant); J. E. Too-Chung (for the respondent).

HILL v. HILL AND ANOTHER

[Supreme Court (Luckhoo, C.J.) July 28, August 8, September 5, 21, October 11, 16, 1962, February 7, 1963]

Husband and wife—Division of property—Property acquired out of income of business operated as joint venture by husband and wife—Precise contribution of each not known—Sale by husband to purchaser with notice of wife's interest—Extent of wife's entitlement—Validity of sale.

The defendant husband and his wife, the plaintiff, carried on a business as a joint venture. From the income of the business they acquired a lease for a portion of land and later bought a house which they erected on the land. The precise contribution of each to the acquisition of the properties was not known. The lease and the receipt for the house were both put in the husband's name. The husband, without his wife's consent, then purported to sell the properties to a third party who, however, had notice of the wife's interest. The husband transferred the lease to the third party, and later removed a portion of the building and utilised it for the construction of another house.

Held: (i) the wife was entitled to an undivided share in the lease and that part of the house which remained;

(ii) with respect to that part of the house which was removed, she was entitled to payment of a sum by her husband calculated upon the extent of loss of her interest in the building by reason of the removal;

(iii) the purported transfer to the third party was invalid and the third party would accordingly be directed to take steps to re-transfer the lease to and in the name of both spouses.

Judgment for the plaintiff.

P. A. Cummings for the plaintiff.

F. Ramprashad for the second-named defendant.

H. O. Jack for first-named defendant

LUCKHOO, C.J.: In this action the plaintiff Mavis Hill claims against the defendants Joseph Hill and Mohamed Hackim Khan the following remedies as set out in the amended indorsement of claim—

“ (a) A declaration that the plaintiff was since the 1st day of September, 1961, and still is the beneficial owner of and is entitled to possession of the following property—

“ ‘one undivided half part or share of and in a two-flat building measuring approximately 18 feet by 6 feet by 60 feet with a kitchen attached thereto and with aluminium sheet roofing situate on land leased from Messrs Sprostons Ltd., and forming part of Silvertown Wismar, Demerara River;

purchased from Brandsford Brandis of Wismar aforesaid on or around the said 1st day of September, 1961.

(b) A declaration that since the 1st day of September, 1961, the first-named defendant has held the building *and the said leased land* aforesaid upon trust for himself and the plaintiff as beneficial owners or joint tenants in equity.

(c) An injunction of the court restraining the defendants or either of them, their servants or agents from interfering with

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the plaintiff's occupation of the building *and the said leased land* aforesaid.

(d) Alternatively, as against the first-named defendant only payment to the plaintiff of half of the proceeds of any sale of the building to the second-named defendant or other person, *and a declaration that the second-named defendant is a trustee of the said lease for and on behalf of the plaintiff.*

(e) Any other order the court may deem just."

The plaintiff and the first-named defendant were married in 1940 but were divorced in 1961, decree absolute of dissolution of the marriage being granted by the Supreme Court on the 31st July, 1961. There are seven children issue of the marriage all or most of whom reside with the plaintiff. At the time of his marriage to the plaintiff, Joseph Hill was carrying on business as a diamond buyer and also general business under an omnibus licence in the Mazaruni district. He carried on such business there until the year 1948 when he obtained employment at the Essequibo Boys' School as a cook and baker instructor. He held that post until 1949 and then turned to coal burning on the Essequibo Coast. In 1950, with his family he came to live at Wismar and obtained employment with the Demerara Bauxite Co., Ltd., at Mackenzie, Demerara River. Until the year 1955 it would appear that Joseph Hill and his family lived rent free in a house occupied by Mavis Bill's brother Bentinck at Wismar.

Early in 1955 an agreement of lease in relation to a parcel of building land at Silvertown, Wismar, was entered into between Joseph Hill as lessee and Sprostons, Ltd., as lessors at a monthly rental. Later on the Central Housing and Planning Authority took over from Sprostons, Ltd., all building land in the housing scheme area in which the parcel in question is situate. In February, 1955, one Brandis, described in evidence as the foster brother of Mavis Hill, procured an aluminium dwelling house from Sprostons, Ltd., at a cost of \$1,500, the sum of \$100 being paid on the 24th February, 1955, by Brandis to Sprostons on account of the purchase price. That house was erected on the parcel of land leased from Sprostons at Silvertown during 1955 and the Hills and their children went to reside there. In 1956 the space below the house was enclosed with boards to make a wooden understorey and in 1957 the wooden understorey was replaced by an understorey enclosed by concrete blocks. During 1958 the wife built a small wooden shop on a concrete floor on the same parcel of land. This was done after the unhappy differences which had arisen between the husband and wife had become more serious. In 1959 the husband left the matrimonial home. In 1960, the wife approached the court requesting a division of property but that request did not include the lease of the parcel of land. For some reason which was not fully explained at the hearing of the present action those proceedings were discontinued. The husband entered into an agreement of sale and purchase with the second-named defendant Khan in respect of the building evidenced by a receipt bearing date 1st September, 1961. The sum of \$2,600 is stated thereon to have been paid by Khan on account of a purchase price of \$6,100 for the house the balance to be paid when

possession of the building is given on the 31st October, 1961. On the day before the 1st September, 1961, the husband had effected a transfer of the lease of the parcel of land to and in favour of Khan.

On or about the 10th March, 1962, while the wife was in Georgetown, the husband caused part of the house to be dismantled and taken away. The wife and her children have continued to reside in the remaining portion of the house.

The wife has now approached the court for the remedies set out in her amended indorsement of claim. In effect she claims a declaration that she is the sole owner, alternatively, an owner of one moiety in the lease and the building, her husband holding the same in trust for her. In the further alternative she claims to be entitled as against her husband only to one half of the proceeds of the sale of the building. She alleges that Khan is not a *bona fide* purchaser without notice of her rights.

The husband claims to be the sole owner of the building and the sole lessee of the parcel of land prior to the transfer to Khan of the lease.

Khan claims to be a *bona fide* purchaser for value without notice of the wife's rights.

The husband has stated that in 1950 when he came to live at Wismar he possessed \$425 apart from some immovable property in Essequebo which he still owns. He lived with his family rent free at his brother-in-law's home at Wismar until 1955. He secured employment as a carpenter at a weekly wage of \$27. A stall was rented in the Wismar Market in 1951 and the husband has said that he spent all but \$100 of his savings of \$425 for stocking the business. Prior to the renting of the stall in 1951 the wife used to sell outside of the market. The wife attended to the business at the stalls in which the husband assisted after working hours when he was employed as a carpenter. His evidence as to his periods of unemployment as a carpenter was very hazy. I accept the wife's evidence that the husband was unemployed for considerable periods after 1952 and when out of employment he would assist in the business in the stalls at which they carried on business in the market.

The stalls were all registered in the books of the local authority in the wife's name except that in 1953 for a period of about six months the husband carried on another stall in the market. The certificate of the local authority to the effect that the wife was registered as the tenant of the stalls and paid all rents for the stalls in her name between 9th November, 1951, and 30th June, 1959, was accepted by both counsel for the husband and wife. In a bank account in the name of the husband was deposited all monies relating to the business and purchases of goods for the business were made in his name. Upon an examination of the evidence given in respect of the business carried on at the stalls I am of the opinion that this was a joint venture on the part of the husband and wife.

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The evidence of Richard Hopkinson, Branch Manager of Sprostons, Ltd., which I believe, makes it quite clear that the wife made the arrangements for leasing the parcel of land. She asked that the lease be put in the name of her husband and that was done. She paid the lease rent until March, 1957, though in view of the relationship of husband and wife this does not by itself lead to the conclusion that she had any interest in the lease. It was pointed out that the indorsement of claim as filed did not contain any prayer in relation to the lease and in the former proceedings she had also not made any claim in respect of the lease. She gave as her reason for not including such a claim in the former proceedings that she did not think her husband would have sold the house and transfer the lease to Khan. It is to be observed, however, that at paragraph 9 of the affidavit sworn by the wife in support of her application for an interim injunction in these proceedings (the affidavits filed have been by consent of all parties treated as the pleadings in the action) it is stated)—

“In the year 1955 the first-named defendant and I agreed that we would use the money we have saved to erect a building for us on the portion of land leased from Messrs. Sprostons, Limited, during the said year 1955. We did in fact commence the said building in or about the month of May, 1955, *with my consent the title document for the said lease was prepared in the name of the first-named defendant.*”

The wife’s affidavit was sworn on the 9th May, 1962. The purpose of securing the lease was for the erection of the aluminium building.

The husband and the wife each sought to show that he or she had solely conceived the idea of purchasing the aluminium house and had approached Brandis to that end. Brandis supports the wife that it was she who approached him about the purchase of the house and went with him to arrange for its purchase. The deposit of \$100 was paid at the market to Brandis by the husband. When Brandis enquired of the wife in whose name the receipt for the deposit should be made she made the significant answer that he must make it in her husband’s name as “her husband is she and she is her husband.”

The payments of the purchase price were made by Brandis by way of deduction from his wages and Brandis recouped from the Hills. The receipts were all made out in the husband’s name and the moneys came from the business, a joint venture, carried on at the stalls.

The subsequent enclosing of the space below the aluminium building at first by a wooden understorey and later by a concrete block understorey was also a joint venture. Although the materials for that work were purchased by the wife or her son and the bills therefor issued in their names the moneys in payment for the materials came from the business. The wife and son contributed much labour to the task of constructing the understorey.

The husband did in fact pay off the balance due on the purchase price some time after he left his wife but this does not affect the

question of the two persons as regards the purchase of the house and the leasing of the land. The husband has produced bills for the purchase of materials which have obviously been tampered with in an endeavour to mislead the court into believing that the materials were purchased by him. I did not place much reliance on the evidence of Rebecca Bentinck or of Claude Hill. The latter, a son of the husband and wife, seemed rather embittered towards his father. I accepted and believed the evidence of Edward Britton to the effect that the wife and son assisted in erection of the house.

I think that from the evidence as a whole the reasonable inference is that the leasing of the land and the purchase and improvement of the building were in the nature of a joint venture of the husband and wife in the provision of the matrimonial home.

The addition of a small shop in 1959 came after the husband and wife were estranged and the husband had refused to re-transfer the stall licence to his wife which because of illness she had transferred to him. The shop was built by the wife for her sole use with the consent of the husband.

It is not possible from the evidence to calculate or give any precise figure of the contribution of either the wife or the husband in respect of the lease or the purchase and improvement of the matrimonial home. The moneys for the lease and the purchase and improvement of the house came from a business operated as a joint venture.

In *Cobb v. Cobb*, [1955] 2 All E.R. 698, DENNING, L.J., said—

“Under s. 17 of the (Married Women’s Property Act, 1882), the court can, on application decide questions as to the title to or possession of property as between husband and wife. The first question in this case is, To whom does the house belong? The law in cases of this kind was considered by this court quite recently in *Rimmer v. Rimmer* ([1952] 2 All E.R. 863). I would like to repeat what I said there (*ibid.*, at p. 868): ‘In cases when it is clear that the beneficial interest in the matrimonial home or in the furniture belongs to one or other absolutely, or it is clear that they intended to hold it in definite shares, the court will give effect to their intention (see *Re Rogers’ Question*, [1948] 1 All E.R. 328); but when it is not clear to whom the beneficial interest belongs, or in what proportions, then, in this matter, as in others, equality is equity.’ I would only add that, in the case of the family assets, if I may so describe them, such as the matrimonial home and the furniture in it, when both husband and wife contribute to the cost and the property is intended to be a continuing provision for them during their joint lives, the court leans towards the view that the property belongs to them both jointly in equal shares. This is so, even though the conveyance is taken in the name of one of them only and their contributions to the cost are unequal, and all the more so when the property is taken, as here, in their joint names and was intended to be owned by them in equal shares. The legal title is in them both jointly, and the beneficial interest is in them both as equit-

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able tenants in common in equal shares. They hold the house as trustees on the statutory trusts for sale. Until the place is sold, each of them is entitled concurrently with the other to the possession of the house and to the use and enjoyment of it in a proper manner, and neither of them is entitled to turn out the other.”

Cook v. Cook, [1962] 3 W.L.R. 441, is a case, as is stated in the headnote to that report, where whilst a husband and wife were living together a house was purchased as a matrimonial home. Both parties contributed towards the purchase price but the property was conveyed into the name of the husband only. Later the wife, having been granted a decree of divorce against the husband, applied to the court for an order under s. 25 of the Matrimonial Causes Act, 1950, on the basis that the property was the subject matter of a postnuptial settlement. The Registrar held that there was no post-nuptial settlement and dismissed the application. PHILLIMORE, J., set aside the Registrar’s order and on appeal to the Court of Appeal the appeal was dismissed. The Court of Appeal held that an equitable right had been conferred on the husband and wife to an undivided share in the house, a settlement being constituted by the purchase of the house as a joint enterprise, each spouse contributing to the cost. As a result there was a trust for sale imposed and the creation of an equitable tenancy in common.

It was also held that the word “settlement” in s. 25 of the 1950 Act was to be liberally interpreted, its application not being confined to strict concepts of conveyancing law.

Section 25 of the Matrimonial Causes Act, 1950, provides as follows—

“The court may after pronouncing a decree for divorce or for nullity of marriage inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or of the parties to the marriage, as the court thinks fit.....”

In that case there was no dispute that the husband was the sole legal owner of the house but it was conceded on his behalf that by reason of his wife’s contribution to the purchase price he held the property on a resulting trust in her favour. It was also conceded that pending sale the husband and wife are equitable tenants in common, each being entitled to an undivided share in the house and that the property is held on trust for sale. The wife wanted an order of court to vary the existing arrangement so as to preserve to her *dum sola* the use of the house to the exclusion of the husband, until such time as the younger child of the marriage attained the age of 21. The husband contended that the transaction lacked the essential element of provision being made for the wife in her character as wife and so there was no settlement such as could call for an order

of the court. DONOVAN, L.J., at pp. 447 and 448, after finding in favour of the wife added—

“Finally, I should like to emphasise that this is a case of a house being bought by husband and wife as a joint venture, both contributing towards the purchase price. It is not a case where the wife merely loans part of the price to her husband. Nor is it a case where the wife earns money for other household expenses so that her husband has more resources of his own to devote towards the purchase price. In either of these cases would any proprietary interest in the house, equitable or otherwise, accrue to the wife by reason of such loan or such assistance: compare in this case the recent decision in *Allen v. Allen*, [1961] 3 All E.R. 385, C.A.”

The instant case I find is one of a house and lease acquired by husband and wife as a joint venture, both contributing towards the purchase price and the lease rent. The wife is entitled to an undivided share in the lease and house.

Turning now to the question whether the second-named defendant is a *bona fide* purchaser for value I was impressed by the evidence of the wife supported as it was by the evidence of her brother Bentinck and of Sydney Duncan and accepted their evidence in preference to that of the second-named defendant in respect of knowledge in that defendant prior to the 31st August, 1961, of the wife's claim of an interest in the property—the lease and the building. There were some discrepancies in the evidence of these witnesses but I do not consider these material. I accept the wife and Duncan's evidence in relation to the fact of the conversation between the wife and Khan on the R.H. Carr on the 29th August, 1961.

Khan has stated that he purchased both lease and building for \$6,100 though the receipt for \$2,600 on account of the purchase price given by the husband to Khan does not appear to include the lease as part of the property sold.

Khan has stated that he really wants the land and is not interested in the building and that as a result he permitted the husband to take away the house and to reduce by \$100 the purchase price originally agreed on. The lease had been transferred to Khan by the husband on the 31st August, 1961.

The circumstances of this case do not show that Khan is a *bona fide* purchaser for value without notice of the wife's rights.

The evidence discloses that a portion of the building has been removed and that a part of that has been utilised in the construction of another house by the husband. The portion taken away has lost its identity.

In the circumstances the declaration asked for at paragraph (a) of the amended indorsement of claim should not be granted, the original building no longer being in evidence.

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The wife cannot get the declaration asked for in paragraph (h) of the amended indorsement of claim as framed.

She is entitled to an injunction restraining both defendants from interfering with her occupation of the remaining portion of the building and of the land. She is also entitled to the payment of a sum by her husband calculated upon the extent of loss of her interest in the building by reason of the removal of portion of the building by the husband. Such sum to be ascertained upon enquiry by the court or by agreement between the husband and the wife.

She is entitled to a declaration against both defendants that the purported transfer by her husband of her one-half interest in the lease to Khan is invalid.

Khan is hereby directed to take steps to effect the re-transfer of the lease to and in the name of the wife and husband within 30 days of the date of this order. Should the Central Housing and Planning Authority refuse to entertain the application the wife shall be at liberty to apply to the court for such other order in connection therewith as she may be advised.

Costs to the plaintiff against both defendants jointly and severally certified fit for counsel. Question as to whether first defendant should recoup second defendant any costs recovered against the latter reserved, Mr. Jack for the first defendant being absent.

Adjourned to Saturday, 30th March, 1963, at 9.00 a.m. for remaining issues to be determined.

Judgment for the plaintiff.

Solicitors: *A. Vanier* (for the plaintiff); *C. M. L. John* (for first-named defendant); *N. O. Poonai* (for second-named defendant).

Re SANICHAR CO., LTD.

[Supreme Court—In Chambers (Bollers, J.) February 9, 1963]

Company—Application by member for order of court convening meeting of company—Applicant allotted 100 shares in respect of one of which he was an original subscriber of the memorandum of association—Agreed consideration for shares not paid—Whether applicant has locus standi—Companies Ordinance, Cap. 328, s. 24 (1) and (2).

The applicant applied by summons for an order of court convening a meeting of the company for certain purposes. He had been allotted 100 shares in the company, and in respect of one of these his name appeared in the memorandum of association as an original subscriber, but he had given no part of the agreed consideration for the allotment. In opposition to the application it was contended for the company that he had no *locus standi* as a member of the company on the ground that the allotment was void for want of consideration.

Section 24 (1) of the Companies Ordinance, Cap. 328, provides that “the subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members”. Section 24 (2) provides that “every other person who agrees to become a member of a company and whose name is entered in its register of members shall become a member of the company”. Under s. 25 (1) the duty to keep the register is on the company. The register was not however produced.

Held: (i) by virtue of his original subscription for the one share the applicant was in law a member of the company and this would be so even if on inspection it were found that his name did not appear on the register of members;

(ii) in respect of the remaining shares the test was whether the applicant had agreed to become a member of the company and whether his name was entered on the register. The applicant had clearly agreed to become a member and, in the absence of the production of the register by the company, it must be presumed that his name was entered therein;

(iii) the remedy available to the company was to sue for specific performance.

Objection overruled.

B. Fullwell for the applicant.

F. Ramprashad for the respondent.

BOLLERS, J.: This is a summons in chambers whereby the applicant, as a member of the Sanichar Company Limited, in pursuance of s. 65 (A) of the Companies Amendment Ordinance, No. 11 of 1961, seeks an order of the court convening a meeting of the company for the following purposes:

- (1) to remove Ramharry of 57, Robb Street, Georgetown, as a director of the company;
- (2) to appoint Ramdat of Lot 4, Bel Air Village, East Coast, Demerara, as a director;
- (3) to appoint the firm of Fitzpatrick Graham & Company as auditors of the company;
- (4) to appoint the firm of Fitzpatrick Graham & Company as inspectors to investigate the affairs of the company pursuant to s. 107 of the Ordinance.

Re SANICHAR CO., LTD.

Also for an order that the registration of executors of one Ramraj and Jagdial under article 33 be effected within seven days of the request and on production of the respective probates of the wills of the deceased members.

An affidavit in support of the summons was filed by the applicant in which he sets out at para. 3 that the share capital of this private company was \$100,000 divided into 1,000 shares of \$100 each of which 700 shares have been issued to five persons including 190 to the managing-director Ramharry and 100 to himself, and that all those shares are fully paid up. Under paras. 7 and 8 he avers that by article 67 of the articles of association of the company, the said Ramharry was appointed managing-director of the company and under article 65 he was one of those persons appointed as first directors of the said company.

An affidavit in opposition to the application was filed by the aforementioned Ramharry who admits his appointment as managing-director of the company and at para. 2 makes the allegation that by an agreement dated the 9th June, 1956, entered into between the applicant, three other persons and himself, they had each agreed and undertaken to transfer their respective interests to and in certain immovable property situate at Pln. Planters' Hall, East Coast, Demerara, and in return to receive allotments of shares in the Sanichar Company, Ltd., in satisfaction of their respective interests; and that in pursuance of this agreement the company allotted the said shares which were accepted by the applicant and others but the applicant and other persons involved have consistently refused to pass transport of their respective interests in the said immovable property to the company despite repeated requests to them to do so, as a result of which he claims that the applicant, although he has received the 100 shares allotted to him in Sanichar Co., Ltd., has not contributed anything to the assets of the company and is in effect seeking to retain transport of the immovable property in his own name and yet at the same time receive the benefit of the shares issued to him by the company without the necessary consideration.

It is on these premises that counsel for the respondent company submits that the applicant is not qualified to make this application not having the necessary *locus standi* as a member of the company on the ground that the allotment of the 100 shares to him by the company was void by reason of a total failure of consideration. A copy of the agreement in writing dated the 9th day of June, 1956, which was filed at the registration of the company was by consent of the parties laid over in this court and counsel points out that at para. B (4) the applicant had agreed to accept ten shares in the company in consideration of his transferring to the said company his portion of Pln. Planters' Hall. He urges that it follows that the applicant not having carried out his part of the agreement there has been a total failure of consideration, and that he cannot now be regarded as a member of the company.

Solicitor for the applicant in reply submits that the applicant is a member of the company and has brought to the attention of the court para. 5 of the memorandum of association in which the applicant's name appears as an original subscriber of one ordinary share to the memorandum of the company; as a result solicitor claims that under s. 24 (1) the applicant must be considered a member.

Section 24 (1) of the Companies Ordinance, Cap. 328, is the equivalent of s. 26 (1) of the Companies Act, 1948, in England and reads as follows:

“The subscribers of the memorandum of a company shall be deemed to have agreed to become members of the company, and on its registration shall be entered as members in its register of members.”

This sub-section has only to be read for it to be seen that the applicant is a member of the company. His name appears as a subscriber of one share to the memorandum and as a result he is deemed to have agreed to become a member and should be entered as a member in the register of members. This register of members is now in the possession of the company and has not been produced by them. Even if it were found on inspection that the applicant's name did not appear on the register of members, he would still for the purposes of the law be considered as a member for as Lord CAIRNS said in the *Evans* case (1867), L.R. 2 Ch. App. 430:

“It is plain that the original subscribers are, by the Act of Parliament, deemed to have taken the shares set opposite their names.”

PALMER'S COMPANY LAW, 20th Edition, at p. 436, states that the object of this is that the public might rely with confidence on the subscribers of the memorandum becoming members of the company.

It is not clear whether the applicant was allotted 99 or 100 other shares in addition to the one share subscribed in the memorandum, but both parties are agreed that he was allotted 100 shares for which he has not paid nor transported his immovable property as agreed, and s. 24 (2) of the Ordinance, which is the equivalent of s. 26 (2) of the English Act, states:

“Every other person who agrees to become a member of a company and whose name is entered in its register of members shall be a member of the company.”

And PALMER'S COMPANY LAW, at p. 437, with reference to this section points out that in the case of members other than the subscribers to the memorandum, two essential conditions have to be satisfied to constitute a person a member: (1) an agreement to become a member, and (2) entry on the register. It is clear that the first condition in this case was satisfied. What is not clear is whether the second condition has been satisfied and the company has not produced the register which is in its possession. Under s. 25 (1) the

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company is under a duty to keep such a register and on failure to comply with this provision, it is liable to a fine. In the absence of its production it must therefore be presumed to have been done. Section 86 (1) of the Ordinance cited by counsel for the company has no application to the present circumstances and makes no reference to the allottee of shares; it merely lays down that when a company limited by shares makes any allotment of its shares the company shall within a certain time file with the Registrar (a) a return of the allotments, (b) in the case of shares allotted as fully or partly paid up otherwise than in cash, a contract in writing constituting the title. Sub-section 2 provides that where the contract is not reduced into writing the company shall within a certain time after the allotment file the prescribed particulars of the contract. Then under sub-s. 3, if there is a default in complying with the requirements of this section, a director, manager, secretary or other officer of the company is liable to a fine. It is the company then, the duties of which are set out in the section, and the company's officers who are made liable on non-compliance. The applicant, although appointed a director under article 65 of the memorandum of association, has not made this application *qua* director. The doctrine of a total failure of consideration has no application to the present circumstances. That doctrine applies where money is paid by one party to a contract in pursuance of an ineffective contract which he believes to be a valid contract but which turns out to be nugatory or void, or while it may have begun as a valid contract it is rendered ineffective by the default of the other party, or through the operation of the doctrine of frustration, or it may have been invalidated *ab initio* as a result of mistake or illegality. If the contract is valid and the plaintiff has paid money to the defendant in pursuance of it and the defendant fails to carry out his part of the contract, the plaintiff may make his claim on the basis of contract or he may treat the contract as at an end because of the total failure of consideration and sue in *quasi* contract for the return of the money. See the chapter on quasi contract at p. 540 of the 5th Edition of CHESHIRE AND FIFOOT ON CONTRACT.

The remedy available to the company in circumstances such as these where the allottee refuses and/or neglects to pay for his shares or give value therefor would appear to be specific performance not being confined to damages in case of breach. See *Odessa Tramways Company v. Mondel* (1878), 8 Ch. D. 235.

The objection must therefore be overruled, and the summons must proceed to be heard on its merits. Question of costs to be reserved.

Objection overruled.

Solicitor: *N. O. Poonai* (for the respondent).

SOOKNANAN v. RAMSARRAN

RAMSAHOYE v. RAMSARRAN

[Supreme Court (Luckhoo, C.J.) January 28, 29, February 23, 1963]

Rice lands—Applications by landlord for leave to give tenant notice to quit on ground that land needed for building purposes—Other lands available for building purposes but this not proved in evidence by parties—Duty of assessment committee of its own volition to investigate facts of such an application—Whether ground pleaded by landlord amounted to fraud—Rice Farmers (Security of Tenure) Ordinance, 1956 ss. 40 (1) and 29 (2) (k).

Rice lands—Supreme Court—Whether jurisdiction exists where equitable relief sought—Rice Farmers (Security of Tenure) Ordinance, 1956, s. 51.

The defendant landlord applied to the assessment committee under s. 40 (1) of the Rice Farmers (Security of Tenure) Ordinance, 1956, for leave to give the plaintiff tenant notice to quit a holding of rice lands on the ground that there was a scarcity of lands for building purposes in the district and that he required the holding for such purposes. There were other lands available in the district for building purposes but this was not brought to the notice of the committee by either party, and the leave sought was granted. The landlord served the required notice and, the tenant having refused to quit, later obtained an order for possession under s. 29 (2) (k) of the Ordinance. The tenant now sued for a declaration setting aside the order for possession on the ground that it had been obtained by the landlord's fraud, and for other related reliefs.

In respect of an application for leave to give notice to quit, s. 40 (1) of the Ordinance provides that "the committee.....after giving to the tenant an opportunity of making any representations he desires to make, may, if it is satisfied that the application is made in good faith and that it ought to be granted, give leave to the landlord to determine the tenancy." Section 51 (1) 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) in hearing an application for leave to give notice to quit, an assessment committee is not merely deciding a contest between parties, but is sitting as a tribunal to investigate the application. Accordingly, the fact that the landlord does not of his own initiative adduce certain relevant evidence cannot absolve the committee from itself calling for such evidence;

(ii) on an application by the landlord for an order for possession under s. 29 (2) (k) of the Ordinance, all that is required is that the committee should be satisfied that notice to quit was duly given in accordance with s. 40 (2) and that the committee considers it reasonable to make an order for possession;

(iii) the court requires a strong case to be made out before it will allow a judgment or order to be set aside on the ground of fraud. In this case the landlord's view that there was a scarcity of building lands might have been wrong, but that was a very different thing from a desire on his part to deceive the committee;

(iv) *quaere*, whether the jurisdiction of the Supreme Court in matters which arise out of the Ordinance is ousted where equitable relief is sought.

Judgment for the defendant.

O. M. Valz for the plaintiffs.

Dwarka Dyal for the defendant.

LUCKHOO, C.J.: These are two actions, consolidated by consent, brought in respect of two holdings of riceland situate at Sheet Anchor, Canje, Berbice.

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The two plaintiffs Sooknanan and Ramsahoye are father and son respectively. Since 1943 they have been tenants of the defendant Cyril Ramsarran of 8 and 8½ acres of riceland respectively at Sheet Anchor.

On the 17th July, 1961, the defendant filed applications to the assessment committee for Zone VII against both plaintiffs for leave to resume possession of their holdings under the provisions of s. 40 of the Rice Farmers (Security of Tenure) Ordinance, 1956 (No. 31). Both applications were heard together on the 1st August, 1961. On the record of those proceedings it is stated that Sooknanan appeared by his son and agent Ramsahoye. In those proceedings the defendant asked leave of the assessment committee to serve the plaintiffs with notice in writing to determine their tenancies as he required the lands for rental to persons desirous of erecting buildings thereon. He told the committee that in the village of Sheet. Anchor there is a scarcity of lands for building purposes. A plan of the block of land in which the holdings are situate was tendered by the defendant and admitted in evidence. That plan dated 28th February, 1961, discloses that on the 26th October, 1960, a survey of that block of land was commenced by Harnandan Singh, a sworn land surveyor, and was completed on the 4th November, 1960. The block of land described thereon as Block A was surveyed, subdivided into lots numbered 1—48 and paaled off by Harnandan Singh at the request of Walter Ramsarran who, it is not disputed, is the defendant in these actions and the applicant in the applications abovementioned.

Block A comprises 24 acres of which Ramsahoye held 8½ acres, Sooknanan 8 acres and one Willie Garbarran 5½ acres as tenants of the defendant. The remaining portion of two acres comprises dams and trenches.

A similar application brought by the defendant against Garbarran had been heard earlier that day and Garbarran had consented to give up possession of his holding by the end of April, 1962. Garbarran has since given up possession of his holding.

Ramsahoye did not cross-examine the defendant and stated to the committee that he did not desire to give evidence either for himself or his father Sooknanan. The committee in its decision granting the applications stated that it was satisfied that both applications were made in good faith and that the holdings of both plaintiffs were required for building purposes. The committee acting under the provisions of sub-s. (2) of s. 40 of the Rice Farmers (Security of Tenure) Ordinance, 1956, gave the defendant leave to give each plaintiff six months' notice in writing to quit ending on the 30th April, 1962.

No appeal was brought by either plaintiff against either of these orders of the committee. Section 43 (4) of the Ordinance provides for a right of appeal against a decision on an application made under s. 40 of the Ordinance.

The defendant duly complied with the order of the committee. The plaintiffs not vacating the holdings the defendant applied to the

committee under the provisions of s. 29 (2) (k) of the aforesaid Ordinance for an order for the recovery of possession of the holdings. The application relating to the plaintiff Ramsahoye was heard by the committee on the 22nd May, 1962. Both the plaintiff Ramsahoye and the defendant were represented by counsel.

The defendant after proof of due compliance with the previous order of the committee made under s. 40 (2) of the Ordinance asked for an order for possession against the plaintiff Ramsahoye. Cross-examined by counsel for Ramsahoye in those proceedings Ramsarran said—

“The respondent is still occupying the said 8½ acres and he is there on to now. I want the land to put horses on it. The land is Block ‘A’. There is no house on the land now. The land is under water now and the water is 1 ft. high. In March, 1962, the respondent scattered paddy on the land and the rice plants are 1 ft. high. The said 81 acres can take about 20 houses. The rent of the land is \$9.00 per acre. I do not want rent for the land. The respondent was planting rice on the land since 1943. The whole place has been declared a residential area and has been partitioned. I do not want the land to give to my son-in-law.”

Ramsahoye in his evidence said—

“The applicant is my landlord of 8½ acres of rice land. I was a tenant since 1943. I have rice plants on the land about 1 ft. high. The place was cultivated with rice since 1943. The land is low and is not good for building houses on it. I paid my rent all the time. Boyo is the son-in-law of the applicant and he planted paddy on Garbarran’s portion in the same area. He got 96 bags of paddy. The applicant wants to put me out and give it to somebody else.”

The committee after reciting the requirements to be proved by the applicant defendant on an application made under s. 29 (2) (k) of the Ordinance including that provision which requires that the committee should consider it reasonable to make the order or give the judgment applied for before making the order or judgment as the case may be, set out their findings as follows—

- “(i) The respondent was a tenant of the applicant of the holding in question since the year 1943.
- (ii) The applicant (landlord) made application to the assessment committee under s. 40 of the Ordinance for leave to give his tenant, the respondent herein, notice to quit the said holding; and, on the 1st day of August, 1961, the assessment committee granted leave to the applicant (landlord) to determine the tenancy between him and the respondent, and to effect this purpose, the applicant was given leave to give to the respondent six months’ notice in writing ending on the 30th day of April, 1962, as enjoined by s. 40, sub-s. 2 of the Ordinance.”

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The committee's formal order reads as follows:

“The applicant is given leave to give to the respondent six months' notice in writing ending on the 30th April, 1962, to determine the tenancy subsisting between him and the respondent.”

- (iii) In pursuance of the said order, the applicant (landlord) duly complied with such order by sending by registered post to the respondent on the 28th August, 1961, a notice in writing terminating the said tenancy, on the 30th day of April, 1962.
- (iv) The respondent has a rice crop on the said holding.
- (v) The instant application is made *bona fide*, that is to say, the applicant requires the said holding for the sole purpose of erecting buildings thereon.”

In conclusion the committee stated—

“Having regard to our findings, we consider it reasonable to make an order for possession, but in fixing the date for delivery of possession regard must be had to s. 31 of the Ordinance, which reads as follows:—

‘In granting an order or giving judgment under the provisions of s. 29 of this Ordinance, the committee shall not require the tenant to quit the holding until the crop then growing thereon has been reaped, or until after the date when the crop would normally be reaped in that Zone.’

As it is admitted by the applicant and the respondent in court today that the respondent's rice growing on the said holding would be reaped not later than the end of the month of October, 1962, we make this formal order for possession—

The respondent is ordered to deliver to the applicant (landlord) possession of 8½ acres of rice land, part of Block ‘A’, Sheet Anchor, Canje, Berbice, on or before the 15th day of November, 1962.”

An appeal No. 1564 of 1962 Demerara lodged against this decision of the committee was heard and dismissed by a judge in chambers on the 31st July, 1962.

Reference to those appeal proceedings discloses that the appellant was represented by counsel who urged certain grounds of appeal which were referable to an appeal as provided for by s. 43 (4) of the Ordinance against the decision of the committee on the application made under s. 40 of the Ordinance, which was not brought, rather than to an appeal against the decision of the committee then under review on the application made under s. 29 (2) (k) of the Ordinance. As a result the appeal was dismissed. A judge in chambers does not have a roving commission to enquire into matters which might have been properly the subject of an appeal in earlier proceedings in

respect of a decision made in those proceedings as distinct from a decision under review.

The plaintiff Sooknanan brought an application by way of affidavit sworn by him on the 16th October, 1962, seeking to obtain a re-hearing of the application made by the defendant on 17th July, 1961, for leave to send a notice to quit terminating his tenancy. The reasons given in his affidavit are as follows—

“1. The respondent (tenant) was absent by reason of illness when the hearing of the said application was had. The respondent is illiterate and was unrepresented at the hearing.

2. The decision was obtained by fraud and/or by mistake and/or by misrepresentation and/or by the concealment of material facts.

3. The said application should have been made under the provisions of s. 29 (2) (i) and not s. 40.

4. The said fraud and/or mistake and/or misrepresentation and/or concealment of the material facts consisted in (i) the applicant’s statement that the whole of Block ‘A’ Sheet Anchor has been declared a residential area; (ii) the actual and/or the implied representation that the applicant’s building scheme was approved by any competent authority or at all; (iii) the actual and/or the implied representation that the applicant (landlord) would be able to erect buildings on the said holdings immediately or shortly after the date of an order for possession (if made).”

The application for re-hearing was heard by the committee on the 6th November, 1962, and was refused. At the hearing of that application it was disclosed that Sooknanan at the time of the hearing on the 1st August, 1961, was present in the yard of the court where the hearing was being held and was not in fact prevented from attending by reason of any illness.

On the 6th November, 1962, the committee also heard the defendant’s application for an order for possession against Sooknanan under s. 29 (2) (k) of the Ordinance. A certified copy of those proceedings was not available at the time of the hearing of these actions but the evidence discloses that it was elicited during the course of the hearing of that application that—

- (a) the defendant is the owner by transport of 11 vacant house lots at Sheet Anchor;
- (b) the defendant exercises control over 24 vacant house lots owned by a brother resident in Trinidad for whom he is agent in respect of those house lots;
- (c) the defendant did not know of any person *resident at Sheet Anchor* who wanted building land at Sheet Anchor but could not obtain any.

The committee after hearing the evidence adduced has, subsequent to the filing of the present actions by Sooknanan on 9th December,

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1962, granted the defendant's application for an order for possession of that plaintiff's holding. On the day decision was reserved in these actions I was informed by solicitor for Sooknanan that an appeal has been lodged against the committee's decision.

On the 10th November, 1962, the plaintiff Ramsahoye filed his action against the defendant claiming—

“1. A declaration that the decision of the Rice Assessment Committee for Zone vii, Area 9, given on the 1st day of August, 1961, and on the 5th day of June, 1962, in favour of the defendant were obtained by the defendant's fraud.

2. An order setting aside the said decision on the ground that they were obtained by the defendant's fraud.

3. A declaration that the plaintiff is still the tenant of the defendant in respect of, and entitled to the possession of the said 8½ acres of rice land.

4. An injunction restraining the defendant, his servants and agents and every one of them from entering into possession of, or evicting the plaintiff from, or in any way interfering with the plaintiff's possession of 8½ acres of rice land, part of Block 'A' Sheet Anchor, Canje, Berbice, which is occupied by the plaintiff as the tenant of the defendant.

5. Costs.

6. Other relief.”

On 7th December, 1962, Ramsahoye swore an affidavit in support of an application for an interim injunction to restrain the defendant, his servants and agents from entering into possession for, or evicting him from, or in any way interfering with his possession of the holding. In his affidavit Ramsahoye alleges that on the 20th and 24th days of November, 1962, the defendant wrongfully and unlawfully entered the holding in company with one Jardin and directed Jardin to damage his dams and stop off and that Jardin complied with that direction. The defendant in his affidavit in answer has sworn that he entered into possession of the holding on the 16th November, 1962, and that later that day the writ of summons in the action was served on him. The return of service endorsed on the writ by the marshal states that the writ was served on the defendant on the 16th November, 1962.

The defendant in his affidavit also referred to the other allegations made by the plaintiff Ramsahoye in his affidavit and the affidavits filed appear to deal fully with the matters in issue. By consent the affidavits filed together with the particulars of special damages filed on behalf of the plaintiff were treated as pleadings in the action.

On the 7th December, 1962, the plaintiff Sooknanan filed an action asking for the following relief—

“1. \$500.00 as damages for trespass and/or for breach of the covenant of quiet enjoyment for that the defendant who was the plaintiff’s landlord did wrongfully and unlawfully enter 8 acres of rice land, part of Block ‘A’, Sheet Anchor, Canje, Berbice, occupied by the plaintiff as his tenant and there destroyed certain dams and stop-offs which had been erected by the plaintiff for the beneficial occupation of the said holding.

2. A declaration that the plaintiff is still the tenant of the defendant in respect of, and entitled to the possession of the said 8 acres of rice land.

3. An injunction restraining the defendant, his servants and agents and every one of them from in any way interfering with the plaintiff’s possession of the said 8 acres of rice land.

4. Costs.

5. Such other and further relief as to the court seems fit.”

He also swore an affidavit in support of an application for an interim injunction referring to the acts alleged to have been done by Jardin as making it impossible for him to beneficially occupy his holding.

The defendant swore an affidavit in answer thereto and those affidavits together with the particulars of special damages filed on behalf of Sooknanan have likewise, by consent, been treated as pleadings in that action.

Dealing firstly with the applications made by the defendant under s. 40 of the Ordinance for leave to serve notices to quit, it is to be observed that at the hearing of those applications Ramsahoye was present on his own behalf and on behalf of his father. He swore falsely in his affidavit in this action at para. 6 that he was not present on that occasion. It is on an application under s. 40 that the committee is required to enquire into the *bona fides* of the applicant in making the application and into such matters as are necessary before a conclusion can be reached that the application ought to be granted. Such matters in the present case would include the availability of land for building purposes and the demand for such land. By s. 40 (3) the procedure in the case of such an investigation shall, *mutatis mutandis* be the same as in the case of an application for the ascertainment of maximum rent.

A right of appeal against the decision of a committee on an application under s. 40 is provided for by s. 43 (4) of the Ordinance.

An investigation under s. 40 is not merely a contest between landlord and tenant. The fact that a landlord does not of his own initiative adduce certain relevant evidence cannot absolve the committee from itself calling for such evidence. The committee is to investigate the application. It falls to the committee to enquire whether his application is *bona fide* and whether it ought to be granted. The committee is required by s. 40 (1) to give the tenant an opportunity of making any representations he desires to make.

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This underlines the fundamental difference between an investigation by a tribunal and a contest between parties. Unless the landlord seeks to deceive the committee by deliberately giving or supplying false testimony or suppressing matters which the committee could not ordinarily discover on investigation it is difficult to see how the landlord can be held guilty of obtaining by fraud leave to issue a notice to quit under s. 40. At that investigation the defendant gave it as his view and as his ground for the application that there is a scarcity of lands at Sheet Anchor for building purposes. His view may be wrong but that is a very different thing from a desire on his part to deceive the committee. The committee could and should have investigated the matters relevant to the determination of such an application. Had the committee done so it must have emerged that the defendant himself had vacant building lots and had under his control, as agent for his brother, a number of other vacant building lots. Whether or not Ramsahoye or Sooknanan knew those facts is besides the point. The question of the availability of and demand for building lots does not depend on the knowledge of the tenants as to the ownership of vacant building lands at Sheet Anchor. The plan Ex. "A" put in evidence in those proceedings, as solicitor for the plaintiffs remarked, merely as intended to show the Block A, possession of which the defendant sought to recover. The plan was not intended to convey to the committee that there were no other vacant building lands at Sheet Anchor. The vacant lands were not concealed from Ramsahoye's view anymore than the committee could not have failed to discover their existence, purpose and ownership on an investigation.

I cannot hold that the defendant obtained by fraud leave to issue the notices to quit. The fact that a committee may have failed to appreciate the nature and extent of its duties under s. 40 is no ground for setting aside its decision on the ground of fraud in an action of this kind. Unless and until its decision is set aside on appeal in the way prescribed by the Ordinance the decision stands.

The committee subsequently granted the defendant's application under s. 29 (2) (k) of the Ordinance for an order for possession of Ramsahoye's holding. On such an application all that is required is that the committee should be satisfied that the notice to quit had duly been given in accordance with s. 40 (2) of the Ordinance and that the committee considers it reasonable to make the order for possession. Such an application differs from an application under s. 40 in that it is not an investigation required to be carried out by the committee. It is contest between the landlord and tenant after due proof of compliance with s. 40 (2) as to whether it is reasonable to make the order. No question arises on such an application as to those matters which were cognisable on an investigation under s. 40.

It is perhaps not surprising that the committee has granted the defendant's application under s. 29 (2) (k) of the Ordinance against Sooknanan. It was stated in evidence that at the hearing of that application (at which Sooknanan was represented by solicitor who now appears for him in this action) the matters now submitted to

be material to the committee's determination of either or both of the applications were brought to the attention of the committee.

In so far as the evidence adduced at the hearing of these actions is concerned I have come to the conclusion that it has not been proved that either plaintiff knew of the ownership of the other building lots in the defendant and in the control of his brother's building lots. However, as I have tried to show this ignorance in the plaintiff's was not really material to the determination of the proceedings before the assessment committee. I also find that the particulars of special damage filed have been proved in the case of each plaintiff and were I not of the opinion that the plaintiffs' claims have failed I would have made an award of damages in those amounts.

Counsel for the defendant has submitted that the jurisdiction of the Supreme Court is ousted in matters which arise out of the Rice Farmers (Security of Tenure) Ordinance, 1956, by reason of the provisions of s. 51 (1) of the Ordinance. He has also urged that s. 32 (2) of the Ordinance specifically provides for a claim for compensation for damage or loss sustained by a tenant where a landlord obtains an order or judgment for possession or ejection under s. 29 by misrepresentation or the concealment of material facts. Such a claim, counsel argued, is unknown to the common law and is cognizable only by virtue of this enactment and that in such a case the claim must be brought in a magistrate's court. Solicitor for the plaintiffs has submitted that a magistrate's court is not competent to grant equitable relief which can only be obtained in the Supreme Court. He contended that the equitable jurisdiction of the court is not ousted by the provisions of s. 51 (1) of the Ordinance.

It is to be observed that s. 32 (2) speaks of an order made under s. 29 of the Ordinance generally and does not refer specifically to paragraphs (k) or (l). It does not relate to an order made under s. 40.

Were a tenant to surrender possession of his holding in compliance with a notice to quit issued under s. 40 after leave granted by a committee he would not be eligible under s. 32 (2) or any other provision of the Ordinance for compensation for damage or loss sustained by him as a result of the surrender of his tenancy. This seems to be so because there is hardly any likelihood of an order under s. 40 being obtained by misrepresentation or the concealment of material facts, the committee having the duty to investigate the application.

Having regard to the conclusion which I have reached on the merits of the two actions, I do not wish to express any concluded opinion on the question raised as to the court's jurisdiction in matters of this kind where equitable relief is sought. Section 51 of the Ordinance seems to be designed to effect speedy and summary determination of litigation in respect of matters arising out of the Ordinance and not to have the more elaborate procedure of a trial in the Supreme Court where litigation may drag through the years. In

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this regard see the judgment of the Federal Chief Justice (with which LEWIS, J., and MARNAN, J., agreed) in *Khan v. Rahaman*, Civil Appeal No. 41 of 1961. (See later herein). I am inclined to the view that the remedies to which a party is entitled in matters arising out of the Ordinance must be found within the framework of the Ordinance. For a claim or other proceeding arises out of the Ordinance if it is necessary to rely on any of the provisions of the Ordinance to succeed in the claim or proceeding. The plaintiffs obviously must seek to rely on the provisions of the Ordinance to protect their tenancies and possession of the holding. Their remedies must I think be found within the framework of the Ordinance.

Rule 3 of Order 23 of the Rules of the Supreme Court, 1955, is the local counterpart of r. 5 of O. 25 of the English Rules in relation to declaratory judgments. It is well settled that there is nothing in this rule which enables the court to make a declaration in a matter in which its jurisdiction is excluded by a statute which gives exclusive jurisdiction to another tribunal (*Barraclough v. Brown*, [1897] A.C. 623, 624), though in exceptional cases the court has jurisdiction to make such a declaration, in which event its effect will be to establish a liability enforceable only in a court of summary jurisdiction. I do not see in these actions exceptional cases which would give jurisdiction to make the declarations sought by the plaintiffs. See further the ANNUAL PRACTICE, 1963, at p. 579, where it is stated that where the legislature has pointed out a mode of proceedings before a magistrate though the court may have jurisdiction to interfere under this Rule by declaration or by way of injunction, such jurisdiction will only be exercised in very exceptional circumstances.

One final word about the setting aside of judgments or orders on the ground that they have been obtained by fraud. It is not in all cases that the courts have given relief against unilateral fraud. The court requires a strong case to be made out before it will allow a judgment or order to be set aside on that ground. Unless the fraud raises a reasonable prospect of success and was discovered since the judgment complained of the action will be stayed or dismissed as vexatious. (22 HALSBURY'S LAWS (3rd Edition) p. 791, para. 1669).

The actions are dismissed in each case with costs to be taxed against the respective plaintiffs. Stay of execution for six weeks.

Judgment for the defendant.