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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.

SUPREME COURT OF BRITISH GUIANA

- | | |
|--|---|
| 1. THE HON. SIR JOSEPH
ALEXANDER LUCKHOO | — Chief Justice |
| 2. THE HON. MR. JUSTICE HAROLD
BRODIE SMITH BOLLERS | — Puisne Judge |
| 3. THE HON. MR. JUSTICE GUYA
LILADHAR BHOWANI PERSAUD | — Puisne Judge |
| 4. THE HON. MR. JUSTICE AKBAR
KHAN | — Puisne Judge |
| 5. THE HON. MR. JUSTICE ARTHUR
CHUNG | — Puisne Judge |
| 6. THE HON. MR. JUSTICE VICTOR
EMANUEL CRANE | — Puisne Judge |
| 7. THE HON. MR. JUSTICE PERCIVAL
ARTHUR CUMMINGS | — Puisne Judge |
| 8. THE HON. MR. JUSTICE GEORGE
AUBERT VAN SERTIMA | — Acting Puisne
Judge; appointed
Puisne Judge with
effect from 1.5.65. |
| 9. THE HON. MR. JUSTICE DHANESSAR
JHAPPAN | — Acting Puisne
Judge from
21.4.65; appointed
Puisne Judge with
effect from 1.5.65. |
| 10. THE HON. MR. JUSTICE JOSEPH
ARTHUR KING | — Acting Puisne
Judge until 31.1.65 |

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**THE LAW REPORTS OF
BRITISH GUIANA
1965**

The Privy Council

*The British Caribbean Court of Appeal
and
The Supreme Court of British Guiana*

EDITED BY

M. SHAHABUDDEEN, ESQ.,

C.C.H., S.C., Ph.D. (Lond.)

SOLICITOR-GENERAL

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LATCHMAN v. GREENWOOD AND ANOTHER

[Supreme Court (Khan, J.) December 11, 12, 13, 19, 20, 30, 31, 1963,
 January 16, 18, November 26, 1964, January 8, 1965]

Sale of land by landlord to tenant—No consensus ad idem as to whether land sold identical with land previously rented—Validity of sale—Whether agreement of sale operated as surrender of previous tenancy.

Justices Protection—Trespass committed by officer and contractor of Central Housing and Planning Authority—Whether protected—Town and Country Planning Ordinance, Cap. 182, s. 46(1).

The plaintiff was a monthly tenant of the Transport and Harbours Department of lot 14, which was one of several lots owned by the department. On it he had a house, a latrine, a garage and a fence. After the commencement of his tenancy it was decided to turn all the lots over to the Central Housing and Planning Authority for sale to the various tenants. In pursuance of a re-planning scheme a plan was drawn up on which the plaintiff's lot was reduced and redefined as lot 14a, his latrine, garage and part of his fence being excluded from the new lot. In 1961 the Transport and Harbours Department sent him a notice to quit which however went on to state, "if you desire to purchase . . . the piece of land on which your house stands, please communicate with the Housing Administrator of the Housing Department." The plaintiff, wishing to buy the land rented, accordingly paid two separate deposits. The receipts which he obtained referred to lot 14a but mentioned no plan, and it was only after the second payment that he became aware of the difference between the two lots. He refused to remove his latrine, garage and fence from the excluded portion of his original lot, and these were accordingly removed by the second-named defendant, a contractor, acting under the instructions of the first-named defendant, an officer of the Authority. In an action by the plaintiff for trespass it was contended for the defence *inter alia* that as a result of the agreement of sale the plaintiff's original tenancy was surrendered and that in any event the defendants were entitled to the protection of the Justices Protection Ordinance, Cap. 18, as applied to them by s. 46(1) of the Town and Country Planning Ordinance, Can. 181, no notice of intended action having been served. The court found that the notice to quit was in fact short notice and therefore bad in law and further —

Held: (i) there was no surrender of the tenancy because there was no *consensus ad idem* as to the subject matter of the sale, and further because the plaintiff could not become the owner until he received transport;

(ii) the plaintiff was therefore in lawful occupation of the whole of the original lot and *prima facie* entitled to bring an action for trespass;

(iii) but the defendants were entitled to the protection of the Justices Protection Ordinance, Cap. 18, and, no notice of intended action having been served, the action was barred by s. 8 (2) of this Ordinance.

Judgment for the defendants.

[Editorial Note: An appeal was dismissed by the Guyana Court of Appeal in 1966.]

O. M. Valz for the plaintiff.

David A. Singh, Senior Legal Adviser, for the defendants.

KHAN, J.: In July 1955 the General Manager of the Transport and Harbours Department recommended that the lands at Kitty, East Coast, Demerara, called Kitty Railway Lands, owned by that Department, and occupied by over 400 lessees, be turned over to the Central Housing and Planning Authority for disposal to the lessees. The planning officer advised that before doing so it was most important to reserve such land as would be necessary for widening narrow roads, for open space and for other public facilities. In consequence a survey was recommended in order to determine what portions of the land ought to be retained by Government in the interest of the community. This was carried out by Mr. J. Phang, sworn land surveyor, and his plan dated 6th June, 1957, was used for preparing the proposals to guide the future development of the area.

On the 8th day of May, 1957, the Legislative Council passed a Resolution (No. LX II) recommending to Government that all tenants be given the opportunity of purchasing the land they occupied at a reasonable price. After several meetings with the Tenants' Association, proposals were considered and approved at a meeting of the Central Housing and Planning Authority on the 19th June, 1958,—Exhibit "Y" prepared by Mr. Aubrey Barker, planning officer, sets out his proposals. These included at para. 39 the following:

"The re-adjustment of lots in the block between Sandy Babb Street and (Shell Road to provide a more equitable and economical distribution of land therein."

The proposals envisaged filling the northern trench, providing a reserve 12 feet wide in the centre of the block for improving drainage and giving equal depths of approximately 148 feet to lots on both Sandy Babb Street and Shell Road. Those lots on Shell Road which have not the required minimum area of 3,053 square feet would now be given extra depths to provide this, while those with wide facades would be sub divided to make extra lots.

In 1955 the plaintiff bought a house on lot 14 Shell Road, Kitty, and he subsequently became a lessee to the Transport and Harbours Department of the lot of land described as lot 14 Shell Road, Kitty, (on which the said house was situate) at a rental of 68 cents per month. On this said lot 14 the plaintiff kept (1) a shed which was used as a garage, (2) a fence, (3) a pit latrine and (4) a garden.

According to a 1943 plan by Phang (Exhibit "G—2") lot 14 measured 71.4 feet x 43 feet—an area of 3070.2 square feet. The facade of lot 14 was 71.4 feet and this lot 14 fell in the class of those wide facades to be sub divided to make extra lots—as stated in para. 39 of the proposals (Exhibit "Y").

In pursuance of the aforesaid proposals referred to and contained in Exhibit "Y", the Governor-in-Council on the 13th day of February, 1962, approved of a scheme described as a "Varying

LATCHMAN v. GREENWOOD

Scheme" to the Greater Georgetown Planning Scheme. A notice to this effect was published in the Official Gazette of Saturday 14th April, 1962, pursuant to the provisions of sub-s. 5 of s. 8 of the Town and Country Planning Ordinance Cap. 181.

According to Mr. Barker, the planning officer, the scheme provided only for the main development of an urban and civil character of the area, *i.e.*, drains, roadways, and other community amenities. The actual dividing up of the land for sale to occupants was not a part of the scheme. "It could not be," he said, "because the scheme was a variation to the Greater Georgetown Planning Scheme which did not provide for the sub dividing of lots."

Provision was subsequently made to sub divide the Kitty Rail-way lands for the purpose of sale. This was done after a new survey plan (Exhibit "Q") by Mr. Joseph Phang, dated 26.10.60. The land was thereafter offered for sale by the Housing Department to lessees with reference to the new plan, Exhibit "Q", although this was not stated in the offer to the lessees.

The previous plan, Exhibit "G-2", by J. Phang showed lot 14 and other lots as they existed prior to 1960. This previous plan, Exhibit "G-2", was not a plan made for the purpose of sale. It merely showed the lots as they actually were at the time, but the plan Exhibit "Q" sub divided the lots for the purpose of sale under the new proposals. Under Exhibit "Q" lot 14 ceased to exist as shown on Exhibit "G-2", but was merged with the western portion of lots 19 and 21 and these were sub divided into 4 lots described as lots 14a, 14b, 14c, and 14d. Under Exhibit "Q" the new lot 14a, has an area of 2175.6 square feet with a facade of 29.4 feet and a depth of 74 feet. The plaintiff's house is substantially on lot 14a of Exhibit "Q", but the kitchen runs over the boundary of lot 14a to lot 14c. The plaintiff's garage, fence, bridge, and latrine were all on the land described as lot 14c (which was part of the old lot 14). It will be seen that under Exhibit "Q" lot 14a is smaller than lot 14 under Exhibit "G-2."

In pursuance of the implementation of the aforementioned proposals the General Manager of the Transport and Harbours Department posted the following notices Exhibit "D" to the plaintiff:

"TRANSPORT & HARBOURS DEPARTMENT,
Main Street,
Georgetown,
31 Aug., 1961.

Sir/Madam,

Take notice, and you are hereby given notice, that you are required to quit and deliver up on the 1st day of October, 1961, the quiet and peaceful possession of the piece or parcel of land known as plot No. 14 situate at Shell Road, Kitty, East Coast, Demerara, presently held by you of the Transport & Harbours Department under a monthly tenancy commencing on the 1st day

of each month, by an agreement entered into between you and, the said Transport & Harbours Department.

If you desire to purchase or rent under a new agreement of tenancy the piece of land on which your house stands, please communicate with the housing administrator of the Housing Department, Waterloo and New Market Streets, Georgetown.

I have the honour to be,
Sir (Madam),
Your obedient servant,
G.A. B. Woolford,
General Manager,
for Transport & Harbours Department.

To all Lessees

You are hereby informed that with effect from 1st August, 1961, all rents in respect of Kitty Railway lands must be paid to the Housing Department, Waterloo and New Market Streets, Georgetown.

G. A. B. Woolford,
for General Manager."

The plaintiff on the 19th day of August, 1961, (and before the receipt of Exhibit "D") made a deposit of \$95 on account of the purchase price of the land on which his house was situate and obtained the receipt Exhibit "E-1." When the plaintiff received Exhibit "D" he paid a further sum of \$205 on account the purchase price "of the piece of land on which your house stands" and obtained the second receipt Exhibit "E-2".

The plaintiff believed in good faith that he was purchasing the land which he held as tenant and on which his house and appurtenances were situate, *i.e.*, the old lot 14 as shown on Exhibit "G-2", notwithstanding the letter (a) after lot 14 which reads lot 14a. The plaintiff saw the new plan Exhibit "Q" for the first time after he made the second payment and then discovered that lot 14(a) was much smaller than the original area he held as a tenant. On the 11th May, 1962, the plaintiff filed an application No. 1081/62 against the Central Housing and Planning Authority opposing the scheme. At the hearing counsel for the defendants assured the court that Phang's plan No. 9530 of 1960 formed no part of the varying scheme. Moreover, in para. 11 of the affidavit of S. L. Narayan, Secretary of the Central Housing and Planning Authority, in those proceedings it was stated that "the scheme in no way affects the ownership or the boundaries of either the original lot 14 referred to in the plaintiff's affidavit or the above-mentioned lot 14(a)." On this assurance, solicitor for the plaintiff withdrew the application on 14th August, 1962.

LATCHMAN v. GREENWOOD

On the 4th September, 1962, the plaintiff received the following letter from Mr. L. A. Freeman, Housing Administrator:

"Ministry of Labour, Health & Housing,
Housing Department,
Waterloo & New Market Streets, Georgetown,
Demerara,
British Guiana,
4th September, 1962,
Freedom Year.

Dear Sir,

I understand that you are refusing to allow the contractor, Mr. Bruce, to remove the fence, latrine and car shelter belonging to you, which stands on lot 14c Shell Road. In so doing you are breaking the law, since the Kitty Development plan under which the work is done is law. Further, your belongings are trespassing since that land is no longer yours. Whilst I sympathise with your loss of a flourishing garden, I must insist that you allow the work to proceed. If you still do not intend to do so, please call in to see me on Friday, 7th September, or write stating your reasons.

Yours faithfully,
L. A. Freeman,
Housing Administrator.

Mr. Latchman,
14a Shell Road,
Kitty,
E.C., Demerara."

On the 19th November, 1962, the plaintiff received the following notice Exhibit "L" from Mr. Greenwood which stated as follows:

"Ministry of Labour, Health & Housing,
Housing Department,
Waterloo & New Market Streets,
Georgetown, Demerara,
19.11.1962.

Freedom Year

Dear Sir,

It is proposed to continue work on the improvement of Kitty Railway lands.

2. You have a fence and garage and latrine which have to be moved. The work will be carried out by a contractor whose name is J. A. Bruce under the supervision of Mr. Wilkinson (clerk of works) and myself. You are asked to give all necessary co-operations to us in this work which is being carried out by Government free of charge to you, but for your benefit.

3. In order to protect you I have included certain conditions in the contract as follows:

- (1) No workman may enter your home or touch your possessions unless accompanied by the contractor or the clerk of works.
- (2) Workmen must not use bad language, or bad behaviour.
- (3) Work and materials must be confined as close as possible to the work in hand.

If you have any complaint against the workmen or contractor, please inform the clerk of works or myself immediately.

4. If your house is to be moved it will be so arranged that you may sleep in it at night whilst moving, but it is regretted that persons living in bottom flats will have to sleep with friends or relatives for a few days. These persons should carry their small possessions such as clothes, pets, wares etc., but furniture will be cared for by the Con-tractor. Every effort will be made to reduce the inconvenience to you as much as possible.

5. Where pit latrines are to be moved you are asked to arrange to use your neighbours own for a day or so.

6. Finally you are asked to take care of the equipment at night time. This mostly belongs to Government and any less may have to be replaced at the public (yourself) expenses.

Yours faithfully,
K. A. Greenwood,
Quantity Surveyor.

Mr. Latchman,
14a Shell Road,
Kitty."

On the 23rd November, 1962, the plaintiff caused his solicitor to write a letter to the Minister of Health. Exhibit "K" is a copy of the letter setting out the facts. Before the plaintiff received any reply to his letter to the Minister, the defendants, purporting to act on the notice dated 19.11.62, entered on, the land in question on the 18th, 19th and 27th December, 1962, and removed the plaintiff's fence, latrine, plants from his garden, bridge, garage etc., from lot 14c to lot 14a. In consequence, the plaintiff on the 19th December, 1963, filed this action claiming (a) damages in the sum of \$500 for trespass; (b) an injunction and such other relief as to the court seems fit.

LATCHMAN v. GREENWOOD

On the 5th day of March, 1963, (11 weeks after the filing of this action) the plaintiff sent a money order Exhibit "C-2" for the sum of \$12.92 for 19 months' rent of lot 14. This was later returned to the plaintiff.

For the defendants, it was contended:

- a) that all acts and things done by the defendants in relation to the plaintiff's property at Shell Road were done pursuant to a decision by Government to sell lots of Colony lands at the Kitty Railway lands in accordance with a plan drawn by Phang, sworn land surveyor, dated 26th October, 1960 (plan No. 9530);
- b) that the plaintiff knew that he was purchasing lot 14a and not his old lot 14 and in consequence surrendered his tenancy of lot 14 when he purchased lot 14a;
- c) that the plaintiff's tenancy was determined by the notice, Exhibit "D", dated 31st August, 1961, terminating the tenancy on the 1st October, 1961. In the alternative, the plaintiff exercised an option to purchase and did purchase lot 14a, and ceased further payment of rent;
- d) that the defendants will object that they were acting in the execution of their offices and, that no notice as is required by s. 8(2) of the Justices Protection Ordinance, Cap. 18, has been served on them;
- e) that the defendants deny that the plaintiff suffered damage as alleged or at all.

From the admitted facts in the case, it is Obvious that although Mr. Narayan had sworn in para. 11 of his affidavit in action No. 1081/62 that "the scheme in no way affects the boundaries of either the original lot 14 or lot 14a", and Mr. Barker stated in para. 11 of his affidavit in the said action that ". . . . the sub division of the said Kitty Railway land in accordance with the said plan by J. Phang (No. 9530) did not form part of the varying scheme of the said area," the facade of the plaintiff's former lot 14 was in fact reduced from 71.4 feet to 29.4 feet and the area reduced by nearly 1000 square feet. Both Messrs. Narayan and Barker may be technically correct because they regarded the scheme as a separate and distinct entity from the sale of lands. The plan for the sub division and sale of the lands in question was indeed separate and distinct from the scheme itself and as Mr. Barker stated the scheme was completed in 1958 while the plan by Phang was made in 1960. But, nevertheless, to the layman tooth operations were regarded as the scheme.

This view was expressed by the witness de Weever, a class I clerk of the Housing Department, who had to deal with the lands. He stated *inter alia*:

" Phang's plan was decided on to implement the scheme. Both plans were concerned with the scheme. Barker's plan showed schools and the widening of roads,

car parks and other amenities; and Phang's plan showed the division of lots. It was to necessitate the removal of houses, etc., in order to acquire the sites to be used for the implementation of the amenities shown on Barker's plan (which was connected with the scheme). It is true to say that both plans had reference to the scheme."

Mr. Aubrey Barker who made the Barker plan is the chairman of the Housing and Planning Department. I don't know what Mr. Barker swore to in his affidavit. I have stated what I believe to be the scheme from the facts I know from my Department. Barker's plan did sub divide lots also, and change their sizes and shapes."

On this aspect of the matter, the defendant Greenwood states in his evidence *inter alia*:

"I did believe that Phang's plan was a properly constituted scheme—a plan is not a scheme. I believed Phang's plan was part of the scheme....."

I have alluded to the evidence of Messrs. deWeever and Greenwood merely to show that while Messrs. Barker and Narayan may be technically correct in their statements that Phang's plan was not part of the scheme, to the layman it was difficult to separate both—and that is why Mr. Valz at the hearing of the action No. 1081/62 was obviously misled in believing that lot 14 was not sub divided under the scheme and that the selling of the lots was part of the scheme—and so withdrew the summons No. 1081/62 on the assurance that Phang's plan was no part of the scheme. The plaintiff's application before the Chief Justice complained against Phang's new plan (No. 9530), Exhibit "Q."

The plaintiff's case is that he believed from the Whole history and circumstances culminating with the purchase of the land referred to in the receipts—Exhibits "E1" and "E2"—that he was purchasing the land he formerly occupied as a tenant. The offer made on Exhibit "D"—the notice—described the land offered for sale and purchase as "the piece of land on which your house stands." No reference is made to any plan or other description. Both receipts, Exhibits "E1" and "E2", refer to lot 14a, but no reference is made to any plan. There is no evidence that the plaintiff knew that he was not purchasing his old lot 14 when he made the first deposit. The reference to lot 14 a on the top of Exhibit "E1" meant nothing to the plaintiff at that time. The plaintiff *bona fide* believed that he was purchasing the old lot 14 when he made his first deposit. After he received the notice, Exhibit "D", he still believed this, as no reference was made to any plan. I believed the plaintiff that he knew that lot 14 a was not his old lot 14, but a smaller lot, *only* after he made a further deposit and saw the plan for the first time and then realised he was not purchasing his old lot 14. On the other hand the Housing Department knew that the old lot 14 ceased to exist and that they were selling the plaintiff the new lot 14a under Phang's plan, Exhibit "2." I am satisfied that there was "no

LATCHMAN v. GREENWOOD

consensus ad idem" as to the subject matter of the 'sale and purchase' of the land described as lot 14 a on Exhibits "E1" and "E2".

Exhibit "E1" reads as follows:

"D
No. 27462
Duplicate

Head of Receipt: Lot 14 a Shell Rd.

Housing Dept.
Date—19.8.67

British Guiana.

Received from Lutchman the sum of Ninety-five dollars being deposit on purchase on above lot.

\$95.00 Initials of Officer Preparing Receipt	for Accountant General
--	---------------------------

T.4"

Exhibit "E2" reads as follows:

"D
No. 28378
Duplicate

Head of Receipt: Lot 14 a Shell Rd.

Housing Department
Date — 2.9.61

British Guiana.

Received from Latchman the sum of Two hundred and five dollars being fur on purchase of above lot.

\$205.00 Initials of Officer Preparing Receipt	for Accountant General
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Moreover, by our law the plaintiff is not the owner until he receives transport, *vide Greenheart Producers Ltd. v. Sutton*, 1961 L.R.B.G. 72. In consequence there was no surrender of the tenancy of lot 14 by the purported purchase of lot 14a.

If there was no surrender of the tenancy of lot 14, then the next question to be determined is:—*was the tenancy determined by the notice, Exhibit "D", dated 31st August, 1961?* It was conceded that if the plaintiff did not receive the notice on/or before the 31st August, 1961, the notice was invalid. The plaintiff stated that he received the notice on the 2nd September, 1961, the very day when he made a further payment and received the receipt Exhibit "E-2". If the notice Exhibit "D" was written on the 31st August as appears on the face of it and posted the same day, it would in the normal course reach the defendant the next day, i.e.,

the 1st September or the day; after. It is therefore not unreasonable for the defendant to have received it on the 2nd September as stated by him.

The witness Woolford testified that he sent all the notices out (over 400) about two days before the 31st August although the notices were dated the 31st August, 1961. The purpose of this evidence was to rebut the presumption "*omnia praesumuntur rite esse acta*" and to show that the notice, Exhibit "D", was telling a lie on itself. On the balance of probabilities I find the *ipse dixit* of Mr. Woolford not strong enough to rebut the presumption that the notice—Exhibit "D" was prepared on the 31st August as stated therein. In consequence, I find the notice, Exhibit "D" invalid and of no effect.

It was urged that the plaintiff had ceased to pay any further rent after the 30th September, 1961, and only sent the money order, Exhibit "C-2", after 19 months and after he was so advised, and after he ceased to be a tenant. It was admitted that although the plaintiff ceased to pay rent, he never vacated the premises and was continuously in possession of the old lot 14 until he was ejected by the defendants. It was further urged by solicitor for the plaintiff that the tenancy was subject to the Rent Restriction Ordinance unless exempted, and Colony building land was not exempted. Counsel for the defendants on the other hand submitted that Colony land as Crown land enjoyed the same immunity and was not caught by the Rent Restriction Ordinance unless so expressly stated.

The facts which I accept show that the plaintiff did not surrender the tenancy; — and no valid notice determined the tenancy. He was therefore in lawful occupation until the tenancy was lawfully determined, and it is my view that this did not take place either in law or in fact, irrespective as to whether the tenancy was subject to the Rent Restriction Ordinance or otherwise in view of the particular circumstances under which the plaintiff had ceased to pay the monthly lease. The result is that the defendant wrongfully interfered with the plaintiff's possession and his belongings.

On the question of damages, I find the plaintiff's claim grossly exaggerated and speculative. I believed and accepted the evidence of the defendants on this issue, and accept the plaintiff's actual loss as that stated on Exhibit "A" amounting to \$20.60. On the plaintiff's own showing, his wife Pet Lutchman stated *inter alias*:

"I did not take care of the plants after they were removed. I abandoned all and that is why I am claiming for all."

It was the duty of the plaintiff to mitigate his damages and not to enlarge it.

Finally it was urged by counsel for the defendants that even if the plaintiff was lawfully on the land, no notice as is required by s. 8(2) of the Justices Protection Ordinance, Cap. 18, was served on

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the defendants. This statement was not disputed. The defendant Greenwood is an officer attached to the Housing Department under the Housing Ordinance, Cap. 182, and the Town and Country Planning Ordinance, Cap. 181.

By s. 56 of Part 8 of the Housing Ordinance, Cap. 182, and by s. 46(1) of the Town and Country Planning Ordinance, Cap. 181, it is provided as follows:

"The Central Authority and every person acting under the provisions of this Ordinance or any other order, resolution, *notice* or regulation made thereunder shall be entitled to the protection afforded by the Justices Protection Ordinance."

The evidence disclosed that the 2nd named defendant Bruce was acting under the direct supervision of Mr. Greenwood. Bruce was not an independent contractor but carried out the direct instructions of Mr. Greenwood and was under his direct supervision: as such they were acting in consequence of the notices served on the plaintiff by the acting Administrator and Mr. Greenwood, *i.e.*, Exhibits "B" and "L" respectively. The defendants are therefore entitled to the protection of the Justices Protection Ordinance.

By s. 8(2) of the Justices Protection Ordinance Cap. 18:

"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; and upon the back thereof shall be endorsed the name and place of abode of the party, and also the name and place of abode or of business of his attorney or agent, if the notice has been served by the attorney or agent."

It is not disputed by the plaintiff that there was non-compliance of the provisions of s. 8(2).

By s. 11 of Cap. 18 it is provided as follows:

"If, on the trial of the action, the plaintiff does not prove that it was brought within the time hereinbefore limited in that behalf, or if he does not prove that the notice aforesaid was given one calendar month before the action was commenced, or if he does not prove the cause of action stated in the notice, or that the cause of action arose in the place laid in the claim, the plaintiff shall be nonsuited, or judgment shall be given for the defendant."

Finally, it is disclosed from the facts of this case that the Housing Department purports to carry out sales of land in a most unorthodox, slipshod and unbusinesslike manner. In the proposals as contained in Exhibit "Y" the Executive Council had agreed to the proposal that the Ministry of Labour, Health and Housing should seek the advice of the Attorney General

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on the form of agreement

to be entered into with the purchasers and tenants. This was approved by His Excellency the Governor on 28.6.61. It is to be deprecated that despite this, no proper form of agreement was entered into between the plaintiff and the Housing Department which alleges that the plaintiff purchased lot 14 a—the only evidence in writing that can be tendered in support of this averment was Exhibit "E-1"—a scrap of paper the contents of which are insufficient to satisfy the requirements of the Statute of Frauds as provided by s. 3(d) of the Civil Law of British Guiana Ordinance, Cap. 2. Because of this laxity on the part of this Government Department this unfortunate situation has arisen.

In consequence I award no costs to the defendants.

The action is accordingly dismissed.

Judgment for the defendants.

LAW REPORTS OF BRITISH GUIANA [1965]
ESTATE OF BOOKEY v. VAN SLUYTMAN AND OTHERS

[Supreme Court (Crane, J.) November 13, 30, 1964, January 23, February 6, 1965].

Practice and procedure—Claim for damages for negligence—Suit by administratrix for benefit of estate—Particulars of persons on whose behalf action is brought not given in statement of claim—Effect—Whether particulars may be provided after limitation.

Practice and procedure—Revivor—Consent by one of several co-defendants—Effect—O. 32, r. 8(2).

Admiralty jurisdiction—Collision of vessels—Loss of life—Claim for benefit of estate—Whether action must be brought in civil or admiralty jurisdiction.

The plaintiff L.B. sued as administratrix of the estate of E.F. for damages for the benefit of the estate in respect of the defendant's negligence which occasioned a collision between two vessels and resulted in E.F.'s death. The statement of claim did not provide "full particulars of the person or persons for whom and on whose behalf the action (was) brought" as required by s. 5 of the Accidental Deaths and Workmen's Injuries (Compensation) Ordinance, Cap. 112. After the period of limitation had expired the plaintiff sought to provide such particulars. The defendants objected to this and in addition contended that the action should have been brought in the Admiralty jurisdiction of the court and not, as was the case, in its ordinary civil jurisdiction; and further that the action should be deemed deserted and abandoned for the reason that although it became ripe for hearing on 12th June, 1962, the request for hearing was not filed until 17th September, 1963. In this regard the fourth-named defendant had granted an extension of time up to 20th February, 1963, for the plaintiff to file her reply to that defendant's statement of defence.

Held: (i) the giving of the particulars required by s. 5 of Cap. 112 was vital to the plaintiff's cause of action;

(ii) the plaintiff would not be allowed to give the particulars since, were she allowed to do so, the defendants would be deprived of the benefit of a plea of limitations;

(iii) the Supreme Court was by virtue of s. 2 of the Colonial Courts of Admiralty Act, 1890, a Colonial Court of Admiralty and fully competent to entertain the claim;

(iv) the action was deemed abandoned on 24th January, 1963, and was incapable of revivor by the unilateral consent of the fourth-named defendant since consent to revivor must be by all the parties to the action.

Objections upheld

C. V. Wight for the plaintiff.

R. H. McKay for the first, second and third-named defendants.

A. B. A. Sankar for *D. Karran* for the fourth-named defendant.

CRANE, J.: The deceased Esther France lost her life by drowning on December 18, 1960, when two motor vessels owned by the defendants collided in the Demerara River.

The plaintiff Laura Bookey now sues the defendants in her capacity as administratrix of the estate of Esther France, claiming damages for negligence for the benefit of the estate of France under

BOOKEY v. VAN SLUYTMAN

the Law Reform (Miscellaneous Provisions) Ordinance, Cap. 4, in respect of the death of the deceased.

There is a further claim under the Accidental Deaths and Workmen's Injuries (Compensation) Ordinance, Cap. 112, in the sum of \$10,000 for the benefit of the relatives of the deceased.

Counsel for the first, second and third-named defendants, the owners of one of the colliding vessels the "Van S", took three preliminary points:

(i) There has been non-compliance with s. 5 of Cap. 112 in that the plaintiff has failed to furnish with her statement of claim "full particulars of the person or persons for whom and on whose behalf the action is brought". Counsel contends that such particulars cannot now be given, for to permit such would be to allow plaintiff a cause of action where none had been stated before. This would deprive plaintiff of the benefit of the Limitation Ordinance.

There is no dispute that the statutory particulars have not been filed. The only question which arises on this point is whether the view contended for is correct, viz., that failure to file such particulars with the statement of claim was vital to plaintiff's cause of action.

It is well known that a cause of action comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment. (See *Read v. Brown*, 22 Q.B.D. 131). Therefore to obtain judgment she must give particulars of the person or persons on whose behalf she preferred the action. This is an absolute essential and vital to her cause of action. I have considered whether I ought not to permit her at this stage to furnish them, as I could ordinarily do, but have decided against such a course for the reason that were I to do so it would deprive the defendants of the benefit of a defence, viz., that "every action shall be commenced within twelve calendar months after the death of the deceased person". This action was filed on December 16, 1961. I am therefore in agreement with counsel for defendants that were I to permit her so to do, would be to deprive the defendants of the benefit of a plea of limitations, which the courts have always consistently refused to do.

(iii) It will next be convenient to deal here with the third point that this matter ought to have been brought by the plaintiff in the Admiralty jurisdiction of the Court and not in its ordinary civil jurisdiction.

In my opinion this point is not a sound one for the Supreme Court is by virtue of s. 2 of the Colonial Courts of Admiralty Act, 1890, a Colonial Court of Admiralty, and fully competent to entertain the claim. (See s. 29 of Cap. 7).

The Accidental Deaths and Workmen's Injuries (Compensation) Ordinance, Cap. 112, is a creature of the Fatal Accidents Act other-

wise known as Lord Campbell's Act. On this analogy any court having Admiralty jurisdiction can entertain claims for damages for loss of life; the jurisdiction is exercisable either in proceedings *in rem* or *in personam*.

(iii) Now as regards the second ground: I am in agreement with counsel for the defendants that the action fails for want of compliance with Order 32 of the Rules of the Supreme Court, and therefore it has been deserted and abandoned.

The record shows that this action was filed on December 16, 1961; that the first, second and third-named defendants entered appearance under protest on January 29, 1962; and that the fourth-named defendant did so on May 24, 1962. A statement of claim was filed on May 25, 1962, to which the fourth-named defendant filed his defence on May 29, 1962. The first, second and third-named defendants were in default of defence despite notice of default of the same sent them and filed in Court on February 11, 1963. This notice warned them that plaintiff would request final judgment, but this warning was never fulfilled. Accordingly, the cause became ripe for hearing 14 days after May 29, 1962, when the fourth-named defendant filed his defence, *i.e.*, on June 12, 1962.

Now by r.1(i) of Order 32, it was plaintiff's duty to file a request for hearing within six weeks thereafter, *i.e.*, before July 24, 1962, but he did not. He did so on September 17, 1963. By r. 8(1) of Order 32: "A cause or matter shall be deemed deserted if no request for hearing shall be filed within six months after the expiration of the period fixed for filing such request" which is six months after July 24, 1962, *i.e.*, January 24, 1963; but plaintiff filed her request on September 17, 1963, nearly eight months after it should have been. The cause was therefore deemed abandoned by the plaintiff on January 24, 1963.

Rule 8(2) directs what happens when such is the case, *viz.*, there must be an order for revivor, or a consent to revivor and a request for hearing signed and filed by all the parties.

The purported extension of time up to and including February 20, 1963, by the fourth-named defendant to plaintiff to file her reply to the defence is of no avail since consent to revivor must be by *all* the parties to the action, and the first, second and third-named defendants have not given their consent. The action is incapable of revivor by the unilateral consent of the fourth-named defendant.

The preliminary objections are therefore sustained on the first and second grounds. No order as to costs.

Objections upheld.

Solicitors: *L. L. Doobay* (for the plaintiff); *A. Vanier* (for the first, second and third-named defendants); *Miss E. A. Luckhoo* (for the fourth-named defendant).

Re MOHAMED ALI (A DEBTOR)

[Supreme Court (Luckhoo, C.J.) October 26, November 3, 10, 1964, January 9, 1965]

Auction sale—Sale by Official Receiver as assignee in insolvency—Condition for payment of 25 per centum of the purchase money on knock of hammer—Non-compliance therewith—Time given by Official Receiver—Whether sale thereby avoided.

The Official Receiver, as assignee in insolvency of a debtor's estate put up certain immovable property belonging to the estate for sale at public auction. One of the announced conditions of sale required the purchaser to pay 25 per centum of the purchase money on the knock of the hammer. With the permission of the Official Receiver this proportion of the purchase price was however paid in two instalments, the first instalment being paid two days after the sale, and the second instalment eleven days later. A more favourable price having been subsequently offered, the debtor moved to set aside the sale on the ground of non-compliance with the condition.

Held: (i) at the fall of the hammer in a sale at public auction the auctioneer acknowledges the acceptance of the highest offer and the contract of sale and purchase is concluded at least when the conditions of sale are signed;

(ii) the purchaser may be held to the terms and conditions of the contract signed but it is perfectly competent for the parties to the contract to vary the terms and conditions thereof;

(iii) the failure of the Official Receiver to ensure payment in accordance with the condition did not have the effect of rendering the sale null and void in law.

Application dismissed.

O. M. Valz for the debtor.

David A. Singh, Senior Legal Adviser, for the Official Receiver.

Reasons for Decision: On the 4th May, 1964, notice of motion herein was filed on the part of the insolvent that—

Re MOHAMED ALI (A DEBTOR)

- "1. The following questions be decided by the court:
- (a) whether the Official Receiver was negligent and/or acted against the best interest of the insolvent and the creditors when he did not accept the offer of \$40,000 made in writing to the Official Receiver for and on behalf of one Bansraj by H. B. Fraser, Esquire, solicitor, in respect of the property described in the first and second schedules hereto;
 - (b) whether having regard to the said offer the reserve price for the property described in the second schedule ought not to have been fixed at \$25,000;
 - (c) whether having regard to the said offer the Official Receiver ought not to have sold the said property by tender.
2. The purported sale of the said property by the Official Receiver, to one Sukhdai Arjune be declared to be illegal, null and void and of no effect and ought to be set aside.
3. The Official Receiver be directed to indemnify the insolvent against all loss suffered by him in consequence of the negligence of the Official Receiver and/or the mismanagement of the insolvent's estate by the Official Receiver.
4. The sale of the property described in the first schedule be stayed generally and/or until after the hearing of this application.
5. The insolvent be granted the costs of this application.
6. The insolvent be granted such other and further relief as to the courts seems fit."

The first and second schedules in the notice of motion contain a description of the property referred to in the first paragraph thereof.

On the 27th January, 1962, a receiving order was made on the debtor's petition and the Official Receiver Was constituted the receiver of the debtor's estate. On the 6th July, 1962, following upon the public examination of the debtor, the debtor was adjudged insolvent. The Official Receiver is the assignee in insolvency of the estate of the insolvent.

On the 10th February, 1964, a summons herein was filed on the part of the insolvent for an order for a stay of the sale at public auction at the instance of the Official Receiver of certain properties forming part of the insolvent's estate. Those properties are the same as have been set out in the first and second schedules in the instant motion and may conveniently be referred to as lot 36, Endeavour and lot 6, Amsterdam. The sale at public auction was advertised to take place on the 18th February, 1964. In his affidavit in support of that application the insolvent stated that the properties were valued at \$9,500 and \$30,000 respectively and swore that one Amy Lowe of Cane Field, Leguan, would grant a mortgage thereon within three months which would enable him to pay off his creditors. He placed his debts at \$20,000. In his affidavit in reply thereto the Legal Assistant of the Official Receiver swore *inter alia* as follows:

" (5) By letter dated 1st November, 1962, Mr. H. B. Fraser, solicitor on behalf of his client Bansraj, made an offer in writing for the purchase of the property of the said insolvent for the sum of \$40,000 subject to certain terms and conditions. A further letter relating to the aforesaid offer was sent by Mr. H. B. Fraser to the Official Receiver dated 22nd November, 1962, and on the 23rd November, 1962, the Official Receiver informed Mr. H. B. Fraser, solicitor for Bansraj, that the said proposals on behalf of his client for the purchase of the insolvent's property will be put by him for the consideration of the creditors in the next meeting of creditors to be summoned.

(6) That on the 10th day of April, 1963, a meeting of the creditors was held at the Official Receiver's office and the aforesaid proposals for the purchase of the property of the said insolvent were submitted to the creditors present for their consideration. After some discussion it was unanimously decided by the said creditors that the aforesaid offer made by the said Bansraj was wholly unacceptable and must be rejected.

(7) On the 29th April, 1963, Mr. H. B. Fraser on behalf of the said Bansraj submitted in writing further amended proposals which were considered at the meeting of the creditors held on 10th August, 1963, at the Official Receiver's Office and were unanimously rejected by the creditors present at the meeting.

(8) Since the date of the receiving order on the 27th day of January, 1962, no other offer was made by any one other than the said Bansraj relative to the purchase of the property of the said insolvent. However, the said insolvent has at no time since the date of the said receiving order submitted any proposals or scheme for the consideration of the creditors in accordance with and subject to the provisions of the Insolvency Ordinance, Chapter 43.

(9) That since the 27th day of January, 1962, up to the present time the said insolvent has committed several unauthorised acts with respect to planting rice in the property of the said estate and utilising the proceeds realised therefrom without the permission and/or approval of the Official Receiver and has failed to account to the Official Receiver in connection thereto after being requested so to do.

(10) In consequence of these unauthorised dealings by the said insolvent with the assets of the said estate it would be in the best interest of the creditors to proceed with the administration of the said estate and to realise the assets as soon as possible.

(11) At the last meeting of creditors which was held on the 16th day of August, 1963, it was unanimously decided by the creditors present that in view of the attitude and conduct of the said insolvent in his persistent and unauthorised interference with the assets of the said estate to the prejudice of the interest of the said creditors that the assets of the said insolvent should be realised as soon as possible.

Re MOHAMED ALI (A DEBTOR)

(12) I am advised and verily believe that in the circumstances of this case no sufficient grounds are made out by the said insolvent for a postponement of the said sale fixed for Tuesday the 18th of February, 1964. Further, the postponement of the said sale would not be in the interest of the estate in genera] and to the prejudice of the interest of the said creditors having regard to the conduct and attitude of the said insolvent.

(13) That I am advised and verily believe that the procedure adopted by the said insolvent by bringing an *ex parte* application by summons seeking a stay of execution of the said sale is void in law and should be set aside."

That application was heard by BOLLERS, J., on the 17th February, 1964, and was refused. There was no appeal brought against the decision of BOLLERS, J. The sale of the properties at public auction took place on the 18th February, 1964, when the two properties were knocked down to the highest bidder, one Moses Arjune for and on behalf of his mother Sukhdai Arjune, for \$16,700. On the 4th May, 1964, the instant notice of motion was filed.

On the 25th January, 1964, at the instance of the Official Receiver one Anthony Bertie Chapman, a property agent and valuer; had sworn an affidavit of valuation of the two properties in which he placed the value of \$2,500 on one property and the value of \$10,500 on the other.

It is common ground that one of the terms of the sale was that the purchaser would be required to pay 25 *per centum* of the purchase money on the knock of the hammer and the balance of 75 *per centum* in three months from the day of the sale with interest thereon at the rate of 6 *per centum per annum*. Another term of the sale was that the purchaser would be required to give two sufficient sureties to the satisfaction of the Official Receiver in respect of the payment of the purchase money with interest thereon and that the property sold would not devolve to the purchaser until the purchase money with the interest thereon was fully paid. After the properties had been knocked down to Arjune for \$16,700, Arjune was permitted by the Official Receiver to pay \$3,100 on account of the purchase price two days after the sale and the balance of \$1,075 to make up 25% of the purchase price on the 3rd March, 1964. The Official Receiver also arranged with the purchaser that the latter should pay to the British Guiana Credit Corporation the sum of \$5,525 on the 15th August, 1964, the corporation agreeing to advance the sum of \$7,000 on a mortgage and to make payment of \$12,525 to the Official Receiver on the passing of transport to the purchaser. The purchaser has since entered into an agreement of sale and purchase with another person in respect of one-fourth part or share in the property for the sum of \$5,000.

At the hearing of this motion evidence was given by one Mohamed, the father of the insolvent, to the effect that he holds a second mortgage from the insolvent having lent the insolvent the sum of \$9,500 with interest payable thereon at the rate of 6 *per centum per annum*. This witness had lodged proof in the insolvency proceedings to the extent of \$11,500. Mohamed said that he attended the sale at

public auction and that he told the officer conducting the sale that he wished to buy the ricelands (at Amsterdam) if the officer would make a discount of the insolvent's debt owing to Mohamed from the purchase price. According to Mohamed the officer told him that he wanted cash money whereupon he (Mohamed) asked for a year to pay the purchase price and the officer replied "No, three months." Mohamed at the hearing of this motion said that he would be able to pay within two days the balance, after discounting the amount of \$11,500 owing to him by the insolvent's estate, to make up a purchase price of \$18,000. Mohamed has sworn that at the sale at public auction he would have bid up to \$18,000. He said that at the sale he had made a bid — he thinks it was \$16,000 or \$17,000 — and that if he knew he would be given more than 3 months within which to pay the purchase price he would have made a bigger bid. He has also stated that he would only be prepared now to pay \$18,000 for the property if the amount of \$11,500 is discounted from the purchase price.

In the state of the evidence solicitor for the insolvent contended that in the exercise of the court's wide powers in insolvency matters the court should permit Mohamed to purchase the property by private treaty for \$18,000 with a discount of the amount of \$11,500 owing to him by the insolvent's estate and that the sale to Arjune should be declared null and void. Solicitor for the insolvent has stated that if the sum of \$18,000 is accepted as purchase price Mohamed would not be getting any preference over the remaining creditors as well over \$1,000 will be left for other creditors. Counsel for the Official Receiver has stated that the insolvent's liabilities total roughly \$26,900 while his assets total \$19,200.

Solicitor for the insolvent during the course of his address abandoned the first question asked in the notice of motion and asked that there be liberty to apply in respect of the third question. In effect, solicitor for the insolvent finally sought to have the sale by public auction to Arjune declared illegal, null, void and of no effect and to obtain the leave of the court to permit Mohamed to purchase the property by way of tender for \$18,000.

For the insolvent it was argued that having regard to the terms and conditions of the sale announced to those present at the time of the sale it was not competent for the Official Receiver to depart there-from in respect of the time and manner of payment of the purchase money.

An advertisement of a sale at public auction is an invitation to treat and a bid is an offer which may be retracted at any time prior to the fall of the hammer. At the fall of the hammer the auctioneer acknowledges the acceptance of the highest offer. A contract of sale and purchase is concluded at least when the conditions of sale are signed. The purchaser may be held to the terms and conditions of the contract signed but it is perfectly competent for the parties to the contract to vary the terms and conditions thereof. Reference may be made to the local cases of *In re petition of Bhugoo* (1902), 2nd July, a judgment of BOVELL, C.J., and *In re petition of Josiah Primo*

Re MOHAMED ALI (A DEBTOR)

(1907), 10th April, a judgment of BOVELL, C.J., A. V. LUCIE SMITH and HEWICK, JJ. In *Re Bhugoo* (1902) the following is the judgment delivered by BOVELL, C.J.:

" In this case the petitioner asks that letters of decree be not granted to one Ramnath for certain immovable property of the petitioner's of which Ramnath was declared the purchaser at an execution sale.

It is alleged in the petition that after the property was knocked down to Ramnath for \$52.50 he paid the marshal \$10 on account of the purchase money, but did not pay the balance till many hours later on the same day, and that before such balance was paid the judgment-creditor at whose instance the levy had been made, through his counsel, notified the Registrar of his wish to withdraw the levy and asked him not to receive the balance of the purchase money but the Registrar stated he was unable to cancel the sale.

On behalf of the petitioner it is urged that the sale was incomplete at the time when it was sought to withdraw the levy, and therefore the levy could be withdrawn, the purchase money not having been paid in cash at the time of sale as required by O. xxxvi, r. 45, Part I of the Rules of Court, 1900, and the Registrar or marshal, having no authority to give time for the payment of any part thereof.

When immovable property is sold by the marshal at auction the effect is that a contract of sale is created, and not that the property sold is thereby transferred to the purchaser (See O. xxxvi, r. 71). The purchaser by that contract acquires a right to have the property sold and transferred to him, and becomes subject to the obligation to pay the price 'at the time of sale'. The contract of sale was therefore in this case complete when the property was knocked down to Ramnath. I am aware of no authority for the proposition that neglect to discharge this obligation of payment at the time when it should be performed terminates *per se* the contract entered into; and the purchaser in this case having in good faith discharged the obligation of payment resting on him without the contract being previously terminated is, in my opinion, entitled to obtain letters of decree even though there was some delay in his making the payment. If the Registrar or marshal was bound to terminate the contract and not to receive the balance of purchase money (a point which it is unnecessary to determine in these proceedings) and the judgment debtor who is the petitioner in this case was damaged thereby he has his remedy, but nothing is shown to have taken place which would, in my opinion, disentitle the purchaser to the benefit of the contract of sale into which he entered.

The petition is therefore dismissed with costs."

In *Re Primo* (1907) the following is the judgment of the court:

" The petitioner, who is an execution debtor, seeks to set aside the sale at execution, made on the 11th March, 1907, of his immovable property, on the ground that the purchaser, who did

not pay the purchase money at the time of sale, did not 'forth-with' deposit with the marshal 25 *per centum* thereof, as required by Order xxxvi, rule 47, of the Rules of Court, 1900.

The Registrar reports that the 25 *per centum* amounted to \$185.25, that the purchaser paid \$140 at the time of sale, that he allowed the purchaser one week within, which to pay the unpaid residue \$40.25 and that the purchaser paid this sum on the 16th March.

The contract of sale to the purchaser must, in our opinion, be held to have been completed, and no sufficient ground is shown for setting it aside, and thus depriving the purchaser of his rights thereunder. If the petitioner was damaged by the Registrar's giving time as already mentioned (which, however, does not appear on the proceedings now before us) he has his remedy against that officer.

It is right, however, to add that, in our opinion, the Registrar has no power to allow time for payment of any part of the 25 *per centum* mentioned in the rule so as to keep the contract open till such part is paid, but is bound (if he desires to give time) himself to pay in the sum for payment of which time is given. The decision in *Re Bhugoo* (2nd July, 1903) referred to by the Registrar in his report, does not support the contention that he has any such power, and it is clear from the language of rule 47 that the contract must be completed at the time of sale, and the 25 *per centum* he paid 'forthwith' so as to avoid the serious risk of the sale proving abortive owing to other intending buyers leaving the place of sale, and afterwards the 25 *per centum* not being paid by the bidder who is declared the purchaser."

Re Primo was referred to in *Niles v. Barratt* (1962), 4 W.I.R. 455 at p. 460 (1962 L.R.B.G. 250). The latter case concerned the sale of immovable property at auction by a marshal of the Supreme Court pursuant to an order obtained by the second mortgagee for foreclosure of his mortgage thereon. The terms and conditions of sale were similar to those in the instant case, one of the terms being that a deposit of 25 *per centum* of the purchase price was to be paid forthwith upon the knock of the hammer. The property was put up for sale and knocked down to the first mortgagees' father who failed to pay the deposit. Thereupon the property was again put up for sale and was knocked down to another person who also failed to pay the deposit. The property was put up for sale a third time and knocked down to the second mortgagee who paid the required deposit and signed the conditions of sale. The first mortgagees subsequently brought an action against the owner of the property to foreclose the first mortgage in their favour. The latter's defence to the action was that the marshal had no authority to put the property up for sale after it had been knocked down to the first mortgagees' father, that he had purchased the property on behalf of the respondent and upon completion of the sale the first mortgage would be discharged. It was held on appeal to the British Caribbean Court of Appeal (affirming the decision of the trial judge) that there was no evidence

Re MOHAMED ALI (A DEBTOR)

to justify a finding that the first mortgagees' father was acting as their agent when he bid for the property and that the authority of the marshal extended beyond that of a mere auctioneer and that he was empowered to put the property up for sale again on failure of the bidders to whom he knocked it down to pay the deposit stipulated for in the conditions of sale.

The British Caribbean Court of Appeal was there considering the question whether it was competent for the marshal to repudiate a sale to the highest bidder who failed to pay the specified deposit and to re-sell. In holding that it was competent for the marshal so to do that court did not hold that he was bound to re-sell in such circumstances. The Court (at p. 466), after referring to *Re Primo*, said "The inference is clear that, if the deposit is not paid, the property *may* be offered there and then to other intending buyers" [(1962), 4 W.I.R. 466, 1962 L.R.B.G. 255].

The judgments in *Re Bhugoo* and *Re Primo* appear to show that while the Registrar is not empowered under the rules of court to allow time for payment of any part of the deposit of 26 *per centum* so as to keep the contract open until such part is paid, if he does give the purchaser time to pay he (the Registrar) is bound to pay in the sum for payment for which time is given. If the execution debtor is damned by the Registrar's failure to do so, the execution debtor has his remedy against the Registrar. The sale to the purchaser is not rendered null and void and of no effect by reason of such failure on the part of the Registrar. Ignoring for the moment the fact that the sale at auction by the Registrar is regulated by rules of court, it may by parity of reasoning be held that a similar failure on the part of the Official Receiver would not have the effect of rendering in law null and void and of no effect a sale to a purchaser. Solicitor for the insolvent urged that in the exercise of its jurisdiction in insolvency, the court has wide powers which may be exercised in the insolvent's interest. Accepting this contention as being well founded, the circumstances of each case must be examined by the court in deciding whether a sale by the Official Receiver of an insolvent's property should be set aside as being in the insolvent's interest so to do.

In addition to the circumstances mentioned earlier in this judgment it is to be recalled that at the time of the filing of the notice of motion herein and indeed until he was called to give evidence Mohamed had made no offer to purchase the property for \$18,000. In the proceedings before BOLLERS, J., nothing had been said of any offer on the part of Mohamed to buy the property.

I know of no principle that if an offer of payment of a large amount as purchase price is made to the Official Receiver after sale at auction that the sale at auction will be set aside on application to the court and the offer of the payment of the larger amount accepted in its place merely because it will be of greater financial benefit to the insolvent's estate.

Having regard to all of the circumstances of this case I did not consider that the sale at auction should be set aside and dismissed the application without any order as to costs.

Application dismissed.

ALEXANDER v. AUSTIN

[Supreme Court (Luckhoo, C.J.) October 21, November 4, 5, 1964, February 10, 1965]

Immovable property—Defendant purchased undivided half of land—Registered in assessment book, assessed and levied upon as divided north half of land—Judicial sale transport consequently passed for divided north half—Validity of transport—Local Government Ordinance, Cap. 150, s. 123(1) and (2).

The defendant purchased an undivided half share in a half lot of land in a village district. He was however erroneously registered in the assessment book of the village as the owner of the north half of the half lot. His interest as so described was accordingly assessed and subsequently levied upon in execution for non-payment of rates. The defendant bought at the execution sale and obtained a judicial sale transport for the north half of the half lot. The plaintiff subsequently bought and obtained transport for the other undivided half share in the half lot, and instituted an action for the purpose *inter alia* of establishing the validity of his title having regard to the defendant's transport.

Held: (i) a judicial sale transport is full, absolute and indefeasible title only if the transport has been lawfully obtained;

(ii) the assessment, the rate levied, the levy made for the non-payment of the rate levied and the subsequent sale at execution in respect of the north half of the property were all unauthorised by law and therefore of no effect. The judicial sale transport issued to the defendants for the north half was therefore null and void.

Judgment for the plaintiff.

H. D. Hoyte for the plaintiff.

C. M. L. John for the defendant.

LUCKHOO, C. J.: In this action the plaintiff Joseph Alexander claims the following declarations —

- (a) that by virtue of transport No. 2063 of 1958 the plaintiff is the owner of an undivided half part or share in the west half of lot 16 B, Two Friends, East Coast in the county of Demerara;
- (b) that the defendant is the owner of an undivided half share or part only in the west half of lot 16 B, Two Friends aforesaid;
- (c) that the sale at execution of the north half of the west half of lot 16 B, Two Friends aforesaid in the year 1943 at the instance of the Ann's Grove and Two Friends Local Authority was unlawful;
- (d) alternatively, that the plaintiff is entitled to ownership of the south half of lot 16 B, Two Friends aforesaid as against the defendant;

and an order setting aside the sale at execution of the north half of the west half of lot 16 B, Two Friends referred to above and the judicial sale transport No. 650 of the 19th May, 1943, issued in respect of such sale.

The evidence discloses that John Benjamin Alexander died intestate on the 27th October, 1938. On the 24th February, 1939, the Public Trustee made application to the Supreme Court under the provisions of s. 17(a) of the Deceased Persons Estates' Administration Ordinance, then Cap. 149 of the Laws of British Guiana (Major Edition), for the issue to him of letters of administration of the estate of the deceased. In his affidavit in support of the application the Public Trustee swore that the deceased's estate amounted in gross value to the sum of \$3,397 to the best of his knowledge, information and belief, that the estate was insolvent and that the creditors had agreed to accept a compromise of their claims. The statement of assets and liabilities of the deceased's estate filed with the application placed the assets at \$3,397 and the liabilities at \$3,999.30, a deficiency of \$602.30. The assets listed consisted of immovable property situate in Georgetown, and at Ann's Grove (and Two Friends) and an amount of \$11 as rents due. Included in the list of immovable property was the west half of lot No. 16, section B (at Two Friends). On the 30th March, 1939, letters of administration No. 71 of 1939 of the deceased's estate were granted to the Public Trustee. The Public Trustee thereafter entered into the administration of the deceased's estate.

On the 4th and 11th days of February, 1939, the Public Trustee in his capacity as administrator of the deceased's estate caused to be advertised in the Official Gazette a sale at public auction at the Official Receiver's office on Tuesday, 14th February, 1939, of one undivided half part or share of and in certain specified lots, which lots included the west half of lot 16, section B, Two Friends, and the whole of certain other specified lots. The sale duly took place on the 14th February, 1939. The plaintiff and the defendant purchased certain of the properties put up for sale. The conditions of sale signed by the respective purchasers cannot now be found. The defendant claims that despite the advertisements in the Gazettes referred to above, whereby it was stated *inter alia* that one undivided half part or share of and in the west half of lot 16, section B, Two Friends, was to be sold at public auction on the 14th February, 1939, the entire west half of that lot was put up for sale and that he bid for and had knocked down to him the entire west half of that lot. He has produced an official receipt issued by the Public Trustee's Office bearing the date of the sale for the payment by him to the Official Receiver's Department of the sum of \$41.25 "for purchase of west half lot 16, section B, Two Friends—East Coast—Dem., property of estate John B. Alexander—Decd." The plaintiff was also issued a receipt for payment of purchase moneys for the property of the deceased's estate he purchased at the sale and again the description of the properties he purchased as specified therein does not relate to an undivided interest in any of the properties but to the entire lots specified therein.

Some time towards the end of 1940 the defendant by letter applied to the local authority of Ann's Grove—Two Friends for a transfer to be made in the local authority's assessment book of the name of the owner of the west half of lot 16, section B, Two Friends.

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He exhibited to the local authority the official receipt which he had been issued for payment of the purchase price. His request for such transfer was granted by the local authority and the transfer duly made. Some weeks later the defendant requested the local authority by letter to have the half lot measured and put up for sale at execution so that he might obtain a judicial sale transport therefor. That request was considered at a meeting of the local authority held on the 17th March, 1941, and it was decided that the defendant's request should be granted. In the minutes of the meeting held on the 17th March, 1941, immediately below that entry appears the following:

"Letter from Mr. D. A. Henry complaining of the transfer of the W 1/2 lot 16 Sec. B. Two Friends, to Mr. P. W. Austin, and informed the Council that it was the undivided one half of the said lot was advertised and sold to Mr. Austin and asked that the said W 1/2 lot 16 Sec. B, Two Friends, be again assessed in the name of John Alexander, dec'd. The Council regrets its inability to grant this request as the receipt tendered by Mr. Austin is quite in order".

The minutes of a meeting of the local authority held on the 15th April, 1941, disclose that the local authority received a letter from Mr. A. Gaskin on behalf of the Public Trustee "informing the Council that it had been brought to the notice of the Public Trustee that a receipt issued to P. W. Austin dated 14.2.39 was incorrect as the property actually advertised and sold was the undivided half of the west half of lot 16, Sec. B, Two Friends, and asked that only the same be assessed in his name". According to the minutes of that meeting this request by the Public Trustee was granted. Thereafter in the minutes appears the following—"W 1/2 lot 16 Sec. B, Two Friends, to be assessed separately in the name of John Alexander, deceased". The minutes of that meeting were confirmed at a meeting of the local authority held on the 12th May, 1941.

In July 1941 the plaintiff, who at this time claimed no interest in the west half of lot 16, Section B, Two Friends, wrote a letter on behalf of Olive Alexander, a sister of the deceased J. B. Alexander, to the local authority protesting at the change in the name of the owner of that property to that of the defendant. Olive Alexander considered that she had an interest in one undivided half, part or share in that property through her husband J. W. Alexander, deceased, brother of J. B. Alexander, deceased.

The name of John Alexander had been entered in the assessment books of the local authority as the owner of the W 1/2 of lot 16, section B, Two Friends. Subsequently, in 1941, pursuant to the granting of the defendant's request, the defendant's name was entered in place of that of John Alexander in the assessment book covering the period 1940-1942. The appraised value of the land was stated therein as \$60. At some time after the letter from Mr. Gaskin for the Public Trustee was received the appraised value was reduced to one half of \$60, that is to \$30, and the property in the name of the defendant was described as the west half of the north half of lot 16 (at p. 51 of the assessment book). The defendant thereafter without any pro-

test paid rates levied upon the property described as the west half of the north half of lot 16, section B, upon appraised value of \$30. One Barry who resided in a house upon the west half of lot 16, section B, was assessed in relation to the house described in the assessment book for period 1940-1942 as being situate on the south half of the west half and rates levied thereon were paid by Barry.

In 1943 the land assessed in the name of the defendant Austin as the owner was levied upon by the local authority for non-payment of the rates. This was done at the defendant's request as he wished to get a judicial sale transport therefor. The sale at execution pursuant to the levy was duly advertised in the Official Gazette of the 20th and 27th days of March, 1943, and of the 3rd April, 1943. The defendant bought in the aforesaid land at the ensuing execution sale for \$5.18 and obtained a judicial sale transport No. 650 of 1943 in respect of the west half of the north half of lot 16, section B.

Barry has been residing on a portion of the west half of lot 16, section B, even since before J. B. Alexander died. He paid rent to J. B. Alexander for his occupation of that portion and after J. B. Alexander's death he would pay the rent to any member of the Alexander family who came to collect it. In 1959 Barry paid the rent to one George Adams who collected the rent on behalf of the plaintiff who claims to have purchased one undivided half part or share in the land in 1958. Barry is in occupation of a portion measuring 136 feet (from east to west) by 44 feet (at western end) and 47 feet (at eastern end). Barry has been in occupation of that portion without objection on the part of the defendant until the dispute between the plaintiff and the defendant commenced subsequent to the purchase of one undivided half part or share in the west half of lot 16, section B, in 1958 by the plaintiff.

After the sale by the Public Trustee in 1939 the plaintiff was unable to obtain transport of the several interests in the immovable property of the deceased he had purchased for the Public Trustee was unable to trace the deeds of title therefor. The plaintiff himself assisted in the search among the records of the Deeds Registry in that regard. Between 1956 and 1957 his efforts were rewarded and he was able to discover transport No. 646 of the 7th December, 1901, and report his discovery to the Public Trustee. By that transport it was ascertained that J. B. Alexander had owned the entire interest and not only one undivided half share or part in the properties specified in the advertisement in the Gazettes of the 4th and 11th days of February, 1939. One of the properties specified in the 1901 transport is the west half of lot number 16, section B, Two Friends. Certain other property of the deceased was discovered to have been held by him under letters of decree No. 24 dated 28th March, 1899.

The plaintiff thereafter sought by way of summons dated 26th November, 1957, to obtain an order that the Public Trustee in his capacity as administrator of the estate of John Benjamin Alexander, deceased, convey to the plaintiff the full property as disclosed and described in letters of decree No. 24 dated 28th March, 1899, and

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transport No. 646 dated 7th December, 1901. Affidavits sworn by the plaintiff and by the trust officer, Public Trustee's Department, in support of the application were filed.

When that application came before the judge in chambers it was directed that an affidavit of valuation of the properties be obtained and that a report by the Public Trustee be filed as to the outstanding creditors of the deceased's estate. Thereafter it was ordered that upon the payment by the applicant of the sum of \$360 the Public Trustee as administering the estate of the deceased do convey to the applicant the property as described in the schedule attached to the order made on the 9th August, 1958. Thereafter transport No. 2063 of 1958 was duly passed therefor to the applicant (plaintiff).

In respect of certain property sold by the Public Trustee at public auction in 1939 to the plaintiff there was purported to be sold one half undivided part or share whereas the deceased was the owner of one undivided third parts or shares of and in those properties.

The defendant has alleged that the order made on the 9th August, 1958, was obtained and carried out by misrepresentation by the plaintiff and his servants and agents, such misrepresentation being to the effect that the plaintiff was entitled to the west half of lot 16, section B, Two Friends, and also by suppression of material facts.

A perusal of the applicant's affidavit and of the schedule to the order dated 9th August, 1958, shows that the judge in chambers was in no way misled in respect of the extent of the interest in the west half of lot 16, section B, the applicant sought to have conveyed to him—it being quite clear that the judge in chambers ordered that in respect of the west half of lot 16, section B, only one undivided half share or part therein be conveyed to the applicant. It is true that the defendant was not made a party to the application nor was he served with a copy of the application. But he was in no way prejudiced thereby. I am unable to find any substance in any of the allegations made by the defendant in seeking to impugn the validity of the order of the 9th August, 1958.

The plaintiff thereafter obtained transport No. 2063 dated the 29th December, 1958, for the properties mentioned therein which includes one undivided half part or share in the west half of lot 16, Section B, Two Friends. Upon obtaining this transport the plaintiff made application to the local authority to have his name recorded in the assessment book as owner of one undivided half part or share in the west half of lot 16, section B. That application was granted and the local authority recorded the plaintiff to be the owner of the west half of the south half of lot 16, section B. The rates levied thereon for the year 1957 were paid by the plaintiff on the 23rd May, 1959. In 1959 the plaintiff agreed to sell Barry his interest in the half lot and in the course of preparation of the papers for the conveyance to Barry the conflict in the descriptions contained in the plaintiff's transport and the defendant's transport became apparent. The plaintiff

then spoke to the defendant about this conflict in their titles. The defendant declined to concede that he held no interest in the west half of the south half of lot 16, section B. Previous to this the defendant had since 1958 been aware that the plaintiff had obtained title for an undivided half share in the west half of lot 16. He had been present at a meeting of the local authority in 1958 in his capacity as a councillor when the plaintiff's communication to the local authority notifying the local authority that he had become owner by transport of one undivided half share in the west half of lot 16 was read out. In that communication the plaintiff asked that his name be entered in the assessment book as owner of one undivided half share in the west half of lot 16. The defendant said that he spoke with someone at the Public Trustee's Office about this but he has admitted that he never took any action by way of objection thereto until the year 1963—some four years later when he consulted solicitor. The defendant has been a member of the local authority from 1957 until the present time.

I am satisfied upon the evidence of the plaintiff which I accept—and it is reinforced by that given by Hammond of the Public Trustee's Office—that only an undivided half part or share in certain of the deceased's property was sold at public auction in 1939, including one undivided half part or share in the west half of lot 16, Section B. The receipt issued to the defendant as indeed that issued to the plaintiff for payment of the balance of the purchase price erroneously described the property sold by omitting to state the true extent of the respective interests sold. This was discovered by the Public Trustee and an officer of the Public Trustee Department, Mr. Gaskin, sought to get the local authority to correct the error in the assessment book of the local authority following therefrom in respect of the property stated therein to have been purchased by the defendant. In endeavouring to rectify the error the local authority fell also into error by misdescribing the defendant's interest as the west half of the north half of lot 16, Section B whereas it was an undivided half part or share in the west half of lot 16, Section B. The remaining half share should have been assessed in the name of the estate of J. B. Alexander. The provisions of s. 123(1) of the Local Government Ordinance. Cap. 84 (Major Edition) then in force authorised the assessment of the entire lot with apportionment of the rate where the lot is lawfully subdivided. By s. 123(1) of that Ordinance each person having an undivided interest shall be liable for payment of the whole rate levied but by s. 123(2) one co-proprietor who paid the whole rate had a right of contribution from the other co-proprietors.

It is clear that in the instant case the local authority was in error in assessing separately a portion of undivided lands describing it as a specific entity—the west half of the north half of lot 16, Section B. The assessment, the rate levied, the levy made for nonpayment of the rate levied and the subsequent sale at execution were all unauthorised by law and are of no effect. The judicial sale transport issued the defendant for the west half of the north half of lot 16, Section B is therefore null and void. A judicial sale transport gives full, absolute and indefeasible title only if the transport has been

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lawfully obtained. See *Baynes v. Prince*, 1949 L.R.B.G. 99; *Codgett v. Thomas*, 1957 L.R.B.G. 181, at p. 182. In *Heerall v. Shivcharran*, (1958), 1 W.I.R. 28, the Federal Supreme Court pointed out that the procedure leading up to levy and sale must be strictly followed.

In so far as the defendant's occupation is concerned when he purchased one undivided half part or share of and in the west half of lot 16, Section B, Two Friends, at public auction in 1939 Barry, as tenant of the estate of J. B. Alexander deceased, was already in occupation of a portion of the half lot. Although the defendant thereafter went into physical occupation of a portion greater than the mathematical half he did so as the owner of one undivided half part or share in the half lot. There is no question of ouster, the possession of one co-owner being in law the possession of the other co-owner. *Corea v. Appuhamy*, [1912] A.C. 230. The error of the local authority in describing the share of the defendant in its assessment book and the subsequent levy, sale at execution and issue of judicial sale transport for a specific portion of the half lot cannot affect the position of the other co-owner.

In the result the plaintiff will get —

- (a) a declaration that by virtue of transport No. 2063 of 1958 the plaintiff is the owner of one undivided half part or share in the west half of lot 16, section B, Two Friends;
- (b) a declaration that the defendant is the owner of one undivided half part or share only in the aforesaid property;
- (c) a declaration that the sale at execution of the north half of the west half of lot 16, section B, Two Friends was unlawful;
- (d) an order that the aforesaid sale and judicial sale transport No. 650 dated 19th May, 1943, issued in pursuance thereof be set aside;
- (e) costs against the defendant to be taxed certified fit for counsel.

Judgment for the plaintiff.

Solicitors: *M. E. Clarke* (for the plaintiff).

R. v. MAGISTRATE, EAST DEMERARA JUDICIAL DISTRICT,
EX PARTE DIRECTOR OF PUBLIC PROSECUTIONS

[In the Full Court (Luckhoo, C.J., Crane and Van Sertima, JJ.) December 23, 1964, January 9, February 12, 1965]

Criminal law—Preliminary inquiry—Accused discharged, at close of case for prosecution—Direction by D.P.P. that magistrate should re-open proceedings and commit the accused for trial—Validity of direction—Criminal Law (Procedure) Ordinance, Cap. 11, ss. 65, 69 and 72.

Mandamus—Application under s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, for order compelling magistrate to perform duty under Criminal Law (Procedure) Ordinance, Cap. 11—Whether applications under s. 37 of Cap. 17 limited to summary jurisdiction matters.

With respect to the holding of preliminary inquiries into indictable offences s. 65(1) of the Criminal Law (Procedure) Ordinance, Cap. 11, provides that "after the examination of the witnesses called on the part of the prosecution has been completed.....the magistrate shall, unless he discharges the accused person," give him an opportunity to say anything he wishes in answer to the charge. Thereafter, under s. 66 the accused may call witnesses. Section 69 provides that "when all the witnesses on the part of the prosecutor and of the accused person, if any, have been heard, the magistrate shall, if, upon the whole of the evidence, he is of the opinion that no sufficient case is made out to put the accused person upon his trial for any indictable offence, discharge him....." Section 71 provides that "if, upon the whole of the evidence, the magistrate is of opinion that a sufficient case is made out to put the accused person upon his trial for any indictable offence he shall . . . commit him for trial . . ." Section 72(1) provides that "in any case where the magistrate discharges an accused person, (the Director of Public Prosecutions) may require the magistrate to send to him the depositions taken in the cause . . ." Subsection 2 provides that "if, after the receipt of those documents (the Director of Public Prosecutions) is of opinion that the accused person should have been committed for trial, (the Director of Public Prosecutions) may, if he thinks fit, remit them to the magistrate, with directions to deal with the matter accordingly, and with any other directions he thinks proper."

At the close of the ease for the prosecution in a preliminary inquiry into a charge for murder the accused was discharged by the respondent magistrate. Purporting to act under the provisions of s. 72(2) the Director of Public Prosecutions then directed the magistrate in writing to re-open the proceedings and to commit the accused for trial. The magistrate having refused to comply with the directions, the Director applied by motion for an order calling upon the magistrate to show cause why he should not comply with the directions. The application was made under s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, pertaining to the refusal of a magistrate "to do any act relating to the duties of his office."

For the accused it was contended *in limine* that the reference in s. 37 of Cap. 17 to "the duties of his office" was restricted to the duties of a magistrate relating to summary jurisdiction matters only and did not therefore authorise the bringing of a motion of this kind. For the Director of Public Prosecutions and the magistrate it was contended in reply that the expression embraced all the duties of the office of a magistrate, including those relating to indictable matters.

On the merits it was contended for the accused that where an accused person has been discharged by the magistrate at the close of the case for the prosecution it is not competent for the Director of Public Prosecutions to give any directions whatsoever under s. 72(2) of Cap. 11. For the magistrate it was argued that the Director could give directions in such a case,

EX PARTE D.P.P.

but not directions to commit since the result would be to deny an accused person his ordinary right to an opportunity to be heard; that the proper direction should be to re-open and continue the preliminary inquiry on the basis that a *prima facie* case had been disclosed by the evidence for the prosecution, that if having then been given an opportunity to be heard the accused was ultimately discharged in circumstances in which the Director of Public Prosecutions was of opinion that he should have been committed, the Director could at this stage direct a committal. For the Director it was contended that the magistrate was bound to carry out his directions to commit even though the accused would in consequence be denied an opportunity to be heard.

Held: (i) section 72(1) of Cap. 11 is wide enough to enable the Director of Public Prosecutions to call for the depositions in any case where an accused person has been discharged, whether under s. 65(1) or under s. 69;

(ii) but in the circumstances of the instant case the magistrate could not have committed the accused person until due compliance had been made with the provisions of ss. 65 and 66 of Cap. 11. The Director of Public Prosecutions in turn could not therefore have formed the "opinion that the accused person should have been committed for trial" within the meaning of s. 72(2) and in the result it was not competent for him to give the magistrate any directions at all in pursuance of the provisions of that subsection;

(iii) the power of the Director of Public Prosecutions under s. 72(2) are restricted to the giving of directions to magistrates after a discharge under s. 69 and do not extend to a case where a discharge has been ordered under s. 65;

(iv) the directions given by the Director of Public Prosecutions were therefore *ultra vires*.

Motion dismissed.

J. C. Gonsalves-Sabola, Senior Crown Counsel (ag.), with *C. Massiah*, Crown Counsel, for the Director of Public Prosecutions.

M. Shahabuddeen, Solicitor-General, for the magistrate.

C. Lloyd Luckhoo, Q.C., with *J.O. F. Haynes, Q.C.*, *L. A. Luckhoo, Q.C.*, and *E. V. Luckhoo, Q.C.*, for the accused.

LUCKHOO, C J.: This is a motion on the part of the Director of Public Prosecutions brought under the provisions of s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, for an order that Mr. I. O. Churaman, a magistrate for the East Demerara Judicial District, be called upon to show cause why he should not reopen the proceedings in relation to the preliminary inquiry into a charge of murder laid against one Ahmad Hussain and commit Ahmad Hussain for trial at the January sessions of the Supreme Court in its criminal jurisdiction for the county of Demerara for the offence for which the said Ahmad Hussain was charged. A further order is sought that Ahmad Hussain be called upon to show cause why the magistrate should not reopen the proceedings and commit him for trial on the charge laid against him.

The documents filed in support of the motion disclose that on the 4th August, 1964, Ahmad Hussain was charged together with certain other persons for murdering one Joseph Porter, contrary to s. 100 of the Criminal Law (Offences) Ordinance, Cap. 10. The preliminary inquiry into that charge was held before Mr. I. O. Chura-

man, a magistrate of the judicial district in which the alleged crime occurred and on the 1st October, 1964, the magistrate upheld a submission made by counsel for the accused persons at the close of the evidence for the prosecution that no *prima facie* case had been made out against any of the accused persons, and thereupon discharged the accused persons, purporting to act in that regard in accordance with the provisions of s. 65(1) of the Criminal Law (Procedure) Ordinance, Cap. 11. On the 2nd October, 1964, the Director of Public Prosecutions acting in pursuance of the powers conferred upon him by the provisions of s. 72(1) of the Criminal Law (Procedure) Ordinance, Cap. 11, requested the magistrate to send him a copy of the depositions taken at the preliminary inquiry and on the 3rd October, 1964, the magistrate duly forwarded a copy of the depositions to the Director of Public Prosecutions.

On the 16th October, 1964, the Director of Public Prosecutions purporting to act in pursuance of the powers conferred upon him by s. 72 of the Criminal Law (Procedure) Ordinance, Cap. 11 sent the magistrate the following written communication:

"D.P.P. 12/1¹¹

"B"

16th October, 1964.

Sir,

The Queen v. Samuel Babwah et al

In pursuance of the powers conferred upon me by section 72 of the Criminal Law (Procedure) Ordinance, Chapter 11, I hereby refer back to you the case of the *Queen v. Samuel Babwah and others* and direct that you re-open the proceedings and commit Samuel Babwah, Ahmad Hussain, Sasenarine, Cyril Dasrat, Janki Persaud, Dhanbeer and Jagit Narine for trial at the January Sessions of the Supreme Court in its Criminal Jurisdiction for the County of Demerara for the offence for which they were charged.

I have the honour to be,
Sir,

Your obedient servant,
(Sgd.) E. A. ROMAO,
Acting Director of Public Prosecutions.

I. Churaman, Esq.,
Magistrate,
East Demerara Judicial District."

On the 3rd November, 1964, Ahmad Hussain and the other accused persons named in the above mentioned communication were taken before the magistrate in accordance with the direction contained in that communication. Thereupon, counsel for the accused persons submitted that the direction contained in that communication was a nullity in that it was not competent in the circumstances of the matter for the Director of Public Prosecutions to direct the magistrate to reopen the preliminary inquiry and to commit the

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accused persons for trial on the charge laid. Counsel for the accused referred to the recent decision of CHUNG, J., in *R. v. Harry Lall*, 1964 L.R.B.G. 455, who in quashing an indictment laid against the accused Harry Lall held that it was not competent for the Director of Public Prosecutions to give such a direction where an accused person had been discharged by a magistrate at the end of the case for the prosecution at a preliminary inquiry into an indictable charge. The magistrate held that he was bound by the decision of CHUNG, J., in *R. v. Harry Lall* and refused to give effect to the direction of the Director of Public Prosecutions.

The argument at the hearing of this motion, apart from an objection *in limine* taken on behalf of the accused in respect of the procedure adopted by the Director of Public Prosecutions, centred around the proper construction to be put upon the provisions of s. 72(2) of the Criminal Law (Procedure) Ordinance, Cap. 11. A further point on the part of the magistrate that the evidence taken at the preliminary inquiry disclosed no grounds upon which Ahmad Hussain could have been committed and therefore no grounds upon which the Director of Public Prosecutions could have formed the opinion that Ahmad Hussain should have been committed for trial, was not pressed at the hearing of this motion, counsel for the magistrate being desirous of having a ruling on the construction to be put upon the provisions of s. 72(2) of the above mentioned Ordinance.

It will be convenient first of all to deal with the submission *in limine* made by counsel for the accused Mr. C. Lloyd Luckhoo, Q.C. Counsel submitted that it was not competent for this motion to be brought under s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17:

"37. (1) Wherever a magistrate or a justice of the peace refuses to do any act relating to the duties of his office, the person requiring the act to be done may apply to the Court on motion supported by affidavit of the facts for an order calling upon the magistrate or justice, and also upon the person to be affected by the act, to show cause why the act should not be done.

(2) If, after proof of due service of the order, good cause is not shown against it, the Court may make it absolute and the magistrate or justice, upon being served with the order absolute, shall obey it, and do the act required, and the costs of the proceedings shall be in the discretion of the Court.

(3) No action or proceeding whatever shall be commenced or prosecuted against the magistrate or justice for having obeyed the order and done the act thereby required.

(4) Nothing in this section shall be construed to be in derogation of the powers conferred by the last preceding section."

Counsel contended that the provisions of that section were referable only to matters concerning the exercise of the functions of a magis-

trate with reference to the Summary Jurisdiction (Appeals) Ordinance and that by relation it applies to the Summary Jurisdiction (Offences) Ordinance, Cap. 14, the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16 and to other summary jurisdiction provisions. Counsel further contended that the magistrate in the instant case was not exercising any jurisdiction in relation to summary jurisdiction offences.

Tracing the history of the enactment of the provisions of s. 37, the Solicitor General observed that the provisions of that section first appeared in the laws of this country as s. 5 of the Justices Protection Ordinance, 1850 (No. 35 of 1850) which was apparently modelled on the Justices Protection Act, 1848, of the United Kingdom. In 1893 that section was repealed by the Consolidated Enactments (Courts of Justice, etc) Repeal Ordinance, 1893 (No. 25) but its provisions were re-enacted as s. 45 of the Magistrates' Decisions (Appeals) Ordinance, 1893 (No. 16), an Ordinance to amend and consolidate the law relating to appeals to the Supreme Court from the adjudications and decisions of the magistrates' courts. Except for modification in language the provisions of s. 45 of the 1893 Ordinance are in substance those of s. 5 of the 1850 enactment. Under the 1893 Ordinance appeals from magistrates were heard by a single judge of the Supreme Court and there was a further appeal to the Full Court from the decision of a single judge, with his leave, on a question of law. Applications under s. 45 of the Ordinance were heard by a judge of the Supreme Court and not by the Full or Appeal Court. This continued to be so until 1922 when appeals from decisions of magistrates to single judges of the Supreme Court were abolished by s. 16 of the Appeals Regulation Ordinance, 1922 (No. 33) and thenceforth all appeals from decisions of magistrates were cognizable by the Full Court of the Supreme Court, which includes any court at any time empowered by Ordinance to hear and determine appeals from decisions of magistrates. The provisions of s. 45 of the Magistrates' Decisions (Appeals) Ordinance, 1893 (No. 16) except for minor alterations not relating to matters of substance appeared as s. 37 of the 1929 Ordinance (now as s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17) and applications thereunder were no longer to be made to a single judge but were and still are to be made to the Full Court.

There is nothing in the provisions of s. 5 of the 1850 Ordinance which restricts their operation to acts required to be done in respect of summary jurisdiction matters. Those provisions included also acts required to be done in connection with a magistrate's jurisdiction in respect of indictable offences. The transfer of the provisions of s. 5 of the 1850 Ordinance to the Magistrate's Decisions (Appeals) Ordinance, 1893 (No. 16) did not alter the ambit of those provisions. It was perhaps considered that such provisions would more appropriately appear along with those relating to the applications, whether by way of appeal or otherwise, to correct what were alleged to be errors made on the part of magistrates in the exercise of the duties of their office as magistrates.

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There are several reported cases where in relation to indictable offences English Courts have held that a rule under s. 5 of the Act of 1848 would go.

In *R. v. Fawcett* (1868), 11 Cox C.C. 305, where cause was shown against a rule calling upon the justices of Durham to show cause why a mandamus should not issue commanding them to hear and determine an information and complaint by one Hodson against one Helen Mitchenson for wilful and corrupt perjury, an indictable offence, it was held that if the justices have heard and determined the application for a summons for an indictable offence, and, on the merits they have declined to grant it, the court would not grant a mandamus to compel them to review their decision but if they have refused to hear the application, or if, after hearing, they have refused to grant it from a mistaken view of their duty amounting to a declining of jurisdiction, mandamus would be granted. See also *R. v. Adamson* (1875), 45 L.J.M.C. 46, and *Ex p. Wason* (1869), L.R. 4 Q.B. 573, referred to in *Ex p. Lewis* (1888), 16 Cox C.C. 449.

For these reasons I think that the submission *in limine* made by counsel for the accused Ahmad Hussain is not well founded and should be overruled.

Turning now to the merits of the application it will be necessary to refer to the procedure prescribed by the Criminal Law (Procedure) Ordinance, Cap. 11 in relation to proceedings on the appearance of an accused person before a magistrate holding a preliminary inquiry. Section 64 of the Ordinance requires the magistrate to take in writing in the form of depositions evidence of the witnesses on the part of the prosecutor in the presence of the accused person who shall be entitled to cross-examine them. The manner in which the depositions are required to be authenticated is also prescribed by this section. Sections 65 and 66 have been the subject of much comment on the hearing of this application and are therefore set out in full:

"65. (1) After the examination of the witnesses called on the part of the prosecutor has been completed, and after the depositions have been signed as aforesaid, the magistrate shall, unless he discharges the accused person, address him in these words, or to the like effect:—

'Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial.'

"(2) Whatever the accused person then says in answer thereto shall be taken down in writing, as nearly as possible in the accused person's own words, and shall be signed by the accused person, if he will, and by the magistrate, and kept with the depositions of the witnesses and dealt with as hereinafter mentioned.

66. (1) After the proceedings required by the preceding section are completed, the magistrate shall ask the accused person if he wishes to call any witnesses.

(2) Every witness called by the accused person who testifies to any fact relevant to the case shall be heard, and his deposition shall be taken, signed, and authenticated in the same manner as the deposition of a witness for the prosecution.'

Thereafter follow provisions dealing with the marking of exhibits (s. 67) and the taking of the deposition of a witness not able to attend through illness (s. 68). Provision is made s. 62 for the magistrate in his discretion to receive further evidence on the part of the prosecutor, after hearing any evidence given on behalf of the accused person. Certain other discretionary powers in the magistrate (not germane to the points argued in this application) appear at s. 62. Section 63 relates to the restriction on publication of reports of preliminary inquiries. Sections 62 to 68 inclusive, all appear under the heading "*Proceedings at Preliminary inquiry.*" Sections 69 and 70 appear under the heading "Discharge." Section 69 provides as follows:

"69 When all the witnesses on the part of the prosecutor and of the accused person, if any, have been heard, the magistrate shall, if, upon the whole of the evidence, he is of opinion that no sufficient case is made out to put the accused person upon his trial for any indictable offence, discharge him; and in that case any recognisance taken in respect of the charge shall become void."

Section 70 relates to the power in the magistrate to award costs and expenses of frivolous or vexatious complaints or information. Then follows ss. 71 to 74 inclusive under the heading "*Committal for trial.*" Sections 3 (copy of depositions for accused persons) and 74 (binding over to give evidence) need not be set out. Sections 71 and 72 are as follows:

"71. If, upon the whole of the evidence, the magistrate is of opinion that a sufficient case is made out to put the accused person upon his trial for any indictable offence he shall, subject to the provisions of section 9 of this Ordinance, commit him for trial to the next practicable sitting of the court for the county in which the inquiry is held.

72. (1) In any case where the magistrate discharges an accused person, the Attorney General may require the magistrate to send to him the depositions taken in the cause or a copy thereof, and any other documents or things connected with the cause which he thinks fit.

(2) If, after the receipt of those documents and things, the Attorney General is of opinion that the accused person should have been committed for trial, the Attorney General may, if he thinks fit, remit them to the magistrate, with directions to deal with the matter accordingly, and with any other directions he thinks proper.

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(3) Any directions given by the Attorney General under this section shall be in writing signed by him, and shall be followed by the magistrate, who shall have all necessary power for that purpose.

(4) The Attorney General may at any time add to, alter, or revoke any of his directions."

As has already been stated the learned magistrate Mr. I. O. Churaman refused to give effect to the direction by the Director of Public Prosecutions in his communication to the magistrate dated 16th October, 1964, as he considered that he was bound by the decision of CHUNG J, in *R. v. Harry Lall*. Harry Lall had been charged indictably with the offence of sedition. At the conclusion of the evidence given on the part of the prosecutor in the magistrate's court, and before the magistrate had complied with ss. 65 and 66 of the Ordinance, counsel for the accused made certain submissions. The magistrate agreed with the submissions and discharged Harry Lall. The Director of Public Prosecutions thereafter remitted the case to the magistrate with a direction that the matter be re-opened and that Harry Lall be committed for trial at the October Sessions of the Supreme Court in its criminal jurisdiction. In pursuance of that direction, the magistrate re-opened the inquiry and after informing Harry Lall of the direction he had received from the Director of Public Prosecutions, asked Harry Lall if he had anything to say.

Harry Lall, on the advice of counsel, replied that he had nothing to say. Harry Lall was then committed for trial and an indictment for sedition was presented against him. Counsel for Harry Lall moved to quash the indictment on the ground that the Director of Public Prosecutions had no jurisdiction to remit the case to the magistrate with a direction to commit Harry Lall and that all proceedings subsequent to the date of discharge by the magistrate were a nullity. Counsel further submitted that even if the Director of Public Prosecutions had jurisdiction, the magistrate did not enquire of Harry Lall if he wished to call any witnesses as was required by s. 66(1) of the Ordinance. Counsel contended that s. 72 only empowers the Director of Public Prosecutions to remit a case for committal when all the evidence has been heard and the magistrate has discharged the accused person under s. 69. Counsel further contended that where an accused person is discharged without the provisions of s. 65(1) being complied with the Director of Public Prosecutions has no jurisdiction to remit the case to the magistrate for committal. For the Crown it was submitted that the Director of Public Prosecutions did have jurisdiction to give such directions whether the discharge took place at the end of the evidence of the witnesses for the prosecutor or at the end of all of the evidence and that the words "should have been committed for trial" appearing in s. 72(2) of the Ordinance show that the Legislature was considering the opinion of the Director of Public Prosecutions as to the accused person being committed for trial rather than a correction of the magistrate for discharging the accused person. Counsel for the Crown also urged that the Director was empowered by s. 72(2) to direct the magistrate to commit an

accused person for trial without even directing the magistrate to observe the procedure set out in ss. 65 and 66.

CHUNG J., after reviewing the arguments of counsel for Harry Lall and of counsel for the Crown Came to the conclusion that the Director of Public Prosecutions was without jurisdiction when he remitted the case to the magistrate for committal, that all subsequent acts of the magistrate were a nullity and that the committal was unlawful. He therefore quashed the indictment. CHUNG, J., summarised his views as follows [1964 L.R.B.G. 460] :

"Under the title '*4. Proceedings on Appearance of Accused Person*', s. 69 comes immediately under the heading 'Discharge'; s. 71 comes immediately under the heading 'Committed for Trial', and s. 72 comes immediately after s. 71 and under the same heading 'Committed for Trial'. It may reasonably be argued that when the Legislature used the words 'in any case where the magistrate discharges etc' in s. 72, the Legislature were only referring to discharge under s. 69 under the heading 'Discharge', and that the words '*unless he discharges the accused person*' in s. 65(1) only creep in as an exception to the procedure to be followed at a preliminary enquiry, and where it is so manifestly apparent that there is no case for the accused person to answer.

It seems therefore that the words 'in any case' in s. 72(1) may or may not be confined to s. 72(1) it would include a discharge under ss. 65(1) and 69, but in the case where it is not confined to section 72(1) then it is qualified by the words '*should have been committed for trial*' in s. 72(2). Whichever construction it is given, the words 'should have been committed for trial' in s. 72(2) limit the powers of the Director of Public Prosecutions to those cases where an accused person was discharged under s. 69, when the magistrate after hearing *the whole evidence* uses his judicial discretion and discharges the accused, that is, after hearing the evidence for the prosecution and the evidence led by the accused, or if no evidence is led by the accused, then after hearing the evidence for the prosecution and after the statutory provisions of ss. 65(1) and 66(1) have been complied with. As I said before, I cannot imagine the Legislature giving the accused person certain statutory rights and also giving the magistrate a judicial discretion and in the same breath taking away those rights and discretion.

In the circumstances, I find the Director of Public Prosecutions was without jurisdiction when he remitted the case to the magistrate for committal, all subsequent acts of the magistrate were a nullity, and the committal was unlawful."

Shortly after CHUNG, J.'s ruling in *R. v. Harry Lall* had been given there came before KHAN, J., the indictment in *R. v. Balkarran Singh* (Indictment No. 16977). (See 1964 L.R.B.G. 464) Counsel who had appeared for the accused in *R. v. Harry Lall* now appeared (with other counsel) for the accused persons Balkarran Singh *et al.* As in

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Harry Lall's case, the accused persons had been discharged at the conclusion of the evidence for the prosecutor and before the magistrate had complied with ss. 65(1) and 66(1) of the Ordinance. The Director of Public Prosecutions thereupon purporting to act in pursuance of the powers conferred upon him by s. 72 of the Ordinance gave a direction in terms similar to those contained in the direction given in *Harry Lall's* case and in the instant case. The magistrate purporting to act in compliance with the direction of the Director of Public Prosecutions re-opened the inquiry and after reading the statutory caution to each of the accused persons, recorded what they said. The magistrate did not ask or invite any of the accused persons to give evidence or to call witnesses.

The accused persons were indicted for murder and on motion to quash the indictment it was submitted on their behalf as is set out in the judgment of KHAN, J., at pp. 3 to 5 inclusive [1964 L.R.B.G. 466,467]:

- (a) That the D.P.P. had no jurisdiction to remit the case to the magistrate for committal, where the magistrate had discharged the accused at the close of the case for the prosecution—on a no-case submission or on his own motion before the caution was given as is provided under s. 65(1) of Cap. 11.
- (b) That s. 72 of Cap. 11, under which the D.P.P. purported to act only empowers the D.P.P. to remit a case to the magistrate for committal for trial after *all* the witnesses on the part of the prosecution *and* of the accused, if any, have been heard as is provided under s. 69 of Cap. 11,—that is,—*the whole procedure to committal stage must be observed*.
- (c) That the words '*If upon the whole of the evidence*' in ss. 69 and 71 mean the case for the prosecution and for the defence, and it is only where the '*whole of the evidence*' is completed as is envisaged in s. 69, *and* the magistrate in his discretion discharges the accused that the D.P.P. can remit for committal for trial, because, *that* is the only stage when the magistrate can decide whether to commit or discharge.
- (d) That s. 71 clearly provides that it is only at *that* stage '*if upon the whole of the evidence*' the magistrate is of opinion that a sufficient case is made out to put the accused person upon his trial he shall commit him for trial, and that is the only stage of the proceedings when the magistrate is empowered to commit for trial.
- (e) That the words '*should have been committed for trial*' in s. 72(2) refers to that stage of the proceedings when the magistrate has to decide whether he would commit or discharge the accused, but not to a case where the accused was discharged at the close of the prosecution's case as is envisaged under s. 65(1).

- (f) That where an accused person is discharged at the close of the prosecution's case, the D.P.P. has no power to remit the case to the magistrate for committal, but he may under the provisions of s. 72(1) require the magistrate to send to him the depositions taken in the cause or a copy thereof and any other documents or things connected with the case which he thinks fit, and in such a case the D.P.P. may order fresh proceedings to be filed. But he cannot commit for trial under s. 72(2) because the words '*should have been committed for trial*' restricts the powers of the D.P.P. to remit for committal only where the magistrate could have committed and that is where the magistrate had discharged the accused person under s. 69.
- (g) That the discharge of the 22 accused persons was under s. 65(1) before '*the whole of the evidence*' was concluded, and at *that* stage of the proceedings the magistrate could not have committed. The powers conferred on the D.P.P. by s. 72(2) of Cap. 11 cannot be exercised in the present case, and no other power is vested in him to do so.
- (h) That the words '*in any case*' in s. 72(1) must not be read into s. 72(2) because the intention of the Legislature may well be, that where the evidence in a case was so weak at the close of the prosecution's case as to be insufficient to disclose a *prima facie* case no further proceedings should be taken by the D.P.P."

The arguments of counsel for the Crown were in part those addressed to CHUNG, J., by counsel for the Crown in Harry Lall's case and now by Mr. Sabola in the instant case. KHAN, J., after referring to the provisions of the ss. 62 to 72 inclusive stated [1964 L.R.B.G. 471]:

"I construe the words '*in any case*' in s. 72(1) to mean '*in all cases*' where the magistrate discharges an accused person, including a discharge under s. 65(1), *i.e.*, at the end of the prosecution's case. Section 72(2) refers to the same documents referred to in s. 72(1) '*in any case*' where the magistrate discharges an accused person, and empowers the D.P.P. if he thinks fit to remit the said documents etc to the magistrate in any of the cases with directions to deal with the matter as he directs. It is therefore clear that ss. 72(1) and 72(2) are linked together and must by necessary implication be read together. Both sub-ss. (1) and (2) deal with the same subject matter, *i.e.*, documents in cases where the Magistrate discharged the accused. This construction admits no straining. The words '*should have been committed*' in s. 72(2) merely reflects the opinion of the D.P.P. as to what the magistrate should have done at the end of the particular case under review. Where the end of that case was at the end of the prosecution's case that is '*the whole of the evidence in that case*' because it was on that evidence that the magistrate exercised his discretion and discharged the accused. On the other hand, where the end of the case was after a defence

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was led, that is 'the whole of the evidence' in that case. In my view, the words 'the whole of the evidence' do not exclude a case where the accused was discharged at the close of the prosecution's case. The 'whole of the evidence' mean simply 'all the evidence which was taken from the commencement of the case to the time when the case was determined by the magistrate, either by a discharge at any stage or by committal under s. 71'.

It was conceded that the D.P.P. is empowered under s. 72(1) to call for the depositions etc., not only in a case under s. 69 but also under s. 65. If this is so, then *for what purpose is he empowered to call for the depositions in the case under s. 65(1)?* The purpose must be gathered from s. 72 itself; that purpose appears to me to be no other than the same purpose for which the D.P.P. is empowered to call for the depositions etc, in a discharge under s. 69.

Section 72 does not reasonably admit any other construction without absurdity resulting. It was conceded by defence counsel that the whole purpose of s. 72 was to correct the Magistrate when in the opinion of the D.P.P. the magistrate fell into error; this power of correction however, he submitted — did not extend to a case where the magistrate discharged the accused under s. 65(1) *i.e.*, at the close of the prosecution's case. The result of this construction is that, where a magistrate exercises his discretion of discharge under s. 65(1) no one has a right in any such case to review the discharge of the magistrate even where this discharge may be patently wrong or even corrupt. This construction obviously creates an absurd situation which was obviously not the intention of the Legislature. It is an established rule of construction that where the consequence of adopting one of two interpretations would lead to an absurdity, then such interpretation is to be avoided. Whenever the language of the Legislature admits of two constructions and if construed in one way would lead to an injustice the courts act upon the view that such a result could not have been intended unless the intention had been manifested in express words. On this matter LINDLEY, L.J., said:

'You are not so to construe the Act of Parliament as to reduce it to rank absurdity. You are not to attribute to general language used by the Legislature in this case any more than in any other case a meaning which would not carry out its object, but produce consequences which to the ordinary intelligence are absurd. You must give it such a meaning as will carry out its objects.' (*The Duke of Buccleuch*, 15 P.D. 96).

There is also this principle that:

'The presumption against absurdity or the leaning of the court against a construction which would produce one, is only a branch of the larger rule that a statute like a deed, should be construed in a manner to give its validity, rather than invalidity—*ut res magis valeat quam pereat.*' (ODGERS ON THE CONSTRUCTION OF DEEDS AND STATUTES (2nd Edn.,) p. 180).

I have considered the cases cited by learned defence counsel in support of the arguments. The case of *Fraser v. Hill* has no relevance to the issues raised in this case, and I share the view expressed by learned Crown Counsel with reference to the other two cases cited. I find the language of s. 72 clear and unambiguous. 'If words are susceptible of a reasonable and also an unreasonable construction, the former construction must prevail'. That is what Lord COKE calls the *argumentum ab inconveniente*. The result is that I find the arguments on this ground untenable—wrong in principle and in law and without merit. It is therefore my considered and firm opinion that the *D.P.P. has jurisdiction in the present case and in every case where the magistrate discharges an accused person at any stage of the proceedings—and I so rule.*

[It would therefore be seen that I hold the opposite view to that in the *Queen v. Harry Lall* on this issue. I do so with the greatest respect to the learned trial judge.]"

KHAN, J., then proceeded to deal with the alternative submissions of counsel for the accused persons that even if the Director of Public Prosecutions had jurisdiction in that case to give directions under s. 72(2) of the Ordinance, he had no power in law to give the direction he did give but that the proper direction would have been that the magistrate should reopen the proceedings, take evidence (if any) for the defence and continue the proceedings according to law. In the judgment of KHAN, J., at pp. 3 to 5 inclusive [1964 L.R.B.G.

"It is true that the object of a preliminary inquiry is *not* to determine the guilt or innocence of the accused, but to enquire whether the accused ought or ought not to be committed for trial. *R. v. Carden* (1879), 5 Q.B.D., *per* COCKBURN, C.J., (*Cox v. Coleridge*) and see EVIDENCE IN CRIMINAL CASES BY SHAW., p. 161—2.

"A preliminary inquiry into an indictable offence is nevertheless a judicial proceeding which may terminate with the discharge or commitment of the accused. This involves the exercise of a judicial discretion by the Magistrate after considering the evidence before him. Whatever is the result it will involve the liberty of the subject. The procedure of such proceedings is governed by statutory provisions to ensure that the rules of natural justice are observed.

Acts and directions which are *prima facie* lawful may be invalidated if they are done by a wrong procedure. The exercise of a quasi-judicial power or judicial discretion in abuse of the rules of natural justice is tantamount to a failure to exercise it at all.

A discretionary power should not mean arbitrary power. It is true that what is authorised by law cannot be illegal even though it may be contrary to the rule of law. Section 97 of Cap. 25—is an example of this. I have examined the powers of the D.P.P. as contained in s. 72 and I find no provision therein

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whereby the D.P.P. is empowered to curtail the procedure in a case arising under s. 65(1) or to deprive an accused person of the statutory benefit of s. 66(1). It is an elementary principle of justice that no accused person ought to have his case committed for trial without being afforded an opportunity of not *only* heaping the case which he has to *meet*, but *also* of stating his own case if he so desires. (See SHAW'S EVIDENCE IN CRIMINAL CASES, pp. 161-162).

The preliminary inquiry into an indictable offence is a judicial inquiry to determine whether there is a sufficient *prima facie* case to commit the accused. If the judicial discretion of the magistrate in such an inquiry is to be taken away at all, it must be done by clear and express language as is seen in s. 97 or Cap. 25 [in the case of perjury committed before a judge.] Where there are no such clear and enabling language, the substantial requirements of justice should not be violated.

The courts will not interfere merely because an irregularity has occurred but only if there is a departure from natural justice which goes to the root of the matter and renders the inquiry a nullity.

A magistrate is bound in every preliminary inquiry into an indictable offence to comply with the provisions of s. 65 and s. 66 before the committal of an accused person. Where there is noncompliance, the committal is bad. The direction which the D.P.P. gave to the magistrate is in my view quite appropriate for a case where the procedure was completed and the magistrate had discharged the accused under s. 69.

Where, however, the magistrate discharged the accused under s. 65(1) as is the position in this case, the appropriate direction ought to be as Mr. Haynes suggested, *i.e.*, to reopen, take evidence (if any) *and continue the proceedings according to law*. If the magistrate then at the end discharges under s. 69, then the direction to '*reopen and commit for trial*' cannot be challenged."

Before us Mr. Sabola submitted that in any case of discharge of an accused person by a magistrate on a preliminary inquiry into an indictable charge, whether the discharge precedes the giving of the statutory caution prescribed by s. 65 of the Ordinance or takes place upon the whole of the evidence including that, if any, of the defence, it is competent for the Director of Public Prosecutions in pursuance of the powers given him by s. 72 of the Ordinance to direct the magistrate to reopen the proceedings and commit the accused person outright.

Mr. Sabola in referring to the provisions of sub-s. (1) of s. 72 of the Ordinance which empowers the Director of Public Prosecutions to obtain from the magistrate in any case where the magistrate discharges an accused person the depositions taken in the cause or a copy thereof and any other documents or things connected with the cause which the Director thinks fit observed that these provisions

embraced cases where an accused person had been discharged prior to the provisions of ss. 65 and 66 being complied with. He contended that when sub-s. (2) of s. 72 is read with subsection (1) of that section it is evidence that the Director is empowered by subsection (2) to give directions to the magistrate to reopen the inquiry and to commit the accused person even where the accused person was discharged without the provisions of ss. 65 and 66 being complied with. The words "should have been committed" in sub-s. (2) Mr. Sabola urged would in such a case refer to the opinion of the Director on the evidence contained in the depositions and the word "accordingly" in the same subsection relate to the words "should have been committed for trial". Mr. Sabola further urged that it would make nonsense of the provisions of sub-s. (2) of s. 72 and would frustrate the intention of the legislation if it were held as it was by KHAN, J., in quashing the indictment in *R. v. Balkarran Singh* (*ubi supra*) that the magistrate may reopen the inquiry, hear evidence (if any) tendered on behalf of the accused person and then proceed to exercise a judicial discretion. He argued that after the magistrate discharges an accused person at the close of the evidence of the witnesses for the prosecutor the inquiry terminates and the magistrate is *functus officio*. The magistrate has no further powers in relation to that inquiry but the Director of Public Prosecutions can clothe him with powers—not judicial powers but ministerial powers—which do not confer a new discretion in the magistrate to decide whether or not the accused person ought to be committed for trial.

Mr. Sabola in referring to the provisions of sub-s. (3) of s. 72 whereby any directions given by the Director of Public Prosecutions under s. 72 shall be followed by the magistrate "*who shall have all necessary power for that purpose*" urged that these words italicised would be unnecessary if the provisions of ss. 65 and 66 were not excluded where the provisions of sub-s. (2) of s. 72 were invoked. He further urged that no right of an accused person is taken away where the accused person is discharged at the close of the evidence of the witnesses of the prosecutor and then the Director of Public Prosecutions directs the magistrate to commit the accused person for trial. In this connection Mr. Sabola referred to the fact that in England there is no comparable provision to s. 72 of the Criminal Law (Procedure) Ordinance, Cap. 11, and on refusal of justices to commit for trial, the prosecutor may apply to a High Court judge for leave to prefer a bill of indictment against the accused person. It should be observed, however, that where a bill of indictment is preferred with leave of a High Court judge the accused person is not committed to prison or on bail.

The Solicitor General for Mr. Churaman, the magistrate, in the main adopted and relied upon the reasons given by KHAN, J., in *R. v. Balkarran Singh* (*ubi supra*). He urged that having regard to the scheme of the Ordinance the test to be applied as to whether a *prima facie* case had been made out against the accused person is exactly the same whether the accused person is discharged at the close of the evidence of the witnesses for the prosecutor or the

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close of all of the evidence including the evidence for the defence, if any. The magistrate must find that the charge has been made out before he puts the statutory caution prescribed by s. 65 of the Ordinance and the only way the magistrate can exercise his judgment in that regard is for him to assume that on the whole of the evidence the charge has not been made out.

The Solicitor General contended that there is nothing contained in sub-s. (2) of s. 72 whereby the Director of Public Prosecutions is empowered in all cases to give a direction to the magistrate to commit an accused person for trial. He urged that a direction to commit for trial before an opportunity is given the accused person to have the evidence of his witnesses taken and considered by the magistrate does take away a right in the accused person, that right being that the magistrate should have before him the whole of the evidence, including that of the witnesses for the accused person before he forms an opinion as to whether or not a sufficient case is made out to put the accused person upon his trial.

For the accused person Ahmad Hussain it was submitted that the judgment of CHUNG, J., in *R. v. Harry Lall* correctly interprets the provisions of s. 72(2) of the Criminal Law (Offences) Ordinance, Cap. 11. It was contended that the provisions of s. 72(2) should be construed without considering the objects desired to be attained by the provisions of s. 72(1) and that the words "should have been committed for trial" in s. 72(2) can only have reference to the case where the provisions ss. 65 and 66 of the Ordinance have been complied with and the accused person has been discharged by the magistrate after all of the witnesses on the part of the prosecutor and of the accused person, if any, have been heard. Counsel contended that the magistrate's error in discharging an accused person at the close of the evidence of the witnesses on the part of the prosecutor cannot deprive the accused person of what are in fact rights given him ss. 65 and 66. Counsel urged that if it were intended that the Director can lawfully give such a direction as is contended for by counsel for the Director then instead of the words "should have been committed" being used in s. 72(2) the words "should have been discharged" would have been used.

I think that in construing the provisions of s. 72(2) of the Ordinance some assistance is derived from a study of the way in which the law relating to preliminary inquiries into indictable offences has evolved. The Solicitor General was good enough to trace the development of this aspect of the matter from the introduction of the Dutch Criminal Law into British Guiana by the Manner of Proceedings of Philip II of 1570 to the present time. From the Solicitor General's account it would appear that dissatisfaction with that system was voiced in 1815 in correspondence between the Second Fiscal (an official holding office comparable to the office of Attorney General of a later creation) and the Colonial Office. In 1817 the President of the Court of Criminal Justice of Demerara and Essequibo reported on the shortcomings of the Dutch Criminal Law

system, the report being published in 1821. A Commission was set up to enquire into the matter and in 1828 an Imperial Order in Council was made for the prevention of abuse in the criminal justice enabling the President and members of the Court of Criminal Justice to make appropriate rules for regulating criminal procedure. By that Order in Council the Dutch system of Criminal Law was abolished in British Guiana. Pursuant to that Order in Council, on the 12th May, 1829, the President and members of the Court of Criminal Justice made rules. One of those rules required the Fiscal to warn an accused person that he was not obliged to answer any question he may put to him thus providing the first statutory caution. Indictments were for the first time introduced in this country, the Fiscal having to petition the Chief Justice for leave to prosecute before he could file an indictment. In Ordinance No. 27 of 1846 (to be found in the Official Gazette for 1846 at p. 1152), s. 13 retained the caution to be given by the Fiscal and s. 14 provided for committal to the common jail of the accused person until he was brought to trial. The words "unless the prisoner is discharged" did not appear in s. 14 of the Ordinance of 1846.

After the enactment of Ordinance No. 3 of 1847 the Attorney General was no longer required to petition the Chief Justice for leave to prefer an indictment.

Ordinance 29 of 1850 re-enacted the provisions of ss. 13 and 14 of the Ordinance of 1846 and ss. 11 and 17 and prescribed (in s. 11) the wording of the caution which apparently was modelled on that contained in the Indictable Offences Act, 1848.

In both Ordinance 29 of 1850 and the 1848 Act (at ss. 17 and 25 respectively) it was provided that when all the evidence offered upon the part of the prosecution shall have been heard if the Justice or Justices of the Peace then present were of the opinion that it was insufficient to put the accused party upon his trial for any indictable offence the Justices were forthwith to order such accused party to be discharged as to the information then under inquiry. When the 1848 Act and Ordinance 29 of 1850 were enacted an accused party could not himself give evidence on oath or call witnesses in his defence though he might make a statement after the statutory caution was administered after all the evidence offered on the part of the prosecution had been heard. There was no provision until the enactment of Ordinance 26 of 1868 (which is obviously modelled upon that of the Criminal Law (Amendment) Act, 1867) for the taking of evidence of witnesses called by an accused person. The preamble to s. 3 of the Criminal Law (Amendment) Act, 1867, provides the reason for the enactment of s. 3:

"And whereas complaint is frequently made by persons charged with indictable offences, upon their trial, that they are unable by reason of poverty to call witnesses on their behalf, and that injustice is thereby occasioned to them; and it is expedient to remove, as far as is practicable, all just ground for such complaint."

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The provisions of Ordinance 29 of 1850 and of Ordinance 26 of 1868 continued in force until the Indictable Offences (Procedure) Ordinance, 1893 (No. 16) came into operation wherein the procedure to be adopted at preliminary inquiries was enacted in its present form. It has been pointed out that the words "unless he discharges the accused person" did not appear in the provision prescribing the statutory caution in either Ordinance 29 of 1850 or the 1848 Act and were clearly unnecessary therein having regard to the provisions of s. 17 and s. 25 therein respectively. Those words appeared for the first time in s. 62 of the Indictable Offences Ordinance, 1893. They were plainly unnecessary in England while the provisions of s. 25 of the Indictable Offences Ordinance, 1848, remained in force.

Provisions as to taking of depositions and caution to and statement of accused in proceedings before examining justices were made by s. 12 of the Criminal Justice Act, 1925, the provisions of s. 18 of the Indictable Offences Act, 1848, being repealed. In 1953 when the provisions of the Magistrates' Courts Act, 1952 (c. 55), came into operation, the Indictable Offences Act, 1848, was repealed save for certain provisions which do not affect this matter. The proceedings preliminary to trial of indictments were prescribed by the Magistrates' Courts Rules, 452 (S.I. 1952 No. 2190) rr. 5 *et seq.* Rule 5(3) thereunder provides:

"After the evidence for the prosecution has been given, the court shall, *unless it decides not to commit for trial*, cause the charge to be written down, if this has not already been done, and read to the accused and shall explain to him its nature in ordinary language."

Thereafter follow provisions prescribing the statutory caution and relating to the taking of the evidence of witnesses called by the accused. Section 7(1) of the 1952 Act provides as follows:

"Subject to the provisions of this and any other Act relating to the summary trial of indictable offences, if a magistrates' court, inquiring into an offence as examining justices is of opinion, on consideration of the evidence and of any statement of the accused, that there is sufficient evidence to put the accused upon trial by jury for any indictable offence, the court shall commit him for trial; and if it is not of that opinion, it shall, if he is in custody for no other cause than the offence under inquiry, discharge him."

The words "unless it decides not to commit for trial" in r. 5(3) of the Magistrates' Courts Rules, 1952, are of the same effect as the words "unless he discharges the accused person" in s. 62 of the 1893 Ordinance (s. 65 of Cap. 11). The provisions of s. 7(1) of the 1952 Act are very similar to the combined provisions of ss. 65 and 66 of the 1893 Ordinance (ss. 69 and 71 of Cap. 11).

In 1893 the provisions which are now ss. 71 and 72 of Cap. 11 were introduced for the first time. For the first time it was specifically enacted that a magistrate is required to take into consider-

ation the evidence of witnesses for the defence. It was not until the enactment of the Criminal Justice Act of 1925 that in England a specific provision was made that justices must take into consideration the evidence of witnesses for the defence. But as the Solicitor General has pointed out these enactments do not mean that prior to 1893 in British Guiana and 1925 in England magistrates and justices respectively could disregard the evidence of witnesses for the defence. The history of the enactments in British Guiana and in England since 1850 show how closely the British Guiana provisions in respect of preliminary inquiries are modelled on the corresponding English enactments.

I was inclined to the view that following upon the repeal of the provisions of s. 17 of the 1950 Ordinance, the enactment of s. 62 of the 1893 Ordinance did not cast any duty upon the examining magistrate to discharge the accused at the close of evidence of the witnesses for the prosecution and before addressing the statutory caution to the accused interpreting the words "unless he discharges the accused person" as giving the magistrate a discretion to discharge the accused at that stage. That view was largely based upon the mere interpolation of the words "unless he discharges the accused person" in s. 62 of the 1893 enactment (s. 65 of Cap. 11) as against the clear positive provision contained in s. 17 of the 1850 Ordinance and by certain views expressed by Lord GODDARD delivering the judgment of the Court of Criminal Appeal in *R. v. Berry* (1947), 32 Cr. App. R. 70, when he said:

"I suppose they (the examining justices) might have said: 'Sit down; we are going to put the statutory caution to the prisoner, and we shall hear you afterwards' but the solicitor, having got up and caught the ear of the Court, made his submission which was a full and lengthy one."

In that case at a preliminary investigation into an indictable offence, immediately after the last witness for the prosecution had given evidence and before the justice had administered the statutory caution, solicitor for the accused submitted that there was no case for committal for trial. The justices after hearing the submission ruled that a *prima facie* case for committal for trial had been made out. Thereafter, the statutory caution was administered and the accused given an opportunity of making a statement, giving evidence and calling witnesses. The accused after protesting against the procedure, said he was not guilty and reserved his defence. The accused after conviction at the assizes appealed against his conviction on the ground of alleged non-compliance with ss. 12(2) and (8) of the Criminal Justice Act, 1925, in that the justices had determined to commit before he had the opportunity of making a statement, giving evidence or calling witnesses. It was held by the Court of Criminal Appeal that the justices in ruling on the submissions of the defendant's solicitor had done no more than decide that at that moment there was sufficient evidence on which to commit the defendant and that the actual committal had not taken place until after the statutory caution had been administered and the prisoner had been given an opportunity of making a statement, giving evidence and calling witnesses.

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and that there had not been any failure to comply with the provisions of s. 12 of the Act of 1925. The words of Lord GODDARD referred to above must be read in the context of the particular facts of the case and when so read do not lay down any general principle that counsel or solicitor is not entitled to make a no-case submission at the close of the evidence for the prosecution.

Having had the opportunity of seeing in draft the views expressed on this point by my brother CRANE, I am now persuaded to the view that the repeal of s. 17 of the Ordinance No. 29 of 1850 and the enactment of ss. 62 and 65 of Ordinance 25 of 1893 (ss. 65 and 69 of Cap. 1.1) in the form in which they appear did not deprive an accused person of the right to a discharge at the close of the evidence of the witnesses for the prosecution and before the statutory caution is administered where in the opinion of the magistrate such evidence is not sufficient to put the accused upon his trial for any indictable offence.

Coming now to the provisions of s. 72 of Cap. 11, it is true that the provisions of sub-s. (1) of that section are wide enough to enable the Director of Public Prosecutions to require the magistrate to send him the evidence or a copy thereof together with any other documents and things in respect of any case when the magistrate discharges an accused person. This would include not only a case where the discharge is effected at the close of the evidence of witnesses for the prosecutor but also a case where, for example, the magistrate discharges an accused person either on his own motion for want of prosecution or for want of jurisdiction or on the motion of the prosecutor even before any evidence is taken. If we apply these situations to the provisions of sub-s. (2) of s. 72 it will enable Us to see in what circumstances the Director of Public Prosecutions may give the directions contemplated by that subsection. Where the discharge of the accused person takes place before any evidence is led, whether the discharge is on motion of the magistrate for want of prosecution or lack of jurisdiction or on the motion of the prosecutor, it is obvious that there is no material upon which the Director can be of the opinion that the accused person should have been committed for trial and he cannot give any directions to the magistrate under that subsection. Where the magistrate in his discretion discharges an accused person at the close of the evidence for the prosecutor he may have done so on his own motion or on the motion of the accused person or even on that of the prosecutor. Can it seriously be suggested, if the discharge of the accused person follows upon the motion of the prosecutor during the course of or at the close of the evidence for the prosecutor, that the Director of Public Prosecutions is enabled to invoke the provisions of sub-s. (2) of s. 72?

Can the Director of Public Prosecutions in such a case be heard to say that in his opinion the accused person should have been committed for trial? I think not. I think that the fallacy in the argument for the Director of Public Prosecutions lies in part, in the argument that because of the wide ambit of the provisions of sub-s.

(1) of s. 72 the provisions of sub-s. (2) of s. 72 embrace all of those cases caught by the provisions of sub-s. (1). I have in the examples given above attempted to show that in fact they do not.

As for the construction to be placed upon the words "should have been committed for trial" I think that if the accused person *could* lawfully have been committed for trial at the stage of his discharge it is not open to this court to investigate the Director's opinion that the accused person *should* have been committed for trial. But the court is entitled to investigate whether an accused person in the circumstances of each case *could* have been committed for trial. The only person who is empowered by law to Commit an accused person for trial under the provisions of Cap. 11 is a magistrate. A magistrate can only lawfully commit an accused person for trial prior to sending the depositions to the Director of Public Prosecutions if he had regard to the whole of the evidence. In that context the whole of the evidence includes the evidence for the accused person (if any) tendered before the magistrate.

In the circumstances of the present case the magistrate could not have committed the accused person until due compliance had been made with the provisions of ss. 65 and 66 of the Ordinance (Cap. 11) and therefore I would hold that it was not competent for the Director of Public Prosecutions to give the directions contained in his communication to the magistrate dated 16th October, 1964, or indeed any directions at all in pursuance of the provisions of sub-s.

(2) of s. 72 of Cap. 11. The learned magistrate was in my opinion not in error in refusing to comply with those directions and I would refuse the orders asked for.

CRANE, J.: At the close of the case for the prosecution on October 1, 1964, the examining magistrate for the East Demerara Judicial District discharged the accused Samuel Babwah and six others on a no-case submission by their counsel. The accused were charged indictably with the murder of Joseph Porter.

This discharge did not meet the approval of the Director of Public Prosecutions, who pursuant to his powers under s. 72 of the Criminal Law (Procedure) Ordinance, Cap. 11, directed the magistrate as follows:

16th October, 1964.

"Sir,

The Queen v. Samuel Babwah, et al.

In pursuance of the powers conferred upon me by section 72 of the Criminal Law (Procedure) Ordinance, Chapter 11, I hereby refer back to you the case of the *Queen v. Samuel Babwah* and others and direct that you re-open the proceedings and commit Samuel Babwah, Ahmad Hussain, Sasenarine, Cyril Dasrat, Janki Persaud, Dhanbeer and Jagit Narine for trial at the January Sessions of the Supreme

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Court in its Criminal Jurisdiction for the County of Demerara for the offence for which they are charged.

I have the honour to be,

Sir,

Your obedient servant,

(Sgd.) E. A. ROMAO,

Acting Director of Public Prosecutions.

I. Churaman, Esq.,
Magistrate,
East Demerara Judicial District."

The learned magistrate however refused to comply, and the Director of Public Prosecutions followed up by obtaining an order calling upon him to show cause why he should not commit the accused for trial on the charge of murder.

The magistrate in his affidavit in reply to that in support of the motion gave reasons for his opinion that the prosecution had failed to make out a *prima facie* case for committal and supported the discharge of the accused under s. 65(1) of the Criminal Law (Procedure) Ordinance, by which he purported to act. He held that the directions to him to "re-open the proceedings and commit" the accused for trial were a nullity in view of the recent ruling at assizes (October 26) of CHUNG, J., in *R. v. Harry Lall* when similar directions were held *ultra vires* the Director of Public Prosecutions. (See 1964 L.R.B.G. 455).

To be mentioned too is the ruling of KHAN, J., also at assizes in *R. v. Balkaran Singh* (Indictment No. 16977, December 8) where on a similar point the same result was arrived at but for different reasons. (See 1964 L.R.B.G. 464). A decision of the Full Court is obviously necessary now that the point also engages our attention; but an objection *in limine* must first be dealt with.

Counsel's objection is that the Director of Public Prosecutions has misconceived these proceedings by preferring them under s. 37 of Chapter 17, the short title of which reads: "This Ordinance may be cited as the Summary Jurisdiction (Appeals) Ordinance." The proceedings, he argues, must be related to the scheme of the Ordinance, which is a Summary Jurisdiction Ordinance but this has not been the case, because the magistrate by refusing to act was not doing so in purported exercise of his powers under any of the Summary Jurisdiction Ordinances. He was refusing to do an act under another Ordinance—Criminal Procedure Ordinance, Cap. 11. It is in this respect that these proceedings are vitiated, he argues.

Section 37 is as follows:

"Wherever a magistrate or a justice of the peace refuses to do any act relating to the duties of his office the person requiring the act to be done may apply to the Court on motion supported by affidavit of the facts for an order

calling upon the magistrate or justice, and also upon the person to be affected by the act, to show cause why the act should not be done.

(2) If, after proof of due service of the order, good cause is not shown against it, the Court may make it absolute and the magistrate or justice, upon being served with the order absolute, shall obey it, and do the act required, and the costs of the proceedings shall be in the discretion of the Court.

(3) No action or proceeding whatever shall be commenced or prosecuted against the magistrate or justice for having obeyed the order and done the act thereby required.

(4) Nothing in this section shall be construed to be in derogation of the powers conferred by the last preceding section."

Counsel for the applicant however contends the contrary, *viz.*, that the proceedings are quite in order for s. 37 is sufficiently wide to embrace the present application. His arguments may be summarised, thus: The heading "Miscellaneous Provisions" above s. 36 proves this to be so. There is nothing to show, he insists, that any of the four sections under this heading must necessarily relate to summary jurisdiction matters. The heading indicates the intention of the Legislature to include matters which do not fall within the ordinance, *stricto sensu*. The phrase "any act relating to the duties of his office" is without limitation, precedent or subsequent, and can only mean an act of a magistrate whether within or without Chapter 17.

Section 37 has already received judicial interpretation by STOBY, J., in *Coghlan v. Vieira*, 1958 L.R.B.G. 108; it was shown to have for its model s. 5 of the Justices Protection Act, 1848. I have been able to ascertain however, that s. 37 was formerly s. 45 of the Magistrates' Decisions (Appeals) Ordinance, 1893—"An ordinance to consolidate and amend the laws relating to Appeals to the Supreme Court from the Adjudications and Decisions of Magistrates' Courts". But the wording of s. 45 differed in material respects from its successor, s. 37, and before it was repealed and re-enacted in Chapter 17, ran as follows:

"45. *In any case* where a Magistrate or a justice of the peace refuses to do any act relating to the duties of his office as *such Magistrate or Justice*, it shall be lawful for the person requiring such act to be done to apply to the Court, upon an affidavit of the facts for a rule calling upon such Magistrate or Justice, and also upon the person to be affected by such act, to show cause why such act should not be done."

Both sections are in *pari materia*, so the absence of the phrases "in any case where" and "as such Magistrate or Justice" in the modern equivalent is very significant. I venture to suggest as an aid to construction and interpretation. The expression "wherever" in s.

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37 is, of course, much wider than "in any case where" in s. 45. Their omission obviously widens the scope of the act to be performed as magistrate *simpliciter* beyond the confines of the Summary Jurisdiction Ordinances to the performance of any duty imposed on him by statute. This will include the holding of a preliminary inquiry under Chapter 11. Compare *Gibbs v. Bookers Shipping (Demerara) Ltd.* 1958 L.R.B.G. 102, where a phrase appearing in an earlier section of a repealed statute was absent from a similar section of the consolidating statute in *pari materia*. This was held to have enlarged the operation of the later section, and so widened magisterial discretion.

I have mentioned all this to show that even though an application of this nature could properly have been preferred under the repealed s. 45 above mentioned as the Chief Justice has shown from the English authorities he has cited, it cannot now be doubted that it is cognisable under s. 37 of Chapter 17, the import of which is plainly wider than s. 45.

But though counsel for the respondent did not suggest an alternative method of procedure, it is evident that he was suggesting mandamus was the appropriate one. The decision of *Coghlan v. Vieira (supra)* is however to the effect that both the prerogative writ of mandamus or a rule *nisi* under s. 37 are concurrent remedies to enforce the performance of magisterial duties. But mandamus is a discretionary remedy, and the court can refuse it if there is already available an alternative which is equally effective. So that if there is a specific remedy provided for by law for breach of a statutory duty the courts will generally refuse performance of that duty in any other manner.

This is sufficient to dispose of the preliminary point.

Now to the merits of the application: the arguments addressed to us by counsel for the applicant in support of the application for an order absolute when summarised are as follows: It is quite competent for the Director of Public Prosecutions, whether the discharge is either under s. 65 or 69 of Chapter 11, to give directions in the manner in which he has, *viz.*, by directing the magistrate to "reopen and commit" the accused. Counsel referred to the Director of Public Prosecution's powers under s. 72(1) and contends that the expression "in any case" means, "in every case," and so will include a discharge under s. 65. He further argues that both sub-ss. (1) and (2) of s. 72 must be read together to be properly understood. When the magistrate has discharged the accused person at the close of the prosecution's case on the submissions of counsel, he is *functus officio*; his judicial powers are spent, but this notwithstanding, the Director of Public Prosecutions can still command ministerial acts from the magistrate by virtue of the powers vested in him by s. 72(1), (2). Accordingly, contends the Director of Public Prosecutions, there can be a committal secured in any of the following ways:

- (1) Where the magistrate complies with all the provisions of s. 71.

- (ii) Where the magistrate complies with all the provisions under s. 69, but discharges; he can then be directed by the Director of Public Prosecutions under s. 72 to commit.
- (iii) Where the magistrate discharges the accused at the close of the case for the prosecution, he can be directed by the Director of Public Prosecutions to commit under s. 72.

Lastly, it is contended that there is no right in the accused to have the statutory caution under s. 65 put to them. The accused cannot be said to have been deprived of any opportunity of placing on the record any evidence after they are committed because s. 76(1) (7) makes provision for this. It is stressed further that a preliminary inquiry is not a trial, but only procedure to determine whether a *prima facie* case is made out, and the accused persons will have suffered no injustice in the respect that they have been deprived of their rights at law.

The directions of the Director of Public Prosecutions having been challenged, it will be necessary to examine his powers closely so as to see whether his actions are legally justified. These are contained in s. 72 of Chapter 11, and are as follows:

"72. (1) In any case where the magistrate discharges an accused person, the Attorney General (now the Director of Public Prosecutions) may require the magistrate to send to him the depositions taken in the cause, or a copy thereof, and any other documents or things connected with the cause which he thinks fit.

(2) If, after the receipt of those documents and things, the Attorney General is of opinion that the accused person should have been committed for trial, the Attorney General may, if he thinks fit, remit them to the magistrate, with directions to deal with the matter accordingly, and with any other directions he thinks proper.

(3) Any directions given by the Attorney General under this section shall be in writing signed by him, and shall be followed by the magistrate, who shall have all necessary power for that purpose.

(4) The Attorney General may at any time add to, alter, or revoke any of his directions."

It cannot be disputed that there are two quite separate and distinct instances when a magistrate holding a preliminary enquiry may lawfully discharge an accused person. The first is at the close of the case for the prosecution after he is satisfied that a sufficient case has not been made out to put the accused on his trial. This is a discharge under s. 65 which is as follows:

"65. (1) After the examination of the witnesses called on the part of the prosecution has been completed, and after the

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depositions have been signed as aforesaid, the magistrate shall, *unless he discharges the accused person*, address him in these words, or to the like effect:

'Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence upon your trial.'

(2) Whatever the accused person then says in answer thereto shall be taken down in writing, as nearly as possible in the accused person's own words, and shall be signed by the accused person, if he will, and by the magistrate, and kept with the depositions of the witnesses, and dealt with as hereinafter mentioned."

The second is after the magistrate has heard "the whole of the evidence" which means, in my view, the witnesses for the prosecution, and those on behalf of the accused if he calls or gives any. This is a discharge under s. 69 which reads as follows:

"69. When all the witnesses on the part of the prosecutor and of the accused person, if any, have been heard, the magistrate shall, if, upon the whole of the evidence, he is of opinion that no sufficient case is made out to put the accused person upon his trial, discharge him; and in that case any recognisance taken in respect of the charge shall become void."

The two rulings at assizes differ materially as to the meaning of the phrase "the whole of the evidence." The Solicitor General, who supports the ruling in *R. v. Balkarran* (above) in its entirety, is of the opinion that this phrase means such evidence which the magistrate acts upon at either of the two stages when he discharges the accused. For my part I am unable to agree with this view, principally for the reason that in both of the sections in which the phrase appears (69 and 71) it is fairly evident that it means the evidence for both prosecution and defence, if any, must be taken to be regarded as the whole of the evidence.

It has been argued that the accused persons are not entitled as of right to a discharge at the close of the prosecution's case, because the words "unless he discharges the accused person" do not mean that the magistrate is bound to discharge them if he finds there is no *prima facie* case made out.

It is my view, however, that the magistrate is obliged to discharge the accused person under s. 65(1) if the evidence for the prosecution does not disclose such a case, for this was a right which the accused had even before the coming into force of the Criminal Law (Procedure) Ordinance, Cap. 11, and it would appear that the words "unless he discharges the accused person" were inserted in the section designedly and with recognition of that right.

The position will become clear if we peer a little into the interstices of historical antecedents; if we go back to the Justices Ordin-

ance, No. 29 of 1850, which was a nigh *verbatim* reproduction of s. 25 of the Indictable Offences Act, 1848, and repealed by Ordinance No. 22 of 1893, (in substance Chapter 11). There, it will be seen that an accused person formerly had no right to call witnesses before the examining justices who, after they had heard all the witnesses for the prosecution were bound to read the statutory caution to the accused (s. 11), unless they were of the opinion that the evidence was not sufficient to put the accused upon his trial. Let the words of s. 17 of that Ordinance (No. 29 of 1850) speak for themselves:

"17. And be it enacted that *when all evidence offered upon the part of the prosecution against the accused party shall have been heard, if the Justice or Justices of the Peace then present shall be of opinion that it is not sufficient to put such accused party upon his trial for any indictable offence, such Justice or Justices shall forthwith order such accused party, if in custody to be discharged as to the information then under inquiry; but if in the opinion of such Justice or Justices such evidence is sufficient to put the accused party upon his trial for an indictable offence, or if the evidence given arouse a strong or probable presumption of the guilt of such accused party, then such Justice or Justices shall, by his or their warrant commit him to any jail of the Colony, to be there safely kept until he shall be thence delivered by due course of law or admit him to bail as hereinbefore mentioned.*"

The words "shall forthwith order" above mean "must immediately order" the accused party to be discharged. Surely this was a legal right in the accused to be discharged.

Then came Ordinance No. 26 of 1868, s. 1 of which was modelled on s. 3 of the Criminal Law (Amendment) Act, 1867, which laid it down that an accused person charged before the justices with an indictable offence, should be asked whether he desires to call any witness or witnesses. This is now reproduced in s. 66 of Chapter 11. It seems quite clear from the above, I think, that the accused persons have a statutory right to be discharged at the close of the case for the prosecution in the event of the magistrate being of the opinion that a *prima facie* case is not disclosed by the evidence.

From the case of *R. v. Berry*, 32 Cr. App. R. 70, which is the very antithesis of the present, it would appear from certain *obiter dicta* of the Lord Chief Justice that there is no right to a discharge of an accused at the close of the prosecution's case. But *Berry's* case in my view does not so decide. There the magistrates came to the conclusion, having heard submissions of counsel, that there was a *prima facie* case at the close of the case for the prosecution and said so. The Chief Justice observed in words which would seem to indicate that the magistrates were not compelled to rule on counsel's submissions, thus:

"I suppose they (the magistrates) might have said: 'sit down; we are going to put the statutory caution to the prisoner, and we shall hear you afterwards,' but the solicitor, having got

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up and caught the ear of the Court, made his submission which was a full and lengthy one."

In my judgment *R. v. Berry (supra)* is no authority for the proposition that there is no legal right in an accused to a discharge when the magistrate has made up his mind that there is no case to answer. I have already opined that when such is the case the magistrate is in duty bound to discharge the accused, and shown that the title to that right was accorded him by s. 17 of Ordinance 29 of 1850 (see above). Can it now at this juncture be said that the law-giver has taken away the content of that right in the event of there being no *prima facie* case for him to answer? I must say that nothing but express words to that effect in a statute would convince me that this is so, for it is well-known that a right once accrued by virtue of a statute will not be taken away by the mere repeal of the statute under which it was acquired. "The law itself", says PUFFENDORE, in his *LAW OF NATURE AND NATIONS*, Book 1, c.6., s.6. "may be disannulled by the author, but the right acquired by virtue of that law whilst in force must still remain; for together with a law to take away all its precedent effects would be a high piece of injustice."

Though Ordinance No. 29 of 1850 has been repealed by Ordinance No. 22 of 1893, the former is not altogether a dead letter, but may be used in the construction and interpretation of later statutes in *pari materia*, i.e., statutes so related as to form a system or code of legislation. In such a case it is well settled they may interpret and be explanatory of each other.

In this connection Lord MANSFIELD said:

"Where there are different statutes in *pari materia*, though made at different times, *or even expired and not referring to each other*, they shall be taken and construed together, as one system and as explanatory of each other." *R. v. Loxdale* (1759). 1 Burr. 447, 448.

Again, to the same effect is Lord BLACKBURN'S observation in *The Mayor of Portsmouth v. Smith* (1883), 23 Ch. D. 103, at p. 108:

"Where a single section of an Act is introduced into another (subsequent) Act, it must be read in the sense which it bore in the original Act from which it was taken, and consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated into the new Act."

In keeping with the above judicial exposition Ordinance No. 29 of 1850 and s. 62 *et seq.* of the Criminal Law (Procedure) Ordinance, Cap. 11, are plainly in *pari materia* and may therefore be read together in an endeavour to elucidate *inter alia* the meaning of the phrase "unless he discharges the accused person" in s. 65(1). In this connection it will be observed that in both s. 17 of No. 29 of 1850 and s. 65(1) of Chapter 11, there is this in common: that the magistrate must form his opinion on the discharge of the accused after he

has heard *all the witnesses on the part of the prosecution*. No one can deny that s. 17 of the 1850 Ordinance did give a right to an unqualified discharge at the close of the prosecution's case when there was no *prima facie* case disclosed. Why then should that right not now exist in law in similar circumstances in s. 65(1) when there is no positive abrogation of it in a succeeding section in *pari materia*? My firm opinion is that implicit, if not explicit, in s. 65(1) is this right to an unqualified discharge by the magistrate in the event of no case being made out at the close of the case for the prosecution. The repeal of Ordinance No. 29 of 1850 was not a divestitive fact. In *Re Orbit Trust Ltd.'s Lease*, [1943] 1 Ch. 144, UTHWATT, J., said when construing two statutes—The Fire of London Disputes Act 1666, dealing with the Fire of London, and the Landlord and Tenant (War Damage) Act, 1939:

"I see no reason for thinking that there is not implicit in the legislation of 1939 the principle.....which Parliament proclaimed as just in 1666."

Section 72(1) enacts that in any case where the magistrate discharges the accused, which means whether the discharge be either under s. 65 or 69, the Director of Public Prosecutions is empowered to send for the depositions taken in the cause or a copy of any other related documents or things as he thinks fit, and if after receiving them he forms the opinion that the accused should have been committed for trial instead of having been discharged, he may remit those documents and things to the magistrate with directions to deal with the matter accordingly, that is to say, with directions to commit the accused person for trial.

It is conceded that the powers of the Director of Public Prosecutions are very wide under s. 72, but the question will arise whether the phrase "should have been committed for trial" after discharge is restricted to the second case of discharge under s. 69, or whether it applies to both ss. 65 and 69 so as to enable the Director of Public Prosecutions to remit to the magistrate those documents and things and directions to commit. The question also arises: Could the Director of Public Prosecutions properly say in the case of a discharge under s. 65 that the accused should have been committed for trial instead of being discharged at that stage? But it is submitted, there is no mandate in the Director to interfere with rights vested under s. 65(1).

There is a strong temptation to read into s. 72(2) the notion that because in any case of a discharge under either of the two sections mentioned the Director of Public Prosecutions can send for depositions, etc., it follows that in any case he could say that his opinion is that the accused should have been committed for trial. To my mind any such conclusion would be quite erroneous, because the truth is that the Director of Public Prosecutions can only form the opinion that the accused should have been committed for trial after the magistrate had discharged him upon hearing the whole of the evidence, *i.e.*, under s. 69.

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A discharge under s. 69 postulates that the magistrate has come to the conclusion at the close of the case for the prosecution that there is a *prima facie* case to answer, and having so considered proceeds to administer the statutory caution and to take the evidence of the accused, if any, and his witnesses. He afterwards alters his view having considered the whole of the evidence as he is entitled to do (see *R. v. Carden* 5 Q.B.D. 1) and holds that there is no *prima facie* case and discharges the accused. It is submitted that only in such a case can the Director give his opinion that the accused *should have been committed for trial*.

I have already referred to what I think is meant by the whole of the evidence and should mention that it is quiteunjuristic to say that by the whole of the evidence is meant the whole or part of the evidence of the case for the prosecution. Such can never be the whole of the evidence. That expression certainly cannot have one meaning in s. 69 and yet another in s. 71.

So wide are the powers of the Director of Public Prosecutions under s. 72 that he is empowered to super-impose his opinion on the examining magistrate's when the latter has discharged the accused under s. 69; but it is submitted he can only do so when the whole of the evidence is on record for only in such a case can a committal take place in law. Only in this way could the Director of Public Prosecutions form his opinion that the accused "should have been committed for trial."

Section 71 provides:

"If, upon the whole of the evidence, the magistrate is of the opinion that a sufficient case is made out to put the accused person upon his trial he shall, subject to the provisions of section 9 of this Ordinance, commit him for trial to the next practicable sitting of the Court for the county in which the inquiry is held."

I am therefore clearly of the opinion that both the remission of the documents to the magistrate, and the directions given him by the Director of Public Prosecutions to "re-open and commit" the accused persons were *ultra vires*. In my view, it is only when the Director of Public Prosecutions can properly form an opinion that the accused should have been committed for trial can he issue the directions he gave.

The Director of Public Prosecutions in the exercise of his powers under the section does so quasi judicially. It is axiomatic that he must exercise his discretion and arrive at an opinion in a disciplined and responsible manner, and with due regard to the law. Before the accused could have been committed for trial the magistrate must have heard the whole of the evidence, which I have pointed out can only mean in the light of the historical survey I have given, the evidence for the prosecution, the evidence for the accused, if any, and any witness he chooses to call. In my judgment, the powers of

the Director of Public Prosecutions under s. 72 are restricted to the giving of directions to magistrates after a discharge under s. 69 and do not extend to a case of discharge under s. 65.

But the question may be asked: What should the Director of Public Prosecutions do in such a case? He can have recourse to the Legislature to give him the necessary powers; but would such really be necessary when he could easily swear a fresh information and have accused taken before another examining magistrate? It would appear that this was the procedure formerly adopted in England (See OUTLINES OF CRIMINAL LAW BY KENNY (15th Edn.) p. 535, footnote 2).

I have pointed out above that the traditional right to discharge by an accused person at the close of the case for the prosecution is legal and preserved in s. 65, of chapter 11, while the procedure for his committal has undergone alteration since 1894. Committal can only be lawfully accomplished today when the magistrate has formed an opinion on the whole of the evidence and not as his predecessors did from 1850-1894 in British Guiana when they heard only the case for the prosecution.

But it is a curious thing to note that while in British Guiana since 1894 a magistrate was statutorily required to consider the whole of the evidence before committing the accused, such was not by statute the case in England until the Criminal Justice Act, 1925, s. 12(8) of which provided:

"The examining justices shall, notwithstanding anything in the indictable Offences Act (section 25), before determining whether they will or will not commit an accused person for trial, take into consideration his statement or any such evidence as is given in pursuance of this section by him or his witnesses."

The position in England before 1925 was that if there was no *prima facie* case the accused was entitled to a statutory discharge (by s. 25 of the Indictable Offences Act, 1848). If there was such a case, however, it would appear that he was bound to be committed in spite of the fact that after the statutory caution his evidence and that of his witnesses were on record. But this was not the practice in fact—as the Solicitor General, to whom we are indebted for a learned argument, pointed out—because for many years hitherto, magistrates in applying the principles of natural justice were taking it upon themselves to discharge accused persons if the evidence for the defence was such that, in their opinion, there was a strong or probable presumption that the jury would acquit. The position was stated in 1879 by COCKBURN C.J., in *R. v. Carden* (1879), 5 Q.B.D. 1, at p. 6, as follows:

"The duty and province of the magistrate before whom a person is brought with a view to his being committed for trial or held to bail, is to determine, on hearing the evidence for the prosecution *and that for the defence*, if there be any, whether the case is one in which the accused ought to be put upon his trial."

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Such was the position at common law and in the words of BYLES, J., in *Cooper v. Wandsworth Board of Works* (1863), 14 C.B. N.S. 180 at p. 194, was stated as follows:

"Although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."

The purport of s. 12(8) of the Criminal Justice Act, 1925, was in effect declaratory of the common law situation prior to 1925, as related by COCKBURN, C.J., above. In 1925 another right to a discharge was thus statutorily created at another stage of the proceedings. This time, after a *prima facie* case had been disclosed and after the magistrate had heard and reconsidered the matter in the light of the evidence of the accused and his witnesses and decided not to commit.

Section 3 of the Criminal Law (Amendment) Act, 1867, merely empowered justices to put on record the evidence of the accused witnesses, whereas s. 12 (8) of the Criminal Justice Act, 1925, made it obligatory that such evidence together with statement of accused, if any, should be considered by them before making up their minds whether to commit or not.

Mr. Haynes has asked us to direct our attention specifically to the point of whether there is jurisdiction in the Director of Public Prosecutions to direct committal under s. 65 on which there is a difference of opinion in the two rulings at assizes which I have already mentioned, and to say in agreement with the ruling of CHUNG, J., in Harry Lall, that the Director of Public Prosecutions has no jurisdiction to interfere in any way whatever in the case of a discharge by a magistrate under s. 65.

I am totally in agreement with Mr. Haynes; and, speaking for myself, I agree that the Director of Public Prosecutions can give absolutely no directions with regard to committal or otherwise in a case where a magistrate discharges an accused person under s. 65. To my mind, this is the clear purport of s. 72(2) which I have set out above. It seems to me that the remission of the documents and things with directions to the magistrate to deal with them "accordingly" must necessarily relate to the committal and not to the discharge of the accused, since they follow on the Director of Public Prosecutions' opinion that the accused should have been committed for trial. This is also true of the succeeding general words—"and with any other directions he thinks proper"—which must likewise relate solely to a case of a committal. I find this interpretation compelling by the application of the *ejusdem generis* rule of construction to these general words.

"It is a general rule of construction", said POLLOCK, C.B., "that where a particular class is spoken of, and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters

ejusdem generis with such class." *Lyndon v. Standbridge* (1837), 2 H&N. 45, 51.

The particular category or class spoken of in s. 72 is a committal. The general words must also relate to committal.

In my view the learned magistrate came to the right conclusion and was justified in refusing to re-open the inquiry and to commit the accused persons for trial as directed by the Director of Public Prosecutions.

I would dismiss the motion with costs.

Motion dismissed.

VAN SERTIMA, J. (AG): I have had an opportunity of reading the two judgments just delivered and I should like to state that I am in full agreement with them.

I have only two observations to add to what has already been stated. In the first place, with respect to the right of an accused person to be discharged at the close of the prosecution's case under s. 65 of the Criminal Law (Procedure) Ordinance, Cap. 11, it is quite clear from the very wording of the statutory caution that the magistrate has a duty to examine the evidence led up to the close of the case for the prosecution and to determine whether a sufficient case has been made out against the accused person. It is only where the magistrate has so determined and accordingly decided that the accused person should stand his trial that he is required to administer the statutory caution. If the magistrate does not so determine, he has to discharge the accused person. In effect, the wording of the caution implies that there may be a trial for which the accused person will be committed.

Secondly, it has been suggested that, having regard to the provisions of ss. 76 and 77 of the Ordinance, no injustice would be done to an accused person, if the Director of Public Prosecutions were to direct a magistrate to commit an accused person under s. 72, even though the statutory caution under s. 65 had not been administered and the opportunity to the defence to call witnesses had not been given under s. 66 of the Ordinance,

An analysis of the provisions of ss. 76 and 77, however, indicates that they give no wider powers to the Director of Public Prosecutions than were contemplated by s. 72, inasmuch as the exercise of the powers under ss. 76 and 77 are based on the premise that the magistrate has performed the requirements of ss. 65 and 66.

Both ss. 76 and 77 fall under Title 5 of the Ordinance which is headed "Proceedings subsequent to the committal of Accused Person." Section 76 sets out the procedure to be followed for the taking of the depositions of witnesses "able to give evidence tending to prove either the guilt or the innocence of the accused person." The

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power under s. 76 is exercisable both by the prosecution and the defence.

Section 77 deals with the power of the Director of Public Prosecutions to remit a case for further inquiry and reads:

"(1) At any time after the receipt of any documents mentioned in this Title and before the sitting of the court to which the accused person has been committed for trial, the Attorney General (now the Director of Public Prosecutions) may, if he thinks fit, remit the case to the magistrate with directions to reopen the inquiry for the purpose of taking evidence or further evidence on a certain point or points to be specified, and with any other directions he thinks proper.

(2) Subject to any express directions given by the Attorney General (Director of Public Prosecutions) the effect of remission to the magistrate shall be that the inquiry shall be reopened and dealt with in all respects as if the accused person had not been committed for trial."

Whereas ss. 76 and 77 give the Director of Public Prosecutions the right to cause evidence to be taken by the magistrate, s. 72, by contrast, gives no such power but merely the power to direct the magistrate to commit the accused person to stand trial.

It is significant that none of these three sections (72, 76 and 77) makes any reference to the requirements of ss. 65 and 66 of the Ordinance. In my opinion, the failure of the Legislature to refer to the statutory caution and the right of the accused person to call witnesses can hardly be either an oversight or a deliberate omission. The only reasonable interpretation of ss. 72, 76 and 77 of the Ordinance is that they contemplate that, and are exercisable only where, the magistrate has performed his duties under ss. 65 and 66 of the Ordinance. Certainly in my opinion, the words "after an accused person has been committed for trial" and "before the sitting of the court to which the accused person has been committed," in ss. 76(1) and 77(1) respectively, must contemplate committal in the same circumstances.

Further, to suggest that s. 72 of the Ordinance could contemplate that the Director of Public Prosecutions has the power to direct that the magistrate first exercises the duties under ss. 65 and 66 before committing the accused person would be an abuse of the language of s. 72(2). Moreover, such an interpretation could lead to a ridiculous situation in practice, if the defence were to give evidence or lead witnesses or both, which clearly establishes the innocence of the accused person, who, according to the directions of the Director of Public Prosecutions would, nevertheless, have to be committed to stand trial. Would such an innocent man, if the charge be murder, have to suffer the indignity of being remanded into custody? Such a situation could never have been in the contemplation of the Legislature.

Finally, it cannot be suggested that the Director of Public Prosecutions is entitled to exercise his powers under ss. 72 and 77 simultaneously. For whereas s. 72 gives only the power to direct a committal, s. 77(2) states that "the inquiry shall be re-opened and dealt with in all respect as if the accused person had not been committed for trial." These two provisions are clearly incompatible in this respect.

The Director of Public Prosecutions, having purported to direct the learned magistrate under s. 72 to commit where the latter had dismissed the accused person before compliance with ss. 65 and 66 of the Ordinance, I agree with the opinions that it was not competent for him to have done so.

The rule will accordingly be discharged and the orders applied for refused with costs to be taxed.

Motion dismissed

KISHNA v. BURKE AND BAPTIST

[Supreme Court (Luckhoo, C.J.) January 27, February 12, 1965]

Moneylending—Mortgage by way of security for moneylending loan—Whether mortgage subject to Moneylenders Ordinance, 1957—No copy of note or memorandum of transaction given to borrower—Action commenced, more than one year after debt due—Competence of action—Moneylenders Ordinance, 1957, ss. 11 and 19.

On 4th November, 1964, the plaintiff instituted an action to recover an amount of capital and interest due on a first mortgage executed by the defendants on 14th December, 1959, by way of security for a moneylending loan of \$2,000 repayable with interest at 12 *per centum per annum* in two years from the date of the passing of the mortgage. No copy of any note or memorandum in writing of the agreement of loan (including the deed of mortgage) was delivered to the defendants.

Held: (i) a loan transaction by way of mortgage admitted or proved to be a moneylending transaction is subject to the provisions of the Moneylenders Ordinance, 1957, unless the lender falls within the five designated classes in the definition of the term "moneylender" in s. 2 of the Ordinance ;

(ii) the mortgage formed a sufficient note or memorandum in writing of the contract but since no copy of it or of any like memorandum was ever delivered to the borrowers as required by s. 11(1) of the Ordinance the transaction was void;

(iii) the action was also statute barred not having been brought within 12 months of the date when the last payment became due as required by s. 19 of the Ordinance.

Judgment for the defendants.

F. L. Brotherson for the plaintiff.

J. Carter, Q.C., associated with *R. H. McKay* for the defendants.

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LUCKHOO, C.J.: On the 14th December, 1959, the defendants executed a first mortgage in favour of the plaintiff upon certain immovable property situate at the south half of the west half of lot numbered 63 in the Albouystown District, Georgetown, Demerara, and all the buildings and erections thereon, and on all other future buildings and erections to be constructed thereon, the property of the defendants. The capital sum lent the defendants was \$2,000 and interest was charged thereon at the rate of 12 *per centum per annum*. On the 4th November, 1964, the plaintiff filed this action claiming the sum of \$2,060 being the capital sum of \$2,000 and \$60 as interest due for the period 14th July, 1964, to 14th October, 1964, under the terms of the mortgage. The plaintiff also claims to foreclose the mortgage and to bring the mortgaged property to sale at execution for the recovery from the proceeds of such sale of the sum of \$2,060 aforesaid and interest on the sum of \$2,000 at 12 *per centum per annum* from the 15th October, 1964, until payment.

It is admitted that it was a term of the mortgage that the capital sum of \$2,000 was to be repaid with interest thereon at the rate of 12 *per centum per annum* from the date of the passing of the mortgage, the capital sum being repayable in two years from the date of the passing of the mortgage. It is also admitted that the transaction is a money lending transaction. See para. 10 of the particulars contained in the plaintiff's statement of claim. It is further admitted that no copy of a note or memorandum in writing of the agreement of loan made or signed personally by the defendants or either of them or of any agent on their behalf was delivered to the defendants or either of them or to any agent on their behalf.

There being no issue of fact in dispute, it was agreed by counsel for the parties that the argument should proceed upon the basis of the agreed facts contained in the statement of claim, the affidavit of defence and such admissions that were made prior to the submissions referred to hereunder.

For the defendants it was submitted —

- (a) that the action for the capital sum and/or interest thereon is absolutely barred and unenforceable by virtue of the provisions of s. 19 of the Moneylenders Ordinance, 1957 (No. 11), in that these proceedings were commenced after the expiration of 12 months from the date on which the cause of action accrued;
- (b) that the contract for the repayment of the capital sum and for the repayment of interest thereon is void by virtue of the provisions of s. 11 of the Moneylenders Ordinance, 1957 (No. 11), in that a copy of a note or memorandum in writing of the contract signed by the defendants was at the time the loan was made delivered to the defendants.

For the plaintiff it was contended that the provisions of the Moneylenders Ordinance, 1957 (No. 11), do not apply to mortgages.

Prior to the enactment of the Moneylenders Ordinance, 1957 (No. 11), the Ordinance in force was the Moneylenders Ordinance, Cap. 335 (Kingdon Edition). It was not doubted that a moneylending transaction by way of mortgage might be subject to the provisions of that Ordinance. See *Munroe v. Dias*, 1942 L.R.B.G. 428, W.I.C.A. A loan transaction by way of mortgage admitted or proved to be a moneylending transaction is likewise subject to the provisions of the Moneylenders Ordinance, 1957 (No. 11), unless the lender falls within five designated classes in the definition of the term "moneylender" in s. 2 of the Ordinance. Further, the provision of sub-s. (4) of s. 12 define the expression "secured loans" in that section as including mortgages and loans made on all forms of collateral security. Section 12 prescribes the maximum rate of interest which may be charged on secured and unsecured loans.

The loan of \$2,000 taken by the defendants from the plaintiff is a secured loan and the interest of 12 *per centum per annum* charged thereon is the maximum rate prescribed by s. 12 of the Ordinance. Had the interest charged exceeded the prescribed maximum rate then by sub-s. (3) of s. 12 not only would the plaintiff have been liable on summary conviction therefore to a fine but he would also not have been able to bring an action for the recovery of the amount lent and any agreement made or security given in connection therewith would have been wholly void.

Section 11(1) provides as follows:

"11. (1) Any contract for the repayment by a borrower of money lent to him or to any agent on his behalf by a moneylender after the commencement of this Ordinance. (including any contract of suretyship or guarantee), or for the payment by him of interest on money so lent, and any security given by the borrower or by any such agent as aforesaid in respect of any such contract shall be void, unless a note or memorandum in writing of the contract is made and signed personally by the borrower or agent at the time the loan is made, and unless a copy thereof is at the same time delivered to the borrower or his agent."

The mortgage passed in favour of the plaintiff does form a sufficient note or memorandum in writing of the contract made and signed personally by the borrowers but it is conceded on behalf of the plaintiff that no copy thereof was at the time of the loan or indeed at all delivered to the borrower or any agent of the borrower. This requirement of s. 11(1) of the Ordinance was therefore not performed and by virtue of that subsection the contract between the plaintiff and the defendants for the repayment of the loan and for the payment by the defendants of interest thereon and the security by way of mortgage are all void.

Turning now to s. 19 of the Ordinance, it is provided that—

"No proceedings shall lie for the recovery by a moneylender of any money lent by him after the commencement of this Ordin-

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ance or of any interest in respect thereof, or for the enforcement of any agreement made or security taken after the commencement of the Ordinance in respect of any loan made by him unless the proceedings are commenced before the expiration of twelve months from the date on which the cause of action accrued;

- (a)
- (b) the time limited by the foregoing provisions of this section for the commencement of proceedings shall not begin to run in respect of any payments from time to time becoming due to a moneylender under a contract for the loan of money until a cause of action accrues in respect of the last payment becoming due under the contract;"

The last payment of capital became due under the mortgage deed in November, 19S1, (date not stated in copy of mortgage deed admitted in evidence), and the last payment of interest thereon became due also at that date. The cause of action accrued to the plaintiff on that date and proceedings thereon had to be brought within twelve months after November, 1961. These proceedings were in fact brought on the 4th November, 1964, and are by virtue of sub-s. (1) of s. 19 of the Ordinance incompetent to enable the plaintiff to recover the capital sum lent or the interest thereon or to enforce the agreement made by the parties or the security by way of mortgage taken by the plaintiff.

During the course of the hearing reference was made to the provisions of the Limitation Ordinance, Cap. 184 (Major Edition), in relation to the case of *The Royal Bank of Canada v. Haynes*, (1931-37) L.R.B.G. 427. In that case the question arose as to the interpretation to be put upon the word "judgment" appearing in proviso (c) to s. 4(2) of Cap. 7 (Major Edition) and in s. 6(2) of the Limitation Ordinance, Cap. 184 (Major Edition) (both since repealed). It was held by CREAN, C.J., that -the term "judgment" in those subsections meant a judgment which was charged upon or payable out of immovable property whereas the term "judgment" as appearing in s. 15 of that Ordinance [now s. 15 of the Limitation Ordinance, Cap. 26 (Kingdon Edition)] referred to a judgment not so charged which was free from any limitation of time within which an action can be brought on the foot of it. Reference to the abovementioned case was made because it was argued that a mortgage being a willing and voluntary condemnation and indeed a judgment would be free of any limitation provision. Indeed, in s. 15 of the Limitation Ordinance it is specifically provided that nothing in that Ordinance shall apply or extend to any mortgage. While it is the case that the provisions of the Limitation Ordinance, Cap. 26, do not affect the plaintiff's claim, the provisions of s. 19 of the Moneylenders Ordinance, 1957 (No. 11), do apply to and affect the plaintiff's claim notwithstanding the fact that a mortgage is in effect a judgment. The provisions of the Moneylenders Ordinance, 1957, do not apply or extend to mortgages which are not passed to secure loans made in the course of money-

lending transactions or in the course of such money-lending transactions made exempt from the provisions of that Ordinance.

The submissions of counsel for the defendants are in my opinion well founded and there, must therefore be judgment for the defendants with costs. Certified fit for two counsels.

Judgment for the defendants.

Solicitors: *A. Vanier* (for the plaintiff); *V. Lampkin* (for the defendants).

BISOO v. DHANKUMARI

[Supreme Court (Persaud, J.) January 22, February 12, 1965]

Will—Proof in solemn form—Application for revocation of probate—Suspicious circumstances not explained—Effect—Presumption of sanity.

The plaintiff sought an order revoking probate of a will granted to the defendant, who sought an order that the probate was just, legal and well founded. The execution of the will was attended by suspicious circumstances which were not satisfactorily explained by the defendant.

Held: (i) the onus was on the defendant to give a satisfactory explanation of the suspicious circumstances and, having failed to discharge the onus, the grant of probate would be recalled;

(ii) observations on the presumption of sanity.

Judgment for the plaintiff.

H. Matadial for the plaintiff.

M. A. Churaman for the defendant.

PERSAUD, J.: This action concerns the validity of two wills alleged to have been made by one Darpanya, who died on the 28th September, 1963, the earlier will naming the plaintiff as the sole executor and the sole beneficiary, while the later will names the defendant as the sole executrix and the sole beneficiary. The plaintiff applied for probate of the earlier will on the 7th November, 1963, whereas the defendant had made an earlier such application on the 2nd November, 1963. Probate was refused the earlier will, but granted in respect of the later will and numbered 149 of 1964 (Berbice).

The plaintiff now seeks a revocation of the probate, a pronouncement against the said will, and a pronouncement in solemn form of the earlier will. The defendant in turn seeks an order to the effect that Probate No. 149 is just, legal and well founded, and in addition a pronouncement against the earlier will. Each side alleges that the will sought to be pronounced by the other side was not executed by the testatrix; that at the time it was purported to be executed the

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testatrix was not of sound mind, memory and understanding; that if it were executed by the testatrix, such execution was obtained by undue influence; that the contents of the will were not explained to the testatrix; that she did not approve of the contents of the will; and, lastly, fraud.

In 39 HALSBURY'S LAWS (3rd Edn.), at p. 857, para. 1299, the law is stated thus:

"Generally speaking, the law presumes sanity, and no evidence is required to prove the testator's sanity, if it is not impeached. It is however the duty of the executors or any other person setting up a will to show that it is the act of a competent testator, and, therefore, where any dispute or doubt exists as to the capacity of the testator, his testamentary capacity must be established and proved affirmatively. The issue of capacity is one of fact."

In *Persaud v. James & Khedaroo*, 1940 L.R.B.G. 80, where as in this case, there were two competing wills, FRETZ, J., said at p. 85 (*ibid.*) :

"It is a rule of law laid down in many cases, *inter alia*, *Fulton v. Andrew* (1875), 32 L.T.N.S. 209, and *Barry v. Butlin* (1838), 2 Moore P.C. 482, that firstly the *onus probandi* lies on the party propounding a will, who must satisfy the conscience of the court that the instrument propounded is the last will of a free and competent testator. Secondly, that if a party propounding a will takes a benefit under it, that is a circumstance which ought generally to excite the suspicion of the court, and calls on it to be vigilant and jealous in examining the evidence in support of the instrument in favour of which it ought not to propound, unless the suspicion is removed, and it is judicially satisfied that the paper does express the true will of the deceased."

Again, in *Finny v. Gavett*, 25 T.L.R. 186, and referred to in the local case of *Singh v. Subryan*, 1948 L.R.B.G. 110, it was said that—

"the vital and essential issue in a case of this description is not whether a question of fraud has been made out, but whether the plaintiffs have discharged the onus cast upon them by the law of showing the righteousness of the transaction and that the paper propounded did express the true will of the deceased."

With these principles in mind, I must examine separately the incidents surrounding the execution of each document, particularly so as they purport to be executed more than a year one after the other.

The first document was executed on the 3rd February, 1962. In this regard, I accept the evidence of the witness Balgobin Manohar,

a clerk attached to the chambers of Mr. H. Matadial, barrister-at-law, to the effect that the testatrix, accompanied by the plaintiff, and the latter's wife attended at Mr. Matadial's chambers, and that he prepared a will on the instructions of the testatrix. I am satisfied that that document was read and explained to the testatrix by the clerk, and that the contents represent her wishes. I also find that that will was deposited in the Supreme Court Registry, New Amsterdam, on the same day by the testatrix herself, the memorandum of deposit having been executed before an assistant sworn clerk. In my view no suspicion can be attached to the execution of the will dated the 3rd February, 1962, and I hold that the plaintiff has discharged the onus of proof which the law places on him.

This finding does not, of course, dispose of the matter in hand, for the reason that a testator is at liberty to revoke wills previously made, to make a fresh will, and to distribute his estate in whatever fashion he pleases, provided he complies with the Wills Ordinance, Cap. 47. Therefore, it is necessary for me to examine the circumstances of the execution of the later will, but before doing so, I wish, in stating the principles governing this subject, to adopt the language of FIELD, J., in *Re Browne, Robinson v. Sandiford* (1963), 5 W.I.R. 505. At p. 511 (*ibid.*) the learned judge said:

"The presumption is that a testatrix knew and approved the contents of her will where it is proved that the will was executed with due solemnities by a person competent to make a will and who is a free agent, unless there are other circumstances leading to a different conclusion. If the will is prepared and executed under circumstances which give rise to suspicion a court will not pronounce in its favour unless it is judicially established that the will is the last will of a free and capable testatrix. A will which has been read over to a testatrix and executed by her either by signature or making her mark is *prima facie* proof of its approval and knowledge of its contents, but circumstances may exist which may require that something further should be done. This burden rests on those seeking to propound the will and there is no under-yielding rule of law that when a testatrix has a will read over to her and it is signed by her mark, all further inquiry is shut out."

Further, the remarks of Lord HATHERLEY in *Fulton v. Andrew* (1875), L.R. 7 H.L. 448, are apposite the facts of the case before me. Lord HATHERLEY said:

"there is a further onus upon those who take for their own benefit after having been instrumental in preparing or obtaining a will. They have thrown upon them the onus of showing the righteousness of the transaction."

As I have indicated earlier in this judgment, I am satisfied that the execution of the earlier will in which the plaintiff was named as sole beneficiary was a righteous one.

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Now to the circumstances of the execution of the later will in which the defendant is named sole beneficiary.

The later will was executed on the 23rd September, 1963. On the 25th September, 1963, after 3 p.m. the testatrix was taken to Dr. Searwar in New Amsterdam by the defendant and the latter's daughter, one Hasmatie. The testatrix was then unconscious, and the doctor diagnosed a stroke; he treated her and sent her away. Not having seen her before the 25th September, the doctor is in no position to say what the condition of the testatrix was on the 23rd, and he admits that she could have been capable of speaking coherently on that day, or even on the morning of the day he saw her, as was stated to him by the defendant's daughter Hasmatie.

One curious feature was that in the presence of the defendant, Hasmatie requested the doctor to make a will; the doctor did not accede to that request as he was of the view that the testatrix was in no condition to make a will. Counsel for the defendant has submitted that this is not a circumstance of suspicion as the defendant's daughter was not present at the execution of the will on the 23rd of September, and therefore would have been unaware of the existence of a will. That may be so; but it is difficult if not impossible to explain away the defendant's conduct in remaining mute during the conversation between her daughter and the doctor when she knew that the testatrix had executed a will only two days previously.

The witness Rampersaud called by the defendant, has not impressed me as a witness of truth. With some difficulty was it elicited from him that Hasmatie is the wife of one Premi who produced the will, and who supervised its execution. This Premi has not been called, and this court is left to speculate as to the circumstances of the preparation of that document. While in view of the doctor's evidence (which I accept), I cannot find, and do not find, that on the 23rd September, the testatrix was incapable of making a will, yet I cannot accept the evidence of the two witnesses for the defence that the defendant was up and about on the afternoon of that day, and that the will was executed under her house, when the suggestion of the defence throughout the trial was that the defendant was at the home of the testatrix from the preceding Sunday, and was engaged in nursing her until she died.

These are all very suspicious circumstances, and the suspicion of this court has not in any way been allayed by the evidence called on behalf of the defendant. The court cannot help observing that the defendant herself did not give evidence.

The plaintiff himself has not been truthful in all aspects of his evidence. I believe the truth of this matter is that after the execution of the earlier will, he paid no mind to the testatrix, and he certainly did not visit her as often as he would have me believe. On the other hand, the defendant and her daughter administered unto the wants of the testatrix during the last days of her life; and because

of this they felt that they should inherit the estate of the old lady. With this object in mind, the defendant's son-in-law procured the execution of the later will which remains shrouded in suspicion. This being the case, the onus which is placed on the shoulders of the defendant with respect to the later will has not been discharged. In the circumstances, there is no necessity for me to consider the question of fraud, or undue influence. I therefore must pronounce in favour of the will dated 3rd February, 1962, and order the recall of the grant of probate in respect of the will dated 23rd September, 1963.

The defendant must pay the taxed costs of the plaintiff.

Judgment for the plaintiff.

Solicitors: *N. C. Janki* (for the plaintiff); *R. N. Tiwari* (for the defendant).

MUSTAPHA ALLI v. HANOOMAN

[Supreme Court—In Chambers (Crane, J.) December 19, 1964. February 13, 1965]

Judgments and orders—Order of court—Failure to express intention of court—Amendment—O. 26, r. 11.

In an action between the parties CRANE, J., held that N.H., the administratrix of the defendant estate, was "liable in that capacity for damages." The order of court, as entered, read ". . . . that the plaintiff do recover from the defendant" damages and costs. Execution having issued against N.H. personally, an application was made to have the order varied to give effect to the judge's decision and intention.

Held : (i) the court has an inherent jurisdiction to vary, modify or extend its own order if, in its view, the purposes of justice require that it should do so;

(ii) the order of court would be varied so as to conform with the intention which the judge had in mind and expressed, which was to order that damages and costs in the first place be recovered out of the estate, and, failing that, to be recovered from the defendant personally.

Order accordingly.

[Editorial Note: Reversed on appeal to the Full Court. See later in this volume]

M. S. Rahaman for the Registrar.

D. Dial for the plaintiff.

T. Lee for the defendant.

CRANE, J.: The defendant was sued as administratrix of the estate of Hanooman, deceased, and judgment went against her in that capacity.

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The order of court having been submitted by the plaintiff's solicitor in draft was duly approved by the Registrar and entered on May 7, 1964; but it is now claimed that the order is out of accord with the judgment.

This is a summons by the plaintiff Mustapha Alli to have it varied to give effect to the "Judge's decision and intention....."

From the wording of the order it would appear that it was the court's intention to make the defendant liable personally in the sum awarded as damages and costs. The wording has in fact misled the Registrar of the Supreme Court Who issued a writ of execution against her personally at the instance of the plaintiff for the recovery thereof. The summons is not now before me, but as has been explained by Mr. Rahaman for the Registrar, one was taken out by the Registrar to have the levy set aside as irregularly obtained.

It is contended on behalf of the applicant that it was the court's intention that the estate of Hanooman should bear the judgment and costs primarily, but the order in its present form does not so state, and that what is sought is a variation of the present order to make it conform to the court's intention as indicated in the judgment. It is urged that the word "defendant" in the order is misleading and really means the defendant in her representative capacity; it is this ambiguity which has caused the writ to issue against her personally and in any case, the defendant being sued only in a representative capacity, judgment could not issue against her personally.

Counsel for the respondent submitted that the order in the terms in which it was entered was as submitted by the applicant's solicitor who could not now be heard to complain, he being estopped from so doing. Counsel cited Order 26, r. 11, and argued that not being an accidental slip or omission the court is powerless to vary its order. The order is correct as it stands, he says, and the suggestion by the applicant that he be allowed to recover from the defendant personally if the estate proves insufficient ought not to be entertained.

The defendant has pleaded *plene administravit* and issue was joined thereon. The burden of proof therefore lay on plaintiff to show that assets existed or ought to have existed in the hands of the defendant at the time writ issued (see WILLIAMS ON EXECUTORS, 12th Edn., p. 1240).

Contrary to the view of respondent's counsel that an order once it has been entered cannot be varied or rectified by the court, there is authority that the court has an inherent jurisdiction to vary, modify or extend its own orders if, in its view, the purposes of justice require that it should do so. It can certainly do so if there is some clerical mistake in its judgment, or some error in a judgment or order arising from accidental slip or omission under the slip rule (see Order 26, r. 11).

In *Lawrie v. Lees* (1881), 7 App. Cas. 19, Lord PENZANCE, said:

"I cannot doubt that under the original powers of the court, quite independent of any order that is made under the Judicature Act, every court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the court—to vary them in such a way as to carry out its own meaning and, where language has been used which is doubtful, to make it plain. I think that power is inherent in every court."

And more pointedly in *Re Swire* (1885), 30 Ch. D 239, LINDLEY, L.J., said at p. 246:

".....if an order as passed and entered does not express the real order of the court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right It appears to me, therefore, that, if it is once made out that the order, whether passed and entered or not, does not express the order actually made, the court has ample jurisdiction to set that right, whether it arises from a clerical slip or not."

In action 1460/1962/Demerara, I said (1964 L.R.B.G. 130):

".... I find that the defendant by refusing to accept transport from Ramsarran has neglected to do an act entirely in her power as administratrix, one which is necessary to enable her to discharge her obligation to the plaintiff. She is therefore liable *in that capacity* for damages for loss of bargain."

Having ruled in the words italicised above, it seems to me that justice requires that the Order of Court as drawn up and signed by the Registrar should be made to conform with the intention I had in mind and expressed, which was to order that damages and costs in the first place be recovered out of the estate of Hanooman, deceased, failing that, to be recovered from the defendant personally.

I therefore grant the order as prayed in para. 10 of the affidavit in support of the summons.

Order accordingly.

R. v. BISSOON SINGH

[Supreme Court (Bollers, J.) January 19, February 17, 1965]

Criminal law—Change of venue—Motion for—Principles governing—Criminal Law (Procedure) Ordinance, Cap. 11, s. 118.

On a motion for a change of venue in a trial for murder.

Held: the principle on which a change of venue in a criminal case will be ordered is stated to be that there is fair and reasonable probability of partiality or prejudice in the place in which the indictment would otherwise be tried; a general prejudice throughout the colony would not be sufficient ground for granting an order.

Application refused.

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

C.A. Massiah, Crown Counsel, for the Crown.

BOLLERS, J.: This is an application by way of motion under s. 118 of the Criminal Law (Procedure) Ordinance, Cap. 11, on behalf of the prisoner, who was charged with the offence of murder in the county of Demerara, for a change of venue of his trial from the county of Demerara to the county of Berbice. The section under which the application is made enables the court or a judge, on a motion of the accused person and on sufficient grounds shown on oath, to order that the trial do take place in some other county than that in which the accused person has been committed for trial.

The grounds of the application as set out in the affidavit of the prisoner seek to establish that it is unlikely that a fair and impartial trial of his cause can be had in the county of Demerara in which it is alleged the offence took place, because of widespread prejudice amongst the jurors selected on the list of jurymen summoned to attend the Demerara Criminal sessions.

In his affidavit the prisoner states that on the 31st day of August, 1964, he was committed to stand his trial at the next sitting of the Supreme Court in its criminal jurisdiction in the county of Demerara, commencing on the 6th day of October, 1964, for the offence of murder involving the death of one Cecil Adams on the 21st day of July, 1964. He alleges that during that period of time there were disastrous racial disturbances between the two major race groups of the Colony, which have caused a deep feeling- of hatred and resentment between peoples of these races, which feeling still persists in the county of Demerara; and, further, that the racial and political disturbances which took place in the other parts of the colony prior to the relevant date brought about the commission of criminal offences involving violence, such as murder and arson, which were unprecedented in the history of the colony. He was of the belief that persons of the two major race groups belong in the main to separate political parties, and that there are several jurors on the jury-list who are not of his own race group who have been affected in their mental outlook by the racial and political situation, in consequence whereof it was probable that a jury sitting in the county of Demerara would be biased against him by reason of race.

The prisoner also alleges that the newspapers of the colony have given unusual publicity to this incident which he considers would add to the prejudice in relation to this trial, and, more especially, among jurors who come from the county of Demerara. It was his view that the minds of the jurors who come from the areas in which there was racial disturbance would be affected by their own experiences in those areas.

Finally, he alleges that the jury in the county of Demerara are composed largely of members of these two race groups who are all members of a certain political party, whose minds would be affected by newspaper reports of the racial and political disturbances in the other parts of the county of Demerara, and it is therefore necessary for him to apply for a change of the place of trial to the county of Berbice in order to secure as far as possible a fair and impartial trial.

The grounds of the application, therefore, may be summarised very briefly as follows:

(1) Prejudicial and biased newspaper reports of the incident.

(2) Prejudice of the minds of the jurors who may happen to come from the East Coast of Demerara, an area of the colony which was involved in racial and political violence at the relevant time, and where the offence is alleged to have been committed.

(3) Prejudice and bias of the jury, being largely composed of one ethnic group assumed to be supporters of one political party, against the prisoner—a person of a different ethnic group—and in respect of which there had been disturbances, political and racial, between these two groups.

The principles on which a court or a judge may order a change of venue of the trial of a cause are clearly set out in the local case of *R. v. Ramjeet Singh*, 1940 L.R.B.G. 18, and it is well established that it is entirely a matter in the discretion of the court, and it is the duty of the court to see that the case should be tried in a place where a fair and impartial trial may be had, and "fair and impartial" is defined to mean a trial resulting in a true verdict, whether of guilt or innocence. The principle on which a change of venue in a criminal case will be ordered is stated to be that there is fair and reasonable probability of partiality or prejudice in the place in which the indictment would otherwise be tried; a general prejudice throughout the colony would not be sufficient ground for the granting of the order. *R. v. Hayward*, (1840) J.P. 428.

As to ground (1), I have examined the newspaper publications and I can find no more unusual publicity given to this incident, as far as the prisoner is concerned, than any other case of this nature. In point of fact, the faces of the men in the pictures arrested by the police and the military are hardly decipherable.

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Ground (2), which appears to me to be the strongest ground of the application, is not borne out in the affidavit by any concrete evidence of any member of the jury being actually involved in any incident, nor is it alleged that they were even present and witnessed any particular incident. The most that can be assumed is that living in that area they may have heard some local gossip as to the various incidents. This, however, would be true of the whole colony, and it could not be fairly urged that their minds would be more affected by these racial disturbances than any other people in other parts of the colony. In the Canadian case of *R. v. Fosbraey*, (1950) O.R. 755, 98 Can. Crim. Cas. 275, (1950) O.W.N. 743-Can., it was held that it must not be lightly assumed that jurymen will not put aside the prejudice against the accused aroused by the nature of the crime when they are solemnly charged by the trial judge.

With regard to ground (3), the allegation contained therein is completely refuted by the facts. The investigation of the matter as revealed by the Director of Public Prosecutions is that in the county of Demerara (without going into figures) there were many cases where persons of the same ethnic group as the prisoner were charged with offences involving the person and property of persons of the other ethnic group concerned, which resulted in acquittal, which could hardly show prejudice against the prisoner in the present application. It cannot be over-emphasized that the population of this colony is cosmopolitan, and it would be a dangerous precedent to do anything which would suggest trial by race, for there is no such practice.

While I am aware that each application has to be considered on its own merits, I am also conscious of the fact that if such an application were to succeed, there would follow a flood of applications of this nature which would lead to a most unhappy state of affairs. All that can be said of this application is that the prisoner is under the belief that he may not have a fair and impartial trial because the majority of the jury may not be composed of persons of his own ethnic group or his own political persuasion. To change the place of venue would be out of keeping with the authorities which establish that evidence of partiality must be extremely strong to change the place of trial in a criminal information. See *R. v. Harris*, 96 E.R. 213. In the exercise of my discretion then, the application must be refused.

Application refused.

[In the Full Court, on appeal from a magistrate's court for the Georgetown Judicial District (Luckhoo, C.J., and Bollers, J.) January 8, February 19, 1965].

Criminal law—Receiving—Appellant and a boy ran away when discovered by police stripping stolen bicycle—Defence that appellant was merely assisting boy in transferring parts to another bicycle—Whether prima facie case of guilty knowledge and possession—Whether appellant merely an accessory after the fact—Summary Jurisdiction (Offences) Ordinance, Cap. 14, s. 66 (a)—Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s. 41(5) and (7).

The appellant and a boy ran away on being discovered by the police in an unoccupied room transferring parts from a good bicycle, which had been stolen, on to a bicycle frame. The appellant's explanation was that the boy had asked him to assist him in fixing up his bicycle, that he told the boy to take it to the cycle shop, but that the boy said he had no money. The appellant then offered to pay half the cost of repair but the boy said he was not working and insisted that the appellant should assist him. In consequence he consented to do so and assisted the boy in the dismantling and transferring of parts. The appellant was convicted by the magistrate of receiving. On appeal it was argued for him that the evidence was not enough to show guilty knowledge or possession and was equally consistent with his having been an accessory after the fact to the larceny of the bicycle, and that for this offence he could not have been properly convicted in these proceedings.

Held: (i) the evidence considered as a whole was enough to show that the appellant had guilty knowledge and neither clearly indicated nor was equally consistent with the bicycle having been brought to the appellant solely for the purpose of the appellant's assisting the boy in transferring parts from it on to the other bicycle;

(ii) the test to be applied on the question whether the appellant had received or taken the stolen bicycle into his possession was one of control, that is to say, whether the appellant had exclusive or joint control with the boy over the bicycle;

(iii) there was ample evidence to show that the appellant was not merely assisting the boy in fixing his bicycle but was in joint possession with him of the stolen bicycle knowing it to have been stolen;

(iv) a receiver is not as such an accessory after the fact of the theft, and would only become that if he received the goods with the object of enabling the thief to evade arrest, trial or punishment;

(v) but although mere assistance to dispose of stolen goods does not implicate a person as an accessory, any alteration of the goods in order to conceal their identity with the stolen goods does implicate, even though the purpose of the alteration is not so much to assist the escape of the thief, as to facilitate the profitable disposal of the goods;

(vi) the evidence did not disclose that the appellant gave positive assistance to the thief personally with the object of enabling him to evade arrest, trial or punishment, and did not in consequence show that the appellant was an accessory after the fact;

(vii) had the evidence shown this the appellant could not have been properly convicted of being an accessory after the fact to the larceny of the stolen bicycle in these proceedings,

Appeal dismissed.

BENNETT v. BENN

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

R. G. Marques, Police Legal Adviser, for the respondent.

Judgment of the Court: In the magistrate's court the appellant was charged with the offence of simple larceny, contrary to s. 66(a) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14, as amended by s. 4 of Ordinance No. 30 of 1954. The particulars of offence were that the appellant on Wednesday, 11th December, 1963, at Georgetown in the Georgetown Judicial District, stole one bicycle valued one hundred and twenty dollars, the property of Joan Austin.

At the close of the case for the prosecution counsel for the appellant made certain submissions which were overruled by the magistrate and the magistrate, acting in accordance with s. 41(5) and (7) of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, being of the opinion that the evidence established a case of receiving property knowing the same to have been stolen, endorsed on the complaint a charge of receiving and called upon the defence to answer the charge thereto, and accordingly to lead a defence to a charge of receiving the said bicycle knowing it to have been stolen.

Counsel for the appellant thereupon informed the court that the appellant did not intend to lead a defence and closed the case for the defence. The appellant was found guilty of the offence of receiving the said cycle, knowing it to have been stolen, contrary to s. 66(a) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14, as amended by s. 4 of Ordinance No. 30 of 1954. It is from this conviction that the appellant now appeals to this court.

The evidence before the magistrate reveals that the police on the 11th of December, 1963, at about 11.15 a.m., acting on information received, went to a house at lot 104, Carmichael Street, where they found the appellant and another man in an unoccupied room removing parts from a lady's Raleigh cycle which was lying on the floor, and putting them on to another lady's cycle of Triumph manufacture which was slung on a rope leading to the roof. The Raleigh cycle was clearly proved to have been the property of the person mentioned in the particulars of the charge, and to have been stolen on the 11th December, 1963, from an address at High and Cowan Streets, Georgetown, and the appellant and the other man were actually found in the act of screwing a fender from the stolen cycle on to the other cycle of which there was no evidence that it was a stolen cycle. On the arrival of the police both men ran down the back steps and escaped.

On the 20th February, 1964, at about 11.30 a.m. the appellant was arrested by a policeman at an address at Duke Street, Kingston, and was informed that he was being arrested for the larceny of two bicycles with which he had been seen in company with another man at Carmichael Street on the 11th of December, 1963, whereupon he was cautioned and he replied, "It is not me, man, I went up Berbice that time."

On the 20th January, 1964, at about 6.30 p.m. when the appellant was shown the two cycles at the police station, he elected to make a statement and was cautioned. That statement was put in evidence by the prosecution and in it the appellant stated that on Wednesday, 11th December, 1963, a boy had come to his home and told him that he would like him (the appellant) to assist him in fixing up his bicycle. He told the boy to take the bicycle to a cycle shop, but the boy told him he had no money. He then told the boy that whatever was the cost he would give him half the money to pay. The boy replied that he was not working and he did not want to leave the bicycle at a shop because he would not get the money to pay for it, and the boy insisted that he should assist him, and as a result he decided to do so. He then assisted the boy in dismantling the lady's Raleigh cycle and started to fix the parts on to the other bicycle that had no wheel, handle bar and gear-case. He further said that at about 11.30 a.m. to 12 midday, while the two of them were in the house the police arrived in plain clothes stating that they had come to make enquiries in respect of some bicycles. They asked the men for their names and he gave his name as Alfred Bennett and the other man give his name as Winston Clarke, and while the police were there writing the man Clarke walked away. He then left the house in search of Clarke and did not find him, and he then returned to his house. He left his house again in search of Clarke but did not find him, and later when he returned to his house he found the police in the yard, became afraid and ran away because he did not know what to do.

It is clear from the evidence that if the version of the matter given by the police was believed, then the latter portion of this statement made by the appellant was false.

The magistrate in his memorandum of reasons recited the evidence which was led by the prosecution as to the circumstances surrounding the finding of the stolen cycle, and stated that at the close of the prosecution's case he found the appellant was not merely assisting in dismantling the cycle, as he considered that there was no need at all for assistance in fitting the parts of the stolen cycle on to the other cycle as Clarke himself could have done that.

The magistrate accepted the statement given by the appellant in so far as it said that another man, Clarke, had brought the two bicycles to him, and he found as a fact that Clarke and the appellant were in joint possession of the stolen cycle when they began to strip it, and the appellant was fully aware from the circumstances that the cycle was stolen. It appears from the memorandum of reasons that the circumstances which influenced the magistrate in arriving at the conclusion that the appellant knew that the cycle was stolen when it was in his joint possession were:

- (a) that the defendant-appellant had run away on the approach of the policeman;
- (b) that when apprehended he tried to set up an *alibi*;

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- (c) that he offered to pay half the cost of the repairs for a man who merely asked for his assistance;
- (d) that the man was in possession at the time of one good bicycle, Exhibit 'C,' and the other an incomplete one;
- (e) that the work involved stripping the parts of Exhibit 'C' and placing them on the other bicycle, and that the work was to be done in an unoccupied and unfinished house.

The points raised on behalf of the appellant in the court below are now repeated in this court and may be conveniently summarised as follows:

(1) that there was not enough evidence to show guilty knowledge that the cycle was stolen at the time it was brought to the appellant and he agreed to fix it up, and that the appellant's subsequent conduct in running away and later denying his presence is equally consistent with guilty knowledge having been acquired after the cycle had been dismantled and before the police arrived, as it was with guilty knowledge having been acquired at the time when the cycle was brought to him;

(2) that there was no evidence that the appellant was ever in the exclusive possession or in the joint possession with the thief of the stolen property. As the statement alleged to have been made by the appellant was put in evidence by the prosecution it became part of its case against the appellant, and as there was no evidence to rebut what the appellant had stated in that statement, it was evidence both for and against the appellant, and the contents thereof must be accepted as *prima facie* true, and therefore the evidence would indicate that the thief brought the stolen cycle to the appellant for the sole purpose of getting his assistance in changing the parts and such assistance did not reduce the cycle into the possession of the appellant;

(3) that the evidence adduced by the prosecution was equally consistent with the appellant having been an accessory after the fact to the larceny of the cycle, for which offence he could not have been properly convicted in these proceedings.

We agree that on the authority of *R. v. Sarah Jones and Mary Jones* (1827), 2 C. & P. 629, and *R. v. Thomas Higgins* (1829), 3 C. & P. 603, that if the prosecution give in evidence a statement or declaration made by the prisoner, it becomes evidence for the prisoner as well as against him, but like all other evidence the jury may give credit to one part of it and not to the other, and we accept that the magistrate found that the man Clarke had brought the stolen cycle to the appellant, but we do not agree that the evidence, considered as a whole, clearly indicated or was equally consistent with the cycle having been brought to the appellant solely for the purpose of the appellant's assisting the thief in placing parts of it on to another cycle.

The circumstances, as set out by the magistrate in his memorandum of reasons, and the portion of the statement of the appellant which was at variance with the evidence of the policemen who gave evidence for the prosecution, all went to show that the appellant had guilty knowledge that the cycle was stolen at the time it was brought to him, and he received it into his possession. From the circumstances the appellant, as a reasonable man, must have known that the cycle was stolen when he questioned the other man who was not prepared to leave it at a shop, even though the appellant was prepared to pay the cost of repairing the cycle or of transferring the parts of one cycle to the other. The very fact of transferring parts of one cycle to another would be sufficient to place the appellant upon his enquiry and would indicate to him that the cycle was stolen property. We consider, therefore, that the magistrate was right when he found the appellant had guilty knowledge.

As far as the question whether it was proved that the appellant ever had possession of the stolen property is concerned, we are aware that for a conviction to ensue on a charge of receiving, the prosecution must prove that the goods were stolen and that they were received into the possession of the prisoner with the intent to convert them, and that at the time the goods were taken into his possession he knew that they were stolen. The authorities show that the test to be applied on the question whether the prisoner had received or taken the goods into his possession is one of control, that is to say, whether the prisoner had exclusive or joint control with the thief over the goods. See *R. v. John Wiley* (1850), 4 Cox C.C. 412, *R. v. Thomas Smith* (1852-1855) 6 Cox C.C. 554, *R. v. Berger* (1914-1915), 11 Cr. App. R. 72, *R. v. Gleed* (1916-1917) 12 Cr. App. R. 32, *Hobson v. Impett* (1857), 41 Cr. App. R. 139, and *R. v. Seiga* (1961), 45 Cr. App. R. 226.

In *R. v. Wiley* it was decided that a person could not have been convicted of receiving stolen property if it had never come into his personal possession. The evidence was that Straughn and Williamson, who were found guilty of stealing the property in question, were seen to be conducted into a stable by Wiley. Straughn and Williamson were carrying a sack and the stable belonged to Wiley. The police entered the stable and found the parties bargaining as to the price of the goods in question. There was no doubt that Wiley knew that the goods were stolen, and the question for the Court of Crown Cases Reserved was whether Wiley had sufficient possession of the goods to be convicted of receiving. The majority of the judges of the court were of the opinion that Wiley could not have been convicted of the offence charged. PATTERTON, J., in his judgment stated what has since been described as an accurate statement of the law on the point, and that is:

"I do not mean to say that it is necessary, in order to constitute a receiving, that the prisoner should in every case actually touch the stolen property, or, that there may not be cases of joint possession by the thief and receiver, in which a conviction would be proper, but I think that there must be such circum-

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stances in the case as will show that the stolen property was under the control or power of the receiver, either jointly with or separately from the thief; and in my opinion there is an absence of such circumstances in this case."

In *Smith's* case, the prisoner was indicted for feloniously receiving a stolen watch, and it was proved that the prisoner, who had been arrested at the time when the watch was stolen, afterwards went to the prosecutor and offered to get it back for him. The prosecutor agreed to pay a sum of money and sent a woman with the prisoner to fetch the watch. They went to a room where there was another man who placed the watch upon a table and the prisoner directed the woman to take it to the prosecutor, which she did. The jury were directed that if they believed that the prisoner knew the watch to have been stolen and also believed that it was in the custody of another person with the knowledge of the prisoner that person being one over whom the prisoner had absolute control, so that the watch would be forthcoming if he ordered it, there was ample evidence to justify them in convicting the prisoner. It was held by the Court of Criminal Appeal that this direction was right. Lord CAMPBELL, C.J., in his judgment pointed out that according to all the cases manual possession of the stolen property was unnecessary in order to constitute the offence of receiving; and to lay down the contrary would indeed be proclaiming impunity for the receivers of stolen property. He went on to state that according to the decisions, including *Wiley's* case, there may be a joint possession by the thief and the receiver, and it is a question for the jury whether there had been such a possession. Lord CAMPBELL further stated that in *Wiley's* case a majority of the judges thought that that question had not been properly left to the jury and in his opinion that was the *ratio decidendi* of that case.

In *Berger's* case the learned judges of the Court of Criminal Appeal approved of the dictum of PATTERSON, J., in *Wiley's* case and stated that the jury should have been told that before they could convict the prisoner of the offence of receiving they must be satisfied that the goods were under the control of the prisoner, and this direction the learned judge had refused to give, so the conviction had to be quashed.

In *R. v. Gleed* a cask containing sixty gallons of gin had been stolen by a car-man employed by the owners of a firm of distillers. Police officers observed the car-man drive with the van to the appellant's house and knock at the door which was opened by the appellant. After a conversation the car-man led his horses across the street and down the garage yard. The appellant followed and helped the car-man to lower to the ground a barrel of gin which was subsequently proved to have been stolen by the car-man from his employers. The deputy chairman in his summing-up did not deal with the case as one of joint possession but invited the jury to find that the appellant had control over the barrel. Lord READING, C.J., in the Court of Criminal Appeal stated that it could not have been properly argued that there was no evidence of joint possession because the mere fact

that the two man having handled the cask together when lifting it from the van is some evidence of joint possession. He referred to the case of *Thomas Smith*, and following that decision stated that it was not necessary that there should be even manual possession of stolen property for a conviction for receiving such property to be sustained against the prisoner. It is sufficient if the alleged receiver had control over the stolen goods.

The cases of *R. v. Watson* (1916), 12 Cr. App. R. 62, and *Hobson v.-Impett* (1957), 41 Or. App. R. 139, and *R. v. Seiga*, (1961), 45 Cr. App. R. 2,6, do no more than recite the principle expressed by PATTERSON, J., in *Wiley's* case that the mere physical handling of goods does not necessarily amount to possession, because the control may be in some other person. There may be a picking of goods, without a taking of them into possession, and it would be a misdirection to tell a jury that manual manipulation of the goods in itself amounts to possession. It is essential that the prisoner should be in control of the goods either solely or jointly with some other person before he is liable to be convicted.

Lord Chief Justice GODDARD in *Hobson v. Impett* in his judgment declared that in those circumstances it is not the law that if a man knows goods were stolen and put his hands on them that in itself makes him guilty of receiving, because it does not follow that he is taking them into his control. The control may still be in the thief or the man whom he is assisting, and the alleged receiver may be only picking the goods up without taking them into his possession, the goods all the time remaining in the possession of the person whom he is helping.

In our view, having regard to the evidence in relation to the authorities which we have considered, there was ample evidence upon which the magistrate could have arrived at the conclusion as he did that the appellant was not merely assisting the other man Clarke in fixing the cycle, but was in joint possession with him of the stolen cycle knowing it to have been stolen. We cannot therefore say that the magistrate was in error at arriving at this conclusion, and we find it impossible to say that there was no evidence on the part of the appellant to exclude Clarke from his exclusive possession thereof. In our view the evidence indicated that there was a joint possession between the appellant and the other man. For the most recent decisions on the point, see *R. v. Frost and Hale* (1964), 48 Cr. App. R. 264, and *R. v. Sharp* (1964), Crim. L.R. 26.

In respect of the third point raised by counsel for the appellant, we concur with his observation that the appellant could not be properly convicted of being an accessory after the fact to the larceny of the cycle in these proceedings, but we do not agree with his submission that the evidence was equally consistent with the appellant being an accessory after the fact to the larceny of the cycle. Even if the evidence did show such consistency, as a matter of law it would be open to the magistrate to draw either inference, or having drawn

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the inference that the appellant was the receiver of the stolen property, we are not prepared to say that he was wrong.

In *R. v. Watson* (1917), 12 Cr. App. B. 63, cited by counsel for the appellant, the evidence showed that a shop had been broken into and jewellery stolen therefrom. Three days later Walker, Collins and the appellant were arrested while in each other's company and on Walker some of the stolen property was found. The only evidence against the appellant was the fact that he was in the company of the other prisoners and, secondly, on the same day he had accompanied them to a certain place and had then gone alone to a jeweller and asked him if he would buy some stuff, that is to say, about thirty-six ounces of gold that had been got from a pawn-shop outside London "on the cross", which meant it had been stolen. The appellant said in his evidence at the trial that he accidentally met the two other prisoners who asked him if he could find a purchaser for some jewellery which had been gat "on the cross", and accordingly he went to the jeweller. The jury found a verdict in the following terms: "We find George Watson guilty of being a negotiator and in full knowledge that the goods were stolen." This was taken as a verdict on the count of receiving stolen property. The Recorder directed the jury as follows:

"If this man assisted to get rid of stolen goods, then he has been aiding and abetting them and you can convict him of receiving the goods knowing them to have been stolen. I tell you that is the law. If he aids and abets them to get rid of these stolen goods, then he can be convicted of receiving these goods knowing them to have been stolen."

The Court of Criminal Appeal was of the opinion that the Recorder had treated the case as one of the appellant being an accessory after the fact and of aiding and abetting in the commission of the offence and that this direction was wrong. The court went on to hold that had the Recorder directed the jury that if they came to the conclusion upon the evidence that the appellant was in possession of the stolen property either by himself or jointly with the other prisoners, in the sense that he had either exclusive or joint control over it, and the jury had accepted that view on the facts, the conviction might have been supported. In the course of the judgment, the court pointed out that if the prisoner Watson was merely a person directing the other two to a place where they might conveniently dispose of the stolen property or was merely acting in the capacity of a messenger or a conduit pipe between the intended purchasers and the receivers, he could not be convicted of the offence of receiving. It is important to note that the Court of Criminal Appeal made no pronouncement in their judgment in that case that the circumstances showed that the appellant was an accessory after the fact.

Lord DENNING in the recent case of *Sykes v. Director of Public Prosecutions*, [1961] 3 W.L.B. 371, at p. 382, gives the latest authoritative definition as to what constitutes being an accessory after the fact :

"The classic definition of an accessory after the fact is when a person, knowing a felony to have been committed, receives, relieves, comforts or assists the felon.....It has been said that, to make a man an accessory, the assistance must be given to the felon *personally* in order to prevent or hinder him from being apprehended or tried or suffering punishment.....so that if the assistance was not given to the felon personally, but only indirectly by persuading witnesses not to give evidence against him; or if the acts of assistance were done, not to hinder the arrest of the felon, but with another motive, such as to avoid arrest himself or to make money for himself without regard to what happened to the felon, he would not be guilty as an accessory after the fact."

And in *R. v. Rose* (1962), Crim. L.R. 252, where the prisoner was convicted of being an accessory after the fact for larceny, and the evidence was that on two occasions the prisoner went to look at the stolen property with a view to buying it, the jury were directed that if a person went twice with a view to purchasing or possible purchasing stolen property or part of it, that would be for the purpose of assisting the principal felon, to escape conviction, and therefore the prisoner would be guilty of being an accessory after the fact. On appeal to the Court of Criminal Appeal it was held that these circumstances did not come within the definition of an accessory after the fact as stated by Lord DENNING and hence there was a clear misdirection, and the conviction was quashed. In a commentary to this report the editor points out that it must be proved that an accessory after the fact gave assistance to the felon with the object of enabling him to evade arrest, trial or punishment. The accused's motive is important, for if he knowingly does acts which have a tendency to enable him to evade justice but with a motive of avoiding his own arrest, he is not an accessory after the fact. (*R. v. Jones*, [1949] 1 K.B. 194). A receiver is not as such an accessory after the fact of the theft, and would only become that if he received the goods with the object of enabling the thief to evade arrest, trial or punishment.

In a later case of *R. v. Thorley* (1962), Crim. L.R. 696, Thorley was a scrap metal dealer and parts of a motor cycle were taken to his yard by one of the thieves and hidden. When police enquiries were pending, it was alleged that Thorley advised the thief what to say to the police. He was convicted of being an accessory after the fact to the larceny of the motor cycle. On appeal, the Court of Criminal Appeal held that a receiver is not necessarily an accessory after the fact and in the ordinary way would not be an accessory after the fact unless there were other matters connected with his receiving which showed that he was suppressing and providing evidence for the felon. If Thorley was a party to the hiding of the parts, this would not of itself make him an accessory after the fact, because the hiding in his own interest as a receiver would be to assist himself and not to assist the felon. On the other hand, if he had assisted the thief to concoct a story which was to be given to the police, that would amount to being an accessory after the fact.

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In *R. v. Phelan* (1964), Crim. L.R. 468, where the prisoner negotiated the sale of stolen property from the thief to the receiver and had a share of the proceeds of sale, it was held that he could not be convicted of the offence of receiving, distinguishing *R. v. Watson*, [1916] 2 K.B. 385, but not of the offence of being an accessory after the fact as there was no evidence that one of his motives was to prevent or hinder the arrest of the thief.

In an article by Professor D. W. Elliot on the *mens rea* of accessories after the fact [(1963), Crim. L.R. 159], the author considers the question at p. 163 whether receiving goods is sufficient evidence of intention to assist the felon to escape justice, and states that when the felon is still liable to be tried and punished, there seems no reason why the receiver should not be guilty of both receiving and assisting the felon. He cannot say that because his offence is receiving it is not also assisting the felon, and the author cites the old case of *R. v. Butterfield* (1843), 1 Cox C.C. 39, where MAULE, J., stated that receipt of goods could be evidence of comforting and assisting. In that case the accused attempted to get changed a hundred pound note stolen by X and in the course of arguments MAULE, J., said:

"Here the prisoner assists the party who has stolen the goods to get rid of them and thus evade the justice of the country." That learned judge gave as an example that if a man stole a horse and another assisted him in colouring and disguising it so that it could not be known again, that would make him an accessory.

This decision was followed by the Recorder in *R. v. Poole and Blake* (1959), Crim. L.R. 45, where Blake was charged with being an accessory after the fact to Poole's garage breaking and larceny of tyres and other parts of the stolen property. In support of the count alleging that Blake was an accessory after the fact, the evidence led by the prosecution was that, with knowledge that Poole had stolen the tyres, Blake offered them for sale to several persons who he thought might be interested in the purchase. It was submitted that this evidence did not support the count charging Blake as an accessory after the fact, because there was no evidence that what was done by him was done in order to hinder the arrest, apprehension, trial or punishment of the principal felon. The Recorder directed the jury that Blake would be an accessory if, knowing that Poole committed a theft, he assisted Poole to dispose of the proceeds of that theft.

"He becomes an accessory by going round looking for customers who would take the goods off Poole's hands and assisting him to realise the proceeds of his crime."

The Recorder himself appears not to have had confidence in his ruling, for he indicated that the point was difficult and he was prepared, if necessary, to grant a certificate to expedite the matter being dealt with by the Criminal Court; of Appeal. The prisoner was, however, acquitted.

In the commentary to this report, the editor makes the point that the direction was not really warranted by *Butterfield's* case as

MAULE, J., did not ignore the traditional requirement that the assistance must have been given to enable the felon to escape justice. It appears to depart from the principle that it is necessary to show that the accessory after the fact gave assistance to the felon with the object of enabling him to evade arrest, trial or punishment:

"An accessory after is one who gives favour and aid to the felon 'that he be not known'. Coke 2 Inst. 183. And see Hawkins P.C. b2 cap. 29, section 26. Enabling the prisoner to realise the proceeds of his crime is by no means the same thing as enabling him to evade justice."

It is clear from the latest authorities already cited—*R. v. Phelan* and *R. v. Rose*—that the direction given by the Recorder was wrong, and Professor GLANVILLE WILLIAMS in his CRIMINAL LAW, section 67, note 19, considers *Butterfield* a doubtful case, though he adds that a receiver would be a party if his purpose were to suppress the evidence. At section 138 of the second edition of his book, Professor WILLIAMS states that the receiver of stolen goods is not as such an accessory to the felony, nor on the preponderance of authority is one who assists the felon to obtain the proceeds of the felony or to dispose profitably of those proceeds. What is required is not assistance to profit from the felony but assistance to elude justice. At the same time the line is a thin one between assisting in the disposal of the goods and assisting the thief to elude justice, for the thief's possession of the stolen goods is evidence against him of the theft, and assisting him to dispose of them is therefore assisting him to destroy the evidence against himself. It seems that the rule is that mere assistance to dispose of the goods does not implicate a person as an accessory, but any alteration of the goods in order to conceal their identity with the stolen goods does implicate, even though the purpose of the alteration is not so much to assist the escape of the thief as to facilitate the profitable disposal of the goods.

Having considered the evidence in this case and the authorities, we are of the opinion that the evidence did not disclose that the appellant gave positive assistance to the felon personally with the abject of enabling him to evade arrest, trial or punishment, and there was certainly no evidence of the motive which influenced the appellant in giving assistance to Clarke in dismantling the stolen cycle and placing some of the parts on the other cycle. On the other hand, there was evidence upon which the magistrate could have found, as he did, that the appellant was not merely assisting Clarke, but assisting himself in disposing of the stolen property, which he knew to have been stolen.

We recognise that there may be cases where the circumstances could give rise to either inference, that is to say, that the prisoner was the receiver or an accessory after the fact to the larceny, but if the magistrate were to draw one inference or the other, it would be impossible for an appellate tribunal to say that he was wrong. For these reasons the appeal is dismissed and the conviction and sentence of the magistrate affirmed with costs to the respondent fixed at \$25.00.

Appeal dismissed.

BURGAN v. IVAN GAY

[Supreme Court (Luckhoo, C.J.) January 27, 28, February 24, 1965]

Will—action by plaintiff in capacity as executor for delivery of will—Probate not yet granted—Whether suit competent.

The plaintiff was the executor named in a will which he delivered to a solicitor for the purpose of making an application for probate. The application was not made and the will eventually found itself in the possession of the defendant. The latter, however, denied having it and thereupon the plaintiff sued in his capacity as executor for its delivery. In defence it was contended that the plaintiff could not maintain the action in his capacity as executor because probate of the will had not yet been granted.

Held: (i) before obtaining probate of the will an executor is entitled to do almost all of the acts which are incidental to his office but he cannot maintain actions before probate except those based on his actual possession ;

(ii) an executor appointed by a will has a sufficient proprietary interest in the will to commence a claim in detinue and, as in the instant case the plaintiff was in actual possession of the will subsequent to the deceased testator's death, it was competent for him to commence and to maintain the claim.

Judgment for the plaintiff.

C. V. Wight for the plaintiff.

R. E. Morris for the defendant.

LUCKHOO, C.J.: This is an action in detinue brought against the defendant Ivan Gay by the plaintiff Livingston Burgan in his capacity as the appointed executor named in the last will and testament of Winifred Gill, deceased, dated the 9th day of August, 1962, for the return of the aforesaid last will and testament.

The evidence of the plaintiff, which I believe, discloses that Winifred Gill in her lifetime made a will bearing date the 9th August, 1962, in which the plaintiff was named the sole executor. Winifred Gill died in the month of September 1962, at which time the will was in the plaintiff's possession. The plaintiff was without the means necessary to have application made for the grant of probate of the will and in August, 1963, the plaintiff and his wife executed a promissory note in favour of the defendant in the sum of \$475. This amount included a sum which the deceased owed the defendant and a sum which the plaintiff owed the defendant, these two sums totalling \$254.64. The plaintiff asked the defendant to lend him money to have application made for grant of probate of the deceased's will. At the defendant's request the plaintiff met the defendant at the office of Mr. T. A. Morris. Mr. Morris is the defendant's solicitor. The defendant told Mr. Morris of the arrangement between the plaintiff and the defendant and Mr. Morris charged the plaintiff \$182 to have the will probated. It was in those circumstances that at Mr. Morris' office the plaintiff and his wife came to sign a promissory note in the sum of \$436.64, to be repaid within seven months' time, which sum included \$182 as the amount to be paid Mr. Morris by the defendant on the plaintiff's behalf for application to be made for the grant of probate of the deceased's will.

The plaintiff left the deceased's will in the keeping of Mr. Morris who undertook to make the necessary application for grant of probate upon the defendant advancing on the plaintiff's behalf the sum of \$182. The defendant has never made the required payment to Mr. Morris and somehow or other—no explanation has been given by the defendant or by Mr. Morris by way of evidence in this action—the defendant got possession of the will. I accept the plaintiff's denial that neither he nor his wife ever left the will with the defendant. When the plaintiff requested the defendant to give up the will—this was after Mr. Morris said that he could not find the will and that probably the defendant had it—the defendant denied that he was in possession of the will. Eventually it was only after this action was filed that the defendant deposited the will in the Registry. I find that there was a sufficient demand made by the plaintiff of the defendant for delivery of the will to him with a sufficient denial by the defendant to deliver the will to the plaintiff.

For the defendant it has been submitted that the plaintiff cannot maintain this action because he has not obtained probate of the will.

Where an executor is appointed by a will his title is derived from the will and not from the grant of probate though he cannot rely on his title in any court without the production of probate as authenticated evidence of his title. Before he proves the will an executor is entitled to do almost all of the acts which are incidental to his office but he cannot maintain actions before probate except those founded on his actual possession. Where he relies on his constructive possession as executor it would usually be necessary for him to prove himself executor by way of grant of probate. He may *commence* actions before probate where founded on constructive possession and may continue such actions up to the point where production of probate becomes necessary. In the present case the plaintiff was in actual possession of the will before handing it to the solicitor Mr. Morris for the purpose of an application being made for grant of probate in favour of the plaintiff. The plaintiff is not relying on constructive possession to found this claim.

In *Jarvis v. Williams*, [1955] 1 All E.R. 108, the Court of Appeal expressly approved the following passage appearing in 33 HALSBURY'S LAWS OF ENGLAND (2nd Edition), at p. 62, para. 98, as being a correct statement of the law:

"In order to maintain an action of trover or detinue, a person must have the right of possession and a right of property in the goods at the time of the conversion or detention; and he cannot sue if he has parted with the property in the goods at the time of the alleged conversion, or if at the time of the alleged conversion his title to the goods has been divested by a disposition, which is valid under the Factors Act, 1889."

The Court of Appeal pointed out (at p. 111) that though the general rule is as stated in the above passage certain classes of persons like bailees have, no doubt, a special right to sustain actions in trover and

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detinue. It was also pointed out in that case that in *Rosenthal v. Alderton & Sons, Ltd.*, [1946] 1 All E.R. 583, the Court stated (at p. 584):

"It is further to be noted that the action of detinue was essentially a proprietary action implying property in the plaintiff in the goods claimed, see, e.g., Viner's Abridgment, vol. Villi p. 23; Holdsworth, History of English Law, vol. VII, pp. 438, 439. It was, and still is, of the essence of an action of detinue that the plaintiff maintains and asserts his property in the goods claimed up to date of the verdict."

In my opinion an executor appointed by a will has a sufficient proprietary interest in the will to commence a claim in detinue and as in the instant case the plaintiff was in actual possession of the will subsequent to the deceased testator's death it was competent for him to commence and to maintain this claim.

It was submitted on behalf of the defendant that the provisions of s. 9 of the Deceased Persons Estates' Administration Ordinance, Cap. 46, enable an executor appointed by a will to move the court to obtain possession of the will from a person in whose possession the will is. However that may be I do not think that the plaintiff is debarred from pursuing such other alternative remedy that may be open to him.

The will having been deposited by the defendant in the Registry subsequent to the commencement of this action it is no longer necessary to make any order relating to the delivery up of the will. The plaintiff is only entitled to general damages and costs. He will get \$50 as general damages and costs to be taxed on lower Supreme Court scale.

Judgment for the plaintiff.

GANGADEEN v. WHITE

[In the Full Court, on appeal from the Magistrate's Court for the Berbice Judicial District (Luckhoo, C.J., and Khan, J.) December 31, 1964, January 21, February 26, 1965]

Magistrate's court—Jurisdiction—Evidence taken of dispute to land—Jurisdiction declined—Whether remedy is appeal or mandamus—Summary Jurisdiction (Appeals) Ordinance, Cap. 17, s. 37.

Magistrate's court—Criminal procedure—Indictable matter taken summarily—Whether offence ceased to be indictable—Dispute to land—Whether jurisdiction ousted—Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s. 60—Summary Jurisdiction (Offences) Ordinance, Cap. 14, s. 10.

The respondent was tried summarily for an indictable offence. The evidence for the prosecution disclosed a dispute to land. The magistrate held that the dispute was *bona fide* and that his jurisdiction was accordingly ousted under s. 10 of the Summary Jurisdiction (Offences) Ordinance, Cap. 14. On appeal by the prosecution, it was submitted for the respondent that the proper procedure was by way of application for a rule under s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17.

Held: (i) the magistrate had dealt with the matter on its merits even though he did so after hearing only the witnesses for the prosecution, and the proper procedure was therefore by way of appeal and not by way of an application for mandamus. *Ridley v. Bishop*, 1956 L.R.B.G. 104, applied;

(ii) where an indictable offence is tried summarily the offence remains an indictable offence even though the procedure shall be, from and after the court assumes power to deal with the offence summarily, the same as if the offence were a summary conviction offence and not an indictable offence;

(iii) the trial was not therefore in respect of a summary conviction offence and the magistrate was not without jurisdiction to determine the matter.

Appeal allowed; matter remitted.

D. Singh for the appellant.

A. S. Manraj for the respondent.

Judgment of the Court: This is an appeal from the decision of a magistrate of the Berbice Judicial District who declined jurisdiction in respect of a charge of malicious damage to property contrary to s. 160 of the Criminal Law (Offences) Ordinance, Cap. 10.

The particulars of offence allege that on Saturday, 28th September, 1963, at Pln. Moor Park, West Coast, Berbice, in the Berbice Judicial District the accused Alfred Crawford and Winston White unlawfully and maliciously damaged two combine belts and two fingers to the value of \$165, movable property of a private nature, the property of Wilfred White.

Before the learned magistrate the prosecutor applied for the matter to be tried summarily and the magistrate, acting in accordance with the provisions of s. 60(1) of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, decided to deal with the matter summarily. After the witnesses for the prosecution had given evidence and the case for the prosecution had been closed it was submitted on behalf of the respondent White that the magistrate was without jurisdiction to decide the matter as it involved a dispute to property. This submission was upheld by the magistrate who declined jurisdiction.

The evidence of Moses White was to the effect that he was reaping padi on his father Wilfred White's ricelands at Moor Park, West Coast, Berbice, on the 28th September, 1963, on his father's instructions. The two accused persons Crawford and Winston White threw sticks -in the machine causing two of the fingers of the combine to be broken. Crawford threw another stick into the machine and on the combine being stopped Winston White cut one of the belts of the combine with a cutlass whereupon Crawford took the cutlass and cut the other belt of the combine. The damage done as a result of these acts totalled \$165. Wilfred White in the course of his testimony admitted that there were heated and animated disputes as to the ownership of the land on which the reaping was going on and that civil actions between certain members of the White family were at that time pending in the Supreme Court. The accused persons are the children of certain of the claimants to the ownership of the land.

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The magistrate in his memorandum of reasons for decision stated that the evidence of the witnesses for the prosecution in support of the charge of the damage to the belts and fingers of the combine was clear and that if he considered that he had jurisdiction to hear and adjudicate on the facts he would have called for a defence. The magistrate further stated that he declined jurisdiction on the ground that he found a question in good faith arose as to the title and interest of the land where the alleged malicious damage occurred there being a *bona fide* dispute to the land and that the matter was for a summary conviction offence.

When this appeal came on for hearing counsel for the respondent Winston White (the other accused Crawford had died before the conclusion of the hearing before the magistrate) submitted that it was not competent for the appellant to come by way of appeal. Counsel contended that the correct procedure in the circumstances of the present case is by way of application for a rule under s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17. We overruled counsel's submission in this regard holding on the authority of *Ridley v. Bishop*, 1956 L.R.B.G. 104, that the appellant has adopted the correct procedure. In *Ridley v. Bishop* the Full Court pointed out that a consideration of the authorities cited therein established that "when a magistrate has considered the facts of a case and has reached a conclusion on the merits even if such a conclusion is that he has no jurisdiction then he has adjudicated the matter on its merits; the proper procedure is by way of appeal and not by an application for mandamus." Where the magistrate has not dealt with the facts of a case on the merits but has disposed of the case without coming to a conclusion on the facts the proper procedure is by way of application for a rule.

In the instant case the magistrate has dealt with the matter on the merits even though he has done so after hearing only the witnesses for the prosecution. As in *Ridley v. Bishop* the magistrate, after hearing the evidence of the witnesses who testified at the hearing, has agreed with the submission of counsel that the case involved a dispute with regard to title of land and declined jurisdiction. The proper procedure as was held in *Ridley v. Bishop* is by way of appeal.

Counsel for the appellant has submitted that the magistrate erred in concluding that the indictable offence charged became a summary conviction offence when the provisions of s. 60 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, were invoked to have the matter tried summarily. Section 10 of the Summary Jurisdiction (Offences) Ordinance, Cap. 14, provides that nothing in that Ordinance shall authorise a magistrate's court acting in respect of its jurisdiction in respect of summary conviction offences to hear and determine any complaint for a summary conviction offence under that Ordinance in which any question in good faith arises as to the title to any immovable property or any interest therein. Where an indictable offence is tried summarily the offence remains an indictable offence even though the procedure shall be, from and after the court assumes the power to deal with the offence summarily, the same as if the offence were a summary conviction offence and not an indictable offence.

The magistrate was in error in coming to the conclusion that the matter was in respect of a summary conviction offence and that he was thereby without jurisdiction to determine the matter.

The appeal is therefore allowed and the order of the magistrate is set aside. The matter is remitted to the magistrate for him to call upon the respondent for a defence to the charge laid and to hear and determine the matter according to law. The appellant will get his costs of the appeal fixed at \$29.08.

Appeal allowed; matter remitted.

DOWNER v. MENTORE

[In the Full Court, on appeal from the Magistrate's Court for the Berbice Judicial District (Luckhoo, C.J., and Bollers, J.) January 15, February 26, 1965]

Criminal law—Inciting persons to resist peace officer acting in the execution of his duty—Strikers peacefully squatting—Attempt by police officer to move them—Obstruction by defendant—Whether police officer acting in execution of his duty—Summary Jurisdiction (Offences) Ordinance, Cap. 14, ss. 20 and 28(e).

A number of strikers were peacefully squatting across the entrance of their employer's garage. A police officer attempted to disperse them, but the appellant called upon them to remain where they were. The appellant was convicted of inciting the strikers to resist a peace officer acting in the execution of his duty. On appeal,

Held: there was no ground for a belief that a breach of the peace might reasonably be apprehended. The continued squatting in spite of the officer's order to disperse could not therefore amount to resisting a peace officer in the execution of his duty, and *a fortiori* the appellant could not be guilty of inciting the workers to resist a peace officer in the execution of his duty.

Appeal allowed.

R. P. Rawana for the appellant.

Doodnauth Singh, Senior Legal Adviser (Ag.), for the respondent.

Judgment of the Court: The appellant Victor Downer was convicted on a complaint that on the 16th March, 1964, at Rose Hall, Canje, Berbice, in the Berbice Judicial District he incited other persons to resist. James Mentore, Assistant Superintendent of Police, a peace officer acting in the execution of his duty, contrary to s. 28(b) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14, contrary to s. 20 of the Summary Jurisdiction (Offences) Ordinance, Cap. 14. From this conviction the appellant appeals on the ground that the decision is erroneous and cannot be supported having regard to the evidence.

The evidence of A.S.P. James Mentore was to the effect that on Monday, 16th March, 1964, at about 7.15 a.m. he was on duty at Rose Hall Public Road, Canje, Berbice, in charge of a police party

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including Police Constable 6663 Mattar for the purpose of preserving order as there were about 250 sugar workers who were on strike gathered on the eastern parapet of the Rose Hall Public Road opposite to the Rose Hall Estate Sugar Factory situate on the western side of that road. The appellant Downer arrived at about that time and went amongst the aforesaid sugar workers. A few minutes later he walked to the western side of the public road followed by about 100 of those sugar workers. He beckoned to them and said "O.K. comrades squat here", indicating the entrance to the garage compound of the estate factory. Those workers then squatted in the gateway of the garage compound and the appellant called to the remaining sugar workers to follow him. About 100 of the remaining workers followed him as he walked northwards in the direction of the main entrance of the factory. A.S.P. Mentore then approached the persons who were squatting in the garage entrance and ordered them to disperse. They started to disperse and while they were doing so the appellant came walking southwards along the public road shouting loudly and waving his fist saying, "Don't move, don't move. Squat right here. Resist the police. Do not toe afraid of the police." A.S.P. Mentore then arrested the appellant who was taken to Reliance Police Station. A.S.P. Mentore has stated in evidence that the persons who were squatting in the garage entrance were there for about 5 minutes in a quiet and orderly manner before he ordered them to disperse. According to A.S.P. Mentore he arrested the appellant for incitement to resist the police as the workers were squatting on private property. P.C. Mattar gave evidence corroborating the testimony of A.S.P. Mentore in respect of the actions and words of the appellant.

David Richards, Field Superintendent employed by Rose Hall Estate, Canje, Bertice, testified to the effect that the men were squatting closely across the entrance of the garage—the entrance being about 2 rods wide—when the appellant came up and told them not to move and to resist the police. According to Richards the factory compound is owned by Bookers Estates and is private property.

The appellant relied upon a submission made on his behalf at the close of the evidence for the prosecution that the evidence did not disclose the offence charged. The learned magistrate however found the offence charged to be proved and convicted the appellant.

Section 20 of the Summary Jurisdiction (Offences) Ordinance; Cap. 14, provides as follows:

"20. Subject to the express provisions of any statute for the time being in force in that behalf, every person who attempts to commit, or incites any other person to commit, any summary conviction offence shall on conviction thereof be liable to one-half of the punishment prescribed for that offence by the statute creating it."

Section 28(b) of that Ordinance provides as follows:

"28. Everyone who—

- (a) * * *
- (b) assaults, obstructs, or resists any peace officer acting in the execution of his duty, or any person acting in aid of that officer; or
- (c) * * *

shall, on conviction thereof, be liable to a penalty of one hundred dollars or to imprisonment for six months."

There is no evidence that there was any breach of the peace apprehended by reason of the workers squatting in the garage entrance. Indeed A.S.P. Mentore's evidence that there had been squatting there for 5 minutes in a quiet and orderly manner before he ordered them to disperse tends to support the view that there was no ground for a belief that a breach of the peace might reasonably be apprehended. Further, it would appear that the land on which the workers were squatting is private land and no request was made by the owner thereof or by anyone on his behalf for the workers to be asked to leave the land. In such circumstances it is difficult to see how the workers by continuing to squat in the garage entrance in spite of A.S.P. Mentore's order to disperse could amount to the resisting of a peace officer in the execution of his duty. *A fortiori* the appellant could not be guilty of inciting the workers to resist a peace officer in the execution of his duty.

In the result the appeal must be allowed and the conviction and sentence set aside with costs to the appellant.

Appeal allowed.

ROZA v. NARAYAN

[In the Full Court, on appeal from the Magistrate's Court for the Berbice Judicial District (Luckhoo, C.J., and Bollers, J.) January 15, 29, February 27, 1965]

Criminal law—Unlawful possession of spirits exceeding one pint—Defence of possession under permit for removal—Defence of purchase from the retailer—What must be proved—Spirits Ordinance, Cap. 319, s. 89 (1) and (2).

The respondent was found in possession of spirits exceeding in quantity one pint and was charged with the offence of having been in unlawful possession thereof contrary to s. 89 (1) of the Spirits Ordinance, Cap. 319. The magistrate dismissed the complaint holding that the respondent came within the exception provided by s. 89 (2) (b) which relates to persons who are in possession of spirits for the purpose of their removal. The respondent did not, however, allege that he was in possession for the removal of the spirits. The respondent also sought to rely on the exception provided by s. 89 (2) (c) which reads: "the spirits have been legally soldunder s. 62 of the Intoxicating Liquor Licensing Ordinance....; and.

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if the spirits have been obtained in separate quarts from a retailer at separate times and not under a permit, the purchaser has obtained a receipt in writing for the purchase money paid for them, . . ." On appeal by the prosecution,

Held: (i) exception (b) did not apply as the respondent was not in possession for the removal of the spirits;

(ii) exception (c) did not apply as the respondent failed to prove that he obtained either a permit if all the bottles were purchased at the same time, or, if they were not obtained at the same time but were obtained at separate times from a retailer in separate quarts, that he obtained a receipt in writing for the purchase money paid for them showing the quantity of spirits for which, and the time when, it was paid.

Appeal allowed.

C. A. Massiah, acting Crown Counsel, for the appellant.

K. Prasad for the respondent.

Reasons for Decision: The respondent Purendra Narayan was dismissed on a complaint by the appellant, the Comptroller of Customs and Excise, that the respondent on the 6th September, 1963, at Blairmont No. 2 Settlement, West Bank, Berbice, in the Berbice Judicial District had in his possession a quantity of spirits exceeding one pint, contrary to s. 89(1) of the Spirits Ordinance, Cap. 319. From this decision the appellant has appealed.

The evidence of the prosecution was to the effect that on Friday, 6th September, 1963, at 4.15 p.m. the complainant, accompanied by Sergeant of Police Gibbs, P.C. Kewley and Customs Guard Lambent, executed a search warrant for rum, whiskey, gin, high-wines, brandy and bush rum at the house and parlour of the respondent at Blairmont Settlement, West Bank, Berbice. An empty XM rum bottle was found at the back of the parlour. In the bedroom upstairs were found one full bottle of Russian Bear Black Label rum and three full battles of XM rum in a carton on the floor. On the dressing table in the bedroom there was found a bottle of brandy. An empty bottle labelled Hennessy Brandy was also found. The respondent admitted that the spirits found belonged to him. The complainant asked the respondent if he had a permit or a bill for the spirits found and the respondent said no. He further said that he had brought them (the bottles of spirits) away from time to time from his spirit shop at Rosignol. The respondent said that the bottle of brandy (not a full pint) was for his wife. The complainant denied that the respondent told him that his son had a permit and that his son was not then at home. From the evidence of Sgt. Gibbs it appears that the respondent said that someone had bought the 3 bottles of rum which had been found together in a carton for a party. Sgt. Gibbs supported the complainant that when the respondent was asked if he had a permit for the spirits or a bill, the respondent said no.

Each of the 4 bottles of rum found in the respondent's bedroom contained 1.2 pints of rum.

In his defence the respondent said that he bought the bottle of Russian Bear rum from his nephew K. Narine's spirit shop at D'Edward Village for his personal use. The 3 bottles of XM rum he said his son Bridgejendra Narine bought for a birthnight party for his (the respondent's) daughter and he (respondent) was not at home when his son brought them. The respondent also said that he did not have a permit on him when the complainant executed the search warrant but he told him to check at his nephew K. Narine's rum shop at D'Edward Village to see the counterfoil of the permit. When his son came he gave him (respondent) a permit which he later exhibited to the complainant. That permit bears the signature of "K. Narayan" as spirit shop licence holder and purports to relate to a sale by him to B. Narayan of Blairstmont Estate of 1/2 gallon of rum of a strength 24.6 u.p. and to give the purchaser authority to remove the said 1/2 gallon of rum to Blairstmont within 24 hours from 10 a.m. o'clock of the 6th September, 1963. The permit purports to have been issued on the 6th September, 1963, under the provisions of s. 58(2) (b) of the Intoxicating Liquor Licensing Ordinance, 1929 (now s. 62(2) (b) of Cap. 316) as being authority to remove more than two quarters of rum.

It was the contention of the complainant that the permit Ex. "H" was obtained from K. Narayan after the raid but before the complainant could go to K. Narayan's shop to check the permit book. The complainant testified as to carrying out another raid and visiting Blairstmont Police Station after the search at the respondent's premises. It was in consequence of hearing something that the complainant said he went to K. Narayan's shop to check the permit book.

The respondent was proved to have been found in possession of spirits totalling 4.8 pints and by virtue of s. 89(2) of the Spirits Ordinance, Cap. 319, being found in possession of spirits exceeding in quantity a pint, he is deemed to be in unlawful possession thereof, unless he could bring himself within one or other of the exceptions provided by paras, (a), (b), (c) or (d) in that subsection. Sub-s. (1) of s. 89 of the Spirits Ordinance provides that every person who is in unlawful possession of spirits shall be liable to the penalty prescribed therein. The offence is created by sub-s. (1) whereas sub-s. (2) relates to the circumstances under which a person may be held to be in unlawful possession of spirits.

The respondent could only seek to bring himself within one or other of the following exceptions:

"(a) he is a distiller, compounder, or authorised methylator or retailer, and they have come legally into his possession in that capacity; or

(b) he is in possession under permit for their removal, or having been legally empowered to remove them, is in possession thereof for the purpose of the removal; or

(c) the spirits have been legally sold, delivered, or disposed of to him under section 62 of the Intoxicating Liquor

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Licensing Ordinance, or under subsection (2) of section 37 of this Ordinance; and, if the spirits have been obtained in separate quarts from a retailer at separate times and not under a permit, the purchaser has obtained a receipt in writing for the purchase money paid for them, and showing the quantity of spirits for which and the time when, it was paid: or

(d) he is the holder of a special licence from the Governor in Council to distil spirits in accordance with section 14 of this Ordinance."

The respondent has made no claim to come within the exceptions in paras, (a) and (d).

Exception (b) does not apply to the circumstances of this case as the respondent has not alleged that he was in possession *for the removal of the spirits* or that he was legally empowered to remove them and was in possession thereof *for their removal*. The sole exception therefore which could avail the respondent is that contained in para. (c). The magistrate was in error in finding that the respondent came within the exception in para. (b). Implicit in his erroneous conclusion, however, is the finding that the permit Ex. "H" related to the 3 bottles of rum found together in a carton.

Is this a reasonable finding of fact? Neither the alleged seller, K. Narayan, nor the alleged purchaser, B. Narayan, gave evidence at the hearing. The permit Ex. "H" is sought to be linked to the 3 bottles of XM rum by the respondent's statement that B. Narayan brought the 3 bottles of rum and that after the raid B. Narayan had given him Ex. "H." He also said that B. Narayan had told him that he had bought the 3 bottles of rum from K. Narayan's spirit shop. Further, the quantity 1/2 gallon stated in Ex. "H" is not the same quantity 3.6 pints found in the 3 bottles. The 3 bottles of rum found in the carton have not been established by evidence (other than hearsay) to form part of the rum alleged to have been purchased by B. Narayan under permit Ex. "H." Further, the genuineness of Ex. "H" is left in doubt for spirit shop licence holder would know that a permit is not required by s. 62 of Cap. 316 for the sale of 1/2 gallon (2 quarts) nor by s. 73 of Cap. 316 for the removal of 1/2 gallon of rum.

Although a permit was not needed in respect of the sale of 1/2 gallon of rum or of 3 bottles containing 3.6 pints of rum yet when a person is in possession of more than a pint of rum it is a good defence if the quantity does not exceed 2 quarts to prove that it was purchased from a licensed spirit dealer. See *Akla v. Peters*, Appelte. J., 8.7.1909, and *Quan v. D'Oliviera*, 1956 L.R.B.G. 76, at p. 78.

The words "and not under a permit" in exception (c) relate to the obtaining of a quantity not greater than 2 quarts for permits are only required for quantities obtained in excess of 2 quarts. The heading of such a permit clearly indicates this (see Form 12).

The respondent failed to prove on a balance of probabilities that the 3 bottles of rum had been purchased from a spirit dealer and cannot avail himself of the exception in para, (c) to sub-s. (2) of s. 89 of the Ordinance.

It was not suggested that he could bring himself under s. 37(2) of the Spirits Ordinance, Cap. 319.

So far we have considered the matter only in relations to the 3 bottles found together in the carton. One other bottle containing 1.2 pints was also found which the respondent said he had purchased from K. Narayan's shop though at what time he did not state. On the state of the evidence he would have to account for the purchase of 4.8 pints, that is a quantity in excess of 2 quarts, from a licensed spirit dealer. To do this he is required by the exception in para, (c) of s. 89(2) of the Spirits Ordinance to show that he has obtained either a permit if all 4 bottles were purchased at the same time or, if the total amount of 4.8 pints was not obtained at the same time but was obtained at separate times from a retailer in separate quarts, a receipt in writing for the purchase money paid for them showing the quantity of spirits for which, and the time when, it was paid. The respondent failed to prove both in respect of obtaining all 4 bottles at the same time under permit and in respect of obtaining the 4 bottles not all at the same time with a receipt therefor.

For these reasons we held that the appeal must succeed and that the order of the magistrate must be set aside.

Appeal allowed.

DEMERARA BAUXITE CO., LTD. v. HENRY AND ALLICOCK

[Supreme Court (Crane, J.) April 21, 23, May 11, 1964, April 27, 28, 29, 30, May 11, 13, June 1, 2, 3, 4, September 20, 1965]

Succession—Illegitimate child—Right to succeed to mother's estate—Civil Law of British Guiana Ordinance, 1916, s. 6(1) (h)—Legitimacy Ordinance, 1932, s. 11(1).

Evidence—Presumption of death.—Practice and procedure—Provisional ruling.—Whether successor entitled to rely on occupation of predecessors—Prescriptive title—Occupation by several persons in succession—In an action concerning a land dispute.

Held: (i) section 11(1) of the Legitimacy Ordinance, 1932, reproduced in substance s. 6 (1) (h) of the Civil Law of British Guiana Ordinance, 1916, and continued the previous legal position under which an illegitimate child was entitled to succeed on intestacy to his mother's estate as if it had been born legitimate;

(ii) in an application for amendment of pleadings the court is permitted to give a provisional ruling;

(iii) observations on the presumption of death;

(iv) in proof of sole and uninterrupted possession for the statutory period a person claiming prescriptive title may rely on previous occupation by persons through whom he lawfully claims. Illegitimate children cannot rely on previous occupation by their father.

Judgment for the plaintiffs.

[**Editorial Note.** See *Re Attioola* elsewhere in this volume].

Van B. Stafford, Q.C., (J. A. King with him), for the plaintiffs.

J. O. F. Haynes, Q.C., (C. A. F. Hughes with him), for the defendants.

CRANE, J.: Many years ago, we do not know exactly when, but it is said for upwards of 45 years, George Thomas Henry, deceased, became possessed of a plantation known as Gurapana or Surapana, sometimes called Nottinghamshire, on the right bank of the Demerara River.

Henry, who died in 1913, was lawfully married to one Priscilla *nee* Robertson. They had seven children, four of the marriage and three whom the wife brought in as step-children. These were respectively: Christina Henry, who predeceased her parents, George Thomas Baron Henry, Florence May Priscilla Henry, and James Carl Berford Henry (legitimate); Frederick William Allicock, the second-named defendant, Catherine Elizabeth Jardine, and Cornelia Ann Ross (illegitimate).

By his will dated November 9, 1912, George Thomas Henry, after giving the usual directions that his debts and funeral expenses be paid, disposed of Surapana, which consisted of 250 roods, to the members of his family as follows:—

"Secondly—I leave and bequeath to my step-daughter Catherine Elizabeth Jardine ten roods (10) of land, the same being a portion of the land of Nottinghamshire otherwise known as Gurapana and consisting of (250) roods two hundred and fifty in facade, and nine hundred in depth (900). Also to Cornelia Ann Ross ten (10) roods, the same being a portion of the aforesaid land. Also to Charles Roland ten (10) roods the same being a portion of the aforesaid land. Also to my god-daughter Julia Ann Henry ten (10) roods the same being a portion of the aforesaid land. These portions are to be taken from the lower end of the land.

"Thirdly—I leave and bequeath to my Wife Priscilla Henry, born Robertson, and my three (3) children, namely:—

George Thomas Baron Henry,
Florence May Priscilla Henry, and
James Carl Berford Henry

two hundred and ten (210) roods being the remainder portion of the said land Nottinghamshire to be equally divided between them also house and effects should my wife die before her children her portion must be returned to the three (3) Henrys....."

The plaintiffs (hereafter called the company) are now the owners by transport of most of Surapana. The steps by which the title became vested in them are important, and should be set out though somewhat circuitous and complicated.

By transport No. 657 of July 12, 1915, all devisees in the above will joined in transporting 50 acres of land being 20 roods in facade by 750 roods in depth forming the *northern-most* portion of a tract of land containing 378 acres known as Surapana to Winthrop Cunningham Neilson whose attorney accepted transport on his behalf.

By transport No. 142 of the 26th January, 1918, the said 50 acres were transported by the attorney for Neilson to the Demerara Bauxite Company, Limited. Again by transport No. 303 of March 17, 1920, the same 50 acres among others were transported to Neilson, who once again by transport 304 of even date finally reconveyed them to the company simultaneously with "the exclusive and unrestricted right to mine on and take from the remaining portion of the said tract of land known as Surapana all bauxite and other ores, minerals and clay with the right of way on, over and across the tract of land at all times which Neilson or his assigns considered necessary for the purpose of mining and taking from the said tract of land the aforesaid substances and things". It is worthy of mention that these several conveyances and re-conveyances were rendered necessary by the Deeds Registry Ordinance of that time so that a transportee could gain an absolute title thereto.

DEMBA v. HENRY

By transport No. 135 dated January 25, 1940, the defendant Charles Roland Henry, John Henry Allicock the administrator of the estate of Julia Ann Allicock nee Henry, and the Public Trustee representing the estates of Cornelia Ann Ross and Catherine Elizabeth Jardine (both deceased), transported to the company the remaining portion of the 20 rods devised under "secondly" in the will of 1913 above mentioned; also conveyed by the defendants were 20/36 undivided parts or shares in the remaining 210 rods under "thirdly" of the said will to the plaintiffs which they inherited from their respective relatives in Surapana to the extent of 16/36 + 4/36 undivided parts or shares respectively, title to which was granted by an order of VERITY, J., on a petition by them and others for a declaration of title in the year 1938 (see Petition No. 42 of 1938), wherein they were both declared to have been in sole and undisturbed possession for upwards of 30 years of the undivided shares and portions above-mentioned, and entitled to the conveyance thereof.

But notwithstanding the sale to them of the defendants' right, title and interests in Surapana, the company now alleges that "on or about the 8th day of June, 1959, the first-named defendant, who had previously been warned by the plaintiffs not to enter the plaintiffs' land at Surapana, entered the same with his servants and agents and proceeded to commence the erection of a building thereon". He was asked to cease such behaviour, but on his insistence that he had right by inheritance to do as he did, the company filed their writ which in its amended form claimed as follows:

- "(1) \$5,000.00 damages for trespass by the first defendant on the plaintiffs' tract of land known as Surapana sometimes called Nottinghamshire, situate on the right bank of the Demerara River in the County of Demerara;
- (2) An injunction restraining the first defendant, his servants and agents from, trespassing in any way whatever on the plaintiffs' land or from interfering with the plaintiffs' right to use and occupy the plaintiffs' said land;
- (3) An order compelling the first defendant to remove from the plaintiffs' said land all buildings and erections placed or erected by the first defendant or his servants and agents on the plaintiffs' said land;"

The plaintiffs have also pleaded that since 1920 when they went into possession of the land they have been in continuous use and occupation of it up to the present. They have exercised rights to such extent as they thought fit from time to time over the whole of the portion of land up to and including the 25th January, 1940, and from thence continued to occupy and use the said property up to the present time. They claim they have exercised full rights of ownership over the land and have been in sole and undisturbed possession, user and enjoyment *nec vi, nec clam, nec precario* for over 30 years, and are, they say, by virtue of s. 3 of the Title to Land (Prescription and

Limitation) Ordinance, Cap. 184, entitled to 16/36 undivided parts or shares in the tract of land described in transport No. 135 of 1940 and to bring and maintain these proceedings. Further and in the alternative, their claim to the remaining 16/36 parts or shares is based on ss. 3, 5 and 13 and the proviso to s. 3 of the same Ordinance since the right of every person to recover the land has expired, been barred and the title of every such person thereto has been extinguished.

To this the defendants have pleaded that with respect to these outstanding 16/36 parts or shares in Surapana, there was no declaration sought or made by the court in favour of George Thomas Baron Henry to whom they belong, nor was there any declaration made at the time or at any time subsequently with regard to them. In their counterclaim it is pleaded that at the time of their application for prescriptive title in Petition No. 42 of 1938, nothing had been heard of Baron Henry, his wife Hester Mabel Ernestine Henry or his son Erie for upwards of 7 years. They claim they are the persons entitled to succeed to Baron Henry on intestacy and are therefore entitled to the 16/36 parts in Surapana.

It is the contention of the first defendant on the pleadings that even after he had sold an undivided 16/36 part to the company in 1940, he fenced and maintained a cattle pasture on the land between the years 1942 and 1958, but when he visited the place in June, 1959, his servants were forcibly ejected therefrom as they were performing certain acts at his instance. The defendants in their counterclaim seek a declaration that they are owners of 16/36 undivided parts or shares in Surapana; an order for accounts by the plaintiffs with respect to their occupation as undivided owners of Surapana; an injunction restraining the plaintiffs, their agents and servants from preventing the defendants from entering or occupying the said lands; and \$5,000 as damages for trespass.

It will be fitting to say something of the topography of Surapana which has been described in the transports above mentioned, with reference to the plans of Krannenburg, Van Bercheyck, Durham, and Cheong (Exhibits "A", "W", "H" and "K", respectively), emanating from the records of the Lands and Mines Department.

The Krannenburg plan purports to be a survey in 1963 requested by the company with a view to redefining the boundaries of Surapana (lot 45), showing the position of the alleged trespass. It refers to Cheong's plan of 1929, and the latter to the still earlier plan of Durham of 1915. All three of these depict Surapana as a somewhat rectangular strip lying on the east bank of the Demerara River between Plantation Fairs Rust in the north and Plantation Nottinghamshire in the south. In both Exhibits "A" and "K" Surapana is numbered lot 45, but lot 45 in these plans would seem to bear little or no relation to lot 45 mentioned in Van Bercheyck's plan (Exhibit "W"), the topographical features not being the same and the creek names different. This may be due to the fact that Van Bercheyck's was of the 18th century.

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Cheong's plan shows Siirapana to consist of two parcels, a smaller northern portion consisting of 56.8 English acres, and a greater in the south consisting of 314 English acres. It is evident that this northern portion in Exhibit "K" was that sold to the company on July 12, 1915, and referred to in the conveyance of that year. The Surapana creek is prominently shown in all the plans tendered save Van Bercheyck's, and the position of the land on which the defendant Henry is alleged to have trespassed as the south-western point of the undivided land some 120 yards south of the Surapana creek on the boundary of Nottinghamshire, exactly where the defendant claims to be entitled to.

At the conclusion of the case for the plaintiffs counsel for the defendants sought leave to make yet another amendment to the statement of defence and counterclaim, stating that he did not feel justified in pursuing the allegations in paragraph 20 relating to concealed fraud and/or mistake, and these were struck out accordingly, but that he would wish to amend paragraphs 15 and 16 of the counterclaim to base the claim to the outstanding 16/36 parts or shares through Eric Henry, the son of Baron Henry. Counsel said he would lead evidence from which the court would be asked to presume the death of Baron Henry. This could not be done before as these aspects of the case only came to his knowledge lately. If the amendment be granted, he would lead evidence to show that Baron Henry communicated with his sister from the United States in 1919, and that there was a subsequent application to presume his death. In 1925 Henry's wife and son Eric left British Guiana, but since 1927 nothing has been heard of him, his wife or son. Counsel contended that this is a ground for drawing the inference that these persons are dead, and that Baron Henry died before his wife. Round about 1958 advertisements were put in certain newspapers circulating in the United States calling upon the heirs of George Thomas Henry to communicate with the defendants, but these were without response he said; this, and the fact that no heir has lodged any will for administration purposes will be sufficient to convince the court of the deaths of Baron Henry and family.

Counsel also asked leave to add certain additional paragraphs for the defence which have not been raised. These he readily conceded will be to establish a "new case" for the defence at this stage, but the court ought not to refuse the request merely on that ground. The point, counsel stressed, that the defendants are really bent on establishing is that the 1940 transport, *i.e.*, No. 135 of that year, in so far as it purported to pass to the company title to 20/36 undivided parts or shares in the disputed area of Surapana, was a nullity. If this is so, he contended, the plaintiffs would be obliged to fall back on their possession merely, which would provide the defendants with a defence to a claim for trespass in as much as the first-named defendant would still have possessed his own undivided interest in the area. The defendants then being co-owners with the company in respect of the lands, the company cannot prescribe the share of its co-owners.

The ground on which counsel sought to argue for co-ownership of the land with the company stems, he argues, from the invalidity of the order of court of 1938 aforesaid. The order of VERITY, J., was bad in that it granted prescriptive title to undivided shares in land; it is incurably bad in that it shows that a man 27 years at the time of the date of the order was in possession of land for a period of 30 years. This is an impossibility as it would mean that the applicants never had a prescriptive title. It will, however, be shown there is a fallacy in this contention.

The sum total of counsel's contention is that the first defendant's share by inheritance was never wholly disposed of; what he disposed of in 1940 by transport No. 135 could not have been any share which he acquired by prescriptive title. In passing it may be as asked: whose share then did Henry sell by transport No. 135 to the company? Certainly it could not have been Baron's for the defendant himself pleads in paragraph 5 of his defence there was no declaration sought of or made by the court in favour of George Thomas Baron Henry, nor was there any declaration made at the time or at any time subsequently with regard to the remaining undivided 16/36 parts or shares in the said tract of land known as Surapana.

The amendments sought were strenuously opposed by counsel for the plaintiffs after counsel for the defendant undertook to file and deliver his formulated amended pleadings on the following day; but they were not forthcoming, and on the following day I gave a provisional ruling which I am permitted to do (see *per PARKER*, L.J., in *Hall v. Meyrick*, [1957] 2 All E.R. 722, at p. 729).

I accordingly refused leave to the defendants to amend their counter-claim by raising what counsel conceded to be a "new case" not before disclosed in the pleadings. I however granted leave to amend paragraphs 15 and 16 of the counterclaim so as to show that the defendants were basing their claim through Eric Henry, the son of Baron Henry, instead of therein before through Baron Henry. I also granted them liberty to lead evidence to show deaths by presumption of Baron Henry, his wife and son Eric Henry and their respective intestacies; also liberty to abandon paragraph 20 of their amended defence, and to withdraw their claim for rectification.

Despite liberty given to the defence to make further submissions when the proposed amendments had been formulated, they were in fact never forthcoming, and so the proceedings were contested on the footing of the amended claim, defence, counterclaim and reply.

In his defence the first defendant gave evidence of family genealogy. He stated he was born on the disputed lands on March 28, 1908, of the body of Florence May Priscilla Henry, daughter of the testator George Thomas Henry, deceased. He was the only child of his mother, and tendering the death certificates of certain of the family insisted there was always a family pasture at Surapana where they farmed openly and without interference from anyone right up to 1934 when his grandmother Priscilla Henry died. He referred to

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the will of G. T. Henry, deceased, and the fact that he is the minor Charles Roland mentioned therein. He refers to what appears to be the fact that the devisees were unrestricted in access to the allocation of the 10 roods each left them under the will, and referring to the order of court of May 10, 1938, he admits he swore to an affidavit for prescriptive title in respect thereto asserting that he was 27 years of age when he did so. He produced transport (Exhibit "S") which was given pursuant to the order of court in respect of his remaining 5 roods, and 16/36 undivided parts or shares which the order of court gave him title to convey having found that he was in sole and undisturbed possession of the land in dispute for upwards of 30 years. He said he fully understood that transport No. 135 of 1940 purported to convey 20/36 undivided parts or shares to the company. He, however, kept his own cattle pasture at Surapana, farmed there and cut wood in 1940. In fact, he was the only member of the family carrying on those activities there, all others having died. This cattle pasture of which he speaks consists of about 4 acres surrounded by a fence of five lines of barbed wire attached to posts; the pasture bounded on the north by a wire fence, by the Surapana Creek on the south, a railway line on the east, and by the Demerara River on the west; he rented out portions to various persons between 5 and 6-acre strips, one of these persons was a Mrs. Rich who between December 1940 and 1941 was lessee of a 6-acre strip for 5 years. In the year 1942 he shifted his business to Bartica but retained his cattle pasture at Surapana where he had left his mother-in-law and brother-in-law, he still paying visits there until 1951. He produced in evidence a letter (Exhibit "T") which, at first sight, would appear to substantiate his claim to have been in communication with the company for the sale to them the interest he is claiming in Surapana. This letter was written by the company to "Messrs. Fraser, Lawyers", the defendant's solicitors. Paragraph 2 of Exhibit "T" is pleaded in paragraph 7 of the amended defence and, from all appearances, it is sought to construe it as an admission by the company of an acknowledgement and recognition of the defendant's interest in Surapana. To my mind, however, this is not so. Far from being an admission of any right or interest of his, paragraph 2 puts the defendant to proof of such interest and states that if he is able to pass transport of it to them they would consider whether they would not wish to acquire it and negotiate with him for its purchase. Of course paragraph 2 is not an open denial of any interest by inheritance in the first defendant by the company who, it will be appreciated, were in no position to deny him such, seeing they were not the transported owners of the whole of Surapana, for there was still then, as there is now, another 16/36 parts or shares supposed to belong to George Thomas Baron Henry. It may well be that the plaintiffs had this interest in mind when they wrote as they did in paragraph 2 of Exhibit "T". As a matter of fact, on the pleadings (paragraph 19 of amended defence) their contention is that they are "entitled to succeed the said George T. Baron Henry on intestacy and as such are entitled to sixteen undivided thirty-sixth parts in the said land." In view of this, it may well be it was this interest which the first defendant was endeavouring to convince the plaintiffs that he was entitled to that" caused them to express them-

selves in the manner in which they did in paragraph 2 of Exhibit "T", and it is in that light that I construe it, rather than as an admission by the plaintiffs of any right title or interest in the defendant.

In 1959, continued the defendant, Messrs. Frasers, Lawyers, wrote the company on his behalf (Exhibit "U") concerning the remaining 16/36 parts or shares in Surapana pointing out that he was entitled by succession to it and proposed to continue his occupation until such time that he petitioned the Supreme Court by formal application for grant of title. The letter pointed out to the plaintiffs that the company had exceeded its authority in effecting to give defendant notice as a trespasser and by threatening to remove any building which he may attempt to erect. I think it is reasonable to say that Exhibit "U" was the result of the insistence of the defendant on exercising the right and interest for which he contends, and about which he said he spoke to Peter Snijders, the company's mining engineer, in February of 1959. The defendant alleges he told Snijders that he intended building saw-mills on the land at Surapana, which fact Snijders admitted in evidence with the fact that he warned defendant against so doing. In June of the same year he again saw Snijders and intimated to him that he hoped Snijders would not interrupt his men at work, that is to say, when they were at work clearing bush for the erection of a saw-mill. Continuing, he testified that the land he claimed was south of the Surapana Creek on the boundary of Nottinghamshire. His wire fence and pasture and posts are still on the land. He adverted to the conversation which took place between himself and the witness John Langham, the company's security officer. This conversation took place in the office of Superintendent La Borde at Wismar, but he denied telling Langham that neither he nor his workmen would return to Surapana. It is clear that if indeed defendant Henry did say so, Langham's evidence would be tantamount to an admission by Henry that he had no right to be on Surapana. In this regard I prefer the evidence of A. S. P. La Borde who testified to the effect that far from promising that he would not go back to (Surapana, Henry said he was prepared to stay in prison as long as they wished, meaning as long as the company wished to keep him there.

In support of the issue as to the whereabouts of Baron Henry and whether by presumption of law he may be said to have died intestate the defendant stated that he did not know either Baron Henry or his wife personally, but he used to receive letters containing money purporting to come from him. These were written to Henry's grandmother, *i.e.*, Baron Henry's mother, until about 1918/1919 when they ceased. It was this fact, namely, that Baron Henry had ceased to support his mother that led him to believe in Baron Henry's death. Cross-examination of Henry revealed, however, that he was unaware who the parents of Catherine Elizabeth Jardine were, though he stated that Jardine used to call his grandmother Priscilla Henry "mother", and his mother the daughter of Priscilla Henry "sister". This evidence on the defendant's part is not important, I believe, since witness had purported to give evidence as to pedigree to which objection had been taken by counsel for the plaintiff that only legitimate relations could properly do so, which, I am forced to admit, is

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certainly the law. Concerning these letters from Baron Henry, the first-named defendant had some 30 of them in his possession at the time of grandmother's death; he also had photographs of Baron Henry which he gave along with the letters to his solicitors. These were not produced in evidence and it is regrettable they were not. Both Jardine and Ross lived at the family house at Surapana but not the second defendant Allicock, so that when his grandmother Priscilla Henry died in 1934, he was the last surviving member resident on Surapana.

The main pillar of the defence to this action is the claim by the defendants to be entitled to succeed George Thomas Baron Henry on intestacy to 16/36 undivided parts or shares in Surapana (paragraph 19 of amended defence). Indeed, in Ms opening remarks after the close of the case for the plaintiff, counsel for the defendants conceded that he did not feel justified in supporting the allegations of concealed fraud and/or mistake in the several transactions of purchase and sale which led up to transports being passed in favour of the company. No evidence was led concerning this aspect of the case, and I take it that the allegations were abandoned; in fact they were struck out.

On the pleadings, therefore, the defendants are claiming possession by inheritance the share Baron Henry and his relatives became entitled to on the death of Priscilla Henry in 1934. I have already referred to the request by their counsel to formulate amendments to the pleadings and my provisional ruling thereon. In this connection as the case progressed, it became apparent that counsel was not minded to produce the proposed amendments in writing, and as a matter of fact he stated that they were no longer needed because, even on the pleadings as they stood, paragraphs 1 and 9 of the amended defence permitted the defendants to plead that defendant Henry acquired a share of the property through his mother, Florence May Priscilla Henry. That share, counsel contends, has never been disposed of or prescribed for and entitles him to go on the land. It would appear therefrom that defendant was shifting his ground thereby abandoning his claim on the pleadings to succeed through Baron Henry and now to his mother's interest instead. In fact, counsel did definitely admit in his address that he did not think the defendant could lawfully claim through Baron Henry, and I would agree with him.

This being the case, it will be necessary to examine the order of court to see exactly what were the respective interests of the parties in Surapana at the time of the alleged trespass, *i.e.*, on June 8, 1959. At that date it is common ground that the plaintiffs had acquired (i) by transport No. 304 of March 17, 1920, from Winthrop Cunningham Neilson 50 acres of Surapana being 20 rods in facade by the full depth of the estate as described in the parcels clause of that transport, which piece of land had been transported to Neilson by the heirs of G. T. Henry, deceased, by transport No. 657 of 12 July, 1915; (ii) in the year 1940 by transport No. 135 of the 25th January, 1940, the company acquired another 20 rods in facade by 750 rods

in depth containing another 50 acres of Surapana as described in that transport; also 20 undivided 36th parts or shares in the remainder of Surapana, and the right to mine and take from the said tract of Surapana all bauxite and other ores, minerals and clays. The company therefore possessed at the date of the alleged trespass 40 roods containing 100 acres of Surapana together with 20/36 parts of the undivided land, the said 40 roods being that portion devised to Jardine, Ross, Julia Ann Henry, and Charles Roland Henry, the first-named defendant, under the will of G. T. Henry, deceased, under the clause "secondly" which was directed by the testator to be taken from the lower (or northern) end of the land which, by Durham's plan, Exhibit "H", and Cheong's plan, Exhibit "K", are shown on the northern part of the land.

I will now endeavour to show the interests possessed respectively by both defendants at the time they and the others passed transport of the second moiety of 40 roods to the company.

In 1938 both defendants, John Henry Allicock and the Public Trustee representing the estates of Jardine and Ross, deceased, presented a petition to the Supreme Court for a declaration of title under the Civil Law of B. G. Ordinance, Cap. 7, s. 4 (1). This was necessary because after January 1, 1917, anyone who sought to pass transport of immovable property under prescriptive rights whether these rights accrued before or after that date must obtain a declaration of title from the Supreme Court (see *Re transport of Reece to Neilson*, 1917 L.R.B.G. 136) and compare the position before then when an ordinary affidavit sufficed. In that petition VERITY J., made an order (a) declaring the petitioners C. R. Henry, J. H. Allicock and the Public Trustee in his representative capacity aforesaid, by themselves and their predecessors to have been in sole and undisturbed possession of 20 roods of Surapana for upwards of 30 years; and (b) declaring the petitioner C. R. Henry and F. W. Allicock by their sole and undisturbed possession for upwards of thirty years to be entitled to, respectively, 16/36 undivided parts or shares, and four undivided thirty-sixth parts or shares in Surapana, and to be entitled to the conveyance thereof.

It is very evident that the 20 roods granted the above-named petitioners by VERITY J., was the second half of the 40 roods owned by the devisees under the testator's will at "secondly", and that these were taken from the lower or northern part of the land (see Exhibits "B" and "G").

Those undivided shares or portions to which the defendants were held to be entitled to under (b) of the order of court of 1938 seem to me to have been awarded them on the following basis: under the third clause of the will at "thirdly", the remainder of the land at Nottinghamshire (210 roods) was directed to be equally divided between the testator's wife Priscilla Henry nee Robertson and his

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three legitimate children G. T. Baron Henry, F. M. P. Henry, the first-named defendant's mother, and J. C. B. Henry; so that each got 1/4 share in the remainder of Nottinghamshire. Of these J. C. B. Henry died in 1924 intestate and childless, and therefore his 1/4 share was by Law divided among the remaining three, each of whom thus acquired 1/12 of the share of their deceased relative. Each of the remaining three in 1934 therefore had $1/4 + 1/12 = 12/36$ share of the remainder. Next to die was the first-named defendant's mother. She died in 1930, and when this event occurred, her son, the defendant Charles Roland Henry, came into an undivided share of the plantation for the first time by inheriting his dead mother's share. Henry, therefore, in 1930 had 5 roods, that is to say, half of the 10 roods left him under clause "secondly" of the will, and what he now inherited from his mother, *i.e.*, 12/36 part or share in the plantation. The testator's wife Priscilla Henry now died in 1934 possessed of her 12/36 share, and this is where the second-named defendant Frederick Allicock came in. Allicock came in and got 4/36 of his mother's share by virtue of s. 11 (1) of the Legitimacy Ordinance, 1932. Three persons accordingly succeeded: her lawful son Baron Henry, her illegitimate son Frederick Allicock, and her grandson the first-named defendant Charles Roland Henry. This aspect of the matter was not canvassed, and so I would not like to be too positive about it, but I believe lit may well be questionable whether it was proper for Allicock to have shared at all, since by the testator's direction, which appears to have been overlooked, has wife Priscilla's share in the land was to return to the three Henrys in the event of her decease before any of them. It is evident thereby that what the testator intended was to keep the 210 roods within the Henry family; and the Legitimacy Ordinance 1932 ought not to have been construed as to have over-ridden this specific direction of the testator by giving Allicock a share. Priscilla's share, it would appear, should have been divided equally between Baron Henry and the estate of Florence Henry deceased, James Carl Berford Henry having died intestate and without issue. But even if Allicock shared unjustly, and to the detriment of Baron Henry and the defendant Henry, it is submitted it made no difference to the final outcome, because both defendants joined in transport No. 135 of 1940 to convey all they acquired by order of court, *viz.*, 8/36 of Priscilla's share to the company, the remaining 4/36 going to Baron Henry.

Counsel for the plaintiffs contended that the defendant Henry never indeed properly came into his grandmother's share which should have been divided equally between Baron Henry and Frederick Allicock. He considered VERITY, J., to have been very generous when he gave him 16/36 share, whereas he should have given him only 12/36, having applied s. 6(1) (a) of the Civil Law of British Guiana Ordinance, Cap. 7 (Major Edn.), now the Civil Law of British Guiana Ordinance, s. 5, Cap. 2.

I am unable to agree, however, with counsel's contention that the defendant Henry did not inherit through his grandmother, and that the Supreme Court was generous in giving him a larger 4/36 share. The Supreme Court, let it be known, is guided by strict law and not

by considerations of generosity. In my opinion he got nothing more or less than his entitlement; so to hold would be clearly out of step both with principle and authority.

In the case of *Parvati v. Pragdut and Janki*, 1922 L.R.B.G. 190, this very point of the right of an illegitimate child to succeed on intestacy, through not only its own mother, but also to its maternal relations was considered. The appellant was an illegitimate child of one Hurdasi, the legitimate daughter of Rattan, the testatrix. Hurdasai predeceased her mother Rattah and on the latter's death the appellant brought an action to obtain proof in solemn form of the will of Rattah. The respondents contended that the claim should be struck out on the ground that the appellant had no interest in the subject matter of the action in as much as the appellant could only succeed to her mother's estate, and could not claim through her mother by way of representation. It was held, reversing the order of the Supreme Court, (i) that in all cases of intestacy an illegitimate child should rank as a legitimate child of its mother, so as not only to succeed to what its mother actually left, *but also to claim through its mother by way of representation*; (iii) that the words "heirs of their mother" in sub-s. 8 of s. 6 of the Civil Law of British Guiana Ordinance were equivalent to "representatives of their mother."

However, sub-s. 8 of s. 6 of the Civil Law of British Guiana Ordinance, 1916 (*i.e.*, s. 6 (1) (h) of the Major Edn.) was repealed by the Legitimacy Ordinance, No. 14 of 1932, s. 11 (1) of which reproduced in substance s. 6 (1) (h) above mentioned, and made it equally clear, it is submitted, that an illegitimate child is entitled to succeed on intestacy his mother's estate as if it had been born legitimate. Section 5 (1) (c) of the Civil Law of British Guiana Ordinance, Cap. 2, says, "if there is no widow or widower, the whole estate shall be divided equally among the children, the grandchildren of any deceased child or children taking *per stirpes*". This paragraph was judicially considered in *Parvati v. Pragdut and Janki* (above), where the word "grandchildren" was held to mean "children". So that by the combined effect of s. 5 (1) (c) of the Civil Law of British Guiana Ordinance, Cap. 2, and s. 11 (1) of the Legitimacy Ordinance, 1932, Henry had acquired a 16/36 share in the undivided land.

Speaking on this matter of an illegitimate child's right of succession to its mother and maternal relations Professor LEE writes in his INTRODUCTION TO ROMAN DUTCH LAW, 1915 Edn., p. 30, as follows:

"A bastard has no lawful father and therefore no rights of succession ex parte paterna. But with the mother it is different for 'eene moeder maakt geen bastaard' and therefore her illegitimate issue succeeds to her and to her blood relations. Such was the opinion of Grotius, though, as regards these last, Van der Linden inclines to a contrary view."

It seems therefore clear that by the enactment of s. 11 (1) of the Legitimacy Ordinance, 1982, and after having repealed s. 6 (1)

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(h) of the Civil Law of British Guiana Ordinance (Major Edn.) by that very Ordinance, the legislature intended still to have retained in our law the Roman Dutch concept on the point. This was the view of the West Indian Court of Appeal in *Parvati's* case above, with which I respectfully agree.

Such was the situation when Priscilla Henry died in 1934. The defendant Henry then became entitled to a 4/36 share of her 12/36 share, just as the appellant Parvati in the case above was held entitled to claim through her mother's and grandmother's estate by way of representation. Henry, therefore, at the date of the order of court of 1938 possessed 12/36 share by inheriting his mother's share 4/36 share inherited from his grandmother the remaining 5 roods devised him under the will, which was precisely what the order of VERITY, J., gave him, *i.e.*, nothing more, nothing less than that which he was entitled to.

It was therefore on the strength of the order of court on the petition for a declaration of title by the two defendants above-mentioned that transport No. 135 of January 25, 1940 was passed to the company. It is very clear, it seems, that this transport conveyed to the Demerara Bauxite Company the self-same interests the defendants were held entitled to convey to the order of VERITY, J., in Petition No. 42 of 1938—(Exhibits "F1—3").

But counsel for the defendants would have none of this. He contends that Exhibits "F1—3" cannot be interpreted as dealing with any interest which Henry acquired from his mother Florence May Priscilla Henry, because if he acquired an interest from her he could not prescribe against it. The order of court of 1938, he contends, is to the effect that Henry *in his own right* prescribed for 16/36 parts or shares in Surapana, and this could not have been his mother's because she died in 1930. The case of *Re Poudroyen*, 1914 L.R.B.G. 14, would appear to support counsel's view that prescription can only run in favour of illegitimate children from the time of possession by themselves. In this case the two illegitimate sons of an original occupier, Henry Grassford Archer, were held not entitled to claim title by prescription for the period of 33 1/3 years which would have given them title under Roman-Dutch law. They had lived with their father and had helped him to look after the land and were in possession after his death in 1887—1914. BERKELEY, J., held "they were not born in wedlock and so prescription can only run in their favour from the date of their father's death in 1887. This would give them (in 1914) 27 years." No one can dispute the soundness of this decision. It is in accord with the Roman-Dutch concept as contained in the quotation above from Professor Lee, and is enshrined in s. 11 (1) of the Legitimacy Ordinance, 1932, which preserves the right of succession only *ex parte materna*.

No case has been found, contended counsel for the defendants, where next-of-kin can prescribe against an interest by inheritance. His argument can be summed-up thus: though the order of court of 1938 gave prescriptive title to the defendant Henry of 16/36 share,

it must have been that belonging to some one other than his mother, and though he does not say whose share, he says it could not have been that belonging to his mother because she died in 1930. If, indeed as he contends, it was not his mother's share granted to him by the said order, then he cannot be called a trespasser he having succeeded to her 1/4 share left her under the will of her father. But this is a strange way to reason, I think. Counsel, however, appears to have abandoned paragraph 19 of the amended defence when he said he did not think the defendants could lawfully claim through Baron Henry, and is now claiming through his mother. To whose share then was the declaration of title granted by the order of court of 1938? Certainly not Baron Henry's 16/36 (see the Exhibit affidavits to the petition) which is still outstanding and for which the plaintiffs have claimed to be entitled by prescription.

Sufficient has been said, I believe, and it has been shown by a preponderance of probability that it was the interests the defendant Henry inherited through his mother and grandmother, and which defendant Allicock inherited from his mother, that were passed to the Demerara Bauxite Company by transport No. 135 of January 25, 1940.

The evidence of the defendant Henry is that after the sale by transport No. 135 of January 25, 1940, of the second moiety of 20 rods of Surapana, and the 20/36 undivided parts therein, he continued occupation of the land where he kept a cattle pasture in the area claimed by the defendant; the issue as to whether all others having died. This is supported by his witness Randolph Trotman, but witness Austin Gill, the company's foreman superintendent at Surapana, denied the existence of any cattle pasture in the area claimed by the defendant, the issue as to whether a cattle pasture ever existed therefore becomes one of fact, and is not made easier to decide by the fact that Samuel Blackett for the plaintiff saw cattle roaming over Surapana in 1941/42 when, as a carpenter foreman, he partially erected some farm building there for the company, because Peter Snijders, the company's mining engineer, testified to the effect that the company had cattle at Surapana from at least 1948 when he first worked with them until 1950/54 when the company ceased to have a cattle pasture. I must say that the evidence is inconclusive that Henry did indeed have a cattle pasture at Surapana though it is clear that he was still asserting rights on the land when he let part of it to Alberta Rich who testified to this effect. Rich, however, was paid off by the company when they discovered she was on the land. Henry, however, did not himself remain in possession for, on his evidence, after leaving his mother-in-law and brother-in-law on the land he took himself to Bartica where he worked, visiting Surapana from time to time. He is of course indicating here that he did not relinquish possession of the land after the 1940 transport. It seems to me that what Henry was doing by first letting out portions of the land to Rich and others, then entering into negotiations with the company for the sale of an interest in it, and then in June, 1959, clearing the land to erect saw-mill business,

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was to assert the right which he claimed of being entitled to his half-uncle Baron Henry's share in the land. He has pleaded in justification that both he and the added defendant Allicock are entitled to succeed Baron on intestacy, and to be entitled to a 16/36 undivided part therein. I agree, however, with counsel for the plaintiffs that the defendants must prove the death of Baron Henry, also the deaths of his wife and son Eric and their respective intestacies, also the non-remarriage of Baron's wife and non-marriage of Eric.

I am asked to presume the death of Baron Henry, who, it is stated, left the colony sometime ago with his wife and son; but what is the evidence in this regard enabling me to do so? It is given by the defendant Henry that Baron used to write to his mother and send her on occasions sums of money up to about 1918/1919 when they ceased as far as he knew. He said he firmly believed Baron is dead because he stopped supporting his mother. While I will readily concede if, indeed, he was not dead, that was the act of an undutiful son, it is certainly no ground alone on which I can presume death. Evidence was also led to show through the clerk attached to the Probate and Administration Division of the Supreme Court Registry that there has been no will deposited there in respect of any of the beneficiaries under the will, nor of Baron Henry's wife and son; the clerk also testified there are no letters of administration either concerning any of these persons. I bear in mind that counsel had said that evidence would be led to show that there had once been an application to presume the death of Baron Henry: but there is no such evidence led.

It is in these circumstances and on this evidence that I am asked to presume the death of Baron Henry. From the defendant Henry's own evidence, contact was lost with him about 1918/1919 when letters to his mother ceased as far as he knew, but I am afraid that this fact by itself is not enough to presume his death, let alone to presume his death before his mother Priscilla Henry. In this regard—the operation of the rule as to the presumption of death,—SACHS, J., had this to say in *Chard v. Chard*, [1955] 3 All E. R. 721, at p. 728:

"My view is thus that in matters where no statute lays down an applicable rule, the issue whether a person is, or is not, to be presumed dead is, generally speaking, one of fact and not subject to a presumption of law. To that there is an exception which can be assumed without affecting the present case. By virtue of a long sequence of judicial statements, which either assert or assume such a rule, it appears accepted that there is a convenient presumption of law applicable to certain cases of seven years' absence where no statute applies. That presumption in its modern shape takes effect (without examining its terms too exactly) substantially as follows: where as regards 'A B' there is no acceptable affirmative evidence that he was alive at some time during a continuous period of seven years or more, than if it can be proved, first, that there are persons who would be likely to have heard of him over that period, secondly, that those persons have not heard of him, and thirdly.

that all due inquiries have been made appropriate to the circumstances, 'A B' will be presumed to have died at sometime within that period."

Even if conditions (1) and (2) have been established, I am unable to say that (3) has been. I must ask what enquiries have been made in this case appropriate to the circumstances? In his opening speech at the close of the case for the plaintiffs, counsel for defendants intimated that evidence would be led to show that round about 1958 advertisements were put in newspapers circulating in the United States calling upon the heirs of G. T. Henry, deceased, to communicate with the defendants, but no answers had been received thereto; counsel further expressed the view that this would be sufficient to convince the court that Baron Henry, his wife and son Eric Henry died intestate. This evidence has not, however, been forthcoming though liberty to lead it was given; had it been, it would have assuredly been such evidence appropriate to the circumstances as stated by SACHS, J., in the case above; but merely to show, as has been done, that in the Registry of our Supreme Court there has been no will lodged nor application for probate is not enough for me to presume the deaths of Baron Henry, his wife and son and their respective intestacies. I must therefore find that the claim of the defendant Henry to have succeeded on intestacy to the 16/36 share of his half-uncle Baron has not been established, likewise the claim for which he contends to his mother's 1/4 share which he says still exists in him and which he did not transport to the company.

The case of the defendant Henry is clearly one of a man who has sold his inheritance and yet seeks to stake his claim to it. In my view he has no such claim. The suggestion that his mother's share is still outstanding and furnishes him with a defence to this trespass action is untenable. Whose interest did he sell in 1940 to the company, I must ask? To ascertain that we must look to the order of the court of 1938 which must be read in the light of the affidavits in support of the petition for a declaration of prescriptive title, presented by the defendants. For sure, after 25 years it is certainly now too late for him to challenge the order of VERITY, J., with which, I have indicated, I am in substantial agreement.

When it is said in an order made on a declaration for prescriptive title to land that a man is "in the sole and undisturbed possession for upwards of thirty years," it is not necessarily the meaning that he has only himself been in possession; it also means, as in the instant case, that either he alone or those through whom he lawfully claims (*i.e.*, his privies in blood, his predecessors) have also been occupying the lands for the stated period. As long ago as 1933, VAN SERTIMA, J. (ag.), alluded to this very point when he said in *Re Benjamin*, (1931-37) L.R.B.G. 168, at p. 170:

"That case, in my opinion, is distinguishable from the facts in this case which were as follows. At the time when the petitioner's predecessor in title first possessed the land there was no one having title to same and therefore no one to interrupt his pos-

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session as there was in *Downer's* case. His possession was *sole and uninterrupted* for a period exceeding twenty years and by his will he devised to the petitioners and others his interests in the said land, and the devisees remained in possession after his death for a considerable time so that the aggregate number of years during which the testator and his devisees possessed the land, exceeded the period then required by law for acquisition of title, to wit, one-third of a century. At that point of time they became the owners of the land in question and I confess I could see no difficulty in awarding them title."

Likewise in this case the aggregate period for which Henry's mother and grandmother occupied could be claimed by Henry in privity with them. His was the successive and mutual relationship to the same rights of the property. I find it was this identical interest which he sold to the company in 1940, that he acquired no other in Surapana, and that he is a naked trespasser.

I must therefore uphold the claim for trespass, the injunction and grant the orders sought in para. 10(3) of the amended statement of claim against the first-named defendant Henry with costs. I award damages against him in the sum of \$200. The counterclaim is dismissed with costs fit for two counsel. Stay of execution for six weeks granted.

Judgment for the plaintiffs.

Solicitors: *Cameron & Shepherd* (for the plaintiffs); *H. B. Fraser* (for the defendants).

BROWN v. KAMALL

[Supreme Court (Khan, J.) January 21, 22, 1964, January 11, 1965]

Crown lands—Application for conditional purchase—Balance of purchase price not paid within time stipulated by regulations—Effect thereof—Sale of land by applicant before issue of either conditional or absolute grant—Validity of sale—Whether vendor obliged to pass transport on obtaining absolute grant—Crown Lands Ordinance, Cap. 175, s. 14—Crown Lands Regulations, Cap. 175, regs. 27 and 30.

Contract—Consideration—Inadequacy—Whether a defence—Point of time at which question should be determined.

In 1938 the plaintiff applied to the Commissioner of Lands and Mines for the conditional purchase of a piece of crown land. On making his application he paid the prescribed fees as well as one-fifth of the total purchase price as required by reg. 27 of the Crown Lands Regulations, Cap. 175. and was given a receipt for these payments. He then entered into occupation of the land but in 1940 he sold it for \$40 to the defendant on condition that "transport fees were to be paid by the purchaser". The balance of the purchase price due to the Commissioner was paid by the plaintiff only in 1953, long after the time stipulated for this purpose by reg. 27 had expired. Nevertheless in 1954 the plaintiff was given a conditional purchase grant and in 1959 an absolute grant. In 1960 the defendant called on him for transport but he contended that the 1940 transaction amounted merely to the grant of a cattle grazing permission, and he accordingly sued for possession and related reliefs. The defendant on the other hand counter-claimed for specific performance. For the plaintiff it was contended that the consideration was inadequate and scandalous, that the plaintiff could not have sold what he did not own, and that he did not own anything because on his failure to pay off the purchase price within the stipulated time the land became "absolutely forfeited" under reg. 30.

Held: (i) the plaintiff had agreed to sell and not merely to grant a grazing permission;

(ii) the failure to pay the purchase price within the stipulated time did not result in a forfeiture, for forfeiture does not take place until the right to forfeit is exercised and the right was not exercised in this case;

(iii) even if a vendor has no title or interest in the subject matter of the sale at the time of the sale, if he subsequently obtains title in time to fulfil the bargain the purchaser is entitled to specific performance;

(iv) inadequacy of consideration is not itself a ground for resisting specific performance unless it is so gross as to amount to conclusive evidence of fraud or there are other circumstances which, combined with the inadequacy, will induce the court not to enforce the contract;

(v) whenever the question of inadequacy of consideration is raised, it must be determined as at the date of the contract and not in the light of subsequent events;

(vi) on the evidence the consideration paid in 1940 was not inadequate.

Judgment for the defendant on claim and counterclaim.

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F. L. Brotherson for the plaintiff.

C. R. Wong for the defendant.

KHAN, J.: During the year 1938 the plaintiff made application under the Crown Lands Regulations, Cap. 175, to the Commissioner of Lands and Mines for the conditional purchase of a piece of crown land described as lot 4, Plantation Cornelia, Leguan. This piece of land was previously occupied by the plaintiff's deceased father under permission No. 2387. The plaintiff paid the prescribed fees under reg. 27 of Part IV of Cap. 175 at the time of the application amounting to \$16.20—as any other applicant—and obtained the receipt Exhibit "A". The land in question comprised 2.5 acres and was subject to the provisions of the Crown Lands Ordinance, Cap. 175, and the Crown Lands Regulations made under s. 17 of the aforesaid Ordinance.

Under these Regulations *conditional purchase grants* of land were made to small cultivators for agricultural purposes at such price as may from time to time be fixed by the Governor and published by the Commissioner of Lands and Mines in the Gazette. Such price is exclusive of the prescribed cost of survey.

By regulation 27:

"One fifth of the total purchase money along with the prescribed fee for survey shall be deposited in cash with the application, and the balance of the purchase money shall be payable in four equal instalments payable yearly in advance on the dates specified in the grant, provided that nothing shall prevent the balance of the purchase money being paid at an earlier date, should the purchaser so desire; but no absolute grant shall be issued until the Commissioner is satisfied that the conditions attached to the provisional grant have been fulfilled".

The amount of \$16.20 on Exhibit "A" paid by the plaintiff represented one fifth of the total purchase money—*i.e.*, 1/5 of six dollars—and the prescribed fee of \$15 for survey as provided by reg. 27.

The plaintiff on obtaining Exhibit "A" occupied the land in his own right. In the year 1938 the koker broke away and flooded the land. According to the plaintiff he "*could not occupy the land because of the swamp*". His evidence disclosed that he never again occupied the land in question. At that time the defendant occupied lots 3 and 5 of Plantation Cornelia—on both sides of the plaintiff's lot 4. On the 6th day of July 1940, the plaintiff agreed" to sell and the defendant to purchase the said lot 4 for the sum of \$20. In pursuance of this agreement the defendant paid to the plaintiff the sum of \$10 on account of the said purchase and the plaintiff issued to the defendant the following receipt, Exhibit "F1":

"Georgetown,
Lot 102 Camp Street,
6.7.40.

Received from Mr. K. Kamall the sum of ten dollars \$10 on account of twenty dollars being the purchase price of lot No. 4 Cornelia, Leguan, .balance ten dollars \$10 to be paid within one week's time the same being my property transport fees to be paid by the purchaser.

Nathaniel Brown."

(A penny stamp affixed).

On the 22nd July, 1940, the plaintiff sent the following receipt, Exhibit "F2", acknowledging payment of the balance of \$10 paid to him by the defendant to complete the purchase:

"Receive from Mr. Kamall the sum of \$10 ten dollars balance due on a sale of lot four Cornelia, Leguan, said being owner.

N. Brown,
22.7.40."

On the 26th July, 1940, the plaintiff wrote the defendant the following note, Exhibit "F3":

"N. Browne,
102 Regent Street,
26.7.40.
Dear M.K.,

I have received your letter the contents hare on you had made mistake with the Street which was Camp instead of Regent Street. Anyway I got through on the 22 instant.

Well be good to yourself until we meet and if it's anything to make right will do so.

Yours ever,
Nathan."

The defendant, who was occupying the adjoining lots to lot 4, went into occupation of lot 4 after the purchase and continued his occupation up to the present time. Exhibit "F1" shows that it was agreed that the defendant would pay the whole of the transport fee for lot 4. It appears that the defendant was in possession of lots 3 and 5 as far back as 1933. He had bought lot 3, comprising 2 1/2 acres, from one Peters for \$15, and lot 5 from one Mc Lean for \$25. When he bought lot 4 from the plaintiff it was in bush and under water. The defendant grazed his cattle on all 3 lots. In 1948 the defendant cleared the bush and bulldozed lot 4 at a cost of \$150 for the planting of rice and ever since planted rice on the land in question.

In January 1944 the Commissioner of Lands and Mines sent the following letter, dated 29th January, 1944, to the plaintiff:

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"DEPARTMENT OF LANDS AND MINES,
Georgetown, Demerara,
29th January, 1944.

Mr. Nathaniel Brown,
71, Seaford Street,
Campbellville,
East Coast, Demerara.

With reference to your application dated 23rd June, 1938, for a conditional purchase grant over a tract of 2.5 acres of crown land situate on the abandoned Pln. Cornelia on the Island of Leguan, I have to inform you that it has been brought to my notice that you are no longer in occupation of the tract and to request you to show cause and reason why the application should not be treated as fallen through.

? Van Sertima
for Commissioner of Lands and Mines"

In September 1953 the plaintiff received from the Commissioner of Lands and Mines the following letter dated 5th September 1953:

"DEPARTMENT OF LANDS AND MINES,
Georgetown, Demerara,
5th September, 1953.

Sir,

I have the honour to refer to your application dated 23rd June, 1938, for a conditional purchase grant over a tract of 2.503 acres of crown land situate at and being lot 4, Plantation Cornelia, Leguan, and to request you to deposit immediately the sum of \$4.81 being balance of purchase money of the said tract of land.

The title is being prepared and you will be informed when to call and uplift it.

I have etc.
(Sgd.) F. Johnson
for Commissioner of Lands and Mines (Ag.)"

Five months later the plaintiff received another letter from the Commissioner of Lands and Mines dated 12th February, 1954 (Exhibit "B2"):

"DEPARTMENT OF LANDS AND MINES,
Georgetown, Demerara,
12th February, 1954.

Sir,

I have the honour to refer to your application dated 23rd June, 1938, for a conditional purchase grant over a tract of 2.503 acres of crown land situate at and being Lot 4, Plantation Cornelia, Leguan, and to inform you that the grant has been prepared, and signed by His Excellency the Governor.

2. You are advised to call at this Department and uplift the title which has been recorded and numbered 7477.

I have etc.

(Sgd) F. Johnson
for Commissioner of Lands and Mines"

Five years later the plaintiff received the following letter Exhibit "B4" which reads thus:

"DEPARTMENT OF LANDS AND MINES,
Georgetown, Demerara,
20th April, 1959

Sir,

I refer to your application dated the 14th January, 1959, to have conditional grant No. 7477 made absolute and to request you to hand in the Original title early.

I have etc.

(Sgd) J. L. Yhap
for Commissioner of Lands and Mines"

On 22nd July, 1959, the Officer Administering the Government made the plaintiff's grant *absolute* and issued Exhibit "B5" to the plaintiff — Exhibit "B5" is the absolute grant. It is to be observed that the absolute grant, Exhibit "B5", had its birth with the application and receipt (Exhibit "A") dated 23.6.38. This is the very land the plaintiff sold to the defendant in July 1940.

The plaintiff admitted that from 1940 and up to the present time — a period of 24 years — the defendant has occupied the land continuously, and he (plaintiff) has not at any time asked the defendant to give up possession or to pay any rent.

On the 25th October, 1960, the defendant on learning that the plaintiff obtained *title* wrote the plaintiff as follows (Exhibit "D"):

"Endeavour, Leguan,
25th October, 1960

N. Browne, Esq.,
71, Seaforth Street,
Campbellville,
East Coast, Demerara.

Dear Sir,

I have been informed that the grant No. 7477 you sold to me situated at Cornelia, Leguan, has been made absolute since July 1959; you should have since then taken steps to pass transport to me as you have arranged. I therefore request you to call at my counsel's office C. R. Wong, Barrister, and give the necessary particulars so that the transport could be passed to me.

Yours truly,
(Sgd) M. K. Kamall"

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The plaintiff, however, on the 22nd January, 1963, filed the present action claiming (a) possession of the aforesaid property;

- (b) a declaration that the land is the property of the plaintiff; and
- (c) mesne profits. The defendant on receiving the writ of summons, wrote the plaintiff Exhibit "E" in which he reiterated the history of the transaction and asked for transport.

At the hearing plaintiff called two witnesses in support of his claim—Mr. Esmond Singh, an officer of the Lands and Mines Department, and Mr. Jonathan Singh, a cousin of the plaintiff. Mr. Singh stated that the purchase price of the land in question was \$6.01 and the application and survey fees were \$15, making a total of \$21.01. The balance of the purchase price was \$4.81 and this was paid on the 9th September 1953. He also stated that where an instalment was overdue for more than 3 months the Department can forfeit the, deposit, but in this case, although the amount was overdue, the Commissioner of Lands and Mines did not exercise the right of forfeiture.

Smith stated in his evidence that the defendant in July 1963 was offering \$100 if the plaintiff would sell him the land, and he (Smith) told the defendant he did not think the plaintiff was going to sell. This was after the writ was filed. I was not impressed with Smith's evidence. I considered him a witness of convenience, and I placed no reliance or value on his evidence.

I believed and accepted the evidence of the defendant in preference to that of the plaintiff. The defendant's evidence was consistent with the exhibits tendered, and those were all consistent with a sale and not a mere permission by the plaintiff to the defendant to occupy the land for grazing cattle. I was satisfied that the plaintiff signed the receipts and knew what he was signing. The plaintiff's whole conduct thereafter was consistent with a sale of the land to the defendant. I believed that the defendant expended money and labour in developing the land as he stated. I find as a fact that after the koker was broken away and the land was swamped in 1938 the plaintiff abandoned it and was glad to get rid of it 2 years later. In consequence he sold it to the defendant in 1940 as stated in Exhibit "F1". The defendant was familiar with such grants of land and was confident from Exhibit "A" that in course of time, the plaintiff would get the grant made *absolute* and would be in a position to pass transport to him.

Since 1940 the price of rice lands has risen considerably. The land in question is now valuable rice lands, I believe this fact is responsible for the unwillingness of the plaintiff to pass transport to the defendant. The defendant has counterclaimed for (a) specific performance of the expressed agreement of sale; and (b) for the other orders claimed.

Mr. Brotherson in the course of a number of submissions contended that the contract of sale was invalid according to the Crown Lands Ordinance, Cap. 175, and relied on reg. 30 of the Crown Lands

Regulations. He further submitted that the plaintiff could not have sold what he did not own.

After the case was adjourned for decision, Mr. Brotherson by letter to the court further submitted that a forfeiture had occurred in respect of the land purported to be sold and cited *Re Levy's Trust*, 30 Ch. D. 119, at pp. 123 and 126, and reg. 30 of the Crown Lands Regulations, Regulation 30 provides :

"In default of payment of anyone or more of the instalments of purchase money within three months after the same becomes due or if the conditions attached to the grant have not been complied with within the prescribed times the land shall be absolutely forfeited with all purchase money that may have been paid."

Section 14 of the Crown Lands Ordinance, Cap. 175, enacts as follows:

"Where any condition of any grant, licence or permission is not fulfilled, or where any regulation is not observed, the grant, licence or permission may be revoked by the Governor, and it shall thereupon cease and determine."

Indeed, the plaintiff had made a conditional purchase of the land in question. He had some interest after he had paid the amount of \$16.20 and obtained Exhibit "A". This interest would normally culminate in an absolute title if and when the conditions of the grant were fulfilled. A breach of any of the conditions set out in the grant would indeed imperil the grant and make it liable to forfeiture. The failure to pay an instalment due was indeed a breach of the Regulations, and this could have been a ground for forfeiture after demand. *But forfeiture did not take 'place until the right to forfeiture' was exercised.* In this case the right of forfeiture was never exercised; *vide* judgment by MARNAN, J., and LEWIS, J., in *Attorney-General v. Mc Doom* (1960), 2 W.I.R. at pp. 401- 413. In WHARTON'S LAW LEXICON, 14 Edn., at p. 429(6), the following appears under forfeiture:

"Breaches of covenants or conditions contained in a lease or other instrument when it is stipulated that they shall occasion forfeiture: *a forfeiture under these circumstances may be waived by the person entitled to take advantage of it by express declaration or by any act inconsistent with it, or admitting a continuing tenancy, as by receiving rent accrued due since the breach....."*

It is clear to my mind that no forfeiture took place in this case.

The authority of *Re Levy's Trust* relied on by the plaintiff's counsel on the question of forfeiture has no relevance whatever to the facts of this case. The case of *Re Levy's Trust* dealt with the grant of a life interest in a settlement in the terms:

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"to pay the rents and profits during the grantee's life or until he shall make any conveyance.....or commit an act of bankruptcy."

The grantee in *Levy's* case was adjudged a bankrupt and therefore the trust ended, not because it was liable to forfeiture for breach of a condition, but because of the *limitation itself*. The act of bankruptcy was an event which delimited the life of the grant.

The next point is whether the plaintiff had any interest to dispose of. In *Bishundyal v. Ross*, 1962 L.R.B.G. 299, the Federal Supreme Court held that there was a binding contract of tenancy between the appellant and the respondents who had occupied crown lands without authority. The respondents were mere applicants for a permission to occupy crown lands under Cap. 175. They, like the plaintiff in this case, were mere applicants. While awaiting a decision on their application they occupied the land and purported to let a part of it to the appellant Bishundyal. The court held that the relationship of landlord and tenant was created between the parties.

In the instant case the plaintiff was a conditional purchaser of a grant and not a mere applicant awaiting the decision of the Commissioner of Lands and Mines. I therefore hold that the agreement of sale of the plaintiff's interest to the defendant as is shown from Exhibits "F1", "F2" and "F3" created a binding contract between the defendant and the plaintiff.

The final question to be decided is whether the defendant is entitled to the orders prayed for in his counterclaim. The plaintiff now has a valid title to the land. He is now in a position to perform the contract by passing transport as he promised in Exhibit "F1". He cannot complain of hardship as the land was in possession of the defendant for the past 24 years.

In para. 5 of the plaintiff's defence to the defendant's counter-claim, the plaintiff further contended that the price of \$20 is not only inadequate but scandalous. In 36 Halsbury's Laws (3rd Edn.) at p. 303, the following appears under the heading "Inadequacy of consideration":

"After some earlier decisions to the contrary, it is now established that mere inadequacy of consideration is not in itself a ground for resisting specific performance unless it is so gross as to amount to conclusive evidence of fraud or there are other circumstances which, combined with the inadequacy, will induce the court not to enforce the contract. The same principle seems now to apply to sales of reversions.

Whenever the question of inadequacy of consideration is raised, it must be determined as at the date of the contract, and not in the light of subsequent events".

At the date of this contract—1940—the value of similar neighbouring lands was not far from \$20 and, indeed, the defendant

testified that he owns and is in occupation of the adjoining lands to lot 4, and he purchased one lot for \$15, and the other for \$25. In these circumstances, I find that the price the defendant paid the plaintiff in 1940 was not inadequate. Counsel's submission in this regard is therefore untenable.

In *Elliott v. Pierson*, [1948] Ch. 452, it was held that even if the plaintiff had not title or interest at the time of the sale, if he obtained title in time to fulfil the bargain the defendant would be entitled to specific performance. *Vide also Forser v Nash* (1865), 35 Ch. 167; *Chamberlain v. Lee* (1840), 10 Ch. 445, and DART ON VENDORS AND PURCHASERS (8th Edn.), Vol. II, at p. 925.

I am satisfied that the only reason why the plaintiff refused to pass transport to the defendant of the property in this case, is because the value of the land has since risen considerably. To refuse the decree of specific performance in this case is to encourage a fraud on the defendant who has expended both money and labour in developing the land. In the result, the plaintiff's claim against the defendant is dismissed. The court finds in favour of the defendant's counter-claim, and grants the orders prayed for in para. 7(a) and (b) of the defendant's counter-claim. The plaintiff is ordered to pay the defendant's costs in both claim and counter-claim to be taxed certified fit for counsel.

Stay of execution for 6 weeks granted.

*Judgment for the defendant on claim
and counterclaim.*

FUNG-KEE-FUNG v. JAIKARAN

[Supreme Court (Luckhoo, C.J.) August 3, 4, September 18, 1965]

Immovable property—Disputed strip included in defendant's transport, hut occupied by plaintiff and latter's predecessors in title for over 12 years—Erroneous belief by plaintiff that strip included in his transport—Subsequent attempt by defendant to dispossess plaintiff—Action by plaintiff for damages—Competence of claim—Civil Law of British Guiana Ordinance, Cap. 7 (Major Edition), s.4(2)—Title to Land (Prescription and Limitation) Ordinance. Cap. 184, ss. 5 and 13.

In 1937 the defendant acquired transport for the north half of lot 41 and erected a fence along what he considered to be the boundary with the south half. In 1956 the plaintiff acquired transport for the south half. At all material times he and his predecessors in title had occupied the south half right up to the fence erected by the defendant, their belief being that the south half extended up to the fence. In 1961 the defendant discovered that the true boundary was in fact 14 feet south of the fence, and in December 1964 he accordingly shifted the fence 14 feet southwards. In an action by the plaintiff for damages and an injunction,

Held: the occupation of the plaintiff and his predecessors in title was adverse to the true owner, the defendant, and such occupation having ex-

tended for a period of over 12 years the defendant's remedy was barred. The defendant was, therefore, liable to be sued for trespass in disturbing the plaintiffs possession.

Judgment for the plaintiff.

[**Editorial Note:** *Be Victor v. West Bank Estates Ltd.* see the decision of the Privy Council in [1966] 3 W.L.R. 750]

C. A. F. Hughes for the plaintiff.

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

LUCKHOO, C.J.: In this action the plaintiff C. O. Fung-kee-Fung, represented herein by his Attorney Alfred R. Yhap, claims against the defendant John S. Jaikaran damages for trespass to a certain portion of land, hereinafter referred to as the disputed strip, an injunction in the usual terms and an order that the defendant do forthwith remove from the disputed strip wooden palings and all other erections that have been placed thereon by the defendant or his agents on the 19th and 20th December, 1964. The plaintiff also claims that he is entitled to the sole and undisturbed possession of the disputed strip. The plaintiff's claim to a declaration that the disputed strip is included in property described in his transport No. 1611 of 1956 as the south half of lot number 41, situate in the Stabroek District, Georgetown, Demerara, British Guiana (known as lot 41, Brickdam) was abandoned at the commencement of the hearing. The defendant, the owner by transport of the north half of lot 41, counterclaims for an order that the plaintiff do remove such part of the staircase of his building which stands upon or over the disputed strip.

Lots 40 and 41, Stabroek, run from Croal Street on the north to Brickdam on the south. Lot 40 is situate immediately west of lot 41. Immediately east of lot 41 is Boyle Place. One Maria d'Andrade became the owner by transport No. 1173A of the 1st December, 1930, *inter alia* of one undivided half part or share in the south half of lot 41, situate in the Stabroek District, Georgetown. She owned the other undivided share in the south half of lot 41 by virtue of her marriage in community of property so that upon the passing of transport No. 1173A referred to above she became the owner of the entire south half of lot 41. In 1930 there was no building or other erection on that land. In 1937 the defendant became the owner by transport of the north half of lot 41 with the building thereon. At that time there was no boundary fence separating the north half of lot 41 from the south half. The defendant erected a building on the north half of lot 41 and he has admitted that not knowing at that time where his southern boundary was, after consultation with his carpenters, he caused an east-west fence to be erected in a position in which it remained until December 1964. The defendant in the course of his cross-examination has admitted that until the year 1961 when he caused a survey to be carried out by a sworn land surveyor Insanally he had regarded that

FUNG-KEE-FUNG v. JAIKARAN

fence as being in the correct position demarcating the boundary between the north half and the south half of lot 41. In 1939, some two years after the defendant had caused the fence to be erected, Maria d'Andrade, who lived on the south half of lot 40, Brickdam, immediately to the west of the south half of lot 41 erected a house on the south half of lot 41 which was fenced on the north by the defendant's east-west fence, and on the east and south. After the house was built a fence separating the south half of lot 40 from the south half of lot 41 was erected. Maria d'Andrade also had a large nursery built in 1939 north of the house she had erected on the south half of lot 41. The nursery extended up to about one foot from the defendant's east-west fence. Maria d'Andrade kept plants in the nursery. The evidence of Joseph Mendonca, one of the grandchildren of Maria d'Andrade, shows that his grandmother occupied the entire area of the land south of the defendant's east-west palings. After the house was erected in 1939 on the south half of lot 41, Maria d'Andrade lived there and in 1948 Mendonca's mother (who was a daughter of Maria d'Andrade) and her entire family went to live With Maria d'Andrade in that house. In 1952 Maria d'Andrade died but Mendonca's mother and her family continued to occupy the land including the disputed strip south of the east-west palings until the south half of lot 41 was sold and transported to the plaintiff in 1956. In the meanwhile, in 1953, the administrators of the estate of Maria d'Andrade, pursuant to a family arrangement dated the 9th January, 1953, which was submitted to the Supreme Court and given effect to by order of the Supreme Court dated 16th February, 1953 (as recited in transport No. 795 of the 20th July, 1953), had passed transport to d'Andrade Trading Company, Ltd. *inter alia* of the south half of lot 41. While no *title* to the disputed strip was or could have been passed under the transports of 1953 and 1956 above mentioned, nevertheless Maria d'Andrade until her death in 1952 and thereafter her daughter, for and on behalf of the deceased estate until transport was passed to the Trading Company in 1953 and for and on behalf of the Trading Company thereafter, until 1956 when transport was passed to the plaintiff, were in continuous occupation of the land from immediately south of the east-west fence. Thereafter and until the defendant caused the east-west fence to be moved farther south in December 1964, the plaintiff has by himself or his tenants been in continuous occupation of that strip along with the south half of lot 41. In 1957 the plaintiff had extended his building by the addition northwards of a staircase and kitchen to a point about 2 feet from the defendant's east-west fence without any protest on the part of the defendant.

In 1961 one Rahaman, the owner of the north half of lot 40, served a notice of intended survey relating to his property upon the defendant who conceived that it would be desirable for him also to engage the services of a surveyor to survey his property. This he did. The defendant wished to have a notice of intended survey served upon the plaintiff but the plaintiff was then resident in Trinidad. The defendant sought and obtained the plaintiff's address in Trinidad from Alfred Yhap who at that time was not yet the plaintiff's attor-

ney. Insanally, a sworn land surveyor, carried out a survey for the defendant who disclosed that the southern boundary of the north half of 41 was some 14 feet farther south of the line of the defendant's east-west fence. This was brought to the plaintiff's attention with a suggestion by the defendant that the plaintiff might consider it reasonable to have a survey carried out on his part. On the 10th August, 1961, the plaintiff's legal adviser, Mr. A. O. Fung-kee-Fung, replied (Ex. "L") to the effect that the plaintiff had bought the property of S 1/2 lot 41, Brickdam, with the existing palings. He objected on behalf of the plaintiff to a removal by the defendant of the existing fence and stated that the plaintiff considered the defendant's suggestion to have the survey checked (presumable Insanally's survey) a reasonable one. Apparently on the 11th August, 1961, the defendant spoke with the plaintiff's legal adviser, for in a letter written on the 17th November, 1961, to the plaintiff's legal adviser the defendant referred to this conversation and concluded his letter as follows: "I also confirm your suggestion that I could go ahead and remove the paling to the boundary". This allegation brought a denial from the plaintiff's legal adviser that he ever made any such suggestion and the affirmation that his client (the plaintiff) maintained that his correct boundaries are where the palings (fences) are situate.

In December 1964 the defendant caused the east-west fence to be advanced farther south to a distance of about 14 feet to conform to the southern boundary of the north half of lot 41 as found by Insanally, in his survey made in 1961. Insanally's position of the southern boundary makes the north half of lot 41 and the south half of lot 41 mathematical halves of lot 41. The present line of the east-west fence commences from Insanally's paal on the east and extends westward turning around the staircase of the plaintiff's building and then turning southwards and extending westwards to Insanally's paal on the west. It is the strip of land commencing from the original position of the defendant's east-west fence and extending some 14 feet to the position shown by Insanally on his plan as the true southern boundary of the north half of lot 41 that is in dispute.

The evidence shows that the defendant has been out of possession of the disputed strip from some time in 1937 until December 1964. The evidence also shows that the disputed strip together with the south half of lot 41 has been since 1937 or at least since 1939 in the continuous possession until December 1964—some 25 or 27 years—of persons other than the defendant. This is really a case of discontinuance of possession for at least a quarter of a century with continuous possession over that period in persons other than the defendant. The plaintiff has discharged the onus which lies upon him of showing that during that period there was no break in the occupation whereby it can be said that at some time there was no one within the limitation period against whom the defendant as owner could have brought proceedings to recover the land.

Maria d'Andrade and those persons who followed her into occupation of the south half of lot 41 and the disputed strip occupied the

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disputed strip not as conscious trespassers but in the *bona fide* but erroneous view that the disputed strip formed part of the south half of lot 41. The facts having been established it is now necessary to consider what the legal position in relation to those facts is. This question may be approached in two different ways. The first is that taken by the Federal Supreme Court in *Victor v. West Bank Estates Ltd.* (1961), 3 W.I.R. 208, [see also 1961 L.R.B.G. 40]. In that case, as is stated in the head note:

"the respondent company was the owner by transport of land acquired in 1927 which it cultivated as a sugar estate. The appellants were adjoining landowners and derived title through a predecessor who obtained transport in 1875. In 1958 the company extended its operations southwards and beyond a dam which the appellants claimed to be their northern boundary. The appellants took out an originating summons seeking registration of title to the land of which they claimed to be owners. The company opposed the application on the ground of objection to the description of the land so claimed. The appellants also brought an action against the company for recovery of possession of the disputed strip, damages for trespass, and an injunction. The two actions were heard together. At the trial the appellants aided a claim for declaration of title and relied on certain acts of user. The judge granted the application for registration of title but amended the description of the land and defined the northern boundary in such a way as to exclude the disputed area. He dismissed the second action, holding that the disputed area was covered by the company's transport and that the appellants had failed to show that they had dispossessed the company and was in adverse possession of the disputed area."

It was held that the principles relating to trespassers had no application to the circumstances of that case, that the standards of proof of dispossession by user should not be applied, and that the concept of adverse possession in so far as it related to the barring of remedies should be disregarded. MARNAN, F. J., delivering the judgment of the court observed at p. 214 that the appellants' claim to be entitled to sue in trespass was based on s. 5 of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184. In holding that the principles relating to trespassers had no application to that case, MARNAN, F. J., (at p. 215), referred to the fact that the appellants' occupancy was based on a *bona fide* belief in long standing ownership and observed that such occupancy is no more divisible than the belief in ownership on which it is based and that if and in so far as they took and maintained possession of the disputed strip they did so, not as conscious trespassers crossing another's boundary, but in the same way they took possession, if at all, of the undisputed land immediately to the south, that is to say, in the *bona fide* belief that their rights extended up to the line of the dam, and as far as the bank line. And at p. 216:

"It may often happen that on a division of land the parties may adopt on the ground a mutual boundary different from that

provided for by the instrument of conveyance. In such cases, if rectification is not obtained, the ultimate result is usually governed by statutes of limitation, and the parties' final rights depend on their occupation and user of the land for the statutory period. As Lord ST. LEONARDS said in *Dundee Harbour Trustees v. Dougall* (1852), '1 Macq. 317 H. L, in a passage cited in CHESHIRE'S REAL PROPERTY (7th Edn.), p. 766:

'All statutes of limitation have for their object the prevention of the rearing up of claims at great distances of time when evidences are lost; and in all well-regulated countries the quieting of possession is held an important point of policy'.

I think that observation is relevant to the position in this case, where no one ever thought of locating a 100-rood line on the ground until 1950, or of claiming such a line as a boundary until 1958."

In the instant case no one ever; thought of locating the line of the true boundary of the north half lot on the ground until 1961 or of claiming such a line as a boundary until after Insanally's survey of that year. The plaintiff, as did the appellants in *Victor's* case, are not seeking to prove that he had dispossessed the defendant whether by a series of acts necessarily inconsistent with the defendant's ownership or otherwise. He is seeking to show sole and undisturbed user and enjoyment in him and in those persons who were previously in occupation up to Maria d'Andrade for a period of far in excess of 12 years during which the defendant laid no claim whatsoever to the strip in question.

As was pointed out in *Victor's* case the principle of *Thomas v. Thomas* (1855), 25 L.J. Ch. 159, is not in point inasmuch as the plaintiff does not seek to claim the disputed strip under a lawful title but rather in the *bona fide* but erroneous belief that it was included in his title. On this approach the plaintiff would succeed in establishing that a right of action accrued to the defendant at the latest in 1939 and that the statutory period as contemplated by s. 5 of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184, has elapsed. The plaintiff would thereby be entitled to succeed in his claim for damages for trespass with the consequential remedies sought.

However, if this approach is wrong then the correct approach would be that of seeing whether dispossession in the sense of there being conscious trespass to the strip has been shown for a period of over 12 years continuously so that the remedy of the defendant would be barred. In this regard it matters not that the period of twelve years or more is aggregated by several successive trespassers so long as there has been no break in the occupation adverse to the lawful owner.

At any time within the period of 12 years after Maria d'Andrade had first gone into possession of the disputed land the defendant

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was entitled to make entry or to bring an action to recover the land but he did not do so. By s. 4(2) of the Civil Law of British Guiana Ordinance, Cap. 7 (Major Edition), then in force until repealed on 31st December, 1952, by the Title to Land (Prescription and Limitation) Ordinance, 1952 [now Cap. 184 (Kingdon Edition)], it was provided that "no person shall make an entry or distress, or bring an action or suit to recover immovable property, but within twelve years next after the time the right to make, bring or recover the same has accrued to him or to some person through whom he claims." It will be observed that under that provision the remedy was barred but the title was not extinguished. Under the 1952 Ordinance, however, s. 5 provides that "no action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person." Section 13 provides that "at the expiration of the period prescribed by this Ordinance for any person to bring an action to recover land, the title of that person to the land shall be extinguished". By 1951 at the latest the defendant's remedy first became barred by reason of s. 4(2) of the Civil Law of British Guiana Ordinance, Cap. 7 (Major Edition). The continuous possession of the disputed land in one or other persons has effectively barred the defendant as owner by transport from making any lawful entry upon the land or of bringing any action in order to recover the land. The defendant could no more effectively seek to re-enter after a period of 12 years than he could after a period of 30 years. See *Boodhan Maraj v. Khan*, 1930 L.R.B.G. 9. This was true in 1930 and is no less true since the enactment of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184, in 1952.

I have already found that for the period commencing in 1937 and until December 1964 the defendant was continuously out of possession of the disputed strip and that for at least a continuous period from 1939 until December 1964 there was always someone other than the defendant in occupation of the strip without any break in such occupation. Such occupation was not with the leave or licence of the defendant nor under any lease granted by the defendant. In short such occupation was not referable to any lawful title. In that sense that occupation was adverse to the true owner the defendant and therefore the defendants' remedy is barred. The defendant is therefore liable to be sued in trespass for disturbing the possession of the person presently in occupation. That the true owner can be so sued if he disturbs the possession of a person who has been in possession for the statutory period of 12 years was not doubted in *Victor's* case. No question arises in the instant case as to which of a succession of trespassers has the better claim to possession and even in the case of a succession of trespassers each adverse to the other the question as to a better right to possession only affects a trespasser *vis a vis* another trespasser. The trespasser in possession who is disturbed by an owner out of possession for the statutory period is always entitled to sue the owner in trespass. See *Willis v. Howe* [1893] 2 Ch. 545, per KAY, L. J., at p. 553:

"A *continuous* adverse possession for the statutory period, though by a succession of persons not claiming under one another, *does*, in my opinion, bar the true owner."

Counsel for the defendant referred to the fact that by virtue of the by-laws made under the Georgetown Town Council Ordinance, Cap. 152, it is not possible for title to be conveyed for a parcel of land less than a half lot in the city of Georgetown and that therefore the plaintiff can never acquire prescriptive title to the strip. While this is true the plaintiff does not seek to acquire prescriptive title to the disputed strip. He seeks to rely upon the limitation provisions contained in the Title to Land (Prescription and Limitation) Ordinance, Cap. 184 (modelled on the Limitation Act, 1939, of the United Kingdom) in the same way as can be done in England. Again, on the argument of counsel for the defendant it would not be possible for anyone to acquire any possessory rights adverse to an owner of land so long as the owner would be left in possession of a piece of land less than a half lot as by reason of the Georgetown Town Council by-laws he would be prevented from conveying by *way of transport* the interest that remains to him. However that may be I am unable to see how the owner's inability to effect a conveyance in a certain way—by transport—can deprive the 'adverse' possessor of statutory rights given him where the owner has been out of possession continuously for the statutory period.

It is not necessary to decide whether the provisions of s. 13 of Cap. 184 are retrospective but had it been necessary for me to do so I could find no good reason for differing from the opinion and the reasons therefor I expressed in the judgment delivered in the *Petition of Basiran*, 1960 L.R.B.G. 232, to the effect that where no vested rights are sought to be taken away a period of possession prior to the 31st December, 1952, may be added to the period subsequent thereto to make up the statutory period.

One other point remains for consideration. Counsel for the defendant submitted that the special power of Attorney, Ex. "D" executed by the plaintiff in favour of Yhap did not authorise Yhap to commence or prosecute or defend a claim in relation to land which does not form part of the south half of lot 41 held tinder transport. Under para. 1 of the power of attorney Yhap is given power to sell and dispose of "lots Nos. 36, 37 and 38 Bel Air Park and lot No. 41, corner of Brickdam and Boyle Place, in the city of Georgetown . . ." By para. 4 Yhap is empowered "to commence, prosecute, enforce and to defend answer or oppose all actions suits and other legal proceedings and demands whatsoever touching any of my properties aforesaid." It seems to me that Yhap's powers referred to in those paragraphs in respect of lot 41, corner of Brickdam and Boyle Place, are not limited to the south half of lot 41 held by the plaintiff under transport but embrace all rights of property held by the plaintiff in and over any part of lot 41. I find therefore that Yhap has been duly authorised to commence and prosecute these proceedings and to defend the counterclaim.

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There will be judgment for the plaintiff on the claim for—

- (a) an order that the defendant do forthwith remove from its present position his east-west fence to the position which it occupied before its removal in December 1964;
- (b) an injunction restraining the defendant whether by himself, his servants and agents from trespassing on the disputed strip and from erecting palings or any other structures thereon;
- (c) damages for trespass in the sum of \$25;
- (d) costs to be taxed certified fit for counsel.

The defendant's counterclaim is dismissed with costs to be taxed certified fit for counsel.

Judgment for the plaintiff

Solicitors: *D. de Caires* (for the plaintiff); *D. Dial* (for the defendant).

Re the Estate of ATTIOOLA, Deceased

[Supreme Court—In Chambers (Luckhoo, C. J.) February 2, June 10, 1965]

Succession—Illegitimate brothers and sisters—Death of brother in 1926 and of mother in 1962, both unmarried and intestate—Claim by surviving brothers and sisters to succeed to the estate of the deceased brother—Competence of claim—Civil Law of British Guiana Ordinance, Cap. 2, s. 6(1) (h)—Legitimacy Ordinance, Cap. 165.

Section 6(1) (h) of the Civil Law of British Guiana Ordinance, Cap. 2, which was enacted in 1916, provides that "illegitimate children shall be entitled to succeed in intestacy as heirs of their mother as if they were legitimate children of their mother . . ." The Legitimacy Ordinance, Cap. 165, enacted in 1932, permits a mother, if she survives her illegitimate child, to succeed to his estate and provides that if she does not survive her illegitimate children then her legitimate and illegitimate children shall succeed through her as if they had been born legitimate.

S. died in 1962 unmarried and intestate. She had a number of children including M.A. who died in 1926 unmarried and intestate. The surviving children sought to have certain immovable property of the estate of M.A. vested in them, their contention being that they were blood relations and heirs *ab intestato* of M.A. and entitled under s. 6(1) (h) of Cap. 2 to share in his estate. The Registrar of Deeds, doubting their entitlement, refused to certify title for transport. On appeal,

Held: (i) the position under the Civil Law of British Guiana Ordinance prior to the enactment of the Legitimacy Ordinance, 1932, was as follows: "(a) illegitimate children could succeed to property belonging to their mother and to property which their mother herself could have inherited; (b) illegitimate children could not succeed as heirs *ab intestato* of each other; (c) a surviving mother could not succeed on the intestacy of her illegitimate children;

(ii) M.A. having died subsequent to 1917 and before the enactment of the Legitimacy Ordinance, 1932, his illegitimate brothers and sisters and his mother would not have succeeded to his estate which would therefore have escheated to the Crown at the date of his death in 1926.

Appeal dismissed.

The Registrar of Deeds and the Supreme Court in person.

H. Matadial for the appellants.

M. Shahabuddeen, S.G., amicus curiae.

David A. Singh, Senior Legal Adviser, amicus curiae.

LUCKHOO, C.J.: This is an appeal from the decision of the Registrar of Deeds refusing to certify the passing of a conveyance by way of transport by Noorum Nisa, administratrix of the estate of Mohamed Attioola, deceased, to herself and others as heirs *ab intestato* of the estate of Mohamed Attioola, deceased.

Mohamed Attioola was one of the illegitimate children of one Sakina. Sakina was never married and the nine children born of her body included Noorun Nisa. Mohamed Attioola died on the 26th January, 1926, unmarried and intestate and there survived him his mother Sakina and six of her children, two of Sakina's children Mohamed Hassim and Kulsum having died in infancy, unmarried and intestate. Sakina died in February 1962, intestate. Allabaksh, one of Mohamed Attioola's brothers, died intestato in the year 1945. Letters of administration of Allabaksh's estate were granted to his widow Rasidan on the 25th June, 1945. The surviving children of Sakina, the appellants herein, now seek to have certain immovable property of the estate of Mohamed Attioola vested in them. The appellants claim to be, along with Allabaksh, blood relations and the heirs *ab intestato* of the deceased Mohamed Attioola and entitled under the provisions of s. 6(1) (h) of the Civil Law of British Guiana Ordinance, Cap. 7 (Major Edition) to share in the estate of Mohamed Attioola, deceased. The Registrar of Deeds stating that he was doubtful as to whether Sakina and the deceased Mohamed Attioola's brothers and sisters could properly be considered to be blood relations so as to prevent the said deceased's estate escheating to the Crown has refused to certify the conveyance of a portion of immovable property, part of the said deceased's estate, to the appellants.

Section 6(1) (h) of the Civil Law of British Guiana Ordinance, Cap. 7 (Major Edition) then in force at the time of Mohamed Attioola's death provided as follows:—

"(h) illegitimate children shall be entitled to succeed in intestacy as heirs of their mother as if they were legitimate children of their mother, and children legitimated by the marriage of their parents shall be entitled to succeed in intestacy as heirs of both parents as if they had been legitimate children at the date of their birth;"

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This provision which was enacted by the Civil Law Ordinance, 1916, permits illegitimate children to succeed to their mother's estate but does not deal with the question of a mother succeeding to her illegitimate children's estate or with the question of illegitimate brothers and sisters succeeding to each other's estate. It is instructive to consider the position prior to the enactment of that provision. The principles of the Roman Dutch law as laid down in the Political Ordinance of 18th December, 1599 (New Aasdoms Law) were applied by Resolution of October 1774 in Demerara and Essequibo and as laid down in the Political Ordinance of 1st April, 1580 (New Schependoms Law) as modified by the Octrooi of 1661, in Berbice, as from December 1732. See *Ex. p. Administrator-General, re Estate Alexander* (1890), 1 L.R.B.G. (N.S.), 6. The deceased was in his lifetime resident in Berbice. The property sought to be conveyed is also situate in Berbice. The South African cases are in point for the order of succession established for Berbice is the same as the common law of South Africa. In *Craig v. Knight*, decided on 10th March, 1866, by a full bench of the Supreme Court of British Guiana it was held that an illegitimate child may inherit from his illegitimate uterine brother, a statement to the contrary in Van der Linden being rejected. The right of illegitimate children to the same mother to succeed in her lifetime to a portion of the estate of one of their illegitimate brothers or sisters was upheld by a full bench of the Supreme Court of British Guiana in *Madden v. Hyndman and Farinha* decided on 21st January, 1871. In *Re Russo* (1896), B.C. Juta 184, de VILLIERS, C.J., held that the illegitimate children of a mother who had predeceased her father who died intestate would have been entitled to share with her legitimate children in her share of her father's inheritance. In *Magamat Jassiem v. The Master*, 8 Juta 259 it was held that illegitimate children of the same mother were entitled to succeed each other *ab intestato*.

In *Re Sullivan*, 1919 L.R.B.G. 184, DALTON, Ag. C.J., held that on the principle that a mother makes no bastard, brothers and sisters could succeed *ab intestato* to each other's estate. DALTON, Ag. C.J. also held that the mother, if alive, took to the exclusion of the surviving children in the ease of intestacy of one of the children. This latter portion of the acting Chief Justice's decision is contrary to the decision in *Madden v. Hyndman and Farinha* (*ubi sup.*).

After the enactment of the Civil Law of British Guiana Ordinance in 1916, DALTON in his work on the CIVIL LAW OF BRITISH GUIANA expressed the view that with the abrogation of the Roman Dutch law and the enactment of the provisions of s. 6(8) of that Ordinance (s. 6(1) (h) of Cap. 7 (Major Edition of the Laws)) effect was not given to the recommendation of the Common Law Commission of 1912 that the illegitimate children should succeed their mother in all cases whatsoever just as if they were legitimate and that while the right of illegitimate children to succeed on intestacy as heirs of their mother is preserved it is restricted and does not extend beyond the estate of the mother nor can a mother succeed on intestacy to the estate of her illegitimate child, the child being *nullius filius*, and in the same principle brothers and sisters of the

same mother could no longer succeed each other as heirs *ab intestato*. In *Krishnath v. Clements*, 1920 L.R.B.G. 199, MAJOR, C.J., held that the chance of succession by one of two illegitimate brothers to the other on intestacy which existed under Roman Dutch law was preserved by s. 2(3) of the Civil Law of British Guiana Ordinance of 1916. On appeal to the West Indian Court of Appeal, 1921 L.R.B.G. 189, THOMAS, C.J., expressed a similar view while BERKELEY, J., held that no right had been acquired before the enactment of the Ordinance and that the right which existed in Roman Dutch law has been taken away. LUCIE SMITH, P., entertained doubt on the point.

In *Parvati v. Pragdat*, 1922 L.R.B.G. 190, a case which was concerned with the question of succession by an illegitimate person to the estate of her deceased maternal grandmother, the mother having previously died, it was unanimously held by the West Indian Court of Appeal that in view of the provisions of s. 6(8) of the Ordinance of 1916, the words "illegitimate children shall be entitled to succeed in intestacy as heirs of their mother as if they were legitimate children of their mother" meant that in any case of intestacy illegitimate children had the same right to succeed as they would have had if they had been legitimate children of their mother. Parvati's case establishes that illegitimate children can succeed not only in respect of property belonging to their mother but also in respect of property which she could herself have inherited.

Illegitimate children can be blood relations of persons other than their mother. In *Steele v. Dundas* (1897), 7 L.R.B.G. 47, SHERIFF J held that illegitimate children of a man's sister could be his next of kin in the sense of being nearest to him by proximity of blood and that if this was in fact so they would! have been his heirs *ab intestato* if he died intestate. It would seem from the provisions of s 6(15) of the Ordinance of 1916 that it is implied that illegitimate children of a female deceased are blood relations of each other. Section 6(15) provided as follows —

"In the absence of all blood relations, including therein all illegitimate children of a female deceased and in the absence of a surviving wife or husband of a, deceased person, his movable and immovable property shall fall to the Crown provided....."

But do they succeed as heirs *ab intestato* on the death of one of them? Before dealing with this question reference should be made to *In re Barclay: Petition of Stull*, 1924 L.R.B.G. 80, where it was held by MAJOR, C.J., that a mother of an illegitimate child does not, since the enactment of the Civil Law Ordinance, 1916, succeed as heir on the intestacy of that child and did not, prior to that date, in respect of the expectation of succession she then had under the Roman Dutch law, acquire such a right as is protected by s. 2(3) of the Civil Law Ordinance, 1916. It will be observed that MAJOR, C.J., stated in that case that after more mature consideration he would not follow his decision to the contrary in *Krishnath v. Clements*. 1920 L.R.G.B. 199, at p. 204, where he had held that brothers and sisters of the same mother were entitled to succeed each other on intestacy although they are illegitimate, that right having existed before the

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passing of the Civil Law Ordinance, 1916, and being preserved by s. 2(3) of the Ordinance. MAJOR, C.J., in *Barclay's* case pointed out that the Civil Law Ordinance, 1916, only affected rights acquired before the date of its coming into operation and that where the very existence of the right depends on the occurrence of a death and that death has not taken place there is but a *spes successionis* and no more.

The Civil Law Ordinance does not enable the mother to succeed on intestacy to the estate of her illegitimate child and this was pointed out by STOBY, J., in *Re White*, 1955 L.R.B.G. 119, at p. 120.

It can fairly be said that the position under the Civil Law Ordinance prior to the enactment of the Legitimacy Ordinance, 1932, was as follows:—

- (i) Illegitimate children could succeed to property belonging to their mother and to property which their mother herself could have inherited;
- (ii) Illegitimate children could not succeed as heirs *ab intestato* of each other;
- (iii) A surviving mother could not succeed on the intestacy of her illegitimate children.

The Legitimacy Ordinance, 1932 (now Cap. 165), was enacted to permit a mother, if she survived her illegitimate child, to succeed to his estate and if she did not survive her illegitimate children, then her legitimate and illegitimate children will succeed through her as if they had been born legitimate.

Turning to the facts of the instant case Mohamed Attioola having died subsequent to 1917 and prior to the enactment of the Legitimacy Ordinance, 1932, his illegitimate brothers and sisters and his mother would not have succeeded to his estate which would therefore have escheated to the Crown at the date of his death in 1926.

The Registrar was therefore not in error in refusing to certify the conveyance to the appellants and the appeal must be dismissed. There will be no order as to costs.

I would like to acknowledge the very considerable assistance I have received in this matter from the researches of the Solicitor General and Mr. David Singh, Senior Crown Counsel, who appeared *amici curiae*.

Appeal dismissed.

[British Caribbean Court of Appeal (Archer, P., Jackson and Stoby, JJ.A.)
December 1, 2, 3, 1964, April 5, 1965]

Landlord and tenant—Tenant continues in possession after notice to quit—Interference by landlord—Action by tenant for damages—Premises subject to Bent Restriction Ordinance—Whether claim arising out of Ordinance—Whether Supreme Court has jurisdiction—Rent Restriction Ordinance, Cap. 186, s. 26(1).

The respondents rented from the plaintiff certain premises which were subject to the Rent Restriction Ordinance, Cap. 186. The appellant gave the respondents notice to quit but the respondents remained in possession. The appellant then interfered in various ways with the respondents' occupation. The respondents, thereupon, sued for damages for breach of covenant for peaceful enjoyment of the premises and for an injunction. In defence it was contended *inter alia* that the Supreme Court had no jurisdiction because of the provisions of s. 26(1) of the Rent Restriction Ordinance, Cap. 186, which provides that ". . . any claim or other proceedings . . . arising out of this Ordinance shall be made or instituted in the magistrate's Court". This submission was overruled by PERSAUD, J., who gave judgment for the respondents. (See 1963 L.R.B.G. 200). On appeal,

Held: (i) the respondents would, but for the Rent Restriction Ordinance, have been trespassers on the expiration of the notice to quit. The rights they enjoyed were statutory and were enforceable only as provided by the statute conferring those rights, namely, in the magistrate's court;

(ii) *per ARCHER, P., and STOBY, J. A.*, the Supreme Court was limited to intervention by way of injunction *ad interim*, pending hearing of an action in the magistrate's court;

(iii) *per JACKSON, J. A.*, the injunction claim could not be sustained nor its claim properly instituted until a decision had been reached on the measure which could give it life; possibly thereafter proceedings for an injunction might be allowed in a court having jurisdiction to grant it.

Appeal allowed.

H. D. Hoyte for the appellant

C. A. F. Hughes for the respondent.

ARCHER, P: The respondents, who are husband and wife, were tenants, under a written agreement, of the appellant. Following court proceedings between the parties the appellant gave the respondents notice to quit but the respondents remained in possession. The action out of which this appeal arises was subsequently brought by the respondents and is a claim for damages for wrongful interruption and interference with them in their use and occupation of the premises rented and an injunction restraining the appellant from interrupting or interfering with their use of, and from excluding them from, the premises. The interruption and interference complained of consisted of the blocking up of the western passageway leading to the back of the yard of the premises and the placing of a paling across the door giving access to the eastern passage of the house in the course of which a communicating door used by the respondents was nailed up.

The respondents, who obtained an interlocutory injunction pending trial of the action, were awarded damages by the trial judge who

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found that the appellant's conduct was a deliberate attempt to get rid of the respondents and that he was liable in tort. [See 1963 L.R.B.G. 200]. He did not grant the injunction asked for as at the time of the hearing the respondents were enjoying the use of an alternative passageway in place of the corridor along which they had formerly passed.

The appellant complained of errors in law made when the trial judge found that the licence to use the western passageway was irrevocable so long as the tenancy subsisted and that the respondents' action was an action in tort. Counsel for the appellant also attacked some of the findings of fact made by the judge and his failure to make other findings and criticised the award of damages on the ground that it was excessive, tout the main argument was directed to the question of the jurisdiction of the Supreme Court to entertain the respondents' claim and it is convenient to deal with that argument first.

The respondents became statutory tenants when they continued in possession after notice to quit. Section 21 of the Rent Restriction Ordinance, Cap. 186, provides that a statutory tenant shall be entitled to the benefit of all the terms and conditions of the original tenancy so far as they are consistent with the provisions of the Ordinance. The common law of England applies to and governs contracts of tenancy (see s. 4 of the Landlord and Tenant Ordinance, Cap. 185) and a covenant for quiet enjoyment was therefore an implied term of the original contract of tenancy. The claim for damages for interruption and interference accordingly arose out of the Ordinance.

Counsel for the appellant, relying on s. 26(1) of the Ordinance, submitted that the respondents' claim for damages was maintainable only in a magistrate's court. He said at first that if an injunction alone had been sought the Supreme Court would have had jurisdiction but not otherwise and that adding a prayer for an injunction to the claim for damages did not give the Supreme Court jurisdiction. Later in his argument, however, he abandoned that contention and argued that the Supreme Court would have had jurisdiction only if the injunction was the principal remedy asked for, which, he maintained, was not the case.

Counsel for the respondents submitted that proceedings can be instituted in the Supreme Court by a statutory tenant where the relief sought is such as only the Supreme Court can grant and that in such a case it is competent to add a claim for damages. He submitted further that the substantive relief claimed was an injunction. An alternative argument put forward was that the appellant had disturbed the respondents' quiet enjoyment by the commission of an act of trespass, namely, the nailing up of his communicating door and the putting up of a paling and that an action for such trespass did not arise out of the Ordinance.

A plaintiff in an action for trespass to land by a stranger has only to allege possession but where the alleged trespasser is the lawful

owner the mere assertion of possession is insufficient. In *Delaney v. T. P. Smith Ltd.*, [1946] 1 K. B. 393, the defendants were the owners of a dwelling-house which had been damaged by enemy action and which was being repaired. In April, 1944, the plaintiff entered into an oral agreement with the defendants' agent that he should become the tenant of the house at a weekly rent as soon as the repairs had been completed, which the county court judge found to be in December. The defendants subsequently decided to sell all the houses on the estate on which this house was situate, and so informed the plaintiff, who, however, made a clandestine entry into possession of the premises in December, 1944. About a week later the defendants forcibly ejected the plaintiff and his effects. The plaintiff thereupon brought an action against the defendants for trespass, alleging that he was tenant of the dwelling-house and as such protected by the Rent and Mortgage Interest (Restrictions) Acts. The defendants by their defence pleaded that there was no note or memorandum in reference to the alleged tenancy as required by s. 40 of the Law of Property Act, 1925. The county court judge found that there was no memorandum signed by the defendants' agent sufficient to satisfy the statute, and that there had been no part performance, tout he held that the plaintiff was not seeking to enforce the agreement by action, as he had entered into possession of the premises. The defendants sought to justify their trespass by alleging that the agreement was not in writing, but their justification was defeated by proof of the agreement, and therefore the plaintiff was entitled to damages for the trespass. On appeal, it was held, allowing the appeal, that though the plaintiff's possession of the premises was sufficient to support an action of trespass against a wrongdoer, it was not sufficient to support it against the lawful owner of the premises. In the latter case lit was an essential part of the plaintiff's cause of action that he had a possession in himself consistent with the freehold being in the defendants, and the onus of establishing this by proving a demise from the defendants to himself lay on the plaintiff. The plaintiff therefore had to rely on the oral agreement to support his action, and consequently his action was in substance an action brought upon that agreement and therefore failed.

The judgments of TUCKER, L.J., and WYNN-PARRY, J., with which COHEN, L. J., concurred, explain the implications in the pleadings in an action of trespass to land and the judgment of WYNN-PARRY, J., is particularly instructive. He said at p. 399:

"It is clear upon the facts in this case, as found by the judge, that if the pleadings had proceeded strictly (a hypothesis which must be assumed for the purpose of testing the matter), the plaintiff would have been compelled to plead the oral agreement for a tenancy by the appropriate proceeding analogous to a reply in the High Court, because he was not in a position to deny the defendant company's freehold title. Now it is to be observed that the plea of *liberum tenementum*, and the corresponding modern defence that the land was the freehold of the defendant, involve a confession and avoidance. The plea admits the possession of the

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plaintiff tout asserts a title to the freehold. If issue were joined at that stage of the pleadings, the defendant would have to assume the onus of proving his title. In trespass *quare clausum fregit* the possession of the plaintiff is the foundation of the action; and the defendant is considered sufficiently to deny the plaintiff's right of possession toy pleading *liberum tenementum* in himself or a third person; in the latter case justifying as the servant and acting by the command of such third person: and by this anomalous plea the plaintiff is put to show how he has a possession in himself consistent with the freehold being in another, unless he chooses to traverse the title set up by the plea: *Roberts v. Tayler per CRESSWELL, J.*, (1845), 1 C. B. 117, 126. So where a plaintiff by his reply admits the title of the defendant but pleads a demise from him, there is a true confession and avoidance. The plaintiff is concluded by his confession and must fail Sin his action unless he proves the case set up by his reply, namely, a demise from the defendant. The onus is thrown upon him to prove the matter set up by way of avoidance, and it has become an essential part of his case to do so. Where, therefore, in such circumstances he relies on a demise or a tenancy, he must prove it, and in order to do so he must comply with s. 40 of the Law of Property Act, 1925, because as a result of the position into which, he has been forced by the course which the pleadings have taken, he is, in my judgment, bringing an action on a contract for the disposition of an interest in land, It is as if he had amended his statement of claim: because, where the allegation in question goes to the root of the matter, he cannot by introducing the allegation into his reply place himself in a better position than he would have been in had he pleaded it in his statement of claim. The question then arises: Does a different result flow if, instead of admitting the defendant's title, the plaintiff by his reply denies the defendant's title, but as an alternative pleads a demise from him? In my judgment the result is the same. In such an event the plaintiff sets up an alternative case: in the event of his failing successfully to traverse the title of the defendant at the trial he is, to quote again the words of CRESSWELL, J., in *Roberts v. Tayler* (1845), 1 C. B. 117, 126, put to show how he has a possession in himself consistent with the freehold being in another. Thus, the proof of the demise or agreement for tenancy becomes, equally in such a case, an essential part of the plaintiff's case, without which he could not succeed. Assuming that I am right in my conclusion that the (plaintiff must satisfy s. 40 of the above Act in a case where be admits the defendant's title, it would be strange if he could avoid that obligation by merely traversing the defendant's title in his reply.

In my judgment the true view is that the pleadings must be looked at as a whole; and if it appears that, in order to succeed upon a sole or alternative cause of action, he must prove a demise or an agreement for a tenancy, then he must satisfy s. 40 of the above Act or prove such part performance as will take the case out

of the section. If this were not so, then it would follow that a person in the plaintiff's position, who has nothing more than an oral agreement to grant a tenancy, upon which, therefore, he cannot bring an action either for specific performance or damages, may, if he is able to effect a clandestine entry, on eviction successfully bring trespass; provided that he takes the precaution of not relying on the unenforceable agreement in his statement of claim, but relies on the allegation that the defendant broke and entered premises of the plaintiff, an allegation which he must know to be unsupportable in law; confident that by so framing his pleadings he will be enabled to do by his reply that which he could not hope to do by Mis statement of claim, namely, to obtain relief against the defendant on the footing that a binding agreement of tenancy existed between them. So to hold would be in my view to defeat the section. For these reasons I would allow the appeal."

In this case it is an essential part of the respondents' cause of action that they have a possession in themselves consistent with the appellant's ownership, that is to say, that they, are statutory tenants, and they must invoke the assistance of the Ordinance to prove it. Having, therefore, to rely on the Ordinance to sustain both trespass and breach of the implied term guaranteeing quiet enjoyment their whole action arose out of the Ordinance.

Section 26(1) of the Ordinance is as follows:

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

In *Butler v. Hudson*, [1953] 2 Q. B. 407, EVERSHED, M. R., speaking of the jurisdiction conferred on a county court by s. 17 (2) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, said at p. 420:

"It is tolerably plain that the subsection is directed, primarily at any rate, to giving to the county court jurisdiction over all matters arising under the Rent Acts, even though, by reason of the value of the property or for other reasons, the High Court would have had jurisdiction".

A county court has a limited jurisdiction to make a declaration or grant an injunction and it was argued in that case that the power to make a declaration could only be used when the declaration sought was ancillary to other relief, a point which the court discussed but did not decide,

A county court's jurisdiction under the Rent Acts is not exclusive but a plaintiff who succeeds in the High Court in an action that could

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have been brought in a county court is deprived of costs. The jurisdiction conferred by s. 26(1) of the Ordinance is exclusive. The language is imperative: Subject to the provisions of s. 3(3) of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, the proceedings indicated shall be made or instituted in a magistrate's court. This language may be usefully compared with the wording of s. 3(1) of the Summary Jurisdiction (Petty Debt) Ordinance. There it is provided that an action (which is a proceeding for the recovery of a debt or demand, or of damages or of a chattel or thing) within the jurisdiction of a magistrate's court as to amount or value may be commenced in a magistrate's court.

In *Barracough v. Brown* [1897] A. C. 615, the question (raised by some of their lordships) was whether an action for a declaration of right would lie where a statute gave a new right to recover certain expenses in a court of summary jurisdiction from persons not otherwise liable. A claim was made by the secretary of undertakers responsible for the navigation of rivers against the owners of a steamship for reimbursement of sums expended in raising and removing the vessel which had capsized and sunk. The claim was preferred upon two grounds: the first being that the respondents were, at common law, responsible to the undertakers for the injury done to the navigation of the River Ouse, and for all costs necessarily and reasonably incurred by them in repairing the injury; and the second, that the respondents were made liable by statute to repay such costs to the undertakers. The House, after hearing argument, was unanimously of the opinion that there was no right to come to the High Court for a declaration and that the applicant could only take proceedings in a court of summary jurisdiction. Lord WATSON said at p. 622:

"The right and the remedy are given *uno flatu*, and one cannot be dissociated from the other. By these words the legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable, and has therefore by plain implication enacted that no other court has any authority to entertain or decide these matters."

Lords HERSCHELL, SHAND and DAVEY expressed similar views.

The law on the point is succinctly stated by ASQUITH, L.J., in *Wilkinson v. Barking Corporation*, [1948] 1 K. B. 721, at p. 724, where he said:

"It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others. As the House of Lords ruled in *Passmore v. Oswald-twistle U.D.C.*, [1898] A.C. 387 (p. 394 per Lord HALSBURY):

'The principle that where a specific remedy is given by statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law'."

A magistrate's jurisdiction is entirely statutory. It does not include the power to grant a declaration or injunction and it has not been suggested that such power can be derived from s. 26(1) of the Ordinance. In matters arising out of the Ordinance proceedings in respect of which must be taken in a magistrate's court the remedy of injunction can therefore only be sought in the Supreme Court. In *Stevens v. Chown, Stevens and Clark*, [1901] 1 Ch. 894, the lessee of the Sidmouth Market and tolls asked for a declaration that the defendants were not entitled to hawk, sell, or offer, expose, or carry for sale within the parish of Sidmouth any commodities usually sold in public markets except in accordance with the provisions of the Sidmouth Market Acts, 1839 and 1846, and after payment of the tolls payable thereunder, and for an injunction, an account of tolls due, and damages. FARWELL, J., held that the Act of 1839 provided for the substitution of a new market-place in lieu of the old market-place and was an Act by way of confirmation of the ancient market. It had been argued that no action at law would lie for the disturbance of the market because a new market had been created and a special statutory remedy provided. FARWELL, J., referred to the judgment of WILLES, J., in *Wolverhampton New Water-works Co. v. Hawkesford* (1859), 141 E.R. 486. In that case, the issue was whether the defendant was a shareholder in the plaintiff company which had sued for calls on shares. WILLES, J., said (141 E.R. at p. 495):

"Reading the 21st section (of the Companies Consolidation Act, 1845), by the aid of the light thrown upon it by the subsequent sections, it appears to me that the remedy was intended to be enforced only in the particular mode prescribed against persons who are shareholders. . . .

"There are three classes of cases in which a liability may be established founded upon a statute. One as, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of case is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, *viz.*, where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it.....The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.

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The company are bound to follow the form of remedy provided by the statute which gives them the right to sue".

FARWELL, J., in *Stevens v. Chown* was of the opinion that the case with which he had to deal fell within the first of the classes enumerated by WILLES, J., in *Wolverhampton New Water-Works Co., v. Hawkesford*. He said (at p. 903):

"On the true construction of the Act, I think it has simply re-enacted the old common law right to the market, applying the right to the particular new building when substituted for the old building as authorized by the Act".

He continued:

"But even if this were not so, it appears to me that the remedy in Chancery, if I am to regard it, as has been argued, as a separate remedy, is wider than the old common law remedy. In my opinion, there was nothing to prevent the old Court of Chancery from granting an injunction to restrain the infringement of a newly created statutory right, unless the Act of Parliament creating the right provided a remedy which it enacted should be the only remedy—subject only to this, that the right so created was such a right as the Court under its original jurisdiction would take cognizance of."

He then dealt with the argument that unless an action at law would lie the court would not have granted an injunction and said (at p. 905):

"Now, if I find that the statute enacts, either by way of new creation or by way of restatement of an ancient right, a right of property that at once gives rise to the jurisdiction of the court to protect that right. If the Act goes on to provide a particular remedy for the infringement of that right of property so created, that does not exclude the jurisdiction of this court to protect the right of property, unless the Act in terms says so.....(pp. 906 and 907). Assume there had been none of these provisions for proceeding before magistrates, there would still have been a right of property in the market declared by the Act of Parliament and, I will assume, against my own view of the construction of the Act, created *de novo*. That is a right of property to which the ordinary incidents would attach, including the right to protect that property by proceedings in the Chancery Division or in the old Court of Chancery. That appears to me to be well established, and it is borne out by *Cooper v. Whittingham*, 15 Ch. D. 501. JESSEL, M.R., possibly expressed himself rather more generally than he would have done had the case been fully argued; but that *Cooper v. Whittingham*, on the question of the general jurisdiction of the old Court of Chancery, is sound, apart from anything said on the Judicature Act, seems absolutely plain, and to have been so stated by CHITTY, J., in *Hayward v. East London Waterworks Co.*, 28 Ch. D 138. The defendants have misapprehended the effect of that case. CHITTY, J.

clearly admitted the jurisdiction; but he was dealing with the jurisdiction arising under the second class of cases referred to in MITFORD ON PLEADINGS, 5th edn., p. 5, and set out in KERR ON INJUNCTIONS, 2nd edn., p. 6—a classification adopted and approved by TURNER, L. J., in *Pennell v. Roy* (1853), 3 D.M. & G. 126. CHITTY, J., was dealing with a case in which there would be the necessity of proceeding before another tribunal, so that the Court of Chancery or the Chancery Division had not the power of deciding the question finally, but could only interfere *ad interim*,.....The jurisdiction of the court which was stated to exist was in that case exercisable only *ad interim*, and fell within the second class of cases mentioned in MITFORD ON PLEADING, namely, the jurisdiction of the court to keep matters in *status quo*, or to prevent irremediable mischief pending the determination of the chief matter in question. Now that this Division exercises all the jurisdiction of both Divisions of the court, there is no question of sending a matter to be tried at law. Such a case as *Hayward v. East London Waterworks Co.*, can only arise where there is some special statutory tribunal to determine some question such as was there pending, and where matters ought to be kept in *status quo*."

The passage from the judgment of FARWELL, J., in *Stevens v. Chown* to which I have referred was approved by the Judicial Committee of the Privy Council in *J. H. Coles Proprietary Ltd. v. Need*, [1934] A.C. 82, at p. 87, and applied to the case of the registered owner of a business name who sought an injunction against its unauthorised use by the defendant. The statutory prohibition against unauthorised use provided no penalty and specified no remedy tout the Judicial Committee held that the registered owner was entitled to equitable relief on the principles stated by FARWELL, J.

The passage in the judgment of TURNER, L.J., in *Pennell v. Roy* to which FARWELL, J., referred in *Stevens v. Chown* will be found at p. 55 of 43 E.R. and is as follows:

"None of the cited cases, therefore, by any means support the general position for which the respondent contended. We must look back then to the root of the jurisdiction, for the purpose of seeing whether that position can be maintained, and upon examining it, I am satisfied that it cannot. Lord REDESDALE, in his admirable TREATISE ON PLEADING, has traced and classed the jurisdiction of Courts of Equity, and he has divided it into two classes; one, where the Court is called upon to decide on the right to property; the other, where it is called upon to interfere without deciding upon any such right. With reference to the first class, he says that the jurisdiction exists where the law gives a right, but does not afford a sufficient remedy, or where the powers of the law are abused; or where the law gives no right, but the principles of universal justice require the interference of judicial power; and with reference to the second class he thus describes it: 'The Courts of Equity also administered to the

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ends of justice by removing impediments to the fair decision of a question in other courts, by providing for the safety of property in dispute pending a litigation; by preserving property in danger of being dissipated or destroyed by those to whose care it is by law entrusted, or by persons having immediate but partial interests; by restraining the assertion of doubtful rights in a manner productive of irreparable damage; by preventing injury to a third person from the doubtful title of others; and by putting a bound to vexations and oppressive litigation; and preventing unnecessary multiplicity of suits; and without pronouncing any judgment on the subject, by compelling discovery or procuring evidence which may enable other courts to give their judgment, and by preserving testimony when in danger of being lost before the matter to which it relates can be made the subject of judicial investigation'. These are, as I apprehend, the true principles by which the jurisdiction of this Court is bounded, and I find nothing in them at all resembling the case put forward (by this bill). This is not a case in which the Court is called upon to decide any right of property, and the bill does not, in my opinion bring the case within any of the cases put by Lord Redesdale as furnishing grounds for the interference of the Court where no right of property is to be decided. The case presented by the bill is, I think, simply one of interference by a stranger with the property of another, in a mode which is warranted by the law of a foreign county, upon an assumption of right. There may or may not be a foundation for that right—so far as I can see there is none—but whether there is or is not a foundation for the right, I think there is no foundation for the interference of this Court. If we were to maintain this injunction we should, I think, be greatly extending the jurisdiction of this Court, under the colour of carrying out its principles. If we were to maintain this injunction we should, as it seems to me, be assuming a jurisdiction in this Court to prescribe the courts in which parties should bring their suits, without there being anything to affect the consciences of the parties, upon the simple ground that the suits were such as, in the opinion of this Court, ought not to be maintained, and thus we should be bringing under the decision of this Court the question whether suits in other courts could be maintained—a question which it is for those courts, and not for this Court, to decide. To assume such a jurisdiction would, I think, be to exercise a legislative, and not merely a judicial power....."

The jurisdiction of the Supreme Court to grant an injunction is regulated by s. 31 of the Supreme Court Ordinance, Cap. 7. This section is in the same terms as s. 25 (8) of the Judicature Act, 1873, which was replaced by s. 45 of the Judicature Act, 1925. The respondents would, but for the Rent Restriction Ordinance, have been trespassers on the expiration of the notice to quit. The rights they enjoy are statutory and are enforceable only in a magistrate's court. The Supreme Court had no jurisdiction to entertain their substantive claim

and was limited to intervention by way of injunction *ad interim*, pending hearing of an action in a magistrate's court.

The respondents also argued that a tenant who can bring himself under s. 46 (1) (b) of the Landlord and Tenant Ordinance, Cap. 185, is not claiming under the Rent Restriction Ordinance. Section 46 of Cap. 185 deals with recovery of possession by a landlord and not with actions against a landlord and has no application to the circumstances of this case.

I would allow the appeal with costs here and below and order the action struck out for want of jurisdiction.

STORY, J. A.: I agree.

JACKSON, J. A.: This is an appeal from the judgment of PERSAUD, J., who found for the plaintiffs and ordered that judgment be entered in their favour for \$200 and costs. [See 1963 L.R.B.G. 200].

The plaintiffs who were tenants of the defendant of premises at "G" D'Urban Street, Lodge Village, East Coast, Demerara, claimed "from the defendant the

- (a) sum of \$500 as damages for breach of the actual and/or the implied covenant by him for the peaceful and quiet enjoyment by the plaintiffs of premises rented by them from him.
- (b) alternatively, the sum of \$500 as damages for the defendant's wrongful interruption and interference with the plaintiffs in their use and occupation of the cake-shop with living quarters and appurtenances and in the use of a passageway on which the demised premises were situate, and which gave them access to a lavatory and other toilet facilities.
- (c) an injunction restraining him, his servants and agents from interrupting or interfering with the means of user of the aforementioned facilities or access to them.

The terms of the tenancy were embodied in a written agreement between the parties in which it was stated, "that the party of the first part (defendant) shall let the parties of the second part (plaintiffs) the building in which the business is being carried on at a monthly rental of \$25 beginning on the date hereof (24/1/59)."

A notice to quit under date 12th February, 1961, was served by the defendant on the plaintiffs requiring them to deliver up possession of the premises on 31st March, 1961; they did not comply with the terms of the notice. The breach of the covenant for the peaceful and quiet enjoyment alleged dates from June, 1961. Later in October, 1961, possession proceedings were instituted by the defendant in a magistrate's court, without success. On 6th January, 1962, FRASER, J., on an application by the plaintiffs made an interim order of injunc-

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tion in terms of the application restraining the defendant and on 18th April, 1962, ordered that the injunction be continued until the final determination of the action. [See 1962 L.R.B.G. 189].

In the interlocutory proceedings and at the trial the defendant contended unsuccessfully that the Supreme Court had no jurisdiction to entertain the claim of the plaintiffs and that proceedings in respect thereof should have been instituted in a magistrate's court.

The grounds of appeal are as follows:—

- (1) The learned trial judge erred in law when he held that the court had jurisdiction to hear the action;
- (2) The learned trial judge erred in law
 - (a) when he held that the licence to use the western passage way was irrevocable so long as the tenancy subsisted;
 - (b) when he held that the action was an action in tort;
- (3) the decision was against the weight of the evidence;
- (4) the damages were excessive and were awarded on a wrong principle because of the error of law alleged in paragraph (2) (b) above.

The learned trial judge in dealing with the question of jurisdiction, (referred to in ground 1, above) said (1963 L.R.B.G. at p. 203):

"This matter has received consideration in a number of cases and has been the subject matter of written decisions including 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, Chapter 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 [See 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), (Man. & G. 421)"

Section 26(1) of the Rent Restriction Ordinance, Chapter 186, which is the basis on which the question of jurisdiction rests, is as follows:

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

Subsection (3) of s. 3 of the Summary Jurisdiction Ordinance to which reference is made in s. 26(1) above, is however not material to the present case.

Judgments of different judges in courts of first instance in this Colony having been cited to us where divergent opinions had been pronounced, I think in such a circumstance it would be correct to say that the question under review is not free from difficulty. The respondents (plaintiffs) in this appeal were, it is accepted, statutory tenants after 31st March, 1961, when the tenancy was terminated by a notice to quit; therefore it seems to follow that rights which flow necessarily from that tenancy must be enforced in a magistrate's court as enacted in s. 26(1) of the Rent Restriction Ordinance.

Mr. Hoyte for the appellant (defendant) submitted that a breach of quiet enjoyment arose out of the Ordinance by virtue of s. 26(1) and but for that there could be no relation of landlord and tenant and no question of quiet enjoyment. He further urged that if that claim could only be made in a magistrate's court, the plaintiffs (respondents) could not create a jurisdiction in the Supreme Court by tacking on injunction to a claim for damages. Mr. Hughes in reply submitted that (1) proceedings can be instituted in the Supreme Court in respect of a statutory tenancy where the relief sought is a remedy which only the Supreme Court has jurisdiction to grant and that in such circumstances a claim for damages could be added; (ii) s. 26, which is procedural only, does not oust the jurisdiction of the Supreme Court, if it did it would have clearly stated; (iii) where a claim or proceeding was known to the law before the Ordinance, Cap 186, came into existence, that claim or proceeding does not necessarily arise out of the Ordinance.

Let it first be ascertained if this "claim or proceeding" arises out of the Ordinance. The learned judge held, firstly, that it does not as it is an action for damages for breach of a covenant for peaceful and quiet enjoyment of premises and in the alternative for wrongful interruption and interference of rights of occupation of those premises; and secondly, that there is nothing specific or by implication in the Ordinance which would take away the original

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jurisdiction of the Supreme Court to grant damages for, or an injunction to prevent such breaches as alleged.

The Rent Restriction Ordinance, Cap. 186, which governs this case, is a special one intituled "An Ordinance to restrict in specified areas the increase of rent of certain classes of dwelling houses and the right to recover possession thereof, and for purposes connected with the matters aforesaid." The Ordinance provides for "statutory tenancy", e.g., by one whose contractual tenancy has been terminated by the landlord after due notice, but holds over and remains in possession. Section 21 of the Ordinance enacts that such a tenant who by virtue of the provisions of the Ordinance "retains possession of any premises to which this Ordinance applies shall, so long as he does so, observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as they are consistent with the provisions of this Ordinance".....Section 26, whose subsection (1) is recited earlier, lays down the procedure to be adopted and before what forum a claim or other proceedings shall be made, instituted or investigated. A "statutory tenant" is known neither to the common law, nor to the Landlord and Tenant Ordinance, Cap. 185. It follows, therefore, that the covenant for peaceful and quiet enjoyment which the plaintiffs claim to have been broken only received revivification from the provisions of s. 21 of the Ordinance. Can it then be correctly said that the claim does not arise out of the Ordinance? In my judgment it does.

A careful but brief research of the principles revealed by the authorities may be useful. In 36 HALSBURY'S LAWS (3rd Edn.) at p. 440, para, 665, and p. 442, para. 668, the following statements appeared:

Paragraph 665:

"For the purpose of establishing liability to individuals in civil actions founded on them, statutes may be divided into three classes, namely, (1) those in which a liability is affirmed which already exists at common law, and a special and peculiar form of remedy, different from that existing at common law, is given; (2) those in which a liability not previously existing at common law is created, but no particular form of remedy is provided; and (3) those in which a liability not existing at common law is created, and a special remedy is provided."

Paragraph 668:

"Where a new obligation not previously existing is created by a statute which at the same time gives a special remedy for enforcing it, the initial general rule is that the obligation cannot be enforced in any other manner. The question is, however, one of the true construction of the particular statute concerned, and it may be the intention of the statute, as disclosed by its scope and by its wording, that

other remedies should not be excluded; on the other hand, the statute may be intended to be a code complete in itself."

The third class mentioned in paras. 665 and 668 above are applicable to the case under appeal for there is the creation of a new obligation, a statutory tenancy with a special remedial procedure; and there are no conditions which can claim for it an exception to the general rule.

In *Wolverhampton New Waterworks Company v. Hawkesford* (1859), 6 C.B. (N.S.) 336, WILLES, J., at p. 356, states the rule thus:

"There are three classes of cases in which a liability may be established founded upon a statute. One is where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of cases is where the statute gives the right to sue merely, but provides no particular form of remedy. There, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which, at the same time gives a special and particular remedy for enforcing it.....The remedy provided by the statute must be followed and it is not competent to the party to pursue the course applicable to cases of the second class".

In *Russoff v. Lipovitch*, [1925] 1 K.B. 628, it was held on appeal that an action by a landlord to recover from a tenant possession of a house was a claim or proceeding "arising out of this Act", (Increase of Rent, etc. Act 1920, s. 17, sub-s. 2), and that the county court had jurisdiction to entertain the action. An observation about the application of the common law, by SCRUTTON, L.J., at p. 636 may be noted:

"It is contended on behalf of the landlord that the claim to recover possession is a claim arising, not out of the Rent Restrictions Act, but out of the common law. That contention is, to my mind, not merely very technical, but also inaccurate. There was a common law existing at the time of Lord COKE, but in many respects it has been materially altered by later statutes, so that many forms of relief can be obtained in the present day which could not have been asked for under the common law in Lord COKE'S time. It is not, in my opinion, accurate to say that the claim in the present case arises out of the common law. It arises out of the common law as modified by subsequent statutes. The original common law right to possession has been modified by the Rent Restrictions Act in the case of houses to which the Act applies, and a claim for the possession of such a house cannot any longer be made under the common law, for the common law has gone."

Again in *Wilkinson v. Barking Corporation*, [1948] L.J.R. 1164, the same point came up for consideration. ASQUITH, L.J., at p. 1167,

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in his judgment expressed his view (in which the other members of the court acquiesced) thus:

"It is undoubtedly good law that, where a statute creates a right and in plain language gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to this remedy or this tribunal and not to others. As the House of Lords ruled in *Pasmore v. Oswaldtwistle Urban Council* (per Lord HALSBURY, 67 L.J. Q.B. at p. 637; [1898] A.C. at p. 394): 'The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law'."

In fine, the plaintiffs' claim is essentially one for a breach of a covenant actual or implied which I have found to have been given a new life by the creation of a statutory tenancy. I think the clear effect of s. 26 (1) is to vest in a magistrate's court exclusive jurisdiction, and it is correct to aver that the Legislature intended to forbid its exercise by any other court. The injunction claimed could not be sustained or its claim properly instituted until a decision had been reached on the measure which could give it life; possibly thereafter proceedings for an injunction may be allowed in a court having jurisdiction to grant it. In view of this finding it would be unprofitable to deal with the case on its merits.

I would allow the appeal, reverse the judgment and order of the trial judge, and order that the respondents pay the costs here and in the court below.

Appeal allowed.

DEOKINANAN v. R.

[British Caribbean Court of Appeal (Archer, P., Jackson and Luckhoo, JJ. A.) March 18, 19, April 5, 1965]

Criminal law—Admiralty jurisdiction—Murder committed on British, launch on Corentyne River, being Dutch territory—No evidence that great ships went to that point of river—Indictment alleged offence committed in county of Berbice—Validity of trial—Supreme Court Ordinance, Cap. 7, s. 29—Criminal Law (Offences) Ordinance, Cap. 10, s. 5.

Appeal—Trial for murder—Trial a nullity—Whether new trial may be ordered—Federal Supreme Court (Appeals) Ordinance, 1958, s. 16(2).

The appellant was convicted of a murder alleged to have been committed on board a launch in the Corentyne River which was conceded by the prosecution to be Dutch territory. There was evidence that the launch had been registered at a port of entry in British Guiana but no evidence that great ships navigated the Corentyne River up to the point where the offence was committed. The offence itself was alleged in the indictment

to have been committed in the county of Berbice whereas s. 5(2) of the Criminal Law (Offences) Ordinance, Cap. 10, provides that in any indictment relating to an offence committed within the Admiralty jurisdiction "the offence shall be averred to have committed on the high seas."

Section 16(2) of the Federal Supreme Court (Appeals) Ordinance, 1958, provides that the Federal Supreme Court (now the British Caribbean Court of Appeal) shall, where it allows an appeal, quash the conviction and direct a judgment and verdict of acquittal to be entered, or, where the interests of justice so require, order a new trial.

Held: (1) the appellant had been tried on an indictment erroneously postulating territorial jurisdiction and there being no averment in the indictment that the offence was committed on the high seas, Admiralty jurisdiction could not be invoked;

(ii) even if such jurisdiction could be invoked it could not be established unless it was proved *inter alia* that the launch was a British ship and that the Corentyne River was navigable by great ships up to the point where the offence was committed. There was *prima facie* evidence of the former if the evidence relating to registration referred to registration under the Merchant Shipping Act, 1894, but there was no evidence of the latter;

(iii) section 16(2) of the Federal Supreme Court (Appeals) Ordinance, 1958, gave power to order a new trial only where there was a trial but in this case the proceedings were a nullity and there was no trial at all and in the result there could be neither a judgment and verdict of acquittal nor an order for a new trial.

Appeal allowed.

C. L. Luckhoor, Q.C., for the appellant.

E. A. Romao, Senior Crown Counsel, for the crown.

[Editorial Note: The appellant was convicted in fresh proceedings subsequently brought. He appealed unsuccessfully to the Guyana Court of Appeal in 1966 and to the Privy Council in 1968]

Judgment of the Court delivered by ARCHER, P.: This appellant was convicted of murder at a sitting of the Supreme Court at Berbice and sentenced to death. The offence was alleged to have been committed on board a launch which was in motion on the Corentyne River. The appellant and the deceased were both employed aboard the launch. The indictment charged the commission of the offence in the county of Berbice.

The appellant has now appealed on two grounds. The first ground is that the Supreme Court of British Guiana had no jurisdiction to try him on the indictment. The argument was based on the contention that the Corentyne River is wholly outside British Guiana. Counsel for the appellant submitted several propositions. The first proposition was that the boundary between British Guiana and Surinam is as set out at p. 6 of volume VII of the LAWS OF BRITISH GUIANA. The reference is to an agreement concerning the boundary between the County of Berbice and Surinam contained in an Act relating to the boundaries between Berbice and Surinam of the 7th February, 1800.

Counsel's second proposition was that the Supreme Court of British Guiana was authorised to try the appellant only if the Corentyne River is within the Admiralty jurisdiction and by virtue of s. 29 of the Supreme Court Ordinance, Cap. 7. That section reads as follows:

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"Admiralty Jurisdiction

29. The Court shall be a Colonial Court of Admiralty within the meaning of the Colonial Courts of Admiralty Act, 1890, and shall have and exercise admiralty jurisdiction in accordance with the provisions of that Act."

Counsel's third proposition was that although Admiralty jurisdiction extends to British ships, the indictment upon which the appellant was charged is incurably defective because it did not contain any averment of the commission of the offence on the high seas, as directed by s. 5 of the Criminal Law (Offences) Ordinance, Cap. 10. That section reads as follows:

"5. (1) All indictable offences mentioned in this Ordinance which are committed within the jurisdiction of the Admiralty of England and are cognisable by the Court shall be deemed to be offences of the same nature and liable to the same punishments as if they had been committed in the Colony, and may be dealt with, inquired of, tried and determined therein in the same manner in all respects as if they had been actually committed therein.

(2) In any indictment relating to any of those offences, the venue in the margin shall be the same as if the offence had been committed in the county of the Colony in which the offence is tried, and the offence shall be averred to have been committed on the high seas:

Provided that nothing herein contained shall alter or affect any of the laws relating to the government of Her Majesty's naval or military forces."

The fourth proposition was that it was necessary to prove that the launch on board which the crime had been committed was a British ship and that the Corentyne River was a place where great ships go, and that there was no proof of either of these essentials.

Counsel for the Crown conceded that the Corentyne River is outside British Guiana and is Dutch territory, and that to found jurisdiction it was necessary to prove that the offence had been committed within Admiralty jurisdiction. He contended, however:

- (1) That oral evidence of «the registration of the launch at a port of entry in British Guiana was sufficient to establish that the launch was a British ship.
- (2) That there was sufficient evidence to show that the launch was a great ship.
- (3) That there was evidence of the tide, ebb and flow at the place where the offence was committed, and it was therefore not necessary to prove that that place was a place where great ships go in the same way as it was not necessary to give evidence about the ebb and flow of the tide if, as in *R. v. Allen* (1837), 1 Moo. C.C. 494, it is shown that

the place where the offence is committed is a place where great ships go.

- (4) That there was no evidence that any (bridges connected British Guiana and Surinam and that Admiralty jurisdiction was therefore sufficiently established.

Counsel agreed that the indictment was defective, but argued that it could be amended, and submitted that if the offence has been committed within Admiralty jurisdiction, the Supreme Court of British Guiana was empowered to try the appellant by virtue of the Admiralty Offences (Colonial) Act, 1849. The jurisdiction conferred upon the Supreme Court by the Colonial Courts Admiralty Act, 1890, does not extend to offences punishable upon indictment in England. Proviso (c) sub-s. (3) of s. 2 of that Act, reads thus:

(c) A Colonial Court of Admiralty shall not have jurisdiction under this Act to try or punish a person for an offence which according to the law of England is punishable in indictment."

Section 3, which deals with the power of a Colonial legislature as to Admiralty jurisdiction, enacts as follows:

- "3. The legislature of a British possession may by any Colonial law—
 - (a) declare any court of unlimited civil jurisdiction, whether original or appellate, in that possession to be a Colonial Court of Admiralty, and provide for the exercise by such court of its jurisdiction under this Act, and limit territorially, or otherwise, the extent of such jurisdiction; and
 - (b) confer upon any inferior or subordinate court in that possession such partial or limited Admiralty jurisdiction under such regulations and with such appeal (if any) as may seem fit:

"Provided that any such Colonial law shall not confer any jurisdiction which is not by this Act conferred upon a Colonial Court of Admiralty."

The Admiralty Offences Colonial Act, 1849, is an Act to provide for prosecution and trial in Her Majesty's Colonies of offences committed within the jurisdiction of the Admiralty. The legal limits of Admiralty jurisdiction is treated in vol. II of *Stephen's History of the Criminal Law of England*, At pp. 24 and 25 and at p. 27 the author says:

"Passing from the jurisdiction of the courts over crimes committed at sea, I come to the question of the local limits of the

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Admiralty jurisdiction. The admiralty jurisdiction upon the high sea, that is to say upon the sea beyond low water mark and not within the body of any county, has never been disputed, and since the time of Edward III has been admitted to be exclusive.

There was indeed a time when the Court of King's Bench is said to have claimed to have jurisdiction over crimes committed on the narrow seas. HALE quotes eight cases from the records in illustration of this, but he says that he finds no such instance later than 38 Edward III (A.D. 1363). It also is clear that there were disputes as to the limits between the jurisdiction of the Common Law Courts and the Admiralty Courts during the reigns of Edward III and Richard II; the former claiming exclusive jurisdiction (which the latter contested) over all waters included within the body of any county, that is to say, over ports, havens, arms of the sea, and mouths of rivers. These disputes were settled as far as criminal jurisdiction was concerned (for as to civil jurisdiction the difference long continued) by the statute of Richard II already quoted, which affirmed the admiral's jurisdiction in cases of homicide and mayhem only in respect of 'great ships being and hovering in the main stream of great rivers only beneath the bridges of the same rivers nigh to the sea.' Taken with the act of Henry VIII, which related to 'crimes committed upon the sea, or in any other haven, river, creek, or place where the Admiral or Admirals have, or pretend to have, power, authority, or jurisdiction,' this act has been construed to mean that the admiral has jurisdiction over all waters within the body of any county concurrently with the Courts of Common Law, and also that he has jurisdiction in all such waters in foreign countries concurrently with the foreign courts. It has been held, for instance, that a crime committed by an American seaman on board a British ship at Bordeaux, below the lowest bridge of the Garonne is committed within the jurisdiction of the Admiralty of England though the French courts would have concurrent jurisdiction. The jurisdiction would also, I suppose, extend up to London Bridge, though concurrently with that of the Central Criminal Court and the Assize Courts of Essex and Kent. The next question which arises is as to the persons over whom the Admiral has jurisdiction within the limits thus defined. It is well settled, as I have already shown, that his jurisdiction applies to all persons on board British ships, whether natural born subjects or foreign."

In *R. v. Anderson*, (1867), 11 Cox C.C. 198, the case to which STEPHEN refers, the Court did not find it necessary to determine whether s. 267 of the Merchant Shipping Act, 1854, had any application to the case. Section 685 of the Merchant Shipping Act, 1894. is a reproduction of s. 267 of the Merchant Shipping Act, 1854, and occurs in a part of the Act the provisions of which are by s. 712 applicable to British Guiana.

Section 4, sub-s. (1), of the Merchant Shipping Act, 1894, provides as follows:

"4. Registrars of British Ships"

- (1) The following persons shall be registrars of British ships:

* * * * *

- (e) At any other port in any British possession approved by the governor of the possession for the registry of ships, the chief officer of customs, or, if there is no such officer there resident, the governor of the possession in which the port is situate, or any officer appointed for the purpose by the governor."

The owner of the launch gave evidence that the launch was registered at a port of entry in British Guiana. If he was referring to registration under the Merchant Shipping Act, 1894, his evidence was *prima facie* proof that the launch is a British ship, but there was no evidence that the Corentyne River is at a point a place where great ships go, and the indictment itself discloses no Admiralty jurisdiction to try the appellant for an offence committed on the Corentyne River. There being no averment in the indictment (that the offence was committed on the high seas, Admiralty jurisdiction could not be invoked. The appellant has been tried on an indictment postulating territorial jurisdiction and the proceedings before the Supreme Court were a complete nullity. The appeal is allowed.

The Federal Supreme Court (Appeals) Ordinance, 1958, has effect as if it was a law enacted in pursuance of art. 5 of the British Caribbean Court of Appeal Order in Council, 1962, by virtue of art. 12 of that Order. Subsection (2) of s. 16 provides that, subject to the special provisions contained in the Ordinance, this Court shall, where it allows an appeal, quash the conviction and direct a judgment and verdict of acquittal to be entered, or, where the interests of justice so require, order a new trial. The distinction between a new trial and a *venire de novo* is well drawn. (See the judgment of Lord ATKINSON in *Crane v. D.P.P.* [1921] 2 A.C. 299, at p. 322 and the pages following). The subsection deals with a new trial and not with a *venire de novo* and can have application only where there has been a trial. In this case the trial has been a nullity, that is to say, there has not been a trial at all. There can therefore be neither a judgment and verdict of acquittal nor an order for a new trial.

The conviction is quashed and the sentence set aside.

Appeal allowed.

BRITISH GUIANA CREDIT CORPORATION v. HANIFF DEEN

[British Caribbean Court of Appeal (Archer, P., Jackson and Stoby, J.J.A.)
November 23, 1964, April 5, 1965]

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.

Statute—Retrospectivity—Procedural—Removal of defence of limitation—B. G. Credit Corporation Ordinance, 1954, s. 47, as amended by Ordinance No. 18 of 1962.

Words and phrases—"Deemed"—Meaning.

In 1952 the respondent 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 Corporation . . ."

The Corporation 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". Section 3 of the amending Ordinance provided that "nothing in this Ordinance shall apply in relation to any action determined prior to this Ordinance", and s. 1(2) provided: "This Ordinance shall be deemed to have come into operation at the commencement of the Principal Ordinance." For the Corporation 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. Luckhoo, C.J., gave judgment in favour of the defendant. (See 1963 L.R.B.G. 26). On appeal,

Held: (Stoby, J. A., dissenting), by s. 55(2) loans made by credit banks were deemed to have been made with the authority of the corporation, but were not converted into loans made by the corporation. Section 1(2) of the 1962 Ordinance applied only to the latter and did not in consequence deprive the respondent of the benefit of the Limitation Ordinance;

(ii) *per* Jackson, J. A., the law to be applied in cases of procedure where there is no specific exception is not that in force at the issue of the writ but that which at the hearing of the claim survives to the determination of the action;

(iii) *per* Stoby, J. A., dissenting, the purpose of the 1962 legislation was to deprive corporation debtors of a statutory defence. The respondent was a corporation debtor and consequently deprived by this legislation of the benefit of the Limitation Ordinance;

(iv) observations on the meaning of the word "deemed".

Appeal dismissed.

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

Respondent in default of appearance.

ARCHER, P: In this appeal a single issue falls to be determined. In 1952 the respondent, who was a member of the New

Mahaicony Co-operative Credit Bank Limited, was granted a loan by that bank the operations of which were controlled by the Co-operative Credit Banks Ordinance, 1944. In 1954 a body corporate called the British Guiana Credit Corporation was created and the function of credit banks operating under the 1944 Ordinance were transferred to fit. This was effected by the British Guiana Credit Corporation Ordinance, 1954, which provided for the winding up of the existing credit banks and repealed the 1944 Ordinance. The corporation was by s. 14 (3) (e) of the 1954 Ordinance empowered to make loans to individuals and by s. 55 (2) it was enacted as follows:

"(2) 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 coming into operation of this Ordinance 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 and other document evidencing any such loan for securing its repayment and all the rights, powers, privileges and authorities vested in or exercisable by the local credit banks in connection with any such loan are hereby transferred to and shall be exercisable by the Corporation."

The 1954 Ordinance came into force on 21st June, 1964. Ordinance No. 10 of 1962 (which was deemed to have come into operation at the commencement of the 1954 Ordinance) added the following subsection to s. 47 of the 1954 Ordinance:

"(2) Nothing in the Limitation Ordinance shall in any way affect any right of the Corporation in connection with any loan made by it."

The respondent did not repay the loan made to him by the New Mahaicony Co-operative Credit Bank Limited and on 23rd October, 1961, the corporation issued a specially indorsed writ against him. The action came on for hearing on 23rd November, 1962, when the corporation's claim was dismissed with costs on the ground that it was statute-barred. [See 1963 L.R.B.G. 26].

In this court it was submitted that by virtue of s. 55 (2) of the 1954 Ordinance loans granted by credit banks under the 1944 Ordinance are deemed to be loans made by the corporation and that accordingly no period of limitation is applicable to them.

The word "deemed" is frequently used in modern legislation but as JAMES, L.J., observed in *Re Levy, Ex parte Walton*, (1881), 17 Ch. D. 746, at p. 756: "When a statute enacts that something shall

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be deemed to have been done, which in truth and in fact was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to." To the like effect is a passage in the judgment of Lord CAIRNS in *Hill v. East and West India Dock Co.* (1884), 9 App. Cas. 448, at pp. 454 and 455, where, dealing with a section of the Bankruptcy Act of 1869 which permitted a trustee in bankruptcy to disclaim the debtor's property and interest in leasehold premises, he said:

"It is said that the 23rd section of the Act of 1869 produces this result, and I admit freely that the section seems to me capable of that construction. No doubt if you read it literally it does seem to provide that, 'When any property of the bankrupt acquired by the trustee under this Act consists of land of any tenure burdened with onerous covenants,' (I pass over some words which are unimportant) 'the trustee may, by writing under his hand, disclaim such property, and upon the execution of such disclaimer the property disclaimed shall,' 'if the same is a lease, be deemed to have been surrendered on the same date'—the date of the order of adjudication.' It says, 'shall be deemed to have been surrendered,' it does not say 'shall be surrendered,' but there shall be a statutory fiction gone through, the result of which is that the lease shall be deemed to have been surrendered on that date. It is possible that that may mean that to all intents and purposes, as between all persons, persons actually concerned in the bankruptcy and those not so concerned, it shall be a surrendered lease and shall be altogether out of the case. But on the other hand is that the only interpretation? For that purpose your Lordships, I think, must consider what the object of this provision is. Why is it that there is this statutory fiction introduced? The section obviously is not one which has been prepared with much care or skill, or which shews indeed that the persons who were preparing it had fully present to their minds the various cases with which they had to deal. But is this necessarily the only construction of which the Act admits? I say that we must look to what the purpose is."

In similar vein are the remarks of SANKEY, L.J., in *Leitch v. Emmott*, [1929] 2 K.B. 236, at p. 248, namely, "The word 'deemed' introduces an artificial definition which, in my view is only intended to be applied as long as the conditions exist to which it is intended to apply."

Section 14 (3) (e) of the 1954 Ordinance deals with loans to be made by the corporation but in s. 55 (2) the subject matter is loans made not by the corporation, but by credit banks. The subsection predicates as having been made by credit banks the loans with which it deals and then provides that loans so made are to be deemed to have been made (by credit banks) with the corporation's authority, and that instruments for securing repayment shall be deemed to have been made in its favour. The subsection does not

convert loans made by credit banks into loans made by the corporation, as might have been done despite the strictures of ROMER, J. in *Batcheller (Robert) and Sons Ltd. v. Batcheller*, [1945] Ch. 169, who said at p. 176: "It is, of course, permissible to 'deem' a thing to have happened when it is not known whether it happened or not. It is an unusual but not an impossible conception to 'deem' that a thing happened when it is known positively that it did not happen. To deem, however, that a thing happened when not only is it known that it did not happen, but it is positively known that precisely the opposite of it happened, is a conception which to my mind.....amounts to a complete absurdity."

The Ordinance differentiates between two categories of loans and the sole purpose of s. 55(2) is to enable the corporation to collect debts due on those loans which had not been made by the corporation. It does not identify one category of loan with the other for all purposes. Moreover, when that subsection was enacted the protection of the corporation against the defence afforded by the Limitation Ordinance was not in contemplation and that defence was available to a debtor whether he had obtained a loan from the corporation or credit bank. The question of protection was an after thought nearly eight years later. By that time the defence may in fact have been successfully pleaded in actions already determined and s. 3 of the 1962 Ordinance recognises that fact and, no doubt, out of abundant caution, excludes debtors concerned from the provisions of the Ordinance for continuing liability despite lapse of time. But in continuing liability the Ordinance has confined itself to loans made by the corporation. Loans made by credit banks are accordingly out-side the scope of the Ordinance and a defence under the Limitation Ordinance is still available to a debtor to whom such a loan was made. I think that the conclusion reached by the trial judge was right though I prefer to support it on the grounds I have indicated. I would dismiss the appeal.

JACKSON, J. A.: The plaintiff, the British Guiana Credit Corporation, appealed from a judgment of LUCKHOO, C.J., in favour of the defendant Haniff Deen, in a suit in the circumstances hereunder narrated. [See 1963 L.R.B.G. 26].

On 18th February, 1952, the defendant, from the New Mahaicony Co-operative Credit Bank Ordinance, 1944, obtained a loan of \$240 bearing interest at the rate of 6% per annum repayable half yearly until fully paid. The defendant was a member of the said bank. In 1953 or 1954 it was decided to wind up the affairs of the banks operating under that Ordinance (later repealed), and that their several assets, liabilities, powers and functions be taken over by the British Guiana Credit Corporation as expressed in s. 55 of the British Guiana Credit Corporation Ordinance, 1954, herein-after referred to as the Principal Ordinance.

"55. *Transfer of assets and liabilities*—

- (1) All lands and property of whatsoever nature vested in the local credit banks shall be and are hereby transferred

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to and shall vest in the Corporation as part of the assets of the Corporation established under this Ordinance without any conveyance, transfer or other formality.

(2) 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 coming into operation of this Ordinance 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 and other document evidencing any such loan for securing, its repayment and all the rights, powers, privileges and authorities vested in or exercisable by the local credit banks in connection with any such loan are hereby transferred to and shall be exercisable by the Corporation.

(3) * * * * *

(4) * * * * *

(5) * * * * *

(6) * * * * *

(7) All causes and rights of action accrued before the commencement of this Ordinance, and then in any manner enforceable by, for or against any of the local credit banks, and all deeds, leases, purchases, sales, covenants, agreements and contracts which have been executed, made or entered into by, with, to or in relation to any of the local credit banks, shall be and shall remain as good, valid and effectual for or against the Corporation as they would or might have been against any such local credit bank if this Ordinance had not been enacted."

The British Guiana Credit Corporation (Amendment) Ordinance, 1962, amended the Principal Ordinance as follows:—

"1. *Short title and commencement No. 13 of 1954*—

(1) * * * * *

(2) This Ordinance shall be deemed to have come into operation at the commencement of the Principal Ordinance.

2. Section 47 of the Principal Ordinance is hereby amended—

(a) by renumbering the section as subsection (1);

(b) by the addition thereto of the following 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.

3. Nothing in this Ordinance shall apply in relation to any action determined prior to the enactment of this Ordinance."

At the date of the suit 2,3rd October, 1961, the amount owing for capital and interest was \$402.94 which purported, to be secured by an instrument executed at the time of the loan creating a charge on the defendant's property. Defendant filed an affidavit of defence on 25th November, 1961, and was given leave to defend; at the hearing the main defence was that the loan was statute barred inasmuch as upwards of six years had passed since the date of the said loan and during which time the defendant had paid nothing on the loan.

Section 3 of the Limitation Ordinance, Cap. 26, is as follows:

"Every action and suit upon any bill of exchange, promissory note or other writing not relating to lands or immovable property or the produce or usufruct thereof, shall be brought within 6 years next after the time at which the amount claimed in respect of that bill note or other writing has become due."

It was recognised that s. 3 of the Amendment Ordinance, 1962, is perfectly clear; it does not at all trench on the issues involved here for the action out of which this appeal arises was not determined prior to the enactment of this Ordinance (1st June, 1962) but was heard on 23rd November, 1962, and determined on 30th November, 1962.

The learned Chief Justice, however, in rejecting counsel's submission for the plaintiff that the corporation's right to succeed lay in the removal of the effect of the period of limitation by the amending ordinance, observed (1963 L.R.B.G. at p. 28):

"Counsel's argument would have the effect that if an action though filed prior to 1st June, 1962, was 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 action. It is difficult to contemplate that the liability of a person should depend on the availability of a judge to hear and determine the litigation. The amendment, if the submission of counsel for the plaintiff 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

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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?"

The Chief Justice seemed deeply concerned as to whether the defendant should be deprived of the benefit of a defence lawfully pleaded at a date before the statute was enacted because the trial of the suit against him was not finally determined before the enactment. With sincere deference to the learned Chief Justice I regret that I cannot share his sense of anxiety, nor am I persuaded that is the correct approach. My own view is that a proper approach in this case would be first to inquire whether the enactment infringes, takes away or impairs any vested right of the defendant secured by the contract, or imposes any penalty, new duty or obligation on him. The contract between the plaintiff's predecessor and the defendant was one of lender and borrower; it is not suggested that any vested right flowing from the contract is involved nor is the legal character affected by the Amendment Ordinance, 1962. No such right has been assailed or prejudicially affected by the statute, nor is there a semblance of the imposition of any penalty, new duty or obligation. The inquiry as to whether the defendant is or is not afforded the advantage of the fact that plaintiff slept upon his rights for six years is not one which is involved in the substance of the contract for that is not an interest in the contract but is something *dehors* the contract. No vested or substantive right of the borrower is interfered with by the Principal Ordinance or by s.2 (2) of the Amendment Ordinance, 1962. All that the latter does is incidentally to bereave the defendant of the chance to escape from the enforcement by the plaintiff of a legitimate claim in court.

Acceptance is general that a statute ordinarily operates prospectively unless by clear and unambiguous language it reveals an intention to operate retrospectively. It will be shown that this is not necessarily pertinent here.

Counsel for the appellant contended that the Amendment Ordinance, 1962, is a procedural one, and therefore the general rule of retrospective construction against an ordinance does not apply. In any event s. 1(2) of the amendment ordinance deems the ordinance to have come into operation at the commencement of the Principal Ordinance with the effect that by s. 2(2) the Limitation Ordinance would not apply to the Corporation's transactions. He submitted that the result is that two years after the loan was effected all the rights of the lender flowed to the plaintiff and the statute of limitation would not apply.

All the Limitation Ordinance does is to say if a person does not pursue his rights in court within six years but pursues it later and the defendant resists the process, the court will not aid that person.

It is merely procedural and such procedural measures have been sometimes imperfectly described as having retrospective operation. BRETT, M. R. in *Turnbull v. Forman* (1884—5), 15 Q.B.D. 234, at p. 237, accredited the opinion that "when an Act deals with procedure it affects all subsequent procedure, but it cannot rightly be said therefore to be retrospective, because it is only the subsequent procedure that it affects; it cannot be said to affect any right which existed before the Act." In the same case BOWEN, L. J., at p. 238, observed:

"If the words are not unequivocally clear to the contrary, a provision must be construed as not intended to take away or lessen existing rights. A converse rule is that, where the legislature is dealing with matters of procedure as distinguished from substantive rights, the same presumption does not apply. It is not unreasonable to suppose that, in regard to mere matters of procedure, the legislature does intend to alter the procedure even when past transactions come in question; because no person who sues or is sued on a cause of action which existed before the enactment as to procedure has a vested right to have proceedings regulated by a particular method of procedure which the legislature has thought imperfect and therefore has altered; and it may, therefore, well be supposed that the legislature intends to apply the new and more perfect procedure universally."

(*West v. Gwynne*, [1911] 2 Ch. 1; *Craxfords (Ramsgate), Ltd. v. Williams and Steer Manufacturing Co. Ltd.*, [1954] 3 All E. R. 17, 18, 19; also refer). I can conceive of no right of a plaintiff or defendant to complain should the legislature choose to effect a change in the laws governing procedure during his litigation, when he suffers no new disability or injustice. Here no sense of justice is disturbed. I am therefore impaled by no doubt that the few to be applied in cases of procedure where there is no specific exception is not that in force at the issue of the writ but that which at the hearing of the claim survives to the determination of the action.

There remains to be considered the true application of the last six words of s. 2(2) of the Amendment Ordinance, 1962:

"Nothing in the Limitation Ordinance shall in any way affect any right of the Corporation in connection with any loan made by it."

Was any loan made by the corporation to the defendant? Section 55 (2) of the Principal Ordinance specifically states, "*Every loan made under the Co-operative Credit Bank Ordinance, 1944.....and still due and owing on the date of coming to operation of this Ordinance shall be deemed to have been made with the authority of the Corporation.*" Counsel contended that the effect of a "deeming clause" is to create an artificial situation and that a proper understanding of this subsection in relation to s. 2 (2) of the Amendment Ordinance is that any loan made by the antecedent New Ma-haicony Co-operative Credit Bank Limited would be a loan made by the British Guiana Co-operative Credit Bank. This in my view cannot be accepted for it is difficult to contemplate that the principles laid down

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throughout the years for the interpretation of statutes should be so lightly eschewed or loosely applied. The words "deemed to have been made" have hitherto attracted judicial attention; they involve the interpretation of statutes, and observations which have been consistently made from time to time do help one to reach a conclusion in this case. A few examples are instanced.

- (i) In *Grey v. Pearson* (1857—1859), 6 H. L. Cas. 61, at p. 106, Lord *Wensleydale* in his speech said:

"I have been long and deeply impressed with the wisdom of the rule now, I believe universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid the absurdity and inconstancy, but no farther."

- (ii) In *Ex parte Walton, In re Levy* (1881), 17 Ch. D. at p. 756 JAMES, L. J. said:

"When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."

- (iii) In *Grundt v. Great Boulder Proprietary Mines* [1948], 117 L. J. R. 1100, where observations by ROMER, J., *Batcheler & Sons Ltd. v. Batcheler*, [1945] Oh. at p. 176, were commented on COHEN, L. J., at p. 1108 re-enunciated "the principle that where you find two contradictory provisions one in general terms but in terms wide enough to cover the specific matter, and the other dealing specifically with it, the specific provision must prevail."

With these before me, I now consider the meaning of the vital words in s. 55(2) of the Principal Ordinance in the light of the submission and shall later test their relation to the operative words in the Amendment Ordinance. The loan in this instance is deemed to have been made with the authority of this Ordinance and nothing more; the language is very precise and the grammatical and ordinary sense in which the words are employed does not need expansion or modification; for they are clear and intelligible; to adopt the meaning suggested by counsel would be to extend the meaning and to read into them more than would be justified. The purpose of this enactment as stated therein is to transfer the rights, etc., vested in or exercisable by the local credit banks to the corporation; in short to keep the debt alive until its discharge in due course of law. Any doubts that might linger are easily dispelled by the provisions of s. 14(3) (e) of the Principal Ordinance.

"14. *General functions and duties of the Corporation*

- (1) It shall be the duty of the Corporation to promote the economic development of the Colony and with that object provide financial credits where necessary and desirable and to stimulate and facilitate private investment in the Colony by local and external capital.
- (2) The Corporation shall in pursuance of the discharge of its duties provide credits for agriculture, industry, rural and urban housing, and utilities both of a public and private nature and other undertakings of a like nature.
- (3) Without prejudice to the generality of the provisions of subsection 2 of this section, the functions of the Corporation in the discharge of its duties shall be to —
 - (a) * * * *
 - (b) * * * *
 - (c) * * * *
 - (d) * * * *

(e) *make loans to individuals, and make loans to, and purchase shares or debentures of, companies engaged in new or existing industries.*"

It will thus be seen that there is a marked distinction between the expressions loans "deemed to have been *made with the authority* of the Corporation" and "*make loans to individuals*." The Legislature cannot be said to have meant the same thing by the two completely different expressions; that body if that had been its intention would certainly not have used different words for the sake of variety. It deliberately confided to the corporation the task of making loans in s. 14, but in s. 55 provided for loans not made by it. The Legislature with that in mind carefully used the words in the Amendment Ordinance in s. 2(2) "*any loans made by it*" thus clearly not exempting the application of the Limitation Ordinance from loans not "*made by it*"

I think the contention of counsel for the appellant must fail and the appeal should be dismissed and the judgment and order of the court below be affirmed. The respondent was not represented in this court and therefore I would make no order as to costs in this appeal.

STOBY, J. A.: During the year 1952 the respondent, who was a member of the New Mahaicony Co-operative Credit Bank Ltd., obtained a loan from the Bank. At that time Co-operative Credit Banks operated by virtue of the Co-operative Credit Banks Ordinance 1944 (No. 16).

At the time of the receipt of the loan the respondent executed the following document as required by the Ordinance. I refer to the relevant part:—

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"INSTRUMENT CREATING CHARGE UNDER SECTION 28 OF THE CO-OPERATIVE CREDIT BANKS ORDINANCE, 1944, AS AMENDED BY THE CO-OPERATIVE CREDIT BANK (AMENDMENT) ORDINANCE 1946,

THIS INSTRUMENT Is made the 19th day of February 1952 between Haniff Deen of Nova, Mahaicony, E.C. Dem. (hereinafter called the borrower) of the one part and the NEW MAHAICONY Co-Operative Credit Bank, Ltd of Zeskinderen, Mahaicony, E. C. Dem. (hereinafter called the bank) of the other part:

1. In consideration of the sum of Two Hundred & Forty dollars now advanced to the borrower by the bank, the borrower hereby charges all the movable property particulars whereof are set forth in the Schedule hereto with the payment to the Bank of the said sum of Two Hundred & Forty dollars together with interest upon the said sum of Two Hundred & Forty dollars and the costs of realisation and enforcement of this security."

The Co-operative Credit Banks Ordinance was repealed by the British Guiana Credit Corporation Ordinance 1954 No. 13, which created the British Guiana Credit Corporation. As the Credit Corporation was designed to take over the functions, assets and liabilities of Credit Banks s. 55(2) of the 1954 Ordinance provided as follows:

"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 coming into operation of this Ordinance 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 and other document evidencing any such loan for securing its repayment and all the rights, powers, privileges and authorities vested in or exercisable by the local credit banks in connection with any such loan are hereby transferred to and shall be exercisable by the Corporation'."

As a result of the 1954 Ordinance the New Mahaicony Co-Operative Credit Bank Ltd., could no longer take proceedings against the respondent in respect of the 1952 loan to the respondent but the appellant could do so. By virtue of s. 55 (2) of the 1954 Ordinance the instrument to which reference has been made would be deemed to have been made in favour of the British Guiana Credit Corporation. Although s. 55 enacts that credit bank loans were made with the authority of the corporation and does not state that the loans were

made by the corporation, the instrument securing the loan is deemed to be in favour of the corporation hence the instrument must be read as if the corporation lent the money. The loan becomes a corporation loan and no longer a credit bank loan.

In 1962 the 1954 Ordinance was amended by the insertion of the following subsection to s. 47:

"(2) Nothing in the Limitation Ordinance shall in any way affect any right of the Corporation in connection with any loan made by it."

On the 23rd October 1961 the appellant claimed from the respondent the sum of \$402.94 being capital and interest in respect of the 1952 loan. The respondent pleaded the Limitation Ordinance, Cap. 26.

The learned Chief Justice held that the 1962 amendment to the 1954 Ordinance was not retrospective and upheld the plea. [See 1963 L.R.B.G. 26].

It was contended on appeal that the 1962 Ordinance was retrospective and that the Chief Justice's attention was not drawn to sub-s. 1 of the 1962 Ordinance which states that the 1962 Ordinance was deemed to have come into force in 1954. It is clear that sub-s- (1) of s. 2 makes the Ordinance retrospective and the trial judge's reasons' for dismissing the appellant's claim was due to the failure to direct his attention to the appropriate section.

During the argument counsel for the appellant was invited to debate the true effect of s. 55 (2) of the 1954 Ordinance, with particular reference to the word "deemed".

The effect of the word "deemed" in legislation has been the subject of several decisions.

In *R. v. County Council of Norfolk* (1891), 60 L.J. Q.B. 379, CAVE, J., said at page 380:—

"Generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not what it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing."

This passage was referred to in *Muller v. Dalgety & Co., Ltd.* (1909), 9 C.L.R. 693. The facts were that s. 9D of the Australian Immigration Restriction Act, 1901, is as follows:

"Any person on board a vessel at the time of her arrival from any place outside Australia at any port in Australia who is not—

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- (a) a bona fide passenger on the vessel, or
- (b) a member of the crew of the vessel whose name is on the articles,

shall be deemed to be a stowaway, unless the master of the vessel gives notice to an officer that the person is on board the vessel, and does not permit him to land until the officer has had an opportunity of satisfying himself that the person is not a prohibited immigrant."

Section 9A is as follows:

"(1) If any vessel, having on board any stowaway, who is a prohibited immigrant, comes into any port in Australia, the master, owners, agents, and charterers of the vessel shall be jointly and severally liable on summary conviction to a penalty of One hundred pounds for each stowaway.

(2) Every stowaway brought into any port on board a vessel shall be deemed to be a prohibited immigrant for the purposes of this section unless it is proved that he has passed the dictation test or that an officer has given him permission to land without restriction."

The master of a ship discovered stowaways on board; he notified the immigration authorities and did not allow the immigrants to land but they were taken back to Singapore. It was held that although the master had given notice under s. 9D he was liable to conviction under s. 9A. GRIFFITH, C.J., said:

"The first question for determination in this appeal is whether sec. 9D is to be read as an interpretation clause in the sense of an exhaustive definition, as suggested by the marginal note or it is to be read as extending sub modo the sense which would otherwise be given to that word as used in sec. 9A.

The word 'deemed' may be used in either sense, but it is more commonly used for the purpose of creating what JAMES, L. J., and Lord CAIRNS L.C., called a 'statutory fiction' (see *Hill v. East and West India Dock Co.*), that is, for the purpose of extending the meaning of some term to a subject matter which it does not properly designate. When used in that sense it becomes very important to consider the purposes for which the statutory fiction is introduced. An instance of the use of the word in the other sense is to be found in the case *R. v. Norfolk County Council*, where it was held that in a clause beginning "The following . . . shall be deemed to be, the word imported an exclusive definition and not an extension of meaning."

The purpose for which the statutory fiction was used in the 1954 Ordinance was not only to enable the collection of credit bank loans by the corporation but to substitute the corporation for credit banks.

The corporation was not in existence in 1952; everyone knew it, was only created in 1954; yet a borrower from a credit bank could not resist payment to the corporation on the ground that he had no transaction with the Corporation. When therefore ROMER, J., said in *Batcheller (Robert) and Sons Ltd. v. Batcheller* [1945] Ch. 169, at p. 176:

"To deem, however, that a thing happened when not only it is known that it did not happen, but it is positively known that precisely the opposite of it happened, is a conception which to my mind . . . amounts to a complete absurdity."

he was referring to the particular facts of that case. The circumstances in *Batcheller's* case were unusual. Article 93 of the company's articles was as follows:

"Subject as herein provided, if at any meeting at which an election of directors ought to take place, the places of the retiring directors, or some of them, are not filled up the retiring directors, or such of them as have not had their places filled up, shall, if willing to act, be deemed to have been re-elected."

At the annual general meeting of the company item 3 on the agenda provided for the re-election of the retiring directors: item 4 provided for the election of two other shareholders in the event of the retiring directors not being elected. At the meeting the retiring directors were defeated on a show of hands. They demanded a poll which was fixed for a later date; consideration of item 4, that is, election of other directors in the event of a defeat, was also fixed for the day when the poll was to be announced. When the poll was declared the retiring directors were defeated. Thereupon the chairman refused to consider item 4 and declared the defeated directors reelected by virtue of art. 93. It is not surprising that ROMER J., refused to hold that art. 93 applied in those circumstances. On the other hand in *Holt v. Catterall* (1931), 47 T.L.R. 332, at the annual general meeting one of the items of business was the election of a director, Mr. Holt retiring by rotation and being eligible for reelection. It was common ground that he was not re-elected. The voting was by show of hands and nobody demanded a poll. No one was elected in his place so the question arose whether he did not continue to be a director. The case is not very fully reported but the headnote states:

"By art. 97 of a company's articles, 'at the second ordinary general meeting in each calendar year, one-third of the directors. . . shall retire from office. A retiring director shall retain office until the dissolution of the meeting at which his successor is elected.' By art. 100, 'if at any meeting at which an election of directors ought to take place the places of the retiring directors, or some of them are not filled up, then subject to any resolution reducing the number of directors, the retiring directors, or such of them as have not had their places filled up and may be willing to act, shall be deemed to have been re-elected.' Held, that if a re-

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tiring director was not re-elected, and if his place was not filled up at the same meeting he retained office until his retirement by rotation, since by art. 100 he was to be deemed to have been re-elected and therefore there was no vacancy to which a successor could subsequently be elected."

This summary of *Holt v. Catterall* is taken from ROMER, J's judgment in the *Batcheller* case when expressing the view that *Holt v. Catterall* was of no assistance to him (except on one point not relevant to this judgment) in deciding *Batcheller's* case. It is apparent, however, that there may be occasions when a defeated director may, because of the articles of association, be deemed to be an elected director, despite the fact that everyone knows he was not elected.

Ordinance 10 of 1962 was deemed to have come into force in 1954. Thus persons who borrowed from the corporation in 1954 and did not repay could in 1961 have pleaded the Limitation Ordinance. After the 1962 Ordinance this defence was not available although everyone knows that the 1962 Ordinance could not be in force in 1954. The reason why there is no reference to credit banks in the 1962 Ordinance is because the corporation had taken the place of the credit banks. The purpose of the 1962 legislation was to deprive corporation debtors of a statutory defence. The respondent is a corporation debtor.

The harsh manner in which this type of legislation can operate is illustrated by the case of *Shepherd v. Broome*, [1904] A.C 342. The headnote reads:

"A director of a limited company knew that a prospectus issued by the directors did not disclose a contract and a resolution of the board of directors which were in fact material but which he was advised were not, and which he honestly believed not to be material. A shareholder who had bought shares in the company having brought an action against the director for misrepresentation:—

Held, that though the director was not in fact fraudulent, he must be 'deemed to be fraudulent' within s. 38 of the Companies Act 1867, and that proof that the plaintiff took shares upon the faith of the prospectus would make the director liable both under the Act of 1867 and the Directors Liability Act, 1890, s. 3, sub-s. 17.

All the Law Lords expressed sympathy with the appellant.

The Earl of Halsbury, L.C., said:

"I feel with COZENS-HARDY, L.J., that it is a painful duty to be obliged to treat that as fraudulent which in truth was not fraudulent; but s. 38 of the Act of 1867 compels us to say that it shall be deemed to be fraudulent."

Lord MACNAGHTEN said:

"I must say I am very sorry for him."

Lord Lindley said:

"My Lords, it is impossible not to sympathise with the appellant in this case, but I cannot say that the decision from which he was appealed is wrong in point of law. The Acts of Parliament which he has been held to have infringed are very stringent and are not very happily expressed. To be compelled by Act of Parliament to treat an honest man as if he were fraudulent is at all times painful; but the repugnance which is naturally felt against being compelled to do so will not justify your Lordship in refusing to hold the appellant responsible for acts which an Act of Parliament clearly declares he is to be held liable."

I feel disinclined to hold that the respondent has been deprived of a defence which was available to him at the time when this action was brought but I see no escape from a logical conclusion. It is possible that on further consideration this Ordinance may be amended or repealed but once it remains a part of the law of the colony the respondent is liable.

I would allow the appeal with costs.

Appeal dismissed.

Solicitor: *Sase Narain* (for the appellant).

[British Caribbean Court of Appeal (Archer, P., Jackson and Luckhoo, JJ. A.) March 22, 23, April 5, 1965]

Criminal Law—Murder—Summing up—Standard of proof—High degree of probability—Whether misdirection.

Criminal Law—Summing up—Common design—No overt act by co-accused—Mere presence—Whether participation in crime.

H. and M. were convicted of the murder of a school boy who died from an explosion caused by a grenade thrown by H. M. was present with H. before, during and after the commission of the offence, when they both hurried away, but there was no evidence of any act of participation in the crime by M. The trial judge directed the jury that they should feel sure of guilt before convicting and added that the evidence need not establish certainty but must carry a high degree of probability. On the question of common design, he said that M. could not be convicted unless on the evidence, it was found that he participated in the commission of the offence. On appeal it was argued that these statements were misdirections.

Held: (i) the direction relating to a high degree of probability was not helpful and it was better not to give it, but since the judge also told the jury that they should feel sure of guilt before convicting, the jury could not have been misled into thinking that they could find H. guilty of murder if they were in doubt as to whether or not he had thrown the grenade but thought it highly probable that he had done so;

(ii) the judge should have explained to the jury in what way M. would in law have participated in the crime by his presence alone. While there was a strong probability that he was present comforting and assisting

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H., that was not the only reasonable conclusion to be drawn from the evidence. He might not have known of H.'s intention and, even if he did, he might have been present out of mere curiosity and not with the intention of assisting H.

Hamid's appeal dismissed. Mohamed's appeal, allowed.

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

E. A. Ramao, Senior Crown Counsel, for the Crown.

ARCHER, P.: Abdul Hamid and Bashu Mohamed were convicted of the murder of Godfrey Texieira. On the 23rd of March, 1964, between 4.30 and 5 p.m., Texieira, a school boy, was a passenger on a bus. The bus stopped to set down passengers, and a grenade was thrown through a window of the bus. Texieira received multiple injuries and died the same night.

Polo, a witness for the Crown, who was a passenger in a taxi which had stopped immediately behind the bus, gave evidence that Abdul Hamid had thrown the grenade. Two other passengers in the taxi also saw a man, whom they described, throw the grenade, but neither of them identified Hamid as the person. Abdul Hamid, Bashu Mohamed and another man, whose identity was not established, were together one hour before the crime was committed. The evidence of Polo was, that at the time When the bus stopped the appellants were on the parapet opposite the left back wheel of the bus, Mohamed right up to the bus and Abdul Hamid about two to three feet north of him with his shirt out of his trousers and his right hand under his shirt; that just as the bus was about to move off Abdul Hamid took something from under his shirt with his left hand and threw it through a window of the bus. At the time Bashu Mohamed was close to Abdul Hamid, and when the bus had travelled two to three rods there was an explosion in the bus, and the two appellants walked quickly away as the explosion was heard.

Both appellants have appealed on the ground of misdirection by the trial judge on the standard of proof. In addition, Abdul Hamid has appealed on the ground of misdirection by the judge when dealing with the question of identification, and Bashu Mohamed has appealed on the grounds of reception of inadmissible evidence and non-direction by the judge in the passages in the summing-up concerning Mohamed's participation in the offence.

Counsel for the appellants criticised two passages in the summing-up in which the judge directed the jury on the burden of proof. These passages occur at pp. 181 and 182 of the summing-up and are as follows:

"By reasonable doubt is meant the kind of doubt which would cause you to hesitate in your ordinary everyday business affairs. It is not a whimsical or fanciful doubt. It must be a reasonable doubt."

The second passage is as follows:

"It has been put in another way by another judge in England, and this is how he puts it: Before an accused person can be convicted there must be a certain degree of cogency which the evidence must reach in a criminal case. That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against the man as to leave only a remote possibility in his favour, it can be dismissed thus: Of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt. But nothing short of that will suffice."

Counsel submitted that the effect of the directions in these passages might have been to lead the jury to believe that if they were deciding a matter in their homes, something affecting them personally, and would not have felt any doubt, they could properly convict; and while they must be sure so as to convict, it would be sufficient for them to feel sure if they felt that it was very or highly probable that the accused threw the grenade.

The first of the two passages to which objection has been taken comes after earlier passages in which the judge had warned the jury against convicting on suspicion and had told them that they must be convinced of guilt before convicting. The second passage follows a passage in which the judge repeated the direction suggested by GODDARD, L.C.J., in *R. v. Summers* [1952], 36 Cr. App. R. 14. The judge did not tell the jury in the first passage complained about that they should determine guilt in the same manner as they would determine a matter arising in their private affairs, but that if they felt such a doubt as would in such a matter have caused them to hesitate to act in the matter, their minds would then be in a state of reasonable doubt. While we do not think that such a direction is helpful and it is better that it be not given, where, as in this case, the judge also told the jury that they should feel sure of guilt before convicting, we do not think that the jury could have been misled by this direction into thinking that they could find the appellant Hamid guilty of the murder if they were in doubt as to whether or not he had thrown the grenade but thought it highly probable that he had done so.

In two other passages the judge's directions were as follows:

"The accused persons are charged with the grave and serious offence of murder, and the consequences of any conviction that might flow from that charge are no concern of yours. You are not concerned with the consequences of a conviction or the penalty that may be imposed on the accused persons. You may find in this case that a diabolical crime was committed on the 23rd March, 1964. Nevertheless, before you can properly convict the accused persons you must be sure that the Crown have estab-

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lished beyond reasonable doubt that the crime was committed by the accused persons. You have a sacred duty to perform and you must perform it to the best of your ability without fear, without favour and without flinching.

"If after a consideration of the whole of the evidence in the case you are convinced of the guilt of either one or other or both of the accused persons, then of course you must give effect to that finding. If, on the other hand, you are not convinced of the guilt of the accused persons, then it would be your bounden duty to acquit them."

The judge further said:

"The Crown has preferred this indictment against the accused persons, and it is the duty of the Crown to prove the guilt of the accused beyond reasonable doubt. The burden of proving the guilt of the accused rests on the Crown throughout the trial, that is to say, from the beginning to the end. It never shifts; it always remains with the Crown."

In the same way the second passage, which counsel criticised as an offending direction, added nothing to a direction that the jury must be convinced of guilt before convicting, and was not objectionable because it contained the words "high degree of probability." When the whole passage, which is also a quotation, is read, its meaning is clear, and the jury must have understood that the judge was not telling them in that passage that they need not be sure of guilt before convicting, but that it would be enough if although not convinced of guilt they felt that it was extremely probable that the appellants were guilty.

The witness Polo said that he had known both the appellants for many years. He was called to identify Bashu Mohamed at a parade conducted by the police, but, though available, was not called to identify Abdul Hamid at a similar parade. The judge drew the attention of the jury to this curious feature, so that they must have been alive to it but nevertheless convinced that Polo was a truthful witness.

The evidence against Abdul Hamid included the significant statement by his father-in-law, Saheed, that Abdul Hamid used his left hand to bowl at cricket and his right hand or either hand to bat. The evidence against Hamid was not weak, las counsel has contended. The judge made it clear to the jury that unless they accepted Polo's evidence they could not convict.

At pp. 190 and 191 he said:

"Let me tell you here at once, Members of the jury, that if in this case you do not accept the evidence of Polo, then, as I told you before, you will be left with evidence which is wholly and solely circumstantial evidence, and as far as the number one accused is concerned that evidence would not be strong enough upon which you could properly convict him of the offence of murder for which he now stands indicted.

"So if you do not accept the evidence of Polo, as far as the number one accused is concerned you will be in duty bound to acquit him. As a matter of law I give you the direction that if you do not accept Polo's evidence or if you are in doubt as to Polo's evidence, then the remaining' circumstantial evidence against number one accused would not be strong enough for you to convict him, and you would be bound in those circumstances to acquit him of the offence for which he stands indicted."

The jury must have been convinced that Polo was a truthful witness. The circumstantial evidence added to his testimony, and the verdict was amply supported by the whole evidence. Abdul Hamid's appeal fails and is dismissed.

In his directions to the jury the judge warned them that Bashu Mohamed's mere presence at the scene of the crime was not sufficient to render him guilty. Bashu Mohamed was seen with Abdul Hamid before, during, and after the commission of the offence when the two appellants hurried away, but there was no evidence of any act of participation in the crime by Bashu Mohamed, and he could only be found guilty if the only reasonable inference from the fact of his continued presence in Abdul Hamid's company was that he knew that Abdul Hamid intended to throw the bomb, and his purpose in being so close to him when they were both standing near to the bus was to assist Abdul Hamid in some way.

The judge dealt with the question of common design in two passages of the summing-up. At pp. 176 and 177 of the summing-up he said:

"For you to convict the number two accused person on this principle of acting in concert in pursuance of a common design to commit the offence for which he now stands indicted, you must find on the evidence that he participated in the commission of the offence. If, on the other hand, you find on the evidence that the number two accused person did not participate in the commission of the offence, that he was merely an innocent bystander, a disinterested spectator, and he just happened to be there, and he did not participate in the commission of the offence, then of course it would be your bounden duty to acquit him. Unless and until you can find that the number two accused had the intention to be a party to the killing of Godfrey Texieira, he is entitled to be acquitted."

And at p. 191 the judge said:

"As far as the number two accused is concerned, if you do not accept Polo's evidence, then you will have to see whether the remaining circumstantial evidence points exclusively to the guilt of the number two accused person, that is to say, you will have to say whether it is consistent with guilt and inconsistent with any other rational conclusion. And if you find that it is not conclusive and does not point conclusively to guilt, or if you are left

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in a state of reasonable doubt as to whether it is consistent with guilt and inconsistent with any other rational conclusion, then in those circumstances you would be bound to acquit the number two accused person."

The situation called for a more careful direction to the jury. There was no overt act of participation, the evidence was circumstantial, and the judge should have explained to the jury in what way Bashu Mohamed would in law have participated in the crime by his presence alone. The jury may have thought that if he was not a disinterested person in the sense that he had guilty knowledge, his mere presence constituted participation in the offence; but that he knew that Abdul Hamid was in possession of a bomb and intended to use it was not an irresistible inference. Moreover, even if Bashu Mohamed had that knowledge, curiosity and not the intention to assist Abdul Hamid by his presence may yet have taken him to the scene of the crime. While there is a strong probability that he was present comforting and assisting Abdul Hamid, we cannot say that that was the only reasonable conclusion to be drawn from the evidence.

For these reasons the verdict against Bashu Mohamed cannot be sustained, and Bashu Mohamed's appeal is allowed, the conviction against him is quashed and the sentence set aside.

Hamid's appeal dismissed.

Mohamed's appeal allowed.

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[British Caribbean Court of Appeal (Archer, P., Jackson and Stoby, JJ. A.)
November 25, 26, 1964, April 5, 1965]

Immovable property—Prescriptive title—Land owned by several joint owners including appellant and respondent's wife—Respondent and his wife alone living on land—Whether respondent's occupation adverse to wife's title—if not, whether wife's possession adverse to title of other joint owners—Civil Law of British Guiana, Ordinance, Cap. 2—Title to Land (Prescription and Limitation) Ordinance, Cap. 184, ss. 3, 5 and 13.

B., who owned lot 9 in Pln. Lot No. "O", Corentyne, died intestate in 1914 leaving seven children as his sole beneficiaries, two of whom were D. and S. D. had a son and a daughter, the latter being the respondent's wife, while S. had four children of whom the appellant was one. On B.'s death D. took possession of lot 9. The respondent married D's daughter in 1928 and went to live with her at D.'s home on lot 9. Sometime later D. left lot 9 to live elsewhere and eventually died in 1945. Ever since D. left lot 9 the respondent and his wife were in sole occupation of it. In 1959 a partition officer awarded portions of lot 9 to persons claiming through B. including the respondent's wife and the appellant. In an action brought by the respondent in opposition to the passing of transport by the partition officer to the appellant, the trial judge granted a declaration that the opposition was just, legal and well-founded but declined to grant a declaration of title.

On appeal it was argued for the appellant that the respondent was not in adverse possession for the reason that his possession was referable to a lawful title, namely, D.'s, and that D. in turn could not be in adverse posses-

sion against the other co-owners as a co-owner occupies on behalf of himself as well as on behalf of the other co-owners. For the respondent it was contended that the respondent occupied as a trespasser with effect from the time of D.'s death.

Held: *per ARCHER, P., and JACKSON, J. A.* (i) as a result of B's death intestate in 1914 his children became co-owners of lot 9;

(ii) from 1928 to 1945 the respondent occupied under licence from D. and therefore no question of prescription arose during that period;

(iii) from 1945 the respondent occupied as a stranger in possession, his occupation being adverse to the title of all the co-owners, including his wife, there being no evidence that she had ever asserted any claim to the land or exercised any rights of ownership over it;

(iv) the respondent was therefore in adverse possession for not less than 12 years and was accordingly entitled to the order made by the trial judge:

Per STOBY, J. A. (dissenting): (i) under the common law possession to be adverse had to be *nec vi, nec clam, nec precario*. This is not now always necessary. Possession may now be deemed to be adverse when the person in possession is there with the consent of the true owner, e.g., as a tenant at will;

(ii) if the respondent's possession was his wife's possession the question would arise as to whether she could be in adverse possession against her other co-owners;

(iii) the trial judge had failed to deal with the issue and the related evidence as to whether the respondent's possession was adverse to his wife's title and a new trial should be ordered so that a specific finding of fact could be made in this respect.

S. D. S. Hardyal for the appellant

C. A. F. Hughes for the respondent

Appeal dismissed.

ARCHER, P.: The respondent entered an opposition to the transport by a partition officer of certain land to the appellant. Boodhoo, who died intestate in 1914, owned an area of land defined as lot 9 on a certain plan and the land in dispute is a portion of that area. Boodhoo had seven children two of whom were Dhaniram and Subhagia. Dhaniram had a son and a daughter (the respondent's wife) and Subhagia had four children of whom the appellant was one. On Boodhoo's death (but precisely when does not appear) Dhaniram took possession of lot 9. The respondent married Dhaniram's daughter in 1928 and went to live with her at Dhaniram's home. In the same year he began to cultivate lot 9. He said that he was put in possession of it by Dhaniram and that Dhaniram's brothers and sisters were aware of his possession which was never contested until the partition was announced.

Dhaniram at first occupied lot 9 together with the respondent but subsequently left and lived elsewhere. He died in 1945 leaving his entire property by will to his wife (Who died in 1953) and his two children in equal shares. His will had not yet been admitted to probate at the time of the hearing of the action.

In 1959 the partition officer awarded portions of lot 9 to persons claiming through Boodhoo (including the respondent's wife and the

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appellant) and he and the appellant advertised the proposed transport of the land in dispute to the appellant. The trial judge granted the respondent a declaration that his opposition is just, legal and well founded and an order restraining the partition officer (who was also a defendant) from passing transport to the appellant but declined to grant a declaration of title.

Mr. Hardyal for the appellant argued that at common law there could not be ouster of one co-owner of land by another and that Dhaniram's possession of the land was that of a co-owner who occupied on his own behalf as well as that of his brothers and sisters, that the proper inference from the evidence was either that both the respondent and his wife had been put into possession by Dhaniram or that she occupied as Dhaniram's agent during the respondent's occupation; that the respondent could not prescribe against his wife and was not in adverse possession of the land, his possession being referable to a lawful title. He contended that negative possession was not the law in British Guiana and maintained that possession to confer a prescriptive right must be adverse in the sense known to the common law.

For the respondent it was submitted (and not disputed by counsel for the appellant) that the respondent was on the land from 1928 to 1945 as Dhaniram's licensee. It was further submitted that on Dhaniram's death the respondent became a trespasser, that no legal title or right to possession passed to the respondent's wife (Dhaniram's will not having been admitted to probate), and that the nature of the respondent's occupation amounted to ouster whether he occupied after 1945 together with his wife or not.

The appellant admitted that the respondent had always lived on the land and that she had made no claim to it before the partition officer made his award. The judge found that Dhaniram's brothers and sisters left the district after their father's death and thereafter showed no interest in the land; that the respondent lived on the land and that they were aware of his occupation but took no steps to assert any claim to the land until transport to the respondent was imminent.

Assuming that the respondent commenced his occupation of the land as a licensee, his status may not necessarily have remained that of a licensee up to the time of Dhaniram's death -but may have become that of a tenant at will when Dhaniram left lot 9 but the record does not disclose the year in which Dhaniram left lot 9 and the question of a change of status is indeterminate on the evidence. As a licensee, however, he could not have disputed Dhaniram's title during Dhaniram's lifetime, the legal possession in Dhaniram and the respondent's occupation of the land being possession referable to a lawful title. On the evidence, therefore, no question of prescription arises during the period 1928 to 1945.

On Boodhoo's death Dhaniram and his brothers and sisters became co-owners of lot 9 as a result of Boodhoo's intestacy. It was not suggested by the respondent that Dhaniram's possession was at any time

adverse to his brothers and sisters and his claim to the land in dispute proceeds upon the basis that on Dhaniram's death his licence came to an end and he became a trespasser against Dhaniram's executor and his brothers and sisters.

In *Gunputh v. Brush*, 1919 L.R.B.G. 124, DALTON, J., observed that since the abolition of Roman-Dutch law principles of the law of personal property had to be applied to determine the rights of co-owners of land held in undivided shares. The Civil Law of British Guiana Ordinance, Cap. 2, while disavowing the application of the common law of real property in matters affecting immovable property failed to particularise the branch of the English law of personal property, namely, leaseholds, choses in possession, or choses in action, to be applied. But whatever uncertainty there may be as to the appropriate law to be applied in ascertaining the rights of co-owners of land *inter se* in other cases, this case presents no such difficulty having regard to the conceptions introduced into the law by the Title to Land (Prescription and Limitation) Ordinance, Cap. 184. That Ordinance reproduces substantially many of the provisions of the United Kingdom Limitation Act, 1939. Land is defined so as to include easements, profits à prendre, servitudes or other rights over immovable property or connected therewith, and references to a right of action to recover land includes *inter alia*, a reference to a right to enter into possession of the land. Sections 6 and 10 of the Ordinance are the same as ss. 5 and 10 respectively of the Act and s. 11 (which is in the same terms as c. 13 of the Act) provides that no right action to recover land shall be preserved by formal entry or continual claim. In *Moses v. Lovegrove*, [1952] 2 Q.B. 533, EVERSHED, M.R., said at p. 539: "The notion of adverse possession, which is enshrined now in s. 10, is not new; the section is a statutory enactment, of the law in regard to the matter as it had been laid down by the courts in interpreting the earlier Limitation Statutes. I am content to make one reference to.....PRESTON AND NEWSOM'S LIMITATION OF ACTIONS (2nd edn.) at p. 71, where it is stated: 'A right of action only accrues, and time only runs, if and so long as there is a person in possession and that person is not disqualified from relying on the statute. Thus, by s. 19, a trustee cannot avail himself of the statute against his beneficiary, and the trustee's possession is not adverse. Again, a beneficiary in possession does not have possession adverse to the trustee or his co-beneficiaries'. Then later: 'A possession may fail to be adverse by reason of the rule that possession is never adverse if it can be referred to a lawful title'."

The only possession during the years 1945 to 1959 that could be relied on by Dhaniram's executor and the other co-owners of the land would be that of the respondent's wife, and upon the footing of entry by a *cestui que trust* which was sufficient to avoid the Ordinance, (See *Gree v. Rolle* (1702), 91 E.R. 1377). But an entry in order to be effective must be *animo possidendi*. (See *Solling v. Brougham*, [1893] A.C. 556). The respondent's wife merely continued in occupation after 1945 along with the respondent and there is no evidence that she asserted any claim to the land or exercised any rights of ownership over it.

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The respondent's status from 1945 was, therefore, that of a stranger in possession of land in whose favour time could run, and against whom an action for recovery of possession had accrued in 1945 to Dhaniram's executor, his brothers and his sisters (and persons claiming through them). The appellant is a person claiming through one of Dhaniram's sisters. Section 5 of the Title to Land (Prescription and Limitation) Ordinance provides that no action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims to that person; and the proviso to s. 3 enacts that title to land or to any undivided or other interest therein may be acquired by sole and undisturbed possession, user or enjoyment for not less than twelve years, if the court is satisfied that the right of every other person to recover the land or interest has expired or been barred and the title of every such person thereto has been extinguished. Section 13 provides that at the expiration of the period prescribed by the Ordinance for any person to bring an action to recover land, the title of that person to the land shall be extinguished. After 1957 the respondent was upon the evidence in a position to resist the claims of all other persons and I think, therefore that he was entitled to the declaration and order which he was granted.

I would dismiss the appeal with costs. JACKSON, J.A.: I agree.

STOBY, J.A.: On the 27th June, 1959, a partition officer awarded two lots of land to the appellant. The two lots so awarded formed part of lot 9, part of Plantation Lot No. "O", Corentyne. The trial judge found that lot 9 was originally owned by one Budu who was lawfully married to Mangree on the 25th August, 1905. Budu died intestate on the 4th December, 1914, leaving seven children, two of whom were Dhamiram and Subhagia. The appellant Dhanrajie is the daughter of Subhagia and the respondent is the son-in-law of Dhaniram, having married Dhaniram's daughter Shivpatia.

After Budu's death Dhaniram went into possession of lot 9. The respondent Baijnauth married Dhaniram's daughter in 1928 and went to live on lot 9 that same year.

The partition officer having awarded part of lot 9 to the appellant Dhanrajie on the ground that she was so entitled through her mother, the respondent Baijnauth opposed the conveyance on the ground of adverse possession for thirty years.

The trial judge posed two questions as follows:

- (a) Did the appellant have a legal interest in lot 9? and
- (b) if he did, was that legal interest destroyed by the respondent's possession?

He answered the first question in the appellant's favour, that is to say, the appellant was entitled to a portion of lot 9 unless his interest was destroyed by the respondent's occupation.

It is his answer to the second question which has resulted in this appeal. The judge said this:

"So far as the second question is concerned, I accept the plaintiff's evidence that he has been living on the land and cultivating it since 1928. He was married in that year, and took up residence with his father-in-law Dhaniram who in turn took up residence at Lot 69 Village. It would appear that all of Budu's children with the exception of Dhaniram migrated to No. 69 Village, and I am satisfied that none of them thereafter showed any interest in Plantation No. 'O'. The second defendant has admitted that the plaintiff has always lived on the land in question and that she has laid claim to the land at No. 'O' only after the awards were made. The second defendant, and the two sons of Budu called on her behalf, Surujpaul and Sookram, all say that they own lands at No. 68 and No. 69. I do not believe Sookram when he says he has planted rice at No. 9 before the partitioning officer's award. I find therefore that the plaintiff has been in undisturbed possession of lot 9 as from 1928, that he was put in possession by Dhaniram, one of the heirs of Budu, and that the other heirs were aware of this, and made no protest, until the partition was announced."

I interpret that passage to mean the judge was finding that the respondent's occupation was with the consent of Dhaniram, a co-owner. Now Dhaniram died in 1945. The judge made no finding regarding the respondent's possession after 1945.

Counsel for the appellant submitted that *In re. Benjamin*, (1931-7) L.R.B.G. 168, was wrongly decided since the law is that one co-owner cannot acquire by prescription the title of another co-owner who is out of possession.

Counsel submitted that a reasonable inference from the evidence is that the appellant's occupation was with the consent of his wife, a co-owner. Counsel for the respondent contended that the occupation was in his own right and quite independent of any right of his wife, the daughter of Dhaniram.

In my view the issues involved in the case were not fully appreciated by counsel until a very late stage of the proceedings. Counsel did not at first cross-examine the respondent or his two witnesses but after the respondent's case was closed, other counsel asked leave to recall them and they were cross-examined. The questions in cross-examination were for the purpose of establishing that the respondent's occupation was not as a result of any occupation on his part but because he was the son-in-law of a co-owner. Counsel addressed the judge on the point but apparently the further issue concerning the respondent's occupation after the death of Dhaniram was not discussed.

The relevance in this appeal of *In re Benjamin (supra)* depends on whether the respondent's occupation was with the consent of his wife, or whether time was running in the respondent's favour against

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his wife. Could she have brought an action against him in 1946 to dispossess him or did she refrain from doing so because her husband was living on her property with her consent? Without a specific finding on this issue of fact it is impossible to consider over ruling or confirming *In re Benjamin*.

Counsel for the respondent did not rely on the provisions of s. 5 of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184. He said there were conflicting views regarding the effect of that Ordinance. In *Linde v. Demerara Company Ltd.*, 1954 L.R.B.G. 25, BOLAND, Acting C.J., said at p. 33:

"Although I do not understand counsel for the plaintiffs to advance the submission that the plaintiffs are both entitled to invoke the proviso to s. 3 of the Title to Land (Prescription and Limitation) Ordinance, 1952, which now fixes a period of prescription as 12 years (except in the case of land of the Crown or of the Colony), where all interested parties are before the court, I think it would be well to make it clear that it is my view that even as against the defendants who are (before the court as a party to the action such a claim would not be maintainable. Before that Ordinance came into force a period of 12 years' occupation as of right merely barred the bringing of an action by the owner for trespass or to recover possession. It did not have the effect of terminating absolutely the interest of the legal owner of the land. If the legal owner could gain possession by some means other than by action he was not debarred from doing so. Nor did possession for 12 years give anyone the right to assert any claim against the legal owner which a decree of prescriptive title now affords him. In other words, before the passing of that Ordinance a period of possession for 12 years was a defensive title merely as distinguished from an assertive title. Before the Ordinance of 1952 the period of prescription was 30 years. In keeping with the well established canons of construction of statutes none of its provisions can be given a construction in the absence of express words that it is to have an effect, which would impair or diminish any vested interest existing before it was enacted. Certainly it would be prejudicing a vested interest of the owner of the land if he is now not only barred from bringing an action against a person in possession for 12 years, but shall have his title as owner extinguished by a declaration of a possessive title on proof of 12 years possession by another. The proviso to s. 3, it may be added, does not like s. 4 (a) provide a new form of procedure for which reason, as I have stated, an enactment may be deemed retroactive in effect; nor is it declaratory of what the law had been prior to its passing which is another reason for an enactment being deemed retroactive."

It is unnecessary having regard to the conclusion at which I have arrived to decide whether the Title to Land (Prescription and limitation) Ordinance, Cap. 184, hereinafter called the Ordinance, is retrospective or not, although if the decision I have arrived at were unanimous it may be of the utmost importance to decide the question.

If the possession of the respondent is adverse to his wife there is no need for him to rely on the Ordinance. Under our common law his 12 years' possession would entitle him to oppose the passing of transport to the appellant. If the Ordinance is retrospective his 12 years would entitle him not only to oppose but to obtain a prescriptive title but the judge did not grant him a prescriptive title.

On the other hand, if the respondent's possession was his wife's possession the submission of the appellant falls for decision and in the alternative the effect of the Ordinance regarding possession prior to 1952 would also require consideration. Although as pointed out by EVERSHED M. R., in *Moses v. Lovegrove*, [1952] 2 Q.B. 533, (C.A.), the 1939 Limitation Act, the model for our Ordinance, enacted the case law on the earlier limitation statutes, the Act as well as the Ordinance changed in some respects the concept of adverse possession. Under the common law possession to be adverse had to be *nec vi, nec clam, nec precario*. This is now not always necessary. Possession may now be deemed to be adverse when the person in possession is there with the consent of the true owner, e.g., a tenant at Will. The following passage in CHESHIRE'S MODERN LAW OF REAL PROPERTY (9th Edition) p. 787, correctly explains the distinction:

"'Adverse possession' bore a technical meaning before the Real Property Limitation Act, 1833. Before that date wrongful possession did not ripen into a claim to bar the owner's remedy unless there had been an ouster of the seisin in one of five ways (for which see CARSON, REAL PROPERTY STATUTES, NOTES TO R.P.L.A., 1833, s. 2). Moreover, possession where possible was referred to a lawful title, and there were several cases where possession obviously held without title was held not to be 'adverse'. For instance, possession of a younger brother was possession of the heir; possession of one co-partner, joint tenant or tenant in common was the possession of all, unless an intention to claim the whole was expressed; tenant for years continued to hold for lessor after the lease ended; if a squatter was entitled to an interest in the land less in extent than that which he claimed under the statute, his possession was referred to his lawful title; see LIGHTWOOD ON POSSESSION, pp. 159 *et seq.* Lord ST. LEONARD described the effect of the 1833 Act in these words: 'It is perfectly settled that adverse possession is no longer necessary in the sense in which it was formerly used, but that mere possession may be and is sufficient under many circumstances to give a title adversely'"

After the Limitation Act of 1833 and before the Real Property Act, 1925, a joint tenant in possession or a tenant in common in possession could plead the Limitation Act against another tenant out of possession for the statutory period. This has now been changed by the Real Property Act, 1925, which provided by s. 2 that a legal estate was not capable of subsisting or of being created in an undivided share of land and by s. 30 that an undivided share in land could only be held behind a trust for sale. The Limitation Act, 1939, recognised these features of the Real Property Act, 1925, and provided that time did not run in favour of a trustee. Prior to 1925 a younger son could oust the heir at law. This is still so in Barbados.

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In British Guiana these principles are not applicable. A joint owner in possession is not a trustee for other joint owners not in possession; hence, if the respondent's wife is in possession whether time was running in her favour or not depends on the answer to counsel's submission. My reason for advertiring to the English Act and contrasting it with the Ordinance, Cap. 184, is to demonstrate that in deciding this appeal the Ordinance may only be relevant with respect to the possessory period before a legal title can be obtained but may not be relevant for the purpose of deciding whether time begins to run or not. In British Guiana the Ordinance, Cap. 184, changed to a lesser degree than in England the concept of adverse possession.

The judge in making the finding to which I have referred did not discuss the evidence of Bridgmohan, the overseer, who said the 1953 rates were not paid (by the respondent and that one of the houses on the land was owned by the respondent's wife (the respondent also owns a house on the land). Nor did he discuss the status of the respondent's wife with reference to the alleged possession of the respondent. If the respondent was in possession in circumstances that time was running in his favour against the appellant then time was running in his favour against his wife. But she was in possession. She was no mere interloper. She was there by virtue of her co-ownership and by reason of her marital status. Had she brought an action for declaration of title could her husband have successfully challenged her? The judge has not said.

For these reasons I consider the appeal should be allowed, the judgment set aside and a new trial ordered so that a specific finding of fact could be made.

Appeal dismissed

Solicitors: *Dabi Dial* (for the appellant); *M. E. Clarke* (for the respondent)

R. v. RAMESSAR

[British Caribbean Court of Appeal (Archer, P., Jackson and Luckhoo, J J. A.) February 25, 26, March 5, 1963]

Criminal law—Evidence of child—Whether he understands the nature and obligation of an oath—Duty of judge—Questions and answers to be recorded—Hearsay.

The appellant was convicted of murder. The trial judge admitted the evidence of an 11 year old boy without examining him upon his understanding of the nature and obligation of an oath. Evidence was also admitted from a prosecution witness while being cross-examined by the defence that shortly before he arrested the appellant he had received information that the appellant had discharged a fire-arm at his father-in-law. On appeal,

Held: (i) a child can only be sworn to give evidence if he understands the nature and obligation of an oath. It is not enough that he is aware of his duty to speak the truth;

(ii) the inquiry conducted by the judge should be recorded in the form of questions and answers so that if any question as to the child's competency should arise it can be determined whether the judge's conclusion was justified or not.

(iii) the evidence concerning the incident between the appellant and his father-in-law was palpably hear-say.

Appeal allowed.

B. O. Adams, Q.C., and R. H. McKay for the appellant.

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

Judgment of the Court: The appellant was convicted of the murder of Baldeo who was also known as "Diamond". The two men left together for Wellington Park about 6 o'clock in the morning of 24th June, 1962, to shoot ducks. Baldeo was carrying his own shotgun but the appellant was unarmed. About twenty minutes after they had left Baldeo's house a shot was heard coming from the direction in which they had gone. About 7 a.m. the appellant was seen walking quickly on the Wellington Park sideline dam going towards the public road. He was then alone and carrying a shotgun. Shortly after the appellant rode up on a cycle and stopped in front of the house of his father-in-law. He had the gun in a hag but it was in three pieces. He fixed the gun up but after a conversation with his sister-in-law he went with her to her home. On their way there a police vehicle passed and the appellant threw the gun into a swamp.

Baldeo's dead body was found about 2 p.m. in a clump of bushes near the building reef at Wellington Park. A *post-mortem*, examination was held on the next day and the medical opinion was that he had died before 11 a.m. on 24th June, 1962, from asphyxia caused by gun-shot wounds of the neck which could not have been self-inflicted.

The stock of the gun which the appellant threw into the swamp was later recovered. The barrel and lock were found in the yard of the appellant's sister-in-law and it was established that the gun was Baldeo's. The trousers and shorts which the appellant had been wearing on the morning of the 24th June, 1962, were also found in the yard.

The appellant was arrested on 5th July, 1962, for the murder of Baldeo. Evidence was given that upon his arrest he said, "I kill, one, a man got to punish for his deeds." He was taken to the police station where, after being cautioned, he made a statement in which he said that he had borrowed the gun from Baldeo to frighten his father-in-law who had taken his wife away from him. The prosecution relied on a passage in this statement as an admission by the appellant that he was present when Baldeo was shot.

The theory of the prosecution was that the appellant had, before setting out for Wellington Park, made up his mind to kill Baldeo and they put forward as proof of this intention the evidence of Kanshal Senjawally, an eleven year old boy, who said that he started to follow the appellant and Baldeo when they were on the way to Wellington Park but turned back because the appellant had told him that he would kill him if he did not. The suggestion was that the appellant's threat was made in order to prevent Senjawally from

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witnessing the killing of Baldeo. The evidence of this witness was given at the trial without objection by the defence. There was, however, considerable argument upon the admissibility of the alleged confession made by the appellant at the time of his arrest. The judge admitted the evidence whereupon counsel for the defence elicited from the constable who made the arrest that shortly before he arrested the appellant he had received information that the appellant had discharged a firearm at his father-in-law.

Counsel for the appellant has relied on several grounds of appeal but his main submissions have been directed against the admissibility of the alleged confession, of Kanshal Senjawally's evidence, and of the evidence concerning the incident between: the appellant and his father-in-law. He contented that the evidence of the confession was irrelevant, or, if relevant, highly prejudicial; that Senjawally's evidence was inadmissible because the judge had not satisfied himself that Senjawally was competent to give evidence on oath; and that the evidence that the appellant had shot at his father-in-law was hearsay and not proof of the shooting but that it had been so treated by the judge.

It is clear from the authorities that a child can only be sworn to give evidence if he understands the nature and obligation of an oath. It is not enough that he is aware of his duty to speak the truth. There is no set form of questions to be put to him by the judge who is inquiring into his competency to testify on oath but they must be such that his answers will enable the judge to decide whether or not he appreciates the binding nature of an oath and what the taking of it implies. It is therefore eminently desirable that the inquiry conducted by the judge should be recorded in the form of questions and answers so that if any question as to the child's competency should arise it can be determined whether the judge's conclusion was justified or not. In this case, the record does not disclose the questions put by the judge to Senjawally. The answers he gave, however, indicate that he was not examined upon his understanding of the nature and obligation of an oath and he was not therefore competent to give sworn evidence.

Section 71 of the Evidence Ordinance, Cap. 25, as amended by the Miscellaneous Enactments (Amendment) Ordinance, 1961, provides as follows:

"Anyone who being—

- (a)
- (b)
- (c)
- (d) a child

is ignorant of the nature and obligation of an oath, may be allowed to give evidence without oath or affirmation:

Provided that—

- (i) the judge shall determine whether the witness is of competent understanding to give that evidence.
- (ii) where the evidence of a child admitted by virtue of this section is given by the prosecution, the accused shall not be liable to be convicted of the offence unless the evidence is corroborated by some other material evidence in support thereof implicating him."

Counsel for the appellant conceded that Senjawally was competent to give unsworn evidence but pointed out that that evidence would have needed corroboration. There was no corroboration of anything that Senjawally said. Even if, therefore, he had been allowed to give evidence not on oath or affirmation that evidence would have been valueless.

Without Senjawally's evidence the case presented against the appellant was very weak indeed. The only other evidence of any cogent value was the alleged confession. This was plainly admissible for the view put forward by the prosecution was that it was the appellant's answer to a specific charge. It was for the defence to show either that the appellant had not used the words ascribed to him (as indeed the appellant insisted in his statement from the dock) or, that if he had, they had no reference to the shooting of Baldeo. It was undoubtedly, therefore, in the appellant's interest that the jury should know about the incident between his father-in-law and himself but the manner in which it was brought to the knowledge of the jury was quite wrong and the evidence concerning it palpably hearsay. The alleged confession was, however, not unambiguous and when considered together with the rest of the evidence fell far short of an admission of guilt. There was abundant evidence that other persons used to shoot in the area in which Baldeo was found dead, there was no proof that Baldeo had been shot with his own gun, there was a history of friendly relationship between Baldeo and the appellant, and the suggested motive for the crime, namely, that the appellant committed it in order to possess himself of Baldeo's gun, was not borne out by the evidence.

It is of course impossible to know what effect Senjawally's evidence had upon the minds of the jury but in view of the nature of the other evidence it may well have converted a case of suspicion into one of certainty of guilt and determined the verdict of the jury. On this supposition the appellant has lost the chance of an acquittal which was open to him if Senjawally's evidence had not been admitted and the conviction cannot be allowed to stand. The appeal is allowed, the conviction quashed and the sentence set aside.

Appeal allowed.

ATTORNEY-GENERAL v. SERRAO

[Supreme Court (Luckhoo, C.J.) October 29, 1964, January 14, 1965]

Contract—Provision stipulating damages for breach—Whether a penalty or a genuine pre-estimate of damages.

By an agreement in writing between the Government and the defendant the Government agreed to defray the costs of a course in telecommunications to be pursued by the defendant in consideration of an agreement by the defendant to return to the Colony on the completion of the course "and, if so required, to serve Government in a capacity for which the course has qualified him for a period of five years at least from the date of his return to the Colony". Paragraph 3 of the agreement provided that for any breach of that condition the defendant would "be liable to repay to the Government all sums of money expended in connection with his attendance at the course". The defendant successfully completed the course, returned to the Colony and served the Government for a while, but left the service before the end of the five year period. Under para. 3 of the agreement the Government in consequence sued for damages for breach of contract in the sum of \$5,714.04 being the amount expended on the course. For the defendant it was contended that this was a penalty and not a genuine pre-estimate of the damages likely to result from the breach.

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Held: (i) the amount claimed pursuant to the contractual stipulation would be held to be a penalty if it was extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach;

(ii) but at the time of the contract the greatest loss to Government that could conceivably be proved to have followed a breach of the agreement would have been the sum expended, *i.e.*, the sum now claimed by the plaintiff. This sum was not therefore extravagant or unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach and was not a penalty.

Judgment for the plaintiff.

D. A. Singh, Senior Legal Adviser, for the plaintiff.

J. Carter, Q.C., for the defendant.

LUCKHOO, C.J.: When the action came on for trial it was stated by both counsel for the plaintiff and counsel for the defendant that the only question to be resolved was whether the sum of \$5,714.04 sought to be recovered by the plaintiff was a penalty or a genuine pre-estimate of the damages likely to result from the breach of an agreement in writing dated the 15th January, 1958. An agreed statement of facts signed by counsel for the plaintiff and counsel and solicitor for the defendant was filed prior to the hearing and the arguments addressed to the court proceeded upon the basis of the agreed statement of facts.

From the agreed statement of facts it appears that in 1957, the defendant Serrao, who was then employed by the Government of British Guiana as a telecommunications apprentice at a salary of \$1,032 *per annum* on the scale CI: \$912 x \$60 — \$1,512, was recommended for study leave training in telecommunications. On the 1st July, 1957, the defendant was entitled to 42 days leave with no leave passage entitlement and it was estimated at the time of recommendation that the cost of training would be \$5,145.36. The courses of study leave training for which the defendant was recommended were of two years' duration. The defendant left British Guiana on the 18th August, 1957, and arrived in the United Kingdom on the 3rd September, 1957. On the 15th January, 1958, the defendant and the Chief Establishment Officer of the Government of British Guiana, acting for the Government of British Guiana, entered into an agreement which is set out hereunder:—

"BRITISH GUIANA

COUNTY OF DEMERARA

THIS AGREEMENT is made this 15th day of January in the year of Our Lord Nineteen Hundred and Fifty-eight between JOHN KEMPTON D'ALREY SERRAO of British Guiana (hereinafter referred to as "the Student") of the one Part and the Chief Establishment Officer of the Colony of British Guiana acting herein for and on behalf of the said Colony (hereinafter called "the Government") of the other Part:

WHEREAS the Government has nominated the Student to proceed to the United Kingdom for the purpose of taking courses in Telecommunications with the British Post Office;

AND WHEREAS the Government has agreed to defray the cost of the Student's passages to and from the United Kingdom and to pay him a subsistence allowance during the period of his residence in the United Kingdom for the purpose of the course referred to above as well as necessary travelling expenses and fees in connection therewith.

NOW THIS AGREEMENT WITNESSETH and it is hereby agreed by and between the parties hereto as follows:—

1. In consideration of the Government agreeing to nominate the Student for the courses as aforesaid and to pay the allowances and expenses referred to above the Student agrees to proceed to the United Kingdom and undergo the courses in Telecommunications with the British Post Office.

2. The Student hereby binds himself and agrees to return to the Colony on the completion of the courses and, if so required, to serve Government in a capacity for which the course has qualified him for a period of FIVE years at least, from the date of his return to the Colony.

3. The Student further agrees that on failure on his part to return to the Colony and, if so required, to serve Government in a capacity for which the course has qualified him he will be liable to repay to the Government all sums of money expended in connection with his attendance at the course as hereinbefore agreed.

4. All legal proceedings under this Agreement shall be instituted in the Courts of the Colony of British Guiana.

5. This Agreement shall bind the heirs, executors, administrators and representatives of the assigns.

IN WITNESS WHEREOF the parties have set their hands the day and year first hereinabove mentioned. SIGNED by the within named in the presence of —

1.....

Student

2.....

Chief Establishment Officer."

The defendant entered upon and completed the courses of training contemplated under the aforesaid agreement and returned to British Guiana on the 20th November, 1959. He resumed duty on the 8th December, 1959. On the 27th November, 1959, the defendant had been appointed a technician in the Post Office Telecommunications Electrical Inspector's Branch with effect from the 1st January, 1958, at a salary of \$1,272 *per annum* in the Scale A18: \$912

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....\$2,292 *per annum*. The defendant was assigned duties under Mr. J. S. Morris, Engineer, Extension Construction, to give him an opportunity to put his training to good use. The defendant was never promoted above the rank of technician and became dissatisfied, considering that he should have been appointed to the post of technical officer at least. Certain correspondence passed between the defendant and the Public Service Commission in this regard during 1962. On the 31st January, 1963, the defendant gave notice in writing of his intention to resign from the post of technician with effect from the 1st April, 1963. On the 5th March, 1963, the Director of Posts and Telecommunications, on the direction of the Secretary of the Public Service Commission, replied to the defendant reminding him of the undertaking given by the defendant in the agreement of the 15th January, 1958, to serve Government for a period of five years at least from the date of his return to British Guiana and informing him that his failure to serve Government for the specified period would render him liable to repay to Government immediately and in full all sums of money expended in connection with his attendance at the courses of training. On behalf of the defendant a reply bearing dated 30th March, 1963, was sent to the Director of Posts and Telecommunications wherein it was claimed that Government was in breach of the agreement of the 15th January, 1958, by reason of the defendant not being required to serve in a capacity of a technical officer at the least whereby the defendant would have been receiving a higher salary than he was in fact receiving as a technician. It was also stated that in the circumstances the defendant no longer considered himself bound by the agreement. The defendant ceased to report for work with effect from the 1st April, 1963, and thereafter the Public Service Commission resolved that he be dismissed from the public service with effect from the 1st April, 1963, inclusive, in accordance with Colonial Regulations 43 and General Orders 95 and 176.

The Attorney-General thereafter instituted the present claim against the defendant for \$4,640.56, as an amount due, owing and payable by the defendant to the Government of the Colony of British Guiana by virtue of the agreement in writing dated the 15th January, 1958. The amount of \$4,640.56 claimed was later amended to \$5,714.04.

Counsel for the defendant at the hearing stated that the defendant waived the point whether the (defendant) was appointed to a post commensurate with his qualifications.

The principle for ascertaining whether a stipulated sum is a penalty or a genuine pre-estimate of the damages likely to result from a breach of an agreement have been stated in a series of "rules" by Lord DUNEDIN in his speech in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*, [1915] A.C. 79; (1914-15) All E.R. Rep. 739, as follows:

"(1) Though the parties to a contract who use the words 'penalty' or 'liquidated damages' may *prima facie* be supposed

to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages.

(2) The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damages: *Clydebank Engineering Company v. Yzquierdo y Castameda*, [1905] A.C. 6.

(3) The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and the inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not at the time of the breach. *Public Works Comr. v. Hills*, [1906] A.C. 368; *Webster v. Bosanquet*, [1912] A.C. 394.

(4) To assist this task of construction various tests have been suggested, which, if applicable to the case under consideration, may prove helpful or even conclusive. Such are:

- (a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach—illustration given by Lord HALSBURY, L.C., in the *Clydebank* case.
- (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid: *Kemble v. Farren* (1829), 6 Bing 141. This though one of the most ancient instances, is truly a corollary of the last test .
- (c) There is a presumption (but no more) that it is a penalty when 'a single lump sum is made payable by way of compensation, on the occurrence of one or more of all of several events, some of which may occasion serious and others but trifling damages.' Per Lord WATSON in *Lord Elphinstone v. Monkland Iron and Coal Co.* (1886), 11 App. Cas. at p. 342). On the other hand:
- (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimate an almost impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties: *Clydebank case per Lord Halsbury : Webster v. Bosanquet per Lord Massay*."

Starting with Lord DUNEDIN'S third rule, it is necessary to have regarded to the circumstances existing at the time the agreement of the 15th January, 1968, was made. The recital and terms contained in the agreement provide a sufficient guide in this regard. Govern-

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ment wished to have available the services of an officer proficient in certain technical matters pertaining to Telecommunications and contracted with the defendant that upon Government agreeing to defray the cost of the defendant's passages to and from the United Kingdom and to pay him a subsistence allowance during the period of the defendant's stay in the United Kingdom for the purpose of the courses of study as well as necessary travelling expenses and fees in connection therewith, the defendant would proceed to the United Kingdom and undergo the courses of study selected and on completion thereof he would return to British Guiana and, if so required, serve Government in a capacity for which the courses had qualified him for a period of five years at least from the date of his return to British Guiana. The defendant further undertook that on his failure to return to British Guiana and, if so required, to serve Government in such a capacity he would repay Government all sums expended in connection with his attendance of the courses.

Judged at the time of the making of this contract, it seems clear from the contract itself that Government might or might not, within five years from the date of the defendant's return to British Guiana after completion of the courses, require the defendant to serve in a capacity for which the courses had qualified him. At the time of the making of the contract there was within the contemplation of the parties but a single obligation — that the defendant should return to British Guiana holding himself in readiness for a period of five years from the date of his return to serve Government in a capacity for which the courses qualified him. Government may not have needed or utilised his services in that regard at all. The words "if so required" in para. 3 of the agreement make that clear. Government may have required his services in this regard for any period of five years or such lesser period down to less than one day. The period of requirement of such services was solely at the discretion of the Government subject to an upward limit of five years after the defendant's return to British Guiana.

At the time the contract was made the loss accruing to the Government from a breach of the agreement on the part of the defendant could not accurately or reasonably be calculated in money. Precise pre-estimation was an impossibility. The greatest loss to Government that could conceivably be proved to have followed a breach of the agreement would of course have been the sum expended, *i.e.*, the sum now claimed by the plaintiff. The sum claimed is therefore not extravagant or unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach. This falls within "rule" 4(a) of Lord Dunedin's "Rules" in the *Dunlop* case.

This type of contract must be distinguished from employment contracts of the type in *Astley v. Weldon* (1801), 2 B. & P. 346, and *Kemble v. Farren* (1829), 6 Bing. 141, where stipulated sums were provided for failure to carry out general provisions on either side. In both cases the stipulated sum was held to be a penalty and irrecoverable as the sum might become due on a number of breaches of sub-

stantially differing degrees of importance, some of which might occasion serious and others but trifling damages.

During the course of the argument reference was made by both counsels to the judgments in a number of reported cases involving hire purchase contracts. I do not think that those cases are very helpful in determining the question to be resolved in the instant case. They all involve the application of the basic "rules" laid down by Lord DUNEDIN in the *Dunlop* case to the particular facts of each case.

The instant case I think falls to be dealt with under para, (d) of "rule" 4 of Lord DUNEDIN'S "rules" in the *Dunlop* case. Viewed in that way the amount claimed by the plaintiff should not be held to be a penalty and there will be judgment for the plaintiff against the defendant for the amount claimed \$5,714.04 with costs to be taxed.

Judgment for the plaintiff.

Solicitors: *Crown Solicitor* (for the plaintiff); *V. Lampkin* (for the defendant).

BOOKERS SUGAR ESTATES LTD. v. LATCHMIN SINGH

[In the Full Court, on appeal from a magistrate's court for the Georgetown Judicial District (Luckhoo, C.J., and Van Sertima, J. (ag.)) April 2, May 22, 1965]

Compensation—Medical opinion given to workman disputed by employers' doctor—Reference to medical referee—Examination some time later by medical referee—Referee supports opinion of employers' doctor—Whether periodic payment should cease from date of reference or from date of examination by referee—Workmen's Compensation Ordinance, Cap. 111, s. 43.

The respondent, who was employed by the appellants, received an injury to her groin in the course of work on 7th November, 1963. On 20th November she was recommended by her own doctor for 8 weeks' leave for temporary disability. On the following day she was examined by the appellants' doctor who concluded that the condition resulting from the injury had largely cleared up. On 4th December the Commissioner of Labour, acting under s. 43 of the Workmen's Compensation Ordinance, Cap. 111, referred the matter to a medical referee. On 9th January, 1964, the respondent was examined by the medical referee who found no incapacity. The respondent did not call the medical referee's attention to any change in her condition since the date of the examination by her own doctor. In an application by the respondent for compensation the magistrate held that she was entitled to periodic payment to the date of the medical referee's examination. On appeal,

Held: the date at which compensation should cease to be payable should be the date of reference to the medical referee and not the date of examination by the medical referee.

Appeal allowed.

J. A. King for the appellants.

D C. Jagan for the respondent.

Reasons for Decision: The sole question which arose for determination in this appeal was from what date the payment of compensation to a workman who was temporarily incapacitated as a result of an accident arising out of and in the course of his employment should in the circumstances of this case cease, the workman having fully recovered from the injury.

On the 7th November, 1963, the appellant Latchmin Singh, who was engaged in the work of throwing manure in a canefield at Pln. Uitvlugt, slipped and jerked herself suffering pain in the left groin. She was examined on the 14th November, 1963, by Dr. E. R. Gunn to whom she complained of pain in the left lower back. Dr. Gunn found the appellant to have a temperature and a tenderness in the left lower corner of the abdomen and came to the conclusion that she was suffering from an inflammation in the left lower corner of the abdomen due to some cause which he (Dr. Gunn) did not discover. He recommended antibiotic treatment for the inflammatory condition. On the 21st November, 1963, Dr. Gunn again saw the appellant and found that her condition appeared to have largely cleared up. There was no temperature. Dr. Gunn has conceded that such an accident could result in the left psoas major muscle—a muscle running on the inside of the pelvis where it is attached to the thigh bone—being torn

and that it was possible that he could have failed to detect such a tear in his examination.

On the 20th November, 1963—that is one day before Dr. Gunn's second examination—the appellant was examined by Mr. H. C. Hugh, a surgeon to whom the appellant gave a history of having slipped while carrying a basket of manure on 7th November 1963. She complained to Mr. Hugh of pain in the back and Mr. Hugh found a swelling in the left groin. He diagnosed a tear in the left psoas muscle and recommended 8 weeks' leave for temporary disability.

On the 4th December, 1963, the Commissioner of Labour, acting under the provisions of s. 43 of the Workmen's Compensation Ordinance, Cap. 111, referred the matter to a medical referee—Mr. N. P. Stracey, Senior Surgeon at the Public Hospital, Georgetown, and on the 9th January, 1964, the medical referee examined the appellant—clinically as well as radiologically—and found a nil incapacity. Upon a claim for payment of compensation being made by the appellant the learned magistrate accepted and relied upon Mr. Hugh's testimony as to the nature of the injury sustained by the appellant and held on the basis of Mr. Hugh's recommendation of 8 weeks' leave for temporary disability (which ended on 14th January, 1964—5 days after the medical referee's finding of a nil incapacity) that the appellant was entitled to periodic payment to the date of the medical referee's examination.

On appeal by the employers it was contended on their behalf that the payment of compensation should have been allowed only up to the date of the reference of the Commissioner of Labour to the medical referee—that is only up to the 4th December, 1963, and we held that in the circumstances of this case this contention was well founded.

As is stated in the medical referee's report the appellant complained of pain in the left groin following a slip on 7th November, 1963. The medical referee's examination was made on the 9th January, 1964, some seven weeks after the examinations of Dr. Gunn and Mr. Hugh. The medical referee was required to adjudicate as between the reports of these two doctors. See per Lord SANDS in *Docherty v. Ross & Marshall, Ltd.* (1931), 24 B.W.C.C. Suppl., at pp. 65 and 66:

"I agree with your Lordship in the chair. In such a case as the present the medical referee has two medical reports disclosing a difference of opinion between the medical men. It is his duty to adjudicate as between these two reports. Obviously there must be some delay—it may be a day or two, it may be a week or two—and it would be intolerable if, in the general case, the referee's report was not to be conclusive as to which medical man was right when the difference of opinion emerged. If the delay is appreciable and the workmen believes that there has been a marked change in his condition since the doctors examined him so that the issue has shifted, it is his duty to call the medical referee's attention to the fact, and, if there were grounds for it, I have no doubt but that the medical referee would take notice of it in his report."

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The delay in this case between the medical reports and the medical referee's examination was considerable and the appellant did not call the medical referee's attention to any change in her condition since the date of her examination by Mr. Hugh, although the disability had come to an end some time before the medical referee's examination.

Gildea v. National Coal Board (1948), B.W.C.C, Vol. XL1, Quarterly Advance Sheets 100, cited by counsel for the appellant, is a case where a workman who had been injured in 1937 was certified by a medical referee in 1940 to be fit for his ordinary work. The payment of compensation thereafter ceased. Some time later, there was no evidence to show when, the worker became unfit for his pre-accident work and in April 1948 the workman claimed compensation on the basis of total incapacity from 1940. Conflicting medical testimony was given before the county court judge who referred the matter to another medical referee who reported that the workmen was suffering from certain disabilities as a result of the injury received in 1937 and that the condition was permanent and incapacitated the workman for his pre-accident work as a coal-miner. The county court judge made an award as from September 1940 on the basis of total incapacity. On appeal, it was held by the Court of Appeal that the certificate of 1940 was conclusive as to the condition of the workman only at the date when it was given and was to the effect that he was fit for ordinary work and that the certificate of 1948 was not in conflict with that of 1940 as it dealt with the condition of the man at the time the report was made. There being no evidence to show when the condition supervened the award of compensation was varied by the Court of Appeal by making the weekly award commence at the date of the hearing of the claim which was earlier than the date of reference to the medical referee. The court had made the reference after hearing conflicting medical testimony.

The Court of Appeal in *Gildea's* case in holding that the certificate of 1940 was conclusive as to the condition of the man only at the date when it was given was relating the certificate to the question of the supervening condition of the workman subsequent to the date of that certificate. The Court of Appeal did not have to consider and did not purport to deal with the condition of the workman between the date of the injury in 1937 and the date of the medical referee's certificate of 1940 and we held that there was nothing in the judgments delivered in *Gildea's* case which could be used in support of the contention of counsel for the appellant that the award of compensation should cease on the date of examination by the medical referee Mr. Stracey. In the instant case the incapacity of the workman ceased at some time *prior* to the medical referee's examination and the appellant did not bring to the medical referee's attention the date at which it had ceased. In these circumstances we considered that the date at which compensation should cease to be payable should be the date of reference to the medical referee and not the date of examination by the medical referee.

For these reasons we allowed the appeal

Appeal allowed.

[Supreme Court—In Chambers (Persaud, J.) May 8, 15, 1965]

Income tax—Deduction for wear and tear—Padi harvester owned for only part of year of income—Whether owner eligible for full annual deduction—Income Tax Ordinance, Cap. 299, s. 13(1) (a)—Income Tax (Depreciation Rates) Regulations, 1955 (No. 24), reg. 2(1).

For the purpose of ascertaining the chargeable income of a taxpayer s. 13(1) (a) of the Income Tax Ordinance, Cap. 299, permits deductions to be made for "wear and tear arising out of the use or employment of.....plant, machinery or equipment in production of the income." Regulation 2(1) of the Income Tax (Depreciation Rates) Regulations, 1955, provides for an annual depreciation rate of 20 *per centum* on cost in respect of padi harvesters.

The appellant acquired a padi harvester on 1st September, 1962, and was granted by the Commissioner the appropriate part of the annual allowance attributable to the remaining four months of that year. The appellant however contended that he was entitled to the full allowance.

Held: (i) wear and tear must be referable to use and employment, and did not bear any direct reference to the period of time for which the machinery was in the possession of the taxpayer;

(ii) so far as the amount to be allowed as wear and tear was concerned, this was a question of fact and would be as the Commissioner might think just and reasonable.

Appeal dismissed.

J. N. Singh for the appellant

David Singh, Senior Legal Adviser, for the respondent.

PERSAUD, J: In 1963 the appellant submitted to the respondent his income tax return in which he declared an income of \$2,974.06 in respect of year 1962. His return disclosed no income exigible to tax, while he claimed the prescribed allowances in respect of five children including a son called Surujballie who was born on June 22, 1941, and who left the country for India in June 1962.

As a result of certain correspondence which flowed between the parties subsequent to the receipt by the respondent of the return the Commissioner computed the appellant's income at the sum of \$12,891.23 on which income tax was assessed at \$1,820.40. As a result of certain representations made by the appellant, the Commissioner made certain adjustments with the consequence that the appellant was allowed a further deduction of the sum of \$2,289, thus reducing the tax payable by him to \$948.60. The Commissioner did not entertain the appellant's claim for the reduction of his income by \$1,500 being the cost paid in respect of his son Surujballie's passage to India, nor did he allow 20% of the cost of a padi harvester for wear and tear as is fixed by the Income Tax (Depredation Rates) Regulations, 1955 (No. 24).

In this appeal, the appellant submits—

- (a) that the sum of \$1,500 should not have been added to his income in ascertaining his net worth as this amount was not paid by him but by his son Surujballie;

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- (b) that he should have been given the benefit of 20% of the cost of the padi harvester for wear and tear; and
- (c) that he should have been allowed the sum of \$800 paid (or payable) as interest to the B. G. Credit Corporation on a loan with which he purchased the harvester. This deduction was not claimed before the Commissioner, but was raised on appeal.

As has already been stated, the appellant claimed the prescribed allowance in respect of his son Surujballie in his income tax return, this son being at the time one of five of the taxpayer's unmarried children. This claim was disallowed on the ground that Surujballie was not attending any educational establishment on January 1, 1962. When requested to supply particulars concerning the payment of the son's passage to India, and the son's employment in British Guiana, the appellant replied that the son had paid his own passage, and that his employment was the son's personal business.

In my view by claiming the prescribed allowance in respect of this son, the appellant was saying that the son was dependant on him; he could not give the particulars of employment because the son was not in employment. If this is so, then it is only reasonable for the Commissioner to believe that the appellant paid his son's passage to India. In these circumstances, I hold that the appellant is not entitled to the relief he claims in respect of the sum of \$1,500.

The appellant's next contention is that notwithstanding the fact that a combine machine was operated for only a part of the relevant year, the full 20% of the cost should be allowed as wear and tear in accordance with the Income Tax (Depreciation Rates) Regulations, 1955 (No. 24). In his statement of the material facts the Commissioner had said this —

"The appellant stated that he received the combine on 1st September, 1962, and he was granted the appropriate part of the annual allowance attributable to the four month period."

The sum allowed under this head is \$1,676, the purchase price of the combine machine being given as \$25,146.65. Counsel for the Commissioner has intimated to this court that he is prepared to concede an allowance of 10% of the cost price as fair measure for wear and tear. All of this is on the basis that the machine was not used for the whole of 1962, the very nature of padi cultivation and reaping being responsible for this state of affairs.

Section 13(1) (a) of the Income Tax Ordinance, Cap. 299, provides as follows:

"In ascertaining the chargeable income of any person who carries on or exercises any trade, business, profession or vocation there may be allowed as a deduction such sum as the Commissioner may think just and reasonable as representing the amount by which the value of any plant, machinery or equipment

owned by him has been diminished by reason of wear and tear arising out of the use or employment of such plant, machinery or equipment in production of the income."

And reg. 2(1) of the Income Tax (Depreciation Rates) Regulations, 1955 (No. 24), provides:

"Annual allowances under subsection (1) of section 11" (this should read section 13) "of the Income Tax Ordinance, for depreciation by wear and tear of plant, machinery or equipment of average type used under normal condition.....shall be calculated,..... on the written-down value for income tax purposes, at the respective rates set out in the Schedule to these Regulations."

The rate fixed for harvesters, ploughs and tractors is 20 *per centum* on cost.

It is readily seen that the regulation speaks of depreciation by wear and tear, and the Ordinance uses the words "by reason of wear and tear, arising out of the use or employment . . ." In my view the language used is explicit; wear and tear must be referable to use and employment, and does not bear any direct reference to the period of time for which the machinery was in the possession of the taxpayer. In *Corentyne Sugar Co. Ltd. v. Com. of Income Tax*, 1941 L.R.B.G. 51, the Full Court of Appeal had to consider the interpretation of the word "property" appearing in s. 11 (now repealed and re-enacted) of the Income Tax Ordinance, and said (at p. 65 *ibid*):

"In the opinion of this Court 'property' means property capable of being physically exhausted by user in the trade of the claimant.

Analysing the section the appellants must show —

- (a) that the property is physical property;
- (b) that the property is exhausted;
- (c) that the property is owned by them;
- (d) that exhaustion was caused by the use or employment in their trade and that exhaustion occurred during the year immediately preceding the year of assessment."

The fact that the wording of s. 13 now differs from that of s. 11 makes no difference in my view to the concept that the exhaustion of wear and tear must result from *use or employment*.

So far as the amount to be allowed as wear and tear is concerned, this is a question of fact and will be as the Commissioner may think just and reasonable. I am not persuaded that the Commissioner based his decision on any wrong principle. (See *Peninsular & Oriental Steam Navigation Co., Ltd. v. Leslie*, 4 Tax Cas. 177, C. A; and *British India Steam Navigation Co. Ltd. v. Leslie*, 4 Tax Cas. 257, D.C.) The appellant's contention is therefore untenable; but in view of the respondent's concession, the percentage allowable in this case will be 10% on the cost of the machine.

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The submission that the appellant should be allowed the sum of \$800 which is interest due to the Credit Corporation in respect of a loan with which the machine was bought was raised for the first time in this court. It is not clear from the record of appeal nor from the arguments whether that amount was actually paid or was still owing at the end of 1962. I feel that the appellant should now make any claim he is advised with respect to this amount.

The result is that the appeal will be dismissed. But in view of the concession of the respondent, and in view of the fresh claim raised by the appellant, this assessment is referred to the Commissioner with directions to allow the appellant 10% on the cost of the harvester as wear and tear, and to consider the claim now raised.

Each party will bear his own costs.

Appeal dismissed.

CRITCHLOW v. NATIONAL UNION OF PUBLIC SERVICE
EMPLOYEES AND OTHERS

[Supreme Court (Cummings, J.) May 1, 13, 18, 22, 24, 1965]

Statutory body—Trade union—Motion extending term of office of office holders—No rules permitting this—Rules require new office holders to be elected at end of term of office of current office holders—Meeting, improperly summoned and constituted—Motion passed by show of hands instead of by ballot as required by rules—Validity of motion—Competence of member to sue—Trades Union Ordinance, Cap. 113.

Under its rules the supreme authority of the defendant union vested in a biennial convention of delegates elected by the various sections of the union. Between meetings of the convention the authority of the union vested in a national executive council the members of which were elected every two years by ballot of delegates at the national convention. Rule 34(iii) provided that the rules might be amended only by resolution carried by a two-thirds majority of delegates present at the biennial national convention or special national convention of delegates. The second, third and fourth-named defendants were members of the union, and were also the president general, general secretary and treasurer respectively of the union. At a meeting of a biennial national convention of delegates purportedly summoned by the national executive committee a resolution was passed by a show of hands extending the normal period of office of the existing members of the council, raising membership dues and creating a new section of the union. The members of the convention had not been elected delegates by the various sections of the union and the motion did not have the support of two-thirds of those present. In an application by the plaintiff a member of the union, for an interlocutory injunction restraining the second, third and fourth-named defendants from acting in the offices of president general, general secretary and treasurer respectively and spending or interfering with funds of the union, it was contended for the defendants that all the proceedings at the meeting concerned the internal management of the union and were mere irregularities which could be regularised by a majority vote at a general meeting of the union and that in consequence the court would not interfere unless the action was brought by the union itself.

Held: (i) the proceedings were not merely irregular, for the resolutions were in effect an alteration of the rules in a manner contravening the rules and were in consequence *ultra vires* the union.

(ii) the plaintiff was therefore competent to sue.

Application granted.

Ashton Chase for the plaintiff.

John Carter, Q.C., with *D.O. Boston* for the defendants.

CUMMINGS, J.: This is an application by the plaintiff in this action for an interlocutory injunction restraining the numbers 2, 3 and 4 defendants from—

- (a) acting in the offices of President General, General Secretary and Treasurer, respectively, of the number 1 defendant, the National Union of Public Service Employees;
- (b) spending or interfering with the funds of the number 1 defendant; and
- (c) the number 1 defendant Union, their servants and/or agents from treating with or recognising the numbers 2, 3 and 4 defendants as the President General, General Secretary and Treasurer, respectively, of the aforesaid union.

The numbers 2, 3 and 4 defendants were at all times material to this application member of the number 1 defendant, the National Union of Public Service Employees, which is a trade union registered, No. 124, under the provisions of the Trades Union Ordinance, Cap. 113. The defendants contend, *inter alia*, that the plaintiff is an unfinancial member of the defendant union, has forfeited all claims, benefits and privileges as a member of the said union, and consequently his claim in the manner and form sued herein is not maintainable. I shall immediately examine this contention.

The rules of the union provide as follows:

"RULE 2 — OBJECTS

The objects of the union shall be as follows:—

- (i) To secure:
 - (a) The complete organisation into the Union of all public service employees:
Employees of any provincial or municipal Government or local authority or any subdivision thereof. Employees of any public board commission established by or related to the municipal authority.
Employees of any public board, commission or authority of a provincial Government. Employees of any social or welfare agencies established to serve a community regardless of the sponsorship.

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Employees of any public utility under the supervision of a governmental body or agency, also all workers under any ministry undertaking public works *e.g.*, Ministry of Works and Hydraulics, Labour, Health and Housing, Georgetown Municipality and Sewage and Water Commissioners.

RULE 3 — MEMBERSHIP

- (i) The Union shall be open to all categories of workers of either sex referred to in (1) of Rule 2.
- (ii) Fees for membership in the Union shall be such amount as the Biennial Convention of Delegates may from time to time deem expedient and shall be distributed in such funds as may seem expedient to the Biennial Convention of Delegates.
- (iii) All members shall purchase their membership cards and rule books at such prices as may from time to time be fixed by the NEC.
- (iv) Each candidate being accepted to membership shall not be less than 15 years of age and shall pledge obedience to the rules of the Union at present in force or as may hereinafter be amended or repealed and shall give such information relative to his age, his date of birth and his dependents that may be necessary for the administration of any of the benefits herein listed.
- (v) Every member will be entitled to all rights and privileges of membership after being financial for a period of twelve consecutive months preceding the claims, provided that members under the age of twenty-one shall not have the right to vote.
- (viii) Any member twelve weeks in arrears of contribution (3 months) shall forfeit all claims to benefits and privileges and shall be deemed as unfinancial member, save and except such member as is dealt with under (via) above.
- (ix) Any member whose membership may have been forfeited may upon application and full payment of all arrears retain his membership at the discretion of the NEC but will not be eligible for all rights and privileges during that period.
- (x) All workers desirous of becoming members of the Union shall sign the check-off form and pay the entrance fee."

The evidence established that there was in existence a collective agreement executed by the municipality and the No. 2 section of the union which provided, *inter alia*, for the deduction from employees' wages and payment over by the municipality to the union of union dues of the employees. Until litigation commenced this was done monthly by one cheque for all employees' dues issued by the municipality to

the secretary of the No. 2 section of the union. As soon, therefore, as a person signed the "cheque-off" form, paid his entrance fee and was admitted to membership, he had no further obligation as regards payment of his union dues.

I am quite satisfied from the evidence adduced by the plaintiff that he was duly admitted to membership, signed the "check-off" form and that necessary deductions and, up to the time litigation commenced, payments over to the union were made by the municipality. Although the deduction for the current month has been made, that has not yet been paid over to the union.

Rule 16 provides:

"RULE 16 — SECTIONS

In these Rules the word "Sectional" Union refers to a Section of the Union based on a group or groups of workers as determined by the NEC. Nothing in these Rules shall imply that a Sectional Union is separate and apart from the Union as a whole, but is referred to as such for administrative purposes only."

Whatever, therefore, might have been the arrangement for the separate operations of each section of the Union having regard to its relationship with the employer of the employees falling within its particular category; it never acted as a separate entity. In the circumstances, it seems to me quite clear that the plaintiff is a member of the defendant union. The plaintiff has never resigned, never been suspended, and paid his subscription according to the rules. I find that he is a financial member of the union, and as such is entitled to all the rights and privileges thereof. He is therefore competent to bring this action.

The union is made up of groups of workers as determined by the national executive committee, which groups are referred to as "sectional unions." The sectional unions are not separate and apart from the union as a whole, but are so referred to for administrative purposes only. At all times relative to this action the union was comprised of two sectional unions referred to as the No. 1 sectional union and the No. 2 sectional union. The rules provide as follows:

"RULE 4 — ORGANISATION & MANAGEMENT

- (i) The supreme authority of the Union shall be vested in the Biennial Convention of Delegates elected by the various sectional Unions at their Biennial Delegates Conference and, subject to that authority, the Union shall be governed by the NEC.
- (ii) The Union through the NEC shall establish Sectional Unions, and in consultation with the Executive Council of the Sectional Unions, establish Branch and District Committees.

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- (iii) The organisational units of the Union shall be:
 - (a) The Biennial National Convention of Delegates.
 - (b) The NEC.
 - (c) The Sectional Union's Biennial Delegates Conference.
 - (d) The Sectional Union's Executive Council.
 - (e) The Branch of the Sectional Union managed by Branch Committee, also District Committees.

RULE 5 — BIENNIAL NATIONAL CONVENTION OF DELEGATES.

The Biennial Convention of Delegates shall be held every two years and within the period 25th March to 30th April and each convention shall, subject to existing expediencies, decide the meeting place of the next one. The NEC shall cause to be sent to each Branch, through the Executive Council of Sectional Unions, not later than four weeks prior to the date of a Biennial National Convention of Delegates, the time and place at which such Convention shall be convened, and all papers and credentials relative to the said Convention. Each Sectional Union shall be entitled to 50 delegates to be elected at their Biennial Delegates Conference preceding this Convention.

RULE 6 — BUSINESS OF THE BIENNIAL NATIONAL CONVENTION OF DELEGATES.

- (i) The business of the National Convention of Delegates shall be to receive reports of the NEC, review the past work of the Union, plan future task and consider all matters upon the Conference agenda.
- (ii) The National Convention of Delegates shall have the power to rescind, alter or add to these rules in accordance with Rule 7.

RULE 7 — AGENDA OF BIENNIAL NATIONAL CONVENTION OF DELEGATES.

- (i) Resolution for discussion at the Biennial National Convention of Delegates and motions for the amendment of the Rules, mergers and/or amalgamation with other unions, shall be sent by the Sectional Union, after discussion at their Biennial Delegates Conference to the NEC not later than twelve weeks before the opening of the Biennial National Convention of Delegates.
- (ii) The General Secretary of the NEC, at the direction of the NEC, shall prepare the agenda of the Biennial National Convention of Delegates including the re-arrangements of resolution and motions for the amendment of the Rules and otherwise and shall forward it to the Branches through their respective SEC's not later than four weeks prior to the Biennial National Convention of Delegates.

RULE 9 — NATIONAL EXECUTIVE COUNCIL

- (i) The National Executive Council (to be referred to as the NEC) shall comprise the following—:
 - (a) *Officers:* President General, 1st Vice President, 2nd Vice President, 3rd Vice President, General Secretary, Principal Assistant Secretary, Assistant General Secretary, Treasurer Assistant Treasurer, Education Secretary, Industrial Relations Officer, and Research Officer.
 - (b) *Committee Members:* Each Sectional Union shall be eligible to elect 8 Committee members to represent them on the NEC and they shall be elected at the Biennial Delegates Conference of the respective Sectional Unions.
- (ii) The NEC shall be the supreme authority between two National Conventions of Delegates and shall interpret the Rules where they are silent and shall have the power to decide and act in the name of the Union.
- (iii) No member shall be entitled to hold a post of an officer of the NEC unless he or she has served on a SEC for a continuous period of two years.
- (iv) The NEC shall meet not less than once a month, and three-eighths of the members shall form a quorum.
- (v) In the event of the death, resignation or dismissal of a member of the NEC other than an officer, the candidate who secured the next highest number of votes in the Sectional ballot at the last elections preceding the Biennial National Convention of Delegates shall fill the vacancy. If there is no such candidate, the vacancy shall be filled by the SEC.
- (vi) Any officer of a section branch or district committee elected to the post of an officer of the NEC shall within two months relinquish the post he held on section, branch or district committee.
- (vii) In the event of death, resignation or dismissal of an officer of the NEC, during the period between two Conventions of Delegates the NEC shall fill the vacancy temporarily.
- (viii) If an officer or member of the NEC absents himself from three consecutive meetings without reasonable excuses his seat shall be declared vacant and shall be filled by the NEC.

RULE 10 — NOMINATIONS AND ELECTIONS (NEC)

- (i) A member, to be eligible for membership of the NEC, must be a financial member of the Union for a period of not less than two consecutive years, and must have either

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served on the executive of a section, branch or district committee or have had training in trade unionism to the satisfaction of the NEC.

- (ii) The election of officers for the NEC must be by ballot of delegates at the Biennial National Convention of delegates.
- (iii) The election of committee members shall be as provided for in Rule 9(i) (b).

RULE 11 — OFFICERS (NEC)

- (i) *President General*
 - (a) The President General shall be elected at the Biennial National Convention of Delegates and shall serve for a period of two years. He shall be eligible for re-election.
- (iii) *General Secretary*
 - (a) He shall be elected at the Biennial National Convention of Delegates and shall serve for a period of two years. He shall be eligible for re-election.
- (vi) *Treasurer*
 - (a) The Treasurer shall be elected at the Biennial National Convention of Delegates and shall hold office for a period of two years. He shall be eligible for re-election.

RULE 34 — AMENDMENT OF RULES

- (i) These rules may be amended at any Biennial or Special National Convention of Delegates by resolution from the NEC or the Biennial Delegates Conference of a sectional union, and in conformity with Rule 7.
- (ii) No individual member shall have the right to propose an amendment to the rules, except through their respective bodies.
- (iii) *These Rules may be amended only by resolution carried by a two-thirds majority of delegates present at the Biennial National Convention or Special National Convention of Delegates.*
- (iv) The NEC or General Secretary, acting on their authority, shall have the power to alter or change the wording of any rule submitted for registration as might be required by the Registrar of Trade Unions provided however that such change or alteration does not alter or change the original purpose and/or intention of the rule."

The plaintiff alleges that the national executive committee of the defendant union purported to convene the biennial national con-

vention of delegates on the 24th and 25th April, 1965, and purported to pass resolutions—

- (a) that the officers present at that Convention should remain in office for the two years next ensuing. The motion was passed by a show of hands—24 for, 7 against and 9 abstentions;
- (b) that membership dues be raised; and
- (c) that a new sectional union be created.

He contends that the effect of the first resolution was to make the number 2 defendant president general, the number 3 defendant general secretary, and the number 4 defendant treasurer, respectively, of the defendant union for the period 1965-1967, and as such place them in control and/or 'in a position to materially influence the operations of the defendant union: in particular the management of its financial affairs. In consequence of this, the numbers 2, 3 and 4 defendants have spent large sums of money without authority as provided for in the rules. All this, the plaintiff urges is in contravention of the rules and *ultra vires* of the union.

Although in their affidavit they deny that the resolutions mentioned and referred to above were passed at the purported biennial conference of delegates or at all, they nevertheless admit that neither section sent delegates to that meeting as required by the rules, and state in their affidavit in opposition filed herein that —

"The Convention of Delegates unanimously agreed and approved the motion which arose out of the discussion under item 4 of the agenda—'Nominations for the post of officers to N.E.C.'—*that the life of the National Executive Council be extended for a period of one year to enable the sections of the Union to hold their conferences in October, November 1965 as contemplated by the rules and that the Biennial Convention of Delegates be adjourned and convened on 25th and 26th April, 1966, at Solidarity House, La Penitence'.*"

The effect of this is the same as that of the alleged resolution (a) above—that is, an extension of the period of office of the executive council and of the numbers 2, 3 and 4 defendants as president general, secretary and treasurer, respectively, in contravention of the rules of the union.

It is common ground that—

- (a) No delegates from the number 2 sectional union attended the purported convention of delegates. No delegates were elected by the number 1 sectional union at their biennial delegates conference to attend the purported biennial national convention of delegates held on the 24th and 25th April, 1965, and none attended in that capacity.

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- (b) No sectional elections were ever held for the officers of the national executive council. No nominations for such officers were made by either of the said sectional unions.
- (c) No complete list or any list at all of nominations was circulated by the general secretary six weeks or at any time before the purported national convention of delegates.
- (d) Voting was by show of hands and not by ballot as provided in the rules.

The defendants deny some of the acts complained of but urged that all the proceedings at that meeting touched and concerned the internal management of the union and were mere irregularities which could be regularised by a majority vote at a general meeting of the union. They contend that in the circumstances the Court, acting upon the rule in *Foss v. Harbottle*, (1843), Hare 461, will not interfere unless the actions were brought by the union itself. But were these mere irregularities? The resolutions were not by ballot, and were in effect an alteration of the rules in a manner contravening the rules. The rules provide for alteration by a special majority. Consequently the purported alteration is *ultra vires* of the union.

A member of the union has a right to be elected to the national executive council at the biennial conference of delegates, and if the union at a meeting other than a biennial conference of delegates elects office-bearers from persons not nominated as delegates from their respective sections, then that is an infringement of the rights of individual members. They have a right to say that the affairs of the union must be conducted by the people who are described or named in their contract with the union—the rules of the union constituting the contract between the union and its members. This group of people purported to elect people other than the people provided for in this contract. For that and many other reasons there was an invasion of the rights of the individual members, and it is tinctured with oppression.

In *Cotter v. National Union of Seamen*, [1929] All.E.R. Rep. 342, Lord HANWORTH, M.R., in the course of his judgment in the Court of Appeal said at p. 350:

"By a sequence of authority it has been held that a registered trade union is a legal entity; if it is a legal entity, with its own code whereby it is governed, any mistake or irregularities by the imperfect carrying out of, or imperfect attention to those rules can be corrected and if so, then the principles of *Foss v. Harbottle* applies."

The rule, however, does not apply in the following circumstances:

- (1) when the act complained of is *ultra vires* the association;
- (2) where the act complained of is one that can only be validly done by some special majority;

- (3) when the act complained of is an invasion of the rights of individual members as opposed to a wrong done to the association.
- (4) when what has been done amounts to fraud on a minority of members of the association.

In *Edwards v. Halliwell*, [1950] 2 All. E.R. 1064 JENKINS, L.J., at p. 1067 says this:

"There is a further exception which seems to me to touch this case directly. That is the exception noted by ROMER, J., in *Cotter v. National Union of Seamen*. He pointed out that the rule did not prevent an individual member from suing if the matter in respect of which he was suing was one which could validly be done or sanctioned, not by a simple majority for the members of the company or association, but only by some special majority, as, for instance, in the case of a limited company under the Companies Act, a special resolution duly passed as such As ROMER, J., pointed out, the reason for that exception is clear, because otherwise, if the rule were applied in its full rigour, a company which, by its directors, had broken its own regulations by doing something without a special resolution which could only be done validly by a special resolution could assert that it alone was the proper plaintiff in any consequent action and the effect would be to allow a company acting in breach of its articles to do *de facto* by ordinary resolution that which according to its own regulations could only be done by special resolution. That exception exactly fits the present case inasmuch as here the act complained of is something which could only have been validly done, not by a simple authority, but by a two-thirds majority obtained on a ballot vote. In my judgment, therefore, the reliance on the rule in *Foss v. Harbottle* in the present case may be regarded as misconceived on that ground alone.

I would go further. In my judgment, this is a case of a kind which is not even within the general ambit of the rule. It is not a case where what is complained of is a wrong done to the union, a matter in respect of which the cause of action would primarily and properly belong to the union. It is a case which certain members of a trade union complain that the union, acting through the delegate meeting and the executive council in breach of the rules by which the union and every member of the union are bound, has invaded the individual rights of the complainant members, who are entitled to maintain themselves in full membership with all the rights and privileges appertaining to that status so long as they pay contributions in accordance with the tables of contributions as they stood before the purported alterations of 1943, unless and until the scale of contributions is validly altered by the prescribed majority obtained on a ballot vote. Those rights, these members claim, have been invaded. The gist of the case is that the personal and individual rights of membership of each of them have been invaded by a

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purported, but invalid, alteration of the tables of contributions. In those circumstances, it seems to me the rule in *Foss v. Harbottle* has no application at all, for the individual members who are suing sue, not in the right of the union, but in their own right to protect from invasion their own individual right as members."

In 38 HALSBURY'S LAWS OF ENGLAND (3rd Edition), at p. 354, the learned editor states the position with regards to alterations of rules thus:

"Rules capable of amendment must be adhered to until amended; but, if a rule is duly amended in accordance with the rules regulating amendments, the amendment is binding upon a member even though he was one of the dissentient minority or was mentally disordered at the time of the amendment."

In the case of the *Imperial Hydropathic Hotel Company, Blackpool v. Hampson*, [1882] 23 Ch.D. 1, the head-note reads as follows:

"A joint stock company whose directors are appointed for a definite period has no inherent power to remove them before the expiration of that period.

If the articles of association of a company contain no power to remove directors before the expiration of their period of office, but authorise the shareholders by special resolution to alter any of the articles, there must be a separate special resolution altering the articles so as to give power to remove the directors before a resolution can be passed to remove any of them.

Certain shareholders, who were appointed directors by a general meeting in the place of the existing directors, brought an action in the name of the company against the existing directors to restrain them from acting. The court held that the new directors were not duly appointed, and refused the relief prayed with costs; but inasmuch as the plaintiffs substantially represented the wishes of the majority of the shareholders, although technically they had no right to use the name of the company the court allowed the costs to be paid out of the company's assets."

COTTON, L.J., at p. 11 of the report said:

"In this case, in my opinion, it is not necessary to express any opinion whether a corporation has any inherent power to remove directors when there is nothing like, as there is in the present case, a contract between all the members of the corporation as to the appointment and duration of the office of the directors. In the present case there is not only the charter of incorporation, and the memorandum, but there are the articles of association, which under the Act are a contract between all the shareholders to comply with the regulations in them, and

we find in the articles provisions as to the appointment of directors, and the rotation of directors, that they are to go out at a certain period; that in my opinion is a contract that those who may be duly appointed by the shareholders to be directors shall continue in the office till under the rotation they are to go out, or until they are to go out under the other provisions of those articles as to disqualification or otherwise. Therefore it becomes not a question, though raised so here, as regards the right of the directors, but it is a question of the right of the shareholders *inter se* to pass any such resolution as has been attempted to be passed in this case. If, as I think there is, there is a contract between all the shareholders as regards the directors, then it is a question whether a majority at a general meeting can bind those who are not there, and take no part in it —whether this is one of the matters as regards which the majority at the meeting has power to bind the absent and has power to bind those who are found, on the investigation being made, to dissent. It is the right of the shareholders not acquiescing in the removal of the directors which is in question, because on that depends whether the resolution to remove them is or is not a valid resolution; and therefore, we have really to consider whether in the present case the contract between these shareholders has been followed."

He goes on to find that it has not been.

"It is in no way altering the regulations. The alteration of the regulations would be by introducing a provision, not that some particular director be discharged from being a director, but that directors be capable of being removed by the vote of a general meeting. It is a very difficult thing to pass a general rule applicable to every one who comes within it, and to pass a resolution against a particular individual, which would be a *privilegium* and not a law. Now here there was no attempt to pass any resolution at this meeting which would affect any director, except those who are aimed at by the resolution."

* * * * *

"No alteration of the regulations was to bind the company to those regulations as altered; and assuming, as I do for the present purpose, as the second meeting seems to have been regular according to the notice, that everything was regularly done, what was done cannot be treated in my opinion as an alteration first of the regulations, and then under that altered regulation as a removal of the directors. But it would be evidently most unreasonable to say that in such a case all these shareholders are not to have notice that this is an alteration in the regulations, but are simply to be told the object is to remove those whose policy is objected to. The case referred to, *Alison's Case*, was entirely different. The principle laid down in that case was confined by the judges who decided it to cases where the resolution is one that necessarily involves the alteration of the constitution and regulations of the company. In that case under the articles there was power given by the Act of Parliament to add to the capital, and when there was a resolution that the directors should issue addi-

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tional capital for a particular purpose that necessarily involved the alteration of the memorandum by providing that the capital should be its original capital plus this new capital. That is entirely different from such a case as the present, where there is not a general alteration of the regulations of the company, but simply an attempt, without altering the rules for the purpose, to remove a director, his removal being, unless there is a general alteration, an illegal act on the part of those who attempt to remove him—by illegal I mean an act *ultra vires* and not supported by any regulation of the company. Therefore, I think that the appeal ought to be dismissed with costs."

In the present case we are concerned not with *ad hoc* removal but with *ad hoc* perpetuation in office in violation of the rules. The same principle applies.

In *Howden v. Yorkshire Miners' Association*, [1903] 1 K.B. 308. at p. 328, VAUGHAN-WILLIAMS, L.J., applying the principles in the last cited case to a Trade Union, said:

"But then it was said that the plaintiff was not the proper plaintiff in such an action; that, if he was bringing the action to enforce his own individual rights, then the case came within the prohibition of s. 4; but, if he was bringing it on behalf of the members of the association to maintain the status quo, and to safeguard the constitution of the association as defined by the rules, then the trustees were the proper persons to bring the action by virtue of s. 9 of the Act. *The answer appears to me that, assuming that in general it be so, an individual member may nevertheless bring such an action, where it is plain that the trustees will not do so; and that it cannot be that there is no remedy in such a case.* The case seems to me to come within the principle of those cases in which an individual member of a joint stock company incorporated under the Companies Acts has been allowed to sue in his own name to prevent something being done which is *ultra vires* on the part of the company, or where the majority of the members are proposing to do something in contravention of the rights of a minority. I am satisfied for the reasons given that the object of the action is not directly to enforce any benefit for the plaintiff individually; and it appears to me impossible under these circumstances to suppose that, merely because the trustees do not choose, or have put themselves in a position in which it is not practicable for them, to bring any action to prevent the proposed misapplication of the funds, the members of the association, or some of them, may entirely alter the objects and character of the association, and then say to the individual member who asks for an injunction to restrain them from misapplying the funds, that he has no right to bring the action, and that, inasmuch as only the trustees can do so, he has no remedy. The principle upon which Courts of Equity have proceeded in the cases to which I have alluded seems to me to be that where a wrong of this kind is being committed, there must be some remedy; and therefore they have allowed a member or

members of a company or association to sue as individuals, where the society is acting or proposing to act *ultra vires*, or where a majority is acting towards a minority in a manner contrary to natural justice."

In the circumstances I consider that it is just and convenient that I should make the order prayed and hereby do so on the usual terms and conditions.

The union will pay the taxed costs of the plaintiff certified fit for counsel.

Application granted

Solicitors: *Dabi Dial* (for the plaintiff); *H. A. Bruton* (for the defendants).

BOOKERS DEMERARA SUGAR ESTATES LTD. v.
BHANMATTIE AND OTHERS

[In the Full Court, on appeal from the magistrate's court for the Berbice Judicial District (Luckhoo, C.J., and Van Sertima, J. (ag.)) March 5, June 4, 1965].

Workmen's compensation—Cane cutter killed by lightning while at work—Place of death specially exposed to lightning—Whether accident arising out of and in the course of employment—Workmen's Compensation Ordinance, Cap. 111.

R. was employed by the appellants as a cane cutter on their sugar estate. While at work and wheeling his bicycle near to a tree on a dam on the estate he was struck down by lightning and killed. Expert evidence was given to the effect that although all rural workers were in danger of being struck by lightning, R. was in greater danger because of his peculiar position in relation to the trees and to the wheeling of his bicycle. On appeal by the employer from the decision of the magistrate awarding compensation to R's dependants,

Held: R's death was occasioned by accident which occurred by reason of his employment bringing about his presence at a particular spot which was specially exposed to the danger of lightning, and he therefore died as a result of accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Ordinance, Cap. 111.

Appeal dismissed.

H. H. Hanoman for the appellants.

S. Mohabir for the respondents.

Judgment of the Court: The question for determination in this appeal is whether the deceased workman Ramdat, who was employed by the appellants as a cane-cutter at their sugar estate at Plantation Rose Hall, Canje, Berbice, died as a result of accident arising out of and in the course of his employment.

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The facts are not in dispute. On the 6th December, 1960, Ramdat was working aback at Plantation Rose Hall cutting cane. It was cloudy and there were small flashes of lightning and claps of thunder. Ramdat was seen to speak with the driver and then wheel away his bicycle along a dam. There were punts on a canal which runs alongside the dam and there was a tree some 16 to 18 feet long lying across the dam. As Ramdat was wheeling his bicycle along the dam he was struck down by lightning and died as a result of electrocution. Reginald Napper, Town Engineer of New Amsterdam, who is in charge of the electricity station and the water works of that town and is a graduate of the American School of Electricity graduating with the Master of Science degree, testified to the following effect. If there is lightning in the locality anyone runs the possibility of being struck and if a person is wheeling a bicycle there is a greater possibility of his being struck by lightning than if he were riding the bicycle. A person who is near a tree is in greater danger of being struck by lightning. Napper who heard the evidence (of the witness Barran) of the circumstances under which Ramdat was struck by lightning gave his opinion that although all rural workers are in danger of being struck by lightning Ramdat was in greater danger because of his peculiar position in relation to the tree and to the wheeling of his bicycle.

"A workman who by the conditions or obligations of his employment has to work in a particular place is subject to the risks attending his presence there, and any accident occurring to him through having to occupy that position and place, while legitimately working there, will be one arising out of his employment." [See WILLIS'S WORKMEN'S COMPENSATION (33rd Edition) at p. 103]. In respect of death or injury from forces of nature the principles to be applied are summed up by SANKEY, J., in *Laurence v. Matthews*, [1929] 1 K.B. 1, 21 B.W.C.C 345 (Digest Suppl.) as follows:

"Where death or personal injury results directly from the operation of natural forces, for example, lightning, the dependants of a workman must show that the workman was specially exposed to such forces. Where the death or personal injury does not directly result from natural forces, but from a cause which is induced by some natural force, for example where lightning knocks down a wall or a storm blows down a tree, and the wall or the tree, as the case may be, causes personal injury at any place to the workman, he is entitled to recover if he was at the time he suffered the injury at the place during the course of his employment."

In the same case RUSSELL, C.J., said:

"If the accident occurred to the workman by reason of the employment bringing about his presence at the particular spot and so exposing him to a danger which in fact is proved to exist at the particular spot, then the accident arose out of the employment."

These principles were in fact laid down in *Thom or Simpson v. Sinclair*, [1917] A.C. 127, 10 B.W.C.C. 220, where it was held that an accident arises out of the employment if it results from some special danger with which the workman is brought into contact by the nature, conditions, obligations, or incidents of his employment.

In *Upton v. Great Central Railway*, [1924] A.C. 302, 16 B.W.C.C. 269, it was held that in considering the special danger with which the workman is brought in contact by the nature, conditions, obligations or incidents of his employment, it is not necessary that there should be direct active or physical connection between the act causing the accident and the employment, but it will suffice if the accident arises directly out of circumstances which he has had to encounter because to encounter them fell within the scope of his employment. An example of accidental injury arising out of the employment was where a man was struck by lightning while working on a scaffold. It was found that in such a position he was subjected to more than ordinary risk of being struck. *Andrew v. Failsworth Industrial Society*, [1904] 2 K.B. 32, 6 W.C.C. 11, C.A.

Applying the principles enunciated in those cases to the facts of the instant case we are of the opinion that the death of Ramdat was occasioned by accident which occurred by reason of his employment as a cane-cutter bringing about his presence on a dam in the open canefield near to a fallen tree and that he was thereby specially exposed to the danger of lightning striking him. He was wheeling his bicycle in the course of his employment after speaking with the driver when the accident occurred. In such a position Ramdat was subjected to more than ordinary risk of being struck by lightning.

We are therefore of the opinion that the decision of the learned magistrate was correct. The appeal is dismissed and the order of the learned magistrate affirmed with costs.

Appeal dismissed.

MOHABEER v. DOOBAY AND OTHERS

[British Caribbean Court of Appeal (Archer, P., Jackson and Luckhoo, J.J.A.) March 24, April 5, 1965].

Contract—Hire purchase—Acceptance of rice mill with knowledge of defective condition—Failure of mill to work properly—Whether breach of fundamental condition—Warranty to procure experts to put mill in order—Damages for breach.

Under a written agreement the appellant let on hire to the respondents a rice mill with an option to purchase, in consideration of the payment by the respondents of a down payment to be followed by a number of instalments. A previous inspection had disclosed a defect but the appellant promised to procure experts to rectify it. The appellant failed to do this and the mill did not work properly. The respondents on their part, without repudiating the agreement, made no payments due thereunder other than

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the down payment and the first instalment. The appellant then sued for the unpaid sums, while the respondents counterclaimed for damages for breach of the undertaking to repair. CRANE, J., gave judgment for the appellant on the claim and for the respondents on the counter claim. (See 1964 L.R.B.G. 376). On appeal,

Held: (i) the mill, although faulty, functioned as a mill and was not something different from the subject matter of the agreement. There was, therefore, no fundamental breach of the agreement and no total failure of consideration;

(ii) as the respondents continued under the agreement up to the time of trial they were liable for the unpaid instalments;

(iii) but the appellant was held in damages for breach of the warranty.

Appeal allowed.

[Editorial Note: Order varied on appeal to the Privy Council. See [1967] 2 A.C. 278].

G. M. Farnum for the appellant

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

ARCHER, P.: The respondents entered into a written agreement with the appellant for the hire of a rice mill with the option of purchasing for \$14,500. They paid down \$3,000 and were to have made payment for the hire by three instalments of \$2,000, \$2,000 and \$7,500 on three specific dates.

The mill was not in working order at the date of hire but the respondents took delivery with full knowledge that it was not working satisfactorily. They installed the mill on their premises and purchased an engine for propelling it, but were unable to get it to work properly. They paid the first instalment of \$2,000 but made no further payments, and shortly after the date on which the last payment should have been made, the appellant sued them for \$9,500 due for goods sold and delivered.

The respondents had earlier suggested to the appellant that he take back the mill, but he had refused to do so and they had not insisted. They pleaded the hire purchase agreement and counter-claimed for damages for breach of warranty to procure experts to put the mill in order. The amount claimed as general damages was \$9,800, but there was a claim in the alternative for the same amount as special damages made up of \$5,000 paid under the agreement, \$3,300 for purchase of the engine to propel the mill, and \$1,500, the expenses incurred in installing the mill.

The appellant amended his statement of claim to include a claim in the alternative for \$9,500 as the balance for hire due under the agreement. The respondents did not amend their defence and counterclaim. The judge found that the agreement had continued up to the date for payment of the last instalment for hire and awarded the appellant \$9,500 on the claim. He also found the breach of warranty

proved and gave \$3,500 damages on the counterclaim to cover the purchase of the engine, the price of which was in fact \$3,519.95. He disallowed the expenses of installation.

The appellant appealed against the award of damages and the respondents cross-appealed against the judgment on the claim and asked for an increase of damages on the counterclaim. They argued that the appellant's failure to procure experts to put the mill in order was a fundamental breach of the agreement resulting in forfeiture of the unpaid instalments and liability to refund the money already paid. They conceded that they could not recover the money expended in the purchase of the engine, but maintained that they were entitled to payment of the expenses of installation of the mill.

Counsel for the appellant submitted that the breach of warranty to provide experts had not been pleaded and that the evidence did not disclose any such undertaking; that judgment had been given on the basis of implied warranty, whereas the respondents could succeed only on an express warranty; that the respondents had taken possession of what they had bargained for and had throughout the proceedings treated the mill as their own property; and that the mill was not entirely useless, and no question of fundamental breach could therefore arise.

The pleadings were carelessly drawn but they did raise the issue of the particular breach of warranty. Moreover, the trial proceeded on this issue and evidence concerning it was led by the respondents without objection by the appellant. That evidence was never contradicted by the appellant for he offered no evidence. Even if, therefore, the argument could have succeeded on a point of pleading, it is now too late for the appellant to take the objection. The respondents completely misapprehended their rights under the agreement and did not appreciate the legal consequence that flowed from their conduct. They did not repudiate the agreement, and at the trial they took the stand that they had purchased the mill and had elected to keep it.

The respondents continued under the agreement up to the time of the trial and are therefore liable for the unpaid instalments. They would have been entitled to a refund of the \$5,000 they paid if there had been a fundamental breach of the agreement, but there was not a total failure of consideration. The mill, although faulty, functioned as a mill and was not something different from the subject-matter of the agreement. The appellant is liable for damages for breach of warranty. The installation of the mill and the provision of an engine are, however, the responsibility of the respondents, and they cannot recover in respect of those items. They did not claim for the cost of putting the mill in good working order, the mill they now find themselves saddled with, and the only item of damage by way of loss of custom proved—and even this was not pleaded—was the refund of \$240 to a customer for broken paddy. The amount they can recover on the counterclaim is, therefore, by reason of the uninspired plead-

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ing and conduct of their case, probably much less than the loss they have actually suffered, but the fault is entirely their own.

The appeal is allowed and judgment on the claim is affirmed with costs. There will be judgment on the counterclaim for \$240, but no order for costs of the appeal on the counterclaim.

Appeal allowed.

MOHABEER AND OTHERS v. SOOKNARAIN SINGH

[In the Full Court, on appeal from the decision of a judge in chambers (Luckhoo, C.J., Persaud, J., and Jhappan, J. (ag.)) May 20, August 20, 1965.]

Legal practitioner—Right of barrister to appear without solicitor—Action for injunction and damages—Subject matter exceeding \$500—Action commenced by plaintiffs personally—Appearance by barrister in chambers on application for interlocutory injunction—Legal Practitioners Ordinance, Cap. 30, ss. 42, 43, 44 and 45.

The appellants personally filed a writ of summons against the respondents seeking *inter alia* an injunction and damages for trespass. The writ stated that the subject matter of the claim exceeded \$500. Shortly after the writ was filed the appellants obtained an interim injunction on an undertaking given by counsel on their behalf in the usual terms. No notice had been given of the appointment of counsel to act as solicitor. On the hearing of a summons to continue the injunction it was submitted for the respondents that the undertaking given by counsel was bad on the ground that he had no *locus standi* in the matter, there being no solicitor on record. VAN SERTIMA, J., discharged the injunction holding that counsel had no authority to give the undertaking. (See 1964 L.R.B.G. 62). On appeal,

Held: by virtue of s. 44 of the Legal Practitioners Ordinance, Cap. 30, a barrister may appear in chambers uninstructed by solicitor, but when he does so he is acting as a solicitor and must be on the record as such.

Appeal dismissed.

[Editorial Note: A further appeal was dismissed by the Court of Appeal. See 1966 L.R.B.G.].

S. D. S. Hardyal for the appellants.

A. B. Sankar for, the respondent.

Judgment of the Court: This appeal concerns the right of audience of a barrister in an interlocutory matter in chambers, that is, whether a barrister can appear in such a matter alone or whether he can only do so instructed by a solicitor.

On September 7th, 1963, a writ of summons was filed by the plaintiffs personally against the defendants seeking *inter alia* an injunction restraining the defendants from entering or dealing with a certain parcel of land. The writ stated that the subject matter of the claim exceeded \$500.

On the same day the plaintiffs filed an *ex parte*, application by way of summons for an injunction, and on September 24, an interim injunction was granted, the summons being made returnable for October 5th.

On September 24th, the plaintiffs were represented before a judge in chambers by Mr. Milton Persaud, a barrister, who stated that he was holding the brief of Mr. S. D. S. Hardyal, another barrister. Through Mr. Persaud, the plaintiffs gave the usual undertaking to abide by any order the court or a judge may make as to damages.

On October 19th, 1963, the matter came up again before a judge in chambers when it was submitted by counsel on behalf of the defendants that the *ex parte* injunction ought to be discharged on the ground that the undertaking which had been given when the order was made was bad in that the plaintiffs could not, having filed the writ in person, have appeared by counsel in chambers unless the latter was instructed by solicitor, and therefore counsel had no *locus standi* when he purported to give the undertaking. The learned judge agreed with the submission after hearing arguments, and he discharged the injunction. This appeal is against that order of discharge. [See 1964 L.R.B.G. 62].

The short point taken by counsel for the appellants (plaintiffs) before us is that s. 42(1) (C) of the Legal Practitioners Ordinance, Cap. 30, enables a barrister to appear in any matter before a judge in chambers (as this was), and that if this submission is correct, then an undertaking given by a barrister in such circumstances would be valid. Section 42(1) (C) of Cap. 30 provides as follows:

"Notwithstanding anything to the contrary in any Ordinance or rule, a barrister or solicitor shall be entitled to act alone and have audience.....on the hearing of any application or proceeding before a Judge sitting in Chambers."

The learned judge took the view that when Mr. M. R. Persaud appeared for the appellants in chambers, he was not acting as a solicitor, and even if he purported to have acted as a barrister, he could only have done so instructed by a solicitor in accordance with s. 45 of the Legal Practitioners Ordinance. We will consider the effects of this section a little later on. We wish to say here that it has been accepted that this matter falls within the ambit of s. 43(1) (A) (a) of Cap. 30. This section gives a barrister exclusive right of audience in court "in any cause or matter where the writ is not specially endorsed under the rules in which the sum of money claimed or the value of the land or thing in dispute as alleged in the statement of claim exceeds the sum of five hundred dollars"; but in such a case he must be instructed by a solicitor on the record. We do not propose to enter into any discussion as to how a solicitor is placed on the record; suffice it to say that in the instant case solicitor was not on the record. It would be relevant to point out that these proceedings were launched by the plaintiff in person, and in these circumstances, he is required to comply with Order 6, r. 3, if he wishes to have a solicitor act for him. That rule says:

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"Where a party, after having sued or defended in person appoints a solicitor to act in the cause or matter on his behalf, he shall give notice of the appointment . . ."

It follows, therefore, that in the matter before us, a solicitor does not have a right of audience, but a barrister has, provided that he is instructed by a solicitor. The question is whether this rule is in any way modified by s. 42(1) (C) of Cap. 30.

The learned judge also gave consideration to the provisions of s. 45 of Cap. 30, and expressed the opinion that ss. 43 and 45 are complementary. We are of the view that they are mutually exclusive. Section 45 provides that a barrister shall not be entitled to practise as a solicitor in any matter in which a barrister is required by s. 43 to be instructed by a solicitor. It should be borne in mind that the ordinance defines what practising as a solicitor means, that is "to perform or do any act or thing which is in England usually performed or done by a solicitor and not by a barrister." In our opinion the right to act alone and of audience given to solicitor by s. 42 is in addition to the right "to practise as a solicitor" as is defined by s. 41.

Section 42 speaks of acting alone and having audience, and seeks to differentiate between "the Court" (meaning the Supreme Court) and "Chambers" whereas s. 43 speaks only of right of audience. We feel that when a barrister is authorised to "act alone" this connotes something in addition to his right of audience, and an examination of s. 42 supports this conclusion.

The learned judge held the view that the right of a barrister to act alone and to have audience before a judge sitting in chambers under s 42(1) (C) is narrowed down by ss 43 and 45 which make it necessary for a barrister to be instructed by a solicitor in certain matters.

We are of the opinion that a barrister may appear in chambers uninstructed by a solicitor by virtue of s 44 of the Legal Practitioners Ordinance, Cap. 30, but that when he does so, he is acting as a solicitor and must be on the record as such. We are fortified in this view by s. 42 (2) of the Ordinance, which provides for the disallowance of the costs of counsel unless the judge certifies that such costs should be paid.

In this matter neither Mr. Hardyal nor Mr. Milton Persaud was on the record as the plaintiffs' solicitor, and therefore could not properly have appeared in chambers. It would follow then that the undertaking given by Mr. Persaud would be invalid. There is nothing before us from which we can say that the undertaking was given in the presence of the plaintiffs in which case it might have been possible to argue that the undertaking binds them.

We are therefore of opinion that the judge was right in discharging the order for an interim injunction for the reasons we have given. The appellants must pay the respondents costs of this appeal.

Appeal dismissed.

INLAND REVENUE COMMISSIONER v. RESSOUVENIR
ESTATES LTD.

[Supreme Court—In Chambers (Persaud, J.) February 20, 23, March 20, 24, May 15, 1965]

Income tax—Claims of deduction—Expenses of preparing abandoned lands for sugar cane cultivation—Whether revenue or capital expenditure—Income Tax Ordinance, Cap. 299, s. 12.

Income tax—Estoppel—Claims to deduction—Allegation of assurance given by Commissioner that expenditure would be treated as revenue expenditure—Whether Commissioner estopped thereby—Whether breach of natural justice—Income Tax Ordinance, Cap. 299, s. 8.

The respondents were assessed to income tax for the year of income 1957 on a chargeable income including the sum of \$35,533.76 being an amount expended by them in that year in preparing 99.2 acres of land for the cultivation of sugar cane. The land had been in a state of abandonment and had never been cultivated with sugar except for 6.5 acres which were last cultivated in 1940. Under the respondents' system of cultivation lands would lie fallow for one year after being under cane for six or seven years. After lying fallow works similar in nature but smaller in scale to the works executed in this case would be necessary to bring back the lands into a cultivable state. The respondents contended that the expenditure was deductible as a revenue-expenditure in the computation of their charge-able income and relied on a letter written to them in 1935 by the Commissioner in which, they asserted, the Commissioner had given the assurance that any expenditure of that kind would be treated as a revenue expenditure. The assessment was set aside by the Board of Review, one of whose members had, however, acted for the respondents in certain discussions with the Commissioner which led up to the writing of the letter in 1935. On appeal by the Commissioner,

Held: (i) the member concerned had an interest in the appeal and there was therefore a real likelihood of bias;

(ii) the expenditure was incurred in relation to the operation of the growing of sugar cane, but it was allowable only if it was incurred for the direct purpose of producing profits, and on the evidence it was not;

(iii) the work could be described as recurrent in the sense that it was a type of work that was done at the commencement of every, "cycle", but by virtue of its extent, its true nature was a "large non-recurrent unusual expenditure" in the sense that whenever sugar cane lands were to be made cultivable for the first time these works were necessary;

(iv) the expenditure was therefore a capital expenditure and not allowable, and this was so even in relation to the 6.5 acres;

(v) in respect of the letter, there was no violation of natural justice on the part of the Commissioner and his decision in one year did not constitute an estoppel binding on him or his successor in office in the following year.

Appeal allowed.

David Singh, Senior Legal Adviser, with Godfrey Persaud, Crown Counsel (ag.), for the appellant.

G. M. Farnum for the respondents.

I.R.C. v. RESSOUVENIR ESTATES LTD.

PERSAUD, J: This as an appeal from a decision of the Board of Review reversing an assessment raised by the appellant in respect of the respondents' income for the year 1957.

The respondents are a limited liability company who carry on business as sugar cane plantation owners and sugar manufacturers, and for such purposes own lands situate at Pln. La Bonne Intention and other adjoining areas on the East Coast of Demerara. In 1957 the sum of \$35,533.76 was spent in the reclamation and preparation of various parcels of land for the cultivation of sugar cane, and the respondents claimed—as they do in this appeal—that that sum of money is allowable as revenue expenditure in the ascertainment of their chargeable income in that it was spent to renew or restore subsidiary parts of a whole; while the appellant contended that this sum of money was spent to improve the income bearing property, that the achievement of the expenditure incurred was of an enduring nature, and therefore such expenditure was eligible to tax. The Board of Review upheld the respondents' contention, and disallowed the tax raised by the appellant. This appeal seeks to test the rectitude of the Board's decision.

Before examining the various legal points raised, it would be helpful to refer to the attitude of the then Commissioners to matters of this sort and also the evidence which has been given before me. It is necessary to examine the former because although counsel for the respondents has conceded that the appellant is not estopped from raising additional tax, he has urged that that is a grave violation of natural justice as the conduct of the Commissioners has been such as to induce the taxpayer to incur expenses by the assurance given that such expenses would be treated as revenue expenditure; and the latter because I am asked to make a finding of fact as to whether or not the lands in question were ever cultivated with sugar cane.

In 1935 the secretary of the Income Tax Commissioners (as they were then described) wrote to Messrs. Bookers Demerara Sugar Estates, Ltd. (the predecessors, it would appear, of the respondents) the following letter (marked Ex. 'XI' in these proceedings):

"Gentlemen,

It has come to the notice of the Commissioners that the distinction between capital and revenue expenditure is not always correctly made in income tax returns.

2. All persons concerned are therefore asked to note that capital expenditure includes *inter alia* expenditure on

- (a) purchase of lands, buildings, machinery, etc.,
- (b) construction or extension of buildings, canals, etc., and
- (c) bringing into cultivation of new lands.

3. In some cases replacements are allowed in lieu of wear and tear, but *additional* items must always be treated as capital expenditure.

4. Whenever there is doubt whether any item should be treated for income tax purposes as revenue or capital expenditure, all the facts relating to such item should be stated for the information of the Commissioners.

I have the honour to be,
 Gentlemen,
 Your obedient servant
 (Sgd.) C.Uchlien
 Secretary
 Income Tax Commissioners."

This letter, it would appear, was written as a result of certain discussions which took place between the Hon. E. F. McDavid, who was then one of the Income Tax Commissioners, and Mr. S. Heald, a member of Messrs. Fitzpatrick Graham & Co., Chartered Accountants to Messrs. Bookers Demerara Sugar Estates, Ltd.

It would seem that in 19S4 before the appellant had finally rejected the respondents' claim to be allowed the sum of \$35,533 as revenue expenditure, but in connection with which they were corresponding with each other, the question whether certain sums of money expended by sugar estates in the preparation of land for cane cultivation again agitated the mind of the appellant for on the 17th February of that year, he wrote Messrs. Fitzpatrick, Graham & Co., a letter in these terms (marked Ex. 'X5' in these proceedings) :

"Gentlemen,

Sugar Plantations—

Cost of making lands suitable for cane cultivation

It has been brought to my attention that some misunderstanding exists as to what expenditures incurred in making lands suitable for cane cultivation are to be treated as revenue expenditure for income tax purposes.

2. By way of concession my predecessor (s) agreed that the cost of making lands suitable for cane cultivation would be treated as revenue expenditure provided that such lands were within the area of empolder. I am quite prepared to continue this practice but with the understanding:

- (i) that the cost of preparation of lands not previously in cane cultivation for the purpose of cane cultivation would not be treated as revenue expenditure but as capital expenditure whether the land was in the area of empolder or not;
- (ii) that lands which were previously in cane cultivation but used afterwards for the cultivation of other crops, the cost for the re-preparation thereof for the purpose of cane cultivation again would not be treated as revenue expenditure but as capital expenditure whether the land was in the area of empolder or not;

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- (iii) that the cost of putting ruinate lands within the empolder and previously in cane cultivation back into cultivable condition would be treated as revenue expenditure.

3. I should be grateful if you would be so kind as to bring this matter to the attention of all your clients who are owners of sugar plantations.

I have the honour to be,
 Gentlemen,
 Your obedient servant,
 (Sgd.) W. G. Stoll
 Commissioner of Inland Revenue."

In Ex. 'XI' it is stated that the cost of the construction or extension of buildings, canals, etc., and of bringing new lands into cultivation would in future be treated as revenue expenditure, while Ex. 'X5' makes it quite clear that the cost of making lands within the area of empolder suitable for cane cultivation would be treated as revenue expenditure, *but* the cost of preparing such lands which have *not* been previously under cane cultivation would be regarded as capital expenditure. To my mind, the meaning of both letters is explicit, and I am not persuaded that there has been a violation of natural justice in this matter.

Under this topic, Mr. Farnum has objected to Mr. Singh arguing a breach of natural justice by reason of the fact that the Mr. Heald referred to earlier in this judgment also sat as a member of the Board of Review in this matter. Mr. Farnum's objection is on the basis that this is not a ground of appeal; this is so. But this, in my view, does not preclude me from making one or two observations if I felt compelled so to do if only for the future guidance of the Board. I wish at the outset to say that no improbity is ascribed to Mr. Heald, nor can I say from the evidence available that he has acted with any improper or partial motive. I make the following observations for the future guidance of the Board so that the Board's business will be conducted in such a manner as not to invite the criticisms levelled at them at the hearing of this appeal, criticisms which are not wholly unjustified.

The maxim that no man shall be a judge in his own cause is too well known and too highly regarded to be commented upon. In this case it can hardly be doubted that Mr. Heald, having been concerned in the earlier discussions in this matter on behalf of the firm of accountants, had an 'interest' in this appeal in the sense in which that term was used in *R. v. Barnsley Licensing Justices*, [1960] 2 Q.B. 167, and *R. v. Hendon Rural District Council, Ex p. Chorley*, [1933] 2 K.B. 696, and therefore there was a real likelihood of bias. Our income tax laws do not specifically provide that a member of the Board who has an interest in any appeal may not sit, but presumably such a circumstance can be advanced as a ground of appeal as is provided for under s. 9(c) of the Summary Jurisdiction (Appeals) Ordinance,

Cap. 17. As I have already indicated, this is not a ground of appeal, and I shall leave the matter here with these appropriate comments of DEVLIN, L.J., in the *Barnsley Licensing Justices* case ([1960] 2 Q.B. 167, at p. 187):

"Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so."

Mr. Farnum, counsel for the respondents, has submitted that the appellant is in effect asking the court to make an assessment which the court is not empowered to do; and has urged that if his submission is of merit, the appeal ought to be dismissed. This is in the nature of a point *in limine*, and this is what I understand Mr. Farnum to be saying: that the provisions of the Income Tax Ordinance, Cap. 299, seek to ensure that the appellant should ascertain the chargeable income of the taxpayer; and having done so, he is then required to exercise his judgment on the *true* facts, and to compute the tax payable on that chargeable income; if, therefore, the appellant has purported to exercise his judgment upon facts which are untrue, and if it is clear that he would not have raised a tax had he been presented with the true facts, it is clearly wrong for him now to ask the court to maintain an assessment which had been arrived at without the exercise by the appellant of his judgment in relation to the true facts. In my opinion, the fallacy of this argument lies in the statement that having ascertained the chargeable income of the taxpayer, the Commissioner is then required to exercise his judgment on the 'true facts' computing the tax on the chargeable income. I would have thought that the Commissioner is able to arrive at the chargeable income only *after* and not before ascertaining the true facts, and that the assessing of the tax payable is a mere mathematical process practised by the application of the rates set out in the Ordinance. As I understand the appellant's case, having ascertained the true facts, he has raised an additional tax which tax has been disallowed by the Board of Review, and against which decision he now appeals to this Court. Section 50 of the Income Tax Ordinance, Cap. 299, empowers the Commissioner to raise a tax where it appears to him that any person liable to tax has not been assessed, or has been assessed at a less amount than that which ought to have been charged. Clearly this section includes the situation where fresh evidence (facts) comes to the attention of the Commissioner after an assessment, and if this is so, then it must mean that he is required to apply his mind first to the "true facts" before he decides on the chargeable income. How else can he arrive at the chargeable income?

Section 57(6) of the Ordinance provides that a judge may either reduce or increase the amount of assessment. Implicit in this section is the power of the judge to affirm an assessment made, whether it be an additional assessment under s. 50 or otherwise, by allowing an appeal where the Commissioner is the appellant, or by disallowing it where the taxpayer is the appellant. Such a course of action is not, in my view, an attempt by the court to assess the taxpayer. I there-

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fore do not agree with this submission made on behalf of the respondents.

Now to the merits of the appeal. The land in question is made up of several parcels or blocks of land forming part of Pln. La Bonne Intention, amounting to approximately 99.2 acres, and are included in one empoldered area. La Bonne Intention is a sugar plantation, and the rest of the empoldered area has been and is under cane cultivation. The parcels of land have been allowed to fall into a state of abandonment in the sense that the drainage and irrigation trenches have been allowed to silt up, weeds to grow, and coconut trees to grow on some of the land. And to make the land suitable for cane cultivation certain works had to be undertaken, the cost of which is the subject matter of this appeal. Is it capital expenditure, or is it revenue expenditure?

Counsel for the appellant has assailed the decision of the Board along two lines of approach. He has urged that —

- (i) the land in question had never been cultivated with sugar cane, and submits that any money expended to render it suitable would be capital;
- (ii) even if the land had been cultivated prior to 1935, as has been found by the Board, the lapse of time was so great—22 years—that it necessitated a large and unusual item of expenditure in the reclamation of the land, which was non-recurrent.

The first submission is really the first ground of appeal, *viz.*, that there was no evidence or no sufficient evidence to support the Board's finding that the area comprising 99.2 acres was previously in cane cultivation.

I would have wished to point to a firm finding by the Board on this aspect, but they appeared to have been of the view that it was not necessary for their decision to make a positive finding, although they did say "we feel the better view is that the greater part of the land in question was at some time under cane cultivation", adding, that whether or not the land had been under cane cultivation was not a question for their decision. Earlier in their decision, they had used words to the effect that whether or not the land had been under cane cultivation did not affect the question as to the nature of the expenditure. In view of the concession of counsel for the respondents that the expenditure may well be regarded as capital expenditure *if* the lands were never in sugar cane cultivation, it seems necessary for me to determine this question, even though counsel for the appellant argues that in any event, that is, whether the lands had been or not under sugar cane cultivation, the expenditure is capital.

As I have already mentioned, the lands form scattered parcels of one generally empoldered area, most of which was already under cane cultivation. In 1957—the relevant year in this appeal—the lands had not been cultivated for at least 9 years according to the oral

evidence. Of the 99.2 acres about 15 acres were under coconut cultivation, while the rest remained uncultivated of any crops at all, some being under water while others under pasture. I accept the evidence that there were certain visible features which indicated that the lands were originally laid out for sugar cane cultivation, but there is no positive evidence that they were ever so cultivated. Neither witness for the respondents produced any records to assist the court, but rather contented themselves with saying that they assumed that the areas were in fact cultivated because of the physical features present, though they had no personal knowledge of this.

Sugar cane lands are allowed to lie in fallow after each 'cycle'; and during the period of fallow, nothing is planted on the lands. The maximum period of fallow is one year; and a 'cycle' would run for about 6 to 7 years after which and following the fallow, works similar to those executed on these lands, but not to that extent, are required to be done in order to commence the new 'cycle'. It is not the case that prior to 1957 these lands were in fallow, so that it cannot be said that the works carried out were being done between 'cycles' in the sense that one crop of sugar cane having been reaped, the lands were being prepared to start another crop. The navigation canals were silted and overgrown, and could not be used as such. Indeed, Mr. Strang concedes that this condition is not a normal one to be found at the end of a 'cycle', and he said that it resulted from the lands not having been under sugar cane cultivation for a long time.

In a letter dated 13th December, 1962 (Ex. 'F') Mr. D. J. Sartin, the acting Chief Accountant of Bookers Sugar Estates, Ltd., informed the Commissioner that of the 99.2 acres, 6.5 acres were lost in sugar cane cultivation in 1940, while the remainder was never under such cultivation. Mr. Sartin said that of the remainder 11.5 acres were in coconut cultivation, and 14.0 acres under rice cultivation. I wish to quote Mr. Strang's evidence as I recorded it in relation to this information, and it is this:

"I know of Exhibit 'F'. The information was given while I was out of the country, and it is incorrect in so far as it states that certain parcels of land were never in cane cultivation, as is stated in para. 2".

Now when this bit of evidence is compared with the evidence of the same witness to this effect —

"I cannot say how long previous the land had not been planted with sugar. I assume that it was cultivated because of the features present. The features are peculiar to an area prepared for cane cultivation."

It will be seen, and I am of this view, that his earlier answers lose any virtue they may have had.

Again Mr. Sartin gave evidence before the Board of Review on the 30th June, 1964 (the notes being laid over by consent at the hearing before me), and I cannot find where he took the opportunity to correct

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these inaccuracies, although the Board in their decision have recorded that Mr. Sartin had said that he had been misinformed.

From the evidence before me, I am impelled to the conclusion that even though the various parcels of land were and are part of the original empoldered area, they had never in fact been put under cane cultivation, except for 6.5 acres which had been up to 1940: No doubt this is the reason why Mr. Sartin described the item of expenditure (Ex. 'F') as "Reclaiming 'New Old' Land."

Strong reliance has been placed by counsel for the respondents upon *Rhodesia Rly v. I.T.C. Bechuanaland*, [1933] A.C. 368. 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 33 1/2 miles of track, the line so laid being the same weight as the old line. On a further 40 1/2 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 that the work constituted repairs and the cost thereof was allowable. Counsel referred to the *dictum* of BUCKLEY, L.J. in *Lurcott v. Wakley. & Wheeler*, [1911] 1 K.B. 905, which was cited with approval in the Rhodesia case (*supra*) by Lord MACMILLAN ([1933] A.C. 363 at p. 374) that "repair is restoration by renewal or replacement of subsidiary parts of a whole." In my view, the *ratio decidendi* in the Rhodesia case (*supra*) lies in these words of Lord MACMILLAN (at p. 374):

"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 in maintaining the appellant's existing line in a state to earn revenue. The analogy of a wasting asset which appears to have affected the minds of the Special Court has really no application to such a case as the present."

And again at p. 372 (*ibid*):

"The result of the renewals, apart from the additional sleepers, was to bring the track back to normal condition, and the line as renewed was not capable of giving more service than the original line."

Had it been the case that the lines which were renewed were in the nature of a wasting asset, as I have found in the case before me in respect of the parcels of land, undoubtedly the decision in the Rhodesia case (*supra*) would have gone the other way. I am of the view that the work carried out is "a material alteration, and a very great improvement in the corpus of the heritable estate." (*Highland Ry. Co. v. Income Tax Special Commrs.* (1855), 2 Tax Cas. 151.)

Counsel for the respondents has submitted that in deciding whether a particular item of expenditure is deductible, the item should not be isolated, but must be looked at in the light of its connection with the operation, transaction or service in respect of which it was made so that it may be decided whether it was made not only in the course of earning income but was a part of the process of earning income. There can be no doubt that the expenditure over which this appeal is concerned was incurred in relation to the operation of the growing of sugar cane, but it becomes allowable only if incurred in the *production of income* (s. 12 of the Income Tax Ordinance, Cap. 299). In the language of Lord MACMILLAN in *Montreal Coke & Manufacturing Co. v. Minister of National Revenue*, [1944] 1 All E.R. 743, at p. 746, "Expenditure to be deductible must be directly related to the earning of income"; or, as the Court of Appeal in its judgment said and as Viscount CAVE, L.C., reiterated in *Ward & Co., Ltd. v. Taxes Comr.*, [1923] A.C. 145, at p. 149:

"The question therefore is: Was the expenditure under consideration exclusively incurred in the production of the assessable income, for unless it was so, the Act expressly prohibits its deduction from such income. It was contended.....that it was illogical that while legitimate expenses incurred in the production of the income are deductible, similar expenses incurred for the much more important purpose of keeping the profit-making business alive are not deductible, and, further, that it was inequitable that the Legislature should, on the one hand, force a certain class of traders into a struggle for their existence and, on the other hand, treat the reasonable expenses incurred in connection with such struggle as part of the profits assessable to income tax.....This court, however, cannot be influenced by such considerations, being concerned only with the interpretation and application of the law as it stands."

In *B.G. Lithographic Co., Ltd. v. I. R. Commrs.* (1959), 1 W.I.R. 241, LUCKHOO, J., (as he then was) said at p. 255 (*ibid*) —

"In my view the test to be applied in determining whether a disbursement or expense is an allowable deduction under the Ordinance is that it must have been incurred for the direct purpose of producing profits." (1959 L.R.B.G. at p. 60).

I cannot say that the expenditure incurred by the respondents in the case under review was incurred for the direct purpose of producing profits. The distinction is vividly drawn by Lord MACMILLAN in the *Montreal Coke Co.* case (*supra*) in construing the words "for the purpose of earning the income" as contained in s. 6 of the Income War Tax Act, (Canada), 1927. At p. 746 (*ibid*), Lord MACMILLAN said:

"If the statute permitted the deduction of expenditure incurred for the purpose of increasing income the appellants might well have prevailed. But such a criterion would have opened a very wide door. It is obvious that there can be many forms of expenditure designed to increase income which would not be appropriate deductions in ascertaining accrued net profit or gain. The statutory criterion is a much narrower one."

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It can be truly said that the expenditure in the instant case has been incurred for the purpose of increasing the respondents' income, but as has been shown, this is not the test.

Counsel for the respondents has argued that the expenditure is in the nature of a recurrent one, and as such is allowable. The evidence in this matter is to the effect that the work done was the type of work necessary at the beginning of every new 'cycle' in order to render the land cultivable, but—and this is important—the extent of the work in this particular case exceeded the volume that is done normally. This must be so if the lands had never been cultivated, or had not been cultivated over a very long period of years. The work can be described as recurrent in the sense that it is the type of work that is done at the commencement of every 'cycle', but by virtue of its extent, its true nature is a 'large non-recurrent unusual expenditure' in the sense that whenever sugar cane lands are to be made cultivable for the first time these works are necessary. In *Atherton v. British Insulated & Helsby Cables, Ltd.* (1925). 10 Tax Cas. 155, at p. 192, Viscount CAVE, L.C., expressed the view:

"But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital."

In discussing this dictum in *Anglo-Persian Oil Co., Ltd. v. Commrs. I. R.*, (1931), 16 Tax Cas. 253, C.A., ROWLATT, J., said at p. 262:

"What Lord CAVE is quite clearly speaking of is a benefit which endures, in the way that fixed capital endures; not a benefit that endures in the sense that for a good number of years it relieves you of a revenue payment. It means a thing which endures in the way that fixed capital endures."

This point has been the subject of discussion in the Australian case of *Sun Newspapers Ltd. v. Fed. Com. of Taxation*, (1938), 61 C.L.R. 337, where one newspaper company agreed to pay to a competitive newspaper a sum of money pursuant to an agreement, the main object of which was to stop the publication of the competitive newspaper. It was held that such sum of money was in the nature of an outgoing capital, and therefore not deductible from assessable income.

At p. 355 (*supra*), LATHAM, C. J., said:

"When the words 'permanent' or 'enduring' are used in this connection it is not meant that the advantage which will be obtained will last forever. The distinction which is drawn is that between more or less recurrent expenses involved in running a business and an expenditure for the benefit of a business as a whole."

And in the same case DIXON, J., said at p. 360 (*supra*)

"As general conceptions it may not be difficult to distinguish between the profit-yielding subject and the process of operating it. In the same way expenditure and outlay upon establishing, replacing and enlarging the profit-yielding subject may in a general way appear to be of a nature entirely different from the continued flow of working expenses which are or ought to be supplied continually out of returns or revenue. The latter can be considered estimated and determined only in relation to a period or *interval of time*, the former at *a point of time*. For the one concerns the instrument for earning profits and the other the continuous process of its use or employment for that purpose."

And again at p. 361 (*ibid*):

"In an attempt, by no means successful, to find some test or standard by the application of which expenditure or outgoings may be referred to capital account or to revenue account the courts have relied to some extent upon the difference between an outlay which is recurrent, or repeated or continued and that which is final or made 'once for all, and to a still greater extent upon a distinction to be discovered in the nature of the asset or advantage obtained by the outlay."

Finally, at p. 362 (*ibid*), DIXON, J., said:

"But the idea of recurrence and the idea of endurance or continuance over a duration of time both depend on degree and comparison. As to the first it has been said it is not a question of recurring every year or every accounting period; but 'the real test is between expenditure which is made to meet a continuous demand, as opposed to an expenditure which is made once for all' (*per ROWLATT, J., Ounsworth v. Vichers Ltd. [1915] 3 K.B. 273*") By this I understand that the expenditure is to be considered of a revenue nature if its purpose brings it within the very wide class of things which in the aggregate form the constant demand which must be answered out of the returns of a trade or its circulating capital and that actual recurrence of the specific thing need not take place or be expected as likely."

In my judgment, having regard to my finding of fact and the decisions reviewed, the expenditure involved is not recurrent in the sense explained above, and therefore falls under the description of capital expenditure, in that it resulted in the improvement of the property, and as such, is not allowable.

I will now turn attention to the problem on the basis that of 99.2 acres of land. 6.5 acres were last cultivated in 1940, and to attempt to find an answer to the question whether the respondents are entitled to be relieved to the extent of the cost of restoring the 6.5 acres into a condition suitable for sugar cane cultivation.

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In my opinion the answer lies in the judgment of Lord CLYDE in *United Collieries, Ltd. v. Inland Revenue Comrs.* (1930), 12 Tax Cas. 1248. In that case the appellants carried on the business of colliery and mine owners. Under certain agreements they were bound to deepen either of two pits, worked by them under a lease, to reach certain lower seams and to work such seams. The sinking operations were completed in 1914, and a small quantity of coal was taken. After a few months, however, it was decided to be inadvertent then to continue work on the lower seams and water in the pit was allowed to rise again to the upper seams. In 1923 the lower seams were again freed from water, and the appellants claimed a deduction in respect of the cost of the "dewatering". Their claim was disallowed. At p. 1253 (*ibid*), Lord CLYDE said:

"Essentially the question is one of proper commercial accounting. Can the cost of the second dewatering—unlike the cost of the first be said to be part of the ordinary expenditure laid out year by year in order to make profits year by year?—or is it—like the cost of the first dewatering—capital expenditure laid out for the purpose of making a permanent development of the works in which—as and when so developed—a profit-earning business is subsequently to be carried on. If the question is put in that form, it is impossible to answer it except in one way. The second dewatering was no part of the ordinary working expenses of the colliery any more than the first. It was a piece of capital expenditure necessary to make or *to complete*." (italics mine) "part of the permanent works, the completion of which was a condition precedent to setting at work the process of earning profit by mining the lower seams . . .

It was not disputed that the expenditure incurred in dewatering the lower seams for a second time would have been a proper capital charge if it had been the result of natural causes, such as an inrush of water from neighbouring mineral seams. But it was strongly argued that we ought to treat this duplicated expenditure as a revenue cost because of the close relation which exists between the process of keeping a pit (once dewatered) free of water, and the process of dewatering a pit either for the first time, or for a second time, if for any reason the water has been allowed to accumulate in it. No doubt the two processes are closely connected; and the question might possibly be one of circumstances and degree; but they are not more closely connected than is the process of brushing and keeping in repair a haulage road in a pit with the process of constructing that haulage road. They both consist in the removal from the strata of whatever is necessary to open—or to keep open—a permanent access to the minerals which are to be worked, but they are entirely different things when considered from the point of view of the person who wants to make money by working the coal as and when made accessible. The dewatering is something that he must do as a condition precedent to the working of the minerals to a profit."

It seems to me that an analogous situation exists in the instant case in that for a period of 17 years 6.5 acres of land were allowed to lie in abandonment, the trenches accumulated weeds and silt, and it was necessary in order to restore the land in such a condition as to make it capable of yielding revenue to embark upon the works in question. If this is so, then in my judgment, the cost of such works would be capital expenditure, and not allowable.

There is one final matter which deserves some observation, and that is the question of estoppel. Apparently the point was taken before the Board that the appellant was estopped from raising this additional assessment, but the Board did not consider it necessary to determine that issue in view of their decision that the expenditure involved was of a revenue nature. Before me counsel for the appellant argued strenuously that the Commissioner was not estopped from raising the additional assessment. In reply counsel for the respondents urged that the Commissioner is estopped in the sense that he has by his letter (Ex. 'X5' pp. 3 and 4 *supra*) led the taxpayer to alter his position, and as there was no notice of the change of attitude by the Commissioner in this matter, there has been a grave violation of natural justice, and the court should not countenance this action by the Commissioner. I have earlier in this judgment expressed the view that the Commissioner may raise an additional assessment in the circumstances set out in the Income Tax Ordinance, and that there has really been no violation of natural justice on the part of the Commissioner. And to take the matter a step further, it is apparent that the decision of the Commissioner in one year does not constitute an estoppel binding on him (or his successor in office) in the following year. The Commissioner is required under the Ordinance to form an estimate in each year of assessment of the amount of income of the taxpayer on which income tax for that year is to be charged. (See *Comrs. of Inland Rev. v. Sneath* (1932), 146 L.T. 434, and *R. v. Income Tax Special Comrs. Ex p. Elmhurst* (1935), 154 L.T. 198, at p. 201). A reference to s. 8 of the Income Tax Ordinance, Cap. 299, would demonstrate that this must be so. That section provides:

"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."

In the final result, this appeal must be allowed. The decision of the Board of Review is set aside, and the assessment of the appellant is affirmed. The respondents must pay the costs of this appeal fixed at \$500.

I desire to add that reference has not been made to all the cases cited in the course of the able arguments addressed in this matter not out of lack of regard, but because most of them merely reiterate the principles already settled in other cases.

Appeal allowed. Assessment of Commissioner affirmed.

Appeal allowed.

Solicitors: *Crown Solicitor* (for the appellant); *Cameron & Shepherd* (for the respondents).

R. v. MAGISTRATE, ESSEQUIBO JUDICIAL DISTRICT,
EX PARTE JAIRAM

[In the Full Court (Bollers, J., and Van Sertima, J. (ag.)) August 17, 1963, February 12, 1964, March 8, 1965]

Mandamus—Revision by magistrate of previous decision to grant ejectment warrant—Previous decision revoked—Application for statutory mandamus—Whether appropriate remedy—Whether appeal lies from new decision—Rent Restriction Ordinance, Cap. 186, s. 26 (2)—Summary Jurisdiction (Appeals) Ordinance, Cap. 17, s. 37.

Landlord and tenant—Power of magistrate to re-hear application and to revise decision—Whether evidence necessary when revising—Whether appeal lies from a revised decision—Rent Restriction Ordinance, Cap. 186, s. 26(2).

Section 26(2) of the Rent Restriction Ordinance, Cap. 186, provides that "a magistrate shall have full powers to hear any application and to revise any decision in any case in which, in his opinion, altered circumstances make it just that he should exercise such powers."

The respondent magistrate granted an application by the applicant for an ejectment warrant against one D. Subsequently, however, the magistrate reconsidered the matter and revoked his decision. The applicant now applied to the Full Court under s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, for an order calling upon the magistrate to show cause why he should not issue the warrant. In support of the application it was contended that the magistrate had acted without jurisdiction in that there was nothing on record to show any altered circumstances such as would have justified the exercise of the powers conferred by s. 26(2) of Cap. 186. For the magistrate and D. it was objected that the correct remedy was by way of appeal.

Held: (i) s. 26(2) of Cap. 186 confers two distinct powers—one to rehear an application, and another to revise a decision, and whereas, a rehearing would of necessity involve the actual taking of evidence, a magistrate may revise a decision of his without taking further evidence;

(ii) the magistrate had in fact exercised his power to revise, and the correct remedy was therefore either *certiorari*—if there was an excess of or no jurisdiction—or an appeal on the merit;

(iii) proceedings under s. 37 of Cap. 17 must be brought within a reasonable time.

Rule discharged.

B. O. Adams, Q.C., with *S. Misir* for the applicant.

David A. Singh, Senior Legal Adviser, for the respondent magistrate.

F. L. Brotherson for the respondent Dhanraj.

[Editorial Note: An appeal by the applicant was dismissed by the Guyana Court of Appeal in 1966. For the decision of the Full Court on the preliminary points see 1964 L.R.B.G. 59]

Judgment of the Court: In a ruling handed down by this court in these proceedings on submissions *in limine* made by the learned Solicitor General on behalf of the magistrate, we pointed out that there were two points that would be deferred for further consideration, if more fully argued before us. The two points were (a) whether

the more appropriate or in fact the appropriate method of proceeding was by way of appeal against the decision of the magistrate rather than under s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17; and (to) to what extent the applicant is bound to bring these proceedings within a certain time.

Both of the above points were fully argued before us when the matter came on for hearing and formed the greater part of the arguments submitted for our consideration.

It was submitted on behalf of the magistrate that he had acted in exercise of the power given to him by virtue of s. 26(2) of the Rent Restriction Ordinance, Cap. 186, to rehear any application and revise any decision in which, in his opinion, altered circumstances make it just that he should exercise such powers. Learned counsel for Dhanraj endorsed the arguments put forward by learned counsel for the magistrate.

In answer to a submission that the magistrate had not in his affidavit set out the section under which he had purported to act, it was urged that the magistrate is not required to put up a defence in his affidavit but merely an explanation.

Although the passage referred to on behalf of the magistrate at 11 HALSBURY'S LAWS OF ENGLAND, 3rd Ed., p. 76, para. 139, does not altogether support the proposition that the magistrate is not required to put up a defence, the wording of the passage is sufficiently wide as to mean that an explanation, if tendered, should be by way of justification of his action. Paragraph 139 states:

"Whenever it is a decision of any justice or justices that gives rise to the application, the justice or justices may make and file an affidavit setting forth the grounds of the decision so brought under review and any facts which he or they may consider to have a material bearing upon the question at issue . . ." [R. v. Sperling (1873), 21 W.R. 461].

It is significant that the words of the passage merely state that the magistrate "may" make and file an affidavit. It is equally significant that s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, at no point require the magistrate to file an affidavit. We cannot agree that the magistrate was under any obligation to state that he purported to review in accordance with the power given to him by virtue of s. 26(2) of the Rent Restriction Ordinance, Cap. 186. Moreover, we are in agreement with the further point submitted on behalf of the magistrate that since it was a clear question of law as to what provisions he purported to act under, he was under no obligation to state those provisions in his affidavit.

It was further submitted on behalf of the magistrate that the correct remedy open to the applicant against a purported review of his earlier decision was to appeal to the Full Court of Appeal and

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not to proceed under s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17. In support of this argument reference was made to the case of *Forde v. Wilson*, 1948 L.R.B.G. 6.

In that case a magistrate, acting upon an application to revise his decision to issue a warrant of ejection, rejected the application on the grounds that he could see nothing in the hearing of the application which was in favour of the tenant and that certain letters tendered supported the landlord's case. The tenant appealed against this decision on the ground that the magistrate had in considering the evidence led at the rehearing failed to appreciate the effect of the evidence led and the issues which the evidence raised. The Full Court of Appeal rejected arguments *in limine* that no appeal lay against a decision of a magistrate acting in pursuance of the powers vested in him by s. 26(2) (then s. 13(2)) of the Rent Restriction Ordinance, Cap. 186, on the ground that the right of appeal conferred by s. 14 of that Ordinance (now s. 27) lay "from the decision of a magistrate on any claim or proceedings" in respect of any premises to which the Ordinance applied. The Full Court of Appeal rejected the argument on the ground that the Legislature could hardly have intended to give a right of appeal where the magistrate had made a decision, but not where he had revised that decision.

It was sought before us to distinguish that decision on the ground that in that case there were altered circumstances, in as much as the landlord had secured fresh premises, whereas the original ground for ordering ejection was that he had required the premises for his own use. In this case, however, there was nothing to indicate that there were altered circumstances so as to justify a review by the magistrate. This, in our view, can hardly be a basis for distinguishing *Forde v. Wilson* from the present case in as much as in that case the magistrate embarked upon a hearing of the review—as in this case.

The purpose of citing *Forde v. Wilson*, in our view, was to show that the correct procedure to be followed where a magistrate has purported to act under s. 26(2) of Cap. 186 is to appeal. Not only is it true that the Full Court of Appeal specifically decided that the Rent Restriction Ordinance, Cap. 186, gives a right of appeal against the revised decision of the magistrate, but it is also quite evident that the magistrate had, as in *Forde v. Wilson*, embarked upon a revision of his decision. It can hardly be argued, therefore, that this case differs from the principle of *Forde v. Wilson* on the ground that in that case there were altered circumstances. In other words, whether or not there were in fact altered circumstances, or whether or not there was evidence thereof before the magistrate, can be more conveniently argued before the Full Court of Appeal.

It cannot be overlooked that s. 26(2) of the Rent Restriction Ordinance, Cap. 186, gives a very wide discretion and power to a magistrate acting thereunder. Subsection (2) of s. 26 (*supra*) reads:

"A magistrate shall have full power to rehear any application and to revise any decision in any case in which, in his opinion, altered circumstances make it just that he should exercise such powers."

It was submitted on behalf of the magistrate and the second-named respondent, Dhanraj, that the court will not exercise its power under s. 37 of the Summary Jurisdiction (Appeals) Ordinance where the magistrate has purported to exercise a discretion vested in him, albeit he may have exercised it wrongly, so as to order him to determine a matter. Further, it was submitted that in proceedings in the nature of mandamus the court will (a) not substitute its own decision for that of the magistrate, and (b) the court will not direct that the magistrate determine the matter in a particular way.

With these propositions we are in full agreement. The purpose of *mandamus* is to direct the magistrate to act where he has refused to act, more specifically to direct him to perform a duty where he has declined to exercise jurisdiction to act at all.

The corollary to this principle was decided in the recent case of *Ridley v. Bishop*, 1956 L.R.B.G. 104, by the Full Court of Appeal. There the magistrate, after hearing the evidence of the witnesses, agreed with submissions that the case involved a dispute with regard to title to land and declined jurisdiction. It was held that the proper procedure is by way of appeal. It was stated in that case that "when a magistrate has considered the facts of a case and has reached a conclusion on the merits, even if such a conclusion is that he has no jurisdiction, then he has adjudicated the matter on its merits; the proper procedure is by way of appeal and not by an application for mandamus." In the instant case there is every indication that there was an adjudication.

On behalf of the applicant it was argued that the submissions made on behalf of the respondents relate to matters that are operative in the Queen's Bench Division as orders for mandamus, prohibition and *certiorari*. Further it was contended that all the references made to HALSBURY'S LAWS OF ENGLAND by counsel dealt with Crown proceedings. It was also contended that in *Coghlan v. Vieira*, 1958 L.R.B.G. 108, referred to by learned counsel for the respondents, the point determined was whether the applicant could go by prerogative writ or, alternatively, under the provisions of s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17.

On a closer look at the decision of *Coghlan v. Vieira (supra)*, which contains an exhaustive review of the relevant decisions of the matter of applications under the provisions of s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, of allied provisions as well as applications for mandamus, it will be seen that the principles involved, quite apart from the procedure, go much deeper than those suggested by learned counsel for the applicant. Briefly, the authorities indicate that the remedy provided by s. 37 (*supra*), which is merely an adaptation of similar U.K. provisions, is just a simpler form of obtaining a mandamus in accordance with statutory provision.

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We quote with approval the decision of the learned trial judge in *Coghlan v. Vieira* at p. 112:

"When, however, s. 37 of Cap. 17 is examined, it will be seen that no new remedy is given. There is no alternative remedy to mandamus prescribed by the section. The Legislature has not indicated that a litigant can appeal, or bring an action, or proceed in some special way against a magistrate who has declined jurisdiction. It has merely described the procedure for obtaining a statutory mandamus against a magistrate who has declined jurisdiction. It has merely described the procedure for obtaining a statutory mandamus against a magistrate who declines to perform an act of office. The remedy against a magistrate remains the same; the ultimate order of the magistrate, whether it be by prerogative writ or by virtue of s. 37, is exactly the same. In HALSBURY'S LAWS OF ENGLAND, 2nd Ed., Vol. 11, p. 731, the following passage appears:

In addition to the prerogative powers inherent in the High Court to issue a writ of mandamus, provision is made by statute for the issue of the writ to justices who refuse to state a case or to do any act relating to duties of their offices as justices."

It seems necessary only to refer to the quotation referred to by this court in its preliminary ruling to indicate that this does not agree with the submissions made on behalf of the applicant now under consideration.

"The principle upon which the courts act in granting or refusing a rule under the statute (i.e., the Justices Protection Act, 1848 — 11 & 12 Victoria C. 44) are the same as those operating with respect to applications for a writ of mandamus, the two proceedings being practically concurrent [*R. v. Dayman* (1857), 26 L.J. M.C. 128; *R. v. Phillimore and Pilling* (1884) 51 L.T. 205; *R. v. Biron* (1885), 14 Q.B.D. 474]."

It was further submitted on behalf of the applicant that there is nothing on the record that there were altered circumstances such as would have justified the magistrate in exercising his power of rehearing and revising under s. 26(2) of the Rent Restriction Ordinance, Cap. 186. It was contended that so far as the record went, therefore, the magistrate had acted on his own and without jurisdiction.

We are in agreement with the arguments put forward by the respondents in reply to these two contentions. In the first place, it is the responsibility of the applicant to bring before the court all the relevant documents and not the responsibility of the respondents. In the second place, the magistrate has already decided the matter, and the correct remedy would be either *certiorari*—where there is an excess of or no jurisdiction—or an appeal on the merits.

On the very wording of s. 26(2) of the Rent Restriction Ordinance, Cap. 186, it appears that there are two powers given to the magistrate—one to rehear an application, and another to revise a decision.

Section 26(2) (*supra*) reads:

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

The presence of the words "to revise", as well as the use of the word "power" at the end of the sub-section, in our opinion, indicate that there are two separate powers. The significance of this distinction is that, whereas a rehearing of an application would of necessity involve the actual taking of evidence, it is conceivable that a magistrate may revise a decision of his without taking further evidence. Off-hand, two examples come to mind: in one case a magistrate may make a decision but upon reconsideration of the evidence later he may find that he had overlooked some important piece of evidence, or he may find that he had inadvertently taken into account material which he had thought to have been led in evidence. The other case that comes to mind is where the parties, subsequent to a decision by consent, agree to a revision of the magistrate's decision.

In the present case, there was a revision of the magistrate's decision. The fact, therefore, that there might not have been evidence taken would not by itself be fatal. The fact remains that it would be for the applicant to satisfy this court that there were in fact no altered circumstances upon which the magistrate could have exercised his discretion. Be that as it may, the contention of the applicant is that the magistrate acted either in excess of or without jurisdiction, and the correct remedy therefore is not mandamus under s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17.

Section 37 (*supra*) applies "wherever a magistrate or a justice of the peace refuses to do any act relating to the duties of his office."

If, on the other hand, the complaint is that the magistrate performed his duty but did so wrongly, then the remedy, in our opinion, would be by way of appeal.

The further point raised about delay in bringing these proceedings need not engage much consideration because there is sufficient from the aforementioned to determine that the decree *nisi* granted will not be made absolute.

There is no specific time laid down for when proceedings should be brought, but it must be a reasonable time. It seems to this court that the applicant must have sat upon his rights and allowed the time to appeal to lapse and then sought to bring these proceedings as an afterthought.

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Having regard to the foregoing, the order *nisi* is hereby discharged and the application for an order absolute dismissed. The respondents will have costs against the applicant to be taxed fit for counsel.

Leave to appeal, if necessary, to the British Caribbean Court of Appeal, is granted.

Rule discharged.

Re DA SILVA (A DEBTOR), EX PARTE DEMERARA MUTUAL
LIFE ASSURANCE SOCIETY LTD.

[Supreme Court (Luckhoo, C.J.) November 18, 19, 1964, March 12, 1965]

Insolvency—Distribution of assets—Interest on special conventional mortgage accruing after date of receiving order—Whether payable in priority to all debts ranking after mortgage—Insolvency Ordinance, Cap. 43, s. 39.

The applicants were creditors of the insolvent in respect of a special conventional mortgage. They applied by way of motion for directions as to whether interest on the mortgage accruing after the date of the receiving order made against the insolvent was included in the security and payable in priority to all debts ranking after the mortgage.

Held: such interest was payable in priority to all the debts ranking after the mortgage out of the net proceeds of the property mortgaged.

Order accordingly.

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

M. S. Rahaman, Legal Assistant to the Crown Solicitor, for the Official Receiver.

LUCKHOO, C.J.: This is an application by way of motion on the part of the Demerara Mutual Life Assurance Society, Ltd., creditors of the estate of Gaston da Silva, insolvent, for directions as to whether interest on a special conventional mortgage passed by the insolvent is, after the date of the receiving order made against the insolvent, included in the security and is payable in priority to all debts ranking after such mortgage.

The official Receiver as assignee in insolvency of the insolvent's estate concedes that from at least the year 1923 and until the year 1962 it was the practice to pay interest under a mortgage accruing after the date of a receiving order down to the date of payment in full in priority of all debts ranking after the mortgage.

Mr. Stafford, Q.C., counsel for the applicants, sought to trace the origin of making such payment to a practice under the Roman-

Dutch law made applicable to this territory and to show that such a practice has been preserved by the combined effect of ss. 2 and 3 of the Civil Law of British Guiana Ordinance, 1916 (now Cap. 2 of the LAWS in the KINGDON Edition). Mr. Stafford contended that such a practice has continued despite the enactment of the Insolvency Ordinance, 1900 (now Cap. 43 of the LAWS). The first authority referred to by Mr. Stafford was the South African case of *Brink N.O. v. The High Sheriff* (1895), 12 Sup. Ct. Repts of the Cape Colony (Tredgold and Buchanan Repts.) 414, where upon an application by the second bondholder over certain property sold by the sheriff in execution in a certain suit upon notice calling on the respondents to show cause why a certain plan of distribution made by the sheriff should not be amended, DE VILLIERS, C.J., in the course of his judgment said (at p. 418):

"In the case of *Cloete v. Aling* (2 Menz. 318) decided in 1834, it was held that the holder of a mortgage bond is entitled in preference on the debtor's sequestration, not to full arrears of interest which may be due on the bond, but only to interest for one year in addition to that for the current year. Interest was further allowed in preference from the date of sequestration to the time of payment. This additional allowance was no doubt made under the 40th section of the old Insolvent Ordinance which is in the same terms as the 33rd section of the existing Insolvent Ordinance, but these Ordinances merely followed the previously existing practice in regard to sales at execution."

In *Cohen v. Christian* (1902), 2 Transvaal L.R. 283, another South African case cited by Mr. Stafford, it was held that a judgment on a mortgage bond for the capital sum with interest from a certain date imposes on the debtor a liability to pay interest at the rate stipulated in the bond up to the date of payment and that where the property mortgaged has been sold in execution, the date of payment is the date of the framing of the plan of distribution and not the date of the confirmation of the sale. INNES, C.J., in the course of his judgment in that case said (at p. 287):

"It is a case in which the court has ordered the defendant to do two things: to pay a capital sum of £3,000, and to pay interest thereon at 8 per cent, from a certain date. And the only point is whether such interest should run on to the date of payment or should cease at the date of judgment and then be superseded by a liability for interest at a different rate. Taking the words of the judgment in their ordinary meaning, I should say that they impose a liability to pay interest until the debt has been discharged."

INNES, C.J., then pointed out that this construction was consonant with the ordinary meaning of the words used and had not been shown to be contrary to the principles of the Roman-Dutch law. He also observed that his construction followed a similar construction placed upon similar judgments in other parts of South Africa.

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NATHAN in his COMMON LAW OF SOUTH AFRICA, vol. 2, at pp. 965 and 966, para. 1032, in dealing with the rules relating to preference states that the rule *qui prior tempore est potior est jure* (he who is first in time has the better right) applies not only to the principal thing hypothecated but to its accessories, so far as they are understood to be bound at the same time and it applies to the payment of interest as well as to the principal. The case of *Brink* is then cited as an example of that rule and the case of *Roberts v. Booy*, 4 E.C.D. 227, is cited as authority for the statement that the court will in any case grant judgment on a bond for the principal and an amount of interest not exceeding the principal sum. It is then stated that for the whole of such judgment the plaintiff will, according to Roman law, be entitled to preference and that in the absence of express local legislation limiting the time for which a mortgage creditor has preference for interest the Natal Court has held that there is no such limitation (*Natal Investment Co. v. Natal Bank N.R.* (1878-79) 10). Thereafter comes the following statement:

"Thus the view of the Cape Supreme Court (following *In re Meiring* (2 M. 320)), that preference for interest is limited to interest for one year and for the current year, differs from that of the Natal Supreme Court, which followed the original Roman Law. But the rule of the Roman Law was clearly abrogated in Holland (VOET 20, 4 paragraph 27; GROENEWEGEN, 20, 4 paragraph 18)."

At first sight this might appear to mean that the view of the Cape Supreme Court was stated to be that interest from the date of sequestration to the date of payment was not allowed as preferent which is contrary to what that court held in *Brink's* case. The statement in fact really refers to the arrears of interest to the date of sequestration which are entitled in preference.

There is a note to para. 1032 in volume 2 of NATHAN'S to the effect that the rule as to preference for interest for a year and the current year prevailed at Amsterdam and that the Cape Supreme Court held that as this rule had been uninterruptedly followed for 98 years, it was part of the customary law of Cape Colony.

The cases of *Brink* and *Cohen* were decided in 1895 and 1902 respectively. The latter serves to confirm what DE VILLIERS, C.J., had stated in *Brink's* case to be the practice in regard to sales at execution. In *Brink's* case the allowance of interest in preference from the date of sequestration to the time of payment was stated to have been made under the 40th section of the old Insolvent Ordinance. Unfortunately, there is no indication in the report of that case as to the year of the enactment of that Ordinance though that Ordinance may have been the Cape Insolvent Ordinance No. 64 of 1829 which was repealed by the Cape Insolvency Ordinance No. 6 of 1843. The reference in *Brink's* case to the 33rd section of the "existing Insolvent Ordinance" is to s. 33 of Ordinance No. 6 of 1843 of Cape Colony. The fact that the Insolvent Ordinances followed the existing practice as to preference at sales at execution only goes to show the basis upon which the relevant sections of the Ordinances were enacted.

and it does not necessarily, follow from the report in *Brink's* case that a practice existed prior to the enactment of the old Insolvent Ordinance in respect of the allowance of interest in preference from the date of sequestration to the date of payment though it may be inferred from a consideration of paras. 1026 to 1031 (which deal with order of preference) and para. 1032 in NATHAN'S, vol. 2, that the rules relating to preference generally apply to preference among creditors in cases of insolvency, distribution of a deceased person's estate and of a debtor's property seized in execution.

Did these rules and practices apply in this territory at any time? It is not a question to which I can find any clear answer. I have not been able to trace any provision enacted locally or any reference to similar rules and practices obtaining locally save that the learned BURGE in his COMMENTARY ON COLONIAL AND FOREIGN LAWS (Vol. 3) at p. 216, when dealing with priorities of mortgages stated that it was the practice in Demerara that the whole arrear of interest was equally preferent with the principal, whereas by the law of Holland the mortgagee could not claim the benefit of his security for interest beyond the last three years and for antecedent arrears he ranked only with the general personal creditors.

Under the Articles of Capitulation of Essequibo and Demerara dated 18th September, 1803, the existing laws and usages were expressly retained and a similar provision is contained in the Letters Patent of the 4th March, 1831, in which Essequibo, Demerara and Berbice were constituted a single Colony under the name of British Guiana. If the practice contended for by the applicants is a relic of the Roman-Dutch law or practice in existence in this Colony then it must have been in existence before the date of the signing of the Articles of Capitulation in 1803. It is often a matter of great difficulty after the passage of time to discover what was the law or usages in existence in British Guiana 1803 in respect of a particular matter for there is not only a dearth of text books on such subjects but there are no written judgments of the courts earlier than 1856. It is also a matter of great difficulty in discovering what laws were enacted in the united colony of Demerara and Essequibo previous to the union of that colony with Berbice in 1831. A volume of the LAWS OF BRITISH GUIANA compiled by H. A. FIRTH and published in 1864 provides a chronological index of the Orders in Council and Commissions and of the various Acts, Notifications, Proclamations, Publications, Regulations, and Resolutions passed by the Governor and Court of Policy of the united Colony of Demerara and Essequibo previous to the union of that colony with Berbice between 1811 and July 1831; and by the Governor and Court of Policy of Berbice between 1812 and July 1831, and Ordinances passed by the Governor and Court of Policy of British Guiana since the union of the colony of Berbice with the United Colony of Demerara and Essequibo from July 1831 until 1864. A number of those enactments have not been reproduced in the publication by reason of their being disallowed or having become obsolete or having been repealed. Further, I have been unable to find any index or reproduction anywhere of legislation

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passed between 1803 and 1811 in this territory. Neither the GUIDE BOOKS nor the POSTAL GUIDES formerly issued in the last century have been of assistance in this regard. It appears from the chronological index of FIRTH'S publication that the first local enactment since 1811 which dealt with insolvent debtors was Ordinance No. 18 of 1844. By that Ordinance the office of Administrator General was created and it would appear that the property of insolvent debtors vested in that officer as assignee in insolvency. Sections 10-22 and 26-71 of that Ordinance were repealed by Ordinance No. 7 of 1851 and have not been reproduced in FIRTH'S publication. There is no Official Gazette extant for 1844 and consequently I have been unable to read the provisions of those sections. Ordinance No. 19 of 1844, it is stated in s. 1 of Ordinance No. 29 of 1846 (which relates to insolvent debtors), was intituled "An Ordinance to abolish Writs of *Cessio Bonorum*, to declare who shall be considered insolvent debtors, to provide relief for the same, and to ensure an equal distribution of the estates of insolvent debtors." "The *cessio bonorum* under the civil law was an act by which an honest but unfortunate debtor who was insolvent, voluntarily surrendered to his creditors all his estate for the satisfaction of their demands", but in order to prevent fraudulent abuse of this privilege it was not allowed unless the debtor first made a confession of the debt or was condemned therein. It was not allowed to those whose insolvency had been caused by their extravagance or had fraudulently contracted debts, when they knew themselves to be insolvent or absconded to avoid payment of their debts. The debtor's effects could not be retained by the creditors to be divided among themselves but were sold to the highest bidder. Where a debtor absconded with the design of cheating his creditors the civil law treated him as a bankrupt and he was declared bankrupt by the judge.

A curator was appointed upon cession by the debtor or upon adjudication as a bankrupt and took care of the debtor's property until it was sold. Upon the sale a *consensus* of the creditors took place for the purpose of settling, by the decision of the court, the order and priority of their demands. In British Guiana the writ was issued by the sovereign or the person to whom he had delegated that power. (BURGE, vol. 3, pp. 887-890). Apparently Ordinance 29 of 1846 was intended to regulate the law relating to insolvency in British Guiana in much the same way as the Cape Insolvent Ordinance No. 6 of 1843 had done in the Cape of Good Hope under one uniform system of law and, to that end, that the benefit or relief of cession of goods and property—the *cessio bonorum*—available to insolvent debtors should be abolished (See *Thurburn v. Steward* (1871), L.R. 3 P.C. 478). By s. 1 of Ordinance No. 29 of 1846, Ordinance No. 19 of 1844 was repealed save and except in so far as the same had repealed the laws relating to insolvent debtors and to writs of *cessio bonorum* theretofore in force in this Colony. FIRTH'S publication does not contain a reproduction of Ordinance No. 19 of 1844. It is perhaps not important to seek to discover what was repealed by Ordinance 19 of 1844 having regard to certain provisions contained in Ordinances which were enacted subsequent to the year 1846. Under s. 6 of Ordin-

ance 29 of 1846, upon adjudication of insolvency the property of the insolvent vested in the Administrator General as the assignee of the insolvent and by s. 29 property which so vested in the Administrator General was to be "distributed and dealt with according to such of the Rules and Regulations prescribed in Ordinance No. 18, of the year 1844, intituled 'An Ordinance to establish Administrators-General in the colony of British Guiana' as shall be in force at the time of this Ordinance coming into operation, and according to the Rules and Regulations prescribed in Ordinance No. 17, of the year 1846, intituled 'An Ordinance to amend Ordinance No. 18, of the year 1844, intituled 'An Ordinance to establish Administrators-General in the Colony of British Guiana'"': Thereafter followed provisos relating to the payment of costs of the adjudication and to the payment of joint creditors out of any separate estate. Ordinance No. 32 of 1846 was enacted in respect of arrangements and compositions assented to by creditors where a debtor was unable to meet his engagements with his creditors. That Ordinance did not deal with debtors adjudicated insolvent. Ordinance 7 of 1851 repealed ss. 10 to 22 and 26 to 71 of Ordinance 18 of 1844.

Section 65 of Ordinance 7 of 1851 provided as follows:

"And be it enacted, that if a creditor claim for a debt with interest, he may in his affidavit accumulate the interest as at the date of the insolvency, if an insolvency shall have been declared, or if no such insolvency shall have been declared, then at the date of the estate coming into the possession of the Administrator-General in whose possession such estate shall be, and he shall specify the amount of the interest, and also of the accumulated sum; but he shall not be entitled to claim on the estate for interest, either on the principal debt or on the accumulated sum, after the date of the insolvency or of the estate coming into the possession of the Administrator-General; and if a creditor claim for a debt which is not payable till after the date of the insolvency or of the estate coming into the possession of the Administrator-General in whose possession such estate shall be, he shall in his affidavit deduct the legal interest thereon from the date of the insolvency, or of the estate coming into the possession of the Administrator-General, to the time of payment, and specify the balance; and the creditor in the several cases shall be entitled to receive dividends for the said accumulated sum of balance respectively and no more."

Section 69 of Ordinance 7 of 1851 enacted the order of preference, "mortgages according to their nature and priority of their dates" being ranked seventhly in the order of preference. Section 80 provided that if there be any residue of an estate after discharging the debts filed and admitted against it, any and every creditor shall be entitled to claim out of such residue the full amount of any interest on his debt due, and which shall not have been claimed, or which shall have been disallowed at the time of his said debt being filed. Section 81 provided that "an estate when reduced into money, and after paying all necessary charges and commissions, shall be divided among

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the creditors according to their several rights and interests." Section 165 of Ordinance 26 of 1855 which related to the Supreme Court of Civil Justice provided that "every mortgage, legal or conventional, shall hold the same rank in respect of priority which it now holds by law, and nothing contained in this Ordinance shall injure or affect the validity or privilege of any such mortgage."

The Administrator-General's Ordinance, 1865 (No. 8), came into operation on the 30th June, 1865, and by s. 4 thereof, so much of Ordinance 18 of 1844, as was still then unrepealed, Ordinance 7 of 1851, ss. 196-198, 201, 205-208, 228 and 231-237 of Ordinance 26 of 1855 in so far as the same severally related to the Administrator General, and so much of Ordinance No. 32 of 1864 as related to sales by order of the Administrator-General, were repealed. Section 27 of that Ordinance provided that the Administrator-General was to be the official assignee of insolvent estates within the Colony. Section 39 required him out of the first available funds of any estate under his administration, to pay according to their order of preference all preferent claims due by such estate with respect to the validity of which he shall entertain no doubt. The order of preference of claims against estates was set out by s. 100 and "mortgages according to their nature and priority of their dates" appear under seventhly on the list of preferent claims. The provisions of s. 100 continued in force until they were repealed by s. 1 of Ordinance 10 of 1866 but s. 6 of the latter Ordinance re-enacted a similar provision in respect of the order of preference for mortgages. Section 92 provided as follows:

" 92. If a creditor claim for a debt with interest he may in his affidavit accumulate the interest as at the date of the insolvency, if an insolvency shall have been declared, or if no such insolvency shall have been declared, then as at the date of the estate coming into the possession of the Administrator-General, and he shall specify the amount of the interest, and also of the accumulated sum; but he shall not be entitled to claim on the estate for interest, either on the principal debt, or on such accumulated sum. after the date of the insolvency or of the estate coming into the possession of the Administrator-General; and if a creditor claim for a debt which is not payable till after the date of the insolvency, or of the estate coming into the possession of the Administrator-General, he shall deduct the legal interest thereon, from the date of the insolvency, or of the estate coming into the possession of such Administrator-General to the time of payment, and specify the balance; and the creditor in the several cases shall be entitled to receive dividends for the said accumulated sum or balance respectively and no more: Provided always that where a creditor shall hold a mortgage or other preferent claim bearing interest, he shall have the same preference upon the nett proceeds of the property mortgaged or charged, for the interest on his claim up to the time of payment as for the capital thereof."

The proviso to this section made it clear that under that Ordinance a mortgagee or any other preferent claimant was entitled to the same

preference upon the *nett proceeds of the property mortgaged or charged* for the interest on his claim *up to the time of payment* as for the capital.

It is to be observed that the preference in relation to the payment of interest was to be upon the proceeds of the property mortgaged or charged. Apart from the proviso, s. 92 was in the same terms as s. 65 of Ordinance 7 of 1851. Section 92 continued in force until it was repealed by s. 129 and the Third Schedule of the Insolvency Ordinance, 1884 (No. 22). Section 113 of the 1865 Ordinance provided that if there be any residue of an estate after discharging all the debts filed and admitted against it, every creditor shall be entitled to claim out of such residue the full amount of interest on his debt which shall have accrued from the time when the interest ceased to be charged upon the claim as filed. This section seems to have been intended to refer to claims other than mortgages and other preferent claims.

Thereafter was enacted Ordinance 13 of 1865 — the Insolvency Ordinance, 1865, which came into operation on the 1st September, 1865. By s. 6 of that Ordinance, Ordinance No. 29 of 1846 was repealed save as regards petitions then pending thereunder. Under s. 46 the Administrator-General by virtue of his office was the official assignee of the insolvent and under ss. 50 and 51 the movable and immovable property of the insolvent vested in the official assignee. Section 63 provided that so soon as any property vested in the official assignee under that Ordinance the same was to be administered and sold and the proceeds thereof distributed and dealt with according to the provisions of the Administrator-General's Ordinance, 1865. Sections 88 and 89 provided as follows:

"88. Upon all debts or sums certain, payable at a certain time or otherwise, whereupon interest is not reserved or agreed for, and which shall be overdue at the adjudication of insolvency and provable thereunder, the creditor shall be entitled to prove for interest, to be calculated at the rate of *six per centum per annum*, up to the date of the adjudication, from the time when such debts or sums certain became payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment.

89. If any plaintiff in any suit, shall have obtained any sentence or order against any person who shall thereafter become insolvent for any debt or demand in respect of which such plaintiff shall prove under the insolvency, such plaintiff shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the insolvency: and if any defendant shall have obtained any sentence, or order in any such suit, against any person who shall thereafter become insolvent, such defendant shall be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the insolvency."

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The provisions of the Insolvency Ordinance, 1865 (No. 13), continued in force until that Ordinance was repealed by s. 5 of the Insolvency Ordinance, 1872 (No. 1), except in regard to petitions then pending.

The Administrator-General continued to be official assignee of the insolvent after adjudication and the property of the insolvent vested in him. Provisions similar to those of ss. 88 and 89 of Ordinance 13 of 1865 were enacted by ss. 92 and 93 of Ordinance No. 1 of 1872. Section 62 provided that so soon as any property movable or immovable shall be vested in the official assignee under the Ordinance, the same shall be administered and sold and the proceeds distributed and dealt with according to the provisions of the Administrator-General's Ordinance, 1865, so that the provisions contained in the proviso to s. 92 of Ordinance 8 of 1865 relating to the payment of interest to date of payment on mortgages in the order of preferent claims, out of the nett proceeds of the mortgaged property, remained in operation. Section 101 of Ordinance No. 1 of 1872 provided that "all and singular the provisions contained in 'the Administrator-General's Ordinance, 1865', with respect to the calling up of creditors, proof of debts, dividends, and appeals, shall extend and be applicable to the estates of debtors adjudged insolvent under this Ordinance." Thereafter followed provisions relating to the payment of dividend to joint creditors out of a separate estate.

In 1884 the Insolvency Ordinance, 1884 (No. 22), which appears to have been based on the provisions of bankruptcy legislation in England, was enacted. The whole of Ordinance No. 32 of 1846 (an Ordinance for facilitating arrangements between debtors and creditors) and of Ordinance No. 1 of 1872 were repealed. Those sections of the Administrator-General's Ordinance, 1865 (No. 8), in so far as they related to the administration of estates in insolvency were all repealed. Section 5 of the amending Ordinance—the Administrator-General's Ordinance 1866 (No. 10) was also repealed. It will be observed, however, that s. 6 of Ordinance 10 of 1866 which related to the order of preference still remained unrepealed. Indeed, s. 127 of Ordinance 22 of 1884, specifically enacted that s. 6 of Ordinance 10 of 1866 was to be construed as if the term official assignee included the Administrator-General or any assignee when acting under Ordinance 22 of 1884. Ordinance No. 22 of 1884 was intituled an Ordinance to amend and consolidate the law relating to insolvency. As in the previous Ordinances referred to above, the Administrator-General was the official assignee in insolvency and the property of the insolvent upon the adjudication became divisible among the insolvent's creditors and vested in the Administrator-General. Rules relating to the proof of debts were provided by the Second Schedule to the Ordinance of r. 20 is in terms similar to the provisions of ». 88 of Ordinance 13 of 1865 save that the rate of interest specified is 4 *per centum per annum* instead of 6 *per centum per annum*.

Under s. 37 of the 1884 Ordinance, secured creditors, other than mortgagees, could with consent of the Administrator-General realise the property in respect of which security was given. In the case of

mortgaged property, however, the Administrator-General had to realise the property and from the nett proceeds pay the amount secured by the mortgage or mortgages in their order of priority, so far as the proceeds may suffice for the purpose.

Section 38(1) provided as follows:

"38. (1) In the distribution of the property of an insolvent preferent claims with the interest due thereon, if such interest be also preferent, shall be paid in full in the order in which by law they are preferent, *out of the funds on which they are preferent* and shall be paid as there are funds in hand."

The preferent claims were those stated in s. 6 of Ordinance 10 of 1866 which continued in force after the enactment of the Insolvency Ordinance, 1884, and "mortgages according to the nature and priority of their dates" continued to rank as seventhly in the order of preferent claims.

The words "if such interest be also preferent" in sub-s. (1) of s. 38 of the Insolvency Ordinance, 1884, connote that not all preferent claims bore interest which was also preferent. There was no similar provision in relation to preferent interest in the Bankruptcy Act, 1883. Nothing contained in the Insolvency Ordinance, 1884, itself specified the claims which bore interest which was also preferent. It would not be unreasonable. I think, to conclude that mortgage interest under the 1884 Ordinance was also preferent having regard to the fact that at least from the enactment of s. 92 of Ordinance 8 of 1865 such interest was preferent up to the date of payment as for the capital and there is nothing contained in the 1884 Ordinance which provided to the contrary.

The provisions of s. 6 of Ordinance 10 of 1866 continued in force until the enactment of the Administrator-General's Ordinance, 1881 (No. 8) under s. 74 of which the preferent claims in their order of preference are set out. "Mortgages according to their nature and priority of dates" appear at para, (g) in sub-s. (1) of that section.

The Insolvency Ordinance, 1884, was repealed and re-enacted by the Insolvency Ordinance, 1900 (No. 29), which as amended from time to time is still in force as Cap. 43 of the LAWS (KINGDON Edition). The Official Receiver's Ordinance, 1905, abolished the office of Adminstrator-General and thereafter the Official Receiver has been performing the functions under the Insolvency Ordinance, 1900, formerly performed by the Adminstrator-General.

Section 39 of Cap. 43 specifies the order of priority of debts, special conventional mortgages appearing at para, (e) of sub-s. (1) of that section. That sub-section provides:

39. (1) In the distribution of the assets of an insolvent at any time being distributed, the assignee, after paying thereout the expenses properly incurred in realising them or in carrying on

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the plantation or business from which they are obtained, all fees and commissions relating thereto, and any costs, charges and expenses payment whereof is prescribed or allowed by the Court, shall pay thereout in the order hereinafter specified the following debts or those of them or any part of any of them not previously paid, namely,—

* * * * *

- (e) legal mortgages and special conventional mortgages affecting the assets then being distributed, or.....the mortgages ranking between themselves in accordance with the priority given to each by the existing law, and in default of any different rule of law as to priority according to the order of their dates of origin and including, in the case of special conventional mortgages, all costs properly incurred in proceedings taken for foreclosing them."

Sub-section (8) of s. 39 of Cap. 43 provides that if there is any surplus after payment of the foregoing debts, it shall be applied in the payment of interest from the date of the receiving order at the rate of six *per centum per annum* on all debts proved in the insolvency. A similar provision existed in the Insolvency Ordinance, 1884 (s. 36(6).) and in the Bankruptcy Act, 1883, in England (s. 46(5)). It will be observed that in the Insolvency Ordinance, Cap. 43, there is no specific provision with respect to preferential interest as there was contained in s. 38(1) of the Insolvency Ordinance, 1884. By s. 38(1) of the Insolvency Ordinance, Cap. 43, any secured creditor may, with the consent of the assignee, and the approval of the Official Receiver if he is not assignee, realise any *movable* property upon which his security exists, if the property is unaffected by any other security.

In England unless there is a surplus there can as a general rule be no proof for interest accruing due after a receiving order has been made [see *Ex parte Lubbock* (1863), 4 De G.J. & S. 516; *In Re Savin* (1872), L.R. 7 Ch. 760, *Quartermaine's case*, [1892] 1 Ch. 639]. If a secured creditor realises his security he may prove for the balance due to him after deducting the nett amount realised. The proof must be limited to the amount due for principal and interest at the date of the receiving order after deducting the proceeds of the realisation. The proceeds cannot be applied on payment of interest subsequent to the receiving order. If a secured creditor surrenders his security to the assignee for the general benefit of the creditors, he may prove for his whole debt.

In Re Savin (1872), L.R. 7 Ch. 760, at p. 764, JAMES, L.J., said:

"There is a general rule in bankruptcy—whether a right and a reasonable rule or not—that there is to be no proof in bankruptcy for interest subsequent to the bankruptcy. There was also a rule in bankruptcy that a creditor holding a mortgage security is to make up his mind whether he will rely upon his security or give it up and come in and prove with the other creditors. This rule was relaxed in favour of the creditor by a rule that his security might be sold, and then he was to apply the realized

proceeds in payment of his debt. On this rule a judicial decision was made nearly eighty years ago, that the proceeds of the sale were in case of deficiency, to be applied in payment of principal and interest up to the date of the bankruptcy, and up to the date of the bankruptcy only; and then the creditor was to prove for the residue of his debt, which of course did not include any interest subsequent to the date of the bankruptcy.

That rule has been repeated in the very same terms by every writer on the subject, and by every Judge, with the exception perhaps of Mr. Commissioner MONTAGU's note to *Ex parte Ramsbottom*. It seems to have been considered as the established rule in bankruptcy, and so it was laid down by Lord WESTBURY in the case already referred to."

The English authorities show that it is by way of practice rather than by way of legal enactment that interest is generally payable only up to the date of receiving order. In British Guiana prior to the enactment of the Insolvency Ordinance, 1884 (No. 22), interest was by legal enactment payable up to the time of payment and so there was no room for the introduction of the English rule in respect of mortgages and other preferential claims and as I have already stated it would not be an unreasonable conclusion that mortgage interest under the 1884 Ordinance was also preferential. It has not been shown that this position was changed by the enactment of the Insolvency Ordinance, 1900, and indeed so far as can be ascertained the position continued as heretofore.

Subsection (8) of s. 39 of Cap. 43 in my opinion is referable to those claims where interest is not payable subsequent to the date of the receiving order.

The history of the legislative enactments in British Guiana during the last century shows that a mortgagee was entitled to the same preference upon the nett proceeds of the property mortgaged or charged for the interest up to the time of payment as for capital. The practice so far as it has been ascertained during the present century and up to the year 1962 has followed what was a legal enactment in the previous century and there has been no provision to the contrary in any of the enactments following upon that enactment.

I therefore hold that interest on the special conventional mortgage passed by the insolvent in favour of the abovementioned creditor on the 23rd September, 1959, accruing due after the date of the date of the receiving order made against the debtor is payable in priority to all debts ranking after such mortgage out of the nett proceeds of the property mortgaged. The Official Receiver is directed accordingly.

On application of Mr. S. L. Van B. Stafford, counsel for the applicants, costs of this application granted to the applicants against the Official Receiver certified fit for counsel.

Leave to appeal granted.

Order accordingly.

SPENCER v. GITTENS

[In the Full Court, on appeal from a magistrate's court for the Georgetown Judicial District (Luckhoo, C.J., and Chung, J.) January 29, March 16, 1965]

Appeal—Appellant convicted ex parte of summary jurisdiction offence—Allegation that appellant was misinformed by clerk of court of date of hearing—Whether a ground of appeal—Summary Jurisdiction (Appeals) Ordinance. Cap. 17, s. 9(k).

The appellant was convicted *ex parte* of a summary jurisdiction offence. Contending that she had been misinformed by the clerk of court of the date of hearing, she appealed on the ground that a specific illegality substantially-affecting the merits of the case had been committed in the course of the proceedings in that she did not have an opportunity to be heard.

Held: (i) the allegation did not disclose a specific illegality as was contemplated by s. 9(k) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17;

(ii) where a complaint such as that made by the appellant was shown to be well-founded *certiorari* would lie and not a remedy by way of appeal.

Appeal dismissed.

[**Editorial Note:** Compare *Singh v. Chunilal*, 1963 L.R.B.G. 157]

H. D. Hoyte for the appellant.

B. S. Rai for the respondent.

Judgment of the Court: In this appeal the appellant seeks an order for re-hearing of a complaint made against her under the provisions of the Summary Jurisdiction (Offences) Ordinance, Cap. 14, on the ground that, being misinformed by a clerk of the court of the date of hearing of the complaint, she was denied an opportunity of answering the charge.

A complaint had been laid against the appellant alleging that on the 29th November, 1963, at 126, Laluni Street, Georgetown, within the Georgetown Judicial District, she unlawfully assaulted the complainant Gittens contrary to s. 21 of the Summary Jurisdiction (Offences) Ordinance, Cap. 14. The complaint had been filed on the 9th January, 1964, and was first called on the 13th January, 1964, in Court I when the matter was transferred to Court II for hearing on the 8th February, 1964, on which day it was transferred to Court III for hearing on the 24th February, 1964, before another magistrate Mr. E. A. Gunraj who fixed the hearing of the matter for the 2nd March, 1964, at 1.30 p.m. On the 2nd March, 1964, Mr. Gunraj was unable to bear the matter and transferred it for hearing before another magistrate Mr. F. Vieira who heard it *ex parte*, neither the appellant nor her counsel Mr. Neville Bissember being present. Later that day, after the hearing had been completed *ex parte* and the appellant found guilty and fined \$7.50 with costs \$7.22 in default 14 days' imprisonment, the appellant and her counsel approached the trial

magistrate and stated that they were under the impression that the matter was to be heard on the following day the 3rd March, 1964. The trial magistrate thereupon pointed out to the appellant and her counsel that there appeared on the case jacket in the handwriting of Mr. Gunraj the date and time of hearing and the fact that that date had been fixed at the request of the parties—"2. 3. 64 at 1.30 p.m.—request parties."

The appellant thereafter lodged this appeal against the decision of the trial magistrate the sole ground of appeal contained in the notice of grounds of appeal being that a specific illegality substantially affecting the merits of the case was committed in the course of the proceedings therein in that the appellant (defendant) did not have an opportunity to be heard. At the hearing of this appeal leave was sought and obtained for the appellant to file an affidavit or affidavits in support of her allegation with leave to the respondent to file an affidavit or affidavits in answer thereto. Accordingly the appellant and Mohamed A. H. Khan, a class I clerk employed at the Magistrates' Courts Office, Georgetown, swore affidavits in support and in answer respectively.

The appellant had sworn an affidavit on the 11th November, 1964, prior to the hearing of this appeal with the intention, as stated in the notice of grounds of appeal filed, that leave would be sought at the hearing to file that affidavit in support of the ground of appeal. However, the appellant informed her counsel that the contents of para. 5 of that affidavit were incorrect and accordingly the intention to apply for leave to file that affidavit was abandoned. It may be observed in passing that in para. 5 of that affidavit the appellant had alleged that on arrival in Court III on the 24th February, 1964, to which court she had been directed to go from Court II, the orderly had informed her that the matter had already been postponed to the 3rd March, 1964, that her counsel was not present at that time and that neither counsel nor the appellant had requested the 2nd day of March, 1964, or any other date to be fixed for the hearing of the matter. In the affidavit filed with leave of this court the appellant swore that on her arrival in Court III the magistrate Mr. Gunraj called the matter and fixed a new date for hearing, that she did not hear the date fixed by the magistrate and enquired of the orderly who told her that the magistrate had fixed the hearing for the 3rd March, 1964. Her counsel was not present at the time and neither he nor the appellant had requested the 2nd day of March, 1964, or any other date as the date of hearing.

Mohamed Khan said in his affidavit that he escorted the appellant to Court III presided over by Mr. Gunraj and that in his presence Mr. Gunraj fixed the date of hearing as the 2nd March and so notified the appellant; at the same time the complainant Gittens and his counsel Mr. Rai were present. At para. 6 of his affidavit Khan has sworn that the magistrate distinctly announced the date for hearing as the 2nd March, 1964, and the place of hearing as Court II and that the orderly of the court repeated the magistrate's announcement and that thereafter he (Khan) took the case jacket to Court II and on his

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way out he again mentioned the date of hearing to the appellant. At the hearing of this appeal counsel for the appellant stated that the contents of para. 6 of Khan's affidavit are challenged by the appellant as being incorrect.

For the purpose of the determination of the question raised on appeal it will be assumed that the contents of the appellant's second affidavit (that filed with leave of this court) are true and accurate and the contents of Khan's affidavit and the note in Gunraj's handwriting on the case jacket to the effect that the date fixed is at the request of the parties will for such purpose be ignored. The grounds of appeal which may be taken in an appeal under the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, are those set out in paras. (a) to (1) of s. 9 and that section provides that those grounds and no other may be taken. At para. (k) is provided the following as a ground—"some specific illegality, other than hereinbefore mentioned, substantially affecting the merits of the case was committed in the course of the proceedings therein or in the decision." It has not been suggested that either Mr. Gunraj or Mr. Vieira committed a specific illegality. The allegation is that the orderly enquiry by the appellant misinformed the appellant of the date of hearing. This can hardly be a specific illegality as is contemplated by para. (k) in s. 9 of the Ordinance. To succeed on appeal on such an allegation the appellant must seek to bring her appeal upon one of the other grounds specified in paras. (a) to (1) of s. 9 of the Ordinance, Cap. 17. It has not been contended that any of the remaining grounds is applicable. The allegation of the appellant, if well founded (which for the purposes of the determination of this question is being assumed), will amount to the position that the appellant was given no opportunity to answer the charge whereby there is a denial of natural justice.

A somewhat similar question arose in the case of *Spencer v. Bramble* (1960), 2 W.I.R. 222, before the Supreme Court of Trinidad and Tobago (BLAGDEN and HYATALI, JJ.) on appeal from two decisions of a magistrate who had heard two complaints brought against the appellant Spencer. The hearing of the complaints had proceeded ex parte in the absence of Spencer who was convicted. Spencer alleged that he was genuinely mistaken as to the date to which the hearing in his cases was adjourned, stating that he thought it was April 10, whereas it was in fact April 3. He sought to have the magistrate's decisions set aside on appeal stating as his ground on each appeal, "I was mistaken as to the date of hearing and the charge was heard *ex parte*". The substance of the affidavits filed in support of the appeals was to the effect that the appellant had been under a genuine misapprehension as to the date to which the hearing of the complaints had been adjourned and that he had a good defence to the charges. Section 131 of the Summary Courts Ordinance, Cap. 3, No. 4 (T), provided that "A notice of reasons for appeal may contain all or any of the following reasons and no others . . ." The reasons which follow are set out in sub-ss. (1) to (10). While absence from the trial for any cause is not one of them, sub-s. (7) provides that an appellant may set forth as a ground of appeal—

"(7) That the court refuses to make a conviction or order, or that the appellant is not guilty, as the case may be, either of which reasons shall entitle the appellant to maintain—

- (a) that legal evidence substantially affecting the merits of the case has been rejected by the court; or
- (b) that illegal evidence has been admitted by the court and that there is not sufficient legal evidence to sustain the decision after rejecting such illegal evidence; or
- (c) that the decision is unreasonable or cannot be supported having regard to the evidence;"

The Trinidad Supreme Court held that the appeal of the appellant could properly be brought under the statutory ground of "not guilty" contained in s. 131(7) of the Trinidad Ordinance allowing him to impugn the decisions against him on matters relating to the evidence. The court, after considering the appellant's reasons, stated that the critical question was whether the appellant had been given a reasonable opportunity of putting forward his case. The court found that it was by reason of his own culpable neglect that the appellant had deprived himself of the opportunity of putting forward his case. The appeals were therefore dismissed, the court considering that it was not necessary in the circumstances of the case that evidence on the allegation made by the appellant should be adduced.

The Summary Jurisdiction (Appeals) Ordinance, Cap. 17, does not contain any provision similar to sub-s. (7) of s. 131 of the corresponding Trinidad enactment. In the instant appeal we find that it is not competent to invoke the aid of the provisions of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17. That does not mean that in a proper case there is no remedy. The English cases of *R. v. Wandsworth, ex parte Read*, [1942] 1 K.B. 281, [1942] 1 All E.R. 56, and *Rigby v. Woodward*, [1957] 1 All E.R. 391, we think provide the answer to the question to be determined in this appeal. In the former case—an application to the Divisional Court for *certiorari* to quash a conviction—the applicant complained that he had not been given an opportunity of answering the charge. CALDECOTE, L.C.J., did not decide whether an appeal could have been brought but held that *certiorari* would lie. HUMPHRYS, J., thought that that was not a case which was ever intended to be the subject of appeal to quarter sessions. In the latter case—an appeal against conviction—the appellant complained against the justices' refusal to allow his solicitor to cross-examine the co-defendant. The Divisional Court was of the opinion that ordinarily the matter would have been brought before the court on a motion for *certiorari* and that it would have been said to be a departure from the common principles of justice in not allowing a witness who had given evidence against the prisoner to be cross-examined. The Divisional Court considered that a radical departure from the well known principles and procedure made the decision given after that departure wrong in law and the appeal was therefore allowed. In the instant case it was not urged, and we think it could not properly have been urged, that there was an error in

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law committed by the learned magistrate. We entertain no doubt that where a complaint such as that made by the appellant in the instant case is shown to be well founded *certiorari* would lie and not a remedy by way of appeal.

Having come to that conclusion we do not think that there is any necessity for evidence to be adduced to ascertain whether or not the appellant's allegation that she was misinformed of the date of hearing is in fact true.

At the hearing of this appeal reference was made by counsel for the appellant to the appeal of *L. C Osborne v. Princess Osborne*, No. 950/1960 Demerara. In that appeal the sole ground of appeal filed was in terms similar if not identical with that filed in the instant appeal, but the Full Court, granted the appellant leave to add further grounds of appeal—that the learned magistrate erred in law when he found on the facts that the appellant was guilty of desertion and that the decision was erroneous in point of law in that the magistrate wrongly found that the matrimonial offence of desertion was established on the facts. The appeal was allowed and the order of the magistrate was set aside, the matter being remitted for re-hearing and determination. No written judgment was delivered in that appeal but from the notes of the argument taken at the hearing it would appear that the appeal was allowed on one or both of the additional grounds of appeal and that the application for adding to the grounds of appeal was made after the Full Court had informed counsel for the appellant that the court could not entertain the grounds of appeal filed.

The appeal is dismissed with costs to the respondent fixed at \$27.64.

Appeal dismissed.

ESTATE OF POONOO, DECEASED v. GANESH

[Supreme Court (King, J. (ag.)) November 6, 24, 26, December 1, 1964,
January 16, 1965]

Mortgage—Claim to recover on mortgage more than ten years after mortgage executed—Whether claim tenable—O. 36, r. 26.

Practice and procedure—Claim by plaintiff as executrix joined with claim by her personally—Whether joinder competent.

Money lending—Promissory notes not issued in registered name of money-lender—Validity—Moneylenders Ordinance, Cap. 335, s. 4(1) (b).

The plaintiff sued as executrix of the estate of her deceased husband to recover on a deed of mortgage and on certain promissory notes. After the death of her husband, who was a moneylender, the plaintiff took out a moneylending licence in her own name and carried on his business. The mortgage had been executed more than ten years previously, but the promissory notes were issued in her own name five years after her husband's death. She herself was the principal beneficiary of the estate. The claim on the mortgage was resisted on the ground that a mortgage is a judgment and therefore under O. 36, r. 26, execution could not issue after ten years had elapsed. With respect to the claim on the promissory notes, it was contended that the plaintiff was seeking to join a claim in her personal capacity with a claim as executrix and that this was not competent. The plaintiff replied that the transaction relating to the promissory notes had been entered into by her as executrix in the course of carrying on the business of the estate.

Held: (i) a mortgage has been described as a "voluntary condemnation," but O. 36, r. 26, does not preclude a party from bringing an action to enforce a mortgage after ten years have elapsed since it was passed;

(ii) an executor has no authority to carry on the business of the deceased except for the purpose of winding it up and completing contracts made by the testator;

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(iii) in respect of the promissory notes, whatever the plaintiff's intention she must in the circumstances be deemed to have been carrying on the business for her own benefit, and accordingly it was not competent for her to join the claim on the promissory notes with the claim on the mortgage;

(iv) if in fact the promissory notes related to the business of the estate the transaction was void because the notes were not issued in the registered name of the moneylender as required by s. 4(1) (b) of the Money-lenders Ordinance, Cap. 335.

Judgment for the plaintiff.

C. V. Wight for the plaintiff.

F. R. Allen for the defendant.

KING, J. (ag.): In this action the plaintiff sues as executrix of the estate of Poonoo deceased for (a) an amount of capital and interest due under a mortgage and for the usual foreclosure order and other consequential relief and (b) for a balance due under certain promissory notes.

The defendant's counsel took a preliminary point that the plaintiff was seeking to join a claim in her personal capacity with the claim as executrix. However, as on the face of the statement of claim both claims appeared to be in the representative capacity I dismissed this contention and took evidence on the whole claim.

The defence was that there was an amount owing on the mortgage, the creation of which was admitted, but that this debt had been compromised by the issue of the promissory notes. As the burden of proving this was on the defendant I called on him to begin.

The defendant and a witness gave evidence to the effect that the plaintiff agreed to cancel the mortgage and at some later date issue a mortgage in her own name if the defendant would sign four promissory notes for the balance owing, to which he, the defendant, agreed, and executed the notes. The plaintiff's principal witness was her daughter Savitri Singh who handled all her mother's business as she, the mother, was illiterate. She denied the contention of the plaintiff and said that the promissory notes of which there were five and not four were in respect of other debts owing by the plaintiff quite separately from the mortgage. I was impressed by the evidence of the plaintiff and her witnesses supported by her books of account and accepted it in preference to that of the defendant and his witness wherever there was a conflict. I am supported in this view in that I cannot conceive of anyone giving up the security of a mortgage for that offered by promissory notes, moreso as in this case the plaintiff was acting as executrix with the duties and responsibilities thereby entailed. I find that the amount of capital and interest on the mortgage was in fact owing and there was never any agreement to substitute the promissory notes for the mortgage.

The defendant's counsel argued the point that a mortgage is a judgment and therefore under O. 36, r. 26, execution could not issue

after ten years had elapsed. This point is hardly worthy of consideration. A mortgage has been described as a "voluntary condemnation," but to say that O. 36, r. 26, precludes a party from bringing an action to enforce a mortgage after ten years have elapsed since it was passed is an attempt to strain the provisions of that rule far from the purpose for which it was intended. The amount of capital owing and the calculation of the interest were not disputed and I accordingly give judgment for the plaintiff on the mortgage for the capital sum \$800 and interest \$376.06 together with further interest at the rate of 13 *per centum per annum* on the capital sum of \$800 from 28th November, 1963, until payment. There will be the usual foreclosure order.

The second part of the claim for the balance due on five promissory notes which were executed by the defendant on 22nd January, 1958, in favour of the plaintiff with no mention of her representative capacity is not as straightforward.

After her husband's death, Budhia took out a money-lending licence in her own name and continued to carry on the money-lending business. She says, and I believe her testimony, that she intended to carry on the business for the benefit of the estate, she did not intend to make any profit for herself and there was no attempt to divide the proceeds between herself and the estate. This may well be, but how far is she permitted to do so? It is settled law that an executor has no authority to carry on the business of the deceased except for the purpose of winding it up and completing contracts made by the testator. He may also, where the business is a valuable asset, carry it on for such reasonable time as may be necessary to enable him to sell it for the best advantage of the estate. In this case, however, the notes were made five years after the death of the deceased. This is not, in my opinion, a reasonable period during which to carry on the business for the sake of winding it up, and it was not the sort of business that could be sold as a going concern. In the circumstances I must hold that whatever the plaintiff's intention may have been she must be deemed to have been carrying on the business for her own benefit. Indeed, as she had been given a life interest in the estate, it would be a normal thing for her to do, and after five years the assets must be considered to have vested in her as a beneficiary.

A further point arises as to whether the plaintiff could in any event have sued as executrix in respect of promissory notes made out to her in her own name. The general rule as stated in WILLIAMS ON EXECUTORS AND ADMINISTRATORS (14th Edition) Vol. 1, p. 361, is that wherever the money recovered will be assets of the estate the executor may sue for it in his representative character. My finding above is that the money recovered would not be assets of the estate and therefore the action could not be brought in the representative capacity. But apart from this it appears that the general trend of decisions has been to limit the right of the executor to sue as such to cases where it is apparent that his representative and not his personal capacity is involved. In the case of *Partridge v. Court*, 5

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Price 412, it was held that an administrator may sue as such on a promissory note given to him *as administrator* since the death of the intestate. The decision does not, it is true, go on to say that where the note does *not* expressly state that it is made in favour of the representative as such the converse would be true, but from the spirit of the decisions I think that this would follow, moreso in this case in view of the lapse of time since the deceased's death.

I am reinforced in this decision by the provisions of the Money-lenders Ordinance, Cap. 335, since repealed, but applicable to the facts of this case as being in force at the time of the transaction. This provides at s. 4(1) (b) that a moneylender "shall carry on the moneylending business in his registered name and in no other name" and if he does not shall be liable under s. 4(2) to penalties. It appears that Budhia, the executrix, was carrying on business in the name of Budhia personally. Whereas the purpose of the section is to prevent fraud, and I do not accept that there was any in this case, nevertheless the law must be observed. In the case of *Kailan v. Hutt & Inniss*, 1958 L.R.B.G. 85, LUCKHOO, J., as he then was, dismissed an action on a promissory note on the ground that the plaintiff was carrying on a moneylending business in a name other than his registered name. Chapter 335 and not the 1957 Ordinance applied in that case as in this one. Similar considerations would seem to apply here as regards Budhia as executrix and Budhia in her personal capacity. For the above reasons I dismiss the claim for \$653.40 for the balance due on the promissory notes.

The plaintiff shall have her costs of the action to be taxed.

Judgment for the plaintiff.

Solicitors : *Carlos Gomes* (for the plaintiff); *O. M. Valz* (for the defendant).

INLAND REVENUE COMMISSIONER v. ARGOSY CO., LTD.

[Supreme Court—In Chambers (Persaud, J.) September 25, October 2, 16, 1965]

Income tax—Failure to submit return—Best judgment assessment by Commissioner—Whether Commissioner must disclose basis of assessment—Income Tax Ordinance, Cap. 299, s. 48(4).

Section 48(4) of the Income Tax Ordinance, Cap. 299, provides that "where a person has not delivered a return and the Commissioner is of the opinion that the person is liable to pay tax, he may, according to the best of his judgment, determine the amount of the chargeable income of that person, and assess him accordingly...." With respect to an assessment made under this provision it was contended for the tax-payer that the Commissioner had no material before him on which he could make the assessment and that, if he had, he was obliged to disclose it on appeal. The taxpayer did not, however, affirmatively establish that there was no such material before the Commissioner. On appeal by the Commissioner from a decision of the Board of Review setting aside the assessment,

Held: (i) the words "to the best of his judgment" appearing in s. 48(4) of Cap. 299 connote that there must be in existence some material on which the Commissioner exercises his judgment. If he had no such material, or he acted on no such material, he can be said to have acted capriciously, but the onus of proving this lies clearly on the shoulders of the taxpayer and the Commissioner is not compellable under the Ordinance to show how he arrived at the tax assessed or to disclose to the court the information upon which the assessment has been based;

(ii) where, as in this case, the taxpayer is unable to discharge that onus the assessment must stand.

Appeal allowed.

[Editorial Note: The respondents appealed unsuccessfully to the Guyana Court of Appeal in 1967. A further appeal to the Privy Council is pending].

Doodnauth Singh, Senior Legal Adviser (ag.), for the appellant

G. M. Farnum for the respondents.

A. M. S. Barcellos, liquidator, in person.

PERSAUD, J.: This is an appeal by the Commissioner of Inland Revenue against a decision of the Board of Review in which the Board allowed an appeal by the Argosy Co., Ltd. (the respondents)—now in liquidation—against an assessment made by the Commissioner on October 31, 1963, whereby the income tax of the respondents was assessed in the sum of \$11,250 in respect of year of income 1961 upon an income of \$25,000, determined by the Commissioner in the purported exercise of his best judgment in accordance with s. 48(4) of the Income Tax Ordinance Cap. 299.

It would be necessary to examine s. 48(4) of Cap. 299, as this appeal really turns on the interpretation of that section; but, before doing so, I should deal with certain preliminary matters.

There seemed to have been some confusion as to whether the Commissioner purported to act under sub-s. (3) or (4) of s. 48. No doubt the confusion arose because in his letter to the respondents on October 4, 1963 (Exhibit "B"), the Commissioner informed the liquidator of the respondents that he was making a "provisional assessment", the express words used by sub-s. (3), but which do not appear in sub-s. (4); but he went on to say in his letter that he was raising the provisional assessment by virtue of the provisions of sub-s. (4) of s. 48. The confusion was perpetuated by the language used by the Board in its judgment when it said—"We find therefore that under the s. 48(4) the Commissioner has not satisfied the Board that he comes within that sub-section", when earlier in their judgment, they had expressed the opinion that s. 48(3) did not apply. My understanding of the Board's statement quoted above is that the Commissioner did not have any material before him by means of which he could have exercised his best judgment under s. 48(4), and nothing more. Indeed, it seems to me that the Commissioner must stand or fall by s. 48 (4) in this particular instance.

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Prior to 1961 the respondents carried on four separate businesses, including a book shop. The returns for the years of income 1958, 1959 and 1960 show an overall substantial loss to the company resulting in an accumulated loss of \$124,801 up to December 31, 1960: but they also show that the book shop was returning a gross profit of \$888.08 in 1958, \$10,168.46 in 1959, and \$15,275.95 in 1960. In March 1961 the respondents sold their entire enterprise, with the exception of the book shop which they continued to operate until March 1962 when they went into liquidation. These facts do not appear to have been brought to the attention of the Board, or if they were (as I have been assured by counsel for the Commissioner) the Board did not seem to consider them of any significance, as they are not mentioned in the Board's decision.

In 1962 the respondents failed to deliver their income tax return, as their books of accounts which were being kept on the premises of the Russian Bear Bar were destroyed by fire in February 1962. This circumstance was brought to the attention of the Commissioner, and after some correspondence, and a meeting with the liquidator, the Commissioner raised a tax of \$11,250.00 in 1963. From all of this, it can be seen that that part of the business which the respondents retained have been showing a gross profit which had been increasing from year to year beginning from 1958.

Section 48(4) of the Ordinance provides as follows:

"Where a person has not delivered a return and the Commissioner is of the opinion that the person is liable to pay tax, he may, according to the best of his judgment determine the amount of the chargeable income of that person, and assess him accordingly....."

Counsel for the Commissioner has submitted that so long as the Commissioner does not act dishonestly, vindictively or capriciously—and there is no evidence of this—s. 48(4) intends him to assess by pure guess, and that there is no necessity for him to show that he made any enquiries, and if so, what enquiries, before he made his assessment; and further, that once he has made his assessment, the law provides that the taxpayer must then satisfy the appellate tribunal that the assessment is excessive, and it is not for the Commissioner to justify his assessment. Counsel is in effect relying on the joint operation of ss. 48(4) and 56 D (10) of the Ordinance.

The respondents' counsel has, on the other hand, argued that, while he concedes that no enquiry is necessary in order that the assessment may be made, nevertheless the Commissioner's assessment ought to be based on available information, and that even though the Commissioner need not indicate his basis of assessment to the taxpayer, he must do so when an assessment is being tested on appeal. Counsel further contended that the assessment which is being challenged must have been raised on the basis of the gross profits as indicated in the previous returns, and as there was nothing to show what the net income was, it was pure guess work to say that the respondents' net income for the year 1961 was \$25,000.

In dealing with s. 39 of the Australian Income Tax Assessment Act, 1922-25, which provides that the Commissioner's assessment is to be taken as *prima facie* correct, I:(3; A.C.J, in *Federal Com. of Taxation v. Clarke* (1927), C.L.R. 246, used language which to my mind can be regarded with profit in relation to the onus of proof in income tax matters. At p. 251 (*ibid*), the learned judge said:

"..... the burden of proving to the satisfaction of the court that the sum in question was not income, but capital transformed, and that it was not his income rests on the respondent. The justice of that burden cannot be disputed. From the nature of the tax, the Commissioner has, as a rule, no means of ascertainment but what is learnt from the taxpayer, and the taxpayer is presumably and generally, in fact, acquainted with his own affairs. The onus may prove to be dischargeable easily or with difficulty according to circumstances. Where, as here, a taxpayer has failed to keep any records of considerable dealings while engaged in profit-making transactions relied on by him to avoid the taxation ordinarily incident to such profits, and where, as here he has entangled these transactions, and has given discordant, and in some cases, inconsistent accounts and explanations of them, the onus is of the heaviest character."

Now as to the interpretation to be placed on s. 48(4) of Cap. 299. First of all, I wish to say that my reading of the section does not make it obligatory on the Commissioner to make an assessment on any person who has failed to deliver a return, but only where such a person is in the opinion of the Commissioner liable to pay tax, in which event, he must use his best judgment in making his assessment. [See *Morisse v. Royal British Bank* (1856). 1 C.B. (N.S.) 67].

In using his best judgment, the Commissioner must not rely on matters of conjecture, suspicion and surmises (*Lalchand Bhagat Ambica Ram v. C.I.T.* (1959), 37 I.T.R. 288), but he must make the assessment according to the rules of reason and justice, not according to private opinion, according to law, not humour, so that the assessment must not be arbitrary, vague and fanciful, but legal and regular. See *Chettyar Firm v. C.I.T. Burma*, 4 Indian Income Tax Cases, 87.

In *C.I.T. v. Badridas* (1937), Indian Income Tax Reports 170, which was a decision of the Privy Council involving a best judgment assessment, Lord RUSSELL OF KILLOWEN, said at p. 179 (*ibid*):

"If the assessment in this case was made by the officer to the best of his judgment, it must stand unless the assessed succeeded in satisfying the officer that he had not a reasonable opportunity to comply or was prevented from complying with the terms of the notice under s. 22(4) requiring him to produce or cause to be produced his accounts for three years."

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It is to be observed that Lord RUSSELL was considering s. 22(4) of the Income Tax Act which enabled the taxing officer to serve a notice upon the taxpayer calling for production of accounts, upon the failure of which, the taxing officer may assess to the best of his judgment. We do not have such a provision in our laws.

Again at p. 180 (*ibid*), Lord RUSSELL said:

"The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously because he must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessment of the assessee, and all matters which he thinks will assist him in arriving at a fair and proper estimate; and though there must necessarily be guess-work in the matter, it must be honest guess-work. In that sense, too, the assessment must be to some extent arbitrary."

To my mind, the words "to the best of his judgment" appearing in s. 48(4) of Cap. 290 and in the laws that were being considered in the cases referred to in this judgment, must connote that there must be in existence some material on which the Commissioner exercises his judgment. But if he has no such material, or he acted on no such material, he can be said to have acted capriciously. The onus of proving this circumstance lies squarely on the shoulders of the taxpayer. The submission that the Commissioner is not compellable under the Ordinance to show how he arrived at the tax assessed does not admit of dispute, but it does appear to me that if the taxpayer can show from the circumstances that the assessment was an arbitrary one in the sense that there were no facts on which the Commissioner could have exercised his best judgment, he ought to succeed. In this regard I do not accept the contention of counsel for the respondents that the Commissioner ought to disclose to the court the information upon which the assessment has been based as there is nothing in the Ordinance which says that he should, and there is no support for this proposition to be found in the authorities. Indeed the dictum of the Australian Court of Appeal in *George v. Fed. Com. of Taxation* (1952), 86 C.L.R. 183, at p. 203, is against such a proposition. At p. 203 it is said:

"But, even were it true that the commissioner must, upon the hearing of the appeal, affirmatively prove by evidence that he formed a judgment of the amount of the income upon which the appellant ought to be taxed, it could not be part of his case to establish the facts upon which he acted in forming the judgment or the grounds on which he proceeded, the materials before him, or the reasoning actuating him."

Counsel for the Commissioner has invoked to his assistance, and relied heavily upon the case of *The Union Steamship Co. of New Zealand, Ltd, v. Federal Commissioner* (1820), 29 C.L.R. 84, and argued in effect that income tax legislation is so heavily weighted against the taxpayer, that there is no need even for a taxing authority to prove that the assessee is liable to tax. I would agree that the income tax legislation is on the side of the taxing authority, and deliberately and rightly so, for this is the only way in which tax dodgers can be made to meet their obligations to the state incurred under the income tax laws. No doubt, counsel wishes to give weight to this passage of ISAACS, A.C.J.'s judgment which appears at p. 92 (*ibid*), and which is as follows:

"When an assessment is made, which I may call a default assessment, the person assessed may or may not be in reality a taxpayer, he may be assessed in respect of a business which is exempt, or he may be assessed in respect of an amount which is erroneous. But for some reason or another he may be called upon by the assessment to pay an amount which is more than he ought, under the circumstances, according to law to be called upon to pay."

In that case, the judge was referring to default assessments under a particular tax ordinance, *viz.*, the Wartime Profits Tax Assessment Act, 1917. In any event, when the facts of the case are examined, it will be seen that the assessment was made on a disclosed basis.

Another case relied upon heavily by counsel for the Commissioner is *A.B.C. v. C.I.T., Singapore*—a case from the High Court of Singapore, a cyclostyled copy of which was made available to me by counsel. Section 72 of the Income Tax Act, Cap. 166 of Singapore, is similar in terms to our s. 48(4). In that case the taxpayer had been assessed for a certain period, and the Comptroller wishing to make a general enquiry into the taxpayer's income tax position for the same period, requested certain particulars from the taxpayer which were not forthcoming. The Comptroller assessed and served notices of assessment on the taxpayer calling upon him to pay additional tax. The taxpayer called upon the Comptroller to furnish him with reasons for or detailed basis on which the latter made the assessments. On appeal, the main and substantial question was the validity of the notices of assessment. There are certain passages in the judgment of BUTTROSE, J., which seem to lend support to counsel's submission. The judge said:

"It is no doubt a truism to say that you cannot have income without a source, but on the construction of the Ordinance as a whole I am unable to find anything which required the Comptroller or imposes upon him a duty to specify or give particulars of the sources of a taxpayer's income before a legal liability to tax is disclosed."

And speaking of the onus which is on the taxpayer to prove the assessment excessive, the judge said:

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"If the taxpayer fails to discharge it because he has conveniently lost his memory or books or failed to keep proper records he must take the consequences. The onus on the appellant here is not only to show that the assessment is wrong but what must be done to put it right."

Later the judge continued:

"The Comptroller is, in my view, perfectly entitled under the Ordinance to say 'I determine your chargeable income at \$X and assess your liability to tax \$Y and nothing more'."

And again:

"The appellant here is not entitled, in my view, to the particulars as to the source or sources from which the Comptroller alleges that the appellant derived the amounts in question set out in the notices of assessment. The Comptroller may no doubt assign a source if he wishes but there is nothing in the Ordinance which can compel him to do so."

In *George v. Fed. Com. of Taxation (supra)* s. 116 of the Income Tax Assessment Act, 1936-1937, enabled the Commissioner to make an assessment of the amount of taxable income of any taxpayer, and of the tax payable thereon from the returns, and from any other information in his possession, or from any one or more of these sources. I pause to observe that we do not have a similar provision in our law. Section 167 of the same act provides that where a person makes default in furnishing a return, or the Commissioner is not satisfied with the return furnished, or has reasons to believe that any person who has not furnished a return has derived taxable income, he may make an assessment of the income upon which in his judgment income tax ought to be levied. In the case referred to the taxpayer had furnished returns with which the Commissioner was dissatisfied, and he increased the taxpayer's income and proceeded to tax him on the income so increased. The taxpayer lodged an objection, and sought an order to have the Commissioner assign a source or sources for the moneys included in taxable income in the assessment over and above those disclosed as taxable income in the return.

The judge at first instance dismissed the appeal, and the matter went to the Full Court of Australia comprised of five judges I should have mentioned that under the Australian Act too, the onus of proving the assessment excessive lies on the taxpayer. Dealing with this onus of proof, the Full Court in referring to the increase of the taxpayer's assets said (at p. 201, *ibid*):

"It is a fact outside any knowledge the commissioner can have except from inquiry into the affairs of the appellant and it is not unreasonable that the onus of proof should be placed by law upon the latter."

At p. 204 (*ibid*) it is stated in unmistakable language as follows:

"The fact is that unless the taxpayer discharges the burdens laid upon him.....of proving that this ascertainment or judgment is excessive, he cannot succeed and it can be no part of the duty of the commissioner to establish affirmatively what judgment be formed, much less the grounds of it, and even less still the truth of the facts affording the grounds."

It seems to follow, therefore, that if the taxpayer is unable to discharge the onus whether inferentially or otherwise, which the law places on his shoulders, the assessment must stand.

I wish now to make a brief reference to s. 48 of our Ordinance, Subsection (1) authorises the Commissioner to assess every person chargeable with tax after the day for the delivery of returns. Subsection (2) provides for two contingencies namely, the acceptance by the Commissioner of a return, and assessment accordingly, and the non-acceptance of the return, and a best judgment assessment. (Subsection (4) (which concerns us here) speaks of the non-delivery of a return and the best judgment assessment. To my mind, this section clearly contemplates the Commissioner using his best judgment on matters other than previous returns; but it does of course not exclude previous returns. And when it is borne in mind that in this case the Commissioner had before him three previous returns which showed gross profits, it can be seen how hard put the respondents would be to discharge the onus, particularly so where their records have all been destroyed. In my judgment they have not discharged this heavy burden of proof, and the assessment must stand by a reversal of the decision of the Board of Review.

Perhaps it can be urged that this is a hard case from the respondents' point of view; so it is, and in my opinion must be so having regard to the interpretation which I have placed upon the law. However, I feel that I am bound by the Ordinance and the authorities to find against the respondents.

The appeal is therefore allowed. The Commissioner's assessment is restored, and the respondents must pay the appellant's costs.

Appeal allowed.

RESSOUVENIR ESTATES LTD. v. BADAL

[In the Full Court, on appeal from a magistrate's court for the Georgetown Judicial District (Luckhoo, C.J., and Chung, J.) February 19, March 19, 1965]

Workmen's compensation—Medical opinion given to workman disputed by employer's doctor—Dispute referred by Commissioner of Labour to medical referee—Workman examined by referee some time later—Whether referee's report should include pronouncement on workman's condition before examination by referee—Power of magistrate to remit dispute to referee—No allegation that workman's condition had changed at any material time—Whether remit should be ordered—Workmen's Compensation Ordinance, Cap. 111, s. 43.

Workmen's compensation—Appeal on fact—Conflict in statement made of different times by workman as to what part of his back had been injured—Finding in favour of workman—Failure of magistrate to advert to such conflict—Validity of findings.

The respondent alleged that he slipped to the ground and injured his back on 18th December, 1963, while fetching cane during the course of his employment by the appellants. He complained of pain in his back as a result of the accident. After an examination on 21st December, this complaint was rejected by the employer's medical adviser. On 28th December the workman was examined by his own medical adviser who upheld his complaint and recommended him for 4 weeks' leave. The conflict in medical opinions was in due course referred by the Commissioner of Labour under s. 43 of the Workmen's Compensation Ordinance, Cap. 111, to a medical referee. Some days later, on the 23rd January, 1964, the medical referee examined the workman and declared him free of injury. The referee's opinion did not include a pronouncement as to the condition of the workman before the date on which he was examined by the referee, but there was nothing in the workman's evidence to show that there had been any change in his condition since the alleged injury was sustained and up to the time of the examinations of any of the medical practitioners concerned. The magistrate accepted that the workman had suffered injury and awarded compensation to the end of the four week period as recommended by the workman's medical adviser. In his memorandum of reasons for decision the magistrate, however, failed to advert to a conflict in certain statements made at different times by the workman as to what part of his back had been injured. On appeal by the employers,

Held: (i) a medical referee is called upon to settle a dispute between two medical practitioners taking different views of an employee's condition as at a special date and as over a special period of time, and his report should accordingly include a pronouncement on the employee's condition as at that date and over that period of time;

(ii) a magistrate has power to remit such a dispute to the medical referee in order to be furnished with such information as may be required to determine the workman's claim if the medical referee has omitted to give the information in his certificate;

(iii) the circumstances of the instant case pointed to the respondent being fit for his ordinary work at least from the date of the reference to the medical referee and payment of compensation should therefore have ceased at least from this date;

(iv) further, it could not be said that the magistrate would have found that the respondent had suffered any injury at all had he borne in mind the conflict in the respondent's statements as to what part of his back had been injured.

Appeal allowed; matter remitted.

J. A. King for the appellants.

D. C. Jagan for the respondent.

Judgment of the Court: This is an appeal by the appellant company, Ressouvenir Estates Ltd., against the decision of a magistrate of the Georgetown Judicial District in respect of an award of compensation to the respondent Basdeo Badal under the provisions of the Workmen's Compensation Ordinance, Cap. 111.

The respondent Basdeo Badal alleged that he slipped to the ground and jerked his back on the 18th December, 1963, while fetching a bundle of cane during the course of his employment as a cane-cutter by the appellant company. He complained of pain in the back as a result of the alleged accident. He was examined by the appellant company's medical adviser Dr. Beadnell on the 21st December, 1963, who came to the conclusion from the result of his examination that the Workman's complaint was not genuine. The workman, according to Dr. Beadnell, had complained of pain over the upper back. On the 28th December, 1963, the workman was examined by Mr. H. C. Hugh, a surgeon. According to Mr. Hugh, the workman gave a history of having fallen and injured his back and complained of pain along his vertebral column with fever. Mr. Hugh said that his examination revealed that his back was stiff and painful with some limitation of movement. Mr. Hugh recommended that four weeks' leave be granted the workman.

There being a conflict in the medical opinion the Commissioner of Labour pursuant to the provisions of s. 43 of the Workmen's Compensation Ordinance, Cap. 111 referred the matter to a medical referee Mr. N. P. Stracey, senior surgeon at the Public Hospital, Georgetown, who examined the workman on the 23rd January, 1964. The medical referee in his report stated that on clinical examination of the workman who alleged injury to the upper dorsal spine there was no evidence of any abnormality and that the function of the spine was full and free.

The workman in his evidence before the magistrate stated that when the accident occurred he felt pain by his waist and that he showed Dr. Beadnell where he felt pain; that he felt pain all over his back but mostly at the bottom near the waist. He denied that he told Dr. Beadnell that he felt pain in the lower back. He also said that he told Mr. Stracey that he felt pain in the lower back. Both Mr. Hugh and Dr. Beadnell testified before the magistrate.

The learned magistrate in awarding the workmen compensation up to the date of the medical referee's examination and report found that the workman did slip and stated that he relied on Mr. Hugh's testimony in coming to his decision and that as Mr. Hugh had recommended 4 weeks' leave from the date of his examination he had awarded compensation to the end of the four week period.

The appellant company by their answer denied that the workman did in fact suffer any injury.

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At the hearing of the appeal one of the grounds of appeal was whether on the evidence adduced the magistrate viewing the circumstances reasonably should have come to the conclusion that the workman did not in fact suffer any injury. Dr. Beadnell's testimony that the workman complained of pain in the upper back and not in the lower back receives support from the medical referee's report wherein it is stated that the injury was alleged to be to the upper dorsal spine. The learned magistrate in his memorandum of reasons for decision has mentioned nothing which could lead us to the view that he has borne in mind the conflict in the evidence as to the position of the alleged injury as related by the workman to Dr. Beadnell and the medical referee on the one hand and to Mr. Hugh on the other hand. The resolving of this conflict was of the utmost importance in view of the issue raised by the appellant company's answer that in fact the workman did not suffer any injury. The acceptance of Mr. Hugh's opinion by the magistrate can hardly be supported if the magistrate failed to show that he appreciated this vital discrepancy.

There is nothing in the workman's evidence to show that there has been any change in his condition since the alleged injury was sustained and up to the time of the examinations of any of the medical practitioners, Dr. Beadnell, Mr. Hugh and the medical referee Mr. Stracey or even up to the date of the hearing before the magistrate, and this fact is of considerable importance on the question for determination in this appeal as we shall in a moment endeavour to show.

Counsel for the appellants submitted that the learned magistrate erred in coming to the conclusion that in the circumstances of this case the respondent's right to compensation should cease as at 23rd January, 1964, the end of the 4 week period of leave recommended by Mr. Hugh and incidentally the date on which the examination by the medical referee took place. Counsel for the appellants referred to the cases of *Enmore Estates Ltd. v. Sirinarine* (1963), 5 W.I.R. 317., (1963 L.R.B.G. 163) and *Docherty v. Ross and Marshall Ltd.* (1931), 14 B.W.C.C. Supp. 57, in support of his argument that, assuming that the respondent did suffer injury, his right to compensation should in the circumstances cease as at the date of the reference to the medical referee. In *Sirinarine's* case it was explained why in the circumstances of the case of *Burrows v. Richard Evans & Co., Ltd.* (1939), 32 B.W.C.C. 168, it was held that the medical referee's certificate was referable to the date of the reference to the medical referee. It was also stated by the Court in *Sirinarine's* case that *Read v. Anchor Donaldson, Ltd.* (1926), 19 B.W.C.C. 502, decided that an arbitrator has power to order a re-remit to the medical referee who had omitted to make any pronouncement on the question of the workman's incapacity during the period commencing from when the employers had alleged that the workman had completely recovered to the date of the medical referee's report. The passage from the judgment of Lord ANDERSON in the *Read* case cited in *Sirinarine's* case is worth reproducing here as it states very clearly the purpose of obtaining a report by a medical referee. At p. 511 of 19 B.W.C.C, Lord ANDERSON is reported as having 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 provision of s. 14 of the Workmen's Compensation Act, 1923 (U.K.), proviso (ii), (s. 19 of the 1925 Act), which refers to a dispute that the medical referee is called upon to settle. That dispute, it 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."

Referring to s. 14(2) of the 1923 Act (s. 19 of the 1925 Act, s. 12 of the Ordinance) the Lord Justice Clerk said (at p. 507):

"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."

The proviso (ii) to s. 14 of the 1923 Act (s. 19 of the 1925 Act) is in terms identical with proviso (ii) to s. 12 of the Workmen's Compensation Ordinance, Cap. 111.

The provisions of s. 43(3) of the Ordinance (Which relate to the contents of certificates of medical referees) are in terms those contained in s. 19(3) of the 1925 Act (U.K.). In each case the medical referee is required to give a certificate as to the condition of the workman and his fitness for employment and it is provided that his certificate shall be conclusive of the matters stated therein. The argument advanced before us by counsel for the respondent was the same as that advanced on behalf of the employers in *Read's* case and rejected by the Court of Session in Scotland—that the medical referee is not entitled to deal with the past condition of the workman and was bound to deal only with his present condition.

In *Read's* case Lord ANDERSON stated his conclusions as follows (at 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."

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A re-remit to the medical referee by a magistrate is nonetheless possible in British Guiana as it is by an arbitrator in England even though in British Guiana the Commissioner of Labour is the person empowered to remit a case under s. 43 of the Ordinance to a medical referee. We can see nothing in principle or in law why: a magistrate cannot do so and indeed when the purpose for which a reference is made to a medical referee is borne in mind it would be ludicrous if a magistrate could not seek to ascertain from the medical referee just what information is required to determine the workman's claim if the medical referee omitted to give such information in his certificate. Whether or not a re-remit should be made depends on the circumstances of each particular case.

In *Docherty v. Ross & Marshall, Ltd.* (1931), 14 B.W.C.C. Suppt. 57, at p. 63, the Lord President (CLYDE) said:

"When a remit is made to a medical referee it is inevitable that a certain interval must elapse between the date when the dispute arises (before the remit) and the date when the certificate is issued after examination. If the workman's condition is one which is subject to continuous or to frequent changes, it may be necessary, in a case in which the delay referred to is great, for the referee expressly to relate his report, not only to its own date, but also to the date when the dispute he is deciding arose. But I take it that it would, in such a case, be enough for the referee to say that he had no reason to believe that any change had occurred between these dates. A medical referee cannot, and is not intended to, take evidence on the matter remitted to him. He does, and is intended to do, just what any medical man of skill does when asked to make up his mind on the condition and fitness of a patient who has been injured by accident—namely, to examine the man personally and to acquaint himself with the history of the accident and the patient's subsequent experience and state of body."

In *Docherty* case it was held that in the absence of any suggestion that the workman's condition had altered between the date of his refusal to accept light work and the date on which he had been certified fit for that work, the arbitrator was entitled to make an award without further inquiry.

In the present case there has been no suggestion on the part of the respondent that there has been any change in his condition from the time of the alleged accident down to the time of the hearing of his claim, including the date of his examination by the medical referee who found that the respondent was in no way suffering from any injury at the date of his examination.

Gildea v. National Coal Board (1948), 41 B.W.C.C. 100, is a case relied upon by counsel for the respondent in support of his argument that a medical referee's certificate only required the condition of the man to be stated as at the date the certificate is given. In our view the Court of Appeal did not so decide. In that case the applicant who

was a coal driller was injured on the 31st July, 1937, and the index finger of his left hand at the knuckle joint had to be amputated. In November 1937, he attempted some stone dusting work with his employers but gave it up. Except for that he had not worked for over 10 years down to the time of the hearing before the county court judge. He was paid compensation until September 1940. On a dispute between the doctors as to his capacity to work the matter was referred to a medical referee who certified that "he has lost some grip of the left hand. The forefinger of the left hand has been almost completely amputated. He is fit for his ordinary work but must persevere." No further compensation was paid until in April 1948, proceedings claiming on the basis of total incapacity from 1940 were brought. Conflicting medical evidence was given by various doctors and the county court judge referred the matter under Schedule I, paragraph 11 of the 1925 Act, to another medical referee to report as to the present condition of the applicant physically and mentally in 1948. The medical referee who had reported in 1940 had since retired from practice and it was not possible for a reference to be made to him in 1948.

The medical referee reported as follows —

"The workman has been a medium grade moron since early life. He was unable to learn to read or write. He is mentally incapable of co-operation in the treatment of the effects of his accident. He is not afflicted with hysteria and he has not been, nor is he now, malingering. The index finger of the left hand has been amputated and the other digits are limited to less than half of their normal movements. The hand is deformed so that its palm cannot be laid flat. The left wrist joint cannot be bent more than one-third of its normal range, and such bending induces what I believe is genuine pain. The present state of the left hand is permanent. The workman is unfit to perform his pre-accident work. He is incapable of work involving the use of both hands. His incapacity is solely due to the accident he sustained on July 31, 1937."

The Court of Appeal came to the conclusion that this report which spoke of the workman's condition as in the year 1948 really did not contradict the certificate of 1940 which spoke of the workman's condition as in the year 1940 and that the county court judge could properly have acted on it. However the court held that there was no evidence before the county court judge which would indicate whether the then existing incapacity had supervened prior to the date of the hearing and that compensation should be payable from the date of hearing before the county court judge.

The argument advanced in that case on behalf of the employers was that there was no conflict in the medical evidence or insufficiency in the medical evidence which would justify the county court judge in referring the matter to a medical referee, and that the medical referee had therefore erroneously exercised his discretion in making such a reference. The Court of Appeal after considering the evidence given before the county court judge was of the opinion that there was in fact some amount of conflict in the evidence and declined to inter-

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fere with the exercise of the discretion of the county court judge in referring the matter to a medical referee.

The point in issue in *Gildea's* case concerned the condition of the workman between the dates of the two certificates. In the first certificate he was reported to be fit for his ordinary work. In the second certificate it was stated that he was not fit to perform his pre-accident work. At some time between the dates of the two certificates there supervened the incapacity found to be existing at the time of his examination by the medical referee in 1948 but the later certificate did not say anything as to when that incapacity supervened. The Court of Appeal did not say anything from which it can reasonably be inferred that if such a point of time could have been ascertained it would have been incompetent for the county court judge to seek to ascertain this from the medical referee. There is no fixed rule whereby the date of reference to a medical referee determines the date at which compensation ceases to be payable to a workman. Regard must be had to the circumstances of each particular case in deciding what the effective date in that regard is.

In the instant case the circumstances which we have described at the beginning of this judgment point to the respondent being fit for his ordinary work at least from the date of the reference to the medical referee and indeed we feel that we cannot say that the magistrate would have found that the respondent suffered any injury at all had he borne in mind the evidence relating to the part of the body which the respondent differently indicated to the various medical practitioners as having been affected by the alleged injury. As we have already pointed out there is nothing in the memorandum of reasons of the learned magistrate which indicates that he did in fact have due regard to these matters.

The reference to the medical referee was made by the Commissioner of Labour for the purpose of deciding between the conflicting opinions of Mr. Hugh and Dr. Beadnell. The finding of the medical referee that the respondent's incapacity was nil at the time of his examination cannot be used in support of Mr. Hugh's opinion nor can it be used to confirm Dr. (Beadnell's) opinion. One is therefore thrown back upon an examination of the evidence of the witnesses and of the circumstances of the case as well as the contents of the medical referee's certificate as to the symptoms described to the medical referee by the respondent.

The circumstances of the instant case are unlike those in *Sirinarine's* case in that in the latter there was no dispute that *Sirinarine* did suffer injury whereas in the instant case this is very much in issue. A re-remit would in the instant case serve no useful purpose.

Had it been made to appear that the magistrate bore in mind the substantial conflict in the evidence to which we have already referred it would not have been possible to challenge his finding successfully.

As we cannot properly say that he has done so the order of the magistrate cannot stand and must be set aside. The appeal is allowed and the matter is remitted to be reheard and determined by another magistrate.

No order as to costs of this appeal. Leave to appeal refused.

Appeal allowed; matter remitted.

NEW BUILDING SOCIETY LTD. v. CARLTON WEITHERS

[In the Full Court, on appeal from a magistrate's court for the Georgetown Judicial District (Luckhoo, C.J., and Khan, J.) April 30, June 18, 1965]

Magistrate's court—Jurisdiction—Whether necessary to aver in plaint that matter within jurisdiction of magistrate's court—Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, s. 3(4)—Summary Jurisdiction (Civil Procedure) Rules, 1939, Part V.

Held: it is not necessary for a formal statement to be made in a plaint in a magistrate's court to the effect that the matter is one within the jurisdiction of the trial magistrate, but it must emerge from the evidence that the matter is one within his jurisdiction.

Appeal allowed; matter remitted.

J. A. King for the appellants.

O. M. Valz for the respondent.

Judgment of the Court: This appeal raises the question whether it is necessary for a plaint filed in a matter under the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, to disclose on the face of it that the matter is one within the jurisdiction of the magistrate's court of the judicial district designated on the plaint.

Under the provisions of sub-s. (4) of s. 3 of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, a magistrate's court shall have jurisdiction when—

- (a) the defendant resides in the judicial district;
- (b) the cause of action has arisen wholly or in part within the judicial district; or
- (c) the chattel or thing the subject matter of the action is in the judicial district.

The appellants had filed a plaint in the Georgetown Judicial District claiming the sum of \$192 as rent due from the respondent in respect of the bottom flat of a building situate at the N 1/2 of lot 263, Thomas Street, Cummingsburg, Georgetown, a place within the Georgetown Judicial District.

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The learned magistrate upon a submission *in limine* made by solicitor for the defendant (respondent) held that no jurisdiction in the court was disclosed on the face of the plaint and dismissed the plaintiffs' (appellants') claim.

The matters which are required to be stated in a plaint on a claim brought under the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, have since the 20th July, 1939, been prescribed by the Summary Jurisdiction (Civil Procedure) Rules. These Rules are to be found in Volume VII of the LAWS OF BRITISH GUIANA (KINGDON: Edition). Part V of these Rules relates to the plaint and its contents (pp. 306-309). Nothing contained in the rules under Part V requires, that any statement as to any of the matters giving jurisdiction should be included in the plaint.

The plaint filed in the instant case contains all of the matters prescribed by the rules contained in Part V required to be stated in a claim of this kind. While it is the practice to set out in the plaint a statement averring jurisdiction in the court by reason of one or more of the provisions of sub-s. (4) of s. 3 of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, this is not a requirement of the Rules relating to the contents of a plaint.

The case of *Humphreys v. Cooks*, 1914 L.R.B.G. 41, was cited to the learned magistrate. The decision in that case that there is no need for proof of jurisdiction in civil as well as in criminal matters was overruled by the Full Court in *Boston v. Jagessar*, 1920 L.R.B.G. 82, Those cases were decided when the Magistrates' Courts Rules, 1911, were in force but we can find nothing contained therein which required that a statement averring jurisdiction in the courts be made.

It is not necessary for a formal statement to be made in the plaint to the effect that the matter is one within the jurisdiction of the trial magistrate but it must emerge from the evidence that the matter is one within his jurisdiction.

This is not a case where on the face of the plaint a lack of jurisdiction in the trial magistrate is disclosed and it is unnecessary for us to say anything in respect of such a case.

For these reasons the order of the magistrate is set aside. The appeal is allowed and the matter remitted to a magistrate of the Georgetown Judicial District to be heard and determined.

Costs to the appellants fixed in the sum of \$31.88.

Appeal allowed, matter remitted.

CHEONG v. RAYMAN

[Supreme Court—In Chambers (Luckhoo, C.J.) May 26, July 1, 1965]

Rice lands—Assessment committee—Whether committee competent to hear application by tenant against landlord for recovery of possession—Rice Farmers (Security of Tenure) Ordinance, 1956, s. 11(h).

Section 11(h) of the Rice Farmers (Security of Tenure) Ordinance, 1956, provides that "upon the filing of any application under this Ordinance a committee shall have.....the following powers and duties.....(h) to hear and determine an application for the recovery of a holding to which this Ordinance applies". Section 29(1) specifically authorises the making of an application by a landlord for possession against his tenant but there is no corresponding provision authorising an application by a tenant against his landlord for the recovery of a holding.

Held: section 11(h) does not authorise an application by a tenant against his landlord for recovery of a holding. It only confers powers in respect of applications authorised by the Ordinance and the Ordinance does not authorise the bringing of such an application by a tenant.

Appeal allowed.

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

C. L. Luckhoo, Q.C., for the respondent.

LUCKHOO, C.J.: The sole question for determination in this appeal is whether a committee appointed under the provisions of s. 8 of the Rice Farmers (Security of Tenure) Ordinance, 1956 (No. 31), is empowered to hear and determine applications by tenants brought against their landlords for recovery of possession of holdings of rice-lands let to them.

The powers and duties of a committee appointed under the provisions of s. 8 of the Ordinance, hereinafter referred to as an assessment committee, are to be found in the Ordinance. In making an order on the application of the respondent (tenant) for the recovery of a holding of ricelands from the appellant (landlord) it is clear that the assessment committee for Essequibo-Demerara purported to act under the provisions of para, (h) of s. 11 of the Ordinance. Section 11 specifies the powers and duties which an assessment committee have in relation to the area in respect of which it is appointed and para, (h) thereof provides as follows:

"Upon the filing of any application under this Ordinance a committee shall have in relation to the area in respect of which it is appointed following powers and duties —

* * * * *

(h) to hear and determine an application for the recovery of a holding to which this Ordinance applies;"

Counsel for the appellant has observed that in relation to the powers and duties specified in paras, (a) to (g) inclusive and in paras. (i) and (j) of s. 11, there are corresponding provisions contained in the Ordinance which specifically authorise the making of

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applications in respect of which the respective powers and duties may be exercised by an assessment committee. In respect of the recovery of a holding there is a corresponding provision (s. 29(1)) which specifically authorises the making of an application in that regard by a landlord but no corresponding provision is to be found which specifically authorises the making of an application by a tenant for the recovery of a holding. Further, counsel observed, there is no provision in the Ordinance for the enforcement of an order for the recovery of a holding by a tenant, whereas a provision appears at s. 29(3) of the Ordinance in respect of the enforcement of an order for the recovery of a holding by a landlord. It was contended that the provisions of s. 51 cannot be invoked in this regard as only the law and practice of the magistrate's court with necessary modifications is authorised thereby to be applied to any claim or other proceedings made or instituted under the Ordinance but not the procedure of the magistrate's court and that the enforcement of such an order in favour of a tenant would be a matter of procedure. Counsel for the appellant submitted that having regard to these matters the words "upon the filing of any application under this Ordinance" at the commencement of s. 11 must refer to any application authorised to be made by a provision of the Ordinance other than s. 11 and that section does not authorise the making of any application but rather specifies the powers and duties of an assessment committee in relation to applications made under the authority of other provisions contained in the Ordinance.

As I understand the submission of counsel for the appellant the provisions of para. (h) of s. 11 cannot be read alone but are to be construed in relation to such other provisions of the Ordinance which refer to applications for the recovery of holdings and when so construed are seen to be confined to applications by landlords for the recovery of holdings let to tenants.

Counsel for the respondent on the other hand submitted that an application under the Ordinance does not have to be filed under any particular section of the Ordinance and that so long as the application relates to and comes within the scope of the powers and duties of an assessment committee then the assistance of the committee can be invoked under the Ordinance. Put another way, the powers and duties under s. 11 are self-contained and it is not necessary to look at all to the other provisions of the Ordinance to ensure that those powers are used in a manner consistent with the framework and the other provisions of the Ordinance.

Counsel contended that an assessment committee inherits its powers from s. 11 of the Ordinance but conceded that the extent of those powers may well be controlled by other sections.

There is no doubt that a tenant may make application for recovery of a holding of riceland of which he has been dispossessed by his landlord, but the crucial matter is whether such an application is one authorised by the Ordinance to be made.

The crux of the matter in my opinion lies in the interpretation to be put upon the words contained in s. 11—"Upon the filing of any application under this Ordinance". I can see no good reason why those words should be restricted to mean "upon the filing of any application under this *section*" and in my view they should be interpreted to mean "upon the filing of any application authorised by this Ordinance to be made." I think it is significant that in respect of each of the powers and duties contained in the several paras. (a) to (j) of s. 11 there is a corresponding provision in the Ordinance which specifically authorises the making of an application by a landlord or by a tenant as specified in the particular provision. Assessment committees are creatures of the Ordinance and can only hear and determine such applications which are authorised by the Ordinance to be made to such Committees.

Section 29 (3) of the Ordinance relates to enforcement of an order or judgment "for the recovery of possession of any holding to which this Ordinance applies"—words identical with those used in s. 11(h)—and "for the ejectment of a *tenant* therefrom". No reference is made therein or anywhere else in the Ordinance to enforcement of an order or judgment "for the ejectment of a landlord therefrom." The omission of such a provision from the Ordinance does not mean that a tenant who is forcibly ejected from his holding of ricelands is without a remedy. Section 58 of the Ordinance preserves his rights in this regard.

Having considered these matters I am of the opinion that the contention on behalf of the appellant is well founded and that the assessment committee was without jurisdiction to hear and determine the application for recovery of the respondent's holding.

It may be contended that it would be convenient for assessment committees to deal with applications for the recovery of holdings of ricelands by tenants. This, however, is a matter for the Legislature and it may be that there are considerations which make it impracticable for assessment committee to be empowered to hear and determine such applications.

The appeal is allowed and the order of the committee set aside.

No order as to costs of this appeal.

Appeal allowed.

SANKAR v. PELLEW AND KHAN

[Supreme Court—In Chambers (Luckhoo, C.J.) on appeal from the rice assessment committee for the Demerara-Berbice Area. July 10, 31, 1965]

Rice lands—Order for possession—Ejectment proceedings—Joinder of third party—Whether permissible—Whether appeal lies from decision—Rice Farmers (Security of Tenure) Ordinance, 1956, s. 26.

Appeal—Rice assessment committee—Order for joinder Whether appeal lies—Rice Farmers (Security of Tenure) Ordinance, 1956, s. 26.

Rice assessment committee—No equitable jurisdiction.

S. obtained an order for possession of certain rice lands against P. and later sought the latter's ejectment. The rice assessment committee made an order for the joinder of K. as a third party in the ejectment proceedings, although K. had never been assigned P's tenancy. On appeal,

- Held:** (i) there was a right of appeal against the decision of the committee in making the order for joinder;
- (ii) the order for joinder was clearly unauthorised by law and must be set aside;
- (iii) a rice assessment committee has no equitable jurisdiction.

Appeal allowed.

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

O. M. Valz for the respondent Sultan Hamid Khan.

LUCKHOO, C.J.: This is an appeal from an order of the rice assessment committee for Demerara-Berbice that Sultan Hamid Khan be joined as a respondent in ejectment proceedings taken by the appellants against Nathaniel Pellew against whom an order for possession of a holding of ricelands had been made in favour of the appellants.

The appellants had brought proceedings for possession against their tenant Pellew on the ground that Pellew had assigned his holding to Khan. On appeal from the decision of the rice assessment committee an order for possession was made in favour of the appellants and Khan was given until the 31st December, 1964, to reap the rice crop he had growing upon the holding. On the 29th December, 1964, Khan filed an application to the committee to be joined as a defendant in the possession proceedings on grounds which clearly appear to seek to invoke an equitable jurisdiction in the committee and which the committee does not possess. Those grounds relate to estoppel, acquiescence, waiver, "standing by", misrepresentation, pleaded additionally and in the alternative. The committee after reciting the grounds put forward on behalf of Khan stated that in the circumstances the order for joinder would be made in ejectment proceedings brought by the appellants against Pellew which had been filed subsequent to the 29th December, 1964.

The ejectment sought by the appellants is the ejectment of their former tenant Pellew and it is difficult to appreciate how an order for

joinder of a third party can be made in respect of the ejectment proceedings. An order for ejectment against Pellew would not operate against anyone but Pellew. Ejectment is by virtue of s. 29(3) of the Ordinance (No. 31 of 1956) enforced as if it proceeds from an order for possession made by a magistrate under s. 46, of the Landlord and Tenant Ordinance, Cap. 185. In s. 46 such proceedings may be taken against the former tenant or the occupier. The argument advanced before the committee by solicitor for Khan clearly accepts that there was no assignment of Pellew's tenancy as is required by the Ordinance so there can be no question of Khan being a tenant of the appellants. Nor is there any question of Khan being a sub-tenant.

The ground upon which the order for possession was made against Pellew is such that it is difficult to see that there could possibly be any circumstance upon which a committee can properly exercise a discretion to refuse an application for the ejectment of Pellew. He was a non-occupying tenant at the material time and admitted in the possession proceedings that he himself had no rice crop of his own growing on the land.

The order for joinder of Khan in the ejectment proceedings against Pellew is clearly unauthorised by law and must be set aside.

One other point remains to be mentioned. The question was raised by me as to whether there was a right of appeal under the provisions of the Rice Farmers (Security of Tenure) Ordinance, 1956 (No. 31) from the decision of the Committee in the making of the order for joinder. The right of appeal given by s. 26 of the Ordinance is against a decision of the Committee other than a decision which is stated by the Ordinance to be final. There is no definition of the term "decision" contained in the Ordinance. Contrast the definition of the term "decision" in s. 2 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17. In the Rice Farmers (Security of Tenure) Ordinance, 1956 (No. 31), there is no good reason for giving a restricted meaning to the term. In my opinion an order for joinder upon an application such as the one made by Khan is a decision within the meaning of that term in s. 26 of the Ordinance.

The appeal is allowed and the order of the committee set aside with costs to the appellants fixed at \$15.

Appeal allowed.

RE GLADYS HICKEN LTD.

[Supreme Court—In Chambers (Luckhoo, C.J.) June 30, August 4, 1965]

Practice and procedure—Consent order—Application for interpretation and amendment—Whether permissible—O. 42, R.S.C. 1955.

Proceedings for the winding up of a company terminated by a consent order which included the words "liberty to apply". W.O.F. and the company, who were both parties to the proceedings, later applied respectively for a declaration as to the meaning of certain terms in the order and for a variation of the order.

Held: (i) the words "liberty to apply", while entitling the parties to go by way of summons in the original proceedings to ask the court to work out the terms" of the court's judgment or order, did not entitle the parties to seek an interpretation of the terms of the order;

(ii) there was no authority for a judge in chambers to alter or vary a consent order, being a final order, save by consent of the parties.

Applications refused.

S. L. Van B. Stafford, Q.C., with John Stafford for Gladys Hicken Ltd.

G. M. Farnum for Walter Ogle Fraser.

LUCKHOO, C.J.: Two summonses, one filed on the part of Gladys Hicken Ltd. hereinafter referred to as the company, and the other on the part of W. O. Fraser, were heard together by consent. These summonses have been filed in the original proceedings for winding up of the company which terminated by a consent order made on the 17th November, 1961, and entered on the 18th November, 1961. In their summons the company seeks a declaration that no part of a parcel of land owned and held by the company under transport No. 1306 of the 16th October, 1947, and described therein as eleventhly is, on a true construction of paragraphs 7 and 8 of the consent order of the court dated 17th November, 1961, included in the direction to the company to give transport to W.O. Fraser of the lands described in the said paragraph 7 of the said order of court and that the only rights over the said parcel of land conferred by the said paragraph 7 are the rights of drainage and irrigation mentioned therein. In his summons W.O. Fraser asks that the consent order of the court dated 17th November, 1961, be varied to the extent and manner that the words "the west half of" be substituted for the words "any rights of drainage or irrigation over or through" and the words "as may exist or be necessary" be deleted in paragraph 7 of the said order of court: alternatively, that the said order of court be read as if the order had been varied as aforesaid. The other questions set out in this summons were not pursued at the hearing.

The proceedings in this matter originated in the year 1958 when W.O. Fraser filed a petition praying that the company be wound up under the provisions of the Companies Ordinance, Cap. 328. After protracted negotiations the parties arrived at a settlement of the matter upon the terms embodied in the consent order which was made on the 17th November, 1961, and entered on the 18th November, 1961. One of the terms of this Consent Order, paragraph 7, provided as follows:

"7. The Company shall forthwith deliver possession and shall on or before the 31st December, 1961, pass transport of the abandoned Plantation Bushy Park cum annexis and the second and extra depths thereof, situate on the east sea coast of the county of Demerara with the building and erections thereon, as held under Transport No. 1306 of the 16th October, 1947, and described under Fifthly and Seventhly therein together with any rights of drainage or irrigation over or through the land in the rear of the said second and extra depths and described under eleventhly, as may exist or be necessary, (hereinafter referred to as the Plantation), to the Petitioner. Should the aforesaid transport not be passed on or before the 31st December, 1961, for any reason other than the act or omission of the Company, such delay or failure shall not operate to accelerate payment of the balance of the purchase price under paragraph 5 hereof."

The company is the owner by transport No. 1306 of the 16th October, 1947, of *inter alia* the following property described therein under—

"FIFTHLY, the abandoned Plantation Bushy Park, cum annexis, situate on the east coast of the county of Demerara and colony of British Guiana, no building thereon,:

SEVENTHLY, a tract of land, situate, lying and being on the east sea coast of Demerara, being the second and extra depths of Plantation Bushy Park, formerly held under Licence of Occupancy No. A24, in the county of Demerara and colony of British Guiana and containing 282.83 acres, as shown on a diagram dated 18th day of December, 1902, by F. U. Tronchin, Government Surveyor, annexed to Grant No. 7154 of the said tract a duplicate of which diagram together with a duplicate of said Grant No. 7154 is deposited in the office of the Department of Lands and Mines, subject to the terms and conditions of the said Grant;

ELEVENTHLY, a tract of Crown land situate lying and being in the rear of the Second and Extra Depths of Now or Never, Bushy Park, and also of Sarah, the tract commences at a paal (iron) N.285° 36' (ded. tr.) 36.7 feet from the southwestern corner of the second and extra depths of Sarah "held by E. Hicken under Grant No. 7155 and its boundaries extend N.285° 36' (ded. tr.) 2714 feet thence N.15' 55' (ded. tr.) 1782.3 feet, thence N.105° 34' (ded. tr.) 2706 feet thence N.195° 36' (ded. tr.) 1785.3 feet back to the starting point, in the county of, Demerara, and colony of British Guiana, and containing 110.9 7 acres as shown on a diagram dated the 6th day of June, 1941, by Jos. Phang, Government Surveyor, annexed to the Grant No. 7433 of the said tract of land a duplicate of which diagram together with a duplicate of the said Grant is deposited in the Office of the Department of Lands and Mines, no building thereon, subject to the conditions contained in the said Grant"

Pursuant to the consent order the company authorised W. O. Fraser's son Geoffrey Fraser (W. O. Fraser was out of the colony

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at the time when the consent order was made and entered) to take possession on behalf of W. O. Fraser of the property described in paragraph 7 of the consent order—being the plantation Bushy Park and its second and extra depths. Geoffrey Fraser, on or about the month of December 1961, entered into occupation of a piece of land approximately 55.485 acres which the company claims forms the western portion of the parcel of land described under Eleventhly in their transport. The company claims that under paragraph 7 of the consent order W. O. Fraser has only been given drainage rights over this parcel of land. The company now seeks a declaration that Fraser is not entitled to possession or transport of the said land or any part thereof under the consent order.

For W. O. Fraser, on the other hand, it was contended that in arriving at a settlement of the matter a valuation made of the developed and undeveloped lands at Bushy Park took into consideration the parcel of 55.485 acres now in dispute as the last depth of Bushy Park and that it was agreed on behalf of the shareholders of the company that the land to be conveyed to Fraser should include the portion now in dispute.

Both the company and Fraser seek to have their summonses determined by virtue of a provision in the consent order of liberty to apply.

The first question to be determined is whether the inclusion of the words "Liberty to apply" contained in the consent order permits the orders now sought to be made by way of summonses filed in the original proceedings. Dealing first with the summons filed on the part of the company what is sought is a declaration as to the meaning of certain terms in the consent order. It is not the case that the court is asked to work out the terms of the consent order. The words "liberty to apply" while entitling the parties to come by way of summons in the original proceedings to ask the court to work out the terms of the court's judgment or order do not entitle the parties to seek an interpretation of the terms of the order. Further, a consent order cannot be varied save by consent of the parties. Order 42 of the Rules of the Supreme Court, 1955, does not apply to an application made otherwise than by way of originating summons and neither of the applications has been made by way of originating summons.

Dealing now with Fraser's application, there is no authority in a judge in chambers to alter or vary a consent order, being a final order, save by consent of the parties. *Australasian Automatic Weighing Machine Co. v. Walter*, (1891) W. N. 170. Even where a final judgment has been made and entered by mistake the court cannot set it aside unless a fresh action is brought for that purpose (*Ainsworth v. Wilding*, [1896] 1 Ch. 673). While it was urged that subsequent to the entry of the consent order made on the 17th November, 1961, it was agreed on behalf of the shareholders that the property in dispute be conveyed to Fraser, there is no consent to the variation by the court of the consent order made on the 17th November, 1961.

Both applications filed as they are in the original proceedings are misconceived and are refused in each case with costs to be taxed certified fit for counsel. Application of counsel for W. O. Fraser for leave to appeal refused.

Applications refused.

Solicitors: *D. de Caires* (for Gladys Hicken Ltd.);

J. Edward de Freitas (for Walter Ogle Fraser).

[In the Full Court, on appeal from the Magistrate's Court for the West Demerara Judicial District (Luckhoo, C.J., and Van Sertima, J.) June 11, 17, August 20, 1965].

Criminal law—Statement of offence—Several offences created by same provision—Allegation that act committed contrary to that provision—Whether sufficient—Rice Marketing Ordinance, Cap. 249, s. 34(4) (b)

Statute—Eiusdem generis rule—Rice Marketing Ordinance. Cap 249, s. 9(1).

In an appeal from a conviction for an offence against s. 34(4) (b) of the Rice Marketing Ordinance. Cap. 249, it was submitted that the prosecutor's authority to institute the proceedings was invalid because it was signed by the Chairman, Manager and Secretary of the Rice Marketing Board, whereas, it was contended, s. 35 of the Ordinance required the authority to be given in writing by the Board. Section 9(1) provides that "any transport, mortgage, lease, assignment, transfer, agreement or other document requiring to be executed by the Board shall be deemed to be duly executed if signed by the Chairman, Manager or the Assistant Manager and the Secretary to the Board."

Held: (i) the *eiusdem generis* rule was not applicable to the interpretation of the words "or other document";

(ii) the prosecutor's authority was a document within the meaning of s. 9(1) and was properly executed in accordance therewith;

(111) while it was usually sufficient to follow the words of the enactment creating the offence when stating the particulars of the offence, where more than one offence was contemplated by the enactment the particular offence charged must be specified. As framed, the complaints did not disclose what provisions of the enactment it was alleged had been infringed.

Appeals allowed.

C. L. Luckhoo, Q.C., for the appellants.

W. G. Persaud, Legal Adviser, for the respondent.

Judgment of the Court: The appellant Gool Mohamed was charged for an offence against s. 34(4) (b) of the Rice Marketing Ordinance, Cap. 249, as amended by the Rice Marketing (Amendment) Ordinance, 1960 (No. 14 of 1960), the complaint being in the following terms:

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STATEMENT OF OFFENCE

Delivers rice from factory otherwise than provided: —contrary to section 34(4) (b) of the Rice Marketing Ordinance, Chapter 249, as amended by the Rice Marketing Amendment Ordinance, No. 14 of 1960.

PARTICULARS OF OFFENCE

Defendant on Friday 28th December, 1962 at La Jalousie, West Coast, Demerara in the West Demerara Judicial District, delivers a quantity of rice from a factory other than in accordance with the provisions of the said Ordinance.

The appellant Gool Mohamed was convicted on the complaint as laid.

The appellants Walter Persaud and Harrychan Bhagwandass were charged along with one Mohamed Kamal for an offence against s. 34 (4) (b) of the Rice Marketing Ordinance, Cap. 249, as amended by the Rice Marketing (Amendment) Ordinance, 1960 (No. 14 of 1960), the complaint being in the following terms:

STATEMENT OF OFFENCE

Removes rice from factory otherwise than provided: —contrary to section 34(4) (b) of the Rice Marketing Ordinance, Chapter 249, as amended by the Rice Marketing Amdt Ordinance No. 14 of 1960.

PARTICULARS OF OFFENCE

Defendants on Friday 28th December, 1962, at Den Amstel, West Coast, Demerara in the West Demerara Judicial District removes a quantity of rice from a factory other than in accordance with the provisions of the said Ordinance.

The appellants Persaud and Bhagwandass were convicted on the complaint as laid. The complaint against Mohamed Kamal was dismissed.

The complaints were heard together by consent. For the purposes of this appeal it is not necessary to refer in detail to the evidence. Suffice it to say that the case for the prosecution was to the effect that Mohamed Kamal was driving a tractor with trailer attached when the respondent Corporal of Police Nestor stopped him and on searching the vehicle found 14 bags of rice dust with 11 bags of rice under the bags of rice dust. The appellants Persaud and Bhagwandass who were on the vehicle told Cpl. Nestor that they did not have any domestic consumption certificate for the removal of the rice. Persaud claimed 7 of the bags of rice and Bhagwandass 4 bags. Evidence was led to show that all 11 bags of rice had come from the appellant Gool Mohamed's factory. According to the prosecution Gool Mohamed admitted delivering the rice but said that he had given permits therefor to Persaud and Bhaswandass. Later Persaud took to the Den Amstel Police Station six domestic consumption permits purporting to have been issued by Gool Mohamed to the appellants

Persaud and Bhagwandass each for 180 lbs. rice and to four other persons each for 180 lbs. rice. No evidence was led on behalf of the appellants, counsel for the appellants relying upon certain legal submissions which the magistrate overruled. The magistrate accepted the evidence of the witnesses for the prosecution and found that there was no evidence that Gool Mohamed was authorised to deliver rice to persons other than Persaud and Bhagwandass. He found that 9 of the 11 bags of rice were delivered by Gool Mohamed in contravention of the provisions of the Ordinance and that Persaud and Bhagwandass had removed them without the necessary permits.

On appeal, it was first submitted by counsel for the appellants that the document produced before the magistrate by the respondent who is described in the complaints as "Rudolph Nestor Corporal of Police No. 4800 Complainant" is not a valid authority to him to institute the proceedings against the appellants because —

- (a) it bears no date of issue;
- (b) it is signed by the Chairman, Manager and Secretary of the Rice Marketing Board, whereas s. 35 of the Ordinance requires the authority to be given in writing by the Board.

Section 35 of the Ordinance, Cap. 249, provides that "all prosecutions and proceedings for offences against this Ordinance shall be instituted under the Summary Jurisdiction Ordinances, and may be instituted by any person authorised in that behalf in writing by the Board."

In the court below no issue was raised as to the validity of the document on the ground that it was undated. The submission of counsel before the magistrate was limited to the contention (not pursued before us) that the signatories were defunct and to one of the contentions before us that the document ought to have been signed by 6 members of the Board by reason of the provisions of s. 5(2) of the Ordinance (which relates to the constitution and powers of the executive committee). It is now too late to challenge the document on the ground that it bears no date and that it may have been issued subsequent to the institution of the complaints. We would, however, wish to observe that the simple matter of dating documents of this kind will save the time of everyone concerned with such prosecutions. On the second contention we are of the opinion that the provisions of s. 9 (as to execution of documents) relate to a document such as an authority contemplated by s. 35 of the Ordinance. We are of the view that the word "agreement" in the passage "any transport, mortgage, lease, assignment, transfer, agreement, or other document....." in sub-s. (1) of s. 9 of the Ordinance does not fall within a genus and that the *ejusdem generis* rule is not applicable to the interpretation of the words "or other document". In the case of *B.G. Rice Marketing Board v. Sookhai and anor.*, No. 1263 of 1956 Dem., decided on 1.8.1957 by DATE, J., (unreported), in relation to s. 3 of the Limitation Ordinance cited to us by counsel for the appellants, the trial judge applied the *ejusdem generis* rule where there was clearly a genus. By virtue of s. 9 an authority in writing may be

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signed by the Chairman, the Manager or the Assistant Manager and the Secretary of the Board. Exhibit "A" was therefore validly signed.

It was next submitted that there is nothing in the complaints to show which provisions of the Ordinance were alleged to have been contravened, the words contained in the particulars of offence in each case being "otherwise than in accordance with the provisions of the said Ordinance". The general rule is that all the facts and circumstances should be stated in the description of the offence with such certainty and precision that the defendant may be enabled to judge whether they constitute an offence, to determine the species of offence and be enabled to plead a conviction or acquittal in bar of another prosecution for the same offence. See *R. v. Hoard* (1842), 6 J.P. 445. While it is usually sufficient to follow the words of the enactment creating the offence when stating the particulars of the offence where more than one offence is contemplated by the enactment the particular offence charged must be specified. As framed the complaints did not disclose what provisions of the enactment it is alleged had been infringed and one is left to range over the entire Ordinance and Regulations made thereunder to seek to discover what infringement, if any, there may be.

It may be urged that the appellants did not request further and better particulars and after the evidence was given on the part of the complainant no point in this regard was urged. However this may be there was no proof of the quantity of rice which the appellant Gool Mohamed may, under s. 23(1) of the Ordinance, without special authority, deliver from his factory at the material time to a rice farmer to be used for his domestic consumption and so there was no proof that it was necessary under reg. 3(3) of the Rice Factories (Record and Accounts) Regulations (see Subsidiary Legislation, Cap. 249) for the appellant Gool Mohamed to issue certificates in respect of rice delivered to rice farmers for their own domestic consumption. The magistrate's finding that the appellants Persaud and Bhagwandass had removed rice from the appellant Gool Mohamed's factory without necessary permits cannot therefore stand. Likewise there was no evidence admissible against Gool Mohamed that four of the six permits taken to Den Amstel Police Station by Persaud and issued in the names of four other persons related to any of the bags of rice found in the tractor. Further, Persaud and Bhagwandass between them had claimed all 11 bags of rice found in the trailer as having been delivered to them by Gool Mohamed for domestic consumption.

On the state of the evidence on the record we are of the opinion that the magistrate in the case of each of the appellants erred in finding that there was a breach of the provisions of the Ordinance as contemplated by s. 34 (4) (b) of the Ordinance.

The appeals of the appellants are allowed and the convictions and sentences are set aside with costs fixed in the sum of \$15 to each appellant.

Appeals allowed.

AZIZAN v. WHITE

[Supreme Court (Persaud, J.) January 7, 28, 1964, January 18, 1965]

Negligence—Accident caused by lorry owned by defendant and driven by his son—Son driving on business of his uncle—Whether owner liable for damages.

The plaintiff's van was damaged in a collision with a lorry owned by the defendant. The lorry was at the time being driven with the defendant's permission by his son but on the business of the defendant's brother. The defendant undertook in writing to repair the van. In an action by the plaintiff for damages for negligence,

Held: the defendant's ownership of the lorry could not of itself impose liability on him. Neither could the fact that the son was driving with his permission. To impose liability it must be established (a) that the son was employed to drive the lorry as the defendant's servant, and (b) that he was, when the accident happened, driving the lorry for the defendant, and not merely for his own benefit and for his own concern or in the business of a third person; and this the evidence failed to establish.

Judgment for the defendant.

C. J. E. Fung-a-Fat, K. Prasad with him, for plaintiff.

R. McKay for defendant.

PERSAUD, J.: On the 22nd December, 1962, the plaintiff's motor van No. XLH 642, driven by her reputed husband Akbar Alli Khan, and the defendant's truck No. XL 533, driven by his son Frederick White, collided while travelling in opposite directions on the public road of West Coast, Berbice. As a result the plaintiff's van was badly damaged, no real damage having been suffered by the truck. The driver of the truck did not stop, but continued on his way, and having passed the defendant's premises, finally parked it at the premises of one Wilfred White, a rice miller and a brother of the defendant. At the time of the accident, the van was carrying cloth and ground provisions which the plaintiff had brought to Berbice to be sold, and the truck was loaded with wood, which, according to the evidence belonged to Wilfred White.

I am of the view that the driver of the truck was negligent, and that his negligence was the sole and proximate cause of the accident. I am also of the view that the chassis of the van was damaged as a result of the accident, and that the only proper method of putting the van in proper working condition as it was immediately prior to the accident was to replace the chassis. I hold the view that the repairs to the chassis effected by Neezamodeen, a person described as a good mechanic, were clumsily done, and do not reflect any credit to an efficient workman.

On the 26th December, 1962, the defendant undertook to repair the plaintiff's van so that it would be put in a condition fit enough to pass the fitness test carried out by the police; this undertaking was put in writing. Also put in writing on the same day was an agreement signed by the plaintiff's reputed husband acting as her agent whereby he purported to have effected a settlement with the defendant for the 'necessary repairs' to the damaged van.

The plaintiff has now sued in tort for damage to her van, and has alleged that the damage to the van was caused by the negligence of the driver of the truck who was at the time the agent and/or servant of the defendant.

Counsel for the defendant has submitted that—

- (1) assuming that the driver was the defendant's agent, the plaintiff could not sue in tort, she having waived any such right by reason of the two documents already referred to; and
- (2) the plaintiff has not established that the driver was the defendant's agent and/or servant.

I will deal with the second submission first, as in my judgment, if this submission is sound, then the plaintiff must fail in this action. The evidence is that the driver of the truck had on previous occa-

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sions driven that truck in connection with the defendant's business, but that on the 22nd December, 1962, the truck had been lent by the defendant to his brother, and that at the time of the accident, the truck was *engaged* on that brother's business. Counsel for the plain-tiff has submitted that it must be presumed that the driver of a vehicle was the agent and/or servant of the owner of the vehicle, and that the onus of rebutting this presumption lies on the defendant. He has also submitted that the defendant's subsequent acts in under-taking the repairs of the van, in taking the van to be repaired, and in taking the plaintiff's reputed husband to the insurance company, all point to the conclusion that the defendant was holding out the driver as his agent and/or servant.

In *Barnard v. Sully* (1931), 47 T.L.R. 557, SCRUTTON, L.J., said at p. 558:

"No doubt, sometimes motor-cars were being driven by persons who are not the owners nor the servants or agents of the owners. As illustrations of that there were the numerous prosecutions for joy riding, and there were also the cases where chauffeurs drove their employers' motor-cars for their own private folly. But apart from authority, the more usual fact was that a motor-car was driven by the owner or the servant or agent of the owner, and therefore the fact of the ownership was some evidence fit to go to the jury that at the material time the motor-car was being driven by the owner of it or by his servant or agent. But it was evidence which was liable to be rebutted by proof of the actual facts."

And in *Murshalin v. Barsatie and Mangroo* (1961 No. 305, Berbice) where both the driver and the owner of the offending vehicle were sued in negligence I held that the driver was the agent of the owner, as there was no rebutting evidence before me.

In *Hewitt v. Bonvin*, 161 L.T. 360, a young man who had previously been prohibited by his father from driving his car, drove his father's car in the latter's absence but with his mother's permission, and was involved in an accident as a result of which a passenger died. In an action by the passenger's administrator in negligence, it was held that the father was not liable for his son's negligence. In the course of his judgment, MACKINNON, L.J., said at p. 361:

"A master is jointly and severally liable with his servant for any tort committed by the servant in the course of his employment. If in this case the plaintiff is to make....the father liable for the damages which he claims, he must establish that the son was driving the car as a servant of his father and in the course of his employment."

His Lordship opined the view that the definition of a servant contained in SALMOND ON TORTS (9th Edn., p. 89) could hardly be bettered. That definition is as follows:

"A servant may be defined as any person employed by another to do work for him on the terms that he, the servant,

is to be subject to the control and direction of his employer in respect of the manner in which his work is to be done."

In the same case, DU PARCQ, L.J., said at p. 362 (*ibid*):

"It is plain that the appellant's ownership of the car cannot of itself impose liability on him.....The driver of a car may not be the owner's servant, but the owner will be nevertheless liable for his negligent driving if it can be proved that at the material time the driver had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty."

In the case before me it is clear that the defendant gave his consent to his son's driving his truck, but to render the owner liable there must be something more than the granting of mere permission. Is there anything more before me? The plaintiff urges that there is the defendant's acceptance of the liability to have the van repaired, and his efforts in that behalf. But this standing by itself, is not, in my judgment, enough to saddle the defendant with the legal liability as a principal. The test of agency is clear. The plaintiff must establish (1) that the son was employed to drive the car as his father's servant, and (2) that he was, when the accident happened, driving the car for the father, and not merely for his own benefit and for his own concern. And I need hardly add that the principle would extend *a fortiori* to the case where the evidence is that the vehicle was being used in the business of a third person, as is the case here.

I would not conclude this judgment without referring to *Ormrod v. Crosville Motor Services, Ltd.*, [1953] 2 All E.R. 753. In that case the owner of a motor-car agreed with a friend that the friend should drive the owner's car from Birkenhead to Monte Carlo. He was to carry a suitcase belonging to the owner, and he was to proceed to Monte Carlo, visiting friends on the way, arriving in Monte Carlo before the end of the Monte Carlo motor rally. Thereafter he and the owner were to go on holiday with the car in Switzerland. While on the direct route to the English coast to cross to France, owing partly to the negligence of the friend, the car collided with a motor omnibus which was damaged.

I set out hereunder a substantial part of Lord DENNING'S judgment as it appears on p. 754 (*ibid*) as this sets out the legal position:

"It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes. In the present case the driver was, by mutual agreement, driving the car partly for his own pur-

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poses and partly for the owner's purposes. The owner wanted the car driven to Monte Carlo; the driver wanted to go with his wife to Monte Carlo, and he intended to visit friends in Normandy on the way. On this account he started two or three days earlier than he would have done if he had been *going* solely for the owner's purposes. Counsel for the third party says that this should exempt the owner from liability for the driver's negligence, because, the accident might never have happened if he had started later. He says that the owner would not have been liable for any negligence of the driver on the trip from Calais to Normandy, and he should not be liable for negligence due to the early start. I do not think that this argument is correct. The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern."

This is the conclusion to which I have come upon the evidence which has been led in this case. In the circumstances, I hold that there is merit in the second submission made on behalf of the defendant, in which case, I need not consider the first submission.

The plaintiff's claim must therefore be dismissed. But having regard to the facts as I have found them, I make no order as to costs.

Judgment for the defendant.

Solicitors: *R. N. Tiwari* (for the plaintiff); *A. Vanier* (for the defendant).

[In the Full Court, on appeal from the Magistrate's Court for the Berbice Judicial District (Luckhoo, C.J., and Chung, J.,) June 25, July 30, 1965]

Magistrate's court—Imprisonment—Power to substitute fine—Whether applicable to conviction under Spirits Ordinance, Cap. 319, s. 104(3).

Section 36 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, enables a magistrate to impose a fine instead of a term of imprisonment where the penalty prescribed for the offence in question is imprisonment. Under s. 104(3) of the Spirits Ordinance, Cap. 319, the penalty prescribed for a conviction under that subsection is a fine and in addition a term of imprisonment. The appellants appealed against their conviction and sentence for an offence under that subsection. The appeal was dismissed on other grounds but the court

Held: *obiter*, s. 36 of Cap. 15 did not relate to a case where the penalty prescribed by the law was a fine and in addition a term of imprisonment.

Appeal dismissed.

S. D. S. Hardyal for No. 1 appellant.

D. Dyal for No. 2 appellant.

N. A. Graham, Acting Senior Legal Adviser, for the respondent.

Judgment of the Court: In this appeal the following were the grounds of appeal filed:

1. Decision erroneous in point of law because there was no warrant.
2. Decision unreasonable having regard to the evidence because the magistrate misunderstood the defence.
3. Sentence was based on a wrong principle because the magistrate regarded peremptory imprisonment as the only penalty for distillery apparatus."

At the hearing the first ground of appeal was abandoned. In respect of the second ground of appeal we did not agree that the record showed that the magistrate misunderstood the defence.

The third ground of appeal was that the sentence was based on a wrong principle because the magistrate regarded peremptory imprisonment as the only penalty for the offence of being found in custody of distillery apparatus for the manufacture of spirits, contrary to s. 104(3) of the Spirits Ordinance, Cap. 319.

The sentence imposed on the three appellants by the learned magistrate was in each case \$500 or 6 months in default and in addition 6 months' imprisonment. Under s. 104(3) of the Spirits Ordinance the maximum penalty a magistrate may impose is a fine not exceeding \$1,000 and, in addition, imprisonment for a term not exceeding 12 months. Subsection (7) of s. 104 prescribes the scale of imprisonment in default of payment of the fine imposed.

We may say at once that there is nothing contained on the record of appeal which could indicate that the learned magistrate was of the opinion that he was in every case bound to pronounce an additional penalty of peremptory imprisonment. Indeed, in his memorandum of

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reasons for decision the learned magistrate showed that he was clearly of the view that the circumstances of the case warranted a sentence of peremptory imprisonment. On the question of sentence the magistrate expressed himself in this way:

"I accordingly convicted the defendants-appellants and imposed penalties which I hoped would have a strong deterrent effect, bearing in mind the prevalence of offences of this type."

We are of the opinion that the learned magistrate did not err in principle in imposing the sentences he did impose on the appellants.

Of necessity, therefore, what we have to say on the question of the construction of s. 36 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, is *obiter dicta*. However, as the point was argued before us we will proceed to give our views on this question. Section 36 of Cap. 15, which was enacted in 1947, provides as follows:

"36. Where a person is convicted of any summary conviction offence for which the court, under any Ordinance or other enactment for the time being in force, has authority to impose imprisonment and has not authority to impose a fine, the court, notwithstanding the provisions of any such Ordinance or other enactment, may, if it thinks that the justice of the case will be better met by a fine than by imprisonment, impose on the offender a fine not exceeding two hundred and fifty dollars, and not being of such amount as will, under the provisions of this Ordinance, subject the offender in default of payment of the fine to any greater term of imprisonment than that to which he is liable under the Ordinance or other enactment authorising the imprisonment as aforesaid." These provisions were modelled on those of s. 4 of the Summary Jurisdiction Act, 1879.

It seems to us that these provisions were enacted to enable a magistrate to impose a fine instead of a term of imprisonment where the penalty prescribed for the offence in question was peremptory imprisonment. In the instant case the penalty prescribed by s. 104 (3) of the Spirits Ordinance is a fine and in addition a term of imprisonment. By s. 36 of Cap. 15 the fine which may be imposed is limited to \$250 and this is in relation to the summary conviction offence of which a person may be convicted. By s. 104(3) of the Spirits Ordinance, Cap. 319, that portion of the penalty which relates to a fine has for its maximum \$1,000. We do not think that s. 36 of Cap. 15 relates to a case where the penalty prescribed by law is a fine and in addition a term of imprisonment.

The appeal is dismissed. Conviction and sentence affirmed. Costs \$28.84 to the respondent to be borne equally by the three appellants.

None of the grounds of appeal contained in the appellant's application to the British Caribbean Court of Appeal were raised or argued before us.

Appeal dismissed.

PERSAUD v. BACCHUS

[In the Full Court, on appeal from the Magistrate's Court for the East Demerara Judicial District (Luckhoo, C.J., and Van Sertima, J.,) July 11, 23, 25, August, 27, 1965]

Criminal Law—Evidence—Charge for unlawful possession of explosive—Evidence of explosive being found with gun powder—Admissibility in respect of gun powder—Res gestae.

Criminal Law—Objection to admissibility of statement—Case on issue—No record of defendant having been given an opportunity to adduce evidence to meet the prosecution's evidence on the issue—Defendant represented by counsel—Duty of magistrate.

Criminal Law—Possession of explosives—Blasting gelatin—Whether an explosive—Emergency Powers Regulations, 1964, s. 49 (A) (1) (a)—Emergency Powers (Amendment) (No. 4) Regulations 1964, s. 8.

Magistrate's court—Amendment of charge to confirm with evidence—Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s. 94(2)—Summary Jurisdiction (Appeals) Ordinance, Cap. 17, s. 25.

The appellant was found in possession of blasting gelatin and gun powder. He was charged with being in possession without lawful authority of an explosive "to wit, gelignite". The evidence, however, showed that the appellant was in possession of blasting gelatin, and so the magistrate amended the charge by substituting the expression "blasting gelatin" for the expression "gelignite". The magistrate, after hearing evidence, overruled an objection as to the admissibility of a statement made by the appellant. The record did not show whether the appellant was afforded an opportunity of adducing evidence to meet the evidence of the prosecution on this issue. The appellant was, however, represented by counsel. On appeal.

Held: (i) a defendant, on the trial of such an issue had a right to adduce evidence to meet the prosecution's evidence on the issue. Where he was unrepresented by counsel or solicitor a duty was normally cast upon the trial magistrate to inform him of that right, but where counsel or solicitor was conducting the defendant's case there was no such duty cast upon the magistrate;

(ii) the amendment made by the magistrate did no more than bring the charge into conformity with the evidence and was permissible under s. 94(2) of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15;

(iii) the evidence relating to the gun powder was not severable and indeed formed part of the *res gestae*;

(iv) blasting gelatin was an explosive within the contemplation of the Emergency Powers Regulations, 1964.

Appeal dismissed.

*E. V. Luckhoo, Q.C., associated with J. O. F. Haynes, Q.C., for the appellant.
W. G. Persaud, Police Legal Adviser, for the respondent.*

Judgment of the Court: The appellant Takchand Persaud was convicted of the offence of having in his possession on the 31st July, 1964, at Enmore, East Coast, Demerara, in the East Demerara Judicial District, without lawful authority an explosive, to wit, blasting gelatin, contrary to s. 49A (1) (a) of the Emergency Powers Regu-

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lations, 1964 (No. 8 of 1964), as amended by s. 8 of the Emergency Powers (Amendment) (No. 4) Regulations, 1964 (No. 16 of 1964), and was sentenced to 12 months' imprisonment and to receive 6 strokes with an approved instrument.

The appellant did not testify at the hearing nor did he call any witness, his case being closed immediately upon the case for the prosecution being closed. For the prosecution Inspector of Police Bryant Bacchus testified that consequent upon a report made to the police by one Gwendolyn Cameron at 2.45 p.m. on the 31st July, 1964, Detective Inspector Simon and another policeman accompanied him to Enmore Estate where Gwendolyn Cameron pointed out an East Indian man who was in company with five other men on a tractor which was being driven north along Station Street, Enmore. Inspector Bacchus said that he stopped the tractor on which were the appellant and five other men and on searching the appellant he found in his right trouser pocket a stick of blasting gelatin and a blackish powder wrapped in a piece of cloth and paper. The appellant was taken to Cove and John Police Station where he was cautioned. The appellant then made a statement which Inspector Bacchus reduced into writing. The appellant signed the statement. In that statement (to which objection was taken at the trial as to its admissibility) the appellant said:

"I bought the dynamite from a salesman and I took it to our rice-field at Cove and John. I left it there for about three months. The salesman insists on me to take a pants length and the dynamite value \$10.00 and if I don't take the dynamite he would not give me the pants length. I got the gunpowder along with the dynamite and pants length from the salesman; this is all I have to say."

The substances found in the appellant's trouser pocket were sent to the Government Analyst for examination and report. The Government Analyst's certificate states that chemical and microscopic examination of those substances revealed them to be blasting gelatin, an explosive, and gunpowder respectively. By the words "an explosive" written in the Analyst's certificate after the words "blasting gelatin" we understand the Analyst to be stating that blasting gelatin is an explosive substance. We do not understand him to be certifying that it is an explosive as defined by law.

At the hearing of this appeal on the application of Mr. J. O. F. Haynes, counsel for the appellant, leave was granted to amend the grounds of appeal filed. The grounds of appeal as amended appear in a separate document laid over with the clerk of court at the hearing.

One of the grounds of appeal argued was that the magistrate erred in the trial of the issue whether the statement of the appellant was admissible in evidence in that the trial of the issue was not conducted in accordance with law and was irregular because the appellant, counsel urged, was not given the opportunity or asked whether he wished to lead evidence in reply to that led by the prosecution on that issue, thereby prejudicially affecting the courses of the case.

which the appellant was entitled to take. To see whether there is any merit in this ground it is necessary to examine the record of appeal to see what course the trial of the issue took before the magistrate. The appellant was represented at the hearing before the magistrate by Mr. F. R. Wills, barrister-at-law. When Mr. Wills objected to the admissibility of the appellant's statement he did so (as is recorded by the magistrate) "on the ground that the statement was involuntary and in non-compliance with the new Judges rules." Thereupon the trial of the issue began.

After Inspector Bacchus had testified as to the circumstances under which the statement was given by the appellant Mr. Wills cross-examined Bacchus on those circumstances but he never made any suggestion that the statement was obtained by any means which could be held to be an infringement of the Judges rules, though he sought to prove the circumstances under which the statement was obtained. At the conclusion of Mr. Wills' cross-examination on the issue there appears the following —

"Case on issue. The court states that statement is admissible. Statement tendered, admitted and marked 'B'

We are of the view that a defendant on the trial of such an issue has a right to adduce evidence to meet the prosecution's evidence on the issue. Where the defendant is unrepresented by counsel or solicitor we are prepared to hold that a duty is normally cast upon the trial magistrate to inform the defendant of that right but we are of the view that where counsel or solicitor is conducting the defendant's case, there is no such duty cast upon the magistrate. In the instant case the record is silent as to whether the trial magistrate did in fact inform the appellant that he had the right to adduce evidence on the issue but we are of the view that it was not incumbent upon the magistrate so to do and in any event having regard to the nature of the cross-examination of Inspector Bacchus and the answers elicited it is not surprising that Mr. Wills did not seek to examine the appellant or to call witnesses on the issue. We find that there was no error committed by the magistrate in this regard.

Counsel for the appellant also submitted that the magistrate erred in amending the original charge by the substitution of the words "to wit, blasting gelatin" for the words "to wit, gelignite". At the hearing after the Analyst's certificate was admitted in evidence, the prosecution sought to have the original charge amended by the substitution of the words "to wit, gelatin" for the words "to wit, gelignite" Mr. Wills objected to the amendment sought but the magistrate amended the charge to read "to wit, blasting gelatin". The amendment made by the magistrate did no more than bring the charge into conformity with the evidence of Inspector Bacchus and the Analyst's certificate. This is permissible under the provisions of s. 94(2) of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15. See also s. 25 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17.

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At the hearing of this appeal it was also submitted that evidence should not have been admitted as to the finding of the black substance or to the admission of evidence relating to the nature of that substance. We are of the view that that substance having been found at one and the same time in the same pocket on the person of the appellant it was not possible to exclude the evidence of its finding and of its nature. This evidence was not severable and indeed formed part of the *res gestae*. However, even if we are wrong in this approach the contents of the appellant's statement to the police render this question of academic importance only. It is to be observed that by virtue of reg. 49A (4) (b) of the Emergency Powers Regulations, 1964 (No. 8), as inserted by reg. 8 of the Emergency Powers (Amendment) (No. 4) Regulations, 1964 (No. 16), "every person who is proved to have had in his possession or under his control anything whatsoever containing any.....explosive shall, until the contrary is proved, be deemed to have been in possession of such.....explosive".

On the question as to whether there is proof that the substance the subject matter of the charge is an explosive within the contemplation of the Emergency Powers Regulations, 1964, Mr. Haynes submitted that the court cannot take judicial notice that blasting gelatin is an explosive. Blasting gelatin according to the CONCISE OXFORD DICTIONARY is an explosive nitroglycerine compound and "explosive" as defined by the Explosives Ordinance, Cap. 346, as amended by s. 2 of the Explosives (Amendment) Ordinance, 1954 (No. 26), means ". . . . nitroglycerine.... and every other substance whether similar to those abovementioned or not, used or manufactured with a view to producing a practical effect by explosionand includes.....any adaptation or preparation of an explosive as herein defined . ." By virtue of this definition blasting gelatin is an explosive.

Counsel abandoned ground 1(a) and (b), which relates to the signing of the complaint, and ground 2 (b), which relates to proof by evidence to show that there was a state of emergency at the time of the alleged offence and that the Emergency Regulations were properly made and were in operation at the time the complaint was made.

On the question of sentence counsel urged that the magistrate erred in taking into consideration matters contained in the report of a probation officer without first giving the appellant an opportunity of accepting or denying those matters. We are of the view that the contents of the probation officer's report are such that they cannot be held to contain any matter prejudicial to the appellant in so far as the question of sentence is concerned. Indeed it is to the contrary. The reference to the admission of the appellant that he was found in possession of the explosive substance does not operate prejudicially against the appellant as he had already been found guilty on the 14th September, 1964, after which the magistrate requested that a probation officer's report be obtained. From the memorandum of reasons for decision it appears that the probation officer's report was taken into consideration in the appellant's favour and that the magistrate had regard to the prevalence of violence and terrorism in the

district and throughout the Colony. We can see no good reason for interfering with the sentence imposed on the appellant.

The appeal is dismissed and the conviction and sentence affirmed with costs \$28.12 to the respondent. Leave to appeal granted in respect of whether the statement of appellant amounting to a confession was legally proved and properly admitted in evidence and whether the admissible evidence established that the appellant was found in possession of an explosive within the meaning of the regulation under which he was charged.

Appeal dismissed

BEEPAT AND ANOTHER v. THE ESTATE OF RAJNARINE

[Supreme Court—In Chambers (Luckhoo, C.J.,) on appeal from the Rice Assessment Committee for the Demerara Berbice Area, July 10, 31, 1965]

Rice lands—Rules of good estate management—Failure to provide bridge suitable for use by tractor—Custom of country—Judicial notice by committee—Rice Farmers (Security of Tenure) Ordinance, 1956, ss. 2 (c) and 58.

The appellants, who rented rice lands from the respondents, claimed a certificate of non-observance of the rules of good estate management on the ground that the respondents had failed to provide a bridge wide enough to permit the passage of a tractor. The application was dismissed by the rice assessment committee who observed that it was a common practice among rice farmers for tractors to be taken across trenches using planks as make-shift bridges. On appeal.

Held: (i) the practice referred to was cognisable by the committee as a custom of the country by virtue of the provisions of s. 58 of the Rice Farmers (Security of Tenure) Ordinance, 1956;

(ii) while the provision of a bridge giving access to a holding of rice lands might in appropriate cases be an essential structure within the meaning of the expression "rules of good estate management", regard must, as slated in the definition of the expression, be had "so far as was practicable, to the character and position of the rice lands."

Appeal dismissed.

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

B. S. Rai for the respondent.

LUCKHOO, C.J.: This is an appeal from the decision of the rice assessment committee for Demerara-Berbice dismissing an application made by the appellants for a certificate of non-observance of the rules of good estate management in relation to their holding of 18 acres of rice-land rented from the respondent and subject to the provisions of the Rice Farmers (Security of Tenure) Ordinance, 1956 (No. 31).

The application was based on two grounds:

(a) that the respondent had removed a bridge erected across a trench over which the appellants could take in a tractor for

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the purpose of bringing out their rice crop and had replaced that bridge by a smaller bridge which was too narrow to allow the passage of a tractor;

- (b) that the dam which gave ingress and egress to the appellants' holding had been planted with coconut trees by the respondent so that the passage of a tractor to and from the appellants' holding was obstructed.

The committee visited the holding and found no physical sign which indicated that a wider bridge had been replaced by the existing bridge. The committee, while stating that the existing bridge only permits the passage of pedestrians and animals, found as a fact that there had been no wider bridge as alleged by the appellants. I can see no good reason for not giving effect to the finding of the committee in this regard.

The appellants contended that the absence of a bridge wide enough to permit the passage of a tractor forced them into a position whereby they had to use the Shanks Canal and dam which are under the statutory control of the East Demerara Water Commissioners for the purpose of ingress and egress, thus rendering themselves liable to conviction for trespass. The committee, however, observed that it is a common practice among rice farmers for tractors to be taken across trenches using planks as makeshift bridges. This I understand the committee to mean is a custom of the country and is cognisable by virtue of the provisions of s. 58 of the Ordinance.

Counsel for the appellants urged that a bridge giving access to a holding of ricelands is an essential structure within the contemplation of definition of the expression "rules of good estate management" in para. (c) of s. 2 of the Ordinance which enacts as follows:

" 'rules of good estate management' means so far as is practicable having regard to the character and position of the rice lands—

* * * * *

- (c) the provision of dams, canals and drains and essential structures for the use of tenants which should be kept clean and in good order to the satisfaction of the assessment committee of the area in which such dams, canals and drains and essential structures are situate, notification of the making of such provisions to be given to the tenants;"

Counsel contends that a landlord is thereby required to provide such a bridge which must be one which, according to normal agricultural standards, would suffice for the needs of the tenant and that the use of a tractor by a tenant on his holding is such a need. While I am inclined to the view that the provision of a bridge giving access to a holding of riceland may in appropriate cases be an essential structure within the meaning of the expression "rules of good estate management" regard must, as stated in the definition of the expression, be had "so far as practicable, to the character and position of the ricelands." As was observed by the Committee a landlord can

hardly be expected to provide each tenant on a large rice estate with a bridge large enough for the passage of a tractor.

Bearing all these matters in mind I hold that the respondent is not in breach of the rules of good estate management by providing only a bridge by which pedestrians and animals may enter and leave the holding and that according to the custom of the country the appellants would be expected to lay down planks across the same trench for the passage of their tractor.

The committee found that the dam giving access to the appellants' holding did in fact have coconut trees growing thereon but that the spaces between the trees were wide enough for the passage of a tractor. There is therefore no substance in the appellants' complaint on this ground.

The appeal is dismissed and the order of the Committee affirmed with costs \$15 to the respondent.

Appeal dismissed.

KISHNA v. BURNETT AND OTHERS

[Supreme Court (Luckhoo, C.J.) February 16, May 19, 1965]

Moneylender—Money lent on mortgage at 24 per centum in 1955—This was then the maximum statutory rate for loans on such security—Maximum subsequently reduced by statute to 12 per centum—Whether transaction caught by new rate—Moneylenders Ordinance, Cap. 335—Moneylenders Ordinance, 1957, s. 12.

The plaintiff sued to recover interest at 24 *per centum per annum* due on a second mortgage executed by the defendants in his favour in 1955. Under the Moneylenders Ordinance, Cap. 335 that was then the maximum permissible rate for loans on a security of that kind. That Ordinance was however repealed by the Moneylenders Ordinance, No. 11 of 1957, s. 12 whereof substituted a new maximum rate of 12 *per centum per annum* for such loans. By Proclamation No. 5 of 1958, made under s. 30 of the new Ordinance, this Ordinance was brought into force with effect from 22nd November, 1958. In defence it was argued that one of the objects of the provisions for bringing the Ordinance into operation on such date as the Governor should by proclamation appoint was to provide all moneylenders with an opportunity of reducing the rate of interest chargeable if the same was above the new maximum, and that accordingly the transaction, was subject to s. 12 of the new Ordinance, sub-s. (3) whereof provides that "any person who loans money at a rate of interest higher than that authorised by this section shall be liable on summary conviction to a fine ..."

Held: at the time the money was lent by the plaintiff it was not lent in contravention of the provisions of s. 12 the new Ordinance. That being so, the plaintiff did not lend money at a rate of interest higher than that authorised by s. 12 and therefore the transaction fell outside of s. 12(3).

Judgment for the plaintiff.

S. Sukhan for the plaintiff.

J. Carter, Q.C., for the second-named defendant.

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LUCKHOO, C.J. This is a claim by the plaintiff Kishna against the defendants for the sum of \$1,920 as being an amount due, owing and payable by the defendants to the plaintiff for 4 years' interest from the 13th June, 1960, to 13th June, 1964, due on a second mortgage executed by the defendants in favour of the plaintiff on the 13th June, 1955, for the capital sum of \$2,000 with interest at the rate of 24 *per centum per annum*, to be paid quarterly.

This action has proceeded against the second defendant Ilton Armstrong only, service of the writ of summons herein not having been effected on the other defendants.

It is admitted that this is a moneylending transaction. No question of fact being in issue no evidence was tendered at the hearing.

It was submitted by counsel for the defendant Armstrong that the transaction is caught by the provisions of s. 12 of the Moneylenders Ordinance, 1967 (No. 11), even though the transaction was effected in 1955 prior to the enactment of that Ordinance. It was conceded, however, by counsel for the defendant that the transaction would not be caught by the provisions of ss. 11 and 19 of the Moneylenders Ordinance, 1957 (No 11). Section II relates to the form of moneylender's contract and the avoidance of such contracts for failure to comply with the requirements of that section and s. 19 refers to the limitation of time for proceedings in respect of money lent by moneylenders.

Section 12 of the Ordinance provides as follows:

"12. (1) The interest which may be charged on loans by a moneylender shall not exceed —

- (a) in the case of secured loans other than loans secured by bills of sale, simple interest at the rate of twelve *per centum per annum*;
- (b) in the case of loans secured by bills of sale, simple interest at the rate of eighteen *per centum per annum*; and
- (c) in the case of unsecured loans, simple interest at the rate of thirty-two *per centum per annum*.

(2) The interest shall constitute a comprehensive charge to include all discounts, commissions, bonuses, fines, expenses, and any amount by whatsoever name called, in excess of the principal, paid or payable to the moneylender in consideration of or otherwise in respect of a loan, but shall not include such charges, expenses and costs as are specifically allowed by this Ordinance or by the court adjudicating on the matter.

(3) Any person who loans money at a rate of interest higher than that authorised by this section shall be liable on summary conviction to a fine not exceeding two hundred and fifty dollars in respect of each loan, and no action shall be brought by the lender or any other person (whether or not a *bona fide* assignee or holder for value of any instrument relating to such loan) for

the recovery of any sum of money lent in contravention of the provisions of this section, and any agreement made or security given in connection therewith shall be wholly void.

(4) In this section, the expression 'secured loans' includes mortgages and loans made on all forms of collateral security, and the expression 'bills of sale' has the meaning assigned to it in the Bills of Sale Ordinance."

If the provisions of s. 12 apply to the transaction in issue the charge of interest at the rate of *24 per centum per annum* would exceed the authorised rate of 12 per centum per annum for secured loans and the agreement to pay interest would be wholly void.

Counsel for the defendant pointed to those sections of the Ordinance which specifically provide that their requirements apply to contracts made after the commencement of the Ordinance, *e.g.*, s. 11, to those sections which specifically provide that their requirements apply to contracts whether made before or after the commencement of the Ordinance, *e.g.*, s. 18, and to those sections where no specific provision is made as to whether their requirements apply only to contracts made after the commencement of the Ordinance or otherwise, *e.g.*, s. 12.

Counsel for the defendant contended that after the coming into operation of the Ordinance on the 22nd November, 1958, by Proclamation No. 5 of 1958 made under s. 30 of the Ordinance, the transaction in issue was caught by s. 12 and that thereafter the agreement to pay interest at the rate of *24 per centum per annum* was wholly void. Counsel argued that one of the objects of providing by s. 30 of the Ordinance that the Ordinance shall come into operation on such date as the Governor shall by Proclamation published in the Gazette appoint was that all moneylenders should have an opportunity of reducing the rate of interest chargeable if the same were above the maximum permitted rate in the contract.

Prior to the enactment of the Moneylenders Ordinance, 1957 (No. 11), it was lawful for moneylenders to charge the rate of interest which was charged by the plaintiff, subject to the power of the court to re-open the transaction where the court was satisfied on the evidence that the interest charged in respect of the sum actually lent was excessive and to grant relief to the borrower from payment of any sum in excess of the sum adjudged by the court to be fairly due in respect of the principal, and interest and charges, which the court, having regard to the risk and all the circumstances, adjudges to be reasonable. The court was also empowered to set aside wholly or in part, or revise or alter any security given or agreement made in respect of money lent by the moneylender. (See s. 3(1) of the Moneylenders Ordinance, Cap. 335, now repealed). Those provisions have been re-enacted by s. 23(1) of the Moneylenders Ordinance, 1957 (No. 11). As re-enacted those provisions would appear to apply to all moneylending transactions apart from those within the ambit of s. 12(3) which deals with those cases where the rates of interest charged exceed the maxima specified by s. 12. Where the maxima specified

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thereby are not exceeded the court may in a proper case invoke the provisions of s. 23(1) of the Ordinance. The question is whether s. 12 applies only to transactions taking place subsequent to the coming into operation of the 1957 Ordinance or embraces transactions taking place prior thereto. There is no specific provision to the effect that transactions taking place prior to the coming into operation of the 1957 Ordinance are caught by s. 12.

The general rule is that statutes are not to operate retrospectively. But the general rule may be departed from (a) by express enactment or (b) by necessary implication from the language used. The former exception does not apply to the present matter. As to the latter exception the question is whether the legislature has sufficiently expressed an intention that it should apply. The general scope and provision of the statute the remedy to be applied and the former state of the law must be looked at to see what it was that the legislature contemplated, per Lord HATHERLEY in *Pardo v. Birmingham*. (1870), L.R. 4 Ch. App. 735, at p. 740.

Postponement of the commencement of a statute by way of a postponing clause has apparently never been suggested as indicating the retrospective operation of the statute except in enactments relating to the Statutes of Limitation. [CRAIES ON STATUTE LAW (6th Edition) at p. 392].

It is clear that at the time the money was lent by the plaintiff the money was not lent in contravention of the provisions of s. 12 of the Ordinance. That being so the plaintiff did not lend money at a rate of interest higher than that authorised by s. 12 and therefore from the very wording of the provisions of sub-s. (3) of s. 12 it would appear that the transaction in question would fall outside those contemplated by that subsection.

In the result the submissions of counsel for the defendant fail.

Judgment for the plaintiff against the defendant Armstrong for £1,920 with costs to be taxed, fit for counsel Stay of execution for 6 weeks granted.

Judgment for the plaintiff

Solicitors: *Dabi Dial* (for the plaintiff); *V. Lampkin* (for the second-named defendant).

BOWMAN v. INSHAN

[In the Full Court, on appeal from the magistrate's court for the West Demerara Judicial District (Luckhoo, C.J., and Van Sertima, J.) May 21, July 2, 1965]

Criminal law—Escape from lawful custody—Appellant arrested for unlawful possession—Escaped from police custody before charged with any offence in court—Whether guilty of escaping from lawful custody—Criminal Law (Offences) Ordinance, Cap. 10, s. 342.

The appellant was arrested at 2.50 a.m. on the public road by a police constable, who, in handing him over to the sentry at the police station, stated that he had been arrested for unlawful possession. Shortly after the appellant escaped from police custody but was later recaptured and charged with an offence under s. 342 of the Criminal Law (Offences) Ordinance, Cap. 10, which provides that "everyone who, being in lawful custody.....on any criminal charge, escapes from that custody, shall be guilty of a misdemeanour," The appellant was tried summarily with his consent and was convicted. On appeal it was argued on his behalf that he could not be convicted under that provision unless, which was not the case, at the time of the escape he was charged with some offence before a court.

Held: (i) the words "on any criminal charge" in s. 342 of Cap. 10 included the case of a person who had been arrested upon a charge and were not to be limited to a case where a person was charged with some offence before a court;

(ii) the report of the arresting policeman showed that the appellant had been arrested for unlawful possession and that he was therefore on a criminal charge within the meaning of s. 342 of Cap. 10 at the time of the escape.

Appeal dismissed.

R. H. Harper for the appellant.

W. G. Persaud, Police Legal Adviser, for the respondent.

Judgment of the Court: The short point in this appeal is whether the provisions of s. 342 of the Criminal Law (Offences) Ordinance, Cap. 10, contemplate that the offence of escape from custody in cases other than those provided for by ss. 340 and 341 of that Ordinance is committed only if the accused were at the time of his escape from lawful custody charged with some offence before a court.

Section 342 of the Criminal Law (Offences) Ordinance, Cap. 10, provides as follows:

"Everyone who, being in lawful custody, other than as aforesaid, on any criminal charge, escapes from that custody, shall be guilty of a misdemeanour, and on conviction thereof shall be liable to imprisonment for two years."

The words "other than as aforesaid" in s. 342 refer to the provisions of s. 340 (which relates to breach of prison) and of s. 341 (which relates to escape from custody in grave cases).

The appellant was charged with the offence of escape from lawful custody, contrary to s. 342 of the Criminal Law (Offences) Ordinance,

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Cap. 10, and was tried summarily with his consent. He was convicted and fined \$26 in default imprisonment for 2 months. The evidence given before the magistrate of the West Demerara Judicial District was to the following effect. The appellant was seen walking in an easterly direction with a travelling hag in one hand and two drums under the other hand at 2.50 a.m. on the public road at Wales. West Bank, Demerara. When he was about 10 feet away from two policemen, the complainant P.C. Inshan and P.C. Aziz dressed in uniform, who were on patrol duty and walking towards him, he changed direction going north instead. He looked back towards the policemen and quickened his pace and on being approached by the policemen he dropped the articles he was carrying. It turned out that the travelling bag contained sugar. According to one of the policemen the appellant on being caught asked for a chance. The policemen then arrested the appellant and took him to Wales Police Station and handed him over to the sentry. P.C. Teekaram testified to the effect that he was sentry in charge of the station when the appellant was brought there by the complainant and P.C. Aziz, who said that they had arrested the appellant at Sisters Public Road for unlawful possession. About 3 months (*sic*) later the appellant made his escape from the Wales Police Station but was later recaptured. A complaint of unlawful possession of the sugar and drums was laid against the appellant as well as the complaint for escape from lawful custody the subject matter of this appeal. The appellant was found guilty on both complaints which were tried together by consent. In respect of the complaint of escape from lawful custody no evidence was tendered on behalf of the appellant, counsel being content to rely upon a submission that there was no evidence that the appellant was on a criminal charge at the time of his escape. This submission has been made in this appeal and forms the sole ground of appeal.

Counsel for the appellant has urged that it is a necessary ingredient of the charge that the appellant should have been at the time of his escape charged with some offence before a court. There is a dearth of authority on the point so far as the researches of counsel and of ourselves have gone but we think that some assistance in the interpretation to be put upon the words "on a criminal charge" in s. 342 is to be obtained from an examination of the provisions of the ss. 340 to 348 inclusive which fall within Title 23 under the caption "Escape and Rescue" in the Ordinance. Such an examination discloses that leaving aside s. 342 there is no provision whereunder a person who is in lawful custody and escapes therefrom before a formal charge is laid can be made liable criminally for such escape. Indeed, there is no such provision in the Summary Jurisdiction Ordinances. Further, provision is made by s. 347 that a person is guilty of a misdemeanour, who having the lawful custody of any person or being employed by or under any person having that custody as a warden overseer, guard or otherwise, through negligence or carelessness, allows that person to escape from custody. It would be strange indeed if there were no provision whereby the person escaping in such circumstances is to be held to have committed a criminal offence.

In *Arnell v. Harris*, [1944] 2 All E. R. 522, which concerned the meaning of the words "person charged" in s. 44 of the Summary Jurisdiction Act, 1879, HUMPHRYS, J., in delivering the judgment of the Court of Criminal Appeal observed (at p. 523):

"The person charged' is an expression which has various different meanings, and in my opinion it may include the case of a person who has been arrested upon a charge, as he might be if it is a case of felony, or a person who has been arrested upon a warrant granted by a magistrate, or even the case of a person who has been summoned, that being another form of bringing a person to court to appear and answer a charge. But I think that the section must be confined to cases where the person is at least accused, and in that sense charged, with some felony or misdemeanour."

Section 44 of the 1879 Act provides:

"Where any property has been taken from a person charged before a court of summary jurisdiction with any offence punishable either on indictment or on summary conviction, a report shall be made by the police to such court of summary jurisdiction of the fact of such property having been taken from the person charged and of the particulars of such property, and the court shall, if of opinion that the property or any portion thereof can be returned consistently with the interests of justice and with the section must be confined to cases where the person is at least any portion thereof, to be returned to the person charged or to such other person as he may direct."

In that case the court held that s. 44 of the Summary Jurisdiction Act, 1879, was confined to cases where property was taken from a person who was at the time charged with an offence before a court of summary jurisdiction. The court observed that at the time when a sum of money had been taken from the respondent no accusation was made against him of any sort or kind by any person and that it would not be right to say that this was a case where property had been taken from a person who could rightly be described as at the time charged with anything at all. It was held that the magistrate had erred in making an order under s. 44 of the Act.

We are of the opinion that the words "on any criminal charge" include the case of a person who has been arrested upon a charge and are not to be limited to a case where a person is charged with some offence before a court. In the instant case the evidence of P.C. Teekaram was to the effect that on the appellant being brought into the station prior to his escape therefrom the complainant and P.C. Alli said that he had been arrested on Sisters Public Road for unlawful possession.

In our opinion the appellant was properly convicted on the complaint laid.

The appeal is dismissed and the conviction and sentence affirmed with costs \$30.04 to the respondent.

Appeal dismissed.

PRESCOD v. REECE

[Privy Council (Lord Morris of Borth-Y-Gest, Lord Pearce and Lord Wilberforce) June 1, 1965]

Will—Proof in solemn form—Testator suffering from debilitating illness—Obligation of plaintiff to dispel suspicions.

Appeal—Privy Council—Judgment of Supreme Court affirmed by Court of Appeal—Concurrent findings of fact—Will not be disturbed by Privy Council in the absence of special circumstances.

The respondent as the executrix, sought to propound her father's will in the Supreme Court. The appellants opposed on the ground *inter alia* that the testator was not of sound mind, memory and understanding and did not know or approve of the contents of the will. Evidence was given to show that he was diabetic but after considering the possible implications of this and all other matters' which might be grounds for suspicion, both the trial judge and, on appeal, the Federal Supreme Court [1962 L.R.B.G. 103] concluded on the evidence that the testator was of sound mind, memory and understanding, both in respect of the will itself and also in respect of his own affairs and effects and the claims of his relatives. On appeal to the Privy Council.

Held: (i) where, as in this case, there were concurrent findings of fact by the court of first instance and the appellate court, the Privy Council would not review the evidence for a third time unless there was some special circumstances that would justify such a departure from their normal practice;

(ii) on the record there was ample evidence to support the concurrent findings of fact made by the Supreme Court and the Federal Supreme Court and no special circumstances were shown for disturbing those findings or for reviewing the evidence for a third time.

Appeal Dismissed.

S. P. Khambatta, Q.C., with J. R. Harry Lefter, for the appellants,

J. G. LeQuesne, Q.C., with R. N. Talbot, for the respondent,

LORD PEARCE delivered the reasons for report: This appeal is concerned with the validity of the will of Jacob James who died on the 17th December, 1958, at the age of 66 years. The respondent, a daughter of the testator, propounded the will as executrix and asked the Supreme Court of British Guiana to pronounce in its favour. The claim was resisted by the three defendants to the action who were a son and two other daughters of the testator. The two defendants who now appeal had set up the defences of undue influence and lack of sound mind, memory, and understanding; but the allegation of undue influence was abandoned at an early stage of the trial. The other defendant, who did not appeal, put the plaintiff to proof and alleged that the testator did not know or approve of the contents of the will. That defence was also adopted by the widow of the testator who had been cited by a defendant.

The trial judge, having heard a number of witnesses, decided that the testator knew and approved the contents of the will at the time of its execution and that he was of sound mind, memory and understanding. From, that decision the appellants appealed to the then Federal Supreme Court of the West Indies which affirmed the judgment of the trial judge and dismissed the appeal

The testator was a man of substance with a wife; eight children still living, and numerous grand-children. He had made one previous will under which it appears that his estate was left equally between his children subject to a life-interest to his widow. But admittedly that will was destroyed *animo revocandi* several years before his death. The testator was a strong, forceful man of affairs, but from 1955 he suffered from diabetes. In addition he suffered at a later stage from cancer. These two diseases caused his death at the end of 1968.

In June or July 1958 the testator informed Clinton Wong, a barrister who had been his legal adviser for four or five years that he wished to make a will. Mr. Wong referred him to Mr. Fraser, an experienced law clerk (who had over many years transacted legal and quasi-legal business for the testator), in order that Mr. Fraser might take instructions for the draft will. Mr. Fraser did so, and made a draft which was shown to Mr. Wong. The will was then prepared. On the 30th August, 1958, the testator was driven in his car by his son Benjamin to Georgetown where he called at Mr. Fraser's house. There he, was given the will and read it while Mr. Fraser ate his lunch. Then Mr. Fraser read the will over to him at his request and he approved it. They both went off in the car to see Mr. Wong, Mr. Wong came to the car, and, sitting in it, read the will aloud to the testator explaining each clause as he went along, and asking whether it conveyed his wish. After the testator had expressed his approval he signed the will which was then duly witnessed by Mr. Wong and Mr. Fraser.

These two witnesses to the will testified that the testator was in a normal mental state both when the instructions for the will were given and on the day when it was executed. They differed in that Mr. Wong considered that he was physically a sick man, whereas Mr. Fraser considered that he was not, although he appeared "unduly anxious to have the will executed." "Despite the conflict as to their respective opinions of the testator's health on those two occasions," said the learned trial judge, "the court accepts their evidence that the testator was mentally normal when he discussed the making of the will with Mr. Wong, when he gave instructions for the preparation of the will to Fraser, and when it was executed." The learned trial judge also gave weight to certain corroborative evidence given by five reliable witnesses as to the normality of the testator's mental condition on occasions both before and after the date on which the will was executed.

After dealing with the case presented by the defendants and certain authorities to which he was referred, the learned judge said: "What the court concludes from the circumstances as a whole is that the testator, at the time he made his will, was not through any infirmity or disease oblivious to the claims of his relations; what he did, he did by design, fully understanding and appreciating the significance of his act, and that any circumstances which were likely to excite the suspicion of the court have been dispelled." And finally, "the court is satisfied from the plaintiff's case that the testator knew and approved of the contents of the will, that he was of sound mind,

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memory and understanding when he executed it, and that such suspicions as may have arisen have been dispelled."

On appeal MARNAN, F. J. (with whom LEWIS and JACKSON, F. JJ., agreed) having clearly set out the appellants' contentions came to the same conclusion as the learned trial judge. [1962 L.R.B.G. 103]. He said *inter alia*, "Having regard to the direct evidence of Mr. Fraser and Mr. Wong to the effect that the testator was in a clear and normal state of mind when the will was read and explained to him and he signed it, it is in my opinion impossible to say that the trial judge was wrong in coming to a corresponding conclusion." And again, "But when one comes to examine the will with all its detailed provisions and distinctions, and to take into account the evidence as to the testator's attitude towards the various members of his family, it seems plain that he intended to dispose of his property as he did."

It is argued for the appellants that the court could not properly have reached that conclusion and that it did so by giving insufficient weight to the following considerations. There was evidence by the widow and a grand-child living in the house that at and about the material date the testator was feeling his diabetes severely and was giving himself injections of insulin, which would reduce the sugar in his blood, and was at the same time taking quantities of sweetened condensed milk, which would increase the sugar. This empiric and unscientific treatment was not checked by any urine tests nor was the doctor who visited him treating him for diabetes. There was medical evidence that overdoses of insulin can produce hypoglycaemia which may cause loss of memory, moroseness, and personality changes. There was great variation between the earlier will and the last will. Both treated the widow reasonably; but the former did not discriminate between the children while the latter gave the predominant share to the plaintiff who had managed the testator's affairs for less than a year, and left to others either derisory sums or amounts which were very ungenerous in comparison with the plaintiff's share. The derisory sums are explained in the will by references (which seem justified by the evidence) to unfilial behaviour. There is, however, no satisfactory evidence as to the reasons for the ungenerous amounts. Further, the testamentary instructions which the testator initialled were destroyed by Mr. Fraser when the will was signed and no copy of them was available.

It is clear on reading the careful judgments of the trial judge and MARNAN, F. J., that both courts had these points well in mind and exacted a high degree of proof. In their view, however, that high degree of proof was supplied by the plaintiff's witnesses.

There are thus concurrent findings of fact by the court of first instance and the appellate court. Their Lordships therefore cannot review the evidence for a third time unless there is some special circumstance that will justify such a departure from their normal practice. Mr. Khambatta contends that this case comes within the fourth proposition in the list of special circumstances set out in the judgment in *Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy* [1946] A.C 508, at p. 521:

"(4) That, in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand: or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their findings is such a question of law."

Mr. Khambatta argues that both courts misunderstood the effect of HARWOOD v. BAKER (1840), 3 Moo. P.C. 282, and *Battan Singh v. Amircand*, [1948] A.C. 161, in two respects. First, they did not give sufficient weight to the suspicion which should attach to a will made by a person with a debilitating illness. Secondly, they failed to appreciate that a mere capacity by a sick man to understand the terms of a will was not enough if it was not supported by an understanding of the testator's affairs and a comprehension of the various claimants on the testators' bounty. In their Lordships' opinion neither of these criticisms is valid. The facts of the two cases cited were wholly different from those in the present case. Both the trial judge and the Court of Appeal gave careful consideration to the testator's illness and its possible implications and to all the other matters which might be grounds for suspicion but they concluded that the evidence of the plaintiff's witnesses clearly established that the testator was of sound mind, memory and understanding both in respect of the will itself and also in respect of the testator's own affairs and effects and the claims of his relatives. There was ample evidence to support such a finding and their Lordships' see no reason to doubt that such a finding was correct. Their Lordships are accordingly of opinion that no ground has been shown for disturbing the concurrent findings of fact or for reviewing the evidence for a third time.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed.

The appellants must pay the costs of this appeal.

Appeal dismissed.

**OFFICIAL RECEIVER v. DEVONSHIRE CASTLE
CO-OPERATIVE SAVINGS SOCIETY LTD.**

[British Caribbean Court of Appeal (Archer, P., Jackson and Luckhoo, JJ.
A.) July 19, 20, December 1, 1965]

Insolvency—Sale of land—Specific performance ordered—Subsequent insolvency of vendor before transport passed—Whether purchasers must prove in insolvency or entitled to transport—Insolvency Ordinance, Cap. 43, s. 39(5).

In 1955 STOBY, J., ordered specific performance of an agreement whereby M.E.H.S. sold plantation Walton Hall, Essequibo, to the respondent society. (See 1955 L.R.B.G. 84). On appeal this decision was affirmed in 1956 by the West Indian Court of Appeal. (See 1956 L.R.B.G. 1). In 1959, before transport was passed, M.E.H.S. was adjudged insolvent and the Official Receiver appointed assignee of his estate. In 1961 the Official Receiver instituted an action against the respondent in which he claimed *inter alia* a declaration that (having regard to s. 39(5) of the Insolvency Ordinance, Cap. 43) the order for specific performance became null and void and the agreement of sale of no effect because of the supervening insolvency of the debtor before conveyance was passed. It was contended that in consequence the land formed part of the insolvent's property available for distribution among the creditors of his estate and that the respondent's remedy was to prove in insolvency as a concurrent creditor. DATE, J., dismissed the action. On appeal,

Held: when the order for specific performance was made the respondent's right to title no longer rested on a contract within the meaning of s. 39(5) of Cap. 43, for it thereafter rested on the decree—*transit in rem judicatam*. The original cause of action under the contract merged in the decree and the latter was not caught by s. 39(5) of Cap. 43.

Appeal dismissed.

Dr. F. W. H. Ramsahoye for the appellant,

H. D. Hoyte for the respondent.

JACKSON, J. A.: This is an appeal from the judgment and order of DATE, J., against his refusal of a declaration sought by the appellant that an order for specific performance made in a previous action in favour of the respondent society is null and void and that an agreement in writing dated July 13, 1953, between the insolvent (M. E. H. Salisbury) and the respondent society, upon which the said order was based is of no effect because of the supervening insolvency of Salisbury before the order was obeyed.

The facts may be set out thus: On July 13, 1953, M. E. H. Salisbury entered into an agreement in writing with the Devonshire Castle Co-operative Society Limited, a society registered under section 7 of the Co-operative Society Ordinance, Cap. 326, to sell to the society all the lots of Plantation Walton Hall situate on the west sea coast of the county of Essequibo, British Guiana, save and except all those lots numbered 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, for the sum of \$20,000; the said sum was to be paid by instalments at certain stated periods before the conveyance which, in accordance with the law of the country, was to be by way of 'transport'. Paragraphs 2 and 3 of the agreement are as follows:

"2. That in the event of the said property being sold at execution as is anticipated, for funded rates or otherwise, the vendor shall bid at the sale thereof and acquire the same and convey it by way of transport to the purchaser within one month from the date of such sale at execution.

"3. That in the event of the said, property being so sold at execution sale and acquired by the vendor, the purchaser shall pay to him on the knock of the hammer a further sum of \$5,000 (five thousand dollars) and the balance of the said purchase price within one month from the date of such sale at execution."

The respondent society, in compliance with the terms of the agreement, duly paid the amounts due aggregating \$20,000 and it is not in dispute that "in pursuance of this agreement the society was put into possession of the property described in para. 2 of the agreement, has remained in possession cultivating and looking after the land." (Judgment of W.I.C.A., 1956 L.R.B.G. at p. 3). The society has not parted with possession.

The vendor, Salisbury, failed or refused to perform his part of the agreement to convey the property by transport to the society; the society instituted proceedings and claimed, *inter alia*, specific performance of the agreement. STOBY, J., found for the plaintiff and on May 23, 1955, ordered accordingly, Salisbury appealed from that judgment and order to the West Indian Court of Appeal which on January 25, 1956, dismissed the appeal with costs and confirmed the order for specific performance and that the necessary steps be taken by Salisbury to transport to the society the property sold under the agreement. The court in course of its judgment observed:

"With regard to the ordering of specific performance it is well established that no principle can be more sacred than that a man shall be compelled to perform his contract and that where the sale of land is involved for reasons of local convenience or suitability or accommodation, a compensation in damages would not be an adequate relief."

This was a final judgment on the merits from which there has been no appeal.

On April 13, 1959, Salisbury was adjudged insolvent and the Official Receiver, the appellant herein, was by statute constituted the receiver in insolvency of the estate of the insolvent. The appellant continued to be the assignee of property in the said estate. In 1961 he instituted proceedings in the Supreme Court praying *inter alia*:

"A declaration that the order of specific performance made in action No. 28 of 1954 in favour of the Devonshire Castle Cooperative Savings Society Limited, is null and void and that the agreement in writing dated 13th July, 1953, made between the debtor and the said society upon which the said order was based

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is of no effect because of the supervening insolvency of the debtor before conveyance passed."

The respondent counterclaimed for:

- (1) a declaration that the plaintiff is bound by the order of the court dated the 23rd day of May, 1955, and that the property sold to the defendant forms no part of the estate of the insolvent;
- (2) an order compelling the plaintiff to comply with the said order and pay into the Supreme Court Registry such sum of money as may be due in respect of the said sale at execution;
- (3) an order compelling the plaintiff to pass transport to the said defendant.

DATE, J., dismissed the claim, with costs and allowed the counterclaim in the terms sought with costs.

Mr. Ramsahoye, for the appellant, informed us that the appeal involved only one issue and that the sole question was whether the property concerned "had fallen in the estate of the insolvent following his having been adjudged insolvent on the 13th April, 1959." He referred to s. 39(5) of the Insolvency Ordinance, Cap. 43:

"No contract for the sale of any interest in immovable property, or any charge of incumbrance on any immovable property, and no conventional mortgage shall be of any force or give any right of preference which has not been completed by transport or mortgage duly passed before the court or a judge; except that the creditor may claim under his contract as a concurrent creditor against the debtor's estate."

and urged that as a result of this statutory provision the decree of specific performance ceased to be effective and the respondent society was relegated to its claim as a creditor of the estate. He submitted that s. 39(5) is in terms identical with s. 36(5) which received consideration in *Re estate of C. O. Andrews*, 1901, Official Gazette of 28th September, p. 737, and that the origin is bound up with the Roman-Dutch sources of the law relating to immovable property in British Guiana. (VAN LEEUWEN'S COMMENTARY ON ROMAN DUTCH LAW, Book II, Cap. 7, s. 8; LEE'S COMMENTARY ON THE JURIS-PRUDENCE OF HOLLAND BY GROTIUS, Book II, Cap. 5, s. 3).

There is no doubt that what was propounded in *Andrews'* case was and is still good law, but I am not persuaded that the circumstances attendant thereon are parallel or similar to the case under review. Andrews, on his own petition for a receiving order, was in July 1901 adjudged insolvent; on March 8, 1901, he had contracted with one Yearwood to sell and the latter agreed to purchase certain property, paid the purchase money and was put in possession but no transport was passed to him. Yearwood, however, filed his claim in the insolvent estate as a concurrent creditor. BOVELL, C.J., held;

"By a contract for the purchase of land by a vendor, a purchaser acquires not a right *in rem* in the land itself but a right *in personam* against the vendor; a right to compel him to transport the land or in default in so doing to compensate the purchaser for the breach of contract the only effect of the insolvency of the vendor is to substitute a special mode of establishing and enforcing the rights of the vendor's creditors against the land agreed to be sold, in the place of the mode prescribed by law where the vendor is solvent; but the purchaser's right to claim under the contract in default of obtaining transport is expressly preserved by the explanation contained in s. 36(5)", now s. 39(5).

Mr. Hoyte for the respondent submitted that s. 39(5) does not apply; that the legal effect of the transactions in this case is that the respondent society had gone beyond the stage of enforcing its rights under a contract, for those rights had merged into a judgment which creates an obligation of a higher nature. The resulting extinguishment of the cause of action could not again spring to life because of s. 39(5). He also stressed that the appellant, the assignee in this case, is equally bound by the order of the court and takes subject to the rights of third parties.

Mr. Ramsahoye, in reply, emphasised the points he previously advanced and contended that, although he does not deny that a judgment imposes a higher obligation than an unexecuted contract, when a judgment comes into conflict with the law, as it does here, the decree does not retain its sanctity and must give way.

For my own part I do not see such a conflict nor can I say the sub section is open to different interpretations. Upon the best consideration I have given to the language of the sub section I do not see in it the embracement of a judgment or order for specific performance of a contract; still less does the submission that the decree only 'retains its sanctity' while the contract on which it is based continues in existence. Indeed, the basis of the original cause of action was a breach of the contract but it must not be forgotten that a judgment supersedes it and it is not alive while the judgment or order is extant; the cause of action is gone, *transit in rem judicatam*; the contract and the cause of action are crystallised in the judgment and order of the court, a new body, and therefore cannot each be singled out or extracted separately for the purpose of enabling a construction favourable to the appellant. Section 39 (5) deals with a contract of sale *simpliciter* and not one which had been adjudicated on and in respect of which an order for specific performance had been made. In my view to accept the interpretation advanced for the appellant would be to treat the language of the section with more scruple than the text deserves.

In the case of *Demerara Storage Co., Ltd. v. Demerara Wharf and Storage Co., Ltd.*, 1942 L.R.B.G 306, which has been cited, the

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plaintiff company had obtained a decree of specific performance in respect of a contract for the sale of immovable property by the defendant company; the latter did not comply with the terms of the order; the chairman of the defendant company, who was also one of its creditors, commenced proceedings to recover, obtained judgment, and proceeded to levy on the property which was the subject of the order for specific performance. The plaintiff company applied for an order to restrain the judgment creditor from proceeding with the levy. VERITY, C.J., at p. 307, said:

"The point at issue is simple: in the circumstances which have arisen in this case is it within the right of the creditor of the defendant company to take proceedings and levy upon the property to recover his debt? It is true that in this country property such as this passes only by transport and that until transport has been duly passed the property remains in the vendor, and, it is submitted, is subject to levy for the judgment debts of the vendor. Superficially this may appear incontrovertible, but nevertheless the nature and effect both of an order for specific performance and of a writ of execution cannot be overlooked. Both move from the court in execution of its judgment and it may be difficult to conceive of a position in which the court may properly order in the first instance the conveyance of property to one person and subsequent thereto its sale to another to satisfy the debt of the defaulting vendor. The question does not appear to have been decided in these courts in any case, whereas? in the present there is no allegation or fraud or collusion between the debtor and creditor, but in the case of *Peroo v. Dooknie*, 1919 L.R.B.G. 150, DOUGLASS, J., expressed the view that were the court to order the levy to proceed....it would stultify its former judgment that the vendor do convey the said property to the plaintiff. The case was not decided on this ground for in that case the learned judge found that there was fraud and held that opposition to the sale at execution was for this reason well founded. Nevertheless, the view expressed appears to be consonant not only with reason but also with the principles upon which a court of equity in England would be disposed to act, as appears from *Brunton v. Neale*, 14 L. J. Ch. 8, for it is to be observed that in the present case the judgment creditor must have been aware of the order for specific performance and only brought proceedings to recover his debt after that order had been made and while his company was in default of compliance I am satisfied that to allow the levy to proceed would be to stultify the prior order for specific performance and from such a result the court will protect itself and the party for whose benefit the order was made. It was further submitted that the procedure adopted by the plaintiff company is inapt and that the court will not in this suit set aside a levy regularly issued in execution of a judgment obtained by a third party in another suit. I am satisfied, however, that where such a course is necessary to give effect to its order the court will restrain the conduct of a third party even though he be not a party to the suit. There will be, therefore

an order restraining the judgment creditor from proceeding with the levy and directing the Registrar to proceed with the passing of transport as authorised by the order of the court dated the 1st April, 1942."

This adjudication by VERITY, C.J., seems apposite and appears to be contrary to the argument for the appellant. I favour the learned Chief Justice's views for they entirely satisfy my thoughts.

There are other aspects of the case which cannot be obscured. The trial judge, STOBY, J., found in respect of the insolvent (Salisbury) that "the defendant is the type of person who is imperturbable in the witness box, but who is transparently dishonest; he struck me as having planned and falsified his evidence for the purpose of keeping the society's money as long as possible in order to bolster his financial embarrassment."

Before DATE, J., the insolvent in answer to questions in cross-examination said: "I agree that 5th defendant (respondent) has been occupying and appreciating the value of Walton Hall since 1953. Lands similar to Walton Hall are being sold in the colony at \$400 per acre. Walton Hall is 500 acres." This would yield \$200,000 instead of the \$20,000 for which it was sold to respondent. The conclusion is irresistible that the insolvent purposely kept his honesty in wretched repair, and with an audacity that is alarming flouted the order of the court, maybe having regard to his resource, in the hope that even though in insolvency, on a sale of the property at anything near the value he estimates he would ultimately reap a larger benefit and deprive the respondent society of the fruits of its labour.

I have already indicated that I cannot hold that the circumstances of this case fall within the ambit of s. 39 (5) of the Ordinance; that contention therefore fails.

The appellant, who by statute stands in the shoes of the insolvent, quite properly sought the aid of the court as he is bound by its orders. There are, however, two orders, one for specific performance and the other an order in insolvency; it had been suggested that as in *Andrews'* case the respondent society should claim as a creditor of the estate. There the creditor had no judgment for specific performance, and he had voluntarily filed a claim as a creditor. Having regarded, however, to the observations of the West Indian Court of Appeal aforementioned and the behaviour of the insolvent I think it would be a precedent of dangerous example to accept such a suggestion. To adapt the words of VERITY, C.J., I say to allow that would be to stultify the prior order for specific performance and from such a result the court would protect itself and the party for whose benefit the order was made.

I would affirm the judgment and order of the court below and dismiss the appeal with costs.

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LUCKHOO, C.J.: In an action brought by the respondents against Salisbury and others claiming specific performance of an agreement of sale and purchase of certain lands situate at Walton Hall, Essequibo, it was proved that at the time the agreement had been entered into it was contemplated by the parties thereto that the lands together with certain other property would be put up for sale at execution for non-payment of drainage and irrigation rates and that Salisbury would purchase the entire lands, and pass title for the lands the subject matter of the agreement of sale and purchase to the respondents. The respondents were put in possession of the lands under the agreement of sale and purchase and paid the purchase price to Salisbury. Later on Salisbury purchased the entire lands at execution sale but refused to complete the purchase. On the 23rd May, 1955, the trial judge made an order that Salisbury do specifically perform the agreement of sale and purchase with the respondents by paying into the Supreme Court Registry within 14 days from the date of the order the sum of \$24,491 and that he thereafter carry out his contract with the respondents by obtaining transport and transporting to the respondents the property he had agreed to sell. On appeal the trial judge's order for specific performance was affirmed by the West Indian Court of Appeal on the 25th January, 1956, that court ordering Salisbury to pay to the marshal of the Supreme Court the sum of \$24,490.48 balance of the purchase price along with any interest that may be due within one month of the date of entry of the court's order and thereafter to take the necessary steps to obtain title and to transport to the respondents the property he contracted to sell under the agreement of sale and purchase. (1956 L.R.B.G. 1) Salisbury neglected to obey the order of the West Indian Court of Appeal. He did not pay the balance of the purchase price to the marshal and did not convey title to the respondents. In April 1959 Salisbury was adjudged insolvent and the Official Receiver is his assignee in insolvency.

The question for determination in this appeal is whether the lands the subject matter of the agreement of sale and purchase form part of the insolvent's property available for distribution among the creditors of the insolvent's estate. In the action out of which this appeal arises the trial judge DATE, J., held they did not.

In support of his submission on behalf of the appellant, the Official Receiver as assignee of the estate of the insolvent Salisbury, that those lands do form part of the insolvent's estate available for distribution among the creditors of the insolvent's estate, counsel for the appellant referred to the provisions of sub-s. (5) of s. 39 of the Insolvency Ordinance, Cap 43, and contended that by reason of that subsection the agreement of sale and purchase was vacated, the respondents being relegated to the position of creditors who may prove in insolvency. Subsection (5) of s. 39 provides as follows:

"(5) No contract for the sale of any interest in immovable property, or for any charge or incumbrance on any immovable property, and no conventional mortgage shall be of any force or

give any right of preference which has not been completed by transport or mortgage duly passed before the Court or a judge; except that a creditor may claim under his contract as a concurrent creditor against the debtor's estate."

Such a provision appears to have been enacted for the first time in this Colony by the Insolvency Ordinance, 1884 (No. 10 in Vol. 3 of the 1895 EDITION OF THE LAWS). There is no similar provision to be found in the bankruptcy laws in England.

That provision came into operation on the 1st January, 1885. Shortly before the enactment of the 1884 Ordinance the Supreme Court of British Guiana in *Re estate of Douglas, ex p. Frank* decided on 30th July, 1884, had held that a vendor of immovable property who became insolvent after entering into the agreement of sale and purchase only had a charge or lien upon the balance of the purchase money and a right to possession until the balance was paid.

In 1884 the law in force in British Guiana in relation to contracts relating to land was the Roman-Dutch common law. The principles of equity as were administered in England were not known to the Roman-Dutch law but the colonial courts did in fact in their judgments introduce from time to time some of the English principles. This is not surprising for the law in these Colonies was administered by judges trained in England. A remedy akin to the English equitable remedy of specific performance was given by colonial courts administering Roman-Dutch law. The Supreme Court in *Re Estate of Andrews* (1901) [See O. G. 28. 9. 1901] held that a contract of purchase of land does not confer an absolute right to transport the land but only a right to compel the vendor to transport the land subject to the rights of the vendor's creditors and that if the vendor is unable, by reason of the enforcement of the creditors, to pass transport the purchaser can claim compensation from the vendor. It was also held that it was those rights which were preserved by s. 44 of the Insolvency Ordinance, 1884 (now s. 47 of Cap. 43). The Court held that by virtue of s. 36 (5) of the 1884 Ordinance (now s. 39 (5) of Cap. 43) the land at the date of the adjudication vested in the Administrator General. The trial judge, BOVELL, ag, C.J., distinguished that case from *In re Douglas* by referring to the fact that provisions of s. 36 (5) of the 1884 Ordinance were not in operation when *In re Douglas* was decided.

There is much force in the argument of counsel for the appellant that the provisions of what now forms sub-s. (5) of s. 39 of the Insolvency Ordinance, Cap. 43, were enacted to ensure that in dealing with estates of insolvents recognition should be given to the system of conveyancing in operation in this Colony and that the right of opposition to persons who claim a legal or beneficial interest in the property sought to be conveyed and to creditors with liquidated claims may be preserved.

Section 47 (d) makes it clear that a contract with the insolvent for valuable consideration including one referred to in s. 39 (5)

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is not rendered invalid by reason of insolvency. Section 39 (5) makes a contract referred to therein unenforceable leaving the creditor to make a claim under his contract as a concurrent creditor against the insolvent's estate. The question is whether the respondents' right to obtain title to the lands the subject matter of the agreement of sale and purchase made with Salisbury is caught by the provisions of s. 39 (5) of the Insolvency Ordinance. Does the respondents' right to obtain title rest upon the agreement or does it, since the decree of specific performance, rest on some higher basis? I am of the opinion that when the order for specific performance was made the respondents' right to title no longer rested on the contract but that it thereafter rested on the decree—*transit in rem judicatam*. The original cause of action under the contract is merged in the decree. In this connection reference may be made to the provisions of s. 43 of the Insolvency Ordinance, Cap. 43, whereby a creditor who has issued execution against the property of the debtor or has attached any debt due to him may retain the benefit of the execution or attachment if he (has completed the execution or assignment before the date of the receiving order—that is, if he has completed seizure and sale in case of execution or received the debt in case of attachment. For ordinary purposes a sale at execution creates only a contract and does not vest ownership in the purchaser. *In re Bhugoo*, L. J., 2. 7. 1902. However, by sub-s. (2) of s 44 of the Insolvency Ordinance, Cap. 43, "for the purposes of this Ordinance, an execution against property is completed by seizure and sale." By analogy it would not be unreasonable to (hold that for the purposes of the Insolvency Ordinance, Cap. 43, the sale of immovable property is completed by an order for specific performance.

In my opinion this case is not caught by the provisions of s. 39 (5) of the Insolvency Ordinance, Cap. 43, and I think that the learned trial judge's conclusion in this regard was right. I would dismiss the appeal with costs to the respondents.

ARCHER P.: The argument developed by counsel for the appellant was arresting but, in my view, it has been effectively countered in the judgments already delivered. I agree with the reasoning contained in those judgments and with the conclusion to which it has led and do not wish to add anything to what has been said.

Appeal dismissed.

LILMAN v. D'OLIVEIRA

[In the Full Court, on appeal from the Magistrate's Court for the West Demerara Judicial District (Luckhoo, C.J., and Chung, J.) July 30, September 10, 1965].

Criminal law—Distillery apparatus—Being found in custody—Distinguished from being found in possession—Apparatus found 100 rods from appellant's house—Whether appellant in custody—Spirits Ordinance, Cap. 319, s. 104(3).

The appellant was convicted of having in his possession distillery apparatus contrary to s. 104(3) of the Spirits Ordinance, Cap. 319. It was argued that the charge as laid was had for the reason that the provision contemplated the finding of distillery apparatus in the custody of a person and not in his possession. The apparatus was found in a clearing in the appellant's farm about 100 rods behind his house. The appellant knew that the apparatus was there but said that it was not his. On appeal,

Held: (i) the charge as laid was not bad because a person in possession of an article was necessarily in custody of it. The complaint and conviction order might therefore be amended accordingly;

(ii) the evidence did not establish that the appellant was in custody of the apparatus.

Appeal allowed.

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

G. A. G. Pompey, Crown Counsel, for the respondent.

The appellant Lilman was convicted on a charge laid under s. 104 (3) of the Spirits Ordinance, Cap. 319, alleging that on Tuesday, 28th January, 1964, at Susannah's Rust, Demerara River, he had in his possession distillery apparatus and material for the manufacture of spirits.

The first ground of appeal argued (upon the amended grounds of appeal laid over) was that the charge as laid is bad in that one of the offences contemplated by s. 104(3) of the Ordinance is the finding of distillery apparatus and materials for the manufacture of spirit in the *custody* of a person and not the finding of those articles in the *possession* of a person. It was conceded by counsel for the appellant that generally speaking there could be custody without possession and he referred to the provisions of s. 104 (6) whereby anyone found in a house or place where such articles are found or in the vicinity thereof shall be deemed until he prove the contrary to the satisfaction of the magistrate, to be the owner or person in charge of such articles for the manufacture of spirits. While appreciating that the appellant was not charged with the unlawful possession of spirits, we are of the opinion that the charge as laid is not bad in that a person in possession of an article is necessarily in custody of it. The complaint and conviction order may therefore be amended accordingly.

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in that those articles were found some 100 rods away from the appellant's house. The evidence disclosed that the respondent, an officer of Customs and Excise, and a party of policemen went to the premises of the appellant at Susannah's Rust, Demerara River. They found the appellant at home and told him that they wished to search his premises for bush rum. He consented that they should do so and in a clearing in the appellant's farm about 100 rods behind his house was found a complete bush rum still set up in operating order. It was not stated whether or not the farm was enclosed. The respondent asked the appellant if the still was his and the appellant said he had seen it there on his farm but it was not his still. The appellant was then arrested and charged. According to the respondent, who said that he has had over 16 years' experience in the manufacture of spirits, the distillery apparatus on examination showed from the residue of the condensation of alcoholic vapour that it had actually been used for the distillery of spirits. The respondent was not cross-examined. The appellant, who was undefended, stated that he had nothing to say. He was found guilty of the offence charged.

It seems clear that the distillery apparatus was found in a place as contemplated by s. 104(3) of the Spirits Ordinance, Cap. 319, the clearing in the appellant's farm being a definite place that can be described in a search warrant. *Chisholm v. Kerr*, Applte. J., 22. 2. 1907. The question is whether the appellant was found in the vicinity of the distillery apparatus which was some 100 rods from the house in which the appellant was found whereby by virtue of s. 104(6) he would be deemed, unless he proved the contrary to the satisfaction of the magistrate, to be the owner or person in charge of the apparatus. We are of the opinion that he was not found in the vicinity of that place. Can it be said that the apparatus was found in the appellant's custody by reason of it being found in a clearing in his farm and his statement to D'Oliveira that he had seen it on his farm but that it was not his still? We do not think that these matters without more would warrant such a conclusion.

In the result we are of the opinion that the case against the appellant was not proved and that the appeal should be allowed and the conviction and sentence set aside with costs fixed at \$31.16 to appellant.

Appeal allowed.

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[Supreme Court (Van Sertima, J.) September 18, 25, October 9, 1965].

Divorce—Wife's costs up to setting down for hearing—Taxed but not paid—Whether bar to hearing of husband's petition for divorce—Whether husband in contempt of court—Matrimonial Causes Rules, Cap. 166, r. 63.

In accordance with r. 63(1) of the Matrimonial Causes Rules, Cap. 106, the costs of a wife respondent to a divorce petition up to the setting down for hearing had been taxed by the Registrar; they were not however paid by the petitioner. The petitioner had nevertheless made arrangements for the respondent's costs of and incidental to the hearing of the petition in accordance with an order of the Registrar made under r. 63(2). At the trial it was contended for the wife that the non-payment of the costs up to the setting down for hearing was a bar to the hearing of the petition and was also a contempt of court.

Held: (i) costs up to the setting down for hearing are separate and distinct from costs of and incidental to the hearing, and in fixing the latter the Registrar is not entitled to take the former into account;

(ii) in view of the petitioner's non-payment of the respondent's costs up to the setting down for hearing he could and would be precluded from proceeding with the hearing of his petition;

(iii) *semble*, even if the husband did later pay the costs up to the setting down for hearing he might still be required to show cause why he should not be precluded from having his petition heard on the ground that he had failed to comply with the court's order for the payment thereof, such failure being in the nature of a contempt of court.

Petition stayed.

J. Nurse and R. Millington for the petitioner.

R. E. Morris for the respondent.

VAN SERTIMA, J.: This is a husband's petition for the dissolution of his marriage to the respondent. The respondent has filed an answer to the petition, but has not cross-prayed for a dissolution of the marriage.

On coming on for the hearing of the petition counsel for the respondent informed the court that a bill of costs up to the setting down for hearing had been taxed by the Registrar on behalf of the respondent in the sum of \$58.40 in accordance with r. 63(1) of the Matrimonial Causes Rules, Cap. 166. This amount has not yet been paid by the petitioner.

It was accordingly submitted that the petitioner was not entitled to have his petition heard until this amount had been paid.

It was conceded that the petitioner had made arrangements for the payment of the respondent's costs of and incidental to the hearing of the petition as ordered. It was contended, however, that this

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amount did not cover the costs of the respondent before setting down for hearing but only the costs of and incidental to the actual hearing.

It was further contended on behalf of the respondent that non-compliance of orders for the payment of costs and alimony pending suit, of which \$214.00 and over is now due, is a contempt of court, in spite of the fact that the orders are enforceable by other process. On behalf of the petitioner it was contended in answer to the first ground of objection (non-payment of the respondent's bill of costs down to setting down for hearing) that the wife having obtained security for costs of and incidental to the hearing cannot now tax her bill of costs up to setting down for hearing because the Registrar will have taken any such costs up to setting down for hearing, when fixing the amount to be secured under r. 63(2) of the Matrimonial Causes Rules, Cap. 166.

It is convenient to set out the provisions of r. 63 of the Matrimonial Causes Rules, Cap. 166.

- "(1) After a cause has been set down for hearing, or at an earlier stage of a cause by order of the court to be obtained on summons, a wife who is a petitioner, or who has entered an appearance as respondent, in the cause, may file her bill or bills of costs for taxation against her husband.
- (2) The Registrar, when the cause has been set down for hearing, shall ascertain what is a sufficient sum of money to be paid into the registry, or what is a sufficient security to be given by the husband, to cover the costs of the wife of and incidental to the hearing of the cause, and shall thereupon issue an order upon the husband to pay or secure the said sum within a time to be fixed by the Registrar.
- (3) If a husband, by reason of his wife having separate property, or for other reasons, disputes her right to recover against him any costs pending suit, the Registrar may suspend the order to pay the wife's costs, or to pay or secure the sum ascertained to be sufficient to cover the costs of and incidental to the hearing of the costs, for such time as seems to him necessary to enable the husband to obtain the court's decision as to his liability.
- (4) The bond taken to secure the costs of a wife of and incidental to the hearing of a cause shall be filed in the registry and shall not be delivered out or be sued upon without the order of the court."

I am of the opinion that the Registrar when exercising his functions under r. 63(2) of the Matrimonial Causes Rules, Cap. 166, ought not, indeed is not entitled, to take into account the costs incurred by or estimated costs of a wife up to the time of setting down of the petition for hearing. Were it not self-evident to me from the very wording of r. 63 that it was contemplated that the costs of wife prior

to the setting down for hearing was separate and distinct from the costs of and incidental to the hearing, I would still have the opinion of STOBY J., in *John v. John and Braithwaite*, 1953 L.R.B.G. 55 at p. 56, to the same effect:

"These rules (rr. 63(1) and 63(2)) envisage two acts on the part of the wife's solicitor, that is to say, taxation of her bill of costs up to setting down and the obtaining of security for her costs of and incidental to the hearing of the petition."

This case (*John v. John and Braithwaite*) was cited to me by counsel for the petitioner as authority for the proposition that the Registrar will take into account any amount incurred by way of costs incurred up to the time of setting down when making an order for payment of or security for payment of costs of and incidental to the hearing. Counsel for the petitioner seems to have misconstrued the passage set out hereunder from, *John v. John and Braithwaite*. It is apparent from the judgment that the learned judge was discussing the situation that obtains subsequent to 1947 whereby under the English Matrimonial Causes Rules, 1947, (r. 74(2)) a wife who is a petitioner or has filed an answer may apply for security for her costs up to setting down and her costs of as well as costs of and incidental to the hearing at one and the same time.

In the course of his judgment STOBY, J., stated:

"Accordingly in England, the wife's solicitor can file a bill estimating the sum sufficient to cover the whole costs that the wife will incur from the beginning to the end of the suit, and the Registrar in fixing security may take into consideration the means of the husband and wife and any other information which may assist him in estimating the proper sum."

Not only is this approach of no assistance to the context of our law as it stands today, inasmuch as the position in British Guiana is still as it was in England before 1947, but in the case of *John v. John and Braithwaite* the court was considering the question of payment of the costs of and incidental to the hearing where in actual fact the costs prior to setting down had not only been taxed, but also paid over to the wife.

I find, therefore, that although the case of *John v. John and Braithwaite* supports the contention that the costs before setting down is separate and distinct from the costs of and incidental to the hearing, that case does not support the proposition that the Registrar will take into account the costs that might have been incurred by the wife up to the time of setting down. Further, in spite of the head-note given in the report which reads, "In a divorce petition the correct procedure in the colony is for the wife's solicitor to tax a bill of costs up to setting down and then apply for security of her costs of and incidental to the hearing of the petition", (and I take cognisance of the fact that the head-note was probably inserted by the learned

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trial judge in his capacity as editor of the volume of decisions) yet I find nothing either in the decision or in the wording of rr. 63(1) or 63(2) to indicate that a wife respondent who has obtained her security for costs cannot still tax her bill of costs up to the setting down for hearing.

That being so, the question that remains to be decided is whether the wife respondent is entitled to seek the assistance of the court in precluding the husband petitioner from having his petition heard before he has paid her taxed costs up to the time of setting down even though he has paid or given security for the costs of and incidental to the hearing.

Before determining this issue I should like to make a passing reference to r. 63(3) which gives the husband the privilege in certain circumstances to question the order of the Registrar both on the question of the costs up to setting down as well as to the amount fixed as security for costs of and incidental to the hearing on the basis of the wife's financial capacity. On the basis of the judgment in *John v. John and Braithwaite* it seems that the proper view is that any such action by the husband should be taken before the matter is actually heard because such issues are not normally gone into at the hearing and that is why a solicitor who fails to take steps to secure the wife's costs will cause her to lose her cost of and incidental to the hearing where steps have not been taken on her behalf to secure them. Likewise, on the same basis of reasoning, a wife whose solicitor has failed to tax the bill of costs of a wife prior to setting down would in my opinion be equally entitled to be deprived of such costs, if the bill is not taxed before the hearing. I make this observation not because it is material to do so in the present case but to accentuate the distinction between the two separate procedures open to a wife petitioner or one who is a respondent who has filed her answer.

I am of the opinion that a wife is entitled, particularly in a case such as the present where she is a respondent who has not cross-prayed, to seek the assistance of the court in preventing the husband petitioner from proceeding with his petition where he has failed to pay, or make adequate arrangements to the satisfaction of the wife, for the payment of the taxed costs up to the time of setting down in the same manner that she is entitled to that privilege where the husband has failed to pay the security for her costs of and incidental to the hearing of the petition.

Although it is not now necessary to consider further the second contention made on behalf of the respondent that failure to pay costs and alimony pending suit ordered by the court is a contempt of court, I propose to deal briefly with that contention.

In support of that contention counsel for the respondent referred to the case of *Leavis v. Leavis*, [1921] P. 299. In that case a husband

who was respondent in a suit for restitution of conjugal rights took out a summons in an attempt to stay the main proceedings on the ground that he was prepared to resume cohabitation. The summons was contested by the wife on the ground that the husband had not paid the costs and amounts awarded in the alimony pending suit proceedings. The court held the view that in spite of the fact that there was an alternative remedy open to the wife by virtue of the Divorce Rules to recover the amounts due by levying execution the failure of the husband to meet these amounts in the absence of extenuating circumstances nevertheless amounted to a contempt of court. In the circumstances HILL, J., who heard the husband's summons, stated *inter alia*.

"The enforcement of such orders is regarded by this court as important to the administration of justice; because the wife should have the costs of litigation provided for and not be left destitute. I have come to the conclusion that it is a matter of discretion for the court to consider upon all the circumstances of the case, whether the summons of the respondent should be heard and that it is a matter material to the exercise of that discretion to consider whether those circumstances are due to the fault or to the misfortune of the respondent (husband)."

In answer to this contention counsel for the petitioner referred to the case of *Langford v. Langford*, 1942 L.R.B.G. 194. In that case DUKE, J., had to determine the question of the costs to a wife petitioner incurred in proceedings for alimony pending suit where it was apparent that although she had been diligent in pursuit of her petition for alimony pending suit she showed no zeal in pursuit of her main petition for dissolution of marriage. This led the learned trial judge to observe at p. 196:

"The alimony *pendente lite* is only incidental to a petition by a wife for dissolution of marriage or for judicial separation. Alimony *pendente lite* is awarded by the court in such cases in order that the wife might be reasonably maintained until the hearing of the petition when it would be determined whether her charges are justified or not. The main object of the originating petition must not be subordinated to the object of the petition for alimony *pendente lite* which petition only has legal efficacy because the filing of the originating petition for dissolution or for judicial separation, and the order on which petition (for alimony *pendente lite*) will cease to have effect on the determination of the originating petition. It would be an abuse of the process of the court for a petitioning wife to bring a petition for divorce or for judicial separation with the dominant object, not of obtaining a decree of dissolution of marriage, or of judicial separation, but with the dominant object of obtaining alimony *pendente lite*."

Apart from the last sentence of the passage quoted, it seems to me that the operative words that distinguish the case of *Langford v.*

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Langford from the present one are those of the second sentence of the quotation. In effect, a wife petitioner suing for alimony *pendente lite* is not in the same position as one who is, as in this case, defending her husband's petition. In the former case the wife has taken the initiative and the husband is to a certain degree at the disadvantage of having to wait until the wife defaults in taking steps to set down the matter for hearing before himself proceeding to have the matter set down for hearing. On either event the husband has to continue his payments of alimony pending suit until the determination of the main petition. In the particular case at hand, however, the husband who is petitioner and Who fails to pay the amounts ordered by way of alimony pending suit, has both the advantage of having the wife at his mercy by failing to meet the payments as and when he feels disposed to do so and of causing her to expend monies initially to enforce payments which monies she may not have, but also, of setting down the main petition for hearing whenever he is disposed to do so in order to shorten the period over which payments of alimony pending suit are payable. In such circumstances, a wife who contests the petition but Who, as in this case, does not cross-pray for dissolution of marriage is at am even greater disadvantage than where she is herself prepared to seek a dissolution of the marriage.

I concede that had it been necessary for me to determine the question whether or not to preclude the petitioner (husband) from proceeding with the hearing of his petition, I may have thought it necessary in order to exercise my discretionary power to do so to call for affidavits from the petitioner showing the reasons for his failure to meet payments for the order for alimony pending suit in accordance with the judgment in *Leavis v. Leavis*. On the other hand counsel for the respondent has submitted that the order for the payment of alimony pending suit has been made by way of consent, as well as the order made on the judgment summons to enforce payment of alimony pending suit. Inasmuch, however, as I have already decided that the husband petitioner can be precluded from proceeding with the hearing of his main petition because of his failure to make payment of the respondent's taxed bill of costs up to the setting down for hearing, it may be felt that all that the petitioner need now do to have his petition heard is to pay that bill of costs. A hint is, however, being thrown out that, even if the taxed bill of costs up to the time of setting down has been paid, the petitioner may still be required to show cause, in terms of the decision in *Leavis v. Leavis*, why the court should not still exercise its discretion to preclude him from having his main petition heard, on the ground that he has failed to comply with the court's order that he pay the costs and the amounts awarded as alimony pending suit.

For the reasons set out above I rule that the petition of the husband shall not be proceeded with at this stage.

Petition stayed.

Solicitors: A. A. Vanier (for the petitioner); T. A. Morris (for the respondent).

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[British Caribbean Court of Appeal (Archer, P., Jackson and Luckhoo, JJ. A.). July 21, 22, 23, 26, 27, 28, 29, 30, December 2, 1965]

Natural justice—Dismissal of police sergeant on disciplinary charges—Inquiry into charges by police court of inquiry—Dismissal by Commissioner of Police on basis of report of court of inquiry—Whether sergeant entitled to copy of report and to be heard by Commissioner before dismissal—Police Regulations, Cap. 77, regs. 50-57.

Police Force—Power of Commissioner to dismiss sergeant—Members of the Force are public officers—Constitution of British Guiana, 1961, art. 303(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, s. 8.

The appellant, a sergeant of police, was charged departmentally with three disciplinary 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 respondent, the Commissioner of Police. At the commencement of the proceedings the appellant 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 it's considered opinion to the respondent. The appellant was supplied with a copy of the notes of evidence but not of the opinion and he was not given an opportunity to be heard by the respondent himself. After considering the notes of evidence and the opinion the respondent found the appellant guilty on all the charges and ordered his dismissal.

In notifying the appellant of the dismissal the respondent stated that he had acted under art. 103(2) of the Constitution of British Guiana, 1061, 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." Paragraph 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 of Police 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 appellant was charged. Regulation 55 provided that "for each and every breach of the regulations as above the Commissioner may.....in the ease or 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.

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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 powers which were obviously inconsistent with the provisions of regs. 55-57. The 1960 Regulations were repealed by the 1961 Constitution.

The appellant sued for a declaration that the respondent's decision dismissing him was invalid and for an injunction restraining the respondent from enforcing the decision. In support of the claim it was argued that the respondent'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 respondent could dismiss; alternatively, that the respondent'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 respondent had jurisdiction to dismiss the appellant the failure to supply the appellant with a copy of the report of the court of inquiry and to afford him an opportunity to be heard by the respondent was a breach of the rules of natural justice. 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. Date, J., dismissed the claim holding that the respondent had jurisdiction to act and was protected by Cap. 18 (See 1963 L.R.B.G. 170). On appeal,

Held: the claim failed because the Commissioner had power to dismiss for the offences charged, and because

Per ARCHER. P., the appellant was a public officer and liable to dismissal at pleasure;

Per JACKSON and LUCKHOO, J.J. A.

- (a) notice of intended action was required by s. 8(2) of Cap. 18 and such notice not having been given, the action was barred by that subsection;
- (b) there was no breach of the rules of natural justice because the appellant was not entitled to a copy of the report of the court of inquiry and because, per LUCKHOO, J. A., there was no duty upon the Commissioner to hear the appellant before ordering the dismissal.

Appeal dismissed.

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

M. Shahabuddeen, Solicitor General, and *David A. Singh*, Senior Legal Adviser, for the respondent.

ARCHER, P.: The appellant became a member of the British Guiana Police Force sometime before 1957. In 1962 he was found guilty on certain disciplinary charges preferred against him and was dismissed from the Force by the respondent who was then Commissioner of Police. His dismissal was upheld by the Governor and on 29th May, 1962, he issued a writ against the respondent claiming declarations that the proceedings against him were invalid and an injunction to restrain the respondent from enforcing the order of dismissal.

The statement of claim which followed the writ alleged inter alia a breach of the rules of natural justice and want of jurisdiction in the respondent to dismiss. The respondent relied, among other defences.

on the absence of notice as required by s. 8(2) of the Justices Protection Ordinance, Cap. 18.

The case was tried upon an agreed statement of facts. That statement is as follows:

"1. The plaintiff was at all material times a member of the British Guiana Police Force. The defendant was at all material times the Commissioner of the Police Force of British Guiana.

2. On the 16th day of February, 1962, the plaintiff was stationed at the Finance Office, Police Headquarters.

3. On the 16th February, 1962, certain incidents, in which the plaintiff was involved, occurred at Police Headquarters, Eve Leary, as a result of which the plaintiff was charged on the 11th April, 1962, with the offences set out in paragraph 2 of the amended statement of claim. He was found guilty on all the charges by the Commissioner of Police.

4. Arthur H. Jenkins, then Deputy Commissioner of Police (acting), was constituted the Court of Inquiry which inquired into the charges on the 17th and 19th of April, 1962.

5. The plaintiff appeared and was represented by his friend at the Inquiry. He gave evidence on his own behalf and was allowed to cross-examine witnesses and to call witnesses on his own behalf.

6. The Court 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 the considered opinion of the Court-

7. The defendant came to the conclusion that the plaintiff was guilty and ordered his dismissal (as stated in the letter set out in paragraph 6 of the amended statement of claim) as a result of a consideration by the defendant of the notes of evidence and the considered opinion of the Court of Inquiry.

8. The plaintiff has since decision of the Commissioner appealed to the Governor who has upheld the said decision except that he allowed the appeal in relation to the fourth charge set out in paragraph 2 of the amended statement of claim.

9. No notice of intended action as required by s. 8 (2) of the Justices Protection Ordinance was served on the defendant.

10. As far as we are aware it has always been the practice never to disclose the report of a police disciplinary inquiry submitted to the Commissioner of Police or the Governor for decision.

11. The Commissioner under the Regulations never considers himself bound by the opinion of the Court of Inquiry.

12. The president of the Court of Inquiry told the plaintiff at the commencement of the proceedings of the said court that the plaintiff was liable to dismissal from the Police Force if he was found guilty on any of the charges.

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13. The plaintiff was never told that he could forward any views or points to the Commissioner after the Court of Inquiry.

14. The salary of the plaintiff on the 16th day of February, 1962 was \$239 per month."

The judge held that the respondent had jurisdiction to dismiss the appellant. He did not deal with the second line of argument which was that the determination to dismiss had been arrived at in an invalid way but decided against the appellant on the ground that the action was not maintainable, notice of intended prosecution of the action not having been served on the respondent (1963 L.R.B.G. 170).

The argument in this court ranged over a number of topics and testified to the industry of counsel. The tracing of the history of the relevant legislation has, however, shown much of this argument to have been unnecessary and the issue to be determined to lie within a narrow compass.

(a) the provisions of Cap. 18 apply only to actions for damages or the recovery of money;

The propositions which counsel for the appellant developed at great length were these:

1. An action for a declaration and injunction is not within s. 8 of the Justices Protection Ordinance. Cap. 18, and no notice of action was necessary because —

(b) these provisions do not apply to an action for equitable relief, and an action for a declaration and injunction is an action for equitable relief;

(c) in any event, where a plaintiff alleges (as in this case) that a public authority has done an act without jurisdiction he may commence proceedings without serving notice and, if at the trial he establishes absence of jurisdiction, the court cannot properly dismiss the action on the ground of absence of notice.

2. The decision to dismiss in purported exercise of powers under art. 103 (2) of the British Guiana Constitution of 1961 was void in law because—

(a) the appellant was not served with a copy of the report and considered opinion of the court of inquiry appointed by the respondent under reg. 51 of the Police Regulations (Cap. 77) and informed of his right to communicate to the respondent any comments or arguments he might wish to make on them for the purpose of persuading the respondent either to find him not guilty or to award some punishment other than dismissal;

- (b) even if the appellant had no right to be heard further on the question of guilt, he had the right to be heard on the question of punishment;
- (c) even if the appellant had been properly found guilty the offence of which he had been found guilty was not one for which the respondent could have dismissed him.

As in my view counsel's submissions are based on a complete misinterpretation of the provisions of the law which governed the proceedings taken against the appellant, it is at once necessary to state what that law is. In 1957 an Ordinance to amend and consolidate the law relating to the British Guiana Police Force (entitled the Police Ordinance, 1957) was enacted. Section 107 (1) of that Ordinance repealed the Police Ordinance, Cap. 77. Section 3 (2) provides as follows:

"(2) The Force shall be employed for the prevention and detection of crime, the preservation of law and order, the preservation of the peace, the repression of internal disturbance, the protection of property, the apprehension of offenders and the due enforcement of all laws and regulations with which it is directly charged and shall perform such military duties within British Guiana as may be required of it by or under the authority of the Governor."

This section differs from s. 3 of the Police Ordinance Cap. 77, which defined the objects of the Force and read:

"3. The police force established by the Police Ordinance, 1891, is hereby continued as an armed semi-military force and shall be employed for the prevention and detection of crime, the repression of internal disturbance, protection against fire, the defence of the Colony against external aggression and any other duties prescribed by the Governor in Council."

Section 5 provides for the application of the Ordinance to persons already in the Force. They are deemed to be appointed or enrolled under the Ordinance and with such designations of rank as the Commissioner with the approval of the Governor may decide. Section 6 authorises the Governor to appoint officers and inspectors and reproduces ss. 6(1) and 15(1) of the Police Ordinance, Cap. 77. By Section 7(1) the Commissioner, subject to general orders and directions of the Governor, is to have command and superintendence of the Force: this repeats s. 7(1) of Cap. 77. Section 12 (as did s. 18 of Cap. 77) authorises the Commissioner to appoint subordinate officers and constables and s. 106 provides for the application of Colonial Regulations and General Orders to all members of the Force except in matters provided for in the Ordinance or in regulations made under the Ordinance. No regulations have been made under the Ordinance.

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Section 107 (2) continues in force regulations made or continued in force under the Police Ordinance, Cap. 77, except in so far as they are in conflict with the provisions of the Ordinance.

Section 60 of the Police Ordinance, Cap. 77 empowered the Commissioner of Police, subject to the approval of the Governor, to make regulations relating to several matters, among them the suspension or dismissal of non-commissioned officers and constables. The section also provided for the inclusion in such regulations of punishments for breaches of the regulations. Dismissal from the Force was not a punishment which the Commissioner was authorised to prescribe.

Regulations (entitled the Police Regulations) were made in 1929 and subsequently amended. Regulation 54(2) of those Regulations created the offence of disobeying a lawful order and reg. 54(44) the offence of improper conduct. Regulation 55 laid down the punishments which the Commissioner could impose for breaches of the Regulations; in the case of a non-commissioned officer the Commissioner was authorised to

- (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.

Power to dismiss from the Force was vested in the Governor by ss. 51 and 58 of the Ordinance: this power is no longer exercisable and for a reason which will shortly appear.

When Cap. 77 was enacted the 1928 Letters Patent and Royal Instructions were in force. In 1953 British Guiana was granted a new constitution. Article 87 of the 1953 Constitution provided as follows:

"(1) The power to appoint (including power to promote and transfer) and to dismiss and to exercise other disciplinary control over judges, magistrates and public officers is hereby vested in the Governor; subject to the provisions of section 85 of this Order, the powers vested in the Governor by this subsection shall be exercised in accordance with the law from time to time in force in the Colony and with any Instructions from time to time issued to the Governor under Her Majesty's Sign Manual and Signet or through a Secretary of State.

(2) Any person appointed to a judgeship, magistracy or public office shall, unless it is otherwise provided by any law for the time being in force in the Colony, hold office during Her Majesty's pleasure."

In 1956 that article was amended by the addition of the following paragraphs:

"(3) (a) Subject to the provisions of paragraph (b) of this subsection, 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 subsection (1) of this section.

(b) The Governor shall not —

- (i) delegate any such power unless he has obtained the consent of a Secretary of State to such delegation; or
- (ii) delegate any such power with respect to officers whose annual emoluments exceed such sum as may be prescribed by a Secretary of State.

(c) for the purposes of this sub-section the emoluments of an officer shall (whether or not he is employed on terms that include eligibility for pension) include only such classes of emoluments as, under the law for the time being in force relating to pensions, are taken into account in computing pensions.

(4) The provisions of this section shall be subject to the provisions of any Instructions that may be issued by Her Majesty under Her Sign Manual and Signet or through a Secretary of State, and any power conferred by this section or delegated under this section shall be exercised in accordance with the provisions of such Instructions.

(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, subject to the provisions by subsection (4) of this section, 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;"

and the additional paragraphs were deemed to have been in operation on the date of commencement of the 1953 Order in Council. This was the effect of s. 25 (2) of the 1956 amending Order in Council

In 1957 when the Police Ordinance, 1957, became law, the power to dismiss a non-commissioned officer from the force continued to be exercisable by the Governor but the Governor's authority was derived solely from the Constitution.

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In 1960 the Delegation of Powers (Police Officers) Regulations, 1960, were published. A great deal of time was spent in argument upon the validity and effect of this publication but, in the view I take, it is profitless to discuss this phase of the history of the legislation.

The British Guiana (Constitution) Order in Council, 1961, revoked the 1958 Order in Council. Article 103 of the new constitution provides for the dismissal of, and disciplinary control over, members of the Police Force and is in these terms:

"103. (1) Save as provided in article 101 of this Constitution, power to dismiss and to exercise disciplinary control over persons holding or acting in offices in the Police Force above the rank of Chief Inspector shall vest in the Governor acting on the recommendation of the Police Service Commission.

(2) Power to dismiss and to exercise disciplinary control over persons holding or acting in offices in the Police Force of or below the rank of Chief Inspector shall vest in the Commissioner of Police and, to such extent as may be prescribed by any law of the Legislature, in such other officers of the Police Force as maybe so prescribed.

(3) In such cases and subject to such conditions as may be prescribed by any law of the Legislature an appeal shall lie —

(a) to the Governor from a decision of the Commissioner of Police to dismiss or to exercise disciplinary control over any such person as is specified in the last foregoing paragraph; and

(b) to the Commissioner of Police from any such decision of any other officer of the Police Force;

and where the person to whom any such decision relates institutes an appeal therefrom the execution of that decision shall be suspended :

Provided that, where the decision included the dismissal of that person or his suspension from performing the functions of his office, the officer whose decision it was may nevertheless suspend that person from performing those functions pending the determination of the appeal.

(4) In determining any such appeal as is referred to in the last foregoing paragraph the Governor shall act on the recommendation of the Police Service Commission; and the Commissioner of Police shall not take part in any business of the Commission relating to such an appeal.

(5) Any power to dismiss or to exercise disciplinary control, and any power to determine appeals from a decision to exercise such a power as aforesaid, that is vested in any person by or by virtue of paragraph (2) or (3) of this article shall be exercised

in accordance with such provision as may, subject to the provisions of this article, 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."

The appellant's challenge to the jurisdiction of the Commissioner of Police to dismiss him from the Force was founded on the premise that dismissal can only be ordered after conviction of a criminal offence. It is true that s. 49 (2) of the Police Ordinance, 1957, provides that if any member of the Force has been convicted of any criminal offence, in addition to any penalty awarded by the court, he shall be liable to dismissal from the Force or a reduction in rank, but shall not otherwise be liable to be punished under the Ordinance for the same offence, and that this is the only provision in the Ordinance dealing with dismissal of a non-commissioned officer, but the flaw in this reasoning is traceable to a disregard of the sections of the Ordinance and the provisions of the 1961 Constitution to which I have referred.

Until 1957 the Force was an armed semi-military body. In 1957 it became a civilian body which could, however, in the event of war or other emergency, be called upon to defend the territory and for the purpose be employed on military duties. This change in the objects of the Force while of some significance is not decisive of the status of the appellant in a court of law *vis-a-vis* the Commissioner and it was not until the argument on both sides had been well advanced that the court, appreciating the importance of s. 106 of the Ordinance, drew counsel's attention to that provision and invited discussion on it. Counsel for the respondent adopted the argument that the appellant held office during pleasure; counsel for the appellant restated his contention that the appellant's appointment and dismissal were regulated by statute and that he was not dismissible at pleasure.

The Colonial Regulations are directions to Governors for general guidance given by the Crown through the Secretary of State for the Colonies. Part I of the Colonial Regulations issued in 1956 (Colonial No. 322) deals with Public Officers. Regulations 16 and 17 are as follows:

"16. The Regulations as to appointment to public offices do not constitute a contract between the Crown and its servants.

17. Appointments to public offices are made by authority of Her Majesty, and such offices are held during Her Majesty's pleasure."

Regulation 19 concerns the selection of candidates for appointment or promotion by the Governor who is directed to take account, of any advice tendered by the Public Service Commission, if there is one. Regulations 58 and 60 lay down rules in accordance with which a

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public officer may be dismissed by the Governor. For the purposes of Regulation 58, "officer" is defined as an officer who neither holds an office appointment to which is subject to the approval of the Secretary of State, nor was selected for appointment by the Secretary of State. Regulation 60 applies to an officer holding an office appointment to which is subject to the approval of the Secretary of State, or who, though not holding such an office, was selected for appointment by the Secretary of State. The method of dismissal indicated in these two Regulations is to be employed unless otherwise provided for in the Colonial Regulations, or by local law or regulations, or, in cases falling under reg. 60, by the Constitution of the Colony concerned.

The terms "public officer", "public Office" and "public service" were defined for the purposes of the 1953 Constitution. The meaning given to "public officer" was the holder of an office of emolument in the service of the Crown in respect of the Government of the Colony. In the 1961 Constitution the meaning of "public officer" is the holder of an office of emolument in the service of the Crown in a civil capacity in respect of the Government of British Guiana.

These definitions are in accord with what was said in a number of cases in which the question as to what constitutes a public officer was considered. In *Henley v. Lyme* (1828), 5 Bing. 91, BEST, C.J. said at p. 107:

"Then what constitutes a public officer? In my opinion, everyone who is appointed to discharge a public duty, and receives a compensation in whatever shape, whether from the crown or otherwise, is constituted a public officer."

He then gave you examples of public officers and continued:

"It seems to me that all these cases establish the principle that if a man takes a reward, whatever be the nature of the reward—whether it be in money from the crown, whether it be in land from the crown, whether it be in lands or money from any individual,—for the discharge of a public duty, that instant he becomes a public officer;"

In *R. v. Whittaker*, [1914] 3 K.B. 1283 (which was a case of a common law conspiracy to bribe a colonel of a regiment), LAWRENCE, J., delivering the judgment of the Court of Criminal Appeal, said at p. 1296:

"Then it was argued that the appellant was not 'a public and ministerial officer.' A public officer is an officer who discharged any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public. If taxes go to supply his payment and the public have an interest in the duties he discharges, he is a public officer. The addition of the words 'and ministerial' does not affect the matter. In our view he is also a ministerial officer. The Attorney-General was

right in his contention that the word 'ministerial' is here used in contrast with 'judicial'; every officer who is not a judicial is a ministerial officer. No other word would aptly qualify the position of the appellant as a public officer, and it is clear that the colonel of a regiment is a public ministerial officer."

In *Beeston and Stapleford U.D.C v. Smith* (1949), 118 L.J.R. 984, it was sought to apply the designation of public officer to the clerk to a local authority but the court declined to give a wide meaning to the expression (as used in the Solicitors Acts 1932 and 1941). GODDARD, C.J., at p. 987 said:

"There remains the question whether the clerk to the council is a public officer. By s. 47 (3) of the Act of 1932, 'This section shall not extend to (a) any public officer drawing or preparing instruments in the course of his duty. . .' To the words 'public officer' different meanings can be given according to the statute in which they occur. For instance, I called attention in the course of the argument to the expression 'public officer' to be found in the statute 7 Geo. 4, c 36 (known as the Country Bankers Act, 1826). By that Act, country bankers who were carrying on business in partnership had to appoint for certain purposes certain members of the partnership who were to be known as 'public officers'. The 'public officer' under that Act was appointed for a particular purpose under that Act: he was not paid out of public funds. We have to consider whether in this Act of 1932 the expression 'public officer' refers to any clerk of a local authority, or whether it must not be given a stricter interpretation, as meaning a public officer who is an officer of a public department. Our attention was called to *Lyme Regis Corporation v. Henley*; but that case really decided that where a corporation had a grant of lands, which grant imposed a public duty, any member of the public who was injured by breach of the duty could maintain an action, just as a member of the public using a highway who is injured by an act of misfeasance has a cause of action against the highway authority responsible for the maintenance of the road. *Lyme Regis Corporation* were charged with the duty of maintaining a certain works and any member of the public with a right to visit it who was injured could maintain an action against the corporation because the corporation were public officers for that purpose: they had a duty to perform which was imposed on them as a condition of the grant of land.

We have to remember that the object of the Solicitors Act of 1932 is to see that conveyancing matters are carried out by qualified and not by unqualified persons. We certainly ought not to give a very wide meaning to the word 'public officer', for that would perhaps be opening the door to a great number of people claiming the right to do conveyancing, which it was clearly not intended by Parliament that they should do. Light is thrown on the matter by s. 77, which provides: 'Nothing in this Act shall prejudice or affect any rights or privileges of the solicitor to the

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Treasury or to any other public department (including the Ecclesiastical Commissioners and Queen Anne's Bounty) or to the Duchy of Cornwall, or require any such officer as aforesaid or any clerk or officer appointed to act for him to be admitted or enrolled or to hold a practising certificate in any case where it would not have been necessary for him to be admitted or enrolled or to hold such a certificate if this Act had not been passed'.

It is, of course, an offence under other sections of the Act of 1932 for a person who is not qualified, who is not holding a practising certificate, to act as a solicitor; and, as is well-known solicitors to a public department such as the Treasury solicitor and various other solicitors in public departments are not on the roll of solicitors: they are barristers, but they are expressly exempted from enrolment. It is relevant to consider also s. 4 of the Solicitors Act, 1933, where the expression 'public officer' is also used and is thus defined, though the definition is limited to that particular section: 'In this section the expression "public officer" means an officer whose remuneration is defrayed out of (a) moneys provided by Parliament; or (b) the revenues of the Duchy of Cornwall or the Duchy of Lancaster; or (c) the common fund of the Ecclesiastical Commissioners; or (d) the general fund of Queen Anne's Bounty; or (e) the fund of the Electricity Commissioners; or (f) the Forestry Fund; or (g) the Development Fund; or (h) any other revenues or fund for the time being prescribed by the Treasury'. A public officer as so defined in that section is a public officer who is the officer of a public department, one of the Departments of State, or one of the departments which set up under various Acts of Parliament, and an officer whose salary is charged on national as distinct from local funds."

In applying the Colonial Regulations to members of the Police Force the Legislature clearly recognised their status as that of public officers. There cannot therefore be any question but that the appellant was a public officer at the time of his dismissal by the Commissioner.

The Police Regulations made under Cap. 77 are continued in force by the Police Ordinance, 1957, but only to the extent that they are not in conflict with the Ordinance. Where, therefore, they conflict with the Colonial Regulations the latter must prevail. The exercise of the Governor's power of dismissal under the 1953 Constitution was subject to local law and to Royal Instructions: section 51 of Cap. 77 provided that the Governor might, in his discretion, dismiss any member of the Force. Section 58 (4) overlapped s. 51 to a certain extent for it provided that the Governor might at any time dismiss any sub-officer (which term included an inspector and a non-commissioned officer) or constable. These two provisions (ss 51 and 58 (4) were not reproduced in the Police Ordinance, 1957, but the Governor's power to dismiss whenever

he considered it advisable was preserved because members of the Force became subject to Colonial Regulations and General Orders. Article 103 of the 1961 Constitution substituted the Commissioner of Police for the Governor as the authority empowered to dismiss non-commissioned officers. The Order in Council also preserved existing laws, one of which is the Police Ordinance, 1967. The position from 1961 onwards was, therefore, that non-commissioned officers could be dismissed by the Commissioner of Police in accordance with Colonial Regulations. Although it is unnecessary to decide the question, I see no inevitable conflict between the Police Regulations and the Colonial Regulations. The provisions of the former which concern offences and punishments form the subject matter of but eleven of the one hundred and forty regulations and are enabling local legislation empowering a head of a department to exercise disciplinary control over subordinates. In 1957 the legislature could not however have taken away from the Governor the power to dismiss which was vested in him by the constitution and this power remained in the Governor until 1961 when the Constitution conferred it upon the Commissioner.

The status of the appellant having been determined it is now possible to consider what his rights in a court of law were. Counsel for the appellant leaned very heavily on Lord REID'S judgment in *Ridge v. Baldwin*, [1964] A.C. 40, when arguing the question of natural justice but ignored what Lord REID said at p. 65. This was:

"The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence; it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them. The present case does not fall within this class because a chief constable is not the servant of the watch committee or indeed of anyone else.

Then there are many cases where a man holds an office at pleasure. Apart from judges and others whose tenure of office is governed by statute, all servants and officers of the Crown hold office at pleasure, and this has been held even to apply to a colonial judge (*Terrell v. Secretary of State for the Colonies*, [1963] 2 Q.B. 482; [1953] 3 W.L.R. 331; [1953] 2 All E.R. 490). It has always been held, I think rightly, that such an officer has no right to be heard before he is dismissed, and the reason is clear. As the person having the power of dismissal need not have anything against the officer, he need not give any reason.....I fully

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accept that where an office is simply held at pleasure the person having the power of dismissal cannot be bound to disclose the reasons. No doubt he would in many cases tell the officer and hear his explanation before deciding to dismiss him. But if he is not bound to disclose his reason and does not do so, then, if the court cannot require him to do so, it cannot determine whether it would be fair to hear the officer's case before taking action."

In *Shenton v. Smith* (1895), 72 L.T. 130, the respondent was gazetted, without any special contract, to act temporarily as a medical officer during the absence on leave of the substantive holder of the office. He was dismissed by the Government (of Western Australia) before the leave had expired and brought an action for damages for wrongful dismissal. It was held that he had no cause of action. Lord HOBHOUSE in the course of his speech in which he expressed the opinion of the Judicial Committee of the Privy Council said:

"It has been argued at the Bar that a colonial Government stands on a different footing from the Crown in England with respect to obligations towards persons with whom it has dealings. Their Lordships do not go into the cases cited for proof of that proposition, for they are quite different from the present case, and neither principle nor authority has been adduced to show that in the employment and dismissal of public servants a Colonial Government stands on any different footing from the home Government. It appears to their Lordships that the proper grounds of decision in the present case have been expressed by STONE, J., in the Full Court. They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown—not by virtue of any special prerogative of the Crown but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a lawsuit, but by an appeal of an official or political kind. Dr. Smith did in fact make such an official appeal to the Secretary of State, and the Colonial Government recognised his right to do so, and prolonged his tenure so as to allow time for the decision of that appeal, and to save him from injury if it should go in his favour. Where there is representative government the other estates may, if they think fit, make themselves the mouthpiece of that sort of grievance against the Crown, as of any other. In a Crown colony, as Western Australia then was, this appeal to the Secretary of State exhausted the plaintiff's remedies within the colony.

As for the regulations, their Lordships again agree with Mr. Justice STONE that they are merely directions given by the Crown to the Governments of Crown colonies for general guidance, and that they do not constitute a contract between the Crown and its servants. In the heading they are stated to be printed for the information and guidance of the Governors of her Majesty's Colonies, and of all her Majesty's officers subordi-

nate to them. They are alterable from time to time without any assent on the part of Government servants, which could not be done if they were part of a contract with those servants. On the face of them it is pointed out (see reg. 64) to be the general rule in Crown colonies that offices are holden during Her Majesty's pleasure. The difficulty of dismissing servants whose continuance in office is detrimental to the State would, if it were necessary to prove some offence to the satisfaction of a jury, be such as seriously to impede the working of the public service. No authority, legal or constitutional, has been produced to countenance the doctrine that persons taking service with a Colonial Government to whom the regulations have been addressed can insist upon holding office till removed according to the process thereby laid down. Any Government which departs from the regulations is amenable riot to the servant dismissed, but to its own official superiors, to whom it may be able to justify its action in any particular case."

The head-note to *Dunn v. R.* [1896] 1 Q. B. 116, reads:

"Servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law, hold their offices only during the pleasure of the Crown."

That was the ease of dismissal of a consular agent. Lord ESHER, M.R., said at p. 118:

"In this case the petitioner was employed as a civil servant of the Crown in the public service at a certain salary, and the question has arisen with relation to his service which, in the case of *De Dohse v. R.* (1886), 66 L.J. Q.B. 422, I foresaw might arise and with respect to which I then indicated what would probably be my view when it did arise. I said, in giving judgment in that case: 'It is said that it was lawful to make such an engagement with him (the suppliant) for seven years, because the engagement offered and proposed was not an engagement of military service, it being admitted in argument that, if the engagement was for military service as a soldier, whether as officer or private, it is contrary to public policy that any such contract should be made. Now, whether that doctrine with regard to the Crown is confined to military service or not need not be decided today, but I do not at all accept the suggestion that it is so confined. All service under the Crown itself is public service, and to my mind it is most likely that the doctrine which is said to be confined to military service applies to all public service under the Crown, because all public service under the Crown is for the public benefit.' That case came before the House of Lords: and it seems to me that Lord WATSON IN his judgment almost in terms decides that what I thought would probably turn out to be the right view on the subject is correct. He says: 'In the first place it appears to me that no concluded contract is disclosed in the statements contained in this petition of right; and in the second place I am of opinion that such a concluded contract, if it

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had been made, must have been held to have imported into it the condition that the Crown has the power to dismiss. Further I am of the opinion that, if any authority representing the Crown were to exclude such a power by express stipulation, that would be a violation of the public policy of the country and could not derogate from the power of the Crown. Anything more distinct and general than that there could not be. It seems to me that the rule, as laid down by the House of Lords, is in consonance with what I suggested to be the true rule in the Court of Appeal. The case of *Shenton v. Smith*, [1895] A.C. 229, appears to me to be really equally conclusive of the matter. Though I think the rule is hardly as clearly laid down in that case as in the House of Lords, one cannot read the judgment of the Privy Council without seeing that they meant to express the same doctrine. It seems to me that both on authority and on principle, it is clear that the petitioner is not entitled to succeed."

Lord HERSCHELL said:

"I take it that persons employed, as the petitioner was, in the service of the Crown, except in cases where there is some statutory provision for a higher tenure of office, are ordinarily engaged on the understanding that they hold their employment at the pleasure of the Crown. So I think that there must be imported into the contract for the employment of the petitioner the term which is applicable to civil servants in general, namely that the Crown may put an end to the employment at its pleasure."

KAY, L.J., said:

"I think that a general principle has been established by the cases on the subject. Some of those were no doubt cases of military service. It was argued that in such cases other considerations applied, and that it was essential for the advantage of the State that the Crown should have the right of dismissal at pleasure, but that the same considerations did not apply to the civil service. I do not concur in that view."

In *Leaman v. R.* [1920] 3 K.B. 663, A39* & J., in disposing of a petition of right for army pay said at p. 668:

"Mr. Merriman contended that although an officer does not enter into any contract with the Crown which he can enforce, it is otherwise with a soldier, but I think that contention fails. It may be that, as stated in the MANUAL OF MILITARY LAW, at p. 189. 'The enlistment of the soldier is a species of contract between the Sovereign and the soldier,' but it by no means follows that it vests in the soldier the right to enforce by proceedings in a court of law the payment of the sums to which he claims to be entitled in respect of his services. It was pointed out on behalf of the Crown that there was nothing repugnant to what is connoted is negligent or careless in the discharge of his duties; s. 35 in law by the word 'contract' in such an interpretation being

put upon the word. Illustrations were given of contracts which might be entered into between subjects, which would be enforceable on one side and not on the other. In my opinion the view put forward by the Solicitor-General of the relations between the Sovereign and the soldier is the correct one, and it would be impossible for me to hold otherwise without disregarding what has been in terms declared by authority binding on this court to be the settled law on the" subject, and has been so declared long after the Army Act became law. I hold, therefore, that the demurrer must be sustained"

The only other case of which I need take notice is *Gould v. Stuart*, [1896] AC 575, which was considered in *Reilly v. R.* (1934), 50 T.L.R. 212, and in *R. Venkata Rao v. Secretary of State for India*, [1937] A.C. 248. In *Gould v. Stuart* it was decided that certain provisions of the New South Wales Civil Service Act of 1884, being manifestly intended for the protection and benefit of the Officer, are inconsistent with dismissal at pleasure and consequently restricted the power of the Crown in that respect. The provisions most material for the decision were contained in Part III of the Act. Part I of the Act provided for the classification of officers according to their salaries, the increase of salaries, and the appointment of a Civil Service Board. Part II of the Act provided for the examination, appointment, and promotion of candidates for admission to the service. Part III contained disciplinary regulations. In determining the effect of Part III the Judicial Committee of the Privy Council said:

"The provisions in Part III. are the most material in the present case. Section 32 provides for the suspension of any officer who in the opinion of the Minister or of any officer authorised by him to investigate any matters or accounts pending a report shall have committed any act which appears to him to justify suspension: but if the suspension is not made by the Minister, the officer making it is immediately to lay before the Minister a report stating his reasons for the suspension, and the Minister may either confirm it or restore the officer to his office. Then s. 33 enacts that if the Minister orders or confirms the suspension he shall report the same to the Governor, who, after calling on the officer to shew cause or make explanation, may remove the suspension, or according to the nature of the offence dismiss the officer from the service, or reduce him to a lower class therein or to a lower salary within his class, or deprive him of such future annual increase as he would otherwise have been entitled to receive or any part thereof during any specified time, or punish him by fine not exceeding £50; provided that the Governor before deciding may direct the board, or appoint one or more persons to inquire into the matter, with authority to receive evidence and to summons and examine witnesses on oath. Section 34 provides for punishment by fine not exceeding £10 of an officer who for the summary dismissal of any officer convicted of felony or

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any infamous offence, and the forfeiture of his office by becoming bankrupt or applying to take the benefit of an Insolvent Act., or making an assignment for the benefit of his creditors; and s. 37 for fine, suspension, or dismissal in case of dishonourable conduct or intemperance. These provisions, which are manifestly intended for the protection and benefit of the officer, are inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure. In that case they would be superfluous, useless, and delusive. This is, in their Lordships' opinion, an exceptional case, in which it has been deemed for the public good that a civil service should be established under certain regulations with some qualification of the members of it, and that some restriction should be imposed on the power of the Crown to dismiss them."

In *Reilly v. R.* the appellant by a petition of right claimed damages for breach of contract alleged to have arisen out of his appointment as a member of the Federal Appeal Board. The Judicial Committee of the Privy Council said:

"The petition of right is founded on averments that there was a contract between the supplicant and the Crown and that the contract had been broken. Both Courts in Canada have decided that by reason of the statutory abolition of the office Mr. Reilly was not entitled to any remedy, but apparently on different grounds. Mr. Justice MACLEAN concluded that the relations between the holder of a public office and the Crown was not contractual. There never had been a contract, and the foundation of the petition failed. Mr. Justice ORDE'S judgment in the Supreme Court seems to admit that the relation might be, at any rate, partly contractual; but he holds that any such contract must be subject to the necessary term that the Crown could dismiss at pleasure. If so, there could have been no breach.

Their Lordships are not prepared to accede to this view of the contract, if contract there be. If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine 'for cause' it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded. This appears to follow from the reasoning of the Board in *Gould V. Stuart* (12 T.L.R. 595; [1896] A.C 575). That was not the case of a public office, but in this connection the distinction between an office and other service is immaterial. The contrary view to that here expressed would defeat the security given to numerous servants of the Crown in judicial and quasi-judicial and other offices throughout the Empire, where one of the terms of their appointment has been expressed to be dismissal for cause.

In this particular case their Lordships do not find it necessary to express a final opinion on the theory accepted in the Ex-chequer Court that the relations between the Crown and the holder

of a public office are in no degree constituted by contract. They content themselves with remarking that in some offices at least it is difficult to negative some contractual relations, whether it be as to salary or terms of employment, on the one hand, and duty to serve faithfully and with reasonable care and skill on the other, and in this connexion it will be important to bear in mind that a power to determine a contract at will is not inconsistent with the existence of a contract until so determined."

R. Venkata Rao v. Seretary of State for India was a case of dismissal of a civil servant without compliance with the procedure prescribed by certain Civil Services classification Rules made under the Government of India Act 1915. The following passage in the opinion of the Judicial Committee is instructive:

"Their Lordships now pass to consider the questions of law raised in the appeal. The contention for the appellant was and is that the statute gives him a right enforceable by action to hold his office in accordance with the rules, and that he could only be dismissed as provided by the rules and in accordance with the procedure prescribed thereby. The respondent's contention, and the decision of the courts below, is that there is no such actionable right conferred by the statute.

There are two decisions of this Board much discussed in the courts below which state the principles to be applied to cases such as this. The first is *Shenton v. Smith* [1895] A.C. 229, relied upon by the respondent, and the other is *Gould v. Stuart*, [1896] A.C. 575, relied upon for the appellant. In the first case Dr. Smith held office in the government medical service in Western Australia and relied upon certain rules and regulations of the service as an essential part of his contract of service. He was dismissed, and brought an action for damages which failed. Upon appeal to Her Majesty in Council, Lord HOBHOUSE, in giving their Lordships' judgment, said ([1895] A.C. 234): 'It appears to their Lordships that the proper grounds of decision in this case have been expressed by STONE, J., in the Full Court. They consider that, unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law-suit, but by an appeal of an official or political kind.....As for the regulations, their Lordships again agree with STONE, J., that they are merely directions given by the Crown to the Governments of the Crown Colonies for general guidance, and that they do not constitute a contract between the Crown and its servants.'

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A special case such as was contemplated in the above cited passage occurred in *Gould's* case, where the Board consisting of three members, two of whom had sat in *Shenton's* case, held that the respondent Stuart held office in New South Wales under certain conditions expressly enacted in the body of the New South Wales Civil Service Act, 1884, and that these express provisions of the statute were 'inconsistent with importing into the contract of service the term that the Crown may put an end to it at its pleasure' ([1896] A.C. 578).

The question is: Does the present case fall into the general category defined and illustrated by *Shenton's* case, or the more exceptional category defined and illustrated by *Gould's* case? On the facts it stands somewhere between the two cases inasmuch as here the rules are expressly and closely related to the employment by the statute itself. In these circumstances difference of judicial view in India has manifested itself. There are decisions favourable to the present appellant in *Satish Chandra Das v. Secretary of State for India* (1926), I.L.R. 54, Calc. 44; in *J. R. Baroni v. Secretary of State for India in Council* (1929), I.L.R. 8 Ran. 215, and to some extent also in *Bimalacharan Batabyal v. Trustees for the Indian Museum*, (1929), I.L.R. 57, Calc. 231. On the other hand, both courts in the present case have adopted the contrary view. In their Lordships' opinion the judgments in the courts below express the correct view. The reasons which have led their Lordships to this conclusion may be shortly stated. Section 96B in express terms states that office is held during pleasure. There is therefore no need for the implication of this term and no room for its exclusion. The argument for a limited and special kind of employment during pleasure but with an added contractual term that the rules are to be observed is at once too artificial and too far-reaching to commend itself for acceptance. The rules are manifold in number and most minute in particularity and are all capable of change. Counsel for the appellant nevertheless contended with most logical consistency that on the appellant's contention an action would lie for any breach of any of these rules, as for example of the rules as to leave and pensions and very many other matters. Inconvenience is not a final consideration in a matter of construction, but it is at least worthy of consideration, and it can hardly be doubted that the suggested procedure of control by the courts over Government in the most detailed work of managing its services would cause not merely inconvenience but confusion. There is another consideration which seems to their Lordships to be of the utmost weight. Section 96 B and the rules make careful provision for redress of grievances by administrative process, and it is to be observed that sub-s. 5 in conclusion reaffirm the supreme authority of the Secretary of State in Council over the civil service. These considerations have irresistibly led their Lordships to the conclusion that no such right of action as in contended for by the appellant exists. It is

said that this is to treat the words 'subject to the rules' appearing in the section as superfluous and ineffective. Their Lordships cannot accept this view and have already referred to this matter in their judgment in *Rangachari's* case (1937), L.R.4 I.A.40. They regard the terms of the section as containing a statutory and solemn assurance that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action, but will be regulated by rule. The provisions for appeal in the rules are made pursuant to the principle so laid down. It is obvious, therefore, that supreme care should be taken that this assurance should be carried out in the letter and in the spirit, and the very fact that government in the end is the supreme determining body makes it more important both that the rules should be strictly adhered to and that the rights of appeal should be real rights involving consideration by another authority prepared to admit error, if error there be, and to make proper redress, if wrong has been done. Their Lordships cannot and do not doubt that these considerations are and will ever be borne in mind by the Governments concerned, and the fact that there happen to have arisen for their Lordships' consideration two cases where there has been a serious and complete failure to adhere to important and indeed fundamental rules, does not alter this opinion. In these individual cases mistakes of a serious kind have been made and wrongs have been done which call for redress. But while thus holding on the clear facts of this case, as they now appear, from the evidence, as they similarly held in *Rangachari's* case, their Lordships are unable as a matter of law, to hold that redress is obtainable from the courts by action. To give redress is the responsibility, and their Lordships can only trust will be the pleasure, of the executive government."

In *Rodwell v. Thomas*, [1944] 1 All E.R. 700, the plaintiff, who was a civil servant, brought an action claiming certain injunctions and declarations and damages for wrongful dismissal. He had been transferred from the Board of Agriculture to the Tithe Redemption Commission and had later been seconded to the Air Ministry. On 18th January, 1943, he was returned by the Air Ministry to the Commission and on the same day suspended from duty upon a charge made against him. He denied the charge but the Commission considered that it had been made out and terminated his appointment. The action was against the Commissioners personally and the Commission and the plaintiff contended that the procedure adopted for hearing his case was contrary to that expressly agreed at a meeting of the National (Whitley) Council between the representatives of the Crown, the Treasury and representatives of the civil service. TUCKER, J., held (i) that the procedure adopted for hearing the plaintiff's case was not a breach of his conditions of service; (ii) the matters settled between the various parties at the National (Whitley) Council were not necessarily incorporated in a civil servant's terms of employment; (iii) a crown servant may be dismissed at pleasure, and any contract providing for his employment for a specified time or that

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the employment can only be terminated in certain ways is a clog upon the power of the Crown to dismiss at pleasure. At pp. 703 and 704 he said:

"Having regard to the argument addressed to me by counsel for the plaintiff, I think it is only right to consider whether they can be considered to form part of the contract between the parties. By 'contract' is meant, of course, a legally binding contract which will give the civil servant the right of access to a court of law to enforce compliance with any one of the provisions contained therein. It is not suggested that there was at any time—at any rate there has not been shown to me—any written contract which established the terms of this particular man's employment when he was engaged or at any other time, but it is, said because the members of the trade union representing him have been parties to this Whitley Council agreement that gives him the right to come to a court of law and say: Every one of the findings of that committee must be considered as part of the terms of my employment for breach of any one of which I am entitled to have access to the courts. It is well-known that it has been found convenient to settle these matters with regard to conditions of employment and so forth by representative bodies of civil servants, but I am at a loss to understand how every matter which is disposed of by give and take in that way can be incorporated into the civil servant's terms of employment so as to give him a cause of action for deviation from any one of those terms and conditions. I therefore think that counsel for the plaintiff has not got within measurable distance of establishing that this Treasury circular is a contractual document forming part of the plaintiff's employment by the Tithe Redemption Commission.

I think there would be further difficulty in this particular case in the plaintiff's way in succeeding in this action in regard to any of the forms of remedy which he seeks, namely, that the authorities show not only that generally speaking a civil servant can be dismissed at pleasure, but that the court will disregard any term of his contract, however clear, which expressly provides for employment for a specified period or that such employment can be terminated only in a specified manner. The court will regard any such provisions in a contract as clogs on the Crown's right to dismiss at pleasure at any time. I think that this action being in substance one in which the contention in that the plaintiff has been wrongly dismissed and alleging in effect that the procedure adopted has been ineffective legally to terminate his employment and was wrongly adopted, and claiming relief founded on such allegations, does amount to an attempt to interfere with the right of the Crown to dismiss at any time for any reasons stated or unstated. It seems to me that when they wrote this letter on Feb. 22 dismissing the plaintiff, there was an end of the matter altogether, and that letter must have had the result of terminating and of properly terminating the plain-

tiff's employment, whether or not it is founded upon this preliminary inquiry. To attempt to get behind that matter and to invite the court to hold that it had not achieved its object would be in effect asking the court to interfere with, or put a clog upon, the Crown's power to dismiss at pleasure."

In *Gould v. Stuart* the enactment of local legislation was held to have excluded the implication of dismissal at pleasure but in this case no such implications can arise because the legislation expressly provides that members of the Force are dismissible at pleasure.

It was argued that the Commissioner's power of dismissal was subject to both existing and future local legislation but art. 103 (5) of the 1961 Constitution cannot be so construed. That provision clearly covers future legislation only and there has been no such legislation fettering the Commissioner's power of dismissal.

The conclusion at which I have arrived obviates the necessity to deal with the other contentions put forward by the appellant. I would dismiss the appeal with costs.

JACKSON, J.A.: The arguments in the proceedings from which this appeal has arisen were based on an agreed statement of facts before the trial judge which may mainly be summarised in this way:

The plaintiff was a member of the British Guiana Police Force stationed at the Police Headquarters when on 16th February, 1962, he disobeyed certain lawful orders given him at different times by one or more of his superior officers. In consequence thereof in April 1962 the appellant was placed on four disciplinary charges, three of the offences being disobedience of lawful orders of Inspector Bryan and Superintendent Greathead, and one for improper conduct. The defendant in his capacity of Commissioner of Police constituted the Deputy Commissioner Arthur H. Jenkins a court of inquiry to inquire into the charges. This, the latter did and later forwarded the notes of evidence together with his considered opinion to the defendant, who was to decide whether the plaintiff was guilty or not guilty. The plaintiff was informed at the inquiry that he was liable to be dismissed from the Force if ultimately he was found guilty of any of the charges; he was duly represented at the inquiry, and he testified in his defence but called no witnesses; he also availed himself of the opportunity afforded to cross-examine the witnesses who supported the charges; he was supplied with a copy of the notes of evidence but not with the considered opinion of Mr. Jenkins.

The plaintiff was found guilty by the defendant and on 9th May, 1962, he received a letter from the defendant in the following terms:

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"Office of the Commissioner,
Police Headquarters.
Georgetown,
British Guiana,
9th May, 1965.

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:

- (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 108 (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 para. 32 of Force Order No. 12/1957 on the subject of disciplinary procedure, a copy of which is attached.

(Sgd.) W. R. Weber,
Commissioner."

The plaintiff appealed from the decision to the Governor who upheld the findings of guilt on three of the charges and the order of dismissal, but disallowed the finding of guilt on the charge of improper conduct.

In May 1962 plaintiff instituted proceedings in this action and claimed *inter alia*:

- (a) a declaration that the decision of the defendant in his capacity of Commissioner of Police dismissing the plaintiff from the British Guiana Police Force was and is invalid and a nullity in law;
- (b) a declaration that the order of the defendant dated 9th day of May, 1962, ordering the dismissal of the plaintiff from the British Guiana Police Force with effect from the 9th day of May, 1962., was and is invalid and a nullity in law;
- (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 the 9th day of May, 1962, until he duly ceased to be a member of the said British Guiana Police Force;

(d) an injunction restraining the defendant from acting upon or enforcing the aforesaid purported order of dismissal.

The agreed statement of facts duly signed by the legal representatives of both parties included the following two paragraphs:

"(10) As far as we are aware it has always been the practice never to disclose the report of a Police Disciplinary Inquiry submitted to the Commissioner of Police or the Governor for decision

(11) The Commissioner under the Regulations never considers himself bound by the opinion of the Court of Inquiry."

DATE, J., dismissed the claim upholding the point raised by the defence that s. 8(2) of the Justices Protection Ordinance, Cap. 18. applied to the action, and that, the plaintiff not having given the prescribed notice, the action must fail. The judge expressed his views on other points raised in the case, but in view of the conclusion which he had reached thought it unnecessary to make final pronouncements on the other aspects of the case. (See 1963 L.R.B.G. 170).

Mr. Haynes submitted that the defendant had no jurisdiction to dismiss the plaintiff in the manner in which he purported so to do; that the plaintiff was charged with offences under reg. 54 of Police Regulations, Cap. 77, made by the Commissioner under authority of s. 60 (1) of the Police Ordinance, Cap. 77, that the power of dismissal was in the Governor. He strove to strengthen his argument by insisting that the offence was cited as being in breach of regulations, offences of such breach being those cited in reg. 54 and that the punishment set out in reg. 55 applied but did not include power of dismissal by the Commissioner.

It may be useful by a short resume to follow the course of the history of the powers of dismissal beginning with the introduction of a new Constitution for British Guiana after the British Guiana Act, 1928 (18 & 19 Geo. 5, c. 5) and the British Guiana (Constitution) Order in Council, 1928, and other Constitutional Instruments. By Letters Patent under the Great Seal of the United Kingdom dated 20th July, 1928 (as amended by Letters Patent of 23rd March, 1943, art. IX) the Governor was given power upon sufficient cause to him appearing, to dismiss or suspend from the exercise of his office any person holding any public office within the Colony, or to take such other disciplinary action as may seem to him desirable. In 1929 the Police Ordinance, Cap. 77, was passed and in that same year the Police Regulations were made by the Commissioner by virtue of s. 60(1) of the Ordinance. Section 87(1) of British Guiana (Constitution) Order in Council, 1953, provided that the power to appoint and to dismiss and to exercise other disciplinary control over judges, magistrates and public officers vested in the Governor, that power to be exercised in accordance with the law in force in the colony. It is indubitable, therefore, that when the Governor was given exclusive

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powers under s. 87(1) mentioned above the regulations 55-57 ceased to have any effect for those regulations had empowered persons other than the Governor to exercise disciplinary control and to inflict punishment. In 1956 the British Guiana (Constitution) (Temporary Provisions) (Amendment) Order in Council (1956 No. 2030), by s. 25 amended the 1953 Order in Council by adding to s. 87, the following sub section:

"(3) (a) Subject to the provisions of paragraph (b) of this sub-section, 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;

(b) The Governor shall not—(i) delegate any such power unless he has obtained the consent of a Secretary of State.

(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. . . .

(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."

This amendment of s. 87 of 1953 Order in Council does seem to revivify certain disciplinary powers enjoyed by any public officer under an enactment by deeming them delegated powers.

Under the Delegation of Powers (Police Officers) Regulations, i960, made under the British Guiana (Constitution) Order in Council, 1953, as inserted by s. 25 of the British Guiana (Constitution) Temporary Provisions Order in Council, 1956, in pursuance of sub-s. (3) of s. 87 thereof, powers were given to the Governor to delegate to the Commissioner power to dismiss or reduce in rank any inspector or subordinate officer, or to inflict other punishment. By s. 1(4) of the British Guiana (Constitution) Order in Council, 1961, the previous Orders in Council and attendant instruments (including the one under which the Delegation of Powers (Police Officers) Regulations 1960, were made) were revoked subject to certain provisions not relevant here.

By art. 103(a) of the British Guiana Constitution, 1961, the Governor was bereaved of his power to dismiss and to exercise disciplinary control over persons holding or acting in offices in the Police Force of or below the rank of Chief Inspector and such power was

vested in the Commissioner of Police. This marks the first occasion whereby directly under the Constitution such unqualified power had been given to the Commissioner to dismiss, and in my view it disposes disadvantageously of the contention that there was no power in the Commissioner to dismiss.

Counsel contended that even if the defendant (Commissioner) had power to dismiss, the decision of the defendant was void in that he had failed to supply the plaintiff with a copy of the considered opinion of the court of inquiry thus ridding him of the chance to be heard on that opinion, and therefore committed a breach of natural justice. Numerous cases were deployed before us. I think however the authoritative judgments in the House of Lords in the case of *Ridge v. Baldwin*, [1963] 2 All E.R. 66, [1963] 2 W.L.R. 935, where the authorities old and new were examined and exhaustively reviewed in the speeches of Lord REID and the other Lords of Appeal, reestablished that the main features of natural justice are (1) the right to be heard by an unbiased tribunal; (2) the right to have notice of charges of misconduct; (3) the right to be heard in answer to those charges. The integrity of the tribunal which investigated the charges was not assailed or challenged; ample notice of the charges with particulars of each, and notice that he was liable to be dismissed if any one of the charges was found proved, were given to the plaintiff before the investigation began; he took full advantage of the right to be heard before the tribunal in answer to those charges. As I understand counsel for plaintiff there is no suggestion of any omission to honour these basic principles; the proved facts of the charges are not questioned here but the gravamen of his complaint is that while he had received a copy of the notes of evidence taken at the court of inquiry he was not afforded a copy of the considered opinion of the court which was forwarded to the defendant: this he asserted deprived the plaintiff of an opportunity to put forward to the defendant any contention he wished in relation thereto. In the admitted statement of facts it is stated that it had always been the practice not to disclose the considered opinion which was in addition to the notes of evidence submitted to the Commissioner of Police or the Governor for decision; moreover the statement noted that the Commissioner under the regulations "never considers himself bound by the opinion of the court of inquiry." In this case, however, and in these circumstances when the correctness of the finding of guilt was not in question before us, there only remained the question as to whether the charges were sufficiently grave to merit dismissal. The defendant was in a position to determine whether each of the charges was grave enough to merit dismissal; that was purely in his discretion and there could be nothing in the considered opinion of the Court of Inquiry on the bare facts to prejudice the plaintiff. I am therefore of the view that the rules of natural justice were not infringed and that nothing was done prejudicial to, or was likely to be prejudicial to the plaintiff.

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I now turn to the special defence raised that the defendant acted in the execution of his office as Commissioner of Police and that as no notice had been served on him in compliance with s. 8(2) of the Justices Protection Ordinance, Cap. 18, the action could not be commenced, and that the claim was barred by s. 8(1) of the said Ordinance. The material parts of s. 8, follow:

"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 agreed that the defendant is a "justice" within the purview of s. 14 of the Ordinance, and that s 8(2) was not complied with. For the plaintiff it was advanced that the action was one claiming a declaration and an injunction and is not within the provisions of s. 8 of the Ordinance and in consequence no notice of action is necessary for (a) the provisions there apply only to actions for damages; (b) those provisions do not apply to an action for equitable relief as claimed. Counsel referred also to ss. 2, 9, 10 and 14 of which the relevant parts are set out:

"2. Every action hereafter to be brought against any justice of the peace for any act done by him in the execution of his duty as justice, with respect to any matter within his jurisdiction as justice, shall be an action as for a tort; and in the claim it shall be expressly alleged that the act was done maliciously and without reasonable or probable cause; and if, at the trial of the action, upon the general issue being pleaded, the plaintiff fails to prove that allegation, he shall be non-suited, or judgment shall be given for the defendant.

(9) In the action the defendant shall be allowed to plead the general issue, and to give any special matter of defence, excuse or justification in evidence under that plea at the trial.

(10) In every such case, after notice of action is so given as aforesaid, (s. 8) and before the action is commenced, the justice to whom the notice is given may tender to the party complaining or to his attorney or agent, any sum of money the justice thinks fit as amends for the injury complained of in the notice. . . .

(14) This Ordinance shall apply for the protection of all members of the police force, all constables, all district commissioners, and all other persons for anything done in the execution of their office under and by virtue of any Ordinance . . . "

As regards the submission that only when the action is a tortious one (which it is said this is not) and sounds in damages that a notice is necessary, I think counsel has crept into error because of the form referred to in s. 2 and the improper emphasis he placed on the expression "shall be an action as for a tort," and also because of the provision in s. 10 for payment into court of money which a plaintiff may accept in satisfaction of damages, or for tender of money as amends for injury done to the plaintiff. The fact that the plaintiff asked for a declaration or an injunction does not in my view matter save perhaps where the latter is claimed in impelling necessity when the need is most urgent and cannot be delayed. Here, although an injunction is sought, plaintiff concedes that this is not a case of urgency and that an interim injunction was not even requested.

The vigorous argument and counter argument by Mr. Haynes and the Solicitor General respectively as to whether the declaration sought was or was not in the circumstances an equitable relief, properly so called, and therefore without or within the provisions of ss.2 and 8 might have been spared for an appropriate occasion for the discussion though interestingly advanced is really not quite in point. A court must be watchful to see that principles laid down and sustained over a long number of years be not defaced by too narrow an interpretation of the provisions of a statute. The substance of the claim must be examined to ascertain whether it was "for an act done" by the defendant in execution of his duty as a justice; the words "an action as for a tort" cannot mean the claim must necessarily be in the form of damages for a wrong. The form of the action does not matter: forms of action have long been buried but they do not in the development of the law in these modern times any longer rule us from their graves. The object of the provisions is to ensure prompt action, to let the justice know what case he has to meet, and to give him an opportunity to make amends if necessary. It is indeed true that a declaration is sought but the gist of the complaint, however subtle the concealment, is that the defendant dismissed the plaintiff; and it is against the act done, an alleged wrong, the plaintiff seeks redress. In *Waterhouse v. Keen* (182(5), 107 E.R. 1033, 4 B. & C 200, certain tolls imposed by a Turnpike Act were collected by a collecting officer from a stage coach drawn by four horses which passed and re-passed through the same gate erected under this Act of Parliament. It was also enacted that no action should be commenced against any person for anything done in pursuance of the Act until 21 days' notice should be given to the clerk of the trustees, or after sufficient satisfaction or tender thereof had been made to the party aggrieved, or after six calendar months next after the fact committed, and that every such action should be brought in the country or place where the matter should arise, and not elsewhere, and the defendant should and might at his election plead specially, or the general issue not guilty, and give in evidence that the same was done in pursuance and by the authority of the Act.

The action was brought by the plaintiffs in assumpsit's for money had and received to their use. Counsel for plaintiff contended that

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notice to the clerk was not obligatory as the action or suit was in assumpsit's and the clause requiring notice only applied to actions of tort. BAYLEY, J., at p. 1037 observed:

"The question is, whether that provision is confined to actions of tort, or extends to actions of assumpsit's; the substantial part of the enactment is that notice should be given to the trustees in order that they may tender satisfaction, and that the action should be brought promptly after the fact committed. If the Act of Parliament does not apply to this case, parties may be at liberty to maintain actions for all sums levied under a misconstruction of the Act within a period of six years. And thus the object of the Legislature, which was that the action should be brought promptly, will be defeated. But it is said that, in this case, there was not anything done by the defendant in pursuance of the Act; but that expression, as used in this Act of Parliament, means that the thing done should be done *colore officii*; if he did *so* act, he is within the protection of the Act of Parliament. I think everything was done in pursuance of the Act."

HOLROYD, J., endorsed the view expressed by BAYLEY, J., and said *inter alia* at p. 1038:

"This is a case within the words of the Act. It is a case also within the mischief intended to be avoided by the Act of Parliament. It is consistent; therefore, with the object of the enactment, if he improperly takes any toll, that he should have an opportunity of tendering amends. The same mischief would arise from the neglect to give the notice in such an action as this as if it were an action of tort. It is said that this clause applies to the case of tort in as much as it speaks of the defendant's pleading the general issue not guilty, and tendering satisfaction; but I think these expressions by no means sufficient to restrain the language of the prior part of the clause, which is sufficiently large to comprehend any species of action against a toll collector for an act done *colore officii*. On principle, therefore, as well as on the authority of *Greenway v. Hurd* (1792), 4 T.R. 553, I am of opinion that notice was necessary."

This question was recently considered by LUCKHOO, Ag. C.J., in *Abrams v. The Members of the Governing Body of Anglican Schools*, (1960), 2 W.I.R. 187, 1960 L.R.B.G. 78 in which he referred to later authorities, and where the decision in *Waterhouse v. Keen* found expression in the language of his judgment.

I have reached the conclusion that the Commissioner had power to dismiss that natural justice was not denied the plaintiff, and that it was obligatory on him to give notice of his action. I would therefore dismiss the appeal with costs and affirm the judgment and order of the court below.

LUCKHOO, J. A.: The appellant Cumberbatch, at all material times a sergeant of police in the British Guiana Police Force, was ordered by the respondent, the Commissioner of Police, after a departmental inquiry to be dismissed from the Force with effect from the 9th May, 1962. The inquiry related to four charges purporting to have been brought against the appellant under the Police Regulations, Cap. 77 (Subsidiary Legislations). The Commissioner of Police, after considering the notes of evidence and the considered opinion of the court of inquiry, found the appellant guilty on all four charges. The appellant thereafter appealed against the decision of the Commissioner to the Governor who allowed the appellant's appeal in respect of one of the charges but disallowed the appeal in respect of the other three charges. The appellant subsequently filed an action against the Commissioner claiming in his amended statement of claim—

- (a) a declaration that the decision of the defendant dismissing him was and is invalid and a nullity in law; alternatively an order setting aside the decision as voidable;
- (b) a declaration that the order of the defendant ordering the dismissal of the plaintiff with effect from the 9th May, 1962, was and is invalid and a nullity in law; alternatively, an order 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 9th May, 1962, until he duly ceases to be a member of the said Force;
- (d) an injunction 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.

An agreed statement of facts signed by counsel and solicitor for the parties was filed and later an amended agreed statement of facts was placed on the record. Thereafter certain arguments were addressed to the trial judge DATE, J., by counsel for the appellant under two heads—

- (a) that the Commissioner had no jurisdiction to dismiss the plaintiff, which he purported to do;
- (b) that the failure to supply the appellant with a copy of the notes of evidence taken by the court of inquiry and a copy of the considered opinion of that court and to inform the appellant of his right to be heard thereon by the Commissioner was a breach of the rules of natural justice.

Another issue raised in the case, and this by way of defence, was whether notice was required to be given the Commissioner under

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the provisions of s. 8(2) of the Justices Protection Ordinance, Cap. 18. For the defence it was contended that no such notice having been given the appellant's claim was barred by s. 8(1) of the Justices Protection Ordinance, Cap. 18.

The learned trial judge found that the appellant's claim was barred by s. 8(1) of the Justices Protection Ordinance, Cap. 18, and that the Commissioner did have jurisdiction to dismiss the appellant. In view of his finding on the former point the trial judge did not consider it necessary to decide the question whether the Commissioner was in breach of the rules of natural justice. (See 1963 L.R.B.G. 170):

Before us all three points have been argued at great length on both sides.

Dealing first with the question of notice it was submitted by counsel for the appellant that an action for a declaration is one for equitable relief and that the provisions of the Justices Protection Ordinance, Cap. 18, have no application to claims for equitable relief. The provisions of that Ordinance as they appear in the statute law of British Guiana today are substantially those of Ordinance 31 of 1850 which were undoubtedly modelled upon those provisions contained in the Justices Protection Act, 1848, of the United Kingdom.

Section 8 of the Justices Protection Ordinance, Cap. 18, provides as follows:-

"(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; and upon the back thereof shall be endorsed the name and place of abode of that party and also the name and place of abode or of business of his attorney or agent, if the notice has been served by the attorney or agent."

Section 14 of the Ordinance gives members of the Police Force the same protection given to justices under the Ordinance "for anything done by them or any of them in the execution of their or his office."

Counsel has been unable to find any reported case decided under any of the English Acts with public authorities' protection clauses contained in them prior to the Public Authorities Protection Act, 1893, where the English courts have decided the question as to

whether notice of action is required to be given where the claim is one for a declaration. In the cases decided under the 1893 Act the courts have held that such notice must be given. Counsel relies, however, on the local cases of *Wight v. Town Clerk of Georgetown*, 1939 L.R.B.G. 144, and *Gray v. Bartica Village Council* (1961), 3 W.I.R. 255, 1961 L.R.B.G 153, in support of his proposition that notice of intended action is not required where equitable relief is sought and more particularly where irreparable harm may be done if action is not brought speedily. The judgments in those cases were based mainly on the English cases of *A.G., v. Hackney Local Board* (1875), L.R. 20 Eq. 626 and *Flower v. Low Leyton Local Board* (1877), 5 Ch. D. 347, decided respectively upon the Metropolis Management Act, Amendment Act, 1862 and the Public Health Act, 1875. In the *Flower* case in the court below Vice Chancellor MALINS held that the claim was in essence one for damages so notice must be given. In the Court of Appeal, JESSEL, M.R., was of the opinion that s. 264 of the Public Health Act, 1875, was intended to apply to an action at law for damages and not to a bill in Chancery and that its object was to make tender of amends. The Court of Appeal held that the action was one essentially for an injunction and so notice was not necessary. In the *Hackney* case, Vice Chancellor BACON held that the words "any act done or intended to be done under their Parliamentary powers" in the Metropolis Management Act, Amendment Act, 1862, could not apply to a nuisance to which such powers could not in any case extend. In discussing these cases the Privy Council in *Bhagchand Dagdusa Gujrathi v. Secretary of State for India In Council* (1927), 43 T.L.R 617, observed that in the *Flower* case counsel hardly contested that an exception of "cases of necessity" as mentioned in the court below by Vice Chancellor MALINS must be understood and that "a view about a bill for an injunction against serious and irreparable damages requiring the intervention of the court" almost undisputed in the Court of Appeal, would not be any guide to the meaning of the Civil Procedure Code (in point in the *Bhagchand* case) where the clause applies to all officers of Government and to all their official acts, and where the words "in respect of" a form going beyond "for anything done or intended to be done" show it to be wider than the statutes on which the English authorities were decided. In the *Bhagchand* case s. 80 of the Indian Code of Civil Procedure provided that:

"No suit shall be instituted against the Secretary of State for India in Council, or against any public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been, in the case of.....a public officer delivered to him or left at his office, stating the cause of action, the name, description, and place of residence of the plaintiff and the relief which be claims,....."

It was held by the Privy Council that these provisions are applicable to all forms of action and to all kinds of relief, and are not subject to any exception in an action where an injunction is prayed for or in

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cases where hardship or injury not reparable by money compensation may arise. In the course of the opinion of the Board delivered by Lord SUMNER the view of s. 80 taken in the High Courts of Calcutta, Madras and Allahabad that "section 80 is express, explicit and mandatory, and it admits of no implications or exceptions: a suit in which, *inter alia* an injunction is prayed is still 'a suit', within the words of the section, and to read any qualification into it is an encroachment on the functions of legislation", was approved. The Privy Council rejected the view held by the Bombay High Court in suits to restrain by injunction the commission of some official act prejudicial to a plaintiff, that if the immediate result of the Act would be to inflict irremediable harms. 80 does not compel the plaintiff to wait two months before bringing his suit though if nothing is to be apprehended beyond what payment of damages would compensate the rule is otherwise and the section applies.

The Privy Council did not express any view as to whether the *Flower* case was correctly decided but significantly observed that while the Court of Appeal in the *Flower* case had held that the Public Health Act, 1875, s. 264 did not extend to a bill in Chancery but only to an action at law, that consideration did not apply to s-80 of the Civil Procedure Code. No doubt this observation proceeded on the basis that in India (as in British Guiana) there were no separate courts administering the common law and equity.

In the instant case the principal relief sought is a declaration that the decision of the Commissioner of Police in dismissing the appellant is invalid. In essence it is a claim for a declaration that the appellant was wrongfully dismissed. All of the other relief claimed including the claim for an injunction would flow from this principal relief sought. In discussing whether the declaratory judgment is equitable relief ZAMIR in his DECLARATORY JUDGMENT at pp. 187—189 referred to the fact that in England the power to make declarations of right is inherent in the Court of Chancery and that court had long before 1860 exercised that declaratory power, whereas the common law courts until the Judicature Act, 1873, did not exercise nor claim jurisdiction to exercise a similar power. In *Chapman v. Michaelson*, [1909] 1 Ch. 238, a decision of the Court of Appeal, FARWELL, J.J., held that the declaratory judgment was not equitable relief and referred to *Ellis v. Duke of Bedford*, [1899] 1 Ch. 494, in which reference was made to O. 25, r. 5, where the declaratory judgment was made available where no consequential relief was sought.

Perhaps the truer view is that declaratory judgment may in some circumstances be regarded as equitable relief. However, the nature of the declaratory judgment sought in the instant case is not such that it should properly be regarded as equitable relief. As I have already observed in essence the instant claim is one for wrongful dismissal.

Much stress was laid by counsel in respect of the provisions of s. 10 of the Ordinance which relate to the tender of amends and the

use of the words "in every such action" contained in that section. The argument of counsel is that this section is indicative of the fact that the provisions of the Ordinance were intended to relate to claims for damages and to money claims and that the provisions relating to giving of notice operated to afford time for the tender of amends. This argument overlooks other reasons for the requirement of notice in s. 8 to prevent actions being trumped up after a long time, to prevent stale claims, to enable justices, etc., to prepare their defences. The words "in every such case" only mean "in every such case in which tender of amends may be made."

Counsel for the appellant has further contended that in 1850 when the Justices Protection Ordinance was enacted the declaratory judgment was not known to the common law of British Guiana which at that time was the Roman-Dutch common law. Unfortunately the reported cases extant date from the year 1856 but a number of reported cases in the Supreme Court of British Guiana in the latter half of the nineteenth century have been referred to by the Solicitor General in which declaratory judgments were given. Such judgments it would seem were well known to the law of Holland. Equitable principles to a limited extent were applied in the courts of justice in this territory as part of the civil law in the early nineteenth century as is mentioned by the Fiscal and the Presidents of the Courts of Justice in Demerara and Essequibo and in Berbice in the answers to questions submitted to them by the Commissioners of Inquiry into the Administration of Criminal and Civil Justice in the West Indies as contained in the SECOND REPORT OF THE COMMISSIONERS published in 1828. It is probable that in British Guiana in 1850 an action as known to the lawyers of that day would have included an action for a declaration. However, whatever may be the doubts on that score the principal remedy now sought by the plaintiff being in essence one in respect of a claim of wrongful dismissal was certainly known in 1850 and the provisions of the 1850 Ordinance, now s. 14 of Cap. 18 (Kingdon Edition) operate to protect a member of the Police Force in respect of an act done in good faith by him in the execution of the duties of his office as a member of the Police Force. In my view, therefore, notice as required to be given under s. 8(1) of the Justices Protection Ordinance, Cap. 18, not having been given; by the appellant the claim is barred.

Counsel for the appellant next submitted that the dismissal of the appellant was unauthorised in that the Commissioner of Police was not empowered to dismiss a non-commissioned officer or if he was so empowered he could not dismiss such an officer for the breaches of discipline charged. In dismissing the appellant the Commissioner of Police purported to do so under the provisions of art. 103(2) of the 1961 Constitution of British Guiana which provides as follows:

"Power to dismiss and to exercise disciplinary control over persons holding or acting in offices in the Police Force of or below

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the rank of Chief Inspector shall vest in the Commissioner of Police and, to such extent as may be prescribed by any law of the Legislature, in such other officers of the Police Force as may be so prescribed."

Paragraph (2) of art. 103 should be read with paras. (3) and (5) of that article:

"(3) In such cases and subject to such conditions as may be prescribed by any law of the Legislature an appeal shall lie —

- (a) to the Governor from a decision of the Commissioner of Police to dismiss or to exercise disciplinary control over any such person as is specified in the last foregoing paragraph; and
- (b) to the Commissioner of Police from any such decision of any other officer of the Police Force;

and where the person to whom any such decision relates institutes an appeal therefrom the execution of that decision shall be suspended;

Provided that, where the decision included the dismissal of that person or his suspension from performing the function of his office, the officer whose decision it was may nevertheless suspend that person from performing those functions pending the determination of the appeal.

(5) Any power to dismiss or to exercise disciplinary control, and any power to determine appeals from a decision to exercise such a power as aforesaid, that is vested in any person by virtue of para. (2) or (3) of this article shall be exercised in accordance with such provision as may, subject to the provisions of this article, 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.

The Commissioner purported to dismiss the appellant for breaches of discipline as being contrary to paras. (2) and (44) of reg. 54 of the Police Regulations, Cap. 77 (Subsidiary Legislation) in Volume VIII of KINGDON edition of the LAWS which provide as follows:

"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—

- "(2) disobeys any lawful order given him by his superior in rank, whether verbally or in writing, or by authorised signals on parade;
- (44) is guilty of improper conduct."

Regulation 55 as it appears in Volume VIII of KINGDON edition of the LAWS provides that the Commissioner may award certain punishment specified therein "for each and every breach of the regulations

as above." In the case of a non-commissioned officer the punishments specified do not include dismissal but include suspension from pay and duty for any period not exceeding 28 days.

These Regulations, it is conceded, were in force immediately prior to the coming into operation of the 1953 Constitution and were made under the provisions of the Constabulary Ordinance, 1928 (No. 37), appearing as Cap. 30 in the MAJOR edition of the LAWS and with amendments as Cap. 77 in the KINGDON edition of the LAWS (with amendments). In order to see whether regs. 54 and 55 continued in force since the coming into operation of the 1961 Constitution it is necessary to see what was the effect of the Constitutions of 1953 and 1956, the Police Ordinance, 1957, and any subsidiary legislation thereunder in relation to the power to dismiss and to exercise disciplinary control over non-commissioned officers. For the respondent it was contended that regs. 54 and 55 are no longer operative to control the Commissioner's power of dismissal of non-commissioned officers. A convenient starting point in the examination of this question is perhaps the Police Ordinance, 1891 (No. 10). Thereunder, by s. 58(3), the Governor was empowered to dismiss at any time non-commissioned officers and constables while by s. 58(1) the Inspector General of Police (now redesignated Commissioner of Police) was empowered, subject to the Regulations, to reduce in rank or suspend non-commissioned officers, a right of appeal to the Governor from a decision of the Inspector General of Police being given by s. 59. Section 80 provided for the Inspector General making regulations *inter alia* relating to the suspension or dismissal of non-commissioned officers. The Police Regulations made under s. 80 of the 1891 Ordinance provided at Part III (regs. 31-37) for matters relating to the suspension and dismissal of non-commissioned officers. Regulation 37 provided that the Governor might dismiss any non-commissioned officer at any time without giving any previous notice and without assigning any reason for such dismissal if he thought proper to do so. Regulation 112 specified 42 offences which if committed by a non-commissioned-officer or constable were deemed to have been committed in breach of the Regulations and amenable to the punishments laid down for such breaches. Regulation 113 laid down the punishments for breaches of reg. 112 and provided for the Inspector General to inflict such punishments. Dismissal was not one of such punishments. The similarity between regs. 112 and 113 of the 1891 Regulations and regs. 54 and 55 of 1929 Regulations (now Cap. 77) Subsidiary Legislation in the KINGDON edition of the LAWS is readily apparent.

The Constabulary Ordinance, 1928 (No. 37) was brought into operation on the 26th January, 1929, and as has already been observed appears as Cap. 30 in the MAJOR edition of the LAWS and as amended as Chapter 77 in the KINGDON of the LAWS of the L ffi:. By s. 30 of that Ordinance, the Inspector General was empowered to appoint noncommissioned officers and s. 52 empowered the Governor to dismiss from the Force any member whose dismissal he considered advisable

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Section 59 empowered the Governor at any time to dismiss any sub-officer (which term included non-commissioned officer) from the Force. Section 61 empowered the Commissioner to make regulations *inter alia* in respect of the suspension or dismissal of non-commissioned officers. The Police Regulations, 1929, were later made under the authority of s. 61 of the Ordinance and contained regulations similar to those of regs. 31-37 and 112 and 113 contained in Regulations made under the 1891 Ordinance. The 1929 Regulations are those now appearing in Cap. 77, Subsidiary Legislation in Volume VIII of KINGDON edition of the LAWS.

Before the Constabulary Ordinance, 1928, was brought into operation, the 1928 Constitution had been promulgated. Article IX of the 1928 Letters Patent empowered the Governor, upon sufficient cause to him appearing, to dismiss any public officer not appointed by Royal Warrant whose pensionable emoluments did not exceed a certain specified sum, provided that unless the officer had been convicted on a criminal charge, the grounds of his intended dismissal were definitely stated in writing and communicated to the officer in order that he may have full opportunity of exculpating himself. Article IX also empowered the Governor upon sufficient cause to him appearing to suspend from the exercise of office any person holding office in the Colony. In 1943, art. IX of the 1928 Letters Patent was amended to empower the Governor, subject to the provisions of any law for the time being in force in the Colony, upon sufficient cause to him appearing, to dismiss or suspend from the exercise of his office any person holding any public office within the Colony or to take such other disciplinary action as may seem to him desirable. On the 6th February, 1943, the Governor acting under s. 38 of the Interpretation Ordinance as enacted by s. 2 of the Interpretation (Amendment) Ordinance, 1942 (now appearing in Cap. 5 of KINGDON edition of the LAWS at s. 39) delegated to the Commissioner of Police the power conferred on him by s. 52 of the Constabulary Ordinance, Cap. 30 (MAJOR edition) to grant permission to withdraw from the Police Force and to dismiss from the Force sub-officers (which included non-commissioned officers) and constables. The position then, immediately prior to the coming into operation of the 1953 Constitution, was that the Governor's power of dismissal of non-commissioned officers was delegated to the Commissioner of Police who, by virtue of reg. 54 and 55 of the Police Regulations, 1929 (Cap. 77, Subsidiary Legislation in Volume VIII KINGDON edition of the LAWS) was empowered to exercise disciplinary control over non-commissioned officers and to inflict specified punishments—not including dismissal—in relation to the offences specified in reg. 54.

The Letters Patent of 1928 as amended in 1943 were revoked when the British Guiana (Constitution) Order in Council, 1953, was brought into operation. Under s. 87 (1) of that Order the power to appoint and to dismiss and to exercise other disciplinary control over public officers (among others) was vested in the Governor and,

subject to the exercise by the Governor of his powers in relation to the public service acting in his discretion, the powers so vested in the Governor were to be exercised in accordance with the law from time to time in force in the Colony and with any Instructions from time to time in force issued to him under Her Majesty's Sign Manual and Signet or through a Secretary of State. By virtue of the definitions of the expressions "public office", "the public service" and "public officer" contained in s. 2 of the Order a non-commissioned officer was a public officer within the contemplation of s. 87 (1) of the Order. By virtue of s. 87 (1) of the Order the Governor alone could exercise the power of dismissal of a non-commissioned officer. In 1956, however, the British Guiana (Constitution) (Temporary Provisions) (Amendment) Order in Council, 1956, was brought into operation. Section 25 (1) of the 1956 Order amended the 1953 Order by the insertion of sub-s. (3), (4) and (5) to s. 87 therein and s. 25 (2) of the 1956 Order provided that s. 87 of the 1953 Order shall be deemed to have been amended in the manner provided for by sub-s. (1) of s. 25 with effect from the commencement of the 1953 Order and that for the purposes of sub-s. (5) to s. 87 aforesaid so amended all laws in force in the Colony before the commencement of the 1956 Order shall be deemed to have been enacted before the commencement of the 1953 Order. Subsections (3), (4) and (5) aforementioned are as follows:

"(3) (a) Subject to the provisions of paragraph (b) of this subsection, 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 subsection (1) of this section.

(b) The Governor shall not—

- (i) delegate any such power unless he has obtained the consent of a Secretary of State to such delegation; or
- (ii) delegate any such power with respect to officers whose annual emoluments exceed such sum as may be prescribed by a Secretary of State.

" (c) For the purposes of this subsection the emoluments of an officer shall (whether or not he is employed on terms that include eligibility for pension) include only such classes of emoluments as, under the law for the time being in force relating to pensions, are taken into account in computing pensions.

(4) The provisions of this section shall be subject to the provisions of any Instructions that may be issued by Her Majesty under Her Sign Manual and Signet or through a Secretary of State, and any power conferred by this section or delegated under this section shall be exercised in accordance with the provisions of such Instructions.

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(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 subsection (3) of this section and accordingly the power shall be exercisable by that officer, subject to the provisions of subsection (4) of this section, unless and until 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 effect of those provisions in relation to the power to dismiss and the exercise of other disciplinary powers over non-commissioned officers was that the Governor retained the power of dismissal but the delegation of this power to the Commissioner of Police which had been effected in 1943 was revived and the Governor's power of other disciplinary control deemed to have been delegated to the Commissioner and by virtue of art. 87 (5) (b) to be exercised in accordance with the provisions of regs. 54 and 56 of the Regulations.

The 1956 Order introduced provisions relating to the establishment of a Police Service Commission which was advisory and not executive.

In 1957 the Police Ordinance, 1957 (No. 39), was enacted. Section 41 (2) dealt with a member of the Force *ipso facto* ceasing to be a member if he is convicted of any offence specified in sub-s. (1) of that section. Section 49 (2) provides that if a member of the Force has been convicted of any criminal offence, in addition to any penalty awarded by the court, he shall be liable to dismissal from the Force or a reduction in rank. There is no provision made in the 1957 Ordinance specifically empowering the Governor or the Commissioner or anyone else to dismiss or to exercise any other disciplinary control over non-commissioned officers. This no doubt was in recognition of the fact that the British Guiana (Constitution) Order in Council as amended by s. 25 of the 1956 Order provided for the power to dismiss and the power to exercise disciplinary control over public officers including non-commissioned officers. Section 107 (2) of the 1957 Ordinance provided for the continuation in force of the Regulations made under the Police Ordinance, Cap. 77, in-sofar as they do not conflict with the provisions of the 1957 Ordinance. Under s 105 of the 1957 Ordinance, the Commissioner

is empowered to make Regulations, with the approval of the Governor, *inter alia* in respect of offences against discipline, disciplinary procedure, and penalties.

Section 106 of the 1957 Ordinance introduces a new provision—that all members of the Force shall, in respect of any matter not provided for in the Ordinance or any regulations made thereunder be subject to the provisions of Colonial Regulations and General Orders as are from time to time in force. Public Officers are under Colonial Regulations dismissible at pleasure. The provisions of the Police Ordinance, 1957 (No. 39) did not affect the Governor's power of dismissal or of the exercise of other disciplinary powers of control over non-commissioned officers or of the delegation of those powers or the mode of the exercise of those powers, for the provisions of s. 87 (5) of the constitution of 1953 as inserted in 1956 preserved the power and the conditions for its exercise. Apparently an instrument of delegation was made on the 8th January, 1958, in pursuance of sub-s. (3) of s. 87 of the 1953 Order as inserted in 1956 (see Regulations 23 of 1960; par. 4). In 1960 the Delegation of Powers (Police Officers) Regulations 1960 (No. 23) were made in pursuance of s. 87 (3) of the 1953 order as inserted by s. 25 of the 1956 Order. Under these Regulations power was delegated (*inter alia*) to dismiss or reduce in rank any subordinate officer with a right of appeal from the decision of the Commissioner to the Governor. Power was also delegated to the Commissioner to dismiss (*inter alia*) any subordinate officer found guilty of a breach of discipline with a right of appeal from the decision of the Commissioner to the Governor. A further power was delegated to the Commissioner to order a disciplinary board to be convened to inquire into any charge or complaint or any breach of regulations made under the Police Ordinance, 1957, or any ordinance amending the same, or any other matter appertaining to the Police Force.

The effect of the delegations referred to is that by virtue of art. 87 (5) (B) of the 1953 Order as inserted by the 1956 Order, reg. 55 of the Police Regulations Cap. 77 ceased to be in operation. In 1961 the Constitution of 1961 was brought into operation. The Police Service Commission remained advisory and the conditions under which it will become executive have not yet been fulfilled. It is common ground that regs. 23 of 1960 were not saved by either s. 17 or s. 20 of the British Guiana (Constitution) Order in Council, 1961. By reason of art. 103 (2) of the 1961 Constitution (set out *supra*) power to dismiss and to exercise disciplinary control over non-commissioned officers was vested in the Commissioner of Police. By art. 103 (3) a right of appeal from the decision of the Commissioner in respect of the exercise of the powers given him under art. 103 (2) lies to the Governor. By art. 103 (5) the power in the Commissioner to dismiss or to exercise disciplinary control over non-commissioned officers must be exercised in accordance with such provision as may be made in that behalf by any law of the Legislature and, in particular offences against Police Force discipline and the punishment

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that may be imposed for such offence, shall be such as may be prescribed by or under such law.

There is no law of the legislature which delimits the exercise of the power of dismissal of non-commissioned officers by the Commissioner and until such a law is enacted the provisions of s. 106 of the Police Ordinance, 1957, would operate to render the exercise of the power of dismissal subject to Colonial Regulations and General Orders.

The appellant's contention that the Commissioner of Police was not empowered to dismiss a non-commissioned officer fails as does his contention that he was not empowered to dismiss such an officer for the breaches of discipline charged.

Lastly, it was submitted that the omission to supply the appellant with a copy of the notes of evidence taken by the court of enquiry and a copy of the considered opinion of the court of enquiry and to inform the appellant of his right to be heard thereon by the Commissioner was a breach of the rules of natural justice. The appellant appears to have been present through the enquiry and heard the testimony given before the court of enquiry. The testimony was directed to the charges laid against the appellant who had previously been informed that his dismissal might follow upon proof of the charges. It was common ground that it was not the practice for the considered opinion of the court to be made available to a member of the Force against whom a charge is investigated. Much reliance was placed by counsel for the appellant upon the opinion of the Privy Council in *Kanda v. Government of Malaya*, [1962] 2 W.L.R. 1155, where a police inspector in the Royal Federation of Malaya Police was dismissed following upon a departmental inquiry at which findings adverse to the inspector contained in the report of a board of inquiry into the failure of a certain criminal prosecution had been acted upon when the report was not made available to the inspector. In that case the inspector had been unaware of the evidence which had been given and the statements made affecting him upon which the department tribunal had acted in making its recommendation upon which the Commissioner of Police had acted in dismissing him. In the instant ease the appellant was aware of the testimony upon which the Commissioner acted in dismissing him. The opinion of the Court of Inquiry was in no higher category than that of a jury whose deliberations on their findings of fact are secret, the judge being left to pronounce whether the facts as found by the jury amount to an offence and whose sentence is based upon the testimony given in the case. In my view there was no infringement of the rules of natural justice in not providing the appellant with a copy of the notes of evidence or of the considered opinion of the Court of Inquiry.

I am also of the view that there was no duty upon the Commissioner to hear the appellant an opportunity having already been

afforded the appellant of laying his defence before the Court of Inquiry with full knowledge of the charges laid, the evidence given in support thereof and the fact that he was liable to dismissal if any of the charges were proved. The appellant exercised his right of appeal to the Governor who allowed his appeal relating to one of the charges and rejected his appeal relating to the other charges. In this matter the Commissioner did not hear evidence or receive representations from one side behind the back of the other and it cannot fairly be said that there was a failure to afford the appellant a reasonable opportunity of being heard in answer to the charges preferred against him which resulted in his dismissal.

I agree that this appeal should be dismissed with costs.

Appeal dismissed

[In the Full Court, on appeal from the magistrate's court for the Corentyne Judicial District (Luckhoo, C.J., and Khan, J.) December 9, 31, 1964, January 22, 1965]

Workmen's compensation—Deceased employed by respondent to fell coconut trees with respondent's bulldozer at a fixed rate per tree—Deceased entitled to select his method and hours of work—Arrangements to give effect to method of work so selected however made by respondent—Whether deceased an independent contractor—Workmen's Compensation Ordinance, Cap. 111.

Workmen's compensation—Appeal on questions of fact—Competence of appellate court to entertain such an appeal—Workmen's Compensation Ordinance, Cap. 111.

Workmen's compensation—Answer—Question whether claim made within prescribed period not raised in answer—Competence of magistrate to decide that point—Workmen's Compensation Ordinance, Cap. 111, s. 15(1) (b).

The respondent, who owned a bulldozer, employed D. to operate it for the purpose of bulldozing certain coconut trees. D. was to be paid at a certain rate per tree bulldozed and was free to select his method and hours of work. The method selected by him was to pull the trees down by the use of a wire rope attached to the bulldozer at one end and to the tree at the other. This method having been selected the respondent employed another person to tie the rope to the trees. In the course of these operations D was killed by a falling tree. In a claim for workmen's compensation by his wife, the appellant, the respondent contended that D. was an independent contractor. The magistrate decided this issue in favour of the respondent and further held that the appellant's claim had not been made within six months after the date of death as required by s. 15(1) (d) of the Workmen's Compensation Ordinance, Cap. 111, but this point had not been raised in the respondent's answer. On appeal,

Held: (i) the magistrate was not entitled to find that the question whether there was due compliance with s. 15 was in issue and to determine it against the appellant;

(ii) in a workmen's compensation matter it is competent for an appellate court to entertain an appeal on the ground that the decision of the magistrate was one which the magistrate viewing the evidence reasonably could not properly make;

(iii) on the question whether the deceased was an independent contractor neither the power of control nor the payment, for piece work was itself conclusive. On the evidence adduced the decision of the magistrate on this point was one which the magistrate viewing the evidence reasonably could not properly make.

Appeal allowed.

H. Hanoman for the appellant.

M. Poonai for the respondent.

Reasons for Decision: The deceased Harold Drepaul died on the 9th July, 1962, at No. 55 Village, Corentyne, Berbice, as a result of personal injuries sustained by him by accident while assisting in the bulldozing of coconut trees. His widow Lochnie Drepaul brought a claim for compensation under the Workmen's Compensation Ordinance, Cap. 111, alleging that her husband sustained the injuries caus-

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ing his death by accident arising out of and in the course of his employment by Jaikarran Poonai.

In the answer filed by Poonai to the claim the only grounds upon which Poonai denied liability were:

- (a) that the injuries to the deceased were not caused by accident arising out of and in the course of his employment;
- (b) that the deceased Harold Sooklall Drepaul was not employed by the respondent;
- (c) that even if the deceased was in fact employed by the respondent, which is denied, the injuries received by the deceased resulting in his death were the result of an accident attributable to the deceased's own serious and wilful misconduct.

No issue was raised by the answer as to whether notice of the claim for compensation was given in accordance with the provisions of s. 15 of the Workmen's Compensation Ordinance. In the application filed by the deceased's widow it was stated that the employer (Poonai) was present at the time of the accident on the 9th July, 1962. The deceased had died on the spot immediately or almost immediately after the coconut tree had fallen upon him. The date of claim for compensation was stated in the application to be the 10th July, 1962.

No amendment of the answer was sought nor made to include as a question to be determined whether due compliance was made with respect to s. 15 of the Ordinance and we considered that the magistrate was not entitled to find that such a matter was in issue and to determine it against the applicant Lochnie Drepaul.

The magistrate found that two issues emerged for determination, one being whether the claim for compensation had been made within six months after the date of death of the deceased as required by s. 15(1) (d) of the Workmen's Compensation Ordinance, Cap. 111 and the other being whether the deceased was a workman or an independent contractor.

The deceased's widow had during the course of her evidence stated that two weeks after her husband's death Jaikarran Poonai came to her, gave her the sum of \$25 and told her that it was five days' money for which the deceased had worked; that he informed her that a form would come to her and that when it came she must inform him and he would fill it up and she would get workmen's compensation. She also testified that she never received any form. Poonai while admitting that he did give Lochnie Drepaul \$25 two weeks after the deceased's death as money due to the deceased for work he had done in pulling down 25 coconut trees denied that he had told her that a form would come to her or that he said that he would fill a form up and Lochnie Drepaul would get workmen's compensation. Poonai further said that Lochnie Drepaul did not at any

time in any manner ask him for the payment of workmen's compensation. He admitted that he had sent a letter to the insurance company with which his bulldozer was insured notifying the company of the death of the deceased. He denied that he had done so in the hope that it would cover a claim for compensation.

The evidence on behalf of the applicant Drepaul was to the effect that the deceased was employed along with one Sugrim and one Sadhoo by Poonai to fell coconut trees, Sugrim to get \$1.50 per tree felled and the deceased \$1.00 per tree. Poonai's bulldozer was used in the operation. They had worked in this operation for five days when the accident occurred. A tree while being felled came down upon the deceased who died within a short time after being struck down. Poonai was present and saw the accident occur. The deceased's widow testified that prior to this operation her husband had been employed as a "grease boy" on Poonai's bulldozer and would work on the bulldozer whenever the state of the weather permitted.

Poonai in his evidence stated that about four days before the 9th July, 1962, he had obtained a contract from the local authority of No. 52-56 Village District to clear a street of coconut trees for which he was to be paid the sum of \$5.00 per tree. He sent for the deceased "who is one of my bulldozer operators on the 7th July, 1962" and for "my other operator Sugrim." According to Poonai an agreement was made between himself, the deceased and Sugrim to bulldoze the trees with his (Poonai's) bulldozer, Sugrim to get \$1.50 per tree as the senior operator and the deceased \$1.00 per tree. Poonai further stated that both Sugrim and the deceased were to work on their own and that he (Poonai) did not supervise them nor did he tell them what hours they were to work. Poonai said that the two men started work on the job on 8th July, 1962, and were both doing job work exercising their own skill and judgment. On the 9th July, 1962, the fatal accident occurred.

Poonai had previously given evidence on the 5th September, 1962, before the coroner at the inquest into the death of the deceased. When cross-examined Poonai swore that what he had said in his evidence before the coroner was true and correct. In his evidence before the coroner Poonai had sworn that he employed Sugrim and the deceased to operate the bulldozer and one Ramdharry to tie the rope to one end of the coconut trees and the other end to the bulldozer, that they worked on Saturday, 7th July, 1962, and on Monday they turned out to work as usual. Sugrim was operating the tractor (bulldozer) and Ramdharry was tying the trees. He and the deceased were present watching the operation when a tree which was being pulled down fell upon and killed the deceased. Poonai also swore before the coroner that Sugrim used to work from 9 a.m. to noon and the deceased from noon to 4 p.m. and that at the time of his death the deceased was going to take over from Sugrim.

Sugrim testified to the effect that the arrangement made was that he and the deceased were to work the bulldozer, one to drive it

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in the morning and the other in the afternoon while Sadhoo was to tie up the trees. Sugrim said his idea was to push the trees down with the bulldozer blade while the deceased's idea was to tie them with a wire rope and pull them down and that this was the easier method. According to Sugrim they used their sense and method to do the work and the defendant never told them how to do the work. They had no special time to start or to end as they were doing job work.

The learned magistrate found that the deceased was an independent contractor. His reasons for so doing are to be found in the following paragraphs of his memorandum of reasons for decision —

"The court found that the defendant-respondent is the owner of a bulldozer and carried on the business of taking jobs to bulldoze and clearing. Sometime in 1962, the respondent obtained from the No. 52 - 56 Village District a contract to clear a street of coconut trees at the rate of \$5.00 per tree, as described by the witness—Peter Jagnandan-dan. The respondent himself did not take part in the bulldozing operations nor directed the method of operation. The respondent sub-contracted with the applicant's husband Harold Drepaul paying at the rate of \$1.00 per tree and also sub-contracted with another Sugrim Ramdhan paying him at the rate of \$1.50 per tree. Drepaul was to work in the afternoon whilst Sugrim was to work in the morning. On the 9th July, 1964, about midday Harold Drepaul had tied a wire rope to a coconut tree whilst Sugrim drove the bulldozer causing one tree to hit another and injuring Drepaul who died on the 9th July, 1962.

There is proper proof by the respondent as to what the terms of the contract were, and ample evidence is given by the respondent and his witnesses as to such terms and as to the manner of doing the work, that is that the two bulldozer operators select their own method of clearing up the trees of which the respondent had no control. Further, there is no proof that he was even present there. It is significant to note that the applicant said in cross-examination, "I do not know the terms under which my husband was working with the respondent. If the respondent said that my husband worked under a contract to do piece work I would have nothing to say because I do not know."

One of the grounds of appeal urged on behalf of the applicant Lochnie Drepaul was that the decision of the magistrate was one which the magistrate viewing the evidence reasonably could not properly make. It was submitted on behalf of Poonai that it had been laid down by the Full Court in earlier cases that in matters of this kind the Full Court would not interfere unless there was no evidence at all to support the decision of the magistrate. Counsel for the applicant (appellant in the appeal before us) however observed that in the appeal of *Smith v. Hancock*, Civil Appeal No. 32 of 1963, which was heard at a recent sitting of the British Caribbean Court of Appeal, this view was dissented from by the judges of that court

and that the Full Court in previous appeals appeared to have overlooked the fact that in England it had been held that the Court of Appeal would only interfere where there was no evidence at all to support the arbitrator's finding because there was a right of appeal solely on a point of law. One of the two grounds of appeal specified in s. 40 of the Workmen's Compensation Ordinance, Cap. 111, is that the decision is one which the magistrate viewing the evidence reasonably could not properly make; the other is that a question of law is involved. We considered that following upon the provisions of s. 40 of the Ordinance and the decision of the British Caribbean Court of Appeal in *Smith v. Hancock* it was competent for us, upon an examination of the evidence to determine whether the appeal could be sustained on the abovementioned ground.

Counsel for Poonai argued that the evidence was to the effect that Poonai had no control over the manner in which Sugrim and the deceased performed their work and that the work to be done was job work and not piece work. Neither the power of control nor the payment for piece work is in itself conclusive. One has to have regard to the real meaning of the agreement. In the present case the bulldozer was owned by Poonai. The deceased and indeed Sugrim had previously been employed by Poonai on the bulldozer. The deceased's widow stated that her husband started as a grease boy on the bulldozer. Poonai in evidence swore that after obtaining the contract from the local authority he sent for the deceased "who is one of my bulldozer operators on the 7th July, 1962" and for "my other operator Sugrim." He described Sugrim as his senior bull-dozer operator. Sugrim received a higher rate \$1.50 per tree while the deceased received \$1.00 per tree although he worked the bull-dozer independently of Sugrim. The difference in the amount of remuneration appears to be due to the fact that Sugrim was the senior bulldozer operator. It is true that Poonai swore that he did not supervise Sugrim, and the deceased in their work and that he did not tell them what hours to work but Poonai in swearing that what he told the coroner was true adopted the evidence he gave on oath before the coroner. Before the coroner he swore that he employed one Ramdharry to tie one end of the rope to the trees to be felled and the other to the bulldozer. Apart from doing the actual driving of the bulldozer and tying of the rope Poonai had made all of the arrangements for the operation. Whether or not the defendant had suggested the *modus operandi* it is the case that Poonai decided what the *modus operandi* should be and employed the necessary labour towards that end.

We were of the view that on the evidence adduced the decision of the magistrate is one which the magistrate viewing the evidence reasonably could not properly make. We therefore allowed the appeal and remitted the matter to the magistrate with a direction to enter judgment for the applicant (appellant) and to proceed to assess the amount of compensation to be awarded. Costs of this appeal in the sum of \$34.25 were awarded to the appellant.

Appeal allowed.

LOPES v. E. W. ADAMS AND ABRAHAM VANIER

[Supreme Court (Crane, J.) January 4, 5, February 11, April 21, 22, 23, May 7, 20, June 9, 1965]

Legal practitioner—Action for damages for negligence and breach of contract against barrister and solicitor—Barrister acting qua. barrister with solicitor on record—No special contract between client and barrister—Fees and disbursements paid to barrister—Whether barrister practising as a solicitor—Whether barrister suable in negligence—Legal Practitioners Ordinance, Cap. 30, ss. 25, 43 and 45.

The defendants A. and V. appeared as counsel and solicitor respectively for the plaintiff in an opposition action. The plaintiff lost the action and retained the services of the defendants to prosecute an appeal. Unfortunately the notice of appeal was not filed in time and four successive applications which were made for an extension of time within which to file the notice were for one reason or another unsuccessful, with costs being awarded against the plaintiff. In the result the plaintiff brought an action against the defendants for damages for negligence and breach of contract.

The subject matter of the opposition action exceeded \$500 in value. Section 43(2) of the Legal Practitioners Ordinance, Cap. 30, provides that in such a case "a barrister shall be instructed by a solicitor on the record." Section 45 provides that "a barrister shall not be entitled to practise as a solicitor in any matter in which a barrister is required by sub-s. 2 of s. 43 hereof to be instructed by a solicitor." Section 25 provides that "no special agreement otherwise valid in law between a barrister or solicitor and his client as to the amount or manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by a barrister or solicitor shall be good and valid in law, unless it is in writing". No agreement in writing had been made but it was established that the fees and disbursements were paid directly to A. and it was contended that this made him liable to be sued as if he was a solicitor.

Held: (i) the receipt by A. of disbursements was an act within a solicitor's sphere of duty to do and one for which A. was amenable to disciplinary proceedings, but it could not *de jure* constitute practising as a solicitor since in the circumstances of the case A. was prohibited from so practising by s.45;

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(ii) Counsel could not be sued if there was intervention in the cause By solicitor (as in this case), unless (which was not so here) he had acted dishonestly in the conduct of his client's case;

(iii) a barrister who makes a contract in writing for legal services (which he is permitted to do by s. 25 of Cap. 30) may sue for his fees and in turn be sued by the client for negligently performing the contract:

(iv) the evidence did not disclose any negligence on the part of B.

Judgment for the defendants.

M. G. Fitzpatrick for the plaintiff

J. O. F. Haynes, Q.C., B. O. Adams, Q.C., D. Jagan for the 1st-named defendant

C. B. Ramsaroop, R. Hanoman for the 2nd-named defendant.

CRANE, J.: The background to this suit is action 620/1958 Demerara. It was an opposition action in which the Chief Justice overruled objections by the plaintiff to the passing of transport of certain property on the East Coast of Demerara, and dismissed it.

In that action these two defendants were the plaintiff's counsel and solicitor respectively, and in this case, it is sought to make them liable for negligence in the conduct of appeal proceedings which followed the dismissal of that action.

The case for the plaintiff as set out in his statement of claim, after alluding to the fate of action No. 620 of 1958, alleges that within one week after the dismissal of the action he engaged the first-named defendant Mr. Adams to proceed with an appeal and advanced him the sum of \$80 to do so. This is the first of two contracts which are alleged therein, and it is important to observe in view of a plea of limitations raised by the defendants with which I will later deal, that it is alleged to have been made within a week of the dismissal of the action.

Paragraph 4 of the statement of claim avers that Adams omitted to file notice of appeal within time, which by rules of court must be within 6 weeks from the date of judgment. This is the first contract alleged. The second is that after failing to file notice of appeal within time, he undertook to apply for an extension of time within which to do so, and this he did by filing an application on October 4, 1960, before the Supreme Court. The application was signed by Mr. Vanier, the second-named defendant, but withdrawn on October 30, 1960.

Mr. Adams advised another application; on this occasion to the Federal Supreme Court. It was made on February 22, 1961, with Mr. Vanier signing the application. The allegation is that it was struck out with \$150 costs for failure of Mr. Adams to appear.

A third application was made for leave to appeal out of time. This was filed on April 26, 1961, but withdrawn on May 15, 1961,

with \$112.84 costs against the plaintiff, Mr. Wills, barrister-at-law, holding the papers of Mr. Adams who did not appear.

Yet a fourth application was filed on November 23, 1961; this was dismissed on December 7, 1961, when the first defendant appeared before the Federal Supreme Court to argue it. Costs were awarded in the sum of \$184.24 against the plaintiff.

It is further alleged in the statement of claim that during the course of the four applications plaintiff paid Adams sums of money amounting to \$355 to pursue the appeal.

Concerning the defendant Vanier it is alleged that, although his name appears on the record and he "agreed to act", the plaintiff never in fact at any time dealt with him, but at all times with Adams. He is referred to as a "dummy" solicitor in the sense that although engaged by plaintiff he performed no act whatever in relation to the proceedings save being signatory to them. But I must observe in passing that this is not entirely fair to him; it is difficult to prove, especially in view of the interest he so plainly exhibited in the matter. Other than the allegation that Adams had negligently omitted to file notice of appeal in time, there is no such direct allegation on the pleadings in relation to him with respect to the applications for an extension of time in which to file the appeal, though it is alleged that he undertook to apply for an extension of time to appeal. In fact, allegations in that regard are made only against Vanier who is also accused of failing to file the notice of appeal in time, of failing to ensure that the first application for an extension of time was brought before the proper court, and failing so to inform counsel. In short, the complaint against Vanier is that he failed to prepare properly, and efficiently the four applications for an extension of time to appeal.

Action No. 620/1958 Demerara, abovementioned, was one in which Mr. Adams enjoyed the exclusive right of audience in court. the value of the land in dispute exceeding the sum of \$500. It was therefore necessary that he should practice as a barrister in the strict sense, that is to say, in the English sense, and that he should be instructed by a solicitor; this is in fact what the law requires of him—see s. 42(2) Legal Practitioners Ordinance, Cap. 30.

At the commencement of this action it was submitted *inter alia* that the court ought not to entertain it for the reason that Mr. Adams being a barrister instructed by solicitor on the record, no cause of action lies in negligence against him. It was contended that he was not in this respect a barrister acting as solicitor, but a barrister practising in British Guiana according to the practices and usages of the English Bar; so that, like his English counterpart, he is clothed with immunity from suit and there can be no action for negligence against him. The matter is not so simple however.

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Barristers and solicitors practising at the British Guiana Bar are known as legal practitioners. They are regulated and controlled by the Legal Practitioners Ordinance, Cap. 30, (referred to hereafter as the Ordinance). In our sphere, just as in many colonial and former colonial territories, a barrister is allowed hybrid practice; he is permitted to do work, unlike in England, both of a contentious and non-contentious nature without the intervention of a solicitor.

Under s. 42 of Cap. 30, both barrister and solicitor have the right to act alone and have audience in both inferior and Supreme Courts of the Colony in certain specified causes and matters, although counsel, if he chooses, need not practice in those very matters as solicitor, he may very well opt to be instructed by solicitor instead and perform as a barrister *stricto sensu*. Section 46 permits them both to transact business of a non-contentious nature.

It is evident to me that from s. 42 (2) of the Ordinance it was the intention of the legislature, while making it possible for a barrister to do solicitor's work, if he so desires, to give the barrister the opportunity of preserving his status, privileges, and immunities of a barrister by being instructed by solicitor in the traditional way in those very causes or matters in which it would be lawful for him to act alone as a solicitor could. He is given thereby the option of practising as a solicitor or a barrister in keeping with the traditions of the English Bar to which he was called before being admitted to practise locally. To my mind this is very clear from the Ordinance.

In the *Executors of P. N. Browne v M. P. Camacho, Jnr.*, (1931-37) L.R.B.G. 317, 318, STEWARD, J., interpreted s. 19(2) of the Ordinance as contemplating a fusion of the two branches of the profession, but this is misleading if not explained; it is obviously too wide an assertion. The fact of the matter is, I think, that there is really only a partial fusion which comes about when a barrister opts not to practise as a member of the higher rank of the profession to which he belongs and practises as a solicitor. But this is only fusion in practise, not fusion in status that comes about. The situation is analogous to the so-called fusion of law and equity which had been shown to be only fusion in administration and in no sense fusion in systems. Otherwise the two branches of the profession locally are just as wide apart as they are in England. To adapt the time honoured metaphor: they are functionaries in the same streams of jurisprudence, but they do not intermingle their waters.

Let us see what are these traditions and usages of the English Bar. An accurate statement of them is to be found in the work "Barrister-at-law" by MARCHANT. The legal position of *counsel and solicitor* in England is stated therein as follows:

"One peculiarity incident to the position of counsel in England is the intervention of a solicitor between counsel and client. In all other professions but that of a barrister practitioners may accept work directly from those that need their services: but the

usage and etiquette of the profession of a barrister require in all but a few exceptional cases that counsel should not undertake work offered to him by any one but a solicitor. The rule prevails in all civil contentious matters and in all criminal business, with the one exception that, at the Assizes, the Central Criminal Court, and Quarter Sessions, a prisoner may instruct counsel directly 'from the dock'.

The rule also applies to non-contentious business with some exceptions the exact extent of which is not clearly defined---.The usage requiring that counsel should be instructed by a solicitor is not enforceable by law, but, in so far as it relates to litigation, it has been approved by the bench as conducing to *the benefit of suitors and to the satisfactory administration of justice*. The usage is in accordance with the respective rights of barristers and solicitors. The retainer of a solicitor to conduct an action constitutes him the agent of the client throughout its course, but a barrister, when acting in his professional capacity, is not the agent of the client at all, and only acts for the client at some particular stages, when his assistance is secured by the delivery of instructions to advise or draw pleadings, or to appear as an advocate. No one but a properly admitted solicitor can 'sue out any writ or process or commence, carry on, solicit, or defend any action, suit, or other proceedings in any court in England, or act as a solicitor in any cause, matter, or suit, civil or criminal.' A barrister, therefore, cannot commence an action for a client or carry on or defend one. No one but a litigant in person or a solicitor can do this. It follows that, when an action is to be instituted, a litigant who does not wish to conduct it himself must retain a solicitor to commence and conduct it for him, or, if the litigant is a defendant, to defend it for him. The solicitor when so retained has the conduct of the whole proceedings, and at the stages at which the assistance of counsel is advisable or indispensable, has authority, as the client's agent, to instruct counsel and to pay counsel's fees."

The legal position between *counsel and client* may be stated too:

"There are some exceptional features incidents to the relation of counsel and client, *viz.*, both counsel and client are mutually incapable of entering into any contract of hiring in reference to the services of counsel; counsel cannot sue the client for his fees; and the client cannot sue counsel for negligence. The general rule of law is that a person who is employed for reward to do work for another has a right of action to recover his reward for such labour, and to this rule there are but two exceptions, *viz.*, members of a college of physicians when prohibited by a bye-law of their college from suing, and barristers. The employment of a barrister is a purely honorary one in the sense that it confers on him no legal right to remuneration for his services; hence the remuneration of a barrister is called

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honorarium as opposed to *merces*. No binding contract can be entered into between counsel and client in respect of the services of counsel, and it follows that counsel on the one hand, cannot sue his client for fees, and the client, on the other hand, and has no legal remedy against his counsel for non-attendance or negligence. The fees of a barrister ought to be paid beforehand, and are not recoverable from the client any more than from the solicitor either directly or indirectly by any legal process. A barrister, provided he acts honestly in the discharge of his duties, is not liable to an action by his client for negligence, want of skill, discretion or diligence; no action lies against counsel for any act done honestly in the conduct of an action; a barrister by accepting a brief undertakes a duty, but does not enter into any contract express or implied; the principle which prevents a barrister from suing the client, *i.e.*, the mutual incapacity of barrister and client to contract with reference to his fees also prevents the client from suing the barrister."

It is clear that a barrister at the local Bar is not bound to relinquish practising strictly as a barrister; but if he so practises, he must observe those standards which his English counterpart would, one of which is the intervention of solicitor between himself and client in those instances which require it. If he does so, he will be immune from action by his client for negligence, want of skill, discretion or diligence, the only requirement from him being that he must act in an honest manner in discharge of his duties. It is improper for him to receive fees directly from the client when a solicitor is interposed; he must look to his solicitor for his honorarium, not to the client. If he receives fees directly from his client he runs the risk of being disbarred. (See ANNUAL STATEMENT OF THE GENERAL COUNCIL OF THE BAR, 1949, p. 18). Strict practice requires that he should not carry on any other profession or business or be an active partner in or a salaried official or servant in connection with any such profession or business. Counsel cannot enter into partnership with each other, and dealings between members of the Bar and solicitors, as regards sharing costs or profits in any shape, are incompatible with the discipline of the Bar.

Such are the standards to which it was necessary for Mr. Adams to have conformed. It is argued that he did not so conform since it is shown that he received sums totalling \$275 directly from the plaintiff inclusive of disbursements.

On oath he denies that he received one week after the decision the sum of \$80 from the plaintiff to proceed with an appeal in the matter, though he admits speaking to the plaintiff shortly after the judgment. He says he advised that his decision whether there should be an appeal should await his receipt of a copy of the judgment of the Chief Justice. There was however no decision in writing because one was not reduced into writing. He vehemently denies that he arranged with Lopes to file an appeal or that he received from him disbursements for filing notice of appeal, and as a matter

of fact, the next time he saw Lopes was early in October 1960 in chambers, where in the presence of Vanier and his clerk Mootoo, just as on the former occasion, a discussion took place. It was agreed then that there should be an appeal and that as the time for filing it had expired there should be made an application for an extension of time within which to do so. This was after he counsel had unsuccessfully tried to dissuade Lopes not to appeal, but to wait until 1964 when he would be in a position to apply for title by prescription. Accordingly, a charge of \$50 representing fees exclusive of disbursements for counsel and solicitor were charged and paid by the plaintiff. Counsel referring to Exhibits E1, E2, F, H and J, which are receipts issued to the plaintiff by counsel's clerk, denies that any of the sums they represent was paid in his presence, though he admits they were issued by his former clerk Mootoo. From the wording of these receipts, however, it is apparent that Mootoo received on counsel's behalf both fees and disbursements. A receipt by Mootoo as "clerk to E. W. Adams Esq." is of course a receipt by counsel, and for the purposes stated. There can be no argument to the contrary about this despite the statement of counsel that he was surprised and unaware of the manner in which Mootoo signed, even though he had expressly forbade him to do so. See *Lloyd v. Grace Smith & Co.*, [1912] A.C. 716. Counsel after admitting that he had no system of checking regularly receipts by his clerk, astonishingly states that he had not seen the counterfoils to the receipts in question until they were produced before the Full Court of Appeal; but I can hardly believe this. It was a rule of his Chambers, counsel says, that Mootoo should collect only fees not disbursements. Mootoo was a registered clerk to Mr. Vanier also—a common clerk to them both—and in the case where he received fees jointly on behalf of counsel and solicitor, a receipt ought to have been issued in counsel's name only, but never for disbursements.

I have no doubt that counsel cannot be heard to say that a receipt by Mootoo is not a receipt by him when Mootoo was his clerk and sign as his clerk; or that he did not receive all sums stated on the receipts which amount to \$275, but only \$160 as he says. It is obvious, without being unduly critical, particularly from his admission, that he has no system of checking and inspecting receipts by his clerk that his chambers are vitally in need of reorganisation. But can such receipt by him relegate him to the category of barrister practising as solicitor? The argument is that such receipt of monies directly from his client for costs and disbursements rendered him *ipso facto* a solicitor; that is to say, there were really two solicitors on the record instead of one. The answer to this is, I think, provided by s. 45 of the Ordinance which states that "a barrister shall not be entitled to practise as a solicitor in any matter in which a barrister is required by sub-s. (2) of s. 43 to be instructed by a solicitor. . . ."

I have already referred to s. 43 (1) (a) and (2), and stated that the value of the land in dispute exceeded \$500 which made it necessary that counsel should be instructed by a solicitor. Mr.

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Vanier is admitted to have been engaged by the plaintiff to be solicitor on the record, therefore Mr. Adams was not entitled to practise as solicitor. He had no legal right to do so. His title of right to practise springs from the Ordinance. Section 45 therefore constitutes a legal incapacity in the way of his so doing, and it seems to me that no act of his, not even breaking the established ethics of his profession can entitle him *de jure* to practise as a solicitor. He cannot so practise, not with a solicitor on the record, and the improper receipt of money from the client cannot make him a solicitor. There cannot be two solicitors when s. 43 (2) requires counsel to be instructed by solicitor. What has clearly happened is that counsel has not been observant of the rules of etiquette of his profession which I have set out above. He has received from his client the sum of \$275 which included disbursements which he, ought not to have done. That is quite clear; but in my view this cannot make him a solicitor even though it is an act within a solicitor's sphere of duty to do, and one for which he is amenable to disciplinary proceedings. I must therefore find that Adams was not legally practising as a solicitor when he received the \$275 from plaintiff in connection with the appeal, but was at all times counsel instructed by solicitor in a matter in which the law requires the intervention of a solicitor. It would indeed be a strange state of affairs if counsel could merely by the receipt of money from the client when there is a solicitor on the record thwart the law, and do the very thing which the law says he has no right to do. I must interpret against evasion of the law.

But the crucial question is: can counsel be sued for negligence? So far in this colony there has been no reported case of an action for negligence brought against counsel. This case, I believe is the first of its kind locally. In the *Executors of the estate of P. N. Brown v. M. P. Camacho Jnr:* (*supra*), STEWARD, J., said *obiter*, after finding following *Sirikissun v. Fernandes*, 1923 L.R.B.G. 1, that a barrister-at-law could lawfully recover his fees from a client:

"In passing, I should mention that it seems to me that a barrister can be sued for negligence as there is privity of contract between a barrister and his client, but I am not called upon to decide this point."

Unhappily however, I am fated to decide the point which now arises in neat form after nearly 30 years from the above *dictum*. I say unhappily, because our *esprit de corps* has traditionally been such that whenever a legal practitioner is in trouble or on trial, every member of his profession, and no less the courts, view the matter with gravity and concern. When this happens, I believe it is true to say that not only the practitioner concerned, but the whole legal profession is on trial. It seems to me that the learned judge was right, and was clearly contemplating the case where a barrister makes a contract in writing for legal services, which he is permitted to do (see s. 25 of the Ordinance); there will then be privity of contract between him and his client; there will then exist that mutuality which will

permit the barrister to sue for fees and the client to sue the barrister for negligently performing the contract; but the client will have to show that the barrister exhibited such a lack of skill and care as to amount to a breach of contract. See *Groom v. Crocker*, [1938] 2 All E.R. 394, at p. 401, per GREEN, M.R.; also *Clark v. Kerby-Smith*, [1964] 2 All. E.R. 835, 837.

There is also the Indian case of *Buddhu v. Diwan* (1915), I.L.R. 37 All. 267, to be considered, (reported in note form in the ENGLISH & EMPIRE DIGEST, Replacement Volume 3, p. 377). The note instances a case where a barrister was sued; it appears, in circumstances remarkably similar to the present case. The note reads:

"*Semble* if a barrister receives instructions to appeal or make an application and the client loses his right to appeal or make the application as the result of the negligence of the barrister to appeal or apply within time; such barrister will be liable to his client in a court of law."

The kind of case from which the appeal was brought and the silence of the note as to whether there was intervention by solicitor render the note of little assistance. It does seem, however, to have been a case where the barrister acted alone in circumstances similar to s. 42 of our Ordinance which permits mutuality between counsel and client.

It has been already shown that counsel cannot be sued if there is intervention by solicitor in the cause, unless he has acted dishonestly in the conduct of his client's case. Can it be so said of him in this case? There has been no allegation of dishonesty or fraud either on the pleadings or in the evidence, or during the conduct of this case against either practitioner, and I am happy to say that I can find no evidence of such. It must thus follow that Mr. Adams cannot be sued in negligence by the plaintiff when solicitor Vanier's name is on the record; but is Vanier liable, he being a solicitor and not in enjoyment of counsel's immunity from suit? This will involve a consideration of the allegations of negligence against him.

Though the statement of claim avers that the plaintiff at all times dealt with counsel and made the first contract that notice of appeal should be filed by him, it is said that solicitor failed to ensure that the notice of appeal was filed in time. This means that he neglected to file it within 6 weeks from August 19, 1960, the date of the pronouncement of the decision. Whether this is so will depend on whether there was indeed a contract as the plaintiff alleges between him and the first defendant to file a notice of appeal. As has been stated counsel has denied this on oath. Vanier too has denied it in his pleadings which, notwithstanding his absence from the witness-stand, must be considered. I accept the evidence of both practitioners that there was no contract as alleged for them to file a notice of appeal on behalf of the plaintiff in August 1960; but apart from his own statement that there was one, plaintiff has been

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unable to satisfy me of any other fact of which there is proof relative to this contract. He has failed to produce a receipt for the \$80 he alleges he gave to Adams to "proceed" with the appeal; although he insists that he was given none. I consider it a curious thing that he has been able to produce receipts for every other payment to the plaintiff than for the \$80 on this alleged contract between him and counsel that a notice of appeal should be filed. In each of his affidavits in support of his applications to the Federal Supreme Court for leave to appeal out of time, plaintiff has categorically stated that his reason for not filing his appeal in time was due to financial embarrassment. I must enquire how this could really be so when his contention is that he paid counsel the sum of \$80 to enable him to proceed with the appeal. He has admitted that the statements of embarrassment in the affidavits were false, and that he knew they were, but says that he so swore because Mr. Adams told him to do so, and that it would be necessary to so swear if he wanted the application to go through successfully. This, of course, can never be an excuse for attempting to deceive the court and flagrantly violating the sanctity of an oath. Moreover, in his affidavit in support of his application for disciplinary proceedings (Ex. E3), he swore that he paid counsel \$275, as "the full amount he (counsel) charged me." He, however, did not mention therein anything of the \$80 which he insists he paid counsel, although he declared it was a mistake if he did say that \$275 was "the full amount" How can I in the face of all this accept that there has indeed been established a contract, between the parties that the legal practitioners should have given notice of appeal against the judgement in action 620/1958 Demerara? That would, I think, be a morally perverse finding to make. See what plaintiff says:

"At the time I swore to the third application I was much disturbed in mind. I found that Mr. Adams was lying. I wanted the case to go on to win; that is why I swore I was financially embarrassed in the affidavits."

He claimed that counsel drafted the affidavits in support that he did see the averments of financial embarrassment, and in fact drew the attention of counsel to their falsity, but counsel insisted they should so remain. This is truly alarming; yet, I cannot bring myself to believe that counsel did so instruct; it would certainly be unbecoming of him as a member of his honourable profession if he did so. In any event, plaintiff knew it was a wrong thing to so swear. He himself said his desire was to win the case; and it would appear at all costs too, even by violating the sanctity of an oath.

I must therefore find against the allegation in the statement of claim that there was a contract with counsel to appeal from the judgment of the learned Chief Justice. This being so, there could be no notice of appeal given when from the facts I find there was

no agreement to give one; hence the defendant Vanier cannot be held liable on the first application.

The second allegation of negligence against the solicitor is that he "failed to ensue that the first application for an extension of time was brought before the proper court and failed, to so inform and instruct counsel"

Much unlike counsel, a solicitor can be made liable in negligence since he holds himself out to his clients as possessing adequate skill, knowledge, and learning for the purpose of properly conducting all business that he undertakes, whether contentious or non-contentious. But a solicitor may escape liability on the ground that he acted on the advice of counsel when the facts would otherwise establish a case of negligence. Counsel must be, of course, competent; this must be established by solicitor who must show that he laid the facts before him and that he carried out counsel's advice. True it is that Vanier did not testify in his defence. He had originally entered appearance under protest, and was content to rest his case on the submissions of his counsel that the statement of claim does not disclose a cause of action against him and should be dismissed. Counsel, however, testified and stated with respect to the first application for leave to appeal out of time, that it was he, counsel, who advised its being brought in the Supreme Court, though he did not draw up the affidavits.

Counsel's advice is, however, no protection to the solicitor, where, in the circumstances of the case, the solicitor ought to have the knowledge himself, or where the question is one of practical procedure, not involving any special difficulty. On a matter where the law would presume him to have knowledge he cannot relieve himself of responsibility by consulting counsel; but on a matter where there is no want of ordinary care and knowledge on the part of the solicitor who acts on counsel's advice, he is not liable to the client.

It will therefore be necessary in the light of the above to examine the conduct of solicitor Vanier in respect of the allegation where-under it is sought to make him liable for negligence. Both counsel for plaintiff and the defendant concede that it will be necessary for me to examine the relevant Rules of the Federal Supreme Court under which the defendants purported to act when making the first application for leave to appeal out of time to the Supreme Court which turned out to be the wrong court in which to make it.

I have perused 0. 11, rr. 16 and 17, of the Federal Supreme Court (Appeals from British Guiana) Rules, 1959, and have come to the conclusion that there is much in counsel's contention that he was not negligent in causing the first application for leave to appeal out of time to be filed in the Supreme Court. I so think because it is clear that r. 17, does permit an application for an extension of time referred to in r. 16 (1) (e) to be filed before a judge of the

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court below, *i.e.*, a Supreme Court judge, who may exercise the powers of a judge of the Federal Supreme Court in cases where undue inconvenience or delay would be caused. It may well be that counsel's reason for adopting the course he took was to get the application for leave out of time before the court as early as possible in view of the fact that the judges of the Federal Supreme Court did not sit, and were not present in the country, as counsel said, until February of 1961, and that he failed to convince the Chief Justice, who heard the application, that "undue inconvenience and delay" would be caused by filing the application in the ordinary way before a judge of the Federal Supreme Court. In fact, counsel denied the suggestion put to him that he was told by the Chief Justice that he had filed the application in the wrong court. It was not a case where the application was not capable of being filed in the Supreme Court at all, but one which the learned Chief Justice in his discretion probably did not consider should be filed in that court, and could very well await the Federal Supreme Court. I do not therefore think that it was altogether unreasonable to have filed the application in the Supreme Court in the circumstances.

Solicitor Vanier acted on the advice of counsel, which I find to be not wholly unreasonable and he is exonerated. I should mention that r. 3 of O. 11 has since been amended (see Federal Supreme Court (Appeals from British Guiana) (Amendment) Rules, 1960), so that it seems there is no doubt now that an application for leave to appeal out of time must be made before the British Caribbean Court of Appeal.

With respect to the second application it cannot be said that he neglected without reasonable excuse to instruct counsel to appear. The evidence shows that he did all he could do, which was, to present himself in court and await counsel who was in another court and neglected to appear. In fact, solicitor rose to speak in explanation of the absence of counsel but was denied audience, whereupon the application was struck out with \$150 costs against the plaintiff. The same goes for the third application which was withdrawn by Mr. Wills who stood in at counsel's request to argue it. Mr. Vanier cannot be held to be blamed for that; there was no act of negligence on his part. No act of negligence is alleged by Mr. Wills' action of withdrawal of the third application, and none can be presumed for counsel when properly instructed has the necessary authority to do so. See *Swinfen v. Lord Chelmsford* (1860), 29 L. J. Ex. 382.

With respect to the fourth and final application, counsel appealed in person and argued it, but it was dismissed with \$184.24 costs against plaintiff. The failure to obtain leave can in no respect be said to be the fault of solicitor, but it is suggested that he ought to have informed counsel that it was hopeless to expect that it would have succeeded after 15 months. I am afraid this was the responsibility of counsel who I would expect should have known that. Mr. Desmond Burch-Smith, clerk to the British Caribbean Court of

Appeal, was called on the plaintiff's behalf. He told the court that this fourth application was heard some 15 months after the pronouncement of the decision on August 19, 1960, and it was dismissed with costs. Burch-Smith was asked to state whether from his experience as clerk to the court he could recall an application of the like nature being entertained after 6 months, and he stated he could not. Objection was taken to this evidence. I allowed the question as I considered witness was merely stating his experience as a clerk of court, although the answer could not be of any assistance since it is not possible to say with any certainty what the court would do in any particular case.

Lastly, there is the plea to be considered on which tooth defendants rely—that the plaintiff's claim for damages is barred by s. 8 of the Limitation Ordinance, Cap. 26, which reads:

"Every action and suit for any illegal or excessive levy, injury to property, whether movable or immovable, assault, battery, wounding, or false imprisonment, and every other action or suit in which damages may be recovered (save and except for libel or slander) shall be brought within three years next after the cause of action or suit has arisen,"

In view of my finding that the first contract alleged in the statement of claim — that Mr. Adams agreed to file a notice of appeal — has not been proved, there is no room for this plea that the action is barred by the Limitation Ordinance; for the reason that there being no such contract proved, there is nothing on which the statute can operate. But with, respect to the second contract, *i.e.*, to apply for leave to appeal out of time, the cause of action accrued when the alleged negligence took place.

In this second contract there was a succession of breaches alleged by the plaintiff on the failure of each of the four applications for an extension of time to file notice of appeal, each giving rise to a separate cause of action. It seems to me that the plaintiff can properly bring an action on any one or more of his causes of action as fall within the statutory period of three years.

In an action for negligence against a solicitor — which, as has been shown above is contractual in nature — the cause of action accrues when the negligence is committed, and not when it is discovered or when the damage is suffered. According to the plaintiff it was negligent to have the second application struck out for counsel's non-appearance, also negligent to withdraw the third, and negligent to have had the fourth dismissed.

The writ in this action was filed on October 21, 1963. All four above negligent acts are alleged to have been committed respectively on October 30, 1960, February 25, 1961, May 15, 1961, and on December 7, 1961, that is to say, within the three year period allowed by s. 8 of the Limitation Ordinance, Cap. 26, which means that this plea must fail.

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In the result I find both legal practitioners not liable for negligence, counsel because of his immunity from suit and his not having been shown to have acted in any dishonest manner in the conduct of his client's case; and solicitor because the allegations of negligence against him are shown to be unfounded. I have already expressed the opinion that to call him a "dummy" is unjust when it is clear that he played an active role in the matter. The evidence is that he was solicitor in the original proceedings, *i.e.* action No. 620/1958 Demerara; he participated in conferences, attended court, where, even though he had no *locus standi*, he tried to explain counsel's absence. Clearly, the only reason why he earned this derogatory sobriquet was because it was counsel and not he who received the disbursements in the matter; but this is not sufficient.

In conclusion, if I may offer a word of advice—it is highly desirable, as this unfortunate case shows, for legal practitioners to keep their respective establishments separate and apart and distinct from each other; although I can see no valid objection to their sharing separate accommodation under the same roof, they should not employ common clerks, for the reason that a barrister remains a barrister and should have his own staff, even though he is permitted to practise as solicitor. He cannot enter into partnership with anyone, not even a solicitor. Had this very necessary requirement been observed, it is certain that counsel would have been spared the ignominy of this suit.

I dismiss this action but make no order as to costs.

Judgment for the defendant.

AJIT v. WEBER AND ANOTHER

[In the British Caribbean Court of Appeal (Archer, P., Jackson and Persaud, J.J.A.) August 3, 5, 1965]

Bastardy—Distress warrant issued, on application of collecting officer—Application not supported by affidavit or information on oath—Validity of subsequent arrest of putative father—Bastardy Ordinance, Cap. 40, ss. 11 and 14—Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s. 71(1) and (2) (b).

Section 11 (1) of the Bastardy Ordinance, Cap. 40, provides that where payments are in arrear an affiliation order may be enforced by distress in the manner prescribed by Part. IV of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15. Section 71 (2) (b) of Cap. 15 provides that no apprehension warrant shall be issued under that Ordinance "without an information or other statement in writing and upon oath." The proviso to s. 11 (1) of Cap. 40, however, states that "nothing in this subsection shall preclude the collecting officer from enforcing such order in the manner hereinafter prescribed." Section 14 (1) of Cap. 40 provides that "where, under an affiliation order which provides that payment thereunder shall be made to the collecting officer, payment is at any time fourteen clear days in arrear, the magistrate may, on *ex parte* application by the collecting officer, issue" a distress warrant, and that "if upon the return of such warrant it shall appear that no sufficient distress can be had", the putative father may be imprisoned.

The appellant, against whom an affiliation order had been made, was arrested in accordance with the procedure set out in s. 14 (1) of Cap. 40. In an action for false imprisonment against the Commissioner of Police and the magistrate, he contended that the arrest was invalid because the application for the distress warrant had not been supported by affidavit and because the collecting officer had not been examined on oath by the magistrate.

Held: under s. 14(1) of Cap. 40 there was no necessity for information or other statement in writing and upon oath.

Appeal dismissed.

M. Shahabuddeen, Solicitor General, and *E. Beharry*, Crown Counsel, for the respondents.

Reasons for Decision: The appellant, Ajit, was in arrears of payment under an affiliation order made against him on 28th April, 1952. A warrant of arrest was issued by the second respondent, a magistrate, but the police constable to whom it was entrusted, after several attempts to execute it which were frustrated because the appellant's premises were found closed on each occasion, made the appropriate return in consequence of which the second respondent issued a warrant for the arrest of the appellant. This warrant was executed by a rural constable and the appellant was taken to a police station where he paid the amount due on the warrant and was released.

In an action brought against the first respondent, who was at the time Commissioner of Police, and the second respondent the appellant claimed damages for illegal arrest and detention. He alleged conspiracy between the two respondents and malice and want of reasonable and probable cause on the part of the second respondent. The judge dismissed the appellant's claim. He found that there was no evidence connecting the first respondent with any act relating to the matter and held that, in any event, the first respondent was not liable having regard to the provisions of s. 8 of the Justices Protection Ordinance, Cap. 18, and s. 25 of the Police Ordinance. 1957. He further held that the second respondent had acted within her jurisdiction as magistrate, that malice and absence of reasonable and probable cause had not been proved, and that, accordingly, the second respondent was, by virtue of s. 2 of the Justices Protection Ordinance, Cap. 18, also entitled to judgment.

The affiliation order made on 28th April, 1952, required the appellant, pursuant to the provisions of s. 13 of the Bastardy Ordinance, Cap. 40, to make payments to the collecting officer for the Georgetown Judicial District. Section 14 of that Ordinance provides for the issue by the magistrate of a warrant of distress, when payment under an affiliation order is in arrear, upon an *ex parte* application by the collecting officer. It also provides for the issue of a warrant of arrest if it shall appear upon the return of such warrant that no sufficient distress can be had.

The appellant (who argued his own appeal) submitted that the warrant of distress issued by the second respondent was illegal be-

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cause the application by the collecting officer had not been supported by affidavit nor the collecting officer examined on oath by the magistrate. He submitted further that the warrant of arrest was also illegal because no information or other statement in writing or upon oath was before the magistrate when she issued it and this constituted a breach of s. 71 (2) (b) of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, which, toy reason, of s. 11 of the Bastardy Ordinance, Cap. 40, laid down the procedure for the enforcement of affiliation orders. The appellant also maintained that in the absence of a plea of mistake, malice must be presumed; that the magistrate had exceeded her jurisdiction and that, by reason of s. 3 of the Justices Protection Ordinance, Cap. 18, malice need not be proved; that the first respondent as head of the Police Force was responsible for the acts of his subordinates and that, in any event, he had not denied that he had given the constables orders and was therefore liable; that the entire Police Force was liable; that the first respondent, not having given evidence, must toe deemed to have admitted the appellant's allegations, in particular, the appellant's evidence that the first respondent knew that policemen were in the habit of returning distress warrants without having executed them; and that there having been no challenge to the amount of damages claimed (\$95,000) the court was without material to arrive at an assessment and must award the amount claimed.

We considered it necessary to hear counsel for the respondents on only one of the appellants contentions, namely that information on oath should have preceded the issue of the warrant of arrest.

Subsections (1) and 2 (b) of s. 71 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, provide that a warrant for the apprehension of any person issued under the Ordinance, or unless the contrary is expressly provided, under any other statute relating to summary conviction offencesshall not be issued without an in formation or other statement in writing and upon oath; "summary conviction offence" is defined in s. 2 and includes any matter in respect of which a magistrate's court can make an order in the exercise of its summary jurisdiction.

Sections 11 and 14 of the Bastardy Ordinance, Cap. 40, are as follows:

"11. Enforcement of orders and procedure (1) Any affiliation order made under this Ordinance, if the payments required by it to be made, or any of them are or is in arrear, may from time to time toe enforced by distress in the manner prescribed in Part IV of the Summary Jurisdiction (Procedure) Ordinance:

Provided that where by an affiliation order it is provided that payment be made to a collecting officer under the provisions of this Ordinance nothing in this subsection shall preclude the collecting officer from enforcing such order in the manner hereinafter prescribed.

(2) Except as otherwise provided by this Ordinance, all proceedings under this Ordinance shall be as nearly as possible

according to the procedure under the Summary Jurisdiction (Procedure) Ordinance and the forms contained in the second schedule to that Ordinance with any variations and additions which the circumstances of the particular case require may be used and, when so used, shall be good and sufficient in law.

14 (1) When payment 14 days in arrear distress may issue. Where, under an affiliation order which provides that payment thereunder shall be made to the collecting officer, payment is at any time fourteen clear days in arrear, the magistrate may, on *ex parte* application by the collecting officer, issue a warrant directing the sum due under such order or since any commitment for disobedience to such order as hereinafter provided, together with the costs attending such warrant, to be recovered by distress and sale of the goods and chattles of the putative father. If upon the return of such warrant it shall appear that no sufficient distress can be had, the magistrate may issue a warrant to bring the putative father before him unless such sum and costs be sooner paid and in case the putative father neglect or refuse without reasonable cause to make payment of the sum so due together with such costs, the magistrate may commit him to prison for any period not exceeding three months with or without hard labour unless such sum and costs, together with the costs of commitment, be sooner paid.

(2) *Arrears not to accrue while putative father in prison unless magistrate otherwise directs.* When a magistrate commits a putative father to prison under the foregoing provisions then, unless the magistrate otherwise directs, no arrears shall accrue under the order during the time that the putative father is in prison."

The proviso to s. 11 (1) of Cap. 40 empower a collecting officer to whom affiliation payments have been ordered to be made to enforce such order in the manner prescribed by s. 14. This procedure is expressly made alternative to the procedure authorised by Part IV of Cap. 15. Section 18 of Cap. 40 authorises the Governor in Council to make rules and prescribe forms for carrying into effect the provisions of ss. 13,14 and 15 of the Ordinance and by rules entitled the Bastardy Rules made on 24th August, 1943, and amended on 14th September, 1946, forms of warrant of distress on application of collecting officer, warrant of arrest where no sufficient distress, and warrant of commitment after apprehension (Forms 10, 11 and 12) are provided. (See Volume 7 of the LAWS OF BRITISH GUIANA, pp 560-562). There are corresponding forms for use where the procedure under Part IV of Cap. 15 are to be followed: (See Volume 1 of the LAWS OF BRITISH GUIANA, pp 513 *et seq.*). An oath is required for purposes of forms 4, 5, 7, 8 (which are forms of warrant of apprehension) in accordance with the provisions of ss. 12, 13, 16 and 17, respectively, of Cap. 15 which demand proof upon oath, but not of form 30 (which is the form of warrant of commitment for want of distress) since s. 49 do not insist upon proof upon oath.

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There is no mention of an oath in the forms prescribed under Cap. 40 because s. 14 of Cap. 40 do not make the taking of an oath by a collecting officer a requirement.

The warrants, the legality of which the appellant disputed are warrants which complied with the provisions of S 14 of Cap. 40 and the Bastardy Rules. The Bastardy Ordinance, Cap. 40 is within the exception contemplated by s 71 (1) of Cap. 16 and there was, therefore, no necessity for an information or other statement in writing and upon oath.

We were of the view that the warrant of arrest had been lawfully issued by the second respondent acting within her jurisdiction and that the claim against the first respondent was misconceived. We dismissed the appeal with costs.

Appeal dismissed.

VIGILANCE AND ANOTHER v. ATTORNEY GENERAL

[British Caribbean Court of Appeal (Archer, P., Jackson and Luckhoo, J.J.A.) July 14, December 1, 1965]

Surety—Bond assuring performance of building contract—Bond not executed under seal—validity thereof—Recital in bond that contract executed and affixed thereto—Contract not so affixed and only executed subsequently—Validity of bond.

Surety—Building contract—Provision for interim payments less maximum retention of 10 per centum—Particular payments exceeded 90 per centum but overall retention equalled, 10 per centum,—Consent of sureties for particular payments not given—Whether sureties discharged.

The appellants appealed from a judgment given against them by MILLER, J., on a bond executed by them for the due performance of contract by L. and T. to build certain houses for the Government. The bond, which was not under seal and was executed on 18th January, 1956, recited that the contract was affixed to it and already executed. In fact, the contract was not so affixed and was only executed on 26th January, 1956, but it was in terms previously advertised when tenders were invited. Clause (a) of para. 24 of the conditions of the contract provided for interim payments to be made to the contractors as the work progressed. Clause (b) provided that the amount of any interim payment should "be the total value of the work properly executed and of the materials and goods delivered upon the site . . . less the amount, to be retained by the employer (as hereinafter provided) and less any instalments previously paid under this clause." Clause (c) provided that "the amount which (might) be retained by the employer" should not exceed 10 per centum. Certain interim payments exceeded 90 per centum of the value of work done. The consent of the sureties had not been obtained for the making of these payments but overall payments did not exceed 90 per centum. In support of the appeal it was contended that the bond was a nullity because it referred to a concluded contract whereas there was none until 26th January, 1956, and that the sureties were discharged from liability when the particular payments were made in excess of 90 per centum and without their consent.

Held: (i) although the bond was not an instrument under seal the sureties bound themselves as effectively as they would have done if they had executed a deed;

(ii) the appellants showed by their conduct that they never intended to make their liability depend on the pre-requisite of signature and affixing of the contract to the bond, and the bond was accordingly valid;

(iii) under condition 24 the amount that could be retained by the employer was not to exceed 10 *per centum*. This entitled the contractors to insist on payment of 90 *per centum* of the amount due to them, but, while they could not demand more, it was not the case that payment of more than 90 *per centum* was not permitted by the contract.

Appeal dismissed.

H. D. Hoyte for the appellants,

M. Shahabuddeen, Solicitor General, for the respondent.

The judgment of the court was delivered by ARCHER, P.: In October, 1955, the Housing Administrator on behalf of the Government of British Guiana advertised for tenders for the construction of houses. In January 1956 a tender submitted by Legay and Tanner was accepted and on 18th January, 1956, the appellants signed a surety bond for the due performance by Legay and Tanner of their contract. Legay and Tanner defaulted on the contract and the Government sued the appellants on the surety bond. Judgment was given against the appellants and this is an appeal against that judgment.

The correctness of the judgment has been disputed on two grounds. The first point taken was that the bond had no legal effect. The contract entered into by Legay and Tanner (Exhibit "G") was signed by them and by E. A. Cameron (presumably the Commissioner of Housing) on 26th January, 1956, and it was claimed that, as this contract was never signed by the appellants as the bond (Exhibit "F") purported to convey nor affixed to the bond as recited therein, the bond was a nullity because it referred to a concluded contract and there was none until 26th January, 1956, when Exhibit "G" was signed.

It was accepted as good law by both sides that sureties' contracts must be construed strictly. Counsel for the appellants read passages from the 8th edition of HUDSON'S BUILDING AND ENGINEERING CONTRACTS (pp. 114 and 115) and sought assistance from the decision in *Governor and Guardians of the Poor of Kingston-upon-Hull v. Petch* (1885), 24 L.J. Exch. 23: In that case, a butcher was sued for breach of his contract to supply the work house of Kingston-upon-Hull with meat. The plaintiffs' advertisement for tenders had stated that all contractors would be required to sign a written contract after acceptance to tender; the defendant had written to the plaintiffs proposing to supply meat in accordance with the advertisement; and the plaintiffs had by letter appointed the defendant butcher for the ensuing quarter, but the defendant had on the afternoon of the same day written the plaintiffs declining to supply them with meat. The question for the opinion of the court was whether the defendant was in breach of contract. In the course of the argument PARKE, B., said:

"The meaning of the advertisement is that there was to be no contract until a regular agreement has been signed. Various

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regulations had to be arranged as to the times of the delivery of the meat and other matters, which were not provided for by the handbill".

Counsel for the plaintiffs then said:

"The signing of the contract was for the benefit of the contractor."

and PARKE, B., replied:

"No, it was for the benefit of both parties. There was *locus poenitentiae* until a written contract was signed."

and, in giving judgment said:

"The tender was only a proposal for a contract. There was no binding engagement until a written contract had been entered into and had been signed by the parties"

PLATT and MARTIN, BB., agreed and judgment was entered for the defendant. That case is easily distinguishable from the appellants' case.

In *Geer v. Kettle*, [1938] A.C. 156, which was a case of principal and surety, there was a recital in the guarantee that a loan was secured on certain shares. The shares were not, in fact, effectively secured and it was held that the guarantor was under no liability. It was also held by the House of Lords that the recital was intended to be the statement of the company which had guaranteed the loan. Lord RUSSELL OF KILLOWEN said at pp. 165 and 167:

"The alleged liability of Parent Trust having never existed, the appellants cannot derive assistance from the concluding words of the agreement which purport to provide that the liability of Parent Trust shall not be affected by the happening of the events therein specified.

From these conclusions Mercantile Marine seek to escape by relying upon the doctrine of estoppel by recital in a deed. They contend that the recital which, on this view of the case, alleges that the debt of the principal debtor is secured by a charge on 275,000 shares in Iron Industries, Ltd., estops Parent Trust from alleging that the debt was not so secured; and that the result of applying this rule of evidence is that on the evidence in the case it is impossible to say that Parent Trust is free from liability.

My Lords, in support of this view various authorities were cited, commencing with *Lainson v. Tremere*, 1 A. & E. 792. That was a case decided at common law on demurrer. In an action on a bond the condition of which was stated to be the payment of the rent of £170 under a certain indenture of lease, the defendant pleaded that the rent reserved by the lease was £140 and that he had paid that sum under the lease. The plaintiff made replication that the defendant had not paid the £170 mentioned in the con-

dition. On demurrer to that replication, the replication was held to be good, Lord DENHAM stating that in a court of law the obligator was estopped from saying that the rent was not £170 a year, and that upon the pleadings the defendant could not get rid of the estoppel with the result that there must be judgment for the plaintiff. How the difference between the two documents arose or which was the correct sum in fact is not stated. If, however, that decision is relied upon as applicable to a case of a misstatement arising from mutual mistake, or as an authority for the proposition that in all circumstances statements in deeds estop all parties to the deed from ever alleging and proving the true facts, I would not, speaking for myself, be prepared to accept it as authoritative at the present day. Indeed, if it were, serious inroads might be made in the jurisdiction to rectify deeds.

Later decisions, however, put the matter on what seems to be the sounder basis. In *Young v. Raincock*, 7 C.B. 310, 338, COLTMAN, J., said: "Where it can be collected from the deed that the parties to it have agreed upon a certain admitted state of facts as the basis on which they contract, the statement of those facts, though but in the way of recital, shall estop the parties to aver the contrary." So, too, in *Stroughill v. Buck*, 14 Q.B. 781, a recital in a deed between the plaintiff and defendant that money had been advanced by the defendant to one Ogle was held to be the language of the defendant only and not to estop the plaintiff from proving that no money had been so advanced: and it was stated that where a recital is intended to be an agreement of both parties to admit a fact it estops both parties; but it is a question of construction whether the recital is so intended.

My Lords, approaching this document from that angle I find no difficulty in saying that Parent Trust are in no way estopped. There is no trace in the language of the document of any agreement that a particular state of facts shall, whether true or not, be an admitted state of facts, or that the contract shall be based on that admission. The recital is a statement as to matters which would normally be within the knowledge of Mercantile Marine and not within the knowledge of Parent Trust, namely, that Mercantile Marine had made a loan to Austin Friars and had obtained from Austin Friars the stated security. There is nothing before us to suggest that Parent Trust were present when those transactions took place. It is no doubt true that Parent Trust requested Mercantile Marine to make the loan on the stated security; but that fact does not make the recital in any way the statement of Parent Trust, or an assertion by them that there was a charge on the 275,000 shares. It is from first to last a statement by Mercantile Marine that they have complied with a request of Parent Trust, *i.e.*, a statement by Mercantile Marine that they have advanced £250,000 to Austin Friars on the security of the shares specified in the schedule, which include the 275,000 shares in Iron Industries, Ltd. There is nothing to estop Parent Trust from asserting the non-existence of a charge on those shares."

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Lord MAUGHAM, after discussing at some length the history of estoppel by recital in a deed, said at p. 170:

"It seems to be clear that having so recently adopted the view that a recital might operate as an estoppel, the courts had not at that time worked out the qualifications which might prove to be necessary unless great injustice was to result. Subsequent cases laid down that the recital must relate to specific facts, must be certain, clear and unambiguous, and would not avail persons who were not parties or privies to the deed. In *Stroughill v. Buck*, 14 Q.B. 781, 787, following *Young v. Raincock*, 7 C.B. 310, another and a very important qualification was laid down PATTESON, J., in his judgement in *Stroughill v. Buck*, 14 Q.B. 781, 787, stated it thus: "When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But, when it is intended to be the statement of one party only, the estoppel is confined to that party, and the intention is to be gathered from construing the instrument." My Lords, in agreement with the Court of Appeal and with the opinion of my noble and learned friend Lord RUSSELL of KILLOWEN I think that this statement of the law is correct; and I also agree with them in coming to the conclusion that upon the true construction of the recital contained in the guarantee of March 20, 1929, read in conjunction with the charge of even date mentioned in the recital, the fair inference is that the recital is intended to be the statement of the Mercantile Marine and not to be that of the Parent Trust and Finance Co."

The surety bond which the appellants signed was not, however, an instrument under seal but we think that they bound themselves as effectively as they would have done if they had executed a deed. In *Windsor Refrigerator Co., Ltd. v. Branch Nominees, Ltd.*, [1961] 1 All ER. 277 one question was whether the appointment of a receiver was valid. Branch Nominees Ltd., a bank's wholly owned subsidiary, held a debenture as security for a company's overdraft with the bank, the principal being repayable on demand. The debenture conferred power, when the principal moneys had become payable, to appoint by writing a receiver. Branch Nominees, Ltd., affixed its common seal to an undated deed appointing a receiver. The sealing of the deed was witnessed by two directors of Bank Nominees, Ltd. The document, undated, was sent to a branch of the bank and, a few days later, the bank's branch manager inserted therein the then date and delivered to the company a formal demand for payment and, on payment not being made, produced the document, handed it to the receiver and indicated that the receiver was appointed. In the court below the appointment was held to be invalid on three grounds:

- (1) delivery of a deed was essential to its validity and the branch manager of the bank was not an agent of Branch Nominees, Ltd. duly authorised to deliver the deed of appointment on its behalf;

- (2) if a deed was delivered to an agent (not authorised by deed to deliver it) on the footing that it was not to become binding on the grantor until certain instructions had been fulfilled and if the instructions were revocable so that the deed could be recalled at any time before delivery, then there was not delivery of the deed by the grantor either as an escrow or at all; accordingly, as the branch manager's instructions were revocable, the deed of appointment did not become binding as the deed of Branch Nominees, Ltd., when he fulfilled them;
- (3) the deed of appointment could not be regarded as an appointment under hand validly made on behalf of Branch Nominees, Ltd., because there was no evidence, that the directors, when they put their names to the deed, were authorised to do any other thing than witness the affixing of the seal of Branch Nominees, Ltd., to the deed of appointment, which, being on its face a deed, could not therefore, be treated as an instrument under hand.

In the Court of Appeal it was considered that there were several questions of fact unresolved as the case then stood but it was held that, assuming that the document of appointment was invalid as a need on the ground that it could not be delivered by Branch Nominees, Ltd., as an escrow subject to an over-riding power to recall it the document could nevertheless be valid as an appointment by writing. Since an appointment by writing might be made out before it was intended to take effect and could take effect on a subsequent date when, e.g., a demand for the money had been made and the appointment had been communicated to the receiver EVERSHED M. R said at pp 280 *et seq.*:

'For the purpose of the rest of my judgment, however, I shall assume that on the grounds stated by the learned judge or for some other good reason, this instrument was ineffective at any relevant date as a deed for the purpose of making any appointment of Mr. Greenwood or otherwise.'

On that basis counsel for the defendants then developed his alternative argument, which was that although the instrument might not be a deed, still it was an instrument in writing; and since what the debenture required was appointment "by writing" it would suffice to satisfy the condition albeit that it was ineffective (for its survival) for any purpose as a deed. I emphasise at once the two words "by writing" because, according to the judgment of CROSS, J., this alternative appears to have been put somewhat differently before him. What was argued and decided was not whether this instrument operated as a writing sufficient to satisfy the condition, but whether it could be treated as a document under hand, which I conceive is not the same thing or at least not necessarily so, CROSS, J., rejected that argument. He was content to assume first that the condition might not require

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appointment by deed; second, that by virtue of the Law of Property Act, 1925, the directors of Branch Nominees, Ltd., could have appointed an agent to execute on their behalf a document under hand; third, that such an appointment under hand by an agent could have been made with the intention that it should not bind unless certain events happened, including the prior making of the demand, etc. In other words, it did not have the disability in this respect that a deed executed as an escrow might have, CROSS. J., stated the alternative submission of the defendants as follows ([1960] 2 All E.R. at p. 576):

" . . . (iv) If this appointment cannot take effect as an escrow, I ought to treat it as being equivalent to an appointment under hand made by the directors who signed it as agents for the debenture holders."

The learned judge decided the point adversely to the defendants. He said ([1960] 2 All E. R. at p. 577):

".... I am prepared to accept proposition (iii), but I am quite unable to see how the facts which I must assume to be correct justify proposition (iv). The debenture holders were asked by the bank to prepare and seal a deed. I have not seen any resolution of the board of the debenture holders, but I assume that it accorded with this request. I have, therefore, no reason to think that the two directors who put their names on the appointment were authorised to do anything else than to witness the affixing of the seal. I cannot assume that they had any authority to bind the company by a document under hand or were purporting to do so."

It seems to me that the point as it has now developed is not the same point as was in the mind of the learned judge, and which was decided by him. The question is not whether these two gentlemen, when they put their names on this document, were purporting to execute a document under their hands as agents for the company, or had any authority so to do. The question, as I conceive it to be, is: Can this document albeit purporting to operate as a deed, but failing so to do—can it none the less be the instrument of the company in writing? I have come to the conclusion that that question ought to be answered in the affirmative. So to decide is far from deciding that Mr. Greenwood's appointment was valid. There remain matters of fact plainly in issue, and all that we can say, as it seems to me, is that assuming those facts are found eventually in a sense favourable to the defendants' case, then this document could operate as an instrument in writing within the contemplation of condition 12 of the debenture so that it could be said by the defendants that Branch Nominees Ltd., had by writing appointed Mr. Green wood.

In order to make clear the limitations of what I am saying, I must also make plain what would have to be the necessary basis of fact before such a conclusion could be reached. I will

repeat that the question what did happen on February 25 might have some reflection on later events. In addition it will be plainly necessary first to establish as a fact that before anything was done which could be called an appointment on February 28, there had been a demand. I gather from counsel for the plaintiffs that that fact is by no means conceded, and that someone will have to prove it. If a demand were made, it was made, as I assume by Mr. Inkin, the branch manager; but Mr. Inkin was the officer of the National Provincial Bank., Ltd., and not of Branch Nominees, Ltd. So there is the second question: Had he authority to make the demand not as a manager of the National Provincial Bank (Reading Branch) but as agent for the debenture holders, Branch Nominees, Ltd? That is a further question for investigation. Then assuming that he did make demand, and had authority to make it for Branch Nominee, Ltd., what then happened. The suggested events, according to the defendants—which I have perhaps already sufficiently indicated—are that after the entry of Mr. Greenwood into the room, the document was handed to Mr. Greenwood, and some words were used which were understood to mean (so they say) that thereupon Mr. Greenwood was appointed, and the instrument was a writing, and evidence to that effect. Once more, that will have to be gone into at the trial.

If all those facts are established in a sense which supports the defendants' case, then as I have indicated it appears to me not fatal to the defendants' case that this appointment started by being (or by being intended to be) a deed, but was ineffective as such. I conceive that if an individual sets out to execute a deed, and for some reason the instrument is not effectively a deed (say, because of the absence of a seal, or the absence of attestation) it cannot be said that therefore it is not, and cannot be an instrument in writing and his instrument in writing. Counsel for the plaintiffs has argued that in considering matters of this kind, one must apply a strict construction adverse to the debenture holders on the language of condition 12 of the debenture. I am not quite sure what the precise effect of that submission is. The words are quite simple words: "appoint by writing"; and in construing them it is fair to note that the condition also empowers the debenture holders by writing to remove. For myself I should have thought that those words would be satisfied if something was done—if the person acting for the debenture holders so conducted himself that one could say that he was appointing someone to be a receiver, and if he accompanied that by handing a writing which was the company's writing to the receiver. That would satisfy the condition. I am not by any means saying that that would be the only way to do it, but that is the relevant alleged course of events here. Counsel for the plaintiffs say: No, this writing came into existence when it was on February 25, and when the two directors, Mr. Brooks and Mr. Wheeler, then appended their

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signatures to the affixing of the seal, and thereby for present purposes identified it as the company's writing. He says that the subsequent putting in of the figure "28" and of the word "February" again before the demand, does not affect that proposition, and that even if it did, it would mean that the writing was complete and (if at all) effective as such at that point of time.

The point is a short one, but in my judgment those propositions are not well founded. I agree with CROSS, J., when he accepted, as I understand that he did, that in the case of a writing it is perfectly competent that it should be made out, that it should come into existence, on a day before it is intended to take effect, and does take effect. The contrary view would seem to have startling results, because, assuming a power to appoint in writing, a man might make a document, lock it up in his desk with the idea that he was not wanting to use it at the moment, but there it was available if he did want to use it, and years might pass. According to counsel for the plaintiffs, when it was produced, it would have been effective from the date when he had made it and put it in his desk. That appears to me an absurd and unreal result of the argument which I do not think is the law."

HARMAN, L.J., said at pp. 283 and 284;

"The other point, *viz.*, whether the document was operative in law as an appointment in writing, was not argued before the learned judge as it has been argued before us. He came to the conclusion that these two directors had authority only to execute, or to witness the execution of a deed by the company, and that as that did not authorise them to execute or sign a document under hand, that was an end of the matter. But with all respect, the appointment need not be under hand. There was no need for any signature here. The two directors were authorised to do that which they did, and having done it, whether that instrument so brought into being operates as a writing is for the court, and is not a matter of their authority at all; and my Lord has expressed the view, in which I concur, that this document on the face of it could operate as an appointment in writing. Whether it did so depends on a number of facts to which we do not know the answer. All we can say, therefore, is that it could so operate.

Counsel for the plaintiffs' assumption that one must write it all out after the demand is made, and one is not entitled to carry a piece of paper in one's pocket with the words written on it, and produce that piece of paper if and when one needs it, seems to be an absolute novelty, and not convenient in practice, or right in law. I can see no reason why one should not write down words on a piece of paper and keep them in one's bosom or one's pocket book, and produce them at the right moment. Nor do I see why, if one so produces them, they should not have effect at the moment when one produces them to the proper

person, here to the receiver. Regarded as a document in writing, the document is not a conditional appointment at all. When the words were written on February 25, they were written without any intent that they should have any present effect and merely in preparation for a day which might or might not arrive. When it did arrive, the production of the document and the handing of it to Mr. Greenwood with an intimation that this was his appointment as receiver, would constitute a good appointment by writing (if Mr. Inkin had the necessary authority)."

DONOVAN, L.J., said:

"As to the second question, the argument is that the receiver was appointed the moment the document was signed, and so before the debt became payable. I agree that in a, context where precision is not required, one might speak of the document loosely as appointing a receiver. But in this context precision is required. What the debenture holder wants to do is to levy equitable execution, and for that purpose to have some person in being clothed with the necessary authority to take possession of the company's property, to carry on its business, to act in its name, and pay the debt; and the company has to submit to the exercise of these powers by the person having such authority. This state of affairs is not achieved simply by the debenture holder signing a document in privacy, and keeping the contents to himself for as long as he wishes. Clearly the contents of that document must be communicated at least to the receiver before his appointment can be said to be effective. One may illustrate this by the converse case of removal, which may also be done under condition 12 by writing. The plaintiffs here are driven to argue that the receiver might also be removed by a writing of which he need know nothing. So he would go on managing the company's business, acting in the company's name and receiving the company's property perhaps for weeks before he became aware of the fact that he had ceased to be receiver, and had been removed. This seems to me clearly to expose the fallacy of the argument."

The Government of British Guiana was not a signatory to the surety bond signed by the appellants. The statement that the contract, the performance of which they were guaranteeing was affixed to the bond was that of the appellants alone. The terms and conditions common to Government contracts had previously been advertised when tenders were invited and the appellants were probably aware of them and for that reason were prepared to dispense with formality and to treat the contract as signed and affixed to the bond when they signed it or to regard the bond as effective from the date when the contract was signed. We make this dedication quite readily in view of the fact that the appellants deliberately signed the bond at a time when the contract had not yet been signed and could not therefore be affixed to the bond and in the absence of any evidence to displace the inference. They showed by their conduct that they never intended to

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make their liability depend on the prerequisite of signature and affixing and we take the view that the bond was a valid document.

The second limb of counsel's argument assumed the validity of the bond but proclaimed it to have lost its validity and the appellants to have been discharged from their obligations under it by over payments made to Legay and Tanner by the Government.

What has been referred to as the contract (Exhibit "G") was in the form of articles of agreement to which were annexed conditions upon and subject to which Legay and Tanner undertook to execute and complete certain works. Number 24 of the conditions reads:

"24. (a) At the Period of Interim Certificates named in the appendix to these Conditions Interim valuations shall be made whenever the Architect considers them necessary, and, subject to clause 21 of these Conditions the Architect shall issue a certificate stating the amount due to the Contractor from the employer, and the Contractor shall be entitled to payment therefor within the period named in the appendix.

(b) The amount so due shall, subject to clause 21 (c) of these Conditions and to any agreement between the parties as to stage payments, be the total value of the work properly executed and of the materials and goods delivered upon the site for use in the works up to and including a date not more than seven days before the date of the said certificate, less the amount to be retained by the Employer (as hereinafter provided) and less any instalments previously paid under this clause. Provided that such certificate shall only include the percentage named in the appendix to these Conditions of the value of the said materials and goods as and from such time as they are reasonably, properly and not prematurely brought upon the site and then only if adequately stored and/or protected against weather or other casualties.

(c) The amount which may be retained by the Employer in virtue of this clause shall be the percentage of the value of the work and materials aforesaid which is named in the appendix as Percentage of Certified Value Retained and up to the amount there named as Limit of Retention Funds (which in neither case shall exceed 10 per cent). Provided that where the limit named reduced in pursuance of clause 21 of these Conditions, as the case may be, has been reached, the full value of the work and materials shall be certified by the Architect.

(d) The amounts retained in virtue of this clause shall be dealt with in the following manner:

On practical completion of the works and, subject to clause 17 of these Conditions, the Architect shall issue a certificate for one moiety of the total amounts so retained, and the

other moiety shall be paid to the Contractor upon the issue of the Architect's final certificate.

(e) In the settlement of accounts the amounts paid or payable by the Contractor to nominated Sub-Contractors or nominated suppliers (including the cash discounts mentioned in Clauses 21 and 22 respectively of these Conditions) and the value of any works executed by the Contractor in pursuance of Clause 21(f) of these conditions shall be set against the prime cost of provisional sum or sums, or sums for additional works mentioned in the specification as the case may be, and the balance, after allowing *pro rata* for the contractor's profit at the rates contained in the Schedule of Rates mentioned in clause 2 of these Conditions, shall be added to or deducted from the Contract Sum. Provided that no deductions shall be made by or on behalf of the Employer in respect of any damages paid or allowed by any Sub-contractor or Supplier to the Contractor, the intention being that the Contractor and not the Employer shall have the benefit of any such damages.

(f) Upon expiration of the Defects Liability Period stated in the appendix to these conditions or upon completion of making good defects under clause 12 of these Conditions, whichever is the latter, the Architect shall subject to the provisions of clause 21 of these Conditions issue a final certificate of the value of the works executed by the Contractor and such final certificate, save in cases of fraud, dishonesty or fraudulent concealment relating to the Works or materials or to any matter dealt with in the certificate and save as regards all defects and insufficiencies in the Works or materials which a reasonable examination would not have disclosed, shall be conclusive evidence as to the sufficiency of the said Works and materials.

(g) Save as aforesaid no certificate of the Architect shall of itself be conclusive evidence that any Works or materials to which it relates are in accordance with this contract."

The interpretation placed upon this condition by counsel for the appellants was that the maximum amount that could lawfully be advanced to the contractors was 90 *per centum* of the value of work and materials; and that it was obligatory for the architect to issue a Certificate before any payment could be made. On these premises counsel assembled the argument that if the contractors were paid more than their entitlement (according to his interpretation of the condition) without the consent of the sureties or without the architect's certificate having been issued the sureties were discharged from their liability. In support of this proposition he cited *Calvert v. London Dock Co.* (1838), 48 E.R. 774, and *General Steam-Navigation Co., v. Rolt* (1858), 141 E.R. I do not accept his contention.

In *Calvert v. London Dock Co.* (1838), 48 E.R. 774, a contractor undertook to do certain work and it was agreed that three-fourths

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of the work, as finished, should be paid for every two months, and the remaining one-fourth upon the completion of the whole work. Sureties guaranteed the performance of the contract. Payments exceeding the value of three-fourths of the work done were made by the employer without the consent of the sureties and the contractor failed to complete the work. The sureties were held to have been released from their liability by the over-payment. Lord LANGDALE, M. R., said at p. 776:

"The defendants do not dispute the fact, that their advances to Streather exceeded the sums which they were bound to advance under the contract, but they say, that the increased advances were made for the purpose of giving Streather greater facility to perform the contract. It is said that the performance of the work by Streather was impeded by his want of funds: and that by the advances made to him, he was enabled to do more, than he otherwise could have done—and that to assist him, was to assist his sureties; and it was only for the purposes of affording that assistance, that the company did more than they were obliged to do.

The argument, however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of time being given to the principal debtor, or of a compromise being made with him. it has been contended, that what was done was beneficial to the surety—and the answer has always been, that the surety himself was the proper judge of that—and that no arrangement, different from that contained in his contract, is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is, whether what has been done lessens that security.

In this case the company were to pay for three-fourths of the work done every two months; the remaining one-fourth, was to remain unpaid for, till the whole was completed; and the effect of this stipulation was, at the same time, to urge Streather to perform the work, and to leave in the hands of the company a fund wherewith to complete the work, if he did not; and thus it materially tended to protect the sureties.

What the company did was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure, which by the contract, was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands, one-fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances, I think, that their situation with respect to Streather was so far altered that

the sureties must be considered to be discharged from their surety ship."

The General Steam-Navigation Co. v. Rolt (1858), 141 E.R. 572, which counsel for the appellants also cited in support of his argument, was another case of over-payment illustrating the effect of a prejudicial alteration of the surety's position upon his liability. In *Warre v. Calvert* (1837), 112 E.R. 425, which was litigation antecedent to *Calvert v. London Dock Co.*, *supra*, it had been held that Calvert (the administrator of the surety) might show, in an action against him on the bond, in reduction of damages that advances had been made to the contractor, not according to the contract, and as the work had been completed within the contract price the plaintiffs were only entitled to nominal damages. The action against Calvert was one of debt on the bond and the allegations were that the contractor was in breach of his agreement by non-performance whereby the plaintiffs (who were the executors of Warre, treasurer of the London Dock Co.) had suffered loss. Lord DENMAN, C.J., said at p. 429:

"It is perfectly clear that the loss sustained by the company arises, not from the breach of the contract, but from their having volunteered an advance to the contractor. But the surety has undertaken only to be liable for the damages arising from the breach of contract."

LITTLEDALE, J., said:

"I am also of opinion that the verdict must be confined to nominal damages. It appears (to use round numbers) that the work actually performed by Streather was of the value of £36,000. The advances, according to the company's contract with him, were to be the three-fourths of the cost of the work done, that is, £27,000. They however advanced, not only more than this, but £48,000, being £12,000 more than the value of the work done. Then, through Streather's default, they are obliged to get the work finished by others, which costs them £18,000 more. The money therefore which was payable under the contract to Streather, by way of instalment, added to the sum afterwards paid for the completion of the work, is less than the sum which, if Streather had performed all the contract, they would have had to pay him, namely, £55,000. The advances beyond the £27,000, were not made under the contract. It might perhaps be proper for the company to make advances for the purpose of enabling Streather to fulfil his undertaking; but such advances are not made in terms of the contract. A surety has the right to require that the obligee shall do his duty; and I think that advances made in this manner by the obligee do not render the surety liable. It is contended that the surety is to see to the performance of his principal's contract; and that is true: but how can he watch the advances made by the other party? Here he may in fact, have known of the advances: but that does not affect the general rule. The company should have advanced only

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what the contract bound them to advance: in the result, the work was completed at an expense below the contract price. Now the assignment of breaches charges that Streather did not perform the contract within the twelve months, nor within the additional term of three months, (the learned judge here referred to *Brown v. Goodman* (note (b) to *Littler v. Holland*, 3 T.R. 592). as to the effect of enlarging the time by a distinct instrument; adding, however, that the present case did not raise that point) and that, by reason thereof, the company were obliged to procure the works to be completed by others, whereby they were damaged. But they have, in fact, sustained no damage at all by this. Sir F. Pollock suggests that the defence should have been pleaded; but it could not; performance might be pleaded, or that the obligee was damified by his own wrong; but this is not a damnification by the wrong of the obligee, but a damnification not arising on the contract. The ground of my judgment is that the advance has been made, not only beyond the £27,000, but beyond the £36,000. How far the defendant could be made liable in another form is not now in question."

PATTESON, J., said:

"This being an action on a bond, the question is, whether, on the breach suggested, any damages are shown to have been sustained by the non-performance of the covenant. Whether the alteration of the time takes the case out of the condition of the bond is immaterial; for the plea denies only the execution of the bond, not the breach. It is clear, therefore, that there has been a breach, and that the plaintiffs must have a verdict: and the question is whether there be any damage. It is asked, what would be the use of the bond, if the company were bound to retain in hand one fourth of the cost of the work performed. The object was that the company might have some one to whom they might resort in the event of Streather failing to perform the contract, and of the works being completed by others at a cost exceeding the contract price. That shows why the penalty of the bond is not larger; it was merely to cover such excess, which was not likely to amount to more than £5,000. The argument, therefore, as to the inconsistency of the security with the alleged restriction on the company fails. Then let us look at the contract. Streather could call for no money till he had performed one-eighth of the work: and after that, as the work went on, he could call for three-fourths only of the cost of the work performed. Any further advances were, no doubt, as Sir Frederick Pollock urges, made on the contract; but they were not made under the contract. Even, therefore, if there were no specific agreement, the surety would not be answerable. His liability is for damages accruing from the breach of contract, not from advances by the company. Still less could he be liable, if the advances were made upon a subsequent negotiation between the company and Streather, and a fresh security given by the latter. No damage, therefore, has been sustained.

WILLIAMS, J., said:

"The liability which it was intended to impose upon the surety was for the non-performance of the contract; but the company is not aggrieved by the non-performance of the contract, since the works have been completed at an expense less than the sum which they would have had to pay to Streather. The loss arises from the contract in no sense except that, if there had been no contract at all, there would have been no advance. But the advance is made, not under the contract, but upon the security of Streather."

It was conceded by the appellants that although some of the individual payments to the contractors were in excess of 90 *per centum* of the value of the work done overall payment was not more than 90 *per centum*. The appellants gave no evidence and the respondent produced only one certificate which relates to payment on 16th March, 1956. This certificate shows a 10 *per centum* retention by the employer and refers to an amount (\$1,962.36) previously certified. The unchallenged evidence of the clerk responsible for writing up the vote book was that vouchers were prepared on the authority of the architect's certificate without which payment could not be made. Counsel for the respondent said that where payment of more than 90 *per centum* was made the excess over 90 *per centum* was insubstantial but in the absence of the relevant certificate it is impossible to determine the amount by which a payment exceeded 90 *per centum* on any particular occasion. However that may be, we find nothing in the condition which forbids payment to the contractors of more than 90 *per centum* of the amount due to them at any time. The amount retained by the employer was not to exceed 10 *per centum* which entitled the contractors to insist on payment of 90 per centum of the amount due to them, but while they could not demand more this is a far cry from counsel's stand that payment of more than 90 *per centum* was not permitted by the contract. The provision for retention up to 10 *per centum* was for the benefit of the employer and in his own interest he would ensure that the fund built up was sufficient to take care as far as possible of any default on the part of the contractors. In fact the fund contemplated by the contract was accumulated so that the appellants enjoyed the maximum protection afforded by the provision.

In our judgment, therefore, the appellant fails on both grounds argued and the appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *H. Bruton* (for the appellants); *Crown Solicitor* (for the respondent).

HARPRASHAD v. HACK AND ANOTHER

[Supreme Court (King, J. (ag.) October 30, November 16, December 18, 19, 1964, January 12, 1965]

Immovable property—Land laid out in separate lots—Plan approved by Central Board of Health showed reserves for streets and drains—Purchaser obtained transport for lot as shown on plan—No servitude over reserves annotated on transport—Whether reserves subject to servitude in favour of purchaser—Sale of reserves by original owner—Whether valid—Agreement by purchasers to cultivate reserve—Whether any purchaser entitled to enforce rights of user over reserves during currency of agreement—Public Health Ordinance, Cap. 145, s. 135.

Transport—Land purchased with reference to plan showing reserves for streets and drains—Claim by purchaser to servitude over reserves—Application for amendment of description of property in transport so as to include servitude—Competence of application—Deeds Registry Ordinance, Cap. 32, s. 24.

The first-named defendant laid out a piece of land, of which he was the owner, in separate house lots on a plan which, as required by s. 135 of the Public Health Ordinance, Cap. 145, made provision for reserves for streets and drains. The plan having been approved by the Central Board of Health under that provision, he proceeded to sell a portion of it to the plaintiff, another to the second-named defendant and another to one M. Two portions of reserve land fell within the plaintiff's land; one portion of reserve land fell within the second-named defendant's land, while one portion of reserve land fell between the plaintiff's land and that of the second-named defendant. Under an arrangement made by the three purchasers each proceeded to plant rice on his entire portion without regard for any internal divisions into lots or for the reserves which were also cultivated. Later the plaintiff bought the portion of reserves lying within his land while the second-named defendant did likewise and further bought the portion of reserves separating his land from the plaintiff's. The plaintiff now brought an action claiming an order under s. 24 of the Deeds Registry Ordinance, Cap. 32, amending the description of the land in his transport so as to show a servitude over the reserves in his favour, and also for an injunction and damages against the second-named defendant for excluding him from the reserves separating their two lands.

Held: (i) a servitude of this nature, being immovable property must be conveyed by transport, and as this was not done no servitude was passed to the plaintiff;

(ii) no servitude or right to a servitude was created over the reserves, but a right over land obtained by statute which was somewhat analogous to a servitude;

(iii) section 135 of Cap. 145 imposes a duty on the vendor to provide means of ingress and egress to each lot and therefore any sale of the reserves without a notation of the rights of way and drainage over them would be void;

(iv) but in view of the arrangement to use the lands *en bloc* for rice cultivation the plaintiff was estopped from asserting any rights over the reserves;

(v) in any event the plaintiff had misconceived his remedy as this was not a case of an error in the name of a person or in the description of a property as envisaged by s. 24 of Cap. 32 but of a separate piece of property being omitted from the transport.

Judgment for the defendants.

C. L. Luckhoo, Q.C., with A. B. Sankar, for the plaintiff.

R. H. Luckhoo for No. 1 defendant.

F. Ramprashad for No. 2 defendant.

KING, J. (ag.): The facts of this matter are as follows: In 1957 the plaintiff purchased from the 1st defendant a portion of land on the east section of Waller's Delight part of a larger area of land the whole of which the 1st defendant intended to sell in separate house lots. In accordance with s. 135 of the Public Health Ordinance, Cap. 145, the 1st defendant had had a survey carried out and a plan prepared showing the land as divided up and also showing certain portions two of which ran from east to west and one from north to south which were marked "Reserved for street and drains." The survey and plan were made in 1950 by Mr. S. S. M. Insanally, sworn land surveyor, and the plan duly registered at the Lands and Mines Department and approved by the Board of Health. A copy of this plan was tendered as Exhibit "B" and the original as Exhibit "J." Two portions of reserved land running east to west fell within the plaintiff's portion of land and one portion of reserved land running north to south lie between the plaintiff's land and that of the second defendant. I shall refer to these portions respectively as the "E-W strips" and the "N-S strip." No mention was made on the plaintiff's transport of the strips having been reserved or of his having any rights over corresponding portions on contiguous lands. At around the same time that the plaintiff bought the second defendant and one Ramadar Misir also bought portions consisting of a number of lots to the west and east of the plaintiff respectively.

The second defendant has sought to prove that at the time of purchasing, he, the plaintiff and Misir agreed that they should plant rice on the whole area, and commenced to do so. The plaintiff denies any such agreement. While there was nothing in writing, I accept that there was an arrangement that each should plant rice on his entire block. This is borne out by the actual occupation and use for planting rice by the three purchasers up to the present time, and is confirmed by the fact that they had a survey done by Mr. Mohamed in 1957 separating the areas into three separate blocks without any internal divisions into lots. When Mohamed went to survey in 1957 the first defendant wrote him a letter pointing out that the reserves were not owned by the purchasers and action would be taken if they encroached on them. This warning was ignored, and in 1958 the 1st defendant brought suit against the purchasers. This was settled by the purchase by the plaintiff of his E-W strips and by the 2nd defendant of the E-W strips falling inside his portion and also of the N-S strip. The plaintiff in the mistaken belief that, he had purchased the N-S strip proceeded to occupy and cultivate it. The 2nd defendant in action No. 1864 of 1961 then sued him for trespassing on the N-S strip and succeeded on the trial judge finding that it was the 2nd defendant and not the plaintiff who had purchased the N-S strip from the 1st defendant. \$400.00 damages were awarded. In this action the question of servitude was never raised.

The plaintiff now claims that in passing transport according to Insanally's plan the 1st defendant created a servitude or an obligation on himself to grant a servitude and asks that the description in his transport be rectified accordingly, also for an order for an

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injunction and damages against the 2nd defendant who has now fenced in and occupies the N-S strip to the exclusion of the plaintiff.

The defendants deny that any servitude was created or that there is any obligation to grant one and say that even if one exists there is no necessity for it to be annotated on the transport; that the plaintiff's conduct amounts to waiver of any servitude that might have been created or alternatively would create an estoppel against him from seeking to enforce it now.

The first question to be determined is whether the plaintiff is entitled to a servitude of way and drainage over and through the N-S strip and the E-W strips which lie in the land of the 2nd defendant. Plaintiff's counsel argues that the plaintiff's transport having been passed in accordance with Insanally's plan must be taken to have conferred on the plaintiff the rights of way and drainage indicated on the plan, thus creating a servitude. Alternatively, he argues that even if a servitude were not actually created the 1st defendant was under an obligation to convey a servitude which he is now called upon to do.

A servitude of this nature being immovable property, must be conveyed by transport. As this was not done no servitude was passed to the plaintiff. The case of *Steele v. Thompson*, 13 Moo. P.C. 280, 15 E.R. 105, cited by the plaintiff's counsel, supports this contention. It must now be decided whether the plaintiff can call upon the 1st defendant to transport a servitude to him, and to do so the nature of the right must be considered. This question was discussed in the case of *Mohamed Din v. Boodhoo and Tetri*, 1941 L.R.B.G. 116. COMACHO, C.J., in dealing with a similar provision of the then Local Government Ordinance, since included in the Public Health Ordinance, said this at p. 118:

"the statutory obligation did not, however, create a servitude. It merely imposed a duty.....to exclude from the lots so much land as was necessary to provide means of ingress and egress to and from each lot."

Though the case went to appeal, was retried, and again went to appeal, it does not seem that this dictum was questioned or disapproved. In *Hanumandas v. The Country Authority of Clonbrook*, 1949 L.R.B.G. 63, an area marked "Dam" on a plan approved by the Local Government Board was later laid out in part for building purposes on a plan approved by the Central Board of Health, the successors of the Local Government Board. The West Indian Court of Appeal said at p. 66:

"Even if the whole area was originally in 1909 allocated for use as a dam.....it is not correct to say that the approval then given by the Local Government Board bound their successors for all time. If the statutory controlling authority had power to approve a lay-out which excluded the appropriation of any part of the land to building, that authority has power to

amend that lay-out so as to exclude in the area appropriated to building purposes, the part previously excluded."

This would negative the idea that a servitude was created as it shows that by unilateral action and without the consent, indeed, against the Wishes of what would have been the owner of the dominant tenement, the "servitude" could be extinguished.

Conversely, if it was a servitude that was conferred, by agreement, merger or some other method of extinguishing a servitude the obligations laid down by statute could be avoided. I am of opinion that no servitude or right to a servitude was created, but a right over land obtained by statute which is somewhat analogous to a servitude. Even so, is the plaintiff entitled to the declaration prayed at para, (c) in the prayer for relief in the statement of claim?

The first defendant purported to sell the E-W strips in the plaintiff's the second defendant's and Misir's land to those persons and the N-S strip to the second defendant. This seems to be a contravention of the Public Health Ordinance. COMACHO, C.J., in the passage already cited from *Mohamed Din's* case said that the section imposed on the vendor a duty to provide means of ingress and egress to each lot. This would indicate that any alienation of the strips without a notation of the rights of way and drainage over them would be void. The evil that the Ordinance was enacted to prevent must however be considered. The prohibition is s. 135 is against dealing with land "in separate lots.....for any purpose whatever" or laying it out for building purposes, without a survey and a plan showing reserves for streets and drains. The idea behind this obviously is that land should not be divided up for building lots or small cultivation lots without proper means of access and drainage. But what happens where from the time the land is bought no attempt is made to use it for any of these purposes but by agreement between the purchasers it is used *en bloc* for rice cultivation? Inter-lot access and drainage here become irrelevant and the Public Health Authority would not be concerned. Though there may be an inchoate right in each purchaser to the use of the reserves for streets and drains this right could not become operative until one or other purchaser decided actually to lay out his portion in separate lots according to the plan, thus necessitating the use of the reserves for streets and drains. In such case he would no doubt have to give the other purchasers adequate notice of his intention so to do in order to enable them to alter their user of their own land.

In short, an estoppel arises. The plaintiff by words and conduct induced the second defendant to alter his position and cannot now go back on his representation to the second defendant's detriment. As I suggested above it may be that if the plaintiff desired to use his land in separate lots he could by a period of notice to the other purchasers recover his right to the use of the reserves as streets and drains. There is a passage at 15 HALSBURY'S LAWS, 3rd Edn., p. 175, which seems to support this:

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"..... it would seem that the person who has made the representation may once again enforce his legal rights after the other party has had an opportunity of regaining the position he held before the representation was made, if that is possible."

As regards the argument that where an agreement is contrary to public policy no estoppel arises, I am of opinion that there was no breach of the Public Health Ordinance and therefore nothing against public policy so long as the land was being used *en bloc* for rice cultivation by all the purchasers. Unless and until an actual division of any of the portions into separate lots commenced there was no need for reserves for streets and drains. If that were to occur it might then become contrary to public policy to use the reserves for planting rice, but that has not so far come to pass.

This is not, therefore, in my opinion, a proper case to make the declaration asked for by the plaintiff at para, (c) of his prayer in the statement of claim. As I have found that no servitude or right to a servitude exists, nor is there any right in the plaintiff to the present use of the reserves for the purposes of access and drainage, the relief asked for in paras, (d), (e) and (f) of the prayer cannot be given.

As regards paras, (g), (h) and (i) of the prayer, even had I not found that no servitude was created I would still have refused this relief because the plaintiff has misconceived his remedy. This is not a case of an error in the name of a person or in the description of property as envisaged by s. 24 of the Deeds Registry Ordinance, Cap. 32, but of a separate piece of property being omitted from the transport. The plaintiff should therefore have sued for specific performance if he was entitled to the servitude. As the plaintiff's counsel specifically abandoned his claims in paras, (a) and (b) of the prayer, I find that he is not entitled to any of the reliefs claimed. The action is therefore dismissed with costs to the defendants to be taxed fit for counsel.

Judgment for the defendants.

Solicitors: *J. A. Jorge* (for the plaintiff); *Dabi Dial* (for No. 1 defendant);
N. O. Poonai (for No. 2 defendant).

DE CLOU v. DEMERARA BAUXITE CO., LTD.

[Supreme Court—In Chambers (Luckhoo, C.J.) May 18, July 9, 1965]

Practice and procedure—Opposition action—Allegation in reasons for opposition that plaintiff was part owner of property—Nature, extent and mode of acquisition of interest in property not stated—Particulars thereof given in statement of claim—Application to strike out particulars—Application refused.

The plaintiff opposed the passing of transport for certain immovable property on the ground that she was part owner thereof. The reasons for opposition did not specify the nature, extent and mode of acquisition of the interest in the property claimed by the plaintiff, but in paras. 1—11 of the statement of claims, she asserted her descent from a previous owner of the property. On application by the defendants to strike out those paragraphs,

Held: the object of those paragraphs was merely to give particulars of, and not to enlarge, the sole ground of opposition that the plaintiff claimed to be part owner of the property, and the application would therefore be refused.

Application refused

EDITORIAL NOTE—An appeal to the Full Court is allowed.

J. A. Jorge for the plaintiff.

G. M. Farnum for the defendants.

LUCKHOO, C.J.: This is an application by way of summons on the part of the defendants for an order that paras. 1 to 11 inclusive of the plaintiff's statement of claim filed herein be struck out and that the action do stand dismissed and the opposition entered by the plaintiff to the passing of a conveyance by way of transport the subject matter of the action be set aside.

On the 13th February, 1965, the defendants and the Greater Mackenzie Development Trust caused, to be advertised in the Official Gazette a certain conveyance by way of transport, numbered 96 for the counties of Demerara and Essequibo, in favour of Edward Henry Theophilus Edwards in respect of certain immovable property. On the 26th February, 1965, the plaintiff caused opposition to be entered to the passing of the conveyance and on the 1st March, 1965, filed and delivered the following reasons of opposition:

"(1) That the opponent (plaintiff) claims an interest in the title to the land described in transport Number 96 published in the Official Gazette of the 13th day of February, 1965.

(2) That the opponent is one of the plaintiffs in action No. 808 of 1960 filed in the Supreme Court of British Guiana on the 30th day of May, 1960, and that the first-named proponent the Demerara Bauxite Company is the defendant in the said land.

(3) That the said action No. 808 of 1960 has not been finally determined by the court.

(4) On these premises it is not competent for the said Demerara Bauxite Company Limited to seek to transport the property hereby opposed."

On the 8th March, 1965, the plaintiff filed the writ of summons in this action to enforce the said opposition. Subsequently the plaintiff filed her statement of claim. Paragraphs 1 to 11 inclusive of the statement of claim seek to set out particulars as to the plaintiff's interest in the immovable property sought to be conveyed, by way of descent from one Robert Frederick Allicock who died in 1822. Paragraph 12 refers to the advertisement of the conveyance in the Gazette and para. 13 repeats the reasons for opposition which were filed on the part of the plaintiff. Paragraph 14 avers that the immovable property sought to be conveyed forms part of plantation Retrieve or Noitgedacht and that the plaintiff has an undivided interest therein as averred earlier in the statement of claim.

For the defendants it was submitted that —

- (1) paras. 1-11 inclusive of the statement of claim should be struck out on the ground that they are not contained in the reasons for opposition entered by the plaintiff;
- (2) the statement of claim (assuming that paras. 1-11 inclusive are in order) does not disclose any interest of the plaintiff in the subject matter of this opposition;
- (3) reasons numbered 2 and 3 as set out in the reasons for opposition do not form any ground for opposition.

Solicitor for the plaintiff conceded that the submission on this third limb was well-founded.

Counsel for the defendants contended that while the plaintiff claimed 1/320 part or share in the said plantation save and except a portion thereof containing approximately 500 acres devised by Robert F. Allicock to Nancy Allicock, she did not show that the immovable property the subject matter of the opposition relates to that portion in which the plaintiff claims an interest. Counsel urged that the averments contained in para. 14 of the statement of claim did not so show that paragraph, though it could have been more clearly worded, was obviously intended to aver that the immovable property forms part of that portion of the plantation in which the plaintiff alleges she has an interest. In any event para. 14 may be reworded to make this explicit and such an amendment would not have the effect of enlarging the grounds of opposition.

Solicitor for the plaintiff conceded that there is only one ground of opposition, namely, that the plaintiff claims an interest in the property sought to be conveyed. Solicitor submitted that it is sufficient to claim an interest in the subject matter of an opposition without specifying the nature, extent and mode of acquisition of that interest. In *Sukhie v. Belair Co., Ltd.*, L.J., 16th November, 1907, the plaintiff in an opposition action merely alleged that the property in question was his *bona fide* property. Application was made by the defendants therein that the plaintiff be ordered to give particulars as to the date and mode of acquisition by the plaintiff. D. M. HUTSON,

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Ag. J., made an order for further and better particulars extending the time for filing a statement of defence to 10 days after the delivery of such particulars. A reference to that case is to be found in DUKE'S TREATISE ON THE LAW OF IMMOVABLE PROPERTY IN BRITISH GUIANA, Cap. 7, at p. 26. Reference is also made in DUKE'S TREATISE to the case of *Demerara Bauxite Company, Ltd. v. Hubbard*, 1920 L.R.B.G. 66, where such particulars were given in the plaintiffs' statement of claim and held to be validly given and to *Peroo v. Dooknie*, 1919 L.R.B.G. 151, where it was held that if a plaintiff in his statement of claim inserts an allegation which is not contained in the notice of entry of opposition and which is not added by way of particulars, that allegation can be struck out on motion made before trial or at the hearing of the action itself.

As was observed by BERKELEY, J., in *Demerara Bauxite Co., Ltd. v. Hubbard* (*ubi supra*) applications to strike out a statement of claim will not be allowed unless the court is satisfied that there is no cause of action disclosed or which would not be disclosed by some amendment or amendments which ought reasonably to be allowed.

In *Hicks v. Receiver General* (3rd May, 1898), the Full Court held that if a ground of opposition is entered in general terms, e.g., "that the levy was bad and illegal" as was done in that case, particulars may be added in the statement of claim showing how that position was sustained. In *Barrie v. Duff* (31st March, 1908) the substantial ground of opposition was that the plaintiffs were part owners of the plantations levied on. Application was made to strike out particulars of the plaintiffs' claim given in the statement of claim. The application was refused. On appeal the Full Court held that the decision of the court below in that regard was correct and that if the particulars had been omitted when opposition was entered and a mere general statement made that the plaintiffs opposed as being part owners, then, on the authority of *Hicks v. Receiver General* (*ubi supra*), the particulars could have been subsequently added.

In the instant case when opposition was entered a mere general statement was made to the effect that the plaintiff opposed as being a part owner and paras. 1 to 11 of the statement of claim supply particulars of that claim. Nothing contained in those paragraphs seeks to enlarge the sole ground of opposition that the plaintiff claims to be part owner of the property.

The defendants' application to strike out paras. 1 to 11 inclusive of the plaintiff's statement of claim is refused. The defendants' application that the action do stand dismissed and that the opposition entered by the plaintiff be set aside is also refused. Costs to the plaintiff fixed at \$15. Leave to appeal granted.

Application refused

FARGNOLI v. LUCK AND ATTORNEY-GENERAL

[(Supreme Court—In Chambers (Persaud, J.) July 3, 17, 1965)]

Practice and procedure—Action against Government for damages for negligence—Governor's fiat not obtained—Appearance entered and defence filed—Competence of suit—Supreme Court Ordinance, Cap. 7, s. 47(1).

Costs—Action against Government—Governor's fiat not obtained—Plaintiff's claim for cost.

Justice's protection—Action against Government for damages for negligence of officer—Whether notice of intended action necessary—Justices Protection Ordinance, Cap. 18.

Legal practitioner—Unnecessary proceedings—Mistake of solicitor—Solicitor ordered to pay costs personally.

The plaintiff instituted an action by way of writ of summons against the Attorney General claiming damages from the Government in respect of negligence committed by a Government medical officer. Although the Governor's fiat was not obtained, the Attorney General entered appearance and filed a statement of defence. Later the plaintiff brought an action against the doctor as well as the Attorney General in respect of the same cause of action. In respect of this action the Governor's fiat had been duly obtained. Both actions were consolidated and judgment given for the plaintiff with costs. The taxing officer disallowed costs to the plaintiff in respect of the first action as well as in respect of a notice of intended action which had been served on the Attorney General. The plaintiff applied for a review of the taxation.

Held: (i) there was nothing in the judgment which precluded the taxing officer from disallowing costs in respect of any proceedings which were improper;

(ii) the failure to obtain the Governor's fiat was fatal and could not be cured by the subsequent steps taken on behalf of the Attorney General;

(iii) in an action of this sort it was not necessary to serve a notice upon the Attorney General under the Justices Protection Ordinance, Cap. 18, and the plaintiff was not entitled to costs in respect of the notice served;

(iv) the plaintiff's solicitor would be ordered to pay personally the costs of the application.

Order accordingly.

O. M. Valz for the plaintiff; *K. M. George* (Registrar) for the taxing officer.

PERSAUD, J.: This is a summons taken out at the instance of the plaintiff for a review of the taxation of a bill of costs taxed by the taxing officer in the above actions (numbered 1963 No. 1349 and 1964 No. 53 respectively) which were heard by the Chief Justice, and in which judgment was given for the plaintiff. The items disallowed and which this summons concerns, are items relating to the first action (1963 No. 1349).

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Before considering the submissions made before me, it will be of some use to trace the history of the earlier action with a brief reference to the later action.

The earlier action was launched by a writ of summons which was filed in the Supreme Court Registry on August 8, 1963. After service had been effected and the normal steps followed, the plaintiff filed a statement of claim, and the defendants filed a statement of defence. A request for hearing was filed on the 2nd April, 1964, and the matter came up for fixture before the Chief Justice who fixed a date for hearing. On the 2nd December, 1964, an order consolidating his action with action No. 53 of 1964 was made at the request of plaintiff's counsel.

Action No. 53 of 1964 had been filed on 11th January, 1964, and was brought against the Attorney General alone even though it related to the same cause of action as that contained in the earlier action. The reason for filing the later action is fairly obvious, and can be seen from the notes taken by the Chief Justice when the application for consolidation was made. These notes which I have consulted through the courtesy of the Chief Justice read thus:

"Manraj opens plaintiff's case:

Refers to action filed by plaintiff against the Attorney General alone No. 53/1964 Dem. Request (for hearing in that action was filed on 23rd November 1964.

Reason for filing of second action is that there was omission to obtain Governor's fiat to bring claim against Attorney General as representing the Government of this Colony. The two actions refer to the same facts. Asks for consolidation of the two actions.

Mr. D. Singh agrees to an order for consolidation of the two actions being made.

Ordered that action No. 1349 of 1963 and action No. 53 of 1964 Demerara be consolidated, and that the hearing of the consolidated actions should now proceed."

Thereafter the hearing of the actions proceeded, and the result was that judgment was given in favour of the plaintiff.

The Chief Justice's notes make it clear — and this was the reason why the later action was filed—that in the earlier action the procedure to be followed when the Attorney General is being sued as representing the Government of British Guiana had not been obeyed, with the result that, in that action the Attorney General was not properly before the court, and this in spite of the fact that an appearance had been entered on his behalf, and his defence filed. No doubt the plaintiff's legal advisers appreciated the realities of the situation, for the later action (No. 53 of 1964) was promptly and properly launched in

accordance with the provisions of s. 46(3) of the Supreme Court Ordinance, Cap. 7, in that a statement of claim and not a writ of summons was filed. Presumably s. 47(1) of Cap. 7 was complied with, as the Governor's fiat appears on the face of the statement of claim. My view is that had action No. 53 of 1964 not been filed, the Chief Justice could not properly have heard the earlier action in so far as it affected the Attorney General. I do not accept the argument of solicitor for the plaintiff that a non-compliance with s. 46 of Chapter 7 is a mere breach of procedure, and that such breach is cured by subsequent steps taken on behalf of the Attorney General. In my opinion, the Attorney General cannot, by taking certain steps such as entering an appearance and filing a defence, waive the discretion of the Governor to grant his fiat, as a discretion it is when s. 47(1) of Cap. 7 is examined.

In my judgment, therefore, action No. 1349 of 1963 was improperly commenced as against the Attorney General, and any costs incurred for service of this writ and matters incidental thereto would not have been properly incurred. The taxing officer was, in my view, correct in disallowing the costs represented as items 29 and 31 of his answer. I would also disallow items 1, 2, 3, 4 and 5 for the reasons given by the taxing officer.

I will now deal with item 6 of the bill and the related items. These concerned expenses incurred for service of notice of intended action on the Attorney General. It is a misconception of the law to think that in an action of this sort it was necessary to serve a notice upon the Attorney General under the Justices Protection Ordinance, Cap. 18, and I am not persuaded that s. 8 of that Ordinance which prescribes the time within which an action against a justice shall be brought is relevant to this matter. It follows, therefore, that these items also are not allowable.

I would have been inclined to leave the matter here, but for the submission of solicitor for the plaintiff, who has urged with his customary vigour that by virtue of his order in the action, the learned Chief Justice has not disapproved of the steps taken in the earlier action (No. 1349 of 1963), and therefore the taxing officer in not allowing the items claimed, has set himself up as a court of appeal from the decision of the Chief Justice. This argument is completely without merit, and I have no hesitation in rejecting it. If I may say so, the Attorney General should have sought an order dismissing that earlier action, and had that been done, I am sure solicitor would not have had the temerity to argue as he has done. The success of such arguments as he has advanced would mean that legal practitioners would have licence to commit mistakes in procedure, and profit by those mistakes. This cannot be right, and violates all principles of justice. And such conduct will not be tolerated in these courts.

Rule 50 of the Rules of the Supreme Court provides as follows:

"On every taxation the Registrar shall allow all such costs, charges and expenses, as shall appear to him to have been neces-

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sary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same no costs shall be allowed which appear to the Registrar to have been incurred or increased through over-caution, negligence or mistake or by payment of special fees to counsel or special charges or expenses to witnesses or other persons or by unusual expenses."

In my opinion, the costs claimed were neither proper nor necessary.

I would commend to all practitioners who may be inclined to the view that the court would permit them to gain by their own mistakes the words of Sir JOHN LEACH, M. R., in *Alsop v. Lord Oxford* (1833), 1 Mylne & Keen 564. Speaking of the duties of the taxing master the Master of the Rolls said (*ibid* at p. 566):

"Generally speaking the decision of the master is final: he is the sole judge of the fact, whether the business has been done, and of the proper charge to be made for it; and it is further his duty to enquire whether the business was required to be done; for if the solicitor negligently or ignorantly takes any unnecessary proceedings, it is the duty of the master to protect the client from any charge in respect of such proceedings. The court will only interfere where the master acts upon some mistaken principle."

And in *Simmons v. Storer* (1880), 14 Ch. D, 154, an order was made directing an account of what was due to a party in respect of costs of proceedings taken by him to enforce a judgment. The taxing master disallowed the costs of certain abortive garnishee proceedings. Upon a summons being taken out to review the taxation, JESSEL, M.R., said (at p. 156 *ibid*):

"With reference to the objections taken by counsel for Storer, when an order is made for taxation of costs, if it is intended that any costs are not to be taxed it should be so stated, otherwise a general direction to tax is implied.....If it turns out that the proceedings in respect of which the costs were incurred were improper, then no costs ought to be allowed. There is nothing in the form of this order which precludes the taxing master from disallowing all the costs."

In my judgment therefore this summons should be dismissed. I regret to say that the plaintiff's solicitor has shown an almost contemptuous disregard for the tenets which ought to be observed and followed in the taxation of bills of costs, and I do not feel justified in ordering the plaintiff to pay the costs of these proceedings. To do so would in effect be taxing him twice with the cost of the mistakes of his legal advisers. This is a fit case, after considerable and anxious thought on my part, where the solicitor himself should be made to pay the costs of these proceedings, and I so order.

Order accordingly.

LAW REPORTS OF BRITISH GUIANA [1965]
ESTATE OF WIGHT v. INLAND REVENUE COMMISSIONER
[Supreme Court (Bollers, J.) October 30, 1965]

Estate duty—Appeal—Time—Probate granted in 1962—Appeal sought to be made in 1965—Whether prescribed—Estate Duty Ordinance, Cap. 301, s. 14(3) and s. (15).

Evidence—Records of court Estate duty appeal—Power of court to refer to previous applications for probate without these being tendered in evidence.

W. died on 1st March, 1961. Limited grants of probate were made in favour of his executrices, the petitioners, later in that year and in March 1962, and certain sums on account of estate duty were paid. Later in 1962 the petitioners applied for probate on the strength *inter alia* of a certificate issued by the proper officer on 10th August, 1962, to the effect that security had been given by the executrices for payment of the remainder of estate duty in the sum of \$325,546.22. The application was duly granted and further sums paid on account of estate duty. On 19th July, 1965, the respondent sent to the petitioners, at the latter's request, a copy of the inventory jacket including a certified copy of an assessment of the whole estate. On 3rd August, 1965, the petitioners served notice on the respondent of their intention to appeal against the assessment and subsequently lodged their petition. For the respondent it was objected that the assessment had been made to the knowledge of the petitioners in 1962 and that therefore the petition had not been filed within the time prescribed by s. 14(3) of the Estate Duty Ordinance, Cap. 301.

Held: (i) the certificate of the proper officer could not properly be prepared until there had been an assessment, and the assessment had in fact been made on 10th August, 1962;

(ii) the copy of the inventory jacket supplied in 1965 was not notice of the assessment and the appeal was therefore out of time;

(iii) in order to determine the preliminary objection the court was entitled to consider the records of the court relating to the applications previously made for probate without these being formally tendered in evidence.

Appeal dismissed.

[Editorial Note: Reversed on appeal to the Guyana Court of Appeal in 1966.]

S. L. Van B. Stafford, Q.C., John Van B. Stafford with him, for the petitioners.

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

BOLLERS, J.: This is an appeal by way of petition by the executrices under the last will and testament of Percy Claude Wight, deceased, who died on 1st March, 1961, under the provisions of s. 14(3) of the Estate Duty Ordinance, Cap. 301, whereby the petitioners claim that on the 19th July, 1965, their solicitor received what purported to be a certified copy of an assessment of the whole estate. It is this assessment, they say, which is the subject of the petition and on the 4th August, 1965, within the time prescribed by s. 14(3), their solicitor served on the Commissioner of Inland Revenue a notice dated 3rd August, 1965, of the petitioners' intention to appeal against the purported assessment.

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Counsel for the Commissioner of Inland Revenue now takes the point *in limine* that the notice of intention to appeal against the assessment was given out of the prescribed time as laid down by the Ordinance as the assessment was made to the knowledge of the petitioners and brought to their notice in August, 1962, and not, as claimed by the petitioners, on the 19th July, 1965, when merely a copy of the inventory of the property subject to estate duty on the death of the deceased prepared by the proper officer in accordance with the provisions of s. 15(3) of the Ordinance was sent to them at their request containing the computations of the estate duty on an assessment that had already been made by the Commissioner in August, 1962.

From the pleadings on the file before me and from the records of the court, it appears that the executrices of the estate were anxious to obtain probate of the will of the deceased before the estate duty was paid and before the certificate of the proper officer had been prepared setting forth that the estate duty had been paid.

Section 15 of the Ordinance reads as follows:

"15. (1) On the duty payable being assessed as aforesaid the proper officer shall cause to be made on the declaration a memorandum of the amount of estate duty payable.

(2) The person making the declaration, or his agent, shall thereupon pay into the Treasury the duty so assessed, and the Financial Secretary shall give a receipt therefor.

(3) The proper officer shall then prepare a certificate under his hand, setting forth that the inventory and declaration have been duly delivered and that the estate duty, if that duty is payable, has been paid, and stating the value as shown by the inventory of the property on which it is payable.

(4) No will shall be received by any officer of the Registry for deposit or for recording therein unless there is delivered therewith the certificate referred to in subsection (3) of this section."

It is clear from the wording of this section that on the duty payable being assessed it is the function of the proper officer to make a memorandum on the declaration of the amount of estate duty that is payable. It is then the function of the person making the declaration to pay into the Treasury the amount of duty assessed for which he must obtain a receipt. It is then the duty of the proper officer to prepare a certificate setting forth that the inventory of the property of the deceased and the declaration thereon have been delivered and the estate duty has been paid, stating the value as shown by the inventory of the property on which the duty is payable. Sub-section (4) makes it quite clear that no will can be received by any officer of the Registry for deposit or recording unless there is delivered along with the will, the certificate of the proper officer referred to in sub s. (3). It follows, therefore, that in order to deposit a will for the purpose of obtaining probate the executrices would have had to pay the estate duty and obtain the certificate of the proper officer. Under s. 24 of

the deceased Persons Estates' Administration Ordinance, Cap. 46, at sub-s-(2), there is, however, provision for the grant of probate before, the payment of estate duty if security is given for the payment to the proper officer under the provisions of the Estate Duty Ordinance.

On the 17th July, 1962, as a result of an application made by the executrices of the estate of the said deceased and on the affidavit of the proper officer, the Honourable Chief Justice by consent of the parties ordered that probate of the will of the deceased be granted to the executrices of the estate before the payment of estate duty, and that payment of such estate duty be paid in a certain manner. The executrices of the estate were then ordered to give a personal bond in the sum of \$250,000, jointly and/or severally, to pay all outstanding duty in the estate and such other duty with interest thereon within a certain time in a certain number of instalments, the first instalment to commence at a certain time with the usual terms as to failure.

It was further ordered that upon any of the assets of the estate being sold, the executrices were to pay over not less than a certain percentage of the sale price of such assets towards the estate duty which may be owing, provided that such assets which were sold did not realise more than the duty actually payable, *in which latter event the whole of the estate duty then became payable*. The rights of the executrices to appeal against any valuation of the assets of the estate or in respect of every liability which may be disallowed were reserved. The executrices were also, under the order, to keep the Commissioner of Inland Revenue informed from time to time in writing of the financial status of the estate so that he might be aware of the solvency of the estate.

Finally, under the order the proper officer was at liberty to revalue any assets of the estate according to law, or to include in the valuation of the estate *any asset or assets of the estate which had not yet been declared*. This order was duly entered on the 23rd July, 1962, and it was on the 27th July, 1962, and 1st August, 1962, that the bond in the sum of \$250,000 was executed by the executrices.

Having carried out the terms of the order made by the Honourable Chief Justice on the 17th July, 1962, the executrices on the 14th August, 1962, made application to the Supreme Court for grant of probate of the last will and testament of the deceased in which the solicitor for the applicant stated that she had lodged the certificate of the proper officer among the other documents necessary to the grant of probate. The certificate of the proper officer is dated 10th August, 1962, and is headed:

"Certificate of Proper Officer under Estate Duty Ordinance, Cap. 301, upon security for payment to the proper officer as provided by section 24(2) of the Deceased Persons Estates' Administration Ordinance, Cap. 46."

In the body of the certificate the proper officer certifies that the inventory and declaration of the estate of the deceased have been duly delivered to him in terms of s. 13 of the Estate Duty Ordinance, Cap. 301, and that in accordance with s. 24(2) of the Deceased Persons Estates'

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Administration Ordinance, Cap. 46, security has been given by the executrices for payment of the remainder of estate duty, the sum of \$325,546.22, with interest at the rate of 6 *per Centum* from the 1st day of May, 1961, to the Commissioner of Inland Revenue under the provisions of the Estate Duty Ordinance, Cap. 301, on property to the value of \$1,469,105.58. At this point, it should be noted that at para. 9 of the petition the petitioners state that they have paid sums of money on account of the estate duty amounting to \$519,000. This is not denied by the Commissioner of Inland Revenue.

In the oath of executrix to lead to grant both executrices swore that they had exhibited at the Inland Revenue Office at Georgetown, as far as they had been able to ascertain, a true and perfect inventory of the said estate for the assessment of estate duty and that they would render a just and true account thereof, and that it appeared from the inventory that the gross value of the estate would be a certain sum, *and that it was intended to have a corrective declaration filed, if necessary, in respect of any assets which might come to their knowledge*, which had not been already declared in connection with the estate for the purpose of estate duty thereon. Common sense would dictate that this being a large estate the assessment of estate duty would fluctuate as a result of changes in the valuation of the property and further assets coming to the knowledge of the executrices which had not yet been declared. Is it, however, a necessary concomitant of this situation that because the assessment of estate duty might fluctuate and because of changes in the valuation or additions made to the list of assets that no assessment was made by the Commissioner of Inland Revenue? I think not.

If an assessment were not made, it is difficult for me to see how the proper officer could have issued a certificate fixing the remainder of estate duty at the sum of \$325, 46.22 on the 10th August, 1962. Surely that sum, together with the sum already paid by the executrices, must indicate that an assessment had been made on the valuation of the assets of the estate after deduction of the liabilities allowed, having regard to the information supplied by the executrices but, of course, subject to any corrective declaration that they might subsequently make. There is procedure for this under s. 20 of the Estate Duty Ordinance, Cap. 301, whereby if it is discovered that the property of the deceased, subject to estate duty, was at the time of the delivery of the certificate of greater value than the value mentioned in the certificate, the executor shall deliver a further declaration with an account to the proper officer and pay in the required duty with interest thereon from the date of the certificate. The Commissioner shall then cause a fresh certificate to be written by the proper officer who shall have the same force and effect as the initial certificate.

It is the submission of counsel for the petitioners that there was a constant chopping and changing of the valuations of the property of the deceased declared in the inventory and that, as a result, no assessment was ever made until he received the document with the computations thereon on the 19th July, 1965, and that his clients had paid estate duty from time to time to the tune of \$519,000 without

any assessment of a fixed sum being made, but they were doing so with an unascertained amount in mind, having regard to the gross value of the estate as given by them in the inventory He laid great stress on a letter signed by the Commissioner of Inland Revenue and addressed to the Solicitor to the executrices dated 26th August, 1963, in which he said that the duty payable to Government was about 45 *per centum* of the net value of the estate. Counsel urges that the Commissioner himself did not know the correct figure of assessment as no assessment had been made, and for 45 *per centum* to be payable under the Tax Ordinance, Cap. 298, the estate would have to exceed \$1,500,000 but not exceed \$2,000,000, whereas the value of the estate was declared at \$1,427,478.16. The inference that I draw, however, from that statement of the Commissioner is that he had in mind the executrices might at any time be called upon to make corrective declarations in respect of valuations already given or in respect of property subject to estate duty not yet declared.

My attention has been attracted to a certificate of the proper officer under Estate Duty Ordinance, Cap. 301, for security for payment to the proper officer, as provided by s. 24 (2) of the Deceased Persons Estates Administration Ordinance, Cap. 46, which was filed in 1961 along with a corrective declaration in relation to the property of the deceased in which, with the consent of the executrices, the Commissioner of Inland Revenue was authorised to receive a certain sum of money payable under certain life insurance policies on the life of the deceased as second payment of duty and such further security for duty in the sum of \$550,000 on the *remaining undeclared portion of the estate*. This certificate was apparently filed when an application was made for a limited and conditional grant of probate, and it states that security has been given by Barclays Bank, D.C.O., on behalf of the executrices for payment of estate duty — \$550,000—on the whole estate as prepared by the executrices to the value of \$1,396,140.51. This sum is much less than the sum declared in the copy of the inventory sent to counsel for the executrices in July, 1965, which shows that there were three corrective inventories and declarations made subsequent to the original declaration. On the certificate of the proper officer filed in 1961, R. M. Wight, the attorney of the second-named petitioner, has stated that he undertakes to pay the balance of duty as soon as possible.

In March 1962 when another application for a conditional and limited grant for probate was made in respect of certain items already declared in the estate duty declaration, the certificate of the proper officer states that in accordance with s. 24 (2) of the Deceased Persons Estates' Administration Ordinance, Cap. 46, security has been given by the executrices for payment of duty—\$600,000—on the whole estate as prepared by the executrices to the value of \$1,553,543.50.

From the records of the court, to which I have had access, the inference is to be drawn that the petitioners were in 1961 actually

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paying estate duty on an assessment based on the valuations of the property declared by them, and giving security for the payment of the remaining balance of estate duty in respect of valuations not yet declared; and later in March 1962, while continuing to pay estate duty on an assessment based on the valuations of certain property declared by them, they gave security for the payment of duty in respect of the whole estate on a fixed sum, in respect of valuations prepared by the executrices. The fixed sum varied according to the change in valuation and the addition of property not yet declared. It was on the 10th August, 1962, that the last assessment in this matter was made when a sum was fixed as to the remainder of the estate duty to be paid, subject, of course, to the provisions of s. 20 of Cap. 301, which would enable the Commissioner to re-open a matter if it is discovered that the property of the deceased is of greater value than that mentioned in the certificate. Indeed, under section 75 of Cap 301 the certificate of the proper officer could not properly be prepared until there had been an assessment. This document, now a record of the court, must be presumed to have been done correctly.

It is inconceivable that the petitioners' solicitor would have advised her clients to pay the sum of \$519,000 in estate duty without an assessment having been made. The document that counsel for the petitioners received from the Commissioner of Inland Revenue in July, 1965, was not notice of the assessment which, according to the provisions of s. 14 (3) need not be in writing, but a certified copy of the last inventory and declaration made by the executrices with the computations for the assessment of estate duty on the valuations thereof made by the Commissioner of Inland Revenue and signed by the proper officer of the Commissioner of Inland Revenue.

The submission of counsel for the petitioners that this court should not consider the records of the court in order to determine the preliminary objection as evidence should be taken, finds no favour with me as it appears to me that for the court to take evidence for the purpose of admitting official records of the court, which cannot be denied and are irrefutable, would serve no useful purpose. From the documents on the file before me it appears that the difficulty in which counsel for the petitioners finds himself has been brought about by his late appearance in the matters concerning the estate. In the letter of the 2nd July, 1965, addressed to the Commissioner of Inland Revenue, he admits that he is not able to get full particulars from his clients or their previous legal advisers as to certain vital facts, and the substance of his enquiry is whether there was a final assessment of estate duty in this estate. And in the letter of 7th July, 1965, he requests a certified copy of the jacket containing the assessment, and in the letter of 14th July, 1965, he admits receiving a copy of the jacket with the computations from the attorney of one of the executrices. His difficulty was further increased when he received no reply to his letters of enquiry.

A right of appeal must be expressly conferred on the subject by statute, and where the statute prescribes a time limit for the doing of certain acts for the purpose of an appeal, the requirements of the statute must be strictly complied with. This appeal is hopelessly out of time and, as a result, must be struck out for want of jurisdiction, and stands dismissed with costs to the respondent to be taxed fit for counsel.

Appeal dismissed

Solicitors: *Jayme Jorge* (for the petitioners); *M. E. Clarke*, Acting Crown Solicitor (for the respondent).

[British Caribbean Court of Appeal (Archer, P. Jackson and Luckhoo, JJ.A.) December 6, 7, 8, 1965]

Justices protection—Act done in reliance on ultra vires law—But act done colore officii—Comptroller of Customs and Excise and Minister of Natural Resources—Whether entitled to notice—Justices Protection Ordinance, Cap. 18, ss. 8 and 14.

The first-named appellant was the Comptroller of Customs and Excise while the second-named appellant was the Minister charged with responsibility for the first-named appellant's department. Purporting to act under the Importation of Poultry Carcasses (Control) Order, 1956, certain customs officers refused to permit entry of a shipment of uneviscerated poultry carcasses imported by the respondent. The Minister refused to interfere with their decision and in the result the respondent eventually had to re-export the shipment. More than six months later the respondent, contending that the Order was *ultra vires*, brought an action for damages against the appellants.

In defence it was contended *inter alia* that the appellants were protected by the Justices Protection Ordinance Cap. 18. BOLLERS J., gave judgment for the respondent, holding that the order was *ultra vires* and that in consequence the appellants were not acting in the execution of their duties as required by ss. 8 and 14 of Cap. 18. (See 1964 L.R.G.B. 4151. On appeal it was contended for the appellants that the Order was valid but that, even if it was not, the appellants had been acting *colore officii* and were therefore entitled to the protection of Cap. I8. In reply it was argued *inter alia* that even if the Comptroller could be said to have acted in the execution of his office under the Ordinance under which the Order was made, this could not be said in the ease of the Minister.

Held: (i) even if the order was *ultra vires*, both the appellants were entitled to notice;

(ii) the Minister's refusal to interfere in what the customs officers did could not make him liable.

Appeals allowed.

[Editorial Note: No written judgment was delivered. This report is based on notes of the oral judgment taken by R. G. Marques, Esq., Barrister-at-Law

GLASFORD AND BENN v. GILLETTE

M. Shahabuddeen, S.G., with *R. G. Marques*, Crown Counsel, for the appellants.

J. O. F. Haynes, Q.C., with *G. M. Farnum*, for the respondent.

JACKSON, J.A., delivering the judgment of the court, said that among the substantive grounds of appeal were:

- (a) that there was no sufficient evidence to support the findings of the learned trial judge that the appellants prevented the landing of the carcasses; and
- (b) that the appellants were entitled to the protection of the Justices Protection Ordinance, Cap. 18.

The two appellants were respectively the Comptroller of Customs and the Minister under whose Ministry the Customs Department fell. The latter had no direct control of the exercise of the duties of the Customs Department but was ministerially responsible for the same.

At the hearing of this appeal Mr. Haynes conceded, his Lordship said, that in so far as the appellant Glasford was concerned, he was entitled to notice. As Mr. Haynes said: "The authorities cited by counsel for the appellants seem to show that Glasford was entitled to notice." But aside of Mr. Haynes' concession, their Lordships were of the opinion that Glasford was entitled to notice and thus this disposed of him.

Mr. Haynes, however, contended that this was not so in Benn's case and that the latter gave direct instructions. However, their Lordships could not find on the evidence that there was interference by Benn in the sense that Mr. Haynes contended. They found that he only interfered to the extent of saying that he would not interfere in what the customs' officers had done.

Further, with regard to s. 14 of Cap. 18, their Lordships found that Benn was entitled to notice under the latter half of the provisions of that section. The appeals would therefore be allowed with costs in both courts-

Appeals allowed.

A. P. SINGH v. ESTATE OF MORTIMER

[Supreme Court (Bollers, J.) November 12, 16, 22, December 10, 1965.]

Sale of land—Land owned by two persons jointly—Document purporting to be agreement of sale for entire land between plaintiff and both owners—Only, one owner signed—Whether agreement complete—Whether specific performance could be ordered against owner who signed in respect of his undivided half.

In 1957 transport was passed for certain lands to M. and C. In 1961 the plaintiff and M. signed a document purporting to be an agreement of sale for the whole property between the plaintiff as purchaser and M. and C. as vendors. The document was, however, never signed by C. who, indeed, without the knowledge of the other parties, had previously died. M. subsequently died and his widow sought to vest title for his share in the land in the beneficiaries of his estate. In an opposition action brought by the plaintiff, it was contended for the defence that the agreement was incomplete and therefore unenforceable. In reply, it was submitted for the plaintiff that the document was at least effective as an agreement by M. to sell his own undivided share in the land and that specific performance should be ordered in respect thereof with an abatement in the purchase price in respect of the regaining half.

Held: (i) where a person has contracted to convey more than it is in his power to convey he ought to be ordered to convey what he can, either with or without making compensation to the purchaser for such part of the subject matter of the contract as the vendor is unable to convey.;

(ii) but this principle has no application to the circumstances of this case because M. made no representation that he alone was disposing of the whole property. Nor, indeed, did he represent that he was selling his own undivided half interest by itself;

(iii) the intention of M. and the plaintiff was to sell and purchase respectively the whole of the land when the signature of C. had been obtained. As that signature was never obtained the contract remained incomplete and a mere *nudum pactum* out of which no right of action could arise.

Judgment for the defendants.

[Editorial Note: Affirmed by the Guyana Court of Appeal in 1966. See (1966), 10 W. I. R. 65].

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

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

BOLLERS, J.: On 26th July, 1961, the plaintiff entered into an agreement of sale with Dixie Fleetwood Mortimer, now deceased in respect of certain property consisting of Pln. Endeavour in Hog Island, Essequibo with the scrap iron brass and other appurtenances thereon. Mortimer agreed to sell and the plaintiff agreed to purchase the said property for the sum of \$2,500. The agreement in writing, which is Exhibit 'A' in this case, was signed by the plaintiff as pur-

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chaser and Dixie Mortimer as one of the vendors. The signature of the other vendor, Hannah De Camp, does not appear in the agreement in the space reserved for it, and it is the evidence that at the time of the execution of the agreement she was already dead and never signed the agreement.

On 16th July, 1962, when letters of administration had not yet been granted to her, the defendant received \$5. from the plaintiff for and on account of the said sale and gave a receipt therefor in her personal capacity.

The agreement in writing reads as follows:

"MEMORANDUM OF SALE made and entered into this 26th day of July, 1961, at the city of Georgetown, county of Demerara, and Colony of British Guiana, by and between DIXIE FLEETWOOD MORTIMER, also called Dixie Fleetwood Trotz, of 57 New Road Vreed-en-Hoop, West Bank, Demerara, and HANNAH BEATRICE DE CAMP, of the same address, hereinafter referred to as the VENDORS and A. P. SINGH of 37 Brickdam, Georgetown, Demerara, hereinafter referred to as the Purchaser:

PARTIES: The Vendor and the Purchaser which term shall include the heirs, executors, administrators and assigns of the parties hereto.

PROPERTY: Pln. Endeavour adjoining Pln. Johanna in Hog Island with the scrap iron, brass and other appurtenances thereon.

PURCHASE

PRICE: The sum of \$2,500.00 (two thousand five hundred dollars) of which the sum of \$100.00 (one hundred dollars) is being paid on the signing of this agreement (receipt whereof is hereby acknowledged). The balance of purchase price to be paid on the passing of transport.

CONDITION: This agreement shall and is expressly made subject to the agreement of sale and purchase with D. YHAP, dated 22nd June, 1957. When it becomes necessary a further sum of \$950 will be advanced to D. YHAP, and deducted.

TRANSPORT: To be advertised and passed as soon as title is acquired by the Vendor.

EXPENSES: To be borne equally by the Vendor and Purchaser.

IN WITNESS WHEREOF the parties have hereunto set their hands the date and year and first above written in the presence of the subscribing witnesses:

D. F. MORTIMER

WITNESSES:

1. Ina Mortimer.
- 2 Karan Singh.

(VENDORS) A. P. SINGH
PURCHASER.

In the Official Gazette of 31st August, 1963, and numbered 67, the defendant, Ina Mortimer, the widow of Dixie Fleetwood Mortimer, who died on 17th December, 1961, advertised transport of one undivided half part or share of and in the said Pln. Endeavour containing 118 acres, situate on the northern side of Hog Island in the Essequibo River, in the County of Essequibo and Colony of British Guiana, by herself in her capacity as the administratrix of the estate of Dixie Fleetwood Mortimer, deceased, letters of administration whereof were granted to her by the Supreme Court of British Guiana on 16th March, 1963, in favour of herself in her personal capacity in respect of one undivided third part or share of and in the said property and for her three minor children—George, Paul and Errol Mortimer—the remaining two undivided third parts or shares of and in the said property, the defendant and her three children being the heirs *ab intestato* of the said deceased.

On the 13th September, 1963, the plaintiff entered opposition to the passing of the transport as advertised in the Official Gazette of 31st August, 1963, No. 67, and in his reasons of opposition he stated that on the 26th July, 1961, he had entered into an agreement of sale and purchase with the deceased and Hannah Beatrice De Camp to purchase from them *jointly* the said Pln. Endeavour with scrap-iron, brass and other appurtenances thereon and on the said date he had paid the deceased the sum of \$100 on account of the said purchase price, the balance to be paid on the passing of transport. His second reason was that on 16th July, 1962, he had paid to the defendant in her capacity as the administratrix of the estate the sum of \$5 further on account of the purchase price of the said property. The third and fourth reasons were that on 5th April, 1963, he had caused his solicitors to write the defendant in her aforesaid capacity to take steps to pass transport to him of the one undivided half part or share of and in the said Pln. Endeavour by a certain date and she had failed to comply with the request and it was not competent for her in her aforesaid capacity to seek to pass transport of the property to herself and three minor children as heirs *ab intestato* of the said deceased.

In the present action, which now follows the opposition entered by the plaintiff to the passing of the transport, the plaintiff claims:

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- (a) specific performance of the contract of sale and purchase dated 26th July, 1961, made between Dixie Mortimer, deceased, and himself in respect of one undivided half of Pln. Endeavour, Hog Island, in the County of Essequibo for the purchase price of \$1,250;
- (b) a declaration that the opposition entered by him to the passing of the transport as advertised in the Official Gazette No. 67 of 31st August, 1963, is just, legal and well-founded;
- (c) an injunction restraining the defendant, her agent and/or attorney from passing the said transport or in any way disposing of the property;
- (d) in the alternative, damages for the loss of the bargain.

It is the uncontradicted evidence of the plaintiff, who is a landed proprietor in the county of Essequibo, that land in Essequibo has increased in value from \$400 an acre in 1961 and 1962 to \$700 an acre at the present time, so it is important to him that the undivided interest be conveyed to him or that he obtains damages for the breach of the contract against the administratrix of the estate.

It is the submission of counsel for the defendant that the agreement entered into between the plaintiff and Dixie Fleetwood Mortimer on 26th July, 1961, is not complete and, as a result, the contract is unenforceable. He urged that the phrasing of the agreement showed that both signatories to it believed that Hannah De Camp was alive and both parties expected her to append her signature at some later date to the document and so complete the agreement: until Hannah De Camp signed the document the agreement was not complete and as a result it was of no effect. He stressed that there was no evidence from the plaintiff that during the lifetime of Dixie Mortimer, deceased, subsequent to the signing of the agreement that the plaintiff had called on him to complete the contract by getting Hannah De Camp to sign or to refund to him the \$100 received by him on the failure of Hannah De Camp to sign the agreement. Nor did the plaintiff call on Dixie Mortimer to convey his half interest to him.

Counsel argued that if two parties meet and agree with the hope of a third party agreeing, the agreement is not complete—and the agreement could not be considered complete in regard to the two parties who had agreed, which would have the result of excluding the third party altogether. Finally, he submitted that equity would never decree specific performance in such a case where there was lack of mutuality, that is, where a party asked for specific performance of a contract equity would never grant a decree in his favour if the circumstances were such that specific performance would never be decreed against him under the

contract. Under the doctrine of want of mutuality, counsel stated that the fact that the plaintiff was willing to accept an undivided part or share in the property now, was no criterion that under the contract specific performance would be decreed against him for the purchase of an undivided half part or share of the property where the agreement between the two parties was for the purchase of the whole property. In support of this proposition council cited SNELL'S PRINCIPLES OF EQUITY, (25th Ed.) 537; *Flight v. Bolland* (1828), 4 Russ. p. 298; *In re Bryant and Birmingham's Contract* (1890), 59 L. J. Ch. N.S. 636; *Elliot v. Pearson*, [1948] 1 All. E.R 939.

Counsel for the plaintiff in reply submitted that the rule or doctrine of want of mutuality is not allowed to apply to cases like the present one, or that if it did apply there was in fact mutuality between the parties. He submitted that it was clear that Dixie Mortimer and his sister, Hannah De Camp, had acquired the whole interest in Pln. Endeavour, so that each person acquired one undivided half part or share in the plantation and each person could then have sold his undivided half part or interest without consideration to the other owner. As each person could have sold his own share separately in a separate agreement, he could see no reason why any difference should arise where a single contract had purported to do what could have been done under separate contracts.

He argued that if each of the co-owners had signed the same document, then each would be conveying merely his own share as if it were done on two separate documents, and in the ultimate the purchaser would acquire the whole property, or estate because he would then get the half interest of each co-owner. He urged that when Mortimer signed the document he was agreeing to sell his share and the plaintiff, the purchaser, was agreeing to accept Mortimer's share and the other person's share when that other person signed, and the two interests were not so inextricably bound up that they could not be separated.

His final submission was that there was a wealth of authority to establish that the plaintiff was entitled to a decree of specific performance in respect of the half part or share of and in the property, that is, Pln. Endeavour, with an abatement of the purchase price which would be approximately one-half of the agreed sum of \$2,500. Counsel cited in support of this proposition the following authorities: *Martlock v. Buller*, (1804), 10 Ves. 291; *Bower v. Cooper* (1843) 2 Hare 408; *Sneesby v. Thorne* (1855), 3 W. R. 438, at p. 605; *Boursot v. Savage*, (1866), L.R. 2Eq. 134; *Hooper v. Smartt*, 43 L. J. Ch. 704; *Horrocks v. Rigby* (1878), 9 Ch. D. 180; *Burrow v. Scammell* (1881), 19 Ch. D. 175; *Bailey v. Piper* (1874), 22 W.R. 943; *Price v. Griffith* (1851), 21 L.J. Ch. 78.

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I think I ought to make it clear from the beginning that I accept the point of view expressed by junior counsel for the defence that this is a contract for the sale of land and perforce must be governed by s. 18 of the Civil Law of British Guiana Ordinance, Cap. 2, which is s. 4 of the Statute of Frauds replaced by s. 41 of the Law of Property Act, 1925, and is required to be evidenced in writing. The contract there having been reduced to writing, the extent of the obligation which exists under it is to be measured only by the words expressed therein. *Summer v. Powell* (1816), 35 E.R. 852; *Clowes v. Higginson* (1813), 35 E.R. 204. As the learned author of PHIPSON ON EVIDENCE, at para. 1781, states:

"When a transaction has been reduced to or recorded in writing, either by requirement of law or agreement of the parties, extrinsic evidence is in general inadmissible to contradict, vary, add to or subtract from the terms of the document."

The reason for this rule is given that when the parties have deliberately put their agreement in writing it is presumed between themselves that they intend the writing to form a full and final statement of their intention. It follows then that, if my opinion is correct, I must look at the document of 26th July, 1961, alone without regard to any other evidence and even the transport of the vendors for that matter, in order to ascertain the intention of the parties at the time of the making of the agreement.

On a close perusal of the document, Exhibit "A", I have come to the conclusion that it was the intention of the parties, that is to say, Dixie Fleetwood Mortimer and the plaintiff, the two signatories to the agreement, to sell and purchase, respectively, the whole of Pln. Endeavour with the scrap iron, brass and other appurtenances thereon when the other purported signatory to the agreement had been obtained. I have come to that conclusion chiefly because it is not stated in the document whether the two vendors hold the property in equal shares, or in what proportion the property is held by them, or whether the title to the land was in the name of Hannah De Camp and the title to the movable property in the name of Dixie Mortimer, or *vice versa*. In other words, it was the intention of the plaintiff to purchase the whole of the property stated in the agreement jointly from the two vendors.

To a lesser extent I have been influenced in this finding by the circumstance that in the body of the document the parties are described as the vendor and the purchaser that is to say, the singular is used and not the plural, which would suggest rather that the parties contemplated a single joint sale. If, as suggested by counsel for the plaintiff, Dixie Fleetwood Mortimer was merely selling his undivided half interest in the property and the purchaser was acquiring that interest and expected at a subsequent date to acquire the other undivided half interest in the property from Hannah De Camp and thus acquire the ownership of the whole property, there was nothing to prevent the plaintiff from purchasing Mortimer's

half interest in a separate document and the undivided half interest of Hannah De Camp in another document on a subsequent date.

The strong inference to be drawn from the circumstances is that the signatories to the agreement were not aware of the death of Hannah De Camp at the time of the signing of the agreement and fully expected that she would at a subsequent date append her signature to the document which would complete the sale and purchase of the whole property. The contract, therefore, between the two signatories remained incomplete as the intention was to make a joint sale and purchase of the whole property, and indeed it is worthy of note that the plaintiff so states in his reasons for opposition.

I accept the submission of counsel for the defence that in the situation which I have found, that is to say, there was an attempt at a joint purchase of the whole of the property mentioned in the agreement by the plaintiff or, indeed, if I am wrong in this approach and there was merely a purchase by him of the undivided half interest of Dixie Mortimer (which I have not found), there was such a lack of mutuality between the parties that equity would never decree specific performance of the agreement. The court will not enforce the obligation of the defendant by a decree of specific performance unless it can also enforce the obligation of the plaintiff, for, as Lord LYNDHURST put it in *Hills v. Croll*, (1845), 1 De G.M. & G. 627, "the court will not decree an agreement to be specifically performed unless it can execute the whole of the agreement." The time when the mutuality is material is when the contract is made. It must be possible to give full relief to both parties, and it is evident to me that if the defendant sought a decree of specific performance against the plaintiff in respect of the sale of his undivided half interest, he would be met by the obvious defence that under the contract it was the clear intention of the defendant to purchase the whole of the property, that is, the whole of Pln. Endeavour and the movables, as stated, thereon. *Hoggart v. Scott*, (1830), 1 Russ. & M. 293. A Court of Equity would never decree specific performance of a contract against the purchaser for the purchase of an undivided interest in land with its attendant difficulties from the other co-owners where the intention was to purchase the whole interest in the land.

At this stage I think I ought to say that there was nothing in the agreement to suggest that Dixie Mortimer, deceased, contracted as agent for Hannah De Camp, or that he had any authority from her whatever to enter any transaction for sale of her property on her behalf. Thus the learned author of SNELL'S PRINCIPLES OF EQUITY, (25th Edn.,) at p. 538, observes that if a vendor has no title to the estate which he has contracted to sell and no right to compel the real owner to convey, he cannot force the purchaser to take a conveyance from the real owner, even if he is willing to convey the property, for the purchaser has no right to compel a conveyance by the real owner. It follows then that the doctrine of want of mutuality is applicable to the circumstances of this case and a decree for specific performance in favour of the plaintiff is out of the question.

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I now turn to consider the aspect of the case on the basis that I am entitled to examine the transport tendered in evidence in which it appears that in the year 1957 Dixie Fleetwood Mortimer and Hannah De Camp made application jointly by petition to the Supreme Court of British Guiana for a declaration of title to certain parcels of land which included Pln. Endeavour (the subject-matter of the agreement Exhibit 'A'), and as a result of which they obtained transport on 8th February, 1957, on the basis of prescription in their favour jointly.

It is pressed upon me by counsel for the plaintiff that under the agreement Dixie Mortimer was merely selling his undivided half interest in Pln. Endeavour which he could have done by separate agreement and, following a long line of authority, his administratrix ought to be compelled to specifically perform his contract and to convey his undivided half interest to the plaintiff (purchaser). A close examination of the authorities cited by counsel for the plaintiff reveals that they are all based on the principle enunciated in the dictum of Lord ELDON, L.C., in *Mortlock v. Buller* (1804), 10 Ves. 315, wherein he stated in the course of his judgment:

"I also agree, if a man, having partial interest 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, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purpose of this jurisdiction, the person contracting under those 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; and the court will not hear the objection by the vendor that the purchaser cannot have the whole. But that always turns upon this: that it is, and is intended to be, the contract of the vendor."

In *Bower v. Cooper* (1843), 2 Hare 408, it was stated that an agreement to sell land, not expressing what interest in it, must be construed to mean the whole of the interest of the vendor in the land. So that where the defendant agreed to sell to the plaintiff "a certain cottage and land recently purchased," it was decided that the word "land" there meant the whole of the interest of the vendor in the land.

In *Boursot v. Savage* (1866), L. R. 2 Eq. 134, A, one of three trustees, executed an assignment of leasehold property held jointly by them, to a purchaser, and forged the signatures of his two co-trustees and requisite assent of the beneficiary to the sale. A, who was the solicitor, acted in that capacity on behalf of the purchaser. It was held that the purchaser had constructive notice of the trust and that the execution by one of the three joint tenants was a valid assignment of the legal interest in one-third to the purchaser. The beneficial interest in the one-third of the property A could not, however, pass to the assignee.

In *Barker v. Cox* real estate was, by a marriage settlement, limited to such uses as the husband and wife should appoint; and in default of appointment to the wife for life, with remainder to the husband in fee. The husband, having entered into a contract to sell the property, died suddenly. The wife then refused to convey her life interest, and it was held that the purchaser was entitled to all the interest, which the husband's representatives could convey, with compensation for the interests of the wife which could not be conveyed. There again, BACON, V.C. repeated what was in effect the principle in *Mortlock v. Boller* when he said that:

"If a man enters into a contract to sell something, representing that he has the entire interest in it, or the means of conveying the entire interest and receives the price of it and does not perform his contract, then the other party to the contract, who has parted with his money, or is ready to pay his money, is entitled to be placed in the same position he would be in if the contract had been completed; or, if not, by compensation to be placed in the same position in which he would be entitled to stand."

In *Hooper v. Smartt*, where the defendants had entered into a contract to sell the entirety of certain property, and it subsequently turned out that they were only entitled to a moiety of it, the purchaser electing to take a moiety instead of the entirety, paying half, the price for half the moiety.

In *Sneesby v. Thorne*, there was an agreement for the sale of leasehold property entered into by one of two executors in the firm belief that the other executor would agree to what he did and, accordingly, the contract was signed by him on behalf of himself and his co-executor. The other executor refused to concur in the sale, and it was laid down by the Lord Justices that a decree for specific performance could not be made as the property was trust property. Their Lordships declined to decree specific performance as to part of the property saying that it was never the intention of the executor to enter into a contract to sell an undivided part.

These cases were reviewed by MALINS V.C. in *Naylor v. Goodall* (1877), 47 L.J. Ch. 53, where one of three trustees, acting as if he were absolute owner, entered into a contract to sell the entirety of certain freehold property in one-fifth part of which he had a beneficial interest. The other trustees afterwards refused to concur in the sale. The plaintiff, having brought his action for specific performance of the contract, it was held that the contract for the sale of the entirety could not be enforced and the property being trust property it could not be enforced against the defendant as to his one-fifth share only.

MALINS V.C., in the course of his judgment, however, stated that if the property had not been trust property he would have followed the decision in *Hooper v. Smartt* and decreed specific performance as to the undivided one-fifth part of which the defendant was

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owner. He placed great reliance on the statement of the law as expressed in DART'S VENDORS & PURCHASERS (5th Edn.,) p. 1067, that where the whole of the contract cannot be performed, the court will insist on the vendor making good his contract to the extent which he is able to make it good, if the purchaser is willing to complete on those terms.

Finally, in *Burrow v. Scammell* (1881-1882), L. R. 19, Ch. D. 175, by a memorandum in writing the defendant agreed to let business premises for one year to the plaintiffs with an option for the plaintiffs at the end of the year to have a lease for a further period of seven, fourteen or twenty-one years. The plaintiffs entered into possession under the agreement and laid out money in alterations, and at the end of the year gave notice of their intention to exercise the option. When the defendant's title came to be investigated it was found that she was possessed of only a moiety of the premises, the other moiety being vested in her son, a minor. The defendant had made a *bona fide* mistake as to the title to the entirety. The defendant was decreed to perform specifically so much of the contract as she was able to perform, with an abatement of one moiety of the rent. BACON, V.C. in the course of his judgment recited the principle stated by Lord ELDON in *Mortlock v. Bullet* which he declared to be a rule of the Court, and made the point that the plaintiffs did contract for the entirety and when the defendant entered the bargain she honestly believed that she was entitled to the entirety and she certainly did mean to bind the entirety, and in her mind she never had the intention of dealing with anything less than the whole, and therefore the parties were all *ad idem* as to the subject-matter of the contract. In the result, the plaintiffs were entitled to the relief claimed by them on the discovery of the mistake, and that was specific performance of what the defendant was able to give them.

These cases are in sharp contrast with *Price v. Griffith* where A, in a letter addressed to B, said he would let the coal at a certain place on the terms stated in the agreement in the hands of C. C. had two papers in his hands: one for letting coals at this place and another place. A, and another were in fact tenants in common in fee in the property situate in these two places. B, had assigned his interest to P. who filed a bill for specific performance of the agreement by A, and the other joint owner. The prayer of the bill was that both might specifically perform the agreement or that A, might perform it if the claim should fail against both. It was held *inter alia* that there being no ground of impropriety or misrepresentation by A, the court would not act against him as the owner of an undivided moiety by decreeing specific performance as to that share, with compensation for the other moiety which he was unable to demise. KNIGHT-BRUCE, L.J., in his judgment pointed out that the colliery belonged to two persons in undivided moieties and that the plaintiff had filed his bill against both alleging that the contract was binding against both, but, alternatively, he prayed relief against one

if he should fail to establish his claim against the two. The hill was dismissed against one leaving only the owner of the other share, but the owner of the other share never meant to contract for one share alone; if he intended to contract at all he intended for the lease of the whole colliery. The learned Lord Justice dismissed the Bill for specific performance against the owner of the other share and in so doing repeated the principle laid down in *Mortlock v. Buller* when he stated:

"I can conceive cases where a person who has contracted to convey more than it is in his power to convey ought to be decreed to convey what he can, either with or without making compensation to the vendee for such part of the subject-matter of the contract as the vendor is unable to convey."

But he went on to point out that at a lease of an undivided moiety of a colliery is a very different thing from the lease of the whole colliery, and in the circumstances there was no ground of impropriety or misrepresentation as by holding himself out as capable of contracting for the whole, or in fact any other ground for enabling the court to act against the owner of one undivided share.

It is clear from an examination of the aforementioned authorities that the principle laid down in *Mortlock v. Buller* could have no application to the present circumstances where it cannot be seriously contended that Dixie Mortimer ever made any representation, or misrepresentation for that matter, that he was disposing of the whole of the property. Indeed, as already indicated, I have not so found, and on the contrary counsel for the plaintiff has pressed upon me that I should find that Dixie Mortimer was merely selling his undivided half interest which he was entitled to do. I have also rejected this argument, but even if this were the position the plaintiff would still not on the authorities he entitled to specific performance of the interest of Dixie Mortimer in the property, as he made no representation that he was selling the whole of the property, nor was it his intention at the time he signed the agreement to dispose of his undivided interest in the property.

In *Boursot v. Savage* one of the trustees of the property forged the signatures of the other trustees and was guilty of fraud by representing that he was in a position to dispose of the whole property In *Hooper v. Smartt* the defendants represented that they were in a position to sell the entirety of the property. In *Naylor v. Goodall* the trustee acted as if he were the absolute owner of the freehold property whereas he was not. In *Burrow v. Scammell* the defendant by mistake thought she held title to the entirety, whereas she did not in fact do so.

In all these cases then, where equity compelled the vendor to convey that which he was in a position to convey, there was either fraud, misrepresentation or mistake by the vendor, causing hardship

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to be suffered on the part of the purchaser. It should be noted that in *Sneesby v. Thorne*, where the executor signed on behalf of himself and co-executor agreeing to sell leasehold property, the court refused to decree specific performance as to part of the property because it was never the intention of the executor to sell an undivided part.

It is not difficult to see why the doctrine of want of mutuality was not discussed in these cases where the vendor was compelled to convey his interest, which he was in a position to convey, and that was because the doctrine simply did not arise as there was in fact mutuality between the parties brought about by the misrepresentation or mistake of the vendor. In these cases the defendant/vendor was *ad idem* with the plaintiff/purchaser on the property, subject-matter of the contract, and was representing and agreeing to sell the entirety in the property which the purchaser was agreeing to purchase. In these circumstances then, there would be no want of mutuality existing at the date of the contract tout equity would never of course permit a vendor to take advantage of his own wrong for he who seeks equity must do so with clean hands and he would be compelled to convey his interest, although he could not obtain specific performance against the purchaser in respect of that interest. 36 HALSBURY'S LAWS OF ENGLAND (3rd Edn.,) para. 368. p. 271, lists this situation as an exception or apparent exception to the rule of want of mutuality, tout I prefer to treat it as being outside of the rule.

In the present case Dixie Mortimer made no representation that he was selling the whole property nor did he represent that he was selling his undivided half interest in the property. All that could be said was that he signed the agreement expecting Hannah De Camp, at a subsequent date, to sign the document which would have the effect of passing their joint interest in the property to the purchaser who would then acquire the whole property.

The matter becomes clearer on a consideration of *Rudd v. Lascelles*, [1900] 1 Ch. D. 815, cited by counsel for the defendant, where it was laid down that the jurisdiction to enforce specific performance with compensation for defects on a vendor, in cases where the contract is silent as to compensation, rests on the equitable estoppel referred to in *Mortlock v. Buller*, namely, that where a vendor has represented and contracted to sell an estate as his own and the purchaser has relied on his representation, the vendor cannot afterwards be heard to say he had not the entirety.

FARWELL, J., in the course of the argument, referred to DART ON VENDORS & PURCHASERS [5th Edn.,] p. 1193, where the author states:

"The result then 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 insist on a vendor making good his contract to the extent of his ability, and on his submitting to a proportionate re-

duction 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."

In *Castle v. Wilkinson*, (1870) Ch. App. 534, where a husband and wife agreed to sell the wife's estate in fee simple, the purchaser being aware that the estate belonged to the wife and the wife after-wards refused to convey, it was held that the purchaser could not compel the husband to convey his interest and accept an abated price, LORD HATHERLY, L.C., in the course of his judgment stated:

"If a man professes to be the owner of the fee simple and undertakes to sell the fee simple and it turns out that he had not power so to do, the purchaser not being at the time aware of the difficulty, then the vendor must convey as much as he can and submit to an abatement, *but the case is wholly different where the vendor does not profess to sell the fee, but only that estate which he is able to dispose of*"

It follows then in the present case, on my findings, that as the vendor Dixie Mortimer did not represent himself able to dispose of the whole interest in the property and the purchaser was well aware that Dixie Mortimer was not intending to sell the whole property but both he and Dixie Mortimer expected Hannah De Camp, to sign the document in order to complete the agreement, the defendant in her capacity as the administratrix of the estate of Dixie Mortimer, deceased, cannot be compelled to convey the undivided interest in the property which Dixie Mortimer, was able to convey, nor could the receipt of 16th July, 1962, issued by her in her personal capacity bind the estate. The agreement is therefore incomplete and a mere *nudum pactum* out of which no right of action can arise. The sum of \$100 paid to Dixie Mortimer on account of the purchase price must therefore be returned to the purchaser but as counsel for the defendant has given an undertaking that this sum will be repaid, I refrain from making any order in relation to it.

The submission made by counsel for the defendant that Dixie Fleetwood Mortimer and Hannah De Camp were joint tenants, I consider to be sound. When these two persons acquired title to the property at Pln. Endeavour, Hog. Island, Essequibo, they did so in their joint names, and no words of severance were used. Indeed, in the transport issued to them, No. 675/1957, there was nothing to indicate that they each held a separate estate in the property. In other words, transport was passed to them absolutely in their joint names and the four unities of a joint tenancy were present.

In England when two or more persons took as tenants in common, the share of each was treated as a separate item of property, which could not only be transferred by him in his lifetime but which would pass on his death to his representative. In the case of joint tenancy, the rights of each were extinguished by his death so as

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to increase the interest of his survivor or survivors. A joint tenant, however, could transfer his interest in his lifetime though not by will. In other words, the joint tenant could sever the jointure by alienating his interest. By s. 3D of the Civil Law of British Guiana Ordinance, Cap. 2, the law relating to immovable property in this Colony is determined according to the principles of the common law of England, applicable to personality. Hence the principles by which the courts of England are guided when deciding whether a tenancy is joint or in common are relevant in determining whether in this Colony a tenancy is joint or common. See *Hamomam v. Harnandan*, 1944 L.R.G.B. at pp; 201 and 208. This situation, to my mind, all the more serves to indicate that the signatories to the agreement contemplated a joint sale and purchase of the property by Mortimer and De Camp, on the one hand to the plaintiff on the other, which was never completed.

In any event, as LINDLEY, L.J. stated in *Lumley v. Ravenscroft*, [1895], 1 Q.B. 685:

"This case is not within the exception as to misrepresentation or misconduct stated in *Price v. Griffith* and *Thomas v. Bering*, but comes within the general rule that where a person is jointly interested in an estate with another person and purports to deal with the entirety, specific performance will not be granted against him as to his share. The plaintiff's only remedy is by way of damages."

But, as I have already stated, Dixie Mortimer did not even purport to deal with the entirety, *a fortiori* specific performance could not be obtainable against his administratrix, nor could damages be awarded against her.

The action must therefore fail and be dismissed, and the opposition be declared unjust, illegal and not well-founded. There will be judgment for the defendant with costs fit for two counsels. Stay of execution for six weeks.

Judgment for the defendants

Solicitor: *Carlos Gomes* (for the plaintiff); *L. Persaud* (for the defendant).

LAW REPORTS OF BRITISH GUIANA [1965]
 PERSAUD AND OTHERS v. BRITISH GUIANA RICE
 MARKETING BOARD

[Supreme Court (Cummings, J.) March 23, 24, 25, April 18, 1964, October 22, 1965]

Master and servant—Termination of services—Allegation of misconduct not proved—One week's wages paid in lieu of notice—Two weeks' notice required—Whether wrongful dismissal—Claim for declaration that contract of employment still subsists—Competence of claim—Labour Ordinance, Cap. 103, s. 17 (2) (b).

Section 17(1) of the Labour Ordinance, Cap. 103, provides that where, as in this case, "there is no agreement to the contrary a contract of service shall be deemed to be a contract for one month certain from the time of entering into the service." Subsection 2 provides that "every such contract may at any time be terminated.....(b) by either party (1) for good or sufficient cause: or (ii)by fourteen days' notice given to or served upon the other party." The plaintiffs were dismissed by the defendants, their employers, and given one week's wages in lieu of notice. They claimed *inter alia* damages for wrongful dismissal and a declaration that they were still in the employment of the defendants. In defence it was contended that the plaintiffs had been dismissed for misconduct, but this was not established.

Held: (i) the defendants had failed to discharge the onus which rested on them of proving that the dismissals were justified;

(ii) the termination of the plaintiffs' contracts by giving them one week's pay in lieu of notice was contrary to the provisions of the Ordinance and their dismissals were accordingly wrongful;

(iii) when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service.

(iv) this was not a case in which the declarations sought by the plaintiffs ought to be made.

Judgment for the Plaintiffs.

Reasons for Decision: The plaintiff's herein claim from the defendants —

- (a) specific performance of an express and/or implied agreement entered into in the month of October 1962 by and between the British Guiana Rice Marketing Board Workers' Union on their behalf and the defendants;
- (b) the following declarations:
 - (1) that the findings of the Commissioner of Labour to whom a dispute was referred by the Board and the Union in accordance with the provisions of the said agreement, were binding on the defendants;
 - (2) the notices of dismissal dated 4th September, 1962 which were served on the plaintiffs on the 6th day

PERSAUD v. RICE MARKETING BOARD

of September, 1962, were null and void and of no effect;

- (3) that the purported subsequent investigation by the defendants into the guilt or innocence of the said 9 employees of misconduct which merited their dismissal was illegal, null and void and of no effect because —
 - (i) the findings of the said Commissioner of Labour were binding on the defendants;
 - (ii) the said purported investigation was against natural justice as it was held in the absence of the said 9 employees and without their being given the opportunity to be heard in their own defence;
- (4) that the plaintiffs are still employees of the defendants upon the same terms and conditions of their employment by the defendants prior to the 4th day of September, 1962:
- (5) alternatively, \$5,000 to each of the plaintiffs for damages for wrongful dismissal;
- (6) costs;
- (7) such other and further relief as to the court seems fit.

After the opening of the plaintiffs' case, and while evidence was being adduced on behalf of the third-named plaintiff, counsel on both sides agreed to restrict the evidence for the plaintiffs to that of the third-named plaintiff and his witnesses, and undertook on behalf of the other plaintiffs, subject to the exercise of any right of appeal, to abide by the result of the decision in his case.

The third named plaintiff, Milton Edwards, was employed by the defendant Board as a foreman from 1946 to 1962. From 1957 until about four months after his dismissal on 4th September, 1962 he was a member and the Treasurer of the British Guiana Rice Marketing Board Workers' Union (hereinafter referred to as "the Union"). At the date of his dismissal he was earning \$25 per week. During 1957/58 as a result of representations made by the Union to the defendant on the subject of alleged dismissals without warning, agreement was reached between them and the manager of the defendant Board issued the following circulars to employees:

"4th December, 1957.

CIRCULAR TO STAFF.

Please be advised that it has been decided that warning notices in the form shown on the specimen below will be issued in

respect of any breaches by members of the staff of organisational routine, errors in work and lapses in general conduct.

The specimen shown below is self-explanatory but if any further clarification is required you should consult the head of your department.

(Sgd.) R. E. Mahadeo,
Assistant Manager.

BRITISH GUIANA RICE MARKETING BOARD
STAFF WARNING NOTICE.

Mr.

.....DEPARTMENT

The undernoted charge has been laid against you. You are hereby warned that a serious view has been taken of this failure on your part to perform your duties efficiently and conscientiously, and that a copy of this warning is being placed in your personal file.

(Sgd.) H. P. Bayley, Manager

Charge:

Results of Investigation:"

"BRITISH GUIANA RICE MARKETING BOARD,
Lots 1 & 2, Water St.,
Georgetown.

Circular to staff

On 4th ultimo the Assistant Manager issued a staff circular drawing attention to the warning-notice system which had recently been introduced. The circular did not explain the intended method of operation and criticism. Apparently some members of the staff have assumed that the system involves 'judgment without trial' and as such is 'unfair and undemocratic'

In order to clear up this misunderstanding I would now like to explain how the system will be operated. First of all I would like to point out that the warning-notice is intended to cover offences of all types from the very minor to the really serious.

Before a charge against any employee is submitted to management, it will be investigated by the head of the department concerned. When the charge is submitted to management, the following procedure will apply.

In the case of minor offences where it is obvious that all that is needed is a stern warning, a warning notice will be issued without the formality of an official enquiry. A copy of the notice will be placed on the personal file of the offending employee, and the

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absence of any further warnings on the same subject in the file will be taken as evidence that the employee has taken heed of the warning and has mended his ways. If, however, the employee feels that the warning is unjustified, he may submit a verbal or written reply, in which case the charge will be investigated and an appropriate entry made against 'Results of Investigation' on the copy of the warning-notice on file.

In the case of more serious offences, a charge sheet will be issued setting out the charge and requiring the employee to submit his defence in writing within a prescribed time. On receipt of the 'defence' the charge will be investigated and the employee will be given every opportunity of answering the charge. After investigation, if the services of the employee are not terminated, the charge and the results of the investigation will be recorded on a warning notice which will be issued to the employee, and a copy of same will be placed on his personal file with all relevant papers.

(Sgd.) H. P. Bayley,
Manager."

In April 1958 the Union and the defendant Board had executed a collective agreement in the following terms:

"MEMORANDUM OF AGREEMENT

between

The British Guiana Rice Marketing Board
(hereinafter referred to as the Board)

and

The British Guiana Rice Marketing Board Workers' Union
(hereinafter referred to as the Union)

in re

The Avoidance and Settlement of Disputes.

1. The Board and the Union, recognising that it is in the best interest of both the Board and their employees that arrangements should be made whereby questions arising out of employment may be fully investigated and settled without stoppage of work, hereby agree as follows:

- (a) When any question which may give rise to a dispute is raised by or on behalf of an employee or employees, the following procedure shall be observed:
 - (i) the employee or a deputation of the employees with or without an employee representative of the Union shall be received, without unreasonable delay, by the immediate supervisor or foreman of the section or gang in which the employee or employees is or

are employed for the mutual discussion of the question which has been raised;

- (ii) failing settlement under (i) above, the employee or employees may see the employee representative of the section or gang who may take the matter up with the officer in charge of the section or gang in which the employee or employees is or are employed, with a view to settlement;
 - (iii) failing settlement under (ii) above, the employee or employees may together with representatives of the executive of the Union take the matter up with the General Manager of the Board with a view to settlements;
 - (iv) failing settlement as in (iii) above, it shall be competent for either party to the Agreement to refer the matter to a conference between representatives of the Board and representatives of the Union upon a request being made by either party for such a conference. Such a conference shall be held as soon as possible following the request being made.
- (b) It shall be competent for either party to this Agreement to raise direct with each other any questions of a general nature, and a conference, if necessary, shall be held without unreasonable delay following a request for such a conference lodged by either the Board with the Union or the Union with the Board.
- (c) In the event of failure to settle any question in accordance with the procedure laid down in (a) (i)—(iv) and (to) of this Agreement, it shall be competent for either party to the Agreement to refer the matter to the Commissioner of Labour to intervene as conciliator.
- (d) Failing settlement, under (a) (i)—(iv) (b) and (c) above, any question may, by mutual consent, be referred to arbitration of one or more persons. Such arbitrator or arbitrators to be agreed on by both parties.
- (e) During the stages of negotiations outlined in this Agreement there shall be no lock-out by the Board or stoppage of work, whether partial or of a general character, by the Union.
2. This agreement shall only apply to those employees on the Board's hourly, daily, weekly and monthly pay-roll who are members of the Union, save and except those employees whose duties, in the opinion of the Board, are of a confidential or supervisory nature.

3. Duration of Agreement

This Agreement shall come into force on the 10th day of April, 1958, and shall continue in operation unless:

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- (a) terminated by either party giving to the other three months' notice of such termination; or
- (b) amended by agreement between the two parties.

On behalf of the British Guiana Rice Marketing Board.

(Signed) Rahman B. Gajraj	Chairman
(Signed) H. P. Bayley	Manager
(Signed) Rupert B. Jailal	Secretary

On behalf of the British Guiana Rice Marketing Board Workers' Union

(Signed) Eric Armstrong	President
(Signed) A. Eversley	Secretary

Countersigned:

Jas. Ramphal
Commissioner of Labour.

Dated: 10th April, 1958."

Edwards said that as a member of the Union he considered that the agreement and circulars formed part of the terms and conditions of his employment.

On the 6th day of September, 1962, he received a letter from the acting manager of the defendant Board in the following terms:

"4th September, 1962.

Mr. J. M. Edwards,
311, East Street,
Georgetown.

Dear Sir,

I am directed to inform you that your services will be no longer required with effect from today's date.

You will be paid your wages at the end of this week and one week's pay in lieu of notice.

Yours faithfully,
H. L. Sobrian
Manager (Ag.)

c.c. Chief Accountant Timekeeper Wharfinger"

As a result of Edwards' dismissal along with the other plaintiffs named herein and others, the Union entered into negotiations with the Board but no agreement was reached. Towards the end of September 1962 the employees of the Board staged a strike in protest of the plaintiff's and others' dismissal. The strike lasted 21

days. The Board and Union agreed to the intervention of the Commissioner of Labour as conciliator. The strikers returned to work-in accordance with the following agreement which was executed between the Union and the Board:

"MEMORANDUM OF AGREEMENT made this 14th day of October, 1962, between the Management of the British Guiana Rice Marketing Board and the Executive Council of the B. G. Rice Marketing Board Workers' Union.

With reference to the stoppage of work currently existing by workers of the British Guiana Rice Marketing Board, it is hereby agreed between the Management of the British Guiana Rice Marketing Board and the Executive Council of the B.C. Rice Marketing Board Workers' Union that the following terms are accepted by both parties as a condition precedent to the resumption of work on Monday, 15th October, 1962:

1. (a) All workers on strike who went out on strike on 26th September, 1962, and who could normally have been working at this time, would return to work *en bloc* on Monday, 15th October, 1962.
(b) All workers who were at work on Wednesday, 26th September, 1962, and who did not go on strike or who went out on strike but returned to work subsequently will also work on Monday, 15th October, 1962.
(c) If the workers at (a) and (b) of this clause do not satisfy the labour force requirement of Monday, 15th October, 1962, then the Board would be free to employ other registered labour as may be required.
(d) After Monday, 15th October, the Board is free to employ labour in the manner usually enforced at the Board, that is to say, registered workers would have priority of employment.
2. The grievances raised by the Union with the Management of the Board by letter dated 26th September, 1962, will be handled at conciliation on Tuesday, 16th October, 1962, at the Department of Labour.
3. The dismissal of the nine workers by the Board will be discussed at conciliation on the resumption of work, and if as a result of conciliation it is agreed to reinstate any or all of the workers, such workers should be paid wages as may be recommended by conciliation and approved by the Board.
4. There shall be no victimisation, intimidation or discrimination on the part of the Board towards any of the workers who were on strike.
5. The principle of 'last in first out all things being equal' is accepted by the Board and will be implemented in relation to the

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register of workers which will be compiled by the Board in consultation with the Union in accordance with the call-on system agreed on. On behalf of the British Guiana Rice Marketing Board:

(Sgd.) H. L. Sobrian, Manager.

(Sgd.) Noor M. Khan, Secretary.

On behalf of the B.G. Rice Marketing Board Workers Union:

(Sgd.) Eric Armstrong, President.

(Sgd.) Harold Reid, Secretary.

Countersigned: E. A. Richards,
Commissioner of Labour (Ag.).
Dated 14th October, 1962"

The conciliation talks continued; and eventually the Commissioner of Labour recommended that the plaintiffs should be re-employed. This recommendation was, however, not accepted by the defendant Board which proceeded instead to confirm the dismissals.

Apart from the documents mentioned and referred to herein which the plaintiff claims were incorporated into the terms and conditions of his employment, there was no express contract of employment between the plaintiff and the Board.

Section 17 of the Labour Ordinance, Cap. 103, (hereinafter referred to as 'the Ordinance'), however, provides as follows:

"17. (1) Where there is no agreement to the contrary a contract of service shall be deemed to be a contract for one month certain from the time of entering into the service.

(2) Every such contract may at any time be terminated —

- (a) by mutual consent of the parties;
- (b) by either party —

(i) for good or sufficient cause; or

(ii) in the absence of any agreement to the contrary, by fourteen days' notice given to or served upon the other party.

(3) Every contract shall be terminated by the death of the employee;

Provided that such termination shall be without prejudice to the legal claims of his heirs, dependants or personal representatives."

Although the defendant has not pleaded that Edwards dismissal was for good and sufficient cause, nevertheless the drift of the proceedings before the Commissioner of Labour was whether or not the men were dismissed for good and sufficient cause and as to whether the dismissal could have been justified where the agreed procedure had not been followed. Indeed, the Board led evidence in this court in an attempt to establish good and sufficient cause for the dismissal, and counsel for the Board strenuously urged that the dismissal was justified.

The onus of proving that the dismissal was justified is on the defendant Board. In my view, that onus has not been discharged. The evidence adduced to establish dishonesty and/or negligence, and/or gross misconduct in Edwards came from unreliable and untrustworthy witnesses. One witness in the course of his testimony said in effect that he committed forgery in connection with the incident over which the conduct of Edwards was impugned, but said he did because he was told to do so by Edwards from whom it was his duty to take orders. These witnesses may well have been implicating Edwards in order to shield themselves. It would be dangerous to make a finding against Edwards on their testimony. It was sought to corroborate their testimony by reference to statements made by one Armstrong and others in the presence of Edwards. Edwards denied that these statements were made and the defendants did not call Armstrong or any of those others.

The police investigated the matter and did not prosecute Edwards. Moreover, the defendants did not adopt the procedure in Exhibit "A".

In *Smith v. Thompson* (1849) 18 L. J. C. P. 314, the Court of Appeal held that it was a question of fact for the jury whether or not dismissal was justified. The onus is on the defendants to establish justification and in my view that onus has not been discharged.

The defendant Board terminated Edwards' contract by giving him one's week's pay in lieu of notice. This is contrary to the provisions of the Ordinance. The dismissal was therefore wrongful.

In my view this was not a case in which the declarations sought by the plaintiffs ought to be made. In *Francis v. Municipal Councillors of Kuala Lumpur*, [1962] 3 All E.R. at p. 637, Lord MORRIS OF BORTH-Y-GEST in delivering the opinion of the Judicial Committee of the Privy Council said:

"In their Lordships' view, when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service. Special circumstances will be required before such a declaration is made and its making will normally be in the discretion of the court. In their Lordships' view there are no circumstances in the present case which would make it either just or proper to

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make such a declaration. In *Vine v. National Dock Labour Board* ORMEROD, J., had in his discretion made such a declaration and the House of Lords, adopting the view expressed by JENKINS, L. J., in his dissenting judgment in the Court of Appeal, were of opinion that the declaration had been rightly made. In that case, however, the circumstances were very special. The plaintiff was and had been for some thirty years a dock labourer. As a result of legislation designed to remove the objection of those so employed that theirs was a purely casual occupation, so that their right to work depended on the accident of its availability at the docks, all dock labourers were registered as employed by the National Dock Labour Board—though they never in fact worked for the board. In the circumstances of that case it was held to be right that the plaintiff—whose dismissal was shown to have been without proper authority—should have the benefit of a declaration that he was still in the employment of the National Board, since, unless he was, he would be disabled from carrying on at all his chosen trade of a dock labourer.

"In his speech in that case (*Vine's* case) in the House of Lords Viscount KILMUIR, L. C, said:

'..... it follows from the fact that the plaintiff's dismissal was invalid that his name was never validly removed from the register, and he continued in the employ of the National Board. *This is an entirely different situation from the ordinary master and servant case.* There, if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract. Here, the removal of the plaintiff's name from the register being, in law, a nullity, he continued to have the right to be treated as a registered dock worker with all the benefits which, by statute, that status conferred on him. It is, therefore, right that, with the background of this scheme, the court should declare his rights.'

In their Lordships' view the circumstances of the present case are not such as to make it appropriate to give a declaratory judgement in the manner contended for on behalf of the appellant. The appellant's employment must be treated as having in fact come to an end on Oct. 1, 1957, and the appellant's remedy lay in a claim for damages. Their Lordships express no view as to the amount of the damages awarded beyond saying that no ground for their increase has been shown."

On the 29th of September, 1963, immediately after the defendants had filed this defence, and before hearing was requested, they paid the sum of \$50 into court to satisfy any damages which might have flowed from any breach by them of the Labour Ordinance. It was urged upon me that in such circumstances the plaintiff would

only be entitled to his costs up to the time of payment in. I consider, however, that as the defendant Board had dismissed the plaintiff for dishonesty, it was necessary for him to vindicate himself. Having done so, he is in my judgment entitled to his costs of the action. Consequently I awarded damages in the sum of twenty-five dollars in favour of the third-named defendant with costs certified fit for one counsel.

Accordingly an order was drawn up and entered in the following terms:

"1963 No. 643 DEMERARA.

IN THE SUPREME COURT OF BRITISH GUIANA.

(Civil Jurisdiction)

Between:

1. EDDIE PERSAUD,
2. HAROLD REID,
3. MILTON EDWARDS,
4. SAVILLE GIBSON

Plaintiffs,

— and —

THE BRITISH GUIANA
RICE MARKETING BOARD,

Defendants.

Before Honourable Mr. Justice Cummings (Ag.)

Dated the 11th Day of April, 1964.

Entered the 15th Day of June, 1964.

This action having come on for hearing on the 23rd, 24th and 25th days of March, 1964, 1st and 2nd days of April, 1964, and on this day AND UPON the numbers 1, 2 and 4 plaintiffs consenting for the Court to hear the claim of the number 3 plaintiff and the defendants herein AND undertaking to abide by the judgment of the Court therein AND UPON HEARING Counsel for the number 3 plaintiff and for the defendants and the evidence adduced and the Court having ordered that judgment be entered for the number 3 plaintiff in the sum of \$25.00 (twenty-five dollars) with costs THEREFORE IT IS THIS DAY ADJUDGED that the number 3 plaintiff do recover against the defendants the sum of \$25.00 (twenty-five dollars) with costs to be taxed AND IT IS FURTHER ORDERED THAT THERE BE A STAY of execution for six (6) weeks from the date hereof.

BY THE COURT

Kenneth Barnwell,
DEPUTY REGISTRAR (AG.)"

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The third-named plaintiff later applied in chambers for an amendment of this order by the addition of the words "on the higher scale" after the words "certified fit for counsel."

During the arguments in court on the question of costs it was urged upon me that the issues were of great importance to the commercial community as there were conflicting decisions at common law as to the period of notice required and that since the repeal of s. 16 of the Ordinance, there was doubt as to the categories of employees embraced by s. 17 thereof. I considered that there was merit in wishing to have the matter fully argued and decided by this court, and indicated that in such circumstances there was justification for costs on the High Court scale. Although I may not have expressly so stated, I think it could have been clearly implied from my comments during the arguments that I intended that costs should have been on the highest High Court scale, that is, scale I. I considered the omission of the words in the order "on the highest scale" or "on scale I" to have been a mere slip and amended the order accordingly.

Judgment for the Plaintiffs.

DUKHNI v. W. R. ADAMS

[In the Full Court, on appeal from a magistrate's court for the Georgetown Judicial District (Luckhoo, C.J., and Khan, J.) November 18, 28, 1964, January 30, 1965]

Legal practitioner—Barrister—Action for fees due on oral agreement in connection with services rendered in wounding cases—Whether acting as a barrister—No bill of costs rendered—Whether claim competent—Legal Practitioners Ordinance, Cap. 30, ss. 24 and 25.

Section 24(1) of the Legal Practitioners Ordinance, Cap. 30, provides as follows : "No barrister or solicitor of the Court shall be entitled to any process issuing there-out for the recovery from a client of the amount of any bill of costs, other than a bill of costs relating wholly to matters in respect of which a tariff of costs has not been by law prescribed, unless the bill has been taxed, and a copy of the bill so taxed has been delivered to the client to enable him to pay it seven days previously to the issuing of the process." Section 25 provides that "no special agreement otherwise valid in law between a barrister or a solicitor and his client as to the amount or manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by the barrister or solicitor, shall he good and valid in law, unless it is in writing."

The respondent barrister obtained judgment and the magistrate's court for fees due on an oral agreement to retain his services in connection with certain wounding cases. No bill of costs had however been rendered. On appeal,

Held: (i) in British Guiana a barrister may in certain circumstances sue for his fees;

(ii) the respondent was retained in his capacity as a barrister;

(iii) but whether or not the respondent acted as a barrister, having regard to the provisions of s. 24 of Cap. 30, he could not obtain judgment without rendering a bill of costs.

Appeal allowed.

F. Ramprashad for the appellant.

F. L. Brotherson for the respondent.

Judgment of the Court: We have decided to deliver judgment in this matter, which was reserved since the 28th November, 1964, without awaiting any further the submission by counsel for the respondent of an authority the name and reference of which he did not recall at the time of the hearing of this appeal. Counsel mentioned that the authority had been cited in another appeal to the Full Court (differently constituted from the present court) and that he thinks that the authority related to a case from New Zealand. We have ourselves been unable to trace such an authority.

This appeal arises out of a claim brought by the respondent Wilfred Robert Adams, a barrister-at-law practising in British Guiana, to recover from the appellant Dukhni the sum of \$250 stated in the particulars of claim to be \$200 for work done and services rendered and \$50 as general damages. It is, we think, of importance to set out the contents of the plaint filed on behalf of the respondent which are as follows:—

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"The plaintiff's claim against the defendant is for the sum of \$250 for damages for breach of oral contract, made at Georgetown within the Georgetown Judicial District between the plaintiff and the defendant on the 18th day of November, 1963. By the aforesaid contract, the plaintiff and the defendant agreed that in view of certain interviews, preparation of defences, taking of statements and otherwise appearing and defending cases for defendant's daughter and for the services which he had rendered her, defendant would pay him the sum of \$250.

In breach of this agreement, however, defendant prevented plaintiff from completing some of the work he had undertaken and has not paid for portions of work completely performed by plaintiff.

Wherefore plaintiff's claim is as per particulars hereunder,

Particulars:

To: Amount claimed for work done and				
services rendered	\$200.00	
General damages	<u>50.00</u>	
Total	<u>\$250.00</u>	

Dated this 17th day of February, 1964.

F. L. Brotherson :
F. L. Brotherson, Esq.,
Counsel for Plaintiff.

This plaint was issued by F. L. Brotherson, Esq., Barrister-at-Law, Counsel for plaintiff whose address for service and place of business is at his Chambers Lot 1, Croal Street, Georgetown, Demerara."

To this plaint there was filed on the part of the defendant the following statement of defence —

"The defendant denies all the allegations in the plaintiff's plaint save in so far as they are expressly admitted.

2. The defendant expressly denies that she is indebted to the plaintiff in the sum claimed or at all.

3. The defendant will contend that the plaint discloses no cause of action.

4. The defendant will further contend that the action is not maintainable in view of the provisions of the Legal Practitioners Ordinance."

The learned magistrate found the claim proved and gave judgment for the respondent in the sum of \$200 with costs \$5 and fee to counsel \$22. Against this decision this appeal has been brought.

Before dealing with the evidence adduced before the learned magistrate it should be mentioned that the respondent had sought to recover from the appellant the aforesaid amount of \$250 in earlier proceedings upon a promissory note bearing date 18th November, 1963. The promissory note which was tendered in the instant proceedings as Exhibit "C" bore what purported to be the X mark of the appellant who cannot read or write.

On the face of it the promissory note was not attested by any of the persons specified in s. 27 of the Bills of Exchange Ordinance, Cap. 338, and was thereby rendered of no effect. The claim brought by the respondent on the promissory note was therefore not pursued. An appeal brought against the decision of the magistrate in that case related solely to the question of costs. The respondent subsequently filed the plaint in the present proceedings claiming against the appellant the sum of \$250 as damages for breach of *oral* contract as set out in his plaint.

The evidence of the respondent was to the following effect, that he is a barrister-at-law practising in British Guiana and that on the 18th November, 1963, the appellant entered into an agreement with him to pay him \$200 each for two cases which concerned criminal charges brought by the police against the appellant's daughter and son-in-law. The appellant made no payment but made her mark to a promissory note for the sum of \$200 (Exhibit "C") in the presence of one Andrew Wilson, then a clerk to the respondent, and Risdon Archer, a tailor by trade. The respondent testified as to his appearances before the magistrate on behalf of the appellant's daughter and son-in-law in the criminal cases brought against them. Later in the course of his testimony the respondent stated that he was in error when he had earlier stated that he was engaged by the appellant to appear in two criminal cases and that in fact he was engaged by her in respect of three criminal cases the fees therefor amounting to \$400. Then he went on to state that he had charged a fee of \$200 for one case, that against the appellant's daughter and son-in-law, and a fee of \$200 for the second case, that against the appellant's daughter, and that while the first two cases were going on a third case—against the appellant's daughter—an indictable charge, came up. The respondent said that he applied to the magistrate to try the last-mentioned case summarily and that he appeared on behalf of the accused person on that charge on two occasions at Mahaica magistrate's court while on a third occasion he went "to see what was happening."

He estimated that he had done work valued \$200 for which the appellant had agreed to pay him and \$50 being loss he had suffered when the appellant terminated his services without payment of his fees. He alleged that the termination of his services in respect of the third case was due to his client (the appellant) being "touted away" to another legal practitioner. When cross-examined the respondent stated that he had been retained in all three cases and that he was not retained for the third case while the first two cases were pending. The respondent denied that he had been paid the sum

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of \$120 as his fees for the cases in which he was retained—two cases according to the appellant—or that he did not give the appellant receipts for payments made by her in respect of fees charged by him. The respondent admitted that he had made application on behalf of the appellant for grant of letters of administration of a deceased's person's estate and said that he might have charged the appellant \$75 in that regard. He also admitted that he had attended an inquest held at Mahaica magistrate's court at the appellant's request but denied that he had been paid \$100 in that regard. The respondent stated that he had had several interviews with the appellant but that he was unable to give the dates of the interviews. He gave instances of some of the interviews he had with the appellant and certain services he had rendered her. The respondent further stated that when on the 18th November, 1963, the promissory note Exhibit "C" was made he had by then made four appearances in the first two criminal cases. The case jackets Exhibits "A" and "B" show that the dates of hearing of those cases prior to 18th November, 1963, in each case had been 1.10.63, 15.10.63, 1.11.63 and 5.11.63. According to the respondent he had asked the appellant for a promissory note because he had no immediate prospect of being paid for services he had already rendered and which were still continuing. The respondent has stated that in all of these matters he was acting as solicitor and that he is suing for services rendered as a solicitor.

Archer testified to the effect that he was standing in the entrance of lot 1, Croal Street, when at the request of the respondent's clerk Wilson he went into the respondent's chambers and there met the appellant, the respondent and an East Indian man. There the respondent asked him to be a witness to a note which the appellant was paying him for money due to him and that she could not read or write and that the appellant said "Yes" and touched the pen. Archer said he then signed his name to the document Exhibit "C" and Wilson did likewise.

In her defence the appellant stated that she had been taken by one Indar to the respondent in connection with the inquest into the death of her husband, and that she had retained the respondent in that connection. The respondent charged her \$100 and she paid him that sum but despite her request for a receipt for the payment therefor the respondent did not give her a receipt. She also engaged the services of the respondent to apply for letters of administration of her deceased husband's estate and paid him the fee of \$75 he charged in that regard. Again she asked for a receipt for that payment and again she got no receipt. Indar again took her to the respondent when she retained the respondent to defend her daughter and son-in-law on charges of unlawful wounding. The respondent charged the sum of \$120 in that regard and she paid him in cash but got no receipt. Later her daughter was charged in connection with some jewellery but she did not retain the services of the respondent in that matter. In respect of the administration bond required for obtaining the issue to her of letters of administration of her deceased's husband's estate, she could get no one to sign as surety and the respondent told her that he would get Indar's wife to sign as surety.

but that she (appellant) would have to pay him (respondent) \$200. This she refused to do. She denied putting her mark on any paper.

Dharammrahie, daughter of the appellant, testified as to the arrangements the appellant had made with the respondent in respect of the several legal matters and as to the payments the appellant had made to the respondent. This witness testified that after the wounding cases had come to an end she received a summons alleging that she had stolen jewellery the property of her father-in-law. The respondent enquired of her if she had received the summons and she told him that she had but would not be retaining his services as he had made her plead guilty to the wounding charges. (Pleas of guilty had in fact been entered in respect of both charges relating to wounding. See Exhibits "A" and "B"). She said that she was present when the promissory note Exhibit "C" was made and that the respondent had said that he had charged the appellant \$200 for each of the cases—the wounding cases and the jewellery case. She swore that the respondent placed an X mark and signed her mother's name on Exhibit "C".

Andrew Wilson, who was at all material times employed by the respondent as a clerk but is now employed by another legal practitioner as a clerk, testified to the effect that the respondent charged and was paid \$120 for his services in connection with the inquest into the death of the appellant's husband. He also swore that the respondent told the appellant that she must bring an additional sum of \$20 for him to get the results of the inquest. The respondent charged \$100 in respect of the wounding cases and was paid that sum. He charged and was paid \$75 in respect of "an estate matter". The wife of Indar signed as surety to the administration bond. Wilson said that he prepared the pro-note Exhibit "C" on the respondent's instructions. The appellant told the respondent that she was in a hurry to get the administration bond so as to collect some money "the Judicial Department" had for her. The respondent then told the appellant that he had charged her \$200 for each of the matters and the appellant told him that he had charged her \$100, \$75 and \$120 respectively. Then the respondent told her that if she did not sign Exhibit "C" he would not allow Inderwattie to sign as surety. He (Wilson) was sent to prepare Exhibit "C" which he did. He gave the appellant his pen to sign the note and the appellant said she could not sign. The respondent then took the note from him (Wilson) and signed the appellant's name on Exhibit "C". The respondent told him (Wilson) to sign as a witness and to call Archer. Archer was called and he signed Exhibit "C" as a witness. The appellant asked the respondent why he was making the note and she had not agreed to sign the note. Wilson denied that he was giving false testimony, the suggestion being that he had been dismissed by the respondent for dishonesty and was now trying to obtain revenge. The respondent had testified that he had dismissed Wilson for dishonesty.

The learned magistrate in finding for the respondent stated that she did not accept the evidence of the defendant and her witnesses

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whom she found to be untruthful. She found that the appellant's daughter was trying to assist her mother and that Wilson had been dismissed by the respondent and was "trying to get his own back" on the respondent for his dismissal.

The magistrate stated that she accepted and believed the evidence given by the respondent and found that the appellant had retained the respondent in two cases and had agreed to pay him \$200. She did not make any payment but instead signed the promissory note Exhibit "C" in the plaintiff's favour. The respondent appeared on five occasions at Mahaica magistrate's court in accordance with his retainer. The respondent was consulted about another case (the jewellery case) by the appellant but the services of another legal practitioner were eventually retained. The magistrate, however, said that she did not award any amount in this regard as the arrangements were not very clear to her.

The magistrate also stated that in arriving at her decision she considered the cases of *Sirikissun v. Fernandes*, 1923 L.R.B.G. 1, and *Browne v. Camacho*, 1931-37 L.R.B.G. 317.

It seems clear from the evidence that the agreement between the respondent and the appellant as to the amount for the services of the respondent in respect of the two wounding cases was made *orally* and was made prior to the 18th November, 1963. The respondent had attended the magistrate's court on four occasions in each of the matters before the 18th November, 1963, arrived and before the promissory note Exhibit "C" came into existence. Although the respondent swore that he was retained in those matters as solicitor it would seem that he was in fact retained in his capacity as a barrister. The appellant is a barrister-at-law and there is nothing in the arrangements made or in his conduct of the cases in the magistrate's court to suggest that he acted otherwise than in his capacity as barrister.

The question as to whether the respondent can recover the amount claimed by him depends largely upon the terms of the Legal Practitioners Ordinance, Cap. 30. In England the employment of a barrister confers upon him no legal right to remuneration for his services and an express promise by a client to pay fees to counsel is not binding whether made before, during or after the litigation. This rule extends to all work done by a barrister as a barrister and neither in English nor in foreign courts can an English barrister sue for his fees (See 3 HALSBURY'S LAWS OF ENGLAND (3rd Edition) p. 45 at para. 64). It was held in *R. v. Doutre* (1884), 9 App. Cas. 745, that a contract for professional services to be rendered by an advocate is "so far as his remuneration is concerned governed solely by the law and custom of his profession, as, for example, by the custom of the bar to which he belongs." (See 7 HALSBURY'S LAWS OF ENGLAND (3rd Edition) p. 78, at para. 144). In British Guiana the law regulating these matters is to be found in the Legal Practitioners Ordinance, Cap. 30. The provisions of Cap. 30 are those contained in the Legal Practitioners (Amendment) Ordinance, 1929 (No. 10 of 1929)

as amended from time to time. The 1929 enactment relates to discipline while the 1897 enactment relates to admission and enrolment and includes provisions relating to the recovery of fees.

In *Sirikissun v. Fernandes*, 1923 L.R.B.G. 1, a barrister practising in British Guiana brought a claim on a *quantum meruit* against his client for services rendered in his professional capacity. There had been no agreement between the barrister and his client as to the question of fees to be paid. The client had promised remuneration for the services to be rendered. In the course of his judgment in the appeal brought against the decision of the magistrate of the East Demerara Judicial District, Sir CHARLES MAJOR, C.J., referred to the provisions of ss. 13 and 14 of the Legal Practitioners Ordinance, 1897 (No. 18). Those sections now appear in the Legal Practitioners Ordinance, Cap. 30, as ss. 23 and 24 respectively. MAJOR, C.J., observed that s. 13 (of the 1897 Ordinance) renders a barrister (or solicitor) liable on demand to account to his client for moneys advanced to him for expenditure in, or as security for, costs and charges, and in default amendable to an order of the court that he shall do so and that "the first subsection to s. 14 directly enables a barrister (or solicitor) to sue for payment of a bill of costs, if the bill has been taxed and a copy of it as taxed delivered to his client within the prescribed time. This subsection actually gives a barrister power to accompany suit with arrest of a debtor client about to quit the Colony." MAJOR, C.J., was of the opinion that the enactment contained in s. 14(2) (now s. 24(2) of Cap. 30) is an express contemplation of a claim by a barrister for fees on a *quantum meruit*. The Chief Justice, however, agreed that the claim must have been founded on a bill of costs.

Browne v. Camacho, 1931-37 L.R.B.G. 317, was a claim brought by the executors of the estate of a barrister on a properly executed promissory note given the barrister by a Client for fees for the con-duct of the defence at a criminal trial. The defence to the claim was that there was no consideration as the money was for professional services rendered by the barrister as barrister and that by the legal Practitioners Ordinance, Cap. 26 (now Cap. 30 (KINGDON EDITION), a barrister cannot sue for his fees. The defendant however admitted making the promissory note. Many letters, including an itemised bill of costs and an account, were sent by the barrister to his client and his father (who with the client had approached the barrister with respect to the client's defence). The trial judge, STEWARD, J., in finding for the plaintiff observed that s. 25 of the Legal Practitioners Ordinance, Cap. 26 (MAJOR EDITION of the LAWS, now s. 25 of Cap. 30 KINGDON EDITION of the LAWS) which relates to contracts in writing for legal services between a barrister or solicitor and his client contemplates direct privity of contract between a barrister and his client. Section 25 provides as follows:

"25. No .special agreement otherwise valid in law between a barrister or solicitor and his client as to the amount or manner of payment for the whole or any part of any past or future ser-

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vices, fees, charges, or disbursements in respect of business done or to be done by the barrister or solicitor, shall be good and valid in law, unless it is in writing."

STEWARD, J., then referred to the provisions of ss. 23, 24(1) and 25 of the Ordinance (ss. 13, 14(1) and 15 of the 1897 Ordinance) and said that by reason of those provisions he had no doubt in his mind that a barrister can sue for his fees. STEWARD, J., also stated that he had come to that conclusion by construing those sections and also following the case of *Sirikissun v. Fernandes*, 1923 L.R.B.G. 1. He added that of course if a barrister is retained by solicitor this decision does not apply.

The cases of *Sirikissun v. Fernandes* and *Browne v. Comacho* establish that a barrister may in certain circumstances sue for his fees.

There appears to be no reported judgments in the courts of British Guiana in which a contrary view has been expressed. While we see no good reason why we should dissent from that view we would like to re-echo the sentiments expressed by MAJOR, C.J., in *Sirikissun v. Fernandes* when he said:

"However undesirable—to use no stronger term—I may personally consider this state of things to be (albeit the natural result of the confusion of the two branches of the profession), however, inclined, nay determined—as Mr. Browne urges me to be—to discourage recourse by members of the Bar to powers of the kind, the respondent is entitled to insist that 'it is the law'."

Having come to the conclusion that a barrister may in certain circumstances sue for his fees, we must now consider whether in the circumstances of the present case the respondent's claim can be sustained. The respondent has not sued upon any special agreement in writing so that s. 25 of the Legal Practitioners Ordinance, Cap. 30, need not be considered. His claim, is upon an oral contract alleged in his plaint to have been made on the 18th November, 1963, for services rendered in respect of certain interviews, preparation of the defences (on the wounding charges), taking of statements "and otherwise appearing and defending cases for the defendant's daughter and for the services he had rendered her."

We cannot substitute our own view of the facts for those found by the learned magistrate. The facts as found by the magistrate were that the appellant had prior to the 18th November, 1963, contracted with the respondent to pay him \$200 for the two wounding cases and that the respondent had received not a penny; that empty of pocket he had appeared on no less than four occasions between the 1st October, 1963, and the 6th November, 1963, at the Mahaica magistrate's court in the wounding cases and that on the 18th November, 1963, the appellant agreed to give him an on demand promissory note in the sum of \$250 as representing the extent of the services he had rendered to that date. The respondent stated that

the sum of \$200 was in respect of the wounding eases and \$50 for services he had rendered in respect of the jewellery case. On the following day, the 19th November, 1963, the defendants in the wounding cases entered pleas of guilty and the matters were disposed of on that day.

The respondent has not sued on the original agreement made prior to the 18th November, 1963. His plaint and evidence relate to the alleged agreement of the appellant on the 18th November, 1963, to pay him \$250 in relation to the services he had up to then rendered. The contents of the promissory note, Exhibit "C", tendered by the respondent in support of his claim relate to "the sum of \$250 (two hundred and fifty dollars) for value received this 18th day of November, 1963." At the 18th day of November, 1963, the respondent had not yet completed his appearances in the cases for which he said the appellant had agreed—under the original agreement—to pay him \$200. The respondent's evidence related the amount of \$250 stated in the promissory note to all three cases then pending (for the termination of the respondent's services had not yet been brought about) while in his plaint and evidence he claims \$200 for services rendered and \$50 as damages for loss occasioned by the termination of his services. His claim is not on the promissory note for an agreed amount but is for services rendered to the 18th November, 1963, in the three matters at that date still all uncompleted. Whether or not he acted as a barrister, having regard to the provisions of s. 24 of the Legal Practitioners Ordinance, Cap. 30, the respondent cannot obtain judgment without rendering a bill of costs.

In the result a judgment for non-suit of the respondent's claim will be entered. The appellant will get her costs in the magistrate's court \$31 and in this court \$35.96. Appeal allowed and order of magistrate set aside.

Appeal allowed.

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[In the Full Court, on appeal from the magistrate's court for the Berbice Judicial District (Luckhoo, C. J., and Chung, J.) September 17, October 6, 23, December 4, 1965.]

Workmen's compensation—Conflicting medical opinions—Matter referred by Magistrate to medical referee—Referee agrees with opinion of employer's doctor—Conclusiveness of medical referee's report—Admissibility of further medical opinions—Workmen's Compensation Ordinance. Cap. 113, s. 34 (2).

Appeal—Full Court—Power to call witnesses—Summary Jurisdiction (Appeals) Ordinance. Cap. 17 & 27.

In a workman's compensation claim a conflict in medical opinions was referred by the magistrate by consent of the parties to a medical referee. The referee's certificate unambiguously agreed with the medical opinion submitted on behalf of the employers. On appeal by the workman from a decision of the magistrate, given in favour of the employers, the Full Court, in purported exercise of its powers under s. 27 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, heard additional evidence from another doctor who testified in favour of the workmen. On objection by counsel for the respondents to the admissibility of this evidence,

Held: the additional evidence was not admissible to contradict the certificate of the medical referee which was conclusive as to the matters therein certified.

Appeal dismissed.

R. P. Rawana for the appellant.

A. Ali-Khan for the respondents.

Judgment of the Court: The appellant's claim for an award of compensation under the provisions of the Workmen's Compensation Ordinance, Cap. 111, was dismissed by a magistrate of the Berbice Judicial District after he had considered the report of the medical referee Mr. N. P. Stracey, senior surgeon of the Public Hospital, Georgetown, to whom the appellant was referred for examination and report.

The appellant, who was employed by the respondents as a labourer, slipped and fell on an iron bridge and suffered injury to the left elbow. The injury occurred while the appellant was on his way to work on the 7th October, 1964. He was examined by Mr. B. Goswami, Resident Surgeon at the Public Hospital, New Amsterdam, on reference to him by the respondents' medical officer. Mr. Goswami reported to the respondents' medical officer that his findings were as follows:

"On clinical examination I found that he had voluntary spasm of the flexor group of muscles of his left elbow and also of the extensor muscles of his left wrist and fingers. His elbow is held in strong flexion and his wrist and fingers are held in strong extension. I could not detect any external evidence of injury to the bone, joint, muscles or blood-vessels and nerves. X-ray of his left elbow and forearm was taken and this does not show any abnormality.

I feel that this patient is rather obsessed with the idea that something is wrong with his elbow as a result of the fall. I also feel that this is more a problem of a Psychiatrist than a Surgeon. If you wish you can refer him to a Psychiatrist for opinion and treatment."

Upon the claim coming on for hearing Dr. Harold Rawana testified to the effect that on 1st February, 1965, he examined the appellant at the Outpatients Department of the Public Hospital, New Amsterdam, and found him to be suffering from —

- (1) deformity of left elbow joint with limited extension;
- (2) diminished carrying angle of the left elbow joint;
- (3) progressive damage of ulnar nerve consequent to pressure;
- (4) flexion of distal inter-phalangal small finger left hand;
- (5) inability to extend fourth finger properly;
- (6) weakness in grip of left hand;
- (7) slight wasting of hypothenar eminence of left hand;
- (8) radial rotation of left forearm.

Dr. Rawana assessed the appellant's disability as a left handed workman at 60 *per centum* permanent partial disability. He was

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shown Mr. Goswami's report but said that he did not agree with it. The magistrate recorded that he observed an apparent deformity of the appellant's arm.

After Dr. Rawana had testified (he was the only witness called before the magistrate), the magistrate with the consent of the parties referred the matter to Mr. Stracey, as medical referee, for his report as to the appellant's condition including the degree of permanent incapacity, if any. It was also agreed that a copy of the evidence given by Dr. Rawana and a copy of Mr. Goswami's report be sent to Mr. Stracey. The agreed reference to Mr. Stracey was duly made and on the 25th February, 1965, Mr. Stracey examined the appellant at the Public Hospital, Georgetown. Mr. Stracey stated his findings as follows:

"I found that although he has some disuse atrophy of some of the muscles of his left forearm there is no evidence of any abnormality as a result of the injury which he sustained. He appears to have a hysterical paresis of the upper left limb and for this I would suggest that he be referred to a psychiatrist for treatment.

In this matter I am in complete agreement with the report submitted by Mr. Goswami of New Amsterdam."

On the 30th March, 1965, the medical referee's report having been received and considered, the magistrate dismissed the appellant's claim. In his memorandum of reasons for decision the magistrate stated that he construed the medical referee's report to mean that the disability of the workman had wholly ceased.

On appeal it was stated by counsel for the appellant that he was not present on the 30th March, 1965, when the hearing of the application was resumed before the magistrate and had intimated to counsel for the respondents that he wished to call further evidence, including that of Dr. Araneta, Medical Superintendent of the Mental Hospital, Berbice. Accepting counsel's statement as accurate we intimated that we would give him an opportunity of calling Dr. Araneta in the exercise of our powers under s. 27 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17. Dr. Araneta, who has neurological experience, duly testified before us and related the various tests he employed on the 22nd June, 1965, in arriving at his final diagnoses which were as follows:

- (1) nerve injury with atrophy of the muscles of the left hand;
- (2) limitation of movement of the proximal radian ulnar joint the cause of which was undetermined and psychiatrically there was no evidence of neurosis or psychosis.

Dr. Araneta was of the opinion that in the first six months after injury there was a possibility of the injured nerve mending

but that as a year has gone by the probability is that the injured nerve can never be mended. He assessed the appellant's disability at 80 *per centum* permanent partial disability by reason of the appellant's inability to grasp insofar as his left hand is concerned.

For the respondent it is contended that the report of the medical referee Mr. Stracey is conclusive and that the evidence of Dr. Araneta is thereby rendered inadmissible.

The reference to Mr. Stracey was without doubt made under the provisions of s. 34(2) of the Workmen's Compensation Ordinance, Cap. 111. By virtue of s. 34(2) of that Ordinance, the certificate of the medical referee's findings shall be conclusive evidence as to the matters so certified, (of. s. 19(3) of the Workmen's Compensation Ordinance, 192S). The certificate of Mr. Stracey appears to be unambiguous and complete and the last two lines of his certificate expressing complete agreement with the report submitted by Mr. Goswami makes it clear that he was of the opinion that the appellant at the date of his examination no longer suffered from any incapacity but was obsessed with the idea that something was still wrong with his elbow as a result of the fall.

In *Renshull v. Spencer* (1917), 10 B.W.C.C. 164, a case under s. 1(3) of the Workmen's Compensation Act, 1906, a dispute arose as to whether a workman with an injured eye was fit for work. After arbitration proceedings had commenced the parties agreed in writing to submit the question to a medical referee and to abide by his decision. The medical referee's report was ambiguous and with the consent of the parties was referred back to him by the judge. On a second application to the judge the case was dismissed on the report. On appeal it was contended on behalf of the workman that the judge should not have sent the case back to the medical referee without receiving medical evidence for the parties and that when he did receive the second report of the medical referee he should not have held that the report was conclusive and binding upon him. The Court of Appeal held that there was an agreement between the parties to abide the decision of the medical referee and dismissed the appeal.

In *Sapcote & Sons v. Hancock* (1911), 4 B.W.C.C. 184, the workman, a plumber, fell off a ladder and injured his back. He received compensation for some time and then agreed with his employers that he should submit himself to a medical referee in accordance with schedule 1(15) of the Workmen's Compensation Act, 1906. The medical referee certified that in his opinion the workman had sufficiently recovered to be able to resume the work of a plumber but that having regard to his prolonged inactivity he was further of the opinion that it was advisable for the workman to begin with the less laborious forms of his occupation. The weekly payments were then stopped and the workman applied to register an agreement to pay compensation. The employers did not resist but immediately applied to review the payments thereunder. At the hearing the

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workman tendered evidence that he was unfit to work. The county court judge, holding that the certificate of the medical referee was conclusive according to the wording of the schedule, rejected the evidence and found in favour of the employers. The Court of Appeal held that the workman's appeal was quite unarguable and dismissed the appeal.

In *Crewe v. John Rhodes, Ltd.* (1925), 18 B.W.C.C. 303, a workman suffered an accident and was paid compensation until his employers obtained a medical certificate that he had completely recovered. The workman then obtained a medical certificate to the effect that he was still incapacitated. The employers applied following upon the provisions of s. 14 (c) of the Workmen's Compensation Act, 1923 (of s. 12 of Cap. 111), for the appointment of a medical referee who upon examination of the workman certified that the incapacity of the workman was not due to the accident. In arbitration proceedings brought by the workman the employers objected to medical evidence being given contradicting the findings in the medical referee's certificate. The county court judge admitted and accepted the evidence and made an award of compensation. It was held on appeal to the Court of Appeal that by virtue of schedule I(15) of the 1906 Act the certificate of the medical referee was final and conclusive and that evidence to contradict it was inadmissible. The award was therefore set aside. In the course of his judgment ATKIN, L.J., at p. 316 said:

"The result of that is that this certificate, having been conclusive, the workman cannot now say that he is suffering from an incapacity due from the accident. The result may be an injustice; I do not know whether it is or not. No doubt the legislature considered that on the whole it was better for all concerned that these certificates should be conclusive and that further expense should be avoided. The reason why it has been said to be wrong is because the medical man called in afterwards by the workman adopted what I am bound to say seems to me to be in these days the very elementary precaution of obtaining a correct diagnosis, namely, obtaining a skiagram of the injured parts, in this case an injury to the spine. Upon the results that they obtained they came to the conclusion that they obtained quite a common result of the accident caused in the way that this was caused. Mr. Singleton says his medical men would have contorted that view. I daresay they would, but at present there is evidence that there may be an injustice, but one cannot help that."

ATKIN, L.J., at p. 317 also referred to the care which should be taken before referring cases to a medical referee.

Similarly in *Wilsons and Clyde Coal Co. v. Burrows*, [1929] A. C. 651, 22 B.W.C.C. 430, it was held by the House of Lords that where a medical referee has given an unambiguous certificate of

complete recovery the arbitrator cannot admit the evidence of Skiagrams, taken since the medical referee's certificate, with a view to showing that there were conditions not apparent on external examination. It was also held in that case that the Court of Appeal was not empowered to remit the case for the purpose of investigation into the allegations which purport to contradict the medical referee. In the course of his opinion in that case Viscount DUNEDIN referring to the words "give a certificate as to the condition of the workman and his fitness for employment" said:

"It is quite clear that under the word 'condition' it would be a perfectly relevant inquiry, not only as to whether the man was fit for employment at the moment—which really comes under the succeeding words—but whether the injury was of such a character that there was, owing to the injury, some more or less latent disability at the time but which at any time might break out, and which, therefore, would give a reasonable probability of unfitness for employment supervening."

It was held that it must be assumed that the medical referee had considered that possibility.

The authorities to which we have been referred show that once the medical referee has given an unambiguous certificate or report as to the condition of the workman and as to his fitness for employment the certificate or report is conclusive of the matters so certified. In the instant case Mr. Stracey's report when examined shows that he is clearly of the opinion that the appellant's incapacity has ceased and that the appellant appears to have a hysterical paresis of the upper left limb for which he would suggest treatment by a psychiatrist. From his endorsement of Mr. Goswami's report it would appear that Mr. Stracey also felt that the appellant's condition is due to his obsession with the idea that something is wrong with his elbow as a result of the fall.

We are of the view from the authorities cited above that the evidence of Dr. Araneta is not admissible to contradict the certificate of the medical referee Mr. Stracey.

Counsel for the appellant has, however, argued that even if Dr. Araneta's evidence is inadmissible both Mr. Goswami and Mr. Stracey have given as their opinion that the appellant is suffering nervous effects as a result of accident. Counsel submitted that the cases of *Eaves v. Blaenclydach Colliery Co.* (1909), 2 B.W.C.C. 329, and *Turner v. Brooks* (1909), 3 B.W.C.C. 22, are authorities supporting his contention that the fact that the incapacity arises from nervous effects produced by the accident does not deprive the workman of his right to compensation during such incapacity. In *Wall v. Steel* (1915), 112 L. T. 846, 8 B.W.C.C. 136, it was held that a finding that a man honestly believes that he is incapable of work and that his

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condition is due to neurasthenia resulting from the accident cannot be disturbed if there be evidence to support it even though there be evidence that employment would facilitate recovery. In *Higgs v. Unicume*, [1913] 1 K. B. 595, 6 B.W.C.C. 205, where the arbitrator found that the workman was suffering from weakness of will and a fixed but erroneous idea that he was a chronic invalid and that a continuance of compensation would have only kept up his present condition, the Court of Appeal by a majority upheld the award, though COZENS-HARDY, M.R., felt that there should have been a reduction of compensation to a nominal sum. See pp. 269, 260 of WILLIS'S WORKMEN'S COMPENSATION (33rd Edition).

In the instant case the claim filed was in respect of permanent partial disability and the evidence of Dr. Rawana and the arguments adduced before the magistrate proceeded on that basis. The question of an award being made on the basis of periodic payments was never canvassed in the court below. The appellant chose to stand or fall by his claim to an award of compensation for permanent partial disability. We do not think that he can properly ask this court to adjudicate upon an alternative claim or to refer the matter back to the magistrate to put his claim on a different basis. In fact there is no amended claim before us for reference back to the magistrate.

The appeal is dismissed and the order of the magistrate is affirmed.

Appeal dismissed

[Supreme Court (Bollers, J.) November 10, 11, 12, 25, 1965].

Mortgage—Nature of interest created—Whether movable or immovable property.

Immovable property—House situate on leased land—Whether movable or immovable property.

Landlord and tenant—Agreement for lease of land—Duration of lease not stated—Rent paid on monthly basis—Nature of interest created—Whether lease or licence—Landlord and Tenant Ordinance, Cap. 185, ss. 6(3) and 7.

Practice and procedure—Mortgage on movable property—Foreclosure proceedings instituted in rem—Validity thereof—0.7, r. 14.

Practice and procedure—Change of solicitors—No notice thereof on record—Validity of act done by new solicitor.

The plaintiff owned a building situate on land which he held under a written agreement of lease from the Transport and Harbours Department. The duration of the lease was not stated in the agreement and rent was paid on a monthly basis. The property was subject to a mortgage in favour of the defendant who instituted foreclosure proceedings *in rem* against the "proprietor or proprietors, representative or representatives of" the property, service being effected by affixing the writ with a nail to the front door of the building. Judgment having been obtained, a new solicitor, without any notice of change of solicitors having been filed, issued instructions to levy, and the property was subsequently bought in at execution sale by the defendant. The plaintiff, who had not been aware of the proceedings and the sale, instituted an action to set aside the judgment and subsequent levy and sale.

Order 7, r. 14, provides that "in an action against the owner or representative of a lot of land or plantation, the name of such owner or representative not being mentioned....., service of the writ of summons may be effected by affixing a copy of the writ to the principal building upon such land or plantation....."

Held: (i) the duration of the lease not having been stated, the document was not effective as an agreement of lease;

(ii) a tenancy from year to year did not arise under s. 6 (3) of the Landlord and Tenant Ordinance, Cap. 185, since rent was paid on a monthly basis;

(iii) the plaintiff was in the position of a person who had a mere permission or licence to go on land, which could never be made the subject of a levy;

(iv) the property was movable property and not "a lot of land or plantation" within the meaning of 0.7, r. 14, and in consequence the mode of service permitted by this provision was inapplicable;

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(v) a mortgage, whether over movable or immovable property, creates merely a movable debt and does not pass title to the mortgagee over the mortgaged property;

(vi) the mode of service adopted and the purported change of solicitor without notice on record were unauthorised and were not mere irregularities but were nullities, and in consequence all the pro-proceedings relating to the foreclosure action, execution and sale were null and void.

Judgment for the plaintiff.

B. S. Rai for the plaintiff,

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

BOLLERS, J.: In 1957 the plaintiff, Jaigobin, purchased property situate at Sparendaam, East Coast, Demerara, from the defendant, and another property at Plaisance, East Coast, Demerara, and obtained a mortgage on both properties in his favour from the defendant for the sum of \$2,000 with interest thereon at the rate of *12 per centum per annum* under a mortgage deed entered into between the parties on 11th February, 1957. The plaintiff made several payments in respect of interest but paid nothing on the capital sum, yet the defendant-mortgagee in the year 1960 released the Plaisance property from the mortgage whereby the plaintiff was able to sell that property.

In October 1964 the defendant in action No. 1587/64 instituted foreclosure proceedings in respect of the Sparendaam property, and on 2nd November, 1964, he obtained judgment therein in the Bail Court presided over by the Hon. the Chief Justice. The order made by the Honourable the Chief Justice enters judgment in favour of the mortgagee (now defendant) in the sum of \$2,140 (the sum of \$140 being interest) together with interest on the sum of \$2,000 at the rate of *12 per centum per annum* from the 12th February, 1964, until paid, together with costs in a sum fixed and with the usual order as to foreclosure of the mortgage on the property "wherein the mortgagee is admitted to proceed in execution against the property thereby mortgagee and recover and receive from the proceeds of sale the full amount for which judgment was given."

The action before the Honourable Chief Justice was brought by the plaintiff-mortgagee (now defendant) against the proprietor or proprietors, representative or representatives of a one-storeyed building standing on land leased, as defendant, and the property described in the writ followed the description of the property as contained in the mortgage deed, and is as follows:

"One one-storeyed building measuring 22 (twenty two) feet 6 (six) inches by 12 (twelve) feet 6 (six) inches with gallery attached measuring 22 (twenty-two) feet 6 (six) inches by 7 (seven) feet with a shed attached measuring 22 (twenty-two) feet 6 (six) inches by 4 (four) inches also with a kitchen attached measuring 8 (eight) feet by 6 (six) feet boarded with galvanised roof standing on 1 (one) foot 6 (six) inches wooden blocks situate

at Sparendaam, East Coast, Demerara, on lands leased from Transport & Harbours Department together with the rights in and to the lease of the piece of land upon which the above building stands."

On the strength of the judgment the present defendant levied execution upon the property as described in the writ of summons, and on a sale at public auction by the marshal of the Supreme Court the defendant purchased the property for the sum of \$1,000 on 30th March, 1965.

The writ of summons in action No. 1587/64 was never served on the plaintiff herein and an order of the court was not obtained to dispense with personal service thereof and the mode of service is recorded on the writ as having been served by the marshal at Sparendaam Village, East Coast, Demerara, on the defendants, proprietor or proprietors, representative or representatives of a building situate at Sparendaam, East Coast, Demerara, by affixing same with a nail to the front door of the said building which was pointed out to him by Charles Hubert Dias (defendant herein) on 9th October 1964.

It is the complaint of the plaintiff that he was never aware of the service of the writ of summons in the action, the judgment and the levy and sale at execution following thereon. This is denied by the defendant, who claims that the plaintiff was fully aware of the entire proceedings and could have taken steps at an earlier stage to set aside the proceedings if indeed there was a defect in the mode of service. There was also a dispute as to the amount of interest owed on the capital sum of the mortgage at the time of the judgment. In respect of both issues I have found in favour of the plaintiff, and from the evidence of the defendant given in cross-examination I have arrived at the conclusion that there was no interest owing to him by the plaintiff on the capital sum of the mortgage, and the plaintiff was never aware of the proceedings in action No. 1587/64, or the levy and sale at execution which followed as a consequence thereof, and took steps as early as possible by this action to set aside the entire proceedings in relation thereto. It will be seen that I have rejected the evidence of the defendant's witnesses who attempted to convince the court that the plaintiff was aware of the proceedings, as I formed the opinion that they were merely servants and relatives of the defendant seeking to assist him in the presentation of his case.

In action No. 1587/64 the solicitor on the record authorised to act for the plaintiff (the defendant herein) was Mr. D. A. Robinson, barrister-at-Law acting as solicitor, but it was Mr. R. L. Millington, barrister-at-law acting as solicitor for the plaintiff, who signed the request for the writ of execution and the instructions of levy. There was no notice of change of solicitor placed on the record. In the instructions to levy the property was stated as being movable property, and on the conditions of sale as advertised by the Registrar the form used was that normally used in a case of movable property.

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being sold. When the writ of execution was issued the form used was that normally used in relation to immovable property, but the inappropriate words on the writ relating to immovable property were scored out. The impression to be gained, therefore, was that the property levied upon and sold at execution was treated as movable property.

In the present action, the plaintiff avers that the service of the writ of summons in action No. 1587/64 is bad in law and a nullity, hence all the proceedings flowing therefrom are a nullity, and the request for the writ of execution was signed by a barrister-at-Law acting as solicitor, who had no authority to act in the matter. Wherefore, the plaintiff now claims as against the defendant—

- (a) an order that service of the writ of summons in the action against the proprietor or proprietors, representative or representatives of the one-storeyed building at Sparendaam on lands leased from the Transport & Harbours Department together with the rights in the lease of and to the piece of land on which the building stands be set aside; and
- (b) an order that the judgment entered in the action and the subsequent levy and sale therein pursuant to the judgment be declared null and void and set aside;
- (c) damages for the illegal levy and sale of the property;
- (d) an order restraining the defendant, his servants and/or agents from selling or otherwise disposing of the property purchased by the defendant at the execution sale on 30th March, 1965.

In this court, counsel for the plaintiff has submitted that the property which was sold at execution sale and which was the subject-matter of the mortgage deed dated 11th February, 1957, and which was the subject-matter of action No. 1587/64, was in fact movable property and could not have been proceeded against in the manner adopted by the plaintiff in that action. He submits that the mode of service was not warranted by the manner in which his client's property was proceeded against. His submission is that the mode of service adopted was clearly that as provided for by O. 7, r. 14, of the Rules of the Supreme Court (and, indeed, this is not denied by counsel for the defendant), and this rule which does not speak of movable or immovable property, but only of a limited class of immovable property, that is to say, "lot of land or plantation", can have no application in the present circumstances, as the property which was levied upon was neither a lot of land nor a plantation, nor was the action against the owner or representative of a lot of land or plantation, the name of such owner or representative not being mentioned.

Counsel referred me to the rubric of action No. 1587/64 and pointed out that the defendant named therein was the proprietor or proprietors, representative or representatives of the building des-

cribed together with the rights in and to the lease of the piece of land upon which the building stands which, he suggested, showed clearly that the defendant in that action who was sued was the owner or representative of a building. Hence the mode of service authorised by O. 7, r. 14, could not apply, as there was no question of a lot of land or plantation being involved.

Counsel for the defendant submitted that the mode of service authorised by O. 7, r. 14, would be applicable to the circumstances as the defendant named in the action was the proprietor or representative of a lot of land. He submitted also that these proceedings were proceedings *in rem* taken against the property and whether it was movable or immovable provision was authorised for the proceedings *in rem* by proviso (b) of s. 3D of the Civil Law of British Guiana Ordinance, Cap. 2.

I think it is meet that I should enter into a discussion as to the nature of the property levied upon; whether it was movable or immovable, the legal position of the plaintiff in relation thereto, and whether the manner of proceeding adopted against the property was authorised by the Rules of Court.

I think it is clear that when a levy is made on movable or immovable property for non-payment of village rates under the Local Government Ordinance, Cap. 150, the levy and proceedings thereto are *in rem* and not *in personam*. The proceedings against the property are taken there by way of parate or summary execution and are proceedings *in rem*, that is, as I understand it, the person purchasing at execution sale acquires rights in the property as against the world at large. *Ramnarine v. Bassoo*, 1956 L.R.G.B. at pp. 15 and 16. As LUCKHOO, C.J., said in that case:

"Nor is it akin to the position where a levy is made *in personam* on the property; for example, if the plaintiff had failed to satisfy a judgment given against him for non-payment of a debt, a levy made on the land to recover the amount due under the judgment would have been a levy *in personam*."

Support for this view is to be found in DUKE'S TREATISE ON THE LAW OF IMMOVABLE PROPERTY IN BRITISH GUIANA in Chapter 8, at p. 28, where the author states:

"In former times, as soon as *fiat executio* was granted, or a writ of execution was issued out of the Supreme Court Registry, the execution could take immovable property in execution without any proof to the Registrar that it belonged to the judgement-creditor. This procedure led to many abuses, many lands being taken in execution in respect whereof the judgement-debtor was never in possession. A change was made in 1910 when it was provided (a) that an affidavit of title was necessary except in cases of proceedings *in rem* by way of parate execution. It was, however, provided that possession of the judgement-debtor

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for any period not being less than five years shall he deemed *prima facie* evidence of title."

As FRASER, J., pointed out in *Simpson v. Yhap*, 1960 L.R.B.G. 326, at p. 329, a sale and purchase following proceedings *in rem* by way of parate execution create rights of a nature quite different from those taken *in personam* by way of ordinary execution for the recovery of a judgment debt, the difference being that the levy in a case of parate execution is against the land as such irrespective of rights over it, and a sale in that event conveys a title free from all rights and encumbrances, including the rights which might have been obtained by other persons including those in adverse possession for the statutory period, enabling them to obtain title by prescription. He cites *Ramnarine v. Bassoo*, 1956 L.R.B.G. 12, following *Bowen v. Jones*, 1948 L.R.B.G. 55, and *Incorporated Trustees of the Diocese of Guiana v. McLean*, 1939 L.R.B.G. 182, as authority for that proposition, whereas in the case of the levy in execution *in personam* the levy is against the right, title and interest of the execution debtor only, and no more. In other words, the purchaser at the sale could obtain no better right and title than that vested in the execution debtor.

By s. 3D (b) of the Civil Law of British Guiana Ordinance, Cap. 2, the Roman-Dutch law and practice relating to conventional mortgages was retained, and it is well settled that a conventional mortgage in this country is a transaction of a different quality from the mortgage known to the English law of real property. The element of security is common to both systems, but the main difference is that unlike the English mortgage the Roman-Dutch mortgage does not transfer to the mortgagee *dominium* or ownership over the property.

DR. F. H. W. RAMSAHOYE, in his TREATISE ON THE DEVELOPMENT OF THE LAND LAW IN BRITISH GUIANA, at pp. 456-465, shows that the courts were of the opinion that a mortgage of real property was a movable debt, the thing pledged never becoming the property of the creditor, and could only be sold after a previous decision of the court in order to realise from the proceeds the capital sum with the arrears of interest. He states:

"The right of the mortgagee was always an action for the recovery of money, the real security being only subsidiary, the primary demand being personal."

The author depends upon the unreported case of *Mendonca v. Gonsalves*, (1883) for this proposition, and points out that the learned judges CHALMERS, C.J., and ATKINSON, J., observed that even the sentence of foreclosure in the proceedings did not have the effect of passing property to the mortgagee for he then only acquired power to sell the property and apply the proceeds in liquidation of his debt.

There is nothing in this statement of the law to suggest, as counsel for the defendant has submitted, that the mode of pro-

ceeding against the property mortgaged should be as in an action *in rem*, although it may well be that the mortgage acquired rights *in rem* over the property in the recovery of the mortgage debt from the proceeds of sale. It would be illogical, in my view, to proceed against movable property *in rem*, for if the writ in the action were to be attached or merely placed on a movable object, it could hardly be brought to the attention of the defendant mortgagor who might be far removed from it and who would have no notice of the pending action. The mortgagee could, of course, adopt proceedings *in rem* against the property mortgaged in the case of immovable property, provided it was authorised by the rules of court.

Counsel's reference to one or two cases where the mode of service adopted against movable property mortgaged was as proceedings *in rem* could hardly establish a practice and must have been clearly wrong. As he concedes there is no caste to be found on this aspect of the matter, I am of the opinion that if this were the general practice there would not be this significant lack of authority. Confirmation for this view is to be found at p. 46 of DUKE'S LAW OF IMMOVABLE PROPERTY, where the author states that a foreclosure action may be of one of two kinds. It may be either an action against the mortgagor himself, or it may be an action *in rem* against the very property. In the latter case, the defendant's name is not given. He is merely described as the owner or representative of the land in question, and the writ is served by affixing a copy "to the principal building upon such land or plantation, or if there be no building or plantation to any railing, tree, or to some conspicuous place on such land or plantation." (O. 7, R. 14, of the Rules of Court, 1900). In the former case, if the proceeds of the sale are insufficient to meet the amount of the mortgagee's claim, then the mortgagee is at liberty to proceed against other property of the mortgagor for the recovery of the balance. But in the latter case, the mortgagee can look only to the proceeds of sale for the recovery of his debt.

If there is authority then for the bringing of a foreclosure action against the mortgagor himself in the case of movable property where the writ could be served personally on the mortgagor, there could be no need to resort to the proceedings *in rem* against the movable property itself giving rise to the illogical situation already described.

It is important to observe that the statute speaks of the law and practice and is to be contrasted with s. 44 of the Supreme Court Ordinance, Cap. 7, which speaks of the practice and procedure of the court. The word "practice" in s. 3, Cap. 7, must therefore be construed as relating to substantive law and not to adjective law which would of course be the law relating to procedural matters.

In *Charlestown Sawmills, Ltd. v. Husbands*, 1931—37 L.R.B.G. 92, the Full Court considered the practice of the Supreme Court in

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the case of sales at execution) of property subject to mortgage, and referred to *Adamson v. Biggins*, 1922 L.R.B.G. 24, in discussing the question whether the mortgagee, after the costs had been paid, was allowed to claim any balance of the proceeds of sale not exceeding the amount due on his mortgage in priority to any payment to the judgment-creditor by the marshal, and decided that this was so even where the mortgagee bought the property. The Full Court did not discuss any question of procedure or manner of proceeding against the property mortgaged.

It is true that in the English case of *Lever Bros., Ltd. v. Kneale & Bag-nall*, [1937] 2 K.B. 87, the question arose as to whether, if an order for injunction had been made and there was a disobedience to it followed by a committal, the order of committal was a part of "the practice or proce-dure", and SLESSER, L.J., in the Court of Appeal thought that it was. He cited with approval the dictum of LUSH, L.J., in *Poyser v. Minors*, 7 Q.B.D. 329, who, on speaking of the word "practice" which occurs in s. 32 of the County Courts Act, 1856, which authorised county court judges with the approval of the Lord Chancellor to frame rules and orders for regulat-ing the practice of the courts and forms of proceeding's therein, said:

"Practice in its larger sense, the sense in which it was obviously used in that Act, like procedure, which is used in the Judicature Act, denotes the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines the right and which by means of the proceeding the court is to administer the machinery as distinguished from its product. Practice and procedure, as applied to this subject, I take to be convertible terms."

It is to be seen, however, that in *Poyser v. Minors* the word "practice" was used along with the words "forms of proceedings", and in the case SLESSER, L.J., was then considering the word "practice" was used along with the word "procedure", and I take it then that the word "practice" in those instances was being used in its larger sense and that is why SLESSER, L.J., came to the conclusion that the order of committal was a mode of pro-ceeding by which a legal right is enforced.

In the instant case, the word "practice" is not used with the word "proce-dure" or with the words "form of proceedings" and must of necessity be given a more restricted meaning. It should be noted that SLESSER, L.J., came to the conclusion that the order of committal is a matter of "practice or procedure" but never fully made up his mind which one it was, and whether it was a rule of practice or a rule of procedure. In my view then, the mode of proceeding against the property *in rem* would be a matter of procedure, and in the case of immovable property the mode of proceeding *in rem* could only be authorised by O. 7, r. 14. In any event, DALTON in his DIGEST OF THE CIVIL LAW at p. 15, considers that sub-s. (b) has been re-pealed by the Deeds Registry Ordinance, 1919, which now settles the law

relating to mortgages and other deeds in so far as the provisions of sub-s.
(b) are contrary to the provisions of the Ordinance.

Order 7, r. 14, of the Rules of the Supreme Court, 1955, follow along the lines of O. 7, r. 14, of the 1900 Rules and reads as follows:

"In an action against the owner or representative of a lot of land or plantation, the name of such owner or representative not being mentioned (or in the case of vacant possession, when it cannot otherwise be effected) service of the writ of summons may be effected by affixing a copy of the writ to the principal building upon such land or plantation, or, if there be no building, to any railing, bridge, tree, or to some conspicuous place on such land or plantation. In addition a notice of the writ approved by the Registrar shall be published in one Sunday issue of a daily newspaper circulating within the jurisdiction."

When one reads the description of the property as set out in the summons in action No. 1587/64, it is abundantly clear that the defendant proceeded against is the proprietor or representative of a building on a piece of land together with the rights in and to the lease of the said piece of land. There is no question of the defendant proceeded against in the action being the proprietor or representative of a lot of land or plantation. Order 7, r. 14, would not, therefore, be applicable to the present circumstances.

Counsel for the defendant has sought to impress me with the argument that the words "lot of land" in the rule must be given their ordinary English meaning, that is, any piece or parcel of land. I cannot accept this contention, as it appears to me that what the rule is seeking to do is to provide an action or proceedings *in rem* against the owner or representative of a limited class of immovable property, to wit, a lot of land or plantation. If that is so, the words "a lot of land" must be interpreted to mean a specific portion of land that has been ascertained, measured and defined with reference to a plan. When the property is sold at execution sale the purchaser obtains a judicial sale transport granting title to the property to him and this can only be passed in his favour under the Deeds Registry Ordinance, Cap. 32, if the lot of land is clearly defined with reference to a plan. If there is no reliable description of the property, the transport cannot be passed.

In *Perreira v. Perreira*, (1931—1937) L.R.B.G. 464, VERITY, J., (as he then was) discussed the meaning of "lot" where the word was not defined or described by reference to metes and bounds, limitations of area or reference to any plan or diagram considered, and pointed out that where that situation existed the lot could only be identified by the production of evidence from which may be rightly inferred what was the actual parcel of land referred to. Even if counsel's argument were sound—that "lot of land" meant "piece of land"—it would be readily seen that it was not a lot of land being proceeded against and levied upon, but merely the building with the rights in and to the lease of a piece of land upon which the building stands.

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I would divert here to say that the transaction into which the plaintiff entered with the Transport & Harbours Department on 15th February, 1957, purported to be an agreement of lease and not a lease. It is true that under the common law an agreement of lease can operate and be construed as a lease if it contains words of present demise and if the essential terms are fixed, and especially if the lessee has entered into possession (as in this case), and if the covenants which would be inserted in the lease are to be binding at once. See 23 HALSBURY'S LAWS (3rd Edn.) p. 436, para. 1033. Whether the agreement operates as a demise or as an agreement only depends on the intention of the parties.

The matter is now, however, regulated by s. 6 (3) of the Landlord and Tenant Ordinance, Cap. 185, which states that every agreement for a lease made in writing or orally under which the person to become lessee went into possession of the land or building, shall take effect and be construed as a tenancy from year to year from the date of the entry into possession and until the lease has been actually executed. Section 7 of the Ordinance, however, states that every lease shall contain the duration of the lease, but the document which purports to be an agreement of lease does not give the duration of the lease. It is trite that the term must be for a definite period in the sense that it must have a certain beginning and a certain ending. It follows then that the document entered into by the plaintiff and the Transport & Harbours Department was neither a lease nor an agreement of lease, but merely an agreement for a void lease. In that situation, under the Landlord and Tenant Ordinance the plaintiff would not even under the statute have held a tenancy from year to year.

Prior to *Walsh v. Lonsdale* (1882), 21 Ch.D 9, the doctrine was firmly established that where a person was let into possession under a mere agreement for a future lease, he became only a tenant at will, but it was equally well established that when he paid or agreed to pay any part of the annual rent thereby reserved, his tenancy at will changed into a tenancy from year to year upon the terms of the intended lease, so far as they were applicable to and not inconsistent with a yearly tenancy. This doctrine applied to an entry upon a void lease. *Doe d. Rigge v. Bell* (1793), 5 T.R. 471.

The plaintiff in this case, however, had never paid or agreed to pay any part of the annual rent and indeed never paid rent on that basis, but paid rent on a monthly basis. The doctrine, therefore, could not assist him in creating a tenancy from year to year. The plaintiff then is in a position of a person who had a mere permission or licence to go on the land, which could never be made the subject of a levy.

Can he, however, be said to have a licence coupled with an interest in land? If indeed he had that kind of licence, then he would have an incorporeal right in immovable property, which itself would be immovable property, and would be what is known as an incorporeal

hereditament. If he had the right to enjoy, draw and remove the things growing on the land and dispose of it and the profits and income from the land, then he would have had what is known as a *profit a prendre* (the law of the Colony relating to which is Roman-Dutch) and he would hold a licence coupled with an interest in land or, as VAN LEEUWEN called it in his COMMENTARIES, a full usufruct. But there is no evidence of this. In any event, a licence coupled with an interest in land does not fall within the limited class of immovable property mentioned in O. 7, r. 14.

I think that the true position is that the property levied upon was movable property and the defendant named in the writ was the owner or representative of movable property, that is, a building standing on a piece of land and, in the circumstances, the mode of service permitted by O. 7, r. 14, was not warranted in this situation.

In *Administrator-General v. da Silva*, 20th December, 1902, the court said that—

"a lease of land is a chattel, that is, movable property, and a levy on a house which is a chattel together with the lease of the land on which it is erected cannot possibly change the nature of the things levied upon and convert what is movable, into immovable property."

In *Charlestown Sawmills v. Husbands*, 1932 L.R.B.G. 94, the Full Court held that a building along with a piece of land on which it stood was movable property. DUKE in his *Treatise* at p. 5 summed it up by saying that according to the Roman-Dutch law houses built on leased land will usually be considered as movable property.

I must now consider whether the mode of service adopted in the action, which I have found to be wrong, amounted to a nullity, in which case all the proceedings arising therefrom must be set aside as being null and void and of no effect; or, whether there was a noncompliance of such a nature as to be treated as an irregularity which could be amended without the subsequent proceedings being set aside. At p. 1958 of the ANNUAL PRACTICE, 1957, it is stated that:

"The line between a nullity and an irregularity is difficult to draw, but an order can properly be described as a nullity if it is something which a person affected by it is entitled to have set aside *ex debito justitiae*, and could be set aside by the court in the exercise of its inherent jurisdiction." (*Craig v. Kanssen* (1943). 168 L.T. 38, C.A.)

In *Caesar v. B.G. Mine Workers' Union*, 1960 L.R.B.G. 72, the Full Court upheld a ruling that the issue and service of a writ which was issued against the defendant union and not served at the registered address for service and place of business of the union, but was served on the union's secretary at some other place, was bad, and that the flaw in the writ was so fundamental as to be regarded as bad *ab initio*,

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and consequently a nullity. In *Baynes v. Prince* 1949 L.R.B.G. 99, WORLEY, C.J., referred to *Apicon v. Woodford* decided in General Civil Jurisdiction by a court of three judges in 1905, which decided that in cases of parate execution where the summation is not duly served, the subsequent proceedings by way of execution are null and void, and that all the subsequent proceedings in execution, including the sale of property, were null and void and the sale must be set aside, and said that that statement of the law was as good in 1949 as it was in 1905.

In *McFoy v. United Africa Co.*, [1961] 3 All E.R. 1169, where the Privy Council was called upon to consider the effect of the non-compliance rule of the Supreme Court of Sierra Leone, which was in identical terms with O. 54, rr. 1-4 of the Rules of the Supreme Court of British Guiana, 1955, that Court 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. Lord DENNING in his judgment pointed out that the rule only applied to proceedings which are voidable, that is, 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 non-compliance 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.

As I said in *Caesar v. B.G. Mineworkers' Union*, it is submitted that there is an irregularity when a party has power to do something but does it wrongly or in a wrong manner (as in *McFoy's* case, and a nullity when he has no power to do the particular act which is unauthorised. It must follow then that when in action No. 1587/64 the defendant-mortgagee adopted the mode of service permitted under O. 7, r. 14, the proceedings were unauthorised under the Rules of Court, and any subsequent proceedings thereunder must be null and void and of no effect.

I am also of the view that when there was a change of solicitor without notice on the record, which was not discovered until the present action was filed, it was too late a stage to be regarded as an irregularity which could be amended on proper terms, and all the proceedings arising therefrom must be deemed to be a nullity and of no effect. The criticism made by counsel for the defendant that the plaintiff could have taken steps by way of motion or summons to set aside the service of the writ and sale under the Rules of Court (O. 10, r. 20(2), and O. 36, rr. 36 and 37) without embarking on an action, is not justified by the decision in *Gourick v. Nascimento*, 1938 L.R.B.G. 106, where the court held that if there is anything irregular

in the mode of execution in the seizure or sale of property following a judgment against the execution debtor whereby the plaintiff was deprived of the fruits of his judgment, his remedy was by action for damages to which he would have been entitled without the need for any proceedings to set aside the sale, and that as he had elected to take proceedings by way of summons to set aside the sale and the expense or loss involved in so doing did not flow from the act of the defendant, the action must fail.

It follows then that all the proceedings in action No. 1587/64 must be declared null and void and judgment must be entered in favour of the plaintiff and the orders of the court sought under (a), (b), (d) and (f) of the relief be granted. It is the evidence that the plaintiff received rent from this property up to the end of May 1965 at the rate of \$40 per month and he has thus been deprived of the use of his property up to the present time, and I assess damages at \$300.00. There will therefore also be judgment for the plaintiff for that sum with costs, certified fit for counsel.

Judgment for the plaintiff.

Solicitors: *L. L. Doobay* (for the plaintiff), and *H. A. Bruton* (for the defendant).

DEMERARA BAUXITE Co., Ltd. v. DE CLOU

In the Full Court, on appeal from the decision of a judge in chambers (Persaud, Khan and Crane, J.J.) September 18, December 11, [1965].

Practice and procedure—Opposition action—statement of claim—Necessity to disclose with precision the nature of interest claimed.

Practice and procedure—Vexatious proceedings—Two actions relating to same cause of action.

Injunction—Proceedings stayed—Attempt by party to transport property in dispute—Whether application may be made for interim injunction.

The respondent instituted an action against the appellants claiming title to certain lands. By order of court the proceedings were stayed until she furnished full particulars of her descent from the original owner. These particulars were never furnished. The appellant, who held title for the property, advertised transport to a third party. The respondent opposed the passing of this transport, giving in her reasons for opposition that she claimed "an interest to the title to the land described" in the transport. In paras. 1 to 11 of her statement of claim subsequently filed she alleged that she was descended from one A to whom the property originally belonged and asserted that she was entitled to an interest in it to the extent of 1/320 parts. The appellants applied for an order striking out these paragraphs as contravening r.9 of the Rules of the Supreme Court (Deeds Registry) Rules, Cap. 32. The application was dismissed by the Chief Justice. (See elsewhere herein). On appeal;

Held: (i) an opponent must in his statement of claim disclose with precision the nature of his interest, for to do otherwise would have the effect not only of embarrassing the proponent but also of failing to disclose a triable issue;

(ii) the genealogical table on which the respondent relied in support of her interest in the land did not disclose the nature of her interest, whether it be legal or equitable, and this she must do in order to sustain her opposition;

(iii) paragraphs 1 to 11 of the statement of claim would therefore be struck out and the action in opposition dismissed;

(iv) *per CRANE, J.*, if a litigant brought two actions concerning the same matter in two different courts of the same jurisdiction in the same country his conduct was in all cases deemed to be vexatious and a defendant in such a case might demand that he be put to his election between the two proceedings'. In this case there was one substantially serious question to be tried in both actions, namely, the title of the plaintiff, and the bringing of the second action was vexatious;

(v) *per CRANE, J.*, while the first case was still pending it was for the appellants to advertise transport. They should first have moved the court for a dismissal of the first action;

(vi) *per CRANE, J.*, the fact that the first action was stayed did not disentitle the respondent from applying in it for an interlocutory injunction restraining the appellants from passing transport.

Appeal allowed.

G. M. Farnum, with *J. A. King* for the appellants:

J. C Nurse for the respondent.

PERSAUD, J.: This is an appeal from a judgement of the learned Chief Justice which arose in the following circumstances.

On February 13, 1965, the appellants caused to be advertised in the Gazette particulars of a transport of a certain piece of land (Lot No. 222) part of Pln. Noitgedacht or Retrieve on the right bank of the Demerara River in favour of one Edward Henry Theophilous Edwards. On February 26, the respondent entered opposition to the passing off the said conveyance, and on March 1, she filed and delivered her reasons for the said opposition, the relevant reason for purposes of this appeal being that she "claims an interest in the title to the land described" in the transport advertised.

On April 23, the respondent filed her statement of claim repeating and relying on her reasons for opposition which, besides her claim aforesaid of an interest in the title to the land described in the transport, included the following:

- (1) That the opponent (respondent in this appeal) is one of the plaintiffs in action No. 808 of 1960 filed in the Supreme Court of British Guiana on the 30th of May, 1960, and that the first-named proponent, the Demerara Bauxite Company (the appellant in this appeal), is the defendant in the said action.
- (2) That the said action No. 808 of 1960 has not been finally determined by the court.

In her statement of claim she alleged that one Robert Frederick Allicock was the owner of Pln. Noitgedacht also known as Retrieve, and she traced her descendants from the said Robert Frederick Allicock alleging that the property advertised and in respect of which she had entered and opposition forms part of the said Pln. Noitgedacht and that she was entitled to an interest in the said land to the extent of 1/320 parts (paras. 1 to 11 and 14 of the statement of claim). And in the course of the argument before the Chief Justice it was conceded by the respondent's solicitor that the respondent was really advancing one ground of opposition, *viz.*, her claim of this interest.

On May 6, 1965, the appellants took out a summons in which they sought an order striking out paras. 1 to 11 of the respondent's statement of claim on the grounds that those paragraphs contravene r. 9 of the Rules of the Supreme Court (Deeds Registry) Rules (Cap.32 Subsidiary Legislation), that the respondent is precluded from relying on those paragraphs, and that it is embarrassing to the appellants to plead thereto, in that they do not disclose any interest of the respondent in the subject matter of the opposition and are prejudicial to the appellants' conduct of their case. The appellants also sought an order that the grounds of opposition be

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set aside, and that the action be dismissed on the ground that it is vexatious and an abuse of the process of the court.

Having heard the arguments, the Chief Justice in a written decision refused the application on July 9. (See earlier in this volume). This is an appeal against that decision.

It is well settled that the law of British Guiana in its present state does not admit of the creation of equitable interest in land, but of legal interests only. This rule needs no elaboration from this court. See *Kitty and Alexanderville Council v. Vieira* (1961), 3 W.I.R. 269, 1961 L.R.B.G. 88 where LUCKHOO, C.J., held that equitable interests in land are not recognised in British Guiana. See also *Br. Colonial Film Exchange Ltd. v. De Freitas*, 1938 L.R.B.G. 35, where, in referring to s. 3 of the Civil Law of British Guiana Ordinance, VERITY, J., said (at p. 39) :

"This interpretation, which appears to me to be clear in view of the words of the section, excludes the creation of equitable estates in land as has already been decided by the case to which I have referred, but it recognises the principle of the application of the doctrines of equity to persons rather than to class of property, and only excludes their application where it would involve the recognition and adoption of legal rules of land tenure or estates in land excluded from the civil law of the colony, or of equitable rules analogous thereto."

I refer to this aspect of the matter, for at one time counsel for the respondent was urging before us that his client was claiming an equitable interest in the land being conveyed; but upon being pressed, he conceded that his client, by claiming an interest in the title to the land was in effect claiming ownership to a portion thereof. It seems to me that by the very nature of the pleadings she was claiming a legal interest in the land by virtue of the fact that she was one of the descendants of the original owner.

This brings me to a statement made by the Chief Justice in the course of his decision to which counsel for the appellant has taken exception. The Chief Justice said:

"In the instant case when opposition was entered a mere general statement was made to the effect that the plaintiff opposed as being a part owner and paras. 1 to 11 of the statement of claim supply particulars of that claim. Nothing contained in those paragraphs seeks to enlarge the sole ground of opposition that the plaintiff claims to be part owner of the property."

Counsel submits that the words used in the reasons for opposition, namely, "claims an interest in the title to the land," do not amount to a claim of part ownership, as they do not disclose the type of interest which the respondent claims. Counsel further advanced

the argument that to trace intestate succession from the original owner, as the respondent has done in her statement of claim, does not cure the defect, as to do so does not disclose any legal interest in the respondent.

Beginning with *Barrier v. Duff* (B.G. FULL COURT (A.C.) 31. 3. 1908), O.G. Jan.—June (1908) 850 it has been held that there can be no objection to a plaintiff stating a bald ground in his reasons for opposition (e.g., that he is part owner of the land), and later elaborating this ground in his statement of claim. In *Demerara Bauxite Co. Ltd. v. Hubbard*, 1920 L.R.B.G. 66, BERKELEY, J., in dealing with an application for striking out of a pleading on the ground that it discloses no reasonable cause of action, said (at p. 67) :

"It is clear from the cases dealing with applications under this rule that the court will not strike out a statement of claim unless it is satisfied that there is no cause of action disclosed or which would be disclosed by some amendment or amendments which reasonably ought to be allowed."

In essence, counsel has urged that by tracing her relationship to the original title holder of the land in her statement of claim, the respondent has introduced a reason for opposition not contained in her original reasons, thus contravening r. 9 (1) of the Rules of the Supreme Court (Deeds Registry) Rules (Cap. 32, Subsidiary Legislation) which provides as follows:

"Unless by leave of the court, the opponent may not, in the action to be brought as aforesaid, allege in his statement of claim, or rely upon, any reason for opposition other than those contained in the statement thereof filed in the registry."

While I do not agree with counsel's understanding of the effect of the respondent's tracing her relationship to the original title holder, I regret that I cannot agree with the learned Chief Justice that by so doing, the respondent is claiming to be part-owner. By setting out a genealogical table, and relying on such a table to support her interest in the land, she does not in my view disclose the nature of her interest, whether it be legal or equitable, which she must do in order to sustain her opposition. She has not really, as counsel submits, introduced a new ground, nor has she disclosed the nature of her interest, and unless she does so in clear and unambiguous terms, her opposition and any ensuing step will take her nowhere, and will be of no avail. In *Mohamed v. Duniader*, 1944 L.R.B.G. 13, DUKE J., expressed the opinion that an action brought to enforce an opposition to a transport is an action of a special nature, and also said (at p. 16):

"Further, the entry of an opposition to a transport of immovable property operates as an interim injunction to restrain the passing of the transport.....On the bringing of the action within the time limited, the injunction operates as an interlocutory injunction restraining the

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passing of the transport until the hearing and determination of the action. This interlocutory injunction arises without notice being given to the defendants; it arises by virtue merely of the entry of opposition and the subsequent bringing of the action. The opponent obtains this remedy quite inexpensively, and without the proponent being able to object to it. In return for these special favours the opponent must not be dilatory in the action which he brings to enforce the opposition."

In substitution for this last sentence, I would use words to say that as an opponent is placed in such a favourable position, he must in his statement of claim disclose with precision the nature of his interest, for to do otherwise would have the effect not only of embarrassing the proponent, but also of failing to disclose a triable issue, and after all, this is the primary object, indeed the only object, of having parties embark on the preparation of pleadings.

When regard is had to the fact that the appellants have held the legal title to the land in question from as long ago as 1920, it will be seen how hard put the respondent will be to set up a rival legal title in so many words as a ground for opposition; I fail to see how she can. And in my view, the tracing of her ancestry may be regarded as a circumventive attempt to do so. In other words she feels that if she merely hints of a legal right, but does not come out in the open and allege it, then she cannot be met with the legal title, and she can successfully avoid being specific. In my judgment, a litigant ought not to be allowed to pursue such a course, particularly when by so doing she obtains what is in effect an interim injunction pending the determination of the action. Where a plaintiff is asserting a right, he should show a strong *prima facie* case, at least in support of the right which he asserts.

I am of the view, therefore, that this appeal must be allowed.

I have had the benefit of reading CRANE, J's judgment in draft, and while I do not disagree with his opinion as regards action 808 of 1960, I would myself say nothing, as in my view, this appeal can be determined without reference to that action.

The order of the court is that this appeal be allowed; that paras. 1 to 11 of the statement of claim be struck out, and that the action in opposition be dismissed. The respondent must pay the appellant's costs here and in the court below.

KHAN, J: I concur with judgment of Persaud J, and do not wish to add anything.

CRANE, J: The background to the summons from which this appeal is brought is an advertisement appearing in the Official Gazette of February 13, 1965. In that issue the defendants (hereinafter also called the company) and the Greater Mackenzie Develop-

ment Trust, a company incorporated in British Guiana, caused to be advertised a certain conveyance by way of transport, numbered 96 for the counties of Demerara and Essequibo in favour of one Edward Henry Theophilus Edwards in respect of certain immovable property on the upper reaches of the Demerara River.

On February 26, 1965, opposition was entered by the plaintiff Lilian De Clou to the passing of the abovementioned transport, and on March 1, 1965, she filed and delivered her reasons for opposition which are as follows:—

Reasons For Opposition

- (1) That the opponent (plaintiff) *claims an interest in the title to the land* described in transport number 96 published in the Official Gazette of the 13th day of February, 1965;
- (2) That the opponent is one of the plaintiffs in action No. 808 of 1960 filed in the Supreme Court of British Guiana on the 30th of May, 1960, and that the first-named proponent the Demerara Bauxite Company is the defendant in the said land;
- (3) That the said action No. 808 of 1960 has not been finally determined by the court;
- (4) On these premises it is not competent for the said Demerara Bauxite Company Limited to seek to transport the property hereby opposed.

On March 8 the plaintiff followed up by filing her writ to enforce the opposition, and appearance was entered on behalf of the defendant/company on March 15, 1965, with plaintiff filing her statement of claim on April 23, 1965.

In paras 1—11 inclusive of her statement of claim the plaintiff gave particulars of family genealogy, showing her descent from one Robert Frederick Allicock (deceased since 1822), who was the owner of Pln. Noitgedacht known as Retrieve on the right bank of the Demerara River, and by virtue of such descent claimed to be entitled to one undivided three hundred and twentieth part or share of approximately 4/5 of Pln. Noitgedacht, known as Retrieve.

The summons, which was heard by the Chief Justice, prayed orders that the abovementioned paras. 1—11 of the statement of claim be struck out on the ground that they contravened r. 9 of the Rules of the Supreme Court (Deeds Registry) in that they are not contained in the reasons for opposition entered by plaintiff, that the plaintiff is precluded from relying on the said paragraphs which embarrass the defendants in pleading to them and are prejudicial to the conduct of their case. An order is also sought that the said paragraphs be struck out, the action dismissed and the opposition

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set aside on the grounds that the plaintiff has no right of opposition, the same being not just, legal and well founded, and that the statement of claim discloses no cause of action against the defendants.

The defendant/appellants also pray further or in the alternative for an order that the action be dismissed on the ground that it is vexatious and an abuse of the process of the court.

In the affidavit in reply of solicitor Jorge, the affidavit of Douglas F. Macorquodale on the company's behalf is challenged in that it does not disclose any ground for striking out the alleged offending paragraphs of the statement of claim. It is stated therein that those paragraphs show plaintiff's interest in the property sought to be transported. The affidavit in reply refers to an order of the British Caribbean Court of Appeal exhibited to Macorquodale's affidavit ("A"), and to action No. 808/1960 mentioned by the plaintiff in her grounds of opposition, and confirms that the plaintiffs therein, including Lilian De Clou, were ordered by the British Caribbean Court of Appeal to furnish full particulars in their statement of claim showing how each of them descended from Robert Frederick Allicock the original owner of Pln. Retrieve. The affidavit in reply states that the defendants were prejudiced and embarrassed in pleading to the statement of claim in action No. 808 of 1960 which concerned the same land the subject matter of the opposition action because links in pedigree of all plaintiffs had not been fully set out, and asserts that the defendants contend the opposite now that such links are set out in the opposition action.

After listening to arguments the learned Chief Justice, in a reserved judgment, dismissed the defendants' application after refusing an order to strike out paras. 1—11 aforesaid; he also refused an order to set aside the opposition entered by the plaintiff. [See earlier in this volume]. It is from that refusal that this appeal is brought.

In answer to the complaint of the defendants that r. 9 of the Rules of the Supreme Court (Deeds Registry) was contravened, the Chief Justice stated in his judgment that "nothing contained in these paragraphs seeks to enlarge the sole ground of the opposition that the plaintiff claims to be part-owner of the property." But with respect, I must observe, the plaintiff makes no such claim. What she does say in her grounds of opposition is that she "claims an interest in the title to the land" which though probably intended is surely not the same thing as saying that she claims to be part-owner of it. This of course is a vague and indefinite statement of her interest.

The authorities show, however, that it is quite permissible to state one's ground of opposition in general terms—see *Hicks v Receiver General*, Full Court 35. 1898, and *Barrie et al v Duff et al*, A.C. 31.3.08, also *Demerara Bauxite Company Ltd., v. Hubbard*,

1920 L.R.B.G. 161, dealing with the implementation and giving particulars in the statement of claim in an action brought to enforce an opposition.

In construing what was plaintiff's "interest in the title to the land", the Chief Justice obviously construed it as part-ownership when he said: "In the instant case when opposition was entered a mere general statement was made to the effect that the plaintiff opposed as being a part-owner and paras 1—11 of the statement of claim supply particulars of that claim." In my view this is where the learned judge erred, for at best, a bare assertion of an opponent that he claims an interest in title to land is, to say the least, vague and uncertain; but when particulars in a statement of claim which seeks to clarify or implement a ground of opposition are themselves so worded that ground cannot be sustained.

When one looks at paras. 1—11 of the statement of claim in the action to enforce the opposition, one sees without difficulty that all that is attempted is a recitation of family genealogy and an assertion of a claim to 1/320 part or share of the land in dispute. There have been no steps taken to show how that part or share became vested in the opponent. No vestitive facts have been pleaded. Some idea of what should have been set out in her statement of claim is to be found in the order of the British Caribbean Court of Appeal (Exhibit "A" to Macorquodale's affidavit) in civil appeal No. 19 of 1963, which is admitted in the affidavit of solicitor Jayme Jorge to concern action No. 808/1960—"the same land which is the subject matter of this opposition action . . ."

In the civil appeal, the British Caribbean Court of Appeal required plaintiff and others to identify the heirs and successors in title of Robert Frederick Allicock, deceased, who had sold their respective undivided interests; it was also required of these persons to state the extent of the interests sold and the number and date of any transfer thereafter passed. The order also called for the identity of heirs and successors alleged to have been at the material times owners of undivided interests and have not sold their interests. Such persons in each case were required to say whether he was an heir or a successor in title or an heir and a successor in title of the devisees and the nature and extent of the undivided interest.

When, however, regard is paid to paras. 1—11 of the statement of claim in question, it is clear that these requirements have not been fulfilled nor anything approaching them; although it must have been abundantly clear to the plaintiff what was needed from her to explain the vagueness of her sole ground of opposition. Very important is the fact that in her petition to the British Caribbean Court of Appeal, she and her co-plaintiffs expressed embarrassment at being unable to comply with the order of that court, and her appeal for leave to appeal to Her Majesty's Privy Council was rejected and the petition dismissed. The affidavit of solicitor Jorge on her behalf avers that the links in pedigree have now been fully set out in the

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opposition action; but I must respectfully differ from him, for paras. 1—11 of the statement of claim are no more explanatory than the statement of the plaintiff in her grounds of opposition that she claims an interest in the title to the land. What has clearly happened is that Lilian De Clou having failed to comply with the order of the British Caribbean Court of Appeal, and having had her petition dismissed by that court, now seeks to bring this opposition action in an attempt to recapture lost ground. She states in her reasons for opposition (see paras. 13(4) of her statement of claim) that action No. 808/1960 has not been finally determined by the court.

In my view, the plaintiff having failed to comply with the order of the court in civil appeal No. 19 of 1963, cannot now by this oblique process of an opposition action seek to throw a spanner in the works by causing the defendants embarrassment in conveying the property in question to Edwards, though I will show later that the company are not entitled to transport the property, and that such action by her amounts to an abuse of the process of the court. This, the defendants have asserted in no uncertain manner, and have asked this court to say so too.

Though this aspect of the matter was not canvassed at the hearing of this appeal, I believe that when the plaintiff instituted her action to enforce opposition to the sale, a veritable case of *lis alibi pendens* arose. It is clear that action No. 808/1960 has reached a virtual stalemate, the British Caribbean Court of Appeal having ordered all proceedings to be stayed until compliance with its order for delivery of particulars. The plaintiff says, however, that this action has not yet been determined meaning, I presume, it is intended to keep it alive either by further appealing, or by later supplying the ordered particulars; we do not know; that indeed would be a matter peculiarly within her knowledge. In my opinion the filing of her statement of claim in this opposition action with the intention of keeping action No. 808/1960 alive is a clear case of abuse which results in the company being doubly and unnecessarily vexed toy reason of what has been admitted in the affidavit of solicitor Jorge on her behalf, to be another action concerning the same land; it is certainly an abuse of process. Nothing could be more clearly established in my mind.

There is a principle, however, that if a litigant brings actions concerning the same matter in two different courts of the same jurisdiction in the same country, his conduct is in all cases deemed to be vexatious, and a defendant in such a case may demand that he be put to his election between the two proceedings, for the *onus* is on him to prove the contrary. In the words of JESSEL, M. R. in *McHenry v. Lewis*, (1882) 22 Ch. D. 397:

"In this country, where the two actions are by the same man in courts, governed by the same procedure, and where, the judgments are followed by the same remedies, it is *prima facie* vexatious to bring two actions where one will do. And, indeed, this has been recognised, I believe, for ages by the practice of the

old Court of Chancery, which always put a plaintiff to his election by an order of course if he was suing for the same cause of action both at Law and in Equity."

That there is a *lis pendens* is what the defendants in so many words have implied in para. 3 of their summons which was heard and determined by the Chief Justice. But they ask further or in the alternative that the opposition action be dismissed on the ground that it is vexatious and an abuse of the process of the court, and I must say that I am in agreement with them.

Save for the first ground I believe the defendants were entitled to succeed on the other two; but they did not. I have excepted the first because I do not consider r. 9 of the Rules of the Supreme Court (Deeds Registry) has been contravened. Here there is, in my view, no allegation in the statement of claim nor a reliance upon any other reason for apposition than that contained in reason (1) of the reasons for opposition. What the plaintiff has done in paras. 1—11 of her statement of claim is to seek to explain the interest which she claims in her reasons for opposing. She is not alleging therein any new ground without the sanction of the court. However, as I have indicated, she has failed to show any interest, legal or equitable, which is an absolute essential in an opposition action and which would give her a right to oppose; she has certainly not shown any investigative facts apart from the bald statements revealed by paras. 1—11 which merely state that she is a descendant of one Robert Frederick Allicock, deceased. This fact does not in my opinion give her title, nor create any legal or equitable interest in her; it does not confer on her the right to oppose transport by the defendants to Edwards of the land in question. Counsel for the defendants has urged the non-recognition by our laws of equitable estates or interests in land; this is quite so, but I believe an enquiry into whether Lilian De Clou's interest is legal or equitable is a fruitless exercise in view of the imprecision and embarrassment of pleading in both the reasons for opposition and the particulars of the statement of claim.

It is at all times highly desirable to encourage pleading with certainty and particularity, the moreso is this the case in an opposition action in which, as Duke, J., explains in *Mohamed v. Duniader and Khan*, 1944 L.R.B.G. 13, at p. 16, the entry of an opposition to a transport has the effect of operating as an interim injunction restraining the passing of the transport.

"The interim injunction", the learned judge said, "continues until the opponent brings his action within the time limited by Rule 7, and, if no action is brought, then until the expiration of the time limited by the Rule for bringing the action. On the bringing of the action within the time limited, the injunction operates as an interlocutory injunction restraining the passing of the transport until the hearing and determination of the action. This interlocutory injunction arises without notice being given to the defendants; it arises by virtue merely of the entry of

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opposition and the subsequent bringing of the action. The opponent obtains this remedy, quite inexpensively, and without the proponent being able to object to it."

Sufficient has been said above to show the disastrous effect of an opposition action to the commercial world if improperly used by an unscrupulous opponent. In the case in review, it was essential that the plaintiff should have particularly pleaded the precise nature of her interest she claimed, especially as the defendants have claimed to be owners by transport No. 304 of 17th March, 1920, of the land sought to be transported, and also to have been in sole and undisturbed possession of it since that date. This being the case, the company will enjoy the protection of s. 23 of the Deeds Registry Ordinance, Cap. 32, which decrees that after January 1, 1920, every transport of immovable property other than a judicial sale transport, vests in a transportee the full and absolute title to the immovable property or to the rights and interests therein described in the transport, subject to statutory claims, registered encumbrances, interests and leases; but the plaintiff has not brought herself within any one of these exceptions.

The Chief Justice in his judgment, alluding to para. 14 of the statement of claim in which the plaintiff says that the immovable property forms part of Plantation Retrieve or Noitgedacht, in which she has an undivided interest, said: "That paragraph, though it could have been more clearly worded, was obviously intended to aver that the immovable property forms part of that portion of the plantation in which the plaintiff alleges she has an interest. In any event, para. 14 may be reworded to make this explicit and such an amendment would not have the effect of enlarging the grounds of opposition. His lordship is here in fact suggesting the situation was a proper one for, and that he would have been disposed to granting an amendment had one been sought. But with great respect, I differ, for I am of the opinion that no allegations in the statement of claim seeking to explain her claim to an interest in the title to the land could have been properly allowed if it were substantially out of accord with the order of the British Caribbean Court of Appeal in Civil Appeal No. 19 of 1963,(mentioned above) which, it will be recalled, the plaintiff and her co-plaintiffs had stated in their petition for leave to appeal to the Privy Council, it was impossible and embarrassing for them to comply with.

It is manifest that what the plaintiff was attempting to do was to escape from the strictness and particularity and of pleading necessitated by the court order in civil appeal No. 19 of 1963, and to try to hold up transport to Edwards by a vague and imprecise pleading which she, out of her own mouth said she could not make good. All affidavits and facts which are now before us were before the learned Chief Justice In my view, on this ground alone paras. 1—11 of the statement of claim ought to have been struck out, ODGERS on PLEADINGS AND PRACTICE, 17th Edn., at p. 114, states: "Where either party claims to be the owner of any property, real or personal, or any

right or interest to, in or over it, he must state his *title* to such property, right or interest, with all due particularity. The pleadings must show title". But title the plaintiff has not shown. Pleading descent is surely not pleading title, for she may well be a descendant, but yet have no title to the land.

I have given my views on the alternative ground in the summons concerning the maxim *lis alibi pendens*: I have stated that the observations thereon are my own, believing as I do that they are apposite, and that from the tenor of the order sought, this was what the defendants were in effect saying when they asked that the proceedings be dismissed on the grounds that they were vexatious and constituted an abuse of the process of the court. I believe that just as soon as it became apparent to the judge from plaintiff's own words that action No. 808/1960 was still alive, and that it concerned the *same land the subject matter of the opposition action* (a fact admitted in solicitor Jorge's affidavit), those facts should have alerted attention, and it should have been considered whether the opposition proceedings were appropriate and not indeed vexatious in view of the doctrine of *lis pendens* which I have enunciated above, and the onus of proof which lies on the plaintiff to establish the contrary. I respectfully say, it is clear that there was one substantial and serious question to be tried, namely, the title of the plaintiff, and that the vexation complained of consists in the bringing of two actions to try that same question. But it is evident that action No. 808 /1960 and its effects on the opposition action were not considered.

But there is another aspect of this matter which I think was passed by in silence both before the learned Chief Justice, and on appeal before us. It concerns the propriety of the action taken by the Demerara Bauxite Company Limited, in advertising transport to Edwards during the pendency of action No. 808/1960. It will be recalled that the British Caribbean Court of Appeal ordered a stay in the action unless the plaintiffs (including plaintiff De Clou) filed particulars within 14 days and that the latter was not filed. The result was that there was an automatic stay of that action on failure to comply. In my view it was wrong for the company to have while action No. 808/1960 is still pending, advertised transport to Edwards. I think that what the company ought to have done was to have moved the court for a dismissal of action No. 808/1960 for failure of the plaintiffs to file the particulars ordered, and so clear the way for transport to Edwards. It is only by this means, it is suggested, that they would be competent to transport to Edwards.

I have pointed out that plaintiff is not entitled to the benefit of an opposition action in the circumstances that have unfolded themselves, but this is far from saying that the company are entitled to transport to Edwards, or that the plaintiff is remediless. I have already pointed out that the company cannot do so, while action No. 808/1960 is merely stayed and not dismissed. If seems to me that an interlocutory injunction in action No. 808/1960, which is still pending was the appropriate remedy for the plaintiff to have pursued in re-

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straining the passing of transport to Edwards instead of the recourse she made to an opposition action in which it was required of her to state precisely the nature of her title of right to the interest, which she has herself stated it was impossible for her to do. The fact that action No. 808/1960 is stayed does not in my view disentitle the plaintiff from pursuing interlocutory proceedings therein. In *Harrington v Ramage*, 51 S.J. 514, KEREWICH, J., is reported to have said that so long as proceedings are only stayed, either party can come to court by way of motion. It may be that plaintiff did not appreciate this which caused her to pursue the opposition proceedings, which I have shown, are not open to her; and even if they are, she has not pleaded investitive facts.

Before concluding I would distinguish the case of *Fernandes and Gomes v. Walcott* (1921), unreported, but discussed in DUKE'S TREATISE ON THE LAW OF IMMOVABLE PROPERTY at p. 25.

In that case the plaintiffs sued out a specially indorsed writ against the defendant to recover the sum of \$1,030, being the price of goods sold and delivered, and the defendant was given unconditional leave to defend. Meanwhile, the defendant advertised a first mortgage of certain property to an insurance company. The plaintiffs opposed claiming that the defendant was indebted to them in the sum claimed. In the pending suit for goods sold and delivered, plaintiffs asked for judgment on the claim; while in the opposition suit judgment was not sought, but an injunction to restrain the sale. Sir CHARLES MAJOR, C.J., considering that the right procedure had been followed made an order for consolidation of the two actions. It is submitted, however, there is an obvious distinction between these two cases, for in *Fernandes'* case, though there was a suit pending, like in the case under review, before the opposition action, the remedy sought in each case was wholly different. In *Fernandes'* case, it was imperatively necessary on the plaintiff's part to bring the second action seeking the injunction because that remedy was not available to them in the first action which was for goods sold, since it would have been to secure the performance of a positive contract, and equity would never injunct the breach of a positive, but only a negative contractual obligation; equity would never restrain by injunction the breach of an affirmative contract to pay the price of goods sold and delivered, for equity does not act in vain. It is submitted that if in *Fernandes'* case the contract were one in which it was possible for equity to grant an injunction in the *lis pendens*, the opposition proceedings to obtain the same remedy would not have been appropriate.

In the case under review, however, the position is different. An application for an interlocutory injunction was available to Lilian De Clou in the first action since it was a case in which there was a strong probability that equity would have granted an injunction since the company had no right in the face of pending action No. 808/1960 to advertise transport. The point is that action No. 808/1960 was still pending when the plaintiff was seeking to obtain

in opposition proceedings the same remedy which was open to her in the stayed action. She has brought two actions when one would have sufficed; she has sought to obtain in the second a remedy available in the first which is still pending. This is precisely the mischief which the Master of the Rolls averted to in the passage cited above in *Mc Henry v. Lewis*, and which courts have consistently deemed vexatious and oppressive.

I would allow the appeal by setting aside the judgment appealed from, and grant the order prayed in para. 2 of the summons, that is to say, dismiss the statement of claim which discloses no case of action with costs to be taxed after striking out paras.1—11. and setting aside the opposition by declaring it not just, not legal nor well-founded.

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[Federal Supreme Court (Lewis, Marnan and Jackson, F.JJ) March 22, 23, 1962]

Labour—Regulations made under the Labour Ordinance prescribing hours of work, but excluding factories—Whether word "factories" has same meaning as in Factories Ordinance, Cap. 115, s. 2(1).

Labour—Claim for overtime—Weekly worker—No regulations made prescribing normal hours of work for weekly workers—Competence of claim—Factory—What is—Factories Ordinance, ss. 26 and 29.

Statute—Ordinances in pari materia—Word defined in one Ordinance only—Given same meaning in the other—Labour Ordinance, Cap. 103—Factories Ordinance, Cap. 115, s. 2(1).

Section 3(1) of the Hours of Work (Watchmen) (No. 2) Regulations, 1953, which were made under the Labour Ordinance, Cap. 103. provided that the number of hours which might normally be worked by a watchman employed on a weekly basis in any week should not exceed 60. Section 3(3) of these Regulations excluded watchmen employed in factories from the

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operation of that section. The respondent was employed by the appellants to watch a lumber yard in which work was done on repairs to tractors, spray-painting of cars, carpentry and welding of steel plates, and in which there were hydraulic hoisters and lifting machinery. By agreement, his normal working hours were 60 per week, but on some days he worked for over 8 hours. He brought a claim for overtime pay under the Factories Ordinance.

Section 29(1) of the Factories Ordinance, Cap. 115, empowers the Governor in Council to prescribe the rate at which factory employees shall be paid (a) in respect of work on any day in excess of eight hours or in respect of work in any week in excess of the normal hours of work prescribed under s. 26(1) (a) of the Ordinance; (b) in respect of work on (non-Christian) public holidays; and (c) in respect of work on Sundays and other Christian public holidays. Section 29(4) of the Ordinance provides that where the appropriate rate has not been fixed the rate shall be, in the case of work on Christian holidays, "twice the rate at which the person employed would but for this section be paid, and in the case of any other work, one and a half times the rate at which the person employed would but for this section be paid." No regulations were made under s. 26(1) (a) prescribing the number of hours of work during which a person might normally be employed in a factory in any week.

Held: (i) the Labour Ordinance and the Factories Ordinance were *in pari materia*. The word "factories" in the Hours of Work (Watchmen) (No. 2) Regulations, 1953, must therefore be given the same meaning that was assigned to it in the Factories Ordinance, and the lumber yard was a factory within that meaning;

(ii) a weekly employee must relate the number of hours he actually worked in a week to the prescribed normal hours of work per week, and not to the prescribed normal number of hours per day;

(iii) but in so far as the overtime referred to in s. 29(1) (a) "in respect of work in any week" was concerned, there was nothing upon which sub-s. 4 could operate until the Governor in Council had, under s. 26(1) (a), prescribed the normal hours of work;

(iv) the parties were, however, free to contract for the number of normal hours to be worked per week in respect of a weekly wage and the agreement for 60 hours was not a contracting out of the Ordinance;

(v) the respondent was, however, entitled to overtime for Sundays and holidays.

Order varied.

J. A. King for the appellants.

Ashton Chase for the respondent.

LEWIS, F.J.: This is an appeal from a judgment of ADAMS, J., in favour of the respondent (plaintiff in the action) for the sum of \$759.78 for arrears of wages in respect of work done by him as a watchman at the appellant's lumber yard and adjoining wharf in Georgetown. The claim is in respect of overtime and for extra pay alleged to be due for work done on Sundays and public holidays and in excess of eight hours on other days of the week, and the money is said to be payable under the provision of the Factories Ordinance. Cap. 115.

The respondent was employed as a watchman on a weekly basis at the prescribed minimum weekly wage of \$13, and worked for the appellants from 16th March, 1955, to 26th June, 1956. It is fair to say that throughout the period of his employment both parties believed that reg. 3(1) of the Hours of Workmen (Watchmen) No. 2 Regula-

tions, 1953, made under the Labour Ordinance, Cap. 103, which fix 60 hours per week as the normal number of hours of work for watchmen employed on a weekly basis, applied to their contract, and overtime was claimed and paid only when the respondent worked in excess of 60 hours. The present claim was only made in October 1961.

The respondent stated in evidence that his normal working hours were 12 hours on Sundays, Tuesdays, Fridays and Saturdays; 5 hours on Mondays and Wednesdays; and 2 hours on Thursdays — a total of 60 hours per week. He also stated that manual labour done in the lumber yard included repairs to tractors, spray-painting of cars, and carpentry. His witness Pollard said there were in the lumber yard tractors, cars, hydraulic hoisters, and lifting machinery normally used on the wharf and that steel plates were welded there. The learned judge accepted this evidence as true and rejected the evidence of the respondent's head watchman, Ramnauth, where it conflicted. He found that the respondent had worked as claimed on the particular days; and he held that the operations carried on in the lumber yard brought it within the definition of a "factory" in s. 2(1) of the Factories Ordinance. Both these findings are complained of by the appellants, but I see no reason to disturb them.

Mr. King, for the appellants, submitted that the respondent's employment fell within the provisions of the Hours of Work (watch-men) (No. 2) Regulations, 1953, and was not governed by the Factories Ordinance. Regulation 3(3) excludes from the application of those regulations "watchmen employed in factories". Mr. King contended that the learned judge was wrong in applying to the word "factories" in that regulation the extended meaning given to it in the Factories Ordinance: the word should be given its ordinary dictionary meaning of "a building with plant for the manufacture of goods." He cited in support *Macbeth & Co. v. Chislett*, [1910] A.C. 220, in which it was held that the definition of the word "seaman" in the Merchant Shipping Acts, 1854 and 1894, ought not to be imported into the Employers Liability Act, 1880, which excludes seamen from its operation; and he referred to the words of Lord LOREBURN, L.C., at p. 223 of the report:

"The statute we are concerned with does not say that you are to apply the Act of 1854: and it would be a new terror in the construction of Acts of Parliament if we were required to limit a word to an unnatural sense because in some Act which is not incorporated or referred to such an interpretation is given to it for the purposes of that Act alone."

I think, however, that different considerations arise in this case to those which existed in *Macbeth v. Chislett*. The Labour Ordinance and the Factories Ordinance form part of a code or scheme for regulating and controlling the employment of workmen, and for protecting their health, safety and welfare; and their provisions must, so far as reasonably possible, be construed with reference to each other so as to give effect to that scheme. The Labour Ordinance gives to the Governor in Council power to regulate the hours of employ-

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ment and overtime rates of wages of employees in any occupation. The Factories Ordinance gives him similar power in respect of a special class of employees, namely, employees in factories. In this and other respects these ordinances are *in pari materia*. Both Ordinances were in force when the 1953 Regulations were made; in fact, ss. 26 and 29 of the Factories Ordinance, which are relevant to this subject, came into force on 1st June, 1953, and the Regulations were made on the 14th July, 1953. It is significant that the earlier regulations on the same subject made on 16th January, 1953, and revoked by the July regulations, did not include a regulation excluding factories from their operation.

It is reasonable to assume that the Governor in Council, when he made the regulations of July, 1953, had in mind the fact that he now had similar powers under the Factories Ordinance. For these reasons, I am of opinion that the word "factories" in these Regulations must be given the same meaning that is assigned to it in the Factories Ordinance. To do otherwise would lead to continuous conflict between the 1953 Regulations and s. 29 of the Factories Ordinance, and uncertainty as to their proper application. Thus, in the present case, the regulations would apply to the respondent's work in respect of the lumber yard, a factory within the extended meaning of the word, but not to the carpenter's shop, a factory within its ordinary meaning; yet he was required to watch both at the same time.

One further question remains — to what overtime wages, if any, was the respondent entitled under the Ordinance? The relevant provisions, ss. 26(1) (a) and 29(1) and (4), are as follows:

"26. (1) The Governor in Council may make regulations —

(a) prescribing the number of hours during which a person may normally be employed, in a factory, on any day or in any week;"

* * *

"29. (1) The Governor in Council may make regulations prescribing the rate at which a person who is employed in a factory, or in any occupation in a factory, shall be paid —

(a) in respect of work on any day in excess of eight hours or in respect of work in any week in excess of the normal hours of work prescribed under paragraph (a) of subsection (1) of section 26 of this Ordinance;

(b) in respect of work on any public holiday, other than as specified in paragraph (c) of this subsection, within the meaning of the Public Holidays Ordinance;

(c) in respect of work on Sundays, Christmas Day, the day after Christmas Day if Christmas falls on a Sunday, the day commonly known as Boxing Day, the first week-day of January, Good Friday, Easter Monday or Whit Monday.

* * *

"(4) Where, in relation to any factory or to any occupation in a factory the appropriate rate under paragraphs (a), (b), or (c) of subsection (1) of this section has not been fixed in regulations made under this section, such rate shall be, in the case of work on any day specified in paragraph (c) of subsection (1) of this section, twice the rate at which the person employed would but for this section be paid, and, in the case of any other work, one and a half times the rate at which the person employed would but for this section be paid."

The learned judge was of opinion that as the Governor in Council has not yet exercised his power to make regulations under s- 26, "it seems a reasonable inference from s. 29(1) (a) that an eight-hour day is considered to be a normal day and that therefore a normal week will be 6 days, that is, forty-eight hours." Since the learned judge delivered his judgment this court has delivered judgment in the case of *Samuels v. Bottlers (British Guiana) Limited* on 15th March, 1962, [1962 L.R.B.G. 86]. In that case, which concerned a similar claim for overtime based upon the provisions of the Factories Ordinance, the effect of s. 26(1) (a) and s. 29(1) and (4) was considered. In my judgment I said [1962 L.R.B.G. at p. 91]:

"No appropriate rates for overtime have been fixed under paragraphs (a), (b) or (c) of sub-section (1) of this section, and it is said that the provisions of subsection (4) apply. I agree that they apply to the case of Sundays and Public Holidays [paragraphs (b) and (c)], and to daily wage workers [paragraph (a)], but in my view a claim for overtime cannot be maintained under this subsection by workers employed on a weekly basis. Such a claim must be 'in respect of work in any week in excess of the normal hours of work prescribed under paragraph (a) of subsection (1) of section 26 of this Ordinance', and until the Governor in Council prescribes 'the number of hours of work during which a person may normally be employed, in a factory.....in any week' there is no scope for the application of section 29 (4) in this respect."

Mr. Chase, on behalf of the respondent, contended that in computing overtime the fact of weekly employment must be disregarded and one must look only at the actual number of hours in excess of eight hours work in each day. He further submitted that a week must be computed as 6 days because under s. 29(1) (c) Sundays are grouped with holidays and must therefore not be regarded as normal hours of work for factory employees. The weakness of this latter submission was exposed when Mr. Chase found himself unable to say how many days would be comprised in a week which included holidays as well as Sundays. The fact is that the number of hours which may be prescribed as "normal" in respect of weekly employees need bear no logical relationship to the number of hours prescribed as "normal" in respect of daily employees. Thus, under the Labour Ordinance normal weekly hours for watchmen was first fixed at 64, later reduced to 60, and now stands at 48. The power to prescribe the number is vested in the Governor in Council, and the court has no authority to

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substitute itself for him or to arrogate his powers to itself. It should further be pointed out that s. 26(1) (a) deals with normal hours of work, while s. 29 deals with rates of pay for overtime. A weekly employee must relate the number of hours he actually works in a week to the prescribed normal number of hours per week, and not to the prescribed normal number of hours per day. This is not so in the case of a daily employee, for while the Governor in Council may prescribe a number less than eight as the normal number of hours to be worked in any day, he can only prescribe overtime rates in respect of hours in excess of eight.

In my judgment, insofar as the overtime referred to in s. 29(1) (a) "in respect of work in any week" is concerned, there is nothing upon which sub-s. (4) can operate until the Governor in Council has, under s. 26(1) (a), prescribed the normal hours of work.

I am of opinion that the decision in *Samuels v. Bottlers (British Guiana) Limited* covers the instant case, and that the respondent's claim for overtime under s. 29(1) (a) and s. 29(4) cannot be maintained. The parties were free to contract for the number of normal hours to be worked per week in respect of a weekly wage and the agreement for 60 hours was not a contracting out of the Ordinance. With respect to Sundays and holidays, the average wage per hour was 21.66c. and he is entitled to extra payment at this rate for the hours he worked on Sundays and holidays on the basis of double time or time and a half as prescribed by s. 29(4) of the Ordinance.

I would vary the judgment of the court below by entering judgment for \$199.32.

MARNAN, F.J.: I agree.

Section 29 of the Factories Ordinance enables the Governor in Council to prescribe rates at which persons employed in factories shall be paid. The section, however, goes further, and itself prescribes such rates, making them effective until such time as the Governor has exercised his powers. In these circumstances I was for a time impressed by Mr. Chase's argument that since the Governor has not yet exercised his powers under the section, an employee is entitled to overtime pay for work on any day in excess of eight hours, whether employed on a daily or weekly basis. In other words if the section provides that an employee shall be paid time and a half in respect of work on any day in excess of eight hours (as its effect with regard to workers employed on a daily basis is admitted to be), why should that provision not also apply to workers employed on a weekly basis?

I think, however, the answer is to be found in s. 26 (1) of the Ordinance which enables the Governor to prescribe what s. 29 refers to as "normal hours of work", and has, *prima facie*, nothing to do with rates of pay. The words of the sub-section are:

"prescribing the number of hours during which a person may normally be employed, in a factory, on any day or in any week."

The powers so given are not mandatory powers, enabling the Governor to limit or restrict hours of work, and thereby make it unlawful for an employee to work longer hours. It seems therefore that the only purpose of prescribing normal hours of work is to provide a basis upon which overtime can be calculated, and for this purpose two distinct bases are envisaged, one daily and the other weekly. In my opinion the whole object of providing for two bases and not one is to provide separate yardsticks for the worker employed at so much a day and the worker employed at so much a week. Assuming regulations under s. 26 to have been made, either could claim overtime pay upon the basis appropriate to the other; otherwise it seems that each could claim both. I am therefore unable to agree that a man employed at a weekly rate of pay for a stated number of hours per week, where the very nature of his employment may require him to work for varying lengths of time on different days within the week, is entitled to overtime on a daily basis, merely because regulations under s. 26 have not been made.

I agree with the order proposed by my Lord, and would merely observe that since the respondent has been held to have worked different hours on different days the calculation of the precise sum for which judgment should be entered will involve ascertaining the days of the week upon which the various public holidays fell. Should any of these be a Sunday obviously it cannot also be claimed for as a holiday. It is clear that this calculation will result in a substantial reduction in the amount of the judgment in favour of the respondent. In this connection I consider him fortunate to have recovered any-thing at all. Where, after a period of little more than a year's service, any employee allows almost five years to elapse before setting up a claim for overtime pay, his evidence may well be regarded with suspicion, particularly where, as in this case, the records by which it could have been tested, have been destroyed in the course of normal business practice.

Order varied.

BICBER LTD. (IN VOLUNTARY LIQUIDATION) (FORMERLY
 F. DAVSON AND CO. LTD.) v. INLAND REVENUE
 COMMISSIONERS.

[Privy Council (Lord Evershed, Lord Morris of Borth-Y-Guest and Lord Pearce) May 8, 9, 10, June 19, 1962]

Income tax—Company—Cash distribution to shareholders from capital reserve consisting of capital profits—Whether a taxable dividend—Income Tax Ordinance, Cap. 299, ss. 5, 26, 27, 29 and 30.

The appellant company challenged an assessment made on it for income tax in respect of the sum of \$1,200 received by way of a cash distribution at the rate of \$2 a share on 600 shares held by it in another company and paid by the latter out of a capital reserve consisting of profits made upon the sale of capital assets. The decision of DATE, J. [1958 L.R.B.G. 32], given in favour of the Commissioners, having been reversed by the Full Court [(1959), 1 W.I.R. 330, 1959 L.R.B.G. 325], the Commissioners appealed to the Federal Supreme Court which allowed the appeal. [1960 L.R.B.G. 178]. On appeal to the Privy Council it was argued that the dividend came from a fund that was capital in the hands of the payer and that nothing had happened to convert it into income in the hands of the recipient.

Held: the sum received by the tax payer was "income in respect of dividends" which attracted tax under s. 5 of the Income Tax Ordinance, Cap. 299.

Appeal dismissed.

Desmond Miller, Q.C., and Neil Elles for the appellants.

Heyworth Talbot, Q.C., and Roderick Watson for the respondents.

The judgment of the Board was delivered by Lord PEARCE: The appellant company was incorporated in the United Kingdom and carried on business in British Guiana. It owned 600 shares in the Rupununi Development Company, Ltd., a company incorporated in British Guiana. That company by the sale of some property made a profit, which was admittedly a capital profit. It transferred this profit to a capital reserve account from which it paid out a dividend of \$2 per share. Thus the appellant company received \$1,200. The Commissioners of Income Tax in British Guiana (contrary to a previous expression of their intention) treated the dividend as investment income, and confirmed the assessment made on that basis. The appellant company unsuccessfully appealed to DATE, J., who confirmed the assessment. [See 1958 L.R.B.G. 32]. The Full Court of the Supreme Court, however, reversed his decision. [See 1959 L.R.B.G. 325]. The Commissioners of Income Tax then appealed successfully to the Federal Supreme Court of the West Indies who restored the judgment of DATE, J., confirming the assessment. [See 1960 L.R.B.G. 178].

The appellant company contends that the dividend of \$1,200 was not properly chargeable to income tax under the relevant sections of the Income Tax Ordinance, Cap. 299 of the LAWS OF BRITISH GUIANA. Section 5 provides:

"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.....

(c) dividends, interest or discounts."

By s. 29:

"Every company registered in the colony shall be entitled to deduct from the amount of any dividend paid to a shareholder.....tax at the rate paid or payable by the company.....on the income out of which the dividend is paid, pro-vided that where tax is not paid or payable by the company on the whole income out of which the dividend is paid the deduction shall be restricted to that portion of the dividend which is paid out of income on which tax is paid or payable by the company."

By s. 30 tax so deducted shall, when the dividend is included in the chargeable income of the shareholder, be set-off against the tax charged on that income. This set-off is the more necessary because companies pay tax at a higher rate than individuals (Section 27). The Full Court of the Supreme Court of British Guiana in finding for the taxpayer adopted the reasoning of SAVARY, J., in *Bollers v. Commissioners of Inland Revenue*, 1931-37 L.R.B.G. 271, where on facts indistinguishable from those of the present case a dividend was held not to be taxable. The *ratio decidendi* in that case was based on the view that a dividend paid out of capital profits would not under the English system of taxation attract tax in the hands of the shareholder, that the Income Tax Ordinance was similar in scheme to the English Income Tax Act so far as companies are concerned, and that therefore no tax was payable under the Ordinance by the shareholder on such a dividend. The Federal Supreme Court were unable to draw any analogy from the English system and Mr. Miller has not asked the Board so to do. Under the English system dividends (other than trading receipts) are not taxed in the hands of the recipient except through deduction by the company (under s. 184 of the Income Tax Act, 1952) when it is paying the dividends out of profits brought into charge for tax. The Income Tax Ordinance of British Guiana, however, imposes upon the recipient a charge on dividends (in so far as they are "income") with a corresponding right on the taxpayer to take credit for tax deducted by the company. Therefore no useful analogy can be drawn in this respect between the two systems.

The case turns on the application of the words "income.....in respect of.....dividends" to the payment in question. It is not disputed that it was a "dividend." The words "in respect of" are not felicitous but can mean no more than "consisting of" or "namely." It is agreed on both sides that unless the dividend was received as income in the hands of the taxpayer it does not attract tax. Mr. Miller argues that it came from a fund that was capital in the hands of the payer and that nothing has happened to convert it into income in the hands of the recipient.

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In *Re Bates*, [1928] 1 Ch. 682, decided that a cash bonus distributed by a company from profits produced by the sale of capital assets must go as rents and profits to the tenant for life and not as capital to the remaindermen. EVE, J., pointed out (p. 687) that profit was "a fund which the company could treat as available for dividend and could distribute as profits or, having regard to its power to increase capital, could apply to that purpose by, for example, increasing the capital, declaring a bonus and at the same time allotting to each shareholder shares in the capital of the company paid up to an amount equivalent to his proportion of the bonus so declared. Unless and until the fund was in fact capitalised, it retained its characteristic of a distributable profit . . . and in the hands of those who received it retained the same characteristics." That case was approved in *Hill v. Permanent Trustee Company of New South Wales, Ltd.*, [1930] A.C. 720, where a similar point arose. Lord RUSSELL OF KILLOWEN giving the judgment of the Board said (p. 731): "(2) A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorised reduction of capital. Any other payment made by it by means of which it parts with moneys to its shareholders must and can only be made by way of dividing profits. Whether the payment is called 'dividend' or 'bonus' or any other name it must still remain a payment on division of profits. (3) Money so paid to a share-holder will (if he be a trustee) *prima facie* belong to the person beneficially entitled to the income of the trust estate."

Those cases dealt with what constituted "income" under a trust, but they were adopted as a guide to what constituted taxable income in *Inland Revenue Commissioners v. Reid's Trustees*, [1949] A.C. 361. The House there held that a dividend paid out of capital profits by a South African company to shareholders in the United Kingdom constituted "income arising from possessions out of the United Kingdom" under case 5 of Schedule D of the Income Tax Act, 1918. In so holding the House rejected the contrary view of the Court of Session in Scotland summarised by the Lord President in the terms "The short answer. . . . is that this sum is not the income of any-one and never was"—a view entirely corresponding to Mr. Miller's submission in the present appeal. Lord SIMONDS (p. 381) after citing the Lord President's opinion said: "My Lords, I must say with great respect that I think this conclusion can only be reached by ignoring that what may be regarded as capital in the hands of the payer may yet be income in the hands of the payee. It is begging the question to say that this sum is not income in the hands of the shareholders: by every practical test it has proved to be income." And later (p. 373) he said: "The shares the respondents held before the distribution of the dividend they still hold intact. The dividend they received was income arising out of those shares." Lord NORMAND (p. 374) said: "There are, in my opinion, valid reasons for treating the dividend as taxable income in the respondent's hand. The payment was quite properly described as a dividend and a dividend is at least *prima facie* income of the recipient. In law capital cannot be returned to shareholders by a mere money distribution, whether called

a dividend or by some other name and there was in this instance no return of capital." Lord MORTON OF HENRYTON (p. 380) concluded that it followed "inevitably that the dividend is income arising from the possession. *Prima facie* a dividend paid on shares is income." Lord MACDERMOTT said (p. 383): "But here the shareholding which was the only relevant capital in the respondent's hands rested as it was and the dividend cannot, therefore, be said to have contained an element of capital. No doubt the shares abated in market value after the payment of the dividend but they nevertheless remained intact. The ripe tree loses weight and worth when it sheds its fruit, but the fruit remains fruit and no more unless in its fall it has taken part of the tree with it." Finally Lord REID said (p. 386): "There are many ways in which a company can deal with its profits. If it adopts certain methods the result is the creation of new capital assets. If it adopts other methods the result is the receipt of income by its shareholders."

Mr. Miller sought with ingenuity to distinguish that case on the ground that it was decided on its particular facts and in relation to Schedule D, and that it is not binding on the facts of the present case. Their Lordships cannot see any valid grounds for such distinction. They agree with the judgment of WYLIE, J., with which the other judges in the Federal Supreme Court concurred. The sum received by the taxpayer in the present case was "income in respect of dividends" which attracted tax under clause 5 of the Income Tax Ordinance of British Guyana.

Their Lordships will humbly advise Her Majesty that this appeal be dismissed. The appellants will pay the costs of this appeal.

Appeal dismissed.

Solicitors: *Simmons & Simmons* (for the appellants); *Charles Russell & Co.* (for the respondent).

**JOE DASILVA v. HAMILTON
JOE DASILVA v. SOLOMON**

[British Caribbean Court of Appeal (Archer, P., Jackson and Date, JJ.A)
November 28, 29, 30, 1962, March 7, 1963]

*Negligence—Dangerous operation—Negligence of independent contractors—
Gasolene station—Spark negligently caused by repairman—Explosion and damage—
Liability.*

The appellant operated a gasolene station which had been built by independent contractors. He employed an unqualified motor mechanic to repair an electrically driven pump which was used to pump gasolene. The mechanic negligently caused a spark to be emitted and this ignited the gasolene vapour around the pump. The respondents, who were present at the station for the purpose of purchasing kerosene, suffered consequential injuries and sued for damage. BOLLERS, J., gave judgment in favour of the respondents. [See 1961 L.R.B.G. 413]. On appeal,

Held: (i) where the personality of the witnesses was an essential element in the decision, there being a conflict of evidence of fact, an appellate court ought not save in the clearest cases to set aside the trial judge who has seen and heard the witnesses.

Flower v. Ebbw Vale Steel and Iron and Coal Company, [1936] A.C. at p. 220;

(ii) the appellant brought upon the land petrol, a thing dangerous in itself, and his liability would have been absolute if his act had not been sanctioned by statute on certain conditions;

(iii) the respondents were invitees and it was therefore the duty of the appellant to take reasonable care to protect them and prevent damage to them from unusual danger, which is understood to mean unusual from the point of view of the invitees;

(iv) how great is the duty of care would depend on the circumstances of each particular case. It is difficult to lay down an inflexible standard of care where things dangerous *per se* are considered, but the degree of care should bear some proportion to the degree of risk involved if that duty remains unfulfilled, while in the case of an invitee only reasonable care is required;

(v) on the evidence the appellant, as an invitor, had failed to discharge his obligation to take reasonable care.

Appeal dismissed.

P. A. Cummings for the appellant.

S. Van B. Stafford, Q.C., with *C. A. F. Hughes* for the respondents.

JACKSON, J.A.: The appellant was the defendant in two actions brought against him by the respondents James Oswald Hamilton, an infant suing by his father, and Priscilla Solomon, in which they claimed respectively damages for injuries alleged to be sustained as a result of his negligence. The actions were consolidated and were heard by BOLLERS, J., who gave judgment for the plaintiffs awarding Hamilton \$6,000 damages with costs and Solomon \$3,000 damages with costs. [See 1961 L.R.B.G. 413].

The appellant was at the material time the owner and the occupier of premises known as the "Esso Filling Station," where he carried on among other things the business of selling gasolene (petrol), kerosene and other inflammable substances. His awareness of the nature of the premises was manifested in two warning notices which were thereon conspicuously displayed prohibiting smoking.

The negligence complained of by each plaintiff was—

- "(a) in improperly constructing the 'air-vent' leading from the defendant's underground gasoline tanks at the said filling station, which vents were ineffective and unsafe;
- (b) in effecting or causing to be effected by an unqualified electrician repairs to one of the electrically operated pumps at the said filling station whereby a spark was occasioned and gasoline vapour ignited;
- (c) in failing to turn off the supply of electrical current to the pump while such repairs to the pump were in progress, thereby permitting a spark or sparks to ignite gasoline and/or its vapour;
- (d) in effecting repairs to the said pump or causing same to be repaired while gasoline was being unloaded from a tank wagon to an underground tank whereby the gasoline or its vapour became ignited and the plaintiff was burnt by the flames thereof;
- (e) in not warning customers or preventing them from entering the premises while repairs were in progress or while the tanks of the station were being filled;
- (f) in constructing the canopy over the entrance of the gasoline station with an attic having no proper ventilation and in which gasoline vapour from the low vapour vent pipes of the underground tanks was likely to seep;
- (g) in leading wires for electricity and their containing pipes through the aforesaid attic, the said wires and pipes not being made vapour proof."

The defence in answer to this complaint was:

- "(a) The defendant denies that any ignition of gasoline vapour was caused by any spark from one of the gasoline pumps and states that the cause of any ignition was and is unknown and was not due to the negligence and/or incompetence of the defendant, his servant and/or agent, and that
- (b) the defendant had taken all reasonable precautions as a prudent man to ensure the safety of the premises by employing a competent independent contractor to erect the premises and to install the electrical installations, and finally that the plaintiffs were guilty of contributory negligence and had consented to run the risk of such danger under the doctrine of *volenti non fit injuria*."

The location, the arrangement of the premises and the proximate circumstances were described by the learned judge in these terms:

"The filling station is situate on the northern side of the public road which runs east to west and faces south. There are

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two gasoline pumps electrically driven situate on a concrete island on the south of the office and a few feet away from it. Above these two pumps is a canopy or shed which projects from the southern end of the office to a point over the pumps so that the two structures become one building. Under this shed which has a galvanised roof are the gasoline pumps. Between the ceiling which is of tentest and the roof there is a space enclosed on three sides but not on the side adjoining the office and this is known as the attic.

Directly below the pumps are the underground tanks in which the gasoline is stored and protruding from the tanks are two metal pipes which support the canopy or shed and which go through the ceiling and project beyond the roof a distance of eight inches. These pipes serve a dual purpose as they support the canopy but are really air vents through which the highly inflammable gasoline or petroleum vapour travels up and finally dissipates into the atmosphere beyond the roof. The kerosene pump or drum at which kerosene is sold is situate on the western side of the main office building.

Immediately prior to the incident an employee named St. Kitts was repairing the mechanism of the western pump and for that purpose had the faces of this pump off and was working on the arm of the pump which operates the motor which drives petrol through the body of the pump into the hose by which it is finally distributed through a nozzle. The arm had jammed and he was changing it and for that purpose was using a screw-driver, a pair of pliers and a spanner. The pump itself is built of metal.

About five feet away from this operation, on the eastern side a tank-waggon was discharging a load of petroleum into the underground tank of the eastern pump through the filler hole of that tank and as a result the filler cap was off. The repairs to the pump on the western side continued while petrol was being discharged by the tank-waggon into the tank of the eastern pump. Suddenly there was a flash of flame followed immediately by a violent explosion and the falling of the burning ceiling above the pumps and the two plaintiffs and the employee St. Kitts received severe burns. At the time the plaintiffs were standing a few feet away from this employee."

The judge sets out his conclusions as follows:

"In considering this mass of evidence, may I say at once that I was not impressed by the evidence of the witness St. Kitts. He did not impress me as being a witness of truth and I was quite satisfied that he was an incompetent and careless workman unconcerned not only with the safety of others but also himself. I am satisfied that he had attempted to repair the mechanism of the arm of the pump without switching off the electrical current directed to that pump and lacked the elementary knowledge and experience of the principles of electricity which

a mechanic of his type ought to have possessed before attempting repairs to the mechanism of the pump. I am satisfied that the incident did not occur in the way he said it did, and that the evidence of the two plaintiffs, in spite of variations (if any) from their depositions given at the inquest, and the witness Sancho was true and correct, and that the fire took place when St. Kitts caused a spark to be emitted from the electrically driven pump either by touching a live wire in the inner workings of the pump or by the pair of metal pliers in his hand striking some other metal object. This spark ignited petrol vapour which came from two sources, firstly, the general amount of vapour that is normally lying around at low level at filling stations when vehicles are loaded with petrol, and also, as in this case, where it can be inferred that petrol vapour was escaping from the filler hose when the tank-waggon was discharging its fuel; and, secondly, more especially from the vapour which arose in the metal pipes or air vents which was caused by the fuel entering the tank, displacing the vapour, sending it up the air vents, some of which was dissipated into the air and being heavier than air some escaped back into the attic through the galvanised zinc sheets of the roof, became trapped in the attic and then descended through the crevices of the ceiling into the empty space below and around the pump. It was this petrol vapour around the area near the pump that was caught afire by the spark in a continuous stream which on ignition ascended by reason of the heat. The continuous stream of vapour led to the attic where it ignited or heated the accumulated or trapped vapour in the attic causing it to expand and the intense heat and pressure finally causing the explosion from the accumulated gas in the attic." I have set these findings out in full because —

- (a) of the ultimate sentence in the quoted findings and on the emphasis the judge seemed to lay on trapped vapour in the attic and what he considered was its scientific behaviour thereafter, and
- (b) two of the principal grounds argued on behalf of the appellant were that the decision was against the weight of the evidence and that the judge erred in finding that St. Kitts caused to be emitted a spark which ignited petrol vapour thus causing a conflagration.

With great respect I cannot from the evidence adduced reach with any degree of certainty the conclusion arrived at by the learned judge as to the scientific behaviour of vapour if trapped, as he found, in or about the attic as described. He might have been misled by the evidence of the fire prevention officer whose conclusions in respect of the construction of the canopy and its supports were not sufficiently informed. This officer did not know that the pipes supporting the canopy contained air vents nor did he know that the pipes protruded the canopy and ended up several inches above and beyond it. Any theory based on this absence of knowledge diminishes its value. Further discussion of this aspect for the purposes of this case, for reasons which will later appear, is in my opinion otiose.

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In support of (b) Mr. Cummings, counsel for the appellant, urged that Hamilton was unreliable, Solomon's evidence conflicting and the expert evidence was in favour of the appellant. He contended that although the judge gave reasons for his findings and stated what witnesses he believed and disbelieved, the reason for belief of the witnesses was not based or declared to be on demeanour. In consequence he submitted that this court was in as good a position as the trial judge and the question of acceptance or rejection of the evidence adduced was at large for this court. This submission I find unsubstantial. The judge has not necessarily to record that his belief of witnesses was based wholly or partly on their demeanour. It is however in this case implicit in his judgment that that aspect was considered by him. In any event if this court is satisfied that the advantage of the trial judge in seeing and hearing the witnesses influenced his belief in their testimony and this court is not convinced that he is wrong or has acted on a wrong principle then his findings of fact should not be disturbed. The accuracy of the recollection by the witnesses of the events which occurred at the material time played an important part and a great deal depended on the credibility of those witnesses. The words of Lord WRIGHT in *Flower v. Ebbw Vale Steel & Iron & Coal Co.*, [1936] A.C. at p. 220 (referring to the case of *Powell v. Streatham Manor Nursing Home*, [1935] A.C. 243, are appropriate :

"Where the personality of the witnesses was an essential element in the decision, there being a conflict of evidence of fact, an appellate court ought not to save in the clearest cases to set aside the trial judge who has seen and heard the witnesses."

There was abundant evidence to support the findings of fact as to the cause of the fire. It was not disputed that there would be inflammable vapour around the pumps and around the tank-waggon which was discharging petrol into underground tanks only about five feet from the pump on which St. Kitts was working; he had the faces of his pump down and it is also common ground that similar vapour was around that pump also.

It cannot be questioned that the appellant brought upon the land petrol, a thing dangerous in itself, and by means of the operation of pumps sold and there purported to sell petrol and other inflammable stuff such as kerosene to people who wished to buy. The liability for any damage done to persons as a result would have been absolute if certain statutory provisions did not sanction such a project on conditions which I understand the appellant had endeavoured to the best of his ability to fulfil. The appellant is, however, not absolved from liability for damage resulting to persons on lawful business but his liability is only limited in so far as he is not negligent either by himself or his servants. The appellant undeniably owed a duty of care to all persons on lawful business at the premises or who were justifiably there. Indeed, on the evidence and also on the acceptance of the relevant findings of the trial judge, the respondents were invitees; it was therefore also the duty of the appellant to take reasonable care to protect them and prevent damage to

them from unusual danger, which is understood to mean unusual from the point of view of the invitee. How great is the duty of care would depend on the circumstances of each particular case; it is difficult to lay down an inflexible standard of care where things dangerous *per se* are concerned but I think it has been acknowledged and settled that the degree of care should bear some proportion to the degree of risk involved if that duty remains unfulfilled, while in the case of an invitee only reasonable care is obliged.

Was there any negligence in this case? Counsel for the appellant submits there was none and harnesses to his aid the fact that for the erection of the station in 1953 the appellant had employed an independent contractor and had also procured the services of a competent electrician to look after the electrical installations; he stressed that a Government inspector had passed the premises fit for use as a petrol filling station on which basis the appellant had secured a licence which was renewed every succeeding year after inspection; he urged that this danger was unforeseen danger for which his client would in those circumstances be immune from liability and be equally free from same even on an admission that the respondents were invitees. I think the position is misunderstood by counsel on both grounds. As to the latter, the doctrine that it is "an invitor's duty to use reasonable care to prevent damage to an invitee from unusual danger" is inveterate and has been hallowed by judicial sanction.

Acutely conscious of the dangerous nature of the premises the appellant had warned by two notices that there should be no smoking on the premises, lest perhaps any untoward ignition from a lighted match or lighted cigarette may cause danger. It is therefore of interest to inquire how far he had been alert, from the initial use of the station to the day of the fire, in the performance of his duty or had discharged his obligation to take, at least, reasonable care.

He testified:

"At the time the original licence was granted I complied with the regulations and every year there was an inspection and the licence was granted . . . I am not an electrician. Mr. Oscar Green installed my electrical works. He is a qualified electrician and electrical engineer. I was not in a position to check what he did. Mr. Green would come from time to time to inspect the electrical fittings and make renovations when necessary. We had pumps and tanks on the premises which were the property of Esso Standard Oil Ltd., and during the time that the gasolene underground tanks and vents and pumps were installed, two of their private engineers visited the site and they were satisfied and everything was alright and they gave the contractor the O.K. This was never done again by them. . . . I knew De Ramos who was employed by me and who met his death. St. Kitts was also employed by me. As soon as I learned that there was a fire I went up there and no person was able to tell me what took place. As far as I am aware no vapour lodged in the attic, *i.e.*,

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between the ceiling and the galvanised roof. I did not permit employees to use naked flames around and there were two NO SMOKING signs by the pipes supporting the canopy on the pump island.....There was an interlock mechanism in the pump that St. Kitts was supposed to be repairing.

.....At the lower level there is a possibility of vapour seeping into the roof, this is what Mr. Frampton said. I did not know before that vapour might have been trapped between the ceiling and the roof. It is the first time that anything has happened in my 20 years in the business. I did not know in my business that I had to guard against the lodgment of vapour in any particular place.....St. Kitts is a mechanic with the automobile electrical knowledge such as fixing starters in motor cars and generators. He has no qualifications. His job is that of a motor mechanic.....I did say at the inquest that since the wiring had been done in 1953 it had never been examined until 1959 after this incident. By wiring I mean wires in conduit pipes leading to the different outlets.....I do not give instructions to see that the premises are cleared as it is not necessary due to the fact that the waggon is fitted with vapour proof connections between the tank waggon outlet and underground filler pipe. I do not instruct my employees to cut off all electrical current when the waggons are discharging the gasolene into the tanks....."

St. Kitts:

"I was using a pair of pliers and a screw driver and a spanner. The pliers and spanner are steel. Blade of screw driver is steel. I do agree if any of those touches another piece of metal there would likely to be a spark. I do realise that in doing repairs a spark might be set off and ignite petrol vapour hanging around. There are two kinds of sparks (1) a spark caused by hitting metal, *i.e.*, by my tools hitting a piece of metal; (2) one of the tools touching part of the pump charged with electric current. I did not desist from working when the tank waggon started unloading because I did not connect their work with mine....."

Mr. Green affirms that around the area and in the vicinity of a pump used for pumping gasolene there would be gas vapour, and the fire prevention officer in his evidence said there must be a certain amount of vapour in filling the underground tanks and that any spark coming in contact with such vapour would ignite it.

The appellant honestly believed that having employed competent persons to erect the building for the purpose of storing and selling petrol, installing electrical connections and obtaining a licence to carry on his business, no obligation devolved on him to do anything more for the safety of his customers save perhaps the putting up of ordinary "no smoking" signs and prohibiting employees from using "naked flames around". He employed St Kitts, a motor mechanic whom he styles as unqualified, to do repairs in an area around which lurked inflammable vapour. This employee was either unmindful of

any potential danger or was well prepared to run the risk, more likely the former for he said he did not consider the work of the unloading of petrol into tanks just a few feet from him had any connexion with his work. The testimony of these witnesses in the circumstances of this case whether from a view of bringing a dangerous thing on premises or from the view of a duty owed "to an invitee establishes more than *prima facie* negligence on the part of the respondent. The danger was an unusual one from the point of view of the invitee and it was the appellant's duty to make reasonably sure that this potential danger did not crystallise into actual danger. This by neglect he failed to do. The answer of the appellant, in the court below on this point was that if any negligence can be attributed to the appellant there was contributory negligence on the part of the respondents and, in addition, that the doctrine of *volenti non fit injuria* applied; he secured an amendment at a late stage to include such a defence but this was not pursued before us.

Considerable argument was addressed before us on the question of foreseeability and as to whether inflammable vapour was trapped in the canopy or its vicinity. It was submitted that that was so and that the appellant could not have prescience of such an event and therefore could not be held guilty of negligence. It was further strongly contended that he was completely absolved on the establishment of that fact, and he would also have discharged himself of any blame if he could show possible ways of how the accident could have happened without his negligence. I think this a curious if not grotesque view of the law, for if there is lurking in and around the station potential danger of inflammable vapour known or ought to be known by the owner and occupier of the premises thereof as a result of his operations, and such owner or occupier does not take care by himself or his servants to prevent the mischief that its presence could cause, then it is idle to ask a court to accept a proposition that the owner is not liable for the mischief such negligence would cause. It is difficult to overlook the fact that the injurious agency was at all times under the management and the control of the appellant and his servants, and that such an accident in the ordinary course of things would not have occurred if proper care was exercised. I wish if I may, to adapt the words of EVERSHED, M.R. in *Moore v. Fox*, [1956] 1 All E.R. 182, at p. 190, and say that where the event is shown to be such that on a true analysis the thing speaks for itself, or where *prima facie* negligence is proved the defendant cannot discharge the onus on him "by proffering explanations of which the most that can be said is that some, at least, are consistent with the absence of care." In fine, the evidence in my view establishes that the appellant, as an invitor, has failed to discharge his obligation to take reasonable care.

On the question of foreseeability it is sufficient to say that the doctrine has here no application; even if application there is, it is inadequate for the appellant to say he does not know how it happened, it might have occurred without any negligence on his part or that he could not foresee the ultimate result of his omission to take

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care. There is evidence of negligence on the part of the appellant and that evidence cannot be displaced merely by showing that the course the flames may have taken could not have been anticipated by the appellant. The appellant has in my view failed in his duty to furnish an effective answer to the respondents' claim.

Seven grounds of negligence were alleged in the statement of claim but it is sufficient to say that the main grounds embraced the two heads considered in this judgment. It was neither necessary nor required for the determination of the real issues to hold an inquiry as to where if at all the lighted vapour did not find ready escape, be it in the attic or elsewhere. In any event the evidence of the experts on that score was inconclusive and ended up only with a series of hypotheses.

The quantum of damages awarded was questioned but I can find no reason to interfere with the award.

For the reasons stated I would dismiss the appeal with costs and affirm the judgment and order of the court below.

ARCHER, P.: I agree with the result arrived at by JACKSON, J.A., and with the order he proposes.

DATE, J: I concur.

Appeal dismissed.

HANCOCK v. SMITH

[In the Full Court, on appeal from the Magistrate's Court for the Berbice Judicial District (Luckhoo, C.J., and Chung, J.) July 20, August 10, 1963].

Workmen's compensation—Workman as distinguished from independent contractor—Workmen's Compensation Ordinance, Cap. 111.

The respondent worked in the appellant's wood-working shop where from time to time he made furniture for the appellant at agreed prices, for which he was paid on Fridays. He was not required to go to the work shop every day and could leave whenever his work was completed. The appellant exercised no control over his work. While at work the respondent suffered injury. On appeal from an order of a magistrate awarding him compensation,

Held: the respondent was not a workman and was therefore not entitled to compensation under the Workmen's Compensation Ordinance, Cap. 111.

Appeal allowed.

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

H. Hanoman for the respondent.

Judgment of the Court: This is an appeal from a decision of a magistrate of the Berbice Judicial District who awarded the respondent Alvin Smith the sum of \$1,512 as compensation under the provisions of the Workmen's Compensation Ordinance, Cap. 111, in respect of personal injury by accident sustained by him at the workshop of the appellant Charles Hancock on the 13th April, 1962.

Two main questions arose for determination before the learned magistrate —

- (1) whether the respondent was a workman within the contemplation of the Workmen's Compensation Ordinance, Cap. 111;
- (2) whether the accident was attributable to the respondent's own serious and wilful misconduct.

From the memorandum of reasons for decision it would appear that the learned magistrate appreciated the test to be applied in deciding whether or not the respondent was at the material time a workman within the contemplation of the Ordinance. The question is whether there is any evidence upon which the magistrate's finding of fact that the respondent was a workman can be supported. It is well settled that an appellant tribunal will only interfere where there is no evidence to support such a finding.

The appellant carries on a woodworking establishment at Coopers Lane, New Amsterdam, Berbice, and at the date of the accident, 13th April, 1962, the respondent was engaged in the appellant's workshop making benches for the appellant. While planing some boards on the appellant's electric plane the respondent's right thumb was injured by the plane. He lost the right thumb through the first phalanx. The surgeon, Mr. Holgate, testified that the injury has resulted in permanent disability to the extent of *35 per centum*.

The respondent testified to the effect that he has been working in the appellant's workshop since the year 1960 and would from time to time be asked by the appellant to make benches and other furniture at agreed prices for which he would be paid on Fridays; that he was not required to go to the workshop every day; that if the work he had to do was completed he could leave the workshop. He also said that he could not employ anyone to work with him in the workshop.

The appellant and one Cayunie, who had been employed at the appellant's Workshop as a foreman while the respondent was working there, gave evidence to the effect that neither of them exercised any control over the work performed by the respondent.

There was admitted in evidence a notebook kept by the appellant in which those persons employed in his workshop signed for the receipt of moneys paid to them by the appellant. The contents of that book show that apart from one S. Melbourne only the respondent received payments in respect of specified articles made from time to

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time. The other persons employed in the workshop were paid at a weekly or daily rate.

Evidence was also given by the respondent to the effect that after the accident the appellant told him that he would "pay me every week until I came out of hospital. He paid me for ten weeks a total of \$134.00. On the tenth week I asked him if only \$134 he would give me for my finger. He said that he did not expect that I would ask him such a question". The appellant's evidence in this regard is that "I have paid the money to lessen his suffering. It is not true I paid compensation; I lent him money for a period of ten weeks. I did not take a note."

The evidence of the respondent in respect of the sums totalling \$134 is not unequivocal. There is nothing in that evidence from which it can be said that that amount was given as compensation and we do not think that the learned magistrate could reasonably have inferred (even rejecting the appellant's evidence that the amount was intended to be a loan) that the amount of \$134 given to the respondent was paid in respect of compensation consequent upon an admission of liability.

The contents of the appellant's notebook do not carry the matter any further but rather tend to show that the respondent (and S. Melbourne) were employed by the appellant on quite a different basis from that on which the other employees were employed. The period of time over which the respondent was employed in the workshop is consistent with his being an independent contractor as well as with his being a workman and no inference can properly be drawn from the period of employment alone. The testimony of the respondent standing alone or coupled with the other evidence does not take the matter any further. We are therefore of the view that the learned magistrate erred when he found that the preponderance of evidence was in favour of the respondent being a workman within the contemplation of the Ordinance and indeed there was no evidence from which it could reasonably be found that the respondent was a workman.

The appeal must be allowed on this ground.

The other ground argued was that the learned magistrate erred when he found that the accident was not attributable to the respondent's own serious and wilful misconduct. There was ample evidence upon which the learned magistrate's conclusion in this regard could be supported and it is to be observed that nowhere in the cross-examination of the respondent in the court below does it appear that it was suggested to the respondent that he had admitted to the appellant that he had released a spring in the plane.

In the result the appeal must be allowed on the first ground argued and the award made by the magistrate set aside. Each party to bear own costs. Leave to appeal to British Caribbean Court of Appeal granted.

Appeal allowed.

Solicitor: *D. Dial* (for the appellant).

BHARRAT v. CORT

[British Caribbean Court of Appeal (Archer, P., Jackson and Stoby, J.J.A.)
January 7, 8, February 11, 1964].

Criminal law—Evidence—Time—Accuracy of clock not established—Whether strict proof necessary.

Shops—Closing time—Permissible extensions.

The applicant was charged with keeping his shop open during prohibited hours. The magistrate dismissed the complaint holding that the accuracy of a clock on which the prosecution relied had not been strictly proved. This decision was reversed by the Full Court which also held that the applicant could lawfully have kept his shop open for an hour after closing time if, as he alleged, he was doing so for the purpose of effecting delivery of a table which he had sold earlier in the day. On application for leave to appeal,

Held : (i) it was sufficient to say that there was some evidence of time;

(ii) there was no right to keep a shop open for an extra period of time unless the shop-keeper was fulfilling one or other of the purposes specified by law, nor could a shop lawfully remain open after that purpose had been achieved.

Application dismissed.

K. Prasad for the appellant.

D. Singh, Crown Counsel, for the respondent.

Judgment of the Court delivered by ARCHER, P.: On the 27th July, 1963, the Full Court reversed the decision of a magistrate who had acquitted the applicant, a shopkeeper in a rural area, on a charge of a breach of the Shops (Consolidation) Ordinance, 1958, and convicted the applicant. The charge was laid under s. 3(1) of the Ordinance and alleged that the applicant had kept his shop open on Saturday, 22nd December, 1962, at a time when it should have been closed.

The evidence which the magistrate accepted was that a police constable saw the applicant's shop open to the public at 9.30 p.m. on Saturday, 22nd December, 1962. The constable had checked his watch with the clock at the police station that night and told the applicant that the time was 9.30 p.m. and that the shop should have been closed at 8.45 p.m. The applicant then checked with a clock which was in his shop and agreed that the time was 9.30 p.m. but asked the constable for a chance. The magistrate, however, held that as accuracy of the clock at the police station had not been established, there had not been strict proof of time and dismissed the charge. He also considered that the applicant could avail himself of the protection of sub-s. (3) of s. 3 of the Ordinance and keep his shop open after the ordinary closing hour during the Christmas period. It will be seen that this was a misreading of the provisions of the subsection.

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The applicant's defence before the magistrate was that his shop was open for the purpose of delivery of a table which he had sold earlier in the day. The magistrate did not believe the applicant and the Full Court's decision was on the basis that, as the applicant had not, on a balance of probabilities, satisfied the magistrate that his purpose was as he alleged, the charged was proved. But the Full Court also thought that the applicant could lawfully have kept his shop open for an hour after 8.45 p.m. if he had in fact been effecting delivery of a table.

In this court two grounds of appeal were argued. The first ground was that there was insufficient proof of time which was of the essence of the offence. Counsel for the applicant sought leave to amend this ground by substituting "no proof of time" for "insufficient proof of time" and submitted that there was no evidence that the time referred to by the constable was local mean time within the meaning of time as defined in s. 5(1) of the Interpretation Ordinance, Cap. 5. It is sufficient to say that there was some evidence of time (see *Penny v. Nicholas*, [1950] 2 All E.R. 89) and this ground of appeal fails.

The second ground of appeal was that the decision of the Full Court was based on a wrong principle in that the Full Court had not applied the provisions of s. 3(3) of the Ordinance. Counsel argued that the applicant was entitled to keep his shop open until 9.45 p.m. on Saturday, 22nd December, 1962, and relied on the combined effort of s. 3 and the Second Schedule of the Ordinance. Counsel for the respondent contended that the shop could have remained open only until 9.15 p.m., but even then only if a shop assistant or shop assistants had been employed by the applicant, and that where there are no shop assistants the provision for an extra half-hour of opening does not apply.

Section 3(1) of the Ordinance restricts the opening and closing of shops to the days and periods of a day set out in the First Schedule to the Ordinance. The restrictions is subject to the provisions of ss. 8 and 17 of the Ordinance, neither of which has any application to the facts of this case. Section 6 of the Ordinance restricts the hours of employment of shop assistants to the hours during which a shop can lawfully be kept open but permits such employment during the extra periods of time and for the purposes set out in the Second Schedule to the Ordinance. Section 3(3) of the Ordinance provides that it shall be a defence to any proceedings in relation to any shop for contravention or failure to comply with the provisions of s. 3(1) to prove that such shop was opened, or kept or permitted to be open, for the purposes provided in the Second Schedule to the Ordinance or in accordance with the provisions of s. 8 of the Ordinance. The subsection does not provide that if a shop is opened, or kept or permitted to be open, for any of those purposes, it can as a matter of course lawfully remain open during the extra periods of time mentioned in the Schedule. The indulgence granted is for the effectuation of a purpose and when the purpose

has been effected the shop-keeper no longer has immunity from the provisions of s. 3(1). There is no right to keep a shop open for an extra period of time unless the shop-keeper is fulfilling one or other of the purposes specified nor can the shop lawfully remain open after that purpose has been achieved.

The second ground of appeal also fails and the application is therefore dismissed.

Application dismissed.

JOHN v. GURRICK

[British Caribbean Court of Appeal (Archer, p., Jackson and Stoby, JJ.A.)
January 28, 29, 30, February 11, 1964].

Local government—Subdivision of lots—Statutory prohibition against subdivision into portions of less than one-fifteenth of an acre—Transport passed for distinct but contiguous portions of lot—Together, but not separately, the portions exceeded the prescribed minimum area—Validity of transport—Local Government Ordinance, Cap. 150, s. 122(2) and (8).

Section 122(2) of the Local Government Ordinance, Cap. 150, provides that "no lot in a village or country district shall be subdivided into portions of less than one-fifteenth of an acre." Subsection (3) provides that "any subdivision which is made contrary to the provisions of this section shall be null and void."

The appellant owned a piece of land the total area of which exceeded one-fifteenth of an acre. He obtained the approval of the Local Government Board to subdivide it into portions each of which was slightly less than the prescribed minimum area. The respondent bought the land and took transport for it, the subdivided portions being separately described in the transport, but was later refused a building permission by the Central Board of Health on the ground that the subdivision was illegal. In an action for rescission of the sale, FRASER, J., gave judgment for the respondent on the ground that the transaction involved an illegal subdivision of land. [See 1962 L.R.B.G. 199]. On appeal,

Held: since the two pieces of land, which were contiguous, together exceeded one-fifteenth of an acre and were conveyed to the respondent under a single transport, no illegal subdivision was involved.

Appeal allowed.

L. F. S. Burnham, Q.C., with *H. D. Hoyte* and *A. O. Holder* for the appellant

B. S. Rai for the respondent

JACKSON, J. A.: This is an appeal by the defendant from the judgment of FRASER, J., in which he found for the plaintiff (respondent) and made the following order:

"(i) Rescission of the contract dated 7th January, 1958, on the ground of illegality;

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- (ii) A declaration that transport No. 1282 dated 24th March, 1958, with mortgage in favour of the defendant is null and void;
- (iii) Cancellation of the lease No. 73 of 1958 dated 24th March, 1958;
- (iv) The defendant to repay to the plaintiff the sum of \$6,000 with interest at the rate of 6% per annum from 24th March, 1958, until final payment;
- (v) The defendant to pay the taxed costs of the plaintiff certified fit for Counsel."

The property, the subject of the judgment under appeal, descended in the following manner:

James Tudor Seymour, a sworn land surveyor, who was under the provisions of the District Lands Partition and Re-allotment Ordinance (No. 16 of 1926) appointed to partition and re-allot lands in Lodge Village District, completed his work and accordingly prepared a plan dated 3rd November, 1928, setting out the allotments. He thereafter as the occasion arose transported the allotments to the parties entitled.

On May 19, 1930, he transported (transport No. 560) to *Luther Chillie Campbell Paul* —

"South half of lot A, and south half of Lot B, South Section, portions of the said Lodge Village, in the county of Demerara, the said lots being laid down and defined on a plan by James Tudor Seymour, Sworn Land Surveyor, dated the 3rd November, 1928, and duly deposited in the Deeds Registry of British Guiana on the 28th day of May, 1929."

On April, 25, 1955 Joyce Evelyn James, in her capacity as the executrix under the last will and testament of Luther Chillie Campbell Paul, transported (transport No. 722) to *Maria Hazadine Bowen*, widow, "South halves of south halves of lots A and B, south section" Lodge, with reference to the same plan.

On June 4, 1956, the appellant acquired by transport (transport No. 1132) the identical piece of land similarly described, from Maria Hazadine Bowen.

On January 7, 1958, respondent and appellant entered into an agreement by which the latter agreed to sell and the former to buy a plot of land, and concluded an arrangement for a lease of an adjoining portion of land to the respondent. On that same date respondent paid \$2,000 in pursuance of the agreement and obtained a receipt from the appellant, the party to be charged, in the following terms:

"\$2,000

7.1.58

Received from Theophilus Gurrick the sum of \$2,000 (two thousand dollars) on account of purchase price of:

- (1) South half of South half of South half Lot A South Section Lodge, transport subject to lease of Northern 1/3 for 999 years with range thereon;
- (2) South half of South half of South half Lot B South Section Lodge, range thereon;
- (3) Lease for 999 years in respect of Southern 1/3 of N 1/2 of S1/2 of S1/2 Lot B. South Section Lodge cottage thereon. Total price \$12,000:

Transport papers to be prepared forthwith.

C. M. Llewellyn John."

The transport in respect of the above named property (1) and (2) and the lease (3) were duly passed on 24th March, 1958. On that date and at the same time respondent executed a deed of mortgage of the transported property in favour of the appellant as security for a loan of \$6,000. On February 21, 1957, the appellant had applied for and received on March 30, 1957, from the Local Government Board acting under the provisions of s. 122 of the Local Government Ordinance, Cap. 150, a certificate of approval of the S1/2 of S1/2 of lot A, south section Lodge, and S1/2 of S1/2 of lot B south section, being subdivided respectively into

- | | |
|---------|--|
| (a) | N 1/2 of S 1/2 of S 1/2 and Lot A |
| | S 1/2 of S 1/2 of S 1/2 |
| (b) (i) | N 1/2 of S 1/2 of S 1/2 and B |
| (ii) | S 1/2 of S 1/2 of S 1/2 |

It is not disputed that north half of south half of lot A and north half of south half of lot B adjoin each other and constitute one plot; similarly the south half of south half of lot A and the 3outh half of south half of lot B adjoin each other and constitute one plot and are easily discernible and identifiable on the said plan by Seymour; the same statement is true for the physical connexion of south half of south half of south half (S 1/2 of S 1/2 of S 1/2) of lot A and south half of south half of south half of lot B.

Respondent applied by letter to the Central Board of Health through the local authority, the Lodge Village Council, to erect a building according to a plan submitted but was on June 20, 1959, advised by the chairman of the local authority that the proposal to build according to that plan was not approved. On June 28, 1960, respondent filed his writ in which he claimed among other things rescission of the contract, a declaration that the transport and the mortgage were null and void, and a cancellation of the lease.

The main arguments before us centred around whether s. 122 of the Local Government Ordinance, Cap.150, rendered under any circumstance the sub-division of any land illegal or null and void other than in terms of that section, or any document or transport

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containing the dimensions of one plot in two or more divisions necessarily illegal or null and void if the plot was not represented therein as being divided in terms of s. 122.

The caption Part VII of this Ordinance is "*Estimates and Rates. Levy of Rates.*" This part embraces ss. 105 to 139. Sections 120 to 139 fall under the special head *Collection of Rates.*

Sections 122, 123 and 124 are hereby set out:

"122. *Restriction on sub-division of lots—*

- (1) No lot in a village or country district may be divided into portions of less size than quarter lots, without the consent of the Board first had and obtained.
- (2) No lot in a village or country district shall be subdivided into portions of less than one-fifteenth of an acre.
- (3) Any subdivision which is made contrary to the provisions of this section shall be null and void.

"123. *Apportionment of rate where lot is subdivided—*

If any lot is subdivided, the local authority of the village or country district, or if the authority fails so to do on application made for the purpose, the Board may apportion the payment of the rate payable in respect of the lot among the several portions thereof.

"124. Where any lot or building in a village or country district is owned by two or more persons, and one of the co-proprietors had paid more than his proper proportionate share of rate levied under this Ordinance, he may recover, by action, from those of his co-proprietors who have paid or contributed less than their proper share as aforesaid the amount of the said excess, but, in relation to the local authority, each of the co-proprietors shall be liable for the payment of the whole rate payable under this Ordinance in respect of the lot or building."

In s. 2 of the Ordinance "lot" and "proprietor" are defined thus: "lot" means any portion of land separately appraised and any subdivision of a lot together with any easement attached thereto; "proprietor" includes the person in whose name any lot or building is rated in the assessment book for rates.

It is obvious that the enactment of Part VII of the Ordinance was purely for the purpose of enabling a local authority or country district to provide for the annual estimate of rates, and for the levy and collection of those rates. It would also appear that although it provides for a sizeable division of lots the main object

is to facilitate the collection of rates from several proprietors who may own parcels of land in one large plot; if that were not so an unnecessary burden would be placed on an original owner or proprietor of the whole plot whose name alone may appear in the assessment books of the local authority.

In this connexion reference may be made in r. 22(3) of the Rules for the passing of transports and mortgages contained in the second schedule of the Deeds Registry Ordinance, Cap. 32, which will be noticed later.

- "22. (i) Every transport or lease must quote the date and number of the grant or transport by which the party transporting or leasing holds, and must also refer to the diagram (if any) of, the property being transported; but no diagram shall be deposited or recorded in the registry until it has been certified by the Commissioner of Lands and Mines.
- (ii) The Registrar with the consent of the parties shall have power to substitute any diagram drawn or corrected by the Commissioner of Lands and Mines for the diagram originally presented.
- (iii) Where two or more distinct properties are to be conveyed by the same deed, each property must be described in a separate paragraph which shall set forth the particulars herein."

A ground of appeal submitted was that the learned trial judge erred when he found that the alleged contravention of s. 122 of the Local Government Ordinance was material to the issue in this case, and that he misdirected himself in considering the "legality of the conveyance by way of transport in as much as he overlooked the fact the two contiguous portions were contained in one transport prior to and after the conveyance and comprised one and the same immovable property."

The trial judge said (1962 L.R. B.G. at p. 201):

"It has been long established that a transport for a portion of land in a village or country district which is less than the minimum required for a sub-division, *i.e.*, one-fifteenth of an acre, is void for the reason that the sub-division of less than one-fifteenth of an acre is void. (See *Austin v. Allen*, O.G. 7.9.04 at p. 599; and *Mohamed Din v. Tetry*, 1943 L.R.B.G. 145)".

The judge has misunderstood the *ratio decidendi* in the former case and has not appreciated that it dealt with a specific section in an Ordinance unconnected with and which does not appear in the Local Government Ordinance. The principal portion of the judgment of LUCIE-SMITH, Acting C.J., in the case of *Austin v. Allen* is as follows:

"The plaintiff alleges that he purchased on 30th July, 1888, one undivided eighth of lot No. 12, Wortmanville, for \$50; that he

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has paid the purchase money and he claims transport or damages and an account.

From the evidence it is clear that if the plaintiff purchased anything he did not purchase an undivided eighth; the receipt put in shows a specific portion, and in the plaintiff's claim it is alleged that he took possession of the land purchased and built a house on part, and the remaining portion the defendant has rented to certain persons, showing without doubt that what the plaintiff alleges he bought was a divided portion. It is admitted that the lot in question is in the city of Georgetown. By the Town Council Ordinance no transport is allowed to be passed of less than a half lot. There is no sufficient evidence that any portion of the land alleged to have been sold has been rented out by the defendant or that he has received rents in respect thereof. The plaintiff cannot therefore obtain judgment either for the transport or the account claimed."

In the latter case, *Mohamed Din v. Boodhoo and Tetry*, lot 24, among other lands, at Plantation Windsor Forest was delineated on a plan dated October 29, 1908 and was shown as having access to a road marked "Private Road"; on that same plan lot 25 was delineated as having access to a road marked "High Dam". A plan of December 11, 1908 "showed a subdivision of lot 25 into two lots numbered 25A and 25B and an alteration of the boundaries of lot 24 providing along the southern boundary thereof a dam along which access could be found to lot 25A which without this dam had no means of access." These plans were approved by the Board. Tetry on May 22, 1909, obtained transport of lot 24 which was therein described by the October 1908 plan; it seemed clear that the October plan was in effect modified or amended by the December 1908 plan. On that same day May 22, 1909, transport of lot 25A was passed in favour of the plaintiff's predecessor in title, in which transport reference was made to the December 1908 plan. In 1937 Tetry transferred lot 24 to her son Boodhoo, and before the transport was passed the Registrar quite properly amended it to conform with the plan of December 1908, approved by the Local Government Board.

VERITY, C.J., in course of his judgment, at p. 149 said:

"It is clear from the terms of s. 27 of the Ordinance (Local Government Ordinance, Cap. 84, since repealed) that it was intended that no disposition should be made upon the division of a single holding into lots until a plan of the proposed division into streets, roads and means of access to each lot had been approved by the Board and deposited in the Registrar's Office and that after such approval and deposit no disposition should be made save in accordance with the approved plan. For the owner to proceed or attempt to proceed otherwise is forbidden under heavy penalty and the matter is plainly one in which the imposition of a penalty amounts to such prohibition as would render void for illegality any contract or agreement or attempted to be made in breach of the statute. It follows that no agreement or attempted agreement prior to the date of the deposit is of any

effect and no allegation of such prior agreement can avail the defendants. In the same way no transport can *prima facie* be deemed valid if its terms are in breach of the statute for it will have been void ab initio by reason of its illegality."

The circumstances of that case bear no resemblance to the present one; here there is admittedly no illegality of contract nor is there any reference to different or inconsistent plans; moreover there is no dispute between the parties as to the extent of the land sold and bought. Again VERITY, C.J., at p. 153 said:

"In the first place there can be no doubt as to the intention of the original owners to reserve a dam as a means of access to lot 25A nor any doubt that the surveyor marked the location of this dam not only on his plan but on earth which is still to be observed."

He found that the dam was owned neither by the plaintiff nor the defendants and that the attempt by each party to set up a prior right of long and undisputed use had failed.

I have perhaps dealt with this cited case more fully than I ordinarily would, because I do not think the parallel to the present case sought to be established by the trial Judge exists.

The judge found that each part of the alleged sub-division of the plot was short of 1/15 of an acre by 33 of a square foot and attracted attention to sub-s. 3 of s. 122 of the Local Government Ordinance which says such a sub-division would be null and void. The Board however gave consent to the sub-division and I think it is reasonable to conclude that the Board was not aware of the deficiency. Since that is void, it seems to follow that the situation would be the same as if there was no sub-division at all. There was no fraud or deception by the appellant. Counsel for appellant and respondent are united in the view that the contract is not illegal but respondent's counsel insists that in the transport the parcels represent two distinct properties and since each parcel is less than 1/15 of an acre the transport is void.

What is the nature of the contract in the present case? That can be gathered from the oral testimony of the respondent and the receipt which is a sufficient memorandum to testify the Statute of Frauds. Respondent said:

"By arrangement I agreed to purchase the S 1/2 of the S 1/2 of the S 1/2 of lots A and B of the south section of Lodge Village District for \$9,000. Before the transaction was closed he told me there was another piece of land adjoining Lot B on which there was a cottage quite independent of the buildings on lot A and B. I agreed to buy that cottage with a lease of 999 years on the land for \$3,000. The total purchase price was \$12,000. I advanced \$2,000 immediately....I expected to get on transport a certain piece of land with buildings and

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errections which included a range and a cottage and a vat. On the lease I expected a cottage.....I was under the impression that I was leasing land with a building on it for \$3,000 contiguous to the property I had transported.....I had agreed to buy the S 1/2 of S 1/2 of S 1/2 of B and A. I got transport for that. When I applied for building permission I did not know what were the functions of the Central Board of Health.....Mr. John did not tell me at the time of the agreement he had a certificate of subdivision. I got transport for the property."

The two parcels of land as set out in the transport are contiguous and constitute one plot; although appellant had a certificate of approval to subdivide before the sale to respondent there is no evidence in my view that appellant did in fact subdivide, sell, lease or even rent any of these parcels separately; it was not alleged or suggested that they were ever appraised separately. Respondent bought one plot and he and the appellant were at all times *ad idem* on the subject.

Respondent's counsel referred to r. 22 (iii) of the Deeds Registry rules mentioned earlier and urged that the fact that the plot appears in two parts in the transport necessarily means that two distinct properties are being described and this offends s. 122 of the Local Government Ordinance and renders the transport void. I reject that submission for the reason that if the alleged sub-division was void, then the position is as before it subdivided, a quarter lot, and the land was being sold as a whole to one person and any misdescription may be corrected if at all necessary, by describing the land as south half of south half of south half of lots A and B.

I assume in the absence of reasons that mortgage was declared void because the learned judge felt compelled to declare the contract illegal, but no reason has been assigned for the cancellation of the lease which is unaffected by the transport of the plot transported.

For the above reasons I am of the opinion that the contract is legal and that the transport, mortgage and lease are valid. I would therefore allow the appeal with costs here and in the court below and certify, if necessary for the rules of the court below, for two counsels; and would reverse the judgment and order of the Court below.

ARCHER, P.: I agree.

STOBY, J.A.: I agree.

Appeal allowed

[Supreme Court (Cummings, J.) September 23, 24, 25, 26, 27, October 26, 1963, February 1, 1965]

Contract—Carriage by air—Provision in consignment note limiting liability for delay in the carriage of goods—Arrangement between sender and airline that goods should be dispatched within a certain time—Goods not dispatched within that time—Whether limitation provisions apply.

Contract—Privity—Arrangement between airline and local agents of British football pools business for local coupons to be sent within a certain time—Coupons not so sent—Plaintiff had sent in a coupon which would have won—Liability of airline.

Contract—Football coupon—Binding in honour only—Plaintiff submitted winning coupon—Through negligence of carriers coupon not dispatched in time—Whether carriers liable in damages to plaintiff.

Sherman's Pools Ltd. of Cardiff, Wales, carried on a pool betting business on the basis of the results of football matches played in Britain. The results were announced locally at 2 p.m. each Saturday. The pools would normally be closed at 4 p.m. in Britain but would remain open up to Sunday for coupons from overseas. The dividends were announced on Tuesday. L., the local agents, would collect completed coupons from local players and send them each week by the defendant airline to London from where they would be dispatched to Cardiff. For this purpose L. had arranged with the defendants for the coupons to be handed in to the defendants in time to be dispatched from British Guiana each Thursday to Trinidad, from where they would be forwarded on the following Saturday to reach Sherman's before closing time on Sunday. Coupons for the matches to be played on Saturday 20th February, 1960, were duly handed in by L. to the defendants in time to be dispatched to Trinidad on Thursday 18th. However, through the negligence of the defendants' servants the coupons did not leave British Guiana until 4.30 p.m. on Saturday 20th, that is, after the local announcement of the results of the matches and did not arrive in Britain until Thursday 25th, that is, after the dividends had been declared. Included in this shipment was a coupon submitted by the plaintiff which, had it arrived in Britain in time, would probably have earned a dividend to the extent of \$97,920 to \$98,196.

Paragraph 5 of the consignment note issued by the defendants to L. stated that no time was fixed for the completion of the carriage of the consignment. Paragraph 4(a) provided: "Carrier is not liable to the shipper or to any other person for any damage, delay or loss of whatsoever nature....arising out of or in connection with the carriage of goods, unless such damage is proved to have been caused by the negligence or wilful default of Carrier....". Paragraph 4(c) included provisions for the limitation of the airline's liability as to quantum. The coupon itself provided that the relationship between the player and Sherman's was to be binding in honour only.

In an action by the plaintiff against the defendants for damages for negligence, alternatively for breach of contract, the defendants sought to rely upon the foregoing provisions of the consignment note and of the coupon, and contended that the plaintiff was not competent to bring the action for the reason that he was not a party to the consignment contract.

Held: (i) in view of the provision of para. 5 of the consignment note that no time was fixed for the completion of the carriage, the carrier was required to deliver within a reasonable time;

(ii) in failing to dispatch the package at the usual time, the defendants did not deliver the package within a reasonable time and were therefore as carriers liable for the consequences of the breach of this obligation;

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(iii) although the package was accepted for carriage, carriage had not commenced, and since the limitation provisions in para, 4 of the consignment note related to "carriage" they did not apply;

(iv) the fact that the plaintiff was not a party to the contract of carriage did not preclude him from suing;

(v) although the contract between Sherman's and the plaintiff was not justifiable, but was binding in honour only, men of honour, and therefore Sherman's, would in all probability have paid had the coupon arrived in time;

(vi) taking all the circumstances and contingencies into consideration the plaintiff would be awarded damages in the sum of \$48,000.

Judgment for the plaintiff.

[Editorial Note: Reversed on appeal to the Guyana Court of Appeal in 1966]

John Carter, Q.C., G. M. Farnum with him, for the plaintiff.

H. Shepherd with *R. M. F. Delph* for the defendants.

CUMMINGS, J.: In this action the plaintiff's claim is for—

- (a) the sum of \$144,000 damages for negligence committed by the servants and agents of the defendants in Georgetown, Demerara, in the month of February, 1960;
- (b) alternatively, the sum of \$144,000 damages for breach of contract; and
- (c) such further and other relief as may be just.

The plaintiff is a turner in a machine-shop at Pln. Leonora and lives at Fellowship Village, West Coast, Demerara. He has been playing "football pools" for about five years and has won small dividends on several occasions. On the 17th day of February, 1960, he sent by one Julie Ali a duly completed football coupon, along with 3s. 6d., the requisite stake money, to S. E. Lee & Co., Ltd., concessionaire in British Guiana of Sherman's Pools, Ltd., of Cardiff, Wales. He kept a copy of the coupon which he tendered in evidence at the trial (Exhibit "D"). He later received through Julie Ali a receipt issued by the concessionaire, which was also tendered in evidence (Exhibit "D1").

S. E. Lee & Co., Ltd., in accordance with an arrangement with the defendant company who are carriers by air, sent the coupon in a package along with other coupons to the defendant's place of business, Main Street, Georgetown, to be shipped to Sherman's Pools, Ltd., at Cardiff. The coupons were to take part in a "football pool" relating to football matches which were to have been played on Saturday, 20th February, 1960. The arrangement between the concessionaire and the defendant company was that the packages of coupons for shipment were to be clearly identifiable. Accordingly, the package was labelled in the following manner;

"MUST GO
SHERMAN'S POOLS LIMITED
COLLECTORS DEPARTMENT
CARDIFF.

FOOTBALL COUPONS.

From: S. E. LEE,
P.O. BOX 219.
GEORGETOWN, BRITISH GUIANA.
T 1709

DON'T DELAY."

The system agreed upon between the concessionaire and the defendants was that football coupons, which were shipped weekly to Sherman's Pools in Cardiff, were to be delivered to the defendants in time to be placed on the British West Indian Airways Thursday flight to Trinidad whence they would be transhipped by B.O.A.C. aircraft on Saturday and arrive in London on Sunday. Sherman's Pools, Ltd., would then send a courier to London who would collect the coupons immediately upon arrival and take them to Cardiff.

The "pools" normally closed at 4 o'clock G.M.T. on Saturday afternoon for coupons in Britain, but special consideration was allowed up to Sunday for coupons from overseas. The football matches were played on Saturday afternoon and the results were usually announced on the air at 2 p.m. (B.G. time) on the British Overseas Programme, and 2.07 p.m. (B.G. time) on the B.B.C. Domestic Programme. The dividends were announced on Tuesday and usually appeared in the evening press on Tuesday and in the national morning press in Britain on Wednesday.

The package was received by Ronald Anthony Willock, a servant of the British Guiana Airways, Ltd., agents of the defendants, who was called as a witness by the plaintiff. He said he was at the material time clerk in charge of the mail and cargo section of the agent company. He prepared the consignment note airway bill—Exhibit "A"—from the customs shipping bill which was submitted to him by an employee of S. E. Lee & Co. On the front of the consignment note appears the following:

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"CONSIGNMENT NOTE/AIR WAYBILL

Issued by	106	195435
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BRITISH WEST INDIAN AIRWAYS LTD.....

Destination (Airport of)

AIRWAYS HOUSE, CHACON STREET,
PORT-OF-SPAIN, TRINIDAD, B.W.I.

<i>Consigned to</i>	<i>Street Address</i>	<i>City and Country</i>
Messrs. Sherman Pools, Ltd.	Collectors Dept.	Cardiff, England.

No. of Packages	Method of Packing	Nature & Quan- tity of goods	Marks and Numbers	Gross Weight (Specify kgs. or lbs.)
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MUST RIDE BA696/20EE B POS/LON FIRAV LON/CWL				
One pkg.	Football Coupons Printed Matter'	Addr.	3.0 kgs."	

He said the words "Must ride, etc." were typed in by him to draw the attention of the personnel at B.W.I.A. at Piarco to the arrangement which existed between the company and the consignor. The letters "FIRAV LON/CWL" meant for the first available opportunity from London to Cardiff, Wales.

On the back of the form are printed the conditions of the contract. Among the terms appear the following:

"1. As used in this contract, 'air waybill' is equivalent to 'air consignment note', 'shipper' is equivalent to 'consignor', 'carriage' is equivalent to 'transportation' and 'Carrier' includes the air carrier issuing this air waybill and all air carriers that carry the goods hereunder or perform any other services related to such air carriage. For the purposes of the exemption from and limitation of liability provisions set forth or referred to herein, 'Carrier' includes agents, servants, or representatives of any such air carrier. Carriage to be performed hereunder by several successive carriers is regarded as a single operation.

"2. (a) Carriage hereunder is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules relating to international Carriage by Air, signed at Warsaw, October 12, 1929, (hereinafter called 'the Convention'), unless such carriage is not 'International carriage' as defined by the Convention. (See Carrier's Tariffs for such definition).

(b) To the extent not in conflict with the foregoing, carriage hereunder and other services performed by each Carrier are subject to (i) applicable laws (including national laws implementing the Convention), government regulations, orders and

requirements, (ii) provisions herein set forth, and (iii) applicable tariffs, rules, regulations and time-tables (but not the times of departure and arrival therein) of such carrier, which are made part hereof and which may be inspected at any of its offices and at airports from which it operates regular services.

(c) For the purposes of the Convention, the agreed stopping places (which may be altered by Carrier in case of necessity) are those places, except the place of departure and the place of destination, set forth on the face hereof or shown in Carrier's time-tables as scheduled stopping places for the route.

(d) In the case of carriage subject to the Convention, the shipper acknowledges that he has been given an opportunity to make a special declaration of the value of the goods at delivery and that the sum entered on the face of the air waybill as 'Shipper's/Consignor's Declared Value—for Carriage', if in excess of 250 French gold francs (consisting of 65 1/2 milligrams of gold with a fineness of 900 thousandths) of their equivalent per kilogram, constitutes such special declaration of value.

"3. Insofar as any provision contained or referred to in this air waybill may be contrary to mandatory law, government regulations, orders, or requirements, such provision shall remain applicable to the extent that it is not overridden thereby. The invalidity of any provision shall not affect any other part hereof.

"4. Except as the Convention or other applicable law may otherwise require:

(a) Carrier is not liable to the shipper or to any other person for any damage, delay or loss of whatsoever nature (hereinafter collectively referred to as 'damage') arising out of or in connection with the carriage of the goods, unless such damage is proved to have been caused by the negligence or wilful fault of Carrier and there has been no contributory negligence of the shipper, consignee or other claimant;

(b) Carrier is not liable for any damage directly or indirectly arising out of compliance with laws, government regulations, orders or requirements or from any cause beyond Carrier's control;

(c) the charges for carriage having been based upon the value declared by the shipper, it is agreed that any liability shall in no event exceed the shipper's declared value for carriage stated on the face hereof, and in the absence of such declaration by shipper, liability of Carrier shall not exceed 250 French gold francs or their equivalent per kilogram of goods destroyed, lost, damaged or delayed; all claims shall be subject to proof of value;

(d) a carrier issuing an air waybill for carriage exclusively over the lines of others does so only as a sales agent

"5. It is agreed that no time is fixed for the completion of carriage hereunder and that Carrier may without notice substi-

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tute alternate carriers or aircraft. Carrier assumes no obligation to carry the goods by specified aircraft or over any particular route or routes or to make connection at any point according to any particular schedule, and Carrier is hereby authorised to select, or deviate from, the route or routes of shipment, notwithstanding that the same may be stated on the face hereof. The shipper guarantees payment of all charges and advances.

"6. The goods, or packages said to contain the goods, described on the face hereof, are accepted for carriage from their receipt at Carrier's terminal or airport office at the place of departure to the airport at the place of destination. If so specifically agreed, the goods, or packages said to contain the goods, described on the face hereof, are also accepted for forwarding to the airport of departure and for reforwarding beyond the airport of destination. If such forwarding or reforwarding is by carriage operated by Carrier, such carriage shall be upon the same terms as to liability as set forth in Paragraphs 2 and 4 hereof. In any other event, the issuing carrier and last carrier, respectively, in forwarding or reforwarding the goods, shall do so only as agents of the shipper, owner, or consignee, as the case may be, and shall not be liable for any damage arising out of such additional carriage, unless proved to have been caused by its own negligence or wilful fault. The shipper, owner and consignee hereby authorise such carriers to do all things deemed advisable to effect such forwarding or reforwarding, including, but without limitation, selection of the means of forwarding or reforwarding and the routes thereof (unless these have been herein specified by the shipper), execution and acceptance of documents of carriage (which may include provisions exempting or limiting liability) and consigning of goods with no declaration of value, notwithstanding any declaration of value in this air waybill.

* * * * *

"12. No agent, servant or representative of Carrier has authority to alter, modify or waive any provision of this contract."

The applicable tariffs, rules, regulations and time-tables of the carrier referred to in clause 2 of the contract were tendered as Exhibit "F." Article 14(11) at p. 27 thereof provides:

"ARTICLE 14. LIMITATION OF LIABILITY.

Except as the Convention or other applicable law may otherwise require:

* * * * *

Carrier shall not be liable in any event for any consequential or special damages arising from carriage subject to this tariff, whether or not Carrier had knowledge that such damages might be incurred."

And Article 16 provides:

"ARTICLE 16. OVERRIDING LAW.

Insofar as any provision contained or referred to in the air waybill or in this tariff may be contrary to mandatory law, government regulations, orders or requirements, such provision shall remain applicable to the extent that it is not overridden thereby. The invalidity of any provision shall not affect any other part."

Paragraph 7 of the Carriage by Air (Non-International Carriage) (Colonies, Protectorates and Trust Territories) Order, 1953, enacted in accordance with the provisions of the Carriage by Air Act, 1932, provides that the Order shall apply to territories mentioned in the first schedule thereto. British Guiana is one of the territories mentioned therein.

Article 19 of the first schedule to the Order provides:

"Article 19

The carrier is liable for damage occasioned by delay in the carriage *by air* of passengers, luggage or cargo to the extent of the amount of any such damage which may be proved to have been sustained by reason of such delay or of an amount representing double the sum paid for the carriage, whichever amount may be the smaller:

Provided that —

- (i) The carrier may by special contract in writing expressly exclude, increase or decrease the limit of his liability as above provided; and
- (ii) Nothing in this Article shall be deemed to affect any rule of law relating to remoteness of damage."

Article 31 of the Order provides:

- "(1) In the case of combined carriage performed partly by air and partly by any other mode of carriage, the provisions of this Schedule apply only to the carriage by air.
- (2) Nothing in this Schedule shall prevent the parties in the case of combined carriage from agreeing to special conditions relating to other modes of carriage, provided that the provisions of this Schedule are observed as regards the carriage by air."

Willock further said:

"Outside of the package I see the words 'Must go' printed in red. This label was supplied by the B.W.I.A. to the shippers, in this case S. E. Lee & Co., Ltd., as we treat football coupons as priority shipment. We supply all football coupon agents as well as shippers of perishable goods with these labels. There are packages which go without these labels. Some packages carry the red label 'Must go' and others do not. Packages that do not

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contain football pools and perishable goods do not have labels. I am a pool player and I know that great winnings may be contained in the package and that is the system I found in operation. The agents advise us by what date and time the package should get up to the U.K. If the package did not get up in time someone may lose a couple of thousand dollars or a couple of shillings. In the regular course of business this package should have left B.G. at 9.45 p.m. on 18.2.60. It did not leave at 9.45 p.m. on the Thursday. There was a 10 a.m. flight on Friday, 19th February. There was a flight on Saturday at 12 noon which could have connected with the B.A. 696 which left Trinidad at 5.15 p.m. The scheduled time of arrival of the flight which left B.G. at noon was 2.55. As far as I know this package did not go out on any of the three flights I have mentioned. The B.G. Government carries on their business at High Street, Georgetown, about 26 miles from the airport. On Saturday, 20.2.1960, about 11.30 a.m. one of the messengers named Persaud brought this package to me and told me something.

"I was surprised to see the package as I had placed it on the cargo manifest for the flight on Thursday, 18th February, 1960. On Friday morning, 19th February, a signal came from B.W.I.A. at Piarco advising that the shipment relating to Exhibit 'A' did not arrive as manifested. I saw the signal. I checked my consignment note file and found that it related to Ex. 'AVP 1'—the package with the coupons. I called our personnel at Atkinson Field. I spoke to Mr. Barclay and referred him to the signal. He said he would check and advise me later. I spoke to him later on in the morning and he advised me that the package definitely went out on the flight. I asked him to reply to the signal and so advise. I did so because he alleged that package had been despatched from Atkinson Field. In February, 1960, there were about five agents for football pools. S. E. Lee was one of them. The other shippers sent their packages out on the Wednesday flight and they went out. I cannot recall any occasion on which the Sherman's Pools had failed to catch the Thurs-day flight. At the material time these packets were kept with outgoing cargo files timetables in a room where the messengers had a desk. Today there is a storeroom for cargo. At the time files, etc., were strewn on the floor. After package was brought to me I reported to Mr. Pierre, a senior officer of the Co. Mr. Pierre advised me to call Loy's garage to get a taxi to take the package from Co.'s office to the airport. This package was found in the storeroom at Main Street on Saturday 20th. Persaud brought it to me and said so. He said he had seen it since the day before in the storeroom. On the Thursday the room was chock full of cargo—urgent as well as ordinary. When I joined the Corporation in 1958 football pools were despatched by B.W.I.A.

* * * * *

"The words 'Must ride BA 696/20 EEA' etc. were intended to convey that the shipment should not go through New York because U.S. Government regulations prohibit the off-loading

or transshipping of football coupons in any of the states of U.S.A. We always avoid that. Customs there would destroy them. The process covered by the waybill is set out at Article 11 of page 25. The first time I saw Ex. 'AVP 1' was on the Thursday afternoon when it was sent down by S. E. Lee. There was nothing unusual about the way it was packed. The second time I saw it was at about 11.30 a.m. on the Saturday. I was in the cargo section at town office. Next time—today. I cannot remember specifically whether there was Sellotape on the package when I first saw it. Of my own knowledge I do not know why package was delayed. I have heard of cases of delay of cargo carried by air. I have heard of cases of delay of postal packages during the strike of up to one week. B.W.I.A is not obliged to carry every type of merchandise."

The plaintiff's coupon contained forecasts that were eligible for first and other dividends. It was what is described as an abbreviated permutation. Had the coupon taken part in the "pools", the plaintiff would have won between £20,400 — £20,457 10s. For some unexplained reason the plaintiff's coupon did not leave British Guiana until 4.30 p.m. British Guiana time on Saturday, 20th February, 1960, that is, after the results of the matches had been declared and broadcast over the radio. The coupons did not arrive in London until the Thursday, 25th February, 1960, after the dividend had been declared and in fact paid.

Paragraph 5 of the consignment note expressly provides that no time is fixed for the completion of the carriage. Consequently the carrier must deliver within a reasonable time. See SHAWCROSS AND BEAUMONT ON AIR LAW, (2nd Edition) at p. 353, para. 375:

"375. *Liability for Delay.* Unless he has contracted to deliver goods at a particular time, a carrier (common or private) is only bound to deliver within a time which is reasonable, having regard to all the circumstances of the particular case. He will be liable for damage caused by a breach of this obligation."

And in 4 HALSBURY'S LAWS OF ENGLAND, (3rd Edition) at para. 380, p. 140:

"A reasonable time means the time within which by due diligence delivery can be effected; and therefore the carrier is not liable for the consequences of delay not due to any breach of duty on his part.....If delay in the delivery of goods has arisen from the fact that the carrier has not dealt with them in the ordinary way of his business, this fact, if unexplained, affords evidence of unreasonable delay.....Where the carrier is exempted by contract from liability for delay, such contract gives protection only where delay occurs in the performance of the contract. It affords no protection against delay if the carrier has done something, such as making an unjustifiable deviation, wholly at variance with the contract whether or not his act or omission is the cause of the delay."

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In this case the conduct of the defendants in supplying "Must Go" labels, their arrangement with the concessionaire to have the package clearly identifiable, their inclusion on the front of the consignment note "Must Ride, etc.", and the fact that this was a course of conduct over a long period, established what the parties considered to be a reasonable time for the achievement of the commercial object which they had clearly contemplated.

In *Wren v. Eastern Counties Railway* (1859), 1 L.T. 5, the course of conveyance of fish from Y. to H. was for a fish train to leave Y. for C. where the H. truck was detached, and afterwards attached to a passenger train for H. which arrived at H. at 8 a.m., in time for market. The railway company only charged "goods fares" for the carriage of fish, and gave a "fish" consignment note, which only stipulated for the conveyance within a reasonable time. The plaintiff had dealt with the company many times previously on the above footing, and invariably received his consignments of fish at 8 a.m. in the morning by a passenger train. On the occasion in question the H. truck was detached as usual at C, but not forwarded by the usual passenger train to H., and did not in fact arrive at H. until 11 a.m., when it was too late for market. The plaintiff then refused to accept the fish, or the proceeds of the sale, and the company sold them. It was held that the company was liable to the plaintiff for the delay in delivering the fish.

In the course of his judgment COCKBURN, C.J., said:

"I think there should be no rule on the first point. It seems to me that the true view of the case is that the company contracted to convey the fish according to the ordinary course of carriage of goods of this character. It is true, generally speaking, that the fish was paid for as goods, and to be carried as such, and that the parties receiving them were entitled to have them forwarded by the goods train; but the company, by a long course of dealing, as far as this species of traffic between Cambridge and Hitchin was concerned, had been accustomed to convey fish from Cambridge to Hitchin by a passenger train, arriving at Hitchin at 8 a.m., in time for the market. Independently of the written contract it is this: a man at Hitchin desires to have fish forwarded from Yarmouth to Hitchin, and he knows that in the ordinary course of conveyance the fish arrives at Hitchin in time for the market, and knowing this, he contracts to have fish forwarded accordingly. And in reason and justice he is entitled to be dealt with by the company on that footing. Is there, then, anything in the written contract to alter that state of things? I think not. The reasonableness of the time of the conveyance is to be ascertained by reference to the ordinary course of conveyance to Hitchin. The fish in this case did not arrive at Hitchin in the usual and fixed time, through some oversight of the company's servants at Cambridge which they cannot justify, and they therefore say that they were only bound to forward the fish by a goods train, and that they did so. But that train did not arrive until 11 a.m., which was too late for the market. I therefore think the plaintiff was entitled to recover."

In failing to dispatch this package at the usual time, the defendants did not deliver the package within a reasonable time and are therefore as carriers liable for the consequences of the breach of this obligation to do so.

Paragraph 4 of the contract provides:

"4. Except as the Convention or other applicable law may otherwise require:

(a) Carrier is not liable to the shipper or to any other person for any damage, delay or loss of whatsoever nature (hereinafter collectively referred to as 'damage') arising out of or in connection with the carriage of the goods, unless such damage is proved to have been caused by the negligence or wilful fault of Carrier and there has been no contributory negligence of the shipper, consignee or other claimant;

(b) Carrier is not liable for any damage directly or indirectly arising out of compliance with laws, government regulations, orders or requirements or from any cause beyond Carrier's control;

(c) the charges for carriage having been based upon the value declared by the shipper, it is agreed that any liability shall in no event exceed the shipper's declared value for carriage stated on the face hereof, and in the absence of such declaration by shipper, liability of Carrier shall not exceed 250 French gold francs, or their equivalent per kilogram of goods destroyed, lost, damaged or delayed; all claims shall be subject to proof of value;

(d) a carrier issuing an air waybill for carriage exclusively over the lines of others does so only as a sales agent."

Did the contract then limit the liability of the defendants? It will be observed that all the limitations incorporated into the contract mentioned and referred to herein are with respect to the "carriage" of the goods. When does carriage commence? According to para. 6 of the consignment note, Ex. "A", the goods are accepted for carriage from their receipt at the Carrier's terminal or airport office at the place of departure to the airport office at the place of destination.

In *Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co.*, [1924] 1 K.B. p. 575, at p. 588, BANKES, L.J., in the course of his judgment said clause 1 of the bill of lading of the goods which were the subject-matter of that action provided that—

"1. The ship shall not be liable for any delay, loss or damage caused by the act of God, perils of the seas, ports, rivers, or navigation of what nature or kindsoever and howsoever caused.....land damage.....prolongation of the voyage, loss or damage arising directly or indirectly in store, on wharf, in craft, or on board, before, during or after loading or until delivery is completed, rain, insufficiency of strength of packages, causes beyond ship owners' control.....effects of climate, sweating, heat of holds, evaporation, contact with goods,

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the ship, or anything in the ship.....latent or other defects, whether existing at the time of shipment or during the voyage.....whether or not all or any of the matters or things above mentioned arise or be caused by the act, negligence or default or errors in judgment of agents, pilots, masters, engineers, stevedores, surveyors.....mariners or others whether on board the vessel carrying the goods, or any craft employed, or any other person or persons whose acts owners might otherwise be responsible or liable for, nor by unseaworthiness or unfitness of hull machinery or equipment, whether when loading sailing or arising during the voyage."

And at p. 592:

"There remains the question whether cl. 1 of the bill of lading protects the ship-owners from liability for the delay. That clause is a very long and rather confused clause, and it is not easy at first sight to see the construction which one ought to place upon it, but after the discussion which has taken place I am satisfied that the only condition upon which the ship is entitled to rely is the condition which provides for non-liability in the event of a prolongation of the voyage owing to any of the matters which are set out in the clause. Can it be said that the taking of the whole of these goods out of the *Bernini* before she started at all and retaining them on shore for more than three months until they were reconditioned, was on any reasonable construction of the expression a 'prolongation of the voyage' within the meaning of this clause? I do not think it can reasonably be said that there was here any prolongation of this voyage at all. What happened was that the voyage referred to in the bill of lading did not commence."

There the goods had been accepted for carriage, actually put on board the ship and taken off. In this case, although the goods were accepted for carriage, the carriage had not commenced, and since the limitations are with respect to "carriage" it would seem that they do not apply. If it were intended that this term was to have embraced the time when the package was received and retained in the defendants' office by their agent, then it should have been clearly and unambiguously so stated. Moreover, article I specifically provides that "carriage" means "transportation". Can it be said that "transportation" had commenced?

In the interpretation of limitation conditions the courts have always evinced a natural desire to protect the weaker party and hence the doctrine of *contra proferentem* came into play. In *Alexander v. Railway Executive*, [1951] 2 All E.R. 442, Lord DEVLIN in interpreting the word "misdelivery" in a limitation of liability clause, said at p. 447:

"No principle is more firmly settled than that when one is construing exceptions to the general liability of a carrier or a bailee, those exceptions are to be construed strictly, and, if a

word is capable of bearing two meanings, it is the narrower meaning which ought to be given to it."

In *Neilson v. London & North-Western Railway*, [1922] All E.R. Rep. 395, at p. 399, Lord DUNEDIN, in dealing with the interpretation of a limitation clause, had this to say:

"The defendant railway, company asserts protection under the clause in the policy which is as follows:

I agree, on my own behalf, as well as on behalf of the respective persons owning or using the goods, to relieve you from all liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods (during any portion of the transit or whilst left in your possession to be stored whether the subject of a charge or otherwise)."

They say there was either delay or misconveyance subsequently. But, then, the delay must have occurred during the 'transit'. I do not think it did. The agreed on transit was from Llandudno to Bolton *via* Manchester, *i.e.*, direct from Manchester to Bolton. It seems to me that when the goods were dispersed by the action of the officials clearing them out of the van at Manchester and then sending some to Scarborough and Bath and others to the cloak room, the agreed on transit to Bolton was by this action put an end to. The detention in the cloak room might at first sight seem not so plainly to be an end of the transit, but when we see that the goods are put there, not for the purpose of being put back in another van—as might have happened if, *e.g.*, the first van had had a heated axle—but as unclaimed luggage, that is, I think tantamount to saying that the transit of the goods had ended and that they were lying there for the owners to claim them. So far as delay is concerned, for these reasons I do not think the clause applies to what happened."

And Lord ATKINSON at p. 400 said:

"I concur. The facts have already been fully stated, and it is unnecessary to recapitulate them. Like SCRUTTON, L.J., I prefer to decide this case on two broad principles, both well established: first, that when a special provision such as that relied upon in this case is introduced into a contract such as that into which the parties in this case have entered, it must be held, in the absence of language indicating the contrary, to refer to the subject-matter of the contract and that alone—namely, the carriage of the goods from the point of departure to the destination named, by the route expressly or impliedly indicated. The special provision would admittedly have no application to a route wholly different, from start to finish, from the stipulated route. Neither can it, in my view, have any application to a deliberate diversion from the route indicated in the contract, after a portion of the authorised transit has been performed. I fail to appreciate the grounds upon which, according to common sense and reason, a distinction can be made between these two cases. As soon as the carrier deliberately deviates from the stipulated route he

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carries the goods where the consignor never agreed that they should be carried, and where he (the carrier) by his special contract never agreed he would carry them. So far from performing the duty to which the special protective provision applies, he abandons the attempt to perform it, ceases to act in accordance with it, and in fact violates it. SCRUTTON, L.J., in *Gibaud v. Great Eastern Railway Co.* clearly and forcibly states this principle, which is not confined to contracts of carriage by a railway company. He says ([1921] 2 K.B. at page 435):

'The principle is well known, and perhaps *Lilley v. Doubleday* is the best illustration that if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you had contracted to do it.'"

In my view the term "carriage" in the consignment note and the documents incorporated therein do not include the period of time when the package is received and is remaining in the defendant's office. The limitations provided in the consignment note and the documents therein incorporated do not therefore apply.

In *Bontex Knitting Works Ltd. v. St. John's Garage*, [1943] 2 All E.R. 690, the head-note reads thus:

"The defendants agreed to hire out to the plaintiffs a van and a driver for the purpose of delivering the plaintiff's goods forthwith to their customers. The delivery was estimated to take 2 1/2 hours and the charge was to be by the hour. No particular driver was asked for or nominated by the plaintiffs and they did not pay his wages. When the van arrived at their premises they merely instructed the driver as to the parcels to be delivered and as to the addresses, the driver being free to deliver the goods in what order he thought fit. It was an express term of the contract that the defendants should not be liable for loss or damage to the goods whilst on their van. During the journey the driver left the van unattended for an hour whilst he had a meal, the only precaution he took being to remove the ignition key. The van was stolen and when it was recovered the plaintiffs' goods had been removed. The plaintiffs brought an action to recover the value of the goods on the grounds of the defendants' negligence, and, alternatively, breach of contract by the defendants in failing to deliver the goods forthwith or at all. The plaintiffs conceded that the defendants were not common carriers and the defendants contended: (i) that the driver had not been negligent; (ii) that the driver was for the purposes of the particular journey the servant of the plaintiffs; (iii) that the exception clause in the agreement excused them from liability for negligence; and (iv) that there was no breach of contract.

Held: (i) on the facts of the case, the driver had been negligent;

(ii) the plaintiffs did not have control of the driver and he was, therefore, the defendants' servant;

(iii) the exception clause was a term in the contract inserted for the purpose of negativing the defendants' liability for loss or damage to the goods even as a result of their negligence, they were, therefore, not liable for negligence;

(iv) the defendants had committed a breach of contract by failing to deliver the goods forthwith and they were not protected by the exception clause because it was only intended to protect the defendants in the due execution of the contract."

In his judgment LEWIS, J., said:

"It is quite clear that at that time, or, if not at that time, immediately the first order was given, it came to the knowledge of the plaintiffs that an important term or condition of the hire was that the defendants did not hold themselves responsible for the loss or damage to goods on their van; and all the transactions, which were 22 in number, including this last transaction out of which this case arises, were all carried out on the terms of that condition of hire, namely, that the defendants would not be liable or responsible for loss or damage to goods on the van.

* * * * *

"Having left the plaintiff's premises, the driver of the van was minded first of all to go to Vesty Street, and he made off in the direction of North London. Somewhere between 11 a.m. and 11.15 a.m., having arrived at East Road, E.C. 1, he thought he would like to have another meal. He parked his lorry, removed his ignition key but took no further precautions to prevent anybody tampering with the van or the goods, and had a meal in the East Road Cafe, and afterwards went to a convenience nearby, some 50 yards away.

* * * * *

"That being so, in my view, the defendants, as they had broken the contract through their servant, and there had been a breach of contract by this hour's delay in the carriage of these goods, which were agreed to be delivered forthwith and immediately, cannot rely upon the clause which exempts them from all liability, because for that purpose the contract was at an end, in the sense that it had been broken by the defendants themselves. Therefore, I have come to the conclusion that this is a case in which the plaintiffs are entitled to succeed, for the reasons which I have given, and there must be judgment for the plaintiffs for the amount claimed."

Sherman's Football Pools Rules, issue No. 3 for season 1959-60, provide as follows:

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"1. Every coupon is an entry form governed by the Pool Betting Act, 1954, and by these Rules in compliance with which it may be completed and submitted to us and on which alone we are prepared to receive and, if we think fit, to accept it as an entry.

"2. It is a basic condition of the sending in and the acceptance of every coupon that it is intended and agreed that the conduct of the Pools and everything done in connection therewith and all arrangements relating thereto (whether mentioned in these Rules or to be implied) and that any coupon and any agreement or transaction entered into, or payment made by, or under it, shall not be attended by, or give rise to any legal relationship, rights, duties or consequences whatsoever, or be legally enforceable, or the subject of litigation, but all such arrangements, agreements, and transactions are binding in honour only.

"3. *Accountants' Decision.* In the interests of clients generally and of fairness and efficiency, an independent firm of Chartered Accountants will supervise the observance of these Rules and they will also control the due computation of the amounts of the Pools and Dividends in accordance with the Pool Betting Act, 1954, and the payment of winnings. To prevent disputes from arising and delays in payment to winners it is a further basic condition that on all matters connected with the conduct of our Pools, and in particular the ascertainment of winners, the payment of winnings, disqualifications, and the meaning and application of these Rules, the decision of such Accountants (or any one of their partners) on such evidence as they may require shall be accepted as final and in honour binding on all parties including ourselves."

The coupon contains the following printed declaration which was signed by the plaintiff:

"I have read and agree to Sherman's Pools Rules for season 1959-60, issue No. 3, and amendments which govern all entries, and agree that this transaction is binding in honour only. I am not under 21."

(Exhibit A.V.P. 2).

Apparently the coupon was never examined by the accountants of Sherman's Pools, Ltd., but their managing-director, Mr. Arthur Vivian Penny, who gave evidence before an examiner, said that the coupon was not included in the "pools" because Sherman's Pools, Ltd., did not receive it until the Thursday after the matches, "by which time, of course, all the dividends had been declared and winners paid out." If the coupons were in on the scheduled flight in the normal course of events, the coupons would have been included in the pools. He however expressed the opinion that the plaintiff's coupon would not have taken part in the pools even if it had arrived on time. The following questions and answers explained his reasons for making that statement:

"Q. 73. If this coupon had arrived in time would it have taken part in the Pools?

A. No.

Q. 74. Why would that be?

A. The circumstances of its *finding* would have immediately put the coupon on inquiry, and in a week such as this there is special control of all winners of a certain category. That control is always carried out by myself. There is no doubt at all that had this coupon been brought to me on Sunday I would have put it on inquiry. The time between my deciding and being able to make inquiries and the closing of the pool would not have been a great length of time and I would have been compelled, in the interest of *bona fide* investors for that week, to say 'I rely on our rules and must disqualify this entry.'

Q. 75. You said 'a week such as this.' What were you referring to then?

A. The winners in this week were very few and very large sums obviously stand to be won when there are few draws.

Q. 76. When you said you would have to put it on inquiry, what inquiries does this entail?

A. I have got to go back now to the package. I have in this package five packets of *envelopes all numbered by me 1 to 5*. Now the coupons, as you will see, before they leave are, in the normal course of events, packed meticulously and they always come so many, I can't say the exact number, but he counts them and puts a rubber band around them. They are all put in the same order because when they come to Cardiff we photograph all the coupons by the micro-film apparatus, so we ask our agents to do everything neatly. *Now this coupon was loose within the packet and at the top of the envelope, not at the bottom—at the top.* That is how it was found; that is how these coupons were pulled out by me and I had senior people present — *what we want to do now is to find a coupon in the name of L. Bart. We didn't have to look very long because the coupon virtually fell into our possession.*

* * * * *

Q. 78. When you told us just now that you would have disqualified that coupon if it had arrived in time, is your decision final?

A. I would have conveyed my suspicions to the accountants and would have gone along to explain that one other coupon. It's a hypothetical case you are putting to me remember, but there is, in the years gone by, a prece-

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dent to my decision in a matter of this kind so I shall tell you what I did then. I would have determined that I was not satisfied to include this coupon in the pools and would have seen the accountants. *I would have explained the circumstances and feel that, having regard to the circumstances, my recommendation would have been accepted without question. I would not have done that until Monday and by that time I had received from Lee a most remarkable telegram, so even if the coupon, the package had been received and my suspicions aroused about this certainly the telegram I received on the Monday would have more than ever put the genuineness of this coupon on inquiry as far as I am concerned.*

- Q. 79. You are referring to a telegram; is that one you received on Monday, 22nd February, 1960?
- A. Yes. Would you like me to read it?
- Q. 80. Produce it, Mr. Penny.
(Telegram marked A.V.P. 3).
- A. I will read the telegram—'L. Bart claims 23 point in 8 treble 20th February. Understand coupons delayed Trinidad. Please endeavour includes this in declaration pending arrival and investigation coupon. Most personally ask this extraordinary consideration for reasons that will write you about.' Then followed the most remarkable thing. He included in the telegram the number of coupons and the value of the total coupons.
- Q. 81. In this telegram it says 'will write,' and did you in fact receive a letter?
- A. No. We did receive a letter from his son saying he had died the same day.
- Q. 82. In the telegram it says '1,423 coupons valued £424.' How many coupons were in fact received?
- A. The number stated.
- Q. 83. 1,423?
- A. That's correct.
- Q. 84. Does that include the Bart coupon?
- A. Yes.
- Q. 85. Would Mr. Bart have been able to calculate his winnings himself?
- A. No, that depends on the number of people who take part in the pools.
- Q. 86. The winners are disclosed to the public when?

- A. The dividends were announced on the Tuesday and they appeared actually in the evening press Tuesday and the national morning press on Wednesday.
- Q. 87. In this country?
- A. Yes.
- Q. 88. Can you tell us how the winners would be notified in British Guiana?
- A. I imagine they would be in the papers not later than Thursday, maybe even Wednesday. We used to advertise in all the overseas capitals papers and our agents would send out a telegram with our dividends for insertion in the press.
- Q. 89. Would the names of the winners be put in by your company or your concessionaires?
- A. The winners in British Guiana would presumably be notified by an advertisement in the papers.
- Q. 90. When you say 'the winners,' the amount of winnings would be notified in the names of the winners, or the amounts they won—just the dividends they were paid? The amount of the winnings would be put in the papers by your company or by your concessionaires, taking British Guiana as an example?
- A. Our agent in London would probably send a cable out. We send all over the world.
- Q. 91. That is sending to the papers rather than to your concessionaires?
- A. Yes. We paid for all such advertisements.
- Q. 92. Has your company received any explanation from the defendants, that is, the Airways, as to the late arrival of this packet of coupons?
- A. The Airways Company has not been in touch with us at all, but there is a letter from Lee, the son of the agent, telling us apparently what happened and which he wrote on the 23rd.
- * * * * *
- Q. 139. Can I just ask you about the package? Was there anything in particular about the packet itself which you personally noticed?
- A. *No, it was difficult.* I looked at it long and carefully but with cellophane and handling, as I knew it would have to come to one airport and take off at another and take off at London I could not say that I immediately thought the package had been opened or tampered with in any way. I haven't submitted it to

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examination at all, *I just opened it to look for the coupon on Thursday.*

Q. 140. So there was nothing which immediately led you to think, for instance, that it had been unpacked and repacked again?

A. No. It's an unsatisfactory method, but it is due to economics more than anything else. The cost of this package is so tremendous over long distances that we make the packing as light as possible in the interests of the costs; those are borne by the agent.

Q. 141. I suppose there was nothing to enable you to tell that the labellings were as they should have been had the package been undisturbed from the first until you saw it on the following Thursday? You didn't know on the face of that label whether it had been applied on the Thursday or whether it had been applied sometime later?

A. No, *I did not.*

Q. 142. Was there anything inside the packet which carried the matter any further one way or another?

A. I was not happy about this particular packet; I was not happy about it, as you can see:

The packet demonstrated has a figure '5' in a ring (the uppermost packet). I am used to overlapping gum and that would invite some suspicion from me.

Q. 143. When you first saw the packet and this envelope Number 5, as with all the other envelopes they were stuck down and at that stage had not been ripped open, and are you saying that you noticed when first you ripped open this envelope would you now point out what looks as though it may be a line of double gum under the flap and roughage on the envelope itself. You mean by 'roughage' that this is much more creased than the other envelopes?

A. You see one was on the top and one at the bottom. One could allow for a certain amount of roughage from the string that tied them, but it was, shall we say.....I opened the package and went to that envelope right away, although at that time it was of no consequence; I was only concerned with finding the coupon and seeing what it was all about.
* * * * *

Q. 154. One more question about the original coupon itself (A.V.P. 2). I don't see anything on the face of it, but did you examine the ink in which the coupon was made out in order to try to determine whether it was

all made out with one pen or the same ink or anything of that kind?

A. You see, examining this as I did, it was a void coupon. I would have done everything possible by way of test had I had this coupon on Sunday. The inquiries I made, having had it when I did, were insignificant to what I would have made having it on Sunday."

Mr. Penny's suspicion about the genuineness of the plaintiff's coupon seems, therefore, to have been aroused by the following facts:

1. The package containing the coupon was in the possession of an employee of the defendant company after the result of the match had been broadcast.
2. The "remarkable telegram" from Lee.
3. The message sent from Georgetown to the airport for the purpose of delaying the 12 o'clock aircraft was not received by the pilot of the aircraft.
4. Lee's offer to pay \$500 towards the cost of chartering the plane when his commission was going to be only \$126.
5. The late arrival of the coupon.
6. The manner in which the coupon was folded.

Consequently, my assessment of Penny's evidence is that, with the exception of the manner in which the coupon was folded, his suspicions all arose out of a series of events which were set in motion by the negligence of the defendant company in failing to dispatch the package at the agreed time. He made no real effort to allay these suspicions because as he said in answer to Q. 154:

"You see, examining this as I did, it was a void coupon. I would have done everything possible by way of test had I had this coupon on Sunday. The enquiries I made having had it when I did, were insignificant to what I would have made having it on Sunday."

In other words, the coupon was excluded because it was late.

I have carefully examined the package—it is true that time and handling may have removed some of the features which appear to have heightened Mr. Penny's suspicion—but I have been unable to appreciate much difference between that and the other packages, and have seen no feature that could not have occurred from the normal handling of the package.

This coupon had a correct forecast.

The plaintiff has proved that he was deprived of a chance to win a prize through the defendants' breach of their obligation to deliver the package within a reasonable time. I accept his evidence that he always folded his coupons when sending them to S. E. Lee. Whether

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Lee had previously sent any forward in that condition is in doubt, but the plaintiff's coupons were previously included in Sherman's Pools, and on the occasions when he won he was paid by Sherman's. There is nothing in the rules which disqualifies a folded coupon, and no evidence has been led to show that the accountants would have disqualified that coupon merely because it was folded. Moreover, the plaintiff cannot be held responsible for the manner in which his coupon was dispatched. If there was some arrangement between Sherman's and their concessionaire, S. E. Lee & Co., Ltd., as to this, that certainly would not have been within the plaintiff's knowledge or control.

There is therefore a strong probability that had this coupon arrived in time it would have taken part in the pool; the plaintiff would have been entitled to share in the dividend to the extent of £20,400—£20,457 10s., that is, \$97,920—\$98,196 B.W.I. currency.

Mr. Shepherd, leading counsel for the defendants, urged upon me the view that the plaintiff not being a party to the contract between S. E. Lee & Co., Ltd., and the defendants, was not competent to bring this action.

In *Smith v. River Douglas Catchment Board*, [1949] 2 All E.R. 179, DENNING, L.J., at p. 188, letter "A," said:

"Counsel for the board says that the plaintiffs cannot sue. He says that there is no privity of contract between them and the board, and that it is a fundamental principle that no one can sue on a contract to which he is not a party. That argument can be met either by admitting the principle and saying that it does not apply to this case, or by disputing the principle itself. I make so bold as to dispute it. The principle is not nearly so fundamental as it is sometimes supposed to be. It did not become rooted in our law until the year 1861 (*Tweddle v. Atkinson*) and reached its full growth in 1915 (*Dunlop Pneumatic Tyre Co., Ltd. v. Se.fridge & Co., Ltd.*). It has never been able entirely to supplant another principle whose roots go much deeper. I mean the principle that a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise; and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it, subject always of course, to any defences that may be open on the merits. It is on this principle, implicit if not expressed, (i) that the courts ever since 1368 have held that a covenant made with the owner of land for its benefit can be enforced against the covenantor, not only by the original party, but also by his successors in title: see the *Prior's* case which is set out by Lord COKE in his work on *Littleton*, at p. 384a, and in his report of *Spencers* case: in SMITH'S LEADING CASES. 13th edn., p. 55; (ii) that the courts of common law in the 17th and 18th centuries repeatedly enforced promises expressly made in favour of an

interested person: see *Dutton v. Poole*, approved by Lord MANSFIELD in *Martyn v. Hind*; (in) that Lord MANSFIELD held that an undisclosed principal is entitled to sue on a contract made by his agent for his benefit, even though nothing was said about agency in the contract: see *Rabone v. Williams*, cited in *George v. Clagett*; and (iv) that Lord HARDWICKE, L.C., decided that a third person is entitled to sue if there can be spelt out of the contract an intention by one of the parties to contract as trustee for him, even though nothing was said about any trust in the contract, and there was no trust fund to be administered: see *Tomlinson v. Gill*. Throughout the history of the principle the difficulty has been, of course, to say what is sufficient interest to entitle the third person to recover. It has sometimes been supposed that there must always be something in the nature of a 'trust' for his benefit: see *Vandepitte v. Preferred Accident Insurance Corp. of New York*, [1933] A.C. 79, but this is an elusive test which does not explain all the cases, and it involves the trustee being made a nominal party to the action either as plaintiff or defendant, unless that formality is dispensed with, as it was in *Les Affreteurs Reunis Societe Anonyme v. Leopold Walford (London), Ltd.* The truth is that the principle is not so limited. It may be difficult to define what is a sufficient interest. While it does not include the maintenance of prices to the public disadvantage, it does cover the protection of the legitimate property, rights and interests of the third person, although no agency or trust for him can be inferred. It covers, therefore, rights such as the following which cannot justly be denied—the right of a seller to enforce a commercial credit issued in his favour by a bank under contract with the buyer; the right of a widow to sue for a pension which her husband's employers promised to pay her under contract with him: see *Button v. Poole* and *of. Re Schebsman* [1943] 2 All E.R. 779; or the right to a man's servants and guests to claim on an insurance policy, taken out by him against loss by burglary, which is expressed to cover them: *of. Prudential Staff Union v. Hall*, [1947] K.B. 689, 690. In some cases the legislature itself has intervened, as, for instance, to give the driver of a motor car the right to sue on an insurance policy taken out by the owner which is expressed to cover the driver, but this does not mean that the common law would not have reached the same result by itself."

In *Pyrene Co., Ltd. v. Scindia Navigation Co., Ltd.*, [1954] 2 Q.B. at pp. 422 and 423, DEVLIN, J., referred to that case in the following terms:

"There is nothing novel about the idea of a third party coming in to enforce a contract either as an undisclosed principal or as a beneficiary. DENNING, L.J., in *Smith and Snipes Hall Farm Ld. v. River Douglas Catchment Board* reviews the main categories into which such third parties commonly fall. The principle is very familiar in mercantile contracts: *Les Affreteurs Reunis Societe Anonyme v. Leopold Walford (London), Ltd.*, is an example given by DENNING, L.J., arising out of a charter-

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party. It is a principle which has constantly to be invoked where the property is the subject-matter of the contract is likely to be transferred during the currency of the contract.

* * * * *

"The principle was described by Lord BLACKBURN in his CONTRACT OF SALE, 3rd edn., (19.10), pp. 422 and 423, as follows: 'Even if the assignee of the bill of lading had acquired the full legal and equitable property in the goods, so that the damage arising from the non-delivery was exclusively his, still he was compelled to bring any action on the contract in the name of the original contractor as his trustee; for, in general, contracts do not by the law of England run with goods, and no custom has ever been recognized making the contract contained in a bill of lading an exception.' The author continues: 'If, however, the goods when shipped are not the property of the shipper, he in general acts in shipping them as agent for the owner of the goods.' *Sargent v. Morris* is an authority on this point."

Consequently I find that submission untenable.

In *Monarch Steamship Co., Ltd., v. A/B Karlshamns Oljefabriker*, [1949] 1 All E.R. 1, Lord WRIGHT at p. 14 said:

"Both parties were tacitly taken to be acquainted sufficiently with the general business position. The same is true in many cases of complicated consequences flowing from an unanticipated breach of contract, but the damages are not treated either as special or remote if they flow from the normal business position of the parties which the court assumes must be reasonably known to them. It would not be helpful to cite the familiar authorities which are numerous but depend primarily on the facts of each case."

In the circumstances of the case I find that the parties contemplated the kind of loss which did in fact occur and also that the damages sustained are the reasonable and probable consequences of the defendant company's failure to perform its obligation.

In *Simpson v. London and North-Western Railway Co., Ltd.*, (1876) 24 W.R. 294, COCKBURN, C.J., at p. 295 said:

"I am of opinion that in this case the rule must be discharged. The law upon this subject, as it is to be found in the reported cases, has not always received a uniform construction. The doctrine as to damages for breach of contract by a carrier has fluctuated. But I think it is now settled that, wherever the prospect of loss of profits was either expressly brought to the knowledge of the carrier, or the goods were received under such circumstances that he ought reasonably to have inferred their nature and destination, so that the use of them might be within the contemplation of both parties, then the plaintiff is entitled

to recover damages for the loss of profits he would have made if the contract had been duly carried out."

In MAYNE & MCGREGOR ON DAMAGES 12th Edn., mention is made of the case of *Chaplin v. Hicks*, [1911] 2 KB. 786, where the defendant, in a newspaper competition, offered engagements as actresses to those twelve of the contestants whom he should choose from the fifty who secured the greatest number of votes of the readers of the newspaper. Of the 6,000 people who entered the contest, the plaintiff succeeded in becoming one of the fifty finalists, but the defendant failed to give her a reasonable opportunity of being interviewed in accordance with the advertised rules, and the twelve prize-winners were chosen in her absence from the other forty-nine finalists. The Court of Appeal upheld the jury's award of £100 to the plaintiff. VAUGHAN-WILLIAMS, L.J., said:

"It was said that the plaintiff's chance of winning a prize turned on such a number of contingencies that it was impossible for anyone, even after arriving at the conclusion that the plaintiff had lost her opportunity by the breach, to say that there was any assessable value of that loss. It is said that in a case which involves so many contingencies it is impossible to say what the plaintiff's pecuniary loss was. I am unable to agree with that contention. I agree that the presence of all the contingencies upon which the gaining of the prize might depend makes the calculation not only difficult but incapable of being carried out with certainty or precision. The proposition is that, whenever the contingencies on which the result depends are numerous and difficult to deal with, it is impossible to recover any damages for the loss of the chance or opportunity of winning the prize.....I agree.....that damages might be so unassessable that the doctrine of averages would be inapplicable because the necessary figures for working upon would not be forthcoming.....*I only wish to deny with emphasis that, because precision cannot be arrived at, the jury has no function in the assessment of damages.*"

In the American case of *Adams Express Co. v. Egbert*, No. 360 of the Supreme Court of Pennsylvania (Harrisburg 1860), the facts were as follows:

"A committee for the erection of a public building advertised for plans and specifications, and offered a premium of \$500 to the successful competitor, who should present the same on or before a given day; the plaintiff, an architect, prepared and forwarded by the defendants, who were common carriers, a set of plans and specifications for the proposed building; but in consequence of the defendants' negligence, the box containing them was not delivered until after the time specified. It was held that the measure of damages, in an action against the carriers, was not the value of the time and labour expended in making the plans and specifications, but the value of the plaintiff's chance of obtaining the premium."

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In delivering the opinion of the Court of Error to the Common Pleas of Cumberland County, STRONG, J., said:

"We are inquiring now, however, only whether the loss of the opportunity by the plaintiff to exhibit his plans and specifications for competition, was, or was not, too remote a consequence of the breach of contract to be taken into consideration by the jury. We cannot perceive why it was not the first consequence, proximate, immediate.....Whether in the present case this plaintiff sustained any actual injury, depended upon the degree of probability there was, that he would have been a successful competitor if the contract had not been broken. If his plans were entirely defective, if they were suited better for a bridge than for an almshouse, it cannot be claimed that he was damaged. *He introduced, however, no evidence to show that there was the least probability that the premium would have been awarded to him had his plans been submitted to the committee in time.* On the contrary, the defendants proved that doubtless he must have failed. So far, then, from there being proof of actual damage, it was disproved. The court below, however, instructed the jury that there might be a recovery for more than nominal damages. They reversed the rule generally recognised, that the plaintiff must show a substantial, real injury, and cast upon the defendants the burden of proving that there was none. In this we think there was an error. The second point of the defendants should have been affirmed unqualifiedly. Independent of the defendants' evidence, the plaintiff was not entitled to recover more than nominal damages, because he had not proved any actual damages, and the chance for the premium was contingent. Much more was this so upon the whole evidence in the cause."

In the present case, however, the plaintiff has in my judgment shown that there was a strong probability that he would have been awarded a share in the dividend. Although the contract between Sherman's and Bart was not justifiable, what would men of honour have done if the coupon had arrived in time? In all probability Sherman's Pools would have paid. Taking all the circumstances and contingencies into consideration, I award damages in the sum of \$48,000 to be paid by the defendant company to the plaintiff. The defendant will also pay the plaintiff's costs certified fit for two counsel.

Judgment for the plaintiff.

Solicitors: *J. A. Jorge* (for the plaintiff); *D. de Caires* (for the defendants).