

# GUYANA LAW REPORTS

1966

*Including The Law Reports of British Guiana,*

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EDITED BY

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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 PERCIVAL ARTHUR CUMMINGS — Puisne Judge
5. THE HON. MR. JUSTICE AKBAR KHAN — Puisne Judge
6. THE HON. MR. JUSTICE ARTHUR CHUNG — Puisne Judge
7. THE HON. MR. JUSTICE VICTOR EMANUEL CRANE — Puisne Judge
8. THE HON. MR. JUSTICE GEORGE AUBERT SYDNEY VAN SERTIMA — Puisne Judge
9. THE HON. MR. JUSTICE DHAN JHAPPAN — Puisne Judge
10. THE HON. MR. JUSTICE CHARLES JOHN ETHELWOOD FUNG-A-FATT — Acting Puisne Judge with effect from 1.4.66; appointed 19.6.66.

## COURT OF APPEAL OF GUYANA

1. THE HON. SIR KENNETH STOBY (PRESIDENT) — Chancellor
2. THE HON. MR. JUSTICE EDWARD VICTOR LUCKHOO — Justice of Appeal
3. THE HON. MR. JUSTICE GUYA LILADHAR BHOWANI PERSAUD — Justice of Appeal; appointed 29.6.66
4. THE HON. MR. JUSTICE PERCIVAL ARTHUR CUMMINGS — Justice of Appeal; appointed 29.6.66

## SUPREME COURT OF GUYANA

1. THE HON. MR. JUSTICE HAROLD BRODIE SMITH BOLLERS — Chief Justice appointed 19.6.66
2. THE HON. MR. JUSTICE AKBAR KHAN — Puisne Judge; acting Chief Justice with effect from 2.11.66
3. THE HON. MR. JUSTICE ARTHUR CHUNG — Puisne Judge
4. THE HON. MR. JUSTICE VICTOR EMANUEL CRANE — Puisne Judge
5. THE HON. MR. JUSTICE GEORGE AUBERT SYDNEY VAN SERTIMA — Puisne Judge
6. THE HON. MR. JUSTICE DHAN JHAPPAN — Puisne Judge
7. THE HON. MR. JUSTICE CHARLES JOHN ETHELWOOD FUNG-A-FATT — Appointed Puisne Judge with effect from 19.6.66
8. THE HON. MR. JUSTICE HORACE MITCHELL — Appointed Puisne Judge with effect from 8.7.66
9. THE HON. MR. JUSTICE FRANK VEIRA — Appointed Puisne Judge with effect from 9.7.66
10. THE HON. MR. JUSTICE KENNETH GEORGE — Acting Puisne Judge with effect from 23.12.66

### CITATION

These reports may be cited as 1966 L.R.B.G. in respect of the period January 1, 1966 — May 25, 1966, and as 1966 G.L.R. in respect of the remainder of the year.

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# The Law Reports of British Guiana

JAN M. BIJL N.V. v. SALIK RAM

[Supreme Court (Persaud, J.) January 3, 5, 7, 1966]

*Legal practitioner—Foreign plaintiff suing by local attorney—Power of attorney not properly executed—Action struck out and solicitor ordered to pay costs.*

*Evidence—Power of attorney—Executed in Holland—No affidavit by subscribing witness—No proof of due execution—Evidence Ordinance, Cap. 25, ss. 28 and 29.*

This was an action purporting to be brought by a company incorporated in Holland suing by their local attorneys. The power of attorney, which was recorded in the Deeds Registry, had been executed in Holland before a notary public and in the presence of two witnesses. Documents had been issued by the notary public to the effect that the power of attorney had been executed before the two witnesses, but there was no affidavit from either of the witnesses as to due execution. Far the defendant it was objected that there was a non-compliance with s. 28 of the Evidence Ordinance, Cap. 25, which provides that "the due execution of any deed, letter of attorney, or other power or instrument in writing made and executed in any place out of Her Majesty's dominions may, subject to all just exceptions, be proved in any civil cause or matter by the affidavit or declaration of a subscribing witness...."

**Held:** (i) the fact that the power of attorney had been recorded in the Deeds Registry did not preclude it from challenge;

(ii) the power of attorney was defective since there was no affidavit or declaration of a subscribing witness as required by s. 28;

(iii) there was no proper authority on record for the institution of the action. The writ would therefore be struck out with an order for costs to be borne by solicitor for the plaintiffs.

*Writ struck out.*

[*Editorial Note:* Reversed on appeal. See elsewhere in this volume.]

*G. M. Farnum* for the plaintiffs.

*R. H. Luckhoo* for the defendant.

PERSAUD, J.: The Plaintiffs allege that they are a company incorporated in Holland, and are suing herein by their duly constituted attorney Joseph Edward de Freitas under a power of attorney dated 29th December, 1964, and recorded in the Deeds Registry of British Guiana on the 16th January, 1965. And they have sued the defendant

for a sum of money being the balance due owing and payable by the defendant to the plaintiffs for the price of goods sold and delivered by the plaintiffs to and at the request of the defendant at Georgetown, Demerara, between the 1st and 6th April, 1963.

Upon this matter being called, and before evidence was taken, counsel for the defendant took a point *in limine* relating to the execution of the power of attorney in this matter. After some discussion as to whether a point of law could be taken *in limine* when not pleaded and after attention was adverted to Order 23, rr. 1 and 3, of the Rules of the Supreme Court, it was agreed upon by both sides that argument would be heard only on the question of the execution of the power, as this would determine whether the plaintiffs are properly before the court. So this decision concerns that point only. The point relates to the power of attorney which was put in by consent for purposes of legal argument, and is marked "A".

The power of attorney has been duly recorded in the Deeds Registry in Book of Records No. 105, Vol. 1, at folio 12, and so forms part of the records of that office. But it is, I believe, clear that the fact of its being recorded will not affect the question that now falls to be determined. As has been said by BOLAND, J., in a similar matter which engaged his attention in 1952:

"The challenged power of attorney was through error received at the Registry and there registered, but the defendants are not thereby debarred from impeaching its validity."

[*See Ogueri v. Argosy Co. Ltd.*, 1952 L.R.B.G. 90].

The documents laid over are three in number. There is the power of attorney itself in which the plaintiffs Jan M. Bijl, N. V. of Holland, constitute and appoint Joseph Edward de Freitas or Herman William de Freitas both of Georgetown, British Guiana, as their attorneys to perform certain acts including the demand of an account of moneys due and owing to them by Salik Ram also of Georgetown. This document purports to have been executed before one H. L. Benjamins, a notary of Rotterdam, Holland, and in the presence of two witnesses, C. K. G. Alexander and G. J. M. Dolk. Then there are two other documents. The first of these purports to be a certificate under seal and issued under the hand of H. L. Benjamins the notary, and reads thus:

"I Henry Louis Benjamins, L.L.M., of the City of Rotterdam, Notary, duly admitted and sworn, residing in the city of Rotterdam, do hereby certify that on the date hereof personally came and appeared before me, the notary, the deponent named in the affidavit hereto annexed and marked with the letter "A", being a person well known and worthy of good credit, and by solemn affidavit which the said deponent there took before me in due form of true, the several matters and things mentioned and contained in law, did solemnly and sincerely declare, testify and depose to be the said affidavit."

## JAN M. BIJL N.V. v. SALIK RAM

The second document (marked "A") is also issued under the hand of H. L. Benjamins, LL.M. Notary, of Rotterdam. Counsel for the plaintiffs urges that this document is not really an affidavit but a certificate, even though it is described by the notary as an affidavit. I do not think that, as the argument went, it is of any importance whether it is an affidavit or not, as it purports to have been executed by H. L. Benjamins before himself as a notary. This document speaks of execution of the power of attorney, and of the witnesses to that execution.

Shortly, the submission of the defence is that before the plaintiffs can launch this action, the documents must comply with s. 28 of the Evidence Ordinance, Cap. 25, and that as they have not done so the writ is not properly before the court. Counsel for the defendant contends that the matter falls to be determined by s. 29 of Cap. 25, and consequently the plaintiffs are properly before the court. It is therefore necessary to examine the two sections referred to.

These two sections of the Evidence Ordinance, Cap. 25, form part of a scheme dealing with, *inter alia*, the proof of private documents in any civil cause or matter. Section 27 makes provision for the proof of such documents which have been executed within Her Majesty's dominions. Section 28 provides for the same matter in relation to documents executed outside of Her Majesty's dominions, as is the case with the document in hand. This latter section provides as follows:

"The due execution of any deed, letter of attorney, or other power or instrument in writing made and executed, or purporting to be made and executed, either before or after the commencement of this Ordinance, in any place out of Her Majesty's dominions may, subject to all just exceptions, be proved in any civil cause or matter by the affidavit or declaration of a subscribing witness sworn or made in any of the following ways, that is to say, —

- (a) before any ambassador, minister, consul general, consul, vice-consul, or consular officer appointed by Her Majesty at that place, if it is attested or purports to be attested by the signature and seal of that officer; or
- (b) before any notary public, if it is attested by his signature and seal, and if the fact that he is a notary public in the place where the affidavit or declaration is sworn or made is certified, or purports to be certified, under the hand and seal of the ambassador, minister, consul general, consul, vice-consul, or consular officer."

Counsel for the defendant submits that there is not an affidavit of a subscribing witness, and that being so, there is non-compliance with this section which renders the document inadmissible. Counsel for the plaintiffs concedes that what is described as an affidavit is not in fact an affidavit, but is a certificate issued by the notary before whom the power was executed, but urges that as such, is of much higher value than an affidavit of a witness. Counsel for the plaintiffs further argues that the word 'may' which appears in s. 28, is permissive, and that as a

result, this section only provides one of many ways in which the execution of the document can be proved. With regard to this last submission, I am not prepared to say that there may not be other methods of proving the execution of a document; but I am of the opinion that if a party seeks to avail himself of s. 28, then he must comply with the provisions thereof. And in this regard 'may' should be read as meaning 'must'. I understand the section to mean that in order to be able to prove the due execution of an instrument outside of Her Majesty's Dominions, the party proffering it in evidence, as is provided for under the section, must do so by the affidavit or declaration of a subscribing witness sworn or made in the manner prescribed. If this question falls to be determined by s. 28, my view is that the document is defective. I am in no different position than BOLAND, J., in *Ogueri v. Argosy Co. Ltd.*, 1952 L.R.B.G. 90, when the learned judge said (at p. 91):

"I hold that there has been a non-compliance with the ordinance and as there is no declaration of the subscribing witness before a proper functionary and accordingly on a challenge of the alleged power of attorney, I am forced to hold that there is no proof of a valid power of attorney by the plaintiff authorising the bringing of the action."

But, says counsel for the plaintiffs, this matter falls squarely within s. 29.

Section 29 makes provision for the recording in the Deeds Registry of certain documents (or authenticated copies) executed before witnesses and a notary outside of Her Majesty's dominions, provided certain conditions are satisfied, and upon registration, an office copy of such a document duly certified by the Registrar of Deeds or his deputy, shall, without any proof, be received in evidence in any civil cause or matter. In my view, this section does not dispense with the conditions prescribed to be observed by s. 28. In other words, it is not an alternative method of proving the execution of a private document outside of Her Majesty's dominions.

In the result, I feel that I must acquiesce in the submission of counsel for the defendant, and rule that there is no proper authority on record for the instituting of these proceedings, and strike the writ out. And, as BOLAND, J., ordered in the *Ogueri s* case (*supra*) I must order the solicitor to pay the costs of the defendant to be taxed fit for counsel.

I wish to add that I refrain from expressing any opinion on whether, assuming the document does fall within s. 29, it is "certified and legalised, or purporting to be certified and legalised, . . . under the hand and seal of an officer of state, judge, or magistrate of that place, or of any ambassador, minister, consul general, consul, vice-consul, or consular officer appointed by Her Majesty for that place . . ." as is provided by that section.

*Writ struck out.*

Solicitor: *Miss D. P. Bernard* (for the plaintiffs);

*D. Dial* (for the defendant).

## DASODRA AND BALMAKUND v. LUTCHWA

[Supreme Court (Crane, J.) February 16, April 25, 30, 1966]

*Practice and procedure—Suit by executors—Objection at trial that plaintiffs are not executors—Objection not tenable unless specifically pleaded.*

*Crown lands—Succession to crown lands lease—Whether title of beneficiaries flows directly from statute independently of will—Crown Lands Regulations, Cap. 175, reg. 10.*

*Immovable property—Co-owners—Trespass by one against another.*

*Administration of estates—All debts paid off but title not vested in beneficiaries—Trespass to property belonging to estate—Whether executors can still sue as personal representatives.*

A testator devised all his property in equal shares to his reputed wife D. and his three sons and appointed D. and his brother B. as his personal representatives. The testator died in 1949 and his executors paid off all his debts by 1951, but failed to vest title in the beneficiaries for a crown lands lease belonging to the estate. The beneficiaries, however, went into possession of the land comprised in the lease and one of the sons sold his undivided share to the defendant. The defendant went into possession, but the executor objected to the sale and sued him for trespass. For the defendant it was objected at the trial that the plaintiffs became *functi officio* when the testator's debts were paid off and therefore could not sue as personal representatives, but the objection had not been specifically pleaded. It was also contended that the vendor's title vested in him not by virtue of the will, but under reg. 10 of the Crown Lands Regulations, Cap. 175, which provides that "every grant, lease, licence or permission shall descend to the heirs and assigns of the holders for any unexpired term thereof after the death of such holder."

**Held:** (i) if a plaintiff sues in a representative capacity and it is contended that he is not an executor or administrator, that defence must be specifically pleaded;

(ii) with respect to the lease, the beneficiaries became vested in interest, not under reg. 10, but under the will;

(iii) the vendor was a joint owner holding under a tenancy in common in undivided shares and had the right to sell his undivided interest even without the consent of his co-owners;

(iv) the mere fact that the plaintiffs paid the testator's debts did not automatically deprive them of their capacity as personal representatives since title had not yet been vested in the beneficiaries, and they were therefore entitled in that capacity to sue for the protection of the estate.

*Order accordingly.*

*R. Hanoman* for the plaintiffs.

*Dr. F. H. W. Ramsahoye* for the defendant.

CRANE, J.: Hashraji also known as Hansraj died testate on July 13, 1949, at La Jalousie, West Coast, Demerara. After bequeathing a legacy of \$50 to his daughter Utmi and giving the customary directions to his personal representatives that his just debts and funeral expenses be paid, Hashraji disposed of the remainder of his property as follows: "I leave all residue movable and immovable properties to be divided share and share alike to (first) my reputed wife Dasodra

and my three sons namely Jairaj, B.R. 501 of 1923; Dasraj known as Suraj, B.R. 1943 of 1927; and Lakraj No. 260 C.R.L., to be equally divided between them". The testator then appointed his wife Dasodra and his brother Balmakund called Shivgobind his personal representatives.

Among the assets of the estate is a lease of 2 3/4 acres of crown lands for 99 years which, ever since Hashraji's lifetime appears to have been cultivated as ricelands. It is with respect to this crown lease that this trespass action is brought.

The evidence reveals that the estate had been cleared within two years of the death, the debts and funeral expenses having been paid off and that from that time Dasodra and her three sons had gone into possession of the ricelands; they planted them; they reaped the crops and sold and divided up the proceeds among themselves. This went on until April 1962 when Dasraj one of the sons, sold a portion of "one acre more or less" of the 2 3/4 acres to the defendant Lutchwa, also called Anmola for \$800 (see Exhibit B), which incidentally, could well be more than his one-fourth undivided share. Dasraj then vacated the portion he purported to sell and put the defendant in possession of it. The defendant consolidated that portion with one which he owned adjacent to it, planted it up and reaped four crops since then.

Unfortunately this sale by Dasraj did not meet with the approval of the personal representatives of Hashraji's will even though it is clear that by standing by and allowing defendant to go into possession and to plant and reap they must have known and approved of the sale to him: they offered to refund defendant his purchase price when they informed him that he had purchased "children's property" and that he had no right to do so. The defendant, however, persisted in his stand that his purchase was sound and refused to quit; the result was the institution of this suit against him for trespass.

It is argued firstly by counsel on behalf of the defendant that this action is misconceived because from Dasodra's own admission she is not in possession of ricelands, she having given them to her three sons by putting them in possession. It is stressed that she was *functus officio* ever since the year 1949 in her capacity of executrix, having then paid all the testator's debts.

The same argument is used with respect to Balmakund who is her co-representative and plaintiff in this suit. Both of them, it is contended, now have no possession of the 2 3/4 acres in their representative capacity to enable them to maintain this suit for trespass. If it is further contended, Dasodra is falling back on her right to possession as beneficiary, then she should have sued in a personal, and not, as she has done, in a representative capacity. But even were I to hold that there is merit, and I will show there is not, in this contention such an objection cannot be taken at the trial because there is a well known rule of pleading that if a plaintiff sues in a representative capacity and it is contended he is not an executor or administrator, that defence must be specifically pleaded: see *Hole v. Bradbury* (1879), 28 W. R. 39; and it has not been.

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Secondly, it is contended that the defendant having bought the share of Dasraj and having entered into possession is a co-owner with the others of the 2 3/4 acres, for Dasraj like the other devisees derived his title to the ricelands, not from the will itself, but from the law, that is to say, from reg. 10 of the Crown Lands Regulations, Cap. 175, which reads as follows:

"Every grant, lease, licence or permission shall descend to the heirs and assigns of the holders for any unexpired term thereof after the death of such holder."

On the above regulation counsel for the defendant has put the following construction; that the legal title of co-owners became vested in the devisees not by virtue of the will, but under the regulation itself. He submits what Dasraj sold to the defendant was his legal interest as a co-owner acquired by him quite independent of the will, which would give defendant the right to occupy *vice* Dasraj, thus rendering it impossible for him to be a trespasser.

Though I am in full agreement with counsel that Dasraj is a co-owner I am unable to agree that the purport of reg. 10 is to vest a legal title to the 2 3/4 acres of crown lands in the devisees named in the will. In my view reg. 10 does nothing of the kind; all that it does is to determine the class of persons who would be entitled to succeed to the unexpired term of the lease of crown land on the death of the holder of it. In short, it regulates the mode of devolution of the unexpired term merely. The regulation of course, cannot specify those persons nor quantify the interests they will take in the lease, only the holder can do so as here, when he directs his personal representatives to carry out the terms of the will. In the technical language of the law, Dasraj's interest under the regulation, though more than a *spes successionis* is inchoate and incomplete; it is only the contingent ownership of a right to title which could be completed when the testator dies, and the contents of his will become known. The law is that a will speaks from the death of the testator, and therefore it was from that moment that Dasraj obtained a vested 1/4 undivided part of share in the 2 3/4 acres of crown lands; it was from that moment that all the investitive facts necessary to create the right had occurred and he became vested in interest, not under the regulation as contended, but under the will. To use a juridical expression—what was an erstwhile contingent ownership of a right dependant upon death as a condition precedent for its fulfilment, blossomed and ripened into a vested right the moment the testator died. The legal position of Dasraj then was that at the time of sale of his interest to the defendant in 1962, he was vested both in interest and in possession of one-fourth undivided part or share in the 2 3/4 acres of ricelands since the executors had assented to possession thereof in the devisees; and notwithstanding the fact that the land was undivided he had every right to dispose of it by sale if he so wished. The only outstanding thing which he did not have, and does not have, is evidence of his title, which only the personal representatives can give him.

In connection with this unquestionable right of an undivided owner DALTON, C.J. (ag.), observed in *Re Downer*, 1919 L.R.B.G. 165, at p. 166, as follows:

"What is the nature of undivided ownership? Joint owners of land are entitled to make a reasonable use of all the land so held proportionate to the share of each therein. Each owner is entitled to access to the whole of the land, and to an interest in every square inch of it. If a joint owner sells his share of the joint property as he may do without the consent of the other joint owners, the purchaser steps into the position of the seller, in respect of his relations to the remaining joint owners."

It is clear from the above statement, which has been cited with approval throughout the years (see per WORLEY, C.J., in *De Aguiar v. Obermuller*, 1948 L.R.B.G. 68, at p. 72) that a joint owner as is one in the position of Dasraj who holds under a tenancy in common in undivided shares, has the right to sell his undivided interest and this, even without the consent of his co-owners. It will be observed that the learned judge has used the term "joint owners" which, it is submitted is equally applicable to co-owners of concurrent interest either under a joint tenancy or under a tenancy in common. In fact, the concept of joint ownership is implicit under both joint tenancy and tenancy in common; although the acting Chief Justice was obviously speaking, as his first sentence shows, of joint owners holding in undivided shares.

To advert now to counsel's first contention that the claim is misconceived because the estate of Hashraji having been cleared within two years after the death, the capacity of the plaintiffs as personal representatives is spent. Although counsel has cited no legal authority in support of this view, he did not say nor does he suggest what is the legal position which follows as a consequence of his argument. Surely the law is not so easily frustrated by the unwillingness of a personal representative to perform the duties of her office. Dasodra when asked whether she proposed to vest title, that is, evidence of ownership of the 2 3/4 acres in the persons entitled, astonishingly replied she would do so when she felt like it. But suppose she never feels like being disposed to do so. What then will be the position at law? In my own researches, I have considered this question, though it was not ventilated at the hearing, of the plaintiffs having shed their capacity of personal representatives and assumed that of trustees, it having been established in evidence that they have paid all the testator's debts and only now remain in possession of the residue jointly with the testator's two sons sharing the profits of the land. As I have said, this view was not canvassed, and it would be difficult for me without hearing argument on the matter to say that a trust by operation of law exists, *i.e.*, a constructive trust arises from the dealings and intromissions of Dasodra with the land, though I will say I was at first very

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strongly inclined to that view, and would almost certainly have made it the basis of my decision and adhered to it if my researches did not reveal a recent authority which proved most helpful. I refer to the case of *Harvell v. Foster*. [1954] 2 All E.R. 736, which I think amply meets the view contended for, a view which certainly held sway before that case, namely, that as soon as the estate has been cleared, the residue is automatically held in the hands of the personal representatives as trustees.

In *Harvell v. Foster* the plaintiff claimed in an action on an administration bond against the defendants, sureties of the bond, that her husband, the administrator during her minority of an estate to which she was beneficially entitled, misappropriated part of the net residue, and that the defendants were liable for the breach of the obligation of the administrator under the terms of the bond. Lord GODDARD, C.J., dismissed the action on the ground that as soon as the estate had been cleared, and residue was in the husband's hands, the administration was at an end and he ceased to be an administrator and held the residue in the capacity of a trustee for the plaintiff until she attained the age of twenty-one years, that the bond could not be held to be a bond to secure the performance of the husband's duty as a trustee, and that therefore the action failed. But the Court of Appeal would have none of it, and referring to the decision of *Re Ponder* which Lord GODDARD followed, observed *ibid*, at p. 743.

"On the more general question, it is unnecessary in the present case for us to attempt any formulation of the circumstances in which a personal representative may be said to cease to act as such and to assume the office and function as a trustee; but if SARGANT J., in *Re Ponder* is taken to have decided that, once a personal representative by clearing the estate has discharged all his functions other than those of a trustee for the persons beneficially interested in the net residue, and has thus become a trustee for those persons, he must be taken, merely by virtue of such clearance, to have discharged himself from all his obligations as personal representative because the capacities of personal representative and trustee are mutually exclusive, then we think the proposition too widely stated."

And at p. 745:

"But as we have earlier indicated, we are unable to accept the view, which SARGANT J'S language read without qualification would seem to support, that because a personal representative who has cleared the estate becomes a trustee of the net residue for the persons beneficially interested, the clearing of the estate necessarily and automatically discharges him from his obligations as personal representative and in particular from the obligation of any bond he may have entered into for the due administration of the estate."

The Court of Appeal further considered and maintained the very important proposition that when in the ordinary case a personal representative was once appointed he retains such character for all time, though he may, and at some stage presumably will have exhausted all his duties or functions as such.

As I have indicated I am not basing my judgment on whether Dasodra and Balmakund are trustees or not; they may well be; though the probabilities are against this view, chiefly because of the fact that they have over 17 years ago assented to the beneficiaries taking possession of the land. This is an important fact because the trust concept postulates the continued existence and control of property of the beneficiary in the possession or control of the trustee, whereas the evidence is that Dasodra had given up possession to the persons entitled ever since the testator's death.

It must follow from the decision of the Court of Appeal above which is the latest authority on the point I have been able to find that the plaintiffs are still the legal personal representatives of Hashraji; they have properly preferred this suit against the defendant as legal personal representatives. There is no automatic change in capacity as *Harvell v. Foster* shows from the mere fact that they have paid their testator's debts and funeral expenses. There remains for completion the last and important function of vesting title in the beneficiaries; this they cannot side-step by saying that their representative capacity as executors is spent.

I have decided that the defendant is no trespasser as to a *i* undivided part or share in the 2 3/4 acres of ricelands, he having acquired the right to it by purchasing Dasraj's share therein, which the latter was fully competent to pass to him, and which I find the personal representatives knew fully well had been sold to him.

An awkward situation, however, arises since it is possible that Dasraj has sold more than his legitimate share in the 2 3/4 acres, for his receipt (Exhibit B) speaks of his having sold "one acre more or less." In my view the defendant could well be a trespasser if he is in occupation of more than Dasraj was competent to sell to him, that is to say, if he is in occupation of more than 11/16 of an acre or a 1/4 share of the 2 3/4 acres, which is the claim of the plaintiffs in para. 8 (a) of the statement of claim. The occupation by the defendant of such excess could amount to an ouster or dispossession of the other co-owners of their share in the land and, in such a case, it is quite competent for those in whom the right to immediate possession and in whom the title is vested in their capacity as legal personal representatives to sue a co-owner for trespass done to the inheritance, and though they have not proved it were right in so doing. The precise extent of his occupation is unknown, however, it being impossible to gather it from the phrase "one acre more or less." The allegation of trespass therefore has not been proved. There is, however, a claim for equitable relief in the form of "any other order as the court may deem just." (para 8 (d)).

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Bearing in mind the history and nature of this case, and the possibility that the defendant may be in occupation of more than a  $\frac{1}{2}$  share, I think it would be just and proper if I were to order the  $2\frac{3}{4}$  acres to be valued and surveyed with a view to determining precisely what portion is in occupation by the defendant and if indeed he is in occupation of more than  $\frac{11}{16}$  acres, he must vacate the excess, or if he prefers, he can relinquish his  $\frac{1}{4}$  share for its present value which the evidence shows he was at one time mindful of accepting.

I will therefore make the following finding and orders:

- (i) the claim for trespass has not been proved;
- (ii) it is hereby ordered that the  $2\frac{3}{4}$  acres be surveyed and valued by a competent valuer at the expense of both parties, to be borne equally between them;
- (iii) that the defendant do relinquish such portion he occupies in excess of  $\frac{11}{16}$  acres, in the event of the survey revealing such occupation by him;
- (iv) that the defendant be at liberty to give up his  $\frac{1}{4}$  share for its present value if the plaintiffs are prepared to pay it. Liberty to apply. No order as to costs.

*Ordered accordingly.*

Solicitors: *A. Vanier* (for the Plaintiffs); *S. Narain* (for the Defendant).

HABIB MOHAMED v. DENIS LI

LUCY WALKER v. DENIS LI

[Supreme Court (Persaud, J.) February 22, 23, March 11, May 7, 1966]

*Immovable property—Co-owners—Application for partition—Jurisdiction of Supreme Court to order partition—Whether one co-owner can prescribe against another—Civil Law of British Guiana Ordinance, Cap. 2, s. 3 (B) and (D).*

A half lot of land situate in Newburg, Georgetown, was owned in undivided half shares by the plaintiff, L. W. and the defendant, L. W. having acquired transport in 1959, and the defendant in 1947. However, since 1911 L. W. had been in sole occupation of the east half of the half lot, save that a fence which she erected on the western boundary lay somewhat beyond the mathematical midline of the half lot. While working on this fence on the orders of L. W. the plaintiff H. M., a carpenter, was assaulted by the defendant. H. M. sued for damages. L. W. sued for damages for trespass and for an injunction, while the defendant asked for an order of partition.

**Held:** (i) H.M. would be awarded \$50 damages for assault and such costs as he would have been able to obtain to the magistrate's court;

(ii) the right to partition is not available in British Guiana because it was originally a right appertaining to immovable property in England and although it came to be administered by the Court Of Chancery it could not on Ms account be regarded as an equitable doctrine within the meaning of s. 3 (B) of the Civil Law of British Guiana Ordinance, Cap. 2;

(iii) there may be prescription by one co-owner as against another where there is exclusive possession for the prescribed time.

*Judgment for the plaintiffs.*

**[Editorial Note:** Reversed on appeal to the Guyana Court of Appeal. See (1968), 12 W.I.R. 195].

*B. S. Rai* for the plaintiffs.

*Dr. F. H. W. Ramsahoye* for the defendant.

PERSAUD, J.: These two actions were consolidated by an order of court dated January 18, 1966, and were heard together, they having arisen out of the same set of events.

In action No. 1048 of 1965 Habib Mohamed sues the defendant Denis Li for damages for assault and battery alleged to have been committed on June 15, 1965, at Georgetown. In action No. 1141 of 1965 Lucy Walker sues the defendant Denis Li for damages for alleged trespass on her premises at the E 1/2 of the E 1/2 of lot 39, New-burg District; she also claims an injunction to restrain Li, his servants and/or agents from repeating the said trespass.

The lot in question (E 1/2 Lot 39) is shown on a plan by the late M. K. Rahaman, a sworn land surveyor, dated the 21st May 1956 (Exhibit "A"). This survey was undertaken at the request of the defendant. The plan, which carries this note purporting to have been initialled by Mr. Rahaman—"The E 1/2 of lot 39 has been surveyed according to occupation and subdivided with equal facades"—indicates in bold lines the true boundaries of both quarter lots, and also by a dotted line the actual occupation of both Mrs. Walker and Denis Li. Mrs. Walker's western boundary at the northern end falls 18 inches west of the true boundary, her boundary being defined by means of a fence whose southern end falls on the true boundary. So that the land which is the subject matter of this dispute forms a narrow triangle with its base measuring 11 inches at the northern end, and dwindling into nothingness as the two sides approach the southern boundary. This situation is also depicted on a plan prepared by Mr. Rutherford who carried out a survey at the instance of Mrs. Walker on October 12, 1965 (Exhibit "B").

Both the plaintiff (Mrs. Walker) and the defendant are owners of an undivided half part or share of and in the E 1/2 lot 39, the former having acquired title thereto in 1959 (transport No. 660), and the latter in 1947 (transport No. 638).

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The case for Mrs. Walker, however, is that she has been in occupation of the E 1/2 of the E1/2 (as indicated on the plans) in her own right and exclusively from as long ago as 1912. The entire E1/2 of lot 39 was once owned by Mrs. Walker's father (Henry Peters) who died around 1896. Around 1909 Mrs. Peters caused a fence to be erected through the land, thereby dividing the land into two sections, and sold half of her interest in the lot to one Gilkes. Thereafter Gilkes occupied the portion west of the fence while the Peters occupied that portion east of the fence—exclusively. There can hardly be any doubt that the intention of the parties then was that each of them would occupy one portion exclusively of the other; and this would have been the intention of all persons who acquired an interest subsequently. The portion occupied by Gilkes later passed through several persons' hands, and in 1947 the defendant, having acquired an undivided half share or interest in the half lot from one Perreira, went into occupation of the western portion. I accept the evidence that the fence was always in the position where it was when the survey was made by Rahaman and Rutherford, that is, from the time Gilkes went into occupation, the Peters (of whom Mrs. Walker was one), and later Mrs. Walker herself occupied 11 inches west of the dividing line, or mathematical half.

At the northern end of the fence is a gate which was repaired by the plaintiff Mohamed in May 1965 at the instance of Mrs. Walker. And in June 1965 Mohamed was again employed by Mrs. Walker to replace the western column of that gate, which would be the column at the end of the fence, and nearer to the portion occupied by the defendant. On the 15th June, while Mohamed was engaged in preparing the wooden framework which was to be used for casting the foundation to take the concrete column, the defendant objected to the framework being placed where Mohamed was putting it as by so doing Mohamed was encroaching on to the defendant's land. No doubt, the sides of the frame must have gone beyond the fence, but this does not necessarily mean that when completed the column would also have done so. There was an altercation between Mohamed and the defendant, resulting in Mohamed suing the defendant for damages for assault. Subsequently Mrs. Walker brought an action against the defendant Li seeking damages for trespass and an injunction, while in a counter-claim Li seeks an order for a partition, and a vesting of title to each party in accordance with the mathematical halves. Mrs. Walker does not object to a partition (if the court can properly make such an order), but such partition to be in accordance with actual occupation. Mr. Rai, counsel for Mrs. Walker, has contended against the jurisdiction of the Supreme Court of this country to make an order for partition, while Dr. Ramsahoye, counsel for Li, has argued for such a jurisdiction. It will be necessary, therefore, to devote some discussion to this question, but I had better dispose of the case for assault first.

Li received an abrasion 1 inch long on his right lower leg, and a contusion 5 inches by 2 inches on his right forearm. I am of the view that he suffered the former injury when he kicked at the wooden frame which Mohamed was putting down, and not as Li suggested, and the latter injury when he forced Mohamed against the wall of

the house. Li strikes me as being a person of very positive views, and one who feels very strongly about what he regards as his rights. I believe that he assaulted Mohamed, and not in self-defence. He is therefore liable in damages. But I hold the view that this assault has been exaggerated out of all proportion. I do not believe, for instance, that the injuries received by Mohamed would have necessitated his staying away from work for as long as a month. This is a matter that could well have been brought in the magistrate's court. I do not agree that s. 10 of the Summary Jurisdiction (Offences) Ordinance, Cap. 14, could have been pleaded with success, as in my judgment it is implied that the question as to title to immovable property must arise in good faith between the parties to the litigation.

I would therefore award Mohamed \$50 for the assault and he can only recover such costs as he would have been able to obtain in the magistrate's court.

Now to the more important questions which fall to be decided. By reason of their industry both in research and argument, counsel must have been impressed by the importance of the points of law that they have canvassed, and the fact that the subject matter of the dispute is so minute did not in any way dampen their enthusiasm. Their discussion was allowed full range, and I feel compelled to be grateful to them.

I will deal first with the question of the court's jurisdiction to order partition. Mr. Rai's argument did not take the line of strong negation of jurisdiction, but rather that, having regard to the state of the pleadings, costs will be affected if the court made such an order, and that even if the court had such jurisdiction, the defendant ought to be refused an order for a division in mathematical halves, he having acquiesced in the occupation.

The question is what was the state of the common law of England when s. 3(B) of the Civil Law of British Guiana Ordinance, Cap. 2, was enacted on January 1, 1917, and what is meant by doctrines of equity. That section provides as follows:

"The common law of the Colony shall be the common law of England as at the date aforesaid including therewith the doctrines of equity as then administered or at any time hereafter administered by courts of justice in England, and the Supreme Court shall administer the doctrines of equity in the same manner as the High Court of Justice in England administers them at the date aforesaid or at any time hereafter;"

Until the enactment of 31 H. 8. c. 1, in 1539 only co-parceners had the right at common law to compel partition. The right was extended to joint tenants and tenants in common by this Act which in time was repealed by the Real Property Limitation Act, 1833 (3 & 4 Will. 4, c. 27). Even before the writ of partition (*de partitione facienda*) was abolished, the Court of Chancery had assumed a concurrent jurisdiction in partition. This was due partly to the inadequacy and partly to the inconvenience of the remedy at law. And

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after the abolishment of the writ, courts of equity continued to exercise jurisdiction over partition up to and after 1917 when the Civil Law of British Guiana Ordinance, Cap. 2, came into operation. So that when the Partition Act, 1868 (31 & 32 Vict. c. 40), was enacted, the Court of Chancery was exercising exclusive jurisdiction in this matter. The Partition Act, 1868, did not purport to vest jurisdiction in the Court of Chancery to make orders for partition: that jurisdiction already existed; rather it provided for the sale of the property and a distribution of the proceeds where if the Act had not been passed a decree for partition might have been made, and where such steps would be more beneficial to the parties interested than a division of the property. It will be seen, therefore, that that Act assumed the existence of this jurisdiction in the Chancery Courts, in *Mayfair Property Co. v. Johnson*, [1894] 1 Ch. 508, where the question was whether a tenant in common is entitled as of right to a partition, NORTH, J., said (at p. 513, *ibid*):

"In my opinion the plaintiffs are entitled to a partition...The old statutes of Henry VIII still provide for a partition being made between tenants in common, and recognise the right of the parties to it, and although no doubt the means prescribed by those statutes, the common law writ of partition, was abolished by the Act 3 & 4 Will. 4, c. 27, s. 36, yet the procedure employed by Courts of Equity in decreeing partition shows either that the writ of partition was merely one mode of carrying out that which the statutes directed to be done, or that Courts of Equity have an independent power to decree partition. It does not matter on which of those two grounds they proceeded, because in fact Courts of Equity held as a matter of course that a tenant in common was entitled to have a partition made of the property which he held in common with others."

It is to be observed that this dictum was delivered after the Supreme Court of Judicature Act, 1873, was enacted.

Mr. Rai concedes that all doctrines of equity are now incorporated in our law by reason of s. 3(B) of Cap. 2, but contends that partition is not an equitable remedy, and that the doctrines of equity do not relate to partition, the latter being a remedy that was born out of the common law, and given statutory sustenance later on. I believe I have said enough to show that partition ended up by being a remedy granted by the Court of Chancery, and that prior to this, except for statutory enactments, only co-parceners had the right to such remedy at common law. Therefore, it will follow that neither joint tenants nor tenants in common could claim such a right at common law. It remains to be seen whether "doctrines of equity," the expression used in s. (B) of Cap. 2, includes rights enforceable by the Chancery Court and if so, whether s. 3 (D) of Cap. 2 make any inroad into the provisions of s. 3 (B).

Perhaps at this stage, it will be convenient to examine the local decisions which affect this matter. There is abundant authority for

holding that equitable remedies can be awarded by the local courts [See *Resaul Maraj v. Bhuklal*, 1925 L. R. B. G. 83, where it was held that the court has power to decree specific performance of a written contract with a parol variation; and *British Colonial Films Exchange Ltd. v. De Freitas*, 1938 L. R. B. G. 35, where VERITY, J., expressed the view that s. 3 (B) of Cap. 7 (now Cap. 2) introduced into this colony the whole system of equitable jurisprudence as administered by courts of justice in England, its doctrines, rules, methods remedies, and reliefs].

In *Gunpath v. Brush*, 1919 L. R. B. G. 122, an application for partition was refused by DALTON, C. J., (ag.). But this case did not raise the question now being posed; rather, it was held that partition was impracticable because of the provisions of the Local Government Board Ordinance. The learned judge expressed the view *obiter*, that by reason of s. 3 (4) of the Civil Law of British Guiana Ordinance, 1917, (which is substantially the same as s. 3 (D) of Cap. (2))—

"In the absence of any statutory enactment dealing with the matter the section would certainly appear to include questions arising on the partition of immovable property. The English common law of real property in respect of co-parceners and with its provision for effecting partition by writ *de partitione facienda* is expressly excluded by the foregoing subsection of this section, but the term 'partition' only applies to land and hereditaments or right and interests therein."

The predecessors of ss. 3 (B) and 3 (D) of Cap. 2 were considered in *Obermuller v. Obermuller*, 1927 L. R. B. G. 71, where DOUGLAS, J., held that the argument that the English doctrine of equity was applicable to immovable property only where specifically applied by definite statute law, was fallacious. I understand that decision to hold that s. 3 (B) makes provision for the application of the common law of England as well as the doctrines of equity, while s. 3 (D) does not have the effect of excluding the application of the doctrines of equity.

These two sections were again considered in *British Colonial Film Exchange, Ltd. v. De Freitas* (supra), where VERITY, J., said (at p. 39):

"Examination of the provisions leads me to the conclusion that the real effect of that section as it affects the issues involved in the present case may be stated to be that the doctrines of equity as administered by courts of justice in England are applicable in so far as they do not operate to make effective the English law of real property or any incident attached in England exclusively to land tenure or estate in land."

On the same page, VERITY, J., went on to observe that the creation of equitable estates in land is excluded, but that the section recognises the principle of the application of the doctrines of equity to persons rather than to classes of property.

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Partition was originally a right appertaining to immovable property and, even though it came to be administered by the Court of Chancery, it did not lose its inherent quality, and it cannot, in my judgment, be regarded as an equitable doctrine. Partition as such, or the right to partition, cannot be regarded as a doctrine, even though I am ready to concede that an English court in making an award for partition may very well be required to apply equitable doctrines. This distinction may be regarded as a technical one, but it is a real one, based on the interpretation of the sections of Cap. 2, and cannot be discarded on the ground of inconvenience of the parties. It follows that the defendant cannot pray in his aid, the provisions of section 3 (B), nor can he avail himself of the provisions of section 3 (D), this latter section having prescribed that all questions relating to immovable property shall be adjudged, determined, construed and enforced, as far as possible according to the principles of the common law of England applicable to personal property.

I would hold, therefore, that the defendant is not, having regard to the provisions of ss. 3 (B) and 3 (D) of the Civil Law of British Guiana Ordinance, Cap. 2, entitled to an order for partition.

Having come to the above conclusion, it will be unprofitable to consider whether an order for partition could be made which, if carried out, would result in a contravention of s. 127 of the Georgetown Town Council Ordinance, Cap. 152, which prohibits the subdivision of lots in the city in less portions than half lots except with the consent of the Town Council. I merely wish in passing to draw attention to *Patel v. Premabhai*, [1953] 3 W.L.R. 834, and *Blennerhassett v. Blennerhassett*, an Australian decision to be found in (1957) V. R. 214, where it was held that such an order could be made.

I come now to the question whether a co-owner can prescribe against another such owner. First, I make a finding of fact that as from 1959, Mrs. Walker obtained title to the western 1/2 of the lot in her own right, but in addition to this she and her predecessor in title were occupying in accordance with the division caused by the fence at least from 1909, she alone so occupying as from 1911. The position was that each co-owner occupied with the knowledge and consents of the other a portion exclusively of the other, and there was no question of either co-owner seeking to enforce any rights over the other's occupation.

Dr. Ramsahoye submits that as s. 3 (D) of Cap. 2 applies the law of personality to immovable property, prescription cannot begin to run against a co-owner unless there has been a conversion, and to apply that rule to immovable property, there can be no conversion unless there has been a complete ouster. He also submits that time in Mrs. Walker's favour should run only as from 1959 being the year when she acquired title in her own right.

I say at once that if prescription can run, it must do so as from 1912, for to say that prescription should only begin to run when a person obtains title to land would be meaningless; as such a person no longer would need time to run in his favour.

I do not agree that this question falls to be governed by the law of personality. Even if it did, then there would be a conversion of a chattel if the person converting has so acted in such a way as to deny absolutely the right of the owner, or to assert a right which is inconsistent with the owner's rights. And Mrs. Walker can be regarded as having so acted.

In *Re Downer*, 1919. L. R. B. G. 165, there was a petition for a declaration of title to an undivided half of a lot of land. The petition had originally asked for a declaration of title for a specific half, but this was amended to apply to an undivided interest in land. DALTON, acting C. J., refused the prayer, expressing the opinion that the petition was opposed to all the principles on which the idea of prescription is based. But in 1920 Sir CHARLES MAJOR, C. J., granted title for such an interest (in *Re petition of Broodhagen, et al* (unreported)). And in *Re Petition of Benjamin*, (1931—1937) L. R. B. G. 168, VAN SERTIMA, J., (Acting), laid down three sets of circumstances in which there can be granted title by prescription to an undivided interest in land, among them being where one or more co-owners have been in exclusive possession for the required period of the share or shares of the other co-owner or co-owners. If I may say so with respect, this only accords with common sense. VAN SERTIMA, J., examined the authorities and came down against the universality of the rule that one co-owner may not prescribe against another, saying (at p. 168):

"I am of opinion that the proposition that title by prescription to an undivided share in land cannot be granted in any circumstances whatever is too wide, and whether such title can be granted depends upon the facts of each particular case."

And again (at p. 169):

"Now the principle underlying these three cases seems to be this, that one or more co-owners can acquire by prescription title to the undivided shares of another co-owner out of possession for the prescribed period."

And by virtue of s. 3 of the Title to Land (Prescription and Limitation) Ordinance, Cap. 184, the prescribed period is 30 years.

In passing, I would refer to *Barry v. Mendonca*, 1923 L. R. B. G. 106, a case often quoted in matters involving undivided interests in land, and followed in *Seugobin v. Waldron*. (1959) L.R.B.G. 45, only to observe that in those cases, unlike the instant one, there was no exclusive possession.

In my judgment, therefore, there may be prescription by one owner as against another where there is exclusive possession for the prescribed time. I agree that there must be complete ouster, but ouster only in respect of that portion of the land in respect of which it is sought to prescribe.

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The result of my judgment will be that there will be an award of damages assessed at \$100 to the plaintiff Lucy Walker, and she will obtain an order for injunction as prayed in her statement of claim. She is also entitled to her costs certified fit for counsel on Scale I. The counter-claim in each action is dismissed.

*Judgment for the plaintiffs.*

Solicitors: *O.M. Valz* (for the plaintiffs); *Sase Narain* (for the defendant).

## CHUNG v. LONDON

[In the Full Court, on appeal from the magistrate's court for the West Demerara Judicial District (Bollers and Cummings, JJ.) April 23, May 12, 1966]

*Criminal law—Trespass to property—Mens rea—Necessity for proof of—Summary Jurisdiction (Offences) Ordinance, Cap. 14, s. 23(e).*

*Magistrate's court—Jurisdiction—Disputed title to immovable property—Whether bona fide dispute—Summary Jurisdiction (Offences) Ordinance, Cap.14, s. 10.*

In view of racial disturbances the appellant and the respondent orally agreed to exchange their houses. The appellant accordingly went into possession of the respondent's house, while the respondent went into possession of the appellant's house. Subsequently the respondent sought to recover possession of his house alleging that the agreement was intended to be in force only for the duration of the disturbances and that the disturbances had ceased. The appellant, taking the view that the arrangement was intended to be a permanent one, refused to leave the respondent's house. On a prosecution by the respondent for the offence of trespass it was objected in defence that the magistrate had no jurisdiction because there was a *bona fide* dispute to title to immovable property within the meaning of s.10 of the Summary Jurisdiction (Offences) Ordinance, Cap.14. The magistrate overruled the objection, holding that there was no *bona fide* dispute, and convicted the appellant. On appeal,

**Held:** (i) there was no evidence that the appellant's claim was not *bona fide*, the circumstance that the agreement was not in writing being far from conclusive having regard to the fact that the agreement was reached at a time of emergency and national distress;

(ii) when an objection is raised under s.10 of Cap.14 the magistrate must first inquire into so much of the case as is necessary to enable him to rule on the objection, before inquiring into the merits of the case;

(iii) s.33(e) of Cap.14 requires clear proof of criminal intent on the part of the defendant in remaining on the premises after having been requested by the owner to depart therefrom. Consequently, if the appellant honestly and genuinely felt, even if erroneously so, that he was, under the agreement, entitled to remain in the house, no offence could have been committed by him.

*Appeal allowed.*

*Zaman Ali* for the appellant.

*A. O. H. R. Holder* for the respondent.

*Judgment of the Court:* This appeal arises out of a private prosecution by the respondent brought against the appellant in the magistrate's court whereby the appellant was convicted of the offence of trespass to property, contrary to s. 33 (e) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14. The particulars of the conviction order are as follows:

"That John Chung on the 5th July, 1965, at Ocean View Uitvlugt, West Coast, Demerara, within the West Demerara Judicial District, having lawfully entered upon the complainant's house land remained thereon after having been required by the complainant to depart therefrom."

The case for the prosecution in the court below as disclosed by the evidence of the respondent (complainant) and his witness, a police constable, was, that during the month of May 1964, there were racial disturbances between the two major race groups on the West Coast, Demerara, and it was agreed between the respondent, who lived at Uitvlugt, a predominantly Indian area, and the appellant (defendant) who lived at Stewartville, a predominantly African area, that there should be a temporary exchange of houses between them until the disturbances had ceased and the situation had returned to normal. The respondent's house at Uitvlugt was on land held by him under a lease from Bookers Sugar Estates, Ltd., whereas the appellant's house at Stewartville was on land owned by him by virtue of a transport.

As a result of the agreement, the respondent and his family on the 14th day of May, 1964, proceeded to occupy the appellant's house at Stewartville, and the appellant and his family occupied the respondent's house at Uitvlugt, the respondent placing a notice outside the appellant's residence which read, "Property occupied by London", and a notice outside of his own residence, "Property occupied by Chung". Furniture was moved by both parties to the agreement to the respective houses, but the respondent left under his house in the yard a blackboard, an old table, a drum containing two gallons of paint oil and a box, all of which he claimed not to have abandoned.

On the 5th July, 1965, the respondent wrote the appellant a letter notifying him that as conditions in the country had returned to normal he was returning the appellant's property to him, and that he would be no longer responsible for it as from the end of the month of July, 1965, and calling on him to make the necessary arrangements for occupying his property for which he had transport. There was no reply to this letter and on the 7th August, 1965, the respondent caused his counsel to write on his behalf a letter to the appellant enclosing the key to his residence at Stewartville, and expressing the hope that the appellant would now hand over to the

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respondent immediately his own house at Uitvlugt. There was still no reply to this letter and on the 24th of July, 1965, the respondent visited the appellant at the house at Uitvlugt and in the presence of a policeman asked him if he had received the letters sent to him and whether he intended to leave the house and hand over the property to the respondent. The appellant replied that he had received the letters but he was not removing from the house and the respondent could do what he liked about it.

The case for the defence was that as a result of the entreaties made by the respondent in the course of the racial disturbances, the parties entered into an agreement whereby there would be a permanent exchange of houses, and the appellant moved his furniture into the respondent's house on the 22nd May, 1964, and on the 4th January, 1965, paid the land rent owing on the property to Bookers Sugar Estates Ltd. in his own name. On the occasion when the respondent visited his premises with the policeman and demanded the return of his property, the appellant admitted that he had received the letters sent to him by the respondent but refused to comply with the request and stated that he regarded the property as his own under the agreement.

On this evidence the magistrate in his memorandum of reasons observed that no effort had been made by the parties to the agreement to transfer the lease or convey the transported land, and it was strange that where such substantial properties were involved the terms of the agreement were not reduced into writing. He then proceeded to reject the defence and accept the evidence for the prosecution and find as a fact that the exchange of houses was only on a temporary basis, and that the appellant had wilfully and unlawfully refused to vacate the house at Uitvlugt when required to do so. It is important to observe that it was only at this stage that the learned magistrate noted that he had addressed his mind to the submissions and authorities cited by counsel for the defendant on the point of jurisdiction and refused to decline jurisdiction in the matter.

Counsel for the appellant has raised two points in this appeal both of which were submitted in the magistrate's court:

(1) that under s. 10 of the Summary Jurisdiction (Offences) Ordinance, Cap. 14, the magistrate ought to have declined jurisdiction in the matter; and

(2) that there was no proof of *mens rea* existing in the mind of the appellant at the time of his refusal to leave the house, as the appellant had asserted a claim of right made in good faith to the subject-matter in question.

In answer to the points raised, counsel for the respondent submitted that the evidence had disclosed that the appellant had not made a *bona fide* claim of right to the property at Uitvlugt, and the magistrate had addressed his mind to the question and had made a finding against him which could not properly be questioned by this court, and furthermore in view of the findings of the

magistrate the criminal intent of the appellant had been clearly proved.

Section 10 Cap. 14 reads as follows:

"Nothing in this Ordinance shall authorise the court to hear and determine any complaint for a summary conviction offence under this Ordinance in which any question in good faith arises as to the title to any immovable property or any interest therein or accruing therefrom, or as to any bankruptcy or insolvency or as to any execution under the process of the Supreme Court."

We consider that the interests in the respective properties arising out of the transactions in this case fall within the ambit of this provision.

In STONE'S JUSTICES MANUAL, 1965, at p. 287, it is stated that in general where title is in question, the jurisdiction of the justices is ousted, even though the facts disclosed a matter of which they otherwise would have jurisdiction. In *R. v. Critchlow*, (1878), 26 W. R. 681, it was held that the jurisdiction of the justices is not ousted when there is evidence *pro* and *con* and they consider the defence is not *bona fide*. In that case a trespasser in search of game put up as a defence the leave and licence of the occupier under a parol lease. The occupier denied that the game was reserved to the landlord, but evidence was given to show that it was, and it was held upon the evidence that the defence was not *bona fide* and therefore the jurisdiction was not ousted. COCKBURN, C. J., in the course of his judgment, expressed the opinion that the decision of the justices that the claim was not *bona fide* was correct, and even if he had thought it erroneous, he would not be prepared to overrule it. He then observed that the claim was only set up towards the conclusion of the tenant's lease because he was dissatisfied with his landlord, and he then got the appellant to go on the land and commit the act of trespass. In our view this latter statement in the judgment of COCKBURN, C. J., shows the distinction to be drawn between that case and the circumstances of the instant case. In *Critchlow's* case the evidence was clear that the claim of right as set up was not *bona fide*, whereas in the instant case there was no evidence that counsel for the respondent could point to in order to show that the claim was not *bona fide*.

In *Critchlow's* case the other judge sitting with COCKBURN, C. J., asked himself the pertinent question: "Can I say that upon the present evidence the justices could come to the conclusion that the appellant's claim was not *bona fide*? I am satisfied that I could." When we ask ourselves the similar question, we cannot say that there was reasonable evidence that the appellant's claim was not *bona fide* in view of the fact that it was merely one man's allegations against another's in respect of an agreement not reduced into writing. The circumstances that there was no transfer of the lease or reduction of the terms of the agreement into writing is far from conclusive, especially when we consider that the agreement was reached at a time of emergency and national distress.

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As LUSH, J., stated in *Watkins v. Smith* (1878) 42 J. P. 468: "If there is any evidence of legal title which a judge must leave to a jury, the justices should hold their hands."

There remains the other aspect of the matter, that the magistrate must first determine the matter of jurisdiction before deciding the issue. In *James v. McRae*, (1931—1937) L. R. B. G. 128, where a similar section in respect of the civil jurisdiction of the magistrate's court fell to be interpreted, that is s. 3 (3) of the Summary Jurisdiction (Petty Debt) Ordinance, Cap. 16, this court held that under this section where the question of title to land is raised, "the duty of the magistrate before adjudicating is to ascertain whether the defence is *bona fide* with evidence to support it and for that purpose he must enquire into so much of the case as is necessary to satisfy him upon that point."

The memorandum of reasons by the magistrate leaves us with the impression that rather than following this line of reasoning and first, addressing his mind to the problem of jurisdiction before adjudicating on the issue, the magistrate made his findings on the evidence, adjudicated on the issue, and then addressed his mind to the question of jurisdiction. In doing this he clearly misdirected himself in his method of approach to the problem. In any event, we consider that the claim of right set up by the appellant was *bona fide* as there was no evidence to show that it was not *bona fide*, and the magistrate ought to have declined jurisdiction.

On the second point, we are in agreement with the submission made by counsel for the appellant that the section requires clear proof of criminal intent on the part of the person remaining on the premises after having been requested by the owner to depart therefrom, for the offence of criminal trespass to be committed, and in *Kellar v. Narayan*, (1960) 1 W.I.R., 373, 1960 L.R.B.G., the Federal Supreme Court pointed out that under the section for an offence to be committed the person remaining on the land or other place must be "lawfully required" by the owner to depart therefrom. It is a cardinal principle of the criminal law that where a particular intent or state of mind is of the essence of an offence, a mistaken but *bona fide* belief by a defendant that he had a right to do a particular act may be a complete defence as showing that he had no criminal intent. *R. v. Hall*, (1828), 3 C. & P. 409. *R. v. Twose*, (1879), 14 *Cox's C. C.* 327. If, therefore, the appellant in this case at the time he was asked to leave the house at Uitvlugt honestly and genuinely felt, even if erroneously so, that he was, under the agreement, entitled to remain in the house, then no offence could have been committed by him. In the record it does not appear that the magistrate ever addressed his mind to this question but merely found that the agreement was for a temporary exchange and not a permanent one. It is clear, however, that on the authorities if the appellant believed *bona fide* that he was entitled to remain on the premises because conditions had not yet become normal or mistakenly understood that the arrangement was permanent and not temporary, no offence would have been committed by him, as in that situation there would be no proof of *mens rea*.

It must also be pointed out that under the agreement which the magistrate found to exist, the respondent could only have required the appellant to leave the premises if the situation had returned to normal after the racial disturbances. There was no firm evidence at all on this aspect of the matter but the mere *ipse dixit* of the respondent under cross-examination that to his mind the disturbance had ceased in January, 19'65. It could not then be properly said that in the circumstances the appellant was "lawfully required" to depart from the "land or other place".

For these reasons the appeal must be allowed and the conviction and sentence of the magistrate set aside with costs to the appellant fixed at \$25 plus the cost of the record \$5.04.

*Appeal allowed*

## MAHADEO SINGH AND OTHERS v. BURNETT

[In the Full Court, on appeal from the Magistrate's Court for the Corentyne Judicial District (Luckhoo, C. J., and Chung, J.) May 6, 20, 1966]

*Jurisdiction (Procedure) Ordinance, Cap. 15, s.9 (1)—Whether offence committed—Spirits Ordinance, Cap. 319, s.97 (a).*

*Criminal law—Assaulting police officer acting under excise law in execution of a search warrant—Warrant issued under Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s.9 (1).*

The appellants appealed from their conviction for the offence of assaulting a corporal of police acting under an excise law contrary to s. 97 (a) of the Spirits Ordinance, Cap. 319. At the time of the alleged offence the corporal was looking for spirits in execution of a search warrant which had been issued under s. 9 (1) of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s. 9(1).

**Held:** the corporal was not acting under an excise law at the material time.

*Appeal allowed.*

*K. Prasad* for the appellants.

*J. G. Sabola* for the respondent.

*Judgment of the Court:* The three appellants, Mahadeo Singh, Victoria Singh and Rudolph Solomon, were charged jointly on a complaint that on the 16th September, 1965, at Springlands, Corentyne, in the Corentyne Judicial District they assaulted Corporal of Police No. 5020 Eustace de Abreu who was acting under an excise law, contrary to s. 97 (a) of the Spirits Ordinance, Cap. 319. The appellants were convicted and were each fined \$250 or in default three months' imprisonment.

The evidence for the prosecution was to the effect that the respondent Paul Burnett, an officer of customs and excise, obtained

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a search warrant directed to him or any constable authorising entry by force if necessary between the hours of 5 p.m. and 10 p.m. into the premises of the appellant Mahadeo Singh situate at Springlands and search for a quantity of spirits which would afford evidence of a commission of an offence against the Spirits Ordinance, Cap. 319. At about 6.40 p.m. that evening the respondent Burnett accompanied by Corporal of Police No. 5020 Eustace de Abreu, Supernumerary Constable John, King and other policemen went to the premises of the appellant Mahadeo Singh at Springlands for the purpose of executing the search warrant for spirits known as bush rum. On arrival there Cpl. de Abreu knocked at the door and the appellants Victoria Singh and Rudolph Solomon came to the door. Cpl. de Abreu was in possession of the search warrant and told the appellant Victoria Singh that he had a warrant to search the premises. He showed her the warrant and offered to read it to her. She thereupon refused to allow a search of the premises and attempted to close the door. What transpired thereafter need not be recited for it has not been contended that the evidence would not sustain the charge against all three appellants if the search warrant were a valid warrant.

The sole ground of appeal in respect of each of the appellants is that the decision of the learned magistrate is erroneous in point of law in that the search warrant is defective and could not authorise the police to act under an excise law.

The search warrant purports to have been issued under the provisions of the Spirits Ordinance, Cap.319, that Ordinance being specifically mentioned therein as well as in the information upon oath leading to the warrant. There are two provisions under which a search warrant may be issued under the Spirits Ordinance, Cap. 319, s. 89(3) and s. 104(1). Section 89(3) provides as follows:

"(3) If an officer has reasonable cause for suspicion that spirits are in the unlawful possession of anyone in any house, building or enclosed place whatsoever, then upon oath made by that officer before a magistrate or a justice of the peace of the grounds of suspicion, the magistrate or justice of the peace may issue a warrant under his hand authorising the officer to enter by force, if necessary, the house; building or enclosed place and search for and seize any spirits unlawfully possessed therein, and either detain them or remove them to a place of safe custody, and also a warrant to arrest the person unlawfully in possession thereof, and to bring him before the magistrate of the district to be dealt with according to law."

Section 104(1) provides as follows:

"(1) If an officer makes oath that there is good cause to suspect that any distillery apparatus, spirits, or materials for the manufacture of spirits, is or are unlawfully kept or deposited in any house or place, and states the grounds of suspicion, any justice of the peace, if he thinks fit; may issue a warrant authorising the officer to search the house or place."

Section 104(2) provides as follows:

"(2) Anyone so authorised may at any time, either by day or by night, but at night only in the presence of a police officer or constable, if he is not a member of the police force, break open and forcibly

enter any house or place aforesaid, and seize any distillery apparatus, spirits, or materials for the manufacture of spirits found therein, and either detain them or remove them to a place of safe custody."

"Officer" as defined by S.2 of the Spirits Ordinance. Cap. 319, means "the Comptroller or any officer of the customs, any member of the police force or rural constabulary, and includes anyone employed on any duty or service relating to the excise law by the order or with the consent of the Comptroller."

There is no form of search warrant prescribed by ss. 93(3) and 104(1) of the Spirits Ordinance, Cap. 319. It is usual for form 50 in the Second Schedule to the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, as issued under s. 9(1) of that Ordinance to be adapted for use in these regards. Section 9(1) of Cap. 15 provides as follows:

"(1) Any magistrate who is satisfied, by proof upon oath, that there is reasonable ground for believing that there is, in any building or place, —

- (a) anything upon, or in respect of which any summary conviction of offence has been or is suspected to have been committed for which, according to any statute for the time being in force, the offender may be arrested without warrant; or
- (b) anything which there is reasonable ground for believing will afford evidence as to the commission of that offence; or
- (c) may at any time issue a warrant under his hand, authorising some police or other constable named therein to search the building or place for any of those things, and to seize and take it before the magistrate issuing the warrant or some other magistrate, to be by him dealt with according to law."

The warrant issued in this case is directed to "P. Burnett Officer of Customs and Excise or any constable" and continues —

"Whereas it appears on the oath of P. Burnett, Officer of Customs and Excise, that there is reason to suspect that Mahadeo of Spring-Hands Housing Scheme, Corentyne, Berbice; in the Corentyne Judicial District, hath in his possession, premises or outbuildings a quantity of spirits which will afford evidence of the commission of an offence against the Spirits Ordinance, Chapter 319, and same are concealed to his premises at Springlands.

This is therefore to authorise and require you to enter by force if necessary between the hours of 5.00 and 10 p.m. into the said premises and to search for the said things and to bring the same before me or some other magistrate.

Dated this 16th day of September, 1965

C. C. Ramdin J.P.  
Corentyne Judicial District.

It will readily be appreciated that the wording of the warrant closely follows form 50 in the Second Schedule to the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, and it has been submitted on behalf of the appellant that in fact the warrant issued was issued

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under the authority of s. 9 of Cap. 15 and that on the facts adduced it is not competent for the prosecution to proceed on a charge laid under s. 97(a) of the Spirits Ordinance, Cap. 319, but rather a charge may have been laid under s. 28(b) of the Summary Jurisdiction (Offences) Ordinance, Cap. 14—assaulting a peace officer acting in the execution of his duty. The search, counsel contended, was conducted not under an excise law but under s. 9 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15.

We would observe that the search warrant was issued not by a magistrate, as is required by s. 9 of Cap. 15, but by a justice of the peace who was not a magistrate.

The matter we think is put beyond doubt by the information leading the warrant which was produced in evidence by Cpl. de Abreu as part of the prosecution's case. The information reads as follows:

"The information of P. Burnett, Officer of Customs and Excise who said on his oath that there is reason to suspect that Mahadeo Singh of Springlands Housing Scheme, Corentyne, Berbice; in the Corentyne, Berbice; in the Corentyne Judicial District, hath in his (possession, premises or outbuildings, a quantity of spirits which will afford evidence of the Commission of an offence against the Spirits Ordinance, Cap. 319."

The wording of that information follows closely the provisions of s. 9(1) (b) of Cap. 15. It does not state the grounds of suspicion and there is no evidence that the grounds of suspicion were stated on oath to the justice of the peace who issued the warrant. While the court will not go behind a search warrant if on its face it appears to be valid, the court will have to take cognizance of the contents of any information leading to the warrant where that information is tendered as part of the case for the prosecution and no further evidence supplementing it is forthcoming.

We find that the search warrant was issued under s. 9 (1) of Cap. 15 and that therefore Cpl. de Abreu was not acting under an excise law at the material time.

The appeal is therefore allowed and the convictions and sentences of the appellants are set aside with costs \$15 to each appellant.

*Appeal allowed*

LAW REPORTS OF BRITISH GUIANA [1966]  
 ENMORE ESTATES LTD. AND ADOLPHUS BOWEN v. SINGH  
 [Supreme Court (Luckhoo, C.J.) May 24, 25, 1966]

*Workmen's compensation—Compensation paid by employer—Claim by employer for indemnity against tortfeasor—Workmen's Compensation Ordinance, Cap. 111, s. 27(b).*

*Damages—Workmen's compensation paid by employer to workman—Claim by workman for damages against tortfeasor—Competence of claim.*

The first-named plaintiffs were the employers of the second -named plaintiff B. who was injured in the course of his employment by a motor car driven by the defendant's servant. The employers claimed to be reimbursed by the defendant for compensation paid by them to B. under the Workmen's Compensation Ordinance, Cap. 111, while B. himself claimed damages from the defendant in respect of his injuries.

**Held:** (i) if a workman recovers compensation from his employer he cannot sue the tortfeasor for damages for loss of wages or for pain and suffering although such matters are not included in such compensation;

(ii) Section 27 (b) of the Workmen's Compensation Ordinance, Cap. 111, is designed to recoup employers such amount which they are liable to pay by way of compensation to the workman under the provisions of the Workmen's Compensation Ordinance, Cap. 111, and which they have so paid.

*Judgment for first-named plaintiffs.*

*Second-named plaintiff's action dismissed.*

*J. A. King* for the plaintiffs.

*Dr. F. H. W. Ramsahoye* for the defendant.

LUCKHOO, C.J.: On the 9th April, 1964, the defendant Harsundai Singh's motor truck driven by her servant Maurice Alphonso collided with the first-named plaintiffs' (hereinafter referred to as the employers) gates and fence at Enmore, East Coast Demerara, and as a result the employers' chief security guard, Adolphus Bowen, the second-named plaintiff (hereinafter referred to as the workman), was struck by the gates and thrown against a wooden stanchion and fell into a concrete drain sustaining injury to his face, left shoulder and spine. The workman was hospitalised for 46 days at the St. Joseph's Mercy Hospital and thereafter received treatment as an out-patient, at the Public Hospital, Georgetown, until the 31st December,

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1965. It has been established that the workman has sustained a permanent partial disability of twenty *per centum* as a result of the accident.

The defendant admitted that the accident occurred by reason of her servant's negligence and has put the plaintiffs to the proof of loss, damages and injury alleged to have been sustained.

It was proved or admitted at the hearing that the employers paid the sums of \$310.79, being the medical expenses of the workman, \$20 for medical certificates issued in respect of the workman and \$72, the travelling expenses of the workman from his home to the Public Hospital, Georgetown, and back for treatment. The workman elected to accept compensation from his employers in the sum of \$1,397.76, assessed on the basis of 20 *per centum* permanent partial incapacity which sum was paid to the workman through a magistrate's court.

The employers also paid the wages of the workman to the week-end of the 13th November, 1965, at the rate of \$24.50 per week, the basic wage of the workman, no periodic payment being made as such. The workman was dismissed by the employers presumably upon the suggestion of Dr. Bender contained in his report dated 30th September, 1965, upon the workman's condition at 3rd September, 1965, that it would be in the employers' interest to compensate the workman with view to terminating his employment.

The repairs to the gates and fence damaged as a result of the accident cost the employers \$164.75.

In this action the employers sought to recover from the defendant the cost of the repairs to their gates and fence and damages by way of indemnity pursuant to s. 27(b) of the Workmen's Compensation Ordinance, Cap. 111 and the workman sought to recover damages for injuries and loss sustained by him by reason of the negligence of the defendant's servant in driving the motor truck. It is common ground that the workman's injuries were injuries for which compensation was payable under the Workmen's Compensation Ordinance, Cap. 111.

Section 27 of the Ordinance provides as follows:

"Where the injury for which compensation is payable under this Ordinance was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof —

- (a) the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Ordinance but shall not be entitled to recover both damages and compensation; and
- (b) if the workman has recovered compensation under this Ordinance, the person by whom the compensation was paid, and any person who has been called on to pay an indemnity under section 21 (relating to liability in case

of workmen employed by contractors) shall be entitled to be indemnified by the person so liable to pay damages as aforesaid, and all questions as to the right to and amount of any such indemnity shall, in default of agreement, be settled by the court."

That provision is in *pari materia* with s. 30 of the Workmen's Compensation Ordinance, 1925, of England, with clause 24 of the schedule to the Workers' Compensation Acts, 1916 to 1936 of Queensland (Australia), and with s. 64 of the Workers' Compensation Act, 1926-1938, of New South Wales (Australia). Insofar as an adult workman is concerned if it is proved at the hearing of an action for negligence brought by him that he has already recovered compensation he cannot succeed in the action (see *Oliver v. Nautilus S.S. Co.*, [1903] 2 K.B. 639, at p. 650, a case under the original English Act). It is well settled that for the purposes of s. 30 of the Workmen's Compensation Act, 1925 (England) and of the relevant provisions of the Australian Acts referred to above, a workman recovers compensation when he receives payment of compensation and that it is immaterial that he has not received the whole compensation to which he is entitled. As was pointed out in *Farmer & Co., Ltd., v. Griffith* (1940) 63 C.L.R. 603, at p. 611, in the judgment of EVATT, J., the case of *Smith v. Commonwealth Oil Refineries Ltd.* (1938), 60 C.L.R. 141, "shows that in legislation which is framed according to the tenor of s. 64 (of the N.S.W. Act), an adult worker who has 'recovered' a sum of money which is paid as, and received as, worker's compensation for an injury, is debarred from recovering against a third party in respect of the same injury; even although the 'recovery' by the worker is limited to one week's compensation, and the worker is willing to repay the sum." In *Smith's* case it was pointed out by LATHAM, C.J., at p. 149, that in the English case of *Huckle v. London County Council* (1910), 27 T.L.R. 112, the Court of Appeal held that the fact of recovery constituted a bar and the subsequent repayment was irrelevant and that when a worker had "recovered" he then lost the right which he might otherwise have exercised and was not restored to the position of a worker not having recovered by reason of repaying the money. If a workman recovers compensation from his employer he cannot sue the tortfeasor for damages for loss of wages or for pain and suffering although such matters are not included in such compensation. See *Tong v. Great Northern Railway* (1902), 86 L.T. 802. In the instant case the workman has undoubtedly received money as compensation and his action against the defendant for damages must consequently fail.

The employers' claim for damages in respect of the damage done to the gates and fence has been conceded. In respect of their claim for an indemnity all of the items of special damage claimed have been conceded save one—that relating to payment of the workman's wages to the week ending 13th November, 1965. Counsel for the employers while agreeing that the claim in this form could not be sustained urged that an amount may be awarded in respect of what the employers would have been liable to pay to the workman by way of periodic payment. Counsel for the defendant contended that the

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payments of wages were made under the workman's contract of employment with the employers and not by way of compensation.

Section 27(b) is designed to recoup the employers such amount which they are liable to pay by way of compensation to the workman under the provisions of the Workmen's Compensation Ordinance, Cap. 111, and have paid him such amount. It is not disputed that by virtue of s. 8(1) (d) the employers were liable to make a periodic payment to the workman based on his average monthly wages of \$120. Counsel was content that the court should fix the period during which such payment should be made. It was pointed out that when Mr. Stracey made his finding of twenty *per centum* permanent partial disability the workman still wore a plaster cast. Mr. Stracey's finding should, I think, in such circumstances, be regarded as a provisional finding confirmed by Dr. Bender at the latter's first examination of the workman on the 28th May, 1965, and again on the 3rd November, 1965. In the circumstances I considered that periodic payments should properly have been made between the date of the accident 9th April, 1964, and the 28th May, 1965. For convenience the period was taken as 14 months. Applying s. 8 (1) (d) (iii) of Cap. 111 as amended by s. 3 (1) (f) of the Workmen's Compensation (Amendment) Ordinance, 1960, (No. 11 of 1960), the amount of periodic payments would be the prescribed minimum of  $\$87 \times 14 = \$1,218$  and the employers would be entitled to be reimbursed this amount in addition to the other amounts claimed and conceded.

In the result the first-named plaintiffs will get judgment in the sum of \$3,190 with costs to be taxed against the defendant. The second named plaintiff's claim is dismissed with costs to be taxed certified fit for counsel.

*Judgment for first-named plaintiffs. Second-named plaintiff's action dismissed.*

## WEST BANK ESTATES LTD. v. LATIFAN

[In the Full Court, on appeal from the Magistrate's Court for the West Demerara Judicial District (Luckhoo, C. J., and Khan. J.) March 4, 18, 25, April 1, May 20, 25, 1966].

*Workmen's compensation—Death of workman while obeying orders of superior—Superior had no authority to give orders—Liability of employers—Workmen's Compensation Ordinance, Cap. 111*

The appellants appealed from the decision of a magistrate awarding workmen's compensation to the respondent in respect of the death of her son upon whom she was dependent. The son died while driving a tractor in obedience to the orders of a superior worker. For the appellants it was contended that the superior worker had been instructed not to permit the deceased to drive a tractor.

**Held:** (i) in the absence of evidence to the contrary it was reasonable to conclude that the deceased could not disobey the orders given him by the superior worker;

(ii) whether or not the superior worker had been instructed not to permit the deceased or anyone else to drive the tractor, the fact that the accident occurred while the deceased was carrying out those orders meant that the accident arose out of and in the course of the deceased's employment.

*Appeal dismissed.*

*G. M. Farnum* for the appellants.

*D. C. Jagan* for the respondent.

*Judgment of the Court:* The respondent Bibi Latifan claimed to be a dependant of the deceased workman Ganesh Harripersaud, aged 16 years, who was her son, and she claimed compensation under the provisions of the Workmen's Compensation Ordinance, Cap. 111, on the ground that her son's death was caused by an accident arising out of and in the course of his employment by the appellant company.

The deceased died on the 29th April, 1964, at Plantation Wales Back was driving overturned pinning him underneath. The evidence disclosed that the deceased had been employed by the appellant company as a chain boy whose duties were to hook and unhook chains on punts upon the instructions of a tractor operator. On the 29th April, 1964 the deceased was working under the instructions of the tractor driver, one Manoo, at the appellant company's estate. According to the evidence of George Shepherd, an employee of the appellant company, a tractor driven by Manoo with the deceased at the back standing on the cross bar came up and stopped opposite to No. 9 field aback of Plantation Wales. Manoo told Shepherd that he had come for empty cane punts. Manoo went to collect cane punts while the deceased laid down under the tractor. Manoo called the deceased who went up to Manoo and spoke with him. The deceased then told Shepherd in the hearing of Manoo that Manoo had told him to start the tractor. Manoo then told the deceased to reverse the tractor towards where he (Manoo) was, in order to collect the empty cane punts. While the tractor was being reversed by the deceased the tractor overturned pinning the deceased under it. When the tractor was removed the deceased was found to be dead.

Manoo testified to the effect that accompanied by the deceased he went to collect cane punts. He stopped the tractor, switched the motor off and went in search of punts. While searching for the punts he heard a shout for help and saw that the tractor had pinned the deceased to the ground. Manoo denied that he had given instructions to the deceased to drive or reverse the tractor.

## WEST BANK ESTATES LTD. v. LATIFAN

It was sought to show by the evidence of Smith-Greene, assistant personnel manager at Wales Estate, that instructions had been issued to tractor operators and re-issued every 18 months about the handling of tractors and that one of the instructions forbade chain boys from driving tractors. Smith-Greene testified that chain boys were told of the rules. A set of the rules with annotation—"Field Manager ac—30/1/ 64"—was admitted in evidence and it was urged that these rules were issued on the 30th January, 1964. However, Smith-Greene was not employed by the appellant company until March, 1964 and it could not satisfactorily be established that these rules were in fact issued to tractor operators on the 30th January, 1964. But whether the rules were issued on that date or not, Smith-Greene admitted that the rules were given to tractor operators and not to the chain boys. When re-examined he said that he gave the deceased instructions that he must not drive the tractor. However, when further questioned by counsel for the respondent Smith-Greene said that if the deceased had been taken on before March, 1964 (which he was) he would get the instructions from someone else. On a consideration of Smith-Greene's evidence as a whole it cannot reasonably be held that the deceased was ever made aware of a prohibition against chain boys driving tractors.

Alfred Garnett, another tractor operator, employed by the appellant company and shop steward for tractor operators, testified to the effect that the rule prohibiting chain boys from driving tractors only came into force from August, 1964, after the deceased's death and as a result of the deceased's death.

The learned magistrate rejected the evidence of Manoo as being not straightforward or truthful and said that he was impressed that Manoo seemed to be trying to save himself. The magistrate accepted Shepherd's evidence and that of Alfred Garnett. The magistrate therefore found that the deceased was in fact instructed by Manoo to reverse the tractor and that at that time there was not yet in existence the rule prohibiting chain boys from driving tractors. There was evidence upon which the magistrate could properly make the findings of fact he did make. The magistrate held that the accident causing the deceased's death arose out of and in the course of his employment and that the respondent was mainly dependent on the earnings of the deceased.

Both findings have been challenged on appeal. Counsel for the appellant company has submitted that driving of a tractor did not come within the sphere of duties of the deceased and was therefore an added peril disentiitling the respondent from succeeding on her claim. Counsel contended that even if it were found that the tractor operator wrongly instructed the deceased to drive the tractor the appellant company would not be liable, the act being one outside the deceased's sphere of employment. During the argument before us certain reported cases were cited to us. In *Wardle v. Enthoven & Sons Ltd.*, (1916), 10 B. W. C. C. 79, C. A., it was held that lack of notice of a prohibition does not enlarge the scope of a workman's employment. The applicant had to show

that the accident arose from some special risk imposed by the employment and if the risk is not in fact imposed a mistaken belief by the workman to the contrary cannot affect the matter. Where the workman is injured when doing something he is not employed to do he is not entitled to compensation. In *Marshall v. J. Rodgers & Sons Ltd.* (1917) 10 B. W. C. C. 588, where a lad was injured in an accident when doing what he had been told to do and did it in the ordinary way that employees did such a thing—the carrying of coal up by a lift—it was held that the lad had done nothing outside of the scope of his employment. In *Cartwright v. Shell Mex* (1932), 25 B. W. C. C. 650, a workman under a mistaken impression that the driver of a lorry had ordered him to crank up the engine attempted to do so and as a result received injuries to his arm. The county court judge held that the workman had to obey his driver's orders and lack of knowledge of the prohibition against his doing so did not limit the scope of his employment. The decision of the county court judge was reversed on appeal, the Court of Appeal holding that the case was covered by the judgment in *Wardle v. Enthoven & Sons Ltd.* (1916), 10 B.W.C.C. 79.

It is clear, however, that a workman is acting within the scope of his employment when he obeys commands of a superior servant to whose orders he is required to conform and it is no answer to a claim for compensation to allege that the superior servant at the time of giving such orders was doing something which he had been instructed not to do. See *Risdale v. s.s. Kilmarnock* (1915), 8 B. W. C. C. 7. And although the sphere of labour is clearly defined it may be enlarged by a person in authority *Geary v. Guzler* (1913), 6 B. W. C. C. 72, and see also *Clarke v. Anderson* (1919), 12 B. W. C. C. 74.

The deceased was attached to the tractor operator Manoo, a servant superior to the deceased, whose orders the deceased was bound to obey. In the absence of evidence to the contrary it is reasonable to conclude that the deceased could not disobey the orders given him by Manoo. Whether or not Manoo had been instructed not to permit the deceased or anyone else to drive the tractor (the magistrate found that such instructions were issued only after the deceased's death) the deceased obeyed the order to reverse the tractor and in so doing the tractor overturned causing the deceased's death. In the result the magistrate did not err in finding that the accident arose out of and in the course of the deceased's employment.

Finally, there was sufficient evidence on which the magistrate could properly have held that the respondent was mainly dependent upon the deceased's earnings at the time of the accident.

For these reasons the appeal is dismissed and the order of the magistrate is affirmed with costs to the respondent fixed at \$31.24.

*Appeal dismissed.*

*Solicitor: Miss D. P. Bernard* (for the appellants).

MUSTAPHA ALLY v. HAND-IN-HAND FIRE  
INSURANCE CO. LTD

[Supreme Court (Persaud, J.) September, 15, 16, December, 7, 1965,  
February 28, March 1, 2, 4, 22, May 25, 1966].

*Evidence—Admissibility of document prepared by witness who later died—Report of inspection of damage done by fire to insured premises—Report made on behalf of insurance company—Claim by insured—Admissibility of report—Evidence Ordinance, Cap.25, s.90.*

*Insurance—Exaggerated claim—Avoidance of policy.*

The plaintiff's rice mill, which was insured by the defendants, was destroyed by fire. At the request of the defendants one J. inspected the destroyed premises and submitted a written report to the defendants. After the fire the defendants terminated the policy as they were entitled to do under condition 11 of it. Condition 14 provided as follows: "If the claim is in any respect fraudulent....this policy shall be absolutely void..." The claim submitted by the plaintiff was substantially in excess of the loss suffered. In an action by the plaintiff to recover under the policy the defendants sought to tender in evidence the report by J., he having in the meanwhile died. Section 90 (1) of the Evidence Ordinance, Cap. 25, permits in certain circumstances statements made by a person in a document to be tendered in evidence "where the maker of the statement is dead", and Sub-s. 3 provides as follows: "Nothing in this section shall render admissible any statement made toy any person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement may tend to establish". For the plaintiff it was objected that the report was inadmissible because J. was a person interested within the meaning of this provision

**Held:** (i) the mere fact that the maker of the statement tendered is in the employment of a party to the action does not by itself make him a person interested in the proceedings. The report could not be excluded unless J. had exhibited an interest which was more than that which could be described as a human interest, and this was not the case;

(ii) the fact that the policy was terminated under condition 11 did not preclude the defendants from relying an condition 14;

(iii) the plaintiff's claim was a fraudulent one in the sense that it was exaggerated and that it bore no relation to the true loss suffered by him, and in the result the policy became void under condition 14.

*Judgment for the defendants.*

*J. O. F. Haynes, Q.C. with E. W. Adams for the plaintiff.*

*J. A. King for the defendants.*

PERSAUD, J.: The plaintiff, who is a rice miller, claims from the defendants who carry on the business of insurers, the sum of \$62,717.76 which he alleges is due and payable to him under the terms of a policy of insurance he had taken out with the defendants to cover a stock of padi and empty padi bags stored at his rice mill at Albion on the Corentyne coast.

It would appear that the plaintiff commenced to erect what is described as a multi-stage rice mill at Albion in 1961. The mill was completed in 1962, and an opening ceremony at which several guests attended took place on March 9, 1963. Upon that ceremony being completed, and the guests having all departed, the mill was closed. During the course of the night, a fire took place within the mill destroying padi

and empty padi bags which had been stored therein. In passing, it is only right to say that there is no suggestion whatever that the fire had been deliberately set; indeed, the cause of its origin is unknown, and one can only conjecture that perhaps it might have been caused by a lighted cigarette end, or some such object inadvertently dropped by one of the several guests who were accommodated in chairs as well as on the stacks of padi and bags in the mill. However, the claim before the court is based on the policy of insurance mentioned earlier for loss of padi and bags as a result of the fire. The question, therefore, for determination is the quantity of padi and number of bags lost, and incidental to this question is the matter of the stocks of padi and bags in the mill on the night of March 9, 1963.

The plaintiff strikes me as being a person of some initiative. It would seem that from the time he conceived the idea of establishing a multi-stage mill, he began to prepare for the day when operations would have commenced. And he started to lay in a stock of empty bags to be used for distribution to farmers to encourage them to take their padi to his mill, to store padi in the mill, and to ship rice to the Rice Marketing Board. The plaintiff says that on the night of the fire there were stored in his mill 12,009 bags of padi, of which 400 belonged to Mr. C. Fung-A-Fatt, 814 to Mr. Fung-A-Fatt and the plaintiff jointly, and the rest to farmers, and 135,000 empty bags. The plaintiff has testified that his and Mr. Fung-A-Fatt's padi were damaged beyond recovery, while only 5,450 empty bags were salvaged from the fire.

That part of the mill in which padi and bags were stored has been described as the bond, and from the plaintiff has come the evidence that the bond measures 160 feet by 100 feet by 30 to 40 feet, and that the empty bags were tied up in bundles of 100, and packed to a height of about 17 to 18 feet. He has also said that the area in which the fire took place measured about 60 feet by 40 feet with stacks of padi and bags for a height of about 15 to 20 feet.

Perhaps a description of the bond, as I have gathered it from the evidence, may be helpful. The bond runs north to south with two doors on the eastern wall. The northern door, it would appear, was used as the main door; this door looks east towards a drainage trench and to a roadway (both of which run north to south) called the Albion Driving Road. Beginning from about 3 feet from the eastern wall were stacks of padi and bags on either side of a broad passageway which flowed away from the doorway going west through the building and which led to a drying floor west of the building. There seemed to have been a narrow passageway which covered the perimeter of the bond but separating the walls from the stacks of padi and bags. Then there were a number of narrow passageways which ran north to south separating various stacks of padi. The fire was restricted to that stack of padi and bags that were immediately south of the northern door and nearest the eastern wall of the bond.

Now before embarking on an examination of the evidence in an effort to answer the main question raised in this matter, it is necessary to express an opinion on certain legal submissions affecting the admissibility of a report made by one Rupert Jailal who is now dead. That report

## ALLY v. HAND-IN-HAND

was made by Jailal at the request of the defendants, and consequent upon a visit to the plaintiff's premises by Jailal and one David Singh on March 19, 19'63- Mr. Jailal was then acting manager of the British Guiana Rice Marketing Board, while Mr. Singh had once been employed by that Board as a district Supervisor for 21 years. These two gentlemen inspected the plaintiff's premises in the latter's presence, and carried out a physical check of the stocks then stored in the bond. Jailal then prepared a report which was signed both by himself and Singh. Upon an attempt being made by Mr. King for the defendants to tender this statement in accordance with s. 90 of the Evidence Ordinance, Cap. 25, Mr. Haynes, counsel for the plaintiff, did not object to its reception subject to arguments as regards its admissibility.

The relevant parts of s. 90 of Cap. 25 (which is the same as s. 1 of the Evidence Act, 1938, (1 & 2 Geo. 6, c. 28)) are reproduced hereunder:

"(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall be admissible as evidence of that fact if the following conditions are satisfied, that is to say —

(i) if the maker of the statement either—

(a) had personal knowledge of the matters dealt with by the statement; and

\* \* \* \* \*

(ii) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead

(2) \* \* \* \* \*

(3) Nothing in this section shall render admissible any statement made by any person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement may tend to establish."

Mr. Haynes contends that the statement is excluded because Jailal was a person interested, and that is gathered from the contents of the statement itself. In other words, Mr. Haynes urges the court to read the document, as it will disclose, among other things, that Jailal was advising the defendants what lines they should pursue in order to succeed in any subsequent litigation, and, says counsel, it must have been patent to Jailal that his estimate would have been challenged, and therefore his reputation as a valuer would have been involved. These circumstances, counsel submits, make Jailal a person interested within the meaning of s. 90 (3) of the Evidence Ordinance, in that he was obviously interested in the result of this litigation being in favour of the defendants.

Section 1 of the Evidence Act, 1968 (U. K.), has been the subject of a number of English decisions, and it is a fact that there have been expressions of opinion on either side from time to time, the most recent decisions being *Bearmans, Ltd. v. Metropolitan Police*, [1961] 1 All E.R. 384, and *Constantinou v. Frederick Hotels, Ltd.*, [1965] 3 All E.R. 847. Before I enter upon a review of the authorities, it would be well to bear in mind the dictum of SELLERS, LJ. in the *Bearmans* case (at p. 388 *ibid*) to this effect:

".....the more I think of this matter the more I feel satisfied that whilst the cases can be looked at as a guide, it is desirable in every case that the words of the section should be looked at and interpreted in the light of the particular circumstances."

In 1941 the position of a tester in the employment of one of the litigants was considered when it was sought to put in his statement in an action where his employers were the plaintiffs. I refer to *Plomein Fuel Economiser Co. Ltd. v. National Marketing Co.*, [1941] 1 Ch. 248. The witness was employed as a tester of fuel economiser, his work being to carry out a test to ascertain the result achieved by the plaintiffs' fuel economiser in the case of each particular boiler sold. It was held that the object of the action being to prevent the plaintiffs' trade being damaged, the tester was a person interested. MORTON J. said (at p. 250 *ibid*):

"In my view, 'a person interested' within the meaning of this subsection must, in the context, mean a person interested in the result of the proceedings 'pending or anticipated'."

In *Barkaway v. South Wales Transport Co. Ltd.*, [1948] 2 All E. R. 460, the plaintiff's husband was killed as a result of an accident while travelling in an omnibus owned by the defendants. Owing to a burst tyre, the omnibus skidded across the road, mounted the pavement and fell down an embankment. The trial judge held that the defendants were guilty of negligence in their system of tyre maintenance, and gave judgment for the plaintiff. On appeal, it was sought to put in evidence the transcript of the evidence of the defendants' expert tyre fitter (who had since died) given in a previous action. It was held that he was an interested person in that his reputation as a tyre tester was involved, and apart from that, he was interested as an employee in his employers winning the case, and the transcript was rejected.

Again in *Evon v. Noble*, [1948] 2 All E. R. 987, it was held that a domestic servant who had been left in charge of a child by its mother was a person interested within the meaning of the Evidence Act, 1938, in that being in charge of the child, her reputation for care in minding the child was in issue. The child had been injured while playing in the yard and it was alleged that this was due to the negligence of a chemist leaving acid in a glass container in the yard. In the course of his judgment, BIRKETT, J., said (at p. 990 *ibid*) referring to the domestic servant:

"She was not financially interested. She may have had the interest of sympathy, but that does not affect me in my decision here. I think, however, that in the true sense of the words she was a person interested. She had been left in charge of the child. The child

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had come to injury, and her reputation for care in minding a child was in issue, just as Jenkins' (referring to the tyre tester in the *Barkaway case* reputation as a tyre tester was in issue."

These last three cases come nearest to Mr. Haynes' submission that Jailal's reputation being involved; he becomes an interested person, thereby rendering his statement inadmissible. In each of the cases, the witness was actually involved in the events which gave rise to the litigation, and was therefore personally interested in the result of the proceedings.

[See *Friend v. Wallman*, [1946] 1 All E. R. 237, per SOMERVELL, L. J., at p. 240]

This is not so in the instant case. I do not feel that the circumstances attendant upon Jailal's visit to the plaintiff's premises warrant a finding that he was personally interested in the litigation which he must have known was being contemplated. The authorities referred to up to the present seem to indicate that the witness must exhibit an interest which is more than that which can be described as a human interest. I will deal with the document itself, but I do not feel that I can leave the matter here without referring to a more recent authority.

I wish to refer to the *Bearmans case*, [1961] 1 All E. R. 384. In that case four shop-breakers overpowered a watchman at a shop and stole a sum of money and various goods. A few hours later, the watchman made a written statement to the police, describing what had occurred to him, and ten days later he made a similar statement to investigators employed by his employers, the shop-owners' insurers. Subsequently the shop-owners and the insurers commenced an action against police authority to recover compensation. The watchman died before the action came on for hearing, and an application was made to have his statement admitted in evidence under the Evidence Act, 1938. It is to be observed that in that action, as in the cases already referred to; the watchman was actually involved in the events out of which the action was conceived. The matter was dealt with at length by Master JACOB ( [1961] 1 All E. R. 395) who reviewed the authorities, and who came down on the side that the watchman was not a person personally interested in the result of the proceedings.

I think it is clearly established that the mere fact that the maker of the statement tendered is in the employment of a party to the action does not by itself make him a person interested in the proceedings [See *Kelleher v. T. Wall & Sons, Ltd.*, [1958] 2 All E. R. 687, and *Constantinou v. Frederick Hotels, Ltd.*, [1965] 3 All E. R. 847].

In the *Bearmans case* (supra) Master JACOB sought to categorise the type of person who can be described as a person interested in the result of the proceedings. These are:

- (1) where the maker of the statement has, or can properly be considered as having any financial or pecuniary interest, whether direct or indirect, or whether to be gained or lost, in the outcome of the proceedings;

- (2) when the result of the action may render him personally liable for the events being litigated.....because the judgment would tend to establish his liability;
- (3) where his skill, competence or conduct in relation to the events litigated in the action, and the result of the action would, or even might, reflect whether favourably or unfavourably, on him.

It has in effect been urged that Jailal would fall in the third category above.

The decision of Master JACOB was affirmed on appeal. DEVLIN, J., appeared to have had in mind the point made by Mr. Haynes to the effect that the court should have regard to the fact that the witness was not available for cross-examination when he said ( [1961] 1 All E. R. 392):

"The second point...is that the test which is applied under sub-s. (3) is the same test.. .that has to be applied whether the maker of the statement is or is not called as a witness in the proceedings...In fact the main object of the Act of 1938 is to admit contemporaneous documents that are made by a witness who is actually called. It is only by way of a proviso that s. 1 goes on to say that the condition that the maker of the statement shall be actually called need not be satisfied in certain circumstances. The test is the same in both cases. Perhaps that is a pity. I think that most judges would be much more careful about admitting a statement made by a witness who is not going to be called than they would be in admitting a document that is produced by a witness who is actually in the box and about which he can be cross-examined. But there it is—the test is the same;

And as Master JACOB had said in the same case ([1961] 1 All E.R. 402):

"The inability to cross-examine the maker of a statement tendered under s. 1 of the Evidence Act, 1938, does not, therefore, go to the question of admissibility but goes only to the question of weight."

Now I pass on to deal with the statement of Jailal itself. Mr. Haynes has urged that I should examine the statement, and from the very language used, I should come to the conclusion that Jailal was a person interested at the time when he made the statement.

I have examined the statement, as I am of the opinion that from a common sense point of view, a court should be entitled to look at the contents of the statement, as when extrinsic evidence fails to disclose what has been described as a pecuniary or other material interest, the views expressed by the maker of the statement might very well do so and would be relevant. I would agree that Jailal went beyond the scope of a survey if the purpose of his survey was to secure evidence to be used in subsequent litigation—as indeed it was. But his intemperance consisted of his personal opinion and advice to the defendants. These

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alone do not, in my judgment, make him a person financially or materially interested in the result of the litigation. The fact that the maker of a statement exhibits a bias towards one side in the same sense that most witnesses (even expert witnesses) would in respect of the side on whose behalf he is called is only normal behaviour, and would not in my judgment make him a person interested within the meaning of s. 90 of the Evidence Ordinance. And I cannot agree that Jailal was associated with the defendants' cause as was the case in *Kelleher v. T. Wall & Sons, Ltd.*, [1958] 3 W. L. R. 236, where, in an action arising out of injuries suffered by a charge-hand in the production department of a factory, it was sought to put in the statement of a person who had been the supervisor in the production department, but who had since died. BARRY, J., agreed with the statement made by WALLINGTON, J., in *The Estate of Heil*, [1948] p. 341, at p. 344:

"It follows that in every case the facts must be ascertained both as to the person whose statement it is sought to put in evidence and as to the character and subject-matter of the 'proceeding' and the relation of the person to the subject-matter of the proceeding, in order to decide the question of admissibility."

I will conclude this part of the judgment by holding that there is a sufficient compliance with the Ordinance to render the statement admissible. This, however, does not dispose of the question of its weight which will be considered with the other evidence in this matter.

The next question to be determined is the number of bags of padi and empty bags destroyed. There is nothing to contradict the plaintiff's evidence that on the night of the fire, there were stored in his bond 12,009 bags of padi, and 135,000 empty jute bags, even though he has deposed that his records of purchases were not destroyed, and he has failed to produce such records.

It is clear from the evidence of both Dr. Mootoo and Mr. Fung-A-Fatt, witnesses for the plaintiff (whose evidence I accept) that the fire occurred in that segment in which padi and bags were stored immediately south of the eastern main door, and was confined to that area only. According to Mr. Fung-A-Fatt 1,214 bags of padi were stored in that part, and immediately south of this padi were stored empty bags stacked to a height of about 20 to 25 feet, about the same distance east to west, and about 50 feet north to south; after the fire the height of the stack of padi had been reduced to about 5 feet, and that of the empty bags to about 5 feet, 6 inches; and there was loose padi and ash scattered about. Dr. Mootoo testified that the height of the padi and bags had been reduced from about 17' 4" to about 5' 9" as a result of the fire.

And to estimate the time the fire must have been burning, the bond was closed around 5.30 to 6 p.m. on the 9th March, 1963 and Dr. Mootoo was aroused from bed around 11.30 p.m. It took the greater part of an hour to bring the fire under control, and that it was not necessary for the Fire Brigade unit to be used for this purpose when it arrived at 11:42 p.m. The officer of the Fire Brigade was satisfied, after the fire had been put out by a bucket brigade which had been formed by Dr. Mootoo, and after examining the interior of the bond, that all danger

was past; but Sgt. Heeralall did not apparently share this view as he warned the plaintiff to post persons in the bond to watch for any further flare-ups. Indeed, the evidence of the plaintiff is that there was a second flare-up during the same night, but presumably no appreciable damage was done, and no further report was made to the police about this. Unfortunately, however, on the 13th, it was discovered that there was still fire among the empty bags, and these were taken to the drying floor of the mill, apparently to avoid a further spread of the fire.

All the witnesses who went to the scene of the fire on the 9th March for one reason or another—bar the plaintiff—point to the destruction of padi and empty bags, but far less than that claimed by the plaintiff himself.

The representative of the defendant company, one Deonarine, visited the scene on the morning of the 10th, and I accept his evidence that the plaintiff agreed that about 80 bags of padi and an equal number of empty bags had been destroyed and that on his second visit on the 13th the estimate was 1,000 empty bags. It seems to me that the evidence of the plaintiff as to his loss has been grossly exaggerated. And in this regard, I am not unmindful of the evidence of Mr. Ulric Trotz who carried out an experiment of burning a portion of a jute bag, and gave as his conclusion that a 31 oz. jute bag entirely reduced to ash would produce 1.24 ozs. of ash, thus losing 96% of its weight in the process. If I were to accept this witness's evidence,—and I do—then according to my calculations, if 13,500 empty bags had been completely reduced to ash, this should have produced about 3 3/4 tons of ash; but were allowance to be made for several bags not having been completely burnt, there still would be a considerable volume of ash and debris. And no witness has testified to seeing such a great amount of ash and debris.

I am inclined to the view that the total destruction was as given by the witness Deonarine—that is to say, approximately 80 bags of padi and about 1,080 empty bags, but I am quite prepared to hold, having regard to the letter (Ex.G.12) written by the defendant's solicitors to the plaintiff's solicitor, that the number of bags destroyed was 2,200. It will be seen that I have placed no reliance on the statement of Mr. Jailal, not because I find the writer of the statement unreliable, but because it was based on a visit some 7 days after the fire. I prefer to rely on the evidence of Deonarine who visited on the morning after the fire, and who himself having carried out a check with the plaintiff preparatory to the issue of the policy, would, in my opinion, have been in a better position to assess the loss suffered.

Now to the terms of the policy itself. The defendants rely on condition 14 of the policy of insurance, and argue that as a result of that condition the whole policy is void, and the plaintiff may not recover, even for his actual loss having regard to his grossly exaggerated claim. The plaintiff submits that the defendants purported to cancel the policy under condition 11; and if that is so, they may not now plead condition 14; that the plaintiff is entitled to recover his actual loss, even though his claim may exceed that loss. To appreciate these arguments, it would be useful to set out *in extenso* the two conditions of the policy. Condition 11 provides as follows:

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"The Directors shall be at liberty for reasons which may appear to them to be in the interest of the Company, to immediately determine their contract under any Policy of insurance by giving to the holder thereof or leaving for him at his address according to the Company's books or records a notice in writing to that effect, and thereupon all liability of the Company under or in respect of the said Policy of Insurance shall immediately cease and determine." And condition 14 is in these words:

"If the claim be in any respect fraudulent, or if there shall appear any fraud or any false statement in such account, or in any of such books, vouchers or other evidence, or if such affidavit or statutory declaration or other such legal form shall contain any untrue statement, or if it shall appear that the fire shall have happened by the procurement or wilful act or by the means or connivance of the Insured, then this Policy shall be absolutely void..."

The fire occurred on the night of March 9, 1963. On March 12, the plaintiff lodged a claim in which he sought to be compensated for the loss of 108,000 empty rice bags and 991 bags of rice; and on March 30, he amended this claim to 135,812 empty bags, and 1,164 bags of padi. It is admitted that on the night of the fire the policy was in force.

Much correspondence passed between the legal advisers to the parties, and between the parties themselves, as the defendants appeared not to have been satisfied of the accuracy of the plaintiff's statement of loss. On August 30, 1963, the defendants' secretary wrote a letter to the plaintiff in the following terms:

"Dear Sir,

*Your Declaration Policy on Stocks, Bags, etc.*

I have been instructed by my Directors to inform you that you have not complied with the conditions, under which Policy No. 58575 was issued in that no declarations have been made by you since the 28th February, 1963. Under the circumstances and in view of your pending claim, this Policy has been written off the books of the Company as from today's date and I enclose herewith our cheque for \$740, being 11/12ths of the Annual Premium of \$1,110=\$92.50, deducted from the provisional premium paid, \$832.50=\$740.

Kindly sign the attached receipt and return."

Monthly declarations were required to be made by the plaintiff by reason of the following additional condition which was attached to the policy:

"The Insured agrees to declare to The Hand-in-Hand Mutual Fire Insurance Company, Ltd., in writing the value of his stocks (other than retail) less any amount insured by policies other than declaration policies, on the following basis, namely—the value at risk on the last day of the month and to make such declaration within

thirty days of the last day of each calendar month, such declaration to be signed by the insured or by a responsible person authorised to sign on his behalf.

\* \* \* \* \*

In the event of a declaration not being made within the thirty days mentioned above, then the Insured shall be deemed to have declared the sum insured hereby as the value at risk."

The letter of August 30, 1963, does not specifically state under which condition the policy was being written off the books of the company, but as the defendants may only, as far as can be ascertained, take such steps under either condition 11 or condition 14, it must be that they were purporting to act under the former. Indeed, in their defence, the defendants have alleged that the plaintiff had failed to make declarations of value for the months of March to July, 1963, inclusive, as he was required to do under the conditions of the said policy, and as he was requested to do.

The argument for the plaintiff is that as the policy of insurance was determined under condition 11, the defendants may not now rely on the terms of condition 14 to disclaim liability in respect of loss which had occurred during the life of the policy. It is my view that condition 14 refers to events arising after loss has been incurred, and during the life of the policy, while condition 11 must of a necessity refer to the living policy and can be invoked at any time. It should be borne in mind that the present plaintiff made his claim during the life of the policy.

The first question is whether the repudiation of the contract of insurance by the letter of August 30, 1963, has the effect of putting an end to the contract, and also of rendering condition 14 inoperative.

In *Jureidini v. National British & Irish Millers Ins. Co. Ltd.*, [1915] A. C. 1915, there was a policy of insurance in which had been inserted an arbitration clause as to the amount of claim. This was a condition precedent to an action. A claim for indemnity for the loss of goods by fire was made, but the insurance company repudiated the claim *in toto* on the ground of fraud and arson. It was held by the House of Lords, reversing the Court of Appeal, that the repudiation of the claim on a ground which went to the root of the contract precluded the company from pleading the arbitration clause as a bar to an action to enforce the claim, Viscount HALDANE, L.C., expressing the view (at p. 505 *ibid*) that "when there is a repudiation which goes to the substance of the whole contract I do not see how the person setting up that repudiation can be entitled to insist on a subordinate term of the contract still being enforced."

In the instant case, there has been repudiation but not at the outset, and not based upon charges of fraud and arson; and I am of the opinion that even though the policy of insurance was repudiated on August 30, 1963, this fact does not preclude the defendants from relying on condition 14, as it is apparent that a claim can be made even after the contract has been terminated, but, of course, such a claim must be based on an event occurring before the termination of the contract.

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The dictum of Lord HALDANE in the *Jureidini* case referred to above was criticised in the House of Lords by Lord WRIGHT in *Heyman v. Darwins, Ltd.*, [1942] A.C. 357. Lord WRIGHT said (at p. 386):

"It may be observed that this observation was solely that of Lord HALDANE and was not concurred in by his colleagues and was not necessary to the *ratio decidendi* adopted by them. It may be simply another way of stating that the company by their conduct had waived the condition and disentitled them to rely on its non-fulfilment."

In the case of *Heyman v. Darwins, Ltd.* (*supra*) an arbitration clause in a contract provided that 'if any dispute shall arise between the parties hereto in respect of this agreement or any of the provisions herein contained or anything arising hereout the same shall be referred to arbitration in accordance with the provisions of the Arbitration Act, 1889.' A dispute having arisen between the parties, the appellants commenced an action against the respondents claiming (a) a declaration that the respondents had 'repudiated and/or evinced an intention not to perform' the contract, and (b) damages. The respondents, who admitted the existence of the contract and denied that they had repudiated it, applied to have the action stayed in order that it might be dealt with under the arbitration clause. It was held that the dispute fell within the terms of the arbitration clause and that the action ought to be stayed. In the course of his judgment; Lord MACMILLAN said (at p. 374 *ibid*):

"I am, accordingly, of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract."

Similarly, in the instant case, it can be said, after the defendants terminated the contract under condition 11—as they are entitled to do—that the main purpose of the contract, *viz.*, the insurance against fire of the plaintiff's stock of padi and bags, no longer existed, but that any liability which might have arisen prior to the termination is not destroyed, unless it is so provided for either in the terms of the contract itself, or by any rule of law.

I shall commence my examination of the effect of condition 14 (if any) upon the claim of the plaintiff, by reciting a statement of the law on insurance made by Viscount DUNEDIN in *Glicksman v. Lanes. & Gen. Assce. Co.*, [1926] All E. R. 161, at p. 163:

"A contract of insurance is denominated a contract *uberrimae fidei*. It is possible for persons to stipulate that answers to certain

questions shall be the basis of the insurance, and if that is done then there is no question as to materiality left, because the persons have contracted that there should be materiality in those questions; but, quite apart from that, and alongside of that, there is the duty of no concealment of any consideration which would affect the mind of the ordinary prudent man in accepting the risk."

That case was concerned with misrepresentation on a proposal for insurance, the policy for which declared that such misrepresentation would render the policy absolutely void, and it was held that the policy was void. I cannot see why the law should be different with respect to claims for compensation in which misrepresentation is made. Indeed in *Britton v. The Royal Ins., Co.*, 176 E.R. 843, it was held that wilful misrepresentation of the value of the property destroyed would under the usual condition against fraudulent claims defeat and vitiate the whole claim. In the course of his summing up to the jury, WILLS, J., said (at p. 844 *ibid*):

"The contract of insurance is one of perfect good faith on both sides, and it is most important that such good faith should be maintained.....It would be most dangerous to permit parties to practise such frauds, and then notwithstanding their falsehood and fraud, to recover the real value of the goods consumed. And if there is wilful falsehood and fraud in the claim, the insured forfeits all claims under the policy."

Mr. Haynes has advanced the argument that the statement referred to above is not good law, and that *Britton's* case is not an authority binding on this court. That may very well be so, but one must treat such a dictum with respect. WILLS, J., made this statement in 1866, and in 1870 in *Chapman v. Pole*, 22 L.T.R. (N.S.) 306, COCKBURN, C.J., expressed similar views, when he said that if a plaintiff knowingly preferred a claim which he knew to be false and unjust, then he is entitled to recover nothing. Again in *Norton v. Royal Fire and Life Assce. Co.* (1884—85), 1 T.L.R. 460, in his remarks to the jury the trial judge said:

"I daresay there is hardly a case of similar insurance in which a larger value is not put on the property than it is worth and than it is known to be worth. No doubt it is wrong, very wrong, and in this case no one can say it was right to 'put it on' in order that it might be taken off and that the party might ultimately get what he had really lost. That is not right, but whether it is fraudulent in the sense of intending to defraud may appear to you to deserve consideration. It is one thing to do it with intent to get all out of the company; no doubt it is wrong to put forward an exaggerated claim; but it is a question whether it is a fraudulent claim in the sense of endeavouring to get and knowingly get far beyond the value. That would be a distinct fraud."

The jury found for the plaintiff and upon appeal Lord COLERIDGE said that no doubt the plaintiff had first put forward an exaggerated

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claim, but it had been reduced before the action for the amount recovered; and in the circumstances he could not say that there had been any misdirection.

In my opinion the *Norton* case clearly points to a claim being a fraudulent one where the claimant makes a claim exaggerated out of all proportion to what was actually lost; and this is a question of fact.

The case before me is not in the same category as *Ewer v. National Employers' Mutual Gen. Assce. Ltd.*, [1937] 2 All E.R. 193, where the plaintiff's claim for the catalogued price of new goods to replace those lost in a fire was held not to be fraudulent, but merely a bargaining figure.

I do not read the expression "absolutely void" in condition 14 of the policy as being tautologous. The word "absolutely" in my judgment means that if a claim be in any respect fraudulent then the policy shall be void in every respect. This to my mind would embrace claims made upon the insurers under the policy even after the policy had been terminated. In my view, therefore, the defendants in this case can validly rely upon the provisions of condition 14 to resist the plaintiff's claim, and having regard to the trend of the decisions to which I have referred and being of the opinion that the plaintiff's claim is a fraudulent one in the sense that it has been exaggerated, and bears no relation to the true loss suffered by him, I must dismiss his claim with costs to the defendants. Certified fit for two counsels.

*Judgment for the defendants.*

# GUYANA LAW REPORTS

HEMWANTIE SINGH v. DEOKIE

[High Court (Bollers, J.) November 9, 10, 12, 18, 19, 23, 24, December 3, 1965, June 6, 1966].

*Sale of land—Mutual mistake—Unilateral mistake—Rectification and specific performance.*

The plaintiff's attorney orally agreed to sell the defendant eleven acres of land, part of which the defendant was already occupying under lease. Subsequently and without any authority from the defendant her husband represented to the plaintiff's attorney that the defendant wished to purchase instead a different piece of land known as lot 'N'. The parties then entered into a written agreement of sale relating to lot 'N', the defendant, however, believing that the agreement related to the subject matter of the oral agreement. In a claim and counterclaim on the written agreement,

**Held:** (i) the written agreement was made under a mutual mistake, alternatively under a unilateral mistake on the part of the defendant;

(ii) the written agreement would be rectified to reflect the oral agreement and would be specifically enforced in favour of the defendant.

*Judgment for the defendant on claim and counter-claim.*

[**Editorial Note:** Reversed on appeal to the Court of Appeal in 1968.]

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

*Dr. F. W. H. Ramsahoye* for the defendant.

BOLLERS, J., In this action the plaintiff, who is represented by her husband and duly constituted attorney Ramnarine Singh, in the amended statement of claim pleads that on the 7th day of June, 1962, she entered into a written agreement with the defendant whereby she agreed to sell and the defendant agreed to purchase for the sum of \$4,300 the following property described as:

"A piece or parcel of land situate at Zorg-en-Vliet, Essequibo, comprising eleven beds of riceland and sand-reefs and measuring approximately eleven acres situate immediately east of the eleven beds bought and occupied by Chunilall, east of the cross-navigation canal running across the said Pln. Zorg-en-Vliet, north to south, on the Essequibo Coast, part of the frontlands of Pln. Annandale, Essequibo."

On the signing of the agreement in writing the defendant paid to the plaintiff the sum of \$400 as a deposit on the purchase price and agreed to pay the balance of the purchase price in the following manner which was laid down as a term of the contract, that is, the sum of \$1,000 on the passing of the transport which was to be advertised and passed in December 1962, and the further balance to be secured

on a first mortgage on the said property by the purchaser in favour of the vendor payable in three years with interest at the rate of 12 *per centum per annum*

In para. 6 of the agreement it was a specific term of the contract that as soon as transport was ready for passing the purchaser agreed to accept transport, failing which the agreement would come to an end and have no effect, and the vendor would forfeit the sum paid so far as a deposit on the purchase price as damages, and would be at liberty to retake possession of the property. It may be convenient here to insert that it was a specific term of the agreement that transport and surveying fees were to be paid equally by each party to the agreement and possession of the property described was to be given on the signing of the agreement.

Paragraphs 9 and 10 of the agreement specifically provided, respectively, that should there be any hitch in the property and the vendor be unable to pass title to the purchaser, the agreement would come to an end, and all deposits would be returned to the purchaser; and should the purchaser fail to comply with any of the terms of the agreement, an end should be put to the agreement and any amount of money paid so far should be retained by the vendor as damages.

It is the averment of the plaintiff that possession of the property was given by the vendor to the purchaser on the signing of the agreement, and the defendant without authority then proceeded to occupy a further area of four acres of land which was the property of the vendor (plaintiff).

It is the allegation of the plaintiff that in accordance with the agreement, of the 7th June, 1962, the plaintiff was at all material times ready, willing and able to perform his part of the agreement, and this fact was communicated to the defendant, but when the plaintiff called upon the defendant to carry out her part of the agreement under its terms the defendant neglected and/or refused to do so. The plaintiff made several requests to the defendant to perform the contract and caused two letters to be written by her legal representatives to the defendant dated the 20th April, 1963, and the 28th September, 1963, to which she received no reply, the defendant continuing to be in default in her performance of the contract.

It is the further allegation of the plaintiff that since the signing of the agreement the defendant had cultivated crops of paddy on 12 1/2 acres of land which she had reaped and disposed of from time to time to her own benefit, and as a result the plaintiff had been deprived of the use and benefit of 15 acres of land from which she could have earned at least \$1,500 per annum. In these circumstances the plaintiff in her pleadings contends that the defendant had wilfully defaulted and had been guilty of breach of the contract, despite repeated requests made on her by the plaintiff's attorney, whereas the plaintiff at all material times was ready, willing and able to perform the contract, and more particularly after the mortgage on the said plantation held by the British Guiana Credit

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Corporation had been paid off by the plaintiff in October 1963, and the defendant still failed and neglected to perform her part of the contract.

The plaintiff therefore claims:

- (a) specific performance of the contract of sale and purchase dated the 7th June, 1962;
- (b) alternatively, damages for breach of contract;
- (c) a declaration that under the terms of the contract the defendant is not entitled to a conveyance or to possession of the tract of land consisting approximately of eleven acres of land from west to east, forming part of Block "N", as shown on a plan of Pln. Zorgen-Vliet on the west sea coast of the county of Essequibo, by S. S. R. Insanally, sworn land, surveyor, dated 5th July, 1962, and commencing immediately west of the lands forming Block "M" in the said plan.
- (d) possession of the aforesaid tract of land wrongfully occupied by the defendant.

In the alternative, the plaintiff claims:

- (a) rescission of the contract;
- (b) forfeiture of the deposit of \$400;
- (c) possession of the tract of land referred to in the agreement along with the four acres of land occupied by the defendant.
- (d) the sum of \$4,500 for use and occupation of the tract of land occupied by the defendant for the whole tract of land from date of the signing of the agreement.

To these allegations the defendant replied with an amended defence and counter-claim in which she denies the allegations contained in the plaintiff's statement of claim but admits the signing of the agreement and the deposit of \$400 and the terms of the contract. The defendant denies that she had occupied a further four acres of land and claims that the plaintiff had failed, refused and /or neglected to deliver up possession of the property, as agreed, and still fails to do so and she denies that plaintiff even called on her to comply with the necessary steps for passing transport and alleges that it was the plaintiff who neglected and/or refused to comply. The defendant admits receiving the letters addressed to her but denies that the plaintiff ever made several requests of her to carry out the terms of the agreement. On the other hand, the defendant maintains that she approached the plaintiff's attorney and requested that transport be advertised but he demanded that the defendant pay to him the sum of \$1,000 before transport was passed, which the defendant refused to do.

It is the case for the defendant that it was the plaintiff who was in breach of the agreement and that after the plaintiff had sought in

April, 1963, and September, 1963, to terminate the contract she, the plaintiff, never expressed her willingness to carry out the agreement and that it was the plaintiff's attorney who, after the letter of the 28th September, 1963, again asked the defendant to pay the sum of \$1,000 before transport was passed, which request was refused by her. The defendant's main contention in her defence is that the area which she agreed to purchase was seen and agreed upon by both the plaintiff's attorney and the defendant at the time of the making of the agreement and comprised eleven acres from the boundary of Block "M" cultivated by one Bispat and now shown on a plan of Plantation Zorg-en-Vliet on the west sea coast in the county of Essequibo by S. S. R. Insanally, sworn land surveyor, dated the 5th day of July, 1962, and deposited in the Deeds Registry on the 6th day of March, 1963, and extending westwards.

It is her further contention that there was an error in the description of the land agreed to be sold and purchased in the agreement of 7th June, 1962, the description failing to state or describe accurately the eleven acres which the defendant agreed to purchase, to wit, an area comprising seven and one-half acres of ricelands already cultivated and a further three and one-half acres of undeveloped land, making a total of eleven acres.

As a result in her counter-claim the defendant claims:

- (a) Rectification of the agreement of the 7th June, 1962, to enable the eleven acres of land agreed to be purchased by the defendant from the plaintiff and commencing from the western boundary of Block "M" on the said plan by Insanally and extending westwards to be properly described therein;
- (b) specific performance of the agreement as amended;
- (c) an order compelling the plaintiff to execute a proper survey of the eleven acres of land actually agreed to be purchased by the defendant from the plaintiff;
- (d) damages in the sum of \$5,000 for breach of contract;
- (e) costs.

In 1944 Pln. Zorg-en-Vliet was transported to Ramnarine, the plaintiff's attorney, and in 1960 Ramnarine transported to Pallo Narine and others, subject to a first mortgage in favour of the British Guiana Credit Corporation, and a second mortgage in favour of himself. In 1961 Ramnarine foreclosed the second mortgage and purchased the property at execution sale. Transport was taken in the name of his wife (the plaintiff) subject to the mortgage in favour of the British Guiana Credit Corporation.

At this time there were many persons occupying various portions of the estate, some of them holding under tenancies from the previous owners of the plantation. At that time the defendant

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Deokie was in occupation of 7 1/2 acres of land which area of land commenced immediately west of an area of land occupied by one Bispat. It appears that this area of land was being cultivated by her nephews, Bagoutie and Ramnarine, who had purchased the tenancy in the land from one Danmattie with a view to obtaining the benefit of the Rice Farmers (Security of Tenure) Ordinance, No. 31 of 1956.

Sometime before June, 1962, the defendant conceived the idea of purchasing the 7 1/2 acres of cultivated land for her nephews, who were under the fear of dispossession by the new owner and landlord, and she spoke to the plaintiff's attorney about the matter and it may be that she did so in the presence of her husband Balmakund. The plaintiff's attorney would only agree to sell her the 7 1/2 acres of cultivated land provided she also purchased the 3 1/2 acres of abandoned or bush land which included a sand-reef. A bargain was then struck so that the plaintiff would sell and the defendant would purchase the area of land consisting of 11 beds of approximately 11 acres for the sum of \$4,300 at the rate of \$400 an acre there being a reduction of \$100 on the total sum because of the bush land. This area of land, it should be pointed out, was immediately west of the land held by one Bispat.

The oral agreement made between the plaintiff's attorney and the defendant was reduced into writing on 7th June, 1962, in the rum-shop of the plaintiff's attorney at Queenstown, Essequibo. The agreement was drafted by the plaintiff's attorney and signed by both parties to the agreement in the presence of Narine Dat and Ramkarran who signed as witnesses, Balmakund remaining outside of the premises. The terms of the agreement were not read out to the defendant. The defendant then entered into possession of the further 3 1/2 acres of abandoned land.

It was towards the end of June, 1962, that the sworn land surveyor Sheik Insanally carried out the survey of the whole of Pln. Zorg-en-Vliet commencing from the eastern extremity from the public road and going westwards to the western extremity of the plantation, and finally drew up and deposited the plan in the Deeds Registry on the 6th March, 1963. The plan showed that plantation had been subdivided into blocks, that is, lots "A" to "Z", and that one Chunilall was occupying Block "P" and the defendant Deokie was occupying virtually the whole of Block "N". The defendant's husband Balmakund had, however, after the oral agreement was made but before the agreement in writing was signed, given the plaintiff's attorney the impression that either he or the defendant wanted to purchase the whole field or block of land between two cross trenches which subsequently turned out to be blocks "O" and "N", and when the survey was being carried out, indicated that he desired this whole field in order to cultivate it partly with rice and partly with coconuts. Block "N" would be the land suitable for the cultivation of rice and Block "O" would be suitable for the growing of coconuts.

This is further evidenced by two letters of the 9th September, 1962, and the 23rd January, 1963, respectively, addressed by the

plaintiff's attorney to Balmakund. Balmakund was, however, acting on his own initiative without the knowledge of the defendant, and was certainly not acting as an authorised agent of the defendant. There is no question here of Balmakund acting as the agent of the defendant, either expressly or by implication, or even by a "holding-out", as there is no evidence of it, and the circumstances indicate that when the agreement was signed on the 7th June, 1962, he was conspicuous by his absence from the spot where the agreement was signed. It may very well be that Balmakund conceived the idea of the defendant purchasing the whole field which subsequently became Blocks "O" and "N", so that he could obtain a piece of it for himself, but he had no authority to purchase this area of land on behalf of the defendant. When, therefore, the parties signed the contract of the 7th June, 1962, the plaintiff's attorney was under the impression that he was selling an area of land, that is, 11 beds approximately 11 acres, situated immediately east of the land occupied by Chunilall (later Block "P"), and indeed the agreement so stated, but the defendant believed that "she was purchasing the area of land occupied by her nephews and herself with an adjoining 3 1/2 acres of abandoned land and which was situated immediately west of the area of land occupied by Bispat.

On these premises I am unable to say with any degree of certainty that the plaintiff's attorney at the time of the signing of the agreement knew that under the contract in writing the defendant was under the impression that she was not purchasing the area of land which she occupied, but was purchasing an area of land some distance away from it, in which case I cannot say that the contract was vitiated by lack of agreement. *Vide Hartog v. Colin & Shields*, [1939] 3 All E.R. 566.

There was, however, a fundamental mistake made, common to both parties to the original oral agreement appearing in the written contract which expressed their respective intentions. This is clearly shown by the circumstance that the defendant would have wanted to purchase the land she was then occupying and the logical conclusion of a survey which was carried out from an easterly direction going westward and not in the opposite direction, as one might have expected from the description of the parcel of land in the written contract. A survey revealed that Block "N" was 12.1 acres which was approximately 11 acres, which was the area of land stated in the agreement. It is true that the words "immediately east of the land occupied by Chunilall" appear in the agreement., and it is noticeable that Bispat's name does not appear therein, but one must not overlook the fact that the defendant was a simple peasant unable to read or write, and her witnesses little better equipped, whereas the plaintiff's attorney was a businessman and law student.

In September, 1962, the plaintiff's attorney wrote the defendant's husband telling him to meet him on the Essequibo Coast and to pay off the surveying fees and to be ready to pass his transport. In December 1962 the plaintiff's attorney approached the defendant and informed her that in accordance with the agreement the time for the passing of the transport had arrived and he was ready and willing to pass transport to her, and called upon her to swear to her

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affidavit of purchase so that the transport could be advertised, and at the same time demanded from her payment of the sum of \$1,000 in accordance with the agreement. The premise on which the plaintiff's attorney made the demand for the sum of \$1,000 from the defendant was, however, false because under para 2 (a) of the agreement the sum of \$1,000 was not payable by the defendant until the actual passing of the transport. At the time of this demand it has also transpired that the plaintiff was in no position to pass transport of that property as the mortgage on the property held by the British Guiana Credit Corporation had not been paid off and cancelled.

The excuse made by the plaintiff's attorney that the relevant portion of the mortgage would have been paid off and transport passed with the consent of the mortgagees is untenable and cannot be accepted as there was no evidence from the mortgagees to support it and the history of other areas of the plantation sold to other persons demonstrates that transport was not passed to these purchasers for one reason or another, which included the reason that the mortgage had not been paid off and they too were unable to obtain mortgages on the land purchased by them from the British Guiana Credit Corporation or the plaintiff herself. The plaintiff, then, in December, 1962, was not in a position to convey the land purchased by the defendant to her and was not able to do so until October, 1963, when the mortgage was finally paid off and cancelled.

In the meanwhile, the plaintiff's attorney on occasions kept on insisting in his demand for payment of \$1,000 from the defendant because he needed the money to assist him in paying the surveyor's fees and to pay off part of the mortgage, as a result of which he hoped that the British Guiana Credit Corporation would give him the necessary permission. It follows then that the plaintiff in December, 1962, right up to October, 1963, when the mortgage was cancelled, was in breach of the agreement of the 7th June, 1962. The defendant also was in breach of the agreement because she too had failed to put herself in order to advertise and to accept transport from the vendor in December, 1962, and failed to pay her portion of the transport and surveyor's fees.

On the 23rd January, 1963, the plaintiff's attorney again wrote the defendant's husband reminding him that they had made an agreement of sale on 7th June, 1962, for the purchase of 11 beds of approximately 11 acres of riceland for the sum of \$4,300, and pointing out to him that he had failed to carry out the second part of the agreement and directing his attention to para. 10 of the agreement which stated that the agreement should come to an end if the purchaser failed to comply with any term of the agreement. The letter, however asked the defendant's husband to remedy the defect and to carry on in a friendly spirit. There was no reply to this letter, and on the 20th April, 1963, the plaintiff's attorney, through his solicitor, addressed another letter to the defendant in which he alleged that the defendant had failed to comply with the following terms of the agreement set out in paras 4, 9 and 10, and at the conclusion of the letter stated

in unequivocal terms that the defendant should regard the agreement as being null and void and required to give up possession of the 11 beds of land as described in the agreement.

It is clear then that from April 1963 the plaintiff regarded the agreement of 7th June, 19'62, as having been terminated and communicated this intention to the defendant. After this letter nothing more was done by the parties, and the matter was left in abeyance until the end of April 1964 when this writ was filed. The defendant, however, remained in occupation of that area of land comprising 11 acres and immediately west of Bispat's land.

On the 29th May, 19'65, the plaintiff advertised transport of the whole of Pln. Zorg-en-Vliet, save and except Blocks "E", "G", "P", "Q", "R", "S", "T", "U", "V", "W", "X", "Y" and "Z", on a plan by S. S. R. Insanally, sworn land surveyor, to and in favour of her husband, that is, her attorney Ramnarine Singh. This transport was then opposed by Ramnarine Singh's brother, one M. E. H. Salisbury, who alleged that the plaintiff had sold the plantation to him.

It should be observed that I have rejected the evidence of the plaintiff's attorney that Balmakund negotiated the purchase of the area of land on behalf of his reputed wife, the defendant, and that he acted as agent for the defendant, and I have also not accepted the evidence that the defendant ever showed any desire to purchase any land other than that which she occupied, save and except, of course, the 3 1/2 acres of abandoned land which adjoined the cultivated land which she was forced to take in order for a bargain to be struck. I cannot also accept the evidence of the plaintiff's attorney that he would necessarily have been given the consent of the mortgagees to pass transport of the various blocks of land on Insanally's plan by merely paying off portions of the mortgage from time to time.

As I have already stated, there was no such evidence forthcoming from the British Guiana Credit Corporation. It is clear to me too that the defendant never occupied 15 acres of land as the plaintiff's attorney, knowing that fact would never have permitted her to purchase merely 11 acres of land and occupy another 4 acres without authority. The evidence given by the defendant which appeared to me to be unreliable, was her statement that she did not know who read the agreement and did not show the agreement to any person until she got home. So too her testimony concerning a visit to the home of the plaintiff's attorney in Georgetown calling upon him to advertise transport of the property to her appears to be doubtful. The evidence given by Narine Dat that when he signed the agreement he did not read it also appears to be hardly credible.

On these findings the plaintiff would not be entitled to a decree of specific performance of the contract in writing of 7th June, 1962, as it stands, or even on a rectification, for he who seeks equity must do equity, and therefore specific performance would ordinarily be

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refused a plaintiff who breaks his own obligation under a contract. *Measures Bro. Ltd. v. Measures*, [1910] 2 Ch. 248; and *Australian Hardwoods Ltd. v. Commissioner for Railways*, [1961] 1 W.L.R. 425. The mere breach of the contract by the plaintiff in December, 1962, by failing to perform her part of the contract when she was not in a position to convey to the defendant would not, however, in my opinion be sufficient to debar her from the remedy of specific performance, for in equity, unlike the position at law, time was never of the essence of the contract except in three cases where the special circumstances might make the breach of terms of a contract the essence of the contract.

The circumstances of this case, it is true, do not fall within the exceptions and certainly in the letters by the plaintiff's attorney addressed to the defendant's husband and the defendant herself, the plaintiff did not give notice to the defendant that time should be treated as being the essence of the contract. See *Stickney v. Keeble*, [1915] A.C. 386. But in the letter of 20th April, 1963, he communicated to the defendant that in view of her non-compliance with certain terms of the contract he regarded the agreement as null and void and at an end. In this situation I could hardly exercise the discretion of the court in favour of the plaintiff in awarding a decree of specific performance when, through her attorney, she made it clear that it was her intention to terminate the contract.

The plaintiff's claim for damages must also fail for reasons given later on in this judgment, for even though she has been able to show breach of the contract by the defendant, I have found that she too was in breach of the contract in that she was not in a position to convey the property until October, 1963, almost one year after the date agreed upon in the contract.

I turn now to consider on my findings whether the defendant on her counter-claim would be entitled to a rectification of the contract to include the eleven acres of land now occupied by her and immediately west of Bispat's land, and to a decree of specific performance of the contract so rectified.

It is well settled that the court does not rectify contracts; it merely reforms the written expression of agreement to coincide with the true intent of the makers thereof. The whole basis of the equitable jurisdiction in respect of rectification is that there was a true agreement, but the written document does not properly represent it; and rectification will only be granted where the mistake is mutual. *Rooke v. Lord Kensington* (1856), 2 K. & J. 753. In *Frederick E. Rose (London) Ltd. v. William H. Pim, Jnr. & Co. Ltd.*, [1953] 2 Q B. 450, at p. 461, DENNING, L. J., as he then was, said:

"Rectification is concerned with contracts and documents, not with intentions. In order to get rectification it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down

wrongly; and in this regard in order to ascertain the terms of their contract, you do not look into the inner minds of the parties—into their intentions—any more than you do in the formation of any other contract. You look at their outward acts, that is, at what they said and wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document; but nothing less will suffice."

When these principles are applied to my findings, it is evident that there was a true agreement reached between the parties some time before the 7th June, 1962, that what was to be sold and purchased was 11 beds or acres of land *west* of the land occupied by Bispat and there was consensus *ad idem* between the parties on the subject-matter of the agreement. When, however, the agreement was signed the position had changed owing to the subsequent intervention of Balmakund who, without the necessary authority, misled the plaintiff's attorney into thinking that what the defendant was seeking to purchase was an area of land east of the land occupied by Chunilall, whereas in truth and in fact the defendant intended to purchase what she had originally agreed upon, and that was an area of land west of the land occupied by Bispat. In such circumstances, in keeping with the dictum of DENNING, L. J. as expressed above, she would be entitled to a rectification of the contract accordingly.

If I am wrong in my finding that there was a mutual mistake in this case, then it may be that there was a unilateral mistake on the part of the defendant and in such cases there is authority for saying that the court will put the defendant to his election of submitting to rectification or of having the entire agreement rescinded.

See *Garrard v. Frankel* (1862), 31 L.J. Ch. 604, *Harris v. Pepperell* (1867), L.R. 5 Eq. 1, and *Paget v. Marshall* (1884), 28 Ch.D. 255. These decisions have been criticised in a statement that was plainly *obiter* by FARWELL, J., in *May v. Platt*, [1900] 1 Ch. 616, who felt that though they would have been correct decisions on fraud, they were incorrect as decisions on mistake, on the ground that the court has no jurisdiction to order rescission, with an option to the defendant to accept rectification, in cases of unilateral mistake, unless the conduct of the defendant discloses fraud or something akin to fraud on his part. This objection was based on the rule in *Woollam v. Hearn* (1802), 7 Ves. 211, that is, that though a defendant can adduce parol evidence for the purpose of resisting specific performance, yet a plaintiff cannot adduce it for the purpose of rectifying a written contract and obtaining specific performance of it as rectified. The rule in *Woollam v. Hearn*, was, however, finally disposed of by Lord BIRKENHEAD in *U.S.A. v. Motor Trucks Ltd.*, [1924] A.C. 196. Lord BIRKENHEAD was of the opinion that the difficulty which was technical had been removed by the provisions of s. 24 of the Judicature Act, 1873, as a result of

## HEMWANTIE SINGH v. DEOKIE

which the court could now entertain an action in which combined relief would be given simultaneously for the reformation of a contract, and for the specific performance of the reformed contract. In this situation then, the plaintiff, who is the defendant on the counterclaim, would be entitled to have cancellation of the contract of the 7th June, 1962, or submit to its rectification.

In considering whether the defendant is entitled to a decree of specific performance of the contract so rectified, I do not overlook the fact that she has been found to have been in breach of the contract in that she failed to put herself in order to accept transport in December, 1962. She also failed to pay her portion of the cost of the survey and refused and/or neglected to swear to her affidavit of purchase within the time stipulated for the passing of the transport, but, as I have already pointed out, equity never regarded time as of the essence of the contract, and the defendant's case also does not fall within the exceptions.

In *Stickney v. Keeble*, [1915] A.C 386, at p. 415, LORD PARKER OF WADDINGTON, after pointing out that at law, time had always been regarded as of the essence of the contract, stated:

"In such cases, however, equity having a concurrent jurisdiction did not look upon the stipulation as to time in precisely the same light. Where it could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure. This is really all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when, for example, the parties, for reasons best known to themselves, have stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a nonessential term of the contract."

Applying my mind to the principles set out in the dictum of Lord PARKER, I can find no good reason why the defendant in this case in the exercise of the court's discretion should be denied a decree of specific performance in her favour. There can be no injustice to the plaintiff, who is herself asking for a decree of specific performance, and there could be no hardship done to her as she will obtain the full benefits under the contract. On the other hand, the defendant, who would suffer hardship if denied a decree, has partly performed the contract being in possession of the land having paid a deposit on the purchase price, and in this situation the common law remedy of damages would be inadequate, as she has merely failed to perform her part of the contract in the time mentioned in the agreement, but is now ready to do so.

As explained by Lord ERSKINE in *Hearne v. Tenant* (1807), 13Ves. 287, at p. 289:

"The principle upon which the court acts is now upon all the authorities brought to the true standard; that, though the party has not a title in law, as he has not complied with the terms, so as to entitle him to an action, as to the time, for instance, yet, if the time, though introduced, as some time must be fixed, where something is to be done on one side, as a consideration for something to be done on the other, is not the essence of the contract, a material object, to which they looked in the first conception of it, even though the lapse of time has not arisen from accident, a court of equity will compel the execution of the contract; upon this ground, that the one party is ready to perform, and the other may have a performance, in substance, if he will permit it."

There is authority too for the proposition that the court has jurisdiction in one and the same action to rectify a written agreement, and to order the agreement thus rectified to be specifically performed. See *Olley v. Fisher* (1886), 34 Ch.D. 367, and the dictum of Lord BIRKENHEAD in *United States of America v. Motor Trucks Ltd.*, [1924] A.C. 196. In a judgment delivered in the Judicial Committee of the Privy Council, he stated that he could see no reason on principle why a court of equity should not at one and the same time reform and enforce a contract, the prior difficulty having been removed by the provisions of s. 24 of the Judicature Act, 1873.

As to the claim for damages by both parties to the contract, as both parties were in breach of the contract, I am of the opinion that technically each party would be entitled to an award of nominal damages, but as I consider it would be pointless to make reciprocal awards I refrain from making any order as to damages, and in any case by reason of the conduct of both parties I do not consider it an appropriate case for damages.

It follows then that the plaintiff's action is dismissed with costs to the defendant to be taxed, certified fit for counsel, and the defendant will have judgment in her favour on the counter-claim and is granted the orders sought in paras, (a), (b) and (c) of the relief, and the plaintiff in this action is ordered to carry out the necessary survey and transport to the defendant the area of land as rectified in the agreement of 7th June, 1962, within three months from date hereof on the payment to her by the defendant of the balance of the purchase price fixed by the contract, that is, \$3,900, failing which the Registrar of the Supreme Court is empowered and authorised to transport the said properly to the defendant. The defendant will have half her costs on the counter-claim, certified fit for counsel. Liberty to apply.

I merely put it forward as a suggestion that rather than embark on another survey the plaintiff do transport to the defendant Block "N" or Blocks "O" and "N" on the plan of S. S. R. Insanally dated 5th day of July, 1962, at the purchase price of \$400 per acre with a

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reduction of a reasonable sum off the total sum of the purchase price in respect of the abandoned or bush land contained in Block "O".

*Judgment for the defendant on claim and counter-claim.*

RAMBARRAN v. RAMNARINE AND OTHERS  
BOATSWAIN v. HEMRAJ AND THOMAS

[High Court (Chung, J.) June 1, 10, 1966]

*Practice and procedure—Actions terminating by consent order—Order set aside on application by third party—Validity of order setting aside consent order—0. 25, r. 13—0. 35, r. 13.*

Two consolidated actions were terminated by a consent order, but thereafter on the application of a third party the order was set aside on the ground that the land involved in the actions was owned by an estate represented by the applicant. At the trial of the reopened actions,

**Held:** (i) the consent judgment could not be said to affect the interest of the applicant as he was not a party to the actions and could not be bound by the judgment;

(ii) there is no provision in the Rules of Court for setting aside a judgment on application by a third party;

(iii) the order setting aside the consent judgment and giving leave to the applicant to intervene in the action was made without jurisdiction and was therefore a nullity.

*Order accordingly.*

*Dwarka Dyal* for the plaintiff.

*S. D. S. Hardy* for the defendants.

*Rex McKay* for the applicant (added defendant).

CHUNG, J.: In action No. 385/59 the plaintiff Walter Boatswain claims from the defendant Hemraj:

- (a) The sum of \$1,000 as damages for trespass on the plaintiff's land situate at first depth, Goedland, on the right bank of the Canje Creek, in the County of Berbice and Colony of British Guiana.
- (b) An injunction restraining the defendants, their servants and/or agents from trespassing on the aforesaid lands and/or from otherwise interfering with the plaintiff's possession thereof.
- (c) Any other order the court deems fit.
- (d) Costs.

In action No. 384/59, the plaintiff Rambarran claims from the defendants Ramnarine, Ramudit and Ramkumari:

- (a) The sum of \$1,000 as damages for trespass on the plaintiff's land situate at second depth Goedland on the right bank of the Canje Creek, in the county of Berbice and Colony of British Guiana.
- (b) An injunction restraining the defendants, their servants and/or agents from trespassing on the aforesaid lands and/or from otherwise interfering with the plaintiff's possession thereof
- (c) Any other order the court deems fit.
- (d) Costs.

These actions were consolidated on the 4th December, 1961, and on the 5th December, 1961, they were settled by the parties and the following consent order was made by the court:

"1. The plaintiff Rambarran in action 384/59 is to be paid by the defendants compensation in the sum of \$100 of which the sum of \$70 is deducted as compensation awarded by PERSAUD, J., to Bhagmattie against Tullo Rambarran, the remaining sum of \$30 to be paid in cash to Rambarran on or before 16th December, 1961

"2. Plaintiff in action 385/59 (Berbice), Walter Boatswain, to be paid compensation by Hemraj, the defendant therein, in the sum of \$150 from which sum the amount stated in undertaking dated 2.11.59 for \$37.36 (thirty-six cents waived) the sum of \$37 (thirty-seven dollars) to be deducted in full satisfaction of the undertaking dated 2.11.59.

The balance of \$113 (one hundred and thirteen dollars) to be paid to Walter Boatswain by Hemraj on or before 16th December, 1961.

"3. The parties to both actions agree to have the 33 acres of rice-land called Big Field and the cattle grazing area all in the first depth of the estate of Goedland to be surveyed *pro rata* to the proprietors of Goedland.

It is specifically agreed that not only the rice land 33 acres are to be surveyed and distributed but also all the grazing lands in the first depth of Goedland.

"4. All the proprietors to pay *pro rata* for the cost of surveying and distributing.

"5. If any of the parties in these actions fail to pay the *pro rata* fees for surveying and/or distributing any other party shall be at liberty to pay such fees and to recover from the defaulting party by action if necessary.

## RAMBARRAN v. RAMNARINE

"6. The plaintiffs to remain in possession until survey and distribution, but not to remove any wire fence or destroy same.

Rambarran's present holding of 10 acres and Boatswain's present holding of 9 acres must not be disturbed until the survey and distribution of the land in question.

Each party to bear his own costs of this action.

Terms of settlement to be made an order of the court."

The order was entered on the 12th December, 1961.

On the 15th March, 1962, an application was made by A. N. Thomas, administrator for the estate of B. Patterson, deceased, to a judge in chambers for an order that—

1. The consent judgment and/or the compromise made and/or approved herein be set aside;
2. The applicant be given leave in his said capacity to intervene in the said action;
3. The costs of this application be costs in the cause;
4. Such further or other orders be made or directions given as to the court seems fit;

one of the grounds for the application being that the land in question is owned by the estate of Barrington Patterson (deceased).

On the 17th March, 1962, MILLER, J., granted the said application, the plaintiffs in both actions consenting, the defendants being absent even though they were served with the summons. Thus the consent order was set aside and the applicant, A. N. Thomas, was given leave to intervene in the action.

On the 10th October, 1963, the added defendant (intervener), A. N. Thomas, applied for particulars that the first, second and third-named defendants be directed to furnish particulars to him. This was refused on a ruling by JAIKARAN, J., on the 13th January, 1964. The ruling by JAIKARAN, J., was reversed by the Full Court on the 26th September, 1964, and on the 19th July, 1965, on appeal to the Caribbean Court of Appeal the appeal was allowed.

The matters now come before me for hearing. It is submitted by counsel for the defendants in both actions that the consent order of KHAN, J., still stands as there is no rule of court providing for the setting aside of a court order by a third party.

There is no provision made in the Rules of the Supreme Court, 1955, for the setting aside of a judgment by a third party.

Order 25, r. 13, which reads:

"Any judgment by default or on *ex parte* hearing, whether under this or any other Order, may be set aside by the Court or a Judge, upon such terms as to costs or otherwise as the Court or Judge may think fit,"

makes provision for the setting aside of a judgment by default.

Order 35, r. 13, reads:

"Any judgment obtained where one party does not appear at the trial may be set aside by the Court or a Judge upon such terms as may seem fit, upon an application made within fourteen days after the trial."

This Order also makes provision for setting aside a judgment when one party does not appear at the trial upon an application made within fourteen days after the trial.

In *Jacques v. Harrison*, 12 Q.B.D. 165, CA., it was held that O. 27, r. 15, of the English Rules, which is almost identical with O. 25, r. 13, of our Rules, and reads:

"Any judgment by default, whether under this order or under any other of these Rules, may be set aside by the Court or a Judge upon such terms as to cost or otherwise as such Court or Judge may think fit,"

is designed to enable judgments by default to be set aside by those who have or who can acquire a *locus standi*, and does not give a *locus standi* to those who have none. In the very case, BOWEN, L. J., who delivered the judgment, said: (*ibid.*, at p. 167):

"There are, so far as we can see, only two modes open by which a stranger to an action, who is injuriously affected through any judgment suffered by a defendant by default, can set that judgment aside, and these two modes are amply sufficient to protect any such stranger in all cases in all his rights. He may, in the first place, obtain the defendant's leave to use the defendant's name, if the defendant has not already bound himself to allow such use of his name to be made; and he may thereupon, in the defendant's name, apply to have the judgment set aside on such terms as the judge may think reasonable or just. Or he may, if he is not entitled without further proceedings to use the defendant's name, take out a summons in his own name at chambers to be served on both the defendant and plaintiff, asking leave to have the judgment set aside, and to be at liberty either to defend the action for the defendant on such terms of indemnifying the defendant as the judge may consider right, or, at all events, to be at liberty to intervene in the action in the manner pointed out by the Judicature Act, 1873, section 24, subsection 5."

In *Windsor v. Chalcraft*, [1939] 1 K. B. 279, C. A., the defendant was insured against third party liability, notice that the writ had been issued was given to the underwriters, but they did not know that it had

## RAMBARRAN v. RAMNARINE

been served on the defendant. The defendant did not enter an appearance to the writ and judgment in default of appearance was signed against him. No notice of those proceedings was given to the underwriters. Application having been made on behalf of the personal representative of the deceased cyclist to the underwriters for the amount of the judgment which had been signed, and underwriters applied to have the judgment set aside and to be allowed to enter an appearance to the writ in their own name or that of the nominal defendant. Notice of this application was served on all the parties, including the nominal defendant. **Held** (following *Jacques v. Harrison*, SLESSER, L. J., dissenting), that the underwriters were entitled to have the judgment set aside and to be allowed to enter an appearance to the writ, although the nominal defendant himself would not, in the circumstances, have been entitled to have the judgment set aside.

In both cases the judgments were judgments by default and not judgments by consent, and the court acted under O. 27, r. 15, of the English Rules. In fact, in *Windsor v. Chalcraft*, MACKINNON, L. J., at P. 293, stated:

"The only other observation which I venture to make is that any analogy from the case of a nominal defendant having, in the course of proceedings, submitted to a judgment by consent or compromise, seems to me irrelevant and immaterial. We are here concerned and concerned only, with the application of the rule with reference to a judgment by default. This is a judgment by default, and any inference from what might happen in the case of a judgment by consent, or by way of a compromise, seems to me to be of no assistance."

In *Ainsworth v. Wilding*, [1896] 1 Ch. 673, it was held that after a judgment has been passed and entered, even where it has been taken by consent and under a mistake, the court cannot set it aside otherwise than in a fresh action brought for the purpose unless (1) there has been a clerical mistake or an error arising from an accidental slip or omission within the meaning of the Rules of the Supreme Court, 1883, O. 28, r. 11, or (2) the judgment as drawn up does not correctly state what the court actually decided and intended to decide—in either of which cases the application may be made by motion in the action.

The consent judgment given by KHAN, J., cannot be said to affect the interest of the added defendant A. N. Thomas, administrator for the estate of B. Patterson, deceased, as he was not a party to the action and could not be bound by a judgment in an action in which he was not a party. He can still assert his rights in the courts by other proceedings.

In the circumstances I find that the order made by Miller, J., setting aside the consent judgment made by KHAN, J., and giving leave to the applicant Thomas to intervene in the actions was done without jurisdiction and is therefore a nullity.

Consent judgment by KHAN, J., therefore stands. Costs \$50 to the defendants.

*Order accordingly.*

## MILROY FORDE v. R.

[Court of Appeal (Luckhoo, J A., Persaud, J.A. (ag.) Cummings, J.A. (ag.))  
July 11, 1966]

*Criminal Law—Summing up—Direction by judge that address by accused confirmed testimony against him—Misdirection.*

Held: an accused person ought to have the right to comment freely on the evidence before the court in his address to the jury, within the limits of his intelligence and subject to legal propriety, without the fear of having his mentality analysed or called into question by a judge, who would use inferences drawn from this exercise to render more probable sworn testimony of an incriminating nature.

*Appeal allowed; new trial ordered.*

*Appellant* in person.

*G. A. G. Pompey* for the Crown.

LUCKHOO, J.A., read the following judgment of the court:

The appellant was charged with the offence of robbery with violence contrary to s. 222 (a) of the Criminal Law (Offences) Ordinance, Cap. 10, and was on the 17th March, 1966, convicted of that offence at the Demerara Criminal Assizes and was sentenced to be imprisoned for a period of 7 years and to receive a whipping of 12 strokes.

The particulars of the said offence were that on the 2nd April, 1965, he robbed Veronica Delph of one band, one bangle, one jingle, one earring and a denture when using personal violence to the said Veronica Delph.

The incident took place about 10.45 p.m. somewhere along the Cemetery Road and Veronica Delph identified the appellant as the person who assaulted and robbed her by the aid of lights in the street.

She was cross-examined by the appellant (who was unrepresented by counsel) on the 15th day of March, 1966, after which she was reexamined and then answered two questions which were asked by the jury. At this stage she volunteered certain evidence to which the appellant objected, but this objection was over-ruled and the evidence which was volunteered was admitted and noted as follows:

"I know it was from the bike that the accused took the piece of wood because after the incident the accused came to my home riding a lady's bike with the same piece of wood and he told me that if I keep away from the court, he would pay me back for all the things."

At the conclusion of this evidence the following note was made by the trial judge:

## MILROY FORDE v. R.

"Court grants leave to the accused to cross-examine witness on this fresh evidence."

The appellant then proceeded to cross-examine the witness who said:

"You came to my home at 352 North-East La Penitence and you told me that if I kept away from the court you would pay me back for everything you had taken. A young lady Mrs. Lucille Alexander was present. She is not at the court today.....You said to me: 'Little one, I come to make up the case. If you keep away from the court I will pay you back everything you lost.'"

In answer to the court the witness said that this incident took place after the identification parade had been held and after she had first attended the magistrate's court.

In further answer to the appellant she said:

"The identification parade was held on the 27th April, 1965. I had gone to give evidence in the magistrate's court but the matter was postponed. I cannot say how long after the holding of the identification parade you came to me. I now say I had already given evidence and the matter had already been put off to this Court.....You told me not to tell the police about the conversation. I did not go to the station. I was afraid that you might do something to me if I did. You did not threaten me."

It passes strange that the witness Veronica Delph never communicated a word of this evidence to the police even though she was not threatened; that the matter was introduced for the first time after her evidence was virtually concluded; that although she remembers that the identification parade was held on the 27th April, 1965, yet she could not say how long after the holding of the identification parade the appellant came to her; that at first she fixed the time as being before she had given evidence in the magistrate's court and afterwards changed it to a time after she had already given evidence and the case against the appellant has been referred for trial.

What has been described as "fresh evidence" then at the outset takes on an unhealthy complexion.

The appellant, who argued his appeal in person, abandoned his first three grounds of appeal and was content to argue:

- (a) that the evidence in question ought never to have been admitted;
- (b) that the learned trial judge misdirected the jury on the said evidence.

It was clearly within the discretion of the trial judge to admit or reject the evidence in question, and so there could be no merit in this first ground argued.

It is in respect of the following summing-up on the 'fresh evidence that the appellant particularly complains, when the judge told the jury:

"You may feel—and it is a question for you—that the words that the witness alleges the accused used to have a ring of truth in them. In effect, do you feel that Veronica Delph, whom you saw here and whom you had an opportunity of assessing, was capable of fabricating these words that she alleges the accused used to her when he came to her house? She said that he told her: 'Little one, ah come to make up the case; if you keep away from the court, I will pay you back for everything you lost'. You may feel—and it is a question for you—this is very significant evidence. Would he, if innocent, have gone to this woman? Is it an admission on his part that he was properly identified, or is it not? You are the judges of the facts and you will have to say what significance you attach to the evidence of Veronica Delph on that question. The accused, of course, suggested that the whole conversation was a fabrication and in the course of his address to you he argued that if this woman wanted to get back her jewellery, which she claimed in the course of her evidence was of such great value to her, was such a great loss to her, then she would have gone along with him in his suggestion that she be repaid for her jewellery. But in so framing his argument, members of the jury, it is a question for you—does he not reflect unconsciously a mentality that would believe that if he went to this woman and made this suggestion to her—made this offer to her to repay—that she would have snapped at the opportunity of getting back her things, and that he, being a person who would reason that way, is a person more likely to approach her with such a proposition? In effect, does his argument rather show that there is quite a likelihood that the accused did go to Veronica Delph, as she alleges, because he is the type who may feel that she would want to get her money back and would stay away from court? You are the judges of the facts, members of the jury, and you would have to say what you make of it."

Is this summing-up a fair and proper assessment of the 'fresh' evidence and does it in any way amount to a misdirection?

It is to be observed that no reference is made to the strange features of this evidence, as for example, the long lapse of time before it was divulged; the fact that although the witness remembers that the identification parade was held on the 27th April, 1965, yet she could not say how long after the holding of the identification parade the particular incident took place. In other words, she has not been able to fix the time of the incident in a way that would enable the appellant to check on his whereabouts to ascertain whether he could possibly have gone to her around that period of time. It must also be remembered that at first she fixed the time as being before she had given evidence in the magistrate's court, but changed it to a period after she had given evidence and after the appellant had been referred for trial.

The absence of any such comments which would detract from the value of the particular evidence could be overlooked, but it is not easy

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to ignore the last portion of the summing up above quoted which will be specifically referred to later.

There the trial judge introduced extraneous and inadmissible matter of a highly prejudicial nature, not founded on or derived from any evidence in the case, and used it in a certain way as damning evidence against the appellant.

This extraneous matter was introduced because of the way the appellant framed an argument which he presented to the jury, and which was noted by the trial judge thus: "Reaction of Delph to suggestion."

A judge is entitled to examine the logic of arguments presented to the jury by or on behalf of an accused person at his trial, but in this case, instead of analysing the argument as put, the trial judge proceeded to analyse the mentality behind the argument and applied his conclusions in a way which could not be sanctioned in the following passages:

- (a) "Does he (referring to the appellant) not reflect unconsciously a mentality that would believe that if he went to this woman and made this suggestion to her—made this offer to repay her—that she would have snapped at the opportunity of getting back her things, and that he, being a person who would reason that way, is a person more likely to approach her with such a proposition?"
- (b) "In effect does his argument rather show that there is *quite* a likelihood that the accused did go to Veronica Delph, as she alleges, because he is the type who may feel that she would want to get her money back and would stay away from the court?"

This probe into the mentality of the appellant on his argument to the jury may well have had the effect of revealing an evil propensity in him which was given evidential value by the trial judge, and was further used by him to confirm and induce belief in the particular evidence of Veronica Delph; to get the jury to place reliance on her testimony; and to help thereby to establish the guilt of the appellant.

An accused person ought to have the right to comment freely on the evidence before the court in his address to the jury, within the limits of his intelligence and subject to legal propriety, without the fear of having his mentality analysed or called into question by a judge, who would use inferences drawn from this exercise to render more probable sworn testimony of an incriminating nature.

In this case I find, the particular directions adverted to above improper and gravely prejudicial to the appellant. The jury may well have been materially influenced by the particular misdirections. The interest of justice demands that the appellant should have a new trial. The conviction and sentence are therefore set aside and it is ordered that the appellant stand trial again on the indictment against him.

*Appeal allowed, new trial ordered.*

[High Court (Bollers, C.J. (ag.)) July 18, 1966].

*Crown proceedings—Originating summons against Chief Education Officer in individual capacity—Summons to determine whether Chief Education Officer had power to withhold teacher's salary and whether teacher was entitled to such salary during sick leave—Competence of proceedings—Education Code, Cap.91.*

The plaintiff, a school teacher, applied for sick leave to the defendant, the Chief Education Officer. The defendant granted leave but without pay. The plaintiff took out a summons under 0.42, r. 2, seeking (1) to determine whether there was power to withhold her salary for the period of the leave, and (2) a declaration that she was entitled to her salary for that period.

**Held:** (i) with respect to the second question, by claiming a declaration against the defendant in his individual capacity that she was entitled to salary, the plaintiff was seeking by an indirect device to bind the purse of the Crown, and this she could not do;

(ii) the court could entertain and grant a negative declaration on the first question provided that the second question was abandoned. But if the second question was abandoned the matter would become academic as the plaintiff would be in no position to enforce payment even if a negative declaration was granted on the first question.

*Summons Dismissed.*

**[Editorial Note:** Reversed on appeal. See (1967), 10 W.I.R. 348].

*H. D. Hoyte* for the plaintiff.

*Doodnauth Singh*, Crown Counsel, for the defendant.

BOLLERS, C.J. (ag.): In this summons the plaintiff, who is a grade I school teacher claiming a legal right, seeks a construction of the Education Code, Cap. 91, and, more particularly, reg. 60 of the said Code, under O. 42, r. 2, of the Rules of the Supreme Court for the determination of the following questions and the consequential relief thereon:

(1) Whether the Chief Education Officer or other official of the Ministry of Education has power to withhold the plaintiff's salary under the said Code or otherwise for the period 28th day of June, 1964, to 15th day of July, 1964, after she had applied for leave under reg. 60 (3) (b) and the said leave had been granted under reg. 60 (3) (c) of the said Code.

(2) A declaration that the plaintiff is entitled to her salary for the above-mentioned period.

In her affidavit in support of the summons the plaintiff states that in the month of June, 1964, she applied to the Chief Education Officer for sick leave for a certain period of time, in accordance with reg. 60 (3) (b) of the Education Code, and submitted a medical certificate along with the application, as required by the regulations, and she subsequently received a notification from the Chief Education Officer,

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through the Permanent Secretary of the Ministry of Education, that the necessary leave had been approved and granted but without pay, and, as a result, 18 days' pay, representing the period of sick leave, was deducted from her salary at the end of the month. The main contention of the plaintiff's case is, therefore, that the Chief Education Officer had no power to grant her sick leave other than with pay and, further, had no power under the Education Code or otherwise to withhold any portion of her salary in respect of which sick leave was approved and granted. She, therefore, asks this court to determine the questions raised in her summons and make the declaration prayed for therein.

It should be observed that although the summons is brought against J. T. Thom in his individual or personal capacity, all the allegations made against him in the body of the summons and affidavit in support thereof are in his capacity as Chief Education Officer. Indeed, in his affidavit in reply the defendant admits that in his capacity as Chief Education Officer the sick leave was approved and granted without pay, and a certain sum of money representing payment of salary in respect of those days for which leave was granted was deducted from the plaintiff's salary.

Counsel for the defendant has taken the point *in limine* that although the rubric purports to cite the defendant in his individual or personal capacity, the proceedings have virtually and in effect been brought against him in respect of an act or acts done by him in his official capacity as Chief Education Officer and, as a result, counsel submits that the Chief Education Officer under the Ordinance is not a legal person and cannot be sued in his official capacity. It is the further submission of counsel for the defendant that in the circumstances of the case a declaration cannot be made against the defendant in his individual capacity the effect of which would involve the crown's purse. In support of the first submission Counsel cited *Abrams v. The Members of the Governing Body of the Anglican Schools in British Guiana & Others*, 1960 L.R.B.G. 78, and in respect of the second submission counsel relied on the cases of *Bombay and Persia Steam Navigation Co., Ltd. v. Maclay*, [1920] 3 K.B. 402, and the case of *Dyson v. Attorney General*, [1911] 1 K.B. 410. Counsel for the defendant, while conceding that the plaintiff could maintain an action against an individual for his unauthorised act done in his official capacity, urged that she could not obtain the further consequential relief of a declaration that she was entitled to salary for the period in respect of which the sick leave was granted the effect of which would be to bind the purse of the Crown.

Counsel for the plaintiff in reply submitted that all the court was requested to do and all that it could do under O. 42, r. 2, was to construe a statute or a statutory provision, and conceded that the court had no power to grant any substantive relief. He urged that all the plaintiff was asking the court to do was to construe the Education Code and to determine whether the defendant Thom could or could not grant no-pay leave, and the court would not be called upon to make an order against the defendant nor would it proceed to make an order that the sum of money actually deducted be paid either by the defendant or the Crown, but would be merely determining the question of construction of the Education Code, Cap. 91 of the Subsidiary Legislation

made under s. 53 of the Education Ordinance, Cap. 91. He was prepared to withdraw the second question for determination in the summons if necessary.

It is clear that the Chief Education Officer is a servant of the Crown and judgment may not be entered against him in his official capacity for any unauthorised act done by him in that capacity, though an action for damages may be maintained against him in his individual capacity. In *Raleigh v. Goschen*, [1898] 1 Ch. 73, the plaintiffs brought a claim against the defendants in their official capacity as Lords of the Admiralty with a view to establishing as against them that they were not entitled to enter upon or acquire by way of compulsory purchase, certain land, the property of the plaintiffs, and claiming damages for trespass and an injunction to restrain further trespass. It was held by ROMER, J., that though the plaintiffs could sue any of the defendants individually for trespass committed against them, they could not sue them in their official capacity. Leave to amend by suing the defendants in their individual capacity was not granted the plaintiffs on the ground that to do so would be to change one action to another of a substantially different character. At p. 77 of the report in the course of the argument ROMER, J., stated the law on the subject succinctly when he said:

"... if the trespass (complained of) had been committed by some subordinate officer of a Government Department of the Crown, by the order of a superior official, that superior official—even if he were the head of the Government Department in which the subordinate official was employed, or whatever his official position—could be sued; but in such a case the superior official could be sued, not because of, but despite of, the fact that he was an officer of state."

Actions then will not lie against Crown servants in their official capacity, and in the local case of *Abrams v. The Anglican Schools* (*supra*) it was held that the Director of Education, who is now styled the Chief Education Officer, is a Crown servant and not a body corporate, and as such he is not therefore a legal person and cannot be sued. In *Dyson v. Attorney General* it was laid down that the court has jurisdiction to maintain an action against the Attorney General as representing the Crown, although the immediate and sole object of the action is to affect the rights of the Crown in favour of the plaintiff. In that case the Court of Appeal reached the conclusion that a declaratory judgment under O. 25, r. 5, of the English Rules (which is now O. 15, r. 16, and O. 23, r. 3, of the local rules) could be made against the Attorney General as defendant representing the Crown, and the plaintiff is not bound in such a case to proceed against the Crown.

In *Dyson's* case certain forms had been issued by the Inland Revenue authorities. The Attorney General was in a position to enforce obedience to them by bringing information for penalties. It was decided that an action could be brought against the Attorney General in the name of his office to have it declared that the forms were bad and that the Attorney General was not entitled to enforce obedience to them. FARNWELL, L.J., in the course of his judgment at p. 421 stated

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that the Attorney General was properly made defendant. It had been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right, because the court cannot make a direct order against the Crown to convey its estate without the permission of the Crown, but when the interests of the Crown are only indirectly affected the Courts of Equity, whether the Court of Chancery or the Exchequer on its equity side, could and did make declarations and orders which affected the rights of the Crown. The learned judge made it clear that the Crown was not directly affected and the plaintiff merely sought a declaration from the court of a true construction of an Act which imposed burdensome and expensive enquiries upon him and for non-compliance with which he was threatened with fines.

COZENS-HARDY, M.R., in his judgment at p. 416 stated that there appeared to him to be distinct authority that the court had jurisdiction to maintain an action against the Attorney General as representing the Crown, although the immediate and sole object of the suit was to affect the rights of the Crown in favour of the plaintiff. The learned judge earlier in his judgment was at pains to point out that the plaintiff did not seek to divest any property of the Crown or to enforce any pecuniary claim against the Crown. This makes it quite clear that the distinction to be drawn between *Dyson's* case and the instant case is that in *Dyson's* case the Attorney General was made the defendant and the plaintiff did not seek to divest any property of the Crown or to enforce any pecuniary claim against the Crown, whereas in the instant case the Attorney General is not a defendant and under the second question for determination in the summons the plaintiff is seeking to enforce a monetary claim against the Crown.

*Dyson's* case was followed by *Bombay & Persia Steam Navigation Company, Ltd. v. Maclay* (*supra*) which is authority for the proposition that procedural difficulties in the way of a plaintiff cannot be overcome by claiming a declaration against a public officer in his individual capacity. In that case the plaintiffs brought an action against Her Majesty's Shipping Comptroller appointed under the Defence of the Realm Regulations in his individual capacity, claiming that he gave a direction under those Regulations whereby the plaintiffs' ship was diverted from her voyage. The plaintiffs thereby lost the use of their vessel for some days and incurred certain expenses. The plaintiffs sued the defendant claiming a declaration that they were entitled to compensation for the loss and expenses so incurred by them. It was not sought to sue the defendant for money payable by statute, but the question was whether when a person had a demand of that kind he could get a declaration of his rights against the Treasury by suing an official in his own name because he could not sue him in any other way. It was held by ROWLATT, J., that he could not. Hence the statement in the ANNUAL PRACTICE, 1965, vol. 1, at p. 284, that before the Crown Proceedings Act, 1947, came into force the principle that a declaration could be made against the Attorney General representing the Crown, though the immediate object of the suit was to affect the rights of the Crown, did not enable a plaintiff in an action against an official—who could only be sued as an individual—to obtain a declaration of the

plaintiff's rights to compensation against the Treasury arising from the acts of the official: nor would the defect be cured by adding the Attorney General, as this would enable the issue which might have to be adjudicated upon in a petition of right to be prejudged.

In my view, as the summons now stands, this authority is dead against the plaintiff as by claiming a declaration against the defendant in his individual capacity that she is entitled to salary, she is seeking by an indirect device to bind the purse of the Crown. ROWLATT, J., in his judgment at p. 406, after pointing out that it had long been established that if an official of the state does something which, if done by anyone else, would be a tort (the modern opinion is that the observation of ROMER, J., in *Raleigh v. Goschen* is not confined to tortious acts, though such was the particular act in that case, but applies to any wrongful or not justifiable act), and there is no law authorising him in virtue of his office to do that particular thing, he must, notwithstanding his official position, answer for it in his own name, went on to say that similarly if a person by virtue of the position which he holds claims to be entitled to do a particular thing himself, an action is maintainable at the instance of someone affected to have it declared that the defendant is not entitled to do that thing. But in dealing with matters of contract or a question of money liability under a statute, the position is very different. The question was: When a person has a demand of this kind, can he get a declaration of his right against the Treasury by suing an official in his own name because he cannot sue him in any other way? As already stated, the learned judge held that he could not.

Counsel for the plaintiff relied heavily on the case of *China Mutual Steam Navigation Company v. Maclay*, [1918] 1 K. B. 33, where it was held that a declaration might be made against an official as an individual negating his right to do unauthorised acts. In that case the defendant, who was the Shipping Controller sued in his individual capacity, purported to act under a Defence Regulation and ordered the requisition of the plaintiff's steamers and directed that they continue running the vessels as for themselves though actually for the account of the Government. The plaintiff's alleging the requisition to be *ultra vires*, brought an action for a declaration that the voyage of one of their steamers was for their account and that they were entitled to retain the profits if any of that voyage. The defendant objected that he was not the proper defendant and set up the argument that he was a servant of the Crown and the validity of his acts as an officer of state could not be challenged in an action against him but only in a properly constituted suit against the Crown. This argument was rejected by BAILHACHE, J. who adopted the observation of ROMER J. in *Raleigh v. Goschen* in these terms (*ibid.*, at p. 41):

"If any person, whether an officer of state or a subordinate, has to justify an act alleged to be unlawful by reference to an Act of Parliament, or state authority, the legal justification can be inquired into in this court; and in such a case it does not matter whether the defendant is the head of the department or not."

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It is not difficult to see that the result of the declaration was that the vessels continued to run for the account of the company and not for the Government.

On the authority of *China Mutual Steam Navigation Company v. Maclay* I am of the view, therefore, that the first question in the summons *ex facie* could be determined upon the construction of the Education Code and this court might entertain it and grant a negative declaration thereon, provided that the second question in the summons is abandoned. There, however, remains the problem in this situation that the question would become merely hypothetical or academic as the plaintiff, if the negative declaration were granted, would be in no position to enforce the payment of salary for the period in dispute. It is well settled that the courts will not entertain theoretical and purely hypothetical questions, and in *Tindall v. Wright* (1922), 38 T.L. R. 521, where it was decided that the court will not decide a point of law which has become academic, even though both parties are anxious to have it determined, and though it is a matter of public importance on which a Government department desires the guidance of the court with a view to introducing amending legislation if necessary.

In the recent case of *Re Barnato*, [1949] Ch. 258, at p. 270, Lord GREENE, M. R., stated:

"In my opinion, if it is desirable that these courts should have power to decide hypothetical questions on the construction of taxing Acts for the guidance of the subjects of the King that ought to be done by legislation and not by this court arrogating to itself jurisdiction to do it."

It is clear, therefore, that a declaration will not be made if it cannot have any possible practical result, and the Annual Practice, 1965, vol. 1, at p. 282, in discussing O. 15, r. 17, which is O. 23 r. 3, of the Rules of the Supreme Court, states that where specific relief is not claimed the jurisdiction to make a binding declaration of right should be made with great caution. The plaintiff must be entitled to relief in the fullest meaning of the word but the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the court to grant, or contrary to the accepted principles upon which the court exercises its jurisdiction. As it would be unconstitutional for this court to grant a declaration in respect of the second question to be determined, and as the matter in respect of the first question for determination becomes academic when the second question is abandoned, in the exercise of my discretion I would refuse to entertain an application for a declaration on the first question in the summons.

There is the other aspect of the matter—that O. 42, r. 2, is the English Order 54a, and in *Lewis v. Green*, [1905] 2 Ch. 340, it was held that the rule is intended for the decision of questions of construction, where the decision of such questions, whichever way they go, will settle the litigation between the parties. If the first question for determination were resolved in favour of the plaintiff and a negative declaration were granted that the defendant had no power in his position as Chief Education Officer to grant no-pay leave or to grant

leave other than with pay, the result of this declaration would not be to put an end to further litigation between the parties as further proceedings would have to be brought by the plaintiff to enforce payment of the sum deducted from her salary, to which the defendant would be entitled to raise the defence, as I see it, that the funds of the Crown are involved.

I am of the view that this case falls within the principle expressed in the maxim, "*quando aliquid prohibetur ex directo prohibetur et per obliquum*"—when anything is prohibited directly it is also prohibited indirectly." The plaintiff is seeking to do indirectly what she cannot do directly, and the summons must be dismissed with costs to the defendant certified fit for counsel.

*Summons dismissed*

## IVAN HARRIS v. TOOLSIE PERSAUD LTD.

[Court of Appeal (Stoby, C., Luckhoo, J. A., and Cummings, J. A. (ag.))  
July 5, 19, 1966].

*Evidence—Typed receipt for salary presented by employer to employee and signed by him—Whether receipt can prevail if inconsistent with tenor of previous negotiations.*

*Appeal—Correctness of inferences to be drawn from established facts—No question of credibility involved—Whether appellate court can disturb conclusions drawn by trial judge.*

*Precedent—Decisions of the House of Lords—To what extent binding on the Court of Appeal.*

The appellant had been employed by the respondents as captain of a vessel, but was laid off without pay while the vessel was under repair. The appellant having challenged their right to do so, the respondents informed him that his contract of service was subject to a condition that no salary would be payable in respect of any period during which his vessel was laid up for repairs. The appellant denied the existence of any practice to that effect. Later, however, he accepted two days work and was paid for this on the basis of the practice, a receipt "in full payment" being in fact given by him. In an action by the appellant for arrears of salary and damages for wrongful dismissal evidence was given on behalf of the respondents of the existence of the practice, but the witness so testifying was himself first employed by the respondents only some time after the commencement of the appellant's employment.

**Held:** (i) (per Cummings, J. A.) where there was no question of the credibility of a witness an appellate court was in just as good a position as the court of first instance to draw inferences from established facts;

(ii) the respondents had failed to discharge the burden of proof, which lay upon them, to establish that the practice applied to the appellant at the time when he was first employed;

(iii) (per Stoby, C., and Luckhoo, J. A.) the implication of the receipt signed by the appellant was that he nevertheless accepted that the practice thereafter applied to him;

(iv) (per Cummings, J. A.) the intention of the appellant was that the receipt "in full payment" was subject to the result of enquiries which were then being conducted by his solicitor as to whether or not he was regarded

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by the respondents as having been dismissed and as to the amount due to him. The court would not allow printed forms to be made a trap for the unwary;

(v) (per Cummings, J. A.) the decisions of the House of Lords, while not *de jure* binding on the Court of Appeal, are so convincingly authoritative that the court, while not slavishly following, will regard them as highly persuasive and only differ from them if forced to do so by reason, logic or binding conflicting decisions of the Privy Council. Decisions of the House of Lords will to effect be *de facto* binding on the Court of Appeal.

*Appeal allowed*

*H. D. Hoyte* for the appellant.

*B. O. Adams, Q.C., E. W. Adams* with him, for the respondents.

STOBY, C.: I have had the advantage of reading the judgment of my Lord Luckhoo and that of my Lord Cummings. I agree with the judgment of my Lord Luckhoo as to the reasons for which the appeal should be allowed and the amount which should be awarded. I agree with the judgment of my Lord Cummings as to the reasons for allowing the appeal, but I do not agree that the appellant was dismissed on the 14th August or that he was entitled to damages for wrongful dismissal.

The judgment of the court then is that the appeal is allowed and the appellant is awarded the sum of \$539.35 with costs here and in the court below.

LUCKHOO, J. A.: The appellant was since the year 1961 in the service of the respondents as a captain of their motor vessel "Peradventure". He worked as such until 3rd May, 1964, when that vessel broke down, after which he was temporarily transferred to another vessel of the respondents until 17th May, 1964, and then given leave for two weeks.

When he returned to work on 1st June, 1964, the personnel officer of the respondents told him that he would have to be laid off until the vessel undergoing repairs was back in operation.

The appellant received no salary from the respondents between 1st June, 1964, and the 14th August, 1964. On the 14th August, 1964, he resumed work on the "Peradventure" but the vessel again broke down and the next day, that is, 15th August, 1964, when he turned out to work he was told by the respondents that in view of a major breakdown of the vessel they would have to pull him off. On the 17th August, 1964, he was paid the sum of \$51 and signed a receipt therefor as "payment in full for work done on the above vessel", *i. e.*, Motor Vessel "Peradventure."

The appellant was again recalled for duty on the 2nd October 1964 and worked on the "Peradventure" until 29th March, 1965, when his services were terminated.

In January, 1965, he brought an action against the respondents claiming the sum of \$649.35 being \$539.35 salary due for period 1st June, 1964, to 14th August, 1964, at \$220 per month, and further \$110 being two weeks' salary in lieu of notice. At the close of the defence this claim was amended in the alternative to claim \$880 being salary from 1st June, 1964, to 30th September, 1964, at \$220 per month.

The defence to this claim was in effect that—

- (a) the plaintiff was employed at a monthly salary of \$220, but was only to be paid his salary while his vessel was in operation, and that if and when his vessel was laid up for repairs no salary was to be paid to him during that period.
- (b) The plaintiff was never dismissed by the respondents.
- (c) The plaintiff was fully paid by the respondents for the period of service which he gave after his vessel was again ready for operation on the 14th August, 1964, and when it broke down for the second time.

The appellant in his evidence at the trial swore as follows. "When I joined the company there was no agreement with myself and the company that during the period of time that the boat was laid up for repairs that I would not be paid".

No questions were asked of the appellant under cross-examination to seek to challenge, contradict or whittle down this positive evidence, which obviously related to the time when he began to serve the respondents.

The learned trial judge, however, concluded from the evidence that "from the period of time of 1st June, 1964, to 14th August, 1964, the plaintiff, who was employed as captain of the M V "Peradventure" at the rate of \$220 per month, was laid off from duty and paid no salary for period *in accordance with the agreement with the company, that when a vessel was laid up for repairs for a substantial period of time no salary was paid to any member of the crew, including the captain, while the vessel was undergoing repairs and the crew not working.*"

Was there any evidence in the case to justify or lend itself to such a conclusion in the face of the positive evidence of the appellant to the contrary, which was unchallenged under cross-examination?

There was only one witness called by the respondents and that was their personnel officer Mr. Ajodha Persaud. It is of importance to note that he was only employed by the respondents as from the year 1963, which would be about two years after the appellant had commenced his service with the respondents. This witness then could only speak of what he knew the practice to be as from the year 1963 and never purported to refer to any period of time prior to 1963. If this witness could have testified of his own knowledge that the practice which he knew existed in 1963, *viz.*, that a captain could properly be laid off without salary if his

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vessel was under repairs for a substantial period of time, in point of fact existed at the time of the commencement of the appellant's employment and was known to the appellant, or that the appellant had subsequently acquiesced in such conditions of employment, then there could have been no arguable appeal.

The defence then did not produce any direct evidence to establish on a balance of probabilities that it was a specific term of the contract between appellant and respondents that when the vessel was laid up for repairs the appellant was to be laid off from his job and was not to receive payment of salary during that period of time.

Were there then any circumstances from which this inference could be drawn? The learned trial judge seemed to think that apart from the evidence of Ajodha Persaud, the evidence of the appellant that he resumed duty on the 14th August, 1964, worked for 2 days and was paid, was then laid off and subsequently resumed duty on 2nd October, 1964, until 29th March, 1965, 'compelled' him to conclude that the appellant was "well aware of the terms of the contract" which the respondents set up in their defence.

Such an inference cannot be properly drawn from the facts as they are because—

- (a) when the appellant resumed work on 14th August, 1964, he knew that the respondents were asserting, whether rightly or wrongly, that his employment did not carry any pay if and when his vessel was laid up for repairs. He then must have resumed work on 14th August, 1964, on that understanding and condition, and to illustrate that this must have been so he signed a receipt in full of payment for the two days he worked in the sum of \$51.
- (b) The appellant had protested from and after the 1st June, 1964, that it was not right for him to be laid off without salary inasmuch as he had not been given notice. After several interviews with the respondents in the month of June, 1964, he had his solicitor send a letter on 24th July, 1964, enquiring whether he had been dismissed and "what offer" the respondents were prepared to make to him by way of salary in lieu of notice to which he was entitled. This conduct then was against any inference that he had the knowledge imputed to him, at least between 1st June and 2nd July, 1964.
- (c) When the appellant resumed on the 14th August, 1964, it must have been without prejudice to his legal rights as they were up to that date and at least on the implied condition that his future employment would be regulated by the term that there was to be no obligation to pay him if the vessel was laid up for repairs.

It is my view therefore that as the appellant was still in the employ of the respondents from 1st June, 1963, to 14th August, 1964, inasmuch as he was not truly dismissed at any time during that period and it was

actually the respondents case that he was never dismissed, that he was entitled to be paid for that period inasmuch as there was no agreement expressed, or to be implied, to the contrary; that when he was allowed to resume work on 14th August, 1964, it was only then it could be said that he was aware that his employment would be without pay if his vessel was under repairs; that when he signed a receipt on 17th August, 1964, as receiving \$51 as payment in full for work done on the said vessel he did not expect to receive any further sum, for any reason, for any period after 14th August, 1964, except he had resumed work other than that undertaken and performed between 14th and 15th August, 1964, for which he was then paid.

I would therefore give judgment for the appellant in the sum of \$539.35 being salary for period 1st June, 1964, to 14th August, 1964, at \$220. per month.

The appellant is to have his costs in the court below and in this court.

CUMMINGS J. A. (Ag.): Ivan Harris (plaintiff) was employed by Tool-sie Persaud Ltd. (defendants) as captain of the M. V. "Peradventure" on the 8th day of August, 1961, and worked thereon until the 3rd May, 1964, when the vessel broke down in the Essequibo River and had to be towed to Georgetown. On that day the plaintiff was put in charge of the M. V. "Progressor" and worked thereon until the 17th May, 1964, when he handed that vessel over to another captain whom he had relieved.

On the 18th May, 1964, he reported to the company's marine superintendent who referred him to the company's personnel officer, Mr. Ajodha Persaud. He was given two weeks' leave until the 2nd June, 1964, when he reported back to the marine superintendent. The latter told him that the vessel would be laid up for some time and he was of the opinion that he would have to be "laid off". He objected and enquired about "some kind of notice or something". After he had gone backwards and forwards and seen the marine superintendent and the manager, the personnel officer finally told him about the end of June, 1964, that "the boss" had said they usually laid off everybody when the boat is laid up for repairs, and that he did not wish to create a precedent by showing any favour to him. At the end of June he went to the company's office for his pay. Although his name was on the paysheet, the cheque which had been made out in his name had been cancelled.

He consulted his solicitor who wrote a letter to the defendants on the 24th July, 1964, in the following terms:

"CHAMBERS,  
7 Brickdam & Manget Place,  
Georgetown 11, Demerara,  
British Guiana  
July 24, 1964.

Dear Sir,

Re: Mr. Ivan Harris and Mr. Donald Campbell, Master and Chief Engineer respectively of M. V. 'Peradventure'.

I write on behalf of my clients, Mr. Ivan Harris and Mr. Donald

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Campbell, who were employed by your company as master and chief engineer respectively of the M. V. 'Peradventure'.

My clients instruct me that they were 'laid off their jobs as from 2nd June, 1964, and 31st May, 1964, respectively, and since then have been uncertain of their position.

I shall be grateful if you will let me know if my clients have been dismissed by your company, and, if so, what offer your company is prepared to make to my clients by way of salary in lieu of notice to which my clients were entitled.

Yours faithfully,  
H. D. Hoyte.

The Secretary,  
Toolsie Persaud, Ltd,  
10—12 Lombard Street,  
Georgetown."

The defendants did not reply to this letter.

In August, 1964, the plaintiff was requested by the defendants to resume work and did so on the "Peradventure" on 14th August, 1964. While bringing the ship to Georgetown on that day she broke down again, but he got her to the defendants' wharf where she was tied up. When he reported for duty on the following day—15th August, 1964—he was told that the ship had sustained a major break-down and he would consequently have to be laid off. He was then given one week's pay, *i. e.*, \$51 for two days' work, for which he signed the following document:

"Stamps cancelled .5c

TOOLSIE PERSAUD LTD;

Cash Cheque Voucher.

PAY I. Harris

Date 17/8/64.

M. V. Peradventure.

Payment in full for work done on the above vessel.

\$51.00

Fifty-one dollars.

I certify that the above represents a true and correct charge for services and/or material received.

? Persaud  
Department Head.  
Account Amount  
110/191 \$51.00  
Received payment.  
Ivan Harris.

PAID  
17 Aug. 1964  
By Cash."

On 12th September, 1964, his solicitor sent another letter to the defendants in the following terms:

"CHAMBERS  
7 Brickdam & Manget Place,  
Georgetown 11, Demerara,  
British Guiana.  
September 12, 1964.

Dear Sir,

Re: Mr. Ivan Harris and Mr. Donald Campbell  
Master and Chief Engineer, respectively,  
of the M. V. 'Peradventure'.

I refer to my letter of 24th July, 1964, on the abovementioned subject, to which I have not been favoured with a reply.

My client, Mr. Donald Campbell, instructs me that your company recalled him on 30th July, 1964, for duty in his capacity as chief engineer of the M. V. 'Peradventure' and dismissed him on 5th August, 1964, without notice or salary in lieu of notice. Furthermore, he has not been paid for the said period 30th July to 5th August.

My client, Mr. Ivan Harris, instructs me that he was recalled for one day during August, 1964, in his said capacity as captain of the said M. V. 'Peradventure' and then dismissed, without notice. He was paid the sum of \$51 in lieu of notice.

In the circumstances, I have been instructed by my client Mr. Donald Campbell to demand of your company payment of the sum of \$722.58 being:

3 months' salary in lieu of notice at		
\$140 per month	...	\$420.00
Salary for 1st June to 5th		
August, 1964	...	<u>\$302.58</u>
		<u>\$722.58</u>

With regard to my client Mr. Ivan Harris, I have been instructed to demand payment of the sum of \$1,199.35 being:

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3 months' salary in lieu of notice at \$220.00 per month	...	\$ 660.00
Salary for 1st June to 14th August, 1964	...	<u>\$ 539.35</u>
		<u>\$1,199.35</u>

If I do not hear from you by 18th instant, I shall be compelled to issue a writ in accordance with my instructions.

All for your information and guidance.

Yours faithfully,  
H. D. Hoyte.

The Secretary,  
Toolsie Persaud Ltd.,  
10-12 Lombard Street,  
Georgetown."

Again the defendants did not reply.

On 2nd October, 1964, the plaintiff was recalled for duty by the defendants, and worked on the "Peradventure" until the 29th of March, 1965, when he received the following letter from the defendants:

"TOOLSIE PERSAUD LIMITED  
etc.

Lots 1—4 & 10—12 Lombard St,  
Georgetown, British Guiana.  
29th March, 1965.

Mr. I. Harris,  
12—12 Norton Street,  
Wortmanville,  
Georgetown.

Dear Sir,

It is with regret that I have to inform you that your services will not be required by this company as from this date.

I wish to thank you most sincerely for the services rendered during the period of your employment with the company and to say that the vacancy now created will be hard to fill.

After you have officially handed over the ship, you may call at the Head Office for payment of the sum of one hundred and one dollars and fifty-two cents in lieu of notice for the termination of your services.

Yours faithfully,  
for TOOLSIE PERSAUD LIMITED,  
Ajodha Persaud,  
Personnel Officer."

He handed over the vessel on 2nd April, 1965, and was paid up to 31st March, 1965.

On 14th January, 1965, plaintiff filed a writ in which he claimed the sum of \$649.35 being —

- |  |                     |
|--|---------------------|
| 1. salary for period 1st June, 1964, to 14th August, 1964 at \$220 per month   | ... \$539.35        |
| 2. two weeks' salary in lieu of notice, the defendants having wrongfully dismissed the plaintiff without notice or salary in lieu thereof on 15th August, 1964 | ... <u>\$110.00</u> |
|  | <u>\$649.35</u>     |

He was later granted leave to amend and claim in the alternative the sum of \$880, being salary from 1st June, 1964, to 30th September, 1964, at the rate of \$220 per month.

Those facts as narrated above are not in dispute. While, however, the plaintiff maintained that when he joined the defendant company there was no agreement between himself and the company that during the period of time that the boat was laid up for repairs no salary was to be paid, the defendant company contended that one of the terms of the plaintiff's employment was that he would be paid a salary of \$220 per month while the vessel was in operation, but that in the event of the vessel being laid up under repairs, no salary was to be paid during that period, but that he would be notified as soon as the vessel was ready for operation.

There can be no doubt that in the absence of such a term, the termination of the appellant's employment in the circumstances narrated would have amounted to dismissal. The onus of proving that there was such a term was on the defendant company which sought to discharge this through the evidence of its personnel officer, Ajodha Persaud. He said that as personnel officer of the defendant company in 1964 and 1965, his duties so far as "men like the plaintiff" were concerned, included employing him, approving payments to him and terminating his services. It was the practice to lay off the crew for all vessels when the vessel was under repairs if it was for a substantial period. This applied to all persons employed on any vessel. "All the company's marine employees are taken on that basis."

The learned trial judge, having accepted Ajodha Persaud's evidence and drawn certain inferences from the circumstances as narrated herein, found as a fact that the respondents' contention was well founded as it was a specific term of the contract. Accordingly, he dismissed the action and gave judgment for the defendants, but made no order as to costs.

The plaintiff appeals to this court. He urges that—

- (1) the learned trial judge erred in law when he held that

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there was evidence upon which he could find that the defendants had discharged the burden of proving that the plaintiff was not entitled to a salary while the motor vessel was laid up for repairs;

(2) the decision was against the weight of the evidence.

The respondents (defendants) contend in this court that the judgment was based upon a finding of fact by the learned trial judge who had the advantage of seeing and hearing the witnesses and consequently this court not having had that advantage ought not to interfere. This raises a question of the utmost importance with regard to the powers of this court. I welcome this early opportunity to declare my views on this subject.

Section 10 of the Federal Supreme Court (Appeals) Ordinance, No. 19 of 1958, enacted in accordance with the provisions of art. 3 of the British Guiana (Appeals) Order-in-Council, 1957, provides that—

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

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

(b) draw inferences of fact."

Section 1 of the Federal Supreme Court (Appeals from British Guiana) Rules, 1959, made in accordance with art. 7 of the said Order-in-Council, provides:

"(1) All appeals shall be by way of re-hearing ....."

With the creation of the British Caribbean Court of Appeal this legislation was expressly saved, *mutatis mutandis*, by art. 12 of the British Caribbean Court of Appeal Order-in-Council, 1962, and adapted, *mutatis mutandis*, with reference to this court by virtue of art. 3 of the Guyana Independence Order, 1966.

It will be observed that the procedure set out for the hearing of an appeal and power conferred on this court is almost identical with that prescribed by Order 58, rr. 1 and 4, respectively, of the Rules of the Supreme Court of England.

In *Benmax v. Austin Motor Co., Ltd.*, [1955] 1 All E. R. p. 326, Viscount SIMONDS in the course of his speech in the House of Lords said at p. 327, para. C *et seq.*, and on p. 328, letter A *et seq.*:

"Learned counsel for the appellant urged in the forefront of his argument that the existence of an inventive step was a question of fact which had been decided by the trial judge, Lloyd-Jacob, J.,

in favour of the appellant, and, therefore, that the Court of Appeal should not have reversed his decision except for certain reasons which clearly were not present in this case. I think at convenient, therefore, to state my view on this question, though I am aware that it does not entirely agree with observations made in this House by noble Lords for whose opinion I have the highest regard. Fifty years ago in *Montgomerie & Co. v. Wallace-James*, Lord HALSBURY, L. C. said ([1904] A. C. at p. 75):

'But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an appellate court.'

"And in *Mersey Docks & Harbour Board v. Proctor*, Viscount CAVE, L. C. said ([1923] A. C. at p. 258):

'The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly.'

"It appears to me that these statements are consonant with R. S. C. Ord. 58, r. 1, which prescribes that;

'All appeals to the Court of Appeal shall be by way of re-hearing.'

"And r. 4:

'The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made .....

"This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or, as it has sometimes been said, between the perception and evaluation of facts. An example of this distinction may be seen in any case in which a plaintiff alleges negligence on the part of the defendant. Here, it must first be determined what the defendant, in fact, did, and secondly, whether what he did amounted in the circumstances (which must also, so far as relevant, be found as specific facts) to negligence. A jury finds that the defendant had been negligent and that

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is an end of the matter unless its verdict can be upset according to well-established rules. A judge sitting without a jury would fall short of his duty if he did not first find the facts and then draw from them the inference of fact whether or not the defendant had been negligent. This is "a simple illustration of a process in which it may often be difficult to say what is simple fact and what is inference from fact, or, to repeat what I have said, what is perception, what evaluation. Nor is it of any importance to do so except to explain why, as I think, different views have been expressed as to the duty of an appellate tribunal in relation to a finding by a trial judge. For I have found on the one hand universal reluctance to reject a finding of specific fact, particularly where the finding could be founded on the credibility or bearing of a witness, and, on the other hand, no less a willingness to form an independent opinion about the proper inference of fact, subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge. But the statement of the proper function of the appellate court will be influenced by the extent to which the mind of the speaker is directed to the one or the other of the two aspects of the problems.

"In a case like that under appeal where, so far as I can see, there can be no dispute about any relevant specific fact, much less any dispute arising out of the credibility of witnesses, but the sole question is whether the proper inference from those facts is that the patent in suit disclosed an inventive step, I do not hesitate to say that an appellate court should form an independent opinion, though it will naturally attach importance to the judgment of the trial judge"

And at page 328, letter H *et seq.*, LORD REID said:

"I have also had an opportunity of reading the speech of my noble and learned friend, Lord Simonds. I am also in agreement with it but, in view of the general importance of the question with which he has dealt, I think it right to express my views in my own words.

"Apart from cases where appeal is expressly limited to questions of law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimise the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only, in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge, or, on the other hand, he may

rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is, and should be, slow to reverse any finding which appears to be based on any such considerations.

"The authority which is now most frequently quoted on this question is the speech of Lord Thankerton in *Watt (or Thomas) v. Thomas*, and particularly the passage which I now quote ([1947] 1 All E. R. at p. 587):

'1. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

'11. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.

'111. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question.'

"*Watt (or Thomas) v. Thomas* was a consistorial case based on cruelty, and I think that the whole passage which I have quoted refers to cases where the credibility or reliability of one or more witnesses has been in dispute and where a decision on these matters has led the trial judge to come to his decision on the case as a whole. If that be right, then I see no reason to doubt anything that was said by Lord Thankerton. But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion. In *Rickmann v. Thierry*, Lord Halsbury, L. C. said (14 R. P. Cat p. 116):

'The hearing upon appeal is a re-hearing, and I do not think there is any presumption that the judgment in the court below is right.'

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And later in the same speech he said (*ibid.*):

'Upon appeal from a judge where both fact and law are open to appeal, it seems to me that the appellate tribunal is bound to pronounce such judgment as in their view ought to have been pronounced in the court from which the appeal proceeds, and that it is not within their competence to say that they would have given a different judgment if they had been the judge of first instance, but that because he has pronounced a different judgment they will adhere to his decision.'

"My Lords, there may be a difference of emphasis between this view and that expressed in the quotations given by my noble and learned friend, Lord Simonds, on the one hand, and the view expressed by Lord Thankerton, and by other noble Lords and learned judges to the same effect on the other hand, but I can find no essential difference between the two views, and, plainly, the present case is not one in which any question of credibility, even in its widest sense, can be said to arise. I, therefore, agree that the appeal should be dismissed."

The decisions of the House of Lords, while not *de jure* binding on this court, are so convincingly authoritative that I make bold to say that this court, while not slavishly following, will regard them as highly persuasive and only differ from them if forced to do so by reason, logic or binding conflicting decisions of the Privy Council. In my judgment they will in effect be *de facto* binding on this court.

Accordingly, the learned trial judge's evaluation of the evidence attracts the due scrutiny of this court. He found that Ajodha Persaud's evidence established that employees of the company, including the plaintiff, were employed on the basis that when a vessel of the company was laid up for repairs the members of the crew, including the plaintiff, were laid off from their jobs without salary being paid to them during that period of time, and after the vessel was repaired they would be recalled for duty. He said that this finding coupled with the following circumstances as found by him:

"(a) appellant resumed duty on the 'Peradventure' on the 14th August, 1964, and worked for two days, was paid one week's salary and signed a receipt as payment in full for work done on the 'Peradventure';

(b) when he resumed duty on 2nd October he worked on the 'Peradventure' until 29th March, 1965, during which time he received salary for the period of time he worked;

(c) the letter written by the plaintiff's solicitor on 24th July, 1964, clearly showed that the plaintiff considered himself laid off from his job and not dismissed,"

compelled him to find in the defendant's favour.

The conclusion he draws from the evidence of Ajodha Persaud is, if I may say so, with great respect a *non sequitur*. It by no means follows

that, because in 1963 and 1964 the company employed seamen on certain conditions, in 1961 the conditions were the same—a *fortiori* when the uncontradicted evidence of the plaintiff is to the contrary. There is no express evidence whatsoever as to either the terms or conditions of the plaintiff's employment or the general employment practice with regard to the employment of seamen in 1961 when the plaintiff was employed. To find that they were the same as in 1963 and 1964 is not to draw a reasonable inference from the evidence of Ajodha Persaud but to speculate. While not alone sufficient, is this evidence sufficiently buttressed by reasonable inferences which can be drawn from the conduct of the plaintiff at any material time to justify the findings of the learned trial Judge? It is necessary to evaluate the evidence on this aspect as accepted by the trial judge. It may be summarised as follows:

1. On 24th July, 1964, appellant's solicitor sends a letter to the respondents enquiring whether the "laying off" of the appellant on the 2nd June, 1964, was to be regarded as dismissal, and if so, what offer were the respondents prepared to make by way of salary in lieu of notice, to which he considered the appellant entitled.

2. The respondent company does not reply.

3. On 14th August, 1964, the appellant, who was apparently unemployed since 2nd June, 1964, is re-employed for two days, "laid off" and paid one week's salary for which he signed a receipt in full payment for work done on the "Peradventure".

4. On 12th September, 1964, appellant's solicitor writes another letter in which he refers to his letter of 24th July, 1964, describes the "laying off" as dismissal without notice, and demands on behalf of the appellant \$1,199.35, being three months' salary in lieu of notice and salary from 1st June to 14th August, 1964.

5. Again the respondent company does not reply.

6. On 2nd October, 1964, the appellant was re-employed on the "Peradventure" and worked thereon, until the 29th March, 1965, when he is dismissed by a letter of that date and offered \$101.52 in lieu of notice.

It is in my view quite clear from these facts that the appellant had sought clarification of his position at all material times. As soon as he was told that he would not be paid for the period during which he was "laid off", he sought legal advice. Indeed, the fact that the respondent company did not reply to the solicitor's letters leads me to infer that the company was at that time itself uncertain as to what the true position was.

The learned trial judge, having misinterpreted the letter of the 24th of July, 1964, seems to have over-emphasised the effect of the receipt. The signing of that receipt cannot be regarded in isolation; it must be evaluated in the light of all the circumstances as outlined above.

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In *Neuchatel Asphalte Co., Ltd. v. Burnett*, [1957] 1 All E. R. 362, the facts as they appear in the head-note were as follows:

"In September, 1955, the defendant employed the plaintiff company to put a new surface on the drive of his premises and to do certain other work. The company's bill amounted to £259, but the defendants raised some minor queries which might reduce it by £14 or £15. On Oct. 26, 1955, the defendant sent a cheque for £125 and stated in a covering letter that this sum was 'on account' pending the receipt of the company's reply to outstanding queries in connection with the work. On Dec. 21 the defendant again wrote to the company saying: 'With further reference to your account, in spite of repeated requests for allowance to which I am entitled you have failed to advise me in this matter. I am therefore enclosing my further cheque for £75 in respect of this work.' On the back of the cheque enclosed with the letter the defendant had typed: 'In full and final settlement of account! The cheque was accepted by the company. The secretary of the company signed a receipt on the back of the cheque, under the typed words, and the cheque was endorsed by the company's rubber stamp. The defendant had thus paid £200 in all against the bill of £259. The company afterwards offered to credit him with £4 10s. in respect of his queries. The defendant replied that his cheque of Dec. 21, was in "full and final settlement of your account" and was endorsed accordingly and accepted by you...the matter must therefore now be considered as concluded.' In an action by the company to recover the balance (£59) of the account,

**Held:** having regard to the correspondence and the surrounding circumstances, there was no intention on the part of the company to accept the cheque for £75 in full satisfaction of the company's claim, because the words 'In full and final settlement of the account', typed on the back of the cheque, were inconsistent with the main object and intention of the transaction, particularly since (a) the covering letter of Dec. 21, 1955, plainly imported that the cheque was sent only on account and not in full and final settlement, and (b) it could not reasonably be supposed that, in the circumstances, the plaintiff company had agreed to a reduction of £59 in the account; and, therefore, the company was entitled to be paid the balance of the account."

In the course of his judgment Lord DENNING at p. 365, letters E and F, said:

"It is a well settled rule of construction that, if one party puts forward a printed form of words for signature by the other and it is afterwards found that those words are inconsistent with the main object and intention of the transaction as disclosed by the terms specially agreed, then the court will limit or reject the printed words so as to ensure that the main object of the transaction is achieved.....We do not allow printed forms to be made a trap for the unwary. So, in the present case, words of this kind on the back of a cheque cannot be made a trap for the unwary: and this is so, even though they are typed and not printed."

Considering all the circumstances of this case in the light of the evidence accepted by the learned trial judge, I conclude that the intention of the appellant was that the receipt "in full payment" was subject to the result of his solicitor's enquiries and subsequent demand. He was merely taking what he could get in the meantime. His conduct, therefore, cannot be regarded either as evidence of knowledge of the alleged terms of his employment and/or as acquiescence in it.

In my view, therefore, the respondent company did not discharge the burden cast upon it. Consequently the plaintiff's contract of employment with the respondent company subsisted until he was dismissed.

In his letter of 12th September, 1964, to the respondent, the appellant's solicitor wrote:

"My client, Mr. Ivan Harris, instructs me that he was recalled for one day during August, 1964, in his said capacity as Captain of the said M. V. 'Peradventure' and then dismissed, without notice. He was paid the sum of \$51.00 in lieu of notice."

It seems, therefore, that the appellant had at that time accepted that in the circumstances as then known and appreciated by him, he had been dismissed on the 14th August, 19'64, but that he was entitled to salary up to that time and wages in lieu of notice.

Section 17 of the Labour Ordinance, Cap. 103, provides as follows:

"(1) Where there is no agreement to the contrary a contract of service should 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;

(b) by either party

(i) for good and sufficient cause;

(ii) in the absence of any agreement to the contrary by fourteen days' notice given to or served upon the other party."

Consequently the plaintiff is entitled to —

(a) salary from 1st June, 1964, to 14th August, 1964	...	\$539.35
(b) two weeks' salary in lieu of notice	...	<u>\$ 99.36</u>
		\$638.71
<i>Less</i> paid on 17.8.64	...	<u>\$ 51.00</u>
		<u>\$587.71</u>

Accordingly, I would allow the appeal, set aside the judgment of the learned trial judge and enter judgment in favour of the appellant for \$587.71 with costs in this court and in the court below to be taxed certified fit for counsel.

BOOKERS CENTRAL PROPERTIES LIMITED AND BOOKERS SHIPPING (DEMERARA) LIMITED v. TOOLSIE PERSAUD LIMITED.

[Supreme Court (Bollers, J.) November 20, 25, December 2, 9, 30, 1965, January 14, 1966]

*Injunction—Negative covenant—Breach of—Whether court has discretion to refuse injunction.*

*Injunction—Nuisance—Defence that injunction would stop operation of saw-mill and that defendant making reasonable use of his property—Whether valid.*

*Nuisance—Emission of smoke by saw-mill incinerator—Eyes of workmen at neighbouring establishments affected—Whether nuisance.*

Under a party-wall agreement with the first-named plaintiffs, the defendants covenanted that they would not install or use or operate on their side of the wall any saw-mill or other machinery or plant which by reason of dust and smoke or otherwise would be a nuisance or annoyance in law to the first-named plaintiffs, their servants, tenants, or licensees. The defendants operated an incinerator on their side of the wall for the purpose of disposing of refuse from their saw-mill. Despite their best efforts, smoke and dust were emitted from the incinerator and this caused damage to the eyes of workmen on the plaintiffs' establishments on the neighbouring lots. The plaintiffs brought an action for damages for breach of contract and nuisance and applied for an interlocutory injunction. The defendants contended *inter alia* that they had taken all possible care to prevent the operation complained of from amounting to a nuisance, that they were using their property reasonably, and that the grant of the injunction would virtually result in closing down their saw-mill and incinerator with consequential loss of employment to hundreds of persons. The evidence however, showed that steps could be taken to guard against the escape of excessive smoke and cinders by proper and efficient operation.

**Held:** (i) the application was one for an injunction to restrain the breach of a negative stipulation in a contract and the rules applicable to the granting of an injunction by the court in the exercise of its equitable jurisdiction did not apply. The mere circumstance of a breach of the stipulation afforded sufficient ground for the injunction and in such a case the court had no discretion to exercise;

(ii) the evidence *prima facie* showed that in allowing smoke and cinders to escape to the plaintiffs' land the defendants were committing a nuisance. There was therefore a *prima facie* case of a breach of the negative stipulation, with the consequence that the plaintiffs were entitled to an interlocutory injunction to restrain the defendants from committing such breach;

(iii) altogether apart from the negative stipulation, the plaintiffs were on ordinary principles entitled to an interlocutory injunction. The damage to the eyes of the plaintiffs' workmen could not be compensated in money and the balance of advantage was not against the defendants, since the effect of the injunction would not be to close down their business, but merely to restrain them from operating it in such a manner as to cause a nuisance, and the evidence showed that it was within their power to avoid a nuisance by proper and efficient operation;

## BOOKERS v. PERSAUD

(iv) the defence that the defendants were making reasonable use of their premises and that all possible care and skill was being used to prevent the operation complained of from amounting to a nuisance was ineffectual.

*Application granted.*

*G. M. Farnum* for the plaintiffs (applicants).

*B. O. Adams, Q.C.*, for the defendants.

BOLLERS, J.: This is an application by way of summons for an interlocutory injunction to be granted until the determination of an action for damages for breach of contract and nuisance.

The first-named plaintiffs are a commercial undertaking and their offices are situated at mudlot 5, Lombard Street, Georgetown, whereas the second-named plaintiffs carry on the business of ship-owners and warehousemen and their business places are situated at mudlots 5—9, Lombard Street, immediately south of the premises of the first-named plaintiffs and are the licensees of the first-named plaintiffs. The defendants carry on the business of saw-milling and stone-crushing on mudlot 4, Lombard Street, which is north of and adjoins mudlot 5, Lombard Street.

It is disclosed in the affidavit of the secretary of the first-named plaintiffs—which was not denied by the defendants—that on the 18th February, 19'63, the first-named plaintiffs and the defendants entered into what may be described as a party-wall agreement whereby it was agreed that the defendants should erect a building on mudlot 4 in such manner that the southern wall of the building should be constructed as a party wall between mudlots 4 and 5 in accordance with and subject to certain covenants. One of the covenants was that the defendants would not install or erect in the building on lot 4 or on their adjoining land, or use or operate any saw-mill or other machinery or plant which by reason of vibration, dust and smoke or otherwise would be a nuisance or annoyance in law to the first-named plaintiffs or cause a nuisance or annoyance in law to the first-named plaintiffs, their servants, tenants or licensees.

Affidavits were filed and evidence led on both sides in this application, and it is the case for the plaintiffs that throughout the year 1964 and up to the month of November 1965 when this matter was being heard the defendants, notwithstanding the repeated protests of the plaintiffs, continued to operate their saw-mill and incinerator plant on mudlot 4 in such a manner as to cause the business premises of the first-named plaintiffs to be shaken by excessive vibration and to cause excessive quantities of smoke, dust, cinders and noxious matter to be spread and diffused over the premises of both plaintiffs to the detriment of their respective businesses, causing discomfort and injury to their employees and actual stoppages of work resulting in great loss to their business.

It is the case for the defendants that the allegations made by the plaintiffs are a gross exaggeration made without justification, and that the defendant company have made every possible effort to control the small amount of sawdust and smoke which might escape from the incinerator from time to time and which may be blown by the wind in the direction of the business premises of the plaintiffs. That the defendant company are operating a modern saw-mill on the best technical advice that could be given, and that no nuisance in law exists or existed, and they were taking every reasonable step to prevent the existence of any nuisance and were merely making reasonable use of their premises, and to grant the injunction would, in effect, virtually amount to the closing down of their business which would cause them tremendous loss and throw several hundreds of their workers out of employment.

The second-named plaintiffs filed the affidavits of their assistant superintendent engineer, wharfinger, and assistant superintendent of the stevedores' department, and these were supported by affidavits of the chief sanitary inspector and the assistant public health officer employed by the Mayor and Town Council of Georgetown, all of whom gave evidence as to the vast amount of smoke emitted by the incinerator of the defendants' saw-mill over a period of time, and the resulting discomfort and injury to the eyes of persons in the vicinity which were subjected to cinders and partly-consumed particles of sawdust.

The defendants filed the affidavits of the managing-director and director of the company, the effect of which was to state that whatever nuisance or annoyance, if any, might have existed prior to the month of July 1965, there was certainly no cause for complaint since that date as steps had been taken to operate the incinerator in such a manner that no nuisance would be caused to any person.

Mr. Christopher Fitzpatrick, the assistant superintendent engineer at the central workshop of the second-named plaintiffs, in his affidavit of 17th February, 1965, stated that the incinerator of the defendant, which is merely 70 yards away from the workshop and north of it, is defective in that it emits dense clouds of smoke and partly-burnt sawdust which is blown into the workshop and across the wharf and any vessels lying alongside. As a result, the workmen's eyes (including his own) are affected by the sawdust, requiring first-aid treatment and causing stoppages of work. The dust from the incinerator also affects the machinery in the workshop which has to come to a halt for the filters to be cleaned. This witness, however, had been transferred to another post since 1st August, 1965, and could not speak of the conditions that existed after that date, but was able to say that in February 1965; at least 50 workmen had to leave their work to go for an eye-wash.

Mr. Joseph Williams, the assistant superintendent of the stevedores' department, in his affidavit of 17th February, 1965, corroborated what Mr. Fitzpatrick had sworn to and stated that the stevedores had fre-

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quently to receive first-aid treatment to their eyes, and on 16th December, 1964, while a ship was being loaded, work had to be suspended as a result of the clouds of smoke and dust being blown on to and across the wharf and ships. The same conditions existed on 8th February, 1965, and again on 11th May, 1965, when the work of discharging a ship was forced to come to a standstill for three periods of three-quarters of an hour, two hours and half an hour, approximately. It was on that occasion that he spoke to the managing-director of the defendant company who promised to correct the situation, and the nuisance abated sufficiently to enable the stevedores to start work. It was his evidence given in November 1965, that within the last three months he had not complained; he was not on duty all the time but he knew that there were complaints. He was under the impression that in October 1965, there was a complaint from the workers that cinders from the incinerator were getting into their eyes, but there was no stoppage of work on that occasion. He maintained that it was uncomfortable to work on the ship or in the office when the smoke containing cinders was blown across from the incinerator in the direction of the wharf.

Mr. Edward Robinson, the wharfinger, in his affidavits spoke of the quantities of smoke and partly-burnt sawdust emitted from the incinerator on the 12th February, 1965, as being particularly severe which made breathing difficult. There were many other occasions when the escape of smoke and dust existed, but *not* as severe as on the 12th February, 1965, when work was stopped.

It was the opinion of the chief sanitary inspector, Mr. Hulbert Davis, that the dense clouds of smoke and dust emitted by the incinerator constituted a danger to health if inhaled continuously over a period of time. He gave evidence that he visited the premises of the defendants on Friday, 12th November, 1965, without giving notice to them, and found the incinerator smoking heavily, and the smoke coming out in large puffs being driven across from a northerly to a southerly direction on to the plaintiffs' premises.

Christopher Andrews, the public health officer, stated that he visited the defendants' premises on many days just under a period of one year, the last visit being 1st November, 1965, and he observed dense clouds of smoke and dust coming from the incinerator on the defendants' premises and being blown across the premises of the second-named plaintiffs. In his opinion, this condition constituted a hazard to health. This witness verified that on 30th May, 1964, the defendant company was ordered by a magistrate of the Georgetown Judicial District, under the provisions of the Public Health Ordinance, Cap. 145, to abate the nuisance.

In reply to this evidence led by the plaintiffs, and which had the appearance of being strong and convincing, the managing-director of the defendant company, Mr. Toolsie Persaud, in his affidavit of 11th March, 1965, alleged that the allegations made by the plaintiffs' witnesses were grossly exaggerated, and the company had erected new

and up-to-date saw-milling equipment on their premises at very high cost, and included the erection of an incinerator for the purpose of disposing of sawdust and shavings from the operation of the mill. He claimed that since the year 1900 the site had been used for the operation of a saw-mill owned by various companies when it was purchased by him in his personal capacity in the year 1954. He, however, admitted that there had been complaints by the plaintiffs as a result of which he had communicated with the manufacturers requesting them to make such alterations in the design of the incinerator as would abate the sawdust and shavings being blown about by the wind. He swore that the defendants were willing to do anything possible to prevent the sawdust and shaving from being blown on to the premises of the adjoining owners' property, and that he was doing everything possible in his power to control the escape of the sawdust and shaving from the incinerator. He denied the existence of the nuisance in law.

In his affidavit of the 19th November, 1965, he states that a representative of the manufacturers visited the colony and inspected the incinerator and gave advice, as a result of which the incidents of fly-ash had been considerably reduced and at times completely ceased. He claims that a forced draught fan recommended by the representative had been installed and was working effectively. In paragraph 6 of this affidavit he admits that at 5.20 p.m. on 11th November, 1965, a complaint was made and on investigation it was discovered that it was the fault of the operator of the incinerator and it was immediately attended to and the discomfort ceased.

In paras. 7 and 8 he gives the assurance that if the defendants are at any time at fault in their operation of the incinerator which would interfere with the work on the business premises of the second-named plaintiffs, then action would be taken to stop it, but it must be borne in mind that the locality was in an industrial area and as a result people living in such an area must be subjected to various nuisances such as smoke and dust.

The director of the defendant company, Mr. David Persaud, in his affidavit of 19th November, 1965, admitted that the defendants now begin operations at the saw-mill at 6 a.m. by burning firewood in order to build up a temperature so as to eliminate the creation of any nuisance, and this operation was having the effect of reducing the incidents of fly-ash which would cease to exist in less than an hour's time when the plaintiffs' employees are about to arrive for work.

Mr. Whittaker, the mechanical engineer and defendants' expert, in his affidavit of 10th June, 1965, stated that he had inspected the incinerator and had made certain recommendations. He recommended a modification of the points where the dust was collected from the various mills in order to remove and convey the dust with the minimum of air and his next recommendation was to refit the dampers on the secondary air inlets and to reopen the primary air inlet; his final recommendation was to fit a rotary seal and feeder unit at the bottom of each cyclone so that only sawdust would be admitted into the

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incinerator and it would prevent excess air entering the incinerator through these points. At the time of the swearing of the affidavit he was of the opinion that what had been done and what was proposed to be done to the incinerator would eliminate any dust nuisance.

In his affidavit of 19th November, 1965, he claimed that after the recommendations made by the manufacturers' representative had been put into operation the incidents of fly-ash had been greatly reduced. In his evidence Mr. Whittaker seems to have made the point that there is nothing mechanically wrong with the incinerator itself but the fault, if any, lay with its operation. He stated that the control dampers now ensure that air is only admitted during the time that a piece of waste wood is being fed into the incinerator and that the incinerator is intended to burn all the saw dust and waste wood produced by the saw-mill, but if the incinerator is fed with dry waste products and wet waste products without proper control of the air, it would lead to partly-consumed sawdust being admitted. The result would be smoke with the damp and partly-consumed sawdust.

He emphasised that the efficient operation of the incinerator would depend on the care exercised in its operation and that either the lack of care in its operation or a possible breakdown in one of its constituents would produce thick clouds of smoke mixed with partly-consumed particles of sawdust. He agreed that the efficient operation of the incinerator required experience and that there had been faulty operation and that the operators had been processing waste products of a vastly different nature from what had gone before and failed to make the proper adjustments. His observation was that on the last occasion he saw the incinerator in operation it was functioning reasonably well and that smoke was visible for a distance of 10 to 12 feet from the top of the stack of the incinerator and beyond that it was dispersed to a slight haze.

Without proceeding to a final conclusion on the matter, I would at this stage venture to suggest that the evidence does seem to indicate that there is nothing inherently or mechanically now wrong with the incinerator. The fault, however, appears to be in its operation by inexperienced personnel, and more particularly with the control of the air through the various inlets when burning various types of material perhaps not suitable to be burnt at the same time.

I am satisfied that on the evidence before me the plaintiffs are seeking an injunction to restrain the breach of a negative covenant embodied in the agreement already mentioned made between the parties under which the defendants have already secured a benefit and in respect of which they covenanted that they would not install or use or operate any saw-mill or other machinery or plant which, by reason of dust and smoke or otherwise, would be a nuisance or annoyance in law to the first-named plaintiffs, their servants, tenants or licensees. In my view the circumstances of this case fall squarely within the principle laid down in the dictum of Lord CAIRNS in *Doherty v. Allman and Dowden*, 3 A. C. 709, when he stated in his judgment (at p. 719):

"My Lords, if there had been a negative covenant, I apprehend, according to well-settled practice, a Court of Equity would have had no discretion to exercise. If parties, for valuable consideration, with their eyes open, contract that a particular thing shall be done, all that a Court of Equity has to do is to say, by way of injunction, that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the Court to that which already is the contract between the parties. *It is not then a question of the balance of convenience or inconvenience, or of the amount of damage or of injury—it is the specific performance, by the Court, of that negative bargain which the parties have made, with their eyes open, between themselves.* But, my Lords, if there be not a negative covenant but only an affirmative covenant, it appears to me that the case admits of a very different construction."

In CHITTY ON CONTRACTS, 22nd Edn., Vol. 1 at para. 1459, it is stated that where a contract is negative in nature, or contains an express negative stipulation, breach of it will be restrained by injunction. In such a case it seems that the court has no option to refuse the grant of an injunction, even though it is normally said to be a discretionary remedy. The authority for the proposition is given as *Doherty v. Allman and Dowden and Warner Bros. Pictures Inc. v. Nelson*, [1931] 1 K. B. 209. So in *Errington v. Birth*, (1911), 105 L.T. 373, a covenant against doing any act which might be "an annoyance or inconvenience" to the occupiers of adjoining property was held to be broken by the carrying on of a fried-fish shop the breach of which could be restrained by injunction.

It is clear then that this is an application for an injunction to restrain the breach of a negative stipulation in a contract and that the rules applicable to the granting of an injunction by the court in the exercise of its equitable jurisdiction do not apply. If the construction of the contract is clear and the breach is clear, the mere circumstance of the breach affords sufficient ground for the injunction. In such a case the court has no discretion to exercise. All that it has to do is to say by way of injunction that the thing shall not be done. The injunction does nothing more than give the sanction of the process of the court to that which is already the contract between the parties. It is, in effect, the specific performance by the court of that negative bargain which the parties made with their eyes open. See 21 HALSBURY'S LAWS, 3rd Edn., para. 802, p. 382. This instance is but an illustration of the equitable maxim that equity regards that as done which ought to be done.

I have not overlooked the important fact that what the defendants covenanted that they would not do, was that they would not install, or erect, or use, or operate a saw-mill which, by reason of dust and smoke would be a nuisance or annoyance in law to the first-named plaintiffs, their servants, tenants or licensees. It follows then that the plaintiffs must establish in these proceedings a *prima facie* case of a

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breach of this stipulation and, therefore, they must show by strong evidence the existence of a nuisance in law by the use or operation of the saw-mill or other machinery. This I consider they have done. The basis of the law of nuisance is the maxim *sic utere tuo ut alienum non laedas*: A man must not make such use of his property as unreasonably and unnecessarily to cause inconvenience to his neighbour, and the act of wrongfully causing or allowing the escape of deleterious things unto another person's land—for example, water, smoke smell, fumes, gas, noise, vibrations, etc., would be a nuisance in law. SALMOND ON THE LAW OF TORTS, 8th Edn., at p. 237, states that all wrongful escapes of deleterious things, whether continuous, intermittent, or isolated, are equally to be classed as nuisances in law for they are all governed by the same principles.

*Fletcher v. Rylands*, (1866) L. R. 1 Ex. 265, (1868) L. R. 3 H. L. at p. 330, is the leading case on the maxim and the rule expressed in the judgment of BLACKBURN. J., as approved by the House of Lords, and is to this effect:

"We think that the true rule of law is that the person who, for his own purposes, brings on his lands and keeps and collects anything likely to do mischief if it escapes, must keep it at his peril; and if he does not do so, he is *prima facie* answerable for all the damage which is the natural consequence of its escape."

In this situation then I am of the view that the plaintiffs are entitled to an interlocutory injunction to restrain the defendants from committing a breach of the negative stipulation in the contract entered into between the parties.

If I am wrong in this approach, and I must consider the general principles involved in the grant or refusal of an interlocutory injunction in the usual way, then I would say that the plaintiffs have shown a strong *prima facie* case of an infringement of their clear legal right causing and likely to cause irreparable injury to their business. The evidence appears to be overwhelming that there was a nuisance in law being committed by the defendants over the period November 1964 right up to November and December 1965, when this matter was heard, as a result of which the plaintiffs' employees have been injured and have suffered much discomfort and inconvenience to their person by cinders and particles of partly-consumed sawdust getting into their eyes, and this situation continues.

There could be no question in this case of damages being an adequate remedy, for the simple reason that damages could hardly compensate a workman for injury to his eyes, and even though there may be no direct evidence that smoke and cinders getting into the eyes of the plaintiffs' employees caused any disease, it is a matter of commonsense that human eyes being intermittently inflamed from smoke and dust would be likely to suffer subsequently from disease. In any event, in such a case damages would be very difficult to assess or perhaps would be incapable of being assessed or estimated in terms of money. It might be impossible for the plaintiffs to state with any

degree of accuracy what compensation each worker should receive for the injury to his eyes and inconvenience suffered, or what contracts they, the plaintiffs, were unable to fulfil or were late in fulfilling, or the exact loss suffered by them due to the stoppages of work, or to estimate in money the amount of man-hours lost to them.

On the question of the balance of convenience, counsel for the defendants has submitted that an interlocutory injunction is never granted where tremendous hardship would be suffered by the defendants, or where greater hardship would be suffered by the defendants than by the plaintiffs. He urges, in support of his argument, that if this injunction were granted it would virtually result in the saw-mill and the incinerator, costing about \$1,000,000, being closed down, 250 regular employees and over 300 persons employed in forest operations being thrown out of work. I cannot accept this contention as the injunction sought is not to restrain the defendants from carrying on their business as saw-millers, or carrying on the operation of the sawmill, but merely to restrain the defendants from operating their saw-mill and machinery on their premises in such a manner as by the emission of dust, cinders, smoke or otherwise to cause a nuisance or injury to the plaintiffs' premises or their servants or agents or their employees on the premises. This they are in a position to do as their own evidence indicates that they can take steps to guard against the escape of excessive smoke and cinders by proper and efficient operation. The plaintiffs have therefore, discharged the burden of proof placed upon them in showing that the inconvenience which they would suffer by the refusal of the injunction is greater than that which the defendants would suffer if it were granted.

The defence that the defendants were making reasonable use of their premises and that all possible care and skill was and is being used to prevent the operation complained of from amounting to a nuisance is ineffectual for, as LINDLEY, L. J., said in *Rapier v. London Tramways*, [1893] 2 Ch. 599:

"If I am sued for a nuisance and the nuisance is proved, it is no defence on my part to say and to prove that I have taken all reasonable care to prevent it."

In any event, the promise made by the managing-director of the company that he undertakes to rectify any fault in the operation of the incinerator and that if at any time its operation interferes with the work on the plaintiffs' premises, action would be taken immediately to bring it to a halt, cannot be regarded with any seriousness as events over the past year have shown that several complaints had been made from time to time which the managing-director of the defendant company promised to rectify and control but never appeared to have succeeded in so doing.

In dealing with the application for the grant of a perpetual injunction, Lord KINGSDOWN said in the case of *Imperial Gas, Light and Coke Co. v. Broadbent* (1859), 7 H. L. Cas. 600, at p. 612:

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"The rule I take to be clearly this—if a plaintiff applies for an injunction to restrain a violation of a common law right, if either the existence of the right or the fact of its violation be disputed he must establish that right at law (and its violation), but when he has established his right at law I apprehend that, unless there be something special in the case, he is entitled as of course to an injunction to prevent the recurrence of that violation."

I am of the view that the plaintiffs have established a *prima facie* case of this position and are therefore, entitled at this stage to the grant of an interlocutory injunction.

I am satisfied that there are substantial questions to be tried and, therefore, in the exercise of my discretion in respect of the equitable jurisdiction of this court I am prepared to grant the injunction as prayed for in the terms of the summons, with the usual undertaking as to damages and costs and so preserve the *status quo*, and order accordingly. Costs to be costs in the cause.

Although I have made it clear that the injunction sought has been granted, I am willing, with the consent of the plaintiffs if they so choose to do in a spirit of goodwill at the commencement of the new year, to suspend the operation of the order of the court for a trial period of four months on terms suitable to them, with liberty to apply.

*Application granted.*

Solicitors: *Miss Desiree Bernard* (for the plaintiffs (applicants));

*A. G. King* (for the defendants).

INLAND REVENUE COMMISSIONER v. GUYANA INDUSTRIAL  
AND COMMERCIAL INVESTMENTS LTD.

[High Court—In Chambers (Persaud, J.) March 19, 26, 28, 29, 31, July 19, 1966].

*Income tax—Dividends paid to shareholder from profits made by company—Profits not liable to tax in hands of company—Deduction of tax by company from dividends paid—Validity of deduction—Liability of shareholder to pay tax on the whole dividend—Income Tax (In Aid of Industry) Ordinance, Cap. 300—Income Tax Ordinance, Cap. 299, ss. 27, 29 and 30.*

D. S. T. Ltd. made certain profits in respect of which it was exempt from payment of income tax by virtue of the Income Tax (In Aid of Industry) Ordinance, Cap. 300. From these profits D. S. T. Ltd. paid over dividends to the respondent shareholders after deducting income tax at 45% under s. 29(1) of the Income Tax Ordinance, Cap. 299. The Commissioner of Inland Revenue contended that the whole of the dividends was taxable in the hands of the respondents.

**Held:** if a company is not liable to tax on certain profits out of which a dividend is paid to a shareholder the company must pay over to the shareholder the full dividend, and the effect of this is to render the shareholder liable to tax on the dividend.

*Appeal allowed.*

*Doodnauth Singh*, Senior Legal Adviser (ag.), for the appellant.

*C. L. Luckhoo, Q.C.*, for the respondents.

PERSAUD, J.: It is perhaps not inappropriate to commence this decision in the same vein as MAC KINNON, L. J., did in *C. I. R. v. Cull*, 22 T. C. 628, and say that there is only one thing about this case of which I am certain, and that is that it presents perhaps the most difficult (tax) problem I have ever attempted to solve.

This is an appeal by the Commissioner of Inland Revenue against a majority decision of the Board of Review in which the Board set aside an additional assessment raised by the Commissioner against the respondent company in respect of income for the year 1962. For the sake of brevity, I shall refer—as was done in the course of the argument—to the respondent company as GICIL, and to the Demerara Sugar Terminals, Ltd., a company of whom GICIL is a shareholder, as DST. DST is a company incorporated in 1958 under the Companies Ordinance, Cap. 328, and is limited by shares, GICIL being one of the shareholders. DST commenced business in 1960, and was entitled to certain initial and annual allowances under the Income Tax (In Aid of Industry) Ordinance, Cap. 300. As a result of these allowances, that company showed a loss in its income tax return for year of assessment 1961. For year of assessment 1962, after the appropriate deductions had been made under the Income Tax (In Aid of Industry) Ordinance, no income remained on which tax was payable, but by virtue of s. 14A of the Income Tax Ordinance, Cap. 299, income tax became payable on a minimum chargeable income of 2% on DST's turnover which amounted to \$52,767. By virtue of s. 27 (1) of Cap. 299, 45% of this amount (Which amounted to \$23,745.15) was payable as income tax by DST and this was in fact paid.

In December, 1961 DST declared a gross dividend in respect of year of assessment 1962 of \$90,909.90, divisible among its shareholders, of which amount \$72,727.27 gross was payable to GICIL. After 45% of this amount had been deducted by DST as income tax and retained, the sum of \$40,000 free of tax was paid over to GICIL, and a certificate to that effect issued by DST in accordance with s. 29 (2) of Cap. 299.

The Commissioner contends that as the sum of \$72,727.27 is not subject to income tax in the hands of DST; DST has no legal authority to deduct such tax, but that the entire amount is liable to tax, as a dividend received by GICIL. The majority of the Board of Review was of the opinion that as the dividend was immune to tax while it was in the hands of DST, it must logically follow that it is also immune to tax when passed to the shareholders of that company, for to hold otherwise would be to defeat the objects of the Income Tax (In Aid of Industry) Ordinance, and they rested their decision on that view, I regret that I have been unable to find the case referred to (*Simon v. C. I. R.*) on which this view was based [see para. 13 of Board's decision].

In deducting income tax at source, DST purported to act under s. 29 (1) of the Income Tax Ordinance, Cap. 299, which provides as follows:

"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:

Provided that where tax is not paid or payable by the company on the whole amount 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."

And it would be pertinent here to advert attention to s. 30 of the Ordinance which provides that tax which is deducted or can be deducted from a dividend shall be set off against the tax payable by the shareholder in respect of the latter's chargeable income.

Counsel for the respondent company has argued that the Commissioner has treated the expression "whole income" in the proviso to s. 29 (1) of the Ordinance to mean chargeable income and in any event that proviso is not applicable to the case under review.

There is no principle in company law which compels a company while a going concern, to divide the whole of its profits (or income) among its shareholders; how the company should deal with such profits (or income) is a matter of management and internal economy. In my opinion, the proviso to s. 29 (1) merely recognises this rule. To understand the proviso, one must first refer to sub-s. (1). That subsection authorises the deduction by a locally registered company from a dividend which is being paid, tax at the rate paid or payable by the company on the income out of which the dividend is being paid. And the pro-

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viso restricts such a deduction to the income on which the tax is paid or payable when the tax is not being paid or is not payable on the whole of the income out of which the dividend is payable. Thus, there can be no confusion between "whole income" and "chargeable income", and this is not the stand taken by the Commissioner. I am of the view that this case does fall within the purview of s. 29.

Both s. 29 and s. 30 were examined in some detail by WYLIE, J., in *I. R. C. v. Davsan*, 1960 L.R.B.G. 178. There the respondent company was assessed 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. Three questions were posed to the court:

- (1) whether or not the sum of \$1,200 was a 'dividend' within the meaning of s. 5 of the Income Tax Ordinance;
- (2) whether or not the said sum was 'income' of the respondent company within the meaning of s. 5 aforesaid; and
- (3) whether or not, even if the sum of \$ 1,200 be a dividend and be income within the meaning of s. 5 aforesaid, the same is chargeable with income tax, having regard to the provisions of the Ordinance relating to dividends and to the fact that the said sum of \$1,200 was paid out of capital profits.

Referring to ss. 2, 5 (c), 26 (1) of the Income Tax Ordinance (Cap. 299), WYLIE, J., said [at p. 180]:

"These provisions taken on their own, and giving the language used its plain meaning, would leave no room for doubt that any dividend received by a company as part of its income must be included in calculating its chargeable income, and is liable to tax as part of that chargeable income at the rate set out in s. 27 (1), even if the fund from which the dividend has been paid has already been subjected to tax under s. 27 (1) as part of the chargeable income of the company which declared the dividend."

And at p. 181 (*ibid*) referring to s. 29 (1):

"Indeed there is a condition in the section that the shareholder is entitled to the set-off only when the dividend is included in the chargeable income of the shareholder. This condition is probably designed to deny any right of set-off in such cases as shareholders beyond the jurisdiction who may not make a return of income, but, whatever its object, it leads irresistibly to the conclusion that the dividend, being included in the chargeable income of the shareholder, is going to be taxed as part of that taxable income, and that there is to be no right of set-off until the dividend has been subjected to tax as part of the taxable incomes of both the company and the shareholder so that the same source of income will have been subjected to tax twice."

At p. 182 (*ibid*) the learned judge draws a distinction between United Kingdom legislation, and ours when he said—

"The United Kingdom legislation, as interpreted by the courts, imposes tax at the standard rate on the income of the company, but not on the dividend in the hands of the shareholder, whereas the British Guiana legislation imposes tax on the income of the company and again on the dividend in the hands of the shareholder, but permits the latter to set off against his tax that part of the tax paid by the company which is proportionate to the amount of the dividend."

And to carry the *ratio* of WYLIE, J., to its logical conclusion, if the company has paid no tax on any part of the dividend which has been paid over to the shareholder—for whatever reason—then it seems that there is no set-off which the latter can claim. I am wholly unable to understand how it can be truly said that DST has paid or is liable to pay tax on the income out of which the dividend has been paid. It is only right to attract attention to another *dictum* of WYLIE, J. (at p. 186 *ibid*) in this regard and to this effect:

"The specific terms of the legislation do not give rise to any consideration as to whether or not the dividends from which the income is derived have been paid out of funds which were not taxable in the hands of the company paying the dividend." That case was taken on appeal to the Privy Council *sub nom. Bieber, Ltd. v. Commrs. of Income Tax* [1962] 3 All E. R. 294 The appeal was dismissed, [See 1965 L. R. B. G. 67] The sole point canvassed before the Privy Council was whether the sum of \$1,200 was received by the appellants as 'income', and this was answered in the affirmative, the main point argued before me in the instant matter not having been raised in the Privy Council.

As has been indicated, there is not in the United Kingdom tax legislation similar to s. 29 of our Income Tax Ordinance, Cap. 299. But it may be gainful to examine a few English cases dealing with the imposition of super tax.

In *Gimson v. Commrs. of Inland Revenue*, 15 Tax Cas. 595, a company paid a dividend on its ordinary shares out of a specific fund part of which consisted of profits of a capital nature, and not liable to income tax. The dividend was declared as '5 per cent, actual' and was paid tax in the hands of the company. The remainder of the fund was made up of accumulated items of income which had not, under the law at the material times, been brought into any computation of liability to income tax. The dividend was declared as '5 per cent, actual' and was paid without any deduction. The appellant received £75, and following the proportion of the capital and income portions of the fund, £35 was regarded as paid out of the income portion.

The appellant was assessed to super tax in respect of £44, £35 plus £9 as the appropriate addition for income tax. He contended that as the income out of which the payment was made was not liable to be assessed to income tax, there was no liability to super tax, and his contention was upheld by ROW-LATT, J. It seems to me that the decision in the *Gimson*

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case points to the general conclusion that where a dividend is not liable to tax (super tax in this case) in the hands of a company, it would not be liable to such tax in the hands of the shareholders.

The *Gimson* case was distinguished by ROWLATT, J., himself in *Hamilton v. Commrs. of Inland Revenue*, 16 Tax Cas. 213, and his decision was affirmed in the Court of Appeal. In the *Hamilton* case the appellant was the holder of shares in a limited company which paid dividends exceeding in amount the income of the company, as computed for income tax purposes, for the periods in respect of which the dividends were declared. The dividends were paid under deduction of income tax at the standard rate. The appellant was assessed to sur-tax, and the full amount of the dividends was taken into account for this purpose, but he contended that his income from the company for sur-tax purposes could not exceed the proportion received by him of the company's 'statutory income'. It was held that the full amount of the dividends was properly included in the assessment to sur-tax.

The object of referring to the *Hamilton* case is to draw attention to a *dictum* of ROMER, L. J., which is in my view of paramount importance, and which explains the position as between a company and its shareholders in regard to their respective liabilities to tax. ROMER, L. J., said (at p. 235 *ibid*):

"It has, however, frequently in recent days been pointed out by the courts...that the company is one taxpayer and that each individual shareholder is another and a separate taxpayer, on whose behalf the company deducts a tax when it pays a dividend, but on whose behalf it is not paying the tax when it pays its own tax to the Crown. If a company should declare a dividend without deducting tax then it seems to me that the shareholder would himself be assessable to tax in respect of the dividend he had received...If that be so, and the company merely acts as a collector of the tax payable by the taxpayer to the Crown, it is quite obvious that the appropriate tax to be deducted from the dividend is a tax which the taxpayer himself would have to pay if he were assessed directly in respect of that dividend."

It seems to me to follow that if a company is not liable to tax on certain profits out of which a dividend is paid to a shareholder, then that company must pay over to the shareholder the full dividend the effect of which is to render the shareholder liable to tax on that dividend. The position in this case resolves itself into this. The taxpayer is claiming relief in the nature of a set-off in regard to income tax which the parent company was not competent to make. In my judgment, the taxpayer—GICIL in this case—would not be entitled to the relief.

I wish to say that I have referred to *Neumann v. C.I.R.* 18 Tax Cas. 332, to which my attention was drawn by counsel for the respondents. In that case a deduction from a gross sum was authorised, but was not in fact made, and the House of Lords held that there could be no distinction in those circumstances between a gross sum and a net sum, and that the actual sum paid was that which should have been in-

cluded in the return. The distinction to be drawn between the *Neumann* case and the instant case is that in the latter no deductions were permitted DST, but a deduction was in fact made. It follows from what I have said so far that in my opinion the Commissioner appears to be on firm ground, and ought to succeed in this appeal.

The next question to be determined is the extent of the respondents' liability. I agree with the Commissioner that the proportion of total dividend paid to GICIL to the total dividend declared by DST is 8%. DST paid the amount of \$52,767.00 as tax; and 8% of this sum is \$4,221.36, 45% of which is \$1,899.61. The sum of \$1,899.61 would represent the respondents' contribution so to speak towards the tax paid by DST. According to my judgment, GICIL should have been taxed on the gross dividend of \$92,727.27; they have in fact been taxed on \$40,000. I do not pretend to understand the method of computation executed by the Commissioner as contained in the statement of facts; but I would have thought that the respondents' additional liability is now limited to 45% of the sum of \$32,727.27 less the sum of \$1,899.61. According to my computation that sum is \$12,726.39.

My judgment will therefore be that the appeal is allowed. The decision of the Board of Review is set aside, and the additional assessment is varied to read \$12,627.39. As the Commissioner has succeeded on a point of law, I think he is entitled to his costs and I so order.

*Appeal allowed.*

GUYANA MARKETING CORPORATION v. PETER TAYLOR AND  
COMPANY LTD., AND PETER TAYLOR

[High Court (Bollers, C.J. (ag.)) July 5, 19, 1966]

*Practice and procedure—Libel—Denial that words published falsely and maliciously coupled with plea of fair comment—Application to strike out denial—O.17, r. 15.*

In an action for libel para. 2 of the statement of defence denied that the defendant published the words complained of falsely and maliciously while para. 4 alleged that the words were fair and *bona fide* comments made without malice upon a matter of public interest. The plaintiffs applied to strike out the denial in para. 2 of the statement of defence on the ground that it infringed O. 17, r. 15, and tended to embarrass, prejudice and delay the fair trial of the action.

**Held:** the denial that the defendant published the words complained of falsely and maliciously was relevant to the defence of fair comment and was therefore harmless. The plaintiffs' remedy lay in an application for particulars, and not in an application to strike out.

*Application dismissed*

## G. M. C. v. PETER TAYLOR AND CO., LTD.

*Mrs. S. Patterson* for the plaintiffs.

*A. S. Manraj* for the defendants.

BOLLERS, C. J. (ag.): In this summons objection is taken by the plaintiffs in the action to the form of pleading set up by the defendants in para. 2 of the defence where they seek to have struck out so much of para. 2 of the defence as denies that the defendant published the words complained of falsely and maliciously.

In para. 3 of the statement of claim the plaintiffs had alleged that the defendants falsely and maliciously printed and published of and concerning the plaintiffs certain words which were the subject-matter of the action and the defendants in para. 2 of the defence admitted the printing and publication of the said words set out in para. 3 of the statement of claim, but denied that they did so falsely and maliciously.

It is submitted by counsel for the plaintiffs that this traverse by the defendants is an infringement by the defendants of O. 17, r. 15, of the Rules of the High Court of the Supreme Court of Judicature, and furthermore that it tends to embarrass, prejudice and delay the fair trial of the action. Order 17, r. 15, is the English Order 19, r. 18. Order 17, r. 15, states as follows:

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

It is the submission of counsel for the plaintiff that under this rule the defendant must raise all such matters of defence which, if not raised, would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the proceedings. It is counsel's contention that the defence infringes this rule because of its generality, and if para. 2 is allowed to remain as it is, then the defendants could at the trial raise the defence of justification, privilege and fair comment. In support of this submission counsel cited *Belt v. Lawes*, (1882), 51 L.J. Q.B. 359. In reply, counsel for the defendants submits that this form of pleading is permissible as in para. 4 of the defence the defence of fair comment is pleaded, and that the plaintiff's remedy is a mere application for particulars in respect of para. 4 of the defence.

The submission of counsel for the plaintiffs is based on a statement in GATLEY ON LIBEL AND SLANDER, 5th Edn., p. 465, wherein it is stated it is bad pleading for the defendant to deny or refuse to admit that he wrote or published the words complained of falsely or maliciously as alleged. *Belt v. Lawes* and *Penryhn v. Licensed Victuallers* (1890), 7

T.L.R. 1. In the former case it was held that in an action for libel the defendant may not deny generally in his statement of defence that the "defendant wrote or published the same falsely or maliciously as alleged", but must set out the facts upon which he relies, either to show justification or privilege. FIELD, J., in that case considered the question whether the allegation that the defendant wrote and published the alleged libel falsely and maliciously was a material allegation which the defendant must deny, or which, in default of such denial, would be taken to be admitted, under O. 17, r. 13, which is the English O. 19, r. 17, and arrived at the conclusion that the word "malicious" was immaterial and that the correct way to traverse the allegation that the words were published maliciously was merely to set out the circumstances that rebutted the implication of malice. He pointed out that the only object of alleging that the defendant published the words maliciously was that if the defendant at the trial wanted to set up privilege or truth he should be precluded from doing so if he had not pleaded it. He was therefore quite satisfied that the allegation as to the publication being malicious was not material. He also felt that the allegation that the words were published falsely was also not material as a libel *prima facie* imported a wrong, which meant that the publication was presumed to be false and cast the onus on the defendant of proving it was true, if of course the defendant was setting up the defence of justification. There was, therefore, no good done by a traverse of the allegation that the defendants published the words falsely, but such a traverse, on the other hand, was mischievous as under it the defendant might set up a defence of justification and under O. 19, r. 18 (local O. 17, r. 15) the plaintiff was entitled to know if such a defence was contemplated.

HUDDLESTON, B., arrived at the same conclusion as FIELD, J., and felt that the traverse of the allegation by the plaintiff that the defendant published the words falsely and maliciously meant that the defendant took on the onus of justifying the alleged libel without pleading justification, and that as regards the traverse of the malice, if the words were libellous, malice is inferred and could only be rebutted by showing privilege or justification, and he pointed out that for these defences the plaintiff should be prepared at the trial having had notice by the defendant's plea that he intends to set them up, but a mere denial of a falsity and malice did not give such notice to the plaintiff. The court then proceeded to dismiss the appeal and upheld the judge's ruling that the offending words in the paragraph of the defence must be struck out.

It is important to observe that in this case the defendant had not set up the defence of justification or privilege or fair comment. So too in *Walcott v. Hinds* (1964), 8 W.I.R. 50, a judge in chambers in a similar situation struck out the offending words in para. 2 of the defence, observing that a denial that the words complained of were published falsely and maliciously makes an inference of an insinuation that the words are true and that the occasion of publication is privileged.

However, in 10 ATKIN'S COURT FORMS AND PRECEDENTS at p. 539, in note (b), the learned author makes it quite clear that unless the defendant pleads justification and privilege or fair comment, the defence must

## G. M. C. v. PETER TAYLOR AND CO., LTD.

not deny that the defendant published the words "as alleged or at all" since to do so would traverse the words "falsely and maliciously", a course which, unless the defence pleads justification or privilege or fair comment, is embarrassing and renders this part of the defence liable to be struck out upon that ground. The author cites the opinion of FRASER ON LIBEL AND SLANDER, 7th Edn., at p. 259, where it is clearly stated that the defendant must not, without pleading justification and privilege or fair comment, plead that he denies that he published the said words either falsely or maliciously. In the 6th edition of FRASER ON LIBEL AND SLANDER it is emphasised that the facts must be set out upon which the defendant relies either to show justification or privilege, and I am of the view that the same principle holds good for the defence of fair comment. It is not difficult to see that in the defence of fair comment the defendant is saying that the subject-matter commented on is one of public interest and that the words complained of are a fair comment thereon, that is, in so far as the words consist of allegations of fact the words are true in substance, and in so far as they consist of opinions of expression they are fair comment made in good faith and without malice.

The question, therefore, of the falsity of the publication and the publication of the words without malice would be relevant. Indeed, in para. 4 of the defence the defendant has set up the defence of fair comment and has alleged that the said words of the publication are fair and *bona fide* comments made without malice upon a matter of public interest. It follows, therefore, that the allegation in para. 2 of the defence that the defendant denies that he published the words set out in para. 3 of the statement of claim falsely and maliciously, would be relevant to the defence of fair comment set up in para. 4 of the defence and in that situation would be harmless.

In *Rock v. Purssell*, 84 L.J. 45, CHITTY, J., laid it down that the mere fact that an opponent's pleading contains some unnecessary matter is not sufficient ground for an application to strike out. A statement will not be struck out merely because it is unnecessary, so long as it is otherwise harmless. The ANNUAL PRACTICE, 1965, vol. 1, at p. 374, however, tells us that all matters justifying or excusing the act complained of must be specially and separately pleaded, and this the defendants have done at para. 4 of the defence, but the paragraph do not contain particulars. I agree with the submission of counsel for the defendants that the plaintiffs' remedy lies in an application for particulars, and not for striking out, under the rule that the pleading tends to prejudice, embarrass and delay the fair trial of the action. See the ANNUAL PRACTICE, 1965, vol. 1, p. 414.

I have been worried by the case of *Penryhn v. Licensed Victuallers* (1890), 7 T.L.R. 1, decided eight years after *Belt v. Lawes* (1882), 51 L.J. Q.B. 359, in which the exact same situation existed as in the present case in which the paragraph of the defence which contained a denial that the words were published falsely and maliciously was amended by striking out the words falsely and maliciously, and the paragraph which contained the defence of fair comment was allowed to remain but particulars of which were ordered to be given, but after

careful consideration I have reached the conclusion that the case was decided *per incuriam* without reference to the argument that those words were relevant in establishing the defence of fair comment.

The application is therefore dismissed with costs to the defendants fixed at \$45.00.

*Application dismissed.*

Solicitors: *M. E. Clarke* (for the plaintiffs); *L. T. Persaud* (for the defendants).

## SATOOPERSAUD v. R.

[Court of Appeal (Luckhoo, J. A., Persaud and Cummings, JJA. (ag.)) July 18, 19, 1966].

*Criminal law—Aggravated robbery—Allegation that robbery committed with other persons—No direction as to acting in concert—Effect.*

The appellant was convicted of the offence of robbery with aggravation, the alleged aggravation consisting in the fact that he acted together with two other persons unknown. The evidence showed that while the appellant was robbing C. B. two other persons were robbing her daughter I. B. The trial judge told the jury that it was "quite permissible to charge (the appellant) in the present manner as having acted together with certain other persons unknown", but did not direct the jury that it was necessary to find that the appellant and the unknown men were acting in concert. On appeal.

**Held:** the jury should have been directed that before they could find the appellant guilty of the offence charged they must find that he was acting together or in concert with the two unknown men with the common purpose or design of robbing both C. B. and I. B. The omission so to direct the jury might well have left them with the impression that the mere presence of the two unknown men with the appellant at the particular time would have been sufficient for them to conclude that they had been all acting in concert.

*Appeal allowed*

*K. Prashad* for the appellant.

*G. Pompey* for the Crown.

LUCKHOO, J. A., read the following judgment of the court:

The appellant was convicted of the offence of robbery with aggravation contrary to s. 222 (b) of the Criminal Law (Offences) Ordinance, Cap. 10. and was sentenced to imprisonment for two years and ordered to receive a whipping of six strokes.

It is of some importance to observe the particulars of the offence charged which is as follows:

"Sahadeo Satoopersaud on the 22nd day of August....together with certain other persons unknown robbed Chinma Baburam and Iris Baburam of two pairs of bangles."

## SATOOPERSAUD v. R.

The case for the prosecution was that the appellant during a dark night forcibly removed a pair of bangles from the hand of Chinma Baburam and that two other unknown persons at the same time and place forcibly removed a pair of bangles from the hand of Iris Baburam, the daughter of Chinma Baburam.

The particulars of the offence charged related then to two robberies, and the circumstances of aggravation consisted of the presence of two other persons unknown acting together with the appellant when Chinma Baburam and Iris Baburam were robbed.

In general an indictment must not be double; that is to say, no one count of the indictment should charge the prisoner with having committed two or more separate offences; but an indictment may charge the prisoner, in the same count, with felonious acts with respect to several persons if it was all one transaction.

Counsel for the appellant raised as his main objection to the summing-up, the failure of the trial judge to direct the jury as to what in law constituted acting in concert, inasmuch as the aggravating circumstances in the particulars of offence required the appellant to be acting in concert with persons unknown if he was to be found guilty of the offence for which he was charged.

All that the trial judge told the jury on this aspect was—

"The aggravation alleged by the Crown is that the accused person acted with certain other persons unknown

The case for the Crown is that the accused acted in concert with other men who are not known to the Crown. If they were known, naturally, as you might expect, they would have been in the dock alongside of the accused. But that does not make any difference to the offence charged against the accused, for it is quite permissible to charge him in the present manner as having acted together with certain other persons unknown. *That should not give you any difficulty to understand.*"

There was no direction of any kind to indicate what in law is meant by acting in concert (and the Crown concedes this to be the case) and consequently the facts of the case were never considered in the light of such a direction which should have been given.

On the evidence, the two unknown men in no way interfered with Chinma Baburam and the appellant in no way interfered with Iris Baburam. The jury was never told that if they found that the two unknown men were acting independently of the appellant, when he removed the bangles from Chinma Baburam and when they (the unknown men) removed the bangles from Iris Baburam, then the appellant could not be convicted of the offence as laid.

The jury should have been directed that before they could find the appellant guilty of the offence charged they must find that he was acting together or in concert with the two unknown men with the common purpose or design of robbing both Chinma Baburam and Iris Baburam.

The omission so to direct the jury may well have left them with the impression that the mere presence of the two unknown men with the appellant at the particular time would have been sufficient for them to conclude that they had been all acting in concert.

The jury then would not have appreciated that where presence may have been entirely accidental, or where there was no participation of one person in the act of the other, or where there was no concerted design, such a conclusion could not have been reached.

The trial judge, however, left the matter to the jury on a different basis. He put it to them in this way:

- (a) "The crux of the case lies on the identification of the accused as the robber of Chinma Baburam and Iris Baburam."
- (b) "Well if you believe these two women (Chinma and Iris Baburam) then you should have no qualms in saying that the offence has been committed."
- (c) "So, members of the jury, if you do not believe the women, that is the end of the case and you must acquit the accused"

The belief or disbelief of the "two women" (which included the question of identification) was only one part of the case. The other part raised the question—was the appellant acting in concert with the two unknown men when both women were robbed? This required a direction in law which would have sufficiently enabled the jury to apply the principles of law to the particular facts of the case.

It is difficult to say whether the jury would still have come to the same conclusion had they been properly directed.

If they were not satisfied after a proper direction that the appellant and the two unknown men were acting in concert, then they would have had to exclude immediately from their consideration —

- (a) the aggravating circumstances as it affected the robbery of Chinma Baburam, and
- (b) the robbery of Iris Baburam, and of any aggravating circumstances, involving the appellant.

With the exclusion of the said matters from their consideration they may well have entertained some reasonable doubt as to whether the appellant robbed Chinma Baburam at all. Especially if at that moment they were to reflect on the evidence of Norvin Jadobeer (a witness for the prosecution) a clerk attached to the Mibicuri Rice Mill and a watchman's assistant, to whom Chinma Baburam made a report immediately after the incident. This witness said in his evidence under cross-examination:

"Chinma Baburam told me she was going home and got a lift on a tractor and a man had interfered with her. That is all....."

## SATOOPERSAUD v. R.

She did not appear distressed when she made her report to me.....Chinma did not say anyone did violence to them—just someone interfered with them."

This witness accompanied Chinma and her daughter home and it was not until the next day that Chinma made a report to the police.

Having regard to the facts of the case, and in the absence of proper directions as regards acting in concert with the two unknown persons, I am of the opinion that the conviction with respect to Iris Baburam cannot stand. However, it may well be argued that, because of the provisions of s. 102 of the Criminal Law (Procedure) Ordinance, Cap. 11, which provide that every count shall be divisible, on the evidence the appellant could properly have been convicted for robbing Chinma Baburam and this court was in fact invited by counsel appearing for the Crown to substitute such a conviction in accordance with s. 17 (2) of the Federal Supreme Court (Appeals) Ordinance, 1958 (No. 19).

But I am unable to say that the jury would inevitably have come to the same conclusion if they had received the directions which in law should have been given. I am not unmindful of the fact that the jury having convicted the appellant on the indictment must have accepted the evidence for the prosecution, but to have convicted the appellant as they did, they had to find that he was acting in concert with others both in respect of Chinma Baburam and Iris Baburam, and in the absence of a proper direction on this aspect, it is not known what verdict they would have reached and so it would be unsafe to allow any part of the conviction to stand.

For the above reasons the appeal is allowed and the conviction and sentenced quashed.

*Appeal allowed.*

## TEIXEIRA v. MARSHALL

[Court of Appeal (Luckhoo, J. A., Persaud and Cummings, JJ.A. (ag)) July 11, 22, 1966].

*Criminal law—Charge of break and enter and larceny—Conviction for receiving—Validity of conviction—Criminal law (Offences) Ordinance, Cap. 10, s. 229 (a)—Summary Jurisdiction (Procedure) Ordinance, Cap.15, ss.41 (5) and 60(1).*

The appellant was tried summarily on an indictable charge for breaking and entering and larceny. Section 41 (5) of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, provides that "where larceny of any kind is charged and the evidence establishes the receiving of any property . . . the defendant . . . may be convicted of the offence the commission of which the evidence establishes and punished accordingly". The appellant was convicted of receiving. On appeal, it was contended for him that the offence of break and enter and larceny was not "larceny of any kind" within the meaning of s. 41(5) of Cap. 15 and that consequently the conviction for receiving was bad.

**Held:** (i) an accused person can be convicted for a lesser offence provided that the language of the charge is such as to include that lesser offence; and this is really the effect of s. 40 of Cap. 15 so far as courts of summary jurisdiction are concerned;

(ii) although the description may differ, break and enter and larceny is merely an aggravated kind of larceny and the conviction for receiving was therefore proper under s. 41 (5) of Cap. 15.

*Appeal dismissed.*

*R. Mc Kay* for the appellant.

*G. A. G. Pompey* for the respondent.

PERSAUD, J. A. (ag.), delivered the judgment of the court: The appellant was charged indictably with breaking and entering and larceny, contrary to s. 229(a) of the Criminal Law (Offences) Ordinance, Cap. 10. The matter was heard as a summary charge under s. 60(1) of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15. At the close of the case for the prosecution, the magistrate, purporting to act under the provisions of s. 41(5) of Cap. 15, and having endorsed the charge accordingly, called upon the appellant for a defence to receiving stolen property whereupon a defence was led, and the appellant was convicted of that offence.

Upon the matter being taken to the Full Court of Appeal, the appeal was dismissed, but leave was given to appeal to this court. It would appear that the ground of appeal which has been urged in this court is the same ground which was being urged in the Full Court, *viz.*: that it was not competent for the magistrate to call upon the appellant for a defence to receiving on a charge of break and enter and larceny, having regard to the provisions of s. 41(5) of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15. The Full Court expressed the view that it was unrealistic to hold that the offence of break and enter and larceny was not a type of larceny "because the ingredient of larceny is coupled with ingredients of breaking and entering the building in which the larceny is alleged to have been committed."

To appreciate the argument advanced on behalf of the appellant in this court, it is necessary to set out in full s. 41(5) of Cap. 15. That subsection provides:

"Where larceny of any kind is charged and the evidence establishes the receiving of any property knowing the same to have been stolen.....the defendant shall not be entitled to have the complaint dismissed but he may be convicted of the offence the commission of which the evidence establishes and punished accordingly."

The argument of learned counsel for the appellant is that the appellant was charged with housebreaking, and that even though larceny formed a constituent part of that offence, it was a separate offence, and could not fall within the meaning of the term "larceny of any kind" to be found in s. 41(5) of Cap. 15.

## TEIXEIRA v. MARSHALL

Counsel concedes that by virtue of s. 40 of Cap. 15, the magistrate could have called upon the appellant for a defence to larceny, and argues that it is only at this stage can it be said that the appellant was charged with "larceny of a kind", but as break and enter and larceny is not 'larceny of a kind', the magistrate could not properly have asked for a defence to receiving.

We do not think that there is any contest as to the meaning of the word 'charged' in s. 41(5). In *R. v. D'Eyncourt* (1888), 57 L.J.M.C. 64, WILLS, J., expressed the view that a person is charged with an offence "when some one, whether a private person or a policeman, either appears before a magistrate to prosecute him for it, or accuses him to a magistrate, constable, or other person, having lawful authority to compel him by arrest or otherwise to appear before a competent tribunal and answer the accusation", (*ibid* at p. 69).

Like the Full Court, we feel that the sole point here is whether the offence of break and enter and larceny can be regarded as a kind of larceny to bring it within the ambit of s. 41(5) of Cap. 15.

In *R. v. Reid*, 5 Cox 104, the accused persons were charged with robbery, but the jury convicted them for assault with intent to rob. It was held that as the offence of assault with intent to rob was not expressly stated in the indictment, the prisoners could not at common law be convicted. At first blush, the result in *Reid's* case would appear to support the argument of counsel for the appellant, but when one looks at the judgment of JERVIS, C. J. (at p. 111 *ibid*), one finds this statement:

"I am of opinion that, in order to convict a felony, not primarily charged in the indictment, it is necessary that the minor offence, so to speak, should be expressly stated in the indictment. Thus an indictment for burglary does include a charge of housebreaking, and it may also include a charge of larceny in the house; and of these different offences, from the highest to the lowest, the party indicted may be convicted."

Again, in *R. v. O'Brien*, 22 Cox 374, the appellant, with a number of others, was indicted for riot. The indictment contained words apt to include both that offence and also the offence of committing an assault. The appellant was convicted of the latter, and it was held that upon such an indictment the jury could properly find the appellant guilty of assault.

In *R. v. Allan and Prentice*, 47 Cr. App. R. 67, it was held that upon an indictment for larceny as a clerk or servant, there was power to convict for simple larceny, and in *R. v. Brown*, [1965] 7 W.I.R. 65, it was held that upon an indictment for robbery with aggravation, the jury could properly have convicted for the lesser offence of larceny from the person.

So that the cases clearly established that an accused person can be convicted for the lesser offence, provided that the language of the

charge is such as to include that lesser offence; and this is really the effect of s. 40 of Cap. 15 so far as courts of summary jurisdiction are concerned. Learned counsel for the appellant has adverted our attention to Titles 12 and 15 of the Criminal Law (Offences) Ordinance, Cap. 10. Title 12 is headed "Larceny and similar offences", while Title 15 carries the heading "Housebreaking and Burglary". Counsel submits that by this separation the intention of the legislature was to differentiate between these offences, in the sense, to make them distinct and separate offences. They are distinct offences, carrying different punishment, but we are of the opinion that the offence of break and enter and larceny is a kind of larceny, and that where a person is charged with the former offence, he can be said to be charged with a kind of larceny.

To put the matter at rest, we would refer to 4 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND as adopted by Robert Malcolm Kerr and printed by the Beacon Press., Boston. At p. 260 (*ibid*) a distinction is drawn between simple larceny, or plain theft unaccompanied with any other atrocious circumstance, and mixed or compound larceny, which also includes in it the aggravation of taking from one's house or person. At p. 276, this statement appears:

"Larceny from the house, though it seems...to have a higher degree of guilt than simple larceny, yet it is not at all distinguished from the other at common law; unless where it is accompanied with the circumstances of breaking the house by night; and then we have seen that it falls under another description, *viz.*, that of burglary."

In our judgment, although the description may differ, break and enter and larceny is merely an aggravated kind of larceny.

So that despite the very attractive argument advanced by counsel for the appellant, we feel that the decision of the Full Court of Appeal is correct. For the above reasons, therefore, we dismiss this appeal and affirm the decision of that court.

*Appeal dismissed.*

PETER TAYLOR & CO., LTD. v. G. S. GILLETTE  
B. S. RAI v. G. S. GILLETTE

[In the Full Court, on appeal from the decision of a judge in chambers (Bollers, C. J. (ag.), Persaud and Khan, JJ.) February 18, March 30, May 6, 16, 25, 28, July 22, 1966]

*Practice and procedure—Libel—Innuendoes—Whether particulars of each innuendo must be given in indorsement of claim—0.4, r. 9.*

*Practice and Procedure—Pleading law—whether permissible.*

*Libel—Newspaper—Innuendoes—Other publications in another newspaper—Subsequent publications in the same newspaper—Admissibility.*

## PETER TAYLOR &amp; CO., LTD. v. GILLETTE

*Constitutional law—D.P.P.—Considerations in deciding to prosecute—Whether, he may consult anyone in exercising his functions—Constitution of British Guiana, 1961.*

The respondent, who was Director of Public Prosecutions, sued for libel in respect of a letter written by the appellant R. and published by the appellant company in their newspaper "The Evening Post." The letter alleged that the respondent had been submitting cases to the Attorney General before indictments were laid. In his statement of claim the respondent pleaded several innuendoes but particulars of these had not been given in the indorsement of claim. One of the innuendoes pleaded was that the respondent was not a fit and proper person to hold the public office of D. P. P. in that he was submitting, to the political influence of the Attorney General. Elsewhere in the statement of claim the respondent referred to the constitutional provisions relating to his position and insulating him from political control. Reference was also made in the statement of claim to previous publications in another newspaper and to subsequent publications in "The Evening Post" and in another newspaper controlled by the appellant company. The appellants applied to strike out various paragraphs of the statement of claim on the ground that they were unnecessary and tended to embarrass the fair trial of the action. Chung J., dismissed the applications. The appellants appealed on many grounds.

**Held:** (i) 0.4, r. 9, which requires particulars to be given of the publication in respect of which action is brought, did not apply to the innuendoes pleaded;

(ii) the paragraphs in the statement of claim referring to the constitutional provisions relating to the respondent's position constituted a pleading not of law, but of material facts, that is to say, the circumstances under which the respondent's powers were derived and his independence and security of tenure of office under the constitution, which were necessary for the purpose of formulating his cause of action;

(iii) libel consists in using language which others, knowing the circumstances, would reasonably think to be defamatory of the person complaining of and injured by them. Such circumstances are the facts and circumstances existing at or before the time when the defamatory words were published and could include the circumstance of a publication in a different newspaper, the test being whether it is connected by reference or community of subject matter to the publication of the alleged libel;

(iv) the pleading of the innuendo as to the respondent's fitness for office could be well justified by the publication since the D. P. P. in exercising his functions has no duty and certainly no power to consult anyone as to the reaction of the public to a particular prosecution.

*Appeal dismissed.*

[*Editorial Note:* Compare the decision on the merits given by George, J., on February 13, 1970. See also *Ex parte Tappin*, G. C. A., May 2, 1973]

A. S. Manraj for the first-named appellants.

Second-named appellant in person.

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

**Judgment of the Court:** In this appeal the respondent (the plaintiff in the action) filed a writ against the appellants (the defendants in the action) claiming damages for libel arising out of the publication of a letter in a newspaper named The Evening Post in the issue of the 21st January, 1964. The respondent then filed his statement of claim within the prescribed time, but the appellants before the filing of

their respective defences made an application by way of summons before a judge in chambers in which they sought to have struck out certain paragraphs in the statement of claim on the ground that the paragraphs were unnecessary, irrelevant and tended to prejudice and embarrass the fair trial of the action and did not comply with the rules of pleading, and that the innuendoes pleaded in the statement of claim could not be reasonably inferred from the publication complained of, nor could they in conjunction with the extrinsic facts pleaded reasonably bear the defamatory meanings alleged. The learned judge in chambers after hearing argument on both sides refused to strike out the paragraphs complained of and ordered accordingly. It is from this order of refusal that the appellants now appeal to this court. It should be observed at this stage that the respondent in his statement of claim pleads that he is a barrister-at-law and the Director of Public Prosecutions of this country, whereas the second-named appellant is a barrister-at-law and the author of the letter the subject matter of the publication in the aforesaid newspaper of which the first-named appellant is the proprietor, publisher and printer. In the indorsement of the claim the respondent merely states his claim against the appellants jointly and severally for damages for libel unlawfully and maliciously printed and published by the defendants of and concerning him in the newspaper of 21st January, 1964, under the caption "More Questions for the Public Prosecutor."

The first point submitted by the second-named appellant is that the indorsement of claim should be struck out as it does not comply with O. 4, r. 9, of the Rules of the Supreme Court, 1955, in that the respondent is relying on the innuendoes set out in para. 22 of the statement of claim, each of which is a separate cause of action. He urges then that the respondent ought to have supplied particulars in the indorsement in respect of each innuendo pleaded by him. In our view this argument is fallacious. Order 4, r. 9, which is O. 3, r. 9, of the English rules, means what it says, *i.e.*, particulars of the publication or publications in respect of which the action is brought must be given. The respondent has not brought an action in respect of each of the innuendoes pleaded by him; the action that he has brought is in respect of one publication only, namely, the publication of the letter in the issue of the Evening Post of contends are the extended meanings that could be given to the words of the 21st January, 1964, and in para. 22 he has merely set out what he contends are the extended meanings that could be given to the words of the publication having regard to the extrinsic facts or circumstances pleaded in the earlier paragraphs of the statement of claim. In *Grubb v. Bristol United Press Limited*, [1962] 2 All E. R. at p. 380, HOLROYD PEARCE, L. J., at p. 383 of his judgment, points out that in respect of innuendoes of this nature, that is to say, extended meanings given to the words of the alleged libel by reason of extrinsic circumstances pleaded, each of them technically constitutes a separate cause of action and can theoretically claim a separate question to the jury and a separate award of damages but in practice it is quite likely that not much will ever be heard of them again and the trial may very well be only concerned with the natural and ordinary meaning of the words. There has been then no non-compliance with O. 4, r. 9,

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Both the appellants now submit that paras. 4—9 of the statement of claim should be struck out because the respondent has offended the general rule of pleading by pleading law and has sought to interpret the constitution of the country which they urge is a matter for the decision of the court. We do not agree with this submission. In paras. 4—19, which would include paragraphs 4—9, the respondent has merely set out the extrinsic circumstances on which he bases his innuendoes in para. 22 of the statement of claim and has not in our opinion pleaded law. In para. 4 the respondent has purported to set out his duties which are in reality his powers under the constitution; in para. 5 he has pleaded that under the constitution his present duties which were before the constitution held by the Attorney General have now been taken away from the Attorney General and vested in the D. P. P. and he further alleges that under the constitution the Attorney General is required to have nothing to do with the initiation, institution or conduct of criminal prosecution. In para. 6 he alleges that the constitution expressly provides that in the exercise of his powers the D. P. P. shall not be subject to the control of any person. In para. 7 he recites the manner in which the D. P. P. is paid salary which is not required to be approved by the Legislature, thus preserving the independence of the D. P. P. in his office and he cites art. 43 of the constitution which declares that the conditions of service of the D. P. P. cannot be altered to his disadvantage. In para. 8 he asserts the only manner in which the D. P. P. can be dismissed from office under the constitution, and finally in para. 9 he pleads that the powers and duties of the D. P. P. were widely known to the members of the public by reason of a certain publication a daily newspaper of the country which has a wide circulation. According to the dictum of Lord MORRIS of BORTH-Y-GEST in *Lewis v. Daily Telegraph Limited*, [1963] 2 W. L. R. 1063, where a plaintiff has pleaded an innuendo, that is to say a true or genuine innuendo, which depends for its existence upon extrinsic circumstances, he may establish that because there were extrinsic facts which were known to readers of the words, such readers would be reasonably induced to understand the words in a defamatory sense which went beyond or which altered their natural and ordinary meaning and which could be regarded as a secondary or as an extended meaning. Lord MORRIS went on to state, "If there are some special extrinsic facts the results may be, that to those who know them the words may convey a meaning which the words taken by themselves do not convey". It was necessary, therefore, for the respondent in his statement of claim having pleaded true or genuine innuendoes to set out those extrinsic circumstances on which he depended to show that potential readers of the words of the publication of the 21st January, 1964, with knowledge of those facts would be reasonably induced to understand the words in a defamatory sense. The plaintiff has, therefore, not pleaded law but has pleaded the material facts, that is to say, the circumstances under which his powers are derived and his independence and security of tenure of office under the constitution, which were necessary for the purpose of formulating his cause of action. Vide *Bruce v. Odhams Press Limited*, [1936] 1 K.B. 697. We venture to suggest that if the respondent had not pleaded the extrinsic circumstances set out in paras. 4—19 the statement of claim would not have been rendered intelligible to its readers.

It is next urged by both appellants that paras. 9—11 and paras. 14, 15 and 17 and 18, which deal with publications in another newspaper, and paras. 12 and 13, which deal with the happenings of events in the magistrate's court, Georgetown, and the official house of a political party, cannot be used as extrinsic circumstances to support an innuendo in an action for libel in respect of a publication alleged to be published by the appellants. Support for this view in respect of publications in another newspaper appears to be found in a passage in *GATLEY ON LIBEL AND SLANDER* (5th Edn.), at p. 551, wherein it is stated:

"Where the libel is contained in a newspaper the plaintiff can, *in explaining its meaning*, put in evidence any other article or passage in the same issue of the paper which is fairly connected, either by reference or community of subject-matter, with the subject-matter of the libel, although locally disjointed from it and printed in a different type or, indeed, any article or paragraph contained in the same or in a previous or subsequent issue of the same newspaper which is fairly connected with the subject-matter of the libel. But the plaintiff is not entitled to put in evidence, *with a view to explaining, modifying or controlling the meaning of the libel*, any article or passage in the same newspaper unconnected with the subject of the libel, or (*semble*) any article or paragraph in a distinct and separate newspaper, even though referred to in the libel complained of."

The authorities cited for the first part of the proposition are a New Zealand case *Pilcher v. Knowles* (1900), 19 N.Z.L.R. 368, and an Irish case of *Bolton v. O'Brien*, (1885) 16 L.R.I.R., 97. The learned editors of *GATLEY*, in a note on the latter case state that MAY, C.J., appears to have thought that passages in other issues of the same newspaper may be adduced in evidence to explain the meaning of the passage charged to be libellous, even though they were not connected either by reference or by community of subject matter with the passage charged to be libellous. But O'BRIEN, J, dissenting, thought otherwise and was of the opinion that passages in other issues of the same newspaper were inadmissible to explain the meaning unless they were directly referred to and in that way virtually made part of the libel complained of. There is then ample authority for the proposition that publications in previous issues of the same newspaper are admissible in evidence where they are connected by reference to the publication which is the subject matter of the action for libel. What, however, is the position in relation to publications in previous issues of a different newspaper? The authorities cited above are unavailable to us but we take the view that in these cases the judges were concerned with publications in previous issues of the same newspaper and did not consider the question of publications in issues of a different newspaper. The authority for the latter part of the second limb of the proposition in the passage from *GATLEY* is a Canadian case also unavailable to us, but which in our view is contrary to the principles enunciated in the English authorities of *Hulton v. Jones*, [1909] 2 K. B. 444, *Cassidy v. Daily Mirror Newspaper* [1929] 2 K. B. 331, and *Hough v. London Express Newspaper Limited*, [1940] 2 K. B. 507, which govern the matter. Hence the learned editor of *GATLEY*, p. 544, para. 997 of the 5th Edn., states:

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" Evidence is also admissible of any 'relevant surrounding circumstances' which would or might lead those who read the libel to conclude that the plaintiff was the person referred to."

He then cites an American case *Van Ingen v. Mail Express* (1898), 156 N. Y. R. 376, as an illustration of this proposition that where an action was brought for a libellous article in an evening paper which did not name the plaintiff but which was based on articles published on the same day in the morning papers which did name the plaintiff, so that anyone who read the latter would know to whom the former referred, it was held that the plaintiff was entitled to put in evidence the articles in the morning newspapers. There appears to us to be sound logic in this result otherwise it would mean that if a newspaper published defamatory matter of a person unnamed, and then subsequently another newspaper published an article not defamatory *ex facie* but mentioning the name of a person, but which would be apparent to anyone who had read the publication by the first newspaper, that the subsequent publication was connecting the person whose name was mentioned in it with the previous publication and referred to him, then there would be no libel, which would be an absurd situation. In *Hulton v. Jones* [1910] A. C. 20, Lord Chancellor stated at page 23:

"consists in using language which others knowing the circumstances, would reasonably think to be defamatory of the person complaining of and injured by it. A person charged with libel cannot defend himself by showing that he intended in his own breast not to defame, or that he intended not to defame the plaintiff, if in fact he did both."

The important words in that passage appear to us to be words "knowing the circumstances", the circumstances being the facts and circumstances which existed at or before the time when the defamatory words were published which could very easily be the circumstances of a publication in a different newspaper, the test being whether it is connected by reference or community of subject matter to the publication of the alleged libel. Nor is it necessary as contended for by the first-named appellant that the extrinsic circumstances must be known to the author or publisher of the libel and must emanate from him. *Cassidy v. The Daily Mirror Newspaper* (supra) clearly establishes the proposition that it is immaterial whether the defendant knew or did not know of external facts which turned a presumptively innocent statement into a defamatory one. As the learned editors of WINFIELD on TORT put it at p. 595 of the 7th edition, "He must take the risk of that and he is liable either way provided the defamatory meaning which is alleged could reasonably have been put on the word." SCRUTTON, L. J., in *Cassidy's* case at p. 340 of his judgment after reciting the dicta of BRETT, L. J., in *Capital and Counties Bank v. Henty* 5 C. P. D. 514, that the evidence which made apparently innocent statements defamatory must be known both to the person who wrote the document and to the persons of whom it was published, stated that this opinion was originally obiter and since the decision in *Hulton v. Jones* is no longer law.

RUSSELL L. J., put the matter succinctly in his judgment in *Cassidy's* case at p. 351 where he stated:

"Nevertheless words may be published with reference to such circumstances, and to such persons knowing the circumstances, as to convey a meaning which would not be attributable to them in different circumstances: see per Lord BLACKBURN in *Capital and Counties Bank v. Henty*, 7 App. Cas. 741,770. So too, I think, words may be published with 'reference to such circumstances, and to such persons knowing the circumstances, as to suggest an inference in regard to some one not in terms mentioned in the statement, which would not be involved by the publication of the same words either in different circumstances or to persons ignorant of the particular circumstances which occasion the inference."

GODDARD, L. J., (as he then was) went one step further in *Hough v. London Express Newspaper Ltd.* when he stated that it was unnecessary, although not inadmissible, to call persons to say that they did so understand the words, provided it is proved that there are people who might so understand them.

One has merely to read the head note of the case of *Astaire v. Campling*, [1965] 3 All E. R. at p. 667, cited by counsel for the first-named appellant, to appreciate the *ratio decidendi* in that case would not assist the appellants in their argument. In that case it was laid down that to be actionable as a libel, a statement must itself be false and defamatory of the plaintiff, if it is itself innocent, it is not possible, by pleading innuendoes to make the defendant responsible for defamatory statements by other persons which are not either expressly or by implication approved, adopted or repeated in the statement by the defendant in respect of which an action is brought. In the instant case the letter of the second-named appellant which is the subject matter of the alleged libel could hardly be described as innocent and which, without presuming to decide the matter, one may with safety say may well be reasonably capable of bearing a libellous meaning, and the extrinsic circumstances pleaded by the respondent are not defamatory statements made by other persons not adopted or repeated in the statement of the defendant but on the contrary are merely surrounding circumstances some of which are actually referred to by the second-named appellant in his letter published in the Evening Post of 24th January, 1964. In the *Astaire* case what the plaintiff attempted to do, which he was not entitled to do, as pointed out by DIPLOCK, L. J., in his judgment at p. 669, was to adopt the device of pleading innuendoes to recover damages from the defendants for defamatory statements made about him by other persons which were not either expressly or by implication approved, adopted or repeated in the statement of the defendant in respect of which the action was brought. No such position obtains in the instant case. This authority therefore has no application to the Circumstances of the present case. It is interesting to observe that in *Lawrence v. Newberry* (1891), 7 T.L.R. 588, decided 75 years earlier than *Astaire v. Campling*, where a lady published a letter in a local newspaper referring persons who were interested in parochial matters in Eversley to the Primate's speech in the House of Lords on the Clergy Discipline Act and in that speech, which was privileged, the Primate had made a defamatory statement which could have been said to refer to the plaintiff, DENMAN, J., refused to strike out the paragraphs in the statement of claim which referred to the

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speech in the House of Lords, because in his view the paragraphs called the attention of the defendant to the allegations making out the libel, the words of the letter not being clearly libellous. Justice DENMAN went on to make it clear that the question would be for the jury to say whether they were intended by the defendant as an adoption of the Primate's description and to be applied to the plaintiff.

We consider the true position to be that which is so ably expressed by MARTIN, J., in the American case of *Van Ingen v. Mail and Express Publishing Co.* (already referred to in this judgment) and referred to by SELLERS, L. J., in his judgment at p. 667 of the *Astaire* case and that is:

"To determine the effect of the defendant's article and to whom it applied it would seem proper to show the condition of the public mind, the information the public possessed upon the subject of the article, and the consequent inference which it would readily draw from reading it."

So the submission by the second-named appellant that paras. 23—27 are not properly pleaded against him because he is in no way connected with the circumstances set out therein we reject as being unsound and must fail.

Both appellants have taken the point that publications by the same newspaper involved subsequent to the publication which is the subject matter of the libel are inadmissible in evidence in order to explain the meaning and content of the alleged defamatory words and as a result paras. 23—27 should be struck out. We take the view that as these subsequent publications are by either the same newspaper or another newspaper owned and managed by the first-named appellant it is arguable that they may be admissible as evidence of surrounding circumstances to explain the meaning of the words of the alleged libel, as a reader may very well have read the subsequent publications before reading the publication which is the subject matter of the libel. The submission by counsel for the respondent that the court acts on the principle that only in a clear case will it strike out paragraphs in a statement of claim, finds favours with us and consequently those paragraphs will remain as they are, the final decision on this question resting with the trial judge.

Finally, the point is taken that the innuendoes set out in para. 22 are not justified by the terms of the publication as set out in para. 20 which form the subject matter of the libel and ought to be struck out. In paras. 2, 3 and 4 of the letter of publication it is stated:

"But is the executive of the Association really satisfied 'without reservation' on the other aspects of the functions and duties of the D. P. P.?"

Is it aware of the fact that cases have been and are being submitted by or on behalf of the D. P. P. to the Attorney General or his officers, before indictments are laid?

Is it satisfied with the D.P.P.'s failure to institute prosecutions when responsible persons have felt that he ought to do so? This surely is a correlative duty to that of entering *nolle prosequis*. An officer may be failing in his duty not only by instituting prosecutions when he ought not to have done so, but also by failing to institute prosecutions when he ought to have done so.

\* \* \* \* \*

B. S. Rai"

As we see it, the sum total of the innuendoes pleaded is that the words by reason of the extrinsic facts known to the public, bear the following defamatory imputations—that the plaintiff was not a fit and proper person to hold the public office of D.P.P. by reason of the fact that he was incompetent and did not preserve the independence of his office but submitted to political influence and allowed political considerations to enter into his deliberations when making decisions whether to prosecute or not to prosecute in certain criminal cases, and that he sought and took directions from the Attorney General, a political minister, as to whether he should prosecute or not and whom he should prosecute or not prosecute. In submitting that the innuendoes were not justified and did not arise as reasonable inferences from the words used in the letter of publication, the second-named appellant contrasted the position of the D.P.P. in this country with the office of Attorney General in England and urged that though the Attorney General in England is in overall charge of all prosecutions of criminal matters in England and is an independent minister, he is under the conventions of the English constitution entitled to consult with the other ministers of the Cabinet as to whether or not he should prosecute in a particular case and to obtain their reaction to any prosecution considered by him. He submitted that in England law officers of the Crown are not autocratic and should take and have to take other considerations into account, for example, public policy, before deciding whether to prosecute or not, even though there may be a clear infraction of the criminal law, and as a result the Attorney General is entitled to consult his colleagues in the Cabinet. Hence there would be nothing defamatory in suggesting that the D.P.P. of this country submits indictments to the Attorney General of this country and consults with him before the indictments are laid. This submission made in the form as stated is misleading. In England while it is true that the Attorney General is responsible for the enforcement of the criminal law in a just and proper manner and the D. P. P. works under his guidance and superintendence, he is also a minister of state and a member of the Cabinet and of the administration. The D.P.P. in this country on the other hand under the terms of the 1961 Constitution is a public officer and is subject to no person, being a completely independent officer possessing powers but no duties—He is not a political figure and is not a member of the Council of Ministers. He is therefore under no duty nor has he the power to consult with members of the Council of Ministers of which the Attorney General is a member, nor indeed has he the power or the duty to consult with any other person. In England as stated by Lord MACDERMOTT in his "PROTECTION FROM POWER UNDER ENGLISH LAW" at p. 31, subject to some minor exceptions, the executive must leave the initiation

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of criminal proceedings by the Crown to the Attorney General and those to whom he is responsible. He must maintain complete independence in this difficult and delicate sphere and if he fails to do so the remedy lies in his dismissal or that of the administration. As stated by a former Attorney General of England it remains the clearest rule that in the discharge of his legal and discretionary duties the Attorney General is completely divorced from party political considerations and from any kind of political control. The Attorney General in England is, however, called upon to regard wider issues than the D.P.P. in this country. The Attorney General in deciding whether or not to prosecute may weigh considerations which go beyond the existence of evidence proving the commission of the offence in question. He must consider the effect of a prosecution on the public interest and any special circumstance which may have a bearing on the justness or rightness of a decision one way or the other. He must exercise his own judgment and his own discretion, but he is entitled to inform himself of the relevant facts and probable consequences and in doing so to seek from his ministerial colleagues such help as they can give him.

In a speech in the House of Commons on 29th of January, 1951, the Attorney General made it clear that he and the D.P.P. would only intervene to direct a prosecution when they considered it in the public interest so to do. It was a discretion which had to be exercised in a quasi judicial way and he therefore had to consider the effect which the prosecution, successful or unsuccessful as the case might be, would have upon public morale and order and all other considerations affecting public policy. In the ordinary case which involved no question of difficulty or high policy the decision to prosecute or not is that of the Director.

In this country the D.P.P. has no such duty and certainly no power to consult anyone as to the reaction of the public to a particular prosecution. Even in England as stated by Lord MACDERMOTT the Attorney General should never ask or be told whether or not he should prosecute, but he can ask and be told with perfect propriety what effect the prosecution would have on the common weal.

When, therefore, the letter of publication states that cases have been and are being submitted by or on behalf of the D.P.P. to the Attorney General or his officers before indictments are laid the reasonable inference may clearly be drawn by persons who know the terms of the 1961 Constitution that the DPP. is doing something which he has no power to do and is certainly under no duty to do and as a consequence he is incompetent, dishonest, guilty of impropriety and permitted himself to be influenced by political considerations, the Attorney General being a political figure and a member of the Government. When the letter goes on to ask the question whether the Bar Association is satisfied with the D.P.P.'s failure to institute prosecutions when responsible persons have felt that he ought to do so, the inference must arise that the plaintiff is not a fit and proper person to hold the office of D.P.P. In our view then, the innuendoes pleaded in para. 22 may well be justified by reason of the words used in the letter of publication of the 21st of January, 1964, and the extrinsic circumstances surrounding that publication.

We have arrived at the conclusion, therefore, that the learned judge was correct in refusing to strike out any of the paragraphs pleaded in the statement of claim and we would dismiss this appeal and affirm the order made, with costs to the respondent to be taxed certified fit for counsel.

*Appeal dismissed.*

## CARIBBEAN FINANCE LTD. v. BASHIR KHAN

[In the Full Court, on appeal from the magistrate's court for the Georgetown Judicial District (Bollers, C. J. (ag.), and Fung-a-Fatt, J. (ag.)) May 17, 18, June 29, 30, 1966]

*Contract—Fundamental breach distinguished from breach of fundamental term—Hire purchase agreement relating to air conditioner—Failure to work—No repudiation—Claim for arrears.*

In an action by the appellants for the recovery of arrears due by the respondent under a hire purchase agreement relating to an air conditioner it was contended for the respondent that the air conditioner never worked and that consequently the appellants were in breach of a fundamental term of the agreement. The agreement included a clause excluding the appellants from liability for any warranty that the air conditioner was fit for any particular purpose, and recited that the respondent had examined the air conditioner and satisfied himself that it was in good working condition. The magistrate found that the air conditioner never worked as an air conditioner and dismissed the claim. On appeal the Full Court found it impossible to say that this finding of fact was correct and further —

**Held:** (i) a party cannot rely on an exemption clause when he has delivered something different in kind from that contracted for or has broken a fundamental term or a fundamental contractual obligation, the general principle being that a breach which goes to the root of the contract disentitles the party from relying on the exemption clause;

(ii) but the magistrate was wrong when he found merely that the air conditioner never worked as an air conditioner. He should have addressed his mind to the problem whether there was a breach of a fundamental term and he should have gone further and considered why the air conditioner did not work as an air conditioner and made a finding whether this was due to a minor or even major defect or defects which could easily have been repaired in a short time, in which case there would be no breach of a fundamental term, or whether it was due to a defect or accumulation of defects which could not be easily repaired and which rendered the air conditioner completely unfit for the purpose for which it was purchased; or, put in other words, whether the air conditioner was at the time of delivery (this being the material time) something essentially different from that which was contemplated by the contract.

*Appeal allowed; matter remitted.*

*J. O. F. Haynes, Q.C., with M. V. B. Akai for the appellants.*

*S. E. Brotherson for the respondent.*

**Judgment of the Court:** This appeal arises out of a claim brought by the appellant company against the respondent in the magistrate's court for an amount due and payable by the respondent as arrears of

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rent under a hire purchase agreement in respect of one 2 h.p. air-conditioner, whereby the respondent had made default in payment of the monthly instalments of rent for the hire of the said article at the rate of \$36 per month.

In his defence the respondent admitted entering into the hire purchase agreement with the appellants, but pleaded that the agreement was subject to the implied condition that the article was suitable for the purpose for which it was bought, and claimed that the air-conditioner had a defect which prevented it from working. The respondent also denied that the article was seized as set out in the appellants' bill of particulars annexed to the claim, and claimed that the article was returned by him to the appellant company.

It should be observed that the hire purchase agreement contained an exemption clause excluding the owner from liability for any warranty that the goods were fit for any particular purpose, and that he had examined the goods and satisfied himself that they were in good working condition.

The case for the appellant company was, that after the hire purchase agreement was entered into on 25th February, 1964, the respondents and/or agents of the company delivered and installed the air conditioner in the respondent's premises in Sussex Street and at that time the conditioner was working properly and efficiently and it was not until the 13th July, 1964, after a complaint was made by the respondent that the conditioner was not working that the workmen in the employ of the company removed it from the respondent's premises and took it to the workshop of the company and repaired it by replacing a running capacitor which had blown and adjusted the fan blade which had loosened up. A check was made and the air conditioner was found to be working satisfactorily and it was returned to the respondent's premises where it was re-installed, checked and found to be in working order. About two or three weeks later on a complaint made by the respondent one of the company's workmen returned to the respondent's premises for the purpose of adjusting the fan blade of the conditioner which was making noise.

It is the further allegation of the appellants that on the execution of the hire purchase agreement the respondent paid \$200 as a deposit on the article, and under the agreement he was to pay rent for the hire of the article at the rate of \$36 per month commencing from 22nd March, 1964, until the sum of \$861.25 had been paid in full, but the respondent had made default in payment of the rent for the hire of the article, and as a result owed the sum of \$216, being the arrears of rent from 22nd March, 1964, to 22nd August, 1964. The company had made a demand on him for this sum which he had failed to pay and as a result on the 9th September, 1964, the company seized the article and conveyed it back to their premises where it was stored.

The case for the respondent, on the other hand, was that the company had delivered the air conditioner to the premises of his restaurant in the middle of March, 1964 where it was installed, but never switched it on at the time because electrical works were going on in the premises

at the time. It was not until three weeks later after the Electricity Corporation had connected wires to the restaurant, that in the absence of the employees of the appellant company he switched on the conditioner, and found that the fan of the machine worked and the engine started but stopped after 10 seconds. He switched off the current and reported the matter to the company around June, 1964. It was in July, 1964, that the appellant company sent their workman to the premises and he took away the conditioner, and brought it back at the end of two weeks and reinstalled it and switched it on when the fan worked but the machine did not work at all. He contacted the company but they did nothing, and as a result he wrote the company a letter on 8th August, 1964.

It was the allegation of the respondent that he complained to the company about the machine on twenty-four occasions during the period when the machine was first installed, and up to the time when he returned the machine to the premises of the appellant company in September, 1964. He complained to several employees of the company and the machine was never repaired and never worked.

The magistrate stated in his memorandum of reasons that after a careful consideration of the evidence, he found as a fact the air conditioner never worked as an air conditioner, and this was what he termed a fundamental breach going to the root of the contract and dismissed the appellants' claim. The appellants now appeal to this court on the ground that the decision of the magistrate, having regard to the evidence, is unreasonable and is erroneous in point of law in that he misdirected himself or did not adequately direct his mind to the relevant principles of law relating to a fundamental breach or breach of a fundamental term in the hire purchase agreement and to the effect thereof, and did not address his mind to the question whether the respondent at the material time had repudiated the hire purchase agreement and made no finding thereon and, finally, that the learned magistrate failed to appreciate the right legal principles for the correct determination of the issues raised on the pleadings and the evidence.

On the first ground counsel for the appellants pointed out that Narine Singh, the clerk of the appellant company who gave evidence of his knowledge of the seizure of the article, was not cross-examined on whether he had told the respondent that the company was finding difficulties with technicians to service such units.

The witness, James Kendall, who gave evidence of having installed the air conditioner in the respondent's premises at Sussex Street in February, 1964, and who stated that on the 9th September, 1964, he returned to the premises with the witness Correga to effect a seizure and at that time the air conditioner was functioning properly, was not cross-examined to show that the conditioner was installed in the month of March, 1964, and not February, 1964, nor was it put to him, as later stated by the respondent in evidence, that Kendall had told him that there was a fault in the manufacture. Kendall's evidence was to the effect that he had gone to the respondent's premises on five occasions—on the first occasion to install the machine; on the second occasion to remove the machine in order to replace a blown capacitor; on the

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third occasion to re-install it; on the fourth occasion to fix the fan blade; and on the fifth occasion to seize it. It was never suggested to this witness that when he turned the switch on about two or three months after delivery that the fan of the machine did not work and he had stated that there was a fault in the manufacture.

Desmond Woo-Sam, the technician attached to the company, said that on the 13th July, 1964, as a result of his action the conditioner was taken to the workshop where he repaired it by replacing a defective running capacitor, and having done so he checked it and found it working properly. About three months later when the air conditioner was seized and returned to the workshop, he checked it and found it working properly.

Thus it Will be seen that in the face of this apparently strong evidence that the capacitor functioned properly at the time of delivery and after it had been repaired by inserting a running capacitor and fixing the fan blade, it was never suggested to the witnesses for the appellants that the conditioner was not functioning at the date of delivery and that they were having technical difficulties in servicing the machine which contained a fault in the manufacture, so as to give the witnesses for the appellants an opportunity of denying or affirming these allegations or to lead further evidence if they so desired. Yet the magistrate appeared to have accepted the evidence of the respondent when he made the finding that the air-conditioner never worked as an air-conditioner.

The respondent's version was that he never switched on the air-conditioner until it had been in his premises for a period of three weeks, and there was no consideration by the magistrate as to what might have happened in the interval, and whether or not dust might have affected the machine in any way.

There was also the apparently strong evidence that the air conditioner had been seized and that at the time of the seizure the respondent had said he had no money and the bailiff could "go ahead". The magistrate made no clear finding whether there had been in fact a seizure or whether the respondent had returned the machine, which would be relevant in considering whether or not there had been a repudiation of the contract by the respondent.

We are of the view that the weight of the evidence being in favour of the appellants, it was the duty of the magistrate to have stated why he made a finding of fact in favour of the respondent, especially when the material time as to the proper functioning of the air-conditioner was at the date of delivery, and the respondent had stated that he did not try the machine out until the lapse of three weeks.

Having regard to the unsatisfactory nature of the magistrate's approach to his finding of fact, we consider that his conclusion may well have been erroneous. It must be observed that there was nothing to prevent the magistrate making the finding that he did, assuming that he approached the matter correctly, for there was evidence on the record on which he could reasonably have made such a finding. However, as he did not approach the matter correctly, we find it impossible to say that his conclusion was correct.

We turn our attention now to the second ground of appeal, and we take the view that by reason of the issues raised on the pleadings and the state of the evidence, it was necessary for the learned magistrate to have addressed his mind to the principles of law relating to a fundamental breach of the contract and/or to the breach of a fundamental term of the contract, and to have considered whether the respondent had discharged the onus of proof which lay upon him, in showing on a balance of probabilities, that in fact there was such a breach and that as a result thereof he (respondent) had repudiated the contract.

Under s. 8 of the Hire Purchase Act, 1968, in England there are three sets of terms implied in all contracts of hire purchase to which the Act extends, and one of those terms is, that where the hirer makes known the particular purpose for which the goods are hired there is an implied condition that the goods shall be reasonably fit for that purpose. There is no Ordinance in this country similar to the Hire Purchase Act in England, but the matter is governed by common law and in the absence of any term in the agreement expressly or by implication excluding any condition of fitness, delivery of the goods by the owner to the hirer implies a condition that the goods are as fit as reasonable care and skill can make them for the purpose for which the owner knows or ought reasonably to know they are hired. *Yeoman Credit Ltd. v. Apps*. [1961] 2 All E.R. 281; *Karsales (Harrow) Ltd. v. Wallis*, [1956] 2 All E.R. 866.

In *Charterhouse Credit Co., Ltd. v. Tolly*, [1963] 2 All E.R. 432, at p. 436, DONOVAN, L. J. (as he then was) stated:

"It is not now disputed that at common law it was an implied term of the contract that the car should be reasonably fit for the purpose for which it was hired."

In GOODE'S HIRE PURCHASE, 1962 Edn., the learned author at p. 140 states that it is generally accepted that the owner is under no duty to ensure that the goods are in proper condition throughout the hiring, but is merely required to see that at the date of delivery they are fit for the purpose for which they are hired. If they are not fit for that purpose, the hirer has his remedy. Either he can repudiate the agreement, avoid liability for payment under it and claim damages for breach of condition, or he can affirm the agreement, elect to treat the breach of condition as a breach of warranty, and recover damages on that basis, remaining liable to perform his part of the agreement. Having affirmed, he cannot later repudiate; *the breach occurs once and for all at the date of delivery and it is then that the hirer must make up his mind which of the alternative remedies he wishes to pursue.*

In *Yeoman Credit Ltd. v. Apps*, where a motor car was delivered with a large number of defects which rendered it quite unroadworthy, it was held that the hirer had derived no benefit from the car at all, and he could rely on a total failure of consideration since the essence of a motor car is that it should be capable of being driven along the road and the owner, not having supplied such a vehicle, had failed to deliver

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that which he had contracted to deliver. In other words, the principle is that where the defect in the condition of the goods delivered is so fundamental that the goods are totally valueless to the hirer, he may recover all sums paid under the agreement as having been paid for a consideration which has wholly failed.

In *Karsales (Harrow) Ltd. v. Wallis* the defendant entered into a hire purchase agreement for the delivery to him of a Buick car which he had previously inspected and found to be in good condition. Shortly after the car was left outside the defendant's premises and was found to be in a deplorable state and incapable of self-propulsion. The defendant refused to accept the car and the plaintiffs relied on the exemption or exception clause in the contract which excluded them from liability for any breach of condition or warranty that the vehicle was roadworthy as to its age, condition or fitness for any purpose.

The Court of Appeal had little difficulty in holding that the car delivered was not the thing contracted to be taken on the hire purchase agreement, and there was therefore a fundamental breach of the contract which disentitled the plaintiffs from relying on the exception clause. And since there was an implied obligation on the part of the owner to ensure that the car was delivered in the same condition as it was when it was inspected by the defendant, the defendant was entitled to refuse delivery and repudiate liability under the agreement.

DENNING, L. J. (as he then was) stated the principle that notwithstanding earlier cases which might suggest to the contrary, it is now well settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or to enable him to turn a blind eye to his obligations. And they certainly do not avail him when he is guilty of a breach which goes to the root of the contract, and he cannot therefore rely on them in that situation-

DENNING, L. J., referred to his dictum in *J. Spurling Ltd. v. Bradshaw*, [1956] 2 All E. R. 121, that the principle is sometimes said to be that the party cannot rely on the exempting clause when he has delivered something "different in kind" from that contracted for or has broken a "fundamental term" or a "fundamental contractual obligation", the general principle being that a breach which goes to the root of the contract disentitles the party from relying on the exemption clause. PARKER, L. J., in his judgment at p. 871 spoke of a breach of a fundamental term and expressed the view that however extensively the exception clause may be it has no application if there has been a breach of a fundamental term-He went on to make it clear that he was not saying that every defect in the article, that is to say, a motor car, in the case he was then considering, which renders it for the moment unusable on the road, amounts to a breach of a fundamental term, but where, as in that case, a vehicle was delivered incapable of self-propulsion, except after a complete overhaul, it seemed to him that it was abundantly clear that there was a breach of a fundamental term and accordingly that the exemption clause did not apply.

In *Astley Industrial Trust, Ltd. v. Grimley*, [1963] 2 All E. R. 33 and *Charterhouse Credit Co., Ltd. v. Tolly*, [1962] 2 All E. R. 432, the Court of Appeal adhered to the principle as laid down by DENNING, L. J., in *Karsales (Harrow) Ltd. v. Wallis*, and in the former case where what was bargained for was a lorry capable of tipping but which was a second-hand lorry with defects known to the hirer and which the hirer accepted and used for heavy work and then found that the lorry was not capable of tipping, the Court of Appeal held that the trial judge was correct in his conclusion that on the facts of the case there was no breach of a fundamental term or implied condition of fitness and dismissed the appeal.

UPJOHN, L. J., (as he then was) stated that if a man takes a vehicle with known defects and uses it for its ordinary purposes and relies on some collateral agreement with the dealer to put the defects right, he cannot afterwards complain to the lender that the latter (who had no knowledge of the defects) has failed in some implied obligation to put it right. In law the answer must be that the implied obligation is excluded for the hirer never relied on it. UPJOHN, L. J., reiterated that in a contract of this nature there is an implied stipulation that the vehicle hired, corresponds with the description of the vehicle contracted to be hired, or, put in another way, the lender must lend that which he contracts to lend and not something which is essentially different. He pointed out that this implied stipulation is a fundamental implied term and breach of it at once gives the hirer the right, if he desires to do so, to treat the contract as repudiated, and, furthermore, being a fundamental term the lender could not by clauses of exclusion or exception, however widely phrased, exclude liability for this fundamental term for the reason that the law will not permit one of the contracting parties to escape liability for failure to deliver that which he has contracted to lend by delivery of something which is essentially different.

The question whether or not the article delivered complies with this fundamental obligation of the lender, the learned judge stated was very largely a question of fact and degree and must depend on the circumstances of each case. He gave as an illustration the case of a car being hired at 9.00 a.m. sharp for the express purpose known to the lender of carrying the hirer 150 miles to lunch in the country and back that same afternoon. If that car is at 9.00 a.m. in a defective condition minus some of its essential parts, the defects would go to the root of the contract and would frustrate it, for the defects could not be put right in time to permit the hirer to reach his luncheon engagement in time. In such a position the hirer would be entitled to treat the contract as repudiated if he so desired.

In *Charterhouse Credit Co. Ltd. v. Tolly*, the question was considered as to the operation of the exception or exemption clause when the contract is affirmed by the hirer where there has been a breach of a fundamental term, and the Court of Appeal came to the conclusion that even in that situation the owner or lender could not rely on such a clause. DONOVAN, L. J., (as he then was) in his judgment at p. 438, after stating that the point was apparently free from direct authority, arrived

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at the conclusion that on principle the election by the hirer of one remedy for the fundamental breach instead of another remedy ought to make no difference to the ineffectiveness of an exempting clause in the face of such a breach. This latter view has, however, been qualified by the House of Lords in the recent case of *Suisse Atlantique Societe d'Armement S. A. v. N. V. Rotterdamsche Kolen Centrale*, [1966] 2 W. L. R. 944, where the learned judges of that tribunal came down on the side of the exception clause being a rule of construction rather than a rule of substantive law, and that such clauses should be strictly construed, and, according to Lord REID, "if ambiguous the narrower meaning will be given."

Their Lordships, after an exhaustive review of the authorities, were of the opinion that the phrases "fundamental breach" and "breach of a fundamental term" had been used interchangeably in some of the cases, but in fact they were quite different. Lord UPJOHN was of the view that "fundamental breach" was a convenient expression for saying that a particular breach or breaches of contract by one party is or are such as go to the root of the contract which entitles the other party to treat such breach or breaches as a repudiation of the whole contract, whereas the expression "fundamental term" had a different meaning, and that was a stipulation which the parties have agreed either expressly or by necessary implication, or which the general law regards as a condition which goes to the root of the contract, so that any breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach and thus confer on him the alternative remedies already stated in the early part of this judgment.

Viscount DILHORNE relied on the view of DEVLIN, J., in *Smeaton Hanscomb v. Sassoon I. Setty, Son & Co.* [1953] 1 W. L. R. 1468, who thought that in relation to a fundamental breach one has to have regard to the character of the breach and determine whether in consequence of it the performance of the contract becomes something totally different from that which the contract contemplates. On the other hand, he thought that a fundamental term was something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates. On the other hand, he thought that a fundamental term was something which underlines the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates.

Having discussed the relevant principles of law which were raised by the issues on the pleadings, we are of the opinion that the learned magistrate was wrong when he found merely that the air-conditioner never worked as an air-conditioner. He should have addressed his mind to the problem whether there was a breach of a fundamental term and he should have gone further and considered why the air-conditioner did not work as an air-conditioner and make a finding whether this condition of the article was due to a minor or even major defect or defects which could easily have been repaired in a short time, in which case there would be no breach of a fundamental term, or whether it was due to a defect or accumulation of defects which could not be easily repaired

and which rendered the air-conditioner completely unfit for the purpose for which it was purchased; or, put in other words, whether the air-conditioner at the time of delivery (and that is the material time) was in such a condition that it rendered the performance of the contract something totally different from that which the contract contemplated; or to use the language of UPJOHN, L.J., whether the air-conditioner which was supplied by the appellants was something essentially different from that which was contemplated by the contract

The next question to which the learned magistrate ought to have addressed his mind was, if there was such a breach, whether the respondent had repudiated the contract. For there to have been a repudiation on the part of the respondent, there would have to be some evidence that he did some act unequivocally referable to his intention to treat the agreement as at an end, such as refusing to accept delivery of the air-conditioner, or returning it to the owner or stating in unequivocal terms that by reason of the defect or defects therein he no longer required the article. Indeed in his letter of 8th August, 1964, addressed to the company, he seems to suggest a new contract rather than a repudiation when he requested the appellants to remove the air-conditioner and replace it with two new electrical fans. In his memorandum of reasons the magistrate makes no clear finding of fact whether the air-conditioner was returned by the respondent to the appellants, nor does he state whether he believed the evidence that there was a seizure of the article by the appellants. If there had been a seizure of the air-conditioner, then that evidence would suggest that there was no repudiation of the contract on the part of the respondent. On the facts of the case the question of the affirmation or approbation of the contract by the hirer does not appear to arise, in which case the resulting consequences would have necessitated the magistrate determining whether on a question of construction the appellants could have properly relied on the exemption or exception clause as a defence where the respondent was treating the contract as still subsisting and had sued for damages for the breach on a separate claim or counterclaim.

As the magistrate did not appear to have addressed his mind to the relevant principles of law and to the questions of fact which arose thereunder and to the question on whom was the burden of proof placed, and as his findings of fact appear to be against the weight of the evidence without giving any reason why he chose to reject the appellants' evidence and accept the respondent's evidence, we are inclined to agree with the submission of counsel for the appellants that the magistrate reached his conclusion by a process of unjudicial reasoning. It must be observed that had he approached the matter correctly and considered the relevant principles of law and made firm findings of fact by reason of correct judicial process, he might have reached the same conclusion, but as he did not do this and misdirected himself on the relevant principles of law which were applicable to the case, we consider that the appeal should be allowed and the order of the magistrate set aside, and that there should be a retrial by another magistrate *de novo*, and accordingly we so order. Costs to the appellants fixed at \$33.40.

*Appeal allowed; matter remitted*

Solicitor: N. C. Janki (for the appellants).

HANSRAJ SINGH v. DRAINAGE AND IRRIGATION BOARD  
 JUNOR v. DRAINAGE AND IRRIGATION BOARD

[High Court (Chung, J.) July 8, August 3, 1966]

*Justices protection—Drainage and Irrigation Board—Negligently allowing water to escape—Action for damages—No allegation that act done maliciously and without reasonable or probable cause.—Whether such allegation necessary—Justices Protection Ordinance, Cap.18, s.2*

In an action against the Drainage and Irrigation Board for damages resulting through the negligence of the Board in allowing water to escape on to the plaintiffs' cultivation, it was objected for the Board that the plaintiffs had failed to comply with s. 2 of the Justices Protection Ordinance, Cap. 18, in that they did not allege in their statements of claim that the act was done maliciously and without reasonable or probable cause and that they had failed to prove that the act was done without such cause.

**Held:** section 2 of Cap. 18 applies both to judicial acts and to administrative acts in the erroneous exercise of judgment, but for acts as alleged in this case—negligently allowing water to escape—and where the act involves no exercise of judgment, s. 2 does not apply, and once negligence is proved the Board would be liable.

*Judgment for the defendants.*

*Dr. F. W. H. Ramsahoye* for the plaintiffs.

*Doodnauth Singh*, Crown Counsel, for the defendants.

CHUNG, J.: By consent the two actions were consolidated and tried together.

The plaintiffs are farmers cultivating their holdings at Jacoba on the West Bank of the Demerara River within the Canals Polder drainage and irrigation area. The defendants are a statutory corporation and have possession and/or control over certain drainage and irrigation works under or around and/or adjoining the lands cultivated by the plaintiffs at Jacoba, and in particular the 'B' line trench or canal and a feeder trench.

This 'B' line trench is an irrigation trench. From the 'B' line trench there is an intake into the feeder trench, and from the feeder trench farmers in that area take water through independent boxes leading from the feeder trench to their farms. Between the 'B' line trench and the feeder trench there is a dam. An old box koker was embedded in this dam when the dam was being built. The koker is 10' in length, the dam 24' in width. So that in order to get to this old box koker, the dam would have to be cut at both ends, as well as the top of the dam.

The plaintiffs led evidence to show that around the 20th December, 1964, water started to rise in their farms, and on the 23rd of January, 1965, it was discovered that the water was coming through the old box koker that was embedded in the dam. The water therefore flowed from the 'B' line trench into the feeder trench, then into another box, into a drain, and then on to their land. They reported the matter on the

23rd January to the Superintendent of the Drainage and Irrigation Board, Mr. Dolphin, and on the 25th the embedded box koker was sealed. The plaintiffs claim that damage was done to their farms.

Ashford Kwang, an overseer attached to the Ministry of Works and Hydraulics, servant of the defendant, stated that after the box koker was sealed, he observed that the box koker was an old one which somebody had broken, and for the water to escape through that box koker both ends of the dam had to be cut as well as the top of the dam. Neither the plaintiffs nor the defendants are in a position to dispute the evidence led by the other.

The plaintiffs base their claim on negligence on the part of the defendants in that between 20th December, 1964, and 20th January, 1965, and in breach of their duty of care owed to the plaintiffs, the defendants and/or their servants or agents negligently caused or permitted water to escape from the 'B' line trench into the feeder trench and on to the farms owned and cultivated by the plaintiffs.

The particulars of negligence alleged are:

- (i) Allowing the 'B' line to overflow without taking care or any adequate care to keep the volume of water in the said 'B' line within limits necessary to avoid such overflow.
- (ii) Permitting the feeder trench to become filled with water to an extent which rendered likely an overflow on to the plaintiffs' farms.
- (iii) Omitting to take care to procure the release of water from the feeder trench to avoid overflow on to the plaintiffs' lands.
- (iv) Omitting to take care or any special care to use the drainage and irrigation works in control of the defendants to avoid flooding of the plaintiffs' farms.
- (v) Omitting to take care or any special care in the construction of their drainage and irrigation works to ensure that there will be sufficient defences against flooding in times of rainfall.

Alternatively, they claim under the rule of *Rylands v. Fletcher* (1868), L.R. 3 HL. 330, that the alleged defendants permitted water, being a dangerous thing, to escape from the 'B' line trench and the feeder trench owned and controlled by them to the plaintiffs' farms; or, in the further alternative, water, a dangerous thing, lodged in the 'B' line trench and in the feeder trench owned and controlled by the defendants escaped therefrom to the plaintiffs' farms.

On the facts as stated above, I am of the opinion that there was no negligence on the part of the defendants as alleged in the particulars of negligence. The question is: Can the plaintiffs succeed under the rule of *Rylands v. Fletcher* if the defendants were not negligent?

In *Green v. Chelsea Water Works Company*, (1894) L.T. 547, an appeal from the Queen's Bench Division, a main belonging to a water works company burst and the water flooded the plaintiff's premises causing considerable damage. It was held that the company, being

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authorised by an Act of Parliament to lay the main and having been guilty of no negligence, was not liable in damages to the plaintiff. LINDLEY, J., in delivering the judgment said:

".....*Rylands v. Fletcher* was not a company authorised to lay down water by an Act of Parliament. It was a case of a private individual storing water on his land for his own purpose.....It is possible that that principle might have been applied to companies having statutory authority to make railways or carry water, but the court has declined to extend it to such cases"

In *Sukhu v. Drainage Board* (1962), 4 W.I.R. 315 (1962 L.R.B.G. 174), LUCKHOO, C. J., said:

"The Board was directed by an Order of the Governor in Council to carry out the works. It was bound to do so just as much as if the provisions of the Ordinance contained that direction."

And in *Mohamed Din v. Drainage & Irrigation Board* (1962), 4 W.I.R., 475 (1962 L.R.B.G. 434), it was held that the Board was under a duty to perform the work authorised under the Ordinance.

There can be no doubt that the water was being kept in the 'B' line trench for irrigation purposes for the benefit of all the farmers in the area, including the plaintiffs, even though they deny that they used the water for irrigation. The defendants are not, therefore, liable under the rule of *Rylands v. Fletcher*.

It was submitted on behalf of the defendants that the plaintiffs did not comply with s. 2 of the Justices Protection Ordinance, Cap. 18, in that they did not allege in their statements of claim that the act was done maliciously and without reasonable or probable cause, and that the plaintiffs failed to prove that the act was done without reasonable and probable cause.

On behalf of the plaintiffs it was submitted that s. 2 of Cap. 18 only applies to the case where a justice is performing a judicial function, as the section speaks of an act done by him in the execution of his duty as justice.

It has already been decided in *Mohamed Din v. Drainage & Irrigation Board* (1962), 4 W.I.R 475, that the Justices Protection Ordinance applies to the Drainage and Irrigation Board.

Section 2 of Cap. 18, reads:

"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."

In *Everett v. Griffiths*, [1921] 2 A.C 631, at p. 666, Viscount FINLAY, in speaking about immunity of judicial acts, said:

"This immunity is not confined to judges of the High Court. It extends to all judges. The protection given to justices of the peace by the first section of the statute 11 & 12 Vict. c. 44, is not wanted, and does not apply, in respect of acts of a purely judicial nature relating to matters within the justices' jurisdiction. Its protection is wanted in respect of acts of a ministerial character,....."

In *Payne v. Town Clerk of Georgetown*, 1915 L.R.B.G. 199, it was held that the Town Clerk of Georgetown and other officers of the Council are entitled to the benefit of the provisions of the Justices Protection Ordinance (1850) and in any action brought against him or them for any act done in the execution of his or their duty as such, it shall be expressly alleged and proved that such act was done maliciously and without reasonable and probable cause. In this case the plaintiff's property was sold at execution for rates after payment of the taxes due for the year, and the action was brought for the negligent action of the Mayor & Town Council. In support of this decision it may be argued that the Town Clerk had exercised his judgment as to whether or not the property should be put up for execution.

It seems, therefore, that s. 2 of Cap. 18 do not only protect persons protected by the Ordinance for judicial acts but also for administrative acts. The question is: Does s. 2 also apply to an act other than the erroneous exercise of judgment on matters affecting the legal right of others? In *S. A. DE SMITH'S JUDICIAL REVIEW OF ADMINISTRATIVE ACTION*, at p. 202, on the liability in tort for exercise of powers in bad faith, it is stated:

"The common thread running through these cases is the erroneous exercise of *judgment* on matters immediately affecting the legal rights of individuals. The functions discharged bore some resemblance to those commonly entrusted to judges in courts. It would appear justifiable to infer that members of administrative bodies which exercise functions of a broadly judicial character are not liable in tort for the consequences of erroneous or unreasonable decisions or procedural irregularities within the scope of their jurisdiction, provided that they have not acted in bad faith. Bad faith is here understood to mean wilful partiality or discrimination motivated by considerations that are incompatible with the discharge of public responsibilities."

Even where a statute has exempted public officers from liability for acts done *bona fide* for the purpose of executing this Act, the courts have held that a negligent act causing damage is nonetheless actionable. See *Bullard v. Croydon Hospital Group Management Committee*, [1953] 1 Q.B. 511. But where the acts complained of were an erroneous exercise of judgment on matters immediately affecting the

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legal rights of individuals, the courts have held that the officer would not be liable even if he acted negligently, provided he acted in good faith. See *Everett v. Griffiths* (*supra*).

In *Mohamed Din v. Drainage & Irrigation Board* (1962) 4 W.I.R. 475, PERSAUD, J., at p. 480 said: "The Board would be liable provided negligence is proved." In that case the point was not raised, but in referring to para. 8 (c) of the plaintiff's statement of claim where it was alleged—

"8. (c) All the aforesaid acts and/or omissions were done or omitted unlawfully, maliciously and without reasonable and probable cause,"

PERSAUD, J., said:

"It would appear that the uses of the words in the latter part of para. (c) were inserted to bring the action within the ambit of s. 2 of Cap. 18 (B.G.); at least the language is the same."

The learned judge, however, made no ruling on the point now being considered.

I am, therefore, of the opinion that s. 2 of the Ordinance applies both to judicial acts and to administrative acts in the erroneous exercise of judgment, but for acts as alleged in the present case—negligently allowing water to escape—and where it is not an exercise of judgment, s. 2 does not apply, and once negligence is proved the Board would be liable.

As I have already found that there was no negligence on the part of the defendants and also that the defendants are not liable under the rule of *Rylands v. Fletcher*, both plaintiffs' actions are dismissed, with costs to the defendants. Agreed costs \$150 in each action.

*Judgment for the defendants.*

## NARAYAN v. ABRAMS

[Court of Appeal (Luckhoo, J. A., Persaud and Cummings, J. J. A. (ag.))  
August 12, 1966].

*Criminal law—Unlawful possession of spirits—Defence of retailer Death of deceased licensee—Business carried on by executor without transfer of licence—Whether executor is a retailer—Spirits Ordinance, Cap. 319, ss. 2, 4 and 89—Intoxicating Liquor Licensing Ordinance,*

*Cap. 316, s. 23.*

*Criminal law—Unlawful possession of spirits—Whether authority from Comptroller needed for prosecution by excise officer—Spirits Ordinance, Cap. 319, ss. 2, 89, 114 and 123—Summary Jurisdiction (Procedure) Ordinance, Cap. 15, s. 5.*

The appellant appealed from the decision of the Full Court dismissing his appeal from a conviction by a magistrate of the offence of being in unlawful possession of spirits contrary to s. 89 (1) of the Spirits Ordinance, Cap. 319. He was the executor and sole beneficiary under the will of his deceased brother who had a licence to carry on a spirit shop. After the brother's death the appellant obtained licences in the brother's name and carried on the business, but he did not secure a transfer of the licence in accordance with s. 23 of the Intoxicating Liquor Licensing Ordinance, Cap. 316. The defence was that he was in these circumstances exempted from liability as a retailer within the meaning of s. 89 (2) (a) of Cap. 319. The defence also objected on the ground that the prosecution had been commenced by an excise officer who had no authority to prosecute from the Comptroller of Customs and Excise.

**Held:** (i) the appellant was not a retailer and therefore could not claim exemption under s. 89 (2) (a) of Cap. 319;

(ii) no authority from the Comptroller of Customs and Excise was necessary to enable a prosecution to be commenced by an officer of Customs and Excise.

*Appeal dismissed.*

*D. Jagan* for the appellant.

*G. A.G. Pompey* for the respondent.

LUCKHOO, J. A.: In this appeal the appellant was convicted before a magistrate for being in the unlawful possession of spirits exceeding in quantity one pint contrary to s. 89 (1) of the Spirits Ordinance, Cap. 319, and was fined \$250 or in the alternative 6 months' imprisonment.

He appealed to the Full Court of the High Court of the Supreme Court where his appeal was dismissed. He now appeals to this court and his counsel argues that the conviction and sentence could not stand because

(i) the Magistrate had no jurisdiction to hear and/or determine the matter as the respondent had no authority to commence and/or prosecute the case against the appellant;

(ii) the appellant was in lawful possession of the rum the subject matter of the charge since he was the executor and sole beneficiary under the will of his brother Mangra, deceased, in whose name there was a licence which permitted of the carrying on of a spirit shop, and the possession of the rum was incidental to that business.

The appellant was found in possession of a little over six pints of rum at a place at Lusignan Public Road which is some distance from Friendship, where there was a spirit shop up to 25th May, 1964, with the licence in the name of Mangra who had died since November, 1962. After Mangra's death, the appellant still applied for and received a licence in the name of Mangra. Probate of Mangra's will was granted in September, 1963.

Section 89 (2) of Cap. 319 is relevant to this matter; that subsection provides as follows:

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"Everyone possessing spirits exceeding in quantity a pint shall be deemed, for the purpose of this section, to be in unlawful possession thereof, unless—

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

There follows three other exceptions which are not involved in any argument adduced on behalf of the appellant, and which it is conceded cannot apply to the facts of the instant case. Therefore, unless the appellant is able to show that he acquired possession under and by virtue of any of the specific exceptions provided for under s. 89 (2), his possession would be deemed to be unlawful.

He has sought to bring himself under the head of an 'authorised retailer' s. 89 (1) (a) and contends that the spirits in question have come legally into his possession in that capacity. It will then be for him to establish this as sub-s. 4 of s. 89 (Cap. 319) provides that "in any proceeding under s. 89 it shall not be necessary to negative any of the exceptions in favour of the defendant contained in sub-s. (2) of that section, *but the onus of proving that any of the exceptions applies in his case shall be on the defendant.*"

Under s. 2 of this said Ordinance, "retailer" means the holder of a spirit shop licence granted under the authority of the Intoxicating Liquor Licensing Ordinance, Cap. 316.

The appellant obviously cannot qualify to come within the clear and unequivocal ambit of the definition given by Ordinance to a "retailer" because *he* is not the holder of a spirit shop licence which was granted under the authority of Cap. 316.

There was a way by which the appellant could have qualified for a limited time as a "retailer" if he had taken advantage of the provisions of s. 23 (1) of the Intoxicating Liquor Licensing Ordinance, Cap. 316, which provides as follows:

"On the death or insolvency of a holder of an hotel, restaurant liquor, railway station or stelling liquor, or *spirit shop* licence, his legal representative, the public trustee, the official receiver, or the trustee of a deed of arrangement, or the liquidator, shall, on proof of title, be entitled to have the licence transferred to him by the Comptroller who shall thereon endorse the fact of the transfer."

And s. 23 (2) of that Ordinance further provides that —

"The person to whom a licence has been transferred by the Comptroller *shall be entitled to the same rights and privileges* and be subject to the same liabilities as the original holder of the licence."

Any such transfer under s. 23 (1) would be of a limited nature as the proviso to s. 23 (2) says that—

"None of these persons, other than the public trustee or the official receiver, shall be entitled to carry on business under a licence so transferred to him beyond the third transfer sessions after the transfer on the next general licensing meeting, whichever last happens."

It may be here convenient to mention that counsel for the appellant attempted to argue (that the Full Court of the High Court of the Supreme Court had wrongfully computed the limitation of time under the proviso to s. 23 (2) above, based on a possible transfer under s. 23 (1) above on the 14th September, 1963, the day after probate was granted. The consideration of this question is irrelevant to this appeal since the appellant never took any steps at any time to effect a transfer of the licence to himself, as personal representative of Mangra. Therefore, for how long he could have enjoyed the benefits of any such transfer if it had been done on a particular date could not be helpful in determining whether he was actually a "retailer" within the meaning of the Ordinance.

The appellant clearly has not brought himself within the legal definition of "retailer", to come within the exception of s. 89 (2) (a). Consequently, on this point we agree with the reasoning of the Full Court.

The other point for consideration is whether the respondent could have brought the proceedings in his name without proving that he had an authorisation in writing from the Comptroller of Customs to do so.

Counsel for the appellant submitted that the respondent who is an officer of the Customs Department should have been authorised in writing by the Comptroller of Customs to bring this prosecution, and referred to *Niven v. Fung*, (1931 — 37) L. R. B. G. 257, in support of his submission. That case concerned a prosecution under the Intoxicating Liquor Ordinance, Cap. 316, the provisions of which made it necessary to obtain the Attorney General's fiat before a complaint for certain breaches of the Ordinance could be made. The fiat had been obtained, but not proved in evidence, and it was held that the prosecution was not authorised. That case does not have any application to the present one. Likewise the case of *Cecil v. Edwards*, 1955 L. R. B. G. 154, (also referred to by counsel for the appellant) could be of no assistance here as that case dealt with a prosecution under the Intoxicating Liquor Ordinance, Cap. 316, with different considerations prevailing. Section 99 (1) of Cap. 316 gives to the Comptroller the right to sue for penalties and consequently the meaning of Comptroller was pertinent to determine whether an officer of customs had to be authorised by the Comptroller in writing before he could institute proceedings.

But in this case s. 114 of the Spirits Ordinance, Cap. 319, provides that—

"Any penalty for an offence against, or any sum of money due under, an excise law may be sued for and recovered, and all proceedings in respect of forfeitures under an excise law may be carried on, *by any officer* before any magistrate, and the magistrate

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shall have full power to hear and determine in the case of that penalty, sum of money, or forfeiture, whatever may be the amount or value thereof."

Under s. 2 of the said Ordinance—

"'officer' means the Comptroller or any officer of the customs..."

The respondent swore that he was an officer of the customs and excise stationed at the Customs and Excise Department, Georgetown.

The respondent then, as an officer of customs, would have the right to institute a prosecution for an offence against s. 89 (1) of the said Ordinance which provides that —

"Every person who is in unlawful possession of spirits shall be liable to a *penalty* not exceeding one thousand dollars or to imprisonment with or without hard labour for any term not exceeding six months and the spirits shall be *forfeited*."

For the above reasons, we are of the view that the proceedings were properly commenced by the respondent.

The appeal will be dismissed and the order of the Full Court of the High Court of the Supreme Court be affirmed.

PERSAUD, J. A.: I concur.

CUMMINGS, J. A.: The appellant was charged under s. 89(1) of the Spirits Ordinance, Cap. 319. He was convicted and fined \$250 or 6 months' imprisonment. He appealed to the Full Court of the Supreme Court. His appeal was then dismissed. He now appeals to this court.

Section 123 of the Spirits Ordinance provides:

"Except as in this Ordinance otherwise provided, the procedure in respect of any charge or complaint brought under an excise law shall be in accordance with any Ordinances for the time being in force regulating procedure before magistrates in the exercise of their summary jurisdiction and appeal from the decisions of magistrates."

Section 5 of the Summary Jurisdiction (Procedure) Ordinance, Cap. 15, provides as follows: —

*"General right of making complaint —*

Anyone may make a complaint against any person committing a summary conviction offence unless it appears from the statute on which the complaint is founded that a complaint for that offence shall be made only by a particular person or class of persons."

Section 4 of the Spirits Ordinance, Cap. 319, provides that—

"The Comptroller shall be the principal officer charged with the administration of the excise system established by this Ordinance and shall be responsible to the Governor for the efficient carrying out of the provisions of this Ordinance and of the regulations."

Section 2 of the Ordinance provides that "officer" means the Comptroller or any officer of the customs,

When read together the effect of ss. 2 and 4 of the Ordinance is that the Comptroller and all officers of customs are charged with the administration of the excise system established by the Ordinance, the Comptroller being the principal officer so charged and responsible to the Governor.

It is clearly apparent from this that the right to bring a complaint under this Ordinance is vested in a particular class of person, that is "officer" as defined herein. The evidence in this case established that the respondent was an officer of customs, and was therefore in my view *ipso facto* competent to make the complaint. No authorisation from the Comptroller was necessary for this purpose.

I do not agree that s. 114 of the Spirits Ordinance has any application to the section of the Ordinance under which the appellant was charged. In my view s. 114 is applicable to the suing for and the recovery of a penalty for an offence which has already been determined, not to the prosecution of a charge.

Subject to this reservation I agree, for the reasons set out in the judgment of My Lord LUCKHOO that this appeal should be dismissed with costs.

*Appeal dismissed*

## ENMORE ESTATES LTD. v. MOONESSAR

[In the Full Court, on appeal from the magistrate's court for the East Demerara Judicial District (Bollers, C. J., and Jhappan, J. (ag.), September 9, 1966].

*Appeal—Notice of appeal to Full Court intituled in the Court of Appeal—Appeal struck out—Summary Jurisdiction (Appeals) Ordinance, Cap. 17, s.8 (3) and s, 28(c).*

In an appeal to the Full Court the notice of grounds of appeal was intituled "in the Court of Appeal."

**Held:** the appellants were out of court and the notice could not be amended.

*Appeal dismissed.*

*J. A. King* for the appellants.

*D. C. Jagan* for the respondent.

**Reasons for Decision:** In this appeal the short point is taken *in limine* by counsel for the respondent that the notice of grounds of appeal filed and served by the appellants is incorrectly intituled. The notice of grounds of appeal is headed "IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE", whereas it is conceded that it ought to be "IN THE FULL COURT OF THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE". It is obvious, therefore, that the appellants are out of court and in the wrong forum.

Section 8(3) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, makes it obligatory that the appellant shall draw up a notice of the grounds of appeal in Form 3 to the First Schedule of the Ordinance which speaks of "IN THE FULL COURT OF THE SUPREME COURT OF BRITISH GUIANA" which would now, under s. 5(1) of the Guyana Independence Order, 1966, and the Judicature Order, 1966, read "IN THE FULL COURT OF THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE".

Counsel for the appellant in reply submitted that a mere formal error in the rubric of the document had been made which could be amended under s. 28(c) of Cap. 17 and no prejudice whatever had been done to the respondent. We are of the opinion that to amend the rubric in relation to the grounds of appeal would offend the cardinal principle on which amendments are made, and that is, that the court cannot amend in order to give itself jurisdiction nor is this situation a defect in the form of stating a ground of appeal under s. 23 of the Ordinance where no objection shall be allowed. In our view, there has been a clear contravention of the Ordinance, the provisions of which demand strict compliance and the appeal must be struck out for want of jurisdiction and stand dismissed with costs to the respondent fixed at \$29.08.

*Appeal dismissed.*

## MAHABEER AND OTHERS v. SOOKNARAIN SINGH

[Court of Appeal (Stoby, C., Luckhoo, J. A., and Cummings, J. A. (ag.), July 6, September 12, 1966].

*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). The appellants appealed unsuccessfully to the Full Court which held that by virtue of s. 44 of the Legal Practitioners Ordinance, Cap. 30, a barrister may appear in chambers uninstructed by solicitor, but that when he does so he is acting as a solicitor and must be on the record as such. [1965 L.R.B.G. 305]. On further appeal,

**Held:** (*per*) Stoby, C, and Luckhoo, J. A.):

(i) where a barrister acts alone in chambers he is practising as a solicitor and is bound by the rules of court. Consequently, he could not appear without an authority, and where, as in this case, the action was commenced by the plaintiffs personally, notice of his appointment as solicitor was required under O. 6, r. 3;

(ii) since the writ in this case was not specially endorsed and the subject matter of the claim exceeded \$500 in value, a barrister was precluded by s. 42B(c) from practising as a solicitor;

Per Cummings, J. A. (dissenting): a barrister could appear before a judge in chambers *qua* barrister and without being instructed by a solicitor.

*Appeal dismissed.*

*S. D. S. Hardy* for the appellants.

*B. O. Adams, Q.C.*, with *E. W. Adams* for the respondents.

STOBY, C.: This appeal raises a point of considerable importance to the legal profession of Guyana.

The Legal Practitioners Ordinance, Cap. 30 ss. 41 to 46, defines the respective functions of barristers and solicitors with respect to contentious and non-contentious business. These sections were enacted in 1931.

Prior to 1931 there was no statutory provision which defined the functions of a barrister or solicitor. Before 1931 and up to the present day a Guyanese desirous of practising law as a barrister in Guyana had and still has to proceed to England and obtain entry into one of the four Inns of Court. In order to obtain admission to an Inn of Court

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there are certain qualifications imposed. On completing his course of study and after conforming with the traditional requirements the student is called to the Bar in England, which means that if he practises his profession in England, he is bound by their traditions and subject to the discipline of their Bar Council. If, however, the barrister returns to a Caribbean territory he is permitted to practise his profession in accordance with the laws of the country subject to the overriding rule that in all Commonwealth countries the English traditions are Commonwealth traditions.

In Guyana there was an ordinance, No. 5 of 1855, entitled "An Ordinance to provide an Amended Manner of Proceeding in the Supreme Court of British Guiana in its Civil Jurisdiction." Section 5 of this Ordinance was in these terms: "Any person may by one general power *ad lites* authorize any barrister-at-law, advocate, or attorney-at-law to prosecute and defend for him in his own right, etc.,....." Section 7 makes reference to a barrister-at-law or advocate, and attorney-at-law. This would seem to imply that in the early days of the Supreme Court in Guyana, there was a fused legal profession, the attorney-at-law being the forerunner of the solicitor. In 1897 an Ordinance was passed to regulate the admission of barristers and solicitors. This Ordinance is not relevant to the point herein being debated except s. 8(2) which provided that a barrister who practises as a solicitor shall, insofar as he so practises, be deemed to be a solicitor within the meaning of the section. Again, this provision implies that before 1897 a barrister's practice was not confined as in England to advocacy, drafting pleadings, advising on questions of law, and so on. Between 1855 and 1897 there must have been a movement towards separation in that barristers had sole right of audience in the Supreme Court in civil and criminal matters. Although a barrister could perform some of the functions of a solicitor, the contrary was not the case; a solicitor had no right of audience in the High Court. A barrister was also able to undertake conveyancing and some other types of work normally confined to solicitors, but he could not issue writs. This state of affairs continued until 1931 when the solicitors' branch of the profession, disturbed at the inroads which barristers had made into the work generally reserved for them, agitated for a fairer division of work. The result was Ordinance 15 of 1931 which is now ss. 41 to 46 of Cap. 30.

The facts which have given rise to this appeal are not in dispute. This summary is taken from the judgment of the Full Court.

"On September 7th, 1963, a writ of summons was filed by the appellants (plaintiffs) personally against the respondents (defendants) seeking *inter alia* an injunction restraining the respondents 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 appellants 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 appellants were represented before the judge in chambers by a barrister. No solicitor was on the record nor did the appellants give notice that they were no longer appearing in person. On this occasion the interim injunction was granted and the barrister gave the usual undertaking to abide by any order the court or a judge may make as to damages.

"When the matter came up again for hearing before a judge in chambers it was submitted by counsel on behalf of the respondents that the *ex parte* injunction ought to be discharged on the ground that the undertaking given by the barrister was bad and of no effect as the respondents having filed their writ in person could not be represented by a barrister practising as barrister without the aid of a solicitor. The judge agreed with the submission and discharged the injunction." [See 1964 L.R.B.G. 62]. An appeal to the Full Court was dismissed. [See 1965 L.R.B.G. 305].

Mr. Hardyal for the appellants contends that s. 42(1) (A), (B), (C) and (D) is unambiguous. The relevant portions are as follows:

"42. (1) Notwithstanding anything to the contrary in any Ordinance or rule, a barrister or a solicitor shall be entitled to act alone and have audience—

- A. In any cause or matter in a magistrate's court or other inferior court or tribunal.
- B. In Court—
  - (a) in actions where the writ is specially endorsed under the rules and the sum of money claimed or the value of the land or thing in dispute does not exceed five hundred dollars;
  - (b) in actions (other than those mentioned in sub-paragraph (a) where the writ is specially endorsed under the rules,
    - (i) when acting for the plaintiff, up to the time when the defendant has delivered and filed a statement of defence pursuant to an order of the Court giving him leave to defend,
    - (ii) when acting for the defendant, up to the time when an order giving leave to defend is made;
  - (c) in any other cause or matter where the writ is not specially endorsed in which the sum of money claimed or the value of the land or thing in dispute as alleged in the statement of claim does not exceed the sum of five hundred dollars;

A claim for any additional relief in any such cause or matter by way of a declaration, an injunction, the appointment

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of a receiver, the taking of an account, or other consequential or ancillary remedy shall not affect the right of audience;

\* \* \* \* \*

"C. On the hearing of any application or proceeding before a Judge sitting in Chambers;"

He analysed the section and stressed that s. 42 (1) (B) was confined to the right of a barrister or a solicitor to appear in court and s. 42 (1) (C) was confined to appearance in chambers. He submitted that the Full Court decision that when a barrister appeared in chambers he was acting as a solicitor was erroneous in that a barrister once a barrister could appear in chambers without being instructed by a solicitor.

Mr. B. O. Adams, on the other hand, contended that in any action over \$500 which is not covered by a specially indorsed writ, there must be a solicitor on the record. He said that if counsel can be instructed by a client he is then acting as a solicitor. Attention was invited to s. 19 (2), Cap. 30, and to O. 6, r. 3. Section 19 (2) states:

"A barrister who practises as a solicitor shall, in so far as he so practises, be deemed to be a solicitor within the meaning of this section. Any question arising under this subsection as to what constitutes practising as a solicitor shall, subject to any enactment for the time being in force, be decided by the Court." And O. 6, r. 3, is: "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, and the provisions of the preceding rule relating to a notice of change of solicitor shall apply to the notice of appointment with the necessary modifications."

In interpreting legislation it is always sound policy to hark back to the age in which the legislation was passed, to examine the state of the law at the time and to consider the purpose for which the legislation was introduced. Understandably, occasions will arise when the purpose desired has not been achieved due to the difficulties of drafting, or again the legislation may be so admirably expressed that it is unprofitable to reflect on the past. But where, as in this case, the interpretation placed on s. 42 (1) (c) by the appellants is repugnant to those accustomed to English traditions, it will be helpful to examine the law and the custom at the time the legislation was passed. In 1931, as I have shown, barristers had made inroads into solicitor's practice. Solicitors, anxious about their rights and jealous of the privileges which barristers enjoyed, clamoured for an improved status. The result was the 1931 legislation which for the first time enabled solicitors to appear as advocates in the Full Court and in the High Court in certain matters. In return for this concession barristers retained the privilege of performing certain functions not normally conducted by a barrister, and obtained the advantage of issuing writs in limited cases. Thus the 1931 legislation gave to solicitors advantages not enjoyed before and permitted barristers to

maintain the privileges which circumstances of history had endowed on them. Did the legislation go any further? Did it change the practice of the bar or introduce in Guyana a practice whereby litigants within certain limits could virtually dispense with the services of a solicitor?

The effect of s. 42 (1) (B) of Cap. 30 was twofold. It permitted a barrister to act alone in the matters stated in the section; for example, among other things he could issue a specially indorsed writ under \$500; and he could appear alone in court in such a case. But then the solicitor could do the same. The solicitor could appear alone in court as an advocate, providing he had issued the writ. When a barrister issues a writ and appears in court he is acting as a solicitor by reason of s. 44 which says:

"44. Notwithstanding anything to the contrary in any Ordinance or rule, a barrister shall be entitled to practise as a solicitor in respect of all proceedings, including the issuing of writs of summons or other processes, in any of the matters specified in section 42 hereof, and in respect of any such matter any reference in the Rules of Court, 1900, or any amendment thereof, to a solicitor shall be deemed to include a reference to a barrister so practising."

Section 44 is relevant in the examples given because the issuing of writs is the business of a solicitor, so when the barrister does a solicitor's work he is acting as a solicitor.

It still remains for consideration whether the lay client can instruct a barrister. Order 3, r. 6, provides that a writ of summons shall be prepared by the plaintiff or his solicitor. Order 3, r. 8, requires a solicitor to produce an authority in writing signed by the plaintiff authorising him to act in the action and O. 6 r. 3, is designed to compel a litigant who has issued his own writ and wishes to appoint a solicitor to give notice of such appointment. Thus it is clear that in so far as solicitors are concerned they cannot appear in chambers or in court without an authority in writing.

In *Doe d. Bennett v. Hale* (1850), 15 Q. B. 171, it was held that there is no rule of law to prevent a litigant from instructing counsel directly but Lord CAMPBELL, C. J., speaking in 1850, referred to "the almost uniform usage which has prevailed upon the subject for more than a century". See 3 (HALSBURY'S LAWS), 3 r. Edn., p. 38. See also the same, note (k), where reference is made to an extract from a memorandum by the Attorney General in 1888 in which he said, "Neither before nor after litigation is commenced should a barrister act or advise without the intervention of a solicitor."

I think it is safe to say that for over 200 years the litigant in England instructed a solicitor in contentious business. Now s. 44 defines "to practise as a solicitor" as performing or doing any act or thing which is in England usually performed or done by a solicitor and not by a barrister. Section 44 of Cap. 30 stipulates that a barrister shall be entitled to practise as a solicitor in respect of all proceedings.....in any of the matters specified in s. 42. Since in England the litigant instructs a solicitor it follows that in Guyana when the litigant purports to instruct a barrister-

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ter that barrister is performing or doing an act which is in England usually performed or done by a solicitor and is therefore acting as a solicitor.

The interpretation I give to s. 42 is that it permits a barrister to undertake solicitor's work in the matters therein stated; where the section says he can appear alone it means that when the barrister does so he is practising as a solicitor other than when he appears in the Full Court. When he acts as a solicitor he is bound by the rules of court and in the matter under review could not appear without an authority. In this particular matter he could not appear at all unless he was instructed by a solicitor as the action was over \$500; the barrister could not circumvent the law by permitting the litigant to issue the writ and sign the interlocutory application, and appearing as a barrister without a solicitor. As soon as he appeared in chambers in a matter in which the writ and application were signed by the litigant, he was appearing as a solicitor without the litigant complying with the rules of court. I would dismiss the appeal with costs here and in the court below.

LUCKHOO, J. A.: I have had the opportunity of reading the informative judgment of my Lord Chancellor and agree with what he has said.

The conclusion reached is inevitable from an analysis of the provisions of ss. 42, 43, 44 and 45 of the Legal Practitioners Ordinance, Cap. 30, and a consideration of their object.

Those sections, broadly speaking, circumscribe two areas of practice open to both branches of the profession, subject to certain conditions and restrictions; one, in which both barristers and solicitors are allowed to participate fully, and quite independently of each other, as though no distinction existed between them; the other, in which they must share the undertaking in a certain way; the solicitor coming into the picture first, the barrister after, and together both serve the same end. I do not find that much help could be obtained from looking elsewhere in construing an Ordinance peculiar to this country, which sought an equitable formula in clear language to satisfy the demands of both branches of the profession.

The question here is whether the right given to a barrister under s. 42 (1) C of Cap. 30, which entitles him to "act alone and have audience on the hearing of any application or proceedings before a Judge sitting in Chambers", is in any way restricted or conditioned, when he appears in Chambers in an interlocutory application for an interim injunction arising from a writ which was issued by the clients personally—which was not specially endorsed under the rules and in which the land sought to be protected exceeded \$500 in value.

To answer this question it will become necessary to enquire into the following:

- (a) When a barrister acts alone for a client in chambers, is he doing so as a barrister practising as a solicitor or *qua* barrister alone?

- (b) If he is so acting as a solicitor, ought he not to file and serve a notice of such appointment as is required of a solicitor under O. 6, r. 3?
- (c) Is it competent for a barrister to act as solicitor in the instant case?

The answer to the first question is to be found in s. 44 of Cap. 30 which is as follows:

"Notwithstanding anything to the contrary in any Ordinance or Rule, a barrister shall be entitled to practise as a solicitor in respect of all proceedings, including the issuing of writs of summons or other processes, in any of the matters specified in section 42 hereof, and in respect of any such matter any reference in the Rules of Court, 1900, or any amendment thereof, to a solicitor shall be deemed to include a reference to a barrister so practising."

This section in short pronounces and emphasises—

- (i) that when a barrister acts alone in all proceedings in any of the matters specified in s. 42, he is practising as a solicitor (except, of course, when he appears in the Full Court);
- (ii) and that his status when so acting merges into that of a solicitor to the extent that whenever reference is made in the Rules of Court to a solicitor, a barrister shall be deemed to be included in that reference, as by so practising he will have brought himself within that category.

Further, s. 19 (2) of Cap. 30 provides that—

"A barrister who practises as a solicitor shall, in so far as he so practises, be deemed to be a solicitor within the meaning of this section. Any question arising under this subsection as to what constitutes practising as a solicitor shall, subject to any enactment for the time being in force, be decided by the Court."

The sections above quoted show that a barrister, so practising, loses his identity as such and for all practical purposes assumes the role of a solicitor; must do what a solicitor will be required to do and takes on the burden of an officer of the court.

The logical consequence of including a barrister within the reference to a solicitor in the Rule's of Court, and of what is otherwise stated, leaves little doubt for the answer to *the second question* that the barrister must file and serve his notice of appointment when acting as a solicitor (which is the case when he acts in chambers alone because of s. 44). There is good sense in this requirement otherwise the opposite party or even the court may be subjected to the whimsical or capricious assertions of a dishonest client that his legal representative did not have his authority to do what he did or that he had ceased to have any authority at all; the notice of appointment enables all and sundry to have cognisance of the client's authorised agent, until changed if at all.

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In the instant case there was no compliance with O. 6, r. 3; therefore, all the acts done by the barrister in relation to his appearance in chambers, including the giving of the undertaking so essential to the grant of the interim injunction, were irregular.

Now to the last question: Even if the barrister had gone on record in this case as 'practising as a solicitor', would it have been competent for him to so act?

By s. 43 (1) a barrister has exclusive right of audience in court in a case of this kind. By s. 43 (2) he would have to be instructed by a solicitor on the record. By s. 45:

"A barrister shall not be entitled to practise as a solicitor in any matter in which a barrister is required by subsection (2) of section 43 hereof to be instructed by a solicitor....."

The proceedings in chambers were part of the action itself. The judge under O. 41, r. 15, could have adjourned the matter from chambers into court.

At no stage, therefore, does it seem proper to me for a barrister to be on the record as solicitor, if when the matter goes into court he will be debarred from being on the record as such because he cannot practise as a solicitor by reason of s. 45 (quoted above).

In a case of this kind (except the client is acting on his own) as soon as it was decided that litigation would ensue, the intervention of a solicitor would become necessary. He (the solicitor) must first appear on the scene, be duly appointed to act, and be on the record. The barrister must be content to await his turn and take instructions from the solicitor on the record. If a barrister attempts in any way to act on his own he would be intermeddling without justification; he should not even draw up affidavits (as was done for the purpose of the interim jurisdiction); or give advice except a solicitor be on the record.

When the first part of s. 45 prohibited a barrister from practising 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, it is significant that the second part of that s. 45 goes on to provide that —

"Nothing herein contained shall be deemed to prohibit a barrister from acting fully for a client in any matter of a legal nature without the intervention of a solicitor up to the time when it has been decided by the client that litigation between that client and any other person will ensue."

Section 43 must be read in conjunction with s. 45; in the same way as s. 42 must be read with s. 44.

Therefore, in a matter where the barrister's exclusive right of audience in court will require him to be instructed by a solicitor on the record who is not a barrister practising as a solicitor, the proviso that the barrister could participate in such a legal matter alone up to the time when it has been decided that litigation will ensue, must mean

that after litigation will have commenced (if the client is not acting on his own) a solicitor must be the first person to intervene at any stage thereafter; the freedom of the barrister to act fully being curtailed by the commencement of proceedings which will require his exclusive right of audience later instructed by a solicitor on the record.

The above sections seem to say that, in work of a certain kind, members of each branch of the profession may have equal opportunities to take and do all of the particular kind of work without sharing it with the other; but in another kind of work they must share it in a certain way; that way is not difficult to discern and any attempt to circumvent it ought not to be permitted.

Even if the barrister had filed and served an authority to act for the appellants practising as solicitor, I would hold that in this case, which comes under s. 43, he could not properly so act

I concur in the decision of my Lord Chancellor and would dismiss the appeal and affirm the decision of the Full Court with costs to the respondents here and in the court below.

CUMMINGS, J. A: The sole point for determination in this appeal is whether a barrister-at-law can properly appear before a judge in chambers in an interlocutory matter *qua* barrister alone, or whether when doing so he must be instructed by a solicitor.

The facts giving rise to the appeal are in short compass, not in dispute; and appear hereunder as set out in the judgment of the Full Court.

"On September 7th, 1963, a writ of summons was filed by the plaintiff's 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 24th, 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. Hardy, 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

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undertaking. The learned judge agreed with the submission after hearing arguments, and he discharged the injunction."

The Full Court of the then Supreme Court (now the High Court of Justice) held that a barrister could appear before a judge in chambers without a solicitor, but that when he did so he was acting as a solicitor and would have to have an authority to solicit on the record, and that as neither of the barristers who had appeared before the judge in chambers was on the record as the plaintiff's solicitor, the undertaking given was invalid. Accordingly, that court concluded that the judge was right in discharging the order and allowed the appeal with costs against the appellants. The appellants now appeal to this court.

The general position with regard to barristers appearing in English courts was stated by Lord CAMPBELL in *Doe d. Bennett v. Hale & Davis* (1850), 15 Q.B. 171, at p. 182, in the following terms:

"There certainly has been an understanding in the profession that a barrister ought not to accept a brief in a civil suit, except from an attorney; and I believe that it is for the benefit of the suitors, and for the satisfactory administration of justice, that this understanding should be generally acted upon. *But we are of opinion that there is no rule of law by which it can be enforced.*

"The alleged restriction, therefore, must depend upon usage from which it might be inferred that such a rule had been promulgated, although not now extant in writing.

\* \* \* \* \*

"But I do earnestly trust that it will not alter the almost uniform usage which has prevailed upon the subject for more than a century, and that the interference of the judges to rectify any abuse of it will not be necessary. Exceptional cases may again occur, though very rarely, when it may be fit for barristers to plead in civil suits, instructed only by the parties; but I hope that they will continue generally to adhere to what has been considered the etiquette of the bar. Although conscientiously bound and ever ready to render their best assistance for the discovery of truth and vindication of right, they are at liberty under the control of the courts, to lay down conditions upon which, for the public good their services are to be obtained."

The admission of barristers and solicitors to practise in the courts of Guyana is regulated by ss. 2 to 19 of Legal Practitioners Ordinance, Cap. 30. A person seeking admission must present a petition to the court and subscribe the prescribed oath administered to him in the presence of a judge.

In the case of a barrister, he must first have been called to the English, Irish or Scottish Bar to practise as a barrister.

The Attorney General or Solicitor General is entitled to appear in any case on behalf of the Crown and the Government of the Country without the requirement of admission.

In the case of a solicitor, he must first have been either:

- (a) admitted as a solicitor of the Supreme Court of Judicature in England or Ireland, or enrolled as a law agent under the Law Agents (Scotland) Act, 1873, *or*
- (b) served a period of articleship, passed a qualifying examination and furnished a certificate of good conduct and character to the satisfaction of the court, signed by the legal practitioner or practitioners under whom he has served his articles of clerkship, *or*,
- (c) held an appointment on or before 31st December, 1935 as a sworn clerk and notary public, or an assistant sworn clerk in the Deeds Registry or as a clerk in the Attorney General's Chambers for a prescribed period and obtained a certificate of competency, and passed the qualifying examination for solicitors.

It follows from this that both branches of the profession practise, except where inroads have been made by statute or long usage, mainly in accord with English traditions.

Part III of the Ordinance defines the respective functions of barristers and solicitors and permits a barrister to act as a solicitor in certain circumstances.

Section 41 defines practising as a solicitor as performing or doing any act or thing "which is in England usually performed or done by a solicitor *and not by a barrister*"

Under the caption "(a) Contentious Business" the following provisions appear:

"42. (1) notwithstanding anything to the contrary in any Ordinance or rule, *a barrister or a solicitor shall be entitled to act alone and have audience—*

A. In any cause or matter in a magistrate's court or other inferior court or tribunal.

B. In Court —

(a) in actions where the writ is specially endorsed under the rules and the sum of money claimed or the value of the land or thing in dispute does not exceed five hundred dollars;

(b) in actions (other than those mentioned in sub-paragraph

(a)) where the writ is specially endorsed under the rules,

(i) when acting for the plaintiff up to the time when the defendant has delivered and filed a statement of defence pursuant to an order of the Court giving him leave to defend,

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(ii) when acting for the defendant, up to the time when an order giving leave to defend is made;

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

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

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

(e) in any proceeding by way of petition made under the common law or under any Ordinance or rule;

(f) in any application under any Ordinance providing for the making of an application for any relief or remedy; and

(g) in any proceeding under the Insolvency Ordinance, or under the Insolvency Rules, or under the Companies Ordinance, or the Companies Winding Up Rules, or any rules amending or substituted for the same;

C. *On the hearing of any application or proceeding before a Judge sitting in Chambers;*

D. In the Full Court on any appeal from a magistrate's court or other inferior court or tribunal in any matter in which he appeared alone in such court or tribunal.

(2) Where a solicitor instructs counsel in any cause, matter, proceeding or application, specified in paragraphs B. and C, of subsection (1) of this section the costs of counsel shall not be allowed unless the Judge certifies it to be a proper case for counsel.

"43. (1) A barrister shall have exclusive right of audience —

A. In Court —

(a) 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;

(b) when sitting in its probate, divorce, matrimonial or admiralty jurisdiction; and

(c) when sitting in its original criminal jurisdiction or as a Court of Criminal Appeal;

B. In the Full Court saves as provided in paragraph D. of subsection (1) of the last preceding section;

C. In the West Indian Court of Appeal.

(2) In every case mentioned in sub-section (1) of this section, except cases falling under *subparagraph (c) of paragraph A.*, a barrister shall be instructed by a Solicitor on the record.

"44. Notwithstanding anything to the contrary in any Ordinance or rule, a barrister shall be entitled to practise as a solicitor in respect of all proceedings, including the issuing of writs of summons or other processes, in any of the matters specified in section 42 hereof, and in respect of any such matter any reference in the Rules of Court, 1900, or any amendment thereof, to a solicitor shall be deemed to include a reference to a barrister so practising."

There is then a rule of law in Guyana abrogating to some extent English custom and tradition with respect to the performance of the functions of barristers and solicitors. Such extent is then merely a question of interpretation. It is clear that the performance by a barrister of *some* of the functions set out at A and B of s. 42 necessitates the performance or doing of acts or things which are in England usually performed or done by a solicitor and not by a barrister, *e.g.*, drawing, issuing, filing and serving writs, petitions, interlocutory applications, filing and serving pleadings; but there are other functions mentioned under s. 42 which in England, although performed by solicitors, are also in important cases normally performed by barristers. For instance, O. 55, r. 1 A, of the Rules of the Supreme Court of England provides that —

"In any proceeding before the Judge in Chambers any party may, if he so desire, be represented by Counsel."

This is identical with O. 43, r. 23, of the Rules of the Supreme Court of Guyana.

In "BARRISTER-AT-LAW, (1905)" MARCHANT expresses the view with which I am in full accord that—

"the most important part of the privilege of a barrister is the right to practise as an advocate in all the superior and most of the inferior courts of England. This right is in most cases to the exclusion of all other persons, but is in some cases exercised concurrently with solicitors and others."

When, therefore, a barrister appears before a judge in chambers in England, his right of audience is *qua* barrister. When he does so in Guyana, his right of audience is also *qua* barrister and his authority to appear is not to be questioned. He needs no "authority to solicitor."

In *Murphy v. Richardson* (1850), 13 Ir. L.R. 430, PIGOT C. B., at p. 433, said:

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"The appearance of counsel with his brief should, I think, be sufficient to satisfy the court; and when counsel does so appear, and states to the court that he is properly instructed, it would be very objectionable to inquire particularly into the authority under which he acted."

RICHARDS, B., at p. 433, said:

"It would be very inconvenient for a judge to investigate at a trial whether the party who appears there is authorised or not; it is to be assumed that the party appearing is authorised: and on these grounds I rest my judgment for a new trial."

LEPOY, B, at p. 434, said:

"The sole question, to my mind is, was the judge authorised in entering into any inquiry on the subject, when counsel appeared there, and stated he was instructed? I do not think he was; he should not have involved himself in any such inquiry, but have rested satisfied with the statement of counsel. The verdict must be set aside."

Section 44 is permissive; it merely *entitles* a barrister to practise as a solicitor for the purpose of performing those functions. It does not, however, by some stroke of legerdemain transform him into a solicitor. He remains a barrister and his right of audience is as a barrister. When however he does the things normally done by a solicitor in England and *not* by a barrister, he is practising as a solicitor, and is then bound by the Rules of the Supreme Court applicable to solicitors. Consequently, in such circumstances he must have an "authority to solicitor" in compliance with the rules.

It is true that in England when a barrister appears in chambers he is usually instructed by a solicitor. That circumstance, however, is merely the accepted traditional machinery for his employment and the receipt of his instructions. It neither creates nor impairs his right of audience.

Put another way: In the exercise of this function by a barrister in England there is no rule of law, but tradition enjoins that it should be exercised upon the instructions of a solicitor. Section 42 expressly enacts that in Guyana, a barrister may appear *alone* and ss. 43 (2) expressly sets out the cases in which a barrister cannot appear alone but must be instructed by a solicitor; and appearance in chambers is *not* one.

The Full Court's view that a barrister may appear in chambers alone, but that when he does so he is acting as a solicitor, does not seem to take cognizance of the fact that the barrister's right of audience is inherently so and is not created by s. 44. It would follow from this view that when he appears with his brief in the Full Court to argue on appeal as provided by s. 42 D the barrister would be acting as a solicitor.

This result, with great respect, in an absurdity.

In *Holmes v. Bradfield R.D.C.*, [1949] 2 K.B. 1, at p. 7, FINNEMORE, J., said:

"The mere fact that the results of a statute may be unjust or absurd does not entitle this court to refuse to give it effect, but if there are two different interpretations of the words 'in' and 'at', the court will adopt that which is just, reasonable and sensible rather than that which is none of those things."

If the intention were that a barrister was to be regarded as acting as a solicitor when he appeared alone as an advocate in chambers or in the Full Court of Appeal it would not have been necessary to have used the word "barrister" in the sentence "a barrister or solicitor shall be entitled to act alone and have audience....." All that would have been necessary would have been "a solicitor shall be entitled to act alone and have audience....." followed by s. 44 which entitles a barrister to practise as a solicitor in respect of all proceedings, etc.

Section 42 C would be redundant and meaningless if its purpose were not to add to the already existing right of audience of a barrister before a judge in chambers the circumstance that he could properly so appear *alone*; that is, without being instructed by a solicitor.

It is a well-established rule of interpretation that a statute must be construed *ut res magis valeat quam pereat* so that the functions of the legislature may not be treated as vain or left to operate in the air.

In my view, the language in the provisions now under consideration is clear and unambiguous and the word "alone" should be given its ordinary and natural meaning. Then too, what was the mischief that the Ordinance was intended to prevent? The necessity for legal practitioners in Guyana to be altogether hide-bound by English traditions. Surely the intention was to create and promulgate legislation which would enable both branches of the profession to benefit by being entitled to perform certain functions alone, which, if English traditions were strictly adhered to, could only be performed either by one or the other exclusively, or by one in conjunction with the other; for example, a barrister practising in Guyana in strict adherence to English traditions could not issue a writ. The provisions of the Ordinance were intended to permit him to act as a solicitor for that purpose in certain cases. Similarly, a solicitor had no right of audience in the Full Court of Appeal, but the intention of the legislature was that he should be permitted to appear alone and argue as an advocate.

In *Sirikissun v. Fernandes*, 1923 L.R.B.G 1, Sir CHARLES MAJOR, in dealing with a barrister's right to sue for his fees, said:

"The respondent, then, a member to be sure of the English Bar, but employed by the appellant as and because admitted to practise as a barrister in this colony and, therefore, conformably with the local law and usage relating to the legal profession, rests his claim thereon. Reference to that law, Legal Practitioners Or-

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dinance, 1897, shows that, first, s. 9, while it does not *totidem verbis* permit a barrister to practise as a solicitor, at any rate expressly contemplates his so doing, thus recognising and giving legal sanction to that usage, then apparently well established, which had already gone far towards a complete amalgamation of the two branches of the profession. And further confirmation of the usage is to be found in the rules to regulate the extent of a barrister's practice as a solicitor made by the Supreme Court rule making authority in the following year. Now, that was to bring barristers into the class of practitioners mentioned in the judgment of the Judicial Committee in the *R. v. Doure* (9 A.C. 745), namely, 'lawyers who are not merely advocates or pleaders, and combine in their own persons the various functions which are exercised by legal practitioners of every class in England, all of whom, the bar alone accepted, can recover their fees by an action at law'. And to that class of practitioners their lordships entertain at any rate serious doubts of the applicability of the reasons why the Bar of England cannot sue or make agreements for their fees, namely, usage and the peculiar constitution of that Bar, apart from general consideration of public policy as expounded in the case of *Kennedy v. Brown* (13 C.C.B. (No. 5) 677). For myself, I entertain no doubt that those reasons do not apply to British Guiana. Again, s. 13 of the Ordinance renders a barrister liable on demand to account to his client for monies advanced to him for expenditure in, or as security for, costs and charges, and in default amenable to an order of court that he shall do so, and the first subsection of s. 14 directly enables a barrister 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 a prescribed time. This subsection actually gives to a barrister power to accompany suit with arrest of a debtor client about to quit this colony. 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'."

In my view, similar although not identical considerations arise here and this view of the law, concerned, as it is, with the abrogation of English usage and tradition by local enactment, is germane. The rule of interpretation declared by the judges in advising the House of Lords in the *Sussex Peerage Claim* (1844), 11 C1. & F. 85 143, and later accepted by the Judicial Committee of the Privy Council in *Cargo ex Argos* (1872), L.R. 5 P.C. 134, at p. 153, was stated in the following terms:

"The tribunal that has to construe an Act of a Legislature, or indeed any other document, has to determine the intention as expressed by the words used. And in order to understand these words it is natural to inquire what is the subject-matter with respect to which they are used and the object in view.

"If the words of the statute are themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves alone do in such a case best declare the intention of the lawgiver." CRAIES ON STATUTE LAW, 5th Edition p. 64.

Having applied these principles to the provisions under consideration I conclude that it was the intention of the legislature that a barrister could appear before a judge in chambers *qua* barrister and without being instructed by a solicitor.

Accordingly I would allow the appeal, set aside the judgment of the Full Court and of the learned judge in chambers and remit the matter back to him to hear the application for the continuation of the injunction on its merits. The appellant should have his costs before the judge in chambers, in the Full Court of Appeal and in this court.

*Appeal dismissed.*

Solicitors: *D. Dial* (for the appellants); *L. L. Doobay* (for the respondents).

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

[Court of Appeal (Stoby, C, Persaud, J. A., and Cummings, J. A. (ag.)) September 28, 29, October 3, 1966].

*Contract—Mutual mistake as to tractor intended to be sold and purchased—Effect.*

The appellants, a finance company, repossessed a tractor which had been the subject of a hire purchase agreement with R. The respondent, who knew of the repossession, went to the appellants and proposed to buy the particular tractor. The appellants accordingly sold it to him, but in the meantime one P. had unlawfully exchanged his tractor for R.'s, so that what in fact the respondent received from the appellants was P.'s tractor. On discovering this, the respondent repudiated the contract and sued successfully for damages on the ground of failure of consideration, alternatively, for breach of contract. On appeal,

Held: it was a condition of the contract that the tractor purchased was to be the one that once belonged to R. Both parties were mistaken as to the identity of the tractor delivered. This was an essential error going to the subject matter of the contract and the contract was therefore void.

*Appeal dismissed.*

*J. O. F. Haynes, Q.C., with D. E. Hoyte and C. B. Ramsaroop for the appellants.*

*B. O. Adams, Q.C., with E. W. Adams for the respondent.*

CRANE, J. A. (Ag.): The appellants, Messrs. Olds Discount Co., Ltd., a finance company, on 3rd November, 1960, entered into a hire-purchase agreement in respect of a DM4 Nuffield tractor of 56 h.p. with

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one Paray. On 6th January, 1961, they entered into another such agreement in respect of another such tractor with one Ramsundar.

In September 1962 Ramsundar defaulted in his hire-purchase instalments and the appellants repossessed his tractor, which was then lying at the Abary. Williams, their agent who seized the tractor in order to ensure that his mission was complete, removed certain parts from it. Two or three weeks later he returned and removed to Georgetown what he thought to be the tractor. In the interval Paray's tractor had been exchanged for Ramsundar's tractor and the number plate with the number 3958 was removed from Ramsundar's tractor to Paray's tractor which had been taken to the appellants' premises in Georgetown.

The respondent knew Ramsundar's tractor before seizure. He had tried it out and worked it himself. He liked it, and after he got to hear that it was repossessed, he got Ramsundar's permission to negotiate its purchase from the appellants. He came to Georgetown on 31st October, 1962, to buy what he thought to be Ramsundar's tractor. He visited the company's premises; saw the Nuffield DM 4 tractor bearing number plate 3958 which he knew to be Ramsundar's number plate. He spoke with Ramdehalchand, the company's machinery agent, and stated in no uncertain manner that he wanted Ramsundar's tractor and only Ramsundar's tractor. Ramdehalchand showed him the tractor bearing number 3958 which respondent bought and took away the very day after obtaining certain spare parts for it. He repaired it at the dealer's premises—Messrs. J. P. Santos & Co., Ltd.—and took it to Foulis, West Coast, Berbice, where he resided. He began to hear certain rumours in the district concerning Ramsundar's tractor and he called upon Ramsundar to examine it. Ramsundar did so and denied that it was his tractor. The respondent made a report to the police after coming to Georgetown, and a search warrant was executed and the police took away Paray's tractor.

Around this time Ramsundar's tractor was found in a trench at Black Bush Polder. Paray was subsequently prosecuted for the larceny of Ramsundar's tractor. The police were in possession of both tractors which they ultimately sold at auction for \$150.

On those facts the respondent claimed against the appellants damages on the ground of failure of consideration. Alternatively, breach of contract. The judge found in his favour and awarded him \$2,588.07 damages, being \$1,700 paid for the tractor, \$588.07 spent on repairs, and \$300 spent on hiring of tractors to plough his land, and costs.

The learned judge based his reasons for decision on two grounds:

(1) He found that the case was one of mistake as to the subject-matter with which the parties were dealing. That the respondent only wanted to buy Ramsundar's tractor and the appellants only wanted to sell Ramsundar's tractor, and that they would not have done so if they knew that the tractor they had sold to the

plaintiff was not Ramsundar's tractor but Paray's tractor. He held that the transaction was a mutual error founded on an innocent misrepresentation.

(2) He found that the tractor which the respondent had bought was subject to an existing hire-purchase agreement, and that the appellant company had only two distinct sets of rights which they could have assigned: firstly, their general property in the goods which may be conveniently termed their reversionary interests; and, secondly, their contractual rights under the agreement. The learned judge found that the contract was void and he ordered damages as stated. From his decision this appeal arose.

Counsel for the appellants in an excellent concise argument submitted that there were two areas of law which he delimited in two propositions:

- (1) Was there a mistake which could in law affect the contract? If so, did it make the contract void or voidable? If voidable, did the respondent elect to avoid the contract, or did he affirm it?
- (2) Assuming there was a contract which was not avoided, did the appellants have a valid title to Paray's tractor which they could pass to the respondent?

In respect of the first proposition, counsel argued, both parties believed the tractor was Ramsundar's tractor. The number plate led them to this conclusion.

Counsel then cited certain passages from the record to show that what the respondent was indeed intent upon purchasing was Ramsundar's tractor, and submitted that there was a bilateral error of the parties that Ramsundar's tractor was being bought and sold, and that this would not make void the contract unless the mistake related to such a fundamental matter which made the subject-matter something different from that which was contracted for. He contended that the only difference between the two tractors was that one had a differential lock. There was no evidence that these differences were material, counsel stressed, though there was evidence that Paray's tractor was older than Ramsundar's.

In support of this proposition counsel referred to 26 HALSBURY'S LAWS OF ENGLAND, 3rd Edn., p. 900, para. 1664—*Mutual Mistake as to Quality*—and read the following passage:

"It seems that a mistake as to the quality of the subject-matter of the contract affects assent and renders a contract void at law provided it is the mistake of both parties and is as to the existence of some quality which makes the thing without the quality essentially different from the thing as it was believed to be. The test is, whether the state of the new facts destroys the identity of the subject-matter as it was in the original state of facts. When goods are sold under a known trade description with mis-

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representation or breach of warranty and the goods answer to that description, the fact that both parties are mistaken as to the quality of the goods is not relevant."

Counsel stressed that this passage is in harmony with a passage from Lord ATKIN in the decision of *Bell v. Lever Bros.*, [1931] All E.R. Rep. 1, at p. 32, letter D, where the learned Lord of Appeal in Ordinary states the test for rescission for mutual mistake:

"Does the state of the new facts destroy the identity of the subject-matter as it was in the original state of facts?"

The facts in this case were, that A, for a large sum of money, purchased a release from a contract to employ B. At the time B, unknown to A, had committed such breaches of the contract as would have entitled A then and there to have rescinded it. A claimed to avoid the release and to recover what he had paid. The House of Lords decided against him.

*Solle v. Butcher*, [1950] 1 K.B. 671, was a case where both parties entered into a lease of a flat under the mutual misapprehension that certain alterations which had been made to the flat had so altered its identity as to make it a new dwelling and so outside the Rent Restriction Act. They had executed the lease under a common mistake of fact that the flat was not tied down to £140 *per annum*, whereas indeed it was. It was held that the lease must be set aside: BUCKNILL, L. J., on the ground that both parties having, in his opinion contrary to what the county court judge had said, addressed their minds to the question whether the flat had changed its identity, the mistake which each had made was that the work done made such a substantial alteration to the building as to make it a different flat, a common mistake of fact; and DENNING, L. J., on the ground that the parties had executed the lease under a common mistake, that each thought that the flat was not tied down to the control rent of £140 a year, whereas in fact it was.

*Leaf v. International Galleries*, [1950] 1 All E.R. 693, was a case which reached the Court of Appeal from the Westminster County Court which dismissed an action for the rescission of a contract for the sale of a picture on the ground of innocent misrepresentation. In March, 1944, the buyer had bought from the sellers an oil painting of Salisbury Cathedral which was represented to him as a painting by Constable, a representation which was held to be one of the terms of the contract. In 1949 he found that the picture was not a Constable. On a claim by the buyer for a rescission of the contract on the ground that there was an innocent misrepresentation, the Court of Appeal held that, assuming that in a proper case a contract for the sale of goods passing by delivery could after its completion for the delivery of the goods be rescinded on the ground of innocent misrepresentation as to the quality of the chattel sold, the present claim was not competent because the buyer had lost the right to reject on the ground when he accepted delivery of the picture, or at least when a reasonable time had elapsed after his acceptance, and five years was more than a reasonable time.

Counsel for the appellants cited this case, as he did the previous, in order to emphasize his point that the contract which had been created between the parties was voidable only. But there are many special features of this case. The respondent failed to have the contract rescinded for more than one reason. He did not repudiate until the lapse of five years and this, coupled with the fact that it was a work of art which might have deteriorated, made rescission impossible. Nobody can ever prove or guarantee with scientific certainty that a painting is by a particular artist.

The true test in deciding whether a contract ought to be rescinded is to determine whether the breach complained of is a condition or a warranty. In this case the trial judge found that it was a condition of the contract that the tractor should have once belonged to Ramsundar. He was correct in so finding. The stipulation concerning Ramsundar's tractor was no mere whim on the part of the respondent; it went to the identity, the very existence of the article. The respondent was not concerned with buying a tractor; he was anxious to have a specified tractor. If then that term of the contract was a condition, then he was entitled to repudiate, and the remaining point is, whether he exercised his right within a reasonable time.

The evidence is that on the 29th November, the respondent took the tractor to Foulis and later, on the 3rd December, 1962, he came down to Georgetown and reported what Ramsundar had told him concerning the tractor. He therefore acted within the space of four days after discovering from Ramsundar that what he had bought was not indeed what he wanted.

The respondent was then put in a dilemma. He wanted the tractor to plough his lands. Thus frustrated, he could get no satisfaction from the appellants who referred him to the police, who seized the tractor. His conduct clearly shows he was repudiating the contract.

Where a contract is voidable the seller would still have rights in it if the purchaser has not sought to set it aside. In every case of a rescission the court aims at a *restitutio ad integrum*—aiming at putting the parties back into their original position as if the contract had not been breached. Counsel placed great reliance on *Leaf's* case and has asked that it be applied to a solution of the case in hand. The judgment of DENNING, L. J., serves to bear out the distinction between *Leaf's* case and the present. At p. 694 his Lordship says:

"The question is whether the buyer is entitled to rescind the contract on that account. I emphasize that this is a claim to rescind only. There is no claim in this action for damages for breach of condition or breach of warranty. The claim is simply one for rescission. At a very late stage before the County Court Judge, counsel for the buyer did ask for leave to amend by claiming damages for a breach of warranty but was not allowed, so no claim for damages is before us. The only question is whether the buyer is entitled to rescind. The way in which the case is put by counsel for the buyer is this: He says this was an innocent mis-

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representation and that in equity he is entitled to claim rescission even of an executed contract for sale on that account. He points out that the judge had found that it is quite possible to restore the parties to the same position that they were in originally by the buyer simply handing back the picture to the sellers in return for the payment of the purchase price."

The contention for the contract being voidable for which counsel strives is designed to achieve just the same object as counsel suggests in the passage under quotation, but it would not be possible in this case to give back the tractor to effect a *restitutio ad integrum* since the police had sold the tractors at auction.

The next case cited by counsel was *Rose v. Pim*, [1953] 2 All E.R. 739. This was another case of common mistake. The sellers in this case had appealed from an order of the trial judge granting rectification of two written contracts of sale by insertion of the word "feveroles" after the words "Tunisian horsebeans" and "Algerian horsebeans" in the specifications of the goods sold appearing respectively in the two contracts. They contended that there was no ground for rectification in law since the written contract correctly stated the terms agreed orally between the parties. The parties had originally made an oral agreement which they subsequently reduced into writing. The court held that the oral agreement was for the sale of horsebeans and notwithstanding the mutual mistake made by them as to the meaning of "feveroles" and "horsebeans", the contract could not be rectified as the written agreement correctly expressed the original oral agreement. Both parties had applied for rectification.

This case is again distinguishable from the present one which is also a case of common mistake. DENNING, L. J., at p. 746 showed the effect of common mistake on contract. He said:

"What is the effect in law of this common mistake on the contract between the buyers and the sellers? Counsel for the sellers quoted *Bell v. Lever Bros., Ltd.* and suggested that the contract was a nullity and void from the beginning, though he shuddered at the thought of the consequences of so holding. I am clearly of opinion that the contract was not a nullity. It is true that both parties were under a mistake, and that the mistake was of a fundamental character with regard to the subject-matter. The goods contracted for—horsebeans—were essentially different from what they were believed to be—feveroles. Notwithstanding the parties, to all outward appearances, were agreed. They had agreed with quite sufficient certainty on a contract for the sale of goods by description, namely, horsebeans. Once they had done that nothing in their minds could make the contract a nullity from the beginning though it might, to be sure, be a ground in some circumstances for setting the contract aside in equity."

The difference between this case and the present is clear. The parties got what they bargained for, though there was a fundamental error as to the meaning of feveroles and horsebeans. It was a mutual

mistake between them, but the court saw no ground for granting rectification as the parties had contracted on the basis of common mistake and there was no ground for nullifying the contract or rendering it void.

As I have already said, these four decisions which were cited were in support of the claim that the contract was voidable only and not entirely void, that is to say, the respondent having elected to affirm the contract in the view of the appellants still gave the appellants certain rights under it, the rights which they claim were that they should pay to the respondent the difference between Ramsundar's and Paray's tractors which is merely nominal damages as distinct from the contract being void as found by the learned judge.

To sum up on counsel's arguments on his first proposition: There was indeed a mistake, as the learned judge found, with regard to the subject-matter of the contract. It was a mutual error made by both parties about the tractor being Ramsundar's. It is clear that the respondent would not have contracted if he had known of the true state of facts. The parties cannot be said to have been in agreement to buy and sell Paray's tractor. I am of opinion the judge was right in holding void the contract for essential error which went to the subject-matter of it. I believe this to be so for the following reasons: That the contract relating as it did to a specific and ascertained tractor, that is, Ramsundar's tractor, the law would supplement their express intention with an implied condition that its existence, and no other, at the time of the making of the contract, was essentially the identical tractor which the parties had in mind. Although not adverted to in argument, s. 8 of the Sale of Goods Ordinance, Cap. 333, also makes provision in this respect:

"8. Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void."

Section 8 was considered and applied by WRIGHT, J., (as he then was), in *Barrow, Layne & Ballard Ltd. v. Phillips*, [1920] 1 K.B. 574, where a contract had been entered into for the sale of a specific parcel of 700 bags of nuts stored in a particular warehouse. At the time of the making of the contract 109 bags had, unknown to the parties, disappeared by reason of the dishonesty of some third person. WRIGHT, J., considered that the subject-matter of the contract was an indivisible parcel of 700 bags, and as this no longer "existed" at the time of the making of the contract, he held the contract to be void.

The foundation of their contract then, was the existence at the appellant company's showrooms on the 31st October, 1962, of a specific and ascertained tractor—Ramsundar's tractor and his tractor only. But the fact of the matter was that, unknown to both parties at that time Ramsundar's tractor was not really in "existence" in just the same way as the 109 bags of nuts in Barrow's case above had "perished", unknown to the seller, thus rendering the contract void because it was stolen from the Abary where it was left between September 1962, when the appellant company re-possessed it and left it lying there, and

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October, 1962, when the appellants brought what turned out to be Paray's tractor to their showrooms in Georgetown instead. Paray was actually prosecuted for stealing Ramsundar's tractor.

The first proposition of counsel for the appellants having been answered in the respect that there existed a mutual error between the parties with reference to the subject-matter with which they were dealing thus rendering their contract void and of no effect, the second proposition, which is based on the assumption that there was such a contract, does not therefore arise.

For the above reasons I would dismiss the appeal with costs.

STOBY, C.: I agree.

PERSAUD, J. A.: I agree.

*Appeal dismissed.*

## SHIVDYAL OJHA v. RAMNAUTH OJHA

[High Court (Bollers, C. J.) July 25, 26, 27, 28, August 9, October 13, 1966].

*Practice and procedure—Fraud pleaded but not undue influence—Whether defendant may be heard on undue influence.*

*Contract—Undue influence—Confidential relationship—Sale below value—Validity of sale.*

The plaintiff was the attorney and manager of the estate of his aged and ailing mother, who resided with him and was cared for by him. He bought immovable property from her at a price considerably below its true value. His mother was present when transport was parsed to him but she did not execute the transport, he having done so both on his own behalf as purchaser and in his capacity of attorney for her as vendor. In an action claiming an injunction against the defendant, his brother, the latter pleaded fraud, but not undue influence. The court, however, heard evidence of undue influence and the arguments of counsel on both sides thereon.

**Held:** (i) the court would inquire into the question of undue influence;

(ii) the plaintiff having failed to prove that the confidential relationship of principal and attorney ceased to exist at the time of the transaction and that the vendor had independent advice or that the contract was the act of a free and independent mind, the contract would be presumed to have been made under undue influence;

(iii) alternatively, the vendor's age, illness, illiteracy and failure to manage her own affairs at the time of the transaction or her being cared for by the plaintiff in his house constituted clear proof of undue influence, and this the plaintiff had failed to rebut;

(iv) the transport was therefore void.

*Judgment for the defendant.*

*Dr. F. H. W. Ramsahoye* for the plaintiff.

*C. E. R. Debidin* for the defendant.

BOLLERS, C. J.: In 1926 the Ojha family moved from Georgetown to Leguan. Mr. Ojha was ailing and had retired from the civil service. The property described under 'Secondly' in the transport. Exhibit 'A', was purchased in the name of his wife, Sukhia. This property consisted both of house-lots on the front portion of the plantation called Boston, part of Pln. Blenheim, *cum annexis*, and also certain lots in the backlands of the plantation, subject to the right of the proprietors of the adjacent plantations to drainage through the existing trenches. The family home was erected on lot 1, one of the house-lots. At that time the defendant was 13 years old, and the plaintiff about 6 years old, both sons of Mr. Ojha and his wife, Sukhia. Sukhia, with the assistance of the defendant, cultivated certain portions of the house-lots with greens and certain of the back lots with rice. Cattle were also depastured on the land and the milk therefrom shipped to Georgetown. Sukhia was the custodian of all the monies received from the working of the estate.

In 1930 Sukhia and her sister, Mangree, purchased the backlands at Pln. Doornhaag from one Guyadeen, and Sukhia, with the assistance of the defendant, cultivated rice on her share of the backlands.

In 1932 Mr. Ojha died, and in 1937 Sukhia sold out her interest in Doornhaag to her sister, Mangree, for a sum around \$1,100, and with the sum of over \$2,000: collected on an insurance policy on the life of her husband she purchased the property described under 'Firstly' in the transport, Exhibit 'A', from Rambaksh. These lands she used for cultivating rice, again with the assistance of the defendant. Strangely enough, the plaintiff never assisted his mother in the work on the estate. Shortly after the acquisition of this property, Sukhia gave her son, the defendant, permission to occupy certain portions of the land described under 'Firstly' in the transport, and also other portions of the land described under 'Secondly' in the transport.

As a result 50 acres of the land formerly owned by Rambaksh were measured off from the cross-dam between Plns. Tewkesbury and Blenheim going east, which would cover lots 21 to 30 on Wong's plan, which the defendant proceeded to occupy, and he cultivated part of it with rice and greens. It appears that three fields known as "Mango", "Pigeon" and "Joie" were included in these 50 acres and amounted to 5 1/2 acres. Ten acres of the 50 acres were placed under rice cultivation, and five acres under the cultivation of greens; the remainder of the 50 acres consisted of bush and sand reef. Part of the 50 acres was also fenced off and the defendant depastured his cows on this area. On the house-lots, an area of 20 rods by 20 rods was measured off and this included house-lots 4, 5, 6 and 7 described under 'Secondly' in the transport.

In 1945 the defendant's sons, with his permission, occupied certain portions of the area of land for which permission was given by his mother to him to occupy. The defendant had been married for the

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second time in the year 1936 but was never happy with his wife because of his drinking habits, and eventually she left him as the same unhappy differences arose as in the case of his first marriage because of his love for strong drink. In 1955 the second wife left him and went to live on the East Coast of Demerara.

The history of this matter reveals that the mother, Sukhia, from time to time passed transport of some of the house-lots and cultivation lots described under 'Firstly' and 'Secondly' in the transport to certain of her children, including the plaintiff, and also sold and transported to strangers certain other lots, but she never transported any land at all to the defendant. The inference is strong that she was not satisfied with the conduct of the defendant by reason of his drinking habits but, nevertheless, was prepared to permit him to occupy, with her consent, the area of land already mentioned.

In 1950 cultivation lots 1 and 2, described under 'Firstly', were transported by Sukhia to the plaintiff, whose un rebutted evidence is that he paid \$1,000 for their purchase. He also purchased and obtained transport for house-lot one on which the family home stood for the sum of \$500. From 1961 to 1963 the defendant paid rates to the local authority on house-lots 4, 5, 6 and 7 and on cultivation lots 10 and 19 to 32, and in 1962 his son paid rates on cultivation lot 10, Section 3. In August 1963 the defendant purported to lease to one Ramratie Ojha a portion of land at lot 23, Blenheim, Leguan, consisting of three acres of rice land at an annual rental of \$15 per acre. This purported lease became the subject-matter of litigation later on. On 2nd June, 1964, the defendant purported to sell and transfer his tenancy of two acres of rice land in cultivation lots 24 and 25 in Pln. Blenheim to his nephew, Chatterpaul Persaud, for the sum of \$200.

In April 1965 the defendant purported to lease three acres of rice land to Sewram Sawh and to sell him what he termed the 'goodwill' in the land for the sum of \$200. \$60 was paid by Sawh on account of this transaction by means of a sale of rum amounting to that sum for which he had not been paid by the defendant, but this sum was eventually returned to him by the plaintiff who was able to convince Sawh that the defendant had no right to lease any land. As a result, in May 1965 the defendant purported to sell to the plaintiff what he termed was the 'goodwill' in Mango Field (the same area of land that he attempted to lease to Sawh), the plaintiff entering into possession thereof, and in November, 1965, the defendant purported to sell to the plaintiff the goodwill in Joie Field and Pigeon Field, and as a result the plaintiff entered into possession. When the defendant sold the goodwill in the various portions of the 50 acres of land occupied by him, I understand this to mean that he was selling the labour expended on the rice land, the tenancy of which he was seeking to transfer to another.

Meanwhile, in October 1962, Sukhia had executed a general power of attorney in favour of the plaintiff who was then managing her affairs, and from then on up to 1964 receipts for rates from the local authority are in the name of Sukhia, paid on her behalf by the plaintiff. Sukhia then became indebted to a Mr. Lowe, who held her transport as

security for the debt and owed rates to the local authority to the tune of \$1,042.08 for which she was sued in 1964, and the plaintiff settled the case and paid off the arrears of rates due.

The plaintiff then purchased the property held under transport No. 1073/64, Exhibit 'A', from his mother Sukhia for the sum of \$4,500, and an affidavit of sale was sworn to by Sukhia but, peculiarly enough, when the transport was passed before the Registrar, though Sukhia was present, she did not execute the conveyance, but the plaintiff did so, signing as attorney for Sukhia to himself in his private capacity. At the time of the passing of the transport Mr. Lowe was paid off his debt of \$2,000 and he surrendered the transport. It appears that after transport was passed the old lady, Sukhia, who was in a delicate state of health, then lived in the plaintiff's house on lot 1, and subsequently died in August 1965.

In March, 1966, the defendant, who had left Leguan towards the end of 1965, returned and went on to the 10 acres of rice land which he had cultivated in the preceding years and some of which included the land the goodwill of which he had sold to the plaintiff. He also sought to impound the plaintiff's cattle which he found depastured on the 50 acres of land formerly occupied by him. He was prevented from doing so by the police when the plaintiff produced his transport, Exhibit 'A'.

The plaintiff now seeks to obtain an injunction against the defendant restraining him from going on to any portion of the land covered by the transport No. 1073/64, Exhibit 'A', and the defendant in reply seeks to set up a title by prescription *nec vi, nec clam, nec precario* to the fifty acres of land occupied by him and in the alternative, that the transport to the plaintiff was obtained by fraud. It is, however, clear to me that his claim to prescriptive title of the 50 acres of land must fail as he was a mere licensee of his mother, Sukhia, the former holder of the transport and, as such, he could never claim to be in adverse possession of the 50 acres of land. "Possession is never considered adverse if it can be referred to a lawful title," per WOOD, V. C, in *Thomas v. Thomas* (1855), 2 K. & J. 79.

There remains, however, the question of fraud, and I must arrive at the conclusion that the particulars of fraud alleged in the defendant's affidavit have not been established by him. Counsel for the defendant, however, submits that there was fraud since the plaintiff obtained the transport from his mother for the purchase price of \$4,500 when the evidence from the official quarters is that the property was worth \$28,000 (later reduced on appeal by the plaintiff to \$19,000 plus \$1,425, and in the fiduciary relationship which existed between the parties this must be clear evidence of undue influence by the plaintiff over his mother. Counsel submits that this purchase, at such a gross undervalue, must result in a finding by the court that there was undue influence exerted by the plaintiff over his aged and ailing mother. His proposition is that this is a case where by reason of the confidential relationship existing between the plaintiff and his mother a court of equity would presume undue influence, in which situation the onus would be

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cast on the plaintiff to show (a) that the relationship had come to an end at the time of the passing of the transport; (b) that the old lady, Sukhia, had independent advice, and this burden of proof the plaintiff had failed to discharge. Counsel for the plaintiff in reply submits that there was no confidential relationship existing between the plaintiff and his mother and this is not a case where undue influence can be presumed and, as a result, if the property were sold at an under-value it was a mere case of a mother's love and affection for her son.

While it is true that in the particulars of fraud alleged there is no allegation made of undue influence, I think that in a modern view of pleading, fraud having been pleaded and the court having heard evidence of the transaction on the point being raised and fully argued by counsel on both sides, a court of equity would enquire into the transaction. Before I consider the law on the matter, I ought to make it clear that I have arrived at the conclusion, that over the years when the mother, Sukhia, was the owner of the property the defendant played an important part in the development of the land and obtained little material benefit therefrom; that while the old lady permitted him to occupy certain portions of the land and actually passed transport of certain portions to her other children and relatives from time to time, she never favoured him with a transport because of his extreme love for strong drink, but later expressed the view that his brother (plaintiff) would give him what was his. Towards the end of 1965 it appeared that after his wife had left him the defendant was essaying to spend less time in the island of Leguan while the plaintiff was seeking to ingratiate himself in his mother's affection in managing her affairs and assisting her financially from time to time. At the same time he appeared to be purchasing and/or occupying as many other portions of the land that he could until, eventually, he obtained the transport of the whole property in 1964.

The text-books, in dealing with fraud in equity by undue influence, divide the cases of transactions *inter vivos* into two categories—(1) those of special confidential relationships in which the presumption clearly arises, (2) those in which there is no such special relationship and where the onus falls on those seeking to impeach the transaction. This division is based on the dictum of LINDLEY, L. J., in *Allcard v. Skinner* (1887), 3 T. L. R. 751, where he observes that cases of undue influence fall naturally into two groups, sometimes overlapping, and states:

"The doctrine relied upon by the appellant is the doctrine of undue influence expounded and enforced in *Huguenin v. Baseley* (1807), 14 Ves. 273, and other cases of that class. These cases may be sub-divided into two groups, which however, often overlap. First, there are the cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor"—and then certain cases are cited." The evidence does not bring this case within this group. The

second group consists of cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him"

The courts have never attempted to define "undue influence" with precision, but in *Allcard v. Skinner*, (1887) 36 Ch. D. 145 at p. 181, LINDLEY, L. J., as already stated, described it as "some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by the guilty party", and in the first class of case equity always took the view that undue influence must be presumed, for the fact that confidence is reposed in one party either endows with exceptional authority over the other or imposes upon him the duty to give disinterested advice. In other words, the possibility that he may put his own interest uppermost is so obvious that he comes under a duty to prove that he has not abused his position. As long ago as 1866, Lord CHELMSFORD in *Tate v. Williamson* (1886), 2 Ch. App. 55, laid it down:

"Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage although the transaction could not have been impeached if no such confidential relation had existed."

As a result, transactions between various classes of persons where one is clearly in a dominating position in respect of the other, and that dominating person derives a benefit out of that relation, are said to raise a presumption of undue influence which the beneficiary must disprove, if he can, before he can enjoy the benefit he has gained. Thus the presumption exists between parent and child where the child confers a benefit on his parent, between uncle and nephew, solicitor and client, spiritual, legal and medical advisers and their clients. (See *Bainbrigg v. Browne* (1881), 18 Ch. D. 188, *Powell v. Powell*, [1900] 1 Ch. 243, at p. 246, and *Gibson v. Jeyes* (1801), 6 Ves. 266).

I agree with the contention of counsel for the plaintiff that there is no presumption of undue influence of a child over a parent; the presumption exists *vice versa*, that is, in respect of a parent over a child, so in the instant case the presumption will not arise by reason of that relationship. I am, however, of the opinion that this case falls within the first category of case by reason of the confidential relationship which existed between the plaintiff and his mother, Sukhia. Two years before the transport was passed Sukhia had executed a general power of attorney in favour of her son, the plaintiff, and it does appear that he was managing her property from the circumstance that he was paying the rates on the property and when the transport was passed he paid off the debtor, Mr. Lowe. This relationship continued up to the date of her death.

In *Inche Noriah v. Shaik Allie Bin Omar*, [1929] A. C. 127 at p., 135, Lord HAILSHAM suggested that where the relation is still subsisting,

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proof of independent advice is only one of the methods by which the presumption can be rebutted. In the past, the equity judges tended to take the view that independent advice was essential, but the common law judges, on the other hand, thought that independent advice was important but not essential.

Lord ELDON in *Gibson v. Jeyes*, which was a case of undue influence presumed between solicitor and client, stated categorically that the client must enjoy other legal advice and show that the relationship had been brought to an end, but in the *Inche Noriah* case, which is the most recent case on the subject, the Privy Council said that if evidence is given of circumstances sufficient to show that the contract was the act of a free and independent mind, the transaction will be valid even though no external advice was given. Counsel for the plaintiff relies heavily on the case of *Re Comber*, [1911] 1 Ch. 723, where the Court of Appeal refused to admit the presumption into a case of an assignment of property by a mother to her son merely on the ground that the son had been manager of the beer stalls which formed the subject-matter of the property. The eldest brother, being unable to prove any improper dealing on his younger brother's part, could not obtain cancellation of the assignment.

The principle on which this decision proceeded was that it was not every fiduciary relationship between a donor and donee which would induce a court of equity to set aside a gift but only those special relations which, from their very nature, raise a presumption of undue influence. It is sufficient if an independent adviser sees that the donor understands what he is doing and intends to do it. He need not advise him to do it or not to do it. The action by the elder brother against his younger brother to set aside the gift on the ground that the younger brother was in the fiduciary relationship with his mother, and a gift from her to him could not be valid unless he proved that she had independent advice, was dismissed on the ground that the gift must be attributed to the mother's affection for her son and not to any fiduciary relation between them, and the dismissal was upheld on appeal.

COZENS-HARDY, M. R., relied on a statement by Lord ELDON in *Harris v. Tremenheere*, 15 Ves 34, at p. 39, which was a case of an agent or attorney, and after saying that certain voluntary leases which had been granted to the agent were pure gifts, continued:

"I cannot find any decision, authorising me to say that the defendant should not have taken these leases, as of the pure gift of his employer. I am quite ready to say, that, if I could find in the answer or the evidence the slightest hint that the defendant laid before the testator any account of the value of the premises, that was not perfectly accurate, that would induce me to set them aside, whatever the parties intend upon the general ground that the principal never would be safe if the agent could take a gift from him upon a representation that was not most accurate and precise. There is no evidence of misrepresentation, circumvention, or any thing, improperly leading the testator to make these leases; that they

were not the spontaneous fruit of his own generosity; not weighing the value or amount of the consideration that should have been given, if it had been the subject of barter."

This was a case, however, of a pure gift, and FLETCHER-MOULTON, L. J., gave as his opinion that there was absolutely nothing in the fiduciary relations of the mother and the son with regard to the property which in any way affected the transaction, but he went on to say something which, in my view, defeats the contention of counsel for the plaintiff in the present case, and that was:

"It is possible that there might have been a transaction between the son and the mother, with regard to a purchase of this leasehold property, in which the son would have had to show that he had given her full information in every possible way as to the value. But in this case the gift was not based on value in any way at all...she meant the property to go to the son whatever its value was and that wish of hers is not shown to be brought about in any way by any conduct of the son which put any responsibility on him in the matter."

It follows then that this being a case of purchase at gross undervalue and a confidential relationship of principal and attorney having existed at the time of the transaction when the attorney was managing the principal's affairs up to the date of her death, the circumstances must fall into the first category of case, and the presumption which arises therefrom has not in any way been rebutted by the plaintiff, for he has failed to prove that the relationship ceased to exist at the time of the transaction, and that the old lady had independent advice or, on the authority of the *Inche Noriah* case, that the contract was the act of a free and independent mind. There remains the suspicious circumstance that Sukhia, having sworn to the affidavit of sale, and being present at the time of the passing of the transport, did not herself execute the conveyance, and gave no receipt for the purchase price.

If I am wrong in saying that the circumstances fall within the first category of case then in my view, the circumstances would fall into the second category of case where by reason of Sukhia's age, illness, illiteracy and failure to manage her own affairs at the time of the transaction, and being cared for by the plaintiff in his house, undue influence has been clearly proved which the plaintiff has failed to rebut. The circumstances would then be an inequitable and unconscious bargain with a weak and ignorant person for, as KAY, J., said in *Fry v. Lane* (1888) 40 Ch. D., 312:

"The result of the decisions is that, where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a court of equity will set aside the transaction...The circumstances of the poverty and ignorance of the vendor and absence of independent advice throw upon

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the purchaser, when the transaction is impeached, the onus of proving in Lord SELBORNE'S words, that the purchase was fair, just and reasonable."

In this case the plaintiff has mixed the character of the attorney of the vendor with that of the purchaser and, in the words of Lord ELDON, he must manifest that he has given his mother all that reasonable advice against himself that he would have given her against a third person.

My attention has been adverted to the proviso to s. 23 (1) of the Deeds Registry Ordinance, Cap. 32, which speaks of transport obtained by fraud being liable in the hands of all parties or privies to the fraud to be declared void by the court in any action brought within twelve months after the discovery of the fraud, and I am aware that in these proceedings, by consent of the parties, the affidavits in the cause were ordered by the court to be treated as pleadings, and the action was set down for a speedy trial. In his supplementary affidavit in reply the defendant seeks, *inter alia*, a declaration that the transport No. 1073/64 was obtained by fraud, and a declaration that the plaintiff is a trustee of the property described under the transport. He also prays for an injunction restraining the plaintiff, his servants or agents from entering upon the parcel of land claimed and occupied by him. As these proceedings are considered an action and as the defendant is within the statutory period, I can see no reason, and I know of none, why I should not grant the declaration that the transport, No. 1073/64, was obtained by fraud and as a result void and I hereby declare accordingly, with the result that the consequential injunction sought by the defendant is also granted.

In the result, the action is dismissed with costs to the defendant to be taxed certified fit for counsel, and the declaration and injunction prayed for at (b) and (c) of the defendant's supplementary affidavit in reply is granted.

Stay of execution granted for six weeks.

*Judgment for the defendant.*

E. V. GOMES AND ANOTHER v. COMMISSIONER OF  
INLAND REVENUE

[Court of Appeal (Stoby, C, Persaud and Cummings, J. J., (ag.)) September 27, October 28, 1966].

*Estate duty—Appeal—Right of judge to consult probate papers of the court—Duty to serve notice of valuation or assessment—Estate Duty Ordinance, Cap. 301, s. 14,*

An estate duty appeal was dismissed on the ground that the appellants were out of time. There was evidence to show that a valuation and assessment had been made and that the appellants knew of it but there was no evidence that notice of it had been given to them. On appeal,

**Held:** (i) the probate papers of the Supreme Court relating to the subject matter of the appeal are records of the court and may be looked at any time in connection with any relevant matter. The trial judge is not entitled to arrive at any conclusion of fact from the records as regards the matter then before him, but gathering the background of the matter engaging his attention from an examination of such documents cannot be objectionable;

(ii) under s. 14(3) of the Estate Duty Ordinance, Cap. 301, notice of valuation or assessment is not required to be in writing, but there must be proof that notice of valuation or assessment (whether oral or in writing) has been given on a definite date. In this regard, the certificate of the proper officer is not notice of assessment.

*Appeal allowed.*

*S. L. Van B. Stafford, Q.C., and John Van B. Stafford* for the appellants.

*Doodnauth Singh*, Senior Legal Adviser, for the respondent

PERSAUD, J. A. (ag.): This is an appeal against an order of a judge of the Supreme Court dismissing a petition brought by the appellants in pursuance of s. 14 (3) of the Estate Duty Ordinance, Cap. 301. Section 14(1) of that Ordinance authorises the Commissioner of Inland Revenue to assess estate duty on the basis of the inventory and estimate of a deceased person's estate delivered in accordance with s. 13 of the Ordinance if he is satisfied with the inventory and estimate of value given, or with any amendments that are made upon his requisition. Subsection (2) is not relevant to the topic under discussion. Subsection (3) provides as follows:

"Any person who is made accountable by this Ordinance and is dissatisfied with any valuation or assessment made by or on behalf of the Commissioner, the sum in dispute in respect of duty on that assessment exceeding one hundred dollars, may, on giving to the Commissioner, within twenty-one days after receiving notice of the valuation or assessment, a notice in writing of his intention to appeal against the valuation or assessment, and, within the further period of twenty-one days, a statement in writing of the grounds of the appeal, appeal by petition accordingly to the Supreme Court."

The petition sought to attack both the valuation and assessment, and I will deal with each separately.

Before dealing with the question as to whether the notice of valuation or assessment should be in writing, and whether a certificate prepared and issued by the proper officer under s. 15 (3) of the Ordinance can be regarded as a compliance with the requirement of giving notice of valuation or assessment, I had better dispose of the first submission made on behalf of the appellants. That submission is that the judge was not entitled to look at the probate papers of the Supreme Court in relation to this estate in deciding the point *in limine* taken in this matter. For to do so, counsel argues, is to give consideration to matters outside of the record then before the court. For my part, I do not subscribe to that view. The records which the judge consulted are records of the court, and may be looked at any time in connection with any

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relevant matter, though he is not entitled to arrive at any conclusion of fact from the records as regards the matter then before him. Gathering the background of the matter engaging his attention from an examination of such documents cannot be objectionable. The originals are themselves admissible in evidence [See PHIPSON ON EVIDENCE, 10th Edn., para. 1732]. In this case counsel for the respondent has stated—and this has not been challenged—that the documents were examined by the judge in open court in the presence of counsel on both sides. Counsel for the appellants could have, if he so wished, applied to have witnesses called and examined, or could himself have perused the documents.

Coupled with the question whether the notice of valuation or assessment should be in writing is the question whether the appellants had notice of any sort of an assessment prior to the 10th August, 1962, the date of the certificate of the proper officer.

I agree that there is nothing in s. 14 (3) of the Ordinance which provides for the notice of valuation or assessment to be in writing. The subsection specifically provides for the notice of intention to appeal to be in writing; no such provision is made with respect to the notice of valuation or assessment. I conclude, therefore, that the Commissioner's contention in this regard is sound. But this does not mean that notice must not be given; and in view of the fact that the time for giving notice of intention to appeal is fixed and measured from the receipt of notice of valuation or assessment, it must be that there must be proof that notice of valuation or assessment (whether oral or writing) has been given on a definite date. It is idle for the Commissioner to contend that the petitioners must have received such notice *by* a particular date; the pursuit of such an argument is asking the court to imply that the appellants had notice from a set of circumstances as opposed to direct evidence of that fact. This could hardly be within the contemplation of the Ordinance. In my view, he must be able to say that notice was given *on* a particular date; nothing less, in my judgment, would satisfy the provisions of the Ordinance. I would hold that although, as the law stands, a notice of valuation or assessment need not be in writing, there is no evidence in this matter that a notice of assessment was received by the appellants.

It may well be that the Commissioner assessed the estate duty on the 6th April, 1962, as the proper officer seeks to imply in para. 4 of his affidavit, but this is a far cry from informing the appellants what that duty was. In my opinion, the Ordinance contemplates that he must do this or cause it to be done specifically, so that the time for appealing may begin to run from the date the notice is received.

I now turn to the notice of the proper officer. Probate was granted to the appellants under s. 24 (2) of the Deceased Persons Estates' Administration Ordinance Cap. 46, after the proper officer had issued his certificate under s. 15 (3) of the Estate Duty Ordinance, Cap. 301. Section 24 (2) of Cap. 46 provide:

"Probate or letters of administration may be granted 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."

The appellants entered into a bond "to the extent of \$250,000 as security for the payment of the balance of estate duty which may be owing after the grant of probate....." There is nothing in the bond or in the oaths of the executrices leading to the grant of probate which suggests that the duty had been assessed up to then.

To understand the steps to be followed by the proper officer when he prepares his certificate, it would be best to set out s. 15 of Cap. 301 in full:

- (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 an 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 will be seen, therefore, that the bond for the due payment of estate duty having been executed, the proper officer was acting within his competence in preparing his certificate. That document speaks of security having "been given by the executors for payment of the remainder of estate duty, the sum of \$325,546.22.....". But as I have already pointed out, this view is not supported either by the bond or the affidavits. It may be that this knowledge was within the breast of the proper officer, and as a result he concluded that the bond must of a necessity have referred to the sum mentioned as, according to the assessment, that was the sum then owing as estate duty. Indeed, in para. 3 of his affidavit, which does not want for a certain degree of vagueness, the proper officer refers to the memorandum he had made on the statement of assets and liabilities which does in fact state the total estate duty that was payable. But, to put it as simply as I can, there cannot be notice to the appellants within the meaning of the Ordinance unless the information contained therein is conveyed to them. This statement of assets and liabilities was supplied in response to a letter written by the appellants' solicitor on the 14th July, 1965, and was received by him on the 19th July, 1965. The document supplied is signed by the proper officer, but not dated, and so there is nothing

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therein to indicate the date on which the assessment of estate duty was made by the Commissioner, but both the valuation of the entire estate together with the total estate duty are set out thereon. There are also endorsements indicating that various amounts have been paid as estate duty from time to time, all prior to the 14th July, 1965. In referring to this document in his affidavit, the proper officer said:

"On 7th May, 1962, the petitioners through their solicitors forwarded to the Commissioner of Inland Revenue in duplicate, a statement of 'assets and liabilities' which agreed with the items of the inventory with supporting vouchers prepared by them and declared by Muriel Geraldine Wight, one of the executors, and the Commissioner, after examining all the documents, assessed the duty when 'certain figures had been determined'.....and the proper officer caused the memorandum of the amount of estate duty payable to be made on the declaration."

It is to be observed that the proper officer does not pretend to state in so many words that notice of assessment was given to the appellants. I do not quarrel with that part of the judgment of the learned judge which reads thus:

"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 \$325,546.22 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."

But with great respect, the fact that the assessment was made does not by itself mean that notice of that assessment has been given.

I hold, therefore, that the certificate of the proper officer is not notice of assessment of estate duty.

I will now pass on to deal with the notice of valuation. I understand valuation to refer to an evaluation of the worth of the estate, or to use the language of s. 14 (1) "the estimate of value", while assessment relates to the computation of estate duty.

In answer to the allegation that changes in the lists of assets and liabilities were made from time to time, the proper officer swore that the Commissioner being dissatisfied with the items of valuation submitted in the estate duty papers first lodged, requisitioned that the (petitioners) appellants make amendments from time to time before the proper officer raised the valuation to \$1,793,826.00 upon which valuation the Commissioner assessed the duty. As I have indicated earlier in this judgment that might very well have taken place, but that does not mean to say that the appellants were notified of the acceptance of the final valuation by the Commissioner. The mere fact that he required amendments to the lists of assets and liabilities is an indication

that the Commissioner had not yet satisfied himself of a valuation upon which he was prepared to assess estate duty. And when he did finally accept a valuation, he failed to notify the appellants that he had done so.

In my judgment, therefore, it cannot be said that the appellants had notice of valuation or assessment until the 19th July, 1965, when their solicitor received a signed copy of the statement of assets and liabilities together with a statement of the duty payable.

It is perhaps worthy of note that prior to 1956, when the Estate Duty Ordinance was amended to give the care and management of estate duty to the Commissioner of Inland Revenue, this problem never arose, as the Registrar of Deeds was the officer charged with the duty of assessing estate duty; both the valuation and the assessment were done at the same time and the person making the declaration was informed there and then of the valuation of the estate as well as the amount of estate duty payable and the payment made to the Registrar. Now all computations are done by the Commissioner, the estate duty is paid to him, but the probate papers are, as is to be expected, lodged and dealt with by the Registrar. In these circumstances, this problem will always arise unless the Commissioner can point to a particular day on which notice of valuation or assessment was given to the declarant.

I hold that the appellants having given notice of their intention to appeal against the valuation and assessment on the 4th August, 1965, and having served a statement of the grounds of appeal on the 23rd August, they have duly complied with the provisions of s. 14 (3) of Cap. 301, and therefore have not lost their right of appeal.

In the circumstances I would allow this appeal. The matter is referred back to the court of first instance to be heard on its merits. The respondent must pay the appellants' costs of this appeal, and in the court below. Certified fit for counsel.

STOBY, C.: I concur.

CUMMINGS, J. A. (ag.): I concur.

*Appeal allowed.*

Solicitors: *J. A. Jorge* (for the appellants): *Crown Solicitor* (for the respondent).

## MUSTAPHA ALI v. HANOOMAN

[Supreme Court (Persaud, J.) January 6, 15, February 19, 1966]

*Administration of estates—Devastavit—Disposal of assets of estate by administratrix with knowledge of claim by creditor of estate—Liability of administratrix.*

The defendant was administratrix of an estate against which the plaintiff obtained judgment for payment of the sum of \$125 with costs to be taxed. The defendant, who was aware of the judgment, disposed of the assets of the estate, taking transport in her own name for part of the property of the estate, but without making payment to the plaintiff. No bill of costs was ever taxed.

**Held:** the defendant was liable to the plaintiff for such sum as was ascertained and of which she had knowledge at the time of her accepting transport, *i.e.*, \$125.

*Judgment for the plaintiff.*

*M. S. H. Rahaman* for the plaintiff.

*R. Harper* for the defendant.

PERSAUD, J.: This matter has a somewhat long and complicated history, and to appreciate the issues involved it would be helpful race that history.

On April 27, 1960, the plaintiff and the defendant's late husband Hanooman entered into an agreement whereby Hanooman, who was then the owner of the N1/2 of Lot 61, Anna Catherina, on the West Coast of Demerara, contracted to sell to the plaintiff N1/2 Lot 53, Anna Catherina. The plaintiff paid \$25 as part of the purchase price. Apparently, there had been an arrangement between one Sundar Ramsarran and Hanooman to interchange these two lots of land, after Ramsarran had obtained transport for N1/2 Lot 53 from the Christian Catholic Church. The agreement of sale between the plaintiff and Hanooman depended on Ramsarran obtaining his title which he did in 1962.

In the meanwhile, the defendant's husband died on August 10, 1960 leaving the defendant and three minor children. On March 16, 1961 the defendant was granted letters of administration of the estate of her deceased husband, which comprised N 1/2 Lot 61, Anna Catherina, and nothing else, and which was valued at \$450; the net value of the estate was sworn at \$400.

On June 26, 1962, the plaintiff filed a writ in the Supreme Court (No. 1460 of 1962) against the defendant in her capacity as administratrix of the estate of Hanooman, deceased, in which he claimed specific performance of the contract of April 27, 1960, and in the alternative, damages for breach of contract for sale. This action was heard by CRANE, J., in 1964, and the learned judge delivered his decision on April 29, 1964. [See 1964 L.R.B.G. 130]. CRANE, J., found that the plaintiff could not claim specific performance of the contract, but awarded him \$100 as damages for the breach, and a refund of his deposit of \$25 together with taxed costs certified fit for counsel. Judgment was awarded against the defendant in her capacity as administratrix of the estate of her late husband. It may be mentioned that the plaintiff did attempt to have the order of CRANE, J., amended to be effective against the defendant in her individual capacity, but this attempt did not succeed. So that the original order of CRANE, J., stands. [See 1965 L.R.B.G. 170].

To revert to the history of N1/2 Lot 53. On the 23rd July, 1961, the transport of this property by the Board of Trustees of the Christian Catholic Church and Nasibia in her personal capacity to one Chandrabaaan was advertised, but after the plaintiff opposed, the instructions to pass transport were withdrawn, and this transport was never executed. Then on the 5th March, 1962, the said lot was conveyed by the Trustees of the Christian Catholic Church to Sundar Dyal Ramsarran. (Tpt. No. 397 of 1962). On the 20th July, 1964, Sundar Dyal Ramsarran conveyed to the defendant in her personal capacity the same lot of land (Tpt. No. 1272 of 1964), both she and Ramsarran having sworn in their respective affidavits that there was a sale from one to the other. In his evidence before me, the plaintiff has deposed that he had opposed the passing of the transport of this property on three or

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four occasions, but this is not supported by the records available. The position now therefore is that the defendant holds the title to the N1/2 lot 53 in her own right. So far as the N1/2 of Lot 61, Anna Catherina, is concerned, the records kept in the Deeds Registry disclose that this is still the property of the Demerara Co. Ltd. under transport No. 986 of 23rd October, 1923. I do not doubt that the Demerara Co. Ltd. might well have sold this lot to Hanooman, but through an oversight the title had not been vested.

On June 25, 1965, the plaintiff launched the instant action as a creditor of the estate of Hanooman, deceased, against the defendant in her personal capacity, claiming *inter alia* a declaration that the defendant now holds the transport as administratrix of the estate of Hanooman, deceased, or as trustee for the said estate, and an order restraining her from dealing with the property, and directing that the defendant pass transport to herself as administratrix of the estate of Hanooman, deceased, failing which the Registrar be directed to pass the transport to the said estate. An order for an interim injunction was obtained by the plaintiff restraining the defendant from dealing with the property until the determination of this cause.

In his statement of claim, the plaintiff avers (para. 8):

"The defendant took transport of the said lot No. 53 in her own name knowing that the said property formed part of the estate of deceased, Hanooman, and that the said land had been sold to the plaintiff by Hanooman. The defendant is, therefore, attempting to defraud the plaintiff, for the estate of Hanooman is now devoid of any assets, the said assets having been unaccounted for and the defendant having committed a devastavit thereof."

At the hearing of this action, after the plaintiff had given evidence of some of what has already been recounted earlier in this judgment and had closed his case, counsel for the defendant closed his case also, and submitted that the orders sought ought not to be made, urging that although there is in the pleadings an allegation of fraud, there is no evidence of fraud, that there is no evidence that the estate is exhausted, nor is there proof that N1/2 Lot 53 is part of the estate of Hanooman, deceased. No doubt, counsel was minded to make these submissions in this form because of the nature of the evidence which was given in this matter. It is frustrating to find litigants seeking orders which the plaintiff now seeks on the bare allegations he has made, and on the scanty evidence he has given, and producing as he did, the pleadings and judgment in the previous case. I may say that the history of this matter was traced by the court from the records kept in the Supreme Court Registry without any assistance from counsel. Perhaps it was felt that it was not the duty of counsel to assist in this regard; but I am of the view that it was necessary to ascertain the background to this matter if only to appreciate the issues now involved, and with this in view I examined what I considered to be the relevant records.

Counsel for the plaintiff concedes that there is no evidence that the estate has been exhausted, but submits that fraud has been established because of these two facts, *viz.*:

- (i) CRANE, J., found that the property belonged to the estate of Hanooman, deceased; and
- (ii) Defendant took title in her personal capacity, notwithstanding that finding.

Counsel further urges that even if these facts are insufficient to constitute fraud, there is enough evidence from which the court can find that the defendant now holds the property as a constructive trustee for the debtors of the estate.

As stated above, CRANE, J., gave his judgment on 29th April, 1964, and the defendant accepted transport of N1/2 Lot 53 from Ramsarran on 20th July, 1964. In his judgment, CRANE, J., had this to say of the conduct of the defendant [1964 L.R.B.G. at p. 132]:

"It is abundantly clear that the defendant Nasibia Hanooman, as executrix" (meaning administratrix) "of the late husband's estate is in flagrant breach of contract. She has stepped into his shoes and now that Sundar Ramsarran is in a position to pass transport to the estate of Hanooman, deceased, and has signified his intention of so doing . . . Nasibia is refusing to take transport from him for reasons that are both dishonourable and unreasonable."

And in awarding judgment, the learned judge said [1964 L.R.B.G. at p. 135].

". . . 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."

It cannot be disputed, therefore, that when the defendant received transport for the lot in question on the 20th July, 1964, she was aware of CRANE, J.'s judgment and its terms.

An examination of the statute governing matters of this nature will be of some assistance. Section 5(1) (g) of the Civil Law of British Guiana Ordinance, Cap. 2, provides that in the case of a person dying intestate, where such estate does not exceed in value four hundred and eighty dollars, the surviving spouse, whether there be descendants or not of the intestate, shall take the whole estate absolutely, but this is subject to the payment of all debts, funeral expenses, and just expenses of every sort having been first allowed and deducted. In my judgment a money award made by a court would be a debt owing by the estate. On 20th July, 1964, at least the sum of \$125 was known by the defendant to be due by the estate of Hanooman to the plaintiff (the bill of costs not having been taxed up to that date, and indeed up to the time of the hearing of this action).

## MUSTAPHA ALI v. HANOOMAN

There is no evidence before me from which I can make a finding that the defendant complied with s. 36 of the Deceased Persons Estates' Administration Ordinance, Cap. 46, which provides for the publication of a notice by an executor or administrator calling upon persons having claims as creditors against the deceased person or his estate to lodge those claims with the executor or administrator, and I will therefore, have to find that there was no such publication. If there was no such publication, the plaintiff could hardly be expected to have lodged a claim: And it would appear that his failure to do so was as a result of the defendant's fault—deliberate or otherwise. Indeed in *Re Land Credit Co. of Ireland, Markwell's case* (1872), 21 W.R. 135, it was held that an executor with notice of a claim against his testator's estate, is not discharged from liability to satisfy that claim by the fact that the person entitled to make the claim has failed to send in particulars of it in answer to an advertisement for creditors.

In *Taylor v. Taylor*, (1870) L.R. 10 Eq. 477, it was held that a personal representative commits a devastavit where he makes payments to legatees without providing for debts. In that case the executors of a shareholder in a joint stock company, which was a going concern at the time of the testator's death, paid a legacy under his will without providing for any contingent liability in respect of the shares which they retained unsold. The company was subsequently wound up, and the executors were placed on the list of contributories. LORD ROMILY, M.R., said that the executors had committed a breach of trust in paying the legacy without providing for the liability attaching to the testator's estate at the time of his death in respect of the shares, and the amount must be paid to the official liquidator. Again *Jeffreys v. Jeffreys* (1871), 19 W.R. 466, there is this head note:

"The rule that an executor who pays a legacy is personally liable to pay the amount of the legacy to any creditor of the testator whose claim is unsatisfied, whether he had notice or not of the claim, applies to a case in which the creditor has given the testator what purports to be a release of his claim, and the executor *bona fide* believes the release to be valid, and the creditor does not question its validity until some years after the executor has paid the legacy..."

I would like to refer to the case of the *Guardian Trust & Exors. Co. of New Zealand Ltd. v. Public Trustee of New Zealand*, [1942] A.C. 115. In that case executors of a will obtained probate with notice of the fact that the next of kin intended or contemplated applying for revocation of the grant of probate on the ground of want of testamentary capacity, paid out pecuniary legacies purporting to have been given by the will to persons and institutions not entitled to share in the estate on an intestacy. In the course of the judgment, Lord ROMER said (at p. 127 *ibid*) in referring to the principles of equity:

"One of those principles is that if a trustee or other person in a fiduciary capacity has received notice that a fund in his posses-

sion is, or may be claimed by A, he will be liable to A if he deals with the fund in disregard of that notice should the claim subsequently prove to be well founded."

It seems to me, therefore, that the defendant would be liable to the plaintiff for such sum as was ascertained and of which she had knowledge at the time of her accepting transport, *i.e.*, \$125. I am not sure, and I have received no satisfactory assistance from counsel in this regard, that I can properly make an order in respect of the costs awarded by CRANE, J., when even up to now the quantum of those costs remains unsettled. Nor can I, in my opinion, make the order for declaration sought by the plaintiff.

I would therefore award the plaintiff the sum of \$125 and half his taxed costs against the defendant in her personal capacity.

*Judgment for the plaintiff.*

Solicitors: *Dabi Dial* (for the plaintiff); *L. T. Persaud* (for the defendant).

## ENMORE ESTATES LTD. v. DARSAN

[Court of Appeal (Luckhoo J. A., Persaud and Cummings, J. J. A., (ag.))  
September 13, 20, October 31, 1966].

*Workmen's compensation—Pre-existing fracture of vertebra—Aggravated by subsequent slip and fall—Whether employer liable—Workmen's Compensation Ordinance, Cap. 111, s. 3 (1), proviso (c).*

The respondent worker slipped and fell and as a result aggravated a pre-existing fracture of a vertebra. The appellant employers contended that they were not liable to pay workmen's compensation because the aggravation was not material and because of proviso (c) to s. 3 (1) of the Workmen's Compensation Ordinance, Cap. 111, which exempts an employer from liability "if it be proved that the accident would not have occurred, or in so far as the incapacity or death would not have been caused, but for a pre-existing diseased condition of the workman".

**Held:** (i) once there is evidence that the employment in itself (in the case of an accident in its extended meaning) or that an untoward event occurring in the course of employment (in the case of an accident in its restricted meaning) aggravated a pre-existing diseased condition in a material degree, the workman would be entitled to workmen's compensation;

(ii) on the evidence in this case there was an accident in its restricted meaning in the course of the workmen's employment which aggravated a preexisting diseased condition in a material degree, and therefore the respondent was entitled to compensation;

(iii) the proviso had no application to this case since on the evidence there was an accident in its restricted meaning.

*Appeal dismissed.*

*J. A. King* for the appellants.

*D. Jagan* for the respondent.

PERSAUD, J. A.: While employed by the appellants fetching sugar cane, the respondent slipped and fell. He felt pain in his back, as a result of which he was X-rayed. The X-ray photographs showed an old fracture of the twelfth thoracic vertebra with small growth of bones around the vertebral margin which would have taken at least one year after the injury to develop. Upon an application for workmen's compensation the magistrate, having heard the medical testimony, and having considered *Demerara Co., Ltd. v. Burnett* (1959, 1 W.I. R. 547, *Jagnarine v. Bookers Sugar Estates Ltd.*, 1956 L. R. B. G. 136, and *Mc Farlane v. Button Bros.* 20 B. W. C. C. 222, said:

".....the rule did not seem to be that any degree of aggravation be it ever so minute, was sufficient to warrant a conclusion in favour of the injured person. Rather it seemed to be that the aggravation must be material. From the evidence of Mr. Stracey I did not form the impression that the aggravation was material," and he dismissed the application.

The Full Court of Appeal reversed the decision of the magistrate, holding that the question of materiality only arises when an accident in

its extended meaning is being considered, and awarded the respondent compensation based on a 70% permanent partial incapacity. During the course of their judgment, the Full Court said:

"We are, therefore, of the view that in the instant case an untoward event or mishap occurred when the appellant (respondent) slipped and fell and jerked his back and sustained an injury which had the effect of aggravating the pre-existing condition of the fracture of the back.....and caused a permanent partial incapacity or disability.....the learned magistrate was wrong in taking the view that the injury must aggravate the pre-existing condition in a material degree for the appellant (respondent) to be successful."

In this court, counsel for the appellants has taken two points. For purposes of his argument. He accepts that the respondent had a fractured thoracic vertebra and that the fall might have aggravated that injury, but submits —

(i) that the finding of the magistrate ought to be restored because in the absence of a material aggravation, the respondent is not entitled to compensation; and

(ii) in any event, proviso (c) of s. 3 (1) of the Workmen's Compensation Ordinance, Cap. 111, protects the employer if the real cause of incapacity is the pre-existing disease.

In developing his first argument, counsel for the appellants sought to distinguish between an accident in its restricted meaning and an accident in its extended meaning, and urged that in either case, where there has been a pre-existing disease, the workman must show an aggravation by the accident of a material degree before he could succeed. Counsel for the respondent contends for the rule that materiality only arises in the case of an accident in its extended meaning.

In *Fenton v. Thorley*, [1903] A. C. 443, Lord MACNAGHTEN defined an accident to mean "an unlooked for mishap or an untoward event which is not expected or designed", and this definition has been taken as conclusive in later cases. It seems to me that this definition covers both categories of accidents canvassed for in this appeal. I would have thought that the question of materiality was relevant in either case, as the question to be determined in workmen's compensation matters is not whether there was an accident in its restricted or its extended meaning, but whether there was an accident within the meaning of Lord MACNAGHTEN'S definition, and whether as a result the workman has been disabled.

It is also quite clear that in this appeal we must consider the situation of an accident in its restricted sense, that is to say, an external event occurring during the course of employment.

*McFarlane v. Hutton Bros. (Stevedores), Ltd.*, 20 B. W. C.C. 222, concerned an accident in its extended meaning in that the applicant, who was a stevedore and who had been suffering from coronary disease of the heart which sooner or later would have caused his death, died soon

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after he took ill at work. It was held that death resulted from a strain incurred in the ordinary exercise of the man's work, and this amounted to an accident within the meaning of the Workmen's Compensation Act, and to establish an accident it was not necessary to find a sudden or special strain. In the course of his judgment, Lord HANWORTH, M. R., said (at p. 228 *Ibid*):

"Did the man die from the disease alone, or did the work which he was doing help in a material degree in the sense that it brought on the mishap which it may be, would not have happened if he had not the diseased condition but owing to the diseased condition and the work that he was doing it was set in motion?"

It seems to me that the same standard can well be applied to cases of accidents in the restricted meaning as in the matter we are now called upon to determine. That this is so, is clear from the dictum of Lord LOREBURN, L C, in *Clover, Clayton & Co. v. Hughes*, 26 T. L. R. 359, even though that case also concerned an accident in its extended meaning. At p. 360, Lord LOREBURN said:

"In each case the arbitrator ought to consider whether, in substance, as far as he can judge on such a matter, the accident came from the disease alone, so that, whatever the man had been doing, it would probably have come all the same, or whether the employment contributed to it. In other words, did he die from the disease alone, or from the disease and employment taken together, looking at it broadly. Looking at it broadly, I say, and free from over nice conjectures, was it the disease that did it or did the work he was doing help in any material degree?"

In that case the facts which are by now quite familiar to all who have had to investigate this point, are that a workman while engaged in tightening a nut with a spanner, strained himself thereby rupturing an aneurism of the aorta which caused his death. A post-mortem examination showed the aneurism was in such an advanced condition that it might have burst even while the man was asleep, and that very slight exertion or strain would have been sufficient to bring about a rupture. It was held that the workman's death was occasioned by an accident arising out of his employment

And in *Oates v. Earl Fitzwilliam's Collieries Co.*, [1939] 2 All E. R. 498, (another case concerning an accident in its extended meaning) the Court of Appeal held that a physiological injury or change occurring in the course of a man's employment by reason of the work in which he is engaged at or about that moment is an injury by accident arising out of his employment, and this is so even though the injury or change be occasioned partly, or mainly, by the progress or development of an existing disease if the work he is doing at or about the moment of the occurrence of the physiological injury or change contributes in any material degree to its occurrence.

I will now consider the case of *Jagnarine v. Bookers Sugar Estates, Ltd.*, 1956 L. R. B. G., but will postpone dealing with *Demerara Co., Ltd. v. Burnett* (1959), 1 W. I. R. 547, as the latter case is more relevant to counsel for the appellants' second submission.

*Jagnarine's* case (*supra*) involved an accident in its restricted meaning, in that an untoward event occurred, that is, the workman's fool slipped while performing his duties, as a result of which a pre-existing hernia was aggravated. The Full Court of Appeal, applying *Jones v. Rexham & Acton Collieries Ltd.* (1917), 10 B.W.C.C. 607, and *Clover, Clayton & Co. v. Hughes (supra)* held that the workman was entitled to workmen's compensation for the disability he suffered from the injury he had received although that injury was by way of aggravation of a pre-existing condition. Having regard to the authorities referred to, I am of the opinion that once there is evidence that the employment in itself (in the case of an accident in its extended meaning), or that an untoward event occurring in the course of employment (in the case of an accident in its restricted meaning) aggravated a pre-existing diseased condition in a material degree, the workman would be entitled to workmen's compensation.

When regard is had to the evidence in this matter, the correct conclusion would be that there was an accident in its restricted meaning in the course of the workman's employment which aggravated a pre-existing diseased condition in a material degree, and therefore the respondent would be entitled to compensation. I do not hold the view that materiality is irrelevant. In my view, all that materiality connotes in matters of this nature is that the worsened condition in respect of which a claim is made must have been the direct result of the accident.

I will now give attention to the appellants' second submission, which is, it will be recalled, that proviso (c) of s. 3 (1) of the Workmen's Compensation Ordinance, Cap. 111, protects the employer where the real cause of incapacity is the pre-existing disease.

Section 3 of Cap. 111 provides for the employers' liability in the event of an accident arising out of and in the course of the workman's employment. Then follow two provisos, the second of which reads thus:

"Provided further that the employer shall not be liable (under this Ordinance) for such compensation should

\* \* \* \* \*

(c) it be proved that the accident would not have occurred, or in so far as the incapacity or death would not have been caused, but for a pre-existing diseased condition of the workman."

It is agreed upon on all sides that there was no corresponding English legislation, so that one can derive no assistance from the English cases on this point.

In the local case of *Demerara Co. v. Burnett*, 1958 L.R.B.G. 227, the Full Court of Appeal was required to interpret proviso (c) above. That court expressed the opinion that the effect of the proviso was

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that the employer was not liable to pay compensation if the accident or the resulting death or incapacity was due *solely* to disease. On appeal the Federal Supreme Court did not share this view. [See *Demerara Co., Ltd. v. Burnett* (1959), 1 W.I.R. 547, *per* HALLINAN, C.J., at p. 550, 1959 L.R.B.G. 266, at p. 69]. In that case a workman, who had been engaged in tilling his employer's land with an agricultural fork, was found lying on the ground nearby and a substantial portion of the soil freshly tilled. He died in hospital the next day. The medical evidence established that death was due to the bursting of a blood vessel in the brain, and that the workman had been suffering from arteriosclerosis, and strenuous effort, such as forking the land, could have caused a bursting of the blood vessel in a person suffering from this disease. In considering the meaning to be placed on proviso (c) of s. 3 (1) of Cap. 111, HALLINAN, C. J., said [(1959), 1 W.I.R. 547, at p.551]:

I have no doubt that para. (c) provides an employer with a defence against liability which was not open to him under the corresponding English legislation. What is this defence? We must, I think, accept the House of Lords' interpretation that any exertion while working for an employer which contributes in a material degree (to use Lord HANSWORTH'S phrase in *Mc Farlane's* case) to an injury suffered by a workman is an 'accident arising out of and in the course of employment'. In these circumstances the mishap and the injury are the same event. It is convenient to refer to this interpretation as 'accident in its extended meaning'. Where then an accident in its extended meaning has occurred proviso (c) enables the employer to escape liability if he proves that a pre-existing diseased condition has also contributed in a material degree towards the injury suffered from a workman

I am not prepared to say that those are the only circumstances in which para. (c) may provide a defence but I do not think that an employer can rely on this paragraph to escape liability in a case where the accident is an external mishap or untoward event unrelated to the pre-existing condition as in the case of *Jagnarine v. Bookers Sugar Estates, Ltd.....*"

LEWIS, J., also restricts the application of para. (c) to an accident in its extended meaning, for he says [at p. 552 *ibid*]:

"In my view, where it is proved that at the time of the accident the workman was suffering from a diseased condition of the body, and there is no evidence of any unusual exertion, or of any untoward event such as a slip, or wrench, or sudden jerk, but the injury occurred or the incapacity or death was caused merely as a result of the effect which the performance of his ordinary work in the ordinary way had upon the diseased condition, then compensation is not payable. I do not think that the proviso applies where the mishap is set in motion by exertion of a degree unusual in the workman's employment, for in my opinion such exertion is similar in character to an untoward event."

Thus it will be seen, that both judges restrict the operation of para. (c) to an accident in its extended meaning, (with which interpretation MARNAN, J., expressed agreement), but while HALLINAN, C. J., declined to put a meaning to the latter part of the paragraph which deals with incapacity or death on the ground that the words are so ungrammatical as to be meaningless, LEWIS, J., sought to interpret the words, and in my view, gave them the only meaning they are capable of in the context used. I say so with the greatest of respect to the opinion held by the other two judges of the court.

Mr. King for the respondent has nevertheless urged upon us the view that para. (c) should not be made to apply to an accident in its extended meaning only. I rest content with the unanimous opinion expressed by the Federal Court of Appeal. The proviso can have no application nor can it be relied upon, on the facts of this case such as they are.

I do not find any merit in the submissions made for the appellants and therefore would dismiss this appeal, affirm the decision of the Full Court, and order the payment by the appellants of the respondent's costs of this appeal.

LUCKHOO, J. A.: I agree.

CUMMINGS, J. A.: I agree. I have nothing to add.

*Appeal dismissed.*

## GAFOOR v. KENNEDY

[Supreme Court (Crane, J.) November 2, 16, 19, December 12, 14, 1966]

*Contract—Goods bought by member of unincorporated association—  
Liability of members of association.*

The defendant was chairman and one B. a member of the B. G. Central Festival Committee, an unincorporated body. The plaintiff claimed from the defendant the price of goods delivered to the committee on two orders, one having been signed by the defendant and the other by B.

Held: (i) in theory of law the members of the committee had only such authority to contract on behalf of the members generally as might be given to them expressly or by necessary implication, but outside of this a non-contracting member could not be held liable;

(ii) in the absence of evidence to show that the defendant was present when B's order was sanctioned (supposing that it was indeed sanctioned at all) by the committee, or that B. had authority to pledge the defendant's credit, and, if so, to what extent, the defendant could only be held liable on the order signed by him but not on that signed by B.

*Judgment for the plaintiff.*

*B. O. Adams, Q. C.*, for the plaintiff.

*J. O. F. Haynes, Q. C.* for the defendant.

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CRANE J.: In the latter part of 1962 the Junior Chamber of Commerce held its festival. Among the many fixtures staged was one on the grounds of the British Guiana Cricket Club at Pln. Thomas. This fixture was arranged and organised by the B. G. Central Festival Committee, an unincorporated body of which the defendant was at all relevant and material times chairman.

In this case he is sued personally by the plaintiff, who trades *sub-nom* A. Gafoor & Sons., for the sum of \$3,328.37 in respect of building materials delivered on two orders to the Festival Committee at the B. G. C. C. ground.

The materials were supplied on two orders dated 2nd and 24th October, 1962 (Exhibits "A" and "B" respectively). There is no dispute as to the cost of, nor his liability for those materials on Exhibit "A", for these he is prepared to accept having given that order for the materials himself. Exhibit "A" bears his signature and that of the secretary of the committee. The dispute, however, concerns materials on Exhibit "B" which bears the signature of one J. B. Brooke who, unlike the defendant, alone signed it without even the rubber stamp of the committee to authenticate it like Exhibit "A". Exhibit "B" is simply an order on the plaintiff signed by Brooke as "committee member" stating—"Please supply to Mr. Maurice Rodrigues all materials required for erecting the B. G. Festival stage, B. G. C. C.;" it does not purport to involve the defendant at all. The materials listed are lumber, floorboards, stones and cement.

The evidence is to the effect that the B. G. Festival Committee is an unincorporated association with trustees in whose names the proceeds of the festival are banked. These trustees have limited duties to perform, one of which is the laudable object of holding the funds in the bank for the construction of a National Sports Stadium. The law with reference to liability to tradesmen who supply goods to such an association is well settled. It is not possible to proceed directly against an association which is not a legal person, and the law to be applied to transactions of the above kind is the law of agency; so that tradesmen in order to recover must sue those individuals who give or authorise the giving of the particular order. In *Fleming v. Hector* (1836), 2 M. & W. 172, at p. 183, PARKE, B, emphasised this point very clearly when he said:

"This is an action brought against the defendant on a contract, and the plaintiff must prove that the defendant, either himself or by his agent, has entered into that contract. That should always be borne in mind in cases of this class, for on most questions of this kind the real ground of liability is very apt to be lost sight of. As the defendant did not enter into the contract personally, it is quite clear that the plaintiff cannot recover against the defendant, unless he shows that the person making the contract was the agent of the defendant, and by him authorised to enter into the contract on his behalf; and the question is in this case, whether there was sufficient evidence to go to the jury to satisfy them that the person who actually ordered these goods, was the authorised agent of the defendant in making the contract; and that really is the question in all

cases of this kind....It is said in this case that the order was given by the committee, and that they were the agents of the members generally; but the question is, whether there was any sufficient evidence to go to the jury that they were authorised by the defendants to enter into and make these particular contracts on their behalf."

Trustees and Festival Committee members in theory of law have only such authority to contract on behalf of the members generally as may be given to them expressly or by necessary implication, but outside of this they cannot be held liable.

It is clear on the above statement of the law that J. B. Brooke, who signed Exhibit "B" as "committee member", was the proper person for the plaintiff to have sued, just as he has sued the defendant Kennedy. Both Kennedy and Brooke gave the orders (Exhibits "A" and "B") under their respective hands and should have been sued. Brooke, however, has not been sued for the reason which counsel gives that his whereabouts are unknown; but it may be asked—what of Rodrigues the building contractor, who took delivery of both orders? I think he would have been a very valuable witness from the plaintiff's standpoint, particularly as he also received defendant's order from the plaintiff, but what has become of him does not appear. It is quite possible that Rodrigues' evidence would have linked up both orders which are separate and distinct, and thrown some additional light as to who Brooke was, and maybe on the defendant's liability. The absence of both Brooke and Rodrigues from the witness-stand is a vital and fatal *lacuna* in the evidence in the case for the plaintiff.

In *Draper v. Earl Manvers* 9 T. L. R. 73, a case which bears striking resemblances to the present one, WRIGHT, J. held that mere membership of a committee would not make a defendant liable for goods supplied to the committee by tradesmen when it was not proved he ordered them or was present when they were ordered. By the rules the subcommittee had delegated to them the functions of the general committee, and there was no evidence to show that Earl Manvers took part in the particular matter as in the current finance of the club.

In the instant case, the defendant said he did not know Brooke, though he had heard of him in connection with either the 1962 or a previous festival; he could not say whether Brooke was ever co-opted to the stage and entertainment committee, which was one of the subcommittees of the B. G. Central Festival Committee; but, just as in the case of *Draper v. Earl Manvers* (above), it has not been shown in the present one that the defendant was present when the order on Exhibit "B" was sanctioned (supposing that it was indeed sanctioned at all), nor has it been shown who Brooke was, or whether he had authority to pledge the defendant's credit, and if so, to what extent. These are all vital matters on which it behoves any tradesman who supplies goods on credit to clubs or other unincorporated organisations to satisfy himself before he supplies them.

It has been said by the plaintiff in support of the alternative claim on a contract of indemnity that the defendant verbally admitted his lia-

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bility to him on more than one occasion in respect of the entire sum claimed; but although a writing to secure such a collateral promise is not necessary, there is no credible evidence to support such a claim which is strenuously denied by the defendant whose insistence that he be permitted to pay and that he be given a receipt (Exhibit "D") specifically for the materials actually ordered by him seems to support his contention that he was always disputing liability for the entire amount. The unchallenged value of the order on Exhibit "A" is \$840.20; the defendant has paid \$420.00; he must therefore pay the balance of \$420.20.

The question of costs is reserved to January 4, 1967, for argument at the request of Mr. Haynes.

*Judgment for the plaintiff.*

Solicitors: *O. M. Valz* (for the plaintiff,); *Sase Narain* (for the defendant).

## FRASER v. LEWIS

[Court of Appeal (Bollers, C. (ag.), Luckhoo, J. A., and Cummings, J. A. (ag.)) November 11, 18, 21, December 15, 1966].

*Contract—Agreement to convey land in consideration for maintenance and upkeep of transporter—Uncertainty—Rescission—Specific performance—Unjust enrichment.*

Under a written agreement the respondent agreed to transport his property to the appellant, his nephew, in consideration of the payment by the appellant of a debt due by the respondent and of an undertaking by the appellant to provide for the "upkeep and maintenance" of the respondent. In an action by the appellant for an order of specific performance to compel the respondent to pass transport, the trial judge rescinded the agreement, holding that it was too vague to be enforced, and ordered the respondent to repay to the appellant the monies spent by the appellant under the agreement. On appeal,

Held: (i) clause 2 of the agreement, which related to the maintenance and upkeep of the respondent, was too vague and indeterminate to be enforced by the court but was an integral part of the agreement;

(ii) the trial judge was in error in ordering the rescission of the contract as in all cases where rescission is asked for the underlying assumption is that an apparent agreement has been concluded and that one of the parties wishes to set it aside;

(iii) there was a want of mutuality which must result in the refusal of the order of specific performance sought by the appellant, as equity would not grant this remedy in the case of a contract which was not obligatory on both parties in the sense that at the time at which it was executed both parties had the right to have the contract specifically performed;

(iv) the appellant was entitled to recover all the monies expended by him which would result in an unjust enrichment of the respondent if he were allowed to keep it.

*Appeal dismissed.*

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

*A. F. R. Bishop* for the respondent.

BOLLERS, C. (ag.): In January 1960, the respondent, who is the uncle of the appellant, was in poor financial circumstances and unable to pay off the mortgage capital and interest due on his property situate at Section 'C' Plaisance, in the Plaisance Village District. He approached the appellant who lent him the sum of \$85 to assist in paying off the arrears of capital and interest due, and eventually he requested the appellant to pay off the entire debt due on the mortgage and take over, the property. Over the period September 1960 to January 1964 the appellant paid off the entire mortgage capital and interest due on the said property and paid rates and taxes to the tune of \$1,899.22. On the 13th of July, 1960, the parties executed an agreement in writing the substance of which was that in consideration of the appellant paying the sum of \$1,400 with interest thereon, being the extent to which the property was encumbered, the respondent would convey to the appellant transport of the said property and the appellant would permit the respondent to reside in the property during his lifetime and provide for his upkeep and maintenance, and the appellant would further keep the property and the appurtenances thereto in good and proper repair and comply with any notice served by the local authority with respect to the said property.

The full text of the agreement is reproduced hereunder and was tendered in evidence in the Court below as Exhibit "A":

"BRITISH GUIANA,

COUNTY OF DEMERARA.

THIS DEED made and entered into at Georgetown, Demerara this 13th day of July, 1960, by and between James Lewis, of 15 Prince William Street, Plaisance, East Coast, Demerara (hereinafter called the party of the second part).

WHEREAS the party of the first part is the owner of certain property to wit: —

"West half of west half of east half of lot number 15 (fifteen), Section A, west half of west half of east half of lot number 20, Section B of west half of west half of east half of lot number 20, Section C, Plaisance in the Plaisance Village District situate on the east sea coast of the county of Demerara and colony of British Guiana the said lots being laid down and defined on a plan by M. Newlands, Sworn Land Surveyor, dated November, 1852, and duly deposited in the office of the Registrar of British Guiana on the 29th July, 1953, with the building thereon".

which said property is duly encumbered in the sum of \$1,400 (one thousand four hundred dollars) together with interest thereon.

## FRASER v. LEWIS

AND WHEREAS the party of the first part is desirous and willing to pass to and in favour of the party of the second part all his right, title and interest in and to the said property to and in favour of the party of the second part subject to a life interest in favour of the party of the first part, and his exclusive right to occupy a portion of the building situate on the premises, and the party of the second part if desirous of taking over the said property under the stipulation and conditions hereinafter set out

## NOW THIS AGREEMENT WITNESSETH

1. In consideration of the payment of the sum of \$1,400 (one thousand four hundred dollars) with the interest thereon by the party of the second part, the party of the first part as owner of the said property hereinbefore described conveys unto the party of the second part the said property for his sole use and benefit.
2. In addition to such payment as aforesaid the party of the second part shall allow the party of the first part to reside in the said property during his lifetime, and to provide for his upkeep and maintenance and to discharge all the duties and responsibilities pertaining thereto.
3. Subject to the covenants hereinbefore mentioned, the party of the second part agrees: —
  - (a) To keep the said property and the appurtenances thereof in good and substantial repair and to comply with any notice or notices served by any local authority with respect to the said property.

IN WITNESS WHEREOF the parties have hereunto set their hand the day and year first above written in the presence of the subscribing witnesses.

Samuel Lewis,

PARTY OF THE FIRST PART.

13th July, 1960."

In the course of his evidence the appellant stated that when he produced Exhibit 'A' to the respondent to be signed the respondent read it and informed him that the only thing he was worried about was his maintenance whereupon he replied to the respondent that he had a cake-shop and the upstairs flat of the building was rented and that could maintain him. The appellant maintained that his wife was present. The wife's version was that after everybody had signed the agreement the respondent expressed fears over his maintenance but the appellant told him that there would be no difficulty as the flat upstairs of the building had been rented and he had a cake-shop below. She was definite that her husband had agreed to maintain her uncle but no amount was fixed for the maintenance. Her impression was that her uncle would have carried on his business in the lower flat and if he

lived upstairs her husband would have given him something. The appellant stated that before the agreement was signed the respondent used to receive \$20 per month rent as his maintenance. He personally gave the respondent no money for maintenance but he expected the respondent to keep the \$20 per month rent from the flat upstairs for that purpose.

It was not until April 1964 that the appellant filed his writ against the respondent in which he averred in the statement of claim that in pursuance of the aforesaid agreement he had paid off the encumbrance and interest thereon due on the property to the extent of \$1,899.22 on the 25th day of January, 1964, and had permitted the respondent to live in a portion of the building on the property and he had collected rent from the other portion of the property and kept the rent. He had made several demands of the respondent to have transport of the said property passed to him but the respondent had refused, failed and neglected to do so. Furthermore, he had caused his solicitor to write the respondent informing him that there was an agreement made between the two parties whereby the appellant was to relieve the respondent's property of certain encumbrances in consideration of the respondent passing to him all his right, title and interest in and to the said property. In pursuance of the said agreement the appellant had fully performed his part of the agreement and now desired the respondent to take immediate steps to perform his part of the agreement and pass transport to the appellant. The appellant then claimed *inter alia* an order for specific performance of the said agreement compelling the respondent to pass transport to him of the said property, in the alternative damages for breach of the said agreement in the sum of \$10,000. The defence in substance was that of *non est factum*, that is to say, that the appellant had lent him some money to pay off the mortgage on the property and when he signed the document Exhibit 'A' he was under the impression that he was signing a document to guarantee the repayment of the money and not an agreement that he should convey his property to the appellant for any services by him. It must be observed that there was no counter-claim and the respondent did not pray for a rescission of the agreement.

At the trial, at the close of the appellant's case, the respondent led no evidence in reply and clearly failed to establish his defence. The learned trial judge on this evidence was quite unimpressed by the testimony of the appellant with regard to the maintenance of the respondent and that was that the \$20 per month rent received from the rental of the upstairs flat would be paid to the respondent, and considered that this evidence was not supported by the wife of the appellant who had stated that although her husband had agreed to maintain her uncle no amount was fixed. He went on to concur with the submission that clause 2 of the agreement and more particularly with respect to the words "to discharge all the duties and responsibilities pertaining thereto" was an integral part of the agreement but was too vague and indeterminate to be enforced by the court. He noted that counsel for the appellant had conceded that there would be difficulty in carrying out that part of the agreement if an order for specific performance were made by the court and in the result he ordered that the respondent

## FRASER v. LEWIS

do repay the appellant the sum of \$1,899.22 being the sum paid by the appellant to clear off the encumbrance with interest thereon at the rate of 4% *per annum* with effect from 1st of February, 1964, until fully paid and further that the respondent do repay the appellant the sum of \$45 which the appellant had expended in installing a receiver on the premises. The learned judge then proceeded to order a rescission of the agreement dated the 30th of July, 1960, and granted the appellant his costs of the proceedings. It is from this judgment that the appellant now appeals to this court on the grounds:

- (a) The decision of the learned Chief Justice was unreasonable and could not be supported having regard to the evidence;
- (b) The learned Chief Justice erred in law when he failed to compel the defendant to pass transport in favour of the plaintiff therein;
- (c) The learned Chief Justice erred in law—
  - (i) When he held that the agreement of the 15th of July, 1960, was unenforceable or void for uncertainty;
  - (ii) When he made the orders for rescission in the absence of any counter-claim by the respondent and any claim for rescission in the pleadings;
  - (iii) When he refused to order specific performance of the said agreement as claimed or alternatively to award general damages for breach of contract.

It is conceded on both sides that the learned judge was wrong when he ordered rescission of the contract. This was not a case for rescission which is the equitable remedy available in a wide class of transactions on the distinct grounds of fraud, innocent misrepresentation, mistake, substantial misdescription and non-disclosure in contracts *uberrimae fidei*. In all cases where rescission is asked for the underlying assumption is that an apparent agreement has been concluded and that one of the parties wishes to set it aside. If, therefore, the learned judge had considered that clause 2, an integral part of the agreement, was too vague and indeterminate to be enforced by the court the resulting consequence of that situation should have been a dismissal of the action.

Counsel for the appellant now submits in this court that the learned judge ought to have decreed specific performance of the agreement failing which he ought to have awarded the appellant damages for breach of the contract, the measure of which would be all sums expended by the appellant under the contract plus a sum representing the loss of the bargain. His submission is that there was a clearly concluded agreement between the parties, the substantial provisions of which were: (i) the respondent to pass transport of the property to the appellant within a reasonable time after the execution of the agreement; (ii) possession of the property to be taken over immediately by

the appellant; (iii) the appellant to pay off the mortgage rates and taxes and to maintain the property; (iv) the appellant to provide reasonable maintenance for the respondent. Counsel urged that this was a fit and proper case for specific performance as under clause 1 there was an obligation on the part of the respondent to convey the property and the consideration for conveying the property was two-fold: (i) payment by the appellant of specific sums for the mortgage rates and taxes; and (ii) providing reasonable maintenance. Counsel argued that the right to have the property conveyed was a separate self-contained provision dependent only upon the stipulation in clause 1. The submission, as I understand it, is that the terms of the contract were clear and definite and although no sum was fixed for the maintenance of the respondent, in such circumstances the court would adopt the test of reasonableness and fix a reasonable sum. In support of this contention, counsel cited *Hillas & Co., Ltd. v. Arcos Ltd.* [1932] All E.R. Rep. 494; *Foley v. Classique Coaches Ltd.* [1934] All E.R. Rep. 88; *Powell v. Brown*, [1954] 1 All E.R. 484. Counsel argued that all that clause 2 meant was payment of money for the maintenance of the respondent and there was no difference in meaning between the words upkeep and maintenance. In reply to this submission on the question of specific performance counsel for the respondent maintained that the trial judge was justified in finding that the particular clause was too vague and indeterminate for any court to properly construe it. He submitted that the promises contained in the agreement were not divisible and the clauses therein were interdependent on each other, and as clause 2 was an integral part of the contract which was vague and indeterminate, specific performance ought not to be granted and, indeed, the whole contract was void for uncertainty.

The principle is clear that a court of equity will not decree specific performance of acts under a contract which will require constant supervision by the court. In the words of ASHBURNER in his EQUITY "the court only makes a positive order for the performance of an act which can be, as a rule, done *uno flatu*," A continuing contract to be performed from day to day by a series of acts will not be therefore specifically enforced; see *Ryan v. Mutual Tontine Association*, [1893] 1 Ch. 116. In that case, the lessor of a flat in a block of buildings agreed that he would appoint a resident porter who should perform certain duties for the benefit of the tenants, such as the cleansing of the common passages and stairs, the delivery of letters and the acceptance of articles for safe custody. He appointed a porter who was by avocation a cook and who absented himself for several hours each day in order to act as chef at a neighbouring club. During his absence his duties were performed by various boys and charwomen not resident on the premises. It was held that though the lessor had committed a breach of contract the only remedy was an action for damages. The ground of Lord ESHER'S judgment was really that equity will not issue ineffective decrees; it will not make orders for which in practice it cannot ensure the enforcement. Not even the defendant's agreement to appoint a porter could be specifically enforced, for when the court cannot compel the whole it will not interfere to compel a part. In dealing with that latter aspect of the matter Lord ESHER in his judgment stated that it had been said that the court could grant a decree for the specific performance of that part of the contract by which the landlord was

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bound to appoint a porter. The learned Master of the Rolls went on to point out that that agreement was contrary to the clear and well-established rule that specific performance was not granted as to a part only of a contract and that the case of *Rigby v. Great Western Railway Company*, 15 L.J. 266 Ch., merely showed that where there were several distinct parts of one large contract which could be separated into several smaller ones equity would decree specific performance of the smaller part or parts.

Counsel for the appellant has argued that clause 1 of the agreement can be separated from the other clauses in the agreement as on a true interpretation of clause 1 all that was meant was that the respondent was agreeing to convey to the appellant the property for his sole use and benefit upon the payment by the appellant of the sum of \$1,400 with interest thereon, and it would be absurd to suggest that if the appellant had paid off the amount the day after the agreement was signed that it could be properly said that he could not have the property and he would have to support the respondent until he died before getting the conveyance. I cannot agree with this submission. In my view the three clauses in the agreement were interdependent on each other and the promises included therein were not divisible. The words "in addition to such payment" appearing in clause 2 and "subject to the covenant hereinbefore mentioned" appearing in clause 3 must bear significance, and I construe the agreement to mean that upon the payment by the appellant of the sum of \$1,400 with interest thereon the respondent would convey to the appellant the property at some future date when the appellant would permit the respondent to reside therein for his lifetime providing for his upkeep and maintenance and discharging his responsibilities pertaining thereto, and at the same time the appellant would be bound to keep the property in good repair. In other words, the conditions laid down in the three clauses were concurrent, the performance of each of which was conditional on the simultaneous performance of the other.

In *Ogden v. Fossick* (1862), 4 De. G. F. & J. 426, a suit was instituted for specific performance of an agreement to grant a lease of a coal wharf. The agreement contained a provision that the defendant should during the term be appointed manager of the wharf. It was held that the two parts of the agreement were inseparably connected and as the one part could not be specifically enforced the whole suit fell to the ground. In this case KNIGHT-BRUCE, L.J., considered the suggestion on the plaintiff's behalf that the agreement might be treated substantially as divided or divisible into two contracts, that is, as I understand it, (1) a contract to lease the wharf; (2) a contract to employ the defendant as manager, of one at least of which it was said that there could not be any good objection to decreeing specific performance whatever might be the correct view of the other, and gave as his opinion that this was not so. He thought that all the stipulations or the instrument must be considered together, that the contract should be treated as one single, entire contract and that its stipulations as to the employment of the defendant by the plaintiff and the services to be rendered to him by the defendant were a material and very important part of it, thus there could be no decree for specific performance. TURNER, L.J., in the course of his judgment stated that it was not according to the

general course of the court to decree specific performance of part of an agreement when there are other terms of the same agreement which it is beyond its power to enforce. There were cases, however, in which the court had decreed specific performance of part of an agreement although the specific performance of other parts of the same agreement could not be decreed, but those were cases in which the parts of the agreement which were enforced were, or at all events were considered by the court to be, independent of the other parts of the agreement which could not be enforced. The learned Lord Justice put it this way later on in his judgment:

"The court when called upon specifically to perform part of an agreement the whole of which cannot be specifically performed is bound to see that the part which cannot be specifically performed is independent of that which it is called upon to perform. It is by this test the case before us must, in my opinion, be tried, and trying it by that test I am of opinion that a specific performance of the agreement for a lease ought not in this case to have been decreed. I think that by this agreement the lease and the employment of the defendant Samuel Fossick are and was meant to be wedded together, that the obligations on the one side and on the other are and were meant to be, as expressed by Lord ST. LEONARDS in *Lumley v. Wagner*, correlative obligations."

Applying the test as laid down by the learned Lord Justices in *Ogden v. Fossick*, it is obvious that the present case is not one in which equity would decree specific performance as clauses 2 and 3, which is the part that cannot be specifically performed, is not independent of the part of the agreement contained in clause 1 and in respect of which counsel urges there should be a decree for specific performance. For the respondent to be able to reside in the property and to receive upkeep and maintenance from the appellant and for the property and the appurtenances thereof to be kept in good repair by the appellant the property must first of all be conveyed to the appellant under clause 1 of the agreement.

There is the other aspect of the matter that equity will never decree specific performance of contracts for personal work or service, for it is well settled, as discussed in *Ogden v. Fossick*, equity will not compel persons against their will to remain in the service of another nor will it compel an employer to keep a servant. The proper and exclusive remedy for wrongful dismissal in such circumstances is an action for damages. "The courts," said JESSEL, M. R., in *Rigby v. Connol* (1880), 14 Ch. D. 482, at p. 487, "have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements of hiring and service, being the common relation of master and servant, or whether they are agreements for the purpose of pleasure, or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy." Counsel for the appellant has sought in vain to get me to say that clause 2 of the agreement does not include a promise for personal service and that the words 'maintenance' and 'upkeep' mean the same thing and merely call for money payment by the appellant to

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the respondent. While I am prepared to concede that mere money payment may be covered by the word maintenance which one encounters in matrimonial proceedings, the word 'upkeep' must have a different meaning otherwise there would be no reason for its presence in the clause. In *Acworth v. Acworth*, [1943] P. 21, C. A., maintenance was described by SCOTT, L. J., as a very wide word as covering everything which a wife may in reason want to do with the income she enjoys, which would include food, lodging, clothes, travelling and making arrangements for the future. Upkeep, on the other hand, must to my mind indicate care and attention, that is, welfare, and when taken in conjunction with the words "to discharge all the duties and responsibilities pertaining thereto" must include care and attention by the appellant personally or through another towards the respondent. I should imagine that what the parties intended in relation to clause 2 of the agreement was that the respondent should reside in the property and be paid a specific sum of money by the appellant for his maintenance for food, clothes, medicine, etc., and be cared for by the appellant both in sickness and in health personally or through another. Finally, there must in this case be want of mutuality which must result in the refusal of specific performance as equity will not grant this remedy in the case of a contract which is not obligatory of both parties in the sense that at the time at which it was executed both parties had the right to have the contract specifically performed. It appears to me to be clear that had the respondent sought specific performance a court of equity would never have granted it as the court would be in no position to superintend performance of that part of the agreement which called for his maintenance and upkeep and "the discharge by the appellant of all the duties and responsibilities pertaining thereto", and for keeping the property in a good state of repair. In any event the terms of the agreement render themselves uncertain to such an extent that a decree for specific performance cannot be considered. I am reminded of the principle that a greater degree of certainty is necessary for the remedy of specific performance than for the remedy of damages. As BUCKLEY, L. J., showed in his judgment in *Waring & Gillow Ltd. v. Thompson*, when one is considering the question of specific performance one is really concerned not with the rights to be enjoyed under the contract as in the case of the remedy of damages, but with the mode of enjoyment of the rights which have to be so identified that a court could order specific performance. He stated:

"The question between the parties here is not as to the mode of enjoying the agreement, supposing the agreement exists, but it is whether the agreement is or is not valid or does or does not exist at all. If the defendant refused to perform a contract sufficiently definite as to the right which was to be enjoyed against him, the plaintiff might be entitled to an injunction or damages though he could not obtain specific performance."

In the present case specific performance is therefore out of the question.

I turn now to consider the submission of counsel for the respondent that there was no clearly concluded agreement between the parties and that the contract was void for uncertainty. HALSBTJRY'S LAWS OF ENGLAND, 3rd Edn., Vol. 8, p. 83, at para. 144, states that if the terms

of an agreement are so vague or indefinite that it cannot be ascertained with reasonable certainty what is the intention of the parties there is no contract enforceable at law unless the uncertain part of the agreement can be separated from the substantial part thereof. As Lord DUNEDIN said in *May & Butcher v. R.* [1934] 2 K.B. 17:

"To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course, it may leave something which still has to be determined but then that determination must be a determination which does not depend upon the agreement between the parties."

There is clearly then no certainty if the term not agreed upon can be determined only by future agreement between the parties. Thus the learned authors of CHITTY ON CONTRACTS, 22nd Edn., at p. 22, point out that the courts seek to uphold bargains wherever possible and accordingly it is the duty of the court to construe agreements fairly and broadly without being too astute or subtle in finding defects but on the contrary the court should seek to apply the maxim *verba ita sunt intelligenda ut res magis valeat quam pereat*. The maxim, however, does not mean that the court is to make a contract for the parties or to go outside the words they have used except in so far as there are appropriate implications of law. It is with these principles in mind that I approach the problem of a true construction of the agreement—Exhibit 'A' — and find myself in great difficulty. In the recital to the agreement it is clearly stated that whereas the party of the first part is desirous and willing to pass to and in favour of the party of the second part, all his right, title and interest in and to the property to the party of the second part, subject to a life interest in favour of the party of the first part, and his exclusive right to occupy a portion of the building situate on the premises, and the party of the second part is desirous of taking over the said property under the stipulations and conditions expressed hereinafter, yet in the operative part of the agreement the respondent is not given a life interest in the property as expressed in the recital nor is he given a specific portion of the building for the purpose of residence but is merely permitted to reside in the property during his lifetime. Can it truly be said then that the intention of the parties as expressed in the recital was given effect to in the operative part of the agreement? it seems to me to be reasonably clear that the respondent was disposing of his property valued at \$4,000 for the absurdly low figure of \$1,400 and at the same time seeking to ensure that he would be granted some small portion of the house in which to live, yet in the operative part of the agreement he was merely permitted to reside on the said premises. It is trite that recitals are not a necessary part of a deed and have no effect or operation and cannot control the operative part when it is clear. They can only be used to clear up doubts which arise on the words of the operative part. The operative part of the agreement in Clause 2 merely provides for residence in the property during the respondent's lifetime and one is therefore left in grave doubt as to whether this provision reflected the true intention of the parties. In any event even if under the agreement it could be said that the respondent would reside in a portion of the building

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there is no certainty as to which portion of the building would be provided for that purpose. When I come to construe the operative part of the agreement, I am reminded of the original argument of counsel for the appellant that the word 'conveys' in clause 1 meant that the appellant took possession of the property in the sense of control although not physical occupation and then his subsequent "volte face" that the word 'conveys' in the context meant "agreed to convey". As I see it, if the word 'conveys' in the context did mean "agrees to convey" it would not necessarily indicate control or the right to possession in the appellant as it might well be that the respondent was to retain control until the passing of the conveyance. It must be that counsel found himself having to argue that the word 'conveys' meant control without physical occupation for the simple reason that the evidence revealed that the appellant did not in fact enter into possession. Clause 1 goes on to state that the party of the first part as owner of the property conveys to the party of the second part the property for his sole use and benefit, thus not giving to the respondent the life interest which he was desirous of having as expressed in the recital. In the very next clause, that is, clause 2, it is apparent that the appellant was not to have the property for his sole use and benefit, for the respondent is to be permitted to reside in the property during his lifetime and in the following clause 3 the appellant is to have, in the words of counsel for the respondent, foisted upon him the duty of maintaining the building and the appurtenance thereof in good and substantial repair and to comply with notices served by the local authority with respect thereto, which must mean subject to the approval of the respondent. If the appellant was to have the sole use and benefit of the property which was to be conveyed to him absolutely, in my view it would be a negation of his rights thereto that he should be compelled to keep the premises in good repair to the satisfaction of the respondent.

In relation to the interpretation of the other part of clause 2, that is, to provide for the respondent's upkeep and maintenance and to discharge all the duties and responsibilities pertaining thereto, I agree that in respect of maintenance in the absence of a fixed sum the court could, having regard to the conduct of the parties, as was done in *Powell v. Brown*, fix a reasonable sum. In that case where an employer wrote a letter to his secretary promising that instead of a rise in salary he proposed to pay her each year a bonus on the net trading profits of the previous financial year and she accepted, it was held by the Court of Appeal that he should pay a reasonable sum, that is, a sum which bore a reasonable relation to the relevant trading profit, and that sum could be easily fixed as the defendant had admitted in evidence that that would be the sort of additional salary which would have been paid if there had not been a bonus. In *Foley v. Classique Coaches Ltd.* the plaintiff agreed to sell and the defendants agreed to purchase certain freehold property subject to the condition that the defendants would enter into a supplemental agreement with the plaintiff for the sale of petrol to them for the purposes of their business as motor coach proprietors. The second agreement provided that the defendant would purchase from the plaintiff all petrol which should be required by the defendants for the running of their business "at a price to be agreed upon between the parties". The Court of Appeal had no difficulty in holding that there must be implied in the contract a term that the petrol was to be supplied at a reasonable

price and should be of reasonable quality. It must be pointed out, however, that the petrol supplied by the plaintiff was a non-combine petrol and it was supplied to the defendants at a price lower than that paid by the public and the parties, believing that they had a contract, had acted on that belief for three years. There was therefore no difficulty in fixing a reasonable price for the reasonable quality of petrol, thus, in *Hillas & Co. Ltd. v. Arcos Ltd.* the plaintiffs agreed to buy from the defendants a quantity of timber of a particular quality the agreement contained an option to purchase more timber at a later date, but gave no particulars as to the quality. When the plaintiffs tried to exercise their option the defendants objected that it had not been intended that this should be binding, it was simply to provide a basis for future negotiation. The House of Lords decided that the language used was sufficient to bind the parties. Here there were two points in the plaintiff's favour: the court could be guided by referring to the previous dealings between the parties and it could also refer to the normal practice in the timber trade. The principle was clearly enunciated in *Waring & Gillow Ltd. v. Thompson* (1912), 29 T. L. R. 154, that a contract which is void for uncertainty is not rendered certain by part performance but where a contract is complete in itself, in that a defined act is done upon reasonable terms, evidence is admissible as to what terms are reasonable and the conduct of the parties may be the best evidence upon this point. It is true that in *Richardson v. Garnett* (1895), 12 T. L. R., where there was a promise to provide for a relation in the future "if she would come and live with him" and the relation having terminated her employment and accepted the offer, the Court of Appeal arrived at the conclusion that there was a binding contract, the Master of the Rolls stating that it was an indisputable proposition of law that if one person told another that if that other would perform some particular act he would pay him, and the other then did it, there was a binding contract. But in that case there was no difficulty in the matter of upkeep and care and attention, it was merely a question of provision for maintenance and there was some evidence of the promisor stating that he would allow the relation £10 a month and travelling expenses upon which a reasonable sum could then be estimated and considered in the measure of damages. The Master of the Rolls was careful to point out that if the proposal was so vague as to be unintelligible then there was no contract.

In the present case the situation here is quite different. There had been no previous dealings between the parties as the evidence of the appellant was that he paid no money out of his pocket to the respondent for maintenance and he merely expected that the respondent would retain the \$20. per month received as rent from the upstairs flat as his maintenance. While I agree that the learned judge was in error when he considered that the evidence of the appellant's wife did not support the evidence of the appellant in this regard, she made it clear that no amount was mentioned, and in any event the learned judge rejected the evidence of the plaintiff on this aspect. *There was therefore no material before the court upon which the court could have been guided in fixing a reasonable sum.* For example, there was no evidence as to the respondent's age or his station in life, or the type of life that he led, or whether he was a sickly person or not and needed medical attention. Further, in respect of the upkeep of the respondent, I venture

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to suggest that the value of such a contingency would be impossible to estimate in terms of money. I have reached the conclusion, therefore, that the whole of this agreement was vague and uncertain and left great room for doubt as to whether the parties thereto were ever *ad idem* on the subject matter of the agreement and whether the agreement, at all, in any way reflected the true intention of the parties. I must hold, therefore, that there was no concluded agreement between the parties. I consider myself fortified in this conclusion by the judgment of MAUGHAN, J., in *Stimpson v. Gray*, 98 L.T. Ch. 315, where he held that if the court is unable to determine all the material terms of the alleged contract, either by interpretation of the language used, or by holding that the missing details are such that the law will supply, he did not think that in that situation there was a binding contract enforceable by the court.

This court, holding as it does, that there was no valid contract concluded between the parties, the question arises as to whether the plaintiff can recover the \$1,899.22 being the extent of the encumbrance of the property paid off by him plus the \$45 expended in installing a receiver on the premises. It is a reasonable inference to draw from the order of the learned judge that what he attempted to do after ordering rescission of the contract was to apply the doctrine of *restitutio in integrum* and restore the parties to their original position but in so doing he included an order for interest on the sum of \$1,899.22 at the rate of 4% *per annum* with effect from 1st February, 1964, which presumably would be the date from which the encumbrance was paid off by the appellant. I accept the submission of counsel for the respondent that though the order for rescission was erroneously made the learned judge could have made substantially the same order under the doctrine of quasi-contract. Professor WINFIELD in his *PROVINCE OF THE LAW OF TORT* has attempted to define genuine quasi-contract and has received the support of the English judges in this difficult task. His definition is "liability not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit". He stresses three elements: (1) a special relationship between the two persons analogous to contract rather than to tort; (2) a resultant duty to pay money; and (3) an underlying aim of making restitution for a benefit unjustly received. Lord WRIGHT in the *Fibrosa* case [1943] A.C. 32, at p. 61, in describing the nature of quasi-contract has pointed out that any system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of another which it is against his conscience that he should keep, and Lord DENNING enumerated the particular heads of cases in respect of money had and received by the defendant from the plaintiff to and for his use which ought in conscience to be returned to him, when in *Kiriri Cotton Co., Ltd. v. Dewani*, [1960] 1 All E.R. at p. 181, in speaking of the action for money had and received he stated:

"It is not an action on contract or imputed contract.....it is simply an action for restitution of money which the defendant has received but which the law says he ought to return to the plaintiff. All the particular heads of money had and received, such as money

paid under mistake of fact, money paid under a consideration that has wholly failed, money paid by one who is not in *pari delicto* with the defendant are only instances where the law says the money ought to be returned."

Thus the learned authors of the 5th edition of CHESHIRE AND FIFOOT ON THE LAW OF CONTRACT, in dealing with the subject where the money is paid as the result of contract, speak of a group of cases where the money is paid in pursuance of an ineffective contract, *i.e.*, where the plaintiff has paid money to the defendant in pursuance of a transaction which he believes to be a contract but which turns out in fact to be nugatory.

I ground my decision, therefore, under the head of money paid in pursuance of an ineffective contract and consider that the appellant is entitled to recover all the money expended by him which would result in an unjust enrichment to the respondent if he were allowed to keep it. The appellant may, therefore, recover that sum of money under the two limbs of that head, namely, where there has been a total failure of consideration in respect of the money paid (see *Rowland v. Divall*, [1923] 2 K.B. 500) and also where the money is paid to the defendant in pursuance of a transaction which was thought to be a valid contract at the time it was entered into between the parties and which is subsequently declared null and void. Finally, the money may be recovered under the head of money paid by the plaintiff to a third person at the defendant's request which is a common form of quasi-contract (see *Brittain v. Lloyd* (1845), 14 M.R. at pp. 762, 773). In restoring the parties to the *status quo ante* there is no room for interest payable on the sum of money expended by the appellant in pursuance of the ineffective contract.

In the result, the appeal must be dismissed and the order of the learned judge affirmed but the order will be varied by striking out that part of the order which calls for rescission of the contract and the payment of interest on the \$1,899.22. The effect of this will be that the respondent will repay to the appellant the total sum of \$1,944.22 and the amount of \$120.00 awarded as costs by the trial judge. The respondent will have his costs of the appeal to be taxed certified fit for counsel.

LUCKHOO, J. A.: I concur.

CUMMINGS, J. A.: I find difficulty in agreeing with some of the reasoning adopted by my learned brother: in particular with respect to the mode of interpretation of the agreement. It is the operative part of the agreement from which intention must be gleaned. It is only where there is doubt that one looks at the recital for assistance. I concur, however, with the conclusion reached in the judgment and the order proposed.

*Appeal dismissed.*

Solicitors: A. Vanier (for the appellant); V. Lampkin (for the respondent).

## R. v. POORAN

[Court of Appeal (Luckhoo, J. A., Persaud and Cummings, J. J. A. (ag.)) November 15, 20, December 20, 1966]

*Criminal law—Evidence—Corroboration—Rape—Necessity for independent source of corroborating evidence—Lie told by accused—Whether corroboration.*

The appellant appealed from his conviction, for raping S. He had been in the habit of visiting her home and there had been some talk of marriage between them. S. testified that at the time of the offence she shouted thrice for her brother, R., who lived nearby, heard S. call out thrice for her brother, but did not go to investigate because he did not feel anything was wrong. The defence was consent, but the appellant had told the police that he was working at the time and was not at home. The defence was conducted on the basis that this statement amounted to an alibi and was a lie. In directing the jury on corroboration, the trial judge omitted to tell them that they must look for corroboration from an independent source. He, however, told them that they could find corroboration in R's testimony and in the lie told by the appellant. In the latter respect he said that if the jury felt that the accused had lied to the police and that he did so out of a sense of guilt, it was for the jury to say whether that lie in fact corroborated the evidence of the prosecutrix. On appeal,

**Held:** (i) the law requires that corroborative evidence — whether oral or circumstantial — must come from a source independent of the prosecutrix;

(ii) *per* Persaud and Cummings, JJ A. (ag.), any omission of the trial judge to tell the jury that they must look for corroboration from an independent source was cured by his direction that they must look for corroboration in R.'s evidence;

(iii) it is not sufficient for a trial judge merely to tell the jury that if they find that the accused lied out of a sense of guilt, then that may be corroboration of the prosecutrix's evidence. He ought to bear the circumstances in mind (and this must include the defence), and must explain to the jury that if they find that an untrue statement is consistent with panic and as well as with guilt, then it is not corroboration;

(iv) *per* Luckhoo, J.A., S.'s call for her brother was just as consistent with an approved visit as with a guilty one and R.'s evidence was in the circumstances incapable of providing corroboration;

(v) *per* Luckhoo, J.A., if a statement made by an accused person is to be used as a lie for the purpose of providing corroboration, it must be a demonstrable and unambiguous lie. The appellant's statement to the police could have meant "almost anything". It was, therefore, not a demonstrable lie and was incapable of providing corroboration.

*Appeal allowed.*

*F. R. Wills* for the appellant

*J. C. Gonsalves-Sabola*, Senior Crown Counsel, for the Crown.

LUCKHOO, J. A.: The appellant was convicted for having carnal knowledge of one Seeranie without her consent on the 27th day of November, 1965, contrary to s. 76 of the Criminal Law (Offences) Ordinance, Cap. 10, and was sentenced to 3 years' imprisonment. From that conviction and sentence he has appealed.

Seeranie, an unmarried girl of 16 years lived together with her mother, stepfather and brother, Bobby, at a place known as Martin's Burial Ground, Mahaica Creek. On Saturday 27th November, 1965, she

was alone at home with her small baby. About 10 a.m. the appellant came into the house. According to her evidence he 'hauled' her out of the hammock while she shouted for help; he slapped her on her face; she again 'hollared;' he dragged her into the bedroom, threw her on the bed and took off her panty; she then shouted out "help, help, Bobby, Bobby, Bobby"; he went on top of her and had sexual intercourse with her and then left. She put on back her panties, looked after her baby, went to the trench, took off her panty and washed it. About 6 p.m. her mother and step father, who had been drinking, returned home, so she did not tell them anything until the next morning at 8 a.m. At that time she was afraid of pregnancy, and worried because she might get a baby.

On that very Saturday one Ramdehur, who lives on the opposite bank of the Mahaica Creek, saw the appellant enter the said house about 10.30 a.m.. After that he heard Seeranie's voice (which he knew) call out "Bobby, Bobby, Bobby". After that he did not "hear anything more at all". He stood up for a little less than half an hour and then saw the appellant come out of the house, go down the steps, and walk away along a track to the west. About one minute after Seeranie came out of the house and *stood* on the platform. Several times before he had seen the appellant sitting on the steps and in the yard of that house. On the day in question people could have seen him where he was standing. He did not go to investigate; in his own mind he did not feel anything was wrong.

Doctor Balwant Singh, the Government Bacteriologist and Pathologist, found the presence of spermatozoa on Seeranie's panties and on her bed-sheet. Tulsi, her mother, told of the complaint made to her the next morning and Detective Constable Maltay produced a cautioned statement made by the appellant on the 1st December, 1965. What is told in that statement will be later examined in detail because of the directions given by the trial judge in relation thereto.

This briefly was the case for the prosecution. The appellant elected to make a statement, not on oath, from the dock. He said

"I am 18 years of age. I never went to Doreen (Seeranie) without her consent. Nothing else, that is all".

Counsel for the appellant dealt with this statement in his address to the jury as indicating that the appellant was setting up the defence that he did have sexual intercourse with the girl, but that it was with her consent, and the trial judge said:

"It may very well be that he is saying that he did go there on that day, and that he did have sexual intercourse with her, but that he had sexual intercourse with her consent. It may be that he is saying that".

I do not doubt that it was the intention of the appellant to indicate that Seeranie gave her consent to the intimacy which took place on the 27th November. The matter went to the jury in this way. However, it would have been more desirable if a clearer statement had been made to give effect to this intention.

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This appeal will be considered on that basis. It will be readily appreciated that on the evidence led the case for the prosecution could not be sustained without firm belief in the material aspects of Seeranie's testimony. She must satisfy the jury of her truthfulness before they could begin to think of returning an adverse verdict against the appellant. Despite the presence of a number of startling discrepancies and contradictions which existed between her depositions, tendered in evidence, and her evidence at the trial, her evidence must have been accepted in the main.

However, the nature of some of the conflict must here be noted:

At the trial she said, "I was not to marry Krisho (the appellant). In the past I was not to marry the accused"; whereas in her depositions she had said, "the accused was to marry me but his mother stopped the wedding, because I was getting a baby". At the trial she said she told her parents what had happened because she was afraid she might have a child, but whether that was so or not she was still going to tell her parents; whereas in her depositions she said, "I was worried because I thought I was going to get a baby and not because of the fact that the accused had intercourse with me. I told my parents what had happened because I was afraid I might have a child. *If I were not afraid of that fact I would not have told them*". At the trial she said that when the appellant removed her panties her feet were not straight out, she bent them to prevent the panties from being taken off, and when the appellant took them off he did not put them on the bed, but on the floor at the side of the bed; whereas in her depositions she said, "When the accused was pulling out my panties my feet were straight out. The accused put my panties on the bed. The accused pulled my panties down with his right hand until it reached about 4—6 inches from my ankle. When the panties were 4—6 inches from the ankle the accused took his right foot and kicked it off. The panties remained on the bed". At the trial she said, "When the accused came to my house he did not have on a head tie"; whereas in her depositions she said, "When the accused was winding himself his head was on my shoulder ... I did not bite his ears because I did not want to bite the accused. *The accused had on a head tie on, which covered his ears*". At the trial she said, "When the accused came into the house he had a stick and cutlass in his right hand; at all times he held the cutlass by the handle; he put them down behind the front door before he came into the house. When he told me that if I spoke he would kill me the stick was in his hand"; whereas in her depositions she said, "Accused put down cutlass and stick before he spoke to me. The accused held the cutlass by the blade, not by the handle".

There were no injuries of any kind on Seeranie, who was medically examined; she did not do anything to the appellant, her panties were not torn.

The two main grounds of appeal, on which counsel for the appellant relied, are

- (a) that the learned trial judge misdirected the jury on the law of corroboration in relation to the case; and

(b) that the verdict of the jury was unreasonable.

On the first ground complaint was made that the trial judge in explaining to the jury the meaning of corroboration omitted to draw their attention to that very essential aspect which requires that evidence in corroboration of a witness's evidence must come from an independent source.

The trial judge in his direction said:

"Now, what is corroboration? Corroboration must be evidence which implicates the accused, that is to say which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it".

In *R. v. Clynes*, 44 Cr. Ap. R. at p. 151, STREATFIELD, J. said:

"...It is, in our view, at least necessary, in order to make the warning intelligible, to tell the jury what is meant by corroboration. No particular language is necessary to describe it, but it is at least necessary to explain to the jury that what is required is *some independent evidence* of some material fact which implicates the accused person and tends to confirm that he is guilty of that offence."

Counsel for the Crown agreed that in no part of the summing up did the trial judge tell the jury that they must look for corroboration from an independent source; but argued that this omission was in effect corrected when the trial judge made reference to two specific instances of corroboration, both of which were independent of Seeranie's evidence, and so no confusion could have existed in the minds of the jury. It must be appreciated that the trial judge did not tell them that those were the *only* two instances in the case from which corroboration could possibly arise. The jury may well have thought that it was open for them to consider other matters which to them appeared to be corroborative, but which did not come from an independent source. In the circumstances then, it was necessary to tell them that Seeranie could not herself supply evidence of corroboration; but that it must emerge from some testimony other than her own.

One cannot be certain that the jury in their quest for corroboration did not feel themselves free to draw from that source (Seeranie's evidence), not being prohibited expressly, nor by clear and necessary implication.

However, the matter does not rest here, since those two instances of corroboration referred to by the trial judge require scrutiny to determine whether, in law, they are capable of being left to the jury as evidence from which corroboration could be derived.

The first consisted of just that portion of the evidence of Ramdehur when he said he heard Seeranie's voice (which he knew) calling "Bobby! Bobby! Bobby!" after the accused entered the house.

With regard to this the trial judge said:

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"Well now, you must look for corroboration of the girl's testimony in this case in the evidence of the man Ramdehur, who said that on the day in question he was standing on the opposite bank of the river and he actually saw the accused come along and go into the house, and shortly after he heard shouts, the shouts of the girl—"Bobby! Bobby!".....So if you believe his evidence you might very well feel that her shouting "Bobby! Bobby! Bobby!" was inconsistent with the consent, because if she had made up her mind to have sexual intercourse with the accused, and did have sexual intercourse with him, she would hardly be likely to shout for her brother "Bobby! Bobby!"

To be exact Ramdehur said Seeranie "called" the name not 'shouted' it. It was Seeranie who said she "shouted Bobby" and kept on "shouting" for help; but it is significant that Ramdehur never heard anything more at all than the call "Bobby! Bobby! Bobby!" About one minute after the accused left the house, he saw Seeranie come out of the house and stand on the platform.

If the calling out of "Bobby" had meant anything one would have expected him to evince some concern, at least to enquire from Seeranie, whom he saw on the platform, whether anything was wrong. His answers, "I did not go to investigate. In my mind I did not feel anything was wrong", clearly show that the name "Bobby" could not have been called in a way to indicate alarm, nor to reflect the ring of urgency of a girl in distress.

On his showing it is difficult to attribute to the call any quality capable of exercising a corroborative influence. If its effect on Ramdehur is worth anything, then it could have been of little moment; and at any rate could hardly have possessed that positive significance to render it meaningful.

Whilst facts which tend to render more probable the truth of a witness's testimony on any material point are admissible in corroboration thereof, so also facts which are equally consistent with the truth of such testimony, on the reverse, are inadmissible for this purpose (See PHIPSON ON EVIDENCE, 10th Edn., para. 1572, p. 612).

In *Finch v. Finch* (1883), 23 Ch. D. 267, the question arose whether the surrounding circumstances did not furnish corroborative evidence in support of a wife's claim against the estate of her deceased husband for certain articles. LINDLEY, L. J., said at p. 277:

"Now, before that could be regarded as corroborative evidence, we must look, at it to see what it corroborates; it is undoubtedly consistent with the lady's story (that is the plaintiff); that is plain enough. *But it seems to me to be equally consistent with another view altogether; and evidence which is consistent with two views does not seem to me to be corroborative of either.* It is not inconsistent with the view taken by the residuary legatee, although it is consistent with the view taken by the lady. Her statement appears to me to be uncorroborated for the purposes of this case".

In *R. v. Isaac Rogers* (1914), 10 Cr. Ap. R. 276, the appellant was convicted on an indictment for having carnal knowledge of a girl not 13 years old and was sentenced to 3 years penal servitude. One of the points taken on appeal was that the judge misdirected the jury in telling them that the doctor's evidence corroborated the story of the girl. The defence alleged that the condition of the girl was due to self-abuse; the doctor admitted that this was possible though not probable, but that her condition was equally consistent with causes not put forward by the prosecution.

READING, L. C. J., said (at p. 278)

"On the question of corroboration, no doubt the judge had in mind that some corroboration was necessary, but what he appears to have overlooked is that the medical evidence established that the general condition of the girl was equally consistent with causes which were not put forward by the prosecution and was equally consistent with either the innocence or the guilt of the appellant. On that ground also we are of the opinion that the conviction must be quashed".

In my view the most that could be said of the call is that it was just as consistent with an approved visit as with a guilty one. If Ramdehur had heard any cries for help or words protesting or denouncing the presence of the accused—words which could reasonably be construed as such, and which were not of an innocent complexion, then the matter would be different. In the circumstances of this case the mere call for "Bobby, Bobby, Bobby" was not sufficiently specific to constitute corroboration. On the evidence the accused was not a stranger to the premises, and his open visit at that time of morning could not be said to be suspicious. I consider Ramdehur's evidence in the circumstances to be incapable of possessing any corroborative value.

*The second instance of corroboration cited by the trial judge consisted of the statement made by the accused on the 1st December, 1965, to Detective Constable Maltay, who on that day told the accused that it was alleged that he went to the home of Seeranie on the 27th November, 1965, and had carnal knowledge of her against her will and consent, and cautioned him. Whereupon the accused said:*

"Saturday (27th November 1965) I wasn't at home. I *am* working with Sarju to dig a drain at Grass Hook. Sarju himself give me the work he was there when I was working. Me nah draw the money yet".

The trial judge told the jury:

"That statement *suggests* that the accused was saying that on Saturday 27th November, 1965, he was at Grass Hook, which the evidence discloses is about one mile away from Martin's Burial Ground. So you have to ask yourselves whether the accused told the police a lie, then it is for you to say whether that evidence in fact corroborates the evidence of the girl Seeranie....Counsel for the accused more or less conceded to you that the accused in that state-

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ment to the police had lied to the police. He suggested to you that the accused in that situation had lied out of pure panic; that anybody placed in that situation would have told the police that they were somewhere else. If you feel that this is so, then that lie can never amount to corroboration, but if you feel on the evidence that the accused did tell a lie to the police, and that he did so out of a sense of guilt, it is for you to say whether that lie in fact corroborates the evidence of the prosecutrix".

Although Lord MAC DERMOTT said in *Tumahole Bereng v. R.*, [1949] A. C. 253, at p. 280;

"Corroboration may well be found in the evidence of an accused person; but that is a difference for there confirmation comes, if at all, from what is said, and not from the falsity of what is said", this dictum is subject to certain qualifications. Demonstrable lies out of court by an accused may amount to corroboration against him. There may be occasions when the only inference to be drawn from certain falsehoods is that they were contrived to conceal guilt, in which case they may afford evidence of corroboration against the maker.

In *Credland v. Knowler*, 35 Cr. Ap. R. at p. 54, GODDARD, L. C. J., said:

"I should be very sorry to lay down, and I have no intention of laying down and I do not think any case has gone the length of laying down, that the mere fact that an accused person has told a lie can in itself amount to corroboration. It may, but it does not follow that it must. If a man tells a lie when he is spoken to about an alleged offence, the fact that he tells a lie at once throws great doubt upon his evidence, if he afterwards gives evidence, and it may be very good ground for rejecting his evidence, but the fact that his evidence ought to be rejected does not of itself amount to there being corroboration. In fact, I do not think we can put the proposition better than it was put by Lord DUNEDIN, in *Dawson v. Mc Kenzie* (1908), 45 Sc. L. Rep. 474, and the passage to which I am about to refer was approved by this court in *Jones v. Thomas*, [1934] I K. B. 323. LAWRENCE, J., giving judgment, with which AVORY, J., concurred and which certainly had the approval of the Lord Chief Justice (Lord HEWART), said (at p. 330): 'Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is, that the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration. The other is, that the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. *It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made.*' That is a very concise and clear statement of the law.

In that same case the Lord Chief Justice (Lord HEWART) referred to that case and said (at p. 327): '*But as I read those dicta it is*

*only when the untrue statements are of such a nature, and made in such circumstances, as to lead to an inference in support of the evidence of the mother'*—that was a bastardy case—'*that they can be regarded as corroborative evidence, and not that the mere fact of the alleged father having knowingly made false statements is in itself corroboration within the statute'*. In other words, one has to look at the whole circumstances of the case. What may afford corroboration in one case may not in another. It depends on the nature of the rest of the evidence *and* the nature of the lie that was told.

In this case, speaking for myself, I am prepared to hold that there was corroborative evidence, and I think strong corroborative evidence, apart from the lie which the appellant told. He told a lie first of all by saying that he was not there at all with the children. Then he admitted that he was there, and finally said: 'I did go to the top of the hill at the back of my house with the two little girls Stark and Richardson. We sat down on the grass for about only two minutes, and I did kiss the girl of Richardson's, but I didn't do anything else and I did not undo the front of my trousers, in any case there were too many people about. I didn't do any wrong to them'. It did not corroborate the whole of the children's story but it corroborated the children's story to such an extent that it showed that the appellant, who had never taken either of these children for a walk before had gone with them to the place to which they said he took them, that he sat down not for the purpose of resting or telling them a story or anything like that, merely for two minutes, and then kissed one of them. That seems to me to be the strongest corroboration of the children's evidence that he not only did that, but went on to do something further, because it shows that the children had been telling a perfectly true story up to the time when he said that he did not do anything and they said that he did.

The lie which he told, in my opinion, would come within the dictum of Lord DUNEDIN which I have read. But for myself I do not want to lay down any particular proposition of law with regard to the lie, except to say that I entirely agree with what was said in *Jones v. Thomas (supra)*, approving *Dawson v. Mc Kenzie (supra)*. I should prefer to say that the statement which the appellant made, which I have already read, in itself afforded corroboration and that therefore this appeal fails".

It is clear then that the mere fact that the accused made a false statement is not in itself corroboration; since a false statement could be due to a multiplicity of motivating factors *e.g.*, through fear of being charged, panic, shame—to disguise the truth for family reasons; and not necessarily out of a sense of guilt.

This the trial judge sufficiently brought to the attention of the jury.

It is only when the untrue statement or statements is or are of such a nature, and made in such circumstances as to lead to an inference in support of the evidence of the prosecutrix—that it (or they) can be regarded as corroborative evidence; the nature of the lie and the nature

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of the rest of the evidence, which shows the circumstances under which the lie was told, will have to be examined together to determine whether the lie in those circumstances, would render the story of the prosecutrix more probable. This the trial judge did not adequately explain to the jury.

In the below quoted passage there was a tendency to lay too much emphasis on the fact of a lie told, without sufficient regard for the circumstances, which would justify such an inference capable of providing corroboration. The trial judge said:

"If the accused lies to the police or tells falsehoods in his evidence in court, those lies or falsehoods cannot themselves amount to corroboration, but they may do so in certain circumstances, as when the accused had the opportunity of committing the crime and denies that this was the case. For example, if a young girl swears that the accused committed an offence against her in this house, the fact that the accused stated that he was not in the house at this time can be treated as corroborative evidence against him. In other words, that evidence in that situation would be capable in law of amounting to corroboration."

It is difficult to see how a mere lie to the police that he (the accused) was not in the house at the relevant time, when the defence at the trial was consent, can be treated as corroborative evidence. If there were in the case circumstances to give a different complexion to the opportunity (bearing in mind the defence of consent) it would be otherwise. The example given in the directions does not do justice to a full appreciation of the principle. In *White v. R.* [1956] 5 D. L. R. at p. 328, the argument was principally directed to the question whether two false statements made by the accused at the trial were in the circumstances of the case evidence in law which could be corroborative. These two statements were (1) that the accused had no opportunity to commit the offence because the complainant's brother slept with him, and (2) that for several years he had been impotent and therefore physically incapable of committing the offence. Three judges affirmed the conviction whilst two dissented.

CARTWRIGHT, J., (dissenting) discusses the matter in this way:

"Evidence in corroboration must at least be independent evidence from which it results as a matter of inference that it is more probable that the offence charged was committed by the accused than not. It is obvious from reading the record that the accused was a man of little education and limited understanding who protested his innocence and asserted that a false charge had been concocted against him. His false statement at the trial could justify the learned judge in refusing to believe his testimony but they do not, in my view, afford corroboration. They do not, I think, give a different complexion to the opportunity which was afforded by the fact of the appellant's residence in the same house as Pearl Miller. They are consistent with the panic of a man of limited mental powers faced with so serious a charge and do not in themselves warrant

an affirmative inference of his guilt. In their nature the false statements do not appear to me to differ from those in the case, put by my brother Nolan during the argument, of an accused who sets up an alibi which is proved to be false, a course which would seem to me to impeach the accused's veracity but not to strengthen the case of the prosecution."

But ABBOTT, J., (in the majority judgment) said at p. 334:

"Whether a false statement is or is not corroboration must, of course, depend upon all the circumstances in a particular case. In the present case both lack of opportunity and physical incapacity to commit the offence were material facts, either of which, if true, afforded a complete defence to the charge laid. In my opinion the nature of the false statements made by the accused and the circumstances in which they were made were such as could lead to an inference in support of the evidence of the child".

The argument of CARTWRIGHT, J., above set out illustrates the necessity for a careful direction.

If a false statement is made by the accused, which does no more than impeach his veracity, but does not strengthen the evidence of the prosecutrix, there could be no corroboration.

A jury would require some guidance to determine whether the false statement merely affects veracity or goes further and aids in the belief of the testimony of the prosecutrix by rendering it more probable that the offence was committed by the accused than not

To look at the false statement alone in isolation will hardly do justice in deciding whether it was made out of a sense of guilt or for some other reason. Its true potential for acquiring corroborative force is to be determined not only from its inherent significance but from the momentum which it is able to gather from the circumstances of the case. A false alibi by itself, whilst affecting the credit of its producer, does not dispense with the burden of proof cast on the prosecution, still less can it add that additional weight where corroboration is to be desired in proof of the prosecution's case. When, however, related to certain circumstances it may assume a deeper significance and lend the confirmation which is being sought. As ABBOTT, J., pointed out (in *White v. R.*):

"Both lack of opportunity and physical incapacity were material facts". The appellant (in that case) schemed to meet the accusation by making two false statements which, at least, cumulatively gave a different complexion to the *bare* opportunity for the commission of the act. He falsely alleged that he could not have done 'so' because the complainant's brother slept with him, and he went further and pretended that for several years he had been impotent. The length to which he had taken his falsehood when applied to the circumstances yielded that probability that the story of the prosecutrix was true; but the concern of CARTWRIGHT, J., illustrates the judicial anxiety in such like cases lest 'his' lie, in the circumstances, may not be enough to render 'her' story true.

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In *R. v. Clynes*, 44 Cr. Ap. R. 158, *Credland v. Knowler* was followed and it was held that where an alleged lie told by the prisoner is relied on as amounting to corroboration, which it was, though it does not follow that it must, a careful direction on this matter is necessary.

It must now be considered whether the accused in his statement to the police deliberately told a lie or lies, and whether in the circumstances of the case they were capable of leading to an inference in support of the evidence of the prosecutrix.

The prosecution's case was that the accused went to Seeranie's home about 10—10.30 a.m. on Saturday 27th November. The question then arises whether his statement to the police reveals that he did not go there at that time, and on that day? Except this is manifestly so from the statement, it could not be said that he told a lie to the police, even though his counsel may have erroneously thought so.

In the first sentence of his statement, the accused said that he was not at home on the Saturday, having left his home since the Friday morning. If the offence had taken place at his home then this statement would have been a lie. If the offence had taken place so far removed from where he said he was, that he could not possibly have been there to commit it, then it would also have been a lie.

In his second sentence he speaks in the present tense and disclosed that when he gave his statement on the 1st December he was working with one Sarju to dig a drain; when exactly he commenced to work with Sarju is not made known. In his third sentence he said Sarju himself gave him that work, was there when he was working, and up to then had not paid him yet. Again this leaves completely unanswered the question as to when exactly he so started to work with Sarju digging the drain; there is nothing to show whether he commenced to do so from the 26th November right on the 1st December or whether he commenced subsequent to the 27th November; and most important of all, there is nothing to show expressly or by necessary implication that he intended to say and was in fact saying that at 10—10.30 a.m. on the 27th November, he was at Sarju's place; in any event even if he had succeeded in saying that he was working at Sarju's on the 27th November, he never said that he never left Sarju's place a mile away to go to Martin's Burial Ground.

If a statement made by an accused is to be used as a lie for the purpose of providing corroboration, it must be unambiguous and unequivocal, it must not be vague and uncertain; it must be able to do more than 'suggest' (as the trial judge construed it); it must have sufficient clarity to give it a probative value for the purpose for which it is being used; it must be a demonstrable lie. Otherwise it becomes useless as a corroborative factor, and ought not to be allowed to go to the jury to serve this end. Like facts which are equally consistent with two things (previously referred to) they would become inadmissible for this purpose and the cases above cited would become pertinent.

In *R. v. Hughes*, 33 Cr. Ap. R. 59, the appellant was charged with buggery with W. (known as Bobby), a youth of nineteen, who was mentally deficient and of bad character, and lived in a place known as the Valley. W. was also charged, and after pleading guilty, gave evidence for the prosecution. Evidence was admitted of a *conversation between the* appellant and one T., several months before the offence charged, in which, according to T., the appellant incited T. to commit an act of gross indecency with him, which T. refused to do, and the appellant thereafter said that Bobby had told him that the Valley boys were good ones, but that Bobby was a damned good one. Apart from the evidence of T., W.'s evidence was uncorroborated. HUMPHREY, J., at p. 63, in referring to the directions of the trial judge said:

"The learned judge continued: 'The prosecution asks you, members of the jury, to read from that conversation this. They ask you to say that that conversation showed that the accused, having just invited Norman Thomas to commit an extremely disgusting act with him and having been refused by Norman Thomas, said, immediately afterwards, that according to what Bobby has told him the Valley boys were good ones and that Bobby himself was a damned good one. Putting it into a nutshell, what the prosecution are really asking you to say is that the accused was then saying to Norman Thomas that he knew very well he could have got from Bobby what Norman Thomas had refused to give him on that occasion'.

The court has not found this an easy case to decide. All the members of the court are of the opinion that if the appellant had in the course of that conversation said in plain terms: 'I know Bobby, you know Bobby, the man I mean. I am in the habit of committing indecencies with him', or 'Bobby and I have done this sort of thing together', that statement would have been admissible, because Bobby was the person with whom the appellant was charged with doing something similar, only worse, later on. The difficulty, however, about this matter is that the conversation may mean almost anything."

This case will have some application to both instances of corroboration referred to by the trial judge.

Assuming the statement of the accused was not in plain terms, at the most it could mean 'almost anything.' In my view, in its ordinary and natural meaning it does not amount to what could be said to be a demonstrable lie.

But, even if he did lie, this further aspect has to be considered: he was no stranger to Seeranie's place; he was in the habit of buying fish from Seeranie's mother. He had on prior occasions been seen about the place. At one time there was apparently marriage contemplated between her and him. His defence at the trial implied that he was there and had intercourse with her consent. I fail to see how his lie to the police that (which may have been told by anyone for a number of reasons) he was not there on the particular day and at the particular time, could, in all the circumstances, corroborate Seeranie that he had carnal knowledge

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with her without her consent. The nature of such an untruth in conjunction with the nature of the rest of the evidence, is, in my opinion, incapable of leading to an inference in support of the evidence of the prosecutrix.

On the whole I can find no evidence which ought properly to have been left to the jury as corroborative, in law, of Seeranie's testimony.

In *R. v. Thomas*, 43 Cr. Ap. R., 210, the conviction was quashed where the jury had been invited to regard matters as capable of constituting corroboration which could not properly be so regarded. ASHWORTH, J., at p. 214, said:

"The second main ground relied on by the appellant related to the question of corroboration. The case was clearly one in which the jury should be warned of the danger of acting on the girl's evidence unless it was corroborated in some material particular, and the requisite warning was duly given in general terms early in the summing-up. At that stage the jury's attention was not directed to any specific matter, but at a later stage two matters were mentioned as constituting possible corroboration, namely, the bottle of whisky and the girl's knickers. We do not think it necessary to deal with either of these matters in any detail. It is sufficient to say that in our view the whisky bottle was not capable of constituting corroboration in respect of any of the three charges on which the appellant was tried, and, in regard to the knickers, the girl's own explanation of the way in which she came to take them off negated any indecency on the part of the appellant at that stage of the proceedings. It follows, therefore, that the jury were invited to regard two matters as capable of constituting corroboration which could not properly be so regarded. This court had occasion to consider this type of problem on many occasions in the past and the decided cases show that in such circumstances the conviction will as a rule be quashed, unless the proviso to sub-s. (1) of s. 4 of the Criminal Appeal Act, 1907, is held to be applicable."

*R. v. Anslow* (Court of Criminal Appeal: ASHWORTH DAVIES and VEALE, I.J.,) is referred to in *Criminal Law Review* of February 1962 at p. 101 as follows:

"A. was convicted at Quarter Sessions of two offences of receiving stolen property. At the trial the thief, one J., gave evidence for the prosecution. So far as the first offence was concerned, J's evidence was the only evidence against A. So far as the second offence was concerned, there was, in addition to J's evidence from the police who had seen J. take the stolen property to A's premises. However, from first to last A. maintained his complete innocence, denied any guilty knowledge, and that the property had been delivered to his premises by means of any antecedent arrangement. There was no corroboration of J's evidence. The trial judge directed the jury that it was dangerous to act on the evidence of an accomplice alone, but he did not tell the jury that there was in fact no corroboration. On appeal to the Court of Criminal Appeal:

*Held*, allowing the appeal, that this was a case which called for a most careful direction on the issue of corroboration. Counsel for the prosecution had conceded in this court that there was in fact no corroboration as regards either offence. The trial judge had warned the jury in appropriate terms that it would be dangerous to act on the evidence of the accomplice alone. However, he had used words implying that there was in this case some material which could properly be regarded as corroboration. This direction was unhappily misleading. In the judgment of this court, in a case where corroboration was called for, a judge who directed the jury properly by warning them of the need for corroboration should go further and tell them in terms, if that be the case, that there was no corroboration in the facts of the case before them. Failure to do that would lead a jury to suppose that in giving heed to the warning there was material upon which they could rely. In the circumstances, the conviction could not be sustained".

In this case the jury was not fully told what was meant by corroboration; two matters were left to them as corroboration which should not have been; they ought to have been told that there was no corroboration in law to be derived from the evidence.

This is not a fit case for invoking the aid of the proviso to s. 16 (1) of the Federal Supreme Court Ordinance, No. 19 of 1958, as adapted by the Guyana Independence (Adaptation and Modification of Laws) Judicature Order, No. 37 of 1966. It would be unsafe to do so.

The appeal is therefore allowed and the conviction and sentence is set aside.

PERSAUD, J. A. (ag.): I do not propose to embark on an examination of the evidence, as this has been fully dealt with by my Lord Luckhoo.

The appellant complains that the judge did not adequately direct the jury as to what in law is corroboration, and that he directed their minds to two portions of evidence which do not in themselves amount to corroboration. I will deal with the first aspect of this submission first, as I find myself in disagreement with the reasons of my Lord LUCKHOO on this matter.

In dealing with corroboration, the learned judge said—

"Now what is corroboration? Corroboration must be evidence which implicates the accused, that is to say, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it."

The law requires that corroborative evidence—whether oral or circumstantial—must come from an independent source, *i. e.*, independent of the prosecutrix, and it is conceded that the judge did not tell the jury this in so many words. There are no set words which a judge is required to use in directing the jury as to the law of corroboration, or indeed of any other matter; he must, however, make it clear to the jury

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what the law is, and perhaps it is not inopportune to say that it would be useful if a judge were to use simple language that a lay jury can understand. In *R. v. Clynes*, 44 Cr. App. R. 151, STREATFIELD, J., said:

"It is in our view, at least necessary, in order to make the warning intelligible, to tell the jury what is meant by corroboration. No particular language is necessary to describe it, but it is at least necessary to explain to the jury that what is required is some independent evidence of some material fact which implicates the accused person and tends to confirm that he is guilty of that offence." After telling the jury what corroboration is, the judge told the jury:

"Well now, you must look for corroboration of the girl's testimony in this case in the evidence of the man Ramdehur...."

He went on to direct them that they must first of all make up their minds whether they would accept this witness's testimony, and if they did, to say whether that evidence in fact corroborated the evidence of the prosecutrix. The judge concluded this part of his summing-up with these words;

"So, members of the jury, you must, as I point out to you, look for corroboration of the girl's story in the evidence of Ramdehur and then make up your minds whether you accept it and whether if it is true, it in fact corroborates the evidence of Seeranie called Doreen."

In my view, the effect of those passages is to restrict the jury's search for corroborative evidence to Ramdehur's evidence which is independent of the prosecutrix's testimony. In my opinion the jury was being told that, (apart from the untruth which it is alleged the appellant told the police) Ramdehur's evidence was the only independent testimony to which they should look for corroboration. It is my judgment that any defect which might have existed in the directions as to the law of corroboration by the omission of the word "independent" has been cured by the manner in which the judge dealt with Ramdehur's evidence.

It must be borne in mind that the defence was one of consent, so that if Ramdehur did see the appellant on the premises that in itself did not negative consent. What was being treated by the judge as possible corroboration of the prosecutrix's story was the evidence of Ramdehur that he heard her call for her brother, and suggested to the jury that the prosecutrix would hardly have called for her brother if she had consented to this act. He left it to the jury to find whether or not Ramdehur's evidence did corroborate Seeranie's evidence. In the argument before us, it was urged that the prosecutrix might have called for her brother to ascertain where he was, so that she and the appellant could have sexual intercourse without interference. I do not dispute the force of this contention, but I certainly protest against such an argument being advanced on appeal, when no such suggestion was put to the witness at the trial. All the witness said in this regard was

that she knew her brother had gone to fish, but did not know how far away, and that she knew that he could not have heard her if he had gone to the place to which he was accustomed to go.

In my opinion, the general directions on corroboration were sufficient, and the issue having been left to the jury, I cannot agree with this submission.

When the appellant was accused of this offence, he was cautioned by the police, and he made the following statement:

"Saturday, (27th November, 1965) I wasn't at home. I am working with Sarju to dig a drain at Grass Hook. Sarju himself give me work; he was there when I was working; me nah draw money yet."

The defence treated this statement as untrue, and so did the judge. So that it is idle to speculate, as was sought to be done during the arguments, whether or not the appellant told the police a lie, when his defence was one of consent. In my view, he was setting up an alibi, and if when he comes to lead his defence he pleads consent, it seems to follow that he had told the police a palpable lie. In any event, speaking for myself, I am not prepared to allow an appellant to pursue one line of defence in the court below, and then try to eke out another possible, if tenuous, line on appeal.

Dealing with this aspect of the matter, the trial judge said:

"If you feel that this is so (that is, that the accused lied out of panic) then that lie can never amount to corroboration, but if you feel on the evidence that the accused did tell a lie to the police, and that he did so out of a sense of guilt, it is for you to say whether that lie in fact corroborates the evidence of the prosecutrix."

No doubt, the learned judge was using language similar to that used by STREATFIELD, J., in *R. v. Clynes* (1960), 44 Cr. App. R. 158, at p. 163. In *Credland v. Knowler* (1951), 35 Cr. App. R. 48, at p. 54, Lord GODDARD, L. C. J., said:

"I should be sorry to lay down, and I have no intention of laying down, and I do not think any case has gone to the length of laying down, that the mere fact that an accused person has told a lie can in itself amount to corroboration. It may, but it does not follow that it must. If a man tells a lie when he is spoken to about an alleged offence, the fact that he tells a lie at once throws great doubt upon his evidence, if he afterwards gives evidence, and it may be very good ground for rejecting his evidence, *but the fact that his evidence ought to be rejected does not in itself amount to there being corroboration.*"

In *Jones v. Thomas*, [1934] 1 K. B. 323, it was held that a false statement made by the alleged father before the hearing of the complaint in affiliation proceedings is not necessarily corroboration of the woman's

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evidence in any material particular as required by s. 4 of the Bastardy Laws Amendment Act, 1872 (U.K.). Referring to previous cases on the matter, Lord HEWART, L. C J., said (*ibid* at p. 327):

"But as I read those dicta it is only when the untrue statement are of such a nature, and made in such circumstances, as to lead to an inference in support of the evidence of the mother that they can be regarded as corroborative evidence, and not that the mere fact of the alleged father having knowingly made false statements is in itself corroboration within the statute."

And the remarks of ABBOTT, J., in *White v. R.* (1956), 5 D. L. R. (2nd) 328, seem to be apposite the situation in the instant case. Referring to the appellant, ABBOTT, J., said (*ibid*, at p. 332):

"His false statements at the trial could justify the learned judge in refusing to believe his testimony but they do not, in my view, afford corroboration. They do not, I think, give a different complexion to the opportunity which was afforded by the fact of the appellant's residence in the same house as [the prosecutrix]. They are consistent with the panic of a man of limited mental powers faced with so serious a charge and do not in themselves warrant an affirmative inference of his guilt. In their nature the false statements do not appear to me to differ from those in the case.....of an accused who sets up an alibi which is proved to be false, a course which would seem to me to impeach the accused's veracity but not to strengthen the case for the prosecution."

It would appear, therefore, from the authorities, that the trial judge is required to do more than the trial judge did in this case. He must not merely tell the jury that if they find that the accused lied out of a sense of guilt, then that may be corroboration of the prosecutrix's evidence. He ought to bear the circumstances in mind (and this must include the defence), and must explain to the jury that if they find that an untrue statement is consistent with panic as well as with guilt, then it is not corroboration. In other words, it is not, in my view, sufficient to deal with an untrue statement in isolation, even though the direction in law might be accurate, and strictly in accordance with what is to be found in the books. It will not be inappropriate to refer to the remarks of Lord DEVLIN in *Broadhurst v. R.* [1964] 1 All E. R. 111—a case, it is granted, which did not concern the question whether a lie corroborated the prosecutrix's evidence in relation to a sexual offence. But I feel that the remarks are apt, and I repeat them hereunder. Lord DEVLIN said (*ibid* at p. 119):

"It is very important that a jury should be carefully directed on the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so.....if on the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can

properly take into account as strengthening the inference of guilt. What strength it adds depends, of course, on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness."

In the instant case, I do not feel that the judge went far enough. The jury may very well have felt that the mere fact that the appellant had told the police an untruth was in itself corroboration of the prosecutrix's evidence, without having regard to the other circumstances of the case. For this reason alone, I feel it would be unsafe to allow this conviction to stand, and I would therefore allow this appeal, and quash the conviction.

CUMMINGS, J. A. (ag.): I have had the advantage of reading the judgment of my Lord PERSAUD. I agree with his reasons and the conclusion to which he has arrived. I would allow the appeal, quash the conviction.

*Appeal allowed.*

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[Court of Appeal (Bollers, C. J., Luckhoo and Persaud, JJ.A.) December 22, 23, 1966].

*Criminal law—Evidence—Deposition of absent witnesses—Proof of absence—Immigration records—Admissibility—Evidence Ordinance, Cap. 25, s. 95 (4).*

The appellant was convicted at the assizes of the offence of causing grievous bodily harm. The depositions of two medical witnesses were tendered. A police constable testified that he saw these witnesses leave the colony, and that he had checked the local addresses which they gave to see if they had come back, but he did not say with what results. He also testified that he had checked the records of the Immigration Office and that as a result of this he concluded that the witnesses had not returned. On appeal,

**Held:** (i) the evidence relating to the immigration records was inadmissible as there was nothing to show that the records were available for public inspection and that they were brought into existence for that purpose. The records were not, therefore, public documents within the meaning of the exception to the hearsay rule relating to such documents;

(ii) the depositions were inadmissible and consequently there was no evidence of the infliction of grievous bodily harm;

(iii) a conviction of common assault would, however, be substituted.

*Appeal allowed.*

*J. C. Gonsalves-Sabola*, Senior Crown Counsel, for the Crown.

*D. A. Robinson* for the appellant.

LUCKHOO, J. A., delivered the judgment of the court: On the 3rd February, 1965, the appellant was a prisoner at the Georgetown

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Gaol serving a sentence when at about noon the Chief Prison Officer, Hubert Humphrey, had cause to order his search, which was resisted. There was a struggle, but he was held. In his inner shirt pocket money to the amount of \$1.25 was found; and in an inner pocket of his shorts four packets of cigarettes were discovered; after which the appellant said, "You make the officers take away me thing I gwine stab you skunt". He was then taken to the punishment cells.

About 3.30 p.m. that day at the dispensary of the prison, the appellant again used threatening language to Humphrey, left him and went down the steps of the dispensary, broke off the handle from a bath broom and with the handle in his hand was evidently returning to the dispensary when he passed Humphrey coming down the stairs. Humphrey turned back, the appellant suddenly turned around and started to lash at Humphrey, who put up his left arm to protect his head and suffered injuries thereto. Other prison officers ran to his assistance the appellant was subdued and taken away.

The appellant was charged for causing grievous bodily harm with intent, contrary to s. 57 (a) of the Criminal Law (Offences) Ordinance, Cap. 10, and was convicted and sentenced to be imprisoned for a period of two years and to receive a whipping of six strokes; this imprisonment was to commence at the expiration of the sentence of five years imposed on him by PERSAUD, J., on the 20th October, 1965. His appeal to this court against this conviction and sentence was argued on two grounds, *viz.*:

- (a) that the trial judge did not put his defence adequately to the jury;
- (b) that inadmissible evidence consisting of the depositions of Doctors Ronald Persaud and Iris Chin See (who were not present to give evidence at the trial) was wrongly admitted.

We could find no merit in the first ground of appeal. The defence of self-defence was fairly put and left to the jury. On the Crown's case self-defence did not arise at all; but there was an abundance of evidence to show a clear settled intention on the part of the appellant to injure Humphrey.

The second ground of appeal, however, raises an issue of some substance:

The depositions of the doctors (Persaud and Chin See), which provided the only evidence of grievous bodily harm, at the trial, could only have been given and received in evidence if there was due compliance with s. 95 of the Evidence Ordinance, Cap. 25, as amended by the Miscellaneous Enactments (Amendment) Ordinance, No. 29 of 1961. The question which arose was whether the last requirement (underlined) of sub-s. (4) of s. 95 below was fully satisfied by the evidence. It reads as follows:

"(4) It shall be sufficient evidence of absence from British Guiana, within the meaning of this section, to prove that the deponent was on board a vessel or an aircraft on its outward journey from British Guiana bound for some port or place beyond British Guiana, *and that on inquiry being made for the deponent before trial at his last or most usual place of abode or business he could not be found.*"

It must be noted that the above subsection really states what shall be deemed to be sufficient evidence of absence from the country when a deponent has left it, but it does not preclude other modes of proving that fact. (See *Harry Persaud v. R.*, 1952 LR.B.G. at p. 147).

It provides a perfectly simple method of proof of absence from the country, at the material time, to justify the reading of depositions as evidence, which the crown prosecutor followed up to a point; he called the witness Vernon Junor, a police constable, and one of the immigration officers attached to the Immigration Department, Atkinson Field, to prove, in effect, the departure of the absent witnesses who boarded aircrafts on different dates on outward journeys from this country bound for places beyond it; he gave their last addresses in this country.

In respect of the witness Dr. Ronald Persaud he said:

"I checked our records at Immigration Office. Brickdam. He has not returned."

In respect of the witness Dr. Iris Chin See he said:

"She has not returned to the country. I checked the Immigration records, Brickdam, which would have a record of persons leaving and returning."

In each case he drew an inference from immigration records, which were not produced in evidence, and reached the conclusion that the respective persons did not return to the country.

The appellant nearly created disaster for himself when under his cross-examination (he was unrepresented) the witness said:

"I checked the immigration records this morning to see if Dr. Persaud and Dr. Chin See had returned to the country. They have not I checked the addresses which the doctors gave locally to see if they are back in the country illegally. They both gave evidence at the preliminary inquiry into this matter."

He had undoubtedly 'rushed in' where angels would fear 'to tread'. If he had continued one stage further and asked "what happened when you checked their addresses?", the answer in all probability would have been "they could not be found". The subsection then would have been fully satisfied, with no room for argument, and no necessity for decision.

The prosecutor at the trial undoubtedly deserted the simple for the complex, the certain for the uncertain, in seeking to prove that the

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deponents did not return to the country. Instead of leading evidence that the deponents could not be found after enquiries were made at their last or most usual place of abode before trial as is prescribed by the statute, he relied on the inference drawn and the conclusion reached by the witness after looking at immigration records, which were not produced.

Two questions now arise, *viz*:

- (a) whether immigration records in the circumstances of this case could be substituted to prove absence up to the time of trial instead of the method stated by sub-s. 4 of s. 95 of the Evidence Ordinance, Cap. 25;
- (b) whether the witness Junor, without producing the immigration records, could give evidence of the inference he had drawn and the conclusion reached after seeing them.

It is clear that the witness Junor did not himself keep the immigration records. He looked at statements prepared by others and used that information to draw inferences and then swore to the truth of his conclusion, derived therefrom, that the deponents had not returned to the country. Even if the records themselves had been produced in evidence they would have been tendered for the purpose of proving the truth of the fact asserted—that the deponents had not returned—and this would have been equally hearsay as what Junor had said.

In *Robinson v. Markis* (1841), (2 Moody & Robinson), 174 E.R. at p. 322: "Witnesses had been examined on interrogatories before the Master on the usual terms, in support of the cause of action set forth in the second count. On the deposition of one of the witnesses (a sailor) being offered in evidence, the attorney's clerk proved that he had made enquiries for the deponent at his residence; and that a person, whom he believed to be the deponent's wife, said that he was abroad, having sailed in the 'Thetis'; and the witness added that he had made enquiries, and been told the 'Thetis' was now on a voyage. It was objected for the deponent that this was not sufficient proof of the deponent's being absent, and ROSCOE ON EVIDENCE, p. 79, was referred to.

LORD ABINGER, C. B., ruled that the deposition could not be read; that it was indispensable to prove, by proper evidence, to the satisfaction of the judge, that the witness was out of England. Here, there was nothing but hearsay to rely upon. The person who gave the attorney's clerk the information ought to have been produced, or other persons who knew the fact of the deponent's having sailed might have been called.

There was a similar want of evidence as to the absence of the other deponents, and the depositions were accordingly not allowed to be read; and there being no other evidence to support the second count, the defendant obtained a verdict on that, and the plaintiff on the first count."

If therefore sub-s. (4) of s. 95 of Cap. 25 had not specifically authorised the reception of a form of hearsay evidence, it would have been necessary to prove absence from the country at the time of the trial by those who personally had sufficient knowledge of facts from which such an inference could be drawn.

The hearsay rule, however, has never been absolute. Many exceptions had become well established by the nineteenth century. This court must then consider whether, in the circumstances of this case, immigration records could qualify for acceptance within any of the already established exceptions, or be added as a further exception to those already established. The latter aspect will be dealt with first, and there could be no better authority to inspect for guidance than the case of *Sturla v. Freccia* (1880), 5 A.C. 623.

There, Lord HATHERLEY said at the beginning of his speech to the House, at p. 634:

"I have anxiously listened to see whether or not there was any case made by the appellants which could at all be brought within the range of the now very numerous authorities which have settled and determined, with tolerable precision, the rule to be adopted with reference to evidence which may come within the class of hearsay evidence, for it really amounts to no more than that. The exceptions which have been made I need not go through or attempt to classify."

And again at p. 638:

"My Lords, I should have been glad to find any case that would have assisted in the investigation of truth, because one is very grieved at all times to be obliged to enter upon the consideration of the admission of evidence with so much caution and so much suspicion. But unfortunately the habits of mankind are not such, at present, as to lead one to desire any extension of the privilege of having evidence given and taken as part of the *res gestae* of that which is sought to be proved, when you do not find any of the ordinary safeguards of evidence, namely, the examination of witnesses in person. There is no such safeguard as that, and no power of cross-examination, and it is only from the difficulty which has arisen in some particular cases from adhering with the utmost rigour to the rules with regard to hearsay evidence that, in the classes of evidence which I have been referring to, and which have been cited before us in argument, exceptions from the rule applying to hearsay evidence have been established. My Lords, I do not think we ought, in a case of this character, to extend the exceptions to cases where we have never yet found them applied, and when it is so easy to foresee extreme hardships, and possibly utter failure of justice, which would arise from such an extension of the exceptions."

Lord BLACKBURN was of a similar view and at p. 640 said:

"It is not disputed that the general rule of English Law is that hearsay evidence is not receivable, one reason probably is the want

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of the safeguards of cross-examination; however, undoubtedly, the law is that, as a general rule, hearsay evidence is not admissible. But to that a great many exceptions have been introduced. I do not say that if we were but beginning to make the law, we should be able to say why so much should be admitted and no more, probably it would be difficult to say that in all cases; but the exceptions have been established and exist, and we have to see whether this case comes within any one of those."

This evident dislike for hearsay evidence springs not only from an absence of an opportunity to cross-examine, but from the fact that the originator of the statement or statements was not on oath when he spoke or made a record; then there is the question of the trustworthiness of the evidence and the possibility of errors arising, depending upon the system under which statements are made or recorded, etc., etc.

More than eighty years after the above opinions were uttered their weight was acknowledged in the same House in *Myers v. Director of Public Prosecutions*, [1964] 2 All E.R. 881. There, Austins, manufacturers of motor cars, made records on cards of the number of the chassis, the engine and the block number which is indelibly stamped on the car when each car is being assembled. The cards were microfilmed and then destroyed. At the trial the learned judge permitted the prosecution to adduce evidence of a witness in charge of the records that were kept of every car built at the manufacturers' works. If these records were admissible they proved that when a particular car left the works it bore certain numbers including one which was indelibly stamped, that is, the cylinder block number which was incapable of alteration, and would go to show beyond doubt that a certain car was stolen car and was not a wrecked car rebuilt.

Lord REID in his judgment at p. 884 said:

"The reason why this evidence is maintained to have been inadmissible is that its cogency depends on hearsay. The witness could only say that a record made by someone else showed that, if the record was correctly made, a car had left the works bearing three particular numbers. He could not prove that the record was correct or that the numbers which it contained were in fact the numbers on the car when it was made. This is a highly technical point, but the law regarding hearsay is technical, and I would say absurdly technical. So I must consider whether in the existing state of the law that objection to the admissibility of this evidence must prevail."

And at p. 885:

"I have never taken a narrow view of the functions of this House as an appellate tribunal. The common law must be developed to meet changing economic conditions and habits of thought, and I would not be deterred by expressions of opinion in this House in old cases; but there are limits to what we can or should do. If we are to extend the law it must be by the development and application of fundamental

principles. We cannot introduce arbitrary conditions or limitations; that must be left to legislation: and if we do in effect, change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty. If we disregard technicalities in this case and seek to apply principle and common sense, there is a number of other parts of the existing law of hearsay susceptible of similar treatment, and we shall probably have a series of appeals in cases where the existing technical limitations produce an unjust result. If we are to give a wide interpretation to our judicial functions, questions of policy cannot be wholly excluded, and it seems to me to be against public policy to produce uncertainty. The only satisfactory solution is by legislation following on a wide survey of the whole field, and I think that such a survey is overdue. A policy of make do and mend is no longer adequate. The most powerful argument of those who support the strict doctrine of precedent is that, if it is relaxed, judges will be tempted to encroach on the proper field of the legislature, and this case to my mind offers a strong temptation to do that which ought to be resisted."

One must not forget in the present case that the Legislature had already surveyed the field as to how a certain matter should be proved and provided for a way of proof which included the introduction of hearsay evidence at one point. This certainly does not confer a licence on courts to substitute other forms of hearsay evidence, although it may be open to have admissible evidence of a different kind.

In the same case Lord REID with logic and reason found himself unable to countenance the admissibility of this hearsay evidence because evidence of this kind was in practice admitted at the Central Criminal Court; further, he felt that unless the jury were entitled to regard the records as probably true, they could afford no corroboration; the view which the Court of Criminal Appeal took that there was an inherent probability that the records were correct rather than incorrect could not be reconciled with the existing law; nor could the argument of the Solicitor General that the records were likely to be trustworthy, and that justice required their admission, fit in with the whole framework of the existing law.

The result was that the majority judgment of the House rejected the admissibility of the records which had been accepted in evidence, because they were really hearsay.

Lord MORRIS was also at pains to point out a number of instances (which could be multiplied) where statutes had expressly provided for the reception of what in effect amounts to hearsay evidence in proof of certain matters. There are also such like provisions to be found in Ordinances in this country to achieve this purpose—to give but two examples, under s. 43 (1) of the Evidence Ordinance, Cap. 25, a report, under the hand of the Government Analyst in respect of certain specified matters is receivable as *prima facie* evidence at a preliminary

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inquiry or in a magistrate's court or before a coroner. So also under s. 43 (2) of the said Ordinance a report of a medical practitioner is admissible in a magistrate's court in the manner therein prescribed.

It would not be correct then to allow the evidence of immigration records, if hearsay, to be admitted in evidence for the purpose of supplying required proof, except it could be introduced within any established exceptions to the hearsay rule, or unless so provided by legislation.

Lord HERSCHELL, L. C, in *Woodward v. Goulstone*, 11 A. C. 469, has succinctly expressed what has been strenuously maintained over many years and that is:

"To add at will from time to time any new exceptions which appear to be capable of being supported on principles similar to those which have been long established would be introducing a dangerous uncertainty into the law of evidence."

It is too late in the day to depart from this principle.

I will now turn to the question as to whether immigration records qualify for acceptance within any of the already established exceptions. The general rule against hearsay has been gradually and guardedly relaxed in relation to various classes of statements, amongst them being statements in public documents. If immigration records could come within the category of public documents then the matter would rest on a different footing.

The classic authority on this question is the speech of Lord BLACKBURN in *Sturla v. Freccia* (*supra*). At p. 642 he said:

"It is an established rule of law that public documents are admitted for certain purposes. What a public document is, within that sense, is of course the great point which we now have to consider.....I do not think that 'public' there is to be taken in the sense of meaning the whole world. I think an entry in the books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be 'public' within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial or quasi-judicial duty to inquire, as might be said to be the case with the bishop acting under the writs issued by the Crown. That may be said to be quasi-judicial. He is acting for the public when that is done; but I think the very object of it must be that it should be made for the purpose of being kept public so that persons concerned in it may have access to it afterwards.

In many cases, entries in the parish register of births, marriages and deaths, and other entries of that kind, before there were any statutes relating to them were admissible, and they were 'public' then, because the common law of England making it an express duty to keep the register, made it a public document in that sense kept by a public officer for the purpose of a register, and so made it admissible. I think as far as my recollection goes, although I will not pledge myself to its accuracy, and so far as I have ever heard anything cited, it will be found that, in every case in which a public document of that sort has been admitted, it has been made originally with the intent that it should be retained and kept, as a register to be referred to, ever after."

What was here said by Lord BLACKBURN was considered and applied in *Thrasylvoulos Ioannou v. Demetriou* [1952] 1 All. E. R. at p. 179.

Taking the above view of the matter there is nothing to show that immigration records were or are available for public inspection, and that they were brought into existence for that purpose, so that recognition cannot be afforded them.

However, even if any immigration records happen to be admissible for one reason or another, first, the necessary foundation must be laid to justify its admission, then the records themselves must be brought into court, except it could be shown that certified copies thereof are allowable through the application of some enabling provisions of the Evidence Ordinance, Cap. 25, or other statutory provisions, as for example, by invoking the aid of s. 44 (2) which provide:

"Whenever any book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom is admissible in proof of its contents, provided the copy or extract purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted."

or of s. 47 which provides that:

"Any copy of or extract from any writing, document, or record in the custody of any public officer, required by any law or regulation to be written or made and delivered to that officer or to be recorded, is, if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, admissible as proof of the contents of the writing, document, or record, and as *prima facie* evidence of the matter or transaction therein mentioned."

In this case it is not known what immigration records Junor examined, how and by whom they were kept, and no attempt was made to produce the original or a certified copy thereof.

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We find that the necessary foundation was not fully laid for the due reception of the depositions in evidence, and consequently there was no evidence in proof that Humphrey had suffered grievous bodily harm.

The appellant then could not have been properly convicted on the indictment as laid.

If Junor had had personal knowledge of all those persons who had returned to the country between the dates of the deponents' departures and the trial then he could have sworn (perhaps after refreshing his memory from records made by him) that the deponents did not return. This would have been a different situation.

In the result we feel the appeal should be allowed. In our opinion, however, there is sufficient evidence upon which a conviction of common assault, contrary to s. 43 of the Criminal Law (Offences) Ordinance, Cap. 10, can be maintained. We propose, therefore, to substitute a conviction for that offence, and to impose a sentence of one year's imprisonment to commence at the expiration of the sentence of 5 years imposed on the appellant on the 20th day of October, 1965.

*Appeal allowed.*

R. v. MAGISTRATE, BERBICE JUDICIAL DISTRICT,  
*Ex parte* ROBERTSON

[Supreme Court (Crane, J.) June 9, July 3, 6, September 25, 1965, February 21, 1966].

*Mandamus—Order nisi made in chambers—Jurisdiction of judge in chambers—0. 41, r. 15.*

*Mandamus—Refusal of magistrate to issue summons in criminal matter—Whether he may be directed to issue summons or only to hear application therefor.*

*Magistrate—Extraneous considerations—Duty to avoid—Mandamus would issue.*

The applicant obtained *ex parte* an order *nisi* from a judge in chambers (not sitting in vacation) calling upon a magistrate to show cause why a writ of mandamus should not go commanding him to issue summonses against certain persons to answer a criminal charge, the ground of the application being that the magistrate had refused to issue the summonses because of extraneous considerations. Without leave of court the applicant filed certain supplementary affidavits relating to matters which could have been deposed to when the application was filed. On a motion to make the order absolute,

**Held:** (i) the order *nisi* could have been granted either in open court or in chambers;

(ii) the affidavits which were filed without leave would be expunged from the record;

(iii) the magistrate could be compelled by mandamus to issue the summonses and not merely to hear and determine the application for the summonses according to law:

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(iv) on the evidence the magistrate had not acted on extraneous considerations. If he had his discretion would not have been properly exercised and mandamus would have gone.

*Order nisi discharged.*

*H. O. W. Patterson* for the applicant.

*M. Shahabuddeen*, Solicitor-General, for the respondents.

CRANE, J.: This motion is for an order absolute. The order *nisi* of the 8th July, 1965, on Prem Persaud, Esq., magistrate of the Berbice Judicial District, called upon him to show cause why a writ of mandamus should not go commanding the issue of summonses against Assistant Commissioner of Police Mr. Carl Austin and two other officers to answer a charge for the crime of conspiracy to pervert the course of justice.

The application was in the first place supported solely by the affidavit of the applicant Thomas Ebenezer Robertson and his information on oath annexed thereto. In that affidavit he acknowledged himself to be the informant in the information to which he swore before Magistrate Persaud praying summonses against Police Commissioner Austin and the two officers aforesaid. He further deposed that he gave formal evidence on oath before the said magistrate, that he was witness to certain illegal acts committed by jurors, defence counsel and accused persons in a certain criminal trial, which had to be stopped on that account by the trial judge, and that the statements he gave were true and correct; but notwithstanding this, Police Commissioner Austin and the two officers mentioned failed to institute legal proceedings against the jurors, defence counsel and the accused persons, but charged him, the applicant, and four other persons, who gave similar statements, instead with the offence of obstructing the course of justice and that this charge was withdrawn by the Director of Public Prosecutions.

The applicant also deposed to having been asked by Carl Austin and the two other officers to change the statement he gave alleging that after the magistrate listened to his evidence on oath he refused to issue the summonses asked for on the ground that he considered the Director of Public Prosecutions erred by intervening and withdrawing the charge against him and his four co-defendants. He complained that since the police were willing to proceed with the charges against him and the others, the magistrate's view that the Director of Public Prosecutions intervened and wrongly withdrew them was an extraneous circumstance which affected his mind and as a consequence led him to refuse to issue the summonses asked for—the inference being, no doubt, that if in the magistrate's mind there was a case against him, Robertson and others, there could be no case against Austin and the two officers.

The matter came on before KHAN, J., in open court on June 5, 1965, on which day, on the application of counsel for the applicant, leave having been granted to file a supplementary affidavit, the matter was adjourned for a fortnight to June 19.

On June 19 there appeared on file two further affidavits of even date. One was the supplementary affidavit ordered, but the other was unsolicited and purported to have been deposed to by one Joseph London on matters concerning the behaviour of certain police officers and jurors (in the abortive trial) at a liquor restaurant in Pitt Street, New Amsterdam, and on matters not altogether referred to in the original affidavit of Robertson in support of the motion. The supplementary affidavit of Robertson which had been ordered on June 5, added nothing new; in the point of fact, it was in the main a mere repetition of his original affidavit, and when this was pointed out to him he made another application to be allowed to file a further supplementary affidavit supplying particulars of, on this occasion, the *extraneous circumstances* which he alleged influenced the mind of the magistrate in refusing to issue the summonses. This further supplementary affidavit having been allowed and filed, though wrongly as I will show, was out of accord with the rule of practice and procedure which governs these matters. An order *nisi* accordingly issued on the magistrate for him to show cause why he should not issue summonses against Mr. Austin and the two officers referred to, at the same time putting the latter on notice.

The first point taken by the Solicitor-General for the respondents is that the order *nisi* is bad in that it was made *coram non iudice*, that is to say, in chambers when it ought to have been made in open court where, by O. 1, r. (4) (b), every motion must be made. But while it is true that a motion must be made in open court, there is no rule prohibiting a judge adjourning it from court into chambers and back again if he thinks fit to do so. This he is authorised to do by O. 41, r. 15, which reads: "*Any application* may if the Judge thinks fit, be adjourned from Chambers into Court *or* from Court into Chambers." But the Solicitor-General contends that our Rules of Court do not apply to this situation, the practice relating to which being as stated in CROWN PRACTICE by SHORT & MELLOR, 2nd Edn., p. 218. While this is so, it will be observed that our rules are not really in conflict with that practice for in each case a motion must be made in court. I am of the opinion, however, that our local rule of court can be applied in this case; as a matter of fact, rr. 2 and 3 of O. 40 both allude to applications of this kind. In my opinion "any application" means any application whatsoever; it also includes any motion, and not one restricted to Order 41, originating at chambers (see O. 40, r. 1). In so believing I am not unmindful of the principle that the title of Order 41 concerns "Applications and Proceedings at Chambers—Summonses," or of the principle that the title of a rule or an enactment is often called in aid to its construction, but it is well known that the title of an Act or rule of court cannot be made use of to control the express provisions of the enactment. It is only when provisions admit of doubt is it a matter to be considered in interpretation so as to give the doubtful language a meaning consistent rather than at variance with the clear title of the rule of enactment; in my view the title cannot override the clear meaning of a rule of court in this matter. The disjunctive *or* in r. 15 above strengthens my belief in the view I express, that is to say, it shows that in which-

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ever place—chambers or court, court or chambers—the application is *originally* made, it may be adjourned from either of the two places to the other.

I must distinguish the case of *Brett v. Brett* (1826), 3 Add. 210 at, p. 218, in which it fell to be decided, exactly like the point in hand, whether the words "*any will or codicil*" embraced all wills and codicils or was restricted to those of real estate. The Master of the Rolls held that the latter interpretation was the right one calling in as an aid to construction the following title to the Act: "*An Act for putting an end to certain doubts relating to the attestation of wills and codicils of real estates*".

But in *Brett v. Brett* there was a probable doubt between the title to the Act and the enacted words; whereas in O. 41, r. 15, the words "from Court into Chambers" can admit of no doubt at all as to what they mean.

The record shows this motion was first entertained in open court, and properly so. There was, therefore, nothing amiss in adjourning it into chambers and making an order *nisi* from there on an adjourned occasion, particularly as it was only an *ex parte* order.

The second point is that at the *ex parte* hearing all affidavits subsequent to Robertson's original in support of the motion ought not to have been sanctioned by the judge. Here the Solicitor-General again referred to SHORT & MELLOR'S CROWN PRACTICE, p. 222, stressing that no affidavit should have been allowed except by order of court or a judge, and that the court should not have exercised its power to allow a party to amend an unsatisfactory or insufficiently worded affidavit. A formal defect in an affidavit he contended, may be allowed, but not one which is inadequate; this goes to the objection that all affidavits subsequent to the first are out of order.

There is no doubt that the learned Solicitor-General is right, and that the normal practice of the court has not been followed in these proceedings by the grant of permission to file supplementary affidavits to that in support of the motion. I will own I was one of the judges who granted leave to file the second of the two supplementary affidavits and like PATTESON, J. (see below) I was wrong in so doing. The policy of the law is that there should be an end to infinite variations in affidavits, and to the perpetuation of elaborations in them subsequent to the first, particularly in an application for a writ of mandamus which is an "extraordinary remedy." In a matter very much akin to the present, DAY, J., said:

"It is no doubt extremely convenient that no second application for a high prerogative writ should be allowed after a first application has been refused. Such a writ is an extraordinary remedy, and persons seeking it may very reasonably be required not to apply for it unless they have sufficient cause for doing so. They

must come prepared with full and sufficient materials to support their application, and if those materials are incomplete, I think, it is quite right that they should not be allowed to come again".

(See *R. v. Mayor & Justices of Bodmin*, (1892) 2 Q.B. 21, at p. 23).

Again in *R. v. Great Western Railway Co.* (1844), 5 Q.B. 597, which was also a motion for an order absolute for the issue of a writ of mandamus, the general rule of practice was stated to be that a party failing in motion by reason of a defect in his affidavit shall not repeat his application on an amended affidavit showing a ground of application which might have been presented before. The only exceptions which the court will generally admit are where the amendments consist merely in correcting an error in the title or jurat. PATTESON, J., at p. 600 stated: I think that motions on amended affidavits should be allowed only where the alteration is in the title or jurat. I believe I was wrong on this point in *Sherry v. Okes* (1835), 3 Dowl, 349, though no injustice was ultimately done by the decision."

Admittedly, in the above cases their Lordships were speaking about the case of the second application for a writ of mandamus, the affidavit for which embodied fresh materials after the first had been discharged, whereas in this case there was no second application, but a second and third affidavit seeking to supplement the original in support of an *ex parte* motion for an order *nisi*. It is submitted, however, the principle is the same, for without the supplementary affidavit the original would have been obviously deficient and the application could not have been allowed. An amended affidavit according to the rule above in a subsequent application would have been rejected, *a fortiori*, there is no reason why on a request for a supplementary affidavit in the same application the rule should be any different.

What is said above must not be, however, understood as imposing in any way a fetter on the court or a judge's discretion to order supplementary affidavits on *ex parte* applications in general, if he thinks fit to order them; but what I have said is restricted by a rule of practice to the issue of high prerogative writs like mandamus, certiorari and prohibition as the quotations from DAY, J., above show. But even though it is an "extraordinary remedy," as the learned judge said, after leave has been granted to apply for an order of mandamus the court or judge may still allow further affidavits or an amended statement to be used if they deal with new matter arising out of affidavits of any other party to the application. See II Halsbury's Laws, 3rd Edn., pp. 74—75, para. 137. In this regard O. 38, r. 19, of the English Rules of the Supreme Court says:

"Except by leave of the Court or a Judge no order made *ex parte* in Court founded on any affidavit shall be of any force unless the affidavit on which the application was made was actually made before the order was applied for, and produced or filed at the time of making the motion."

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The purport of the above rule is clear; it is to prohibit the filing of affidavits subsequent to that in support of an *ex parte* motion, unless the court grants leave to do so. In our local Rules of Court we have no like provision, but the English rule being a matter of practice and procedure is by virtue of O. 1, r. 3, of our rules applicable here. Moreover, it is applicable to Crown Office proceedings also SHORT & MELLOR, p. 470.

The instant case is well illustrative of the awkward situation inattention to established rules of practice can bring about. I will accordingly pay no heed to the affidavits of the deponents Joseph London and Oscar Ramjeet, which are both on file; and, uninvited as they are they will be expunged from the record.

We are left therefore, only with Robertson's three affidavits for consideration, and on the other side, that of his Worship Prem Persaud, Esq., Magistrate, to which is exhibited the copy of the proceeding before him.

The third point raised against the order *nisi* being made absolute is that it is impossible to grant the prayer in the affidavit in support of the motion, there being no power in this court to compel a magistrate by mandamus "to issue a summons." All the authorities, it is contended, are to the effect that the order sought should have been one directing the magistrate "to hear and determine the summons according to law" and, mandamus being a discretionary remedy, it is wrong to let the order go commanding the doing of something in a particular way.

In *R. v. Gloucester Bishop* (1831), 2 B. & Ad. 158, at p. 163, PARKE, J., said "there is no mode of forcing a person, who has a discretionary power, to exercise his discretion in a particular manner." But while this is true in principle, courts may indirectly exercise control of the person by indicating the particular manner in which he ought to exercise his discretion when it holds inadmissible the considerations on which he has based his decision. The courts will, however, insist that he exercises a discretion according to law, and on his failure to do so will direct mandamus to issue. But it is evident that counsel has missed the case of *R. v. Nuneaton, JJ. ex parte Parker*, [1954] 3 All E. R. 251, which is clearly in favour of the issue of the order of mandamus to compel the performance of a duty in a particular way. In that case on an application by an inspector of the Warwickshire Constabulary to the Nuneaton justices for the issue of a summons against a respondent for careless driving under the Road Traffic Act 1930. s. 12, the chairman of the justices informed the applicant that he would not issue a summons for careless driving and that an information for dangerous driving under s. 11 would have to be laid. On a motion for mandamus it was held that the discretion as to what charge should be preferred in a particular case must be left to the prosecutor, and consequently, an order of mandamus must go and that the justices must issue the summons for which the police ask. Without saying more the above case is an answer to the argument of the Solicitor-General that justices cannot be commanded to do a particular act in a particular way.

The affidavit of magistrate Prem Persaud sworn to on July 26, 1965, to which is exhibited a certified true copy of the proceedings before him pursuant to Robertson's application for the issue of the summonses, states *inter alia*, that no evidence had been led before him on May 26, that Commissioner Austin and the two other officers had requested him to change their statements. An examination of the record of proceedings against the magistrate's affidavit will show that he never indeed had the facts of the subsequent allegations before him, and that he denied refusing to issue him summonses on the ground that he considered the Director of Public Prosecutions erred when the latter intervened and withdrew the charge against Robertson, but insisted he had refused the application on the ground that on the evidence led no case had been made out for the issue of the summonses.

I have already averted to the impropriety of the admission of affidavits subsequent to originals in *ex parte* applications for high prerogative writs, and when I compare the record of proceedings before the magistrate dated May 26, with the averments in the applicant's affidavit of May 31, the explanation of the magistrate becomes all the more plausible. It is abundantly clear that the record amply supports the reason why the summonses were not issued, namely, that the magistrate was not satisfied that a case had been made out. It is shown he had considered the matter and exercised a judicial discretion against issuing those summonses.

But if indeed the learned magistrate made the remark that the Director of Public Prosecutions was in error, which is attributed to him in para. 4 of the applicant's original affidavit, then that was very injudicious of him particularly as that officer is empowered by Art. 45(1) (c) of the Constitution of British Guiana to do exactly as he did. It would certainly have been an extraneous circumstance if he said so, and in keeping with the directions given by President DUFFUS in *Campbell v. Guelph* (1963), 5 W.I.R. 366, at p. 368, counsel for the applicant ought to have immediately objected and respectfully asked that his objection to the remark be noted. It was in fact his duty to his client to do so; but there is no record that he did so, nor any statement in any affidavit from him nor anyone else to that effect.

As I have said, that remark, if made, would indeed have been an extraneous consideration which might have well vitiated the application; for, as Lord ESHER said "if people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eve of the law they have not exercised their discretion." See *R. v. St. Pancras Vestry* (1890), 24 Q.B.D. 371, at p. 375; but the learned magistrate in para. 5 of his affidavit has expressly stated that he did not refuse to issue the summons on that ground, and more specifically in para. 8 stated that the statements in paras. 3, 4 and 5 of the affidavit of July 1, 1965, were wholly false.

There is also a conflict of evidence in Robertson's original affidavit and its supplement of July 1, 1965, relative to the precise time when the alleged injudicious remark was made. In his original affidavit (para.

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4), the remark is stated to have been made after Robertson gave evidence on oath before the magistrate; while in the supplementary, (para. 3), it is stated to have been made before he gave evidence supporting his application. There is, however, little doubt that the latter allegation is tantamount to an accusation of bias and unfair dealing by the magistrate on the part of the Director of Public Prosecutions for having withdrawn the charge against Robertson and his four co-defendants. I may add, there is no such accusation in the original affidavit or earlier in the proceedings before the learned magistrate for the issue of the summonses, and I must prefer the version of the magistrate to the applicant's in this respect.

Before concluding, it may be well to remark that there can be no restriction placed on a magistrate's discretion to make comments on any aspect of a case of which he is seised. Such licence is an essential part of the judicial function, but comments must at all times be legitimate, relevant and fair. Above all, a magistrate should guard against the tendency, if such exists, of expressing too hasty or early a view in a case before him, and thus giving the impression that he is prejudging the issue or is biased, because nothing can be more destructive of public confidence in him than the creation of such an impression. He should at all times cultivate the judicial spirit; otherwise there may be good ground for recalling his decision and referring the case for re-hearing before another magistrate.

I have already signified my acceptance of the word of the learned magistrate in para. 8 of his affidavit in reply that the remarks attributed to him by the applicant are entirely false. I believe the magistrate's version is amply borne out by the absence of any reference to the alleged extraneous circumstances on the record of proceedings before him on May 26, and by the contradictions in Robertson's affidavits as to whether those words were spoken before or after evidence was taken which creates a doubt as to whether they were ever spoken at all by the magistrate.

The order nisi is accordingly discharged with costs.

*Order nisi discharged.*

## JAN M. BIJL N. V. v. SALIK RAM

[Court of Appeal (Stoby, C. J., Luckhoo, J. A., and Cummings, J. A. (ag.)), October 31, 1966].

*Evidence—Power of attorney—Executed in Holland before notary public—No affidavit by subscribing witness—Whether proof of due execution—Evidence Ordinance, Cap. 25, ss. 27, 28 and 29.*

The appellants, a company incorporated in Holland, instituted an action suing by their local attorneys. The power of attorney, which was recorded in the Deeds Registry, had been executed in Holland before a notary public and in the presence of two witnesses. A certificate had been issued by the British Consulate General in Rotterdam verifying the lawful standing of the notary public. Section 29 of the Evidence Ordinance, Cap. 25 provides that "where any....power or letter of attorney.....purports to be made and executed....in any place out of Her Majesty's dominions in the presence of a witness or witnesses, before or with one or more notaries public,....the power or letter of attorney.....purporting to be certified and legalised....under the hand and seal of any.....Consul General.....appointed by Her Majesty for that place, may be recorded in the Deeds Registry and shall without any proof be as valid and effectual as any original.....power or letter of attorney....coming from any part of Her Majesty's dominions, and proved and attested in the manner hereinbefore prescribed;....." Persaud, J., held that the power of attorney was defective since there was no affidavit or declaration of a subscribing witness as required by s. 28 of Cap. 25. On appeal

**Held:** (i) under ss. 27 and 28 of Cap. 25, it is the subsequent act of the subscribing witness in issuing an affidavit or making a declaration of due execution which gives the document its evidential acceptability. Under s. 29 it is the way of making and the prior act of a particular mode of execution which impart to the document its evidential efficacy and this renders unnecessary any subsequent act of a subscribing witness;

(ii) proof of the due execution of a document, which would otherwise have been required under s. 28, is dispensed with under s. 29 because of the fact of its execution before a witness and a notary public with a consular's certificate of the notary's legal status.

*Appeal dismissed.*

LUCKHOO, J. A.: The appellants, a company incorporated in Holland sued the respondent for a sum of money alleged to be due for goods sold and delivered at Georgetown, Demerara, by their duly constituted attorney Joseph Edward de Freitas, under Power of attorney dated 29th December, 1964, recorded in the Deeds Registry of British Guiana on the 16th January, 1965, (Book of Records No. 105, vol. 1, at folio 12). The respondent denied indebtedness in the sum claimed, or in any sum, and raised the question *in limine* at the trial, that there was not a valid power of attorney in existence under which Joseph Edward de Freitas could have properly instituted proceedings on behalf of the appellants, because there was an absence of proof of due execution, required by law, before the document could be received in evidence in a civil cause or matter.

Both counsel for the appellants and respondent agreed that the document should be put in evidence by consent, only to permit of arguments being heard as to its validity, for the purpose of determining whether it was in order to enable the action to be brought. This was done; the document was marked as an Exhibit; and after argument, the trial judge upheld the objection raised, and ordered that the writ of summons be struck out, with costs to respondent, to be taxed fit for counsel, and that such costs be paid by Solicitor for the appellants.

The document which was marked as an Exhibit consisted of four parts *viz*, —

(a) the power itself dated 29th December, 1964, which was sealed with the common seal of the Company Jan M. Bijl N. V. and was executed by Jan Marinus Bijl the sole director of the said company, who signed on its behalf, it also bore the signatures of three witnesses, *viz*, Henri Louis Benjamins, a notary public, and Cornelia Alexander and Geradina Dolk; at the back thereof is written "And in my presence; *quod attestor*" "The Notary" with his signature following and his stamp "Mr. H. L. Benjamins Notaris te Rotherdam".

(b) A certificate (attached to (a) issued by the said notary public Henri Louis Benjamins, LL.M., residing in Rotterdam, who certified that he was present together with Cornelia Alexander and Geradina Dolk, and saw the power of attorney, hereunto annexed, sealed with the common seal of Jan M. Bijl N. V., and signed on its behalf by Jan Marinus Bijl, sole director of the said company; that the signature of "J. M. Bijl" affixed to the said power of attorney is of the proper handwriting of the said Jan Marinus Bijl; that the signatures "H. L. Benjamins Notaris", and "Cornelia Alexander" and "by J. M. Dolk" set and subscribed to the said power of attorney as the witnesses attesting the due execution thereof, are of the proper handwriting of himself and the said witnesses.

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(c) A further certificate of the said notary public (annexed to (a) and (b)) certifying, declaring, testifying and deposing, solemnly and sincerely that the several matters and things mentioned and contained in (b) are true in faith and testimony whereof he signed his name and caused his notarial seal to be affixed and the power of attorney to be annexed.

At the back of this particular certificate appears the following endorsement:

"British Consulate General Rotterdam for the legalisation of the seal and signature of Mr. H. L. Benjamins Notary Public at Rotterdam this 29th day of December, 1964. Signed: British Pro-Consul"

This certificate bears the seal of the British Consulate General and is duly stamped.

(d) A certificate from Leon Oswald Rockliffe, sworn clerk and notary public of the Deeds Registry of Guyana (also attached), certifying that the document annexed purporting to be the power of attorney dated 29th December, 1964, by Jan M. Bijl N. V., of Rotterdam, Holland, to and in favour of Joseph Edward de Freitas was left for record at the Deeds Registry on the 16th day of January, 1965, and has been duly recorded in the book of records number 104, vol. 1, folio 12. Then follows the attestation, signature and seal of the said sworn clerk and notary public.

There are two sections in the Evidence Ordinance, Cap. 25, which deal with the execution of documents outside of Her Majesty's dominions; they are ss. 28 and 29; then there is s. 27 for documents executed within Her Majesty's dominions.

Counsel for the defendant (respondent) contended before the trial judge that the document exhibited did not fulfil or satisfy the requirements of s. 28, which was the only section applicable, and could be utilized in proof of due execution of the document; and that if there was not compliance with that section, the document could not gain recognition in a court of law, because there was no other provision under which its proof could be advanced. This argument ruled out the propriety of invoking the aid of s. 29, which counsel for the plaintiffs (appellants) presented as the proper section which permitted the reception of the document in evidence.

The trial judge accepted the argument of counsel for the plaintiffs and thought that the only avenue of proof of due execution of the document was through the medium of s. 28 which required (*inter alia*) an affidavit from a subscribing witness and went on to say:

".....makes provision for the recording in the Deeds Registry of certain documents (or authenticated copies) executed before witnesses and a notary outside of Her Majesty's dominions, provided certain conditions are satisfied, and upon registration, an office

copy of such a document duly certified by the Registrar of Deeds or his deputy, shall, without any proof, be received in evidence in any civil cause or matter. In my view, this section does not dispense with the conditions prescribed to be observed by s. 28; in other words, it is not an alternative method of proving the execution of a private document outside of Her Majesty's dominions."

Section 28 and 29 require careful scrutiny and observation to determine whether there is merit in the submission and justification for the ruling. It will be necessary to set out these sections in full: Section 28 is as follows:

"The due execution of any deed, letter of attorney, or other power or instrument in writing made and executed, or purporting to be made and executed either before or after the commencement of this Ordinance, in any place out of Her Majesty's dominions may, subject to all just exceptions, be proved in any civil cause or matter by the affidavit or declaration of a subscribing witness sworn or made in any of the following ways, that is to say—

- (a) before any ambassador, minister, consul general, consul, vice-consul, or consular officer appointed by Her Majesty at that place, if it is attested or purports to be attested by the signature and seal of that officer; or
- (b) before any notary public, if it is attested by his signature and seal, and if the fact that he is a notary public in the place where the affidavit or declaration is sworn or made is certified, under the hand and seal of the ambassador, minister, consul general, consul, vice-consul, or consular officer."

Section 29 is as follows:

"Where any procuration, power or letter of attorney, contract or agreement, or other instrument in writing, is made and executed or purports to be made and executed, either before or after the commencement of this Ordinance, in any place out of Her Majesty's dominions in the presence of a witness or witnesses, before or with one or more notaries public, the procuration, power or letter of attorney, contract, or agreement, or other instrument in writing, and every notarial grosse, or authentic copy purporting to be a notarial grosse, or authentic copy of the procuration, power or letter of attorney, contract or agreement, or other instrument in writing, certified and legalised or purporting to be certified and legalised either before or after the commencement of this Ordinance, under the hand and seal of any officer of state, judge, or magistrate of that place, or of any ambassador, minister, consul general, consul, vice-consul, or consular officer appointed by Her Majesty for that place, may be recorded in the Deeds Registry, and shall without any proof be as valid and effectual as any original procuration, power or letter of attorney, contract or agreement, or other instrument in writing coming from any part of Her Majesty's dominions, and proved and attested in the manner hereinbefore prescribed; and an office copy of every recorded procuration,

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power or letter of attorney, contract or agreement or other instrument in writing aforesaid, duly certified by the Registrar of Deeds or his deputy, shall, without any proof, be received in evidence in any civil cause or matter."

In my opinion on a true construction of s. 28, the following must be concluded:

1. That section does no more than prescribe certain ways of proving the due execution of documents; it does not expressly decree what should actually be done to effect due execution; however, inferentially it contemplates a subscribing witness who is required to prove the due execution for the purpose of any civil cause or matter by swearing to an affidavit or making a declaration in either of the two ways specified in the section.

2. It does not, nor even intend to stipulate that the proof of due execution therein set out should be the only method of so doing. This is illustrated by the words "may-be proved" and the further words "subject to all just exceptions".

The reservation here made, makes room for the indulgence of any other way of proof at common law, or, by other statutory provisions, and emphasises that there are and may be other ways of gaining the admission in evidence of such a document made in any place out of Her Majesty's dominions.

3. The actual execution of the document need not take place before any of the functionaries mentioned in s. 28 (a) or (b).

Similarly section 27 seeks to achieve the same result for documents executed within Her Majesty's dominions by providing three different ways of proving due execution. But here again no specific manner of execution is laid down; it need not be before any of the functionaries mentioned in s. 27 (a), (b), or (c); but the subscribing witness to provide the proof of execution before the document is accepted in evidence must swear to an affidavit before any of those functionaries there mentioned.

The donor of a power of attorney then could execute his power before a subscribing witness alone, but before the document could qualify for reception in evidence in a civil cause or matter that witness will have to swear to an affidavit or make a declaration, in the way prescribed, in proof of due execution.

Under both ss. 27 and 28, it is the subsequent act of the subscribing witness in swearing to an affidavit or making a declaration which gives the document its evidential acceptability.

This is almost the converse to what is provided by s. 29, where it is the way of making and the prior act of a particular mode of execution which impart to the document its evidential efficacy and render unnecessary any subsequent act of a subscribing witness. The mode of execution there is before a notary public in the presence of a witness

or witnesses; and a consular officer certifies the legality of the seal and signature of the notary public under his hand and seal. The effect of this is that the document so made, certified and legalised is sufficiently proved to be recorded in the Deeds Registry, and would not require any proof from a subscribing witness by way of affidavit or declaration; it will be as valid and effectual as an original procuration or any such document coming from Her Majesty's dominions and proved and attested in the manner which will enable such a document to be received in evidence; and an office copy of every such recorded document duly certified shall without any proof be received in evidence in any civil cause or matter.

The dispensation of proof under s. 29 of the execution of such a document, which would otherwise have been required under s. 28, clearly arises because of the fact of its execution before a witness and a notary public, with a consular certificate of the notary's legal status.

The office of the notary is of great antiquity. Importance from those early days was attached to the office because notaries recorded matters of judicial importance as well as important private transactions or events where an officially authenticated record or a document drawn with the professional skill or knowledge was necessary or advisable, (See 38 HALSBURY'S LAWS, 3rd Edn., para. 121, note (a)).

The notary public is recognised in all civilised countries, and by the law of nations his acts have credit everywhere. (See *Hutcheon v. Mannington* (1802), 6 Vols. 823, at p. 824, *per* Lord ELDON, L. C):

In as much as the requirements of s. 29 were duly fulfilled the certificate or declaration of the notary public under his hand and seal were of high probative value and what was so certified as having been done in his presence must be taken to be beyond dispute and proved.

The case of *Ogueri v. Argosy Co., Ltd.*, 1952 L.R.B.G. 90, was referred to by the trial judge. There the power of attorney was quite rightly rejected. There was no subscribing witness; there was consequently no affidavit or declaration in proof of execution; there was no notarial execution so it would have been useless to look at s. 29; s. 28 was examined, but the facts did not harmonise with its requirements. That case then could be of little assistance to the matter now under consideration.

Reference was also made by counsel for the respondent to the case of *Harvey Aluminium Inc. v. Reynolds Metals Company*, 1953 L.R.B.G. 74, Here again there was no subscribing witness or witnesses and the learned trial judge had this to say at p. 84:

Registry on the 15th January, 1953, was improperly executed and "I propose to consider, firstly, whether the power recorded in the if so what consequences, if any, result therefrom.

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Section 19(3) of the Deeds Registry Ordinance, Chapter 177, enacts that the due execution of every instrument or document filed as of record or recorded in the Registry if executed beyond the limits of the Colony, shall, before it is filed or recorded, be proved in accordance with the provisions of the Evidence Ordinance dealing with the proof of public and private documents. The Evidence Ordinance, Chapter 25, s. 29 requires a power of attorney executed out of Her Majesty's dominions to be proved in any civil cause or matter by the affidavit or declaration of a subscribing witness sworn or made in one of various ways as set out in the section

The Power of Attorney by Harvey Aluminium Inc., in favour of Carlos Gomes and filed in the Registry on the 15th January, 1953, is devoid of any subscribing witness (see Ex. A of E. V. Luckhoo's affidavit). As there was no subscribing witness to the power there could be no affidavit of a Witness made before an Ambassador, consul, notary public or any of the other functionaries, mentioned in s. 29 of the Evidence Ordinance. There was instead, a declaration by a notary public that two executives executing the power had appeared before him and acknowledged executing it and that they were personally known to him. As BOLAND, J., decided in *Eze Anyanwu Ogueri v. The Daily Argosy Company Limited et al.* No. 1102 of 1952, there is nothing to prevent a consul or notary public being a subscribing witness, but if he is, he must make a declaration before a proper functionary that he had witnessed the execution of the deed. To me, it is unchallengeable that the Power in favour of Carlos Gomes was not evidenced in accordance with the Evidence Ordinance".

The Power of Attorney in this case suffered similarly from the fatal disadvantage of not having a subscribing witness required under both ss. 28 and 29 (then ss. 29 (d) and 30); further, the document was not actually executed before the notary public, a prerequisite to the operation of s. 29; the fact that two executives had acknowledged executing the power before the notary public could not give the document the authenticity which would arise from actual execution in his presence. Only then would he have been able to vouch for or verify the act of execution. There were no grounds for considering s. 29, and it was not considered; s. 28 was considered but the proof of execution there required was absent and indeed could not have been supplied so that, in any event, neither section could have been of any avail.

In the instant case, however, everything was done which was required to be done to render the power of attorney, under which suit was brought, valid and authentic.

The document derived its qualification for acceptance and recognition, without the requirement of any formality of proof from a witness, by reason of the probative value inherent in execution notarial in the presence of a witness, with the necessary verification of the lawful standing of the notary. This document was duly recorded in the Deeds Re-

gistry and satisfied the requirement of s. of the Power of Attorney Ordinance, Cap. 33. It proved itself by the way it was made and the mode of its execution.

There was no justification for impeaching its validity, and consequently for striking out the writ. The learned trial judge overlooked two significant aspects of s. 29, viz.

- (a) The effect of a notarially executed power, which after being recorded in the Deeds Registry—

"shall, without any proof, be as valid and effectual as any original procuration, power or letter of attorney..."; and

- (b) that an office copy of such a document duly certified by the Registrar of Deeds or his deputy, *shall "without any proof be received in evidence in any civil cause or matter."*

The appeal is allowed. The case will be remitted for hearing on its merits. The appellants will have their costs in this court and in the court below.

STOBY, C.: I concur.

CUMMINGS, J. A. (Ag.): I concur.

*Appeal allowed*

## FRANK EDWARDS v. O. GEER

[High Court—In Chambers (Van Sertima, J.) November 9, 1966]

*Practice and procedure—Service of third party notice—No formal appearance entered by third party—Application by third party to set aside service of third party notice—Authority to solicitor to third party not filed—Affidavit in support of summons to set aside, sworn to by secretary to third party—No averment in affidavit of authority from third party to swear to it—0.14, r.18—0.10, r.20.*

An application was made on behalf of a third party to strike out the service on it of a third party notice. There was no formal entry of appearance on behalf of the third party and no authority to solicitor on record in respect of it. An affidavit in support of the application was sworn to by the secretary to the third party, but it included no averment that the secretary had sworn to it with the authority of the third party.

**Held:** (i) the third party was not bound to file an entry of appearance before taking steps to set aside the service of the third party notice;

(ii) it was necessary for the third party to file an authority to solicitor;

(iii) the failure of the secretary to the third party to aver that he had authority to swear to the affidavit did not make the proceedings void. Leave would be granted to the third party to file a supplementary affidavit averring that the secretary had authority to swear to the original affidavit.

*Order accordingly.*

*O. M. Valz*, for the third party.

*S. Persaud*, for the respondent/defendant.

VAN SERTIMA, J.: On the 16th of August the defendant in the main action obtained leave in chambers to issue and serve a third party notice on the Guyana National General Insurance Company Limited.

The third party notice was filed on the 22nd of September, 1966.

On the 6th of October, 1966, the third party company purported to file the present summons to set aside the issue and service of the third party notice on them.

This ruling is not on the merits of the summons but on the objections made *in limine* on behalf of the respondent/defendant, hereinafter referred to as the defendant, through counsel, as to the procedure adopted by the third party company.

Three objections were made, namely, that—

- (1) there has been no formal entry of appearance by the third party;
- (2) there has been no authority filed by solicitor for the third party or indorsement of an undertaking by him to file his authority, as required by O. 3, r. 8, of the Rules of the Supreme Court;

- (3) there is nothing to indicate in the affidavit in support of the summons that the secretary of the third party company, who swore to it, had the authority to do so.

Dealing with the first objection I was referred to the provisions of O. 14, r. 18, of the Rules of the Supreme Court which read as follows:

- "18. If a third party, who is served as is mentioned in the preceding rule, desires to dispute the plaintiff's claim in the action as against the defendant on whose behalf the notice has been given, or his own liability to the defendant, he must enter an appearance in Form No. 2 in Appendix E to these Rules within ten days or within such further time as may be directed by the Court or a Judge and specified in the notice:

Provided that a third party failing to appear within such time may apply to the Court or a Judge for leave to appear, and such leave may be given upon such terms, if any, as the Court or Judge shall think fit."

I was referred also to the provisions of s. 5 of the Arbitration Ordinance, Cap. 38, which read as follows:

- "5. If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may, at any time after appearance and before delivering any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

In reply, solicitor for the third party referred me to the provisions of O. 10, r. 20, of the Rules of the Supreme Court which, he contended, were clear in their terms. The provisions of that rule read:

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

- (2) A defendant shall be entitled either before entering appearance or within seven days after entering appearance to take out and serve a summons or serve a notice of motion, to set aside the service upon him of the writ or of notice of the writ or to; discharge the order authorising such service or to strike out the writ, on the ground that —

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- (i) the Court has no jurisdiction to determine all or part of the plaintiff's claim; or
  - (ii) the issue or service of the writ was irregular; or
  - (iii) .....
  - (iv) .....
- (3) After the service of such summons or notice of motion the plaintiff shall not be entitled to obtain judgment in default or take any other step in the action without leave of the Court or a Judge."

It was contended that inasmuch as the provisions of O. 10, r. 20, of the Rules of the Supreme Court were subsequent in point of time to the legislation of the Arbitration Ordinance, Cap. 38, the provisions of the Rules superseded those of s. 5 of the Arbitration Ordinance. With due respect, I cannot agree with this proposition. It is a trite rule of construction of legislation that, in the absence of a special clause in an Ordinance with respect to the provisions of a subsidiary enactment, such as the Rules of the Supreme Court, or a provision of such subsidiary legislation, the provisions of the legislation of Parliament, as representing the will of the people, must of necessity have overriding effect. It is not without significance that there are in fact portions of the Arbitration Ordinance that have savings in favour of the Rules of the Supreme Court, but none with respect to s. 5 of the said Ordinance.

In this matter I am of the opinion that the provisions of s. 5 of the abovementioned Ordinance do not conflict with those of O. 10, r. 20, of the Rules of the Supreme Court. Section 5 is merely declaratory of the rights of the parties as set out in the context of the circumstances of the matter dealt with by that section. Further, I should be prepared to hold that the expression "after appearance" used in s. 5, as distinct to the expression "enter an appearance" as used in the Rules, is sufficiently wide to embrace the cases where there has either been an entry of appearance, which according to the provisions of O. 10, r. 20, does not amount to a submission to the jurisdiction of the court, or where the defendant avails himself of the provisions of para. (2) of that rule and takes steps to set aside the service of a third party notice to him. In effect under our Rules the filing of a summons to set aside has the effect of the provision in the English Rules of entering an appearance conditionally or under protest. So that where, as in the present case, the party takes the privilege acting under the provisions of O. 10, r. 20, he is not deprived of the benefits of s. 5 of the Arbitration Ordinance.

It would be difficult to conceive that the framers of the Rules of the Supreme Court could have intended that a third party should be deprived of the rights given to an original defendant by O. 10, r. 20. To use a simple analogy, it could hardly have been the intention that a third party who had indemnified the defendant in advance of the bringing of the action would have to incur legal expenses of litigation simply because the original defendant was dishonest enough to join him.

I am satisfied that the provisions of O. 14 of the Rules provide adequate reasons why a third party would consider it advisable to enter an appearance or seek to set aside the service of the third party notice. In particular, I refer to the provisions of rr. 19 and 20 of the Order, which it is not necessary to set out here. Be that as it may, I am satisfied that the short answer to the submissions made on this aspect of the matter can be found at para. (4) of r. 17 of O. 14 which reads:

"(4) The third party shall, as from time of service upon him of the notice, be a party to the action with the same rights in respect of his defence against any claim made against him and otherwise as if he had been duly sued in the ordinary way by the defendant."

For the foregoing reasons I overrule the submission that the third party is bound to file an entry of appearance before taking steps to set aside the service of the third party notice.

With respect to the second submission, on the necessity of solicitor to file an authority to appear, I was referred to the provisions of O. 5, r. 3, which read as follows:

"3. In all cases where the proceedings are commenced otherwise than by writ of summons, the preceding rules of this Order shall apply to the document by which such proceedings shall be originated as if it were a writ of summons, and the provisions of Order 3, rule 8 shall apply to such document."

The provisions of O. 3, r. 8, referred to above state as follows:

"8. The plaintiff's solicitor, unless authorised by general power *ad lites* duly registered and recorded in the Deeds Registry, shall, when presenting a writ of summons to the Registrar, produce an authority in writing, signed by the plaintiff or his attorney, appointing the solicitor to act for him in the action; provided that where the Registrar is satisfied that it is not practicable for the solicitor to produce the written authority when presenting the writ of summons the Registrar may accept the writ subject to the solicitor giving a written undertaking to file the authority within such time as the Registrar may think fit. Such authorisation or undertaking shall be indorsed upon the original writ or contained in a separate document filed with such writ."

In reply, solicitor for the third party referred to the provisions of O. 2 which read as follows:

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

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It was contended that these are not fresh proceedings and accordingly, there was no necessity to file an authority to solicitor. This proposition indicates a misunderstanding of the terms of O. 2. The significance of the order lies in the opening words and the fact that it does not purport to say that the only type of proceeding contemplated by the Rules is an action. If that were so, then there would be no necessity for r. 3 of O. 5.

I am satisfied that the filing of the present summons to set aside the third party notice is a proceeding within the contemplation of r. 3 of O. 5 and, accordingly, it is necessary for the solicitor of the third party to file an authority.

Nevertheless, I am prepared to hold the provisions of O. 3, r. 8, are such that the failure to comply with those provisions is an irregularity as contemplated by O. 54 of the Rules of the Supreme Court which can be corrected by leave from me. I, therefore, grant leave to the solicitor of the third party to file his authority out of time.

Finally, I am prepared to deal with the third point very briefly. I do not think that the failure of the secretary of the third party company to aver that he had authority to swear to the affidavit would make the proceedings void. I shall grant leave to the third party to file a supplementary affidavit averring that the secretary had authority to swear to the original affidavit.

Leave is granted to file the abovementioned documents on or before the 19th of November, 1966.

Costs of the matter to date shall be costs in the cause.

*Order accordingly.*

Solicitors: *O. M. Valz* (for the third party); *L. Persaud* (for the respondent/defendant).

## RESSOUVENIR ESTATES LIMITED v. RAMBEHARRY

[Court of Appeal (Luckhoo and Persaud, JJA., and Cummings, J. A. (ag.))  
August 4, 11, 1966].

*Appeal—Magistrate Court—Written notice and grounds of appeal served on respondent before being lodged with clerk of court—Whether appeal competent—Summary Jurisdiction (Appeals) Ordinance Cap. 17, ss. 4(1) (b) and 8(3).*

Section 4(1) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, provides that "an appellant may.....(b) within fourteen days after the pronouncing of the decision, lodge with the clerk a written notice of appeal in form 1, and serve a copy thereof upon the opposite party". Section 8(2) requires the clerk of court to prepare a copy of the proceedings and to notify the appellant in writing when he has done so. Section 8 (3) then provides that "the appellant shall, within fourteen days after receipt of the notice, draw up a notice of the grounds of appeal in form 3, and lodge it with the clerk and serve a copy thereof on the opposite party". The appellant served his notice of appeal and his notice of the grounds of appeal on the respondent as well as

on the clerk within the stipulated period of fourteen days, but both documents were served on the respondent before they were served on the clerk. The Full Court by a majority upheld a preliminary objection that the dark should have been served before the respondent. On further appeal,

**Held:** (i) *per* Luckhoo, J.A., and Cummings, J.A. (ag.), it was immaterial whether service of the notice of appeal and of the notice of the grounds of appeal was effected on the respondent before being effected on the clerk provided that they were both served within the stipulated period of fourteen days;

(ii) *per* Persaud, J.A., dissenting, the notices were required to be served on the clerk before they were served on the respondent and that, this not having been done, the appeal was not competent.

*Appeal Allowed; matter remitted to the Full Court.*

*G. M. Farnum* for the appellants,

*D. C. Jagan* for the respondent.

LUCKHOO, J.A.: The appellants were prevented from prosecuting their appeal in the Full Court from a decision of a magistrate in a claim under the Workmen's Compensation Ordinance consequent upon an objection *in limine* taken by the respondent's counsel that they had not strictly complied with a certain requirement in both ss. 4 (1) (b) and 8 (1) (3) of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, in that they had failed to lodge their notice of appeal and grounds of appeal with the clerk of court before serving a copy of that notice and grounds of appeal on the respondent as the aforesaid actions respectively require.

The facts upon which the said objection was founded are not in dispute.

The magistrate gave his decision on 27th September 1965; notice of appeal was served on the respondent on 2nd October, 1965, and was lodged with the clerk of court on 4th October 1965; the grounds of appeal were served on the respondent on 20th November, 1965, and lodged with the clerk of court on 22nd November, 1965.

Anyone who is dissatisfied with a decision of a magistrate may appeal therefrom to the court in the manner and subject to the conditions provided for in the Ordinance (Cap. 17).

An appellant may under s. 4(1)—

- "(a) At the time of the pronouncing of the decision and before the opposite party has left the court room either personally or by his counsel or solicitor, give verbal notice of his appeal in open court, of which notice the magistrate shall make a minute; or
- (b) Within fourteen days after the pronouncing of the decision, lodge with the Clerk a written Notice of Appeal in form 1, and serve a copy thereof upon the opposite party."

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Then there comes a time when the appellant is notified that a copy of the proceedings is ready and s. 8 (3) provides that —

"The appellant shall, within fourteen days after receipt of the notice, draw up a notice of the grounds of appeal in form 3, and lodge it with the clerk and serve a copy thereof on the opposite party....."

In interpreting s. 4 (1) (b) and s. 8 (3) above set out, the Full Court has treated these sections as requiring an appellant to lodge first his notice (in one case), and grounds of appeal (in the other case), with the clerk of court before serving a copy thereof on the opposite party, and held that service on the opposite party of a copy of the respective documents before those documents were lodged with the clerk of court amounted to a non-compliance with those sections, although done within the specified time of two weeks in each case, and that this was fatal to the prosecution of the appeal and an order was made that the appeal be deemed abandoned.

In my view the language of those sections does not justify this construction, the effect of which is to create a condition precedent that there should be a lodging first with the clerk before service is made on the opposite parties.

When one examines s. 4 (1) (a) it is clear that a notice of appeal, when given verbally to the magistrate at the time of the pronouncing of the decision, must be done in the presence of the opposite party, which means that one communication suffices for both, and is so to speak received by both at the same time.

Was it ever intended to impose on the language in s. 4 (1) (b) an interpretation which would require written notification first to the clerk and then subsequently to the opposite party? Would not words like "first lodge" or "afterwards serve" have been used? In the absence of any such words is it necessary and proper to conclude in that wise? I think not. The words used stipulate in their ordinary and natural meaning that the following things should be done, *viz*:

that a written notice should be lodged with the clerk within fourteen days after the pronouncing of the decision;

that that notice should be in form 1 in the first schedule to the said Ordinance;

that a copy of this notice should be served on the opposite party within fourteen days after the pronouncing of the decision.

A similar interpretation would apply to s. 8 (3). These sections do not require that one document should be lodged or served before the other, but that both should be in particular forms and the one for the opposite party should be a copy of the one served on the clerk and that both should be served within fourteen days.

To hold otherwise could very well curtail the time expressly allowed by the legislature for service as, for example, to serve on an appellant, who is far removed in distance from the clerk, at the last possible moment within two weeks would have to involve a much earlier service on the clerk if he has to have his document before the appellant. And, if s. 38 of the Summary Jurisdiction (Appeals) Ordinance was to be utilised in serving documents by registered post (which is permissible under that section), then, if delivery is first made to the opposite party of a document posted after the document for the clerk, the appellant's appeal will be of no avail; or even if delivery was made at the same time, the appeal could not be pursued, if the interpretations of the majority decision of the Full Court were correct (although verbal notice at the same time would be sufficient).

When the language of an act is clear and explicit, a court must give effect to whatever may be the consequences; but "if there are two different interpretations of the words in an Act, the court will adopt that which is just, reasonable and sensible rather than that which is none of those things." (FINNENMORE, J., in *Holmes v. Bradfield*, [1949] 2 K.B. 7).

I interpret the words "serve a copy thereof upon the opposite party" to mean to serve a copy of the notice (or grounds of appeal) made out for the clerk in the particular form specified.

As long as this notice (or grounds) is served within two weeks and that for the clerk is lodged within two weeks there is compliance with the particular sections. I find nothing from the language in the particular section to render such a construction untenable. On the contrary, it is the only interpretation which would do justice to the purpose and object of the Ordinance.

It has been well laid down that non-compliance with statutory provisions in the bringing of an appeal will have fatal consequences for those who fail to observe specific requirements. However, these requirements must be clear and certain, otherwise an appellant will not know what is expected of him, and it would be unfair to penalise him for failing to carry out an obligation which was not manifest, and which he could not have reasonably apprehended.

In *Craies on Statute Law* (6th edition) at p. 109, there is ample authority for this passage:

"If the meaning of a statute is not plain, it is permissible in certain cases to have recourse to a construction by implication, and to draw inferences or supply obvious omissions. But the general rule is not to import into statutes words which are not to be found there, and there are particular purposes for which express language is absolutely indispensable. Words plainly should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context."

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In my opinion the appellants have fully complied with the requirements of ss. 4 (1) (b) and 8 (3) of Cap. 17 and the right to continue their appeal was wrongly taken away from them in importing a condition precedent in those sections which does not exist.

I would allow the appeal with costs.

The decision of the Full Court of the High Court of the Supreme Court is set aside and it is ordered that the appellants be allowed to continue their appeal against the order of the magistrate.

PERSAUD, J. A.: I regret that I have to dissent from the view held by my learned brothers, and I do so with diffidence, and great respect.

The short point in this appeal is whether an appellant who wishes to appeal from a decision of a magistrate can serve a copy of a notice of appeal and of a notice of his grounds of appeal on the opposite party before he lodges the same with the clerk of court. This problem necessitates an examination of the relevant sections of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17. I will set out the relevant portions of the sections in full. Section 3 provides as follows:

"Unless the contrary is in any case expressly provided by Ordinance, anyone dissatisfied with a decision of a magistrate may appeal therefrom to the court (meaning the Full Court of Appeal) in the manner and subject to the conditions hereinafter mentioned."

There are two methods of appealing; the method with which this appeal is concerned is provided for in s. 4 (1) (b) of the Ordinance. This section provides as follows:

"An appellant may within fourteen days after the pronouncing of the decision, lodge with the clerk a written notice of appeal in form 1, and serve a copy thereof upon the opposite party."

Section 8 (1) and (2) makes provision for the drawing up of the conviction, order and reasons for his decision by the magistrate, and for the preparation of the record of appeal, for the dispatch of a notice to the appellant, and for the delivery thereof to the appellant upon the payment of the proper fees. And sub-s. (3) provides as follows:

"The appellant shall, within fourteen days after receipt of the notice, draw up a notice of the grounds of appeal in form 3, and lodge it with the clerk and serve a copy thereof upon the opposite party....."

In the instant matter, the appellants, wishing to appeal to the Full Court of Appeal from a decision of a magistrate, purported to comply with s. 4 (1) (b) and s. 8 (3) by serving the respondent with the documents mentioned therein before lodging them with the clerk, but both acts were effected within the period of time mentioned therein—14 days in each case.

Upon the appeal coming on for hearing, the respondent submitted that there was a non-compliance with the two sections aforementioned, in that the document ought to have been lodged with the clerk before they were served on the opposite party. This submission found favour with a majority of the Full Court.

In this court counsel for the appellants submitted that it mattered little which act was done first, provided that both were done within the prescribed time, for to hold otherwise would only have the effect of depriving a person of his right of appeal—a right which is vested in him by statute. I do not wish to belittle the force of Mr. Farnum's submission, as any argument which seeks to establish a deprivation of a citizen's right should always be given very careful consideration, as in cases of doubt or ambiguity in the interpretation of a statute the courts would lean against any threat of the loss of a right which a citizen enjoys.

It has long been established that strict compliance with the conditions precedent to an appeal is necessary before an appeal can be entertained (See *Henry v. Foo* (1931—1937) L.R.B.G. 443.) And Boland, J., more particularly puts it this way in *Williams v. Chestney*, 1953 L.R.B.G. 1, at p. 2:

"This court has on more than one occasion decided that unless an appellant complies strictly with the directions contained in ss. 4, 5 and 8 (3) (referring to ss. 4, 5 and 8 (3) of what is now (chapter 17) his appeal will not be heard. The reason advanced for refusing to entertain the appeal in such circumstances is that the court is without jurisdiction."

Section 3 of the Ordinance makes it quite clear that an appeal is to the court, and may be launched in the manner and subject to the conditions set out in the Ordinance. If an appeal is to the court, then the court must first be apprised of the fact that an appellant proposes to appeal, and it derives this information from the notice of appeal which is filed. In my judgment the words "copy thereof" refer not to the notice *simpliciter*, but to the notice which has been lodged with the clerk. My opinion is that the language of the statute leaves no room for doubt. Similarly, s. 8 (3) requires a copy of the notice of the grounds of appeal which has been lodged with the clerk to be served upon the opposite party.

A comparison between the present Ordinance and the Magistrates' Decisions (Appeals) Ordinance, 1893 No. 13, may be of some assistance, and it is my opinion that the relevant section in that Ordinance may more lend itself to the interpretation which Van Sertima, J., sought to put on ss. 4 (1) (b) and 8 (3) of Cap. 17.

Section 5 (2) of the 1893 Ordinance provides that—

"The person who desires to appeal from a decision of a magistrate shall, within fourteen days after the pronouncing of the decision, serve notice in writing of his appeal upon the magistrate and upon the opposite party."

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While s. 6 (1) of the same Ordinance provides that —

"The appellant shall also, within fourteen days after the pronouncing of the decision, serve upon the magistrate and upon the opposite party notice in writing of the reasons of appeal."

It may be not without some interest also to note that s. 7 of the Ordinance of 1893 provides as follows:

"A notice of reasons of appeal may be served either at the time of giving or serving notice of appeal . . ."

In this section giving notice of appeal bears reference to giving notice of appeal in open court under s. 5 (1).

The point I seek to make is that nowhere in the 1893 Ordinance is there provision for lodging a notice of appeal or a notice of grounds of appeal with the clerk as in the case in the sections we are asked to construe. The first time such an expression appeared was in the Magistrates' Decisions (Appeals) Ordinance, 1929 No. 6, which repealed the whole of the 1893 Ordinance.

Now, one of the canons of construction is that a change of language, even though slight, in a statute *in pari materia* with an earlier statute, is some indication of a change of intention on the part of the legislature. In this instance, this is not a change in language to "improve the graces of the style and to avoid using the same word over and over again" [*per* Blackburn, J., in *Hadley v. Perks*, (1866) L.R. 1 Q.B. 457], in which case the meaning would remain the same. Rather the change of language indicates a change of intention, for as Cockburn, C.J., said in *R. v. Price* (1871), L.R. 6 Q.B. 416, "where the legislature, in legislating *in pari materia* and substituting certain provisions for those which existed in an earlier statute, has entirely changed the language of the enactment, it must be taken to have done so with some intention and motive." In my opinion, the intention and motive in altering the language in s. 4 (1) (b) and s. 8 (3) of Cap. 17 is to provide for the lodging of the notice of appeal and the notice of grounds of appeal before serving copies on the opposite party.

Finally, though this is by no means conclusive, the order in which the words 'lodge' and 'serve' appear in the two subsections may be indicative of the order in which the acts are to be done.

I am of the view that the scheme of the Ordinance is such that the computation of time is related to acts with which the clerk of court is concerned. For example, the clerk is not required to do any act, or any further act, in relation to the appeal until he receives the notice of appeal or the notice of the grounds of appeal (See s. 7).

For the above reasons I would dismiss this appeal and affirm the decision of the Full Court with costs to the respondent.

CUMMINGS, J. A.: I have had the advantage of reading the judgment of my Lord Luckhoo in this appeal and I agree with the views he has expressed therein. I only wish to add this: The rules to be applied to the interpretation of the provisions of the Ordinance now under consideration are clearly and accurately set out in *Maxwell on Interpretation of Statutes*, 11th ed., p. 183, as follows:

PRESUMPTION AGAINST INTENDING WHAT IS  
INCONVENIENT OR UNREASONABLE.

"In determining either the general object of the Legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles, should, in all cases of doubtful significance, be presumed to be the true one. An argument drawn from an inconvenience, it has been said, is forcible in law; . . ."

And at p. 193:

PRESUMPTION AGAINST  
INTENDING

INJUSTICE OR ABSURDITY.  
Injustice.

"A sense of the possible injustice of an interpretation ought not to induce judges to do violence to well-settled rules of construction, but it may properly lead to the selection of one rather than the other of two reasonable interpretations. Whenever the language of the legislature admits of two constructions and, if construed in one way, would lead to obvious 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."

The Ordinance provides that an appeal may be effected either

- (a) by notice orally
  - (i) in *coram lege*, and
  - (ii) in the presence of the respondent—  
in which event the notice is given simultaneously; or
- (b) in writing when two acts are necessary:
  - (i) lodging a notice of appeal in the required form with the clerk of the court within 14 days after the pronouncement of the decision; and
  - (ii) service of a copy of the notice of appeal on the respondent within 14 days after the pronouncement of the decision.

## RESSOUVENIR ESTATES v. RAMBEHARRY

What would be the reason for permitting notification to the respondent—for that is all that it is—simultaneously with that to the court in one case, and requiring that the clerk must have prior notification in the other when the objective is the same? I can see no reason whatever. Possible inconvenience and absurdity tending to cause injustice could be the only result. Although, therefore, it is trite law that there must be strict compliance with the provisions for effecting an appeal, the legislature could not have intended to render abortive the important right it sought to create in the appellant because he served the required document on the respondent before he did so on the clerk, even though he did so within the time specified by the Ordinance. If that were the intention the language would have been clear and unambiguous.

The real intention must obviously be that an appeal is effected by the indication to the court and the respondent either orally as soon as the decision is pronounced, or within 14 days thereafter. There must, of course, be strict compliance with that, that is to say, the document must be in the proper form and both the lodging with the clerk and the service on the respondent must be within 14 days. On the other hand, even if the provisions could be interpreted to mean that the written notice should be lodged with the clerk first, non-compliance with this is such an ineffective trifle that this court ought not to permit that to render a right of appeal abortive. The maxim is *de minimis non curat lex*.

I take the view that the notice in the prescribed form having been lodged with the clerk of court and a copy of the notice having been served on the respondent, both acts having been performed within 14 days from the pronouncement of the decision, there has been a sufficiently strict compliance with the provisions of the Ordinance to accord with the well-established principles set out in the cases cited.

The same consideration applies to the service of the grounds of appeal.

I agree that the appeal should be allowed. The judgment and order of the Full Court should be set aside and the matter remitted to that court for the hearing of the appeal on its merits. The appellant should have his costs of this appeal in this court and on this issue in the Full Court.

*Appeal allowed*

## OFFICIAL RECEIVER v. D. A. WHITEHEAD

[Full Court (Crane, Van Sertima and Jhappan, J J.) November 11, 18, December 2, 9, 1966]

*Practice and procedure—Insolvency—Application to recover property from assignee—Prescribed procedure is by motion in open court—Application brought by summons in chambers—Adjourned into open court—Failure to object—Pleadings ordered—Whether procedure valid—Insolvency Ordinance, Cap. 43, s.62—Insolvency Rules, Cap. 43, rr. 5 (e) and 16.*

*Trust—Property bought by two persons with intention to own beneficially in half shares—Deed subsequently executed by them purporting to declare that one was always holding his half share in trust for the other—Validity of deed.*

*Insolvency—Settlement made by bankrupt within less than two years of bankruptcy—Validity of settlement—Insolvency Ordinance, Cap. 43, s.45(1).*

*Insolvency—Contract of sale for land—Failure of seller to pass transport—Supervening insolvency of seller—Effect on rights of purchaser—Insolvency Ordinance, Cap. 43, s. 39 (5).*

*Insolvency—Receiving order—Subsequent adjudication of bankruptcy—Date of such adjudication relates back to date of receiving order—Insolvency Ordinance, Cap. 43, s.41.*

*Parties—Order against non-party—Submission of non-party to jurisdiction of court—Competence of order.*

In 1945 transport was passed to D. W. and R. W. for certain immovable property which they had bought for \$10,000. The sum of \$2,500 was paid in cash, a mortgage being executed by them on the property for the balance. The whole of the cash payment was made by D. W. except for \$100 which was contributed by R. W. From the time of its acquisition D. W. alone was in effective day-to-day management of the property. To raise money to pay expenses incurred in renovating the property two other mortgages were later passed by them over it. On 29th May, 1951, they both executed a deed in which R. W. stated that it had been his intention to pay one half of the purchase price but that due to lack of finance he was unable to do so and that, contrary to the facts, the whole of the purchase price had been paid by D. W. whom he described as the absolute owner of the property. In 1953 D. W. paid back to R. W. the \$100 which the latter had contributed to the purchase price. On June 9, 1953, a receiving order was made against R. W. and on November 26, 1954, he was adjudicated bankrupt.

D. W. applied to a judge in chambers by originating summons for an order requiring the Official Receiver as assignee of the property of R. W. to pass transport to D. W. for R. W.'s half share in the particular property. Rule 5 (e) of the Insolvency Rules, Cap. 43, required an application of this kind to be heard and determined in open court. The judge in chambers adjourned the summons for hearing, with pleadings, in open court and the remaining proceedings were taken there. No objection to the procedure was taken at the trial. The trial judge, holding in favour of the trust, held that R. W.'s half share had not passed to the assignee and ordered R.W. himself, though not formally a party to the proceedings, to transfer his half interest in the property to D. W. The Official Receiver appealed.

**Held:** (i) the procedure should have been by motion in open court and not by summons in chambers, but, the appellant not having made any objection in this respect before the trial judge, it was now too late for him to do so;

(ii) it was competent for the judge to adjourn the summons for hearing in open court and to order pleadings;

(iii) R.W., though not formally a party to the proceedings, had submitted himself to the jurisdiction of the court, which was accordingly competent to order him to pass transport to D.W. if the deed of trust had been valid;

(iv) however, the deed of trust was not seeking to create a new trust but was purporting to declare that R.W. was from the time of the acquisition of the property holding his half share in trust for D.W. This was con-

## OFFICIAL RECEIVER v. D. A. WHITEHEAD

trary to the facts which showed that, although R.W. only contributed \$100, the intention was that he should acquire a half share of the beneficial interest. There was no trust in 1945 and the subsequent deed could not validly declare the contrary;

(v) the adjudication of bankruptcy on November 26, 1954 related back to the date of the receiving order, namely, June 9, 1953. As this was less than two years from the date of the deed of trust, to the absence of proof by D.W. of R.W.'s solvency at the date of the deed, the deed was rendered void as against the assignee by virtue of s.45(1) of the Insolvency Ordinance, Cap. 43;

(vi) there was no evidence that R.W. had sold his interest to D.W., but, even if he had, the contract of sale, not having been completed by transport, was deprived of force by s. 39(5) of the Insolvency Ordinance, Cap. 43.

*Appeal allowed.*

**[Editorial Note:** The decision of the Full Court was later reversed by the Guyana Court of Appeal.]

*Dr. F. W. H. Ramsahoye* for the appellant.

*C. L. Luckhoo, Q.C.*, for the respondent.

CRANE, J.: The contest in this appeal is between the Official Receiver as assignee of the property of Reginald Exley Whitehead, an insolvent, and Dennis Arlington Whitehead, brother of the insolvent.

The Whitehead brothers were in the 1940s and 1950s well-known dealers and speculators in immovable property in town and country. They were wont to contribute to purchase money equally, and on resale to share profits in like fashion. Between them they once held jointly six properties including N 1/2 64 King and Robb Streets, Lacytown, Georgetown. On the 10th December 1945, Reginald held in his own right another six, also 19 lots of land at Mahaicony and 1/6 part or share in Plantation Farm.

Reginald unfortunately fell on evil days. All his own property was between 1946 and 1953 either sold or taken in execution and he was adjudicated bankrupt on November 26, 1954.

This matter first came upon originating summons on November 28, 1961, before Miller, J., in chambers. Dennis there sought an order on the Official Receiver, as assignee of the property of Reginald, still an insolvent, to advertise and pass transport of N 1/2 lot 64 King and Robb Streets in his favour. This was the last property they acquired, and the only one now remaining to them. It is the property in dispute.

In his affidavit in support of the summons, Dennis positively asserts that Reginald holds that property in trust for him, Reginald having so declared in a registered Deed of Trust No. 135 of 1951, dated May 29, 1951. This affidavit is revealing, and providing as it does a clear and concise account of his claim against the assignee in insolvency, its 10 paragraphs will be set out verbatim:

"I, Dennis Arlington Whitehead, of 6A Water Street, Georgetown in the county of Demerara, and colony of British Guiana, being duly sworn make oath and say as follows :

1. I am the plaintiff (applicant) herein.
2. On 10th December, 1945, by transport No. 1360 of 1945, Reginald Exley Whitehead and I received transport for North half of lot numbered 64 (sixty-four) in that part of Georgetown called Lacytown, as laid down and defined on the plan of the Town District situated on the lands of the Vlissengen estate made by the Sworn Land Surveyor, Luke M. Hill, dated the 17th June, 1879, and deposited in the office of the Registrar, of the counties of Demerara and Essequibo, on the 1st November, 1879, said plan having been approved by the Governor and Court of Policy on the 22nd September, 1879, and deposited in the office of the Registrar aforesaid in pursuance of the provisions of section sixty-four of Ordinance No. 2 of the year 1876, with all the buildings and erections thereon subject to the lien of the Colonial Treasurer of British Guiana.
3. That the interest of the said Reginald Exley Whitehead in the said property was then \$100.
4. That I repaid this sum of \$100 to Reginald Exley Whitehead, and that he now owns no share of the said property.
5. That by deed of trust No. 135 of 1951, the said Reginald Exley Whitehead declared that he held the said property in trust for me.
6. That on 11th February, 1954, a receiving order was made against the said Reginald Exley Whitehead by the Supreme Court of British Guiana, and the Official Receiver is an assignee of his property.
7. That the said Reginald Exley Whitehead has applied for his discharge and the matter is fixed for 27th November, 1961.
8. That in his statement of affairs the said insolvent Reginald Exley Whitehead claimed no interest in the said property.
9. I am advised and verily believe that the Official Receiver as assignee of Reginald Exley Whitehead, Insolvent, should transport the interest of the said insolvent to me before his discharge and I am applying for an order of court to this effect.
10. I wrote the Official Receiver on 13th November, 1961, to this effect.

And further I say not.

(Sgd.) Dennis A. Whitehead."

## OFFICIAL RECEIVER v. D. A. WHITEHEAD

After the many vicissitudes through which the matter passed, with which we shall be dealing presently, it was finally disposed of by the Chief Justice, from whose decision this appeal is brought. The learned Chief Justice found that the legal estate in the property in dispute had never passed to the Official Receiver, but remains and has always remained in the insolvent because the latter no longer had a beneficial interest in the property. Consequently he found, he had no power to make the order sought in paragraph 9 above on the Official Receiver and ordered Reginald instead to advertise and pass transport of the property, the subject-matter of the deed of trust, to the plaintiff not later than six weeks from the date of his order, failing which, the Registrar of Deeds would be directed to do so. It is from that order and the dismissal of the defendant's counter-claim that this appeal is brought.

There are six grounds of appeal, the sixth alleging simply that the court below had no jurisdiction to hear the claim. On objection being taken by counsel for the respondent to the lack of particulars accompanying this ground, particulars were ordered of the manner in which the court lacked jurisdiction, an adjournment being granted for compliance. At the resumed hearing a list of seven objections was filed under this head. We granted leave to pursue ground 6 first for the obvious reason that, if there was merit in it that would dispose of the appeal.

It will be observed that of the seven instances alleging a want of jurisdiction, paras. (a)—(e) of ground 6 are to a large extent interrelated and so may be considered together, seeing that they raise objections to the form and manner in which the proceedings are brought; but paras (f) and (g) of ground 6 stand on a different footing, their real objection being to the validity of the orders which were made. They do not challenge the court's jurisdiction to hear the claim, but merely the making of the orders. It will be appropriate, it is thought, if they are considered with the other grounds of appeal.

Objection was taken before us, though there was none in the court below, that procedure by originating summons was not the proper mode of initiating the matter.

It is now contended that the appropriate manner should have been by motion under r. 16 of the Insolvency Rules, Cap. 43, which provide that: "Every application to the court (unless otherwise provided by these rules, or the court shall in any particular case otherwise direct) shall be made by motion supported by affidavit". Though this rule does not preclude a summons, if the court shall direct it, there is no doubt that a summons in chambers was not the prescribed manner of preferring this matter before the learned judge, because in substance the summons was in effect an application under s. 62 of the Insolvency Ordinance, Cap. 43. This section outlines the procedure when property in the custody of the assignee is being claimed by a third person such as is Dennis Whitehead. It reads: "When anyone lays claim to property in the *custody or possession* of the assignee he may apply to the court in the prescribed manner to issue directions to the assignee". The phrase custody or possession is juristic, connoting property over

which the assignee has either a physical control or the right to possession following on the insolvency order. In this application, he is claiming N 1/2 lot 64 King and Robb Streets, the legal estate of which he alleges is in the possession of the assignee. (See para. 9 of his affidavit above). The nature of his claim was therefore a clear application under s. 62, though not in the "prescribed manner", for by r. 5 (e) of the Insolvency Rules an application under s. 62 is one of those specifically directed to be heard and determined in open court. Therefore, it must be admitted that the procedure should have been by motion in open court and not by summons in chambers.

But the learned judge before whom the matter was first brought obviously considered that the question raised in the summons could not properly be decided in a summary way for he ordered pleadings, and adjourned it for hearing in open court. Objection is taken that there is no warrant for such procedure, that the Rules of the Supreme Court, 1955, were inapplicable to the proceedings in the court below, the trial not having been conducted in the insolvency court in accordance with the law of Guyana.

While it is conceded that s. 62, unlike s. 61(1), does not give a judge the power to order that "a suit be instituted in the ordinary manner", if it appears to him that the question raised before him cannot be tried in a summary way, yet in an application under s. 62 he has an inherent power to order trial of issues as in an ordinary action if there are triable issues of fact to be determined. This must be so in any proceeding in bankruptcy of which he is seised, even though the procedure is not specifically stated as it is in s. 61 (1).

It seems very clear to us that *Miller J.*, in a bankruptcy matter had ample authority to do as he did. The learned judge fully realised that the application was brought under s. 62 of the Ordinance and that it was one which involved the trial of issues of fact (see r. 5(i) of the Insolvency Rules); he then exercised his discretion, as he is entitled to do under r. 6 *ibid.*, by adjourning the matter from chambers to court, thus establishing an open court hearing which a motion in the first place would have ensured. Though neither side in argument supported what the learned judge did, we are clearly of the opinion that he adopted the right course.

When issues of fact arise for trial in these applications, the English practice and procedure to be followed is stated in vol. 2, *Halsbury's Laws of England*, 3rd edition, p. 595, para. 1195, to be as follows:

"ISSUES OF FACT: If in any proceeding in bankruptcy a question of fact arises, which either of the parties desires to be tried before a jury, or which the court thinks ought to be so tried, the court may direct a trial accordingly. *Thereupon the issues of fact will be tried in the High Court in the same manner as if they were issues of fact in an action*, and in a county court in the manner in which jury trials in county courts are ordinarily held". [Bankruptcy Act. 1914, s. 105(3).]

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A single judge sitting without a jury may of course try issues of fact; and the parties may, if agreed on questions of fact in issue, consent to a trial of them. But a more appropriate way of formulating issues of fact for decision than by ordering pleadings, in case parties do not agree as to what are the issues, or if the judge deems it fit, is yet to be discovered. His notes are not available; but how else in our situation could the judge have ordered a trial of such issues of fact if the parties so desired; or if they could not agree, than by ordering written statements to be delivered alternately between them until issues joined? The English practice is that the question in issue must be reduced into writing and submitted to the court for approval and, when approved, is called the record for trial (see Bankruptcy Rules 1952, r. 90). But our rules which date much earlier have no like provision. In our view, the power of a judge to order pleadings is not restricted to suits instituted in the ordinary way and governed by the Rules of the Supreme Court, 1955. The exercise of such power is an essential part of the judicial function in any bankruptcy proceeding in formulating triable questions of fact for decision. We therefore do not disapprove of the procedure followed by *Miller, J.*, and will observe that every step he took was justified by law.

In any event, it is far too late now to raise any valid objection to a non-observance of the Insolvency Rules. The authorities are replete with instances in which judges have ruled that objections to jurisdiction in bankruptcy must be taken at the earliest opportunity, and that whenever an objecting party had taken a chance of a decision in his favour on the merits and failed in a lower court, it will be too late to raise objection on appeal. In *Re Harrison, ex-parte Butters* (1880), 14 Ch. D. 265, a trustee in a bankruptcy applied to a county court to set aside a fraudulent mortgage which the bankrupt had executed. The court having directed the trial of certain issues by a jury, declared the deed to be void, and ordered it to be delivered up to be cancelled. The mortgagee applied for a new trial, but the application was refused. He appealed to the chief judge from the order which declared the deed void, but did not appeal from the refusal of a new trial. On the hearing of the appeal the objection was taken that the case was not one in which the Court of Bankruptcy ought to have exercised its extraordinary jurisdiction under the 1869 Act, s. 72 (repealed). It was held that the objection was raised too late after the mortgagee had taken his chance of a decision in his favour on the merits in the county court.

In our view, therefore, the appellant may not now complain that the appropriate procedure was by motion and not by summons. The proper place to have raised that objection was before the judge, before whom the matter first came. Moreover, the appellant stood by and raised no objection to the order of the judge in chambers of December 5, 1961; he may indeed have consented to what was done; in fact, he obeyed it by filing a defence and counter-claim and took the chance of a decision in his favour. It may well be that if the decision of the Chief Justice were in his favour and he were appearing here as respondent instead of as appellant, he would have been supporting the order of *Miller, J.*, instead of attacking it. But we will not allow him to approbate and reprobate. The order was not a nullity as it is

claimed. The defect which was caused in the first place by an erroneous application by summons in chambers instead of by motion in open court was only formal and is clearly saved by s. 123 of the Insolvency Ordinance, Cap. 43, which reads:

"No proceeding in insolvency shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding, is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court".

See also r. 340 of the Insolvency Rules *re* non-compliance with rules. This disposes of paras, (a)—(e) of ground 6 of the appeal. We have already referred to grounds 6(f) and (g) and expressed our reasons for saying they cannot properly be considered in a ground where the court's jurisdiction to *hear* the claim is denied.

The second and subsequent grounds of appeal are directed to the validity of the deed of trust. In this, it will be recalled, the affidavit of Dennis Whitehead (above set out) declares that Reginald Whitehead is a trustee of his beneficial interest of N 1/2 lot 64 King & Robb Streets. But it is contended that this trust deed is of no force and effect because it was made to carry out a contract of sale which is void under s. 39(5) of the Insolvency Ordinance, Cap. 43, which reads:

"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 the creditor may claim under his contract as a concurrent creditor against the debtor's estate."

Before dealing with this contention, it will be necessary to narrate briefly the salient points in the evidence of the facts and events which have occurred in sequence after the Whiteheads acquired transport of N| lot 64 King and Robb Streets.

On December 10, 1945, the brothers acquired transport of the property in their joint names for \$10,000, both having declared in their purchasers' affidavit that sum to be the full and true consideration paid by them for it, although from the evidence it may be rightly assumed that it is now worth considerably more.

In their evidence on oath, however, they both give conflicting versions as to the composition of the purchase price. Dennis says that Reginald's personal contribution was a mere \$100 whilst he (Dennis) was obliged to foot the cash remainder of the purchase price of \$2,400 and legal fees after a first mortgage of \$7,500 in their joint names was obtained from one Wm. De Ryck. He said that Reginald told him he was financially embarrassed and owed a lot of people and could not as usual put up his half share of the purchase price. His

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brother showed very little interest in the property; he only attended transport court on the very last occasion when transport and mortgage were passed, at that time intimating that he was no longer interested in the property because he felt it a bad deal which did not have a resale value. As a matter of fact, Reginald only attended transport court so as to allow the sale to go through and to avoid inconvenience, delay and possible litigation. It was then that he told Reginald that he was interested in the property and that he would carry out repairs and extensions and tries to make something of it as he considered the site very valuable. Reginald, according to Dennis, replied that he left it "wholly" to him. Dennis went on to testify as to how he converted the property from one of low rental to one with an economic value, securing a rent of \$525 per month by renovating and extending it on the north, south and west and converting it into three, instead of two flats, spending some \$30,000 in the process of so doing Reginald took no interest in this work; he gave it no supervision whatever, nor paid anything in respect of labour or materials. From 1945 right up to the present time Dennis collected all rents and paid all rates, taxes and insurance on the property. In all income tax returns of his since that year he has declared himself the sole owner of the property.

About 1950, *i.e.*, after the renovations and extensions, a second mortgage was taken on the property—on this occasion in the sum of \$16,000 with the Demerara Life Assurance Society Ltd. It is very important to note that this mortgage was taken in the joint names of the brothers just like the first. The first mortgage was paid off and cancelled, and later another mortgage with the same life insurance company was obtained—again in their joint names for \$2,500. No date is given when this occurred, but it must have been about the year 1952 or 1953, since the evidence is that the renovations and extensions were started about four years after purchase in 1945, and took one year to complete before the mortgage with the Demerara Life for \$16,000 was obtained. It is important also to observe that Dennis said that "every bit of that money from the mortgages was used to pay off those expenses . . . . These mortgages have not been cancelled". The fact that these mortgages are in their joint names is of tremendous importance because, quite apart from the disputed contention of Dennis on which the learned Chief Justice obviously rested his judgment—"that at no time did the insolvent ever have more than \$100 interest in the property;" and "that \$100 has been refunded", (seen also in paragraphs 3 and 4 of his affidavit above), and that the repayment of the \$100 which Reginald contributed to the purchase price of the property wiped out any beneficial interest he had on that account—it will be considered later whether this joint personal liability on the mortgages did not give him a lien, which is a beneficial interest in the property.

The controversial deed of trust (Exhibit A) is dated May 29, 1951. This document was prepared by a barrister, the son-in-law of Dennis Whitehead on the latter's instructions when he was about to emigrate to Canada, and when, preparatory to his departure, he was desirous of putting his affairs in order. There is nothing on record of the date on which he emigrated, but clearly it must have been after

May 1951, when he executed the deed of trust in the Supreme Court Registry. Dennis Whitehead remained in Canada for two years after which he returned home. It was whilst there that he repaid Reginald the \$100 which the latter contributed to the purchase price of the property in dispute—that is to say, after a lapse of some six to eight years from 1945.

This matter of the contribution of \$100 by Reginald Whitehead and the circumstances of its repayment to him by Dennis is of extreme importance, because the finding of fact which was made by the learned Chief Justice in relation to it is challenged together with his construction of the true nature of the transaction as evidenced by the deed. We will deal with this aspect of the matter presently.

The contents of the deed are so important that they must be set out in full:

BRITISH GUIANA

COUNTY OF DEMERARA.

DEED OF TRUST

BE IT KNOWN that on this day the 29th day of May, 1951, before me BERKELEY BERTRAM MCGARRELL GASKIN, Sworn Clerk and Notary Public of the Deeds Registry, George-town, personally came and appeared DENNIS ARLINGTON WHITEHEAD of lot 48 Anira Street, Queenstown, Georgetown, in the county and colony aforesaid (hereinafter referred to as "the party of the first part") and REGINALD EXLEY WHITEHEAD, of lot 183 Barr Street, Kitty Village, East Coast Demerara, (hereinafter referred to as the party of the second part).

WHICH APPEARERS stated and declared that on the 10th day of December, 1945, transport was passed in favour of the appearers for North half of lot number 64 (sixty-four) in that part of Georgetown called Lacytown, with all the buildings and erections thereon.

AND the party of the second part further stated and declared that it was his intention to pay one-half of the purchase price of the aforementioned property, but due to lack of finance at the time was unable to do so and the party of the first part paid the whole purchase price therefor, but allowed the transport to be taken in the names of both parties to avoid delay and possible litigation.

AND the party of the second part further stated and declared that he was holding the one-half share in and to the said transport in trust for and on behalf of the party of the first part who is the absolute owner of the whole of the aforesaid property until such time as the party of the first part shall call upon him to deliver up the same when he will render up to the party of the first part the said half share in and to the aforesaid property.

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FOR THE DUE AND FAITHFUL PERFORMANCE of all which the parties bind themselves, their heirs, executors, representatives and assigns, and

IN WITNESS WHEREOF the parties hereto have signed these presents in the presence of the subscribing witnesses, the date and year first above written.

D. Whitehead

R. E. Whitehead.

*Witnesses:*

1. L. O. Ramsay
2. C. Mc Kenzie

AND IN MY PRESENCE

B. B. Mc G. Gaskin

Sworn Clerk and Notary Public.

(Stamps cancelled \$3.60)

A TRUE COPY of the original which was executed and registered in the Deeds Registry of British Guiana, at Georgetown, on the 29th day of May, 1951.

Jas. A. Joseph

Assistant Sworn Clerk  
21st November, 1961

*Left Side Seal.*

A comparison between the declarations in the deed of trust and the *viva voce* evidence shows material conflicts of fact, intention and interest. The deed sets up, contrary to fact, that Dennis Whitehead paid the whole of the purchase price for the property, whereas the evidence, which is admitted on both sides, is to the effect that Reginald contributed at least \$100 in cash to it. This difference between the declarations in the trust deed and the evidence led has important and far reaching consequences, for *ex facie*, on the construction of the deed, Reginald Whitehead never held at any time a beneficial interest at all in the property; according to the deed he held from the time of the passing of transport in 1945 merely the legal estate jointly on a resulting trust for Dennis Whitehead. *Lewin on Trusts*, 16th edition p. 136, tells us, however, that a trust which results to the real purchaser by presumption of law is merely an arbitrary implication in the absence of reasonable proof to the contrary. Extrinsic parol evidence is always admissible to prove the real intentions of the maker of the instrument. In cases of resulting trusts, whenever the question of intention is involved, it may be established by parol evidence *dehors*

the deed itself. See the observations of Stoby, J., as he then was, in *Bacchus v. Sobers*, 1952 L.R.B.G. 132, at p. 135, on the concept of the resulting trust in the law of Guyana, with which we respectfully agree.

But the original intention of Reginald Whitehead is clearly and unequivocally stated in the very first declaration in the deed to be that of a joint purchaser with a liability for one-half of the purchase price; so there is no need to look elsewhere for it. It is important too that Dennis Whitehead also signed the deed of trust. He cannot therefore say he is unaware of Reginald's intention to be liable for one-half the purchase price. The Chief Justice found that he did not have the full amount of his contribution in cash to this half-share at the time of the passing of transport and that he had only \$100 which he contributed; but this notwithstanding, can it be said that he did not have a half-share in the property despite his unequal cash contribution?

There is a rule of equity expounded by Sir Joseph Jekyll, M.R., in *Lake v. Gibson* (1729), 1 Eq. Cas. Ab. 291. It says that where parties contribute to the purchase price in unequal shares this makes them tenants in common in equity, and a trust results to each of them in proportion to the amount originally subscribed. But, as it is pointed out, a resulting trust is one drawn by arbitrary implication of law only, and must necessarily give way to an expressed intention—in this case, that expressed in the deed of trust, that is to say, Reginald's intention to own half-share in the property.

We said we would revert to the construction put upon the true nature of the transaction evidenced by the trust deed and will here set out the finding of the learned Chief Justice in that respect:

"In the instant case by reason of the *express trust* in favour of the plaintiff the legal estate remains in the insolvent and has not passed to the Official Receiver as assignee in insolvency. In any event", said he, "I do not think that the true nature of the transaction evidenced by the trust deed is a contract for the sale of an interest in immovable property.

It is an acknowledgment that, as is stated in the deed itself, at first the insolvent intended to pay one-half of the purchase price of the property, but due to lack of finance at the time of the purchase he was unable to carry out that intention and only allowed the transport to be passed in the names of both of them in order to avoid delay and possible litigation. The \$100 repaid the insolvent was a refund of the amount advanced by him *at the time the agreement of sale and purchase was entered into*".

The argument for the transaction between the brothers being a contract for sale within s. 39(5) (set out above) was pressed upon the Chief Justice just as it was on us. The contention originates from the evidence given by Reginald Whitehead for the defence; it is to the effect that he was repaid the \$100 on account of his share in the pro-

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perty because he had agreed to sell it to Dennis. There was then made, he said, no agreement of sale (in writing) between them, so no amount was fixed, but he Reginald wanted \$25,000.

We must agree with the view of the learned Chief Justice that there is no evidence of a contract for the sale of an interest in immovable property contained in the deed and would add no reliable *viva voce* evidence of such either. Indeed, the only evidence of such emanates from the defence and perhaps Dennis Whitehead's assertion that he considered he was under a legal obligation to repay the \$100, and this he would have done any time it was demanded from him. This aspect of the matter will be dealt with a little later on.

An analysis of the reasoning in the passage under quotation above seems to indicate that two situations were considered and accepted: firstly, that the original intention of the insolvent before the passing of transport was to pay half of the purchase price and acquire half-share in the property when he paid over the \$100; secondly, that at the time of the passing of transport when the insolvent had no more cash contribution to make, and said so, he resiled from the transaction allowing "transport to be taken in the names of both parties only to avoid delay and possible litigation". The latter are the very words of the deed of trust which the judge accepted, and from which he construed its true nature as an acknowledgment. We are unable to agree, however, with the construction the judge has put upon the deed of trust and that the second situation indicated any change from the insolvent's original intention to retain his half-share in the property. In his construction of the second declaration in the deed, the most important aspect of it was omitted from the passage under quotation and evidently not considered, namely, "the party of the first part paid the whole of the purchase price therefor".

The learned judge was no doubt influenced in his decision by what he thought to be a strong association in the catalogue of facts which he considered adverse to the insolvent's claim not to have relinquished his half interest—the fact which he found, and which we shall not disturb, of his being short-by \$1,150 on his cash contribution at the time of the passing of transport; his belief of Dennis Whitehead's evidence that Reginald left the property "wholly" to him; by his not supervising the reconstruction and renovations; his non-payment of rates, taxes and insurance; his failure to include the property until several years had passed in his income tax returns; and by the fact, on the other hand, that Dennis had always done so claiming the property as his own. The judge was obviously unimpressed by the insolvent's claim to have paid the whole cash instalment of the purchase price of \$2,500, and, on the other hand, to have been most impressed by the insolvent's admission that his brother dealt with the property "as if it were his own"; that Dennis collected all rents and the insolvent none, that he always paid insurance premiums, mortgage interest and rates and taxes save that on one occasion in 1958 when the property was levied upon for non-payment of rates, the insolvent paid them off. The judge also considered the fact that the insolvent for the first time only had included in an amended statement of affairs N 1/2 lot 64 King and Robb Streets as being among his assets whereas he had not done so previously.

Above all, he took a poor view obviously of the insolvent's claim that he was made to sign the deed by a trick played on him by Mr. J. E. Hazlewood, an official of the Supreme Court Registry, in complicity with his brother Dennis Whitehead and, as a result, considered him a witness whose actions and explanations were incredible.

While we can find no fault with his finding on the veracity of the insolvent and do not differ in any way on that matter from him, we do differ however from the judge's finding that there was an "express trust in favour of the plaintiff", or any evidence from which an inference can be drawn that the insolvent resiled from his original intention of becoming an owner of half-share, or that he gave up his interest, became a trustee of it and only joined in the transport to avoid delay and possible litigation.

It is respectfully submitted that the judge misdirected himself in the passage quoted above into so thinking by construing the deed as a declaration of trust arising for the first time in 1951. The deed does no such thing; and it is considered it is for this reason he thought it to be in the nature of an express trust. All the deed purports to do is to declare on a trust which it alleges has existed since 1945. In our opinion the tenses employed in its third and final declaration bear ample testimony to this view. The third declaration does not say that Reginald Whitehead *is*, but *was*, holding the half-share in trust. This difference in tense is of the utmost importance, and must be construed in the context of the first and second declarations of the deed. In the second, Reginald Whitehead is not alleged to hold on any *express trust*, but on a *resulting* trust which, ever since 1945, arose by implication of law when Dennis Whitehead paid the whole of the purchase price for the property. There are no words appointing himself an express trustee. Certainly the assumption of acts of ownership by Dennis Whitehead, the several manifestations of dealing with the property as if it were his own, and the numerous inconsistent and contradictory statements by the insolvent which were discredited, could not be regarded as evidence creative of a fiduciary relationship; but on these the learned judge appears, to have laid strong emphasis. They are not circumstances which are unequivocally referable to the existence of a trust as counsel for the respondent has urged upon us.

The respondent's case is that his brother "voluntarily", *i.e.*, spontaneously gave up his interest in the property and from his declarations at the time as evidenced by his subsequent actions, all show that he held his beneficial interest in trust. We take it that he is saying thereby that his brother made a gift to him of that interest in the agreement of sale and purchase which it was found as a fact existed in the above quotation from the judgment; but even if there is evidence of a certainty of words from which a declaration of trust can be implied, it seems to us at the most they could only amount to evidence of an imperfect gift which a court of equity will not construe as a declaration of trust; "equity will not assist a volunteer", is an old maxim in Chancery. There was no valuable consideration moving from the respondent. Certainly the repayment of the \$100 *after* the execution of the deed could not afford such consideration.

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"The distinction between completely and incompletely constituted trusts", says Professor Keeton in the 4th edition of his *Law of Trusts* at p. 71, "is of importance principally with regard to the question of consideration. If valuable consideration is given in exchange for the creation of the trust, it does not matter whether the trust is completely constituted or not, for equity regards as done that which ought to be done and will perfect the imperfect conveyance; but equity will not perfect an imperfect voluntary trust". The question to be answered is: were the insolvent's alleged parol declarations at the time of the passing of transport indicative of an imperfect gift, which is unenforceable in law, or the creation of a trust which is enforceable?

A declaration of trust, however, to be effective, need not be literal; no form of words is necessary. It was not necessary for Reginald Whitehead to say: "I declare myself a trustee". What was necessary was some form of expression from him which clearly showed that he intended to constitute himself a trustee, or to constitute his brother a beneficiary of his interest. "That being the principle of the court, the question in each case is one of fact; has there been a gift or not or has there been a declaration of trust or not?" See *per* Lord CRANWORTH, L.C., in *Jones v. Lock* (1865), 1 Ch. App. 25, 13 L.T. 514, 515. In every case, therefore, where a declaration of trust is relied on the court must be satisfied that a present irrevocable declaration of trust has been made. The question arises: could Reginald be said to have been irrevocably bound merely by the intimation he gave at the time of the passing of transport that he did not want the property any longer, by saying that it was not a feasible investment in which he was any longer interested, and that he left it "wholly" to Dennis? What was to prevent his going back upon his word and selling his half-share to another the very next day after? The authorities show that only by his giving valuable consideration could this have been assured; for though consideration is not necessary for the creation of a trust—see *Madray v. Cameron* 1956 L. R. B. G. 8, 11—it must be given in exchange for the creation of a trust which is not completely constituted so as to render it valid and effectual. It is our considered opinion that for Dermis to have secured the irrevocability of the binding trust for which he contends, he ought to have heeded the advice which Lord Eldon, L. C, gave as long ago as 1802, in *Ellison v. Ellison*, 6 Ves. 656, at p. 661:

"I take the distinction to be that, if you want the assistance of the court to constitute you a *cestui que trust* and the instrument is voluntary, you shall not have the assistance for the purpose of constituting you *cestui que trust*, — as upon a covenant to transfer stock, etc., if it rests in covenant and purely voluntary, this court will not execute that voluntary covenant. But if the part has completely transferred stock, etc., though it is voluntary, yet the legal conveyance being effectually made the equitable interest will be enforced by this court." and which was explained by Turner, L. J., in *Milroy v. Lord* (1862), 4 De G. F. & J. 264, at p. 274, as follows:

"I take the law of this court to be well settled, that in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of

the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases, I think, go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the court will not give effect to it by applying another of those modes. *If it is intended to take effect by transfer, the court will not hold the intended transfer to operate as a declaration of trust for then every imperfect instrument would be made effectual by being converted into a perfect trust.*"

See also *Sarajpaul v Ramdela and Sarju*, 1942, L. R. B. G. 309, 318.

How apt are the Lord Chancellor's words in relation to Dennis Whitehead! He has asked the court to declare him *cestui que trust*; he says his interest is a gift which was intended to be transferred to him in the future; he gives no consideration for it, but allows it to remain imperfect by taking no steps to perfect it. It is submitted that what it is sought to achieve by the deed in 1951—some six years after—clearly falls within the mischief of the rule enunciated by Turner, L. J., above,—namely, the future intended transfer of Reginald's beneficial interest being construed as a declaration of trust.

However, counsel for the respondent has asked us to say from all the circumstances as narrated above that the existence of a trust has been established at the time of the passing of transport in 1945 when, according to him, the insolvent had already backed out of the transaction. In the same breath, he has asked us to regard the repayment of the \$100 as being merely in the nature of a simple debt owing by the respondent to the insolvent who could have called for it at any time. Here it seems, counsel is betwixt Scylla and Charybdis; if he argues for a contract he is caught by s. 39(5) abovementioned; if he argues for a trust he is equally lost for he has to fulfil the requirement of valuable consideration for the imperfect voluntary trust which he contends was created in 1945.

But it is not surprising that counsel for the respondent has unconsciously slipped into this kind of double reasoning. This is precisely the same line of reasoning counsel for the appellant has adopted. Such argument, it seems to us, brings into prominence the admittedly difficult question of the respective provinces of the concepts of trust and contract which has frequently baffled the courts and text-writers. On the point, Professor Keeton in his *Law of Trusts*, 4th edition, p. 5, observes:

"It is also clear, however, that the determination of the question whether a given set of facts gives rise to a trust or a con-

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tract simply is not easy to determine....That looks like another way of saying that the whole question is one of *intention* of the parties, inasmuch as equity looks to the intent and not to the form, and further, as no technical words are required to constitute either a trust or a contract, where the conduct of the parties leads the court to conclude that a trust was intended, a court of equity will give effect to that intention. Where the parties did not possess such an intention, then normally a contract will result from the agreement. *It may be, however, that in a particular case, the parties had no clear intention one way or the other."*

One really wonders—is this such a case? But a court of equity will only give effect to the intention if the basic requirements of either trust or contract are satisfied.

A debt must have necessarily some legal basis for its existence, some *raison d'etre*, and here one is obliged to ask oneself the question: is counsel asserting the very thing which he denies and which is contended for by the appellant,—that is to say, was the return of the \$100 a debt which arose *ex contractu* for the sale of an interest in immovable property? The truth would seem to lie in the fact that the repayment of the \$100 to Reginald Whitehead, coming as it did after some two years of the execution of the deed, could not in all probabilities furnish the consideration for any agreement made by him as alleged, to sell his interest to his brother at the time of the passing of transport in 1945, particularly when it is considered that the purchase price consisted of, not only the \$100, but also the sum for which he had bound himself under the mortgage for \$7,500 to De Ryck.

The jural relationship must therefore, be considered within the framework of trust and not contract bearing in mind the third declaration in the deed of trust is to the effect that the intention of the brothers was to create a trust in 1945. Neither principle nor authority constrains us to construe the repayment as a debt. Clearly, what Dennis Whitehead ought to have done as soon as possible after 1945 was to have perfected his imperfect gift either by deed of transport by getting in his brother's half-share so as to hold both halves in his own right, and thus satisfy the rule in *Milroy v. Lord* enunciated by Turner, L. J., above; although there were certain to be several opposition actions by the many whom he owed and of whom Dennis spoke. Dennis had said that being "heavily indebted" was what made it impossible for Reginald to join in advertising transport of S lot 6A Water Street (another property which they both owned at one time) to the Water Street Pawnbrokery Ltd. Of course, no consideration would have been necessary in the case of a deed. But what happened was that in 1951 he suddenly woke up to find before emigrating to Canada that he had no document of title to Reginald's half-share; and it was no doubt with that reflection that he procured the execution of the deed which, as we shall see, is also invalid for another reason—that it is retrospectively caught by an invalidating section of the Insolvency Ordinance (section 45 (1), below). We are afraid we are bound by *Milroy v. Lord* (above), and cannot construe the deed as a valid declaration of trust. There was no trust in 1945. The deed of trust of 1951 therefore, cannot declare on a nullity for *ex nihilo nihil fit*.

To recapitulate, the argument for the respondent as we have seen it is this: the deed of trust is not seeking to declare a trust of the beneficial interest in his favour for the first time in 1951; what it does is to declare that a trust of the beneficial interest in his favour was already in existence ever since 1945, at the time of the passing of transport. The deed is declaratory merely; it does not seek to give *ex post facto* validity to the trust. This result from the presumption of a resulting trust, it having been declared in the deed that Dennis Whitehead "paid the whole of the purchase price therefor". But without doubt, this is false premise on which to base a resulting trust of the beneficial interest in favour of the respondent because, even if his testimony be accepted, as indeed it was, that Reginald paid only \$100 in cash at the passing of transport, this sum was not returned to him until some 6 —8 years later. The true position is that at least this \$100 together with Reginald's contribution in the mortgage money of \$7,500, which was also not considered by the learned judge, went towards the purchase price. The allegation of a resulting trust in the deed was a *suggestio falsi*, unsupported and resolved by the parol evidence. The learned Chief Justice found the repayment was a "refund"; but even if it was so intended, or as Reginald said as payment "on account", we hold it could not affect his entitlement to a half-share in the property as a joint owner.

We may mention that the distinction taken above between an incompletely and completely constituted trust was not ventilated before us. It is entirely our own. Although we believe it is the real point in the case which was missed by both sides, and is decisive of this appeal, we are loath to base our decision on a point not argued before us, and will now proceed to consider the position from another point of view which counsel advanced. If we are not correct in the above, we think that the parol evidence of Dennis Whitehead that his brother voluntarily gave up his interest in the King and Robb Streets property merited consideration of the deed as a settlement within the meaning of s. 45 of the Insolvency Ordinance.

The argument of counsel for the assignee was two-fold, namely, if the transaction was not a contract for the sale of an interest within S. 39(5) then it is a settlement, *i.e.*, the transaction was either in contract or in trust. Section 45(1) reads:

"Any settlement of property, not being a settlement made—

- (a) before and in consideration of marriage, or
- (b) in favour of a purchaser or incumbrancer in good faith and for valuable consideration, or
- (c) on or for the wife or children of the settlor of property which has accrued to the settlor after marriage in right of his wife, shall, if the settlor becomes insolvent within two years after the date of the settlement, be void against the assignee, and shall if the settlor becomes insolvent at any subsequent time within ten years after the date of the settlement, be void against the assignee unless the parties

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claiming under the settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement, and that the interest of the settlor in that property passed under the settlement on the execution thereof."

The transaction as evidenced by the deed may also be interpreted in the light that what it purported to achieve constituted a settlement of Reginald's beneficial interest in trust for Dennis, See *Shrager v. March*, [1908] A. C. 402, 405. The Chief Justice found against a contract for sale of an interest in immovable property and, as we have indicated, we agree with that finding. The transaction as evidenced by the trust deed and the *viva voce* evidence reveals the complexion of a voluntary settlement of the beneficial interest in favour of Dennis Whitehead within s. 45 (1) as it is not caught by any of the exceptions (a), (b) and (c) therein. This aspect of the matter, we say with respect, was not appreciated by or explained to the learned judge and, as a consequence, it seems to us, he failed to consider the validity of the deed of trust in relation to the subsequent bankruptcy of the insolvent Reginald Whitehead. In s. 45 above there are two and ten-year invalidating periods which make void a settlement as against an assignee in insolvency. The word void, of course, has been judicially construed as voidable within the section.

In the judgment under review, Reginald Whitehead was found to have been adjudicated bankrupt on November 26, 1954. His adjudication was the result of a petition by his brother Dennis when his Kitty home was taken in execution by marshals of the Supreme Court. This was proved to be an act of bankruptcy and a receiving order made on June 9, 1953, the same day as the petition was filed. Under s. 41 of the Ordinance, the doctrine of relation back applies; so Reginald Whitehead's insolvency would commence on June 9, 1953

It will therefore, be seen from a computation of the above dates that Reginald Whitehead became insolvent only 11 days outside the absolute period of two years, and that being the case, Dennis Whitehead, who is the party claiming under the settlement, had the *onus* of proving that the insolvent on May 29, 1951, the date of the trust deed, was able to pay all his debts without the aid of the interest he had in N 1/2 lot 64 King and Robb Streets, something which would have been rather difficult for him to do since his own evidence is that Reginald had always told him he was in debt, and "heavily indebted". It was found that Reginald had no beneficial interest, but this finding of fact is totally against the weight of evidence.

The Chief Justice accepted that \$100, was repaid Reginald. He found it was first paid at the time of the making of the agreement for the sale and purchase of N 1/2 lot 64 King and Robb Streets, and he construed the repayment as a "refund". It is our opinion that by so construing it he slipped into the fallacy of the argument which was so patently exposed before us, and which is revealed in paragraph 4 of the affidavit in support of the summons and the oral evidence, namely, that because the \$100 was repaid Reginald, it followed as a natural consequence that "he now owns no share in the property", because of the de-

clarations in the deed of trust. But we have shown where Reginald Whitehead's intention in the trust deed was clearly to be a half-owner by his original intention to hold himself liable for half the purchase price; we have shown how he was unable to furnish that half-share fully because he was in debt, and expressed our view that the "refund" of the \$100, coming, as it did, some seven or eight years after he paid it, and after the execution of the trust deed, could not cause him to lose his half share in the property and, this, despite whatever may be the declarations in the deed.

But notwithstanding the failure to construe the deed of trust as a voluntary settlement made void by the insolvent's subsequent bankruptcy, the legal significance of those mortgages which were subsequently executed in the joint names of the brothers was not appreciated and relegated to its correct legal category as beneficial interests even though they were referred to in the judgment in this wise:

"I am satisfied on the evidence adduced that whether or not the insolvent was in fact unable to raise a sum of \$1,150, the balance of his half share in the amount of \$2,500 to be paid in cash in respect of the purchase of the property, he so represented to his brother and so represented in the trust deed which bears his signature. In coming to this conclusion I have not overlooked the evidence to the effect that even after the execution of the trust deed, mortgages were effected on the property in the joint names of the brothers and one mortgage was transferred from another property to the property in dispute. *These dealings in the joint names were not done by reason of any recognition on the part of the plaintiff of any interest in the property remaining in the insolvent. They were done in good-faith by the plaintiff who at that stage had no cause to believe that the insolvent would later seek to avoid the deed of trust*".

It is not true to say that the insolvent contributed only \$100 to the purchase price, even if his evidence that he contributed the remainder of the cash contribution of \$2,400 and not Dennis Whitehead is not believed. It has to be remembered that he also made a joint contribution of \$7,500 in mortgage money at the time of the passing of transport which was subsequently paid off by another mortgage of \$16,000, again in their joint names; this and the others executed subsequently have not been fully paid off. Let it be conceded that such monies were not cash coming from his own pocket, but even so, as a trustee holding the beneficial estate in trust for another, Reginald would have had at least a right to be indemnified in respect of all liabilities on mortgages subsequent to the sale in 1945, which is first charge on the trust property—see *per Kay, J., in Re Pumfrey* (1882), 22 Ch. D. 255, where the learned judge, speaking of this right of indemnity at p. 262, said:

"His (the trustee's) right of indemnity gives him a right of charge or lien upon the trust estates. He has a right to come and say, I claim to have my right of indemnity. I am now called upon to pay a sum of money for which I have a right of indemnity out of the trust estate and to have the charge enforced by the process of the Court of Equity".

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Thus, when it was held that Reginald Whitehead was a "bare trustee"—(an expression which has been subject to much judicial criticism, but which it is thought, means a trustee who divests himself of the beneficial interest — See per Jessel, M. R., in *Morgan v. Swansea Urban Sanitary Authority*, 9 Ch. D. 582, at p. 586), the Chief Justice applied the dictum of the Master of the Rolls at p. 585 in Morgan's case above—"under the Bankruptcy Act where a trustee has no beneficial interest the legal estate does not pass, but where he has it does pass."

As we indicated, the contest in this appeal is between the Official Receiver, the assignee in insolvency, and Dennis Whitehead, the beneficiary under the deed of trust. What is meant by the words under quotation above is that the legal estate would not pass to the assignee unless there is also an available beneficial interest which could be made available for creditors, since the assignee would not be interested in an empty title. That is why when an insolvent holds property in which he himself has no beneficial interest on trust for another it is not considered property divisible amongst his creditors. See s. 42(1), Chapter 43.

So that even if the deed of trust were a valid instrument and was not a settlement within s. 45 (as indeed we have found it to be), still Reginald Whitehead, by virtue of the undoubted lien he has on the trust property would have a right to be indemnified in respect of any personal liability incurred in relation thereto; that is to say, a right to be saved harmless from any liability Dennis Whitehead as beneficiary did not keep him safeguarded against in respect of N 1/2 lot 64 King and Robb Streets. It is well settled that such a right is a beneficial interest and passes to an assignee in insolvency; but this aspect of the matter went unconsidered in the court below, although the judge did reflect on s. 42 (1) that property held by an insolvent on trust for any other person is not divisible amongst his creditors. Lord Justice Farwell however did consider such a right in *St. Thomas's Hospital (Governors) v. Richardson*, [1910] 1 K. B. 271, at p. 284, when he said:

"It is said that s. 44 sub-section 1 [the equivalent of our s. 42 in the English Bankruptcy Act, 1883] shows that this cannot be so, because the property of the bankrupt does not include property held by the bankrupt on trust for any other person. But it does include property held by the bankrupt on any trust for his own benefit, and when, as here, he holds property to secure his own right of indemnity in priority to all claims of any *cestui que trust*, and the retention of such property is necessary to give full effect to such right, *it follows that the property, i.e., the legal estate, and the right of possession vest in the trustee in bankruptcy to the extent to which they were vested in the bankrupt.*"

We have said we would return to paras, (f) and (g) of ground 6 which in substance are complaints against the orders made and not as to jurisdiction to *hear* the claim.

In ground 6(f) complaint is made that since the judge found that the property was held by the insolvent on trust for another person, he ought to have dismissed the claim because he was then not dealing with

an insolvency matter, no property then being available for division amongst creditors. We do not agree. The argument on this ground overlooks the fact that the contest in this appeal is between the assignee in insolvency and Dennis Whitehead, the beneficiary under the settlement. Far from dismissing the case for want of jurisdiction, as has been suggested, the judge, having found that the assignee was not entitled, had to consider next whose claim was the more proper, and he found that Dennis' was: this did not make the matter any the less one in insolvency. There is no substance in this ground of appeal.

Ground 6(g) asserts that the order was bad in that the insolvent Reginald Whitehead, who was not a party to the proceedings, was directed to convey to his brother.

While it is true that in the strict sense the insolvent was not a party to the proceedings, they were to all intents and purposes conducted on his behalf by the Official Receiver. In the first place, the Official Receiver when applying to the court for instructions stated that the insolvent was desirous of defending the matter. Though the court did not expressly permit him to intervene as a defendant, the defence and counterclaim filed by the Official Receiver expressly stated that both Official Receiver and insolvent were defendants. This aspect of the matter though canvassed was not fully argued before us, nor were any authorities cited, but we are not so sure from the action he took in this matter that the insolvent was not really more than a bare witness for the defence in the proceedings and did not submit himself to the jurisdiction of the court. If indeed he so submitted himself, we have no doubt that an order could properly be made against him. See *Maikoo v. Barratt*, [1962] L. R. B. G. 489.

We prefer to say that the order directing Reginald Whitehead to transfer his interest in N 1/2 lot 64 King and Robb Streets, Georgetown, is bad, not for the reason given by the appellant on this ground—that he was not a party to the proceedings—but because we find, contrary to the judgment of the court below, that the insolvent had indeed a beneficial interest in one-half part or share in the property which passed to the Official Receiver as assignee in insolvency for the benefit of his creditors.

We allow the appeal and set aside the order of the learned Chief Justice having found that the deed of trust is null and void and of no force and effect, for either one of the following two reasons: (a) it is based on false premises, because in 1951 it declares on an incompletely constituted trust the foundation for which did not exist in 1945; (b) being a voluntary settlement it is caught by the invalidating provisions of s. 45(1) of the Insolvency Ordinance and consequently void.

In the result, the contest is resolved in favour of the assignee in insolvency who is entitled to the following declaration and orders on his counter-claim:

- (1) that the deed of trust No. 135/1951 executed and registered in the Deeds Registry is hereby declared null and void and of no force and effect;

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- (2) accounts by both Dennis and Reginald Whitehead relating to all their dealings, transactions and intromissions in respect of N 1/2 lot 64 King and Robb Streets, Georgetown, credit being to each for such sums properly incurred in or about the administration of the said property;
- (3) costs here and in the court below.

Lot 6A Water Street, Georgetown is not directly involved in this appeal and we therefore, make no order in that respect.

VAN SERTIMA, J.: I agree.

JHAPPAN, J.: I also agree.

*Appeal allowed*

## BRITISH WEST INDIAN AIRWAYS, LIMITED v. L. A. BART.

[Court of Appeal (Stoby, C., Bollers, C. J., Luckhoo, J. A.) August 12, 13, 15—20, 22, 23, September 30, 1966]

*Contract—Carriage by air—Provision in consignment note limiting liability for delay in the carriage of goods—Unreasonable delay in dispatching goods—Whether limitation provisions apply—Warsaw Convention, 1929—Carriage by Air Act, 1934—Carriage by Air (Non-international Carriage) (Colonies, Protectorates and Trust Territories) Order, 1953 No. 1206.*

*Contract—Privity—Arrangement between airline and local agents of British football pools business for local coupons to be sent within a certain time—Whether persons filling in coupons can sue on contract of carriage.*

*Tort—Bailment—Failure of carrier through negligence to carry goods within reasonable time—Loss suffered by owner, not being consignor or consignee—Whether owner can sue for delay.*

*Contract—Football pools—Chance of winning—Loss of chance.*

Sherman's Pools Ltd. of Cardiff, Wales, carried on a pool betting business on the basis of the results of football matches played on Saturdays in Britain. L, their local agents, would collect completed coupons from numerous local players and send them each week by B.W.I.A., the appellant airline, to Trinidad, and from there by B.O.A.C. to London, from where they would be dispatched to Cardiff. For this purpose L had arranged with B.W.I.A. for the coupons to be handed in to B.W.I.A. 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 on Sunday. Although the matches would have been played when the aircraft arrived to Britain on Sunday, Sherman's were prepared to honour winning coupons provided they left on the Saturday B.O.A.C. flight from Trinidad.

Coupons for the matches to be played on Saturday, 20th February, 1960, were duly handed in by L to B.W.I.A. at its Georgetown terminal in time to be dispatched to Trinidad on Thursday 18th. Other connecting flights to Trinidad were available on Friday and Saturday. However, through the negligence of B.W.I.A.'s servants the coupons remained at its Georgetown terminal until Saturday 20th and did not leave British Guiana until 4.30 p.m. on that day, two hours after the results of the games had been broadcast locally. The package arrived in Trinidad too late to catch the Saturday London flight, and did not in fact arrive in Britain until Thursday 25th. Included in the shipment was a winning coupon submitted by the respondent, B, which; had it arrived in Britain in time, would (subject to the rules of the competition) probably have earned a substantial dividend. On account of its late arrival the coupon was excluded from the final competition. But a senior official of Sherman's testified that because of the peculiar condition in which it was folded and included with the package it would have been disqualified under the rules of the competition.

Articles 12 and 13 of the second schedule to the Carriage by Air (Non- international Carriage) (Colonies, Protectorates and Trust Territories) Order No. 1206 of 1953, gave certain rights of control and disposition to a consignor and a consignee respectively over any goods consigned by air. Article 13 (3) provided that ".....if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, the consignee is entitled to put into force against the carrier, the rights which flow from the contract of carriage". Article 19 provided that the "carrier is liable for damage occasioned by delay in the carriage by air of passengers, luggage or cargo", but art. 24 imposed limitations on the quantum of damages obtainable for such liability. Paragraph 4 of the consignment note issued by B.W.I.A. to L included provisions for the limitation of the airline's liability as to quantum. Paragraph 5 stated that no time was fixed for the completion of the carriage of the consignment.

In an action by B against B.W.I.A. for damages for negligence, alternatively for breach of contract, Cummings, J., awarded damages to the plaintiff in the sum of \$48,000. See 1965 L.R.B.G. 92. On appeal,

Held: Per Stoby, C: (i) articles 12 and 13 of the Order did not prevent a person other than the consignor and the consignee, such as an undisclosed principal or a bailor, from suing;

(ii) the words in art. 13 (3), "if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived", did not mean that the carrier incurred no liability for delay until seven days had elapsed. In the circumstances of the case there had been unreasonable delay in forwarding the shipment to Britain;

(iii) such delay was not "delay in the carriage by air" within the meaning of art. 19, but, even so, the quantum of damages claimable would have been limited by clause 4 of the consignment note unless there was a fundamental breach of the contract;

(iv) the failure to commence the contract before the football matches were played was a fundamental breach of the contract;

(v) but there was no privity of contract between B and B.W.I.A.;

(vi) so far as the claim in tort for negligence was concerned, B was the owner of the coupon but this merely entitled him as bailor to sue B.W.I.A. as sub-bailee for any destruction or loss of the coupon and not for loss resulting from breach of a contractual obligation to carry the coupon within a reasonable time. Even if B as bailor could rely on that obligation, L, as bailee, had implied authority to sub-bail to B.W.I.A. and *a fortiori* to limit liability. B was therefore in any event bound by the limitations imposed by the consignment note and the Order and could in consequence obtain merely nominal damages.

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**Per Bollers, C.J.:** (i) so far as the claim in tort for negligence was concerned, the relationship of bailor and sub-bailee between B and B.W.I.A. would not entitle B to claim damages for unreasonable delay since the duty to carry the coupon within a reasonable time arose, not out of that relationship, but from contract.

(ii) B.W.I.A.'s negligence did not amount to the breach of a fundamental term of the contract and the limitations as to quantum of damages consequently applied. Even if the coupon was not delivered to Sherman's within a reasonable time, by virtue of art. 13 (3) of the Order, B could only sue if (which was not the case) the delay exceeded seven days;

(iii) B had failed to discharge the onus placed upon him of showing that on a balance of probabilities Sherman's, as men of honour, would have paid, and had consequently failed to prove loss of a chance to win.

**Per Luckhoo, J. A. (Bollers, C. J., concurring):** (i) B could not sue on the contract of carriage between L and B.W.I.A. merely because he was interested in it or stood to be benefited by it;

(ii) there was no privity of contract between B.W.I.A. and B as L was not acting as B's agent when dealing with B.W.I.A.

(iii) even if L was acting as B's agent, B, not being the consignor or consignee under the contract of carriage, was deprived by the Order of the right to bring any suit against B.W.I.A. in the absence of a special contract providing for such a right;

(iv) the Order only created liability against B.W.I.A. for loss or destruction of the package and for delay exceeding seven days from the date when the package ought to have arrived. There was no such loss, destruction or delay;

(v) in any event liability would have been limited by the consignment note and the Order;

(vi) such limitation could only be excluded if there was a fundamental breach of the contract but such a breach was not established, mere negligence not being enough for this purpose;

(vii) B had not proved that he had suffered any loss or damage through delay.

*Appeal allowed.*

*Michael Kerr, Q.C., with J A. King for the appellants.*

*J. O. F. Haynes, Q. C., with C. A. F. Hughes for the respondents.*

STOBY, C: On the afternoon of Saturday the 20th February, 1960, the plaintiff Bart must have been a very happy man. He had listened to the B.B.C. broadcast, checked his football coupon and found that he had forecast correctly the results of a number of matches which could mean his winning a considerable sum of money. But in the same way as forecasting what hundreds of football players will do is not an

exercise of skill but of chance, so too the vagaries of human conduct cannot be depended upon. By a series of negligent acts Bart's coupon had not arrived at the scheduled time. His hopes were destroyed. He had won nothing.

In the action which he subsequently brought against the carriers, British West Indian Airways, Limited, the full story emerged.

Sherman's Pools carry on the business of football pools from Cardiff in accordance with the Pool Betting Act, 1954 (U.K). Sherman's send football coupons to S. E. Lee & Co. Ltd. who carry on business in Georgetown, Guyana. Lee & Co. Ltd. then distribute these coupons in Guyana to collectors who in turn distribute them to investors who fill in a coupon with an appropriate entry and return the coupon and stake to Lee & Co. Ltd. There is no obligation to return the coupon to Lee & Co. Ltd. An investor can, if he wishes, post the coupon direct to Sherman's but the general practice was for coupons to be handed to Lee's who would place all the coupons received for the week in a package and ship the package by air freight to London in an aircraft of British West Indian Airways, Ltd. and British Overseas Aircraft Corporation. Lee's had an arrangement with Sherman's that the package containing coupons should leave Guyana not later than the Thursday prior to the Saturday matches. The reason for this was that there was no direct flight from Guyana to London. B.W.I.A. would carry the coupons to Trinidad where they would be transshipped to a B.O.A.C. aircraft leaving Trinidad on Saturday and arriving in London on Sunday. Although the matches would have been played when the aircraft arrived on Sunday, Sherman's were prepared to honour winning coupons (unless the rules were broken) provided they left on the Saturday flight from Trinidad.

Although the system in operation between Lee's and B.W.I.A. seems simple to perform, it nevertheless broke down completely the same week that Bart had a winning coupon worth £20,457.10s.

When Bart filled in his coupon he sent it by Miss Nellie Ali to Lee's. An employee of Lee's took a package containing the week's coupons to the office of British Guiana Airways—a Government owned Airways—who are the agents for B.W.I.A. The package was accepted for shipment and a consignment note made out and a copy delivered to Lee's. This consignment note is of the utmost importance, as Bart pleaded that the terms of the contract are contained in that consignment note. Through what the trial judge termed an unexplained delay, the package with the coupons never left Guyana on Thursday. B.W.I.A operated flights on Friday and Saturday, either of which would have reached Trinidad in time to catch the B.O.A.C. flight to London, but the package was not dispatched. It was found in the Georgetown office of B.G. Airways on Saturday at about 11.30 a.m., too late to catch the 12.15 flight to Trinidad.

Bart claimed damages against B.W.I.A. on the footing of breach of contract, alternatively negligence. The trial judge awarded him \$48,000.

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Counsel for the appellants referred to the Carriage by Air Act, 1932, and the first schedule thereto which contains the Warsaw Convention. This is an Act to give effect to a Convention for the unification of certain rules relating to international carriage by air, to make provision for applying the rules contained in the said Convention, subject to exceptions, adaptations and modifications, to carriage by air which is not international carriage within the meaning of the Convention, and for purposes connected with the purposes aforesaid. The first schedule to this Act sets out the provisions of the Convention for the unification of certain rules relating to international carriage by air.

The Act empowered these provisions to be applied to non-international carriage by Order in Council with such exceptions, adaptations and modifications as were thought fit. As Guyana was in 1953 the colonial territory of British Guyana, carriage by air was non-international. By three Orders in Council most of the provisions of the legislation for international carriage were extended to non-international carriage, the consequence being, counsel submitted, that the legislation was applicable to Guyana. He said the object was to lay down the rights and liabilities of passengers, consignors and consignees on the one hand and the airlines or carriages on the other. He contended that in relation to cargo only a consignor or consignee can sue.

Subsections (4) and (5) of s. 1 of the Carriage by Air Act, 1932 (U.K.), and the provisions of the first schedule to that Act, subject to certain exceptions, adaptations and modifications, were made applicable to Guyana by Order in Council No. 1206 of 1953, which came into force on 1st October, 1953. Previously Order in Council No. 158 of 1952 had applied the rules, and sub-s. (4) and (5) of s. 1 of the Act, to Guyana. Finally, Order in Council 1474 of 1953, which came into force on 1st January, 1954, extended certain rules of the Convention relating to international carriage to Guyana, so the present position would appear to be that nearly all the provisions applicable to international carriage are applicable to non-international carriage. The argument in this appeal proceeded on the assumption that Order No. 1206 of 1953 was the relevant one, and not Order No. 1474 of 1953.

As there is a vital difference between Order 1206 and Order 1474, I do not feel justified in assuming that both counsels are wrong, and I will deal with the arguments as if Order 1206 is the relevant one. The important distinction between the two Orders is that articles 8 and 9 of the Convention relating to international carriage are omitted from Order 1206 but included in Order 1474. Article 8 requires the air consignment note to contain certain particulars and article 9 states that if the air consignment note does not contain all the required particulars then the carrier cannot avail himself of the provisions of the Convention which exclude or limit his liability. Since on examination it appears that the air consignment note contains all the particulars enumerated in article 8, and in view of the decision to which I have come, it does not matter whether the relevant Order is 1206 or 1474.

Counsel analysed the Order in Council and referred to three American authorities and one South African authority in support of his proposition that only the consignor or consignee could sue.

It is the fact each case decided that an action against a carrier will only lie at the suit of a consignor or consignee. Unfortunately, only the South African report is available and so the reasons which led the American courts to arrive at their decisions cannot be adopted. In the circumstances I feel free to test the argument without the aid of any persuasive authority.

Starting off with the proposition that prior to the Carriage by Air Act, 1932—the provisions of which give effect to the Warsaw Convention signed on the 12th October, 1929—the law was that an undisclosed principal or a bailor could institute proceedings against a carrier, it has to be shown that the Act or the Order in Council took away these common law rights.

Although the Carriage by Air Act, 1932 (U.K.), is not part of the law of Guyana, yet when one is determining whether an Order in Council made in pursuance of the Act takes away established rights, one is entitled to look at the Act itself, especially so, as the argument is that whether the carriage is international or non-international the same result flows.

I have already set out the preamble to the Act. Section 1, sub-s. (1) and (4) of the Act are as follows:

"(1) As from such day as His Majesty may by Order in Council certify to be the day on which the Convention comes into force as regards the United Kingdom, the provisions thereof as set out in the First Schedule to this Act shall, as far as they relate to the rights and liabilities of carriers, passengers, consignors, consignees and other persons and subject to the provisions of this section, have the force of law in the United Kingdom in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing that carriage."

"(4) Any liability imposed by Article seventeen of the said First Schedule on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger either under any statute or at common law, and the provisions set out in the Second Schedule to this Act shall have effect with respect to the persons by and for whose benefit the liability so imposed is enforceable and with respect to the manner in which it may be enforced."

Cognisance must be taken at once of two features in the subsections — the words "and other persons" in sub-s. (1) and the statement in sub-s (4) that with regard to passengers the liability is in substitution for any liability under any statute or at common law. The question must be posed why refer to other persons when the draftsmen knew there were no other persons. The language is not used meaninglessly, nor is it customary to refer to mythical persons in legislation. Some person or persons other than consignors or consignees must have been contemplated. Again, why specifically take away common law and existing statutory rights when a passenger dies and not do so where someone

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other than a consignor or consignee might have a claim. It is clear that the substantive provisions of the Act itself do not lend support to the claim made for it. But this is not conclusive, so one turns to the Order in Council and, for comparison, to the Convention.

Much reliance was placed on Articles 12, 13, 14, and I set them out in full:

## ARTICLE 12

"(1) Subject to his liability to carry out all his obligations under the contract of carriage, the consignor has the right to dispose of the goods by withdrawing them at the aerodrome of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note, or by requiring them to be returned to the aerodrome of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors and he must repay any expenses occasioned by the exercise of this right.

(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air consignment note delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air consignment note.

(4) The right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with Article 13. Nevertheless, if the consignee declines to accept the consignment note or the goods, or if he cannot be communicated with, the consignor resumes his right of disposition.

## ARTICLE 13

(1) Except in the circumstances set out in the preceding Article, the consignee is, entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air consignment note and to deliver the goods to him, on payment of the charges due and on complying with the conditions of carriage set out in the air consignment note.

(2) Unless it is otherwise agreed, it is the duty of the carrier to give notice to the consignee as soon as the goods arrive.

(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the

date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.

#### ARTICLE 14

The consignor and the consignee can respectively enforce all the rights given them by Articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract."

The contention is that under Article 12 the consignor is the only person who is entitled to possession from the carrier up to a certain point, and under Article 13 the consignee has the right of delivery and if others could intervene the unpaid seller might be in conflict with the consignor if the consignor is not the seller.

This argument presupposes that the law of agency and the Sale of Goods Act or Ordinance have been impliedly repealed. Under the Sale of Goods Act the unpaid seller can stop the goods in *transitu*. Where this right is exercised the seller must pay the full freight to the destination and must also pay the carrier the expenses of the delivery of the goods. In such a case the consignor is either an agent for the unpaid seller or he is himself the seller. His interests do not conflict and the carrier is in no danger of an action from anyone nor does he lose his freight.

Take the case of an owner of a valuable parcel of diamonds stolen from him. The thief consigns them to "X". The carrier's agent knows the diamonds are stolen. The owner learns that the stolen diamonds are bound for a certain destination. Is the owner to ask the consignor thief to return them or can he himself contact the carrier? Has the owner no right of action against the carrier who peddled in stolen property?

Articles 12 and 13 permit the consignor or consignee to enforce all the rights given them by the Articles, provided the obligations imposed by the contract are carried out. If either fails to carry out the obligations he loses the right to sue.

I would like to stress that when art. 12(4) emphasises that the right conferred on the consignor ceases at the moment when that of the consignee begins in accordance with art. 13, it is referring to the right which the consignor has been given in art. 12(1). Although the court is agreed on the result of this appeal, my brother judges and I differ on several aspects. With the utmost respect I cannot agree that all the rights of the consignor cease as soon as the cargo reaches its destination. His right to divert *in transitu* cases, and so does his right, if any, to delivery, but not any rights which he might otherwise have. Article 13(3), which enables a consignee to sue if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, refers to loss of cargo, not delay. The carrier can admit the cargo is lost and the consignee can sue. After seven days the cargo is presumed lost and the con-

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signee, not the consignor, can sue. This cannot deprive a third party of his rights, if any. To suggest that if Bart had a just claim against B.W.I.A. only Sherman's, the consignee, could institute proceedings would be to place commercial transactions in the realm of speculation. In law there is no binding contract between Sherman's and Bart; assuming actionable negligence by B.W.I.A. as a result of which Sherman's decline to pay, how can Sherman's proceed against B.W.I.A. on the ground that but for the late arrival of the cargo they would have paid? Sherman's suffer no damage; Bart has no action against them; but still it is said they and they alone can sue. I respectively disagree.

Article 14 entitles the consignor or consignee to sue even if he is acting in the interest of another. But he must first carry out the obligations of the contract. When he does not, I question whether a third person's rights are taken away.

Chapter III is an important part of the Order in Council.

## ARTICLE 17

"The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

## ARTICLE 18

(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered luggage or any goods, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or goods are in charge of the carrier, whether in an aerodrome or on board an aircraft, or in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

## ARTICLE 19

The carrier is liable for damage occasioned by delay in the carriage by air of passengers' luggage or goods."

Later on I will discuss the meaning of carriage by air; at the moment it is enough to attract attention to the fact that the legislation deals with the carrier's liability in the event of destruction or loss of or of damage to cargo during the carriage by air, as well as damage occasioned by delay in the carriage by air. *Shawcross and Beaumont*, discussing these articles, says this:

"In some cases the passenger or consignor or consignee may have two alternative courses open to him, either (i) to sue the carrier for delay under art. 19 or (ii) to sue for damages due to non-performance in which case the action would not it seems be subject to the provisions of the Act".

The conclusion that an action can sometimes be brought to which the provisions of the Convention are not applicable is clearly correct; another example is where destruction, loss or damage takes place outside of the carriage by air (which I agree is not limited to when the goods are on the aircraft). The moment it becomes apparent that the Convention is not applicable to certain circumstances and is not always binding on consignors and consignees then it follows third parties who may have rights can sue.

It was pressed upon the court that art. 24 (1) puts the interpretation beyond reasonable doubt. Let us see what it says:

#### ARTICLE 24

"(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention."

*Drion* in his *Limitation of Liabilities in International Air Law* at p. 135, makes this comment:

"Any actions, 'however founded', are governed by the limitation provisions of the Convention. If the words were not already sufficiently clear themselves, we have the drafting history to confirm that whether the action is founded on the contract or is brought outside the contract as an action in tort, Article 22 will apply to it. It is to be observed that only with respect to the cases of death or injuries to passengers (i.e., those contemplated by Article 17) does the Article contain an express proviso to the effect that the Convention does not prejudice the question as to who is entitled to bring an action. This would seem to imply that with respect to loss or damage to baggage or goods, the framers of the Convention were of the opinion that only the persons envisaged by the Convention have a right to claim compensation. As to loss, damage or delay of goods, the better view would seem to be that only the consignor or the consignee has a right of action. With respect to loss, damage or delay of baggage, and delay of passengers, the person contemplated as entitled to an action for damages was no doubt the passenger, though

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especially in case of delay the person with whom the carrier contracted—assuming him to be other than the passenger—should also be considered a good plaintiff."

In support of his statement that the person who contracted with the carrier should be considered a plaintiff, he said:

"The problems arising when the passenger is not the same person as the one who contracted with the carrier has received too little attention. *Cf. Cleveringa* (1946) pp. 502 sq. In case of an employee travelling on business for his employer any damage for delay will generally be suffered only by the employer. See also *French* decisions mentioned by *Sauvage* in 5 D.M.F. (1953) 607, at 613, which held the employers of commercial travellers entitled to claim damages in case of loss of baggage containing samples."

Later on in discussing to what extent the Convention precludes actions against persons other than the carrier, the view is expressed that the liability of all persons connected with the carrier's enterprise is limited in accordance with art. 22 (this article limits liability to a certain sum). This opinion can be defended and supported on the ground of master and servant or principal and agent. If this is correct, as I think it is, the ordinary law of agency should operate at the other end of the scale, that is, when the consignor acts as agent for an undisclosed principal. The law of contract has not been repealed by the Warsaw Convention. The Convention created certain legal obligations and certain legal limitations but the following statement of the law in *Cheshire and Fifoot* (6th edition) p. 415, is trite law:

"Where an agent, having authority to contract on behalf of another, makes the contract in his own name, concealing the fact that he is a mere representative, the doctrine of the undisclosed principal comes into play. By this doctrine either the agent, or the principal when discovered, may be sued, or either the agent or the principal may sue the other party to the contract.

There is nothing remarkable in this doctrine so far as it concerns the agent. The existence of an enforceable contract between him and the third party is scarcely deniable, for he purports to act on his own behalf and the other party is content with this apparent state of affairs."

In *Keighley Maxsted & Co. v. Durant*, [1901] A.C. 240, at p. 261, Lord LINDLEY said:

"The explanation of the doctrine that an undisclosed principal can sue and be sued on a contract made in the name of another person with his authority is that the contract is, in truth although not in form, that of the undisclosed principal himself. Both the principal and the authority exist when the contract is made, and the person who makes it for him is only the instrument by which the principal acts. In allowing him to sue and be sued upon it, effect is given, so far as he is concerned, to what

is true in fact, although the truth may not be known to the other party."

Three American and one South African cases were mentioned. *Manhattan Novelty Corporation v. Seaboard and Western Airlines Incorporated* was the first in point of time. It was decided on 25th January, 1957. The judgment of *Benvenega, J.*, is not available, but the head note reads:

"When carriage is governed by the Warsaw Convention, only the disclosed consignor and consignee may sue for the loss of the goods. Another party may not sue even though he has some proprietary interest in the goods".

This case was followed by *Holzer Watch Co., Inc.*, decided by *Rivers, J.*, on 30th September, 1957. In the course of his judgment *Rivers, J.*, said:

"Nor can I agree that the result here reached upon the authority of the *Manhattan Novelty Corporation* case is unreasonable. It is reasonable that the carrier be subject to suit only by those whom it knowingly dealt with, that is, by the consignor or consignee named in the air waybill. It is not unreasonable that the identities of consignor and consignee be disclosed in the air waybill and that others be not permitted to sue".

Finally, in *Pilgrim Apparel Inc. v. National Union Fire Insurance Company et al*, *Quinn, C.J.*, said:

"The plaintiff is not named either as consignor or consignee in the air waybill which was issued by the moving third-party defendant. That third-party defendant is therefore not liable to suit. The provisions of the Warsaw Convention of 1929 constitute the law of the land and are controlling."

These cases certainly indicate a uniform stand in New York courts to confine a carrier's liability to the consignor or consignee. The South African case of *Pan American World Airways Incorporated v. S. A. Fire and Accident Insurance Co., Ltd.*, April 1, 1965, arrived at the same conclusion by a majority. *Thompson, J. A.*, relied on the American cases, but ended his judgment by saying:

"I have come to the conclusion that, in the case of goods, the Convention should be construed as limiting the right to sue to consignor and consignee. Exactly what persons answer those descriptions need not be decided in this appeal".

*Holmes, J. A.*, with whom *Potgieter, A. J. A.*, agreed, simply expressed the view that claims against a carrier are limited to the consignor and consignee *Rumpff, J. A.*, reasoned that the Convention regulated the relationship between the carrier on the one hand and the consignor and consignee on the other. He drew attention to arts.

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14, 18, 19 and 22. *Steyn, C.J.*, dissented and as his reasons were adopted in full by counsel for the respondent, I set out the relevant portion of his judgment:

"The submission here is that in the context of the Convention as a whole, this article, although it does not in express terms say that in respect of goods the carrier is liable only to consignors and consignees, must be interpreted to mean that the carrier's liability is so limited. In support of this submission counsel referred to cases decided in other countries, mainly in the United States. The available reports of these cases unfortunately do not reflect the full reasoning leading to a conclusion favourable to the appellant. With due deference to others who have thought otherwise and conscious of the desirability of uniformity in a matter such as this, I venture to doubt whether such a conclusion would be sound. If such an interpretation were to be accepted, the result would be that persons other than consignors and consignees, who would otherwise have had rights of action against carriers, would be deprived of those rights. It is a well established rule that provisions said to have such an effect are to be narrowly construed. An intended forfeiture of rights is not to be presumed. Here there is no clear language providing for such a forfeiture. It could only be arrived at by inference, and it may well be questioned whether the inference is so obvious that an express provision must have been considered unnecessary. By contrast, the parties to the Convention embodied specific stipulations in a number of other articles to exclude or limit the liability of carriers. It is certainly arguable that, wherever such an exclusion or limitation was intended, the parties saw to it that it was expressed in the Convention; that the limitation here in question is no less important than those dealt with in the various articles, and that the absence of any provision expressing this limitation in the same way as others rather suggests that no such limitation was intended."

The above cases although of strong persuasive authority are not sufficiently analytical to tip the scales in favour of the appellants on this part of the case. I am aware of the opinion of VISCOUNT SIMONDS in *Scruttons Ltd. v. Midland Silicones Ltd.*, [1962] 1 All E.R. at p. 9, that "it is very desirable that the same conclusions should be reached in whatever jurisdiction the question arises. It would be deplorable if the nations should after protracted negotiations reach agreement as in the matter of the Hague Rules and that their several courts should then disagree as to the meaning of what they appeared to agree on;" but that learned judge was referring to a situation where the law was never obscure. This is not the case with the proposition under review. This is what *Shawcross and Beaumont* have to say:

"Experience showed that there were numerous obscurities in, and omissions from, the Convention, and work on proposed revision (either by amendment or by a new Convention) began as early as 1938...The new draft also included definitions of all technical expressions used (the meanings of many of which are at present

obscure), suggested simplification of traffic requirements, and substantial revision of many articles, some of which involve questions of principle, with a view to removing legal difficulties and uncertainties for the benefit of carriers and their customers.....The Hague Protocol has already come into force having been ratified to date by some thirty-five states. Unfortunately, however, neither the United Kingdom nor the U. S. A. has yet ratified the Protocol.....Suggestions have been made in the U. S. A. that the Warsaw Convention should be renounced and the Hague Protocol not acceded to."

In *Deeble v. Robinson*, [1954] 1 Q. B. 77, (it was said that) plain words are necessary to establish an intention to interfere with common law or contractual rights. And in *Re Cuno* (1889), 43 Ch. D. 12, *Bowen, L.J.*, said: "In the construction of statutes you must not construe the words so as to take away rights which already existed before the statute was passed, unless you have plain words which indicate that such was the intention of the legislature". See also *Trons v. Dent* (1853), 8 Moore's Privy Council Cases 419; *Brandt v. Liverpool Brazil Steam Navigation Co. Ltd.* (1923) 16 Asp. Maritime Cases 262.

Bearing these principles in mind, I take my stand with *Steyn, C.J.*, and hold that a person other than the consignor and consignee can sue.

If I am wrong in holding that Bart was entitled to bring his action it would be the end of the case, but if my view is the correct one then the position of Bart *vis-a-vis* B. W. I. A. was a matter of considerable importance. Before the trial judge it was submitted for the defendants that there was no privity of contract between the plaintiff and the defendants. Counsel for the plaintiff answered this submission by saying that Lee was acting as agent for Bart. The judge dealt with the submission in this way: "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." He then referred to a passage in the judgment of *Denning, L. J.*, in *Smith v. River Douglas Catchment Board*, [1949] 2 All E. R. 180, and a passage in the judgment of *Devlin, J.*, in *Pyrene Co. Ltd. v. Scindia Steam Navigation Co. Ltd.*, [1954] 2 Q. B., at p. 422, and concluded, "Consequently I find that submission untenable"

In my view the judge rested his decision on the basis of an interest by Bart in the contract. He considered that Bart being an interested party in the contract between Lee and B.W.I.A. entitled him to bring an action. On this footing the judge was clearly wrong as the decision in *Smith v. River Douglas Catchment Board* was specifically overruled in *Scruttons Ltd. v. Midland Silicones Ltd. supra*, where VISCOUNT SIMONDS said at p. 7:

"Therefore I reject the argument for the appellants under this head and invite your Lordships to say that certain statements which appear to support it in recent cases such as *Smith v. River Douglas Catchment Board* and *White v. John Warrick & Co., Ltd.* must be rejected. If the principle of *jus quaesitum tertio* is to be introduced into our law, it must be done by Parliament after a due

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consideration of its merits and demerits. I should not be prepared to give it my support without a greater knowledge than I at present possess of its operation in other systems of law."

Counsel for Bart invited the court to find as a fact that Lee was Bart's agent at the time the contract of carriage was entered into by Lee. If the evidence justifies such a finding I am prepared to do so and thereafter approach the legal issues involved as if the judge had so found. This necessitates recourse to the evidence. Bart's evidence so far as it relates to the question of agency is as follows:

"Mr. Lee sends my coupons to the U.K.—*i.e.*, S.E. Lee & Co. That has been going on for about five years. I started playing with Sherman's, and S. E. Lee & Co., have always taken up my coupons to Sherman's. I do not know Mr. Ross from B.G. Airways and I do not know even where it is. When I sent coupons to Lee it was on the understanding that Lee would send the coupons up to Sherman's all the time. That has been the practice all the time and I am claiming the sum of \$98,196".

That being the state of the evidence, the law one has to apply is to ask whether Bart and Lee agreed that Lee should enter into a contract with B.W.I.A. by which B.W.I.A. could bind Bart. For the purpose of this case Lee could have become Bart's agent in one of two ways, (a) by direct evidence of an express agreement or (b) by inferring from the uncontradicted evidence that an express agreement existed. Bart never said he had appointed Lee as agent, nor did he say that Lee was authorised to contract with B.W.I.A. on his behalf. One has to fall back then on inference. The strongest circumstance is that for five years Lee shipped Bart's coupons. But this circumstance must be viewed in its correct setting. Lee was concessionaire or agent of Sherman's. In the week relevant to this case 1,453 people handed their coupons to Lee. There is no logical reason why Lee could not be agent for 1,453 people, but the mere fact that many of those who invested in Sherman's pools took their coupons to Lee for shipment seems to suggest that Lee's true interest in the transaction was as intermediary for Sherman's. Instead of leaving individual investors to post their entries it was convenient to receive and send them all in one bundle.

The amended statement of claim is worthy of notice. Paragraph 5 states: "By a special contract of carriage made on behalf of the plaintiff between S. E. Lee & Co., and the defendants....." Paragraph 6: "the freight for the said packet containing the said coupon was paid by S. E. Lee & Co., on behalf of the plaintiff....." The amended defence said: "The said S. E. Lee & Co., did not enter into the said contract as agents for, or on behalf of, the plaintiff". And as to paragraph 6, "Save that it is denied that the freight for the said packet was paid by S. E. Lee & Co., on behalf of the plaintiff no admission is made in respect of paragraph 6". These were two specific issues pleaded and denied and dealt with at the trial in the perfunctory manner recorded earlier.

In *Pole v. Leask* (1862), 33 L.J. Ch. 135, it is stated that the relationship of principal and agent exists and can only exist by virtue of the express or implied assent of both principal and agent.

In *Garnac Grain Co., Inc. v. H. M. F. Faure & Fairclough Ltd.*, at p. 953, Diplock, L.J. said:

"The judge states the proposition of law upon which he acted thus: 'If B requests A to buy goods in his own name and the common intention, understanding or agreement is that when A gets the goods or acquires contractual rights in respect of the goods A is to hold the goods or the contractual rights not to be dealt with at A's will or pleasure, but to the instructions of and at the disposal of B, then, in my judgment, A would, at least normally, be properly treated as the agent of B in buying the goods.' With great respect there is in my view a vital lacuna in this proposition. For A to be the agent of B in entering into a contract with C to buy goods from C, there must be a previously existing agreement between A and B that A shall contract with C on B's behalf so as to create privity of contract between B and C. If all that is agreed between A and B is that A when he has bought the goods from C will hold them to the instructions of and at the disposal of B, this does not make A the agent of B to make a contract of sale between B and C."

The argument addressed to us by counsel for Bart was that there are some people who never carry out undertakings themselves; a person, for example, may set himself up as a building contractor but he has no workmen and does not build himself; he would still accept a building contract and then get someone else to do the work. A contract with such a person, says counsel, will be a contract between principals because the builder was a person who held himself out to be a builder. On the other hand, if one person goes to another who is not a builder and asks that person to obtain a builder then the person making the arrangement is an agent. In the first case the builder is contracting himself but getting the work done by another; in the second case there is an intermediary who is an agent.

I have set out counsel's proposition in full as the success of his case may stand or fall on this.

Before testing this proposition with the relevant law, the contract which Lee entered into with B. W. I. A. must be ascertained.

The consignment note contains the evidence of the contract. It shows that B. W. I. A. contracted with S. E. Lee & Co. Ltd, to ship one package of football coupons to Sherman's Limited, Cardiff. The airport of departure was Atkinson; the first stop was Port-of-Spain, then from there to London by B. A. and from London to Cardiff by F. I. A. V. Typed on the consignment note are the words, "Must ride B. A. 696/20 Feb POS/Lon FIRAV Lon/CWL", which Willock, the airways clerk, said meant 20th February, Port-of-Spain to London first available opportunity London to Cardiff. B. A. 696 was the B. O. A. C.

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flight leaving Trinidad on Saturday the 20th at 5.15 p.m. and arriving in London on Sunday. This was the flight which Penny, the manager of Shermans Pools, agreed with Lee that coupons arriving by it would be recognised as valid entries. When the words B. A. 696 were written Willock knew that football matches were played on Saturday and the coupons he accepted were forecasts for the Saturday matches.

Looking at the face of this contract the conclusion is inescapable that the carrier's agent was contracting with Lee that the football coupons would leave Trinidad by the Saturday flight. To conclude otherwise would be unrealistic. Counsel for the appellant drew our attention to the reverse side of the contract which of course binds Lee and forms part of the contract. Paragraph 2(h) makes the carrier's general conditions of cargo published in a handbook, part of the contract, and also the Order in Council already discussed. Paragraph 5 of the consignment note states that no time is fixed for the completion of the carriage and the carrier may without notice substitute alternate carriers. Paragraph 3 of Ex. "F", the general conditions, says no time is fixed for the commencement or completion of the carriage. These provisions and others, counsel said, mean that once the carriage was commenced or completed within a reasonable time the contract is properly fulfilled and since the package arrived on the 25th February, there could be no breach of contract.

Now although the airlines clerk purported to contract that the cargo would leave by Saturday on B. A. 696, I accede to counsel's argument that in the light of the general conditions for carriage of cargo, paragraph 3 of art. 6 of Ex. "F" and also paragraph 5 of Ex. "A", the consignment note, the contract must be interpreted as meaning that the package containing the coupons would arrive within a reasonable time. Legally no specific flight or time could be fixed for the commencement or arrival of the aircraft. In determining whether the arrival on the 25th February, was a reasonable time several factors must be considered. Reasonableness is relative. The athlete who undertakes to run a hundred yards in a reasonable time does not do so by taking 20 seconds: B. W. I. A. operated a flight on Thursday, another on Friday and again on Saturday. Any one of these flights would have connected with B.A. 696 on Saturday. The reason for stipulating that no particular time or flight can be guaranteed is manifestly due to the conditions under which aircraft operate. Mechanical trouble, bad weather, illness of personnel, all may conspire to delay aircraft and so protective clauses providing for such eventualities exist. When, however, there is delay, it is proper, I apprehend, to ask whether there was in fact any mechanical trouble, any unforeseen circumstance which contributed to the delay. If there were, then a delay of one day or one week may be reasonable, but, if not, a delay of one day may be unreasonable. In the instant case the delay was due to negligence. Further, the scheduled flights departed on time. The airline knew that they were in possession of football coupons which would become worthless if the coupons did not arrive on the Sunday. All these circumstances conspire to make an arrival on the 25th February, an unreasonable time of arrival.

The terms of the Convention are such that what is reasonable time for the performance of a contract is of the utmost importance. By art.

19 the carrier is liable for delay and in international carriage he cannot exclude his liability for delay (See arts. 19 and 23(1) of the schedule to the Carriage by Air Act, 1932), although he may do so in non-international carriage (See art. 19 of the 1206 Order, but otherwise in the 1474 Order). When deciding whether there is delay or not art. 13 must be placed in its correct perspective. The words in art. 13 (3), "if the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived", do *not* mean that the carrier incurs no liability for delay until seven days have elapsed. The date on which the cargo ought to have arrived has to be ascertained and to ascertain that date the test is a reasonable time in all the circumstances. Once that date is ascertained an arrival after such date makes the carrier liable (and absolutely liable in international carriage) for delay. In legislating that the consignee is entitled to put into force against the carrier the rights which flow from the contract seven days after the ascertained date of arrival, the intention was not to give the carrier a period of seven days grace to cure his negligence, but to place the onus on the carrier to prove that the cargo is not lost. To interpret this article otherwise would mean that the carrier is not liable for delay unless the delay extends for over seven days. Article 12 deals with the consignor's right to divert the cargo and art. 13 with the consignee's right to receive the cargo on arrival. There ought to be no confusion about this.

Having ascertained that the contract between Lee and B. W. I. A. was for a package of football coupons to be delivered at London Airport within a reasonable time from Wednesday 17th February, and that such reasonable time in the circumstances was the 21st February, the question of agency must be examined. It was necessary to find the terms of the contract between Lee and B. W. I. A. in order to say whether in the light of the contract Lee was acting for an undisclosed principal.

Counsel, in support of his argument that agency should be determined in the way suggested, referred to *Pyrene Co. Ltd. v. Scindia Steam Navigation Co. Ltd.*, [1954] 2 All E. R. 159, where *Devlin, J.*, as he then was, referred to what *Lord Blackburn* said in *Blackburn on Contract of Sale*: "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". And again at p. 168:

"Let me look at the situation first from the standpoint of the shipper, I. S. D. In the ordinary case, such as I have been considering above, where the shipper takes out a bill of lading or an insurance policy, he has, at the time of the contract, himself got the property in the goods; the question whether he contracts for the benefit of subsequent owners depends on proof of his intention at the time of contracting. But where, as in this case, he has not got the property at the time of the contract and does not intend to acquire it before the contract begins to operate, he must act as agent. He cannot intend otherwise; the intention is inherent in the act; he must either profess agency or confess himself a wrong-doer. For if the ship-owner lifts the seller's goods from the dock without the seller's authority he is guilty of conversion to which the shipper by requiring him to do it makes himself a party."

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The question *Devlin, J.*, was dealing with was whether there was privity of contract between the seller (who was the owner of the goods but not the shipper) and the owners of the ship. He drew the inference that the shipper was agent of the owner for the purpose of entering into a contract of affreightment because of the nature of the article to be shipped, and the contract between the seller (owner) and shipper. The conclusion of agency was inescapable the moment the contract between the shipper and the owner was proved. It was the shipper who took out the bill of lading and then instructed the seller (owner) to place the goods on the ship owner's ship. Clearly the seller (owner) was then bound by the contract of affreightment.

No doubt when Lee entered into the contract with B. W. I. A., Bart became bound by the conditions in the consignment note for the reason that it can be implied that if there was authority to ship by air there was an acceptance of the conditions inherent in shipping by air. As *Devlin, J.*, said in *Pyrene (supra)*, "if it were intended that he should be a party to the whole of the contract his position would be that of an undisclosed principal and the ordinary law of agency would apply".

What is the ordinary law of agency is what concerns this case. There are many ways in which agency may be created. *Cheshire and Fifoot* limit the formation of agency to (1) express agreement, (2) estoppel, (3) ratification, (4) necessity, and (5) through cohabitation. These classifications are perhaps not exhaustive as the law has always recognised that in the absence of evidence of an express agreement a person may so act that the irresistible inference is he is an agent, and it has become customary to speak of an agent by implication or an agent by conduct. But whenever one is forced to have to imply a person's acts or conduct are such that it is safe to say he is an agent, one is in effect saying there was an express agreement. The acts and conduct are simply the means of proving the agreement.

When the cases referred to by both counsel are examined—*Troy v. Eastern Co. of Warehouses Insurance and Transport of Goods & Co. Ltd.* (1921), 37 T. L. R. 833; *Lee Cooper v. C. H. Jeakins & Sons*, [1965] 1 All E.R. 283; *Morris v. C. W. Martin & Sons*, [1965] 2 All E.R. 725,—although I appreciate the careful argument of Mr. Haynes, I can see no justification for his position that if A goes to B and asks B to perform an act which he knows that B cannot perform and will have to obtain the services of another in order to perform it, then B is an agent of A. Such a statement over-simplifies the law and minimises the powers of an agent. In the proposition as expounded B will be an independent contractor unless A expressly authorises him to enter into a contract with C. See *Garnac Grain Co. (supra)*.

In this case Lee was Sherman's agent. It was to Lee's interest to facilitate investors by receiving their coupons. There is nothing unusual in one man being an agent for a pools promoter and for a pools investor, nor is there anything wrong in one man being an agent for hundreds of people. But where one man receives hundreds of coupons and there is no evidence of any specific contract between him and any person, then the implication of agency must recede in direct proportion to the num-

ber of people dealing with him. Lee could have shipped the coupons by any carrier; he could have sent some on Thursday, some on Friday and some on Saturday. The carrier too must have some choice in regard to its customers. In *Pyrene* the carrier could have refused to deal with the shipper or rejected the article. Here, the carrier could not tell Lee to open the package and remove 1, 2 or 20 coupons. This is not to infer that the carrier must know whose goods are being shipped, but if the shipping of goods without more implies agency as understood in the law of agency, the carrier is entitled to know he is contracting with 1,453 people.

I do not feel justified in finding from the evidence that privity of contract between Bart and B. W. I. A. was established. I am not persuaded that the contract which I have found as the contract between Lee and B. W. I. A. was as a result of Bart's specific instructions to Lee or general authority given by Bart to Lee. Nor can I find that Lee's acts or his conduct was such that he was acting as Bart's agent so as to create privity of contract between Bart and B. W. I. A.

Counsel for Bart relied on his alternative claim in tort in the event of an adverse decision on the claim in contract. He contended that if the relationship between Bart and Lee was not principal and agent then it was bailor and bailee and the relationship between Bart and B. W. I. A. would become a relationship of sub-bailment.

Counsel for the respondent proceeded on the basis that Bart was the owner of the coupon and as such could claim in tort against a sub-bailee. On the other hand, appellants' counsel relied, among other submissions, on the fact that there was no ownership in Bart nor did he have the immediate right to possession.

The evidence of the manner in which Bart received the coupon has already been discussed. An investor who wishes to be eligible for a prize in a football pool may not be compelled to submit his entry on a printed coupon, but when a coupon is delivered to him the original owner must surely intend to pass the ownership in the paper. The coupon, as a coupon, has no monetary value; if someone deliberately destroyed a large quantity of coupons so as to force investors to enter a rival's competition, Sherman's remedy would be to direct Lee not to give that person coupons. Lee can protect Sherman's by exercising care in distribution but once Lee parts with the coupon it must be on the assumption that ownership passes. My opinion is that Bart was the owner of the coupon and his ownership lasted until his entry reached Sherman's when by the rules no legal relationship then existed.

Bart then, being the owner had *prima facie* a right to sue B.W.I.A. as a sub-bailee unless the right to immediate possession was in the sub-bailee, under such circumstances that the owner's right to bring an action against a third party passed to the sub-bailee. This was a simple case of bailment where the sub-bailee's possession did not impinge on the owner's rights.

As *Diplock, L.J.*, pointed out in *Morris v. Martin (supra)* most cases of bailment are accompanied by a contractual relationship between

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bailee and bailor, but bailment can exist independently of contract. The same point was brought out again by *Diplock, L. J.*, in *Bagot v. Stevens Scanlon & Co. Ltd.*, [1964] 3 W. L. R. 1162, where he referred to *Green, L. J.*'s judgment in *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K. B. 399:

"The distinction in the modern view, for this purpose, between contract and tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract, it is tort, and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."

The first essential in considering Bart's claim in tort is to analyse his complaint. If the complaint is founded on the contract between Lee and B.W.I.A. then he is complaining of a contractual duty not owed to him, but if his complaint is referable to the status obligation of bailor and bailee then the action in tort will lie.

When Bart, bailor, delivered his coupon to Lee, bailee, and Lee shipped it by B.W.I.A., sub-bailee, what duty was owed by B.W.I.A. to Bart independently of contract? *Halsbury* (3rd edition), Vol. 2, p. 114, states the law in this way:

"A custodian for reward is bound to use due care and diligence in keeping and preserving the article entrusted to him on behalf of the bailor. The standard of care and diligence imposed on him is higher than that required of a gratuitous depositary, and must be that care and diligence which a careful and vigilant man would exercise in the custody of his own chattels of a similar description and character in similar circumstances."

The application of this principle of law to the facts of each case as it occurs is sometimes difficult and extending over the years a matter of controversy. *Marshall, J.*, in *Lee Cooper v. Jeakins (supra)* held that bailees for reward were in law bound to exercise due care and diligence in caring for the goods entrusted them, which duty was seriously breached owing to gross negligence of an employee. Quoting *Lord Macmillan* in *Donoghue v. Stevenson*, [1932] All E. R., at p. 30, "the categories of negligence are never closed", he said, "the courts should not hesitate to produce a new duty where a set of facts hitherto unconsidered rule it right so to do." In *Morris v. Martin (supra)* the sub-bailee was held liable for the loss through a servant's dishonesty of the article bailed.

The controversy in this case is whether the time has come for a further duty to be added to a bailee's obligations.

In the same way as a proper understanding of the law of bailment can be traced to *Coggs v. Bernard* so too *Donoghue v. Stevenson (supra)* destroyed the tendency to limit a bailee's liability to cases where a bailee owed a contractual duty to take care; once it is appreciated that neither

*Donoghue v. Stevenson (supra)* nor any other case imposed on a bailee other than his common law duties where the action was founded on tort the application of the law is a simple exercise. Modern conditions, modern methods and modern ideas of trade may create novel standards of care, such as the bailee's chauffeur not leaving his truck unattended for ten minutes (*Lee Cooper's case*)—negligent in England where the crime of stealing from unattended vehicles is prevalent but hardly negligent in those territories where hundreds of unattended cars and trucks are safe from plunderers. But the twin duties owed by the bailee to avoid damage or loss are citadels which no judge has dared to storm. The duties have never been extended, only the kind of actionable negligence which causes the damage or the loss. Why did a bailee have a duty to exercise reasonable care to prevent damage or loss to the goods bailed? The reason is because of the nature of bailment itself. *Sir William Jones'* definition is: "A delivery of goods on a condition expresses or implied that they shall be restored by the bailee to the bailor according to his directions as soon as the purpose for which they are bailed shall be answered". While this definition overlooks a bailment for sale, yet, whether the bailment is for return or sale, where the goods bailed cannot be returned or sold through loss or damage caused by negligence the bailee must be liable. But delay in returning or selling even through negligence means that the goods are still in existence and the loss or damage caused to the bailor as a result of delay must depend on the contract of bailment.

Thus it is in this case that B.W.I.A.'s negligence caused delay not loss or damage and such delay depends on a contract to which Bart was not a party. In *Fleming v. The Manchester, Sheffield, and Lincolnshire Railway Co.* (1879), L. T. 39, N. W. 556, *Bramwell, L. J.*, said:

"In these cases, as we laid down in *Bryant v. Herbert* (39 L. T. Rep. N. S. 17; L. Rep. 3 Q. B. Div. 389), we must look not at the form but at the substance of the action, and when we do so it is manifestly clear that this action is founded on contract in its substance, and this was also the opinion of the court below. The statement of claim states that the defendants were common carriers, and that certain goods were delivered to them as such to be carried for reward, and that they accepted them as such to carry safely. It then alleges breaches, namely, that they did not carry safely, and that through their negligence the goods were lost. This is surely a claim for breach of contract."

The respondent placed considerable reliance on *Hedley Byrne & Co. Ltd. v. Heller & Partners*, [1963] 3 W. L. R. 101. In a very interesting argument he said that the fact of bailment brought the parties together into a relationship of proximity and that such proximity imposed a bailment obligation similar to a contractual obligation; the contractual obligation owed to Lee, he said, is to send the package within a specified time or within a reasonable time and the bailment was to do the same thing to the package.

As I understand the submission, counsel, relying on *Hedley Byrne (supra)*, is contending that while Bart could not sue B.W.I.A. for breach of contract, yet if B.W.I.A. undertook with Lee to send the package to

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London within a reasonable time and did not do so through negligence, they are liable for economic loss to Bart.

The great weakness of this argument, if I may say so, is that B.W.I.A. did not give any undertaking to Bart. Without any undertaking whatsoever B.W.I.A. would be liable to Bart if they destroyed or lost his coupon; this is not because of a proximity relationship but from a bailor/bailee relationship. The House of Lords in *Hedley Byrne (supra)* rejected the view that there is no common law liability for negligence in the absence of a contractual or fiduciary relationship but Lord Devlin explained at p. 142:

"It is not, in my opinion, a sensible application of what Lord Atkin was saying for a judge to be invited on the facts of any particular case to say whether or not there was 'proximity' between the plaintiff and the defendant. That would be a misuse of a general conception and it is not the way in which English law develops. What Lord Atkin did was to use his general conception to open up a category of cases giving rise to a special duty. It was already clear that the law recognised the existence of such a duty in the category of articles that were dangerous in themselves. What *Donoghue v. Stevenson* did may be described either as the widening of an old category or as the creation of a new and similar one. The general conception can be used to produce other categories in the same way. An existing category grows as instances of its application multiply, until the time comes when the cell divides."

B.W.I.A. had a specific contractual obligation to Lee and a common law tortious liability to Bart and no amount of proximity between Bart and B.W.I.A. can enable Bart to sue on Lee's contract.

If I am wrong in thinking that Bart's action in tort is in reality an action founded on a contract to which he was not a party, then another and difficult legal position arises. B.W.I.A. in contracting with Lee, limited their liability for delay in accordance with the consignment note, the special conditions of carriage Ex. "F", and art. 19 of the Order in Council. This was one of the reasons which caused counsel for the appellants to contend that while Lee as consignee could bring an action, Bart in any capacity could not. If Bart can claim, as I hold he can, and if he does so in tort, as he has, then the question is whether the limitation conditions bind him. This point of law has not been finally resolved in England.

In *Scruttons v. Midland Silicones (supra)* it was held that apart from special considerations of agency trust, assignment or statute, a person who is not a party to a contract cannot enforce or rely for protection on its provisions. For the purposes of the distinction I wish to make, the facts of *Midland Silicones* are important—consignees and ship-owners contracted by bill of lading to limit liability for loss or damage to goods; the ship-owners and stevedores unknown to the consignees contracted that the stevedores should have the protection afforded by the bill of lading. The stevedores having

negligently damaged the consignees' goods sought to limit their liability in terms of the contract between the consignees and the ship-owners, but with the result as stated. But the *Midland* was concerned with the law of contract; considerations of tort were not involved. *Denning, L. J.*, adhered to his view that a person interested had a cause of action and while it is now definitely and authoritatively settled that such is not the case, his discussion on the difference in principle between contract and bailment is persuasive. His application of the law of bailment to the facts of the *Midland* case was not followed by the other judges and his view must be accepted as being wrong. In a case of this kind, however, where Bart in handing his coupon to Lee knowing that Lee would probably send it by aircraft which limited its liability for delay, must assuredly be bound by the Order in Council. Not on the ground that Lee was his agent but because as bailee Lee had implied authority to sub-bail and a *fortiori* to limit liability. Lee could not create privity of contract between B.W.I.A. and Bart, but as a bailee he could limit his own and his sub-bailee's liability. This is what *Denning, L.J.*, said in the *Midland*:

"the law of bailment is governed by somewhat different principles than those of contract or of tort: for 'bailment' as *Sir Percy Winfield* said —

'is more fittingly regarded as a distinct branch of the law of property, under the title possession, than as appropriate to either the law of contract or the law of tort',

see *The Province of the Law of Tort*, at p. 100. One special feature of the law of bailment is that the bailee can make a contract in regard to the goods which will bind the owner, although the owner is no party to the contract and cannot sue or be sued on it. The contract must, no doubt, be of a category which the owner 'impliedly authorised the bailee to make, such as a contract for repair, storage, loading, unloading or removal: but provided it is impliedly authorised, the true owner is bound by it."

The decision of *Devlin, J.*, in *Pyrene* is to the same effect. See also *Morris v. Martin (supra)* where *Denning, L.J.*, at p. 733 said: "the owner is bound by the conditions if he expressly or impliedly consented to the bailee making a sub-bailment containing those conditions, but not otherwise."

If my view of the law is correct, this may well explain why the draftsmen of the Articles of the Warsaw Convention did not specifically state that only a consignor/consignee could claim and why in the South Africa case in referring to a consignor, *Thompson, J.A.*, said: "Exactly what persons answer those descriptions (consignor, consignee) need not be decided in this appeal", the reason being that a bailor who is not the consignor has no stronger claim than a consignor; he is in the same position.

As I hold that the Order in Council would bind Bart, this means that, even if successful, subject to what I say hereunder, his damages

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under art. 19 will be limited to an amount representing double the sum paid for the carriage, which in Bart's case means nominal damages.

I have read the judgments of my Lords and so I will deal very briefly with the remaining questions discussed before us. Should I be right in holding that Bart is a good plaintiff and wrong in finding that he was not an undisclosed principal, what is his position having regard to the consignment note and the Order in Council? Article 19 of the Order in Council, as I have shown, limits the damages he may recover; clause 4 (c) of the consignment note confines his damages to 250 gold francs. The plaintiff can avoid the limitation provision by proving a fundamental breach of the contract. And if the delay was not delay in the carriage by air as contemplated by art. 19 but was delay due to negligence in connection with the carriage of goods as provided in clause 4(a) of the consignment note, then damages would be about \$48 instead of practically nothing. Furthermore, it may be possible to show that the delay was outside the scope of the Order in Council and the consignment note.

The learned judge in the course of his decision made these two observations: "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. 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 defendants' office. The limitations provided in the consignment note and the documents therein incorporated do not therefore apply". This is a positive finding by the judge that the delay was not delay in the carriage by air.

The appellants challenge this finding and submit the correct interpretation of art. 19 is that there is delay in the carriage by air if the goods arrived late at the place of destination. This construction accords with Professor *Drion's*. The respondent supported the judge's interpretation and argued that no question of delay can arise if the cargo never starts since carriage by air would begin at the earliest with the package being at Atkinson airport.

Despite the fact that about forty countries signed the Warsaw Convention intending to codify the law of international flying and to have uniformity in interpretation, art. 19 has been construed by textbook writers in different ways. What was intended to be simple has turned out to be complex and difficult. To my view two articles hold the clue to the true meaning of art. 19; one is art. 31 and the other art. 18(2). Article 31(1) states that "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". If carriage by air commences as soon as the cargo is received at the terminal office then the words "any other mode of carriage" are redundant. In *Crows Transport Limited v. Phoenix Assurance. Co. Ltd.*, [1965]. 1 W. L. R. 383. the plaintiffs insured against all risks of loss or damage to the subject matter insured belonging to or in the custody of or control of the in-

sured...and whilst temporarily housed during the course of transit whether on or off the vehicles. Gramophone records being transported from one town to another were offloaded from a vehicle and stolen before they could be reloaded on to the plaintiff's vehicle. The county court judge found that the transit did not begin until the goods were on the plaintiff's vehicle. The Court of Appeal held the goods were stolen during the course of transit. This decision depends on the language of the insurance policy and cannot be used as laying down any principle of law. If the gramophone records were left on the ground for three days and the vehicle arrived at its destination it could hardly be said that the records were delayed on the lorry. They were delayed in transit but not delayed in a vehicle.

Article 18(2) is as follows:

"The carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever."

Article 17 concerns passengers. The point was made that a passenger takes care of himself and luggage until he reaches the aerodrome while cargo is in charge of the carrier at the town office from the time it is shipped, hence the necessity to limit liability in the case of passengers to damage sustained on the aircraft or in the course of any of the operations of embarking or disembarking. This is understandable but I can find no explanation for differentiating between destruction, loss, damage and delay. In the former, "carriage by air", has the specific meaning given to it by art. 18(2); in art. 19, which concerns delay, no specific meaning is given to the words "carriage by air". I conclude that no definition is given because it was obvious that the definition in art. 18(2) was exhaustive and applicable to art. 19. In my opinion the coupons were not delayed in the carriage by air.

Whether there was delay in the carriage by air is largely academic. Clause 4 of the consignment note limits liability, if negligence is proved, to 250 gold francs, even if such negligence occurs outside of the carriage by air. The admitted negligence of the defendant comes within the ambit of clause 4(a) of the consignment note and so in any event the trial judge was wrong in finding that he was entitled to award substantial damages. This conclusion is based upon the provisions of the 1206 Order in Council. In international carriage and under the 1474 Order, if applicable, a provision to exclude liability for delay is void. Clause 4 (a) and (b) of the consignment note would be of no effect as under the Carriage by Air Act and the first schedule thereto, once there is delay the onus is on the carrier to bring himself within the terms of the Convention and if he fails to do so damages will flow. Even clause 4(c) of the consignment note limiting the damages may be questioned in international carriage or under Order 1474, but this was not canvassed at the time or on the appeal and I do not consider it open. This being so the plaintiff's damages if successful would be limited to 250 gold francs unless he proved a fundamental breach.

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Counsel for the respondent was quite emphatic that there was a fundamental breach of the contract. He put his argument this way: "It is quite wrong to say that mere delay by negligence could never constitute a fundamental breach; acts of omission or commission in carrying out a contract which results in the frustration of it can lead to a fundamental breach". He analysed *John Carter (Fine Worsteds) Ltd. v. Hanson Haulage (Leeds) Ltd.*, [1965] 2 W. L. R. 553; *Suisse Atlantique Societe d'Armement Maritime S. A. v. N. V. Rotterdamsche Kolen Centrale*, [1966] 2 All E.R. 61, and *The Cap Palos*, [1921] All E. R. Rep. 249. He relied, among others, on *Wren v. Eastern Counties Railway* (1859), 1 L. T. 5 and *Grein v. The Imperial Airways Ltd.*, [1936] 2 All E. R. 1258. The law relating to fundamental breach was fully considered in *Suisse Atlantique v. N. V. Rotterdamsche (supra)*. Lord Reid referring a judgment of *Upjohn. L.J.*, said: "The authorities establish that where there is a breach of a fundamental term the person in breach cannot rely on clauses of exclusion to protect him as against the other party"; and at p. 86 *Upjohn, L. J.*, said:

"I must now examine some of the cases that were cited to your lordships as examples of the principle that, in some circumstances, a party to the contract cannot rely on clauses inserted for his benefit. The earlier cases were nearly all cases of carriage of goods by sea or by land or concerned with the warehousing of goods. The principles on which these cases, mainly in the last century, were decided were not expressed by the judges to be related to repudiatory conduct on the part of one party thereto nor to any principle of frustration, for these conceptions were not so fully developed as they are now. Thus, in cases of carriage of goods by sea, an unreasonable deviation from the usual and customary course is, and has always been, considered as precluding the ship-owners from relying on any clauses inserted for his protection: see, for example, *Davies v. Garrett and Scaramanger v. Stamp*. So strict is this rule that, although the deviation has not been the cause of any loss to the plaintiff's goods and was, so to speak, a mere incident in the voyage, nevertheless having taken place the owner is no longer entitled to rely on clauses of exception contained in the relevant contract, unless it can be shown that the loss would have happened in any event: see *United States Shipping Board v. Bunge y Born Limitada Sociedad; James Morrison & Co., Ltd. v. Shaw, Savill & Albion Co., Ltd.* It was not, however, until this century that deviation was finally established as a fundamental breach."

In *John Carter's* case (*supra*) *Davies, L. J.*, at p. 570 said: "Mr. Ackner rightly points out that mere negligence in the performance of a contract is not a fundamental breach of it: *Swan Hunter & Wigham Richardson Ltd. v. France Fenwick Tyne & Wear Co. (The Albion); Spurling (j) Ltd. v. Bradshaw.*"

Applying these authorities to the facts of this case the contract between Lee and B. W. I. A. must be scrutinised; when that is done the provisions limiting liability must be related to that contract. If the contract, as I have found, is a contract to carry football coupons to London by Sunday 21st February, and through negligence these coupons were

not dispatched from Trinidad until after the 21st, one has to decide whether that negligence was mere negligence which is provided for by the limitation provisions of the Order in Council and the consignment note or whether the negligence did not amount to a frustration of the contract causing a fundamental breach. Having regard to the authorities I am convinced that the failure to commence the contract before the football matches were played is a fundamental breach. To disregard the performance of a contract by negligence is far different from performing a contract negligently. Had I been able to find that Bart was an undisclosed principal I should have developed this point extensively in an effort to show that there was a fundamental breach but as the plaintiff's claim cannot succeed for reasons already given and as my brother judges differ from me on this part of the case I am content to indicate that *I* would have found a fundamental breach.

This case illustrates the danger of allowing an individual to transact one's business without some document specifying the extent of his authority. There is express provision where goods are to be shipped by air, for a special contract, if so desired; there is express provision for declaring the value of the cargo to be shipped. Commercial transactions unlike football pools do not depend on chance. Carriers have taken care to protect themselves and those who deal with them should do likewise. I would allow the appeal with costs and dismiss the cross-appeal.

BOLLERS, C. J.:

I have read the judgment of *Luckhoo, J. A.*, and I concur in it but would add a few observations of my own on three points:

(1) whether the appellants were liable in an action for negligence in tort for failing to dispatch the package containing the coupon in time to make the necessary connection with the B.O.A.C. plane leaving Piarco on Saturday at 4.50 p.m.;

(2) whether, assuming the respondent to be an undisclosed principal to the contract with the appellants, there was a breach of a fundamental term of the contract by the appellants in failing to dispatch or deliver the package containing the coupon to the B.O.A.C. plane leaving Piarco on the vital flight in a time agreed upon or within a reasonable time, as a result of which the respondent would have been entitled to treat the contract as repudiated by the appellants, in which case the question would arise as to whether the respondent is bound by the provisions of the Order-in-Council known as the Carriage by Air (Non-International Carriage) (Colonies, Protectorates and Trust Territories) Order, 1953, whereby the provisions of the First Schedule to the Carriage by Air Act, 1932, adapted and modified as set out in the Second Schedule to the Order, applies to all carriage by air, not being international carriage by air, as defined in the First Schedule to the Act, or by the conditions on the back of the air consignment note;

(3) whether the learned trial judge was right in awarding damages on the basis of a loss of a chance in taking part in the pools for that week and winning a first dividend.

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Under the first point, counsel for the respondent submitted that, assuming that the respondent was not an undisclosed principal, then a cause of action in his favour arose from the negligence of the appellants based on the ground that the respondent as the owner of the coupon or such proprietary interest *per se* in the coupon which vested in him gave him the right to sue the carrier in tort, and furthermore, in view of the circumstances, there would be a bailment for reward between the respondent and the appellants whereby the appellants owed a common law duty to the respondent to dispatch the coupon in the time to make the necessary connection at Piarco; and if the true position is that this common law duty was negligently carried out by the appellants they would be liable for the loss which ensued. Finally, counsel submitted that the bailment between the respondent and the appellants, which was brought about by the sub-bailment between S. E. Lee & Sons and the appellants, brought the respondent and the appellants into such proximity that, in relation to the coupon contained in the package, the appellants owed to the respondent a duty which fell within the principle laid down by Lord *Atkin* in the celebrated case of *Donoghue v. Stevenson*, [1932] A. C. 562, p. 580. This ground of liability, being separate and distinct from the common law duty owed by a bailee to a bailor, did not import that the terms of the contract between S. E. Lee & Co. and the appellants became part of the obligation of the appellants to the respondent. In other words, the duty which the appellants in that situation owed to the respondent was not contractual but completely independent of the contract.

The first matter that must be disposed of is whether the respondent was the owner of the coupon or, if not, whether he had the right to possession of it in order to maintain an action against the sub-bailees who would be the appellants in the action. Counsel for the appellants maintains that the respondent would not be the owner of the coupon because under the system existing at Shermans Pools Limited the coupon would be distributed to the plaintiff as a potential investor for a specific or limited purpose, that is to say, to be filled up by him and sent back to Shermans, and while it is true that he might destroy it and Shermans would take no action against him in respect of such a trivial matter, there was no intention on the part of Shermans when the coupon was distributed to the respondent to pass the property in the coupon to him. Counsel urges that under the system employed at Shermans when the coupon is returned to Shermans Pools Limited it remains there and is filed away and it is inconceivable that the respondent would be able to maintain an action for the recovery of the coupon. I am of the view that the evidence of the respondent on the record, which was unrebutted by the appellants, shows that up to the time when the coupon was posted he was the owner of it and the person entitled to possession. The rules of Shermans Football Pools are silent as to the ownership of the coupon and there is nothing on the coupon to indicate that Shermans did not intend to pass the property in it to any potential investor who received a coupon from a distributor under the system.

It appears to me on the authority of *Morris v. C. W. Martin & Sons, Ltd.*, [1965] 3 W. L. R. at p. 276, that there was in this case a bailment of the coupon (*locatio operis faciendi*) by the respondent to

S. E. Lee & Company, the agents and concessionaires of the consignees, Shermans Pools Limited, when the respondent sent the coupon to them by bearer for dispatch by them to Shermans in Cardiff, United Kingdom, and in turn there was a sub-bailment by Lee & Company to the appellants under a contract of carriage whereby the appellants undertook to carry and convey the coupon in the package to London, United Kingdom, and in *Morris v. C. W. Martin & Sons, Ltd.*, Lord Denning, M. R., in his judgment at p. 285 of the report, in the Court of Appeal made it clear that an action does lie by the owner direct against the wrong-doer if the owner has the right to immediate possession (see *Kahler v. Midland Bank, Ltd.* (1950) A. C. 24); even if he has no right to immediate possession he can sue for any permanent injury to, or loss of, goods by a wrongful act of the defendant: see *Mears v. London & South-Western Railway Co.*, (1862) 11 C.B.N.S. 850. In *Morris v. Martin & Sons, Ltd.*, the circumstances were that the plaintiff sent a mink stole to a furrier to be cleaned. With the plaintiff's consent the furrier, who did no cleaning himself, delivered the fur to the defendants who were well-known cleaners to be cleaned by them for reward. The contract between the furrier and the defendants, which was made by the furrier as principal and not as agent for the plaintiff, contained printed conditions of trading with exemption from liability clauses. Whilst the fur was with the defendants, it was stolen by one of their servants whose duty it was to clean the fur. The fur was never recovered.

In the Court of Appeal it was held that the defendants, being sub-bailees for reward, owed to the plaintiff, the owner of the fur, the duties of a bailee for reward to take reasonable care of the fur and not to convert it. Judgment was then entered in favour of the plaintiff for damages based on the value of the coat for the negligence of the defendants in failing to take reasonable care of the fur and not to convert it. As I understand the decision in that case, the liability of the defendants was based on the common law duty which they owed to the plaintiff as bailees of her property, that is to say, the duty to take reasonable care to keep the goods safe and not to do any intentional act inconsistent with the bailor's rights in the goods, e. g., not to convert them, which common law duty arose by reason of the bailment which was created by the contract between the furrier and the cleaners (defendants) but which was independent of the contract. Hence, although the plaintiff as owner of the goods had no privity of contract with the defendants, yet it was held she could maintain an action in tort for the breach of the common law duty which the defendants owed to her as bailees of the fur.

Lord Denning, M. R., at p. 282 of his judgment, in dealing with the position of a bailment for reward, made it clear that once a man has taken charge of goods as a bailee for reward, it is his duty to take reasonable care to keep them safe: and he cannot escape that duty by delegating it to his servant. If the goods are lost or damaged whilst they are in his possession, he is liable unless he can show ... and the burden is on him to show—that the loss or damage occurred without any neglect or default or misconduct of himself or of any of the servants to whom he delegated his duty. The bailee, to excuse himself, must show that the loss was without any fault on his part or on the part of his servants. If he shows that he took due care to employ trustworthy ser-

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vants, and that he and his servants exercised all diligence and yet the goods were stolen, he will be excused.

*Diplock, L. J.*, at p. 287 of the report, in his judgment considered the question whether the defendants were in breach of any common law duty owned by them to the plaintiff and stated:

"Duties at common law are owed by one person to another only if there exists a relationship between them which the common law recognises as giving rise to such duty. One of such recognised relationships is created by the voluntary taking into custody of goods which are the property of another. By voluntarily accepting from Beder the custody of a fur which they knew to be the property of a customer of his, they brought into existence between the plaintiff and themselves the relationship of bailor and bailee by sub-bailment. The legal relationship of bailor and bailee of a chattel can exist independently of any contract, for the legal concept of bailment as creating a relationship which gives rise to duties owed by a bailee to a bailor is derived from Roman law and is older in our common law than the legal concept of parol contract as giving rise to legal duties owned by one party to the other party thereto. The nature of those legal duties, in particular as to the degree of care which the bailee is bound to exercise in the custody of the goods and as to his duty to re-deliver them, varies according to the circumstances in which and purposes for which the goods are delivered to the bailee."

This learned judge then made it clear that this was a case which involved conversion of goods and that while most cases of bailment are accompanied by a contractual relationship which may modify or extend the common law duties of the parties that would otherwise arise from the mere fact of bailment, this is not necessarily so, as, for instance, a gratuitous bailment or bailment by finding. He went on to point out that the furrier was authorised by the plaintiff to hand over the custody of her fur to the defendants for them to do work on it, that is, to create between her and them the common law relationship of bailee for reward to do work upon the fur, and that this relationship, which was created by sub-bailment, although it might affect a claim by the plaintiff in detinue, is irrelevant to a claim for conversion or damage to the goods.

Finally, on this aspect of the matter *Diplock, L.J.*, stated categorically that the mere existence of the common law relationship of bailor and bailee for reward gave rise to common law duties owed by the defendants to the plaintiff in respect of the custody of her fur and the work to be done by them upon it as well as to common law rights enforceable against her, and one of the common law duties owed by a bailee of goods to his bailor is not to convert them. The learned Judge stressed that this duty, which is common to all bailments as well as to other relationships which do not amount to bailment, is independent of and additional to the other common law duty of a bailee for reward to take reasonable care of his bailor's goods. An analysis of *Morris v. Martin & Sons, Ltd.* leads me to the con-

elusion, therefore, that this was a case which involved conversion of the goods bailed, and damages for the negligence of the defendants based on the value of the article were awarded for breach of the common law duty which the defendants as bailees of the goods owed to the plaintiff as owner, which duty arose by virtue of a contract made between the sub-bailee and the bailees, but which was independent of the contract. The breach of the common law duty was the failure to take reasonable care to keep the goods safe and not to convert them. Nowhere was it suggested that the action which the plaintiff could maintain against the defendants as bailees for loss or damage to the goods included loss by delay in delivery, or consequential loss.

In *Bagot v. Stevens Scanlen & Co., Ltd.*, [1966] 1 Q.B. 197, *Diplock, L. J.*, had to consider whether an action which was brought against architects in respect of a breach of their duty to carry out with reasonable care and skill the supervising of a building contract entered into by them was a cause of action founded on contract only or on tort, or on both contract and tort, and came down on the side of the action being founded in contract as there was no status relationship between the architects (the defendants) and their clients, the other party to the contract (the plaintiffs), as in the case "where the law," as he put it, "in the old days recognised either something in the nature of a status like a public calling such as a common carrier, common inn-keeper, or a bailor and bailee, or the status of master and servant." There the judge pointed out it could be properly said that in such cases independently of contract there existed from the mere status a relationship which gave rise to a duty of care not dependent upon the existence of a contract between the parties. The learned judge relied heavily on what he considered to be an accurate statement of the law set out in the judgment of *Greer, L.J.*, in *Jarvis v. Moy, Davies, Smith, Vandervell & Co.*, [1936] 1 K.B. 399, which was an action brought against a firm of stockbrokers for failure to exercise reasonable skill and care in their duties to the plaintiff who was their customer or client. *Greer, L. J.*, in that case said:

"The distinction in a modern view, for this purpose, between contract and tort may be put thus: where the breach of duty alleged arises out of a liability independently of the personal obligation undertaken by contract it is tort and it may be tort even though there may happen to be a contract between the parties, if the duty in fact arises independently of that contract. Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."

In *Lee Cooper, Ltd. v. C. H. Jeakins & Sons, Ltd.*, [1965] 3 W.L.R. at p. 753, where forwarding agents contracted with the plaintiffs to clear through customs and deliver to a destination in Eire certain goods which the plaintiffs had ordered from a company in New York, the contract between the forwarding agents and the plaintiffs was subject to the conditions of the Institute of Shipping and Forwarding Agents. In order to fulfil the contract the forward-

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ing agents requested the defendants, who were transport contractors, to provide a vehicle. to collect the plaintiffs' goods from the docks and deliver them to the warehouse of the forwarding agents some distance away. The defendants knew from a period of trading with the forwarding agents that they were continuously handling goods owned by their customers and the defendants received delivery notes naming the plaintiffs as owners of the goods. The defendants' driver collected the goods from the docks but when some distance from the warehouse left his vehicle unattended and unlocked for nearly an hour; the lorry was stolen and when recovered was found to contain only a few cartons of the goods.

In an action by the plaintiffs against the defendants for loss of the goods in which they alleged negligence, the judge found that the theft of the goods arose from the negligent act of the defendants' driver for which they were responsible; that the contracts between the plaintiffs and the forwarding agents, and the forwarding agents and the defendants, were separate contracts made between principals, and that there was no contractual relationship between the plaintiffs and the defendants. On the question whether the defendants were liable to the plaintiffs in tort, it was held that the defendants were bailees for reward of the plaintiffs' goods although their contractual duty was owed not to them, but to the forwarding agents; that since the defendants knew that the goods were the plaintiffs' they owed to the plaintiffs a duty of care in respect of them, and since in the circumstances the defendants could reasonably have foreseen the loss which in fact occurred, they were liable to the plaintiffs for the value of the stolen goods.

The learned judge, *Marshall, J.*, in considering the question whether the defendants were liable to the plaintiffs in tort, was reminded of the words of *Denning, L.J.* (as he then was) in *Green v. Chelsea Borough Council*, [1954] 2 Q.B. 127, that during the nineteenth century there was a doctrine current in the law which was called 'The Privity of Contract Doctrine', and in those days it was thought that if the defendant became connected with the matter because of a contract he had made, then his obligations were to be measured by the contract and nothing else. It was said that he owed no duty of care to anyone who was not a party to the contract. This doctrine, however, received its quietus by the decision in the House off Lords in *Donoghue v. Stevenson*, [1932] A.C. 562, and that worn-out fallacy must be resisted. *Marshall, J.*, then came to the conclusion that the defendants owed a common law duty to the plaintiffs and had brought themselves within Lord *Atkin's* famous dictum in *Donoghue v. Stevenson*. The common law duty arose from the defendants being bailees for reward of the plaintiffs' goods, albeit their contractual duty was owed to the forwarding agents. *They knew from an extended period of trading that the forwarding agents were continuously handling their customers' goods and not their own goods, and they knew from the delivery notes that the plaintiffs were the owners of the goods and they must have realised that the consignment was a valuable one.* *Marshall, J.*, then repeated the test as laid down by Lord ATKINS and that was not a test of physical proximity, but of

foresight; care must be taken to avoid acts or omissions which can be reasonably foreseen would be likely to injure your neighbour who is a person who should be reasonably in your contemplation as being so affected when directing the mind to acts or omissions called in question. He then proceeded to award damages on the basis of liability in tort for the loss caused by the negligence of the defendants in failing to exercise reasonable care in keeping the goods of the plaintiffs safe.

The result of these authorities would indicate that a bailment, though usually accompanied by a contract either expressed or implied by law, may, however, arise without a contract; nevertheless, where the bailment does arise by virtue of a contract the bailee would owe to the bailor by reason of the relationship, the common law duty to take reasonable care to keep the goods safe and not to do any intentional act inconsistent with the bailor's rights in the goods which would, of course, be a duty quite independent of the contract. In the instant case the respondent is claiming that the appellants have committed a breach of the common law duty owed to him by their delay in the delivery of the coupon at Piarco in time to catch the vital B.O.A.C. flight. This breach, however, as I see it, would arise out of the contractual duty which the appellants may have owed to S. E. Lee & Company under the contract to deliver the coupon to the plane in Trinidad. In other words, when we consider the breach we find that it does not arise from the common law duty owed by the appellants to the respondent from the status relationship of bailee and bailor, but it arises out of the terms of the contract in which the respondent seeks to maintain that one of those terms was that the appellants agreed to carry and convey the coupon within a fixed time or within a reasonable time to Piarco, Trinidad, in order that it should make the necessary connection with the B.O.A.C. plane bound for the United Kingdom to arrive on the following day so that the coupon could be included in the pools for that week. There was no physical loss or destruction of the goods as in *Morris v Martin* and *Lee Cooper v. Jeakins*, in which case it might be said that there was a breach of the common law duty which the bailee owed to the bailor and which existed independently of the contract. The breach, if any, arose directly out of the contractual obligations which the appellants undertook under the contract.

It is true that in *John Carter (Fine Worsteds Ltd.) v. Hanson Haulage (Leeds) Ltd.*, [1965] 2 W.L.R. 559, *Sellers, L.J.*, stated in his judgment:

"The defendants were private carriers and as bailees of the goods for the purpose of carriage for reward were under an obligation to take reasonable care both (a) of the goods and (b) to convey them to their destination, and *there deliver in accordance with the contract.*"

But there again the learned judge was emphasising that the duty to deliver was in accordance with the contract and not in accordance with the common law duty which arose out of the status relationship

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between the parties. In all the authorities I have considered in respect of duties owed by the bailee to the bailor the action was brought by the bailor for the physical loss, that is to say, conversion of the goods or damage to the goods. There was no question of pecuniary loss or damage to the goods in relation to delay in the delivery or non-delivery of the goods. In the instant case what is complained of is pecuniary loss caused by delay in delivery of the coupon, that is to say, delay in the delivery by carriage by air which must bear a contractual notion. Delay in the delivery of goods, to my mind, cannot denote a tort under the old forms of action or an action on the case for there is no such tort as delay in the delivery of goods. It is true that the view expressed by *Denning, L.J.*, (as he then was) in *Candler v. Crane, Christmas & Co.*, [1951] 1 All E.R. p. 426, in his minority judgment in the Court of Appeal that once the duty of care is established liability does not depend on the nature of the damage, was later approved of by the House of Lords in *Hedley Byrne & Co., Ltd. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575, but this dictum presupposes a duty of care in regard to the particular breach that is alleged.

In the *Hedley Byrne* case it was held that if in the course of business or professional affairs a person seeks information or advice from another who is not under contractual or fiduciary obligation to give the information or advice, in circumstances in which a reasonable man so asked would know that he was being trusted or that his skill or judgment was being relied on, and the person asked chooses to give the information or advice without clearly so qualifying his answer as to show that he does not accept responsibility, then the person replying accepts a legal duty to exercise such care as the circumstances require in making his reply, and for a failure to exercise that care an action for negligence will lie if damage results.

In *Candler v. Crane, Christmas & Co.*, *Denning, L.J.*, (as he then was) held that the defendants, a firm of accountants, who had prepared by their clerk a company's accounts and balance-sheet which, to the knowledge of the clerk were intended to be put before the plaintiff to induce him to invest money in the company, owed the plaintiff a duty of care when the accounts which had been prepared negligently did not give a true view of the state of the company's affairs and the plaintiff, relying on the accuracy of the accounts, subscribed a large sum of money for shares in the company which was eventually lost. The learned judge overruled the submission of counsel for the defendants that a duty to take care only arose where the result of a failure to take care would cause physical damage to persons or property, and gave the illustration of an analyst who negligently certifies to a manufacturer of food that a particular ingredient is harmless, whereas it is, in fact, poisonous. There the analyst would be liable to any person who was injured by consuming the food if there was no likelihood of intermediate inspection; but *Denning, L.J.*, went on to hold that there was no valid distinction to be drawn between the negligence in that case which caused physical damage and negligence in any other case which caused financial loss. It is important to observe that *Denning, L.J.*, stated that he could understand that

in some cases of financial loss there may not be a sufficiently proximate relationship to give rise to a duty of care, but if once a duty exists he could not think that liability would depend on the nature of the damage.

This minority view of *Denning, L.J.*, was not shared by the two other judges who sat on the appeal and who arrived at the conclusion that there was no duty of care owed by the defendants to the plaintiffs and that the formula laid down by Lord *Atkin* in *Donoghue v. Stevenson*, [1932] A. C. 562, did not extend to financial loss but was confined to physical damage or injury. *Asquith L. J.*, in the course of his judgment, after stating the formula, said:

"This passage, if read literally and without regard to the qualifying effect of its context or of the *subjecta materies*, might be taken to comprehend not only conduct causing physical injury to person or property through setting a certain kind of chattel in motion or in circulation (the case immediately under review), but also conduct of any kind through any means (including negligent mis-statement) causing *damnum* of any kind recognised by the law, whether physical or not, to anyone who could bring himself within Lord *Atkin's* definition of a 'neighbour'. I cannot believe so broad an application was intended by Lord *Atkin* himself. The case may not decide quite so little as is contained in its somewhat conservative head note...It has, however, I think never been applied where the damage complained of was not physical..."

In the *Hedley Byrne* case the judges in the House of Lords arrived at the conclusion that there is a duty of care owed by the defendants to the plaintiffs where there is a fiduciary or contractual relationship between the parties, or a duty which arises from the relationship of proximity between the parties and the damage is not limited to physical injury or loss but extends to financial loss caused by the negligence. Lord *Devlin* in his judgment on p. 607 referred to Lord *Atkin's* dictum and stated that what Lord *Atkin* called a general conception of relations giving rise to a duty of care is now often referred to as the principle of proximity. The learned judge went on to state that it was not in his opinion a sensible application of what Lord *Atkin* was saying for a judge to be invited on the facts of any particular case to say whether or not there was proximity between the plaintiffs and the defendants. That would be a misuse of a general conception and is not the way in which English law develops. What Lord *Atkin* did was to use his general conception to open up a category of cases giving rise to a special duty. It was already clear that the law recognised the existence of such duty in the category of articles that were dangerous in themselves. What *Donoghue v. Stevenson* did may be described either as the widening of an old category or as the creation of a new and similar one. The general conception can be used either to produce other categories in the same way and an existing category grows as instances of its application multiply, until the time comes when the cells divide.

Lord *Devlin* then addressed his mind in the case he was then considering to the question whether the relationship between the parties

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was such that it could be within a category giving rise to a special duty. It is interesting to observe that in considering this question the learned judge noted that the defendants (respondents) were performing a service and were doing so gratuitously and without consideration, but stated that the law was that if the service was in fact performed and done negligently the promisee could recover in an action in tort and this was the foundation of the liability of a gratuitous bailee. He cited the famous case of *Coggs v. Bernard*, (1703) 2 L. D. Raym 909, as authority for this proposition where *Gould, J.*, said: "The reason for the action is, the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing of which he has miscarried by his neglect." In *Coggs v. Bernard*, where the defendant was a gratuitous bailee of several casks of brandy belonging to the plaintiff, he negligently spilt a quantity of it and it was held that he was liable for the loss which was incurred. There it must be pointed out that there was no question of pecuniary or financial loss involved other than the physical loss. Nevertheless, Lord *Devlin* stated that the proposition in *Coggs v. Bernard* was not limited to the law of bailment but had been applied generally to the law of negligence and referred to the dictum of *Willes, J.*, in *Skelton v. London & North-Western Railway Co.*, (1867) 2 C. P., 631, where that learned judge laid it down, "Actionable negligence must consist in the breach of some duty...if a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of *Coggs v. Bernard*."

Lord *Devlin* then proceeded to make it quite clear that the principle has been applied to cases where as a result of the negligence no damage was done to person or to property and the consequential loss was purely financial. He cited *Wilkinson v. Coverdale*, (1793) 1 Esp. 74, as an example of the principle where the defendant undertook gratuitously to get a fire policy renewed for the plaintiff, but in doing so neglected formalities, the omission of which rendered the policy inoperative. It was held that an action would lie. He also cited *Shiells v. Blackburne*, (44), where the defendant had voluntarily and without reward made an entry of the plaintiff's leather as wrought leather instead of dressed leather, with the result that the leather was seized.

It is at this stage that counsel for the respondent presses the point that the appellants were performing a service and knew from a course of dealing with the shipper that he was sending goods not his property to the United Kingdom and realised, or must be taken to have realised, that their omission to send the package might lead to financial loss to the respondent, and if they omitted so to do they would be liable to the respondent for any loss suffered, and this ground must be separate and distinct from the common law duty owed by the appellants as bailees to their bailor, the respondent. While I am prepared to concede, on the authority of the *Hedley Byrne* case (25), that in the relationship between the respondent and the appellants as bailor and bailee the appellants owed the respondent a duty of care to keep the coupon safe and not to do any act inconsistent with the bailment and there was the relationship of proximity as envisaged by Lord *Atkin* in *Donoghue v. Stevenson* (21), that relationship would only arise in respect of the duty of care owed by the appellants to the respondent in failing to keep the

coupon safe or in failing to refrain from doing any act inconsistent with the bailment, and would not be limited to physical loss but would extend to financial loss.

The *dictum* of POLLOCK, C. B., in the old case of *Anderson v. The North Eastern Ry. Co.* (1861), 4 L. T. 216, which is plainly *obiter* also supported this view, in which he said:

"Where a carrier is employed it is known and must be assumed that the goods are going for some purpose, and so far it is notice which may render the carrier responsible for damages resulting from loss of the goods beyond their actual value."

The breach of duty, however, complained of is the delay in the delivery of the coupon or delay in its carriage by air, and I can see no relationship of proximity between the respondent and the appellants as far as this is concerned, as there is no duty of care owed in this regard in the status relationship of bailor and bailee.

A good illustration of the point I am seeking to make is the case where the law has always held that a duty to exercise reasonable care, a breach of which is remediable in damages has been imposed, where persons hold themselves out as possessing special skill, *e. g.*, a surgeon, and are thus under a duty to exercise that skill with reasonable care. As *Denning, L. J.*, said in *Candler v. Crane* [1951] 1 All E. R. 426, from very early times it has been held that they owe a duty of care to those who are closely and directly affected by their work, apart altogether from any contract or undertaking in that behalf. Supposing, therefore, the surgeon delays in the operation and the patient dies or is crippled for life, I should think that the relationship of proximity is established in respect of the death or physical injury of the patient, but if in the delay of the operation the patient, who may be an architect, loses valuable commission on a contract, the proximity cannot in my opinion arise as there is no duty of care in this regard owed by the surgeon to the patient independent of contract. As *Denning, L. J.*, said in *Candler v. Crane (supra)*, speaking of the duty owed by professional persons:

"The test of proximity in these cases is: did the accountants know that the accounts were required for submission to the plaintiff and use by him?"

Just as the surgeon would not be concerned with the private engagements and contracts of the architect, so, too, the appellants would not be concerned with the intention of the respondent that the coupon should travel on the aircraft from Georgetown in order to catch the vital flight in Trinidad on Saturday, especially when their contract with shipper stipulated that there was no time fixed for the commencement or completion of the carriage.

In other words, if through the negligence of the pilot, the airplane had crashed or exploded, the appellants may very well have been liable for the negligence of their employee in performing the service for damage or physical loss to the package, which would extend to financial

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loss because of the relationship which arose out of the common law duty owed by a bailee to his bailor, as there would be a special duty owed in such a relationship, but there is no special duty owed by the bailee to the bailor to deliver goods at a fixed time or within a reasonable time to any person. The delay in the delivery, as has already been stated, is a contractual notion, as *Denning, L. J.*, appreciated in *Candler v. Crane (supra)* that in some cases of financial loss there may *not* be a sufficiently proximate relationship to give rise to a duty of care. While it is true that Lord *Macmillan* in *Donoghue v. Stevenson* [1932] All E. R. Rep. 1 said that the categories of negligence are never closed and the development of existing categories or the erection of new ones must be the result of creative decisions by the court, he also stressed that the courts must proceed with caution in creating new categories.

I have arrived at the conclusion, therefore, that an action in tort will not lie for the delay in the delivery of the coupon to the B.O.A.C. 697 flight at Piarco on February 20, 1964, at 4.50 p.m., as in respect of this aspect of the matter there was no relationship of proximity between the respondent and the appellants.

It must be appreciated that this submission was considered on the basis that the respondent was the owner and bailor and entitled to immediate possession of the coupon, but I am of the view that the respondent lost his right to possession of the coupon when it was posted by the shipper, S. E. Lee & Co., under the Air Consignment Note. Under cl. 9 of the note and art. 8, para. 1, of the General Conditions of Carriage of Cargo, delivery of the goods will be made only to the consignee named on the face of the note unless such consignee is one of the carriers participating in the carriage, in which event delivery shall be made to the person indicated on the face of the note as the person to be notified. Under art. 7, para. 1, the shipper has the exclusive right of disposition. The word "owner" is excluded in this article, although mentioned in other articles, and para. 2 of art. 7 gives the shippers option of disposition over the goods, and only the shipper may withdraw the goods at the airport of departure or stop the goods in the course of its journey. The respondent, not having any right to immediate possession of the goods after the coupon was posted cannot, therefore, maintain an action in tort or in contract against his bailee or any other person in respect of the damage done to the coupon or arising therefrom. Having lost the right to immediate possession he can only sue the wrong-doer for permanent injury to or loss of the coupon and there has been no such damage alleged in this case.

Even if the respondent in the situation which arose out of the relationship of bailor and bailee were entitled to sue, on the authority of *Morris v. Martin* [1965] 2 All E. R. 725, the appellants would be able to rely as against the respondent on the exempting conditions or the conditions which limit liability in the air consignment note, although there was no contract directly between the respondent and the appellants as the respondent expressly or impliedly consented to S. E. Lee & Co. making a sub-bailment containing those conditions. He was well aware that Lee & Co. would send his coupon on to Sherman's Pools, Ltd., by air, and for that purpose would be compelled to make a con-

tract with an airline company. Although the other judges of the Court of Appeal in *Morris v. Martin* (*supra*) refrained from forming any opinion on this matter, Lord *Denning, M.R.*, expressly stated that the owner would be bound by the conditions if he expressly or impliedly consented to the sub-bailment, but not otherwise. In the instant case, under art. 14, para. 11, of General Conditions of Carriage of Cargo, carrier is not liable in any event for any consequential or special damages arising from carriage subject to the tariff, whether or not carrier had knowledge that such damages might be incurred.

On the second question as to whether or not there was a fundamental breach or a breach of a fundamental term of the contract by the appellant, I think I ought to refer to the words of the learned authors of CHESHIRE AND FIFOOT, LAW OF CONTRACT (5th Edn.), p. 115 that in a number of cases extending over many years judges have ruled from time to time that no exempting clause, however wide, may protect a party who has broken the basic duties created by the very nature and character of the contract. The learned authors point out that a variety of languages has been used to describe this overriding consideration but the words "fundamental term" is the expression most widely used. They suggest that the more appropriate title is the "doctrine of the fundamental obligation" where the essential allegation is that the party by his conduct has destroyed the whole of the contract and can no longer rely on one of its component parts.

The doctrine of the breach of a fundamental obligation appears to have originated in the deviation cases, where the courts have always taken the view that a deviation is such a serious matter that changes the character of the contemplated voyage so essentially that a ship-owner who has been guilty of a deviation cannot be considered as having performed his part of the Bill of Lading contract but something fundamentally different, and therefore he cannot claim the benefits of stipulation in his favour contained in the Bill of Lading. In *Hain SS. Co., Ltd. v. Tate & Lyle, Ltd.*, Lord *Atkin* stated in his speech ([1936] 41 Com. Cas 350 at p. 354) .

"I venture to think that the true view is that the departure from the voyage contracted to be made is a breach by the ship-owner of his contract, a breach of such a serious character that, however slight the deviation, the other party to the contract is entitled to treat it as going to the root of the contract and to declare himself as no longer bound by the contract terms."

Later in his speech *Lord Atkin* pointed out that the event of deviation falls within the ordinary law of contract and the party who is affected by the breach has a right to say that he is not now bound by the contract whether it is expressed in a charter party, bill of lading, or otherwise, and once he elects to treat the contract at an end he is not bound by his promises under the contract. On the other hand, he can elect to treat the contract as subsisting, and if he does this with knowledge of his rights he must in accordance with the general law of contract be held bound. Lord *Wright, M. R.*, in the same case stated categorically

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that an unjustified deviation is a fundamental breach of a contract of *affreightment*. Lord Wright also pointed out that an unjustified deviation is like any other breach of a fundamental condition which constitutes the repudiation of a contract by one party, and the other party may treat it as such or may treat the contract as subsisting and to that extent may waive the breach.

In *Glynn v. Margetson & Co.* [1893], A. C. 351, where the contract was for the carriage of oranges from Malaga to Liverpool, and the charterparty contained a provision giving the vessel liberty to go to any port on the route from Malaga to Liverpool, and the vessel then went to a port not on a route from Malaga to Liverpool, and the oranges were damaged, it was held that there was an unjustified deviation and a breach of a fundamental term of the contract which entitled the plaintiff to treat the contract as repudiated and sue for damages for the breach. The ship-owners were not entitled to rely on an exempting clause in the charterparty as LORD HERSCHELL, L. C, came to the conclusion that the main object and intent of the charterparty was the voyage so agreed on, and it would defeat what was the manifest object and intention of such a contract to hold that it was entered into with a power to the ship-owner to proceed anywhere.

Lord Reid in his judgment in the case of *Suisse Atlantique Societe d'Armenement Maritime, S. A. v. N. V. Rotterdamsche Kolen Centrale* [1966], 2 All E. R. 61, after stating that there is no special rule applicable to deviation cases and the ordinary principle of the law of contract must apply, pointed out that the special feature of these cases is that the consignor's goods were lost before he knew of the deviation and, therefore, before he had any opportunity to elect whether or not to treat it as bringing the contract to an end. When he learns of the deviation and of the subsequent loss of his goods, there is hardly room for any election but the fact that he sues for their value could be treated as an election to terminate the contract by reason of and immediately after the deviation.

In *Brandt v. Liverpool, Brazil and River Plate Steam Navigation Co., Ltd.* [1924], 1 K. B. 575, delay by the owners of a vessel dealing with bags of zinc was held to amount to a deviation. In *Mallet v. Great Eastern Ry.* [1899] 1 Q. B. 309, goods were sent by a different route from that contracted for and a clause relieving the company of liability was consequently held not to apply. And in *Gunyon v. South Eastern and Chatham Railway Co.'s Managing Committee* [1915] 2 K. B. 370 where fruit was carried by goods train when the contract was for it to go by passenger train, an exemption clause was held not to apply, and in *Lilley v. Doubleday* (1881), 7 Q. B. D. 510, where goods were destroyed by fire in a warehouse other than that contracted for, an exemption clause was held not to apply. Thus it would be seen that a breach of a fundamental term takes place when one of the parties to the contract does something essentially different from that which he contracts to do, and in such cases it has been held that he is not entitled to rely on an exempting clause.

In *Bontex Knitting Works, Ltd. v. St. John's Garage* [1943] 2 All E. R. 690, where a lorry owner left the lorry unattended for an hour in

breach of an express agreement for immediate delivery, it was held that there was a breach of a fundamental term by the defendants in failing to deliver the goods forthwith, and they were not protected by the exemption clause because it was only intended to protect the defendant in the due execution of the contract. *Lewis, J.*, in his judgment at p. 695 stated that the clause in the contract which absolved the defendant from any liability for loss or damage, only applies whilst the contract is in existence, and if there is a breach of the contract by the defendants any clause upon which the defendants can rely to save themselves from liability goes. He then referred to the principle laid down by *Atkin, L. J.*, (as he then was) in the *Cap Palos* case where it was held that delay in the performance of a charterparty may amount to deviation and so to a fundamental breach. In that case *Atkin, L. J.*, stated ([1921] P. 458, at p. 471):

"The principle is well known, and perhaps *Lilley v. Doubleday (supra)* is the best illustration, that if you undertake to do a thing in a certain way, or 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 have 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."

That passage was cited from the judgment of *Scrutton, L. J.*, in *Gilbaud v. Great Eastern Ry. Co.* [1921] 2 K. B. 426, and the same proposition was laid down by the House of Lords in *London & North Western Ry. Co. v. Neilson* [1922] 2 A. C. 263.

The hire purchase cases have also played an important part in the doctrine of a breach of fundamental obligation, e. g., *Smeaton Hanscomb & Co. v. Sassoon* [1953] 2 All E. R. 1471, *Karsales (Harrow), Ltd. v. Wallis* [1956] 2 All E. R. 866, *Yeoman Credit, Ltd. v. Apps* [1961] 2 All E. R. 281, *Astley Industrial Trust Co. v. Grimley* [1963] 2 All E. R. 33 *Charterhouse Credit Co., Ltd. v. Tolly* [1963] 2 All E. R. 432, *U. G. S. Finance, Ltd. v. National Mortgage Bank of Greece and National Bank of Greece S. A.* [1964] 1 Lloyd's Rep. 446.

In *Karsales (Harrow), Ltd. v. Wallis (supra)*, the agreement called for the delivery of a Buick car in good condition, but what was delivered to the defendant was a car in a deplorable state, incapable of self-propulsion. The defendant refused to accept the car and the plain-tiffs relied on the exemption or exception clause of the contract which excluded them from liability for any breach of condition or warranty that the vehicle was roadworthy as to its age, condition, or fitness for any purpose. The Court of Appeal had little difficulty in holding that the car delivered was not the thing contracted to be taken on the hire purchase agreement and there was therefore, a fundamental breach of the contract which disentitled the plaintiffs from relying on the exception clause. *Denning, L.J.*, (as he then was) stated the principle that notwithstanding earlier cases which might suggest to the contrary, it is now well settled that exempting clauses of this kind, no matter how

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widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or to enable him to turn a blind eye to his obligations. And they certainly do not avail him when he is guilty of a breach which goes to the root of the contract, and he cannot therefore rely on them in that situation. *Denning, L. J.*, referred to his *dictum* in the earlier case of *J. Spurling, Ltd. v. Bradshaw* [1956] 2 All E.R. 121, that the principle is sometimes said to be that the party cannot rely on the exempting clause when he has delivered something "different in kind" from that contracted for or has broken a "fundamental term" or a "fundamental contractual obligation" the general principle being that a breach which goes to the root of the contract disentitles the party from relying on the exemption clause.

*Parker, L. J.*, in his judgment in the *Karsales* case (*supra*) spoke of a breach of a fundamental term and expressed the view that, however extensively the exception clause may be it has no application if there has been a breach of a fundamental term. In *Astley Industrial Trust Ltd. v. Grimley, (supra)* and *Charterhouse Credit Co., Ltd. v. Tolly supra*, the Court of Appeal adhered to the principle as laid down by *Denning, L. J.*, in the *Karsales* case (*supra*), and *Upjohn, L. J.*, (as he then was), reiterated in his judgment that in a contract of a hire purchase of a motor vehicle there was an implied stipulation that the vehicle hired corresponds with the description of the vehicle contracted to be hired or, put in another way, the lender must lend that which he contracts to lend and not something essentially different, and this implied stipulation is a fundamental implied term and breach of it at once gives the hirer the right, if he desires to do, to treat the contract as repudiated and, furthermore, being a fundamental term the lender could not by clauses of exclusion or exception, however widely phrased, exclude liability for this fundamental term for the reason that the law will not permit one of the contracting parties to escape liability for failure to deliver that which he has contracted to lend by delivery of something which is essentially different.

In *Charterhouse Credit, Co., Ltd. v. Tolly (supra)*, the question was considered as to the operation of the exception or exemption clause when the contract is affirmed by the hirer where there has been a breach of a fundamental term, and the Court of Appeal came to the conclusion that even in that situation the owner or lender could not rely on such a clause. *Donovan, L. J.*, (as he then was), after stating that the point was apparently free from direct authority, arrived at the conclusion that on principle the election by the hirer of one remedy for the fundamental breach instead of another remedy ought to make no difference to the ineffectiveness of an exempting clause in the face of such a breach. This latter view, has, however, been qualified by the House of Lords in the recent case of *Suisse Atlantique Societe d'Arme-ment S.A. v. N.V. Rotterdamsche Kolen Centrale (supra)*, where the learned judges of that tribunal came down on the side of the exception clause being a rule of construction rather than a rule of substantive law, and that such clauses should be strictly construed, and, according to Lord *Reid*, "if ambiguous the narrower meaning will be given".

Their Lordships, after an exhaustive review of the authorities, were of the opinion that the phrases "fundamental breach" and "breach of a fundamental term" had been used interchangeably in some of the cases, but in fact they were quite different. Lord *Upjohn* was of the view that "fundamental breach" was a convenient expression for saying that a particular breach or breaches of contract by one party is or are such as go to the root of the contract which entitles the other party to treat such breach or breaches as repudiation of the whole contract, whereas the expression "fundamental term" had a different meaning, and that was a stipulation which the parties have agreed either expressly or by necessary implication, or which the general law regards as a condition which goes to the root of the contract, so that any breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach and thus confer on him the alternative remedies already stated in the early part of this judgment.

Viscount *Dilhorne* relied on the view of *Devlin, J.*, in *Smeaton Hanscomb & Co., Ltd. v. Sassoon I., Setty, Son & Co.* (*supra.*) who thought that in relation to a fundamental breach one has to have regard to the character of the breach and determine whether in consequence of it the performance of the contract becomes something totally different from that which the contract contemplates. On the other hand, he thought that a fundamental term was something which underlies the whole contract so that, if it is not complied with, the performance becomes something totally different from that which the contract contemplates. Lord *Reid* in his judgment stated ([1966] 2 All E.R. 61 at p. 71):

"If fundamental breach is established the next question is what effect, if any, that has on the applicability of other terms of the contract. This question has often arisen with regard to clauses excluding liability, in whole or in part, of the party in breach. I do not think that there is generally much difficulty where the innocent party has elected to treat the breach as a repudiation, bring the contract to an end and sue for damages. Then the whole contract has ceased to exist including the excluding clause, and I do not see how that clause can then be used to exclude an action for loss which will be suffered by the innocent party after it has ceased to exist, such as loss of the profit which would have accrued if the contract had run its full term."

He then considered the position where the contract had been affirmed by the innocent party and thought that, at first sight, the position was simple. The innocent party must either affirm the whole contract or rescind the whole contract. He could not approbate and reprobate by affirming part of it and disaffirming the rest because that would be making a new contract; so the clause excluding liability must continue to apply. He considered that result was too simple and there was authority for two quite different ways of holding that in spite of affirmation of the contract as a whole by the innocent party the guilty party may not be entitled to rely on a clause in it. One way depends on construction of the clause; the other way depends on the existence of a substantive rule of law.

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Lord *Reid*, after a review of the authorities, held that if the innocent party affirms the contract it becomes a rule of construction whether the party in breach could rely on the exemption or exception clause, and he pointed out that as a matter of construction it may appear that the terms of the exclusion clause are not wide enough to cover the kind of breach which has been committed and such clauses must be construed strictly or it may appear that the terms of the clause are so wide that they cannot be applied literally and that may be because this may lead to an absurdity or because it would defeat the main object of the contract. And where some limit must be read into the clause it is generally reasonable to draw the line at fundamental breaches.

Viscount *Dilhorne* stated in his judgment that it was his view that it was not right to say that the law prohibited and nullified a clause exempting or limiting liability for a fundamental breach or breach of a fundamental term. He felt that such a rule of law would involve a restriction on freedom of contract. What had to be considered was not only the terms and scope of the exempting clause, but also the contract as a whole, and he drew the inference from the cases cited earlier in this judgment that on construction of the contract as a whole it was apparent that the exempting clauses were not intended to give exemption from the consequences of a fundamental breach.

From an analysis of the *Suisse Atlantique* case (28) I have come to the conclusion, therefore, that where there is a fundamental breach or breach of a fundamental term, it does not automatically follow that the exclusion clauses will go. Whether the innocent party treats the breach as a repudiation, or whether he seeks to affirm the contract, it still becomes a rule of construction as to whether the party in breach can rely on the exemption or exception clauses or not. As Lord *Reid* said, it cannot be said, as a matter of law, that the resources of the English language are so limited that it is impossible to devise an exclusion clause which will apply to at least some cases of fundamental breach without being so widely drawn that it can be cut down on any ground by applying ordinary principles of construction.

In the instant case, can it be said that there was a fundamental breach or a breach of a fundamental term of the contract by the appellants by reason of their negligence (assuming there was negligence) in failing to deliver the package containing the coupon to the B.O.A.C. plane leaving Piarco on the vital flight in a time agreed upon by the parties or, in absence of such fixed time, within a reasonable time? The learned judge in his judgment found that there was an unexplained delay in the delivery of the respondent's coupon and that the appellants were negligent in failing to deliver the package within a reasonable time. The finding of negligence counsel for the appellants is prepared to accept, but submits that mere negligence can never amount to breach of a fundamental term. I am prepared to uphold this submission as the contract itself, at clause 4 (a) of the Air Consignment Note provides for this eventuality. The substance of the clause is that the 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 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. The delay in this case complained of is the delay of the package at the air terminal in Georgetown, so without considering whether the delay arises out of the carriage by air it would certainly be delay in connection with the carriage of the goods by air. As I understand it, under this condition the onus is placed on the shipper or other person to prove the negligence or wilful fault of the carrier but, in this case, the matter is simplified as the carrier has admitted negligence, the sole point being whether the admitted negligence amounts to a breach of a fundamental term. If the contract between the parties provides that the carrier is not liable unless there has been negligence on his part, how can it be properly said that where there has been negligence there has been a breach of a term of the contract which goes to the root of the contract? Under condition 4 (c) of the Air Consignment Note the liability of the carrier shall in no event exceed the shipper's declared value for carriage and in the absence of such declaration by the shipper the liability of the carrier shall not exceed 250 French gold francs or their equivalent per kilogram of goods destroyed, lost, damaged or delayed, and under clause 2 (d) the shipper acknowledges that he has been given an opportunity to make a special declaration of the value of the goods at delivery and if in excess of 250 French gold francs such sum would constitute a special declaration of value. As I see it, the carrier there limits his liability in negligence or wilful default to a sum not exceeding 250 French gold francs or to the sum stated on a special declaration of value if there has been negligence or wilful default on his part.

The same position obtains under the Order in Council, for under art. 20 where there has been a delay in the carriage by air under art. 19 the carrier is not liable if he proves that he and his servants or agents have taken all reasonable measures to avoid the damage or that it was not reasonably possible for him to take such measures. Under the provisions of the Order in Council, therefore, negligence is presumed on the part of the carrier where there has been a delay, unless he can establish that he took all reasonable measures to avoid the delay. Under art. 19 his liability for damage occasioned by delay in the carriage by air is limited to the extent of the amount of 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 may be the smaller. Certainly, in this case, on the claim of the respondent the amount representing double the sum paid for the carriage must be the smaller amount. If, therefore, when the parties entered into the contract the terms of the contract under the Order in Council provided for the liability of the carrier in the event of negligence there cannot, in my view, be a breach of a fundamental term going to the root of the contract when it is proved that there has been negligence on the part of the carrier, which must be an event which the parties had within their contemplation at the time of entering into the contract.

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As Lord *Denning* stated in *Ms* judgment in *Sze Hai Tong Bank, Ltd. v. Rambler Cycle Co., Ltd.* ([1959] 3 All E.R. 182 at p. 186):

"The self-same distinction runs through all the cases where a fundamental breach has disentitled a party from relying on an exemption clause. In each of them there will be found a breach which evinces a deliberate disregard of his bounded obligations."

It cannot be said, in the instant case, that the evidence suggests that the appellants were evincing a deliberate disregard of their bounden obligations, or that they were doing something essentially different from that which they had contracted to perform akin to deviation.

[The CHIEF JUSTICE dealt with the evidence and then proceeded]:

Assuming that there was negligence, this then was a clear case of negligence in the due execution of the contract, and it cannot be said that the appellants, in the words of *Atkin, L. J.*, in the *Cap Palos* case *supra*, "had broken the contract by not doing the thing contracted for in the way contracted for", in which case they could not rely on the conditions in the contract. The evidence indicates that the appellants were executing the contract in the manner contracted for, but were negligent in the execution thereof, in which case they could properly rely on the conditions which were intended to protect them if they carried out the contract the way in which they had contracted to do it. There was no question of a deliberate disregard of the prime obligations of the contract, as pointed out by Lord *Denning* in the *Sze Hai Tong Bank, Ltd. v. Rambler Cycle Co., Ltd. supra* Nor can it be said, applying the rule in *Glynn v. Margetson & Co. supra*, that the exemption clause in this case limiting liability for the negligence of the carrier to a certain sum would defeat the main object of the contract.

In *John Carter (Fine Worsteds), Ltd. v. Hanson Haulage (Leeds), Ltd.* [1965] 1 All E.R. 113, where there was an exemption clause limiting the liability of the defendants in respect of loss or damage to goods to a certain sum, *Davies, L. J.*, stated that mere non-delivery cannot amount to a fundamental breach, otherwise the exempting clause could never apply, for non-delivery connotes loss and *vice versa*. If, therefore, non-delivery, where there is an exemption clause providing for liability in respect of loss, cannot amount to a breach of a fundamental term, then certainly delay in the dispatch or delivery of goods in such circumstances cannot amount to a breach of a fundamental term, and this learned judge states categorically that mere negligence in the performance of a contract is not a fundamental breach of it—*Swan Hunter & Wigham Richardson, Ltd. v. France, Fenwick Tyne & Wear Co. (The Albion)* [1953] 1 W.L.R. 1026, and *Spurling (J.), Ltd. v. Bradshaw supra*, In *John Carter, Ltd. (27), Davies, L. J.*, stated ([1965] 2 W. L. R. 533 at p. 571):

"Clause 7 presupposes liability. And liability can arise only in the event of negligence or lack of reasonable care. And there does not appear to be anything in the conduct of the defendants,

acting by the London company, which could be said to take it out of the category of that ordinary negligence to which the clause is admittedly designed and apt to apply."

And Lord *Denning* in the *Sze Hai Tong Bank Ltd.* case *supra*, after mentioning the cases which dealt with breach of a fundamental obligation, stated ([1959] AC. 576 at p. 588):

In the *John Carter supra* case a carrier agreed to carry goods. the servant or agent deliberately disregarded one of the prime obligations of the contract. He was entrusted by the principal with the performance of the contract on his behalf: and his action could properly be treated as the action of his principal. In each case it was held that the principal could not take advantage of the exemption clause. It might have been different if the servant or agent had been merely negligent or inadvertent."

In the *John Carter supra* case a carrier agreed to carry goods on the terms of the Road Haulage Association's condition of carriage, a certain clause of which limited liability of the carrier in respect of loss or damage to goods. In the course of the journey the goods were stolen by the carrier's employee, who had been hired two days before, as a result of negligence attributable to the carrier. The carrier resisted an action for the difference between the sum to the extent of which liability was limited and the greater value of the goods. The Court of Appeal held that whether or not the defendants would ordinarily be vicariously responsible for the deliberate theft of their driver, it could not be imputed to them otherwise than vicariously, and therefore could not constitute a fundamental breach by them of the contract, for a fundamental breach had to be some deliberate breach, amounting to a complete departure from the contract, which could be imputed to the contracting party personally so as to show a repudiation by him of the contract.

In that case the employee was a mere driver of the van in which the goods were carried, and *Davies, L. J.*, in the course of his judgment on this point, on which the court was unanimously agreed, referred to the opinion of Lord *Denning* in the Privy Council in the *Sze Hai Tong Bank Ltd.* case *supra*, from which he said it would appear that a fundamental breach disentitling a party from relying upon an exemption clause occurs if an act amounting to a complete departure from the contract is done, which can be imputed to the contracting party himself as opposed to an act for which the contracting party is vicariously responsible as having been committed by one of his servants. In other words, there must be something amounting to a deliberate breach of the contract which can be imputed to the contracting party personally. He referred to the distinction drawn by Lord *Denning* between *Chartered Bank of India, Australia & China v. British India Steam Navigation Co., Ltd.* [1909] A.C. 369, and the circumstances of the case that Lord *Denning* was then considering and that was, that in the former case the action of the fraudulent servant there could in no wise be imputed to the shipping company. His act was not its act; his state of mind was not its state of mind.

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In the circumstances of the present case the negligence of the reservation clerk, Mr. Willock, that is, so junior a clerk, in failing to dispatch the package could hardly be imputed to the appellant company. Mr. Willock was not the managing director of the company nor was he possessed of executive status, nor can it be said that his failure to dispatch the package amounted to a complete departure from the contract as his evidence indicates that from the moment he became aware of the information that the package had not left the country he endeavoured to locate it and send it off. It follows then that the negligence of the appellants in the delay in the dispatch or delivery of the package in the present case cannot amount to a breach of a fundamental term, and they can properly rely on the clause limiting their liability for negligence to a certain sum. It must be emphasised that this submission has been considered on the basis that there was negligence on the part of the appellants under an agreement between the parties to dispatch the package within a certain fixed time, or failing which within a reasonable time, but I must make it clear that in my opinion there was no agreement to send it off within a fixed time. The arrangements whereby the package contained the words "Must Go" printed in red was merely a facility offered by the appellants to the shippers as a result of which the football coupons are treated as a priority shipment.

As Mr. Willock stated in his evidence, the shippers advise the employees of the appellants by what date and time the package should get up to the United Kingdom and expect their shipments to go by the earliest opportunity, and the Company being there to please the members of the public do their utmost to facilitate them. The words "Must Ride BA 696/20 EEB" which were written in on the Air Consignment Note by the Reservation Clerk merely convey the meaning 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 state of the United States of America. While it is true that under art. 11 of the Order-in-Council the Air Consignment Note is *prima facie* evidence of the conclusion of the contract, in the circumstances of this case there were no other terms or conditions of the contract and the words "Must Ride" and "FIRAV, LON" (first available opportunity) and the label "Must Go" on the package were merely a facility by the airline company to the shipper (for which there was no consideration) in an effort to ensure that the package arrived in London on the Sunday following the day on which the matches were played. In any event, under cl. 12 of the Air Consignment Note the reservation clerk would have no authority to alter, modify, or waive any provision of the contract.

I agree that in the absence of a fixed time there would be an implied agreement between the shipper and the carrier that the goods would be conveyed by air within a reasonable time. I fail to see how there could be an agreement to deliver within a fixed time when under cl. 5 of the Air Consignment Note it is agreed that no time is fixed for the completion of the carriage and the carrier assumes no obligation to carry the goods by any specified aircraft or over any particular route or to make any connection at any point according

to any particular schedule. Under art. 6, para. 3 (a) of the General Conditions of Carriage of Cargo no time is fixed for the commencement or completion of the cargo, and time-tables are regarded as approximate and not guaranteed and form no part of the contract of carriage.

In the present case the package was carried and delivered in the U.K. on the Thursday following the Sunday on which it would have been delivered had it caught the vital flight leaving Piarco, Trinidad, on Saturday, February 20, 1964, which it barely missed. Even if it was not delivered in the United Kingdom within a reasonable time, delay, which is actionable, does not automatically arise from failure so to do. The effect of art. 13 of the Order-in-Council bears on the subject, particularly para. (3). This treats delay as arising at the expiration of seven days from the time when the cargo ought to have arrived, and permits the consignee to enforce his rights which flow from the contract of carriage after this period of seven days will have elapsed. Rights under the contract are held in abeyance until the passing of this prescribed period, and whatever rights the consignor had will pass to the consignees under the provision of art. 12(3).

Apart from the condition of contract which appear under el. 5 of the Air Consignment Note and art. 6, para. 3 (a) of the General Conditions of Carriage of Cargo, it would be surprising to me to find an airline company willing to bind itself to deliver goods within a fixed time when weather conditions, aircraft worthiness and expected or unexpected eventualities may intervene to render futile their most earnest intentions.

Finally, I must observe that in this case there is no evidence of any written notice of this claim being given to the appellants by the respondent as required by cl. 10 (a) of the Air Consignment Note, and this requirement was not pleaded by either side. I can only presume, therefore, that notice was given. It may be, however, that the point escaped counsel for the appellants in his arguments. I have arrived at the conclusion, therefore, that having regard to the terms of the contract between the shipper and the carrier (appellants) as laid down by the Air Consignment Note and the Order in Council there was negligence proved against the carrier, which occurred at the air terminal in Georgetown in the delay in dispatching the package between Thursday, February 18 and Saturday, February 20, 1964, to Piarco, Trinidad, and the finding of the trial judge that there was negligence on the part of the carrier (appellants) in failing to deliver the coupon in the package in the U.K. within a reasonable time in the circumstances, cannot be seriously questioned, but the rights which flow from the contract by reason of the delay becomes enforceable only after the expiration of the prescribed time under art. 13 (3).

On point 3 the learned judge, on the authority of *Chaplin v. Hicks* [1911] 2 K.B. 786, arrived at the conclusion that the respondent had shown a strong probability that he would have been awarded a share in the dividend declared in the relevant week of the pools conducted by Sherman's and that, although the contract between Sherman's and the respondent was not justifiable, that Sherman's in all pro-

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bability would have paid. He then proceeded to award the respondent the sum of \$48,000 damages, being exactly half the sum of the first dividend declared by Sherman's for that week which the respondent would have been paid had the coupon arrived in time to take part in the pools, and of course if Sherman's as men of honour would have decided to pay in the normal circumstances. Thus it appears that the judge assessed damages in favour of the respondent on the basis that he had lost a 50 per cent chance of being declared a winner of the first dividend for that week. It is conceded on all sides that this was wholly wrong as Sherman's as men of honour would either have paid or not paid, in which event the judge should have awarded the whole sum of the dividend or nothing at all.

I must now investigate the evidence and see whether this finding of the learned judge is justified on the evidence and further, whether the respondent had discharged the onus of proof which lay upon him in showing on a balance of probability that he would have been paid the first dividend of \$96,000 or indeed any part of it, or more especially if he had in fact any chance of sharing in the dividend declared which was lost to him when the coupon arrived late.

Mr. Vivian Penny, the Managing Director of Sherman's, in his evidence which was taken on commission at Cardiff on October 1, 1962, was asked the direct question in his examination-in-chief:

"If this coupon had arrived in time would it have taken part in the pools?' He replied categorically, 'No.' Then he was asked: 'Why would that be?' He answered, 'The circumstances of its finding would have immediately put the coupon on enquiry, 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 enquiry. The time between my deciding and being able to make enquiries and the closing of the Pool would not have been a great length of time and I would have been compelled, in the interests of *bona fide* investors for that week to say "I rely on our rules and must disqualify this entry".'

He then explained what he meant by "a week such as this" and that was, that the winners in that particular week were very few and very large sums stood to be won when there were only a few draws. He gave as his reason why the coupon would have been put on "enquiry" that the coupon was loose within the packet and at the top of the envelope and not at the bottom. Earlier in his evidence Mr. Penny had stated that when the coupon was brought out of the packet it was folded over in eight to make an eighth of its normal size. It was the only coupon in the packet that was folded; all the other coupons in the packet were flat out and straight, and it literally dropped out of the package when opened.

This evidence at once suggests to the mind that a dishonest person could have unsealed the top half of the flap of the envelope and inserted the coupon easily by folding it in the manner in which it was

found by the Governing Director of Sherman's. It is suggested that Mr. Penny's evidence was coloured by the fact that he had opened the package the Thursday following the Saturday on which the coupon would normally have arrived and been opened by Sherman's and that his mind was and must have been affected by the "remarkable telegram" that he had received on the Monday from Lee which stated that L. Bart was claiming 23 points in eight treble on February 20, that it was understood by Lee that the coupons were delayed in Trinidad, and with an entreaty by Lee that Mr. Penny should endeavour to include the coupon in the declaration pending arrival and investigation of the coupon. Indeed, the learned judge stated that Mr. Penny's suspicions about the genuineness of the respondent's coupon seemed to have been aroused by the following facts:

- (1) The package containing the coupon was in the possession of an employee of the appellant company after the results of the matches 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 a 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.

With great respect to the learned judge, I find myself unable to draw this inference from Mr. Penny's evidence. Mr. Penny said no such thing. He never at any stage of his evidence stated that his suspicion about the genuineness of the coupon arose from any of the first five circumstances set out by the judge. He stated categorically that his suspicion was aroused by the circumstance of the coupon arriving in the package in the condition in which it was found, that is to say, folded to an eighth of its normal size and loose at the top of the envelope containing the package, whereas the other coupons were flat and neatly packed. He went on to state on three occasions in his evidence that had the coupon arrived in time it would not have taken part in the pools. He would, in the interests of *bona fide* investors for that week have disqualified the entry. He was then asked if his decision in this matter would have been final, and he explained that he would have determined that he was not satisfied to include the coupon in the pools and he would have seen the accountants, explained the circumstances to them, and, having regard to the circumstances, his recommendations would have been accepted without question. He followed this up by saying that having received the remarkable telegram from Lee on Monday his suspicion of the coupon which had already been aroused would have more than ever put the genuineness of the coupon on enquiry. All that Mr. Penny is saying, as I understand it, is that the telegram would have confirmed his suspicions about the genuineness of the coupon which, as far as he was concerned relying on the rules, would have been disqualified from entry.

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At this stage it must be pointed out that, contrary to the learned judge's finding, there was no evidence on the record by Mr. Penny that the package containing the coupon was in the possession of an employee of the appellant company after the results of the matches had been broadcast, or that a message which was sent from Georgetown to the airport for the purpose of delaying the 12 noon flight was not received by the pilot of the aircraft, or that Mr. Lee had offered to pay \$500 towards the cost of chartering a plane when his commission was going to be only \$126. These answers by the witness were all assumptions based on hypothetical questions put to him by counsel appearing on behalf of the appellant company in order to obtain the reaction of the witness to certain situations had the witness been aware of these facts. The witness was not saying that these facts were within his knowledge when he opened the package and found the coupon loose and folded inside. The learned judge's conclusion, therefore, that Mr. Penny's suspicions all arose out of a series of events which were put in motion by the negligence of the appellant company in failing to dispatch the packages at the agreed time, was not justified by the evidence, and clearly wrong and based on extraneous matters which he took into consideration.

It is clear from Mr. Penny's evidence that Sherman's Ltd. would not have paid any dividend or any part of the dividend on that coupon had it arrived in time, because of its condition on arrival, whether it was posted in that way, or whether its condition was brought about by the negligence of the appellants. Indeed, in my view it cannot be said that any man of honour would have paid on that coupon which arrived in a condition of such grave suspicion. The respondent, therefore, lost no chance of winning the first dividend or any part of it declared by Sherman's Ltd., on the pools for that week, and he therefore failed to discharge the onus placed upon him in showing on a balance of probabilities that Sherman's, as men of honour would have paid. In any event, if my assessment of Mr. Penny's evidence is incorrect I am still of the opinion that in order to discharge the burden of proof which lay on the respondent it would have involved clear evidence from a senior official of Sherman's that they would have paid and, of course, there is no such evidence. If Mr. Penny's evidence left a doubt as to whether Sherman's as men of honour would have paid, then the respondent has still not discharged the burden placed upon him.

I agree with the reasoning of *Vaughan Williams, L. J.*, in *Chaplin v. Hicks* (*supra*) when in his judgement he rejected the proposition 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. Merely because precision cannot be arrived at, it does not mean that damages cannot be assessed. In my opinion, the application of this principle does *not*, however, arise in the instant case as the respondent has not been able to show the loss of a chance. Indeed, the evidence would suggest that from the very condition in which the coupon arrived he never had a chance.

If the conditions on the back of the Air Consignment Note and in the Order in Council may be thought to operate harshly against the shipper of goods, it must be borne in mind that under art. 19 (1) of the

Order in Council the parties are free to enter into a special contract, provided that the stipulations do not conflict with the provisions of the Schedule as stated in art. 33, and under clause 2 (d) of the Air Consignment Note, it is open to the shipper to make a special declaration of value.

In this appeal I can find no valid point in favour of the respondent and I would allow the appeal and set aside the judgment and order of the trial judge, and order costs in favour of the appellants in this court and in the court below to be taxed certified fit for two counsels.

*I would dismiss the cross appeal.*

LUCKHOO, J.A.: Lawrence Andrew Bart (referred to as Bart) sued British West Indian Airways Limited (referred to as B.W.I.A.) for £30,000 damages for negligence; alternatively, the sum of £30,000 damages for breach of contract; he was awarded damages in the sum of £10,000 with costs by *Cummings, J.*, B. W. I. A. on appeal now ask this court to set aside that judgment; in the alternative to find that only nominal damages, if at all, should have been allowed.

The facts are not without interest and matters of some importance affecting the carriage of cargo by air arise.

The popular pastime of playing football pools in countries far removed from Britain, where the games are played and the pools computed, is made possible by the carriage of coupons by air, which must arrive by a certain time if they are to be reckoned in a particular pool.

Sherman's Pools, Ltd., of Cardiff (called Sherman's), among other promoters, provide facilities in this country designed to enable pool players to participate. Their representative here at the material times was S. E. Lee & Co., Ltd. (referred to as Lee), described in evidence as "Concessionaires and agents of Sherman's".

Bart wished to take part in Sherman's Pools competition (No. 29) run on football games played in Britain on Saturday, February 20, 1960, and duly filled in a Sherman's coupon containing his forecast for the eight draws (treble chance) pool. On February 17, this was sent to Lee, with the stake necessary to cover the number of lines played plus an amount for government tax, by one Julie Aly, for transmission to Sherman's. No sum was paid by Bart to Lee for sending his coupon to Sherman's, or to cover postage or air carriage.

Lee was in the habit of using B.W.I.A. to carry by air all the coupons collected for competition in a particular week; he would send these coupons in one package, as shipper or consignor, to Sherman's as consignee; a courier from Sherman's would collect this package at London Airport on arrival and travel up the same day by train to Cardiff to enable the coupons, if in time, to be counted in the pool.

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B.W.I.A. is a company incorporated in Trinidad and carry on business in this country as carriers by air through their agents (then) British Guiana Airways.

On February 18, 1960, B.G. Airways at their Georgetown office received from Lee a package of football coupons for transmission by air to Sherman's, Cardiff, England; a reservation clerk, by name Ronald Anthony Willock, filled in the consignment note or airways bill for the shipper. The important matters recorded on the face of the bill were:

<i>Name of Shipper</i> .....	S. E. Lee & Co., Ltd.
<i>Consigned to</i> .....	Sherman's Pools, Ltd.
<i>No. of packages</i> .....	"One package"
<i>Nature and Quantity</i>	
<i>of Goods</i> .....	"Football coupons printed matter"
<i>Shipper's declared value</i> .....	"\$6.40 (B.W.I. currency)"
<i>Weight</i> " .....	3.0 kgs."
Freight to London (3 kgs. at \$6.38 per kg.) prepaid.....	\$19.14
" " Cardiff .....	72
Transport—Georgetown to Atkinson.....	<u>25</u>
	<u>\$20.11</u>

At the bottom of the consignment note the shipper (Lee), by his agent, certified that the above particulars on the face of the consignment note were correct, and agreed, under his signature, to the conditions of contract printed on the reverse side of the said consignment note.

Similarly, the issuing carrier's agent, R. Willock, certified under his hand that the goods were received for carriage and subject to the said conditions of contract.

In the column for "Nature and quality of goods" Willock wrote in words which meant:

"Must ride BA Flight 696, 20th February, Port-of-Spain London—  
First available opportunity."

These words were to draw the attention of the B.W.I.A. personnel at Piarco, Trinidad, that the particular shipment should not go through New York because the U. S. Government regulations prohibited the off loading or transshipping of football coupons in any State of U.S.A., and this was to be avoided as Customs there would destroy them.

The package itself contained a label with the words "Must go" in red. Such labels were supplied by B.W.I.A. to "football coupons" agents as well as shippers of perishable goods with a view to obtaining priority

shipment, but the evidence showed that the shippers were aware that it was impossible to make a reservation for cargo.

The particular package, in the regular course of business, should have left Guyana at 9.45 p.m. on February 18, 1960, to be transhipped at Trinidad for carriage to London on Saturday, February 20, (BA 696) to arrive in London on Sunday, February 21. That is what the shipper expected. On Friday, February 19, a signal came from Piarco advising that the particular package did not arrive as manifested. Enquiries were made by Willock, who was advised that the package was definitely sent out on the Thursday flight (February 18) from Atkinson Field. There was another flight to Trinidad on Friday, February 19, at 10 a.m., and yet another on Saturday, February 20, at 12 noon, both of which would have been able to take the package in time to connect with flight 696, which left Trinidad at 5.15 p.m. on February 20, arriving in London on Sunday, February 21. It transpired, however, that at 11.30 a.m. on Saturday, February 20, a messenger discovered the package in question in the storeroom, took it to Willock, who reported the matter to a Mr. Pierre, Senior Officer of the Corporation, who advised him to get a taxi and take the package to the airport (Atkinson Field) some 26 miles away from Georgetown. The package, however, did not catch the noon flight that day, and was not dispatched from the airport until 4.30 p.m.; was too late to make the vital connection with flight 696 at 5.15 p.m., and did not arrive in London until Thursday, February 25, four days after the shipper had counted on its arrival there.

In consequence of a cable received by Lee from Sherman's on Monday, February 22, Lee inserted the following notice in the press; which was read by Bart and produced in evidence:

*"SHERMAN'S"*

The following cable has been received

HAVE RECEIVED COUPONS FROM TRINIDAD, BARBADOS AND JAMAICA ONLY. NONE FROM GEORGETOWN, POOL NOW CLOSED THEREFORE IF COUPONS RECEIVED LATER THEY WILL NOT BE ACCEPTED STOP ADVISE CLIENTS IMMEDIATELY. ALL STAKES HAVE BEEN CREDITED TO CLIENTS ACCOUNTS AND MAY BE USED IN FUTURE.

SHERMANS,

Much to be regretted therefore, Coupon No. 29 for matches played 20th February have been declared void in accordance with the rules

Investigations show that this parcel of coupons was delivered to B. G. Airways on Thursday, 18th February, 1960, and no information is as yet forthcoming as to why it was not shipped out to Trinidad, as was usual, by any one of B.W.I.A.'s three successive flights of Thursday, 18th, Friday, 19th, and Saturday 20th February, 1960.

About two hours before the package was dispatched to Trinidad on Saturday, February 20, the football results were broadcast from the

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British Broadcasting Corporation and relayed through a local station, so that the results were known before the package left Atkinson Field on that day.

On Monday, February 22, Lee sent the following telegram to Sherman's:

"L. BART CLAIMS 23 POINTS IN 8 TREBLE 20TH FEB RURY. UNDERSTAND COUPONS DELAYED TRINIDAD. PLEASE ENDEAVOUR INCLUDES THIS IN DECLARATION PENDING ARRIVAL AND INVESTIGATE COUPON. MOST PERSONALLY ASK THIS EXTRAORDINARY CONSIDERATION FOR REASONS THAT WILL WRITE YOU ABOUT."

Bart's coupon was not allowed to take part in the pool. If it had, he would have been entitled to a dividend of £20,457 10s. Od. Hence this action, and now the appeal.

I find it necessary, first, to consider five fundamental questions to determine whether there is merit in this appeal:

- (1) Does Bart have the right to sue B.W.I.A. merely because he was a party "interested" in the contract of carriage which Lee made with B.W.I.A., even though he was not a party to the contract?
- (2) Was Lee, acting as agent for Bart, an undisclosed principal, when contracting with B.W.I.A.?
- (3) Does the Carriage by Air (Non-International Carriage) (Colonies, Protectorates and Trust Territories) Order 1953 [U.K.] (referred to as the Order-in-Council) vest rights, only in the consignor and consignee to sue, and no others?
- (4) What is the nature and extent of the carrier's (B.W.I.A.'s) liability under the Order in Council?
- (5) Has Bart suffered any loss?

On the first question:

When objection was taken at the trial that Bart could not maintain an action against B.W.I.A. because he was not a party to any agreement with them, the learned trial judge recoiled from the submission, rejected it as being untenable, and sought refuge for the result he pronounced in (a) the *dictum* of Denning, L. J., in *Smith and Snipes Hall Farm, Ltd. v River Douglas Catchment Board* [1949] 2 All E. R. 179, and (b) that of Devlin, J., in *Pyrene Co., Ltd v. Scindia Navigation Co., Ltd.* [1954] 2 All E. R. 158.

*Denning, L. J.*, in his judgment questioned and disputed the authority of the principle of the privity of contract and sought to undermine its influence by the proposition that a person not a party to a contract could sue on it, if it was made for his benefit, and he had a sufficient interest to entitle him to enforce it.

Long before the decision in this case was given the Lord Justice's opinion on this aspect was not followed in *Green v. Russell* [1959] 2 All E. R. 525, and in *Scrutton v. Midlands Silicones, Ltd.* [1962] 1 All E. R. 1, and was considered to be out of harmony with principles well enshrined in the common law.

The seeds of the doctrine of privity of contract were sown nearly three hundred years ago in *Bourne v. Mason* (1669) 1 Vent. 6, where a plaintiff was non-suited because he:

"...did nothing of trouble to himself or benefit to the defendant, but is a mere stranger to the consideration"

and took root in *Price v. Easton* (1833), 4 B. & Ad. 433, where it was held that the plaintiff being no party to the contract, was unable to recover, and it was said that an action for breach of contract must be brought by the person from whom the consideration moved. (See also *Tweddle v. Atkinson* (1861), 1 B. & S. 393, and *Cavalier v. Pope* [1906] A. C. 428.)

These cases found further acknowledgment for the principle enunciated in *Dunlop Pneumatic Tyre Co., Ltd. v. Selfridge & Co., Ltd.* when the law was stated by Viscount *Haldane, L. C.*, in these words ([1915] A. C. 847 at p. 853):

"..... in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of a contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*. A second principle is that if a person with whom a contract not under seal has been made is to be able to enforce it, consideration must have been given by him to the promisor or to some other person at the promisor's request. These two principles are not recognised in the same fashion by the Jurisprudence of certain continental countries or of Scotland, but here they are well established."

Departure from this doctrine was not gladly received in the *Silicones* case (*supra*) and Viscount *Simmonds* was far from encouraging to any new look when he said that "heterodoxy", or, as some might say, "heresy", is not the more attractive because it is dignified by the name of "reform".

Even before the emphatic pronouncement of the House of Lords in that case, it is interesting to observe that the pendulum of Appellate Courts elsewhere was swinging in the same direction, for in Australia in *Wilson v. Darling Island Stevedoring & Lighthouse Co., Ltd.* [1956] 1 Lloyd's Rep. 346, the High Court of Australia took the same line in rejecting the "heresy", and similarly in America the decision of the Supreme Court of the United States in *Krawill Machinery Corp. v. Robert C. Herd & Co.*, [1958] 2 Lloyd's Rep. 159, arrested a contrary concept.

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In *Pyrene* (12) although *Devlin, J.*, may have leaned somewhat towards the scope of the wide principle stated by *Denning, L. J.*, in the *Snipes Hall* case (11), that was truly a case based on agency and evoked this comment from Viscount *Simmons* on the *Silicones* case *supra*.

"*Devlin J.*'s decision in *Pyrene supra* can be supported only upon the facts of the case, which may well have justified the implication of a contract between the parties."

Whilst the *Snipes Hall* case *supra* would still be good law, for its decision on the principle of covenants running with the land, and *Pyrene supra* for the principal of agency on its facts, it is clear that at the time when the trial judge succumbed to the spell of *Denning, L. J.*, contrary and weighty opinions had already reinforced the formidable foundations of that doctrine which prevents and precludes Bart from having the right to sue as a party merely because he was interested in the contract between Lee and B.W.I.A. or that it was for his benefit.

However, this is not an end of the matter, since B.W.I.A. could still be bound to Bart, if Lee as his agent had forged a link to couple B.W.I.A. to him as an undisclosed principal. This brings me to the second question: Was Lee acting as agent for Bart, an undisclosed principal?

The common law reached the solution of creating direct relationship between an undisclosed principal and a third party very many years ago and as early as 1785 Lord *Mansfield* stated that the rules of the undisclosed principal are long settled (*Rabone v. Williams* (1785), 7 Term Rep. 360 N).

Undoubtedly as time went on this concept offered many a solution to urgent problems of the day, and enabled matters to be adjusted and settled in a fair and reasonable manner. The explanation of the doctrine that an undisclosed principal can sue and be sued on a contract made in the name of another person with his authority, is, as stated by Lord *Lindley* in *Keighley, Maxsted & Co. v. Durant* (1) ([1901] A.C. 240 at p. 261):

"that the contract is in truth although not in form, that of the undisclosed principal himself. Both the principal and the authority exist when the contract is made; and the person who makes it for him is only the instrument by which the principal acts. In allowing him to sue and be sued upon it, effect is given, so far as he is concerned, to what is true in fact, although that truth may not have been known to the other contracting party."

It will then have to be ascertained whether Lee had the necessary authority from Bart to make a contract on his behalf with B.W.I.A., and actually did so as Bart's agent.

The learned trial judge did not make any finding of fact as to whether Lee was acting as agent for Bart, an undisclosed principal; he may well have felt that there was no evidence upon which such a finding could properly be made.

However, as there is no evidence of a conflicting nature (B.W.I.A. having led no evidence in denial of anything adduced) it will not be difficult to evaluate the evidence on the record to see whether such agency could be inferred to justify this action brought by Bart against B.W.I.A. Reference has already been made to Bart's evidence of his relationship with Lee. On that it seems quite impossible to draw the inference that Bart was ever in any contractual relationship with B.W.I.A. through Lee.

I will, however, examine the other attendant circumstances to see whether, on the whole, agency in a legal sense could be properly implied.

Sherman's carried on their pools business in Guyana exclusively through Lee, who was known as their "concessionaire". Lee appointed agents or collectors locally — this had been going on for approximately five years. Sherman's would send coupons in bulk to Lee, who would distribute them through these agents or collectors. After the clients filled in their coupons they would hand them back to the collectors or to Lee. Lee would then have to abide by Sherman's instructions when the coupons were to be sent, to be able to participate in the pool. At one time the coupons had to be placed on an aircraft to leave Guyana on a Tuesday for Trinidad and to leave Trinidad on a Wednesday for London. This was with reluctance changed by Sherman's (with Lee's persuasion) to allow a later departure to connect with a later flight—the Saturday flight from Trinidad to London—arriving at London on the Sunday morning, when a courier from Sherman's would meet the package at the customs shed (London) and take same up to Cardiff by train to make delivery to the offices of Sherman's.

This operation was under the control and direction of Sherman's, and Lee was their agent for that purpose. Bart had no voice of any kind in what was done. He merely took advantage of the facilities offered by Lee, as Sherman's representative, to send away his coupon; it was at Lee's discretion as to how, when, or in what manner, the coupon would be dispatched.

Sherman's paid Lee an overall commission of 4s. 3d. in the pound on stakes collected plus various expenses, and Lee would deduct that amount from the stakes and remit the balance. Lee, in the instant case, as always paid for the air freight of coupons dispatched. Bart never contributed or agreed to pay any money towards the same. Sherman's presumably met the expenses of their courier from London to Cardiff and again Bart paid none of that. Bart, however, had the alternative of posting up his coupon on his own, but to do that he would have to comply with the rules in the ordinary way that is, post not later than the Friday before the matches, but it would have

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to reach Sherman's before 4 p.m. on the Saturday. If this method is adopted (according to the rules):

"Any coupon reaching (Sherman's) after 4 p.m. on the Saturday will be disqualified and no claim in respect of that coupon will be entertained."

I find myself unable to construe Bart's evidence, and the relevant matters above stated to draw the inference that Lee was Bart's agent in a legal sense to contract on his behalf with B.W.I.A. Lee was free to do what he wanted in his own way (to get the coupons to London) without reference to Bart, or any other client, and only subject to necessary instructions from Sherman's. Instead of posting the package he could have sent it by a special envoy, or by a special flight, at great cost, just as it could have been sent by a passenger or servant of the aircraft at no cost. In such cases it would be Lee dealing as principal with persons who know Lee alone and would be contracting with him in such terms as import that he is the real and only principal. Lee could never in the circumstances legally demand that Bart should pay for any costs incurred in sending the package up to London or Cardiff. Lee made avowedly the contract with B.W.I.A. for himself alone. There was no question that he was acting to any extent for another, or that he had that other's authority to act in the way he acted.

In *Garnac Grain Co. v. H. M. F. Faure & Fairclough, Ltd*, what *Diplock, L. J.*, said could be usefully applied here ([1965] 3 W. L. R. 934 at p. 949):

"No question of ostensible authority arises. The agency issue is concerned only with the legal relationship between Faure and Allied. Whether in law Faure entered into the contract as agents for Allied as their undisclosed principals depends on whether Faure and Allied agreed with one another that Faure should enter into that contract of sale with Garnac on behalf of Allied so as to create privity of contract between Garnac and Allied, that is to say, so as to make a contract of sale with Garnac which was directly enforceable by and against Allied.

Again (*ibid.*) at p. 953, *Diplock, L. J.*, said:

"The judge states the proposition of law upon which he acted then. 'If B requests A to buy goods in his own name and the common intention, understanding or agreement is that when A gets the goods or acquires contractual rights in respect of the goods A is to hold the goods or the contractual rights not to be dealt with at A's will or pleasure but to the instructions of and at the disposal of B, then, in my judgment, A would, at least normally, be properly treated as agent of B in buying the goods.' With great respect there is in my view a vital lacuna in this proposition. For to be the agent of B in entering into a contract with C to buy goods from C, there must be a previously existing agreement between A and B that A shall contract with C on B's

behalf so as to create privity of contract between B and C. If all that is agreed between A and B is that A when he has bought the goods from C will hold them to the instructions of and at the disposal of B, this does not make A the agent of B to make a contract of sale between B and C."

The contents of the package shipped were simply described on the consignment note as "Football coupons printed matter", no more, no less. There was nothing to indicate whether the coupons were filled in, by whom, and for what games and closing time. But even if it could be said that B.W.I.A. knew or ought to have known that it concerned games to be played on Saturday, February 20, and had to arrive by Sunday, February 21, could it be said with any degree of reality that they (B.W.I.A.) were willing to accept contractual relationship with 1,437 investors whose coupons were in that package and/or that Lee had authority to establish any such contractual relationship for those 1,437 customers, none of whom paid any freight for carriage to B.W.I.A., or that these 1,437 customers were bound by any condition of carriage which Lee accepted on his own? If Lee could legally tie Bart to B.W.I.A., so also could he effectually convert 1,436 other customers unknown to B.W.I.A. in names or existence, as joint obligants to them for the purpose of the contract of carriage.

It would be placing too great a strain on the legal concept of agency to conclude that Lee was in any way Bart's agent in the instant case for the purpose of establishing privity of contract, and so I find against that proposition.

However, for the purpose of the third question which now arises, I will assume that Lee was Bart's agent to consider whether Bart could sue, although he was not the consignor or consignee.

Except he is expressly or by necessary implication debarred from so doing by the Order in Council, his common law rights would permit him to bring suit. Therefore, the Order in Council must be carefully scrutinised to ascertain whether only the consignor or the consignee, and no others, could sue. It would be a harsh penalty indeed, if the owner or persons with interest in the cargo could not initiate litigation because they were not known to the carrier as the consignor or consignee.

To provide a code for international use which had to be interpreted in different countries with differing legal concepts must have been a very exacting responsibility, and required considerable time for the Warsaw Convention to fulfil. The language used is carefully chosen. Its true meaning, effect and purpose appear after a close inspection, and must be read as a whole before the answer to the instant question becomes apparent.

... The articles for the most part centre around and concern three principal parties, viz., the carrier, the consignor, and consignee (who are, of course, in this case, B.W.I.A., Lee and Sherman's respectively).

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Attention must first be focused on art. 14, with its very significant proviso. That article is as follows:

"The consignor and the consignee can respectively enforce all the rights given them by arts. 12 and 13, each in his own name whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract."

It can be readily seen that the Order in Council recognises that the consignor and the consignee may be acting not only for himself alone, but in the interest of another; and it expressly allows each to enforce not only his own rights, under the respective articles, but also the rights of others who may be interested in some way in the cargo in question. That power, however, is subject to what in my view amounts to a condition precedent, namely, that he (the consignor or the consignee) should first carry out his respective obligations before seeking to enforce any rights which he may claim for himself or on behalf of any other. The importance of the proviso in the article must be given its full weight. This statutory imposition demanding that obligations which are laid down must first be met before rights could be enforced must be strictly complied with, both as to terms and persons. It seems to say, before you (consignor or consignee) can complain you must first comply; if you comply you can complain.

The contract of carriage is in reality being subjected to the terms of the Order in Council which imposes on the consignor and consignee and no other person a number of obligations, in return for which they will be at liberty to enforce certain rights given to them under the contract. How then can others, however interested, enter into the sanctuary of this statutory privity of contract, where consideration moves from the consignor and consignee and where everything points to recognition only of the immediate parties? The obligations which the consignor or consignee have to perform cannot be sought, expected, or exacted from strangers to the consignment note, however great their interest may be.

Now to look at some of the obligations and rights of consignor and consignee. A carrier has the right to require the consignor to make out and hand over to him an Air Consignment Note. The consignor is responsible for the correctness of the particulars and statements relating to the cargo which he inserts in the Air Consignment Note and will be liable for all damage suffered by the carrier or any other person by reason of the incorrectness or incompleteness of the said particulars. The consignor further must furnish information and documents for customs and police before cargo could be delivered to the consignee, and he may be liable for damages for faulty information, etc. All of these obligations must be met by the consignor; and when an Air Consignment Note is made out, it is *prima facie* evidence of the conclusion of the contract, of the receipt of the cargo, and of the conditions of carriage. As the consignor has specific obligations under the contract of carriage, so also does he have rights—such rights of disposition of his cargo as to withdraw it at the place of departure or destination, stopping it in the course of the carriage, or calling for it to be delivered to a person other

than the consignee at the place of destination or in the course of carriage, etc. The consignor's stipulated rights over the cargo, which he has shipped, continues up to the place of destination, when the consignees, rights begin and his ceases. The consignee likewise, has to discharge certain obligation like the paying of charges due and complying with the conditions of the contract of carriage. If the cargo is lost, or delayed for more than seven days after the date on which it ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.

So that the consignor, consignee, and carrier are linked directly together by conditions of contract largely imposed upon them by statutory provisions which for the most part they must accept (except where they are allowed to make a special contract).

Bart, or the 1,400-odd coupon investors even if they were undisclosed principals, could never fit into the definition of "Shipper" (in the conditions of carriage) which is equivalent to the term consignor and means "the person whose name appears on the waybill as the party contracting with the carrier for the carriage of goods".

There is no doubt that the Warsaw Convention, 1929, in balancing the rights, duties, and obligations of the air carrier and those who send and expect to receive cargo set about to avoid legal complications as far as possible, and to give certain protection to an industry in its infancy subsidised by the respective governments of many countries. To do this, the parties to the contract must be fixed and known; others cannot turn up later and confuse the conformation of its contractual concept. The carrier's responsibility is fixed and determinable and the conditions of contract must comply and come within the scope of the provisions in the schedule. The matter is made simple by recognising only the carrier, the consignor, and the consignee as parties to the contract in so far as the carriage of cargo is concerned.

In so doing, the relations of the latter two with each other or third parties were left unaffected since art. 15 (1) provided that:

"Articles 12, 13 and 14 do not affect either the relations of the consignor or the consignee with each other or the mutual relations of third parties whose rights are derived either from the consignor or the consignee."

The comment may be made that the true owner or persons really interested in the cargo may not be the consignor or consignee, who may be unwilling to lend their names to sue the carrier to enforce the rights of the owner or person in which case, is redress to be denied by interpreting the relevant articles in a restrictive sense? The answer to this may be made in two parts:

- (a) the provisions of the Order in Council are there for all to see and know, and those who may be affected must govern themselves accordingly;

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(b) the Order in Council itself in anticipation of eventualities of the kind arising has expressly provided by art. 15 (2) that:

'The provisions of arts. 12,13 and 14 can only be varied by special contract in writing between the parties.' "

This means that if it is desired to alter the rights of the consignor under art. 12, or those of the consignee under art. 13, or the stipulation under art. 14, that the consignor or consignee can enforce all the rights given them under those articles (subject to the proviso), then a special contract must be entered into providing for this, otherwise, what is laid down must be accepted.

Therefore, it is left to the parties to contract in a way which would vary the provision of art. 14 (also 12 and 13) if a different result is desired from what is there expressed. Lee then could have specially contracted with B.W.I.A. (if they were so disposed) to transfer all the rights of the consignor or consignee to Bart, or to any or all of the other 1,436 investors, in respect of the carriage of their individual coupons.

Bart's name does not appear anywhere in the consignment note, and no special contract was made under art. 15 (2) to permit him or anyone else to have any rights in any way under the contract of carriage, so that recognition legally could only be given to the consignor and consignee as they are on the consignment note.

An analysis of art. 24 lends further support to the proposition that Bart cannot bring this action. That article is as follows:

- "(1) In the cases covered by arts. 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Schedule.
- (2) In the cases covered by art. 17 the provisions of the preceding paragraph also apply, without prejudice to any question as to who are the persons who have the right to bring such an action and what are their respective rights".

Cases under arts. 18 and 19 may arise in tort or contract. However, they arise, they can only be brought subject to the conditions or limits set out in the schedule, and here one reverts almost immediately to the condition in art. 14 that before certain rights could be enforced certain obligations must be carried out by those who seek to enforce these rights, which would be the consignor or the consignee as the case may be (in the absence of anything to the contrary). To meet this condition before launching an action in contract or tort would then require either the consignor or consignee to bring the action.

It is significant that art. 24 (2) expressly reserves the right for others to enter the field when dealing with claims resulting from death or injury to passengers under art. 17.

Then finally art. 30:

"(1) In the case of carriage to be performed by various successive carriers, each carrier who accepts passengers, luggage or cargo shall be bound by the provisions of this Schedule, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

.....

(3) As regards luggage or cargo, the passenger or consignee will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage, or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee."

Article 30 (1) preserves and demonstrates the basic idea of privity of contract by providing specifically that by operation of law successive carriers who may not be actually parties to the original contract would be deemed to be contracting parties to the contract of carriage, etc. Thus express provision is made by the Order in Council to bring an entity within the ambit of the contract, not a party to the contract for the purpose of giving effect to the contract in a certain way. Article 30 (3) makes it abundantly clear as to the right of action of a consignor or consignee against a particular carrier.

I am deeply conscious of the serious and grievous consequences in restricting the rights of an affected party to have redress for a wrong by raising a prohibition on a doubtful premise. Three American cases have, however, been referred to by counsel for the appellants in support of the restrictive view. They are: *Manhattan Novelty Corpn. v. Seaboard & Western Airlines, Inc.* (1965), New York Supreme Court. *Holzer Watch Co., Inc. v. Seaboard & Western Airlines Inc.* [1958] U.S. & Can. Aviation Rep. 142. *Pilgrim Apparel, Inc. v. National Union Fire Insurance Co., Ltd* [1960] U.S. & Can. Aviation Rep. 373, Also reference was made to the South African case of *Pan American World Airways Incorporated v. 5. A. Fire & Accident Insurance Co., Ltd*, (1965), South Africa in which four judges supported the view taken in the American cases and the Chief Justice dissented therefrom.

In the *Holzer Watch Co.* case *supra* the judge (RIVERS, J.) merely contended himself with expressing the view that it was reasonable that the carrier be subject to suit only by those whom it knowingly dealt with, that is, by the consignor and consignee, and in the *Pilgrim Apparel* case *supra* (PETER A. QUINN, J.) merely said:

"The plaintiff is not named either as consignor or consignee in the airways bill which was issued by the moving third-party defendant. That third-party defendant is therefore not liable to suit. The provisions of the Warsaw Convention, 1929, constitute the law of the land and are controlling."

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In the South African case, however, there is a little more discussion and a strong dissenting opinion from the Chief Justice, who said:

"An intended forfeiture of rights is not to be presumed. Here there is no clear language providing for such a forfeiture. It could only be arrived at by inference, and it may well be questioned whether the inference is so obvious that an express provision must have been considered unnecessary."

I have given full consideration to what the Chief Justice has said, but find myself irresistibly driven to another conclusion.

Whilst the decisions quoted are not binding on this court, but only persuasive, yet it must be borne in mind as was said in the *Silicones* case (6) in the House of Lords by Viscount *Simmonds* (in reference to decisions in other jurisdictions where the Hague rules have been embodied in the municipal law) ([1962] 1 All E. R. 1, at p. 9):

"It is (to put it no higher) very desirable that the same conclusions should be reached in whatever jurisdiction the question arises. It would be deplorable if the nations should, after protracted negotiations reach agreement, as in the matter of the Hague Rules, and that their several courts should then disagree as to the meaning of what they appeared to agree upon."

And again in *Stag Line, v. Foscolo, Mango & Co., Ltd.* Lord *Macmillan* ([1931] All E. R. Rep. 666, at p. 677):

"It is important to remember that the Act of 1924 (referring to the Carriage of Goods by Sea Act, 1924) was the outcome of an international conference and that the rules in the schedule have an international currency. As these rules must be one under the consideration of foreign courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptance."

The cumulative effect of all these articles have coerced me to the conclusion that it was the clear intention of the Order in Council to permit none other than the consignor or consignee to sue the carrier. If a different result is required a special contract must be made to provide for that under art. 15 (2).

Now comes the fourth question.

What is the nature and extent of B.W.I.A.'s liability under the Order in Council?

Many countries at different points of time enacted legislation to give effect to the uniform rules of the Warsaw Convention, 1929, governing the rights and liabilities of carriers on the one hand, and passengers and consignees of goods on the other: in 1932 in England the

Carriage by Air Act did so. In 1953 Orders in Council did so for a number of countries, including British Guiana (as it then was.) There were exceptions, adaptations and modifications specified in the order, and the provisions for International Carriage were in certain respects different from Non International Carriage.

The Order in Council brought into operation a code which in effect declared and pronounced upon the rights, duties, obligations and liabilities of persons mentioned therein and (except it expressly authorised) did not permit of contracts which made stipulations in conflict with the provision of the schedule.

When the Warsaw Convention was enacted the International Air Transport Association drafted consignment notes and unified conditions of carriage designed and intended to comply with the requirements of the Warsaw Convention; with the result that, some of these conditions of carriage were embodied at the back of the consignment note and described thereon as "conditions of contract", and referred to and brought in play general conditions for carriage of cargo (available for inspection at the Airways office). Any of these conditions of carriage would be inapplicable if their provisions were contrary to mandatory law, government regulations, orders or requirements; so that the Order in Council, the conditions of contract (at the back of the consignment note) and the general conditions of carriage (in the Airways office) governed the transmission of the package, with the Order in Council standing supreme.

On a careful reading of the Order in Council, I am of the opinion that it was intended to, and did set out that for which the carrier would be liable and to what extent; so that where it is sought to introduce liability outside the scope of the provisions therein contained, such would not, in my view, be maintainable.

What then, is the carrier's liability under the Order in Council as it affects cargo?

This is specific. It covers—subject to limitations—a liability for damage occasioned by delay; and damage sustained in the event of destruction or loss of or damage to the cargo during the carriage by air; provided there is what amounts to negligence, on the part of the carrier. (See arts. 18, 19 and 20 of the Order in Council.)

The common law must operate and shed enlightenment within these stipulated categories of liability, namely, damage to cargo, destruction or loss of cargo, delay in delivery of cargo. To introduce new aspects or concepts of liability would not be permissible. This would defeat the purpose of the Order in Council which has declared the compass and extent of the carrier's liability.

Where, however, the damage is caused by the carrier's wilful misconduct he will not be entitled to avail himself of the provisions of the articles which exclude or limit his liability (see art. 25) and the full tide of common law liability will be allowed to flow against him through his own folly.

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Put shortly, if the carrier wishes to escape liability for delay in delivery, or for loss, destruction, or damage to cargo, he and his servants must be prudent in dealing with the same; if he or his servants are negligent then liability or limited liability accrues. If, however his conduct is so reprehensible as to come within the category of "wilful misconduct" he loses all the protection, including the limitation of liability which would otherwise have been available to him under the Order in Council.

In this case there was no destruction or loss of or damage to the package, so that no liability is or could be attributable to the carrier in respect of these categories. There was, however, what the trial judge described as an "unexplained delay" in transporting the package to Trinidad between Thursday, February 18, and Saturday, February 20, in time to connect with Flight 696 to reach London by Sunday, February 21; and this was due to the negligence of B.W.I.A., their servants or agents, and the package which the shipper or consignor expected to arrive in London on Sunday, February 21, never got there until Thursday, February 25.

Was there then a legally binding duty on the part of B.W.I.A. under the contractual terms to deliver the package on Sunday, February 21, and no later? Lee must have expected that in the normal course of events the package would arrive on Sunday, February 21, and B.W.I.A. would know from the label "Must Go" that, if cargo space was available, it was urgent that the package should not be delayed. But this is a far cry from establishing an undertaking to deliver at a fixed time which, in any event, would be repugnant to the conditions of carriage. The words on the consignment note "Must Ride BA 696/ 20th February, Port-of-Spain/London first available opportunity" were explained as being no more than instruction to personnel at Trinidad not to send the package via New York where the customs might have destroyed the package because it contained football coupons. This was a prudent act, but was never intended to create a contractual term. Terms of that kind would be contrary to the actual set conditions of contract, for example, para. 5 of the conditions of contract on the consignment note stipulates that:

"It is agreed that no time is fixed for the completion of carriage hereunder...Carrier assumes no obligation to carry the goods by any specified aircraft...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."

And art. 6, para. 3, of the conditions of carriage provides:

*Schedules, Routings and Cancellations*

- (a) Times shown in time-tables or elsewhere are approximate and not guaranteed and form no part of the contract of carriage. No time is fixed for the commencement or completion of carriage or delivery of cargo. Unless otherwise provided in carrier's regulations, carrier assumes no obligation to carry the cargo by any specified aircraft or over any particular

route or routes, or to make connections at any point according to any particular schedule, and carrier is hereby authorised to select or deviate from the route or routes of consignment, notwithstanding that the same may be stated on the face of the airways bill. Carrier is not responsible for errors or omissions either in time-tables or other representations of schedules. No employee, agent or representative of carrier is authorised to bind carrier by any statements or representations of the dates or times of departure or arrival, or of the operation of any flight;

and para. 12 of the conditions of contract expressly states that:

"No agent, servant or representative of carrier has authority to alter, modify or waive any provision of this contract."

This does not mean and cannot mean that delivery will be permitted to take place, however it pleases the carrier. It will then become necessary to imply that the carrier must perform the carriage within a reasonable time, having regard to all the circumstances of the particular case.

This would require the trial judge (sitting as he is without a jury) to determine when the cargo ought to have arrived. There can be no doubt, on the evidence, the answer would have been—Sunday, February 21, since there were three fixed air opportunities on the 18th, 19th, and 20th, all of which took place, and any of which would have connected with the Saturday afternoon flight from Trinidad to arrive in London on February 21. Upon this finding it will be necessary to interpret and apply art. 13 (3) which is as follows [After setting out this article his Lordship continued].

This forms part of an article which deals with the right of the consignee after that of the consignor ceases. Under that article the consignee becomes entitled upon the arrival of the cargo at the place of destination to require the carrier to deliver the cargo to him (subject, of course, to the payment of charges, etc.); and it would be the duty of the carrier (except otherwise agreed upon) to give notice to the consignee as soon as the cargo arrives.

If loss is admitted by the carrier then his liability for loss arises immediately in accordance with his contractual obligations. If the cargo has not arrived at the expiration of seven days after the date on which it ought to have arrived, this would mean a delay of seven days beyond the expected time of delivery, which is considered sufficiently long a period by the Order in Council to open the doors of liability under the contract of carriage. It may well be that this delay may lead to the subsequent discovery that the cargo has become lost, or it may turn up sometime after the seven days. Whether it does or not, delay will have ensued and the rights which flow from the contract of carriage will become enforceable after the prescribed time.

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For damages occasioned by delay a special contract could be made under art. 19 (2), which may increase the limit of liability fixed, and that increase could provide for payment of a higher sum in the event of delay, than the value of the cargo. Therefore, it must be open to the consignee to choose what rights he seeks to enforce under the contract of carriage when he is permitted to assert those rights, *i.e.*, seven days after the cargo ought to have arrived. These rights may be for delay in delivery or delay which ultimately leads to the conclusion that the cargo has been or must be considered to be lost.

Whatever the cause of the delay, it is my view that, except the carrier admits the loss of the cargo, seven days must expire from the date when it ought to have arrived, before rights could be enforced against the carrier under the contract of carriage. In this case delivery was actually made four days after it ought to have been made, but the carrier has, by operation of law, until March 1 before rights under the contract could be enforced against him; a protection which is in the nature of a condition precedent to a complaint for delay which would give rise to an action, assuming Bart was the consignee. Even if Bart had been the consignee and the package had not arrived until March 1, the carrier's liability would have been limited (there being no special contract expressly increasing the liability fixed).

Under art. 19, which provides that:

"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."

If the delay was not "in the carriage by air" then there is ample provision in the condition of contract at the back of the consignment note to limit liability under para. 4 (c) which provides that:

"...it is agreed that any liability shall in no event exceed the shipper's declared value for carriage and in the absence of such declaration by the shipper, liability of carrier should not exceed 250 French gold francs or their equivalent per kilogram of goods destroyed, lost, damaged or delayed."

The weight of the whole package was 3 kilograms. The weight of Bart's coupon is not known. Also para. 6 provide that:

"The goods or packages...are accepted from their receipt at carrier's terminal or airport office at the place of departure to the airport at the place of destination...If such forwarding is by carriage operated by carrier (which is the case here) such carriage shall be upon the same terms as to liability as set forth in paras. 2 and 4 hereof..."

And art. 14, para. 11, of the general conditions of cargo provide:

"Carrier shall not be liable in any event for consequential or special damages arising from carriage subject to this tariff, whether or not carrier had knowledge that such damages might be incurred."

Now to the last question. Did Bart suffer any loss?

The answer to this question will be found in the evidence of Vivian Penny, Managing Director of Sherman's taken on commission at Cardiff, and tendered in evidence as part of Bart's case. [After reciting the evidence referred to, his Lordship continued:]

Further, it must also be borne in mind that Sherman's rules contain the following:

"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.

Whether Penny was justified or not in the conclusion which he had reached about the particular coupon is not as important as the fact that he would have recommended its disqualification to the accountant, whose decision was final, and he felt that having regard to the circumstances, his recommendation would have been accepted without question. Penny's position as managing director cannot be ignored in this connection.

In short, Penny's evidence was that Bart was not likely to have been given the opportunity of competing even if his coupon had arrived in time.

Whether he was right or wrong is of little moment. The fact is that the rules permitted Sherman's to act in any manner which pleased them. On the only evidence before the court (Penny's evidence) it is likely that Bart's coupon would have been disqualified, so that there is no evidence that he had lost the opportunity of winning the dividend claimed.

Before concluding I ought to examine briefly certain submissions of counsel for the respondent. He has argued that B.W.I.A. owed a duty to Bart to make delivery of his coupon to Sherman's on Sunday, February 21, and that they ought to have known that if his coupon did not arrive in time he might suffer damages, and in view of their negligence they would become responsible to Bart for damages suffered on an extension of the principle in *Donoghue v. Stevenson supra*. He referred to the cases of *Lee Cooper, Ltd. v. C. H. Jeakins & Sons, Ltd. supra*, and *Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd. supra*

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In view of my finding that the statutory scope of liability under the Order in Council cannot be enlarged, it would be unnecessary to enquire whether the relationship between Bart and B.W.I.A. in this case is such that it can be brought within a category giving rise to a special duty, or under any other category except that which is specially provided for under the Order in Council (already considered).

The aid of the common law can only be invoked if the Order in Council ceases to exclude or limit the liability of the carrier in the event of wilful misconduct as where "the person concerned must appreciate that he is acting wrongfully or is wrongfully omitting to act regardless of the consequences, or acts or omits to act with reckless indifference as to what the result may be" (*Horabin v. British Overseas Airways Corpn.* [1952] 2 All E. R. 1916, or where there was an intentional omission of some act, with knowledge that such omission will probably result in damage or injury, or the intentional omission of some act in a manner from which could be implied reckless disregard of the probable consequences of the omission" (*Pekelis v. Transcontinental & Western Airlines, Inc.* [1951] U.S. An. R. 1).

Counsel has also argued that there was such a fundamental breach as would prevent the exclusion or limitation of liability from applying.

It is true that the courts have tended to set their faces against the exclusion or limitation of liability, and so far as rules of construction allow, to confine the operation of exemption clauses within the narrowest limits. But in this case the court can have no option; legislation has been decreed in clear language, and this must be obeyed.

According to that legislation, there has been no breach from which rights under the contract of carriage can be enforced (art. 13 (B)). Further negligence must exist before any liability arises, so that negligence alone cannot give rise to a fundamental breach. It is only if there is negligence of a kind which comes within the scope of wilful misconduct, then in effect this would be a fundamental breach and all exclusion and limitation provisions would cease to apply.

Article 25 provides:

- (1) The carrier shall not be entitled to avail himself of the provisions of this Schedule which exclude or limit his liability if the damage is caused by his wilful misconduct.

In this case wilful misconduct was not pleaded, nor was there any evidence to justify such a plea.

On the whole case, therefore, I must find that there was no privity of contract between Bart and B.W.I.A.; that Lee was not an agent for Bart, an undisclosed principal, to make a contract with B.W.I.A. on his (Bart's) behalf; that Bart, not being the consignor or consignee under the contract of carriage, was deprived by the Order in Council of the right to bring any suit against B.W.I.A.; that the Order in Council only created liability against the carrier for loss of or damage to the pack-

age (which did not happen) and for delay (which did not occur beyond the period of seven days) before which rights under the contract of carriage could be enforced; that in any event liability would have been limited: and that Bart had not proved that he had suffered any loss or damage through any delay on the evidence of his own witness, Penny.

I must, therefore, allow the appeal and set aside the judgment of the court below with costs there and here to the appellant certified fit for two counsels. The cross appeal is dismissed.

*Appeal allowed*  
*Award of damages set aside.*

Solicitors: *D. Bernard* (for the appellant).

*J. A. Jorge* (for the respondent).

## BARCLAYS BANK D.C.O. v. KHAN AND FUNG

[Supreme Court—In Chambers (Luckhoo, C.J.) December 11, 21, 22, 30, 1965, February 26, 1966]

*Execution—Judgment debtor absent—Movables pointed out by judgment creditor—Marshal not satisfied that movables belong to judgment debtor—Execution levied on immovables—No application for discovery in aid of execution—Validity of levy—0.36, rr. 38 and 42.*

*Practice and procedure—Execution—Application to set aside—Whether procedure should be by summons or action—Waiver—Delay—Marshal's return—Procedure for questioning.*

The plaintiffs levied execution to recover a judgment debt against the defendant K. K. was absent at the time of the levy. The plaintiffs' agent pointed out certain movables, but the marshal, after discussing with K's wife was not satisfied that they belonged to K. He then levied upon K.'s immovable property which was sold to the added defendant F. Before transport was passed to F., K. applied by summons to set aside the execution on the grounds that, contrary to 0.36. r. 42, the marshal had no authority to disregard the instructions of the plaintiffs' agent to levy on the movables pointed out, that the marshal did not permit K. the opportunity of pointing out his movable property and/or selecting what he would prefer to be levied on. For the plaintiffs, it was objected in limine that the correct procedure was by action.

Held: (i) at least where title has not been passed to the purchaser at execution sale, a judgment debtor may seek to have the levy and sale set aside by way of summons in the action out of which the levy originated;

(ii) a marshal is not a mere automaton. He can decline to carry out the instructions of the execution creditor if his inquiries lead him to the conclusion that it would not be compatible with his duty to do so. In any event it was for the judgment creditor and not the judgment debtor to complain of prejudice to his rights arising from the failure of the marshal to levy on the movables pointed out by the judgment creditor's agent:

(iii) the requirement for the judgment debtor's presence and for him to be asked to point out his movables is a condition precedent to the valid execution of the writ only if no inquiries are made to ascertain whether there are movables or if on inquiring it be ascertained that there are movables. Where after all reasonable inquiries it is ascertained that there are no movables owned by the defendant, there is no requirement for his presence or for him, even if present, to be asked to point out anything;

(iv) the provision of 0.36, r. 38, as to discovery in aid of execution may well be utilised by a judgment creditor where a judgment debtor cannot or will not attend the execution of the writ of execution, but omission to do so does not affect the levy made where the marshal pursues all reasonable inquiries to ascertain if the judgment debtor has movables and ascertains from those inquiries that in fact he has no movables;

(v) the marshal's return is *prima facie* evidence of the facts stated in it and its truth cannot be investigated upon affidavit, the only remedy being by action against the marshal for a false return;

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(vi) even if the provisions of 0.36, r. 42, were infringed, the levy was merely irregular and as such the irregularity could be waived by the judgment debtor. On the facts there was a waiver. Further, an application to set aside must be made as early as possible, and on the facts the instant application was not so made.

*Application refused.*

*G. M. Farnum* for the plaintiffs.

*E. V. Luckhoo, Q. C.* for the defendant.

*M. H. Bacchus* for the added defendant.

LUCKHOO, C. J.: On the 2nd March, 1964, the defendant Ahmad Khan appeared in the Bail Court and personally consented to judgment in the sum of \$1,853.64 with interest thereon at the rate of 9 *per centum per annum* with effect from the 16th December, 1963, until payment together with costs in the sum of \$107.50 on a specially indorsed writ filed by the plaintiffs Barclays Bank D. C. O. as civil action No. 298 of 1964 Demerara. The Order of the Court in respect of this judgment was entered on the 13th March, 1964.

On the 1st April, 1964, the plaintiffs' solicitor requested the issue of a writ of execution in relation to the above-mentioned judgment of the court and a writ of execution directed to a marshal of the court was issued on the 18th June, 1964. Subsequently, a levy was executed upon certain immovable property of the defendant, his interest under a long lease, and the property sold at execution sale to one Dr. J. Fung in April, 1965.

On the 8th May, 1965, a summons in the aforesaid action was filed on the part of the defendant for an order that the writ of execution issued on the 18th June, 1964, and all proceedings thereunder be set aside as being irregular on the following grounds—

- (a) that the defendant is the owner of movable property of sufficient value to satisfy the amount in fact due by the defendant to the plaintiffs at the date of the levy and/or the date of the sale at execution and is in fact able to pay off the said judgment;
- (b) that the marshal acted in contravention of the Rules of the Supreme Court 1955 and of the practice for the time being in that—
  - (i) he made no enquiry of the defendant whether he owned any movable property or at all;
  - (ii) he made no request of the defendant to point out his property;
  - (iii) he made no, or no proper or sufficient search for the defendant's movable property;

- (iv) he made no levy on the defendant's movable property;
- (v) he advertised the defendant's property for sale at execution in the Gazette of the 10th, 17th and 24th days of April, 1965, and on the 27th day of April, 1965, purported to sell the same at execution and without any prior or sufficient notice to the defendant of such intended sale;
- (c) that the marshal was directed to sell the defendant's immovable property and in fact sold the same at execution for an amount larger than the amount in fact due on the said levy;
- (d) that the said levy and/or the said sale was wrongful having regard to a stay of execution which had been agreed upon between the plaintiffs and the defendant.

The defendant seeks an order that his aforesaid property be restored to him and that it be made a term of the Order that he be at liberty to bring an action in respect of the said levy which he contends to be wrongful.

I have been informed by the Registrar of Deeds that upon the request of solicitor for the defendant pending the hearing and determination of this summons, title to the property levied on and sold to Dr. Fung at execution sale has not been issued to Dr. Fung.

At the hearing of this summons it was submitted *in limine* by Mr. G. M. Farnum, counsel for the plaintiffs, that it is not competent for the defendant to seek the above-mentioned orders by way of summons in the action and that the proper procedure therefor would be by way of an action. No authority was cited by Mr. Farnum in support of his submission.

Mr. E V. Luckhoo, Q. C. for the defendant, has stated that the instant application is founded upon the provisions of Order 54, r. 1 (O. 70, r. 1 A. P.) whereby a writ of execution if irregular may be set aside on application made by summons, Mr. Luckhoo referred to a statement to this effect in ATKINS ENCYCLOPEDIA OF COURT FORMS and PRECEDENTS IN CIVIL PROCEEDINGS, Vol. 9 at p. 120, to Form No. 24 contained therein at p. 167 which relates to the form of summons to set aside a writ of execution on the ground of irregularity.

There are instances in the law reports of this Colony of actions being filed to set aside irregular levies of immovable property and the sales thereof, as was done in the case of *Singh v. McCloggan* (1961). 3 W. I. R. 166. However, it does not appear that any question was raised in these cases as to the procedure for bringing the application before the court.

I think that at least where title has not been passed to the purchaser at execution sale a judgment debtor may seek to have the levy and sale set aside by way of summons in the action out of which the

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levy originated. I can find nothing in the Rules of the Supreme Court, 1955, which specifically prescribes that such an application cannot be brought by way of summons or which specifically prescribes a procedure otherwise than by way of summons. I therefore overruled the plaintiffs' objection *in limine* and held that *prima facie* such an application may be brought by way of summons.

Evidence was led to show *inter alia* the circumstances under which the levy was effected. The testimony of Marshal of the Supreme Court C. C. de Abreu which I accept, is as follows. On the 29th August, 1964, he went to the S1/2 of lot 177 Charlotte Street, Lacytown, Georgetown, for the purpose of executing the writ issued on the 18th June, 1964, at the instance of the plaintiffs' solicitors. The marshal was accompanied by the plaintiffs' agent Sue-Ho and clerk to the plaintiffs' solicitors, one Van West. On their arrival at the defendant's premises the defendant was not there, but the marshal spoke to a woman on the premises who gave her name as Bhagmani Khan and said that she was the defendant's wife.

It may be observed that no suggestion has been made that the defendant's wife did not in fact speak with the marshal and indeed the defendant's wife, although it was admitted by the defendant at the hearing that she was available, was not called to testify. The marshal waited for one hour and twenty minutes for the defendant to arrive—from the evidence of Van West it appears that a message was sent by the defendant's wife to the defendant for him to come—but the defendant did not come. Sue-Ho, the plaintiffs' agent, pointed out a motor car parked on the premises and asked that the marshal levy on the car. The car was then claimed by the defendant's wife who produced a certificate of registration and a certificate of insurance in support of her claim. As a result the marshal did not levy on the car. (The defendant has admitted that the car is the property of his wife.) The marshal and Sue-Ho then went into the defendant's house where the defendant's wife produced receipts for payments of instalments in respect of a refrigerator claiming that they related to the refrigerator then standing in the house and that the refrigerator was her property. The marshal examined the receipts and, concluding that the claim to ownership of the refrigerator by the defendant's wife was genuine he did not levy on the refrigerator. The defendant has claimed the refrigerator then standing in the house is his own. His evidence in this regard will be dealt with later. In the kitchen there was a kerosene oil stove in respect of which the defendant's wife produced receipts in support of her claim to ownership. As a result the marshal did not levy on the kerosene oil stove. (The defendant has admitted that the stove is the property of his wife). Another stove in the kitchen and not in use was also claimed by the defendant's wife as her property but she did not produce any receipt to support her claim. The marshal did not levy on this stove because of the claim to ownership on the part of the defendant's wife. The defendant's wife claimed all of the furniture in the house and produced some

receipts in support of her claim. The marshal did not check the receipts against the furniture but he did not levy on any of the furniture. The defendant has sworn that the furniture is his property but he has produced no receipt in support of his claim.

The marshal has stated that as a result of the enquiries he made and what was shown to him he was satisfied that there was no movable property that he could levy on as property of the defendant.

Van West did not accompany the marshal into the house so he was unable to testify as to what took place in the house.

Sue-Ho, who did go into the house and point out to the marshal certain movable property attended court on the 21st December, 1965, and when called at 4.33 p.m. to testify he was absent. When the hearing was resumed on the following day counsel for the plaintiffs closed the case for the plaintiffs without calling Sue-Ho.

The only other person present in the house at the time of the execution of the writ—the defendant's wife—was not called to testify. The defendant swore that the refrigerator standing in his house at the time of the marshal's visit was a G. E. C. Refrigerator bought by him in 1955 of Bookers Stores Ltd., where he was then employed and that payments in respect of the purchase price were made by way of deduction from his salary over a period of two years. He produced in evidence a printed guarantee in respect of a G.E.C. refrigerator bearing a certain machine unit number. He also stated that this refrigerator is presently in his house and is valued at about \$300. He also claimed that he is the owner of the stove valued \$250 (other than the kerosene stove) and said that he had bought it from McTaggart, a former director of Bookers Stores Ltd. in early 1964 when McTaggart was leaving the Colony. No receipt was produced by the defendant in respect of this stove.

The defendant also claimed ownership of the furniture and other household effects in the house at the time of the marshal's visit but has produced no receipt in relation thereto. He also claimed that at the time of the marshal's visit he had approximately \$1,500 or \$1,600 in the house as well as jewellery to the value of approximately \$1,000. He admitted that the kerosene oil stove belongs to his wife. When cross-examined the defendant admitted that the jewellery belongs to his wife. He said he bought the car as well as the jewellery and made gifts of them to his wife. The defendant was closely cross-examined as to his financial position at the date of the marshal's visit and it is clear from the evidence that he was in sore financial straits at that date, being indebted not only to the plaintiffs on the judgment in this action but also to the New Building Society Ltd. on a mortgage. I have no hesita-

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in coming to the conclusion that the defendant's evidence relating to the presence of cash in his house on the date of the levy is false. I am also not satisfied that the defendant is the owner of the stove (other than the kerosene oil stove) or of the refrigerator which stood in the house on the day of the levy. I accept the evidence of the marshal that the defendant's wife claimed the refrigerator and was shown receipts which she claimed related to the refrigerator. According to the defendant he received one receipt when he had fully paid off for the refrigerator by way of deductions from his salary. It may be that the defendant did in 1955 purchase a refrigerator bearing the serial number shown in the printed guarantee and it may well be that that refrigerator was in the defendant's house at the time of the hearing of this summons, but the defendant's testimony does not lead me to believe that that refrigerator was there at the time of the marshal's visit.

The evidence of Van West, clerk to the plaintiffs' solicitors discloses what transpired between the defendant and plaintiffs' solicitors after the levy had been effected by the marshal on the defendant's immovable property.

Van West said that on Monday, 31st August, 1964, the defendant and his wife came to the offices of the plaintiffs' solicitors. The wife said that it had been arranged that she would take over the property from her husband and pay off his existing indebtedness both to the plaintiffs and to the New Building Society Ltd. Both husband and wife suggested that the advertisement of the levy be stayed on payment of an agreed sum. Van West communicated this offer to the plaintiffs' manager and an agreed sum of a little more than \$1,000 was to be paid in reduction of the judgment debt and balance to be paid at the rate of \$50 per month. It was agreed that the wife would make these payments to the plaintiffs' solicitors on behalf of her husband. She explained that her husband had lost his job at Bookers and was unemployed. As a result of this arrangement a down payment of \$1,000.25 was made on the 4th September, 1964, and the advertisement of the sale at execution was stayed. The first instalment of \$50 was to be paid at the end of September 1964. The sum of \$40 on account of this instalment was paid on the 3rd October, 1964. Later on the balance of this instalment and the two succeeding instalments were paid.

There was admitted in evidence by consent a letter dated 8th September, 1964, written by the plaintiffs' solicitors to the plaintiffs in which it is stated that a cheque in sum of \$958.50, being the sum of \$1,000.25 collected from Bhagmani Khan the wife of the defendant less deduction of execution expenses, was enclosed. It is further stated therein that Mrs. Khan had undertaken to pay the balance of her husband's indebtedness to the plaintiffs at the rate of \$50 per month commencing on the 30th September, 1964. In reply thereto, the plaintiffs on the 10th September, 1964, wrote their solicitors stating that

the outstanding balance of the account was \$1,089.63 on which interest was accruing at 9% with effect from the 15th June, 1964. The plaintiffs also stated their willingness to accept the undertaking of the defendant's wife to pay the balance of her husband's indebtedness at \$50 per month With effect from 30th September, 1964, and specifically stated that it must be understood that payments must be promptly made and if she defaults the plaintiffs would proceed with the execution of their judgment.

The instalments agreed upon under the arrangement with the defendant's wife fell into arrears and as a result the immovable property levied upon was advertised for sale on the 10th, 17th and 24th days of April, 1965. On the Saturday before the date fixed for the sale Van West spoke with the defendant who asked if it were possible to pay off the arrears under the arrangement and to have the sale withdrawn. Van West told the defendant he would discuss it with the plaintiffs' manager. This he did and on Monday when the defendant telephoned he told the defendant what were the amounts to clear the arrears and to pay expenses incurred. The defendant said he would bring the amount to the office of the plaintiffs' solicitors to have the sale withdrawn. In anticipation that this would be done a letter was prepared to be sent to the marshal to have the sale withdrawn. The money, however, never reached the office of the plaintiffs' solicitors.

The defendant Khan himself has stated in evidence that he had proposed to pay the sum of \$300 being arrears of instalments and execution expenses in order to have the sale withdrawn. He said that on the morning of the sale he gave instructions to his wife to send that sum to the office of the plaintiffs' solicitor. He then left Georgetown, crossing by the 9 a.m. ferry to Vreed-en-Hoop to do some accounting work for someone on the West Coast of Demerara. He said that in error the sum of \$300 was sent by his wife that day to the New Building Society Ltd. Mr. de Cambra, Secretary of the New Building Society Ltd., testified to the effect that the sum of \$240 was paid on the 27th April, 1965, to the New Building Society Ltd. on the defendant's behalf and a receipt issued. The money was, however, refunded to the defendant's wife at about 3 p.m. on that day (because the execution sale had taken place) and the receipt issued taken back. Mr. de Cambra said also that at that time the New Building Society Ltd. had threatened foreclosure proceedings against the defendant in relation to the mortgages which had been passed in 1956 and which almost from the inception had fallen into arrears. It will be observed that a lesser sum than that required by the plaintiffs for withdrawal of the sale had been sent by the defendant's wife to the New Building Society Ltd.

The defendant said that he was aware that the levy was bad on the very day he was informed by his wife that the levy had been made, but that he did not tell Van West that the levy was bad because Van West did not ask him anything in that regard. I find that the reason

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why the defendant did not tell Van West that he considered the levy to be bad was because he did not in fact believe it to be bad and well knew that there was in fact no movable property upon which the levy could be executed. Certain submissions have been raised by counsel for the defendant with a view to showing that the levy is in fact a nullity.

Rule 42 of Order 36 of the Rules of the Supreme Court, 1955 provides as follows —

"42. (1) A writ of execution by sale of property when issued shall be handed by the Registrar to the Marshal, who shall thereupon levy upon and take in execution as much of the movable property of the party condemned (hereinafter called the judgment debtor) to be pointed out by the party at whose instance the writ was issued (hereinafter called the judgment creditor) or his agent as will in the Marshal's opinion realise at execution sale proceeds sufficient to satisfy the judgment and costs, together with the expenses of the levy and sale, unless the judgment debtor shall point out and desire execution to be levied on any other movable property sufficient in the Marshal's opinion for the purpose aforesaid

(2) In the event of the movable property taken in execution being in the Marshal's opinion insufficient, then the Marshal shall, in virtue of the same writ, provided the same be effective, forthwith and without waiting for the sale of the movable property, levy on the immovable property if the judgment debtor to the extent in value Of such part of the judgment creditor's claim as will, in the Marshal's opinion, remain unsatisfied after the sale of the movable property levied upon."

Counsel for the defendant has submitted that there was a failure to comply with the provisions of that rule in that the marshal—

- (a) did not obey the instructions of the plaintiffs' agent to levy on the movables pointed out:
- (b) did not permit the judgment debtor the opportunity of pointing out his movable property and/or selecting what he would prefer to be levied on instead of what was pointed out by the agent.

In respect of his first submission counsel for the defendant contended that the marshal performs merely ministerial functions and has no judicial functions when executing a writ; that even in the face of documentary evidence he cannot purport to decide that property pointed out by or on behalf of the execution creditor does not in fact belong to the judgment debtor. The duties and liabilities of a marshal

in this regard are similar to those of a sheriff in England. At para. 29 at p. 21, in 16 HALSBURY'S LAWS OF ENGLAND, 3rd edition, are set out the duties and liabilities of a sheriff in executing writs of execution —

"The sheriff's duties under the writ are threefold:

(1) to the judgment creditor, to obey the writ and any lawful instructions that have been given him; (2) to the judgment debtor, not to do any act not authorised by the writ; and (3) to the Court, to make a return to the writ, if required to do so. As to his duty to the judgment creditor, he must carry out the execution as soon as the opportunity arises and must in the case of a writ of *feri facias* levy the whole debt if the goods are sufficient. He is bound to disregard a fraudulent or merely colourable transfer of property made to prevent execution, but is not bound to seize property already in *custodia legis*....."

In *Re Crook* (1894), 63 L.J.Q.B. 756, it was stated that as a rule a sheriff in executing a writ must have regard to the interests and instructions of the execution creditor as far as compatible with his duty. Where the evidence shows that the sheriff has made all necessary and proper enquiries he is protected against an action for trespass as well as for wrongful seizure where the premises entered or the goods seized do not belong to the execution debtor. *Salberg v. Morris* (1887) 4 T.L.R. 47. This connotes that if he has not made all necessary and proper enquiries he is not so protected. *Scarlett v. Hanson* (1883) 12 Q.B.D. 213, C.A., is authority for the statement that a sheriff is not bound to seize under a writ of *feri facias* goods in which the judgment debtor's interest is only an equitable one and can, on ascertaining this, withdraw and make a return of *nulla bona*. These authorities show that the sheriff is not a mere automaton. He can decline to carry out the instructions of the execution creditor if his inquiries lead him to the conclusion that it would not be compatible with his duty to do so. In any event the judgment creditor and not the judgment debtor may complain of prejudice to his rights.

The second submission is founded on the judgment of the Federal Supreme Court in *Singh v. McCloggan* (1961), 3 W.I.R. 166 where the Marshal proceeded to the judgment debtor's property and a little way from that property he told the judgment debtor that he was going to levy. He proceeded to make the levy. There was nothing to suggest that the Marshal took any steps to see that the judgment debtor pointed out any property. In that case it was observed by the Federal Supreme Court that neither the Marshal nor the judgment creditor gave any evidence to indicate that a proper search was made for movable property and in fact in that case the Marshal did not even enter the judgment debtor's house. Therein lies the vital distinction between that case and the instant case. Further, there was no return to the writ at all with regard to movable property. In the instant case the Marshal's return does state that he made a diligent search and could not find any movable property of the defendant on which to levy.

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Rule 42(1) of O. 36 of the Rules of the Supreme Court, 1955, does give a right to a judgment debtor to point out and desire execution to be levied on movable property sufficient in the marshal's opinion for the purpose of satisfying the judgment and costs and expenses of levy and sale other than movable property pointed out by the judgment creditor. Where the judgment debtor is absent, of course, he cannot point out other movable property and in such circumstances the marshal is obliged to make a proper search for movables. This Marshal de Abreu in the instant case did do and he gave evidence at the hearing in that regard. I do not consider the passage in the judgment of the Federal Supreme Court in *Singh v. McCloggan* (1961) 3 W.I.R. 166, at p. 167, letter C—

"There is nothing to suggest that he took any steps to see that the judgment debtor pointed out property. He was there, the marshal spoke to him, but he does not appear to have asked him to come along and point out property."

to mean that unless the marshal asks a judgment debtor to point out property the levy made is *ipso facto* bad. The next two sentences immediately following that passage —

"The marshal or the respondent has not given any evidence to indicate that a proper search was made for movables. The marshal did not even enter the appellant's house, and finally, there is no return to the writ on movables,"

must be read together with the earlier passage and when so read it appears that had the marshal asked the judgment debtor to point out movables and had the judgment debtor declined to do so, in the absence of evidence to the contrary it would have been presumed that there were no movables.

The requirement of the defendant's presence and for him to be asked to point out his movables is a condition precedent to the valid execution of the writ only if no enquiries are made to ascertain whether there are movables or if on enquiring it be ascertained that there are movables. Where after all reasonable enquiries it be ascertained that there are no movables owned by the defendant there is no requirement for his presence or for him even if present to be asked to point out anything.

It was contended that the provisions of rule 38 of Order 36 as to discovery in aid of execution should be invoked where a judgment debtor cannot or will not attend the execution of the writ of execution. That provision might well be utilised by a judgment creditor in such circumstances, but omission to do so does not affect a levy made where the marshal pursues all reasonable enquiries to ascertain if the judgment debtor has movables and ascertains from those enquiries that in fact he has no movables. Likewise if the judgment debtor be present

and falsely states that he does not have movables that cannot vitiate a levy on the immovable property of the judgment debtor. In the instant case the evidence discloses that not only did the marshal seek to afford the defendant an opportunity of being present at the execution of the writ of execution—he waited over an hour for the defendant to come but he also made all reasonable enquiries as to movables which might be in the ownership of the defendant. His enquiries did not disclose evidence of movables owned by the defendant and the evidence led at the hearing of this summons did not establish that there were in fact movables owned by the defendant. In fact the evidence points the other way.

One point should be dealt with even though not raised at the hearing for it affects the question of procedure by which challenge was made to the marshal's return. The return answered the command of the writ in such a manner as, if true, would afford an answer to any action founded upon it. It is not bad on the face of it so it does not appear that it may be set aside by summons. At para. 34 on pp. 24 and 25 of 16 HALSBURY'S LAWS OF ENGLAND, 3rd edition, it is stated that the return is *prima facie* evidence of the facts stated in it and its truth cannot be investigated upon affidavit, the only remedy being by action against the sheriff for a false return. See also footnote (t) on p. 25 where it is stated that a return has been said to be of such high regard that no averment can be permitted against it.

If I am wrong in holding that the provisions of rule 42 of O. 36 of the Rules of the Supreme Court, 1955 were not infringed in the instant case, the question arises whether the execution should be set aside. It would be an irregular execution (see paragraph 55 at page 38 of 16 HALSBURY'S LAWS OF ENGLAND. But it will not be set aside if the irregularity is waived by the judgment debtor (*Lewis v. Gompertz* (1837), Will, Woll. & Dav. 592; 21 Dig., 464 No. 447 (request for time) cited at footnote (b) on p. 38), unless bankruptcy on the part of the execution debtor intervenes. Further, an application to set aside must be made as early as possible, In the instant case the writ was executed on the 29th August, 1964, and application to have the levy set aside was not made until 8th May, 1965. The evidence discloses that the irregularity (if any) was waived by the judgment debtor by virtue of the arrangement the defendant and his wife entered into with the plaintiffs as a result of which the sale was stayed.

In the result the orders asked for in the defendant's summons cannot be granted. The plaintiffs and the added defendant Dr. Fung are entitled to their taxed costs, in the case of the plaintiffs fit for counsel.

Leave to appeal granted.

Application refused

Solicitors: *H.W. de Freitas* (for the plaintiffs), *O.M. Valz.*, (for defendant).

## R. v. DEOKINANAN

[Court of Appeal (Stoby, C., Luckhoo, J. A., Cummings, J. A. (Ag.)) September 22, 23, 26, December 20, 1966]

*Criminal Law—Evidence—Murder—Confession—Prisoner wished assistance of friend to find and dispose of material exhibits—Police aware of such wish—Friend collaborating with police—Police arranged for interview between prisoner and friend—Confession made to friend—Admissibility.*

*Criminal Law—Admiralty—Principles regulating jurisdiction—Launch owned by British subject—No evidence of registration—Whether a British ship.*

The prisoner was convicted of murdering M. S. while the two of them and two other men were out on a business expedition in the launch *Miss Carol* on the Corentyne River. The case for the prosecution was that the crime was committed for the purpose of robbing M. S. of a large sum of money, which the prisoner hid away on Powis Island in the river. The two other men were killed at the same time. While in custody at New Amsterdam Prison the prisoner sent a message asking his friend B to visit him at the prison. B, who had been assisting the police with their investigations, reported the prisoner's request to the police and with their knowledge saw the prisoner at the prison. There the prisoner told him that as he, B, had a boat with an outboard engine he could go to the island where the money was. B reported this conversation to the police who arranged for B to be placed in the same cell as the prisoner on a subsequent occasion at Whim Magistrate's Court. There the prisoner asked B whether he had found the money. B answered that the directions previously given to him by the prisoner were not enough. The prisoner then gave B fuller directions for finding the money and for its use, including the suborning of two potential witnesses. B then asked him, "How the money got missing?" and "How the bodies got chopped?" The prisoner then confessed that he had killed M. S. In accordance with the prisoner's instructions the money was duly found. Overruling an objection, the trial judge admitted the confession in evidence.

The incident occurred in the Corentyne River at a point where the river was still tidal. Evidence was given that the launch was owned by a British subject resident in British Guiana, but there was no evidence of its registra-

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tion. The indictment alleged that the crime had been committed on the high seas within the jurisdiction of the admiralty of England. On appeal,

**Held:** *Per* Stoby, C, and Liuckhoo, J. A.: (i) B was not a person in authority because—

(a) *per* Stoby, C: in the prisoner's mind B was a friend who could carry out his instructions, not someone who would influence the course of the prosecution, but someone who would help illegally to destroy the evidence;

(b) *per* Luckhoo, J. A.: nothing in the second conversation could be interpreted as signifying to the prisoner that he would derive some advantage in relation to the charge against him if he answered the two questions asked, or said anything;

(ii) the evidence of the confession was accordingly admissible;

(iii) *per* Stoby, C: there was no necessity to aver that the crime was committed in foreign territorial waters. It was enough to say that it was committed "on the high seas within the jurisdiction of the Admiralty";

(iv) *per* Stoby, C: the point on the Corentyne River where the offence took place was geographically within the jurisdiction of the admiralty;

(v) (Cummings, J. A.: concurring): the evidence that the launch was owned by a British subject was enough to prove that the launch was a British ship for the purpose of Admiralty jurisdiction;

*Per* Cummings, J. A. (dissenting): (i) prior to visiting the prisoner in the prison, B had in effect become a sort of private detective being used by the police and might have been regarded by the prisoner as a friend who was in the strategic position of an *ad hoc* policeman. B was consequently a person in authority;

(ii) the confession was made by the prisoner to B pursuant to an inducement to help which was held out by B. Such inducement was at least in part in relation to an advantage to be gained by the prisoner with respect to the charge;

(iii) the confession was consequently inadmissible.

*Appeal dismissed.*

**[Editorial Note:** A further appeal by the prisoner to the Judicial Committee of the Privy Council was dismissed in 1968. See [1969] 1 A.C. 20].

*F. R. Wills* for the appellant.

*E. A. Romao*, Ag. Director of Public Prosecutions, for the Crown.

STOBY, C: On the 15th October, 1963, the prisoner and three men left their respective homes at Crabwood Creek on a business expedition on the Corentyne River. On the 24th October, 1963, the prisoner and a man named Raghubar entered the police station at Spring-lands, a village on the bank of the Corentyne river. Raghubar in the presence of the prisoner reported to the N.C.O. in charge that the accused and three other men, Motie Singh known as Baboon and Heera and

Dindial were in his launch *Miss Carol* in the Corentyne River during the night of the 23rd and early morning of the 24th October, 1963, and the accused had told him that they had met in a collision with another launch, and that the *Miss Carol* had sunk, and the accused had said that he did not see the other three men. The N.C.O. questioned the prisoner as to how the incident had occurred and was told that he had been sleeping in the launch when he heard a crash, and he found himself in the water; that he swam to the shore, and he did not see the other men.

The prisoner made a full statement to the corporal of police.

On that same day a search party went up the river but no bodies were found; another search the next day proved fruitless. On the 26th October, the bodies of Motie Singh, Heera and Dindial were found floating at different points in the Corentyne River. Each body was mutilated. Motie Singh's injuries were found to be an incised wound two feet long along the centre of the abdomen from a point opposite the third rib down to the pubis. The abdominal wall was cut through and its contents were protruding. The doctor also found an incised wound eight inches long on the left side of the neck cutting through all the structures of the neck including the trachea and the sixth cervical vertebrae, and he gave as his opinion that the cause of death was haemorrhage and shock due to those injuries. He said either of these two injuries could have caused instant death.

When one of the bodies was found on the 26th October, the prisoner who was present held Detective Constable Ramjattan around his neck and whispered to him. The constable thereupon cautioned the prisoner and arrested him. What the prisoner said to the constable was not given in evidence and to speculate about the nature of the conversation would be unprofitable. It is enough to stress that the prisoner was cautioned and was arrested and therefore, must have been aware that he was at the very least under grave suspicion. He was subsequently charged with the murder of Motie Singh. His first trial was abortive; he was convicted but on appeal it was held that the court had no jurisdiction to try the accused as the Corentyne River was foreign territory.

He was arraigned a second time on an indictment charging him with murder the particulars of which were that—

"Deokinanan, between the twenty-third and twenty-fourth days of October, in the year of Our Lord one thousand nine hundred and sixty-three, on the high seas within the jurisdiction of the Admiralty of England, murdered Motie Singh".

He was convicted and sentenced to death.

The following eight grounds of appeal were lodged:

"1. The learned trial judge was erroneous in point of law when he ruled that the Supreme Court of British Guiana had jurisdiction to try the appellants on the indictment as laid before the court.

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2. The evidence disclosed no or insufficient facts upon which the court could find jurisdiction to try the appellant.
3. Inadmissible evidence in the form of an oral confession was wrongly admitted by the trial judge without which the defendant could not be convicted.
4. Inadmissible evidence relating to the death of two other persons was wrongly admitted by the learned trial judge and the effect of this was highly prejudicial to the accused.
5. The learned trial judge misdirected the jury in respect of their functions in dealing with alleged admissions by accused.
6. The learned trial judge misdirected the jury in relation to what constituted the offence of murder.
7. The learned trial judge failed to put the defence of the accused adequately to the jury.
8. The learned trial judge failed to direct the jury in respect of the probative value of statements made in the presence of accused persons."

Grounds 5 to 8 were abandoned. After some argument ground I was abandoned. In the main the appeal centered around ground 3 which relates to a confession.

At his trial the evidence adduced by the Crown fell into two compartments—(a) circumstantial and (b) a confession.

The circumstantial evidence was very clearly and thoroughly explained to the jury by the trial judge. The Crown proved opportunity, motive and circumstances from which inferences of guilt could be drawn.

Sookhia, the wife of Motie Singh, packed his clothing and other personal belongings in a canister on the 15th October and saw him to the stelling prior to his departure. On the 6th November she identified at Springlands some of the articles she had packed.

Another witness Raghubar established that he employed Motie Singh to purchase lumber on his behalf. The system adopted was for Raghubar to supply Motie Singh with a launch—in this case the *Miss Carol*—and money. Motie Singh was given \$2,000 and employed the prisoner and two others to accompany him. The Crown proved that the four men were still in company with each other on the 16th October and traced their movements up to the 21st October when Raghubar, the employer of Motie Singh, arrived and handed over \$10,000 and 1500 guilders to Motie Singh. This was known to the prisoner. After delivering the money Raghubar departed leaving the prisoner, Motie Singh and the two others in the *Miss Carol*. Evidence was given of the purchase of logs on the 22nd in order to show that up to then the *Miss Carol* was afloat and the four men all alive. Next there was proof of the occupants of the launch being alive up to 8 p.m. on the 23rd Oc-

tober. On the 24th October at about 6.30 a.m. the prisoner reported to a man named Chung that Raghubar's launch had been in a collision with another boat on the river between Powis Island and the Dutch shore. The prisoner gave Chung details of how the accident occurred. Later that same morning the prisoner, having obtained transportation to return to Crabwood Creek, gave one of the occupants of the launch precise details of how the accident occurred which resulted in the loss of Motie Singh and two others. There was some evidence by two Amerindians that on the 24th October in the early hours of the morning a noise was heard coming from Powis Island as if someone was running in the bush.

After the report to the police at Crabwood Creek, the finding of the bodies and the arrest of the prisoner, as earlier described, there were clearly circumstances and inferences from which a jury properly directed could have convicted the prisoner. Be that as it may, it is the events which took place after the prisoner's arrest and charge which form the main ground of appeal. These events in chronological order are as follows: On the 3rd November a man named Balchand was at Crabwood Creek when the prisoner's brother spoke to him. As a result of the conversation Balchand went to the New Amsterdam prison about 2 p.m. Balchand and the prisoner met in the waiting room. The prisoner said "Bal man, ah glad you come, I want to see you very important". Balchand asked "what was it all about, so important". The prisoner replied that as Balchand had a boat with an outboard motor he could go to Powis Island where the money was. At that stage the prison officer announced that time was up and Balchand left.

The next day a police constable saw Balchand and gave him certain instructions.

On the 12th November by arrangement with the police Balchand went to the police station at Whim. (Between New Amsterdam and Springlands there are police stations with a court attached to each. A preliminary investigation with regard to an indictable offence can be heard at any one of these courts. There was nothing significant in the choice of Whim as the place where Balchand and the prisoner would meet). The prisoner was placed in the cell with Balchand. On seeing Balchand the prisoner said, "Man Bal, what you do here, you got the money". Balchand replied that he had not been given proper directions. The prisoner then gave detailed instructions as to where the money could be found. Subsequently the money was found in accordance with the directions. The prisoner told Balchand to keep \$1,000 for himself and to give his father-in-law the balance and to tell his father-in-law not to forget the buck (Amerindian) men who had seen him running on the island. Balchand promised to do so and then asked how the money "got missing". The prisoner replied that whilst they were coming on the river, "We slipped out the money and hide it in the launch." Balchand asked him how the bodies got chopped and he told him that Dindial caused the whole trouble. He said that while they were coming Motie Singh and Heera wanted to go to the Dutch police station to report the loss of the money; that Heera and Dindial had an argument,

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and Dindial told Heera to stop the launch; that Heera said "no man, a wee a go report the matter at the Dutch police station." That while arguing, Dindial picked up a cutlass, gave Heera several chops. He said that "Motie Singh went to assist Heera, and he (the accused) picked up his cutlass, and chopped Motie Singh on his neck (this was one of the injuries which the doctor said would cause instant death), and the two of them decide to burst the belly of the men, to tie them and sink them with the boat anchor."

The submission of counsel for the appellant is that the confession was inadmissible as it was not voluntary and was obtained by hope of advantage held out by a person in authority.

Certain legal principles with regard to confessions are well settled. To be admissible, the burden is on the Crown to prove that the confession is voluntary. The reason for this rule was explained by Pollock C. B. in *R. v. Baldry* (1852), 2 Dem. C. C. 430, and in *Ibrahim v. R.*, [1914] A. C. 599, where Lord Sumner said at P. 609:

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

Whether a confession is admissible or inadmissible is a question for the trial judge alone. If he rejects the confession, that is an end of the matter; if he admits it he must still explain to the jury that what weight, if any, is to be attached to the confession is for them and he must also explain the principles on which confessions are admissible and leave it to the jury to decide whether any inducement was made.

Two comparatively recent cases have put the law in its correct perspective. In *R. v. deary* (1964), 48 Cr. App. Rep. 116:

"The prisoner, who was suspected of complicity in a capital murder, was interviewed by police officers at a police station. During the interview the prisoner's father arrived and spoke to the prisoner in the presence, but not in the hearing, of the police officer. At the end of this conversation the prisoner's father said to the prisoner in the hearing of the police officers: 'Put your cards on the table. Tell them the lot. If you did not hit him, they cannot hang you.' The prisoner subsequently made a statement to the police. The judge ruled that, as a matter of law, the father's words to the prisoner could not amount to an inducement held out to him in the presence of a person in authority and that the statement was, accordingly, admissible.

*Held*, that the father's words were capable of amounting to an inducement, and that the judge should have left it to the jury to decide whether they did in fact amount to an inducement, and should have directed the jury that, if they so regarded them, the

subsequent statement of the prisoner to the police was voluntary and admissible only if the jury took the view that the prisoner was not affected by the inducement. As the question of the words amounting to an inducement had wrongly been treated by the judge as a question of law, the conviction must be quashed."

*R. v. Priestley*, April 5, 1966, unreported, stresses a point often overlooked; in this case it was said by the C. C. A. that "a concept of inducement based on the construction of precise words derived from a series of authorities decided before the Criminal Evidence Act, 1898, has today no reality in practice because it is essential in every case to look at the particular facts which are relied on as an objection to the admissibility of a statement on the ground of inducement, remembering that the burden never shifts from the Crown to satisfy the court that the alleged confession is in truth a voluntary statement".

The danger of selecting passages from the judgments of previous cases and treating those judgments as deciding questions of law without relating the principle expounded to the facts of a particular case is a danger which must always be guarded against. As pointed out in *Priestley*, the period in which the decisions were given is of the utmost importance, for as *Wigmore* has said, the state of the law prior to the Trials for Felony Act, 1836, the Indictable Offences Act, 1848, and the Criminal Evidence Act, 1898, exercised considerable influence on the mind of the judge giving the decision. What, however, is now indisputable is that not only is the burden of the Crown to prove a confession voluntary, but it is the judge's duty and his alone, to arrive at a decision in accordance with recognised principles. A judge in his discretion can, if he thinks it necessary for the protection of an accused person, reject a confession although there has been compliance with the Judges' Rules; not an arbitrary rejection but a decision made because of some impropriety on the part of the prosecution; a trick practised on an accused, and so on. Conversely, where there has been a breach of the Judges' Rules, a judge, if satisfied that a confession is voluntary, may still admit it. When one looks at the summing up and the direction given by the judge after he had admitted the confession it is obvious this experienced judge exercised his discretion judicially.

We were urged to say that the confession was not voluntary because Balchand was a person in authority and he induced the prisoner to confess by reason of a promise.

Again there is no lack of authority for the proposition that a confession induced by a person in authority is inadmissible. What must be decided then is whether Balchand was a person in authority. In *R. v. Simpson* (1834), 1 Mood. C.C. 410, and *R. v. Boughton* (1910), 6 Cr. App. Rep. 8, it was held that someone engaged in the arrest, detention, examination or prosecution of the accused is a person in authority, but this is not a comprehensive list of persons in authority, and on the other hand a person detaining an accused is not necessarily a person in authority. In England as far as I have been able to ascertain no attempt has ever been made to

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formulate a rigid rule as to how it can be determined whether a person is or is not in authority. The decided cases give considerable assistance in showing how various judges approached the matter.

In *R. v. Jenkins* (1822), Russ. & Ry. 492, a private prosecutor was held to be a person in authority; in *R. v. Enoch* (1833), 5 C. & P. 539, Park and Taunton, JJ., rejected a confession when the prisoner was left in charge of a woman to whom she confessed; and in *R. v. Windsor* (1864) 4 F. & F. 360, Charwell, B., and Crompton, J., also held a confession under such circumstances inadmissible. It was held in *R. v. Frewin* (1885), 6 Cox C.C. 530, that where a promise is made by a person who does not in fact have authority, such confession is admissible although the prisoner having regard to his knowledge, may reasonably suppose the promisor to be a person in authority. Since the confession although held to be admissible was not received in evidence *Frewin's* case may be regarded as inconsistent with the trend of the authorities. Although no unerring guide can be laid down, what emerges is that if an accused genuinely believes the person to whom the confession is made possesses some degree of authority, then such person is a person in authority. That is to say, the test is subjective.

What then is the evidence? On the 2nd November, the visit to the prison by Balchand was made at the prisoner's request. Previous to this visit the police had refused to allow the prisoner to speak to Balchand. Before Balchand visited the prison he had been to the police station and made a statement. It is obvious he must have told the police of his proposed visit, and equally obvious that the prisoner did not know what Balchand had done. The prisoner's request to Balchand to obtain the money, undoubtedly money taken from Motie Singh, was admissible evidence. No question of a promise arose. This was a bold attempt by the prisoner to requisition Balchand's help in defeating the course of justice. In the prisoner's mind Balchand was a friend who could carry out his instructions, not someone who would influence the course of the prosecution, but someone who would help illegally to destroy the evidence.

After the visit on the 2nd November, Balchand very properly reported again to the police who, without the knowledge of the prisoner, arranged for them to meet in a cell on the 13th November. It is this second meeting which counsel said converted Balchand into a person of authority.

I have already recorded what took place in the cell. Let me stress the sequence of events. The request made by the prisoner to search for the money and, if found, how it was to be disposed of; then the promise to carry out the instructions followed by a promise to the prisoner; and lastly the confession.

Counsel contends that the admission made by Constable Barker at the *voir dire*, that he expected Balchand to report what the prisoner said and Balchand's admissions under cross-examination that he believed the prisoner would say where the money was if he promised

to help him, were sufficient to make Balchand a person in authority. My own interpretation of this cross-examination is that when Balchand said he believed the prisoner would say where the money was if he promised to help him, he meant help him find the money. At the point of time to which Balchand was referring he did not know that the prisoner would say how the money was obtained. The whole tenor of Balchand's admission shows he was referring to the finding of the money.

I have already indicated that the test to be applied in determining when a person is in authority is a subjective test. Despite this fact in each case, a judge has to make up his mind on two things:

- (a) Did the prisoner know that the person to whom he made the confession was a person in authority? or
- (b) Is it reasonable to say that he believed the person to be a person in authority?

In answering these questions an important factor must be the nature of the promise made and how the promise came to be made. When one speaks of a promise made by a person in authority the clear implication is that someone has approached the prisoner, made a threat or promise as a result of which a confession is extracted.

Public policy frowns on such an action; but where a prisoner seeks out a friend or where friend encounters friend and the friend charged, in his distress solicits help from his friend—albeit a treacherous one—on what legal ground can a conversation between betrayer and betrayed be deemed inadmissible? The informer and the spy are always regarded with suspicion and disfavour. Subterfuge under any name or whatever the cause is abhorrent. Neither the conduct of the police nor Balchand's excites approval, but the true test of admissibility is not whether the conduct of the police is reprehensible but whether the confession is free and voluntary. In the past, judges have exercised their discretion and rejected confessions obtained by the exercise of a trick. In *Histed* (1898), 19 Cox C.C., 16, at p. 17, Hawkins, J., said:

"No one, either policeman or anyone else, has a right to put questions to a prisoner for the purpose of entrapping him into making admissions. A prisoner must be fairly dealt with."

But in *R. v. Derrington* (1826), 172 E.R. 189, it was held that—

"If a prisoner in gaol on a charge of felony, ask the turnkey of the gaol to put a letter in the post for him, and after his promising to do so, the prisoner give him a letter addressed to his father, and the turnkey, instead of putting it into the post, transmit it to the prosecutor;—this letter is admissible in evidence against the prisoner, notwithstanding the manner in which it was obtained."

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See also the Canadian case of *R. v. Todd* (1901) 13 Man. L.R. 364, where a man named Todd was tried for murder:

"Suspicion had immediately pointed to Todd, but there was insufficient proof even to detain him. Two individuals were therefore engaged by the Winnipeg police to associate with Todd in an effort to obtain further information. The two—neither of whom was a member of the police force—managed to gain Todd's confidence by telling him that they were members of an organized gang. Todd appeared interested and asked to be admitted into this select group. Told that membership was limited to persons who had committed serious crime, he promptly confessed the crime under investigation.

DUDUC, J., in considering the statement's admissibility, was forced to come to the same conclusion as so many judges had before him. 'The means employed in this case,' he said '.....were contemptible; but it does not seem to be a sufficient ground for excluding the evidence'."

I hold that there is no ground for concluding that Balchand was a person in authority; no ground for substituting the discretion of an appellate court for the discretion of the trial judge, and no ground for holding that the confession was not free and voluntary.

In coming to these conclusions I have purposely refrained from taking into consideration the fact that at the *voir dire* the accused did not give evidence. Counsel told us that in view of *R. v. Hammond* (1941), 28 Cr. App. Rep. 84, C.C.A., he did not think it advisable to do so. Whether *Hammond* was correctly decided is not an issue in this court, but since the crux of the matter at the *voir dire* was the prisoner's state of mind when he was alleged to have confessed, his failure to give his version of what took place deprived the trial judge of hearing available evidence.

The other point in this appeal which counsel for the appellant at first advanced for argument but later did not proceed with was whether the High Court of the Supreme Court of Judicature had jurisdiction to try the accused on the indictment. Nevertheless I consider it essential to embody in my judgment the legal position in this territory with respect to the exercise of criminal jurisdiction of the Admiralty by our courts. This will serve to save further research in the matter.

The authority for the exercise of the courts of Guyana of the criminal jurisdiction of the Admiralty is provided for by the Admiralty Offences (Colonial) Act 1849. (See *Halsbury's Statutes*, 2nd edition, vol. 6, p. 519).

Prior to 1536 felonies committed on the high seas could not be tried by a jury, but were triable by the court of Admiralty in accordance with the civil law. As a result the Offences at Sea Act, 1536, was passed giving jurisdiction in certain offences committed at sea to the Admirals, but with provision for trial by the common law. Then in 1799 the Offences at Sea Act (see *Halsbury's Statutes*, vol. 4) specified that all offences on the high seas should be tried in the same manner as offences on land, thereby extending the jurisdiction exercised under the 1536 Act to all offences.

Thereafter the Offences at Sea Act, 1806, provided for a more speedy trial of offences committed in distant parts of the sea or in any haven, river, creek or place where the Admirals have power, authority or jurisdiction, and that instead of carrying offenders to England for trial they could be tried under the King's commissions. In 1826 the Admiralty Offences Act, which named certain commissioners for oyer and terminer to try offences committed within the admiralty jurisdiction, ended the necessity of sending out special *ad hoc* commissions. Then in 1844 the Admiralty Offences Act conferred the entire jurisdiction to the Assize Court. Finally, in 1849 this jurisdiction was given to the courts in the colonies and the provisions of this Act are in substance repeated in s. 5 (1) of Chapter 10 of the *Laws of Guyana*, while sub-s. (2) thereof deals with the procedure to be adopted in the framing of the indictment. These sub-sections are as follows: —

"5. (1) All indictable offences mentioned in this Ordinance which are committed within the jurisdiction of the Admiralty of England and are cognizable 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."

Thus it will be seen from sub-s. (2) that there is no necessity to aver that a crime was committed in foreign territorial waters, but enough to say the crime was committed "on the high seas within the jurisdiction of the Admiralty".

In *R. v. Bruce*, 168 E. R. 782, it was argued that the Offences at Sea Act, 1536, did not extend the jurisdiction of the Admiralty because the Statute of Richard II (15 Richard II, Cap. 3) passed in 1391 owing to the increasing usurpation of jurisdiction of the Admiral's Court, limited the jurisdiction of that court to the high seas and the great rivers "be-

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low bridges". This argument prevailed and since then Admiralty jurisdiction is confined to the high seas and the great rivers below bridges. This case and *R. v. Mannion* (1846), 2 Cox L.L. 158, show the geographical extent of the jurisdiction of the Admiralty and what is meant by river, haven, creek, etc. The *Tolten*, [1946] 2 All E. R. 372, is a civil case which dealt extensively with the geographical extent of the criminal jurisdiction of the Admiralty and puts it beyond doubt that "high seas" is a term of art, meaning as far as the tide ebbs and flows or where great ships could go and limited to below bridges.

There is abundant evidence in this case that the tide ebbed and flowed as far as 210 miles up the Corentyne River and likewise there is abundant evidence to show that the place where it is reasonable to suppose the offence took place was geographically within the jurisdiction of the Admiralty.

Counsel for the appellant, while conceding that the court had jurisdiction, submitted the *Miss Carol* was not proved to be a British ship for the purpose of Admiralty jurisdiction.

While there was no evidence that the *Miss Carol* was flying a British flag or indeed any flag at all, there was evidence that the owner was a British subject. In *Chartered Mercantile Bank of India, London and China v. Netherlands, India Steam Navigation Co.*, (1883), 10 Q.B.D. 521, it was held that if a ship belongs absolutely and entirely to English owners, she is an English ship before she is registered and whether she is registered or not, and that her nationality depends solely upon her ownership. I therefore, hold that on the evidence the *Miss Carol* was a British ship for the purpose of Admiralty jurisdiction.

As there were no other arguable grounds of appeal, and as I have held the confession admissible, the appeal is dismissed and the conviction and sentence affirmed.

LUCKHOO, J.A.: The appellant was on November 23, 1965, convicted on an indictment charging him with the murder of Motie Singh between October 23 and 24, 1963, on the high seas within the jurisdiction of the Admiralty of England, and was sentenced to death. He now appeals. On this appeal some attempt was made to argue that the Supreme Court had no jurisdiction to try the appellant, despite the averment in the indictment and the evidence pertaining thereto. This was, however, not pursued.

[After referring to s. 5 (1) and (2) of the Criminal Law (Offences) Ordinance, Cap. 10, His Lordship continued as follows].

On the evidence the jurisdiction of the Admiralty of England was legally established and by virtue of the above provisions it was within the competence of the Supreme Court to try the indictment as laid which fell within and complied with those provisions.

The *Miss Carol* was a British ship because the evidence disclosed that the owner, at the material time, was a British subject, resident in this country. It was built, fitted, and insured in this country, and was used in connection with the business and occupation of its owner; nothing was really offered in contradiction. In law, this is enough (see *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, (1883), 10 Q.B.D. 521).

[His Lordship reviewed the evidence and continued].

On the above evidence the jury was entitled to consider that only four persons were on a launch; that launch was found at the bottom of the river intact; the cork of the launch was unscrewed to let water in; the compressor lever was at zero to stop the engine; the gear lever was in a neutral position so that the propellor could not revolve; the lights which were working were turned off; three of the four persons were later found dead; they all had died from shock and haemorrhage due to severe injuries from a sharp cutting instrument; an attempt was made to disembowel all of them; the only survivor was unhurt; a large sum of money in the possession of one of the dead men was missing; the survivor's account that an accident had occurred was not borne out by the condition of the launch; his story differed in material aspects as told to different persons; the launch must have been sunk by human agency; the three persons must have been killed by human agency; the motive for the killing of the deceased could be traceable to the unlawful taking of his money, amounting to 1,000 guilders and \$4,800 B.W.I. currency, all but \$100 of which was recovered from its hiding place on Powis Island; the appellant on his own admission was on that island on the fateful night.

This circumstantial evidence of undoubted cogency was reinforced by certain oral statements made by the appellant to one Balchand, a witness for the prosecution, on November 6, 1963, at the New Amsterdam Prison after he was charged and when he was in custody. (This will be referred to as "the prison conversation".) No objection was taken to the admissibility of this conversation; nor was it suggested that anything else was said other than what was deposed to; its admissibility then was conceded, and its veracity not questioned.

At this conversation the appellant revealed that he had "the money" on Powis Island. How it was brought about, and what was said, will be of much importance in considering the admissibility of a similar but more extended conversation between the two of them on November 12 (six days afterwards) at a cell at Whim Police Station, the admissibility of which was questioned, and now constitutes the main ground of appeal. This conversation will be referred to as "the Whim conversation".

At the trial it was objected that what the appellant said to Balchand at this conversation was not voluntary but was induced by a promise or promises made by Balchand to him with the knowledge and consent of a person in authority, that is to say, Sergeant Barker,

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and that the circumstances were such that the police created in the mind of the accused that he was free to speak his mind to a man whom they knew had promised to assist the accused, but who in reality had no intention of so doing and so procured information from the accused which ought to be rejected.

Before this court it was argued that: the accused told Balchand about how Motie Singh came to his death because Balchand had promised to go to Powis Island, get the money which was the motive for the alleged crime and use it in trying to suborn witnesses—all matters which at the time were relevant to the charge and the death of Motie Singh. It was after those promises had been made and the appellant believed that Balchand would have helped him that Balchand then asked him questions about how the man died, and the accused told more than he would otherwise have done; that Balchand was used as an agent of the police to extract a confession from the accused, and that his presence in the cell at Whim was for the purpose of trapping the accused, who was there in custody and already charged with the offence; and that this constituted a grave malfeasance against the spirit of English jurisprudence. This court was asked to find: that the trial judge had no alternative on the evidence, but to find that the confession was made in consequence of inducements of a temporal character, relating to the charge before the court held out at the instance of a person who had some authority over the accusation and should never have been admitted.

The question now is, whether on the evidence before the trial judge, in the absence of the jury, it was within his province, after the application of legal principles to admit this conversation.

The principles of law to be applied are well settled, and were fully appreciated by the trial judge.

It was incumbent on the prosecution to prove affirmatively that the conversation (which was tantamount to a confession in law) was made voluntarily. It would not be deemed to be voluntary, if it was caused by any inducement or promise, proceeding from a person in authority, and having reference to the charge against the appellant, whether addressed to him directly or brought to his knowledge indirectly, or if such inducement or promise gave the accused person reasonable grounds for supposing that by making a confession he would gain some advantage or avoid some evil in reference to the proceedings against him; if, however, there was an inducement or promise held out by a person in authority which was collateral to the proceedings, or was held out by a person not in authority, it would not be involuntary. [See STEPHEN'S DIGEST OF THE LAW OF EVIDENCE, 5th Edn., Art. 22.]

It will then be excluded if made in consequence of any inducement of a temporal character connected with the accusation or relating to the charge held out to the accused by a person having some authority over the subject matter of the charge or accusation (see *R. v. Joyce* [1957] 3 All E.R. 623).

The law was placed on its present basis since the middle of the nineteenth century after varying and fluctuating judicial approaches.

The facts must now be examined to determine whether there was any legal impropriety which caused that self-incriminating evidence to come to light and if so whether the appellant would be entitled to demand as of right its rejection.

"The Whim conversation" cannot be considered in isolation from "the prison conversation" which provides the background to and explains its origin. The one continues from, and is an extension of, the other. Therefore, it will become necessary to examine the first to be able to understand and appreciate its effect on the second, and with what result.

Balchand was no stranger to the appellant. He was a friend of long standing. He had taken the appellant home in his boat on October 25, when a police search was being made for the missing launch and men. He was present with the appellant when the dead bodies were found floating in the river on October 26, and the appellant was taken in police custody. The appellant had tried to speak to him that very day, but was prevented from so doing by the police.

After that he had received a message from the appellant's brother-in-law, one "Preacher" in consequence of which he went to the New Amsterdam prison on November 6, where the appellant was in custody. At the prison he was allowed to have an interview with the appellant.

There could be little doubt as to what "Preacher" had told Balchand which caused him to go to the prison, because as soon as the appellant saw him in the waiting room he said, "Bal man, ah glad you come, I want to see you, very important." The fact of this interview was proved by independent evidence. A police officer patrolled nearby, though not within hearing distance.

Balchand asked the appellant, "What was it all about, so important?"

The appellant then told him that he wanted his help as he (Balchand) had an engine and a boat.

Balchand then asked him what he could do to help him.

The appellant then said that he got "the money" on Powis Island, and he wanted him to go to the island. It, however, became necessary to change the conversation when the prison warden patrolled behind the appellant. Before leaving the prison that day Balchand had promised the appellant to go for "the money" 25 rods in Powis Island as he had requested.

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Here then was a voluntary admission made by the appellant to Balchand that he, the appellant, had "the money" on Powis Island. There could be little doubt that he was referring to "the money" which was missing from Motie Singh's possession. He must have had the recent possession of that money the very night the launch went down (and when Motie Singh died); he must have hidden it on that island that very night; as there is no evidence that he went on that island at any time other than that night. Therefore, a not unreasonable inference is that he was in some way involved in the killing of Motie Singh, who like the other two occupants of the launch did not die by accident.

A person like the appellant held in custody was powerless to act on his own. He must seek the aid of, and act, through another whom he believed to be trustworthy. The appellant turned to his good friend who had an engine and boat. Obviously, he hardly wished to see his ill-gotten gains disappear from his grasp, or go to waste on a desolate island. Balchand could help him solve his problem; that was why he sent for Balchand, and was glad to see him at the prison.

It was not argued, nor could it be, that what the accused told Balchand at the prison was due to or in consequence of any inducement or promise; that when Balchand agreed there to try his best to assist the accused to go for the money, that he, Balchand, was a person in authority or that his promise related to the charge against him. Nothing had there transpired to remotely suggest that the accused was influenced by anyone to tell of "the money" or where it was. He did so freely and of his own volition to fulfil a predominant urge to achieve a certain end.

He was prepared to show his hands and commit his confidence to someone whom he trusted in this gamble to retrieve his hidden loot.

It then became Balchand's duty to report to the police what he had been told at the prison, and he did so.

It must have been apparent to the police that "the prison conversation" was prematurely terminated because the time for the interview had come to an end and the presence of the prison officer was an impediment in the way of the appellant's freedom of communication.

A meeting between the appellant and Balchand was facilitated on November 12, by placing Balchand in the same cell which the appellant would occupy when he was taken to the police station at Whim that day for remand.

Normally, the police are not expected, and ought not, to originate situations under which a prisoner awaiting trial is unsuspectingly brought into proximity with another whom he has no desire to meet for the sole purpose of securing information, which would not otherwise have been divulged. Criticism of such conduct would be justi-

fied, and may well adversely affect the reception of evidence derived in this manner.

Different considerations, however, apply in the instant case.

The police had not created the situation of the meeting of the prisoner and Balchand on November 6. They later became aware of it and acted in a certain way. In pursuance of their duties it would be necessary to seek to foil legitimately any attempt to remove "the money" from where it was hidden, so as to be able to secure it for its evidential value in the interests of justice, and to be made available afterwards for the use of its true owner.

In arranging for Balchand to meet the prisoner alone in a cell at Whim, they were in effect providing the opportunity for the prisoner to continue further with his unfinished conversation. They anticipated this would be done; *but if the evidence is to be received, Balchand must say or do nothing which would render it involuntary in a legal sense.* He must not pose as a person in authority, and under this guise induce by a promise (having a bearing on the charge) the making of any confession; he may use the situation but must not abuse it by violating recognised judicial precepts. After all, there was nothing to prevent the prisoner from seeking the help of another, if he were to lose faith in Balchand, in which case "the money" may have been lost to its true owner and its evidential value to the administration of justice.

The crucial question then would be, whether anything had transpired during "the Whim conversation" to render the same inadmissible.

Had the image of Balchand in the eyes of the appellant changed at any time since "the prison conversation"? Had any event occurred, or was any pretence made, to clothe him with the mantle of "a person in authority" (as is known to the law) or to suggest that he had assumed that role? Did the appellant ever consider or believe him to be such a person?

The very first words spoken by the appellant, who was the first to speak, would indicate that the same atmosphere and relationship which obtained at "the prison conversation" prevailed. His words were, "What you doing here Bal, you got the money?"

Bal. was still his trusted friend; the recovery of "the money" was still his earnest desire.

Balchand reported that he could not get "the money" because he did not have proper instructions. The appellant immediately proceeded to give full detailed directions to enable him to know precisely where "the money" could be found, which was clearly based on facts, as "the money" was so recovered. Then followed directions as to how "the money" was to be utilised (\$1,000 for Balchand, the balance for the father-in-law of the accused) and instructions not to "forget"

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the buckmen who had seen "him" (the appellant) running on the island. All of this was obviously quite spontaneous and perfectly voluntary, although very self-incriminating. Not a word came from any inducement. It would be convenient to regard this much as the first part of "the Whim conversation". Balchand then promised to carry out these instructions just as he had promised at the prison to assist in getting "the money". They were all promises to comply with requests emanating from the appellant, and were not in any way directly or indirectly referable to the charge. Whilst the first part of "the Whim conversation" concerned a detailed description of how to reach "the money" buried under a tree, and how to distribute that money, the second part, which followed after Balchand's promises to assist, related to answers given by the appellant to two questions asked by Balchand, that is—"How the money got missing?" and "How the bodies got chopped?" Clearly in fact and in law there could be no possible basis for the rejection of the first part of the conversation.

Now as to the second part: Balchand said he believed the appellant would give him information only if he promised to help him. This was only his opinion which may have been fully unjustified since at the prison the disclosure was made before any promise to assist, just as in the first part of "the Whim conversation" (which included instructions not "to forget" the buckmen who had seen him running on the island).

All of these substantial disclosures seemed to spring from a mind which trusted implicitly the person to whom the communication was being made.

It seemed to be taken for granted that assistance would be forthcoming upon the revelation of the confidence. The two questions asked were not tied to or hinged on any promises. They were independent of any promise to assist, and arose naturally from the disclosure volunteered. At the stage when those questions were asked, the appellant had already gone very far in incriminating himself, without any vestige of an inducement. If he did not care to satisfy Balchand's curiosity and tell of "How the money got missing?" and "How the bodies got chopped?" there was no compulsion. Balchand had never promised (nor was it suggested that he did so) to assist only if he was told. The law is clearly stated by TAYLOR on the LAW OF EVIDENCE (11th Edn.), Vol. 1, Art. 881, with ample authority cited at p. 595;

"If no inducement has been held out relating to the charge, it matters not in what way the confession has been obtained; for whether it were induced by a solemn promise of secrecy, even confirmed by oath or by reason of the prisoner having been made drunken or even, by any deception practised upon him, or false representation made to him for that purpose, it will be equally admissible, however much the mode of obtaining it may be open to censure, or may render the statement itself liable to suspicion."

If the question would not have been answered but for promises to do what the appellant wanted done, the most that could be said is that the answers resulted from collateral promises, which could not affect the charge against the appellant.

The offer of some merely collateral convenience, or temporal advantage unconnected with the result of the prosecution, is not such an inducement as will render a confession inadmissible (see *R. v. Lloyd* (1834), 6 C. & P. 393). The promise or words, to have such effect, must have reference to the result of the prosecution; suggesting a more favourable determination of the proceedings. TAYLOR in his work, *supra*, at p. 595 puts it this way:

"...promise of some merely collateral benefit or boon will not be deemed such an inducement as will authorise the rejection of a confession made in consequence."

Nothing which transpired during the whole of "the Whim conversation" could with any reason be interpreted as signifying to the appellant that he would derive some advantage in relation to the charge against him, if he answered the two questions asked, or said anything. Balchand's promises to help him to enrich himself or his family off ill-gotten gains and to pay money in an attempt to pervert the course of justice, or to collude or conspire with him in any other criminal way had no bearing on the charge and could not aid the appellant in avoiding a confession made in the belief that he had succeeded in procuring the support of his friend to add to and further his criminal designs. This motive does not militate against the truth of what was said and render it unsafe to accept. However, in reality it was the appellant who had induced Balchand to be his "contact man" for which he was to be recompensed by the payment of \$1,000, out of "the money" after its recovery. This was the main project. To give some of it to the buckmen who had seen him running away was merely incidental, and may have been thought to be useful. At the most it was no more than a collateral promise. In *R. v. Derrington* (1826), 2 C. & P. 418. where a turnkey promised he would put a letter in the post, but detained it, it was received in evidence as a confession. And the evidence was also received where a person took an oath that he would not mention what the defendant told him (*R. v. Shaw* (1834), 6 C. & P. 372).

I am satisfied that there is nothing to be deduced from all the evidence concerning the circumstances of "the Whim conversation" from which it could be said that the appellant was induced to speak by unfair or improper means. I do not find any principles of law offended. Justice and common sense require the reception of what was said by the appellant. He wanted, and desired, to speak entirely for purposes of his own.

It was proved affirmatively before the trial judge that the whole of the confession was free and voluntary and there was no inducement expressed or implied held out by a person in authority. There were only two persons present throughout the whole of that conversation. The only two persons who would know what was said would be Balchand and

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the appellant. At the *voir dire* Balchand laid the foundation for the reception of the evidence; however, it was not considered desirable to call the appellant to contradict or dispute Balchand's positive assertion as to what transpired in that cell. Indeed, it was never specifically put to Balchand in cross-examination that anything else, or something else, was said other than what he had narrated. There was no attempt to hint or suggest that he was a person in authority; that he had induced the appellant to disclose where the money was, that he had made any specific promises in relation to the charge; or that he had done or said anything which could be described as objectionable or improper, in relation to what was said by the appellant.

The trial judge was right in admitting the evidence since nothing had occurred from which it could be truly said that incriminating statements were made, in consequence of any inducement of a temporal character, connected with the accusations, and held out to the appellant by a person who had some authority over the accusation.

The learned trial judge explained to the jury that the Crown was relying "exclusively on what is called circumstantial evidence" (apart from the statements made to Balchand orally); he explained carefully and fully the implications of the circumstantial evidence in the case and how it should be considered so that the jury were aware that even if they gave no weight to the confession, the circumstantial evidence must point unremittingly and unmistakably to the guilt of the accused person and to no other conclusion before they could convict.

The cogency of the evidence of the finding of "the money", which the jury was entitled to find was the money which Motie Singh possessed, could hardly have been missed (the amount of guilders were exact—1,000; instead of \$4,800 B.W.I, currency there was \$4,700, but it was in the same denominations); it was found on the uninhabited island, which the appellant had crossed on the fateful night; the appellant's short pants were actually found hanging on a tree on that island on October 29; the appellant wanted Balchand on November 6 to recover that money for him; on November 12 he told Balchand he must go in search for a mora tree about 5 to 6 in. thick, shaven on the trunk with a cutlass, and with a vine tied with some young mora leaves around the trunk, and from the tree he must go 6 rods on the low side and he will see a large big mora tree with some spurs around and some old tacooba longside the large mora tree, and he must dig under the mora tree root 6 in. and he will see the money there; these instructions were followed on the next day and led to the finding of the money, tied in a handkerchief, which was how Motie Singh kept it; the launch obviously did not go to the bottom by accident, Motie Singh did not die by accident, neither did the other two fellow travellers; the only person alive was the one who must have taken Motie Singh's money from the launch and buried it on Powis Island, that is the appellant.

The circumstantial evidence which existed before, and led to the charge against him was ample to establish the guilt of the appellant; that evidence was strengthened by "the prison conversation" which dis-

closed that the appellant had hidden money which obviously came from Motie Singh, whose neck had been almost severed, on Powis Island; was further strengthened by "the Whim conversation which told of how and where to find the money", and how it was obtained and about Motie Singh's death; and last, but by no means least, the finding of "the money" in the way described and directed by the appellant, who chanced the confidence of his friend, in a gamble which did not pay off.

The circumstantial evidence was overwhelming. Even if "the Whim conversation" were to be excluded, it is difficult to see how the jury could have reached any other conclusion.

The appellant has had a fair trial.

He was properly convicted.

I can find no merit in the only grounds of appeal argued, *viz.*, that the *Miss Carol* was not a British ship and that "the Whim conversation" was inadmissible.

The appeal must therefore be dismissed. The conviction and sentence is affirmed.

CUMMINGS, J. A., after holding that the High Court had jurisdiction to try the appellant and also that there was enough evidence on which the court could hold that the *Miss Carol* was a British ship, proceeded as follows:

The other point that remains to be considered is the admissibility of the alleged confession. In this connection it is important to give consideration at the outset to Balchand's role in the investigation, the circumstances surrounding the making of the alleged confession and the nature of the evidence proffered by the Crown at the *voir dire*.

Balchand was a logger who lived at Crabwood Creek, Corentyne. He used to cut logs at Mari Mari on one Jagmohan Singh's grant, which is 448 miles up the Corentyne River. He owned a boat which was driven by an out-board motor, and in the course of his work made frequent trips up and down the Corentyne River. He knew the deceased and the accused, and was friendly with the latter for about 15 years. He in his boat, was one of a police party searching for the *Miss Carol* on October 25, 1963. He continued assisting in the search and on October 26, 1963, was one of the party who, while in his boat, saw Heera's body floating in the water. It was he who, after seeing the other bodies, transported them in his boat to the sawmill of one Patrick Khan at Siparuta. Later he joined the *Majestic*, another of Raghubar's launches, and the *Majestic* towed the bodies in his boat to Crabwood Creek.

He was present, assisting the police when the accused was cautioned, and arrested, after which the accused expressed a desire to speak to him, but P. C. Ramjattan prevented him.

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During the investigations the police had hired his boat and he went up in charge of it to Powis Island along with the police. Inspector Chee-a-Tow had instructed him to steer the launch *Majestic* when she towed the *Miss Carol* to Crabwood Creek after having been salvaged. The accused, being present while all of this was going on, must have been aware of the role that Balchand was playing. He was paid by the police for the towing and salvaging.

Up to this stage, then, Balchand was at least a potential witness for the prosecution and must have appeared to the accused to have been close to the police in connection with investigations—someone who, perhaps, in the mind of the accused, could influence the course of the investigation by virtue of his position. It seems that Balchand had some interest also in assisting Raghubar—who would have been the virtual prosecutor on any charge relating to the disappearance of the money—in finding his launch and money. Raghubar showed his appreciation of Balchand's services by giving him \$1,000 after the trial. He said in cross-examination:

"I did not give him before because I was waiting to hear what evidence he would have given. I gave to no one else any reward. I would have given Balchand the reward whatever the result of the previous trial would have been."

On November 6, 1963, Balchand went to the New Amsterdam Prison and spoke with the accused. His version of the conversation is as follows:

"Accused said to me, 'Bal man, ah glad you come, I want to see you, very important.' I ask him what it was all about, so important. He said he wanted me to help him because he know I had an engine and a boat. I asked him what I could do to help him. He said that he got the money in Powis Island and he wanted me to go to the island. I told the accused that I would try my best to assist him by going for the money."

It is important to observe that that was all that was said at the New Amsterdam Prison as a prison officer was patrolling within earshot, and then the time for the visit expired and Balchand had to leave. He said he had gone to the New Amsterdam Prison to see the accused as a result of a conversation he had had with the accused's brother on November 13, 1963. (This is not supported by any other evidence.)

In cross-examination, however, he said:

"On that very day before I went to the prison, I gave a statement to Inspector Chee-a-Tow. I had gone to the police station at New Amsterdam on my own. I now say that I went in search of Chee-a-Tow because I understood he wanted to see me. I did not find him at first, but I did so, and made my statement before I went to the prison. I did mention the name 'Preacher' to Chee-a-Tow. I had arrived in New Amsterdam around 8.30 a.m. I gave a

long statement to Chee-a-Tow. I cannot remember whether I received instructions from the police regarding my proposed visit to the prison.

I spoke to Ramjattan about my visit to the accused at the prison. I expected to visit the accused again, and to speak about the money and the *Miss Carol*. I might have heard about Motie Singh.

I expected the police to make the arrangement for me to meet the accused. I believed that if I got a chance to speak to him, he would tell me where the money was if I promised to help him to get it. I had in mind to ask him what had happened. I intended to convey to the police what the accused would have told me, and I told the police this.

"I did tell the accused after we had conversation that the police had held me on a warrant, and my brother was coming to take me out. It was not true that I had been arrested. I had told the accused a lie as I did not want him to know that the police had brought me there to speak to him."

It is clear from Balchand's own evidence that the police had "brought" him to Whim to speak to the accused. This was not a visit at the request of the accused. He continued:

"After leaving the cell, I spoke to Superintendent Soobrian. This was because I had promised to speak to him. I also spoke to Ramjattan about the conversation between the accused and me."

Why did Deokinanan want that money while in prison? Is it not reasonable to infer that the pressing need for it was that it could be used to influence the course of the prosecution in his favour?

Detective-Sergeant Barker, who, though not in charge of, was assisting in, the investigations, said at the *voir dire* that his intention when he "placed" Balchand in the cell at Whim was that Balchand "would get information which might assist the police or the accused". He expected the accused to speak to Balchand about the case because Balchand requested to see the accused. He expected Balchand to relate to the police what the accused had said. He was aware that Balchand was at Whim because of a previous arrangement. He appreciated before he placed accused in the cell that the accused could have told Balchand something which might incriminate or exculpate himself; and that the accused might have believed that Balchand could have helped him. "I did nothing to indicate to the accused that he need not have said anything to Balchand."

It should again be observed that this was not done at the request of the accused. It is a police arrangement with Balchand.

This was all the evidence adduced at the *voir dire* and it was upon this that the learned trial judge exercised his discretion.

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Detective-Constable Ramjattan (who was not called at the *voir dire*) said when he later gave evidence that on their way down river with the bodies of the deceased, the accused attempted to speak to Balchand and he prevented him because he felt that at that stage their speaking together might have interfered with the course of justice. On November 7, 1963, while he was at Springlands Police Station, Balchand spoke with him, as a result of which he spoke with Inspector Chee-a-Tow. On November 12, 1963, he spoke to Balchand who left him at about 8.30 to 9 a.m. Later that day, at about 8 p.m., he spoke to him again. He said that after speaking with Balchand on November 7, he expected to see him again. He was expecting to see him on November 12. He knew that on that date the accused was a prisoner on remand at the New Amsterdam Prison, and that he would come up for remand on the 12th, as he had already been charged. He knew that there was only one cell at Whim Police Station, and that the accused and Balchand were to meet on November 12 at Whim. He was not aware that Balchand was holding out promises to the accused to contact his father or to help to recover the money, but he expected Balchand to give him information about the recovery of the money after he would have spoken to the accused. (All of this was not before the learned trial judge at the *voir dire*).

In these circumstances, therefore, it is clear that prior to going to the accused in the prison, Balchand had become, in addition to being a potential prosecution witness with regard to the finding of the bodies and the salvaging of the launch, a police informer; a sort of private detective being used by the police, and if not prior to going, certainly after leaving the prison and going to the police, he had become a material witness as to the whereabouts of the money. The police were well aware that he proposed, on the strength of a promise which he had made to the accused at New Amsterdam Prison and proposed to continue to hold out, to extract from him and convey to them how he got the money and how the deceased met his death.

Counsel for the Crown in his address to the jury conceded that the meeting at Whim Police Station between the accused and Balchand was arranged by the police. It was in this context that the police planted Balchand in the cell at Whim Police Station. This concession by the Crown was not before the learned trial judge at the *voir dire*.

In *Kuruma, son of Kaniu v. R.*, LORD GODDARD, C. J., in delivering the opinion of the Privy Council, referred to the case of *R. v. Leatham* (1861), 3 E. & E. 658, and said ([1965] 1 All E. R. at p. 239):

"The Court of Queen's Bench held that, though the defendant's answers could not be used against him, yet if a clue was thereby given to other evidence, in that case the letter, which would prove the case, it was admissible. CROMPTON, J., said:

'It matters not how you get it; if you steal it even, it would be admissible.'

.....

In their Lordships' opinion, when it is a question of the admission of evidence strictly, it is not whether the method by which it was obtained is tortious but excusable, but whether what has been obtained is relevant to the issue being tried."

And at p. 240, *ibid.*, he said:

"It is right, however, that it should be stated that the rule with regard to the admission of confessions, whether it be regarded as an exception to the general rule or not, is a rule of law which their Lordships are not qualifying in any degree whatsoever. The rule is that a confession can only be admitted if it is voluntary and, therefore, one obtained by threats or promises held out by a person in authority is not to be admitted. It is only necessary to refer to *R. v. Thompson* [1893] 2 Q. B. 12, where the law was fully reviewed by the Court for Crown Cases Reserved."

In *Ibrahim v. R.*, Lord SUMNER, who delivered the opinion of the Board, thus laid down the law ([1914], 24 Cox C. C at p. 180):

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear or prejudice or hope of advantage exercised or held out by a person in authority."

LORD COLERIDGE, C. J., in *R. v. Fennell*, laid down the same principle in other words [(1881), 7 Q.B.D. at p. 150]:

"The rule laid down in RUSSELL ON CRIMES (5th Edn.), Vol. III, pp. 441, 442, is, that a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence."

LORD SUMNER states the above rule as a "positive rule of English criminal law". Whether the statements sought to be admitted be "voluntary" or not is, however, a question of fact. When that fact is determined, the law steps in and declares the statement admissible or inadmissible in evidence, according as the trial judge finds it is "voluntary" or not. The onus rests upon the Crown or prosecution to show that the statement is a "voluntary" one before it can be received in evidence. This proposition is a corollary to the above rule laid down by the Privy Council in *Ibrahim's* case, but LORD SUMNER also expressly approves of it and says in the same case ([1914], 24 Cox, C.C. at p. 181):

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"The burden of proof in the matter has been decided by high authority in recent times in *R. v. Thompson.*" *supra.*

The court in this case consisted of LORD COLERIDGE, C.J., HAWKINS, DAY, WILLS, and CAVE, JJ. The judgment was delivered by CAVE, J., who ([1893] 2 Q.B. at p. 16), quoting from TAYLOR ON EVIDENCE (8th Edn.), Part 2, Ch. 15, s. 872, says:

"The material question consequently is whether the confession has been obtained by the influence of hope or fear; and the evidence to this point being in its nature preliminary, is addressed to the judge, who will require the prosecutor to show *affirmatively*, to his satisfaction, that the statement was *not* made under the influence of an improper inducement, and who, *in the event of any doubt subsisting on this head, will reject the confession.*"

CAVE, J., continued on the same page:

"The case cited in support of this proposition is *R. v. Warringham*, (1851), 2 Den. 447, n, where PARKE, B., says to the counsel for the prosecution:

'You are bound to satisfy me that the confession, which you seek to use in evidence against the prisoner, was not obtained from him by improper means. I am not satisfied of that, for it is impossible to collect from the answers of this witness whether such was the case or not.'

PARKE, B., adds:

'I reject the evidence of admission, not being satisfied that it was voluntary.'

In *R. v. Thompson, supra*, CAVE, J., said ([1893] 2 Q.B. at p. 17) that the judge has to ask "Is it proved affirmatively that the confession was free and voluntary—that is, was it preceded by any inducement to make a statement held out by a person in authority?" And he ends his judgment by saying (*ibid.*, at p. 19):

". . . but, on the broad, plain ground that it was not proved satisfactorily that the confession was free and voluntary, I think it ought not to have been received."

The cases establishing and illustrating this rule are very numerous both in England, Ireland and in Canada. A very clear and concise statement of the rule is to be found in *R. v. Tutty*, a Nova Scotia case.

It is there laid down ((1905), 9 Can. Crim. Case at pp. 547—8) that:

"the onus was upon the prosecution to establish that the statement of the prisoner was entirely free and voluntary, and I think it was not sufficient for this purpose that the officer should swear to this. He should have proved it by negating the possible

inducements by way of hope or fear that would have made the statement of the prisoner inadmissible."

Again in *Thiffault v. R.*, DUFF, C.J., said ([1933] 3 D.L. R. 591 at p. 596):

"The second objection is on the ground that the voluntary character of the statement signed by the accused has not been established. The law governing the decision on the point raised by this objection was stated in a judgment of this court in *Sankey v. R.* [1927] 4 D.L.R. 245, in the course of which it was said:

"We feel, however, that we should not part from this case without expressing our view that the proof of the voluntary character of the accused's statement to the police, which was put in evidence against him, is most unsatisfactory. That statement, put in writing by the police officer, was obtained only upon a fourth questioning to which the accused was subjected on the day following his arrest. Three previous attempts to lead him to "talk" had apparently proved abortive—why, we are left to surmise. The accused, a young Indian, could neither read nor write. No particulars are vouchsafed as to what transpired at any of the three previous "interviews"; and but meagre details are given of the process by which the written statement ultimately signed by the appellant was obtained. We think that the police officer who obtained that statement should have fully disclosed all that took place on each of the occasions when he "interviewed" the prisoner; and, if another policeman was present, as the defendant swore at the trial, his evidence should have been adduced before the statement was received in evidence. With all the facts before him, the judge should form his own opinion that the tendered statement was indeed free and voluntary as the basis for its admission rather than accept the mere opinion of the police officer, who had obtained it, that it was made "voluntarily and freely".'

It should always be borne in mind that while, on the one hand, questioning of the accused by the police, if properly conducted and after warning duly given, will not *per se* render his statement inadmissible, on the other hand, the burden of establishing to the satisfaction of the court that anything in the nature of a confession or statement procured from the accused while under arrest was voluntary always rests with the Crown. *R. v. Bellos*, [1927] 3 D.L.R. 186; *Prosko v. R.* (1922), 66 D.L.R. 340. That burden can rarely, if ever, be discharged merely by proof that the giving of the statement was preceded by the customary warning and an expression of opinion on oath by the police officer, who obtained it, that it was made freely and voluntarily."

In considering whether the onus has been discharged, it is important that the trial judge should bring his mind to bear on what

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must now be considered to be the extended meaning of the terms "voluntary" and "person in authority". The terms "voluntary" and "authority" used in the statement of this rule are used in artificial or technical senses. Originally, like the expression "free and uninterrupted use" as definitive of a person's right of travel on a highway, they represented very simple concepts, and were when first used appropriate terms; but in the process of evolution of the common law, they have come to represent very complex concepts, and are now misleading.

Mc KEOWN, C.J., in his judgment in *R. v. Godwin*, in the Supreme Court of Canada, very aptly says ([1924] 2 D.L.R. at p. 371):

"The question whether or not a statement is voluntary must be determined in relation to the mental attitude of the accused when he made the statement in question, rather than from the standpoint of his hearers or questioners, who, in this case, testify they made no threats to him nor did they hold out to him any inducement to speak. No doubt that is so. The officers speak very clearly upon this point and I believe what they say; but that does not throw much, if any, light on the decisive question, which is—How did the accused regard the inquiry, or what result did he think his answers or silence might lead to?"

In PHIPSON ON EVIDENCE (10th Edn.), at paras. 796 and 797, on p. 330, the learned author states:

"To exclude a confession, the inducement must have been held out by a person in authority, *i. e.*, someone engaged in the arrest, detention, examination, or prosecution of the accused, or by someone acting in the presence and without the dissent of such a person, or perhaps by someone erroneously believed by the accused to be in authority.

The following have been held to be persons in authority: a constable or other officer having the accused in custody; or in cases of felony perhaps a private person arresting; the prosecutor or his wife, or a partner's wife where the offence concerned a partnership; or his attorney; the prisoner's employer if the offence had been committed against his person or property but not otherwise; a magistrate; a magistrate's clerk, and a coroner.

It is doubtful whether a private person, to whose temporary custody the accused has been committed by a constable, is a person in sufficient authority; or the chaplain of a gaol. A doctor called in by the police to examine an accused person is an independent medical expert and in no sense an agent of the police, and a confession made to him is admissible, but in Scotland he is a person in authority as acting for the police. The captain of a ship as such would seem not to be in such a position with regard to the crew, nor is the wife of a constable a person in authority. In *R. v. Smith* [1959] 2 All E.R. 193, it seems to have been assumed by the court

and by counsel that a R.S.M. who threatened to keep a number of soldiers on parade until he received a confession, was a person in authority.

A confession made to but not induced by a person in authority is admissible."

The ground of the exclusion was recently considered in the Court of Appeal in England in *R. v. Harz*, CANTLEY, J., said ([1966] 3 All E.R. at p. 456):

"The English case law in relation to confessions has mainly developed during a period in legal history when most persons charged with criminal offences were poor, illiterate and pathetically ignorant, and when, moreover, they had no right to go into the witness-box to deny or explain what they were alleged to have said. In those circumstances, justice required that extreme and even exaggerated care should be taken to ensure that the jury did not hear any admission which was not clearly shown to have been voluntary. The situation today is very different. It seems to me that the interests of justice would be adequately served if the principle were simply to be that no admission should be receivable in evidence if it appeared from examination of the circumstances in which it was made that there was any realistic danger that it might be untrue; but I do not think that in the present state of the authorities it is open to this court to decide this case by application of that principle. If my view of the law is thereafter held to be wrong and THESIGER, J.'s, view prevails I shall be content."

What then is now the underlying principle to be applied?

In *R. v. Baldry* (1852), 2 Den. 430, POLLOCK, C. B., said that the true ground of the exclusion is not that there is any presumption of law that a confession not free and voluntary is false, but that it would not be safe to receive a statement made under any influence or fear. If that is a correct statement of the law—and it has been held to be so by the Court for Crown Cases Reserved in *R. v. Thompson supra* which was approved by the Judicial Committee of the Privy Council in *Ibrahim v. R. supra*—then the categories of "persons in authority" are not closed. The term must logically include any person, be he friend or foe, policeman or police decoy, who is in a position to create in the mind of the accused hope or fear. In my view, for the purposes of the application of the rule of exclusion under consideration, the test to determine whether or not a person is "in authority" must be whether or not that person is in a position to make a promise, the fulfilment of which would, in the mind of the accused, create an advantage in his favour in relation to the trial of the offence for which he is charged. It is an "authority" to influence the mind of the accused, so that his confession does not flow spontaneously but is the result of hope or fear.

Since the test is a subjective one, it can only be applied by drawing a reasonable inference from the surrounding circumstances as they were known to and probably appreciated by the accused, because no one but

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himself could say with any degree of certainty just what went on in his mind at the time he made the confession. It seems to me that the accused in the instant case at all material times from his knowledge of the role that Balchand had been openly fulfilling in the case, would have been seeing in him, not only a trusted friend, but also a person so close to the police in the carrying out of the investigations that they were likely to be regarding him as one of themselves, and in that setting Balchand would have the necessary scope to fulfil his promise. Accused might very well have been saying to himself:

"The police would suspect my brother, my father, or any other friend of mine if any of them were seen moving up and down the river and/or hovering around Powis Island—not so with Balchand, he was in their employ, acting for them and for Raghubar; moreover he is my friend, I could trust him".

In other words, he may have regarded Balchand as a friend who was in the strategic position of an *ad hoc* policeman; as a "person in authority".

Balchand, then, for the purposes of the application of the rule was a "person in authority".

Counsel for the Crown urged that there was no inducement in this case because, *inter alia*, the promise was the result of a request from the accused. In my view that does not matter. See *R. v. Windsor* (1864), 4 F & F 360. The question really is: Was the alleged confession obtained by any direct or implied promises, *however slight*, or by the exertion of any improper influence? Would the accused have answered Balchand's questions?

- (a) "How the money got missing?"
- (b) "How the bodies got chopped?" if Balchand has not first promised to
  - (a) find the money;
  - (b) give it to accused's father-in-law to, *inter alia*, suborn two potential Crown witnesses who accused thought had seen him on the island?

If the answer is "No", then the alleged confession should be excluded; if it is, "It is unlikely" or "It is impossible to tell", then also it should be excluded.

The promise which Balchand made was only a trick to get the confession. It was like carrots held to a donkey's nose—an inducement.

Bearing in mind that the onus is on the prosecution to prove positively and affirmatively that the confession was voluntary and that Balchand's mental attitude when he approached the accused at Whim

Police Station was that if he promised to help the accused he would speak to certain witnesses, they ought to have been called by the prosecution or at least put up for cross-examination by counsel for the accused at the *voir dire*.

Had these witnesses been called at the *voir dire*, it would have emerged, as it did later in the trial, that both Rarnjattan and Inspector Chee-a-Tow definitely had conversations with Balchand both before and after he went to the prison and to the cell at Whim, and the trial judge would no doubt have found the details of these conversations of material assistance to him in the exercise of his discretion, but both the accused and the learned trial judge were deprived of this evidence.

It seems that the nature of the Crown's onus to prove positively and affirmatively that the confession was free and voluntary was not fully appreciated, and this resulted in the accused having to endeavour—even to the extent of calling a prosecution witness—to show that the confession was *not* free and voluntary. Fortunately for the fair name of justice, both Rarnjattan (when subsequently called at the trial) and Barker at the *voir dire* were frank in their answers, so that the Crown at the end of the case conceded that Balchand was placed in the cell with the accused "by arrangement" with the police. It is not sufficient for Balchand to have said in cross-examination at the *voir dire* that he does not remember whether the police gave him any instruction before he went to the prison at New Amsterdam. What the details of this arrangement were and the manner in which the purpose of the arrangement was consummated can only now be arrived at by a reasonable inference drawn from the following proven facts:

- (a) The police knew that Balchand and the accused were friends.
- (b) When they had made up their minds to charge the accused they prevented him from speaking to Balchand.
- (c) Balchand was assisting the police in their investigations in the presence of the accused.
- (d) It became apparent from the time the bodies were seen by Balchand and put into his boat that he was a potential witness for the prosecution, consequently in a position to discuss the case with the police and other prosecution witnesses.
- (e) Balchand had gone to the New Amsterdam prison after speaking with the police, spoken with the accused, and told the police of his conversation with the accused—albeit, he says—at the request of the accused.
- (f) Before the alleged confession was made in the cell at Whim Police Station, Balchand told the police that he believed the accused would only give him information if he promised to help him.
- (g) Balchand said, before going into the cell it was his intention to convey to the police what information he obtained from the accused while in the cell.

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(h) The police expected Balchand to convey to them what information he got from the accused while in the cell.

(i) With this knowledge the police plant Balchand in a cell into which they expected the accused to be brought, and the accused is duly brought and after the promises of help, one of which related to the charge, are made, he is alleged to have confessed.

I find it impossible to draw any inference other than that the police placed Balchand in that cell in order that he should continue to hold out an inducement and so get information which he was to convey to them. Would not Balchand then had so conducted the conversation with the accused as to achieve his objective? "Actions speak louder than words." (No one can now recapture Balchand's manner and demeanour in that cell—the inflections and tone of his voice.) In my view the alleged confession was the result of an implied inducement. Even if I am wrong in such a positive inference, the prosecution has not in my view positively and affirmatively negated this inference. In fact, they have never attempted to do so.

The inducement—or at least a part of it—was in relation to an advantage to be gained by the accused with respect to the charge.

The situation then is, that the police planted in the cell of an accused person, a police informer or private detective and potential witness for the prosecution, with knowledge that that person intended to get information from the accused for conveyance to the police, by holding out *inter alia* an inducement in relation to an advantage to be gained by the accused with respect to the trial of the offence for which he was then charged. That person could reasonably in the mind of the accused have been regarded as a person in authority.

Moreover, the confession was obtained by the police by an obvious circumvention of the Judges' Rules, a fact which could not be fully appreciated at the *voir dire*, although it clearly emerged after the statement had been admitted.

Should the learned trial judge in the circumstances have admitted the alleged confession? It is now a well-settled rule that the admissibility of any statement or admission by a prisoner is a preliminary or subsidiary question *for the trial judge alone* to determine. The authorities for this proposition are very numerous, definitive and conclusive, among which is the Privy Council case of *Ibrahim v. R.*, Lord SUMNER, L. J., says [(1914), 24 Cox, C. C. at p. 181]:

"There was no evidence to the contrary. With *R. v. Thompson supra* before him, the learned judge must be taken to have been satisfied with the prosecution's evidence that the prisoner's statement was not so induced either by hope or fear, and, as is laid down in the same case, the decision of this question, albeit one of fact, rests with the trial judge."

Again (*ibid.*, at p. 183):

"I am not aware of any distinct rule of evidence that, if such improper questions are asked, the answers to them are inadmissible, but there is clear authority for saying that the judge at the trial may in his discretion refuse to allow the answers to be given in evidence."

In TAYLOR ON EVIDENCE (8th Edn.), Vol. 1, s. 872, it is laid down:

"As the admission or rejection of a confession rests wholly in the discretion of the judge, it is difficult to lay down particular rules, *a priori*, for the government of that discretion; and the more so, because much must necessarily depend on the age, experience, intelligence and character of the prisoner, and on the circumstances under which the confession is made.

HAWKINS, J., in *R. v. Miller* ((1895), 18 Cox, C. C. says at p. 55): 'Every case must be decided according to the whole of its circumstances.'

In *R. v. Booth & Jones* ((1910), 5 Cr. App. Rep. at p. 179), DARLING J., quoting CHANNELL, J., in *R. v. Knight* (1905), 69 J. P. 108, says: 'the moment you have decided to charge him' (the accused) 'and practically got him into custody, then inasmuch as a judge even can't ask a question or a magistrate, it is ridiculous to suppose that a policeman can. But there is no actual authority yet that if a policeman does ask questions it is inadmissible—what happens is that the judge says it is not advisable to press the matter'."

This dictum of CHANNELL, J., is cited with approval in *Ibrahim v. R. supra*, and LORD SUMNER proceeded to add (*ibid.*, at p. 183), after the quotation:

"...and of this DARLING, J., delivering the judgment of the Court of Criminal Appeal, observes, 'The principle was put very clearly by CHANNELL, J.'."

In *R. v. Voisin*, LAWRENCE, J., said ([1918] 1 K. B. at p. 539) that the Judges' Rules—

"...are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these rules may be rejected as evidence by the judge presiding at the trial.

In *McDermott v. R.* DIXON, J., said ((1948), 76 C. L. R. at p. 513):

"It is apparent that a rule of practice has arisen, deriving almost certainly from the strong feeling for the wisdom and justice of the traditional English principle expressed in the precept *memo*

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*tenetur se ipsum accusare.* It may be regarded as extension of the common law rule excluding voluntary statements. In referring the decision of the question whether a confessional statement should be rejected to the discretion of the judge, all that seems to be intended is that he should form a judgment upon the propriety of the means by which the statement was obtained by reviewing all the circumstances and considering the fairness of the use made by the police of their position in relation to the accused. The growth of rules of practice and their hardening so that they look like rules of law is a process that is not unfamiliar."

He continued (*ibid.*, at p. 515):

"Here as well as in England the law may now be taken to be, apart from the effect of such special statutory provisions as s. 141 of the Evidence Act, 1928 (Vict.) that a judge at the trial should exclude confessional statements if in all the circumstances he thinks that they have been improperly procured by officers of police, even although he does not consider that the strict rules of law, common law, and statutory, require the rejection of the evidence. The Court of Criminal Appeal may review his decision and if it considers that a miscarriage has occurred, it will allow an appeal from the conviction."

Had a policeman obtained the alleged confession in the circumstances disclosed in the instant case, it would have been in flagrant disregard of the Judges' Rules. Such a statement would no doubt have been excluded by the learned trial judge upon a proper exercise of his discretion, had all the facts been before him at the *voir dire*.

In dealing with the fact in *McDermott's* case *supra*, DIXON, J., went on to say (*ibid.*, at p. 515):

"The character of the questions, the absence of any insistence or pressure in putting them, the fact that no questions were put directed to breaking down or destroying the prisoner's answers or statements and the fact that there was no attempt to entrap, mislead or persuade him into answering the questions, still less into answering them in any particular way, these are all matters which negative such a degree of impropriety as to require the exclusion of the testimony as to the prisoner's admissions."

Can that be said of the circumstances of this case? Here the police flagrantly and knowingly circumvented the Judges' Rules by a trick to obtain the alleged confession. In PHIPSON ON EVIDENCE (10th Edn.). p. 330, para. 799, the following passage appears:

"In the nineteenth century it was held that a confession induced by false representations or deception practised upon the accused, *R. v. Derrington, supra* or obtained by plying him with alcohol, *R. v. Spilsbury* (1835), 7 C. & P. 187, was admissible; it is very doubtful whether the cases would now be followed in England and Wales."

In my view they will not be followed. To follow them would be to defeat the policy upon which the rule was formulated. This view seems to be supported by the case of *R. v. Mangin*. I have not had the opportunity of reading the case, but the following note appears in 14 Digest (Repl), 484:

*"Wilfully untrue representation.* M. was charged with having stolen gold from a co. G., a private detective, who had worked himself into M.'s confidence, gave evidence that he told M. that he came from S. Africa and had done business in diamonds. M. replied, 'that money could be made here if one went the right way about it.' G. then, by means of false statements, induced M., by promising to participate in gold robberies, to admit he had some gold scraped from the co.'s reports. The statements were admitted and prisoner convicted:

*Held:* the representations being untrue, and being made after the subject-matter of the charge had been taken, all subsequent confessions of M, were inadmissible as being induced by such false statement and the conviction must be annulled."

In *R. v. Histed* (1898), 19 Cox, C. C. 16, the prisoner was charged with bigamy. The clergyman who married her on the occasion of the first marriage, produced the marriage register but was unable to identify her as the person. A detective, while the prisoner was on remand, took the clergyman to the police station. Pointing him out to the prisoner the detective said:

"Do you know this gentleman?" The answer which appeared upon the deposition was as follows: 'Yes, you are the Mr. Cobb who married me and Charles Histed at Stockbury Church on September 4, 1886. James Bigg was one witness, and a police-constable was there named Reeves or Reed.'

By his Lordship,

Q. Did you caution the woman?

A. No, my Lord.

Q. What was the object of the question?

A. It was simply a remark.

Q. Do you really mean to tell me that?

A. Yes."

HAWKINS, J. said:

"I shall not allow this question to be put. It is a matter on which I hold a strong opinion. No one, either policeman or anyone else has a right to put questions to a prisoner for the purpose of entrapping him into making admissions. A prisoner must be fairly dealt with. In this case no caution was given by the detective.

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The fact was, that to the knowledge of the detective there was no evidence of identity against the prisoner. Mr. Cobb failed to recognise her, and so, by a trick, he endeavoured to set the case on its legs again out of her own mouth. This cannot be permitted. In my opinion, when a prisoner is once taken into custody, a policeman should ask no questions at all without administering previously the usual caution."

The following note appears at the end of the report:

"*Note.* The decisions in the cases of *R. v. Gavin* (1885), 15 Cox C. C. 656, and *R. v. Brackenbury* (1893), 17 Cox C. C. 628, were subsequently brought to the notice of the learned judge, who said: 'I entirely agree with the ruling of SMITH, J., in *R. v. Gavin, supra.* Cross-examination of a prisoner by a policeman should not be permitted, and in my discretion I should exclude evidence obtained in that way.' The case I have just tried shows exactly the danger of allowing such evidence to be given."

Would it not, then, make a mockery of the Judges' Rules and all the learning thereon if the police can knowingly substitute for one of themselves an *ad hoc* policeman to do exactly what the rules preclude themselves from doing?

The conclusion, then, to be drawn from this consideration of the authorities is that the trial judge's discretion with regard to the admissibility of the confession of an accused person is a judicial discretion and must accordingly be exercised in accordance with well established principles. He must pay due regard to the principles of the common law and to the policy of the legislature in safeguarding persons against being inveigled into admitting criminal responsibility. It would be most incongruous if the action of the police in evoking statements was opposed to "the fair administration of justice" and yet the trial judge should submit to the jury the very statement which had been improperly made to them by a prisoner. If it does not clearly appear that these principles were appreciated and/or applied by the trial judge or that all the facts necessary for a proper exercise of the discretion, and this court will review his decision and, if there appears to have been a miscarriage of justice, quash the conviction.

If the learned trial judge in this case appreciated the principle of the Crown's onus, he does not seem to have applied it. Moreover, had he known of the police "arrangement"—subsequently conceded by the Crown but of which he was not aware at the *voir dire*—he may very well have rejected the confession. In the circumstances, I consider that the confession should have been excluded and should not now be allowed to stand.

I would allow the appeal, quash the conviction and set aside the sentence.

*Appeal dismissed.*

## NOBREGA v. ATTORNEY-GENERAL

[Supreme Court (Chung, J.) January 12, 1966]

*Crown servant—Reduction of pay—Right of Crown to order reduction.*

On 11th December, 1964, the plaintiff was appointed a grade I class I teacher at a government school. On 17th March, 1965, she was required by the Chief Education Officer to produce her birth and academic certificates by the Ministry's messenger or by return mail. She did not comply with this requirement and on 19th March, 1965, the Chief Education Officer wrote to her stating that her appointment was rescinded from that date and adding: "The effect of such rescission is that you will be paid as an unqualified assistant mistress pending the submission of the documents asked for by me. Upon receipt of those documents your status as a teacher will be determined and a new letter of appointment issued to you." The plaintiff later submitted the required certificates and continued teaching but at a reduced salary and without being issued with any new letter of appointment. She brought an action claiming a declaration that the rescission of her appointment was *ultra vires*, that she was entitled to her original salary, and that the reduction was *ultra vires*.

**Held:** (i) the Crown has a right to dismiss a civil servant at will and can offer to mitigate the exercise of its legal right by continuing the contract of service at a lower rate of pay;

(ii) in the present case the Crown mitigated the exercise of its legal right of dismissal by rescinding the plaintiff's appointment as a grade I class I teacher and continuing her service as an unqualified assistant mistress at a lower rate of pay.

*Judgment for the defendant.*

[*Editorial Note:* Reversed on appeal to the Guyana Court of Appeal in 1967, but an appeal by the Crown to the Privy Council was later allowed. See (1966), 10 W.I.R. 187, G.C.A., and [1970] 3 All E. R. 1604, P.C.]

*Dr. F. H. W. Ramsahoye* for the plaintiff.

*L. F. Collins*, Senior Legal Adviser, for the defendant.

CHUNG, J.: In this case the plaintiff in her statement of claim states:

"1. The plaintiff was on the 11th day of December, 1964, duly appointed grade I class I teacher at Lodge Government School in the service of the Government of British Guiana at the salary in the sum of \$251 per month in scale \$118 x 7—\$195/211 x 10—\$251 x 7—\$258 x 10—\$288.

2. On the 19th day of March, 1965, while still holding the said appointment the plaintiff was notified by the Chief Education Officer duly acting for and on behalf of the Government of British Guiana that because of her failure to submit to the Ministry of Education her birth and academic certificates as was requested in a letter of the 17th day of March, 1965, her appointment as a grade I class I teacher was rescinded as from the 19th day of

March, 1965. The said documents were in fact submitted to the office of the Chief Education Officer on the 19th day of March, 1965.

3. The plaintiff has since the 19th March, 1965, been offered payment as an unqualified assistant mistress with salary at the rate of \$92 per month at the said Lodge Government School, but has not accepted same.

4. The purported reduction of the plaintiff's salary and status was effected without lawful authority.

5. Wherefore the plaintiff claims:

- (a) a declaration that the purported rescission of the plaintiff's appointment as a grade I class I teacher is *ultra vires* and of no effect;
- (b) a declaration that the plaintiff is entitled to receive from the Government of British Guiana in respect of her services as a teacher at Lodge Government School salary at the rate of \$251 per month;
- (c) a declaration that the purported reduction of the plaintiff's salary by the Government of British Guiana acting by or through their servants and/or agents from \$251 per month in respect of such service to \$92 or any other sum per month is *ultra vires* and of no effect;
- (d) further or other relief;
- (e) costs."

The facts of the case are not in dispute. The plaintiff led evidence to show that in 1936 she obtained the School Certificate of the University of Cambridge. After that she worked at several places in the Colony and abroad. In 1957 she opened her own school and she managed that school from 1957 to 1963. In 1963 she was awarded a Commonwealth Bursary and she spent one year at the Institute of Education at the University of London doing a full-time course for the academic year 1963-1964, where she went through certain training.

After receiving a letter dated 15th October, 1964, from the Ministry of Education she decided to return to the Colony, and she returned on the 4th December, 1964. On the 11th December she received a letter of appointment appointing her a grade I class I mistress as from 4th December, 1964, at a salary of \$251 in the scale \$118 x 7—\$195/211 x 10—\$251 x 7—\$258 x 10—\$288.

On the 17th March, 1965, she received a letter from the Chief Education Officer dated 17th March, 1965, Exhibit "A", which reads as follows:

## NOBREGA v. ATTORNEY-GENERAL

"17th March, 1965.

Dear Madam,

With reference to a letter dated 11th December, 1964, from this Ministry appointing you a mistress at Lodge Government School with effect from 4th December, 1964, I am to request that you send to the Ministry your birth and academic certificates (if possible by the Ministry's messenger or by return mail).

2. Your prompt attention to this request will be greatly appreciated.

Yours faithfully,  
(Sgd.) C. Chris Blackman,  
for Chief Education Officer (ag.)"

On the 19th March, 1965, she received another letter, Exhibit "F", which reads as follows:

"19th March, 1965.

Dear Madam,

Because of your failure to submit to this Ministry your birth and academic certificates as requested so to do in my letter dated 17th March, 1965, I have to inform you that your appointment as a grade I class I teacher has been rescinded as from today, 19th March, 1965.

2. The effect of such rescission is that you will be paid as an unqualified assistant mistress pending the submission of the documents asked for by me. Upon receipt of those documents your status as a teacher will be determined, and a new letter of appointment issued to you.

Yours faithfully,  
(Sgd.) G. O. Fox,  
Chief Education Officer (ag.)"

She continued to teach after receiving the letter of the 19th March, 1965, and later when she went for her salary the payslip showed that she was receiving a lesser sum as from 19th March, 1965. She did not accept her salary but continued teaching. In October 1965 she accepted the new salary, subject to her rights not being prejudiced.

Both counsel for the plaintiff and counsel for the Crown agree that there was a contract of service and the Crown could dismiss at pleasure. The only issue, then, in the present case is whether or not the Crown can, without dismissal, reduce the salary of its servant.

Counsel for the plaintiff submitted that even though the Crown could dismiss at pleasure, yet the Crown could not retain and at the

same time reduce the terms of the contract. He cited the case of *Powell v. R.* (1873), 4 A.J.R. 144, 23 A.J. 506, which held expressly that a police sergeant irregularly reduced to the ranks was entitled under s. 13 of the Police Regulations Act, 1928, to receive the difference, but in this case Legislation made provision for that.

It is stated in the CROWN PROCEEDINGS by GLANVILLE N. WILLIAMS under the heading "*Reduction of Pay*", at p.68:

"The Crown has a right to reduce its servant's pay. In the case of civil servants that right follows as a logical consequence from the right to dismiss at will. If the Crown can dismiss at will it can offer to mitigate the exercise of its legal right by continuing the contract of service at a lower rate of pay. It seems on principle that the offer could be refused and that the servant could quit the service without rendering himself liable to an action for breach of contract, even if otherwise he would be liable."

This view was also expressly adopted by RIGBY, L. J., in *Worthington v. Robinson* (1897), 75 L.T. 446. The learned judge said:

"I have never heard of such a thing as a civil servant holding office at pleasure having a right to question the acts of those civil servants who have dismissed him from his office. I treat what has happened as a dismissal because though in effect he has been reduced to a lower position, his new appointment is in fact a reappointment."

It is true that in that particular case the Inland Revenue Regulations Act, 1890, give the Commissioners power to reduce or discharge any officer, but RIGBY, L. J., in that case did not base his decision on the Inland Revenue Regulations Act, 1890.

In the present case Exhibit "F" clearly communicated that the plaintiff's appointment as a grade I class I teacher had been rescinded as from 19th March, 1965, and a new appointment was offered to her. She could have exercised her right in leaving the service, but having not done so it must be taken that she accepted that new appointment, subject to her rights being determined by the court. She can still refuse to serve if she wishes.

As has already been stated by GLANVILLE WILLIAMS,

"The Crown has a right to reduce its servant's pay. In the case of civil servants this right follows as a logical consequence from the right to dismiss at will."

And in the present case the Crown mitigated the exercise of its legal right of dismissal by rescinding the plaintiff's appointment as a grade I

## NOBREGA v. ATTORNEY-GENERAL

class I teacher and continuing her service as an unqualified assistant mistress at a lower rate of pay. In the circumstances, the declaration sought is refused. Costs to the defendant to be taxed.

*Judgment for the defendant.*

Solicitors: *A. Vanier* (for the plaintiff); *Crown Solicitor* (for the defendant).

## HOWARD v. MOTOR UNION INSURANCE CO. LTD.

[Supreme Court (Luckhoo, C. J.) December 16, 20, 22, 1965, February 26, 1966].

*Insurance Election by insurers to reinstate damaged motor car—Failure to reinstate property—Damages to include cost of hiring another car.*

The plaintiff insured his motor car with the defendants. The car having been damaged in an accident, the plaintiff wished it to be treated as a total loss but the defendants elected under the terms of the insurance policy to reinstate the car, that is, to repair it and restore it to its former condition. This, however, they failed properly to do and the plaintiff accordingly sued for damages.

Held: after election the contract to reinstate became the one contract under the policy and, the defendants having breached it, the plaintiff was entitled to damages which would include not only the depreciation in value of the car, but any loss by way of the hire of another car occasioned by the breach.

*Judgment for the Plaintiff.*

*B. O. Adams, Q. C.*, associated with *E. W. Adams* for the plaintiff.

*J. A. King* for the defendants.

LUCKHOO, C. J.: This is a claim by the plaintiff for damages arising out of the defendants' alleged failure to reinstate the plaintiff's motor car PM 111, following upon damage to the car resulting from the overturning of the car in a trench on the western side of the Coverden Public Road, East Bank, Demerara, on the 14th September, 1962. At the time of the accident the plaintiff's car was insured with the defendants against loss or damage by accidental overturning.

The plaintiff purchased the car, a Wolseley 1550, in England in April, 1961, for about \$4,700. The mileage done in England was about 7,000 when the car was brought to British Guiana by the plaintiff in September, 1961. On the 5th September, 1961, the plaintiff effected a comprehensive insurance policy with the defendants, the estimated value of the car being stated therein at \$4,250. On the 1st September, 1962, the plaintiff effected the policy sued on—also a comprehensive policy in which the estimated value of the car was stated at \$3,500. On the 10th September, 1962, the car while being driven by the plaintiff overturned into a trench on the western side of the Coverden Public Road. Damage resulted to the top of the car, the front grill, bonnet, doors, two fenders, luggage booth and to the upholstery. The car was taken to Bookers Garage on the same day. The plaintiff wished the car to be treated as a total loss but the defendants elected, as they were entitled so to do, under the terms of the insurance policy to reinstate the car, that is, to repair it and restore it to its former condition.

The repairs were put in hand at Bookers Garage and in December 1962, the plaintiff was informed that the repairs were concluded. The plaintiff took Mr. H. Phang, an experienced motor mechanic, to Bookers Garage to have the car taken on a test run. This was done in December, 1962, and Mr. Phang found that the car had not been

put into its former condition. Mr. Phang, it must be observed, had regularly serviced the car before the date of the accident. He found that the top was dented with ripples making it obvious that the car had been damaged and repaired. The doors did not fit properly. The bonnet had some ripples and certain other minor defects were to be seen. On being road tested there was "clutch chatter" and rattles were coming from underneath. He estimated the depreciation in value at that point of time at \$900 to \$1,000. As a result of Phang's observations further repairs were done by Bookers Garage to the car and Phang again tested the car on a trial run. There was some improvement effected for Phang said that the depreciation was about \$100 or \$200 less than it was at the time of his first examination. Phang's second examination of the car was effected on the 6th February, 1963. The defendants obtained a report dated 27th February, 1963, from Mr. N. J. Driver of T. Geddes Grant Ltd. who stated that the condition of the car was consistent with a very well kept car of its mileage and was in excellent condition.

Thereafter at the request of plaintiff the matter was referred to arbitration in terms of condition 9 of the policy of insurance. There was some delay in the arbitration getting under way because of an objection raised by the plaintiff's legal adviser to Mr. N. J. Driver being appointed one of the arbitrators. Eventually it was agreed that Driver along with Mr. Compton Pooran, Principal of the Government Technical Institute, should be the arbitrators. On the 14th November, 1963, the arbitrators issued their findings in the following terms—

"14th November, 1963.

This is to certify that we have visually examined a Wolseley car bearing registration number PM 111 on 21st October, 1963 at the premises of Messrs. Bookers Garage.

Detailed examination in light conditions as existed at the time of survey show imperfections in body finish, slight depressions and ridges on the top and along the left edge of the roof near the guttering. In full daylight these will be even more prominent.

The area contained in a triangle formed by the left front corner, the right front corner and the right rear corner shows the above condition. In addition there were other imperfections on the right side front and rear fender panels and the luggage compartment lid.

The transverse profile across the roof has also been affected and the right side shows a greater radius than the left side, as a result of this, the left front door shows an imperfect fit on the door pillar.

Although a very good repair job has been effected on the car, some body distortion appears to be present and cannot be effectively eliminated without the use of special jigs which are too expensive for economical use locally.

## HOWARD v. MOTOR UNION

It was not possible for a road test to be made, nor was it convenient to examine the underbody sections of the car or to make a test for alignment.

The imperfections noted depreciate the value of the car should the owner offer it for sale, and the vehicle is not regarded as having been restored to its condition prior to this accident, provided there was no damage from any previous accidents.

P. C. Pooran  
15/XI/63

N. J. Driver  
15 Nov. 63"

On the 3rd December, 1963, solicitor for the plaintiff wrote the defendants claiming the sum of \$3,500 under the policy of insurance and the sum of \$725 as the plaintiff's travelling expenses from September, 1962, to November, 1963, and thereafter at the rate of \$50 per month until the amount claimed is paid. The defendants referred this letter to their legal advisers Messrs. Cameron & Shepherd, solicitors, who on the 25th February, 1964, wrote the plaintiff's solicitor stating that effect could not be given to the arbitrators' award as it contained no findings as to values and further that the plaintiff is not entitled to any damages for loss of use of the car. Mr. Pooran, one of the two arbitrators, has testified to the effect that the resulting depreciation is \$800 to \$1,000 based on resale price which could be obtained for the car. This, according to Pooran, is the only basis for estimating the depreciation caused by the accident and the subsequent effort to reinstate. His estimate is not substantially different from that of Phang. Driver's estimate of the depreciation made upon the same basis is \$450 to \$500; while Greathead's estimate is \$400 to \$500 and Phillips' estimate \$200 to \$300. Greathead is the manager of Bookers Garage and Phillips the workshop superintendent of Bookers Garage. I myself have had the opportunity of inspecting the car and have had the flaws complained of by the plaintiff pointed out to me. Having regard to the arbitrators' factual findings and the evidence of those witnesses who testified as to the depreciation, I think that the estimates of Phillips, Greathead and Driver are too low and those of Pooran and Phang somewhat on the high side. A fair figure I think would be \$750.

The case of *Anderson v. Commercial Union Assurance Co.* (1886), 34 W.R. 189, is instructive in that it shows that failure to reinstate when the insurer elects to do so entitles the assured to an award of damages. In that case the sum of £127 10s. was awarded the assured for defective reinstatement of certain machinery. In *Brown v. Royal Insurance Co.*, 28 L.J.Q.B. 275, a company executed a policy insuring premises against fire, reserving to themselves the right of reinstatement. The premises were damaged by fire and the company elected to reinstate them but did not do so. In an action for not paying, compensating or reinstating, the company pleaded that they elected to reinstate and were proceeding to do so when the commissioners of sewers caused the

premises to be taken down as being a structure in a dangerous condition and that such dangerous condition was not caused by the damage from the fire. That plea was held bad inasmuch as the contract to reinstate being lawful impossibility of its performance was no defence and the company was bound if they could not perform it to pay damages for not doing so. After election the contract to reinstate became the one contract under the policy. In the instant case the contract to reinstate was not performed in that the car was not when repaired put into its former condition. For breach of that contract damages would flow. Such damages would include not only the depreciation in value of the car but any loss by way of the hire of another car occasioned by the breach of contract. Although the rejection of the plaintiff's claim came as late as the 25th February, 1964, much of the intervening period was taken up by the objection by the plaintiff, later not pursued, against Driver being one of the arbitrators. By the end of February, 1963, the car ought to have been repaired as well as it could be, so that for the period between the date of the accident and the 28th February, 1963, the plaintiff cannot claim consequential loss under the contract of indemnity. Thereafter and until the entire rejection of the plaintiff's claim on the 25th February, 1964, the matter was in the process of arbitration under the policy. By the end of November, 1963, the plaintiff's claim should have been settled. I think that the plaintiff can claim consequential loss for the period between the end of November, 1963, and 25th February, 1964, at the rate of \$50 per month.

In the result the plaintiff should be awarded \$900 being \$750 for depreciation and \$150 for consequential loss by way of hiring of a car.

Judgment for the plaintiff for \$900 with costs to be taxed.

*Judgment for the plaintiff*

Solicitors: *Dabi Dial* (for the plaintiff); *Miss D. P. Bernard* (for the defendants).

CENTRAL GUIANA EXPLORATION COMPANY LTD.  
v. J. A. K. SYNDICATE

[Supreme Court (Chung, J.) October 30, November 6, 19, December 11, 16, 30, 1965, January 21, March 1, 1966].

*Mining—Appeal—Statutory requirement for recognisance in sum of \$50—lodged in cash—Non-compliance—Mining Ordinance, Cap. 196, s.76.*

*Mining—Lands held under claim licences—Whether location by another person is valid—Mining Regulations, Cap. 196.*

Section 76 of the Mining Ordinance, Cap. 196, requires an appellant to enter into a recognisance in the sum of \$50 conditioned for the due prosecution of his appeal. Instead of entering into the required recognisance the appellant company lodged \$50 as security for the due prosecution of an appeal under the mining laws. A cross-appeal concerned an attempt by the respondents to make a location on lands over which the appellants held certain claim licences

CENTRAL GUIANA EXPLORATION COMPANY  
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**Held:** (i) the lodging of the sum of \$50 was not compliance with the condition required by s.76 of Cap. 196 and the company's appeal would therefore be struck out;

(ii) once a claim licence is in existence the holder is deemed to be in occupation and thus has a right to continue in occupation until his licence has been revoked under reg. 24, or forfeited under regs. 29, 30 and 31 of the Mining Regulations, Cap. 196.

(iii) regulation 6 (1) gives anyone the right to locate, provided that the land has not been previously occupied or lawfully located. The appellants fell to be considered as in occupation of the land by virtue of their claim licences and so the location by the respondents was invalid.

*Appeal and cross-appeal dismissed.*

*C. L. Luckhoo, Q.C.*, for the opposers.

*C. A. F. Hughes* for the respondents.

CHUNG, J.: This is an appeal by the Central Guiana Exploration Company, Ltd., and a cross-appeal by J. A. K. Syndicate from the decision of Mr. C. S. Cole, hearing officer. A preliminary objection was taken by Mr. Hughes, counsel for J. A. K. Syndicate, that the appeal by the Central Guiana Exploration Company, Ltd., should be struck out for non-compliance with s. 76 of the Mining Ordinance, Cap. 196, in that the appellant company had lodged as security the sum of \$50 instead of entering into a recognisance as provided for by s. 76 of Cap. 196.

Section 76 of Cap. 196 read as follows:

"The appellant, within one month after the date of the decision under appeal, shall enter into a recognisance, with at least one sufficient surety, in fifty dollars to the satisfaction of the Commissioner, or Deputy Commissioner, or warden, conditioned for the due prosecution of the appeal and for abiding the result thereof, including the payment of all costs of the appeal and otherwise."

The right of appeal is a right created by statute and unless there is a strict compliance with the condition laid down by the statute the right of appeal is lost and the Appeal Court has no jurisdiction. In *Wilson v. Kensil*, 1914 L.R.B.G. p. 57, it was held that lodging the sum of \$50 is not compliance with the condition laid down. In view of this decision the company's appeal was struck out.

In the cross-appeal the Syndicate appealed on the following grounds:

- (1) The hearing officer erred in law when he held that the areas over which the appellants (syndicate) located their claims were not open to location.

- (2) The hearing officer erred in law when he held that the respondent company's claims were in existence.
- (3) The hearing officer erred in law when he held that the respondent company was permitted or authorised in law to hold claims in British Guiana.
- (4) The decision was unreasonable in that the hearing officer, having found that the respondent company were guilty of several breaches of the Mining Ordinance and Mining Regulations, nevertheless went on to hold that the said lands were not open to location by the appellant syndicate.
- (5) The decision was against the weight of the evidence in that the hearing officer, having found that there were various areas over which the respondent company had never located, nevertheless held that even those areas were not open to location by the appellant syndicate.
- (6) The hearing officer erred in law when he held that it was proved that the disputed area or any part thereof was ever lawfully located or lawfully occupied by the respondent company.
- (7) The decision was erroneous in point of law.

Grounds (1), (2), (4) and (6) were argued under the heading of "Crown Lands were open to location unless such lands have not previously been lawfully located or lawfully occupied."

The dispute in this matter is over the locations of twenty-three claims over lower Kurupung River, Mazaruni Mining District, for which claims the company is in possession of mining licences, which still exist, since 1957-1958. From the commencement of 1963 right through to September 1964, when boards were put up on all twenty-three claims by the company's agent, none of the claims was kept properly marked, as required by the regulations, by location boards in each corner of a claim. The syndicate located the area of these claims somewhere around June to August 1964. They applied for a licence. Notice was advertised in the Gazette and the respondent company opposed the licence on the ground that it had licences for the area and the licences were still in force.

With regard to ground (3), it was submitted that the company was not permitted or authorised in law to hold any land in the Colony without being authorised by licence of the Governor in Council to do so.

Without going into the question as to whether holding lands means owning lands, I am of the opinion that in these proceedings the court cannot go behind a licence, once the licence is in existence. Moreover, the knowledge of the agent Naraine, who stated in his evidence that the company had no such permission, is limited, and in proceedings to set aside the licences the person taking such steps would have to prove

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that the company had no such permission. Also one must take into account that the licences were issued by the Commissioner with the approval of the Governor under s. 32(1) of the Ordinance.

During the argument it was also submitted that there was no evidence before the court that Robert Naraine was authorised to bring these proceedings on behalf of the company. The opposition was signed by a solicitor for the company and it must be deemed that he had the authority of the company. It is true that Robert Naraine said he gave instructions to the solicitor, but the company must act through an agent.

So that the whole question in this appeal is whether or not in the opposition to the claim licence the company's licences are *prima facie* proof that the holder of the licences is the person entitled to occupy the area in question and thus deemed to be the person in lawful possession and throw on the appellant syndicate the duty to prove that the area has not been lawfully occupied or lawfully located.

Under reg. 6(1) of the Mining Regulations, Cap. 196, a person on obtaining a prospecting licence may personally or by some other person who is authorised by him and who acknowledges such an authorisation with the approval of the Commissioner, or any officer of the Department of Lands and Mines appointed for that purpose, prospect for and locate claims, provided such land has not previously been lawfully occupied or lawfully located or reserved by notice published in the Gazette, or is not a landing place etc. Any location made contrary to this regulation shall be null and void.

In *Henery v. Swain*, February 26, 1903, BOVELL, C.J., stated:

"There appears to be no provision in the Regulations of 1899 debaring any person from locating claims except the provisions contained in reg. 10."

As far as this appeal is concerned, those regulations were similar or identical with the present regulations.

The whole question, therefore, is: What is the effect, of the licences? Are they merely documents showing the following: (1) the receipt of a notice of location by the Commissioner—reg. 14; (2) the receipt of an application for a claim licence by the Commissioner—reg. 14; (3) payment of prescribed fees for filing the notice—reg. 14; (4) payment of prescribed fees for claim licence—reg. 14; (5) marking of the time on receipt of documents and filing of the same—reg. 15; (6) issue of receipts to the application—reg. 15(1); (7) publication of notice and application in the Official Gazette—reg. 18; (8) either that there was no opposition to the issue of a licence or, if there were an opposition, that opposition was resolved in favour of the applicant for the licence, as submitted by the appellant syndicate. Or, were the licences *prima facie* proof as between the parties in the present case that the holder of the licences is the person entitled to occupy the area

in question and thus deemed to be the person in lawful possession and therefore put on the appellant syndicate the onus of proving that the land in question has not been lawfully occupied or lawfully located?

Regulation 25, of the Mining Regulations, Cap. 196, states:

"Subject to the provisions of the Mining Ordinance and to these regulations, every licence shall continue in force so long as the rent payable in respect thereof is regularly paid."

Regulation 24 makes provision for the Governor to revoke a licence provided that no licence shall be revoked until the holder of the licence has had an opportunity of being heard either personally or by counsel and showing cause of such revocation before the Governor in Council.

Regulation 26 makes provision for claims to be deemed abandoned for non-payment of rent, for voluntary abandonment of claims and for claims to be open to location after abandonment of claims.

Regulation 29 makes provision for any holder of a prospecting licence to challenge the right of the holder of the claim to *continue in occupation* thereof if the claim is left unworked for a period of one year, or if the boundary lines are not kept reasonably clear, and the boundary marks erected and marked in accordance with these regulations for a period of six months in any one year, or if the area located is greater than that allowed by these regulations.

Regulation 31 gives the warden the right to challenge the right of the holder of a claim to *remain in occupation* thereof on the grounds laid down in reg. 29. In both cases, as far as the right to challenge in regs. 29 and 31 of the Mining Regulations is concerned, the Commissioner has a discretion under reg. 30(2) to allow the holder of the claim to rectify his omissions if the claim holder had made a *bona fide* attempt to work the claim or to comply with the regulations as to the marking of the boundaries, as the case may be, and that the non-observance of the formalities of those regulations is not of a character calculated to mislead other persons desiring to locate claims in the vicinity, etc. It may be noted that reg. 29 speaks of "the right of the holder of the claim to continue in occupation." Regulation 31 also speaks of "the right of the holder of a claim to remain in occupation."

It seems, therefore, that once a claim licence is in existence, the holder is deemed to be in occupation and thus has a right to continue in occupation thereof until his licence has been revoked under reg. 24 of the Mining Regulations or forfeited under regs. 29, 30 and 31 of the Mining Regulations.

In the case of a challenge under regs. 29 and 31, the onus is on the person challenging to prove the non-compliance by the claim holder of the regulations. So that in the present case it seems as between the claim holder, that is, the company holding the licence, and the syndicate, the holder of prospecting licence, that the onus is on the syndicate

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to prove that they have a right to locate the areas in question. And to do so they will have to prove that the area in question has not previously been lawfully occupied or lawfully located. For an opposite view to be held, it would mean that in the case of a challenge the challenger, who would then have been the syndicate, would have to prove the company's failure to observe the regulations, whereas in the present case where the syndicate located over an area for which the company has licences, the onus would be on (the company to prove that the claims were lawfully located. Regulation 6(1) gives anyone the right to locate, provided the land has not been previously occupied or lawfully located.

With regard to ground (5) of the grounds of appeal, I agree with the hearing officer's findings that the survey shows that the syndicate's locations completely overlapped the Kurupung from mouth to Macreba, and it is not possible for the court to say that any of them is not affected by the company's holdings. In the circumstances the cross-appeal is therefore dismissed.

It has been urged on behalf of the company that the court has full jurisdiction to hear and determine all questions of facts and law between the parties raised on appeal, and that the court should declare that the hearing officer had no jurisdiction in these proceedings to recommend that the Governor invoke the power conferred on him by reg. 24 of the Mining Regulations to revoke the licence granted to the company. As already stated, under reg. 24(1), the Governor in Council may revoke a licence issued, provided that no licence shall be revoked until the holder of the licence has had an opportunity of being heard either personally or by counsel and showing against such revocation before the Governor in Council. Someone has to make recommendations for the Governor to act under reg. 24(1), and the Commissioner of Lands and Mines would be the proper person to do so being custodian of all Crown lands. Regulation 24(2), which states —

"Whereupon the complaint of any person who desires to obtain a licence for the same area or any part thereof, and the warden certifies that the area included in any licence is not being efficiently worked, and upon such certificate such licence is cancelled, it shall be lawful to grant to such complainant a licence for such area or any part thereof,"

is only making it lawful for a complainant in those circumstances to be granted a licence over the area revoked by the Governor instead of having the complainant going through the usual process of applying for claim licences, and it does not restrict the Governor's powers of revocation. Section 35 of the Mining Ordinance supports this view—s. 35(1) of the Mining Ordinance gives the Governor power to revoke. Section 35(2) makes it lawful for a complainant to be granted a licence. Section 35(3) gives the Governor power to order that a licence shall not be issued. Section 35(4) makes any transfer void unless with the approval of the Governor.

In the circumstances, the court cannot say that the hearing officer exceeded his jurisdiction when he stated:

"The Commissioner will immediately upon giving decision submit this matter to the Governor with a recommendation that the Governor invoke the power conferred on him by reg. 24 of the Mining Regulations to revoke the licence granted to Central Guiana Exploration Company, Ltd."

Both parties to stand their own costs.

*Appeal and cross-appeal dismissed.*

## GANGASARRAN v. MISREPERSAUD

[Supreme Court—In Chambers (Luckhoo, C.J.) February 12, 17, March 12, 1966]

*Appeal—Rice assessment—Denial by landlord of tenancy—Jurisdiction of assessment committee to determine issue of tenancy—Whether appeal lies—Rice Farmers (Security of Tenure) Ordinance, 1956, s 11.*

*Rice lands—Assessment of rent—Denial by landlord of tenancy—Jurisdiction of assessment committee to determine issue of tenancy—Rice Farmers (Security of Tenure) Ordinance, 1956, s. 11.*

The respondent, who was personally out of possession, claimed to be the tenant of certain rice lands and applied for assessment of rent. The appellant landlord denied the tenancy and disputed the jurisdiction of the assessment committee to determine the issue of tenancy unless there was an admission on his part of the tenancy or there was evidence of a prior assessment in respect of the holding in the name of the respondent. On appeal from the assessment made by the committee,

**Held:** (i) the question as to whether the relationship of the landlord and tenant exists is collateral to the main question of the assessment of rent and must be decided by the committee in the first instance, but the Supreme Court may upon certiorari inquire into the correctness of the decision;

(ii) it was doubtful whether an appeal could be brought in respect of the collateral question of jurisdiction.:

*M. Poonai* for the appellant.

*B. O. Adams, Q. C.* for the respondent.

LUCKHOO, C. J.: Only one point of substance arises for determination in this appeal. The appellant contends that the assessment of rent of 41/2 acres of ricelands situate in the Polder area of No. 56 Village, Corentyne, Berbice, made by the assessment committee of the Berbice—Corentyne Area on the application of the respondent was made without jurisdiction.

The respondent Misrepersaud claimed to be a tenant of the holding of ricelands. He said that about 8 or 9 years ago he became a tenant of the holding paying a rental of \$108 per year to Bishundial (now deceased). He paid rent to Bishundial in cash but got no re-

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ceipts. His brother Sugrim cultivated the holding on his behalf, the respondent being a clerk employed at the B.G. Rice Marketing Board. On the 28th December, 1963, he posted the rent for the year 1963 to Dinanauth, a son of Bishundial. Bishundial had died on the 1st October, 1963. The holding had been devised jointly to Gangasarran and Dinanauth. Dinanauth returned the cheque to the respondent disclaiming that he had ever rented any ricelands to the respondent and stating that he has never been the owner of ricelands in the No. 56 Polder. On the 8th January, 1964, the respondent posted a cheque in payment of the rental for 1963 to the appellant in his capacity as the executor of the deceased's estate. At that time probate of the deceased's estate had not yet been applied for (See Exhibit "A"). The cheque was accepted by the appellant and cashed by him. Earlier, in the month of November 1963, Dinanauth had gone onto the holding and had ploughed it. The respondent also ploughed the holding and shied padi. On the 7th April, 1964, he sent workmen to reap the padi growing on the holding but the padi had already been reaped. The matter was reported by the respondent to the police at No. 51 Village, Corentyne, and the respondent took legal advice.

Sugrim gave corroborative evidence in relation to cultivating the holding for the respondent for eight years. He also testified that on the 7th April, 1964, the padi growing on the holding was reaped under instructions of Dinanauth.

The appellant testified to the effect that one Satram, a brother of the respondent, was the tenant of the holding in 1962 when on behalf of Bishundial he (appellant) collected rent from tenants of holdings of ricelands at No. 56, Corentyne. In 1963 Satram died and the respondent reaped the padi growing thereon at the time of Satram's death. The appellant has admitted that he cashed the cheque for \$108 sent him by the respondent in payment of the rental due for 1963 but stated that in the letter accompanying the cheque the respondent has not mentioned in what capacity he sent the cheque. The appellant admitted that he was not in a position to say if the respondent had paid rent to Bishundial and he also admitted that he had put Dinanauth in possession of the holding.

The assessment committee made the following findings of fact on the evidence adduced:

- (1) In or about the year 1956 or 1957, the applicant became a tenant of the respondent's father Bishundial who died on the 1st October, 1963, leaving a last will and testament dated 25th June, 1960, probate whereof was granted to the respondent, the executor named in the said will, with respect to 41/2 acres of rice land at the Polder area of No. 56 Village, Corentyne, Berbice, and that he (the applicant) is still a tenant thereof.
- (2) That Satram, the brother of the applicant, was never a tenant of the respondent's father with respect to the holding in

question and that the respondent's evidence that Satram and not the applicant was the tenant of the respondent's father is lying and impudent.

- (3) That the applicant was at all material times, and still is, the tenant of the holding in question, and in this connection we advert to the sum of \$108 received as rent by the respondent from the applicant for the year 1963.
- (4) The applicant was wrongfully and unlawfully evicted from the said holding on the 7th day of April, 1964 by the respondent's brother and agent who is one of the legatees under the will of Bishundial, deceased.
- (5) The soil of the said holding is clay.
- (6) The said holding is in an area declared under the Drainage and Irrigation Ordinance.
- (7) The sum of \$10.80 per acre represents the local authority rates and the sum of \$3.28 per acre represents the Drainage and Irrigation rates payable in respect of the said holding for the year 1963."

It was submitted on behalf of the appellant before me, as it was before the committee, that there being proof that the respondent was out of possession of the holding at the time of making the application and of the hearing the committee had no jurisdiction to hear the application without the issue as to whether the respondent is a tenant having been first decided by a competent court.

The respondent had made application to the committee for recovery of the holding and for damages for breach of quiet enjoyment. Those applications, heard by consent together with the respondent's application for assessment of the rental, were held by the committee to be without their jurisdiction as given under the provisions of the Rice Farmers (Security of Tenure) Ordinance, 1956 (No. 31), and there has been no appeal from the decision of the committee in this regard.

The submission made on behalf of the appellant is based upon a judgment delivered by BOLAND, J., in *Bovell v. Kalamadeen*, 1955 L.R.B.G. 58. In that case the applicant, although in occupation of premises subject to the Rent Restriction Ordinance, Cap. 186, at the time of filing of her application, had been ejected as a trespasser while the rent assessment proceedings were pending and was still out of possession when the application was called on for hearing. The rent assessor, holding that no assessment could be made on the assumption that the applicant was a tenant until that issue had been decided by a competent court, declined to make an assessment and struck out the application. On appeal, it was held by the judge in chambers, BOLAND, J., that the rent assessor was right in declining to make an assessment and that the issue as to tenancy could not be determined

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by the rent assessor. No authorities were referred to in the judgment of BOLAND, J. It emerged at the hearing of the application that the respondent is in fact the executor of the estate of Satram (deceased). This evidence was not challenged in any way by the appellant, and must be taken as admitted. In fact at the hearing of this appeal there was no challenge made in this regard. "Tenant" in s. 2 of the Rice Farmers (Security of Tenure) Ordinance, 1956 (No. 31), includes the executor of a tenant, so if Satram was indeed the tenant of the holding at the time of his death, upon his death the respondent became the tenant of the holding within the meaning of that term in the Ordinance. On the case for the appellant therefore, the committee would have jurisdiction to make the assessment, though it would be in the name of the respondent as tenant in his capacity as executor of the estate of Satram.

However, the issue raised before the committee was whether it was competent for the committee to embark upon the determination of the issue as to whether the respondent is the tenant in his own right. Counsel for the respondent has submitted that the committee is the proper tribunal to decide the issue. Counsel for the appellant contended that the committee could only decide such an issue where a tenancy had been established by an admission on the part of the appellant or by evidence of a prior assessment in respect of the holding in the name of the respondent as the tenant. He contended that there was never any such admission or assessment at any stage previous to the application before the Committee.

*In R. v. City of London, etc., Rent Tribunal, Ex parte Honig.* [1951] 1 All E.R. 195, as is stated in the headnote, "at the hearing of a reference under s. 2(1) of the Furnished Houses (Rent Control) Act, 1946, the landlord contended that the tribunal had no jurisdiction because a notice to quit given by him had expired before the date of the reference and so there was no contract of tenancy to refer to the tribunal. There being no documentary evidence as to the nature of the tenancy, the tribunal decided on the evidence of the parties that the notice to quit was invalid, and there was a subsisting tenancy between the parties, and that, therefore, the tribunal had jurisdiction to entertain the reference and to reduce the rent. On a motion by the landlord for *certiorari*,

**Held:** (i) since it was on the collateral question whether or not a tenancy subsisted that the jurisdiction of the tribunal to determine a reasonable rent depended, the tribunal was entitled to decide that collateral question first before proceeding to the main matter under consideration.

In the course of his judgment in the Divisional Court with which the other judges, (HILBERY, J., and PARKER, J.,) expressed agreement, Lord GODDARD, C. J., said (at pp. 197, 198):

"Unless the tribunal could first decide on the question of the existence of a tenancy they could only proceed on a case where both parties agreed that a contract was in existence and it would always be open to the landlord to dispute the existence of the

tenancy. That would result in an action in the county court and if the county court judge decided one way, the tenant would be able to go on with his reference, but if he decided the other way he would not. I cannot think that it was intended that that should take place in regards to proceedings under this Act. The principles on which such tribunals as these can act seem to me to be well established by decided cases. First, one has to consider whether the tribunal must, to enable itself to obtain jurisdiction, find a certain state of affairs collateral to the main question exists. The question whether or not there is a contract seems to me clearly to be collateral to the main question which the tribunal has to decide, *viz.*, what is a reasonable rental under the tenancy?"

Lord GODDARD, C.J., then referred to the case of *R. v. Income Tax Special Purpose Commissioners* (1888), 21 Q.B.D. 313, at p. 319 per ESHER, M.R.:—

"When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they acted without jurisdiction."

Lord GODDARD then stated that ESHER, M.R., pointed out in that case that the legislature may give power to the court to come to a final decision on that matter, and that if the statute does not give a right of appeal the matter cannot be questioned in any other court. Both Lord GODDARD and PARKER, J., specifically stated that furnished houses rent tribunals are rather of the first type referred to by ESHER, M.R., in *R. v. Income Tax Special Purposes Commissioners* (*ubi supra*).

In *R. v. Fulham, Hammersmith and Kensington Rent Tribunal, Ex p. Zerek*, [1951] 1 All E.R. 482, as is stated in the headnote "Under an oral agreement premises were let unfurnished on a tenancy for one year at a weekly rent of 35s. The landlord, however, refused to grant the tenant possession unless he agreed to hire his furniture to his landlord for one year at a rental of £12 and to execute a document certifying, *inter alia*, that the letting was a furnished letting at a rent of 35s. per week. The tenant signed the document and entered into possession. Later, the tenant applied to a rent tribunal to fix a reasonable rent for the premises as an unfurnished dwelling house under the Landlord and Tenant (Rent Control) Act, 1949. The tribunal accepted the tenant's evidence that the premises were originally let unfurnished, and came to the conclusion that the document signed by the tenant did not constitute a valid agreement and did not modify or replace the earlier oral agreement and that the premises were not *bona fide* let furnished. Accordingly the tribunal assumed jurisdiction and reduced the rent to 15s. a week. On application by the landlord for an order of certiorari,

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*Held:* the tribunal was entitled to inquire into the facts to decide whether or not it had jurisdiction, and, therefore, it had power to consider the *bona fides* of the agreement signed by the tenant, and *certiorari* would not issue....."

In that case the Divisional Court, comprising Lord GODDARD, C.J., with HUMPHRYS and DEVLIN, JJ., referred to and followed *R. v. City of London, etc., Rent Tribunal, Ex p. Honig* (ubi supra). It is true that in the case of *Ex p. Honig* referred to above it had not been doubted that there was at one time the relationship of landlord and tenant but this does not affect the general statement of the law as set out in the judgment in that case nor indeed that of the Master of the Rolls in *R. v. Income Tax Special Purposes Commissioners* (ubi supra.).

The powers and duties prescribed by s. 11 of the Ordinance relate to the main questions which the committee may determine and do not relate to matters collateral to the determination of those questions.

But in effect the Ordinance says that if the relationship of landlord and tenant exists and is shown to the committee to exist before the committee proceeds to do certain things the committee shall have jurisdiction to do such things but not otherwise. The question as to whether the relationship of landlord and tenant exists is collateral to the main question of the assessment of rent and must be decided by the committee in the first instance, but the Supreme Court may upon *certiorari* inquire into the correctness of the decision. The appellant has not questioned the correctness of the committee's decision by way of *certiorari*. He has brought an appeal in respect of the collateral question of jurisdiction. It is doubtful whether there is a right of appeal given in respect of collateral questions such as jurisdiction. However, the findings of fact made by the committee on the evidence adduced on the collateral question cannot be successfully challenged.

In the result the appeal fails and must be dismissed.

*Appeal dismissed*

Solicitor: *L. T. Persaud* (for the respondent).

## Mc ALMONT v. RAMBARRAN

[In the Full court, on appeal from a magistrate's court for the Georgetown Judicial District (Luckhoo, C.J., and Khan, J.) March 11, April 1, 1966]

*Evidence—Judges' Rules—Appellant found in possession of unlicensed fire-arm—Questioned about possession without being cautioned—Admissibility of answers—Judges' Rules, rr. 1, 2 and 3.*

Acting on information received, a police officer kept watch on the appellant and later found him in possession of an unlicensed revolver and ammunition. At the time of the discovery the officer felt that the

appellant had committed an offence, but, without administering any caution, questioned him as to how he came in possession, whether he had a licence and his reason for carrying the revolver and ammunition. The appellant's answers were admitted in evidence by the magistrate at the trial of the appellant for the offence of unlawful possession of the revolver and ammunition. The appellant, having been convicted, appealed on the ground that his answers had been obtained in breach of the Judges' Rules, and were therefore inadmissible in evidence.

**Held:** (i) there was not enough evidence to prefer a charge in the possession of the police up to the point of time when the appellant was searched and the revolver and ammunition were found in his possession and there was therefore no breach of r. 3 of the Judges' Rules;

(ii) the mere possession by the appellant of the revolver and ammunition was not enough evidence (as distinguished from information) which afforded reasonable grounds for suspecting that he had committed an offence, and consequently there was no infringement of r. 2 of the Judges' Rules.

*Appeal dismissed.*

*B. O. Adams, Q.C.* for the appellant.

*N. A. Graham, Crown Counsel,* for the respondent.

**Judgment of the Court:** The appellant Henry McAlmont was convicted by a magistrate of the Georgetown Judicial District on two complaints—(1) that on the 24th July, 1964, at Georgetown, in the Georgetown Judicial District, without lawful authority he had in his possession a fire-arm, to wit a revolver, contrary to reg. 49A(1) of the Emergency Powers Regulations, 1964, as amended by the Emergency Powers (Amendment) (No. 4) Regulations, 1964; (2) that on the same date and place, without lawful authority he had in his possession a quantity of ammunition, namely four rounds of .38 cartridges, contrary to the provisions above-mentioned. He now appeals against both convictions.

The evidence is to the effect that on Sunday, 24th July, 1964, at about 4.40 p.m., Deputy Superintendent of Police, Henry Fraser, Ag. Inspector of Police Ramcharran Rambarran and other policemen went to the Lighthouse Bar situate at the corner of Barrack and Water Streets, Georgetown, where they found 15 men including the appellant sitting around a table. All of the men were searched. In the appellant's right trouser pocket were found a revolver and four rounds of .38 cartridges. The cartridges were in a sugar estate pay packet envelope. Mr. Fraser asked the appellant if he had a licence to carry a revolver and ammunition and the appellant answered in the negative. Mr. Fraser asked the appellant whose property the revolver and cartridges were and his reason for carrying them. According to Mr. Fraser and Ag. Inspector Rambarran, who testified on behalf of the prosecution, the appellant replied that the revolver and ammunition were his property and that he was carrying them for protection. It is common ground that the appellant was a corporal in the Volunteer Force and was wearing the pants of the Volunteer Force and long stockings at the time of the search. There was evidence that at the material time he was on the

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permanent staff of the Volunteer Force and was assistant armourer. There was also evidence that the revolver found in the possession of the appellant was not a service revolver.

The appellant made an unsworn statement from the dock to the effect that while in the bar he was approached by a middle-aged negro man who asked if he was a member of the Volunteer Force and if he was embodied. The appellant said that he answered in the affirmative. The man then told him that he had a revolver and four rounds of .38 bullets to be surrendered to the authorities. He told the man to take the articles to the Police Force or Volunteer Force Headquarters and the man said that he had to catch the 5 o'clock train and that time was short. After some further exchanges between them the man said that he would take the matter further to the Governor if he did not accept the articles. He then agreed to take them. The man gave his name and address as someone living at Ogle Estate, East Coast, Demerara, and this he (appellant) wrote down on a piece of paper and placed it in an envelope the man gave him containing the bullets. He then placed the articles in his pocket and was about leaving the premises when the police came. The appellant denied that he told the police that the articles were his.

In finding the complaints proved the learned magistrate stated in his memorandum of reasons for decision that he accepted the evidence of the witnesses for the prosecution, that he believed Supt. Fraser and Insp. Rambarran when they said that the appellant told them that the revolver and ammunition were his, that he had no licence to carry them and that he was carrying them for his own protection. The learned magistrate said that he did not accept the explanation of the appellant and that as a matter of fact that explanation was not even suggested by counsel for the defendant to the prosecution witnesses.

Before dealing with the main complaint against the magistrate's decision it might be convenient to deal with the submission of counsel for the appellant that the magistrate took extraneous matter into consideration, namely, that the explanation given by the appellant in court was not even suggested to the prosecution witnesses by the appellant's counsel in the court below. As we read the memorandum of reasons for decision we do not think that the basis for the magistrate's decision in any way rested on the observation complained of and in any event we think that all the magistrate meant by this observation was that counsel did not suggest to the prosecution witnesses that the appellant had told the police officers of the circumstances under which he had come into possession of the articles, which it would be expected he would have done if the police officers asked him questions as to whose revolver and ammunition they were and his reason for carrying them. It is clear from the magistrate's memorandum of reasons for decision that the magistrate rested his finding that the offences were proved upon the acceptance of the testimony of the police officers and the rejection of the appellant's unsworn statement from the dock and that his reference to the appellant's explanation, not having been suggested to the prosecution's witnesses, was merely an observation following upon his findings of fact.

The main ground of appeal was that inadmissible evidence was wrongly admitted by the magistrate without which there was not sufficient evidence to support the convictions. The evidence complained of as inadmissible is that given by the police officers of the answers given Supt. Fraser by the appellant when the appellant was questioned as to how he came into possession of the articles, whether he had a licence to carry the revolver and ammunition and his reason for carrying the revolver and ammunition. It is conceded that the appellant was never cautioned until after he had been questioned and had given those answers. Counsel for the appellant has submitted that the questioning of the appellant offended against r. 2 of the new Judges Rules or even r. 3 and that the answers given by the appellant were in the circumstances not given voluntarily and freely; alternatively, the answers should have been excluded on the ground of fairness as being an infringement of those rules; in the further alternative, the magistrate erred in either failing altogether to direct himself in the exercise of his discretion to exclude such answers or in misdirecting himself as to whether they should be excluded.

It was stated by Supt. Fraser that early in July 1964 he had received certain information and as a result he had kept observation on the appellant and on the magazine of the British Guiana Volunteer Force at Eve Leary on varying dates from about a week prior to the 24th July, 1964. Between 4.15 p.m. and 4.30 p.m. on the 24th July, 1964, he received further information and as a result went to the Lighthouse Bar where the appellant was found in possession of the revolver and ammunition. Supt. Fraser said also that at the time he searched the appellant and found the articles he felt that the appellant had committed an offence. Counsel for the appellant contended that in these circumstances Supt. Fraser must be considered as having reasonable cause to suspect that the appellant had committed an offence and that his omission to caution the appellant at that stage was in breach of r. 2 of the new Judges Rules.

It would be well to set out rr. 1, 2 and 3 of the Rules:

1. When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.
2. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.
3. (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:— (thereafter follows the wording of the caution).

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(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement. (Thereafter follows the wording of the caution).

(c) When such person is being questioned or elects to make a statement, a record shall be kept of the time and place at which any questioning or statement began and ended and of the persons present."

In *R. v. Collier and Stenning* (1965), 49 Cr. App. Rep. 344, the Court of Criminal Appeal held that in r. 3(a) the word "charged" means that the prisoner must actually have been charged and does not mean "charged or ought to have been charged" and the words "or informed that he may be prosecuted" are intended merely to cover a case where the suspect has *not* been arrested and where, in the course of the questioning, a time comes when the police contemplate that a summons may be issued. The court observed that evidence obtained in breach of the rule will, subject to the discretion of the judge, be inadmissible, but that where the rule does not apply because there has been no actual charge but a police officer has enough *evidence* to prefer a charge but in breach of the principle set out in para, (d) of Appendix A of the Introduction to the Rules has not done so, that breach will be a factor in determining whether any statement obtained or made thereafter is a voluntary statement.

The principle set out in para, (d) of Appendix A of the Introduction to the Rules is as follows:

" (d) That when a police officer who is making enquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence he should without delay cause that person to be charged or informed that he may be prosecuted for the offence;"

Paragraph (e) of Appendix A of the Introduction to the Rules contains a principle which is overriding and is applicable in all cases:

" (e) That it is a fundamental condition of the admissibility in evidence against any person, equally of any oral answer given by that person to a question put by a police officer and of any statement made by that person, that it shall have been voluntary, in the sense that it has not been obtained from him by fear of prejudice or hope of advantage, exercised or held out by a person in authority, or by oppression."

In *R. v. Collier & Stenning* the appellants were seen to walk towards a van and to look into the door of premises. A police officer cautioned them and asked them what they were doing. At that stage there were no grounds for anything but suspicion. One appellant replied

that he was looking for a mate's house and the other appellant said that they were doing nothing, and that they had just left their van over there. The police officer examined the premises and saw that a pane of glass had been broken and a mortice lock removed from a door. He then arrested them and cautioned them again. One appellant then said, "You got us too early. We haven't had anything yet", and the other appellant said, "I suppose you won't say who stopped us". They were taken to the police station in a police car. Meanwhile the van was being searched and in it the police found a hacksaw, wrench, jemmy and a screwdriver. The police officer asked one appellant at the police station about the implements found in the van and he said, "They are mine. I got them in case the van breaks down. I am sorry, Mr. Stapley you have got me bang to rights, but I can't plead guilty, can I? There's always the chance of some legal slip up and I might get away with it. So I have got to have a go". The other appellant was also questioned and replied, "The jemmy is for cleaning my nails. The saw for filing them down. You know that no decent screwman would go to work without them".

The integrity of the police officers was attacked by the appellants through their counsel and the appellants gave evidence denying the alleged admissions and observations attributed to them.

The court held that there was no breach of the r. 3(a) as was contended by the appellants and that there was no breach of the principle set out in para., (d) in Appendix A. The appellants had been charged for burglary and for possessing housebreaking implements by night. The court held the presence of the implements was so intimately involved in the offence for which they were arrested (burglary) that it would be wrong to hold that the questions asked by the police officer were anyhow permissible as being directed to another offence and the court said (49 Cr. App. Rep. at p. 351):

" However in considering whether there was in any case 'enough evidence' to prefer a charge, the court must consider the exact facts as they existed at the time, and determine whether they constitute enough evidence in the sense that the police acting reasonably should have preferred a charge. Though the statements made before the appellants were brought to the police station were certainly incriminating statements, we do not think that the police, acting reasonably, should have preferred a charge. In these circumstances though the arguments advanced at the trial were different from those advanced in this court, we think that the deputy chairman was right in his conclusion that there had been no breach of the Judges' Rules."

In the instant case it has been urged that either together with or apart from the question of reasonable cause for suspecting that the appellant had committed an offence there was "enough *evidence*" to prefer a charge by virtue of the fact that the appellant was found in possession of a firearm and ammunition and the burden of proof was upon him to show that he was in possession with lawful authority. There is no evidence as to the nature of the information the police re-

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ceived in respect of the appellant nor indeed of the purpose for which they had him and the magazine under observation for the week prior to the 24th July, 1964. Further, the revolver and ammunition found on the appellant were not of the type issued to members of the Volunteer Force, though whether at the time the articles were found on the appellant the police knew of this is not disclosed by the evidence. We do not think that there was "enough evidence" to prefer a charge in the possession of the police officers up to the point of time when the appellant was searched and the revolver and ammunition found in his pocket. In that event we cannot find that there was any breach of r. 3.

Counsel for the appellant contended that Supt. Fraser had evidence which would afford reasonable grounds for suspecting that the appellant had committed an offence and that, therefore, as required by r. 2, the appellant should have been cautioned before being questioned. It is important to observe that the word "evidence" is used in r. 2—"has evidence which would afford reasonable grounds for suspecting" and not the word "information". The mere possession by the appellant of a revolver and ammunition was not *evidence* which would afford reasonable grounds for suspecting that he had committed an offence. It is true that Supt. Fraser had received certain information, but information is not necessarily evidence and in the absence of evidence of the nature and source of the information (it might have been purely hearsay) it cannot be held that Supt. Fraser had evidence which would afford reasonable grounds for suspecting that the appellant had committed an offence. If "evidence" were to be construed as "information" simpliciter then r. 1 would be rendered nugatory.

In our opinion there was no infringement of r. 2 of the new Judges' Rules and we find that the answers of the appellant cannot be considered other than voluntary, in the sense that they were not obtained from him by fear of prejudice or hope of advantage, exercised or held out by the police officers, or by oppression. It will be observed that counsel in the court below did not seek to impugn the admissibility of the evidence in any way. There was nothing unfair to the appellant in the admission in evidence of his answers to questions asked him by Supt. Fraser.

Although not forming any specific ground of appeal reference was made by counsel for the appellant to the non-production in evidence by the prosecution of the envelope in which the ammunition was found. This reference no doubt was made because in his unsworn statement from the dock the appellant had referred to his writing on a piece of paper the name and address of the man he said had given him the revolver and ammunition. In the court below it was not suggested by counsel for the appellant to either Supt. Fraser or Ag. Inspector Rambarran that such a piece of paper was found by them in the envelope with the ammunition and production of the envelope and piece of paper was not requested by counsel for the appellant. If it were conceived that either the envelope or the piece of paper alleged later in the appellant's unsworn statement to have been put by him into the envelope would support the defence it would be incomprehensible that counsel did not cross-examine the police officers in this regard or even call for the production of the envelope or of the paper or of both.

The evidence against the appellant was overwhelming. The appeals must be dismissed and the convictions and sentences affirmed with \$20 costs to the respondent in each appeal. Leave to appeal granted.

*Appeal dismissed.*

BRODIE & RAINER LTD. v. BRITISH GUIANA AND TRINIDAD  
MUTUAL FIRE INSURANCE CO., LTD.

[Supreme Court (Luckhoo, C. J.) October 6, 7, 12, 13, 14, 15, 18, 19, 21, 22, November 18, 19, 22, 23, 24, 25, 1965, January 17, 19, 20, 21, 24, 27, 28, 31, February, 1, 2, April, 13, 1966].

*Insurance—Loss by fire during and in consequence of riot and civil commotion—Exception clause—Burden of proof—Nature of riot and civil commotion—Policies assigned to bank—Whether bank must be joined.*

In protest against certain budgetary proposals of the Government, many demonstrations were organised in Georgetown by Opposition political parties and other bodies. Looting and rioting broke out and many buildings were burnt. Passers-by, who were not engaged in breaking into premises, also joined in looting. K's building and one belonging to the plaintiffs were also looted. Fire broke out at K's building and spread to the plaintiffs building which was in consequence destroyed. The plaintiffs sought to recover against the defendant insurance company on fifteen insurance policies relating to their building. Thirteen of these policies had been assigned to bank as continuing security against the plaintiffs' indebtedness with the bank. The defendants objected that it was not competent for the plaintiffs to sue on these policies without the assignees being joined as parties to the action and that the plaintiffs could not recover by reason of exception (v) (1) (a) of the policies which read: "The insurance does not cover loss or damage by fire during (unless it be proved by the insured that the loss or damage was not occasioned thereby), or in consequence of (a).riot, civil commotion,.....".

Held: (1) the assigned policies were enforceable in equity and if it was found that the defendants had not brought themselves within the exception the court would be disposed to make either an order dismissing the claim in so far as it related to the assigned policies unless the assignees were joined as plaintiffs, if they were willing to join, or as defendants, if they were unwilling to join: or an order that the plaintiffs might instead of joined obtain from the assignees a withdrawal of the assignment substituting some letter of trust under which the plaintiffs undertook to hold any sum recovered under the respective policies in trust or the assignees;

(ii) by reason of the exception, if the loss or damage by fire occurred during a riot or civil commotion, the burden lay upon the plaintiffs to show that the loss or damage was not occasioned by such riot or civil commotion;

(iii) the passers-by who joined in the looting were as much rioters as if they had first assembled with original rioters;

(iv) on the evidence the fire which destroyed the plaintiffs' property was the extension of the fire which originated in K.'s premises during the riot which took place there. That being so, the exception would apply unless the plaintiffs discharged the onus upon them to show that the fire resulting in their loss was not occasioned by the riot, and this they failed to show;

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(v) further, on the evidence the fire at K's premises fallowed the riot so quickly as to lead to the very strong presumption that the riot was the cause of the fire, and the plaintiffs' loss was therefore loss by fire in consequence of riot within the meaning of the exception;

(vi) further, on the evidence the plaintiffs' loss occurred not only during, but also in consequence of civil commotion within the meaning of the exception.

*Judgment for the defendants.*

*J. O. F. Haynes, Q.C.*, associated with *C. A. F. Hughes* for the plaintiffs.

*E. V. Luckhoo, Q.C.*, associated with *C. L. Luckhoo, Q.C.*, for the defendants.

LUCKHOO, C.J.: On Friday, 16th February, 1962 — a day which is now commonly referred to as Black Friday — the premises, fittings and stock of the plaintiffs, Brodie and Rainer Ltd., situate at lot 29, Water Street, Georgetown, Demerara, were almost completely destroyed by fire. At the time of the fire there were in force some 15 policies of insurance effected with the defendants, the British Guiana and Trinidad Mutual Fire Insurance Company Ltd., in respect of the plaintiffs' premises, fittings and stock to the extent of \$201,800. The plaintiffs' claim under those policies was subsequently rejected by the defendants.

The defendants have resisted the plaintiffs' claim on two main grounds:

- (1) that in respect of 13 of the 15 policies there were in force at the time of the fire assignments to the Royal Bank of Canada and to the British Guiana and Trinidad Mutual Life Insurance Company Ltd., and that it is not competent for the plaintiffs to recover upon those 13 policies without the assignees being joined as parties to this action;
- (2) that the plaintiffs' loss was sustained during or in consequence of riot or civil commotion within the contemplation of exception V(1) (a) contained in each of the policies.

Those policies which were assigned had been assigned in each case in a year other than the current year and were assigned as security for the plaintiffs' indebtedness to the assignees in the event of the plaintiffs' premises and/or stock being destroyed by fire. The assignments were never renewed in subsequent years by way of re-endorsement on the policies or otherwise, but the plaintiffs' managing director Frank Widdup has stated that he understood the assignments to be a continuing security to the assignees until the plaintiffs' indebtedness to the respective assignees was completely repaid. At the time of the fire the plaintiffs had not yet repaid their indebtedness to the assignees. Widdup has also stated that the plaintiffs treated the assignments as being still in force so that the assignees could recover any sums that may be due to them. Some time after the fire the plaintiffs, on the advice of the defendants, surrendered some or all of the policies. No issue has been raised in respect of the surrender of the policies.

For the defendants it has been urged that so long as it is the intention (as is the case here) of the parties for a particular policy to be assigned for an indefinite period then it is not obligatory for the assignments to be renewed periodically upon the renewal of the policies. In support of this contention the case of *Walter & Sullivan, Ltd. v. J. Murphy & Sons Ltd.*, [1955] 1 All E.R. 843, was cited. In that case there was an arrangement made between the plaintiffs and Hall & Co., which amounted to an equitable assignment to Hall & Co. by way of charge of part of a debt due from the defendants. It was held by the Court of Appeal that the plaintiffs could not proceed with their claim unless Hall & Co. were joined as parties. In that case a *dictum* of MATTHEW, L.J., in *Hughes v. Pump House Hotel Co.*, [1902] 2 K.B. at p. 193—"... the action must be in the name of the assignor..." was explained by PARKER, L.J., who delivered the judgment of the court, to mean that the question was merely whether the action should have been brought by the assignee in his own name or by the assignee in the name of the assignor. In *Hughes'* case the plaintiff, a builder, had assigned to his bankers all moneys due from the defendants, the building owners, and the question was whether the assignment was an absolute assignment within s. 25(6) of the Judicature Act, 1873, in which case the action should have been in the assignee's name, or whether it was by way of charge only in which case "the action must be in the name of the assignor..."—that is by the assignee in the name of the assignor.

For the plaintiffs it was observed that the assignments were by way of security only to cover loans; no part of the subject matter of the premises or goods which were insured was assigned or transferred to the assignees; the assignment was of the right to receive moneys if a fire occurred during the currency of the assignment; the assignees had no interest in the proceeds of the policy over and above the amounts which were owed them by the plaintiffs; in each assignment there was specific authority in favour of the assignee to collect the money. I do not think that there is any doubt that the assignments were equitable assignments. The substantial question is—were they in existence at the time of the fire? For the plaintiffs it was submitted that they were not. It was urged that each policy constituted a contract for a year at the end of which period the policy could be renewed by mutual consent, each renewal constituting a fresh contract. Counsel argued that unless there is a fresh assignment made between the parties when the new contract comes into effect or unless there is some renewal of the former assignment that assignment comes to an end at the termination of the current year of the policy. In support of that contention the case of *Stokell v. Heywood* [1897] 1 Ch. 459; 74 L.T. 781, was cited. In that case the benefit of an accident insurance policy had been assigned to a trustee for the assured's creditors. Premiums for two succeeding years were paid when the assured was killed by lightning. The question which arose was whether the policy moneys should be paid to the trustee or to the executor. It was held that upon the payment of the premium for each year an entirely new contract arose for that year only and that the amount payable under it on the accidental death of the assured in the current year for which the premium had been paid was not affected

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by any assignment made by the assured in any previous year and not extending to after acquired property. It would appear that KEKEWICH, J., was of the view that an assignment in a previous year made to extend to after acquired property might have been effective in a subsequent year. In the course of his judgment KEKEWICH, J., said (at p. 782 of 74 L.T.):

"The words of the grant in the deed of the 4th July, 1893, are words *in praesenti*. There is not anything to show that any property accruing at any future date was to pass; and that is borne out by the covenant of the debtor, who is to make full and true discovery of his affairs and so on, and give such further inventory of his property as may be required. That must mean property to which he was then entitled, the property which was to be realised, the property which was by the process of realisation to be distributed among his creditors."

And at p. 783:

"I think it would be going too far to say, having regard to the terms of the deed of the 4th July, 1893, that because the company paid under this policy, which was a contract renewed from time to time by consent, therefore the deed passed the rights under the renewed contract which might with more propriety be described as a new contract. I think it is rather a new contract than the renewal of an old contract."

Counsel for the plaintiffs has urged that if it be considered that the assignments were still in force at the time of the fire, and should the defendants fail in their defence under the exception in the policy an order may be made dismissing the claim insofar as it relates to the assigned policies unless the assignees are joined as plaintiffs if they are willing to join or as defendants if they are unwilling to join; or that the plaintiffs may instead of joinder obtain from the assignees a withdrawal of the assignment substituting some letter of trust under which the plaintiffs undertake to hold any sum recovered under the respective policies in trust for the assignees. See *Walter & Sullivan, Ltd. v. J. Murphy, Ltd.* [1955] 1 All E.R. 843, at p. 845 letters H. and I.

In the instant case the plaintiff's managing director has stated that he understood the assignments to be a continuing security to the assignees until the plaintiffs' indebtedness to the assignees is completely repaid and I think it is fair to conclude that the assignees and the plaintiffs contracted on that basis.

In effect the plaintiffs had promised for consideration to assign future property capable of ascertainment. Such an assignment is enforceable in equity. In *Tailby v. Official Receiver* (1888) 13 App. Cas. at p. 543, Lord MACNAGHTEN stated the principles as follows : —

"It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment

for value in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding on the subject matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified."

And at p. 546:

"Long before *Holroyd v. Marshall* (1862) 10 H.L.C. 191, was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord THURLOW said he took to be universal, 'that whenever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him, voluntary or with notice, raises a trust': *Legard v. Hodges* (1792), 1 Ves. Jun. 478."

SWINFEN EADY, L.L, in the case of *In re Lind: Industrials Finance Syndicate Ltd. v. Lind*, (1915) 2 Ch. at p. 360, in summing up the effect of the authorities said:

"It is clear from these authorities that an assignment for value of future property actually binds the property itself directly it is acquired—automatically on the happening of the event, and without any further act on the part of the assignor—and does not merely rest in, and amount to, a right in contract, giving rise to an action. The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for."

Having come to the conclusion that the assignments made by the plaintiffs in respect of 13 of the 15 policies are enforceable in equity, I would be disposed to make one of the orders suggested by counsel for the plaintiffs in the event that it is found that the defendants have not brought themselves within the exception V (1) (a) contained in the policies.

The main issue in this action was whether the plaintiffs' loss was sustained during or in consequence of riot or civil commotion within the contemplation of the exception V (1) (a) contained in the policies. This exception in each policy reads as follows:

"The Insurance does not cover loss or damage by fire during (unless it be proved by the Insured that the loss or damage was not occasioned thereby), or in consequence of,—(a) ... riot, civil commotion ... "

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Before dealing with the evidence adduced it is necessary to ascertain upon whom the onus lies in proving that the case is within the exception. The general rule is that the onus of proving that a condition has been broken rests upon the insurers but by express words in the policy the onus may be placed upon the insured (*Levy v. Assicurazioni Generali*, [1940] 3 All E.R. 427, P.C.). An exception similar in wording to the one in the instant case was in point before the House of Lords in the case of *Motor Union Ins. Co. v. Boggan* (1923) All E.R. Rep. 331 —

"Loss or damage arising during (unless it be proved by the insured that the loss or damage was not occasioned thereby) or in consequence of earthquake, war, invasion, riot, civil commotion, military or usurped power."

The Earl of BIRKENHEAD, L.C, in whose opinion the four other members of the House concurred on this point, said at p. 332, letter E:

"The words 'unless it be proved by the insured that the loss or damage was not occasioned thereby' are enclosed within brackets and they may be dismissed with the observation that one is not to forget in construing this exception that the onus is, as learned counsel for the respondent very properly pointed out, upon the appellants here. It is, therefore, necessary for the appellants here to satisfy your Lordships, as it was an obligation upon them to satisfy the courts below, that this loss or damage was the result of riot or civil commotion or both."

In that case the insurers were the appellants and the insured the respondent. This opinion must be contrasted with the opinion of the Judicial Committee of the Privy Council in the case of *Pawsey & Co. v. Scottish Union and National Insurance Co.* [see report contained in Appendix IV at pp. 505-510 in WELFORDS & OTTER-BARRY'S FIRE INSURANCE, 2nd edition]. That action arose out of the conflagration in Kingston, Jamaica, on the 14th January, 1907, the day on which a disastrous earthquake occurred in Jamaica. The action was brought to recover under four policies of insurance against loss by fire on stock in trade at the plaintiffs' stores. Three of the policies contained a condition providing that such policies did not cover—

"Loss or damage by fire occasioned by or happening through...earthquake,"

and the fourth policy contained a condition providing that such policy did not cover —

"Loss or damage by fire (unless it be proved by the insured that the loss or damage was not occasioned thereby) or in consequence of...earthquake or other convulsion of nature."

The trial judge in dealing with the burden of proof treated all the four policies alike placing the burden upon the insurers. It was con-

tended that this was a misdirection insofar as the fourth policy was concerned and that the proper direction in regard to that policy was that if the loss by fire occurred during the earthquake, the burden lay upon the insured to show that the earthquake was not the cause. The Privy Council (Lords MACNAGHTEN, ATKINSON and COLLINS and Sir ARTHUR WILSON) was of the opinion that the contention of the insurers on this point was correct and that the proper ruling would have been that suggested. The Privy Council observed that the difference between the one ruling and the other was material only if the loss by fire occurred *during* the earthquake, and whether it did so or not was a question for the jury. That question had been left to the jury with a proper direction and answered in the negative so that the misdirection complained of became inoperative.

It will be appreciated that the views expressed by the House of Lords and the Privy Council on the onus insofar as it related to the words "during (unless it be proved by the insured that the loss or damage was not occasioned thereby)" appear to be in conflict. In the earlier case of *Lindsay & Pirie v. The General Accident Fire & Life Assurance Corporation Ltd.* (1914), S. Afr. Law Reports, Appellate Division, the Appellate Division of the Supreme Court of South Africa (INNES, C.J., SOLOMON, J.A., and DE VILLIERS, Actg. J.A.) had reached a conclusion similar to that expressed by the Privy Council in respect of an exception clause similarly worded, contained in a fire insurance policy, SOLOMON, J.A., in delivering the judgment of the Court, said (at p. 596):

"And this brings me to the last point which has attempted to be made on behalf of the appellants, *viz.*, that even if the fire did occur during a state of civil commotion, it has been proved by the plaintiffs that it was not occasioned thereby. Now the question that arises on this point is whether the plaintiffs have discharged the onus of proof which is cast upon them by the pleadings. For the legal position would appear to be as follows:— If premises, which have been insured against fire, are burnt down, the Insurance Company is *prima facie* liable for the damage sustained. If, however, the Company brings itself within the terms of the exception by proving that the fire was occasioned *in consequence* of civil commotion, it is relieved from liability, and the same result follows if it is established that the fire occurred *during* civil commotion, 'unless it be proved by the insured that the loss or damage was not occasioned thereby.' Now the defendant company has satisfied the burden which was laid upon it of proving that the fire took place during a state of civil commotion, and the only remaining question is whether the plaintiffs have discharged the onus thereby shifted upon them of establishing that the damage was not occasioned thereby. For if not, the case must be decided against them even though it may be open to doubt whether in fact the fire was occasioned by civil commotion. Now the onus cast upon the plaintiffs is that of proving a negative, and it is difficult to see how it can be discharged except by satisfactory

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evidence as to how the fire originated. If, for example, the plaintiffs had established that the loss was due to an accident, or that the building had been set on fire by some person in order to gratify a long-standing spite, having no connection with the disturbances it might be said that proof had been given that the loss had been occasioned by something else than civil commotion. But in the absence of evidence to show how the fire originated, it is difficult to see how the onus cast up the plaintiffs can be discharged."

While paying great regard to the unanimous opinion of the House of Lords in the *Boggan* case I would respectfully wish to adopt the opinion of the Privy Council in the *Pawsey* case and the reasoning of SOLOMON J. A., in the *Lindsay and Pirie* case. The opinion of the Lord Chancellor in the *Boggan* case is curiously worded and it may be that the Lord Chancellor did not mean to say that the words in brackets do not place any burden on the insured even where the insurers have discharged the burden placed upon them of proving that the fire took place during the state of civil commotion. But the difficulty in placing this interpretation upon the opinion of the Lord Chancellor is his conclusion that the loss or damage must be proved by the insurers to have been *the result of riot or civil commotion*.

The evidence adduced must be examined in some detail in view of the contention of the plaintiffs that at no time on or before Friday, 16th February, 1962, does the evidence disclose that there was in existence a state of civil commotion. The plaintiffs adduced evidence to show that they suffered a loss of their buildings, stock and equipment to an extent far in excess of the amount of \$201,800 claimed under the policies. Although there was considerable cross-examination of the plaintiffs' managing director Widdup as to the extent of the loss no point in this regard was made in the summing up of counsel for the defendants. It is common ground that the loss was occasioned by fire spreading from the premises of L. Kawall Ltd., situate immediately to the north of the plaintiffs' premises on the western side of Water Street and that the fire spread by the operation of natural causes only. The plaintiffs also proved that the 15 policies of insurance covering the plaintiffs' premises, stock and equipment to the extent of \$201,800 were in force at the time of the fire. Having proved that their loss was caused by fire and that the policies were in force at the time of the fire the plaintiffs were allowed to split their case having regard to the nature of the defence set up by the pleadings and rebuttal evidence was later adduced to meet the evidence led by the defendants which endeavoured to show that the loss fell within the exception.

The evidence discloses that certain budgetary measures proposed by the Government met with considerable disapproval from the commercial community, the trade unions and the political parties then in opposition—the People's National Congress led by Mr. L. F. S. Burnham and referred to in the evidence as the P.N.C., and the United Force led by Mr. Peter D'Aguiar and referred to in the evidence as the U.F. The party then in power was the People's Progressive Party

referred to in the evidence as the P.P.P. Dr. C. B. Jagan was the Premier. The forms in which this disapproval was expressed have been shown in the events which took place from and including Friday, 9th February, 1962, and culminating in Black Friday, 16th February, 1962, when there were disorders in Georgetown which resulted in what were conceded to be riots at various points in Georgetown. It was during the late afternoon of the 16th February, 1962, that the plaintiffs' premises, stock and equipment were destroyed by fire.

His Lordship then dealt with the evidence and proceeded as follows:

The evidence of S. J. Kawall, Churchill Cox and Inspector Jainarine, which I accept, clearly establishes that looting of Parsram's and Kawall's in Water Street was in progress from about 4.30 p.m. after those premises had been broken into by portions of a crowd which came from north in Water Street armed with sticks, bottles, bricks and what Cox described as stanchions. The looters at Kawall's store included persons who joined in the looting but did not form part of the crowd which had broken into Kawall's store. Looting at Kawall's was still in progress when fire was seen in the upper flat of the Kawall building. Looters had set fire in various places in Parsram's store and the efforts of Cox and Peroune did not succeed in putting out those fires. Eventually Parsram's store was destroyed by fire. The fire at Kawall's spread to the plaintiffs' premises and both of those premises were burnt down. I cannot accept the evidence of McPherson that a cordon existed at the corner of Water and Commerce Streets before Kawall's was on fire. I was not impressed with McPherson's evidence relating to a first visit to the plaintiffs' premises. It is perhaps significant that Widdup in his evidence did not refer to such a visit and in fact spoke of standing outside of the plaintiffs' premises after his return there at about 3-3.15 p.m. until 5 p.m. when he opened the door of the plaintiffs' store for the firemen to enter. Lilleyman's evidence of the area being deserted at the time of his hearing the sound of an explosion at Kawall's, I am also unable to accept in the face of trustworthy evidence to the contrary.

Counsel for the plaintiffs has conceded, and I think properly conceded, that on the 16th February, 1962, a number of riots took place at various places in Georgetown. Some of the instances of riot mentioned by him are those at the Electricity Corporation in Water Street and outside and in the vicinity of Freedom House. He also conceded that what took place at Kawall's store in Water Street constituted a riot. He, however, submitted that the fire at Kawall's was not proved by the defendants to have been the result of a riot. The judicial definition of a riot is that stated in *Field v. Receiver of Metropolitan Police*, (1907) 2 K.B. 853, a p. 866, adopting in substance Hawkins' definition 1 Hawkins c. 65 ss. 1-5; to include five necessary elements —

- (a) three persons at least must take part;
- (b) there must be a common purpose;
- (c) there must be execution or inception of the common purpose;

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- (d) there must be an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose;
- (e) there must be force or violence used in the execution of the common purpose not merely used in demolishing but displayed in such a manner as to alarm at least one person of reasonable firmness and courage.

This definition was applied in *Ford v. Receiver for the Metropolitan Police District* (1921) 2 K.B. 344, where it was held sufficient that one witness said he was afraid that his own property might suffer, and in *Munday v. Metropolitan District Receivers* (1949) 1 All E.R. 337. In *R. v. Sharp & Johnson*, (1957) 1 Q.B. 552, it was stated that the fifth element as laid down in *Field's* case may require re-consideration at some future time. It is not disputed that riot must be *in terrorem populi* or that the violence and tumult must in some degree be premeditated.

A number of questions in the cross-examination of witnesses for defendants was directed to show that passersby who were not engaged in the breaking into of premises joined in the looting. In this regard I would adopt the following passage appearing at p. 248 in Vol. 1 of RUSSELL ON CRIME (12th Edn.) adopting 1 Hawkins, c. 65, s. 3:

"If any person seeing others actually engaged in a riot, joins them and assists them therein, he is as much a rioter as if he had first assembled with them for the same purpose, inasmuch as he had no pretence that he came innocently into the company, but joined himself to them with an intention of seconding them in the execution of their unlawful enterprise. And it would be endless, as well as superfluous, to examine whether every particular person engaged in a riot were in truth one of the first assembly, or actually had a previous knowledge of the design."

On the evidence I find that what took place at Kawall's constituted a riot and I find also that the fire at Kawall's originated and was in blaze *during* the riot. That fire spread to the plaintiffs' premises and destroyed them along with the stock and equipment therein. The fire had spread from Kawall's to the plaintiffs' premises by the operation of natural forces only without the intervention of anything to change its character or identity. Counsel for the plaintiffs contended that insofar as the plaintiffs' loss is concerned for the exception to apply there must be proof that the riot occurred at or in proximity to plaintiffs' premises so that it could have been the cause of the fire. I agree that one has in respect of causation to look at the proximate and not the remote cause. See *Ionides v. Universal Marine Insurance Company*, 8 L.T. Rep. 705, cited by MCKINNON, L. J., in *Hall Bros. S. S. Co., Ltd., v. Young S. S. Trident* (1939), 19 Asp. M.C. (N.S.) 269, at p. 272. This principle applies equally to exceptions and insurers are only exempt from liability when the loss is directly or proximately occasioned by a fire which is attributable to an excepted cause unless the language of the clause extends to exempt the insurers

from liability even where the loss is only the remote consequence of an excepted cause, e.g., as in *Coxe v. Employers' Liability Assurance Corporation*, (1916) 2 K.B. 629, a case of accident insurance where the exception excluded death directly or indirectly caused by or traceable to war, or where the excepted peril from its nature cannot be the proximate cause of fire but only its remote cause, e.g., an earthquake fire as in *Broadhurst, Lee & Co. v. London & Lancashire Fire Ins., Co., Ltd.* (1908), already cited.

Several authorities were cited on both sides to illustrate what may be considered as proximate cause. Among those authorities were the cases of *Everett v. London Assurance* (1865), 19 C.B. (N.S.) 126; *Marsden v. City and County Assurance Co.* (1866), L.R. 1. C.P. 232, and *Rogers v. Whittaker* (1917) 1 K.B. 942.

*Everett v. London Assurance* was a case where the damage was caused by the concussion of air which resulted from an explosion which in turn was caused by fire. It could not, therefore, be said that the damage was caused by fire. *Marsden v. City and County Assurance Co.* was a case where plateglass was damaged by the violence of a mob which formed when a fire broke out next door to the assured's premises. There the damage could hardly be held to have been caused by the fire. The proximate cause was the violence of the mob and the remote cause the fire next door. Perhaps a more comparable case is that of *Rogers v. Whittaker* where an incendiary bomb dropped from an enemy Zeppelin set fire to a warehouse causing loss. Such loss while caused by fire was proximately caused by enemy action and therefore fell within the exception of military or usurped power.

The fire which destroyed the plaintiffs' property was in fact the extension of the fire which originated in Kawall's premises during the riot which took place there. That being so the exception would apply unless the plaintiffs discharged the onus upon them to show that the fire resulting in their loss was not occasioned by the riot. It has not been suggested that the fire resulted from an accident. The facts indeed are against any such conclusion. It has not been shown that the fire resulted from any grudge or spite on the part of anyone and was unconnected with the riot. On the evidence I must hold that the plaintiffs have failed to discharge the onus placed upon them by the exception. It may be remarked that in the *Pawsey* case where the Privy Council expressed its opinion on the onus of proof, the assured's contention was that their loss resulted from an earthquake fire which spread from other premises. The direction of the trial judge was challenged in respect of the words (in the fourth policy)—following the word "during". The duration of the earthquake shock in that case was stated by the witnesses to be about half a minute. It was not contended that the fire which destroyed the assured's premises had spread to those premises while the shock was yet in progress. In fact the Harbour Street fire (the one the insurers alleged had spread to the assured's premises) was put by various witnesses at an interval of half to three quarters of an hour after the

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shock. The jury found that the fire which destroyed the assured's premises did not occur during or in consequence of earthquake. In finding that the trial judge's direction on the burden of proof as it related to the words in bracket in the exception referred to above was incorrect, the Privy Council said that the difference in the ruling was material only if the loss by fire occurred during the earthquake, that the question was one for the jury and had been left to them with a proper direction and had been answered in the negative, but did not say that the question should not have been left to the jury on the facts of the case. The reason for the Privy Council finding a misdirection on the burden of proof in the fourth policy I think, is that the insurers were urging that the fire which destroyed the assured's premises was the same fire which had originated in the premises at 92 Harbour Street and was an earthquake fire—questions of fact for the jury—thereby raising the issue of whether the assured's loss was by fire *during* earthquake.

The other limb of the exception relating to riot is whether the plaintiffs' loss was by fire in consequence of riot. Here again the question of proximate cause arises. The fire at Kawall's was observed even as the rioting continued though the rioters had thinned out. I am of the opinion that the fire followed the riot so quickly as to lead to the very strong presumption that the riot was the cause of the fire. In other words the fire was the result of the rioting. The plaintiffs' loss has therefore been proved to have been loss by fire in consequence of riot.

The defendants have further relied on the exception relating to civil commotion undertaking the burden placed upon them for proving that the plaintiffs' loss was loss by fire during or in consequence of civil commotion. Counsel for the plaintiffs while conceding that there were several riots taking place in various parts of Georgetown prior to the fire at Kawall's premises, submitted that there was no evidence of the existence of a state of civil commotion at the time of the fire at the plaintiffs' premises or before at any previous time. The definition of civil commotion given in *WELFORD AND OTTER-BARRY'S FIRE INSURANCE* 3rd Edn., at p. 64, has received judicial approval by the Privy Council in *Levy v. Assicurazioni Generali*, [1940] 3 All E. R. 427 at p. 431, letters F-G —

"Civil Commotion. This phrase is used to indicate a stage between a riot and civil war. It has been defined to mean an insurrection of the people for general purposes, though not amounting to rebellion; but it is probably not capable of any precise definition. The element of turbulence or tumult is essential; an organised conspiracy to commit criminal acts, where no tumult or disturbance until after the acts, does not amount to civil commotion. It is not, however, necessary to show the existence of any outside organisation at whose instigation the acts were done."

Counsel for the defendants has submitted that the events related in evidence commencing on Friday, 9th February, 1962, and culminating on Friday, 16th February, 1962, while not amounting to rebellion do

show an insurrection of the people for general purposes, there being ample proof of the essential elements including that of turbulence or tumult.

Counsel for the plaintiffs referred to a number of cases, *e.g.*, *Cooper v. General Accident Fire and Life Assurance Co., Ltd.* (1923), 39 T.L.R. 113, H.L.; *Motor Union Insurance Co., Ltd. v. Boggan*, (1923) All E.R. Rept. 331, H.L.; two cases which arose out of the Irish disturbances; *Bankers and Traders Insurance Co., Ltd. v. Cromwell*, 1952 L.R.B.G. 153, W.I.C.A., a case from Grenada, where the existence of civil commotion was held to be proved and observed that in all of them the state of commotion existed over a period of days before the happening of the event in question, whereas in the instant case it could not be said that there was in existence any state of turbulence or tumult prior to the morning of the 16th February, 1962. Counsel contended quite rightly that it must also be borne in mind that an affray is not civil commotion. On the other hand, the events may be such that although they take place over a period of but some hours a state of civil commotion comes into existence. Each case must be decided on its own facts and circumstances. The events of the period, Friday, 9th February to Thursday, 15th February, 1962, including the inscription on the banners and placards carried in processions and by crowds, are of importance in understanding the events which occurred on the 16th February, 1962. To recapitulate briefly, it was apparent that there was great dissatisfaction among the opposition parties in the Legislature, the trade unions, the Civil Service Association and in the commercial community to certain budgetary proposals on the part of the Government then in office—the Premier being Dr. C. B. Jagan the leader of the People's Progressive Party. As Lilleyman in the course of his evidence correctly observed, with each succeeding day those in opposition to those budgetary measures banded themselves more firmly together to oppose the Government. As early as Monday, 12th February, 1962, the Police and Fire Brigade were initiating certain precautionary measures in the event of disorders breaking out. By Wednesday, 14th February, 1962, the commercial activity of the city was almost paralysed by reason of a general strike having been called by the T.U.C. and of workers coming out on strike and not without some effort on the part of strikers to coerce those who were unwilling to come out on strike. By Wednesday, 14th February, 1962, the Governor was satisfied that there was apprehended civil disturbance in the Colony and accordingly Proclamation No. 2 of 1962 was made and published. (Of course the opinion of the Governor does not prove that there was a state of civil commotion and it is not so contended). Some of the essential services were being run by skeleton staffs while the remainder was at a standstill by reason of employees going on strike. On Thursday, 15th February, 1962, the two leaders of the opposition parties in the Legislature followed by about 30,000 persons openly defied the Government and the Proclamation by going in procession around the Public Buildings which contained the Legislative Hall as well as the offices of the Premier and other Ministers of Government. On that evening the President of the T.U.C.

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addressed a meeting in terms which next morning was followed by what has already been described in considerable detail as taking place outside the Electricity Corporation. The succeeding events on Friday, 16th February, 1962, up to the time Kawall's store and then the plaintiffs' premises were burnt down have also already been fully described. There were persistent efforts made to hamper the work of the Fire Brigade, the appliances being subject to attack by firearms and missiles. There was malicious destruction of hoses and the setting up of road blocks to impede the passage of the appliances. This was in addition to the earlier steps taken to stop the supply of water pumped through the mains from the waterworks. Having regard to the evidence adduced, it is not possible for me to come to any other conclusion than that there was in existence at the time of the Kawall fire and indeed at the time of the destruction by fire of the plaintiffs' goods, equipment and premises, a state of civil commotion in the city of Georgetown and in the area where the plaintiffs' premises were situate. The plaintiffs have not shown that their loss was not occasioned by civil commotion. The defendants have clearly proved that the plaintiffs' loss occurred not only during but also was in consequence of—the result of—civil commotion which was then in existence in Georgetown and including the area where the plaintiffs' premises were situated.

In the result the defendants have brought themselves within the exception clause V in the policies and the plaintiffs' claim therefore fails and must be dismissed with costs certified fit for two counsel.

I would like to express my appreciation to counsel on both sides for the careful preparation and presentation of their arguments in a case in which a great volume of evidence was adduced and a large number of authorities had to be critically examined.

Stay of execution for six weeks granted.

*Judgment for the defendants.*

Solicitors: *A. G. King* (for the plaintiffs);

*F. I. Dias* (for the defendants).

## GULBATOOR SINGH v. KANOO

[In the Full Court, on appeal from the Magistrate's Court for the Berbice Judicial District (Luckhoo, C.J., and Khan. J.) April 22. 29, 1966]

*Criminal law—Offence against Emergency Regulations 1964, Reg. 18 A (1) (b)—Whether prosecution must prove state of emergency—Evidence Ordinance, Cap, 25.*

A prosecution for an offence committed contrary to Reg. 18, A (1) (b) of the Emergency Powers Regulations, 1964, as amended, was dismissed by the magistrate on the ground that the prosecution had failed to adduce *prima facie* evidence of the existence of a state of emergency. At the

material time there was in force a resolution of tire Legislature passed under art. 14(1) of the Constitution of British Guiana, 1961, continuing in force a Proclamation of public emergency which had been previously made by the Governor under s. 3 of the Emergency Powers Orders-in-Council, 1939 to 1964.

**Held:** (i) proclamations issued under an Order of the Queen-in-Council or under the Constitution may be judicially noticed;

(ii) the magistrate erred in holding that *prima facie* evidence of the existence of the state of emergency should have been given by the prosecution.

*Appeal allowed;*

*matter remitted.*

*N. A. Graham*, Senior Crown Counsel (ag.), for the appellant.

*M. Poonai* for the respondent.

**Judgment of the Court:** A complaint was brought against the respondent Kanoo for publishing a statement likely to promote feelings of hostility, contrary to the provisions of reg. 18A (1) (b) of the Emergency Powers Regulations, 1964, as amended by the Emergency Powers (Amendment) (No. 4) Regulations, 1964. The learned magistrate accepted the evidence of the witnesses for the prosecution and was satisfied that the words used by the respondent satisfied the test of being words "likely to promote feelings of hostility between the races of the inhabitants of the Colony." The magistrate, however, dismissed the complaint giving as his reason for doing so that although the prosecution need not prove the existence of a state of emergency at least *prima facie* evidence of its existence ought to have been led.

It is contended on appeal that the learned magistrate was in error in dismissing the complaint for the reason that he should have taken judicial notice of the proclamation of emergency made by the Governor and published in the Gazette declaring that a state of public emergency exists for the purposes of art. 14 of the Constitution of British Guiana and of the resolutions of the Legislature from time to time approving the continuance in force of the proclamation of emergency.

The Emergency Powers Regulations, 1964, under which the complaint is laid, were made under s. 6 of the Emergency Powers Orders in Council, 1939 to 1964, in accordance with art. 22 (1) of the Constitution and by virtue and in exercise of all other powers enabling the Governor in that behalf. Section 6 empowers the Governor to make such regulations as appear to him to be necessary or expedient for securing public safety, the defence of this territory, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community.

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By s. 3 of the Orders in Council the provisions of s. 6 shall have effect in British Guiana in case of any public emergency if they are brought into operation by proclamation made by the Governor. A proclamation is also required by art. 14 of the Constitution to be published in the Gazette and ceases to be of effect after the period specified in that article unless a resolution is passed by the Legislature for its continuance in force from time to time for a further period not exceeding three months beginning on the date on which it would otherwise expire.

It is conceded that the Emergency Powers Regulations are required to be judicially noticed, but it is contended that proof must be given of the making of the proclamation of public emergency and of any relevant resolution of the Legislature continuing in force the proclamation made under art. 14 (1) of the Constitution beyond Sunday, 29th August, 1965, the date on which the offence was alleged to have been committed.

Section 24 (iv) of the Evidence Ordinance, Cap. 25, provides that judicial notice shall be taken of "all publications... of the Colony, unless the contrary is expressly provided in any of the publications..."

Section 24 (v) of the Evidence Ordinance, Cap. 25, provides that judicial notice shall be taken of all orders of the Queen in Council having effect in the Colony, and all rules, regulations or by-laws, respectively made or approved by the Governor and Legislative Council or by the Governor in Council, or by any other body or person under the authority of any Ordinance. By virtue of s. 20 (2) of the British Guiana (Constitution) Order-in-Council, 1961, references in the Evidence Ordinance, Cap. 25, to Governor-in-Council shall be construed as references to the Governor.

Judicial notice is also required by s. 24 (xv) of the Evidence Ordinance, Cap. 25, of the Government Gazette of this Colony. In this connection see para. 1106 to 1108 in PHIPSON ON EVIDENCE (10th edn.).

Counsel for the appellant submitted that by virtue of these provisions, more especially those of s. 24 (iv), judicial notice is required to be taken of proclamations made by the Governor and that the provisions of s. 39 of the Evidence Ordinance, Cap. 25, as to proof do not apply, those provisions excepting as they do proclamations issued by the Governor, Orders-in-Council and rules, regulations and by-laws made or approved by the Governor or Legislative Council or by the Governor-in-Council not being within the provisions of s. 24 of the Ordinance. Counsel for the respondent contended that proclamations by the Governor are not specifically mentioned in any of the provisions of s. 24 and therefore fall to be proved in the manner provided by s. 39.

Even before the amendment of s. 21 of the Interpretation Ordinance, Cap. 5, by s. 4 of Ordinance No. 16 of 1960, whereby the expression "rules" in s. 21 was re-defined to include *inter alia* proclamations, it had never been held that it was necessary to tender *prima facie* proof of the making of a proclamation bringing into operation an Ordinance or of the passing of a resolution by the Legislature extending the life of an Ordinance, e.g., the Rent Restriction Ordinance, In *Manning v. Ah Fook*, 1915 L.R.B.G., App. J., BERKELEY, J., held that by virtue of s. 25 (4) of the Evidence Ordinance, 1893 (now s. 24 (iv) Kingdon Edition) judicial notice was required to be taken not only of Ordinances but also of proclamations mentioned in Ordinances which bring the Ordinances into operation. Such proclamations he considered to be of a public nature and further held that if a magistrate is unacquainted with a proclamation he could on his own initiative refer to the Official Gazette to satisfy himself in relation thereto. BERKELEY, J., observed that s. 40 of the 1893 Ordinance (s. 39 of Cap. 25) specially exempts proclamations which are within the provisions of s. 25 of the 1893 Ordinance (s. 24 of Cap. 25).

In the same way proclamations issued under an Order of the Queen-in-Council or under the Constitution may be judicially noticed.

On the 22nd May, 1964, the Governor by Proclamation No. 3 of 1964 declared that a state of emergency existed for the purposes of art. 14 of the Constitution and on the same day by Proclamation No.4 of 1964 he declared that the provisions of Part II of the Emergency Powers Order in Council, 1939 to 1963, shall come into operation in British Guiana. These proclamations were published in the Supplement to the Official Gazette (Extraordinary) on the 23rd May, 1964. Thereafter, Proclamation No. 3 of 1964 was kept in force by virtue of sub-para, (d) of para. 1 of art. 14 of the Constitution, as inserted by s. 2 of the British Guiana (Emergency Provisions) Order, 1964, S.I. 1964 No. 776, published in the Official Gazette of 13th June, 1964, and brought into operation on that day by instrument made by the Governor under sub-s. (2) of s. 1 of the Order (see Notice 590 B at p. 165 in supplement to the Official Gazette of 13th June, 1964). Sub-para. (d) of para. 1 of art. 14 of the Constitution provided as follows —

" (d) Part II of the Emergency Powers Order in Council 1939 is in operation in British Guiana."

This provision continued in force until the British Guiana (Constitution) (No. 2) Order, 1965 S.I. 1965 No. 979, made on the 14th April, 1965, and published in the supplement to the Official Gazette of the same date provided by s. 3 thereof that the British Guiana (Emergency Provisions) Order 1964 shall have effect as if s. 2 were omitted there from. However, s. 4 (1) of the Order S.I. 1965 No. 979 declares for the avoidance of doubts that any instrument made by the Governor in the exercise of any function conferred upon him by the Emergency Powers Order-in-Council 1939 as amended or by s. 4 of the British Guiana (Emergency Provisions) Order, 1964, as the case may be shall.

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subject to the Governor's powers to revoke that instrument and subject also, in the case of Regulations made under the Emergency Powers Order in Council, 1939, to any proclamation made by the Governor directing that Part II of that Order shall cease to have effect in British Guiana and to the provisions of Part I of the Constitution, as modified by the Order (S.I. 1965 No. 979), continue to have full force and effect.

Section 4 (2) of the 1965 Order, S.I. 1965 No. 979, provided that art. 14 of the Constitution shall have effect as if a proclamation of emergency had been made thereunder at the commencement of that Order and as if the House of Assembly had passed a resolution approving its continuance in force for a period of three months from the commencement of the Order (*i.e.*, from 14th April, 1965).

On the 6th July, 1965, within the aforesaid period of three months, the Governor by Proclamation No. 2 of 1965 published in the supplement to the Official Gazette of the 6th July, 1965, declared that a state of public emergency exists for the purposes of art. 14 of the Constitution. On the same day by Proclamation No. 3 of 1965 (published in the same issue of the Gazette) the Governor in pursuance of the provisions of art. 14 (3) (a) of the Constitution summoned the House of Assembly to meet and sit at 2 p.m. on the 9th July, 1965. On the 15th July, 1965, the House of Assembly resolved (Resolution XXVII First Session 1964-1965) that Proclamation No. 2 of 1965 does continue in force until 18th October, 1965, unless sooner revoked. It was not revoked.

It would follow, therefore, that Proclamation No. 4 of 1964 declaring Part II of the Emergency Powers to be in force continued in force beyond 29th August, 1965 (the date the complainant alleges the respondent committed the offence), and that Proclamation No. 2 of 1965 also continued in force beyond that date.

We are of the opinion that the learned magistrate erred in holding that *prima facie* evidence of the existence of a state of emergency should have been given by the prosecution. As the respondent closed his case without adducing evidence and the learned magistrate found the complaint proved save for proof of the existence of a state of emergency we will in allowing the appeal direct that the magistrate's order of dismissal be set aside and a conviction on the complaint entered, and that the matter be remitted to the learned magistrate for him to impose such sentence on the respondent as he may consider to be warranted in the circumstances of the case. Costs \$27.50 to the appellant.

*Appeal allowed,  
matter remitted.*

## NARAIN v. OUTRADAI AND PERSAUD

[Supreme Court (Persaud, J.) January 18, 20, November 29, 30, December 14, 1965, January 14, 1966]

*Divorce—Evidence—Adultery—Standard of proof—Corroboration required—Letter from respondent intercepted before reaching co-respondent—Admissibility—Matrimonial Causes Ordinance, Cap. 166, s.10(2).*

Section 10(2) of the Matrimonial Causes Ordinance, Cap. 166, provides in relation to a petition for divorce alleging adultery that "if the Court is satisfied by the evidence that the case for the petitioner has been proved.....the Court shall pronounce a decree declaring the marriage to be dissolved". In support of an allegation of adultery in a divorce petition, evidence was tendered of a letter written by the respondent to the co-respondent but intercepted before reaching the latter.

**Held:** (i) With respect to allegations of adultery, section 10(2) of Cap. 166 means that the court must make a positive finding of fact from the evidence, that is, that the court must be satisfied beyond a reasonable doubt that adultery was committed;

(ii) the letter and its contents were not evidence against the co-respondent though they were evidence against the respondent;

(iii) in matrimonial matters although a court is entitled in a proper case, where it is in no doubt where the truth lies, to act upon the uncorroborated testimony of the petitioner, corroboration is required as a matter of practice, and in cases of adultery some corroboration is required.

*Petition dismissed.*

*Bhairo Prasad* for the petitioner.

*M. R. Persaud* for the respondent and co-respondent.

PERSAUD, J.: The hearing of this matter was commenced in Berbice on January 18, 1965, and continued on January 20, but was adjourned at the request of the Attorney General with a view to his intervention in the matter as Queen's Proctor. On February 11 the Attorney General intimated by letter that he did not propose to intervene. Thereafter the matter was adjourned from time to time for one reason or another until November 29 when the hearing was resumed in Berbice. On December 18 counsel addressed, and I reserved my decision to today.

The petitioner (husband) and respondent (wife) were married on March 11, 1956, and the marriage was subsequently registered under the Indian Labour Ordinance, Cap. 104. After marriage the parties lived at the home of the petitioner's parents at Fyrish Village, Corentyne, and then at the matrimonial home at Courtland Road, Corentyne, where the petitioner carried on a shop. They lived together quite happily, it would appear, until August 1964 when certain events are alleged to have taken place out of which this petition was conceived. The respondent left the matrimonial home on October 4, 1964, and has not returned since.

There are six children born to the petitioner and respondent, five boys and a girl. The boys are now being cared for by the petitioner's mother, and the girl who is the youngest is with the respondent.

Before dealing with the evidence, there is a certain curious feature in this matter to which I would wish to allude. The petitioner seeks a dissolution of his marriage on the ground of the respondent's adultery with the co-respondent on August 15, 1964, and also on the ground of malicious desertion alleged to have been committed by the respondent on October 4 of the same year. The petition was filed on October 28, 1964, and copies were served on the respondent and co-respondent on November 5. On December 7 the co-respondent entered an appearance and filed an answer. The matter was then fixed for hearing before me in New Amsterdam on January 18, 1965. On that day the matter was called, and all parties appeared, the respondent not being represented by counsel. In answer to me, the respondent, who appeared at that time to be severely disturbed in mind, said that the petition had not been served on her. She then admitted that it was served, but that she did not propose to defend the petition, and that she would prefer the petitioner to obtain his divorce. The petitioner gave evidence, and called witnesses after which the hearing was adjourned to January 20.

On January 20, Mr. H. Hanoman, a barrister, entered appearance in court on behalf of the respondent. Mr. Hanoman informed the court that he had been approached only the day before by certain of the respondent's relatives with a view to defending the petition. He applied for leave to file an answer, and for an adjournment to enable the respondent to be medically examined as he was of the view that she was unwell. After another witness was taken the hearing was further adjourned, and Mr. Hanoman was told to produce the respondent so that the court could be informed definitely whether she wished an opportunity to defend the petition.

When the matter was called again later the same day Mr. Hanoman intimated to the court that he had spoken to the respondent during the interval, and that she told him she was ill; that a Mrs. Matadial in whose house the respondent was then staying, and who, the evidence discloses, is an aunt of the petitioner, had asked him to leave the premises, that is, had prevented him from taking proper instructions from the respondent. At this stage a telegram was received purporting to have come from the Attorney General applying for an adjournment,

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and the matter was accordingly adjourned. It was later ascertained that the Attorney General, having made certain investigations, did not propose to intervene. The matter was then fixed for a continuation of the hearing, and after several postponements for one reason or another, the hearing was continued on November 29, 1965.

When the matter was called on that date, it was discovered that the respondent had put an answer on record, and on that day she was represented by counsel, Mr. M. R. Persaud, who is also counsel for the co-respondent. Thereafter the hearing proceeded with all parties represented and taking part.

I feel impelled to record these events if only to make one or two observations with respect to the behaviour of this lady Mrs. Matadial. Her conduct has been severely attacked by counsel for the respondent, and, he argues, such conduct lends support to his contention that there was a conspiracy among the petitioner and his relatives to prevent the respondent from defending this petition. If it is true that, except for a short period immediately prior to her filing her answer, the respondent had been given shelter and accommodation by the father and an aunt of the petitioner in the face of the allegation that she had been unfaithful to her husband, which allegation must have been known by both father and aunt, then the impact of this criticism is at once apparent. I am quite prepared to accept Mr. Hanoman's statement from the Bar as to the events occurring at Mrs. Matadial's home upon the occasion of his visit. And I venture to express the opinion that Mrs. Matadial's conduct was such as to hinder the due administration of justice, conduct which is reprehensible and which ought not to be condoned.

Now to the case proper. The petitioner's prayer for a dissolution of his marriage is grounded on the allegations of the respondent's adultery with the co-respondent committed on August 15, 1964, and malicious desertion on October 4, 1964. But as the trial progressed it became clear to me that while not abandoning his allegation of malicious desertion, the petitioner was relying mainly on the allegation of adultery. So I shall give my attention first to the question whether adultery has been proved, having regard to the standard required.

The standard of proof of adultery was said in *Ginesi v. Ginesi*, [1948] P. 179 (C.A.), to be as high as that required in a criminal case, that is, beyond all reasonable doubt to the satisfaction of the tribunal. But in *Gower v. Gower*, 66 T.L.R. 717, DENNING, L.J., said (at p. 718):

"I do not think that this court is irrevocably committed to the view that the proof of a charge of adultery must be as high as in a criminal charge."

Lord DENNING went on to express the view that having regard to the statutory provisions governing the matter, that is, that the court must "be satisfied on the evidence that the case for the petition has been proved," there was really no different standard of proof for adultery as for cruelty, desertion or unsoundness of mind. Our Ordin-

ance uses language not dissimilar to that referred to by DENNING, L. J. Section 10(2) of the Matrimonial Causes Ordinance, Cap. 166, provides in relation to a petition alleging adultery that —

"If the Court is satisfied on the evidence that the case for the petitioner has been proved . . . the Court shall pronounce a decree declaring the marriage to be dissolved."

And in the Australian case of *Wright v. Wright*, 77 C.L.R. 191, DIXON, J. said (at pp. 210 & 211):

"While our decision is that the civil and not the criminal standard of persuasion apply to matrimonial causes including issues of adultery, the difference in the effect is not as great as is sometimes represented. This is because . . . the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue and because the presumption of innocence is to be taken into account."

In *Davis v. Davis*, [1950] 1 All E. R. 40, a case in which the petition for divorce alleged cruelty, DENNING, L.J., said (at p. 42):

"In considering the standard of proof in divorce cases it is important to remember that it has been held by the House of Lords in *Mordaunt v. Moncrieffe*, (1874) L.R. 2 Sc. & Div. 374, 30 L. T. 649, that a suit for divorce is a civil and not a criminal proceeding. One would expect, therefore, to find that in the ordinary way the rules of civil procedure and not the rules of criminal procedure would apply to divorce suits. The standards and rules of the criminal courts have been built up out of the high regard which the law has for the liberty of the individual. No man's liberty is to be taken away unless the case is proved against him beyond a reasonable doubt. The same stringency is not necessarily called for in divorce suits, or at any rate, in divorce suits on the ground of cruelty or of desertion, where the court is concerned, not to punish anyone, but to give statutory relief from a marriage that is broken down."

In the same case, dealing with the United Kingdom Act which required the court to be "satisfied on the evidence that the case for the petitioner has been proved" BUCKNILL, L.J., said (at p. 42 *ibid*):

"I understand that simply to mean that if there is any reasonable doubt at the end of the case, the burden of proof has not been discharged and the decree ought not to be granted. If on the other hand, the court is satisfied beyond all reasonable doubt, the petitioner is entitled to his decree."

It is only right to point out again that *Davis v. Davis* was concerned with proof of cruelty. But there is a clear statement in *Gower v. Gower* (*supra*) that the proof of adultery is not as high as in a criminal case, but it must be proof beyond reasonable doubt. I would interpret the language of our statute (referred to above) to mean that the court

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must make a positive finding of fact from the evidence, that is, that the court must be satisfied beyond a reasonable doubt that adultery was committed.

I will now apply this test to the evidence in this case.

To prove his allegation of adultery the petitioner relies upon his own evidence, and a letter which he alleges was written by his wife and signed by her in which she admitted having committed adultery with the co-respondent. I will deal with this letter first. It is undated and is addressed to the co-respondent and marked in these proceedings as Exhibit 'B'. There is no doubt that the contents of this letter suggest undue familiarity between the respondent and co-respondent. The petitioner's evidence is that he took this letter away from his wife as it was being returned to her by the maid on October 3. The maid, who gave evidence, was unable to identify the letter, but she did say that she was taking a letter from the respondent to the co-respondent when the petitioner took the letter from her. The respondent said that she wrote this letter under the compulsion of a beating given to her by the petitioner. I will for the moment assume that the contents of this letter point to the commission of adultery and that it was written by the wife not under coercion, and will first examine its legal effect so far as the co-respondent is concerned.

There can hardly be any doubt that the letter and its contents are not evidence against the co-respondent, though they are evidence against the respondent. In *Gabriel v. Eliatamby*, [1926] A.C. 133, where letters written by a wife in which she admitted adultery did not get to the hands of the co-respondent, but were delivered to the husband instead, it was held that such letters were not evidence against the co-respondent. In the course of the opinion of the Privy Council DARLING, L.J. said [at p. 138]:

".....it is precisely because the *ex parte* statement of one person made in the absence of the other to whom it concerns does not show the relation of the parties, especially in regard to a third party (but merely amounts to a version by one of them probably false), that the Law of England excludes such statements as hearsay—as not being evidence."

In so far as it is evidence against the wife, it would be wise to bear in mind the statement made by COCKBURN, C. J., in *Robinson v. Robinson*, 1 Swa. & Tris. at pp. 393 et. seq., to this effect:

"No doubt the admissions of a wife unsupported by corroborative proof should be received with the utmost circumspection and caution; not only is the danger of collusion to be guarded against, but other sinister notions which might lead to the making of such admissions, if, though unsupported, they could effect their purpose, are sufficient to render it the duty of the court to proceed with the utmost caution in giving effect to statements of this kind; the

moreso as it must always be borne in mind that the co-respondent, though not in a legal point of view interested in the result, inasmuch as from the absence of evidence available as against him, he is entitled to an acquittal, has yet, socially and morally, the deepest interest in the result. Nevertheless, if, after looking at the evidence with all the distrust and vigilance with which . . . it ought to be regarded, the court should come to the conclusion, first, that the evidence is trustworthy, secondly, that it amounts to a clear, distinct, and unequivocal admission of adultery, we have no hesitation in saying that the court ought to act upon such evidence, and afford to the injured party the redress sought for. The admission of a party charged with a criminal or wrongful act has at all times, and in all systems of jurisprudence, been considered as most cogent and conclusive proof; and if all doubt of its genuineness and sincerity be removed, we see no reason why such a confession should not, as against the party making it, have full effect given to it in cases like the present."

In order to determine whether I can accept the truth of the contents of this letter, I must of necessity examine the conduct of the parties, particularly that of the petitioner, for notwithstanding that this letter is not evidence against the co-respondent, if I accept the evidence of the petitioner as regards the events of August 15, then I must find that his allegation of adultery so far as the respondent is concerned has been proved.

It has been suggested by the respondent that the petitioner conceived of a plan to rid himself of the respondent after relieving her of a sum of money, and of certain lands, while the petitioner has answered that after the events of the 15th August, he decided to recall a gift of \$4,000 which he had made to his wife by way of a deposit with the Royal Bank of Canada. The wife claims that the sum of \$4,000 had been a gift to her by her father. I am not required to determine this allegation, but I have examined the bank books, and this is what I have found. The petitioner has an account with Barclays Bank while the respondent has an account with the Royal Bank of Canada. The respondent's account was opened on February 28, 1961 with a deposit of \$4,500. On February 24 of the same year, the petitioner withdrew from his account the sum of \$4,000. The respondent has said that the sum of \$4,500 was made up of money the petitioner had withdrawn from the bank and \$500 he had given to her. As a result of other deposits the respondent's account rose to \$4,595.96 when on January 29, 1962, there is a withdrawal of \$4,490. On February 12, 1964, there is a deposit of \$4,000 to the credit of the respondent, and on that same day there was a deposit \$5,000 to the petitioner's credit on his account. I have not had the benefit of the deposit and withdrawal slips, but it seems to me not unreasonable to conclude that the petitioner was in fact operating both accounts at the time for his own reasons. He says that at his request his wife withdrew on August 16, 1964, the sum of \$4,000 from her account out of her penitence for her adultery on the 15th, and gave it to him, and this was really his money. Maybe it was his money; but the books show that on August 10, and not on August 16, the sum of \$4,100 was withdrawn

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from the wife's account, and a like sum was deposited to the husband's account on the same day. No doubt he was minded to say the 16th, because a hasty glance at the bank book would give that impression, but it is in my view clearly the 10th, and his bank book supports this. The conclusion I have come to, therefore, is that the money was transferred from one account to the other before August 15, and that the petitioner has not told the truth here. And so it could hardly be the case that the wife agreed to return her husband's money because of her guilty conscience.

I now pass to deal with the transport of certain lands by the respondent to her children. There is no doubt that the respondent swore to the affidavit of sale, and also executed a special power of attorney in favour of the petitioner so that he could pass the transport on her behalf. She alleges that she was forced by her husband to sign these documents not knowing what she was signing to; while her husband swore that she parted with her property as a token of her penitence for having committed adultery on August 15, and to show her *bona fides* in wanting to save her marriage, and herself from humiliation. If this were true, then I would be inclined to hold it in her favour, not against her. But an examination of the transport papers (which were prepared by a barrister-at-law) discloses that the affidavits of purchase and sale were sworn to on the 13th August. Here, again, the petitioner could hardly have been speaking the truth when he said:

"The respondent's parents begged me to forgive her her adultery; my parents also begged me. My wife said that even if I kept her as a servant, she wanted to stay if I would forgive her. Later, she told me that to prove her loyalty, she would offer the land to me. I told her that I did not want her property, but that if she decided to give, she must give the children. She passed the property willingly to the children."

I also wish to point out that the address given by both petitioner and respondent is the same.

These two matters to which I have referred do not point, in my judgment, to any incident occurring on the 15th August. When to these are added the improbability of the co-respondent committing adultery with the respondent a short distance away from where he knew the petitioner to be (albeit in a closed garage), after having announced his arrival at the petitioner's shop and the alibi advanced by the co-respondent and his witness, which alibi was unshaken, I must say that I am not satisfied from the evidence that adultery has been proved.

One would have thought that if the respondent did confess adultery in the presence of the petitioner's parents, they, or one of them, would have been called to testify in this matter. This was not done, and so I am left with the petitioner's oral evidence and the two letters, one of which he admits is not in his wife's handwriting, but which is signed by her. As regards this letter (Exhibit 'D') the wife says she was

forced to sign it by her husband. I am inclined to believe this, as I cannot contemplate an adulterous wife writing to the employer of her paramour and a stranger to her, admitting adultery thereby inviting condemnation by all and sundry.

In my view, the witness Baba Keshni was at the bottom of this unhappy affair. By this I do not mean to say that I have accepted the respondent's evidence that she found her husband and this witness in *flagrante delicto*. But I do mean to say that the witness Baba Keshni seemed to have nurtured a dislike for the respondent, and as a result poisoned the mind of the petitioner against the respondent, as a result of which a very ingenious plot was conceived to indict the respondent and co-respondent with this serious allegation, and at the same time to enable the petitioner to rid himself of his wife. I do not believe any part of the evidence of Baba Keshni. She struck me as being no less unreliable than the witnesses Ellen Cort and Churchill Doman, both of whom were at the material time employees of the petitioner.

The petitioner and his wife seemed to have got on quite well until Baba Keshni took up residence in the home. I do not doubt that as a result of what Keshni told the petitioner, the latter harboured in his mind certain suspicions about the relationship between his friend and his wife, but I do not believe, having regard to the nature of the evidence, that the petitioner caught the respondent and co-respondent committing adultery in the garage.

In matrimonial matters corroboration is required as a matter of practice, but a court is entitled in a proper case, where it is in no doubt where the truth lies, to act on the uncorroborated testimony of the petitioner. Speaking of corroboration in matrimonial matters, Sir JOYCELYN SIMON, P., in *Alli v. Alli*, [1965] 3 All. E.R. 480, said at p. 484:

"In our opinion, therefore, there is abundant authority to support Sir BOYD MERRIMAN, P.'s statement of the practice of the court in *B. v. B.* [1935] All E.R. Rep. 429, namely, that the court demands that, when a matrimonial offence, whatever it is, is charged, if possible the evidence of the spouse making the charge should be corroborated. To sum up, then, our view of the authorities so far: (a) where a matrimonial offence is alleged, the court will look for corroboration of the complainant's evidence; (b) the court will normally, before finding a matrimonial offence proved, require such corroboration if, on the face of the complainant's own evidence, it is available; (c) these are not rules of law, but of practice only. They spring from the gravity of the consequences of proof of a matrimonial offence; and because, we would add, experience has shown the risk of a miscarriage of justice in acting on the uncorroborated testimony of a spouse in this class of case; (d) it is, nevertheless, open to a court to act on the uncorroborated evidence of a spouse if it is in no doubt where the truth lies; (e) these statements are equally applicable to proceedings in courts of summary jurisdiction as to those in the High Court."

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And in dealing with the question whether justices should signify in their reasons for decision that they had kept the question of corroboration in mind, and whether the Court of Appeal would quash a decision where there is no such reference, the learned president referred (at pp. 484 and 485 *ibid*) to cases where corroboration was required and to others where the court acted on uncorroborated evidence, and said:

"We think that this discrepancy is significant and due to there being two classes of case. In the first—those alleging sexual misconduct and those where the evidence of adultery is that of a willing participant—experience has shown that there is such an exceptional risk of a miscarriage of justice unless the court has in mind the danger of acting on uncorroborated evidence that an appellate court will intervene unless the trial court has expressly warned itself of that danger."

It would seem, therefore, that in cases of adultery, some corroboration is required. In the instant case I find that the evidence which has been proffered as corroboration is unreliable.

Now to the allegation of desertion. The respondent admitted leaving the matrimonial home on October 4, but said that it was as a result of acts of violence and threats meted out to her by the petitioner. On the other hand, the petitioner has alleged that after he had agreed, upon the supplication of his wife, and that of the parents of both parties, to forgive her for what had occurred on August 15, the respondent left the home in his absence on October 4 because he had rebuked her about writing a letter (Exhibit 'B') to the co-respondent on the previous day. I have already expressed my opinion about this letter, and I prefer to accept the respondent's reason for leaving the home, and therefore I find the allegation of malicious desertion not proved.

It was necessary to enter into some detail in dealing with this matter because of its background, and, of course, because of the seriousness of the allegations made by all sides.

The result is that the petition is dismissed; and the petitioner must pay the costs of the respondent and the co-respondent.

*Petition dismissed.*

*Solicitors: Dabi Dial (for the petitioner); R. N. Tiwari (for the respondent and the co-respondent).*

## KEITH MAYERS v. R.

[Court of Appeal (Stoby, C., Luckhoo, J.A., and Persaud, J. (ag.)) April 8, 11, 15, 19, 29, 1966]

*Criminal law—Evidence—Rape—Evidence of complaint—Objection that complaint elicited by witness—Failure of trial judge to rule on objection.*

In a trial for rape evidence was given by a witness as to a complaint made to her by the virtual complainant. It was objected that evidence of the complaint was inadmissible on the ground that the complaint had been elicited by questions of an inducing character. The trial judge failed to rule on this objection and the accused was convicted. On appeal,

**Held:** where, as in relation to complaints made in sexual cases, the admissibility of evidence depends on the discretion of the trial judge and the principles to be applied in exercising that discretion, the trial judge cannot flinch from exercising his authority.

*Appeal allowed.*

*J.O.F. Haynes, Q.C., with C. A. Massiah, for the appellant:*

*G.A.G. Pompey for the Crown.*

STOBY, C, delivered the judgment of the Court as follows: The appellant in this case was convicted of rape. He appealed to this court on three grounds but we propose to deal with one ground only.

During the trial the mother of the girl alleged to be raped was called as a witness for the Crown. The purpose of her evidence was to show that the virtual complainant had made a complaint to her. After she had given evidence and was cross-examined, counsel who appeared for the appellant at the trial submitted in the absence of the jury that having regard to the answers given by the mother in cross-examination, the complaint was inadmissible as it was elicited by questions of an inducing character.

Counsel for the Crown submitted that although the mother asked her daughter certain questions, yet having regard to the relationship of mother and daughter, the complaint was admissible.

While counsel for the Crown was replying to the defence submission, the judge intervened. The record before us is as follows: "At this stage, court indicates to counsel for defence that having regard to the defence as put to the complainant it would seem the making of the complaint was consistent with the defence, although its weight may be attacked having regard to the manner in which it was made." As a result of this statement by the judge, counsel for the Crown did not proceed with his reply, the jury was recalled and the trial proceeded without demur from defence counsel.

On appeal it has been argued that the complaint was inadmissible because it was obtained by leading questions and suggestions, and that in any event it was the function of the judge to rule on the submission, and his failure to rule deprived the prisoner of the possibility of the complaint being held inadmissible.

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Ever since the *R. v. Lilleyman*, [1896] 2 Q.B.D. 167, in cases of rape and kindred appeals, evidence that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, have been given in evidence on the part of the prosecution not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box and as negating consent on her part.

Whenever evidence of a complaint is given two factors have to be borne in mind: (a) was the complaint made as speedily as could reasonably be expected? and (b) was it voluntary and spontaneous and not elicited by leading, inducing or intimidating questions? It can happen, and often does, that the virtual prosecutrix as well as the witness to whom the complaint was made give their evidence in such a convincing way that no question can arise about the admissibility of a complaint. If such be the case, no ruling from the judge is required. On the other hand it may occur, and often does, that the person to whom the complaint is made makes admissions in cross-examination which might or might not cause the evidence to be inadmissible. As soon as the possibility arises of the complaint being held by the judge to be inadmissible it is for him (the judge) to rule.

*R. v. Cummings*, [1948] 1 All E.R. 551, was a case in which the prosecutrix alleged that she was raped at night. Owing to certain circumstances she did not make a complaint that night although she saw several people, but complained next day to an elderly person. Evidence of the complaint was admitted and the accused convicted. It was submitted on appeal that the complaint was wrongly admitted as it was not made immediately. Lord GODDARD, C.J., in giving the judgment of the court said:

"Who is to decide whether the complaint is made as speedily as could reasonably be expected? Surely it must be the judge who tries the case. There is no one else who can decide it. The evidence is tendered and he has to give a decision there and then whether it is admissible or not. It must, therefore, be a matter for him to decide and a matter for his discretion if he applies the right principle."

In *R. v. Norcott*, 12 Cr. App. Rep. 166, an objection was taken at the trial that the person to whom the complaint was made had induced the prosecutrix to make the complaint. The judge overruled the objection and admitted the evidence. In his summing-up he said:

"In each case the decision on the character of the question put, as well as other circumstances such as the relationship of the questioner to the complainant, must be left to the discretion of the presiding judge."

The accused was convicted and on appeal the conviction was upheld.

Looking at the matter without the aid of any persuasive authorities, we are in no doubt about the judge's function in a criminal case where objection is taken to the admissibility of evidence. The judge must make up his mind and rule one way or the other. Quite understandably a situation may arise where counsel withdraws his objection and the evidence, if already accepted, remains and is dealt with in the summing-up as admissible evidence. A Court of Appeal can, if opportunity offers, decide whether the evidence was correctly admitted. But where the admissibility of evidence depends on the discretion of the trial judge and the principles to be applied in exercising that discretion, the trial judge cannot flinch from exercising his authority. The reason is patent. Normally, admissibility depends on fixed principles, relevancy and so on; the judge's discretion is not required; his view of the relationship between the parties, the surrounding circumstances and the impression created in his mind are unimportant. In sexual cases the unimportant assumes a different character which the written word can never convey. When this court looks at the evidence objected to, it cannot with a feeling of certainty say that the judge, had he exercised his discretion, would have admitted the evidence. He might have done so and had he applied the correct principles this court would not have interfered. But he refused to decide. He compromised and we are not constrained to substitute our discretion for the judge's hesitancy.

A circumstance of some importance is that there was practically no corroboration whatsoever. The judge warned the jury against convicting on uncorroborated testimony; he told them there was no corroboration; he told them that the complaint to the mother did not afford corroboration. In this setting it was vital for the jury to know whether she had told a consistent story; had the complaint been ruled inadmissible this element of the prosecution's case would have been lacking and without it we cannot say the jury must have convicted.

We consider the failure of the judge to give a decision on an important bit of evidence was a fatal omission, and consequently the conviction must be quashed and the sentence set aside. The appeal is allowed.

*Appeal allowed*

BOOKERS STORES LTD. v. G.L.B. PERSAUD AND CLERICAL AND  
COMMERCIAL WORKERS' UNION

[Supreme Court (Chung, J.) March 18, 30, April 28, 29, 1966]

*Arbitration—Order by arbitrator for party to supply particulars—  
Declaratory action questioning order—Jurisdiction of Supreme Court—  
Arbitration Ordinance, Cap. 38.*

*Action—Declaratory order sought questioning order for particulars made by  
arbitrator—Whether action lies—Arbitration Ordinance, Cap. 38—0.23, r.3,*

## BOOKERS v. PERSAUD

The first-named defendant was arbitrator to an arbitration in a bonus dispute between the plaintiff employers and the defendant union. The arbitrator made an order requiring the employers to supply particulars of their trading balance and of their monthly sales. The employers then brought an action for a declaration that the order for particulars was *ultra vires*. The union sought to strike out the writ on the ground that the Arbitration Ordinance, Cap. 38 provided means for dealing with the situation and excluded the jurisdiction of the Supreme Court to deal with the matter in an action for a declaration.

*Application refused.*

**Held:** (i) unlike a declaratory action, the remedies available to the plaintiffs under s. 20 of Cap. 38 did not give them a right to test the opinion of the trial judge on a question of law in the higher courts;

(ii) Cap. 38 did not exclude the jurisdiction of the Supreme Court to grant relief by declaration.

*J. O. F. Haynes, Q. C.*, with *F. Ramprashad*, for the appellant, the second named defendant.

*C. L. Luckhoo, Q. C.*, for the respondent (plaintiff).

CHUNG, J: In this matter the plaintiff is a private company incorporated in British Guiana under the provisions of the Companies Ordinance, Cap. 328, and whose registered address is at lot 19, Water Street, Georgetown, in the county of Demerara.

The second-named defendant (hereinafter referred to as the "union") is a trade union registered under the Trade Unions Ordinance, Chapter 113, and whose address is at 193, Wellington Street, Georgetown.

The plaintiff carries on the business of merchants and is the owner of stores in Georgetown and elsewhere in British Guiana and the employer of a large number of workers many of whom are members of and are represented by the union.

On the 30th day of March, 1963, an agreement between the plaintiff and the union for the avoidance and settlement of disputes was executed. This agreement provides that it shall remain in force at the pleasure of the parties and may be terminated at any time by either side giving to the other 90 days' written notice of its intention to do so. This agreement has not been terminated and still remains in force.

On the 29th day of June, 1964, a memorandum of agreement between the plaintiff and the union in respect of wages and conditions of employment was executed. This memorandum of agreement provides that it shall remain effective until the 30th day of June, 1966, and shall continue in force thereafter until either side shall have given 90 days' notice in writing of a desire to amend or terminate the agreement. This memorandum of agreement has not been amended and still remains in force.

There is no provision for the payment of a bonus to the plaintiff's employees covered by the said memorandum of agreement of the 29th June, 1964.

On the 18th day of February, 1965, the union wrote the following letter:

"The Secretary,  
Messrs. Bookers Stores Ltd.,  
Water Street,  
Georgetown.

Dear Sir,

It is with a deep sense of satisfaction that we have observed the great improved trend in the business of your stores during 1964, which surely must have resulted in a record sales figure and consequently increased profit for the year.

We have always expressed the view that an organised worker is a better worker and the improved sales for last year, we feel, support this view. We say this because to have achieved such a successful year of operation despite the unstable political climate and disturbances during this period, not only reflects a high degree of efficiency on management's part, but also increased co-operation and productivity of employees in general. We do honestly feel that the improved performance of the workers can be contributed to great part to the encouragement given them by the union to increase their co-operation, which would naturally improve productivity and result in more profits for the company; this they have done with the confidence that whatever success the business achieves, they the workers will share in such success; for if the fruits of such increased cooperation were transmitted solely to management or owners, such co-operation would appear to offer no benefit to the worker. It is in this light, coupled with the fact that the firm's representatives had intimated to the union some time ago, that consideration of some extra benefit will be given workers, should the profits increase, that we are now requesting a bonus be given employees based on the record sales figure of 1964.

We are sure you will agree with us, that in granting this their request, the firm will beyond doubt convince the workers that their increased performance has resulted in material benefit to them and thereby give them the impetus to go forward in the new year with even more effort and energy.

We submit this request for your earnest consideration and look forward to a favourable reply at an early date.

Yours faithfully,  
(Sgd.) EDNA ABRAHAM.  
(Branch Secretary)."

On the 22nd day of March, 1965, the plaintiff replied to the union's letter rejecting the said claim for payment of a bonus. Further correspondence passed between the said parties in relation thereto.

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On Friday the 20th day of August, 1965, there was a meeting between the plaintiff and the union at which, *inter alia*, the said claim for a bonus was discussed, but no agreement was reached.

On the 19th day of October, 1965, the union wrote to the Chief Labour Officer purporting to advise him that a dispute existed between the plaintiff and the union over a claim for bonus, and requested him to intervene as conciliator, as provided for in the agreement for the avoidance and settlement of disputes.

A conciliation meeting was held on the 5th day of November, 1965, but no agreement was reached.

On the 24th day of November, 1965, the union wrote to the plaintiff renewing its demand for payment of a bonus and requesting an early date for a meeting.

On the 26th November, 1965, two meetings were held between the plaintiff and the union, but no agreement was reached. On this day the union demanded that the plaintiff pay from its profits for 1964, a bonus of \$150 to each of its permanent employees confirmed at 31st December, 1964. This demand was refused by the plaintiff.

On the 27th November, 1965, the union called out their workers on strike, which caused a stoppage of work of all departments of the plaintiff's stores. The strike continued for six days, namely, from the 27th November, 1965, to the 2nd December, 1965, both days inclusive, resulting in loss and damage to the plaintiff's businesses during the Christmas season which is the busiest trading period of the year.

After meetings were held between the plaintiff and the union, it was agreed on the 2nd December, 1965, that the plaintiff and the union should refer the alleged dispute to arbitration on the following terms:

## "AGREED TERMS OF REFERENCE

To examine the union's claim for bonus as put forward in its letter of the 18th February, 1965, having regard to the negotiations which resulted in the agreement for the avoidance and settlement of disputes signed on the 30th March, 1963, and the memorandum of agreement in respect of wages and conditions of employment signed on the 29th June, 1964, and to determine whether the union's claim is proper and to make such award as the arbitrator deems fit."

The first-named defendant (hereinafter referred to as "the arbitrator") was subsequently appointed sole arbitrator in the said alleged dispute on the said agreed terms of reference, and duly began the hearing of the proceedings in relation thereto on the 10th December, 1965, when counsel for the union unsuccessfully sought to obtain from

the arbitrator an order for the production of the plaintiff's final trading account or balance-sheet for 1964, 1963, 1962 and 1961 and also for the plaintiff's monthly sales figures for the said years.

However, on the 15th December, 1965, during the examination-in-chief of the Union's witness, Dwarka Persaud Sankar, following an application by counsel for the union and after hearing counsel for the plaintiff, who strenuously opposed the application, the arbitrator made an order for the plaintiff to supply particulars of the trading balance for the year 1964 and the monthly sales of the plaintiff-company from January to December for 1960 to 1964, within seven days from the 16th December, 1965.

On the 10th December, 1965, counsel for the union in his opening address was allowed to present as part of his case that during the negotiations for the agreement of the 29th June, 1964, in respect of wages and conditions of employment, the plaintiff was guilty of misrepresentation to the Union in stating that business was bad, and that they were doing less business in 1964 than in 1963, when the sales figures for the months of January, February, March and April, 1964, far exceeded those for a similar period in 1963, and that consequently the union was misled and deceived prior to the signing of the agreement of the 29th day of June, 1964, so as to affect the said agreement.

Dwarka Persaud Sankar, a witness for the union, gave evidence on the 14th December, 1965; to the effect that the plaintiff's representative admitted during these negotiations that business was good during the first quarter of 1964.

When the arbitrator made the order on the 15th December, 1965, for the said particulars, he indicated to the plaintiff's counsel that the plaintiff might desire to test his ruling, and counsel stated that he would like to have an opportunity of taking instructions from the plaintiff, and the arbitrator adjourned the hearing to the 16th day of December, 1965. On the 16th December, 1965, the plaintiff's counsel indicated to the arbitrator that the plaintiff would bring proceedings in the Supreme Court to test the validity of the arbitrator's said order by the 22nd day of December, 1965. The arbitrator then completed his order of the 15th December, 1965, by ordering the said particulars to be supplied within seven days from the 16th December, 1965, and then adjourned the hearing of the arbitration to the 23rd December, 1965, in order to give the plaintiff an opportunity up to the 22nd December, 1965, to take whatever steps it considered fit to test the said order.

The writ herein was filed in the Supreme Court of British Guiana and served on the arbitrator on the 22nd December, 1965, and served on the union on the 23rd December, 1965.

On the 23rd December, 1965, the arbitrator ordered that the further hearing of the arbitration proceedings be stayed until the final determination of these proceedings.

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On these facts the plaintiff claimed by way of a writ:

- (i) a declaration that the order made by the arbitrator, the arbitrator appointed under the submission dated the 2nd day of December, 1965, of the alleged dispute between the plaintiff and the union to arbitration, that the plaintiff-company must supply particulars of the trading balance for the year 1964 and the monthly sales of the plaintiff company from January to December, for 1960 to 1964 within seven days from the 16th day of December, 1965, was wrongly made, unlawful, null and void, irregular and ineffective, and *ultra vires* the powers of the arbitrator and constituted a specific illegality and should be set aside;
- (ii) a declaration that the arbitrator was not entitled in law under the memorandum of agreement in respect of wages and conditions of employment signed on the 29th day of June, 1964, and/or the agreement for the avoidance and settlement of disputes dated 30th March, 1963, made between the plaintiff and the union, to make the said order at all or, alternatively, to make the said order before construing the said memorandum and agreement as to whether the union is entitled in law to claim a bonus;
- (iii) a declaration that it is not competent or proper for the arbitrator to make the said order complained of having regard to the agreed terms of reference upon which he was called upon to arbitrate;
- (iv) a declaration that the issues in the arbitration are and cannot be defined until the delivery of points of claim and of defence and until this is done the relevancy of evidence oral or documentary cannot be determined;
- (v) a declaration that the union is estopped from denying or otherwise impugning the validity of the memorandum of agreement of the 29th June, 1964, and the agreement of the 30th March, 1963, entered into between the plaintiff and the union referred to in the terms of reference;
- (vi) a declaration that the particulars ordered by the arbitrator to be supplied by the plaintiff are not relevant or material to the issues raised in the agreed terms of reference and can in no way assist the arbitrator in resolving the said issues and are oppressive, and unnecessary either for disposing fairly of the issues or for saving costs;
- (vii) a declaration that in any event the evidence so far led does not disclose any ground of false or fraudulent misrepresentation by the plaintiff during the negotiations or at all inducing the execution of the said memorandum and agreement by the union;

- (viii) a declaration that the manner and form of the conduct of the arbitration proceedings rendered the same null and void in so far as the order was concerned and the failure to order the delivery of points of claim and defence;
- (ix) an injunction restraining the arbitrator and the union from holding any meeting or session or taking any evidence or making any enquiry into the alleged dispute between the plaintiff and the union or otherwise proceeding with the reference to arbitration dated the 2nd day of December, 1965, until the determination of this action.

The union is now asking the court to strike out the plaintiff's writ on the following grounds:

- (a) the court has no jurisdiction to determine all or any of the plaintiff's claim;
- (b) the issue or service of the writ was irregular;
- (c) the issue of the said writ was and is an abuse of the process of the court.

No argument was put forward to support (b). The whole argument with regards to (a) and (c) was put forward on the ground that the plaintiff cannot come by this means to the court, and in a matter of this kind the court has no jurisdiction to give a declaration of the kind sought.

It is submitted on behalf of the union that what the plaintiff is asking the court to do is to give a judgment by way of declaration that the arbitrator was wrong in making the order, and that the court cannot give such declarations as the arbitrator must presumably have been acting under r. (f) of the First Schedule of the Arbitration Ordinance, Chapter 38, s. 4, and that it is a rule for the provision of evidence and would assist the arbitrator in determining the matter that he had to determine. In other words, the arbitrator is calling upon the plaintiff to produce documents and possibly information which is within his jurisdiction and therefore it is not open to the plaintiff to challenge this ruling in an action for declaration on the ground that the ruling is bad.

At this stage the court cannot go into the merits of the plaintiff's case and the writ can only be struck out if it is plain and obvious that the court has no jurisdiction to grant the declaration asked for.

The union is not contending that the plaintiff has no remedy to come to the court. It is contending that all the plaintiff can legally do is one or the other of the following:

- (1) Seek with leave of the court by motion under s. 3 of Chapter 38, to revoke the submission of counsel, that is, the claim to submit the matter to arbitration.

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- (2) Ask the arbitrator to exercise his power under s. 20 of Chapter 38, to state a special case for the opinion of the Supreme Court on the question of law — whether or not the arbitrator could require the evidence to be produced. If the arbitrator refuses to do so, then the plaintiff may under the said section apply to the Supreme Court to compel him to state a case for the court's opinion. Such an opinion being given the arbitrator will be expected to follow that opinion and continue with the arbitration. There is no appeal from the opinion of the court.
- (3) The plaintiff could produce the evidence, and then if the arbitrator on the basis of that evidence makes an award unfavourable to the plaintiff, then the plaintiff could move the Supreme Court to set aside that award or remit the matter back to the arbitrator for reconsideration on the ground of legal misconduct by him on the form of misrepresentation of evidence.

It is submitted that our Ordinance, Cap. 38, is word for word of the English Arbitration Act of 1889, and there is no authority by way of decided case dictum or in the opinion of the text-book writers to show that one may proceed by way of declaration. All the authorities and text-books refer to the three above-mentioned matters as the procedure in dealing with the present situation.

It is submitted that the Arbitration Ordinance, Cap. 38, is a self-contained Ordinance and provides means for dealing with the situation and that the expressed terms of the Ordinance excluded the jurisdiction of the Supreme Court to deal with the matter in an action for declaration.

Section 3 of Cap. 38 gives the court power to revoke the submission; s. 11 gives the court power to remit an award; s. 20 makes provision for a special case to be stated for the opinion of the court on any question of law. The sole question, therefore, is whether or not the procedure given in Cap. 38 is exclusive and thus takes away the jurisdiction of the court in making a declaratory judgment.

The case law indicates a tendency against construing a statute so as to oust or restrict the jurisdiction of the court whether original or supervisory. Viscount SIMONDS in *Smith v. East Elloe Rural District Council*, [1956] A. C. 736, said at p. 750:

"Anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that this grievance may be remitted to some other tribunal. But it is our plain duty to give the words of an Act their proper meaning."

Not infrequently courts have held that upon the proper meaning of legislation their declaratory jurisdiction is excluded. In *Bar-*

*Barraclough v. Brown*, [1897] A. C. 615, the defendants were the owners of a ship which sank in a river. The plaintiffs had power under statute to remove the ship and to recover the expenses thereof in a court of summary jurisdiction. Instead of resorting to the prescribed procedure, the plaintiffs sued the defendants in the High Court for the expenses incurred by them. The plaintiffs argued that even if they were not entitled to recover the expenses by action in the High Court, they were, at all events, entitled to go to that court for a declaration that on the true interpretation of the statute they had a right to recover them. This argument was unanimously rejected by the House of Lords.

Lord HERSCHELL said at pp. 619-620:

"The only right conferred (by the said statute) is to recover such expenses from the owner of such vessel in a court of summary jurisdiction. I do not think the appellant can claim to recover by virtue of the statute and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right I think it would be very mischievous to hold that when a party is compelled by statute to resort to an inferior court he can come first to the High Court to have his right to recover—the very matter relegated to the inferior court—determined. Such a proposition was not supported by authority and is, I think, unsound in principle."

Usually a statute prescribes a specific legal procedure to be followed. It does not expressly exclude other legal proceedings, but it is not necessary that the jurisdiction of the court should be barred by express words; it is sufficient if the jurisdiction is barred by necessary implication as is decided in *Barraclough v. Brown*.

The question in this case is whether the prescribed remedy and procedure in Cap. 38 exclude a resort to the declaratory jurisdiction of the Supreme Court. This, of course, depends on the ordinary rules of construction. *Vide* case of the *Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government* [1958] 1 Q.B. 554, [1960] A. C. 260. There s. 17(1) of the Town and Country Planning Act, 1947, had to be construed. The section provides:

"If any person who proposes to carry out any operation on land wishes to have it determined.....where an application for permission in respect thereof is required.....he may.....apply to the local planning authority to determine that question."

It was held that nothing in s. 17 or in the Act excluded the jurisdiction of the court to grant declarations, and s. 17 did no more than provide an optional method of having the question determined by the minister. In the said case *Barraclough v. Brown* was considered.

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It is to be noted that when the *Barraclough v. Brown* case was decided in 1897, it was a few years after O. 25, r. 5, came into being, and that the *Pyx Granite Co., Ltd. v. Ministry of Housing and Local Government* case was decided when the powers of the court to grant declaratory judgment or orders without other relief had largely developed.

In *Bernard v. National Dock Labour Board*, [1953] 1 All E. R. 1113 P. 1119, DENNING, L. J., said:

"I know of no limit to the power of the court to grant a declaration, except such limit as it may in its discretion impose on itself, and the court should not, I think, tie its hands in this matter on statutory tribunals."

BANKS, L. J., in the *Guaranty Trust Co., of New York v. Hannay & Co.*, [1915] 2 K. B. 536 at p. 572, said:

"The relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the court to grant, or contrary to the accepted principles upon which the court exercises its jurisdiction. Subject to this limitation, I see nothing to fetter the discretion of the court in exercising a jurisdiction under the rule (i.e., O. 25, r. 5) to grant relief, and having regard to general business convenience and the importance of adapting the machinery of the courts to the needs of suitors I think the rule should receive as liberal construction as possible."

In RUSSELL ON THE LAW ON ARBITRATION, 17th Edn.. 1963, at p. 303, it is stated:

"The objection of want of jurisdiction covers two distinct cases, the first where a valid arbitration was in progress, but the arbitrator exceeded his jurisdiction, the second where the objection is that the whole arbitration was a nullity.

In either case an action on the award may be defended on this ground, or an action brought for a declaration."

At p. 204:

"While there may be circumstances where the court might not, on the authorities, be able to grant an injunction restraining either a party or the arbitrator from proceeding with a reference, there is no restriction on the court's power to grant a declaration that a reference is outside the jurisdiction of the arbitrator."

In fact, in *Government of Gibraltar v. Kenney*, [1956] 2 Q.B. 410, in an arbitration matter, the plaintiff while making no objection to the arbitrator hearing the rest of the defendant's claim, sought as against the defendant a declaration that the arbitrator had no jurisdiction to hear and determine certain parts of his claim and was therefore outside the ambit of the reference to arbitra-

tion. **Held**, that the court had jurisdiction to grant the declaration if it ought to be granted on the merits. **SELLERS, J.**, at p. 421, in commenting on the *Den Of Airlie* case, 106 L. T. 451, said:

"It seems to me that there may be circumstances where the court could appropriately make a declaration where it might not on those authorities be able to grant an injunction.....I would not, I think, have felt myself restricted in granting the declaration sought had I come to the conclusion on the merits that it was one on which I ought to grant in favour of the plaintiff."

Order 23, r. 3, of the 1955 Rules states:

"No action or proceeding shall be open to objection on the ground that a mere declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed."

It seems, therefore, that the proceedings lay down in Cap. 38 do not exclude the court's power to grant relief by declaration.

It has been submitted on behalf of the union that the plaintiff cannot at this stage interrupt the proceedings of the arbitrator by coming to the court for a declaration.

Section 20, Cap. 38, states:

"Any referee, arbitrator, or umpire, may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a judge, state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference."

Rule (f) reads:

"The parties to the reference, and all parties claiming through them respectively shall, subject to any legal objection, submit to be examined by the arbitrators..... "

It seems, therefore, that such objection could be taken to the court during the reference and the party need not wait until the award is made. Moreover, **BORCHARD ON DECLARATORY JUDGMENTS**, 2nd Edn., p. 20, states:

"While in these cases no traditional 'wrong' has yet been committed or immediately threatened, a condition of affairs is disclosed which indicates the existence of a cloud upon the plaintiff's rights, a cloud which endangers his peace of mind, his freedom, his pecuniary interests. This is a tangible interest which the law protects against impairment, and by protecting it, promotes social peace."

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If the plaintiff produces the trading figures as asked for by the arbitrator and afterwards it was found that the arbitrator had no power to order their production, the damage would have already been done and would be irreparable. If the court were to rule that Cap. 38 excludes the declaratory jurisdiction of the court, then it would mean that the only way the plaintiff could come to the court, in the present case, in order to protect the plaintiff's interest or right of not disclosing matters which are considered confidential by the plaintiff, is under s. 20 of Cap. 38. In this respect the opinion of the court need not be accepted by the arbitrator, even though it is expected that he would accept it. Moreover, there is no appeal from the opinion of the court. This would mean indirectly denying a party the right to test the opinion offered by the court in the Appeal Court.

In the matter of *Coghlan v. Drainage and Irrigation Board*, and in the matter of *The Application of the Drainage and Irrigation Board*, a statutory Authority, action No. 653 of 1958, Demerara, [1958 L.R.B.G. 108] the plaintiff had applied to the court for a writ of mandamus even though s. 37 of the Summary Jurisdiction (Appeals) Ordinance, Cap. 17, provides:

- "(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."

An order nisi was made and the defendants applied to have it struck out. They submitted:

"That the prerogative writ of mandamus only applies where there is no other remedy."

STOBY, J., giving as one of the reasons that influenced him in upholding the procedure taken by the applicant, said:

"If an application for a rule had been made under s. 37, the application would be heard by the Full Court. Normally, two judges sit in the Full Court to hear appeals from decisions of magistrates.

On the other hand, the procedure by way of prerogative writ must come before a single judge of the Supreme Court (see *Ex parte Surujballi*, 1948 L.R.B.G. page 1).

If the judge who makes the order nisi does not direct that the subsequent proceedings should be before a full Bench of Judges, then the application to make the rule absolute comes on for hearing before the same, or possibly another judge. By virtue of s. 94 (1) (b) (iii) of Cap. 7, there is a right of appeal from a decision of a single judge in a matter of this kind to the Full Court in its appellate jurisdiction where three judges will normally sit. The result is that five judges may be concerned where the prerogative writ is in issue as against two if the procedure under s. 37 is adopted.

From June, 1958, in both cases there may be a further appeal to the Federal Supreme Court."

In my opinion it would not be in the best interest of the plaintiff to proceed by way of s. 20. of Cap. 38, as this would not give the plaintiff the right to test the opinion of the judge on any question of law in the higher courts.

I know of no reported cases where a party is allowed to come to the court by certain procedures and excluded from coming to the very court by way of declaration. It may be noted that in the present case, apart from the inherent right of the court to grant declarations, the court has jurisdiction both original and supervisory, given by Cap. 38, and it is not a case where the court will be trespassing on the jurisdiction of any other tribunal.

I am, therefore, of the opinion that the procedure given in Cap. 38 is not exclusive and does not take away the court's right to grant a declaration. It is a matter for the discretion of the court to grant a declaration and the court may very well in going into the merits of the matter refuse to grant a declaration.

In the circumstances the application is refused. The applicant (defendant) to pay the cost of the plaintiff (respondent). Certified fit for counsel.

*Application refused.*

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